LAW-IN-SPACING: GEOGRAPHIES OF TERRITORIALIZATION AND RESISTANCE

by

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B.A., Indiana University-Purdue University at Indianapolis, 1991

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF
MASTER OF ARTS
in
THE FACULTY OF GRADUATE STUDIES

(Deptartment of Geography)

We accept this thesis as conforming to the required standard

THE UNIVERSITY OF BRITISH COLUMBIA

October 1993

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Abstract

My thesis revolves around the extension of Anglo-American common law to the newly acquired territories of the Old Northwest and Louisiana. Both of these territories had French-speaking populations with traditions of European Civil law systems. I suggest that the extension of common law to these territories highlighted a process of law-in-spacing, a process by which the private law principles of common law became increasingly visible in the context of these traditionally Civil law populations. I also show that the common law had specific and unforeseen consequences for these French-speaking populations. I use concrete issues such as land and slavery to suggest that there are not only geographies of law, but geographies of custom. I also discuss the production of space as it relates to slavery.
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Acknowledgements

I would like to thank my advisor, Dr. Derek Gregory, for encouraging me to try something a bit different. The best parts of this thesis owe a great deal to his inspiration and patience, his uncanny ability to understand half-formed thoughts, and his confidence in me. Many thanks to Nick Blomley, and Cole Harris, both of whom took a lively interest in this project.

I would also like to thank my 'cohorts' in the Geography Department for taking an interest in this project, and for frequent invaluable advice. Thanks particularly to David Deemerit and Averill Groenveld-Meyer, who were always supportive in their own particular ways. I also want to thank Daniel Clayton, who perfectly combined an analytic mind and a sympathetic ear.
Introduction

Law, we are told, embodies assumptions and values central to specific historical periods.¹ I do not want to argue with this statement, but rather to supplement it, by proposing that geography also plays a role in the construction of legal assumptions and values. I am trying, then, to write a geography of law which revolves around American territorial expansion, an expansion that was predicated on the extension of Anglo-American common law to the territories. I consider one of these territories in some detail, Louisiana, and for the purposes of contrast, I also take a brief look at the Old Northwest Territory. Both territories have in common French-speaking populations with European Civil law traditions. The extension of common law to traditionally Civil law populations highlights a process that I call law-in-spacing, a process by which the structuring assumptions of private law become visible, not only by their extension through space, but also by their 'implantation' on populations with different sets of social and spatial practices.

In Chapter One I look at the extension of American common law to the Old Northwest Territory, an extension which occurred largely through the Ordinance of 1787. I focus on the different conceptions of property which were built into American common law and French Civil law, and the effects that

common law had on the French populations of the Old Northwest. I suggest that the different property assumptions of the U.S. federal government and the French may have reflected different 'logics of space', different ways of visualizing space which were historically and geographically contingent.

Chapter Two looks at the same issues, land and law, after the U.S. acquisition of Louisiana in 1803. I contrast the territorialization of Louisiana with that of the Old Northwest, suggesting that there were geographies of territorialization which can be traced in each of these areas. I also point to the intensification of law-in-spacing in Louisiana, where Civil law was more widespread, and where the French-speaking population outnumbered the Anglo-American population for over two decades. I also focus on the Louisiana Remonstrance, which highlighted three issues of immense concern to Louisianians: U.S. land laws, Anglo-American common law, and the Congressional ban on the importation of 'foreign' slaves.

My third chapter, then, deals with slavery in Louisiana. I contrast the French Code Noir with the 1806 Black Code, both of which set broad parameters to master/slave relations, and suggest that these parameters did not necessarily reflect actual practice. I discuss the rhetorics put into play by Louisianians in reaction to the ban on slave importation, rhetorics which exemplified a moral geography of race and place. I use Henri Lefebvre's conception of the production of space to point to the possibility that slaves were able to
create their 'own' space, space which overlapped and subverted the 'white' space designed to contain and control them. I also examine a law suit to point to the ways that socio-spatial behaviors engender *lex loci* - custom - which can often subvert or completely override more formal laws which (in this case) represent norms created by the Church or State.

Chapter Four revolves around the Territorial Court of Pleas, which I think exemplifies the process of a legal system becoming visible which I have called law-in-spacing. The Court of Pleas was the first court in Louisiana to use common law court procedures and Civil law substance. The Court is important because it demonstrates the factionalism of the New Orleans 'community'. I also discuss two of the Court's judgments to demonstrate that there may have been two conflicting geographies of equity at work in territorial Louisiana.

My final chapter revolves around a court case known as the Batture Controversy, a series, really, of litigations which started in 1804 and continued for several decades. The Batture concerned the attempted removal of an alluvion in New Orleans from a realm of public customary use to one of strictly private ownership. The case demonstrates the complex geographies of public and private right in Louisiana, geographies which point to the larger geographical and historical differences of common and Civil law.

I propose, then, to range widely over a variety of geographical, spatial and legal issues, and to highlight the
ways in which these issues are interconnected. I am not trying
to write a legal history, much less a critical legal history.
I am not trying to rewrite American history. I have simply
chosen to write about American territorial expansion to get at
the geographies of law which seem particularly clear in that
process.
Chapter 1  
Territorializations

Law was crucial to the American experiment in westward expansion. The Ordinances of 1785 and 1787 were designed by the federal government to achieve specific goals in its territories. Federal sovereignty was to be established through the implementation of 'law and order' on the frontier, while principles of republican government were to be introduced and nourished through a series of stages which offered increasingly representative government to the inhabitants of the newly acquired territories. Liberty and equality were to be guaranteed to the new territories by the common law. Finally, the federal government would systematize, order, and regulate the disposal of the new public domain through Congressional legislation. These policies were intended to facilitate the assimilation of territorial populations, which were quite disparate, both within and between territories.

The Northwest Territory, acquired by the United States from Britain in 1783, and the Orleans Territory (Louisiana), the southernmost part of the Louisiana Purchase from France in 1803, posed different sets of challenges to the federal government. The Old Northwest was a vast tract of land populated predominately by native groups, while Louisiana was home to over thirty thousand, mostly French-speaking merchants, planters, tradesmen, and black slaves. The

2 Daniel Clark estimated that there were over 50,000 whites in the entire territory, and a census in the Annals of Congress
function of territorial law in both areas was to guarantee federal sovereignty over land and resources, and to establish control over the inhabitants through the extension of American government and common law.

The successful advance of an American governmental structure was linked to establishing a common law jurisdiction in the territories. Common law came to America with the first British colonists; it is that system of law in which judicial authority rests wholly in jurisprudence, or the decisions of the court. Precedent (stare decisis), plays a large role in common law jurisprudence, which is largely 'unwritten' (case) law. This dependence on precedent is one of the characteristics which distinguishes common law from Civil law. Civil law, descended from Roman law, derives its authority from legislation, limits the function of judges to the application of principles, or at most to interpretation, and is codified, or written law. The extension of common law to the territories was essential to the federal government because the principles embodied in the common law were, ironically, the guarantors of two of the government's most cherished objectives. First and foremost, common law was to

ensure that a republican system of government would be established in the territories. This emphasis reflected the belief that the political philosophy of an American form of republicanism, as expressed in the Constitution, was universal. In other words, that American liberty, justice and equality were the most beneficial for all men. The common law was one of the principal means by which this political philosophy was made possible. George Dargo has argued that "If the common law was the basis of American liberties, then it was basic to the liberties of all men." By extension, then, common law was the legal system that would most benefit all men.

The implications of this belief that the liberty and equality expressed in the Constitution and implemented by the common law were universal were to make an indelible impression on the judicial and governmental systems of the territories, and consequently, upon the inhabitants themselves. Universal principles were just that - universal - and consequently there was no need to tailor them to specific circumstances or locales. The first Governor of the Northwest Territory, Arthur St. Clair, summed up his attitude toward law and its functions

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3 By republicanism I mean a form of government that was not monarchical but was based on a representative government elected by the citizens, and responsible to them.
4 I use 'men' advisedly. Liberty, justice and equality were political guarantees, and women were not included in the political process at this time.
thus: "That people in a new country have some different prospects and objects from those who inhabit an old one, is certainly true; but how the change of objects can affect the regulations that are necessary for preventing crimes and protecting property, I own I cannot conceive." St. Clair's assumption that geography and social differences had no bearing on the primary functions of common law was typical of an attitude that was to be displayed by more than one territorial Governor.

Most American politicians believed that the common law, which was essentially established in the United States by the Constitution, and the Ordinance of 1787 (which guaranteed that new territories would be common law jurisdictions) embodied universal principles and could therefore be instituted anywhere with only good effects. Because it was not bound to place, and because there could be no 'reasonable' argument against it, American common law had great assimilatory potential. Further, it was self-contained - whole and complete - so that the establishment of common law jurisdictions in the territories was sufficient to expunge all previously existing systems of law. This in effect limited the "legal operations [of the territorial judges]...to the principles of the

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Constitution and common law only." The Ordinance of 1787, and the common law system which it promised, were necessary to duplicate American institutions in the new territorial settings, as well as to bind those territories more tightly to the Union by the creation of mutual "interests." Politicians in the Eastern states worried that the West's "...interests, if not opposed, will be but little connected with ours." This emphasis on interests not only reflected conflicting regional politics within the Union, but also an awareness of the tenuous nature of republican government over long distances and the plethora of foreign interests which (literally) surrounded the Old Northwest and the Louisiana Purchase. It was essential to the United States to govern firmly, while guaranteeing the eventual benefits of statehood to the newly acquired territories.

It seems to me that law was, therefore, multi-functional. It served to promote and guarantee an identification of interests by expressing acceptable (to the Eastern U.S.) political and social values. It also enabled the federal government to maintain sovereignty over the territories through its more blatantly coercive functions, such as the prosecution of criminals and the protection of public welfare. As such, the extension of American law to the territories can

7 Judges Parsons and Varnum to St. Clair, July 31, 1788, Ibid., 2: 69.
be seen as the extension of federal power over the territories.

But the rhetoric of interest that occupied so much of the attention of Eastern politicians invites another interpretation. For the United States, the process of settling the territories involved a process of othering. Not only were the territories a wild frontier, populated by "savages" (both white and Indian) and foreigners, but it seemed likely that non-English westerners would add to this "other" population. There was a need, therefore, to educate these "others", to assimilate, and Americanize them. Issues such as education, assimilation, and Americanization were intended to reflect a unitary federal policy regarding the territorial populations, but in reality they varied over time and through space, and from administration to administration. These concerns were trebled with the United States' acquisition of Louisiana, where the population must surely be seen as the United States' first encounter with a self-consolidating other. By this I mean that in Louisiana, and to some degree in the Northwest Territory, there were differences which were perceptible to the American eye, such as the predominance of the French language, the Roman Catholic religion, the Civil law system, and (in Louisiana) status as subjects of the Spanish Crown, but these differences were not constructed by Americans or the American government and imposed on Louisianians or the French

populations of the Old Northwest. Rather, these differences were pre-existing and 'real'. I am not suggesting, however, that the federal government did not use these differences in particular and political ways, for example the notion that Louisianians, as Spanish 'subjects,' were not yet 'ripe' for citizenship.\(^\text{10}\)

In any case, the settlement of the Old Northwest did not bear out predictions of massive foreign immigration, and it was a huge area with a minimal population. The otherness of the Northwest rapidly became part of the American self-image - bold, industrious pioneers subduing the frontier - accompanying the spatial imagery of manifest destiny.\(^\text{11}\) This image could not hold true in the lower Mississippi basin, however. The problem there involved the incorporation of 'civilized' people into the Union: people with sophisticated networks of commerce, and established social, linguistic and legal arrangements. In this sense, the territorial expansion of the period between 1785 and 1812 can be seen as the first American efforts at imperialism, a process that is not usually

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\(^{10}\) Two points are necessary here. First, the "othering" that developed around blacks in the southern U.S. was vastly different from the process I have outlined here. I will address this issue in Chapter 3. And second, the first self-consolidating others the U.S. encountered were the Native Indian populations, but I cannot include their stories here at all.

\(^{11}\) Manifest destiny was an American belief that the 'natural' limit of U.S. expansion westward was the Pacific ocean. Disputes over the territory included in the Louisiana Purchase frequently revolved around an American insistence that the Purchase included portions of the Rocky Mountains, which, by international law, would then give them rights to the western territories by virtue of the watersheds of rivers which originated in the mountains.
thought of as beginning until a century later, and then exercised over native populations and foreign nations.

Thus, the United States government was attempting to manage these "new" spaces as part of an essentially imperialistic project. Social change was to be brought about by the (spatial) transplantation of American common law to the territories, while political change was to be wrought by the extension of American forms of government.

By examining the concrete fabric of produced space associated with these processes, and the development of governmental and legal institutions on the territorial peripheries of the "United States", I hope to allegorize this larger heterogeneous process, to avoid "the sanctioned ignorance" of imperialism that is common in histories of the American west concerned with this period. In order to do this I will use a few specific, concrete, examples which focus on the role of law to illuminate the larger imperialist processes at work - to allegorize those processes. Gayatri Spivak's "intervention" in the allegorical subtext of European imperialism informing the work of European theorists such as Foucault is pertinent to my case. She suggests:

"Sometimes it seems as if the very brilliance of Foucault's analysis of the centuries of European imperialism produces a miniature version of that heterogeneous phenomenon: management of space - but by doctors; development of administrations - but in asylums; considerations of the periphery - but in terms of the insane, prisoners, and children. The clinic, the asylum, the prison, the university - all seem to be screen allegories that foreclose a reading of the broader narratives of imperialism...Yet we have already spoken of
the sanctioned ignorance that every critic of imperialism must chart."12

In the context of this thesis, an allegorical subtext, such as the legal personalities of property owners under common and Civil law, can highlight the assimilatory potentials of legal systems implicated in larger imperialist projects. I want, therefore, to turn this critique inside-out, as it were, using some of the "miniatures" of American territorialization to point to more heterogeneous processes that might be named "imperialist" - American territorialization being a founding moment in the production of an American 'west' and in the production of America as 'The West'.

Working with this sense of the "miniature" as a particular constellation of puissance/connaissance, I want to focus on local networks of power and knowledge in Louisiana which bump up against larger constellations of pouvoir/savoir put into play by the federal government. As Foucault suggests, "les résistances... sont l'autre terme, dans les relations de pouvoir; elles s'y inscrivent comme irréductible vis-à-vis."13 I focus on particular connaissances, local in nature, to point to the tensions in law-in-spacing, Louisiana being my "local foci", where local connaissances were bound up with a Civil

13 "Resistances...are the other term in relations of power; they are irreducibly inscribed therein face to face," from Michel Foucault, La Volonté de Savoir, cited in Gayatri Chakravorty Spivak, "More on Power/Knowledge" in Thomas E. Wartenberg, Rethinking Power (Albany: State University Press, 1992), 157. All translations from the French will be mine unless otherwise stated.
legal system which, like American law, was far from inert. By law-in-spacing I want to imply a set of related processes and concepts, having to do with power and resistance, law and space. One thread of my allegory wends through the multiple geographies of law that can be traced out in Louisiana: at a broad level, geographies of common and Civil law; at finer levels, geographies of the varied legal constructions of property ownership contained within the frameworks of common and Civil law; and widening the scope again, a geography of the meaning of justice, as it is embodied by, for example, equity. The image that I want to evoke with the term law-in-spacing is similar to Spivak's term power-in-spacing, which highlights Foucault's notion that networks of power may be most visible at the peripheries, or extremities, of the spatial arrangements they engender. In the same vein, I want to suggest that the effects of law, or of specific systems of law, are most visible when they are extended to the 'frontiers' of society. The extension of common law to the newly acquired hinterlands of the United States can be seen as a process of territorialization. Thus, my allegory spins around a conception of space as one medium of social change through, in this instance, legal transplantation. But space is also, by virtue of its social production, instrumental in tempering legal transplantation."

14 Henri Lefebvre has frequently emphasized the notion of 'juridicality', particularly as it relates to private property, but he has offered no sustained analysis of the ways in which legally constructed notions like private property produce new sets of spatial practice. In any event, his
The extension of the American legal system through space to distant, "new" settings, was problematic. For example, the private aspects of common law, primarily regulatory in the American Union, contrasted sharply with those portions of the territories with French and/or Spanish populations accustomed to European Civil law. Because territorial law was a construction of the American federal government, and was intricately bound up with common law, when it was applied to European populations it was clearly unconnected to the social relations of the people and communities it was intended to regulate. Territorial law had no local underpinning in places like Louisiana, Vincennes, or French Illinois; it is this lack of fit - the catachrestic quality of 'territorial law' - that points to the more general relations between power, resistance, and social space that I want to explore. In spaces like Louisiana and Illinois, territorial law acquired a metonymic quality that concealed a larger project of imperialism initiated by the federal government - the quest to instill the universal principles and virtues of the republic through territorial aggrandizement.

The degree to which the contours of common law became transparent in the territories was governed not only by the nature of the spatial arrangements it was intended to

discussion is limited to Europe. Henri Lefebvre, The Production of Space, Donald Nicholson-Smith, trans. (Cambridge, Massachusetts: Basil Blackwell, 1991). 15 I will use civil law when writing of private common law, and Civil law to designate the European systems of law based on Roman law.
construct, but also by the social and cultural backgrounds which had produced and sustained, and often contested and reworked, those arrangements. Law-in-spacing in the Old Northwest can be seen as a matter of degree. For Anglo-American settlers, territorial law was probably visible and welcome, as there was no unifying or entrenched legal system in place in this vastly underpopulated area. For the French inhabitants of the Old Northwest, the common law system, in conjunction with the land laws, caused a unique set of problems which revolved around social and legal conceptions of property and property ownership. In the smaller French settlements, these problems seemed insurmountable, and a common response was emigration to the Spanish side of the Mississippi River. For Anglo-American settlers, territorial law posed problems of a different nature, revolving around legal title to land and enfranchisement.

The discursive juxtaposition of two territories, the Old Northwest and the Orleans Territory (hereafter referred to as Louisiana) will highlight several aspects of territorial law which make the term law-in-spacing peculiarly appropriate to the legal settlement of these two areas. In this chapter my focus in the Old Northwest will be on the period between 1785 and 1795. In the following chapter I will focus on Louisiana from the end of 1803 through 1808. Each chapter considers these territories at the beginning of their respective territorial periods. In this chapter I will discuss the ways in which the United States attempted to use the Ordinances of
1785 and 1787 to protect its interests in the Old Northwest, as well as the ways in which these two Ordinances can be seen as having interlocking effects on the populations of that territory. I will focus specifically on the multiple effects which these Ordinances engendered as they were put into place on Anglo-American and French populations in the Northwest Territory. I will also discuss the varying problems these two populations experienced in this encounter with territorial law, and the responses they made to it.

Order and Ordinances

As early as 1780 the federal government had realized the importance of the western lands. A huge, and unacceptable, foreign debt had accumulated during the Revolutionary War. Payments to war veterans were in arrears. The federal government proposed to satisfy both of these debts by disposing of the western lands: the foreign debts would be payed through land sales, while grants of land would be issued to veterans in lieu of money payments.

There were several problems to be rectified before these schemes could be put into action. The first, and apparently most insurmountable, was that the federal government did not actually possess title to the western lands. Most of the land east of the Mississippi River had been claimed ('by right of conquest') by the individual states during and immediately after the Revolutionary War (see figure 1). One of the first
State Cessions and the Old Northwest
chores of the Continental Congress was to convince the states to cede their claims to the federal government, a request that was not greeted enthusiastically by the states. It was only after an acrimonious debate in Congress that the first cession was made by New York to the federal government, a cession which had been brought about by federal guarantees that all "unappropriated lands" ceded by the states would be disposed of for the "common benefit" of all the states in the Union, and that these lands would eventually be admitted to statehood on an equal footing with the original states. Congress was able to officially claim the Northwest Territory upon the signing of the Treaty of Paris with Britain in 1783, and with the Virginia cession of 1784, which granted all the territory in the Old Northwest that Virginia had seized and occupied during the Revolutionary War to the federal government.

There was intense debate in Congress over the potential division of the new territory into states, due to sectional interests, particularly between the Northern and Southern states. These debates were temporarily laid to rest by the Ordinance of 1784, which stipulated how the territory was to be divided into states, and provided a government for those

16 It would take over 15 years for the government to acquire all the lands east of the Mississippi River from the states. Georgia refused to cede lands that would become the northern portions of Alabama and Mississippi until 1802. Another strip of land to the south of this area, known as West Florida, was claimed by Georgia, Spain and the United States, and was not acquired by the latter until 1819.

states. This Ordinance was never actually in force, and the issues that it dealt with were again taken up by Congress in 1787.

The second problem facing Congress was the actual method of disposing of the newly acquired public lands. There were several crucial issues at stake here. The first involved balancing the needs of the federal government with the needs of individual settlers. Basically, the government had to ensure that it would profit from the immigration of settlers to the Northwest Territory. This meant regulating settlement and instituting a workable system of payment and title registration. Settlers, on the other hand, needed affordable terms, particularly during the post-war depression. At the same time Congress wished to maintain governmental control of the territory without appearing tyrannical, while settlers needed some type of federal protection which would not impinge upon their conception of democracy. The Land Ordinance of 1785 addressed the first of these goals.

Naturally, these questions were politically charged. There was some argument over the method of alienating public lands: New England favored a system of rectilinear survey, while the Southern states favored a less systematic, more indiscriminate approach to settlement. A rectilinear system of township and ranges was decided upon, each township to be divided into 36 sections and then sold. This in turn threatened the interests of several northern land companies which had been formed with an eye to the opportunities
presented by the opening up of the Northwest Territory. If the land was sold by section, there would be a great deal of inconvenience, and loss of profit to the land companies, while if entire townships were offered it would be impossible for the average settler to afford land. A compromise was reached whereby townships would be sold alternately whole and by section.

However, the most vital issue to many members of Congress was to guard against "squatting", which was seen as more than simply trespassing on the public domain. As a House Committee explained, squatting was objectionable because it "...was wholly incompatible with the idea of deriving revenue from the sale of public lands, and [it] encourage[d] migration beyond its natural and necessary progress." Squatters had wreaked havoc in Kentucky through their constant warfare with Indians, their habit of claiming lands indiscriminately through "tomahawk rights", and their movements across the Ohio River and into the Northwest Territory. All of these practices made the government of the new lands more difficult: Native people were reluctant to part with lands they were engaged in warfare to defend, settlements were impossible to defend against Native attacks because they were so scattered and isolated, while the cost of defense skyrocketed due to the continuous hostilities and due to dispersed settlement patterns. These

18 American State Papers - Documents, Legislative and Executive of the Congress of the United States 1789-1824, 38 vols. (Washington, 1832-61), Miscellaneous, I:387. [Hereafter cited as ASP]
were the conditions that Congress was determined to avoid when it created the Land Ordinance for the Northwest Territory. The concern with squatting was so great, however, that the federal government instigated a policy of squatter removal even before the Land Ordinance was passed.¹⁹

This desire to realize the goal of controlling settlement, and thereby turn the new lands to profit, motivated the Land Ordinance. First, there was to be no sale of lands until the Geographer of the United States had surveyed and demarcated seven ranges.²⁰ These lands would then

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¹⁹ On January 26, 1785, the Commissioners for Indian Affairs instructed Colonel Joseph Harmar to move into the Northwest Territory and to "...employ such force as he may judge necessary in driving off persons attempting to settle on the lands of the United States. Harmar took the defense of United States property seriously, posting notice of the Commissioners' instructions along the Ohio River. He later reported that "...a party has been detached, who drove them [squatters on the north side of the Ohio River] off as as far as seventy miles from this post. The number lower down the river is immense, and unless Congress enters into immediate measures, it will be impossible to prevent the lands being settled", and again,"[t]his position at Muskingum will answer the valuable object of removing the intruders from the public lands, should any hereafter presume to encroach upon them, which I do not believe will be the case, as shortly before I left McIntosh they sent up a most humble representation in behalf of the whole, purporting that they were convinced that they had behaved most disorderly, and praying, as the last indulgence, that they might only be permitted to stay a short time and gather in their crops, after which they would instantly depart. Lenity I thought to be out of the question, and have directed Captain Doughty, on his way down, to burn and destroy any remaining cabins between McIntosh and Muskingum." Col. Joseph Harmar to Secretary of War Henry Knox, June 1, 1785, and October 22, 1785, St. Clair Papers, 2: 3 n.1, 6, 12.

²⁰ The office of Geographer of the United States was established by the Ordinance of 1785, and President George Washington appointed Thomas Hutchins to the post in that year. The Geographer was to direct surveys, set up regulations for the surveyors, and report to Congress. Hutchins died in 1789, and was never replaced: the Geographer's duties were divided
be put up for public auction in the major eastern cities. This would facilitate payment and the complex registration process envisioned in the Ordinance. The government would be provided with one of three plat maps issued, the other two going to the purchaser and to the register.\(^2\) This method would not only insure that the Board of Treasury knew precisely who owned, and owed, what, but also that widely scattered settlements would not prevail in the Old Northwest. These objects were further provided for in that the entirety of the first seven ranges had to be sold before newly surveyed lands were offered for sale.

The Land Ordinance of 1785 never proved effective as a means of protection for the federal government's landed interests in the Old Northwest. First of all, the attempt to disallow any settlement whatsoever before the sale of the the first seven ranges was unrealistic. By mid-1787 only three and


21 The register's duty was to keep careful track of all lands sold, making sure that no tract was sold twice, and to keep a master plat of all tracts sold. He was also in charge of distributing plats to the Board of Treasury, and to the purchaser, on receipt of the final payment. The receiver was in charge of all moneys received, as well as tabulating the complex system of interest which Congress had designed. An extremely detailed account of the registration process is available in Charles Judah Bayard, *The Development of the Public Land Policy 1783-1820, with Special Reference to Indiana* (New York: Arno, 1979)
one half ranges had been surveyed, and the sales were sluggish at best. Second, there was initially no provision for land offices in the territory itself, so that purchasers were buying land sight unseen. Third, the registration process and the payment plan for land sales were so complex that actually obtaining a plat, and a title, were extremely time consuming and difficult.

Indeed, title to land would become, and remain, the source of most of the litigation that took place in all the newly acquired territories. This was partly due to the impracticality of the system of sales and registration. It was also due to the large number of squatters who had settled, made improvements, and felt that they had earned title to their claims. At the federal level, Congress was constantly barraged by petitions from the "ancient" French inhabitants requesting a final settlement of their titles. It was also due to Congress' determination to profit as much and as quickly as possible from its new assets. Several large land companies, most notably the Ohio and Miami Companies, and one individual, John Symmes, had contracted privately with Congress to buy over six million acres in the territory. Many individuals who bought from these companies were unable to establish title to land that they had payed for because the companies, through default, fraud or mismanagement, were unable to fulfill their contracts with Congress. Many of the oversights of the

22 Indeed, the survey of the first seven ranges was not completed until 1796, when they were again offered for sale, in Pittsburgh.
Ordinance of 1785 would be amplified by the passage of the Ordinance of 1787.

The Ordinance of 1787 established a system of government for the Northwest Territory which was intended to progress in stages from a colonial style government through to statehood. Initially a form of government was implemented in which the entire upper echelon of officials was federally appointed. Civil and military power were combined in a Governor, who shared legislative powers with three federally appointed judges. However, law did not issue solely from the councils of the governor and judges in the form of legislation; it was also within the governor's power to issue proclamations (to the civilians) and orders (to the militia). All lesser officials were to be appointed by either the President, Congress, or, usually, the Governor. This was the "first stage" of territorial government as it was set forth in the Ordinance, and its similarity to colonial rule seems obvious. Territorial Governors repeatedly found themselves in the awkward position of close contact with a local population with whom they had no real ties, implementing policies that derived from a distant source, and from which they were invested with their only claim to legitimacy. 23

23 This was a particularly difficult position for St. Clair. He did not seem to be aware of the delicacy of his position: his reliance upon governing by proclamation earned him a "private and friendly" letter from President Washington warning him of a potential misconstruction of his actions in the capitol. George Washington to St. Clair, January 2, 1791 Territorial Papers, 2: 320.
The Ordinance of 1787 was also composed of six Articles of Compact. These articles guaranteed to the potential states freedom of religion, a republican form of government, the benefits of the common law, taxation proportionate to representation, and the exclusion of slavery and indentured servitude. Doubtless, the intention was to soften the nakedly imperialistic overtones of the first stage of government by making these guarantees.

Population requirements were to trigger the movement from one stage to the next. When the population of the territory reached five thousand free white males of twenty one years of age and over, the government was to move from a strictly colonial type of government to one in which there was limited representation for the inhabitants of the country. This type of government provided for a House of Representatives elected by the voting public (free white males of age who met residency, citizenship and property ownership requirements), the House then being empowered to nominate ten men from whom Congress would choose five to serve as a Legislative Council. The Council and House were also empowered to elect a delegate to Congress who had the right to debate but not to vote. The Governor, as the chief officer of the territorial legislature, had the power to convene, prorogue and dissolve that body, as well as to veto any bills passed by the legislature. The territory was to be divided into no less than three, but no more than five states, which were to apply to Congress for
entry into the Union upon proving a population of sixty thousand "free Inhabitants." 24

Politics of Property: Anglo-Americans

Some of the benefits promised by the Ordinance of 1787 might have been more forthcoming if it had not been for the odd way that this Ordinance seems to have worked in tandem with the provisions of the Land Ordinance, slowing all movement toward statehood to a crawl. For example, the requirements in the Ordinance of 1787 stipulating that each voter possess a freehold of fifty acres in the district was, in itself, not unusual in the United States at this time. While it was not universal suffrage, it guaranteed, for instance, that people from Kentucky could not swamp a county in the Northwest territory and bias that county's elections. The problem arose when the inhabitants had to prove their titles to land. These had been slowed down immensely by the difficult and unwieldy process provided for in the Land Ordinance, and the Northwest Territory did not enter the second stage of territorial government until 1799.

24 This stipulation dates back to the 1784 debates that centered on sectional power. The North felt that the West would be decidedly biased in favor of the Southern states, as well as providing the latter with certain economic and security perquisites. Therefore it was in the Northern interest to divide the territory up into as many small blocks as possible, thus safeguarding northern power in the House of Representatives. On the other hand, the Southern section of the country wanted to keep the number of potential states low, for the opposite reasons.
The enormity of the problem of obtaining title to land can be illustrated by taking into consideration some of the emigration and population figures which are available. For example, General Josiah Harmar reported to the Secretary of War that 18,761 "souls" had passed down the Ohio River by Fort Harmar (Marietta, Ohio) between October 10, 1786 and May 8, 1789.\(^1\) This does not even address the existence of a long established French population in the city of Vincennes, which Harmar estimated at 900 "souls" in 1787, nor the populations of the villages of Cahokia and Kaskaskia, in present day Illinois.\(^2\) Neither does it mention the number of emigrants who may simply have crossed the Ohio River from Kentucky to settle in the Old Northwest. These figures suggest the likelihood that by 1789 the free white male population in the territory had outstripped the 5,000 mark, which was not officially attained until 1799.\(^3\)

Legal recognition of land ownership was also, however, important to settlers because land title was bound so tightly to enfranchisement in the territory at this period. It was a reasonable expectation that longtime citizens of the original

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\(^1\) Harmar to Knox, June 12, 1789, *Territorial Papers*, 2: 196.


states should have procured legal title to their lands, but
the same expectation, when applied to such a new and distant
territory, was unrealistic. The question of title was
exasperating for many Anglo-Americans in the territory. In
response to a petition received from settlers on the Symmes
Purchase, St. Clair explained the ties between voting and land
title succinctly:

"You will consider that the right of suffrage is confined
to those who hold land either by freehold - that is a
lease for life - or in fee simple. Now, none of you hold
lands by either of those titles. You hold under Judge
Symmes, who has himself neither of these titles, and,
indeed, nothing but a claim in virtue of a contract,
which he says ought to be fulfilled, but which Congress,
the party with whom the contract was made, has hitherto
refused to fulfill...You stand, in respect to the right
of voting, precisely on the same ground as those who have
sat down on the public lands that are not claimed...But
you think it hard that, as you have paid your money for
the land, you should not have a right to vote...[and] you
think because you have paid [county] taxes, you should be
allowed to vote."\(^{26}\)

Unfortunately, there were several communities which had
purchased land from large land companies, and found themselves
in precisely the same situation.\(^{29}\) They were unable to
retrieve their money from the company, nor were they able to
force the company to comply to the terms on which they had
agreed to settle. At the same time, they were also unable to
participate in their own government because they were unable
to produce a legal title.

\(^{28}\) St. Clair to Joseph Page, December 13, 1798, *St. Clair

\(^{29}\) Another example of this situation was the community of
Gallipolis, which had emigrated from France after contracting
with the Scioto Company. They, too, sent several petitions to
These difficulties in obtaining even the most basic of American entitlements, such as the right to vote, or to be quieted in the possession of property, contrast sharply with the utopianism implicit within the American Government's colonizing schemes. The desire to produce a 'new' American space which mirrored the positive elements of Eastern American society was an essential goal of the Ordinance of 1787. The oddity lies in the fact that the government believed that this space, and the society which would colonize it, could be produced by means of a legal apparatus - a legally produced space. Henri Lefebvre charts a history of socially produced space in Europe, yet he suggests that this socially produced space has been in decline, due to the rise and ascendancy of abstract space in conjunction with the rise and ascendancy of capitalist economic systems.

Abstract space, according to Lefebvre, is space which is homogeneous and homogenizing, institutional and institutionalizing. The irony of American utopianism lies in its dependence on politically or legally produced space, rather than on space produced by the citizens or inhabitants of the territories. With Lefebvre, I would suggest that the American belief that a "true space can be constructed" completely evades the question of the "truth of space". In this sense, some of the problems I have pointed to were created by the imposition of this rationalized, "true" space on lived spatial practice. The key, then, to American

30 Lefebvre, 9.
utopianism was written into the Ordinance of 1787: the legal (and political) construction of a space, and the legal (and political) construction of who could, and should, participate in the ownership of that space.

The recurring problems with the large land companies point out yet another problem with the territorial system of law and its lack of fit with conditions on the ground. This was the tendency of the judicial system to become drastically politicized, at both the federal and local levels. At the federal level, appointments to territorial office tended to be made according to the appointees' political influence, or to his party affiliation. Hence, St. Clair's continuation in the post of Governor of the Northwest Territory despite the bitter complaints and ruthless attacks made on him by many of the "citizens" can be seen partly in terms of President Adams' election to the presidency. Both men were staunch Federalists, and wary of "democracy", which was seen as the road to anarchy. On the other hand, Winthrop Sargent, the territorial secretary, may have owed his appointment to his connection with the Scioto and Ohio companies (he was a co-founder of the former), which both had powerful backers in Congress.

At the local level, federal appointees had ample opportunity to influence events. In the Northwest Territory this was peculiarly true of the judiciary. Of the three men originally appointed territorial judges, James M. Varnum, Samuel H. Parsons and John C. Symmes, the first two were involved in founding the Ohio Company, which contracted
privately with Congress to purchase 1.5 million acres, while Judge Symmes also contracted privately to buy one million acres. 31 Varnum died, and was replaced by George Turner, who did not seem to have any involvement in land speculation, but against whom there were several complaints on other matters. 32 Parsons also died while in office, and was replaced by Rufus Putnam, another co-founder of the Ohio Company, and the eventual Surveyor General of the United States.

It must be remembered that the judges, along with St. Clair, were the sole legislators for the territory during the first stage of government. They were also a court of the last resort, from whom there was no provision made for appeal, and in which one judge constituted a quorum. Even St. Clair, who maintained a good relationship with the judges, was alarmed by these circumstances:

"Every land dispute will be traced to some transaction of one or of the other of those gentlemen [Putnam and Symmes]...Interest hangs an insensible bias upon the minds of the most upright men...In the matters that are most likely to be litigated, in whichever of the associations they necessarily happen, these must be of so great a similarity that, deciding in one by a judge who has no direct interest in the cause, may have, nevertheless, as direct and certain an effect in another where he is interested, as if he had determined his own cause." 33

31 Apparently the surveyor contracted by Symmes did such a poor job that the judge's property ended up to be a mere 311,000 acres.
32 Turner seems to have had an enhanced vision of his jurisdiction, for St. Clair complained that the judge meddled in Indian Affairs, at that time the exclusive province of the Governor.
33 St. Clair to Thomas Jefferson, December 14, 1794, in St. Clair Papers, 2: 333.
This letter was written in response to various complaints by litigants. While I have not found any positive evidence that the judges adjudicated in their own favor, their presence on the bench must have had an impact on the manner in which the legal system was approached, and used, by the inhabitants. Certainly it would have been the height of absurdity for Symmes' purchasers to expect justice from Symmes' own court.

The federal government's efforts to control the pace of emigration, and the spatial arrangements of settlement were largely unsuccessful. What is more, after 1787 the brunt of the negative force of legal formality appears to have fallen most heavily on those who actually had an equitable claim to land, or to the right to vote. The Land Ordinance, rather than encouraging orderly settlement, impeded those settlers who tried to abide by its tenets. The Ordinance of 1787, rather than moving the Northwest Territory through the stages of government according to its population requirements, was bogged down by the ties between formal legal property requirements and enfranchisement.

While the discussion thus far has considered the problems of territorial law broadly, and in a specifically Anglo-American setting, the same problems were amplified, and different problems created, in the French settlements of the Old Northwest.
Politics of Property Two: The French

The French inhabitants of the Northwest Territory shared some of the problems faced by the Anglo-American population, but also experienced the effects of the two Ordinances in ways that were uniquely related to their own ways of life. One issue of particular importance related to the ways in which title stipulations in the Ordinance of 1787 were geared toward distinctly Anglo-American notions of family and private property. This had a great impact on the French settlers.

The case of Vincennes is instructive: the inhabitants of this community could trace the establishment of Post St. Vincents in 1732 to the French authorities of Louisiana. The land on which the post stood, and the surrounding area which the inhabitants farmed, had been granted to the French by the Piankashaw Indians, and further confirmed by a conveyance of the same by the Piankashaws to Lord Dunmore in 1768, who reserved it for the use of the inhabitants of Vincennes.34 In 1788 Congress "confirmed" the titles of the French and Canadian settlers at Vincennes who had settled there prior to 1783, on the condition that the tracts were surveyed and registered. It also "donated" 400 acres of land to each head of family who met these 1783 settlement requirements.35

34 This, at least, is what the inhabitants of Vincennes claimed in a Memorial to Congress of February, 1788. In Territorial Papers, 2: 92. It would seem that the claim was not disputed by Congress, because they based their decision on it, ASP, Public Lands, I: 32-33.
35 Resolution of Congress: The Inhabitants of Vincennes, August 29, 1788, Territorial Papers, 2: 145
These donations completely overlooked the differences in the French system of conveyancing and inheritance which were guaranteed by the Ordinance of 1787. For instance, there was no provision made by Congress for minors who held title to land. Certainly there was no provision for women or female children who held title - a case which would not have been uncommon in the French communities, where property could be inherited equally by all children regardless of gender.  

While the Ordinance eliminated any possibility for the existence of primogeniture in the territory, the Congress assumed that land ownership was the exclusive realm of married men over 21 years of age, preferably with families. It ignored the possibility that land which may have been owned 'informally' by a family for decades, could be held by a rightful heir as a minor, or that a married woman could hold real estate which was completely outside the community of

36 Inheritance laws were diverse and complex in pre-revolutionary France. Coutumier succession distinguished between nobles and commoners (roturiers), and between types of property: movables, immovables, propres (immovable property inherited from relatives) and acquets (immovables or movables acquired during one's lifetime through labor). Testamentary freedom to dispose of property varied significantly from region to region in France, but law required that a légitime, a guaranteed share, be reserved for ascendants or children. For a good, but unintended, geography of succession law in pre-revolutionary France, see James Traer, Marriage and the Family in Eighteenth Century France (Ithaca, New York: Cornell University Press, 1980). For a good account of the ways in which law was manipulated to "protect family heritages from the partition which the law required", see Ralph E. Geisey, "Rules of Inheritance and Strategies of Mobility in Prer evolutionary France", American Historical Review 84 (1977), 271-289, 288.
acquets and gains she shared with her husband.\textsuperscript{37} The latter went completely against the common law tenet that women were not persons under the law.\textsuperscript{38}

The Congressional donations also did not include the commons, fenced-in land used by the entire community for fuel and pasturage, nor did it include the common field just outside the town itself which was traditionally farmed by French communities (see figure 2).\textsuperscript{39} These lands were crucial to the French communities of the Old Northwest because they were the source of most of the grains and dairy products produced by the community. They were not, however, privately owned, and hence no one individual could point to an area of the commons and claim it - it belonged to the community as a whole. Since the land was not divided into separate lots owned by private persons, Congress initially considered it

\textsuperscript{37} While French women did have legal personalities under Civil law, I am not suggesting that they were treated equally - sexism was alive and well in French law and French society. See Jane Abray, "Feminism in the French Revolution" American Historical Review 82 (1975), 43-62.

\textsuperscript{38} William Blackstone described a married woman's status under common law as such that "the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated or consolidated into that of the husband," nor could a wife bring action for injury "without her husband's concurrence, and in his name, as well as her own." Blackstone contrasted this to the Civil law, under which "the husband and wife are considered as two distinct persons; and may have separate estates, contracts, debts and injuries." Commentaries on the Laws of England, St. George Tucker, ed., 5 vols. (New York, 1803), 2: 442, 444.

unappropriated - part of the public domain and hence owned by
the United States. While the concept of a commons would have
been perfectly familiar in both England and New England in the
seventeenth century, it was foreign to the United States
government by the end of the eighteenth century. It was only
on the recommendation of Secretary Winthrop Sargent, who was
on the spot trying to sort out the title problems in
Vincennes, that Congress, in 1791 "appropriated to the use of
the inhabitants" the fenced in common.40

But the problems of French title to land were not due
simply to the recalcitrance of Congress; they were also
brought about by the inability of the American government to
deal with the French (and Spanish) system of granting lands in
the Northwest Territory and, later, in Louisiana. On one hand,
the federal government failed to recognize that, though
different, the French and Spanish systems of granting lands
had validity and meaning for the people who had received the
grants in question. The European land grant system was based
on a network of relations between the inhabitants and the men
they recognized as figures of authority, whether the authority
was delegated by the Crown, as in the case of post
commandants, or earned socially and politically, as in the
case of the syndics, who were elected by an assembly of all
the village men to supervise the execution of the laws of the
commons and the assembly's decisions.41 The system depended on

40 Land Grant to the Inhabitants of Vincennes and the Illinois
41 Alvord, Cahokia Records, xxiii.
the presence of these men in the community itself, rather than on an elaborate legal or written procedure. Grants were contingent upon the fulfillment of certain requirements by the grantees - for example, in Vincennes it was incumbent upon individuals to build and maintain fences which passed through the portion of the commons they farmed. Not only were these requirements enforced through pressures exerted personally by the commandant or syndic, but it was through their fulfillment that title to land was recognized. Boundary and other property disputes were settled by men who were intimately acquainted with the physical and social organization of the community, on the basis of familiarity and equity, rather than on a formal basis. This was a necessity considering that very few of the properties had been surveyed or mapped.

Yet another problem, in the eyes of Congress, was the extra-legal appearance of these grants: only rarely was there an extant written record, and if one existed it had not necessarily been recorded by the commandant or the notary. For example, of 88 land titles reported from Vincennes by the last post commandant, St. Ange, less than half were "entre ses mains" [in his hands], 33 were "perdue" [lost], and 13 "verballes" [verbal]. Oddly enough, all nine of St. Ange's own claims were in writing and recorded.42 It was this vagueness and informality, as well as the potential for abuse, that made Congress so wary of the European system of land holding. Seemingly, the only way to determine the validity of

42 Cited in Bayard, Public Land Policy, 9-10.
the French land claims was by an examination of each individual's claim, to assess whether the land was actually occupied and improved. Indeed, this is exactly the system that Congress tried to implement. It was, however, far too inefficient, arbitrary, and time consuming to work, and the French land claims in Vincennes were not satisfactorily settled until 1819.

This brief discussion highlights some of the difficulties that the federal government encountered when it came into contact with established communities with different land use and land grant systems. Vincennes was one of the largest of these French settlements, but it had a population of only around 900 people. The Government's inability to cope effectively or efficiently with the situation in Vincennes did not arise, therefore, because of large numbers of claims or because of a necessity to manage extensive tracts of land. The problem lay in the government's profound inability to understand some of the basics of the French villages. The conception of a commons, of communal property, was difficult to grasp, in part because the government worked on the assumption that property could exist only in two forms: it was either privately owned by an individual, (private property) or it was public property owned by the government. 43 Indeed, E.P.

43 This governmental lack of understanding regarding the importance of commons was paralleled by a similar, but far more complex process in England. E.P. Thompson has documented these struggles over commons, and has pointed to the gap between the theory and practice of law, as well as to the various contested definitions of what constituted law, arguing that "claim and counter-claim had been the condition of forest
Thompson has noted a similar problem on each occasion that English common law has encountered "an alien notion of property in land" - each encounter is marked by the inability of the law to take "cognisance of such a communal personality."\(^4\)

This can be recast as a conflict between two "logics of space".\(^4\) Lefebvre has argued that abstract space was produced in tandem with a logic of space that served to rationalize and to hide its contradictions. This logic of space, which is linked with order, rationalism, and planning, could be considered as a perceptual and conceptual strategy. It seems that such a logic of space would necessarily be bound up with what Lefebvre has called a 'logic of visualization,' or at least that the connections between these two logics are clear enough to permit an extended analogy between them.

Martin Jay has argued that within a seemingly hegemonic visual order based on Cartesian perspectivalism 'competing ocular fields' developed which offered alternative visual cultures." Jay has called these visual orders 'scopic regimes', but I think that they provide good examples of life for centuries. On the one hand, the nobility and local gentry had been nibbling and continued to nibble [at the forest]...on the other hand, the customary tenants of the several manors had pressed forward on every occasion their own claims to unrestricted grazing, timber and peat-cutting on their commons." E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (New York: Penguin Books, 1975), 31-32.
45 Lefebvre, 293-300.
Lefebvre's logic(s) of visualization. Jay, however, offers no point of entry into a discussion of how these different scopic regimes came into being. I would suggest that different spatial practices or 'styles' produce different logics of vision, or that different logics of vision could produce different sets of spatial practice. Indeed, Jay notes that there seem to be correlations between particular scopic regimes and different styles of urban life, for example that "L'Enfant's Washington showed the fit between state power and urban space built according to the visual principles of the dominant scopic regime of the modern era."47

Washington, then, seems to embody a representation of space which makes a clear distinction between what is public and what is private. But more, it embodies a conception of order, of rationalization, and of politics, which it attempted to extend through territorialization (see figure 3). We get a sense, then, of a logic of space that tends toward abstraction.

On the other hand, the French villages do not seem to have developed this degree of abstraction as yet. One need only look at any map of the French long lot system in North America to see that order, and private property, were

47 Construction on Washington began in 1800. The quote is from Jay, ibid., 191.
important. But the existence and importance of communal property, seem to suggest that in Vincennes these visions of space had not hardened to the same extent as had the federal government's vision of space. Property was not seen as either public or private, but as something in between. I think that this suggests that there are geographies (and histories) of the abstraction of space that have not yet been examined, and further, that these geographies and histories suggest that perhaps abstraction is not so globally hegemonic as it had seemed to Lefebvre to have become in Europe.

It seems possible, then, that the commons in dispute did not have a place in the American government's logic of space for two reasons. First, since the commons were not individually, privately owned, they could not be legally claimed by anyone other than the federal government. Second, by virtue of the invisibility of the commons as a legal object - belonging neither to the public or the private domain - it could have no social reality for the government.

The federal government was also unable to recognize that social and legal definitions shift between cultures. The definition of a land owner in the United States assumed a family man, of a minimum age, who had acquired title in a legally prescribed fashion, and who could, therefore, vote. The definition of a landowner in the French villages was far broader than this. There were fewer age and gender limitations on property ownership and the legitimacy of title did not hinge on formal legal requirements to the same extent that
title under the U.S. did. The link between title and enfranchisement was probably felt differently among the French, where communal decisions were traditionally made by all the men of the village on Sundays after mass in front of the church door. The right to vote would have been an essential emblem of the entire U.S. political system to Americans. It was in part these social discrepancies which made the system of territorial law, and its common law assumptions, seem so out of tune with the lives of the French in the Old Northwest. Indeed, it must have seemed out of tune at the time: by 1794, the situation in Vincennes had become such that "The French inhabitants, I mean such of them as yet hold their land rights, for by far the greater part, having neither patience, nor confidence in the Government, have sold their rights for little or nothing ...."48 The French, then, frequently preferred to sell in order to relocate across the Mississippi River in Spanish territory, where property rights, religion, and the political system must have seemed more familiar.

Conclusions

The Ordinances of 1785 and 1787 affected the French and Anglo-American populations of the Old Northwest in different and unexpected ways. On the one hand, government adherence to inefficient and highly formalized mechanisms of acquiring

48 Judge Turner to St. Clair, June 14, 1794, St. Clair Papers, 2: 326. The situation in Vincennes would not be cleared up to the satisfaction of the inhabitants until 1819.
title deprived many Anglo-Americans of their political right to vote. On the other hand, the extension of American common law to the French settlements endangered customary rights to land, and rights to property ownership. In the case of the French, I have suggested that many of their problems could be attributed not only to differing legal constructions of property ownership, but to a clash of spatial logics. These logics differed not only over space, but over time: the French in the Old Northwest seem to have clung to an older logic of space which emphasized different objects than did the American logic of space. The latter seems to have been far more dependent on written and legal rationalisms, and particularly so as a means of imperialist expansion.

These small effects and responses elicited by territorialization are examples of two of my goals in this chapter. First, I wanted to show the importance of private law to American territorial expansion. But I also wanted to demonstrate the unforeseen consequences of extending common law, and land laws, to the Old Northwest. I think these are important issues because they lend some insight into, in this case, the common law's potential for assimilation and Americanization. These potentials were brought about largely by American private law, seemingly the least coercive segment of the American legal system. I think that frequently we overlook the ways in which legal definitions, of women or property for example, structure and construct people's lives in complex ways. In this sense, these constructions of
individuals and their everyday lives serve as an allegory for colonialism, which also shapes people and their lives, in both overt acts of violence, and in far more insidious and subtle ways.

And second, I wanted to show how the effects of the extension of common law to the French settlements in the Old Northwest could be used as "miniatures", which would also serve to introduce the problems that the much larger French population in Louisiana would encounter after the Louisiana Purchase. By 1805, both Ordinances would be in force in Louisiana. The effects they would have on that population, and the reactions they would engender, though, were vastly different from those in the Old Northwest. I will trace out one possible history, legal and political, of Louisianians' responses to the extension of territorial law.
Chapter 2

One Spot on the Globe: Law and Land in Territorial Louisiana

The Louisiana landscape in 1803 must have presented a rather desolate aspect to newly arrived Americans. Arriving by sea from Balize at the mouth of the Mississippi River, swamp and marsh predominated for the two weeks it could take to make the one hundred mile trip upstream to New Orleans. Habitations began some 27 miles from the city, but concentrated settlement appeared only 18 miles south of the city itself, and the traveller's view was obstructed by the levees which rose on either side of the river to guard against seasonal flooding. New Orleans itself presented a dilapidated spectacle to the traveller, straggling along for about a mile on the east side of the river. It was, however, a bustling port city, a "tower of babel" during the winter trading season. The population of 8,000 was divided almost evenly between blacks and whites; but the Anglo-American population was outnumbered by about seven to one by the French-speaking community. Divisions within New Orleans society were numerous, but (race aside), the largest split appeared between the Anglo-Americans and the 'ancient inhabitants.' The linguistic and cultural divide between these two groups was reinforced by religious differences: Louisianians were avowedly Catholic, while the majority of Anglo-Americans were Protestant.

Many of these sources of conflict between the ancient inhabitants and the Anglo-Americans were manifested in political and social struggles which often revolved around
questions of law. Louisianians were accustomed to a legal system which had its roots in the Roman legal tradition, while the Anglo-Americans saw common law as familiar, and as a means to assimilate and Americanize Louisiana. Louisianians were aware of the American desire to implement common law in the Territory, and the remainder of this thesis will trace out some of the confrontations that developed around these competing legal systems.

The previous chapter outlined the establishment of Territorial government in the Old Northwest, and some of the problems that the common law system created for the French inhabitants. The Louisiana Act of 1804 was Congress' first attempt to install an American territorial government and American legal principles in Louisiana. The Act aroused antipathy in Louisiana on three counts: the governmental and judicial institutions that were established, the new and different land policies of the federal government, and the ban on the importation of slaves into Louisiana from outside the United States. This chapter revolves around two provisions of the Louisiana Act: land law and common law, and focusses specifically on the differences between American and European land grant systems, and on the strategies Louisianians employed to register their dissatisfaction with the Congressional land laws and with the American system of common law.¹ The next chapter focusses on the ban on slave

¹ Terminology is problematic. I will use Anglo-American to denote English speakers from American or English backgrounds. The French-speaking 'community' in New Orleans and throughout
importation proposed by Congress, and the Louisiana reponses to it.

Jefferson's Purchase

On October 1, 1800, Spain and France signed the Treaty of San Ildefonso, which effected the secret retrocession of Louisiana from Spain to France. When rumors of the transfer reached the United States government in 1802, President Jefferson responded promptly with a letter of inquiry to Robert Livingston, the American Ambassador in Paris, explaining:

"...There is on the globe one spot, the possessor of which is our natural and habitual enemy. It is New Orleans, through which the produce of three-eighths of our territory must pass to market, and from its fertility it will ere long yield more than half of our whole produce and contain more than half our inhabitants. France placing herself in that door assumes to us the attitude of defiance. Spain might have retained it quietly for years."

American alarm grew when the American right of deposit at New Orleans was suspended by the Spanish Intendant Morales in Louisiana poses more of a problem because it was composed of Creoles, people of French or Spanish descent born in Louisiana; French from France and other French colonies; and Acadians and their descendants in more rural areas. I have settled on 'Louisianians' to describe this diverse group of French speakers. Both groups were extremely fluid, reflecting various, and varying, economic, political, and romantic interests. I certainly do not want to suggest that there was a stabilizing or unifying consensus within either 'community' - both were factionalized, and alignments may have reflected agreement on one particular issue. Free people of color and slaves may have formed two other distinct communities in Louisiana as well.

October of 1802, precipitating talk of war in the west. These two circumstances combined to pique American interest when Talleyrand (French Minister of Foreign Affairs) hinted that an American purchase of the territory from France was possible. Negotiations took place in Paris throughout the month of April, 1803, a Treaty of Cession was signed on April 30th, and the United States purchased Louisiana for fifteen million dollars.

The Purchase was vehemently protested by the Spanish, who based their complaints on a promise made by the French government that it would never alienate the territory without the approval of the Spanish government. These protests compounded the need for haste on Congress' part to ratify the treaty, which stipulated a time limit for ratification after signing.

However, Jefferson was plagued with misgivings about overstepping a strict construction of the Constitution, which made no explicit reference to the incorporation of foreign territories or peoples into the United States. He therefore contemplated the desirability of a Constitutional amendment authorizing the acquisition of Louisiana. This, however, would take time to be ratified by a majority of the states. Jefferson's dilemma boiled down to a conflict between "...his

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philosophy of strict construction,...[and] the need for expedition and practicality in government." Expedience won the day, for Jefferson submitted the Treaty to Congress with no mention of the need for an amendment to the Constitution.

There were other ideological problems posed by the acquisition of Louisiana which had not been previously encountered in the short history of the United States. Chief among these was the shadow of imperialism which was cast over the Jefferson administration by the presence of large numbers of 'foreigners' along the southern banks of the Mississippi River. This presence did not simply require the acquisition and settlement of empty lands but entailed the subjugation and assimilation of 'civilized' people. The debates in Congress which would follow reflected these concerns, and centered around questions of the governance and incorporation of such a large population of foreigners into the Union.

The Treaty was, however, ratified quickly. An awareness of the strategic and economic importance of Louisiana did much to outweigh the ideological qualms of Congress regarding the Constitutionality of the Purchase, and the United States took formal possession of Louisiana on December 20, 1803.

Congress next addressed the mode of government which should apply to Louisiana. Disagreement centered around three issues. First, the meaning of the guarantee made in Article 3 of the Treaty of Cession, which read "The inhabitants of the

ceded territory shall be incorporated into the Union of the United States and admitted as soon as possible according to the principles of the federal Constitution to the enjoyment of all these rights, advantages and immunities of citizens of the United States, and in the mean time they shall be maintained and protected in the free enjoyment of their liberty, property and the Religion which they profess." The second issue stemmed from the first: if "as soon as possible" did not mean immediately, then what was the best system of government for a foreign people to whom "...the principles of a popular Government are utterly beyond their comprehension "? And last, what type of government would best enable the United States to establish and retain power over Louisiana?

There seems to have been some tacit agreement that the Treaty of Cession provisions must take a back seat to the more practical question of government. The debates on this issue were polarized between those who believed that one of the existing grades of government set forth in the Ordinance of 1787 should be extended to Louisiana, and those who believed that a new form of government should be fashioned to fit the peculiarities of the situation. The range of these debates cannot be detailed in the context of this thesis, but two excerpts can index the scope of disagreement. The Massachusetts Representative, Mr. Eustis, declared that,

"I am one of those who believe that the principles of civil liberty cannot suddenly be engrafted on a people accustomed to a regimen of a directly opposite hue...it is absolutely necessary to consider the relation of these people to the United States. I consider them as standing in nearly the same relation to us as if they were a conquered country..."

And from Mr. Campbell of Tennessee,

"Is there, too, anything in the Spanish government whose effects are so degrading as to disqualify a man from enjoying freedom? If this were the case it would have been an argument against accepting the country at all...If this principle [of waiting until a people were deemed ready for liberty] had been pursued, liberty had never flourished; if the people had never enjoyed liberty till they were ripe for it, how many ages of darkness would have passed away!"

Thus, much of the debate centered on the political status of the inhabitants of Louisiana, and particularly their relation to the federal government - were they to be treated as conquered people or as citizens?

An Act Erecting Louisiana into Two Territories, and Providing for the Government thereof was passed on March 26, 1804, and was to take effect on October 1, 1804. It did not extend the first stage of government set forth in the Ordinance of 1787 to the new territory, but provided instead for a more restrictive form of government. The Act provided for a governor vested with civil and militia powers, a territorial secretary, and three superior court judges, all presidential appointees. Justices of the Peace, the Attorney General and district court judges were also to be federally appointed. Legislative powers were to be vested in the

6 Annals of Congress, 8th session, 1st Congress, 1058.
7 Ibid., 1066-1067.
8 2 Statutes 283-289.
Governor, and a Council of thirteen "fit and discreet persons of the territory", all to be appointed by the President. The Governor was to legislate for the territory, "by and with the advice and consent" of the Legislative Council.

Obviously, this arrangement did not allow any kind of self-government to the inhabitants, but the Act went further, dividing Louisiana into two territories, the northern section to be called the Louisiana Territory, and the southern portion, the Orleans Territory. This would have reduced the population of both territories sufficiently to ensure that they would not meet the population requirements for statehood which had been established by the Ordinance of 1787, while no provisions or guarantees for statehood were included in the Act. But protest and resistance revolved around three specific provisions of the Louisiana Act. In this chapter I focus on two of these provisions: the first provision covered land, and voided "every act and proceeding...towards obtaining any grant, title, or claim to...lands" subsequent to the Treaty of San Ildefonso. The second provision concerned the limited extension of common law to the Territory. The next chapter will focus on the issues of slavery, for the Act also included a ban on the importation of slaves from outside the United States.

9 Act of March 26, 1804 2 Statutes 283-289 (1804)
A Powerful Engine: Land Law

Congressional land laws and Louisianians' responses to them are best understood in the context of the land policies established by the Spanish government during the period between 1769 and 1802. These policies were in marked contrast to those of the United States (1803), and left a number of incomplete titles with which the latter government had to contend.

The Spanish did not view Louisiana land as a source of profit through sales, but rather as a way of attracting settlers and increasing the population. A liberal immigration policy aimed to make Louisiana self-sufficient agriculturally and defensively. Land was usually free, and periodically the Spanish government offered special inducements to new settlers. In 1778, for instance, Governor Galvez decreed that each new settler would be provided with farm implements, maize, and two hens, a cock and a two-month-old pig.10 The Spanish government, however, stipulated that land ownership depended upon the fulfillment of certain conditions, most notably the building and maintenance of levees by settlers with water frontage. This stipulation for the construction and maintenance of levees, had been established during the French regime and was continued by the Spanish government. Yet another inducement offered to settlers was freedom of

conscience during the first generation, which was tempered by the requirement that the second generation must be Catholic. Each Spanish Governor-General exercised discretionary powers over land policy, so that the Spanish system tended to be flexible, changing in response to circumstances or gubernatorial personality.

Confirmation of land grants under the Spanish system was a lengthy and complex procedure, and most inhabitants seem to have regarded it as an unnecessary expense. Since the Spanish government rarely re-annexed lands to the Crown for non-fulfillment of conditions, permission from the post commandant was generally recognized to be sufficient proof of title.

11 An example of the complex and time-consuming nature of the process can be found in ASP, Public Lands, IV: 506. The following Spanish grant was declared by Congress to be "the most authentic and complete that is known: The legal representatives of Narcisse Carrière claim a tract of land, In this claim the following documents of title have been filed: a) The requête of the said Narcisse Carrière, dated at Opelousas, Nov. 24, 1777, soliciting a grant of the above described tract of land. b) The certificate of the commandant, Chevalier de Clouet, dated Nov. 25, 1777, stating that the land petitioned for was of the domain. c) The order of survey by Governor de Galvez, dated at New Orleans, Feb. 26, 1778, conceding the said land as solicited to the petitioner, and ordering the commandant to fix the boundaries of said land. d) The return or certificate of the commandant, Chevalier de Clouet, stating that he had fixed the boundaries in the presence of Narcisse Carrière and the neighbors, dated Nov. 28, 1778. e) The patent or title in form by Governor de Galvez to the said Narcisse Carrière, dated at New Orleans, June 23, 1781, for the above described land."

12 Major Amos Stoddard, Sketches, Historical and Descriptive of Louisiana, (Philadelphia: Mathew Carey, 1812), 248-249. Stoddard was appointed "commandant" of St. Louis by Jefferson, who believed that this system of government should be maintained for a time in Upper Louisiana. Apparently Stoddard, who spoke French and was familiar with the inhabitants and the area through long residence, was very popular.
It is not surprising, then, that Louisianians were alarmed by the Congressional order of 1805 requiring them to register their land. Besides the generally relaxed attitude of the Spanish government to legal title, there had been two devastating fires in New Orleans in 1788 and 1794 which had consumed most of the city, and, most important of all, the documents stored there. Other factors contributed to the destruction of written proof of title, such as humidity, hurricanes, and frequent flooding. With their emphasis on legal, written title, the Congressional land laws were perceived as designed to deprive Louisianians of their customary landed property rights. This opinion was echoed by other sources at the international level where there was widespread belief that the American acquisition of Louisiana would profoundly affect property. Pierre Clément Laussat, the French Colonial Prefect sent to receive possession of Louisiana from Spain in 1803, wrote to his government that,

"one of the most speedy effects of the change in sovereignty is going to be a complete revolution in the basis of the population of these countries. The best part of the principal properties will have changed hands there in less than ten years. The ancient colonists will be disgusted, repulsed, dispossessed, driven out." 13

Laussat believed that the process of dispossession he described was a breach in the third article of the Treaty of Cession, and could warrant French intervention on the Louisianians' behalf, thereby maintaining France's "connection

13 Pierre Clément Laussat to Decrès, French Minister of the Navy and Colonies, April 7, 1804, in Robertson, II:57.
in their bosoms." He disagreed with Napoleon's decision to sell Louisiana to the United States, in part because he believed that it had great potential value, and in part because he believed that Louisianians still regarded France with affection.

The Spanish Ambassador to the United States also remarked on the new land situation in Louisiana, and by extension its possible benefits for Spain:

"By its article 14, [the Louisiana Act] annuls all concessions of land made in the territories ceded by France to the United States after the treaty of April, 1803. That measure puts the inhabitants in the most disagreeable position, for they see in it a pretext for attacks on their property, and their dispossession thereof." 15

Many Spanish officials connected with Louisiana regarded the problems that surrounded land title as important because they believed that it would encourage Louisianians to emigrate across the Mississippi into Spanish territory, and there form a buffer against future American expansion, while at the same time weakening Louisiana through depopulation. 16

The reality of these fears can be confirmed at the local level. An editorial dated August 7, 1804 in The Louisiana Gazette, warned:

14 Ibid., II: 58. Schemes like this, coupled with Spanish protests of the cession, mitigate some of the American government's paranoia at this time.
15 Marquis de Casa Calvo to the Spanish Ambassador to the United States, Don Pedro Cevallos, May 18, 1804, in Ibid., II: 191.
16 See in particular "Reflections on Louisiana", by Vincente Folch, Spanish Governor of West Florida, 1804?, Ibid., II: 325-347.
"Reflect on these truths Louisianians, and on the misery that awaits you when you are to be governed by a dependent legislature, when justice is to be administered by judges dependent on the will of the President, and remember that the man is rarely to be found independent enough to [form a] judgment against his employer or patron. That this concerns you all is plain - look to your land titles - what has the United States done with respect to them - what has it declared sufficient to ensure you the enjoyment of your property - ." 17

This editorial not only reflects the concern that many locals felt about the provisions made for land title in the Louisiana Act, but it may also have been intended to generate and focus suspicion. This, at least, was the prevalent opinion of many federally appointed officials in Louisiana. 18

The provisions of article 14 of the Louisiana Act remained in effect for less than a year, when Congress passed the Act of 1805, which was concerned wholly with title to land and the establishment of a registration process for Louisiana. Louisianians regarded this law as even more intrusive and less

17 The Louisiana Gazette was certainly not impartial in its reporting. It tended to reflect the opinions of Anglo-Americans, and to disagree with federal policy regarding Louisiana. Claiborne feared that "we shall soon find here a strong federal Party, nearly all the Gentlemen of the Bar, and many of the Merchants are of that Sect; they have a federal paper (the Louisiana Gazette) and it is assuming a decided Tone." Claiborne to Jefferson, December 21, 1804, Territorial Papers, 9: 358.

18 It is interesting how frequently the question of land title was linked to local self-representation, and the number of ways that title was justified. One unusual view was offered in response to Thomas Paine's article: "You add, we wish to govern a Territory which you have purchased. In what have you made the payment? Do you not say that you are to pay for Louisiana from the proceeds of the sale of lands in this territory? In that case it is not you that pay the debt. Are you ignorant that this territory belongs to us by rights of conquest from the Indians above an age since? How often have our fathers and we spilt our blood to acquire and preserve it? What, would you deprive us of our privileges and powers so legitimately our due?" November 17, 1804, The Union.
equitable than the Louisiana Act and anxieties increased proportionately.

An Act for the Adjustment of Land Titles, approved by Congress March 2, 1805, set up a complex system of land registration, and also defined who must register, and the types of land grants that would be countenanced by the United States government. The first two sections of the Act provided criterion for incomplete grants which would be acceptable to the United States. The first of these sections provided for people who had obtained orders for survey or duly registered warrants from the French or Spanish government during the time these governments had possession of the territory; the claimant must also have actually inhabited and cultivated that land. The second section confirmed titles to people who had obtained permission to settle from the proper Spanish authorities prior to December 20, 1803, and had settled, inhabited and cultivated the land by that date; these tracts were not to exceed one square mile. Both sections stipulated that these types of incomplete grants were valid only if the party was the head of a family, or above twenty-one years of age. The fourth section provided that persons claiming land by virtue of legal French or Spanish grants made before October 1, 1800 were permitted to file their claim of notice with the Register, but people claiming by virtue of incomplete titles, or under the first two sections of the Act were required to
file in writing by March 1, 1806, under penalty of their claims being "forever barred". 19

In July, 1805, John W. Gurley, Register for the Eastern District of the Orleans Territory, journeyed through the parishes in his district to assess the situation. He reported that the 1805 Land Law had not been well received by the general populace, indeed that it was

"regarded by the enemies of ye Government as a powerfull engine by which to excite discontent in this Territory. Already it is represented as intended to rob the people of their rights [,] to destroy the equitable titles which exist in the Country and finally to become the instrument of the most vexatious oppression." 20

To counter this discontent, Gurley, a longtime resident of Louisiana, intended to make an extended tour through the Eastern district, disseminating copies of the Land Law in French, explaining the law to the people, and providing them with claim forms and detailed instructions for completing the forms.

It seems that Gurley was an unabashed optimist. On March 6, 1806 he reported that the people of the Eastern district seemed well satisfied with the promptness of the Land Commission, while at the same time noting that 160 claims had come before the Commission. 21 The Eastern District comprised, roughly, "all that part of the Territory which lies East of the Mississippi, together with all the parishes lying on the

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21 Gurley to Secretary of the Treasury Albert Gallatin, March 6, 1806, Ibid., 9: 606.
West bank and bordering the same, and including the Fourche" (see figure 4). This of course was the most populous portion of Louisiana at the time, and the figure given by Gurley of only 160 claims speaks volumes about the almost complete lack of local participation in the registration program. This disregard of federal instructions was not just a reflex to the newness of the process, or the result of inadequate time for claimants to register. Louisianians continued to disregard federal instructions concerning their titles despite federal pressure and, eventually, federal concessions.

For instance, the Land Act of April 20, 1806 removed the age requirement of claimants if they had inhabited the land for ten years prior to December 20, 1803, while the Act of March 3, 1807 repealed both age and head of family restrictions, and increased the amount of land that an individual could claim to two thousand acres. Both Acts extended the time period allotted for registration, as well as extending the powers of the commissioners. In 1808, Benedict Van Pradelles, the new Register for the Eastern District, reported that 183 claims had been filed under the first law (1805), 148 under the second (1806), and 50 under the third (1807). A report from the Eastern District in 1811 estimated that over eight-tenths of the land grants in that district were based on incomplete titles. Considering that "all the lands on both sides of the Mississippi from the

23 Van Pradelles to Gallatin, June 11, 1808, Ibid., 9: 791-792.
The Eastern and Western Districts
distance of sixteen leagues below New Orleans to Baton Rouge, are granted to the depth of forty acres...", a total of 331 claims in four years is a poor showing indeed."

The situation in the Western District - "all the settlements on the Red and Washita rivers, together with the parishes of Attacapas and Opelousas" - was somewhat different. The federal government assumed that most of the vacant lands in the Territory were located in the Western District, and this was of two-fold importance. First, the Western District represented the most potential profit for the government, and second, it offered the best opportunity to accommodate a large influx of Anglo-American settlers. The government was anxious that the latter should take place as soon as possible: it would begin the shift to the Anglo-American majority that the federal governent regarded as indispensable to establishing firm governmental control in the Territory. It is unclear how many claimants actually

25 Ibid.
26 "You will perceive by the subsequent sections of the enclosed Act, that it is the wish of the Legislature that the public lands should be offered for sale in that quarter [in the area around the Bayou Teche]; and I will add, that that object is considered as intimately connected with the welfare, & even the safety of that newly acquired territory. - For it is the only portion where any great increase of American population can take place, and I need not comment on the importance of that object. - It may indeed in this instance be found necessary to sacrifice the scientific correctness, which would otherwise be desirable, to the dispatch which is indispensably necessary." Gallatin, like Jefferson, believed that an Anglo-American majority was necessary to fix the American presence in Louisiana, and to gain control over local politics. Gallatin to Surveyor General Isaac Briggs, May 8, 1806, Territorial Papers, 9: 630-631.
attempted to register in the Western District, but Secretary of the Treasury Albert Gallatin thought in April of 1806 that fewer than 500 claims had been presented to the Commissioners.27

U.S. Commissioners gave a variety of reasons for the lack of compliance with the land laws, among them the disappearance of the Spanish archives, a Louisianian belief that the Spanish would soon regain possession of the Territory, and the machinations of enemies of the government.28 There is not a great deal of evidence available which portrays the attitudes of Louisianians themselves - breaking the law is not something one writes to a cousin about. A petition from claimants in the Western District sheds some light on the matter:

"That Among these Causes for their non Entry, some of your petitioners state, that they are Ignorant natives of the Country, and Unacquainted with the views of the Government, and Consequently, were frequently advised by the Enemies of that Government, not to make an Entry of their Claims, as their Titles wou'd be lost; That, others of your petitioners, were discouraged from Enrigistering their Claims, under the defects of the first Land Laws, that were passed. When they resorted to the office for that purpose, they were told, that these claims wou'd ultimately prove to be invalid under the Law; so that your petitioners, to save Expense, did not make the Entries - These discouragements operated on others of their neighbours, who also, deemed it Unnecessary to Enter their Claims - By this means, the claims of your petitioners who live retired, were never entered under successive changes of Laws that were more favorable.- That, another class of your petitioners, were prevented from entering their claims in time, by their papers being either mislaid, or in the Spanish Country; others, from

28 Cf. James Brown to Gallatin, December 11, 1805; Benedict Van Pradelles to Gallatin, June 11, 1808; Gurley to Claiborne, July 25, 1805 and James Brown to Gallatin, September 3, 1805, in Territorial Papers, 545-548, 791-792, 477, and 496-498.
the retired habits of their lives and great distance from the Land office, which precluded them from a knowledge of the necessity of the Measure; and others again, from misconceiving the intention of the Requisition to Enter, which they have since found to be just. "

The reasons given for failure to register, then, range from a belief that the land laws were unjust to fear that title would be denied. Many written titles were unavailable due to the removal of the Spanish archives, but many people claimed land on the basis of requêtes, which were basically written petitions, stating certain facts about the petitioner (size of family, etc), and signed by the proper post commandant. These signed requêtes were considered as sufficient proof of title during the Spanish period but carried little weight with American officials, who were accustomed to a far more formal - written and legal - system of proving ownership. Gallatin, in particular, seems to have construed requêtes according to a literal French translation - a request - and denied their validity as a formal means of establishing title.

It is not difficult, therefore, to make a connection between the perceived injustice of the land laws and the belief that the registration process was the mechanism by which American law would deprive Louisianians of their property. While this attitude may not have applied to all the

30 ASP, Public Lands, II: 765-766. Also Gallatin to Commissioners of the Western District, May 24, 1811; Commissioners of the Eastern District to Gallatin, January 25, 1811; and Claiborne to Gallatin, December 24, 1810. Claiborne uses the word "rickets", which I presume is an Anglicized version of requêtes, Territorial Papers, 9: 934-936, 919-921, and 903-904.
less politically active, more geographically isolated portions of the Louisiana populace, public opinion on this issue was certainly widespread and united. James Brown, Register for the Western District, stated that:

"The inhabitants of N[ew] Orleans and of the Islands formed by the Iberville and the Chafalaya give a tone or impression on political subjects which pervades the whole Territory. On no questions are the feelings of the people of every Country more alive than on those which affect the Titles to the Lands on which they reside."  

It seems that the lack of participation, whether instigated in or around the New Orleans area, was the norm throughout Louisiana.

Despite the increasingly liberal attitude of the federal government's land policy, the damage had already been done with the implementation of the Act of 1805. The Act had numerous faults, which necessitated frequent Congressional supplementation and repeal.  

Despite these changes, the initial impression that the federal government intended to deprive the inhabitants of their property was slow to dissipate - the Land Act represented a position in which the federal government, "instead of taking possession merely of public lands and leaving private property to individuals, virtually declared the whole a public domain and required all landholders to come forward and prove their titles."

other words, the United States was assuming that all Louisiana land was public domain until proven otherwise, rather than vice versa.

Another vital consideration was the lack of an appeals mechanism satisfactory to Louisianians. Gallatin remarked that if a title was denied by both the Land commissioners and Congress, "it will not preclude the Claimants from their remedy in Courts of law." 34 This must have seemed a hollow promise to landowners - they were to seek remedy from Congressional land laws in courts whose judges were appointed by the President and confirmed by Congress.

Some of these fears would be borne out by several Supreme Court judgments in later decades. In the United States v. Reynes, the Supreme Court set a precedent which stated that the date of signing of the secret Treaty of San Ildefonso (October 1, 1800) ended all powers of the Spanish government to dispose of lands, thereby invalidating any title which may have been acquired by individuals after that date. By strict legal construction, the judgment is perfectly correct. But how a settler arriving at Opelousas in November 1800, for example, was to know about a secret treaty that had been signed overseas seems unclear, nevertheless the court declared that "the inceptive equity of grants made by the governors of remote territories, who do not know that a cession of it has been made, or that negotiations have begun for such an end,

34 Gallatin to Gurley, March 30, 1805, Territorial Papers 9: 428.
may be recommended to the kind consideration of the sovereign who receives the transfer; but no more can be claimed...The language of it is hope - not right." This construction must have seemed particularly inequitable to Louisianians, considering that it is the de facto effects of government - "the exercise of sovereignty...which is necessary for social order and commercial purposes" - which are usually felt by the citizen, rather than the strictly formal aspects of that government."

Congress would, however, revise land law many times in the decade following the acquisition of Louisiana, attesting to the complexity of land claims, and to Congress' desire to balance fairness and profit. Indeed, federal policy seems to have shifted in favor of purchasers, and of individuals who were actually occupying the lands which they claimed.

The discrepancies between the position taken by Congress regarding the Old Northwest and Louisiana are striking. This can probably be attributed to the presence of the Republican party in office at the time: Jefferson was renowned for his agrarian policies, which viewed the individual farmer as the backbone of the American Republic. A case can be made, however, that Congress had learned a lesson in the Old Northwest, namely that land companies and other large speculative enterprises could do far more damage to government profits than small farmers. Indeed, the land provisions of the

35 9 Howard, 127-155. The quotes are from Samuel Davis v. The Police Jury of the Parish of Concordia (9 Howard, 280-297)
Louisiana Act suggest that the Congressional preoccupation with squatters in the Northwest Territory had shifted to fear of land speculation in Louisiana. The pendulum had swung from the need to control settlement to the need to control capitalist adventurers. Claiborne had warned the federal government as early as September 7, 1803: "I have reason to believe that much of the vacant land in Louisiana, will be covered by fraudulent grants, previous to the delivery of the province to the U.S...I have also understood...that these lands are now at Market at very reduced prices; some have been purchased for ten cents per acre." 36 Thus, the Louisiana Act can be seen as a (hasty) Congressional response to land fraud and speculation, a reaction which echoed the squatter policy in the Old Northwest.

But Louisianians' response to the land laws is best understood in the context of the Louisiana Act as a whole - that is, in conjunction with the provisions for the government and judiciary of Louisiana, as well as on the ban on the importation of slaves.

**Louisiana 'Grumbles': Common Law**

While the land laws caused consternation and anxiety in Louisiana, the sections of the Louisiana Act that received the most local criticism were the portions that dealt with the 

legal system. The Louisiana Act established the trial by jury in capital criminal cases, and also allowed for trial by jury in criminal and civil cases before the superior court upon the request of either party in the case. It extended the writ of habeus corpus and bail to the Territory, and forbade cruel and unusual punishment. However, the Act was vague, if not silent, on the question of which law was in force in the Territory, the common law or Civil law. The Act provided that no law contrary to the Constitution or the laws of the United States was valid, but never directly confronted the substance of Louisiana law. The focus of Congress seems to have been to establish common law procedure, and particularly common law criminal procedure, but phrases such as "the laws which may be in force" and "the laws in force in said territory, at the commencement of this act, and not inconsistent with the provisions thereof, shall continue in force, until altered, modified, or repealed by the legislature", did not address the substance of law in Louisiana. This deficiency in federal legislation would prove to be serious - it neither implemented the common law, nor did it specify the Civil law system which was to be in force in Louisiana. Congress' failure to directly address the topic of law in Louisiana led to debates at both the federal and local levels that would only be resolved with the Territorial Legislature's passage of the Louisiana Civil Code in 1808.

Substantive law was a particularly difficult question in Louisiana due in part to the changes in sovereignty the
territory had undergone. During the initial French period the *Coutume de Paris* and the King's ordinances were the rule of law. When the Spanish had taken physical possession of Louisiana in 1769, Governor Alexander O'Reilly instituted "O'Reilly's Code", an encapsulation of the *Recopilacion de las Indias* and a multitude of other Spanish legal sources. It remains unclear whether O'Reilly abrogated French law. During the Spanish reign, justice had been administered by the *Cabildo*, which combined judicial and municipal functions. But with the transfer of Louisiana from Spain to France in 1803, the Colonial Prefect, Pierre Clement Laussat, dissolved the *Cabildo*, and all offices empowered by the Spanish crown. Claiborne described the situation as he found it in December, 1803:

"Many of the Embarassments I have experienced, may be attributed to the disorganized revolutionary state, in which we received Louisiana from M. Laussat...for the destruction of the Cabildo, I had supposed myself indebted to him...Nearly all the ancient Establishments of the Country were overthrown: the Cabildo dissolved, the judiciary abolished, and nothing erected in their place, but a Municipality, or City Council, whose powers were undefined, and seemed to be limited only by the will of their creator." 38

With the abolition of the Cabildo, the fact that Laussat had not formally re-established French law, and the limited substantive content of the American law which was extended to Louisiana, there would appear to have been, technically, a legal vacuum. This was certainly true of the period from December 20, 1803, when the Americans took possession of

Louisiana, to October 1, 1804, the date the Louisiana Act went into effect. During this period Governor Claiborne took temporary measures to establish a minimal civil legal apparatus in New Orleans, a court of Common Pleas, which was the source of much discontent in New Orleans, which I will discuss in Chapter 4.

I do not, however, intend to engage in a debate over the precise national origins of Louisiana law. My point is, rather, that Louisianians were perfectly aware of the rules of civil procedure by which they lived, and they demonstrated their awareness and appreciation of their system of civil law in several ways. The first was a memorial presented to Congress on December 31, 1804, most commonly known as the Louisiana Remonstrance.

The Louisiana Remonstrance

A memorial to Congress was first discussed in mid-March 1804, when a committee was nominated to draft the grievances of Louisianians. It is unclear whether this first meeting actually produced anything material. However, a second meeting was held on June 1, 1804 in which both planters and merchants were present. The meeting was held entirely in French, and it seems likely that Edward Livingston was chosen to draft the memorial which was to be presented to Congress.  

important to bear in mind that the Remonstrance expressed the concerns of several loosely defined segments of the Louisiana populace, and that everyone who signed it may not have agreed with all of the grievances it set forth. Indeed, at about the same time the Remonstrance was formulated, a petition was circulated by Anglo-Americans which expressed "satisfaction and hope" regarding the Louisiana Act: only English speakers were allowed to sign it.⁴¹

The Remonstrance is a cleverly worded and argued petition which encompassed the subjects most alarming to the Louisianians: the substitution of common for Civil law, the perception that Congress had breached the third article of the Treaty of Cession by not admitting Louisiana immediately to statehood and that a form of government had been instituted which was less than republican in nature, the substitution of English for French, and the ban on slave importation. The Remonstrance was particularly critical of the vagaries of the legal system which had been (partially) established by the United States, and the role the Governor played:

"A single magistrate, vested with civil and military, with executive and judiciary powers, upon whose laws we had no check, over whose acts we had no control, and from whose decrees there is no appeal: the sudden suspension of all those forms to which we had been accustomed; the total want of any permanent system to replace them; the introduction of a new language into the administration of justice; the perplexing necessity of using an interpreter for every communication with the officers placed over us; the involuntary errors of necessity committed by judges uncertain by what code they are to decide, wavering between the civil and the common law, between the forms of the French, Spanish and American jurisprudence, and

⁴¹ Louisiana Gazette, October 26, 1804.
with the best intention unable to expound laws of which they are ignorant, or to acquire them in a language they do not understand; these were not slight inconveniences, nor was this state of things calculated to give favorable impressions or realize the hopes we had entertained; but we submitted..."42

The Remonstrance had numerous signatories in New Orleans - Claiborne estimated that over 150 people had attended the meeting at which the Remonstrance was read, and who had signed it on the spot.43 Later it was circulated throughout the Territory, and it is probably fair to say that the portions of the Remonstrance which covered the legal and political situation of Louisiana reflected the opinion of a large portion of Louisianians. Pierre Sauvé, Pierre Derbigny, and Noel Destrehan were deputed to take the petition to Washington and present it to Congress.

Reactions to the Remonstrance varied widely. Locally, Governor Claiborne considered it to be the product of party spirit and persuasion; "Some no doubt, thought they had real grievances, and many were made to think so; - But the impression among the latter, I am certain was not durable..."44 While party spirit was doubtless at work, Claiborne underestimated the depth of feeling throughout the French-speaking community regarding questions of law.

On the other hand, the Remonstrance was taken quite seriously in Washington and elsewhere. Thomas Paine, under his pseudonym of Common Sense, penned a scathing reply to the

43 Claiborne to Jefferson, October 27, 1804, Territorial Papers, 9: 314.
44 Ibid.
Ramonstrance in the *Aurora*, a Philadelphia newspaper, which was reprinted in the *Mississippi Messenger* November 12, 1804.

He charged that the Louisianians were

"already participating, without any merit or expense in obtaining it, the blessings of freedom acquired by ourselves; and in proportion as you become initiated into the principles and practice of the representative form of government, of which you have yet had no experience, you will participate more...[but] you already so far mistake principles, that under the name of rights you ask for powers; power to import and enslave Africans; and to govern a territory that we have purchased."

Naturally this touched off several local responses in the New Orleans press. One signed "Your pedantry's humble servant, A Louisianian" retorted:

"You say, that we are already participating in the blessings of freedom. - This shews that you have no idea of our present government. No, sir, there is no such thing as freedom among us, and that is precisely what we complain of - You are willing, however, to give us freedom and self-government by degrees, when you and some others like you, I suppose, shall have had time to teach us how to conduct ourselves. That is a good plan to be sure, and a very modest idea of the bargain. But, my dear Common Sense, the same experience which has taught you so many fine things, has shewn us already that this theory will not do."

Paine's article and the A Louisianian's response seem to echo the Congressional debate outlined above, which pitched conquered subjects against free citizens.

The memorialists had arrived at Washington during the session of Congress which was to debate a new government for Louisiana (by section 16, the Louisiana Act was to remain in force only through October 1, 1805). On Capitol Hill, John


46 *Louisiana Gazette*, January 4, 1805.
Quincy Adams predicted that the memorialists would succeed in their mission so far as to bring about the early admission of Louisiana as a state (although he would soon change his mind regarding this prediction). Adams' later assumption was to prove correct, and the Louisianians were to be disappointed on this count. In a Report to their fellow citizens, the Remonstrance deputies described their lack of success in Congress:

"...without paying any regard to our representations, they persisted in assimilating us to the other territories of the United States, and continued to trace out for us a government founded on the Ordinance of 1787. In vain did we insist that our situation was quite different, in vain did we represent that this ordinance was a local law, totally unconnected with the Principles of the Federal Constitution, and made exclusively for the Territory N. W. of the Ohio."

This citation speaks of an effort to avoid the strictures of the Ordinance of 1787, and in doing so, to avoid the total assimilation of the American territorial process.

The authors do not explain the precise cause of their dislike of the Ordinance of 1787, but some speculation is possible. Probably the most important consideration for the Louisianians was the achievement of statehood. The Ordinance set the population figure for admission to the Union at 60,000 free white inhabitants. Sauvé, Derbigny, and Destrehan had endeavored to push a figure of 33,000 through the Senate, but were unable to convince the Senate of this amendment."

48 The Louisiana Gazette, June 11, 1805.
49 Ibid., June 11, 1805.
Statehood would have guaranteed the Louisianians a large degree of autonomy over their internal affairs, thus removing such topics as slavery and the legal system from the purview of the federal government. It is only in light of this desire to regulate their own internal affairs that some of the language of the Remonstrance, and of the Report, can be understood. But the authors of both pieces appeal to the uniqueness of Louisiana, an appeal which would be reiterated throughout the territorial period as a justification for many local practices. The Ordinance of 1787 and its judicial structures, the population figures, and the extension of the common law that it embodied were seen as inimical to local interests. Indeed, the Remonstrance stresses the point that even "The purest principles will be misapplied...without an intimate knowledge of the manners, customs, pursuits and interests of the people to whom they are applied..."

Louisianians were struggling for control over their own destinies, particularly their own land tenure system, their legal system, and the institution of slavery as a whole.

Despite the publicity that the Remonstrance had received, and the presence of Derbigny, Destrehan, and Sauvè, An Act for the Government of Orleans Territory was passed by Congress March 2, 1805. The Act was based on the Ordinance of 1787, but excluded the sections which prohibited slavery and

50 "There shall also be appointed a court to consist of three judges any two of whom form a court, who shall have a common law jurisdiction..." Ordinance of 1787.
52 2 Statutes 322-323.
regulated descent and the distribution of estates. The Act provided that Lower Louisiana should move directly into the second stage of government, and ordered that the election of representatives should take place the first Monday in October, 1805.

The assembly of the first Territorial House of Representatives marks the beginning of a new phase in the struggle over the legal system in Louisiana. Up to this point, most of the complaints of Louisianians had centered around the institutional changes in form that had been effected by the federal government. During a trip through the major settlements early in 1806, Claiborne noted repeatedly that

"...the system [in this case the county courts] is generally reprobated and is really the source of much discontent. The Trial by Jury; the powers of the court; and the frequency of their Sessions are all objected to: But the conduct of the lawyers...has occasioned great dissatisfaction, and has served to alienate the affections of the Louisianians from the Government. These men are said to encourage litigation; to extort from their clients heavy fees; and when the judgment of the court and costs of suits come to be paid, they the Lawyers are not unfrequently the only monied men to attend the Sheriff's sales." 53

And again, in the Remonstrance, form takes precedence over substance in a discussion of the effects of the introduction of English into the courts;

"...judicial proceedings were indeed in Spanish; but being carried on altogether by writing, translations were easily made...and the introduction of viva voce pleadings into the courts of justice subjects the party who can neither understand his counsel, his judge, nor the

advocate of his opponent, to embarrassments the most perplexing, and often to injuries the most serious."

By mid-1806, however, the \textit{substance} of law had become the focus of legal debates. Unlike the first Legislative Council appointed by Jefferson, French-speakers overwhelmingly dominated the Louisiana House of Representatives. This, of course, affected the composition of the Legislative Council, because the House nominated the ten men from whom the President was to choose. Eight of the original ten had strong ties to the French-speaking community, as did all the men who were eventually appointed. This changed the balance that had been established between the executive and legislative "branches" of the government under the Louisiana Act. The new Assembly owed its allegiance to local constituents rather than to the federal government. This was reflected by the infrequent but devastating use of the Governor's veto powers during this first session.

\textbf{The Louisiana Civil Code of 1808}

On May 26, 1806, Claiborne vetoed a bill that declared the laws in force in the territory to be the Roman civil code and the Spanish laws deriving from the \textit{Recopilacion de las Indias}. The Assembly responded by introducing a bill to dissolve itself, meanwhile publishing its reasoning in \textit{Le Télégraphe}:

"...Le bienfait le plus inestimable , pour un peuple, c'est la conservation de ses lois, de ses usages et de ses habitudes....Quelles sont les lois qui doivent être

sujettes à être revues et rectifiées par les Législatures de ce Territoire?...Il est évident que c'est des anciennes lois qui était en usage en ce pays, avant sa cession aux États-Unis d'Amérique, qu'il s'agit ici....Il faut distinguer, dans les lois qui règlent un état, celles qui tiennent à sa constitution et à son gouvernement, d'avec celles qui ne règlent que les contrats et les conventions entre particuliers. Les premières doivent être, indistinctement, communes à toutes les parties de la république, mais sur les autres elles peuvent différer sans inconvenien.

The proposal to dissolve the Assembly was defeated by one vote, and the Assembly adjourned within two weeks of the veto, much to Claiborne's relief.

Interestingly, Claiborne seems to have seen the entire process simply as an example of the "hazards" of an "early extension of the Representative system" to the territory, because the "Executive and the two Houses of assembly do not harmonize" rather than as a serious move to address the substance of the laws in force. He dismissed the bill, the motion for dissolution, and the publication, as an attempt to "...raise the popular sentiment in favor of the Signers...but I am persuaded that its effects will soon pass away."

55 "The most inestimable benefit for a people is the preservation of their laws, usages and habits...What are the laws that must be subject to the review and rectification of the Legislature of this Territory?...It is evident that they are the old laws that were in use in this country before its cession to the United States of America...It is necessary to distinguish between the laws that govern a state, those that belong to its constitution and to its government, from those that only govern contracts and agreements between individuals. The former must indispensably be common to all parts of the republic, but the latter may differ without inconvenience." Le Télégraphe, June 3, 1806. Reprinted in The Louisiana Gazette, June 5, 1806.

56 Claiborne to Jefferson, June 4, 1806, Territorial Papers, 9: 657.

57 Claiborne to Madison, June 3, 1806, ibid., 642.
This attitude was typical of the government at that time - it assumed that support for the Civil law was manufactured for purely political reasons by a few ambitious men. In the American mind, the Civil law represented unenlightened despotism, the diametric opposite of the principles of the American version of republicanism. Civil law was the natural adjunct of that "government of a different hue" so repugnant to American principles, while the differences between American common law and Louisiana Civil law would certainly impede that identification of interests the United States government considered so essential to the successful incorporation of Louisiana into the Union.

These fears certainly reflected federal mistrust of Louisianians, a distrust which centered on the extent of their attachment to the United States. However, the events of late 1806 would do much to dispel these doubts.

In late 1806 the "Burr Conspiracy" erupted. Rumors flew that ex-Vice President Aaron Burr intended to separate the western states from the Union and to form them into an 'empire' from which he would attack the Spanish possessions west of the Mississippi River. New Orleans was rumored to be his intended headquarters. Jefferson responded to this threat by sending General James Wilkinson to New Orleans to fortify the city and to establish military control. Wilkinson took his task seriously, fortifying the city, as well as making a series of dubious arrests, attempting to suspend habeus corpus and generally instituting a military 'reign of terror' with
decidedly political overtones. During this period, Claiborne was able to dispose of several of his most vituperative enemies by implicating them in Burr's conspiracy. Most of the accusations that were flung, and the majority of Wilkinson's arrests, targeted Anglo-Americans in New Orleans. The Creole community seems to have remained completely aloof from these proceedings.58

The result of this episode - the lack of Creole participation in it - was to transform the Creoles in Governor Claiborne's eyes, from "...uninformed, indolent and luxurious - in a word, illy fitted to be useful citizens of a Republic", to "the best supporters of the American government."59 The Creoles had proved their loyalty to the American government.

Another unlikely alliance was to be established between the federal government and the Creoles during 1807. This revolved around the issue of the St. Mary Batture, which will be discussed in more detail in Chapter 5. The Batture incident served to bring the issue of the Civil law in Louisiana to the direct attention of the administration in Washington, due to

58 Ironically, the circumspection of the Creoles during this affair earned them criticism from some quarters. In a letter to Nathaniel Evans, (a prominent citizen of Fort Adams), an officer named Robert Gamble described his views of the Creoles: "I really am astonished at the tameness the inhabitants of this city displayed during the execution of so many oppressive and arbitrary decrees of the late Dictator [Wilkinson] - it can only be accounted for by their long residence under the Spanish Government - had the citizens felt as freemen should - Gen'l W. would not have dared to have acted thusly -" Robert Gamble to Nathaniel Evans, June 5, 1807, Nathaniel Evans Papers, Series 1, Box 1, Folder 2, LSU Archives.
59 Claiborne to Jefferson, January 16, 1804 and June 28, 1807, Territorial Papers, 9: 161 and 745.
Jefferson's involvement in the law suits instigated by Edward Livingston. Jefferson's defense depended in large measure on the premise that the laws in force in Louisiana were French, rather than Spanish. I suspect that Jefferson's plight may have eased the way for the adoption of the 1808 Civil Code in Louisiana. The form and language of the code bore an obvious affinity to the Napoleonic Code of 1804, and this may have encouraged the conception that the laws it expounded were also French.

To what degree the Burr Conspiracy or the Batture may or may not have influenced Governor Claiborne, in 1808 he cheerfully approved the Louisiana Civil Code he had so vehemently rejected only two years earlier. Claiborne gave his reasons in a rather misleading letter to Madison:

"The civil code alluded to in my last letter, is nothing more than a Digest of the Civil Laws now in force in this Territory - This work will be of infinite service to the Magistrate and the Citizen; - Heretofore, a knowledge of the laws, by which we were governed, was extremely confined. The lawyers who avowed themselves to be civilians, told the Judges what the Law was, and the Citizens in the most common transactions of life, needed the aid of Council; But this state of insecurity and uncertainty will for the future be in a great measure removed. - I see much to admire in the Civil Law, but there are some principles, which ought to yield to the Common Law Doctrine; - Indeed it has been with me a favorite policy to assimilate as much as possible the Laws and usages of this Territory to those of the States generally; - but the work of innovation, cannot be pursued hastily, nor could it be prosecuted to advantage or with safety until the existing Laws were fully presented to our views."

Claiborne misrepresented the nature of the Civil Code of 1808 - it was a code of law that had been passed by the legislature, not simply a digest, or list, of the laws. In this sense he also misrepresented the prospect of completely implementing common law in the Territory, which could have occurred at this point only through drastic federal intervention.

The survival of the Civil law in Louisiana would be ensured by a clause in the State Constitution of 1812, which provided that "The Legislature shall never adopt any system or code of laws by a general reference to the said system or code; but in all cases shall specify the several provisions of the laws it may enact."

Conclusions

Louisianians were vocal in their protests against the land and legal provisions of the Louisiana Act. In response to the land laws, they tried recourse to the courts, they ignored registration deadlines, and they complained bitterly in petitions and newspaper editorials. In many instances their patience was rewarded by an increasingly liberal Congressional attitude toward the acquisition of title, and of property ownership generally.

On the other hand, the battle lines seem to have shifted with regard to the implementation of common law. The first complaints about the legal system, expressed explicitly in the Louisiana Remonstrance, centered around the confusion produced
by new procedures (and a new language) in the courtroom. Eventually, however, protest began to focus on the actual substance of the laws in force, which led to the failed attempt to pass a Civil Code in 1806. Circumstances such as Burr's Conspiracy seem to have contributed to a change in the federal government's attitude toward the Louisianians, and Claiborne signed the Civil Code into law in 1808.

While Louisianians encountered many difficulties with the extension of the American territorial apparatus, they did not experience these difficulties to the degree that the smaller and more isolated French populations of the Old Northwest had. The numerical superiority of the French speaking population of Louisiana seems to have been a key difference: by gaining control of the political system they were able to preserve the Civil legal system in Louisiana, something that would have been almost impossible for the French in the Old Northwest to accomplish. The Louisiana populace did not have to survive the legal re-definition of such basic categories as property ownership, possibly because their recalcitrance and remonstrances reached Congressional ears frequently and emphatically.

Yet another difference between the Old Northwest and Louisiana comes to the fore regarding slavery. The Ordinance of 1787 had banned slavery in the Northwest Territory, while the Louisiana Act simply aimed to prevent the introduction of 'foreign' slaves into the Louisiana territory. Slavery
essentially died out in the Old Northwest, while it flourished in Louisiana.
Chapter 3

Louisiana Subjects

The institution of slavery can be examined at a number of levels: at a general socio-economic level, or at the level of the plantation, and the "highly personalized mechanisms of coercion" adapted by an individual planter. My account ranges widely over these levels, beginning with the rhetorics of slavery expressed in slave codes and newspapers, the customary usages of Louisianians which permit us to see through to the practices of slavery which were not embodied by law, and moving through an account of power and space as they came to bear on the slaves themselves. More specifically, I look at the slaves codes designed by Europeans and Americans in Louisiana. These codes are useful because they embody many of the ideological and philosophical preoccupations of their time, and they also set the broadest, although often blurry and unreliable, parameters of the system. Slave codes, however, are limited in that they say little about the actual practices of Louisiana slaves and slave owners. With this in mind I look at the ways in which the codes were supplemented, or subverted, by practices that became customs so wide spread and so consensual as to defy positive law. I will also point to the rhetorics of slavery that developed in Louisiana in response to the federal government's ban on slave importation, suggesting that in tandem with law, these rhetorics attempt to

construct blacks as slaves, and to naturalize slavery in Louisiana by fixing the slave body into the landscape. And I will try to come to grips with the ways in which power and space were implicit in the social and legal relations of Louisiana slaves and their owners.

**European and American Slavery in Louisiana**

In the French colonies in the New World slaves were regulated by the *Code Noir*, which was originally enacted by Louis XIV in 1685, and revised and extended to French Louisiana in 1724. The Code had 55 provisions which covered a broad range of subjects. The Catholic church required that slaves receive baptism, instruction in the Catholic religion, rest on Sundays and holidays, and that they be buried in consecrated ground. There were food and clothing requirements, a *peculium* (limited ownership of property) was allowed, and the Code encouraged slave owners to respect slave families: marriages were recognized, and husbands and wives were not to be sold apart, nor were children under the age of fourteen to be sold apart from their mothers. Miscegenation and concubinage were penalized, while manumission was discouraged. Owners were further encouraged to act as "bons pères de familles."

The *Code Noir* also dealt with the legal status of slaves. They were allowed to testify in court if there were no other 'suitable' witnesses, but were never allowed to testify
against their owners. Although they were designated as movable property, slaves between the ages of 14 and 60 could be seized for debt only for their purchase price, otherwise they could not be seized for debt unless the plantation on which they worked was also seized. These stipulations tended to fix slaves onto the land they worked, making them virtually immovable property.

Punishment figured large in the Code. First offense runaways could be branded or have their ears clipped, those who tried a second time could be hamstrung (severing of the hamstring muscle in the leg), and a third offense was punishable by death. Petty theft was punished by beating and branding, grand theft by "peine afflictive" or death "if the case required it." In cases of repeated illegal gathering, whipping, branding or death were countenanced by the Code, according to the seriousness of the offense. Naturally any slave who struck an owner or member of the owner's family was subject to the death penalty. Slave owners were forbidden to torture, kill or maim their slaves, but were permitted to chain them and beat them. The punishments prescribed by the Code had an extremely visual orientation, in a double sense. Punishment was a public spectacle, intended to set an example and to act as a deterrent, but it was also visual in that the body of a slave was literally a record of his or her

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transgressions - it was possible to read the history of a slave's crimes through a cursory visual inspection.

By today's standards, it is difficult to conceive of the *Code Noir* as anything other than a brutal and demeaning piece of legislation. In the context of the European criminal system, where, as Mathé Allain has pointed out, "in early nineteenth century England...juveniles were hanged for stealing a handkerchief, [and] a Frenchman convicted of stealing [animals or crops] would have been sent to the galleys", the *Code's* provisions could indeed have been considered "extremely mild."³ The *Code* was, however, no tribute to the humanitarianism of the French crown. Like all slave codes, it was designed in part to protect and control a valuable species of property. But it was also an expression of sovereign will. The *Code* had a two-fold purpose: not only was it intended to regulate slaves, but it was also intended to establish royal control over the colonists, ostensibly by setting limits on the degree of control (physical violence) the colonists could exercise over slaves. Thus, while the *Code* vested a slave owner with power that could be exercised directly on the body of a slave, it sought to establish authority over the colonists simply by the act of limiting the degree of violence they could use. When French subjects (other than slaves) came into the purview of the sovereign, death was meted out frequently and cruelly for the least offense. Thus,

in 1745 a French soldier could be convicted of sedition for refusing to eat his ration of moldy bread, and "hung and strangled until death doth ensue." The Code was a complex expression which was typical of what Foucault has called sovereign power, power which "spoke through blood," and which "culminated in the privilege to seize hold of life in order to suppress it." It reserved the ultimate 'right of death' to the sovereign.

The Code, then, was not exclusively concerned with slaves. It sought to extend Catholicism, and most of all, royal control to the colony. These goals may have made it palatable to the Spanish Crown - indeed, Spanish possession of the colony saw the continuance of the bulk of the French Code Noir, supplemented by provisions that tailored it to the Spanish perception of local conditions. Several provisions of the French Code Noir extended the "mesmes Droits, Privileges et Immunité" [same rights, privileges and immunities] to free people of color "dont jouissent les personnes nées libres" [which persons born free enjoy], with the express exception that free people of color could not receive *inter vivos* donations from whites. The Spanish, however, supplemented the Code Noir with seventeen provisions concerned almost

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6 *Le Code Noir*, Article LIV. An *inter vivos* donation, as opposed to a testamentary gift, is made while the donor is living.
exclusively with the regulation of free Blacks. Significantly, they removed many of the impediments to manumission (emancipation) that had been present in the French Code. The Spanish law of *coartacion* allowed a slave who had accumulated money equivalent to his or her market value to purchase freedom — further, it required owners to accept payment. However, Thomas N. Ingersoll maintains that the law of *coartacion* cannot be attributed to Spanish humanitarianism; rather, it was a policy designed to increase economic development in a wretchedly backward colony. He also notes that the Spanish Crown did not extend *coartacion* to all of its colonies, which suggests that it was intended to address specific economic situations.

The Spanish policy of *coartacion*, combined with large numbers of refugees from the Caribbean, contributed immensely to the large proportion of free Blacks in New Orleans. In 1770, one year after the Spanish officially took possession of Louisiana, there were 165 free blacks in the territory; by 1795 there were over 1,500. Under the Spanish and French

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7 Emancipation is an interesting word in French law, particularly in light of Allain's argument that the "status of a slave under the Black Code" was one of "a perpetual minor over whom a master exercised paternal authority unless manumission altered his [sic] status." Under French law, when a minor child comes of age, he or she is "emancipated" from paternal power, which included the right to control person and property, and to moderate physical correction. Allain, 132-133.


governments free people of color had enjoyed many of the "rights and privileges" that white free people enjoyed. Indeed, as Virginia Dominguez has pointed out, there was a tripartite division of society, based upon legal recognition of the distinction between free Blacks and slaves in the European colonies. These divisions were closely scrutinized by both the Creole planters and the new American government, though for different reasons.

Many of the Americans found the presence of the large population (1,566 in New Orleans by 1805) of free Blacks awkward at best. Claiborne's diplomacy was tested almost immediately by a petition from the free Black militia companies requesting that they be permitted to continue under the American government. Americans living in Louisiana sent

James Thomas McGowan, *Creation of a Slave Society: Louisiana Plantations in the Eighteenth Century* (PhD Dissertation, University of Rochester, 1976), 196-201. McGowan calculated that over four-fifths of the population of free blacks lived in New Orleans, suggesting that there was a geography to coartacion.


12 James Sterrett, an American posted in New Orleans explained that Claiborne had to set a guard around the 'mulatto' Company "to keep off the mob", but there was still trouble, when "one of Mecklenberg's men Struck a French man (that crowded on him) with his gun. The French man enter'd a complaint and this day we are to try the Soldier -- the other Soldiers swear hard in favor of their Mess Mate -- and the french Men Swear equally hard against him -- some of those little Frog eaters will get themselves into trouble, I foresee." James Sterrett to Nathaniel Evans, June 23, 1804, Nathaniel Evans Papers, Series 3, Box 2, Folder 70. See also the Address by the Free People of Color, January 1804, *Territorial Papers*, 9: 174-175.
numerous warnings to the federal government regarding the potential explosiveness of the free Blacks, warnings which fed into a general suspicion of them.¹³ Free Blacks were despised by white Louisianians because they were associated with slave revolts and the 'contamination' of white blood. They had also become increasingly numerous and economically successful under the Spanish, signalling the failure of a moral logic which rested upon the 'naturally' degraded condition of the black 'race'. Not only were free Blacks excluded from many of the new American institutions, but they were also deprived of many of the liberties they had been accorded under the French and Spanish systems. With the arrival of the American government, the legal distinction between free Blacks and slaves was almost completely eradicated by the Territorial Legislature's reluctance to distinguish between blacks who were free and blacks who were slaves in the Black Code of 1806. The tripartite system of France and Spain, which was established by legal recognition of free people of color, began to crumble. Black skin, or any evidence of 'blackness', would become the determining factor of slavery in Louisiana.

The legal systems of both the European and American eras were implicated in these constructions of race. Law, in the nineteenth-century and today, frequently represents social relations, and in a convoluted process it seems to represent society to itself. In this capacity, one of the powers of law

¹³ See for example, Benjamin Morgan to Chandler Price, August 7, 1803, Ibid., 7; and Daniel Clark to Claiborne, November 23, 1803, Ibid., 121.
lies in its ability to categorize, define and demarcate objects, domains, events, and people. These categorizations can be creative, establishing new labels, or they can be confirmative.

Societies have categorized people since time out of mind. But since Linnaeus, who has become the emblem of taxonomy and biological classification, there has been a renewed vigor in the belief that it is possible to distinguish between things, or people, according to specific biological criterion. These biologically based, or genotypical, categorizations were particularly potent in the juridical field, and their implications were profound for racial distinctions: the differences that enable us to categorize in this way were conceived to be produced by Nature (with a capital N). We see them not as arbitrary social constructions but as natural categories produced by the laws of Nature. The act of categorizing according to biological criterion implies that Nature has already divided things or people up, so that legal recognition of race seems merely to be (re)affirming or reflecting these Natural laws. Civil legal systems provided for a ternary division of society into free whites, free gens de couleur, and black slaves, and were most explicitly concerned with the distinction between free people and slaves. These legal distinctions were bound up with color distinctions: free people of color were recognizable by their lighter skins, while darker skin designated a slave. The American legal system, on the other hand, set up a binary and
far more polarized society by assuming that all blacks were 'naturally' slaves and all whites were 'naturally' free. In this sense, and in others, law was an essential ingredient in the production and maintenance of the system of black slavery in Louisiana. These legal, and social, constructions - that blacks were somehow 'naturally' slaves, and 'inferior' - are reflected in a variety of rhetorics of slavery which were prompted by the federal government's intention to ban the importation of 'foreign' (non-American) slaves into Louisiana. Indeed, these rhetorics depended on the construction of an equivalency between black and slave.

**Louisiana Rhetorics of Slavery**

The federal government's ban on the importation of slaves from outside the United States took effect on October 1, 1804. It is important to note, however, that much of the disgust that the ban generated in Louisiana came from very specific sources. Most of the following excerpts were written by Anglo-Americans residing in Louisiana, and were published by newspapers which targeted Anglo-American readers. Anglo-Americans and merchants seem to have been solidly in favor of keeping the external slave trade open. The position that Creole planters took is far more ambiguous. A debate over the importation of slaves had raged between planters and merchants in Louisiana since 1795, when a highly coordinated slave revolt had been uncovered in Point Coupée, and another uncovered on the German Coast the following winter. Planters
believed that these rebellions were initiated by slaves that had been imported from the West Indies, where news of the successful St. Dominguan revolt of 1791 was widespread. Planters argued that the only way to prevent such rebellions in Louisiana was to stop importing slaves, in spite of the acknowledged need to supplement the labor force. The merchants, however, ridiculed this suggestion, emphasizing the economic importance of slaves and pointing to planter debt. The debate moved to the Cabildo in 1800, where the merchants, backed by the Spanish government, prevailed. It is difficult to know, then, to what extent Creole planters' views may have changed by 1804 - certainly many Creoles signed the Louisiana Remonstrance, which included a condemnation of the ban.

The rhetorics which follow were, I think, intended to justify and naturalize slavery for a broader audience, most particularly the federal government. I want to argue that the majority of these diatribes tried to inscribe slavery as an institution into the Louisiana landscape, and to fix it there.

News of the ban on the importation of slaves elicited a prompt and negative response from many Louisianians. Governor Claiborne remarked on the reaction to the ban as early as April, 1804: "the prohibiting the Importation of Slaves into Louisiana, will be viewed by the Citizens as a great Grievance; on this subject much irritation is manifested, and the general opinion seems to be, that the Territory cannot

14 McGowan, 401-413.
prosper without a great encrease of Negro's."\textsuperscript{15} Claiborne's assessment was accurate, in that much of the rhetoric surrounding the ban linked prosperity and slave labor. However, the justifications for slavery in Louisiana ranged widely over a variety of issues.

The first of these spun around the notion that the nature of the country itself made slavery a necessity:

"...it is impossible for white men to cultivate the land in that hot, sultry and moisty climate. Perhaps you don't know that those whom misery drives to that extreme, either perish or languish in a state of decay, while the negroes, on the contrary, not only resist it, but are remarkably healthy."\textsuperscript{16}

The author points out that for whites agricultural labor in the Louisiana climate was a death sentence, while black slaves seemed to have flourished in the heat and humidity. The inference is that blacks in general were somehow specially suited to labor in the Louisiana climate, and that, therefore, they 'naturally' belonged there. This statement about race and place has a pedigree which goes back to Aristotle, and which became particularly important during European expansion to the 'New World', as well as to more recent brands of environmental determinism. It is an excellent example of what David Livingstone has called a 'moral geography', a rhetoric which seeks to back racist judgments with scientific data, thereby

\textsuperscript{15} Claiborne to Jefferson, April 15, 1804, \textit{Territorial Papers}, 9: 221-223.
\textsuperscript{16} \textit{The Louisiana Gazette}, January 4, 1805.
legitimating those judgments.' According to Livingstone, climatology was particularly suited to this task, in that it 'permitted' a wide variety of statements to be made. The 'logic' of the author of this citation moves quite simply through a series of 'givens': 1) the climate of Louisiana is sultry and hot; 2) blacks come from Africa, a sultry and hot climate; and 3) therefore they will 'naturally' flourish in Louisiana, just as they did in Africa. A simple connection is made between race and place, a connection which inscribes black slavery into the Louisiana landscape 'naturally'. Conversely, whites do not flourish in Louisiana because they are from more temperate climates - Louisiana is therefore not their 'natural' environment. This would serve as the 'scientific' justification for transplanting a black labor force to the Territory.'

18 A brief note will suffice to show the hypocrisy involved in a statement like this. Creole slaves drew considerably higher prices in Louisiana than slaves from other sections of the United States because it was believed that they were "acclimated" to the climate and to disease. The high prices paid for Creole slaves presents one of the many gaps in the textual fabric that Louisiana writers were attempting to weave. If all negroes were "remarkably healthy", as this editorial claimed, then there could be no plausible reason for the significant difference in value between Creole slaves and those imported from outside Louisiana. The tenuous nature of the textual subterfuge employed by slave owners in Louisiana becomes more obvious if it is seen as a strategy to naturalize, or domesticate, black slavery in the Louisiana. Newspaper advertisements are the best evidence for the premium placed on Creole slaves: "un Negre nommé Robert, créole"; "Environs quarante Esclaves, presque tous créoles"; "Une Négresse...garantie de vices et de maladie"; "Une Négresse...garantie des maladies et défauts". Le Moniteur,
Another justification for the continuation of the slave trade was an appeal to value and property rights. Slave owners were quick to point out that the third article of the Treaty of Cession guaranteed their property rights, and property included slaves. Further, slaves were not only valuable in themselves, they also added to the value of land:

"The treaty secures to us our properties, that is to say in plain words, that we cannot be deprived of what we possess. Now if by cutting short the principal resource, which gives value to our lands, you reduce that value to one half or one third, will you think that the engagement has been fulfilled?" 19

Again, slavery is seen as an integral part of the Louisiana landscape, this time as one of its principal resources. Louisiana writers seem to have been attempting to inscribe slavery into the landscape in such a way as to make the two inseparable. Slaves were depicted (enpicted?) as essential to, and as productive of, the Louisiana landscape. Therefore, to ban the one meant, to Louisianians, the destruction of the other.

This process seems inversely related to the process described by Marie Louise Pratt. She points out that European imperialists tended to write texts that eradicated, or removed, indigenous peoples from the landscape. Pratt suggests that this textual disposal of the indigenous occupants of the land facilitated their physical removal. 20 In Louisiana, we see

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June 8, 1807; March 25, 1807; January 17, 1807; December 20, 1806.
19 The Louisiana Gazette, January 4, 1805.
20 Mary Louise Pratt, Imperial Eyes: Travel Writing and Transculturation (New York: Routledge, 1992), 64-65.
this logic in reverse, but with the additional necessity of equating blacks with slavery. Once this equivalence was established, Louisianians could move to the next step: by tightly binding slavery and the landscape together, by establishing their interdependence, Louisianians seem to have been trying to make slavery a normal, natural part of that landscape. Once the presence of slaves was firmly fixed, their absence would be abnormal. Thus, by textually embedding black slavery into the landscape, Louisianians hoped to prevent their physical removal. This strategy depended upon legal, as well as the phenotypical and genotypical, constructions of race I discussed above. By arguing along ethno-climatological lines that blacks were suited to the climate of Louisiana, and whites were not, blacks become a natural part of that landscape. Further, it speaks to the necessity of moving blacks to Louisiana - since blacks were from the same type of climate they could adapt more readily than could whites. These ethno-climatological rhetorics echoed certain veins of Enlightenment philosophy, in particular Montesquieu's argument on "How the laws of civil slavery are related to the nature of the climate." 21

21 Montesquieu also supports my contention that European conceptions of race were largely phenotypical. Indeed three of the reasons he gave as a defense of Negro slavery were: Those concerned are black from head to toe, and they have such flat noses that it is almost impossible to feel sorry for them; One cannot get it into one's mind that god, who is a very wise being, should have put a soul, above all a good soul in a body that was entirely black; It is so natural to think that color constitutes the essence of humanity... The Spirit of the Laws, Anne M. Cohler, et al. trans. and ed., (Cambridge: Cambridge University Press, 1989), 250.
The Louisiana Remonstrance underlines this connection between land and slaves, stating simply,

"If therefore, this traffic is justifiable anywhere, it is surely in this province, where, unless it is permitted, cultivation must cease, the improvements of a century be destroyed, and the great river resume its empire over our ruined fields and demolished habitations." 22

According to this statement, slavery is important not only because it is the basis of the agricultural system and the economy, but because the very survival of Louisiana itself depends on the presence of slaves. Only slave labor can maintain the levees that keep the "great" river in check, and that permit the existence of cultivation and habitation.

And again,

"The consequence of this [ban] is, that bye and bye there will not remain in lower Louisiana, a sufficient number of hands even to guard it against inundation. Hence the destruction of our lands and the utter ruin of our country, and so will our property be secured and protected if that system will prevail." 23

Once more, the author is emphasizing the importance of slavery to the very nature of the territory, here in terms of flood prevention.

These citations have in common a constant appeal to the uniqueness of Louisiana, embodied particularly by the Mississippi River. Rather than relying solely on the claim that slavery was necessary to the agricultural system in Louisiana (an argument that could have been used by any of the plantation states), Louisiana slaveholders repeatedly pointed

23 The Louisiana Gazette, January 4, 1805.
out that slavery was necessary to prevent inundations. By
textually creating, or fabricating, the uniqueness of
Louisiana, they were literally distancing and distinguishing
themselves from the rest of the country. Not only were they
affirming the differences embedded in Louisiana which so
alarmed the federal government, they were also enlarging those
differences, trying to use them to their own advantage.
Louisianians were producing a textual strategy for explicit,
clear cut purposes: they were textually delineating a unique
space, a landscape that was totally dependent upon the
presence of the slave body. By extension, these exceptional
circumstances warranted the continuation of the slave trade in
Louisiana.

Implicit in this claim to difference was the suggestion
that local interests could only be recognized and served by
those with local knowledge. A broad federal policy could not
be expected to understand or appreciate such matters. Local
knowledge was validated by the 'nature' of Louisiana itself.

This rhetoric is interesting because it worked against
the grain of the larger federal project. Federal
territorialization was intended to smooth over, or erase,
differences in the interests of assimilation and the common
interests of a national project. The rhetoric surrounding
slavery was intended to bring difference to the fore and to
underscore it. In light of my uncertainty about the position
taken by Creole planters regarding the ban, it would be unwise
to attribute any broad political intentionality to these
rhetorics. The emphasis on local problems and local solutions does seem to reflect a broader Anglo-American suspicion, at the time, of the hegemonic tendencies of the federal government and a fierce determination to defend the local rights and interests of the states.

The federal government did not change its ban on slave importation into Louisiana: Congress knew that it would end the African trade nation-wide on January 1, 1808. In the meantime, Louisianians experienced little, if any, difficulty in obtaining slaves after the deadline - a burgeoning trade with the Eastern seaboard states developed. The increase in the slave population, and the desire for closer regulation, prompted the speedy passage of the 1806 Black Code by the Territorial legislature.

The Black Code of 1806 was promulgated by the first Territorial legislature, and 'perfected' by subsequent codes. Many of the provisions of the Code Noir were retained with little or no alteration. However, the control of slaves was seen as a critical issue by the Territorial Legislature, partly in response to the successful slave revolt on St. Domingue (Haiti) in 1791. Freedom of movement was curtailed by a pass system which was enforced by the provision that any white could, and should, demand to see the pass of any black outside the limits of a plantation. A patrol system, which was created and paid for by local planters, was designed to apprehend slaves out of bounds.
While some of the provisions of the Louisiana Black Code were slightly more humane than the slave codes of other Southern states, the general movement in Louisiana in the Territorial period was to increasingly enmesh blacks, slave or free, within an extremely limiting web of legal and spatial prohibitions.  

While the physical punishments prescribed in the Black Code may have been less brutal than those in the Code Noir, the legally prescribed mechanisms for control were more effective and extensive in the nineteenth century. Mathé Allain notes that "if the French and Spanish empires had milder laws concerning slaves, it was because those absolutist régimes did not leave slave legislation in the hands of the colonists." This suggests that the slave codes produced by the French and Spanish represented the interests of the Crown far more than the interests of slave owners, but more importantly, that a slave code produced by slave owners would reflect their interests more closely and would yield far greater latitude to the individual planter concerning slave control. The Black Code of 1806 was the first opportunity Louisianians had to develop a Code that reflected their own

24 There was a concern for maintaining family units with members over 60 and under 10 which was unique to Louisiana. These are among the articles of the code, however, which demonstrate the gap between legal theory and local practice. Solomon Northrup, a slave in Louisiana in the 1850's and 1860's, wrote that a mother and her two children (both under ten years of age) were sold to three different masters. Solomon Northrup, Twelve Years A Slave: Narrative of Solomon Northrup in Gilbert Osofsky, ed., Puttin' on Ole Massa, The Slave Narratives of Henry Bibb, William Wells Brown, and Solomon Northup (New York: Harper & Row, 1969), 264-269.  

25 Allain, 137.
interests and beliefs. It also reflected their own contradictory logic, a 'logic' which became particularly untenable in their attempts to define human beings as property.

A Most "Troublesome Property"

The Black Code owed much of its substance to the Code Noir, while also imposing more stringent limitations on slaves. It did, however, change the property status of slaves. Under the Code Noir, slaves were defined as movable property, but they were not defined as chattel - their humanity, and their souls, were clearly recognized by the Code. During the American regime, slaves were redefined as immovable property, and as "chattel personal", although the latter principle was not explicitly stated in the Louisiana Black Code.

The 1808 Civil Code offered a more concise definition of the slave's condition under Louisiana law: "A slave is one who is in the power of a master to whom he belongs. The master may sell him, dispose of his person, his industry and his labor. He can do nothing, possess nothing nor acquire anything, but what must belong to his master." As this article makes clear, Louisiana slaves were by definition without civil rights. Civil cases involving slaves were generally limited to owners' suits for damages to their human property. Obviously, a being who can own nothing, and who has no legally recognized

26 Louisiana Civil Code of 1808, Arts. 35 and 173.
familial bonds, would have little reason to recur to private law.

The denial of a slave's right to own property is essential to the logic of Southern slavery. William Goodell suggests that "if the slave could possess property, he could dispose of it; he could make contracts; he might contract marriage; he might become a man,...and cease to be a slave...the idea that a slave can possess property...is the idea that the slave has rights." By possessing property rights the slave would have become autonomous, the 'owner' of his or her own person. As a bearer of rights, the slave would have been included in a web of social relations which gave such abstract concepts as rights, duties and obligations meaning - by vesting rights in a person, society concretizes what is essentially a (modern) fiction. Only through the social recognition of rights and obligations can a person truly be said to possess those rights.

Inclusion into the community at large, through rights such as property ownership or marriage, would have effectively destroyed what Orlando Patterson considers to be the primary characteristic of slavery: social death. According to Patterson, social death is the consequence of a slave's dependence and lack of power, formal natal alienation, and degraded, or honorless, status. This condition is achieved by

a combination of physical force and the manipulation of
symbolic authority. Obviously, Patterson's is one view in a
larger on-going discussion of the modalities and mediations
involved in slavery." Patterson believes that the role of law
as a primary source of the master's authority has been
frequently misunderstood and overstated. As he correctly
observes, "law itself begs for the thing we call authority." 29

I think, however, that Patterson underestimates the
importance of law on at least two counts. The first is the
dual process of inclusion and exclusion: exclusion from civil
rights and a private law personality, inclusion as a criminal
personality. And second, is the multiplicity of ways in which
slave owners and slaves contributed to the law-making process.
While the Louisiana Black Code may have derived its authority
largely from local custom and tradition, and while it may have
been ignored altogether by slave owners who preferred to mete
out 'justice' as they saw fit, it was in itself an important
source of authority. Slave legislation transformed a social
fact, the ownership of persons, into a legal fact - in other
words, slave ownership became a right which was recognized by
the larger community. This recognition was important partly
because it implicitly guaranteed that the planters would enjoy

28 Cf. Eugene D. Genovese, Roll, Jordan, Roll: The World the
Slaves Made, (New York: Random House, 1972); Lawrence W.
Levine, Black Culture and Black Consciousness (Oxford: Oxford
University Press, 1977); and Herbert G. Gutman, The Black
Family in Slavery and Freedom, 1750-1925 (New York: Vintage
29 Orlando Patterson, Slavery and Social Death, A Comparative
Study (Cambridge, Massachusetts: Harvard University Press,
1982), 36.
the "quiet possession" of their slaves. But the support of the majority of the community was also desirable for the obvious necessity of controlling black slaves, who in Louisiana constituted just under half the population.30

General recognition of the right to own slaves came with a price. The interests of Louisiana society as a whole dictated that slaves must be held accountable for their actions under criminal law. This need points to one of many inconsistencies in the logic of the system. Article 173 of the 1808 Louisiana Civil Code reads: "The slave is entirely subject to the will of his master." The Louisiana legal system, as well as the legal systems of other Southern states, was constantly confronted with the practical consequences of this contradiction.31 The heart of the matter lies in the notion that if slaves were solely the extensions of their master's will, there would be no need to account for slave crime. By making slaves liable for their criminal actions, the law implicitly acknowledged that they had wills of their own, wills that were not completely subsumed by those of their owners. This led to the inescapable fact that slaves were not

31 Several Kentucky judgments demonstrate the Courts' difficulty in negotiating the contradictions of human property: "However deeply it may be regretted, and whether it be politic or impolitic, a slave by our code is not treated as a person, but (negotium) a thing, as he stood in the civil code of the Roman Empire" (1828); "A slave has volition, and has feelings which cannot be entirely disregarded" (1829); and "But, although the law of this state considers slaves as property, yet it recognizes their personal existence, and, to a qualified extent, their natural rights" (1836). Cited in Genovese, 30.
things and not livestock - they were people, and as such they were indeed a most "troublesome property."  

E. P. Thompson has argued that some categories of people were excluded from the logic of the law, most notably, children and slaves. This assessment is meaningful on two levels. First, he assumes that the special nature of the law means that its logic will be applied according to standards of "universalism and equity". Obviously the laws that were designed to apply to slaves were neither universal, nor equitable. Second, it seems obvious that while slaves were excluded from private law except as objects of litigation, they were not outside of, nor excluded from the law in any other sense. Not only did law apply to them, but they also contributed to its construction, not in a formal sense, but to its social construction. As Eugene Genovese has pointed out: "Had [the planters] reflected on the implications of a wagon's inability to raise an insurrection, they might have understood that the slaves as well as the masters were creating the law." The necessity of creating a body of law focussing on slaves, then, was brought about by the contradictions implicit within the concept of human chattel.

Law, however, is only part of the story. While it legitimized the ownership of other human beings, represented the consent of the state to use its coercive powers for the planters' cause, and set limits on the degree of physical

32 Cited in Levine, 122.
33 Thompson, Whigs and Hunters, 262.
34 Genovese, 30.
coercion which could be employed by slave owners, its effect on the daily lives of slaves was sporadic. Custom played an important role in Louisiana, and its effects are particularly clear in the institution of slavery, where it could sometimes supersede positive law.

The Force of Habit

The institution of slavery in Louisiana reflected the varying social and economic imperatives of the French, Spanish and American régimes. James McGowan has traced a history of Louisiana slavery which illustrates broad, informal changes in the institution in response to material conditions and specific events. He notes, for example, a shift from a regime of brutality and fear to one of management and (some) accommodation in response to a joint uprising of slaves and Natchez Indians in 1729 which claimed the lives of over one-eighth (235 people) of the white population along the Mississippi River.\(^3^5\) Planters and administrators came to believe that slaves had to be "persuaded to accept their condition" in order to prevent future uprisings.\(^3^6\) Le Page DuPratz, the official in charge of the Crown's plantations in Louisiana, suggested showing slaves "those marks of humanity [which] flatter them, and attach them to their masters."\(^3^7\) He also recommended that slaves be given their own garden plots,

\(^{35}\) McGowan, 98.
\(^{36}\) Ibid., 107.
and that planters "engage them to cultivate it for their own profit, that they may be able to to dress a little better, by selling the produce of it." 38

This shift in the 1730's marked the beginning of a customary practice which saw Sundays as "Negroes' day", a day on which they could cultivate garden plots in order to sell the produce, or to hire themselves out to anyone who wished to engage their services for the day. The strength of this custom is clearly illustrated by a law suit, Loppinot's Case, initiated in 1774 during the Spanish regime. 39

The issues in Loppinot v. Villeneuve revolved around questions of absolute ownership, but were essentially decided according to the strength of the custom of allowing slaves to work for themselves on Sundays. Mulet, Loppinot's slave, accidentally drowned on his way home to his owner's plantation, having spent Sunday building a chimney for Villeneuve. Loppinot claimed restitution from Villeneuve for his lost property, a claim that was upheld by an arbitration committee composed of planters respected in the colony. Villeneuve's lawyer, Mazange, challenged the arbitration committee's award, however, on the basis that his client's relationship to the slave Mulet had been one between an employer and an employee, rather than one between the two

38 Ibid., 387.
39 Most of my facts about Loppinot v. Villeneuve come from Laura L. Porteus, "Civil Procedure in 1774 - Loppinot's Case", LHQ 12 (1929), 49-120. McGowan also discusses the case, considering pivotal to a broader conception of the slaves' power to shape their own world.
owners. If the former relationship was recognized, Villeneuve could not be held responsible for Mulet's death. Broutin, Loppinot's attorney, recognized the untenable terrain involved in pursuing an argument which rested on the conflation of slavery and voluntary wage labor. Instead, he argued his case on the basis of canon law, which stipulated that Sunday was a day of rest, and on a legal technicality which stated that slaves could not leave their owner's plantation without a written permit. Even Broutin's own witnesses refused to acknowledge these basic facts, however. Rather, they maintained that it was "a custom, use and style for all the Negroes on the plantations as well as those in the cities to work for themselves the days the courts are closed", and further, that "on legal holidays the Negroes do not need permits from their masters to communicate with each other nor for any private work they do."Owners themselves, then, were acknowledging that their property rights in slaves were not absolute. If these rights of ownership had been regarded as absolute Broutin would have won the suit when he pointed out that

"It is by right and incontestable any property that belongs to me in ownership also belongs to me legitimately on Sunday just as on the other six days of the week, so then no one has the right to take him from me any more on this day than on the other working days."41

The court's decision for Villeneuve clearly illustrates the force of custom, even when it was contrary to the most basic

40 Porteus, Loppinot's Case, 77-78.
41 Ibid., 101.
tenets of Civil and canon law, and even though it flouted local law. The case is unusual in that it yields a particularly clear glimpse into the unwritten and informal relations between masters and slaves in colonial Louisiana, and gives us an example of the chasm between law and social practice, and the ways in which the latter can grow to both supplement and subvert the former.

I want to make it clear that custom carried a great deal of weight in Louisiana (and not only in Louisiana), a point that I will explore more thoroughly in chapters to follow. But more immediately, I want to point to the importance of custom as a means to get from what the slave codes said, to what slave owners actually did. While the slave codes are important as statements of the way things 'ought' to be, or as expressions of general principles, they do not necessarily provide insight into the some of the primary issues of slavery. Thus, in the following section, I will discuss a modality of critical importance to slave owners and slaves - the operation of physical coercion on the bodies of slaves.

Servants Obey in All Things Your Masters

Power, the ability of each individual planter to exert physical and social control directly onto the bodies of slaves, was a primary means of maintaining slavery. Louisiana slavery as an institution poses numerous problems for European

42 The title is taken from a line in a catechism that the Reverend C.C. Jones had written to teach his slaves. Cited in Levine, 45.
theories of power such as Foucault's. His genealogy of power, which charts a shift from sovereign to disciplinary modes of power in Europe, is not entirely appropriate to the relations of power involved in Louisiana slavery.\(^4\) As I have noted above, the *Code Noir* was an expression of sovereign power, but the same cannot be said about the non-discursive relations of Louisiana slavery. In eighteenth and nineteenth century Louisiana slavery, the shift that Foucault charts in Europe is less evident. The nature of a master/slave relation required that the type of power exercised by masters over slaves not be anonymous, but capable of being exercised directly on the bodies of slaves - if its source was not clear to the view of the slave, its efficacy was lost or at least diminished. In this sense power was ascending, and its source was necessarily visible, suggesting that it was sovereign in nature. On the other hand, disciplinary mechanisms did play a role in the control of slaves. The planters were aware of the need to 'rationalize' their agricultural system, to make it as productive and profitable as possible. Rationalization was accomplished in a number of ways: set routines, quotas to be filled or specific tasks to be accomplished, constant surveillance during the daylight hours, direct coercion upon the slaves' bodies, and by minor concessions, or rewards, on

\(^4\) While I owe a great deal of my perspective on the power relations of slavery to Foucault, he himself never seems to have come to grips with slavery, or with colonialism. His unwillingness to address the power relations of slavery led him to argue that it was a relation of violence rather than a relation of power.
the part of the individual planter. Thus it could be said that Louisiana slavery rested on a combination of sovereign and disciplinary regimes of power. Slave owners were concerned to regulate and police slaves through the manipulation of space, but this concern with spatial arrangements does not seem to have altered their reliance on physical power, because they could not rely on the twin instruments of disciplinary power as Foucault described them:

"like surveillance and with it, normalization becomes one of the great instruments of power at the end of the classical age...It is easy to understand how the power of the norm functions within a system of formal equality, since within a homogeneity that is the rule, the norm introduces, as a useful imperative and as a result of measurement, all the shading of individual differences."

The processes of surveillance and normalization to which Foucault refers seem to have a double aspect, in that both are originally initiated from a point, or set of points, exterior to the body. However, to be truly effective, they must be internalized by the object of their scrutiny. Once the 'standards' of discipline have been internalized, the originary, external source of discipline acquires the function of a safety net: the 'real' work is done by the object/individual.

The countless examples of slave resistance, ranging from a defiant word or gesture to armed rebellion, suggest that

44 Indeed, Genovese notes that the slaves were often able to turn these "favors" or "bonuses" into established rights whose removal would only create turmoil on the plantation.
surveillance was sporadic, and that slaves never came to accept their condition as the norm. Resistance points to the continued necessity of an external source of discipline throughout the Southern slave régime. Orlando Patterson characterizes Southern slavery as a "direct, personal mode of domination in the midst of a prevailing capitalistic indirect idiom": the image is one of brute force at work in a society in which power is usually disguised by the social relations of production." This spectacle of naked force could not lend itself to a perpetuation of the mythos of Southern gentility, and slaveholders attempted to control their slaves in myriad ways. Eugene Genovese has suggested that a locus of control was provided by the hegemonic paternalism which pervaded southern slave societies." This assessment certainly contributes to an understanding of antebellum (1820-1860) southern slave societies, and it sheds light on the countless pages which have been written by slave owners about their slaves in that period. The textualization of slaves has been a constant preoccupation with southerners, and not just because they represented economic assets, but because they were, for want of a better word, mysterious." I am not sure, however,

46 Patterson, 33.
47 Genovese, 1-5.
48 The clearest examples of the mysterious nature of the slaves can be found in women's writings. See particularly Mary Chesnut, who constantly notes this quality in "her" slaves: "I am always studying these creatures. They are to me inscrutable in their ways and past finding out"; "their faces are as unreadable as the sphinx"; while "Laurence [the butler] wears the same bronze mask." C. Vann Woodward, ed., Mary Chesnut's Civil War (New Haven: Yale University Press, 1981), 48, 114, 132.
that Genovese comes to grips with earlier slave societies. Certainly, no one could be "paternalized" into slavery, whereas it is not difficult to find accounts of the coercion which took place throughout the period of the African slave trade. It also seems unlikely that paternalism as a system could have preceded Patterson's criterion - social death and the ways in which it is brought about - for the creation of a slave society. While paternalism may be an appropriate name for the relations between southern men and 'their' women and children, I do not think it gets to the crux of the relations between masters and slaves: clearly there are different relations of power at work here.

One modality of power, then, was physical coercion and the creation of what I would call a space of fear. Immanent physical coercion, and the act itself, was essential to the maintenance of slavery - it was essential to ensuring that black people would continue to perform as slaves. Power was, however, exercised in more subtle ways. As Foucault has suggested in another context, mechanisms of power entertain "complex and circular relations" with a vast array of forms of subjection, exploitation and domination. Power does not always, or even necessarily, "act directly and immediately on others. Instead it acts upon their actions..."49 One of the most subtle forms of domination implemented by slave owners was the spatial arrangement of their human property. While

slaveholders tried to manipulate space in order to segregate, contain and control slaves, the slaves were able to take advantage of the spaces designed for them, and to produce spaces of their own.

Spatial Designs

The majority of slaves in Louisiana lived on large farms or plantations, rather than on smaller farms or in urban areas. Herbert Gutman has calculated that 72% of Louisiana slaves were owned by masters with 20 or more slaves, while 51% were owned in groups of 50 or more. These figures indicate that most slaves were engaged in large scale agriculture in rural areas. Therefore, any discussion of slavery in Louisiana must necessarily come to grips with the nature of slavery on plantations.

In lower Louisiana, roughly from Baton Rouge south, the climate was favorable for the cultivation of sugar, and many of the plantations in that area were sugar plantations. Cotton was also grown, but predominated in northern Louisiana. Work routines varied with crop, but as a rule, sugar cultivation was more labor intensive than was cotton. Sugar production required more hands, and a larger investment in labor and equipment. Sugar plantations in lower Louisiana were

50 Gutman, 44.
51 Sugar had been grown in southern Louisiana sporadically in the 18th century, but it was not until Etienne Boré, a Louisiana sugar planter, perfected the refining process in 1795 that sugar became a staple crop in Louisiana.
almost invariably located on a bayou or river, the most dependable means of transportation in Louisiana at the time.

As Figure 5 shows, slave quarters were usually at a generous distance from the "big house", while the overseer's house tended to be adjacent to, but not in, the quarters. The focal point of the plantation was generally the owners' home. Outside of Louisiana this was frequently established by situating the house on a hill. In Louisiana, where hills are virtually non-existent, the house was distanced from the huddle of the quarters, and was frequently demarcated by an avenue of oaks which ran up to the gallery. On many plantations there was clearly an aesthetic at work. Oak avenues often ran perpendicular to rivers or bayous, or presented the house from the most flattering perspective. The aesthetic ideology embodied by many Louisiana plantations can be seen as the ordering, and representing, of an ideal space - an almost smug statement that things are as they should be. Indeed, as Lefebvre has noted, the inscription of aesthetics on the landscape evokes specific notions of property and permanence, and imbues "the countryside with depth and meaning." 52 Two qualifications should be noted however. First, unlike Lefebvre's poderi, which illustrate a representation of space (linear perspective) generated by spatial practice, the Southern landscape was undoubtedly influenced by artistic representations of space. And second, this aesthetic preoccupation with landscape was not always

52 Lefebvre, 78.
Representative Sugar Plantations
practical: while much plantation space was produced and
arranged in such a way as to make slaves and their doings as
visible as possible, spatial configurations such as treed
avenues hardly lent themselves to this function.

The effect created by this physical and aesthetic
distancing, did serve, however, to create a boundary of sorts;
the slaves as a rule were limited to the quarters when they
were not in the fields, while the whites were not limited to
any particular space. This boundary, then, was characterized
by a one-way permeability, which undoubtedly lent an aura of
mystery and luxury to even the most shabby "big house": a
summons was usually required for the typical field hand to get
a glimpse of the interior of the house. When field hand
Benjamin Johnson of Georgia visited the house, the other field
hands plied him with questions about the unknown territory.53

The distance separating the quarters and the House was
probably cherished by the slaves. It represented if not
privacy, at least some relief from the continuous scrutiny of
the daylight hours. Housing within the quarters itself seems
to have changed over time. In the eighteenth century, slaves
were often quartered in a barracks-like building, with no
regard for crowding, hygiene, or family units. By the
nineteenth century there seems to have been a shift to cabins,
which can be attributed to heightened concerns about health,
morals and morale.54

53 Genovese, 532.
54 Ibid., 524
Although slaves often built their own cabins, they had little control over the form their housing would take - specifications were inevitably provided by the planter. Many planters put a great deal of thought into the design of their slaves' housing. One recommended that:

"Housing for Negroes should be good; each family should have a house, 16 by 18 feet in the clear, plank floor, brick chimney, shingle roof; floors elevated 2 feet above the earth. There should be no loft, no place to stow away anything, but pins to hang clothes upon. Each house should be provided with a bedstead, cotton matress, and sufficient bedclothes for comfort." 55

This, of course, was an ideal that was rarely realized, but it does contain several hints as to what was important to the planters. There are numerous accounts, by slaves and visitors to the South, which attest to the lack of furniture in slave cabins, as well as to the lack of partitioning in the cabins. This not only made it extremely difficult to "stow" things, but people too. Ostensibly cabins were raised off the ground to permit circulation (and in Louisiana, to prevent flooding), but this also made it difficult to hide things under floorboards or in the ground within the perimeter of the cabin. Cabins were generally not designed for "comfort" but for adequate shelter: planters expected waking hours to be spent at work. Cabins were spaces to be utilized at night and on Sundays.

Field work was closely supervised, by the owner, overseer, or both. Solomon Northrup described his typical day

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on a cotton plantation in northern Louisiana as one that was filled with fear: fear of oversleeping; fear of not keeping up with his line in the field; fear of either not picking enough cotton or picking too much (in which case his quota for the next day was raised); and fear of breaking precious branches off the cotton plants. All these offenses were punished by the whip, and most accounts agree that it was ever present and frequently used.

On most plantations, some relief from the scrutiny of overseers and owners was available because of the separation between the quarters and the House. The quarters tended to be a familial space, where the entire family was gathered together in one place, where evening meals were cooked, stories told, days compared, and garden plots and livestock tended.

The separation of the House and the quarters was more than a spatial division between whites and blacks. It also marked a division of labor, and according to many white and some black accounts, a division in slave society. House servants formed a very small proportion of slaves, and were generally highly prized as skilled cooks, butlers, maids and nannies. However, it was only on the very large and aristocratic sugar and rice plantations, most notably around Charleston and New Orleans, that there was an élite of house servants; servants who considered themselves superior to, and who refused to associate with, the mass of field workers.

56 Northrup, 313-317.
Many of these servants lived in the "big house", or in quarters separate and somewhat better than those of the field hands. By virtue of proximity, and training, these servants often came to be regarded by whites as members of the family. However, proximity to master and mistress was a mixed blessing; while food and clothing were sometimes better, house servants were constantly and unremittingly under the eye of the whites. As Genovese notes, "The very intimacy of life in the Big House meant that every fault and every passion appeared in full view." 57 Unlike the inhabitants of the quarters, house servants had little opportunity to distance themselves from their owners.

Not only were there spatial divisions within the plantation itself, but most plantations in Louisiana were also designed to be relatively self-sufficient. Sugar plantations in particular had their own refineries, their own store, and frequently their own church, or a priest who visited from time to time. Most plantations raised much of the food necessary to feed their slaves, and in Louisiana, timber was usually available in the back swamp which bordered many properties. Plantations were not fenced, but there were many attempts to control their borders.

One of these was the pass system mentioned above. During the night hours, when much of the slave's social life took place, the boundaries of plantations were policed by groups of patrollers. There were numerous reasons why a slave might want

57 Genovese, 336.
to leave the confines of an owner's domain; there was a lively black market trade on Louisiana bayous, and religious gatherings frequently occurred at night in the woods. Dances, social gatherings, hunting and love interests or family on a neighboring plantation also provided an impetus for nocturnal wandering.

Intended to discourage runaways and inter-plantation theft, and to prevent rebellions, patrollers were the source of fear and anxiety in the quarters. They travelled in groups, frequently mounted and armed, and usually with one or more dogs in tow. They were usually non-slaveholding whites, and less than impressed with the valuable property they were paid to police, leading to complaints of brutality from both slaves and owners. The slaves summed up the problem concisely in a song that warned: "Run, nigger, run, patteroller'll ketch yer, Hit yer thirty-nine and sware'e didn' tech yer."58 Their raids frequently took them into the quarters, and into cabins - they were extremely intrusive, but sporadic at best. The frequency and success with which slaves evaded them is attested to by the flourishing black market, and in slave tales.

Thus far I have focussed primarily on the spatial arrangements, and particularly the boundaries, that planters constructed to contain and control slaves. These spaces were produced by a society that was dependent on slave labor, or, as Lefebvre would probably point out, a capitalist mode of production in which labor was not sold for wages but was

58 Cited in Levine, 14.
(literally) captive. I have little doubt that these relations constituted a socially produced space, one produced by Southern slave-owning whites, with the general participation of the vast majority of Southerners. According to Lefebvre's conception, spatial practice, representations of space and spaces of representation, all contribute, individually or in combination, to the production of space. Spatial practice denotes the ways in which people generate and use material space. Representations of space tend to be rational, readable, and reproducible conceptions of space, while spaces of representation are lived spaces produced and modified by their inhabitants - they are spaces imbued with meaning and symbolism.59 These "moments" are useful, in that they permit not only a broader conception of space, but also because they permit a recognition of different types of space. Each of these moments is present in the plantation society I have described: agriculture is an age old spatial practice; the form - the plan - of Louisiana sugar plantations is a representation of space; the quarters, and the entire Louisiana mythos of moonlight and magnolias, were spaces of representation.

Slaves inhabited, and to a certain extent, participated in the production of these spaces. It seems clear, though, that this space was predominately white - it was called forth by, and answered the needs of, Southern white society. The

59 Lefebvre, 38-39.
question that insistently emerges from this train of thought is, could, and did, the slaves produce a space of their own?

I think that Lefebvre points in the right direction when he suggests that:

"Perhaps we shall have to go further, and conclude that the producers of space have always acted in accordance with a representation, while the 'users' passively experienced whatever was imposed upon them inasmuch as it was more or less thoroughly inserted into, or justified by, their representational space...As to whether or not 'inhabitants' possess a representational space, if we arrive at an affirmative answer, we shall be well on the way to dispelling a curious misunderstanding..."  

Lefebvre is trying to come to grips with a "free" twentieth century capitalist society, in which the dominant modes of spatial practice and representations of space (the space of the producers) are made palatable, or capable of justification, through a process of ideological mystification. Here Lefebvre is emphasizing the potential for domination in the non-physical aspects of the production of space: by its nature, modern society must depend more on ideological domination than on naked physical domination.

Planters, by contrast, did not depend on the ideological imposition of their spatial productions on slaves - the operation of white space on slaves was distinctly physical, although it undoubtedly had mental and emotional ramifications as well. If slaves were so enmeshed in the space imposed upon them by whites how could they produce a space of their own? The importance of Lefebvre's question becomes obvious at this

60 Ibid., 43-44.
point - slaves, the inhabitants of this dominating space, did
"possess" a space of representation, in the sense that they
had produced a cultural and social space that overlayed the
physical space to which they were subject.

Historians of Southern slavery have produced a great deal
of evidence which suggests that despite the physical
subjugation of slaves, they were able to create and maintain a
"world" which enabled them to endure the brutality of their
lives. Genovese proposes that slaves were able to fashion a
unique and fulfilling set of religious beliefs, while Levine
adds slave songs and tales (religious and secular) to
religion. Gutman suggests that familial practices -
reproduction and marriage - which were more reflective of
African practices than of American norms, were an important
part of slaves' lives. These practices composed what Genovese
calls "the world the slaves made". These historians focussed
on daily life in slave communities, and particularly the
social relations that slaves had built with one another and
with their paternalistic "white folks." They intended to
appeal to the humanitarian instincts of a broad, sympathetic,
and liberal audience, and to be sure, they have
revolutionalized the history of Southern studies.61

I suggest that these histories can be seen from a
different perspective than the ones they were perhaps intended
to call forth. It seems that they all have a common thread:
all of these studies point toward the notion that slaves -

61 Genovese, Levine, Gutman, op. cit.
through cultural, religious, or familial practices - were able to produce a space that was uniquely their own. I am suggesting that Lefebvre's conceptual moments, spaces of representation, lived spaces, are invaluable to conceiving the ways in which slaves, simply by "using" or "inhabiting" the spaces into which they were inserted, were able to make something new and different: they were able to produce their own space. Indeed, if we take Lefebvre's claim that bodies produce spaces seriously, and I do, it is difficult to see why slaves would not produce their own spaces. Further, I would suggest that the production of these slave spaces were critical to slaves' ability to resist white domination, whether it was physical, emotional or ideological.

Resistance is an important issue in slavery. De Certeau has suggested that tactics privilege time over space, that they occur only in the interstices of a space generated by a proprietary power. Hence they have no space of their own, they are guided solely by considerations of opportunity and circumstance. Strategies, he believes, privilege space over time. I do not entirely agree with de Certeau's theory of tactics and strategies, because I think that he ignores two essential points. First, space is not always material - it is not necessarily tangible. With Lefebvre, I think that there are conceptions of space which are powerful and compelling without having to be physically manifested. One example of the

power of this type of conceived space is linear perspective, which has produced a way of seeing, and of thinking, that has dominated the European (and American) imagination for centuries. But there are other spaces which are equally powerful and meaningful, although possibly more local. Second, it seems that de Certeau's conceptions of tactics and strategies privilege hegemonic power relations. By this I mean that he does not come to grips with the political, contested, nature of space. If bodies do indeed produce spaces, the potentials and possibilities inherent in that production are infinite. The fragility of hegemonic apparatuses of power such as slavery becomes clear, and we can see how it was possible for a group of people to have undergone perhaps this most virulent and violent form of oppression with their humanity intact. Thus, it seems to me that tactics and strategies are constantly producing, and being produced by and through space, and further, that it makes no difference whether that space is material or conceived. Or, that perhaps tactics and strategies are connected more to one type of space than to another: that, for example, material spaces and representations of space privilege strategies, while spaces of representation, lived, inhabited spaces privilege tactics. Whatever the case may be, I am suggesting that slaves did not seek simply 'to endure the brutality of slavery', but that they were constantly active in a realm of subversive strategies and tactics that were bound up with space.
For example, slaves were aware of, and appreciative of, the significance of distance. Thus the physical distance separating quarters and House was prized, as a relief from watchful eyes, and as a boundary, no matter how porous, between coercion and desire. The Reverend C.C. Jones of South Carolina observed: "the Negroes are a distinct class in community and keep themselves very much to themselves. They are one thing before the whites, and another before their own color." Slaves were able to produce distance by their demeanor, their wit, their awareness. As one planter warned:

"They soon ascertain the character of those in authority over them, their peculiarities of temperament and disposition, and frequently under the cloak of great stupidity, make dupes of the master and overseer. The most general defect in the character of the negro is hypocrisy [!]; and this hypocrisy frequently makes him pretend to more ignorance than he possesses; and if his master treats him as a fool, he will be sure to act the fool's part. This is a very convenient trait, as it frequently serves as an apology for awkwardness and neglect of duty."  

Slaves tried to turn any gap, any lapse, any privilege to their own advantage.

63 Genovese, 583.
64 Ibid., 583. The choice of the word hypocrisy is interesting, because this planter seems to be aware that it is not the most fitting word to describe the actions of his slaves. As for the slaves themselves, they seem to have settled the issue of hypocrisy to their own satisfaction. Asked if it was wrong to steal from his master, one slave responded with this exquisite logic: "A Lord, dou...taught dy sarvents dat it want no harm fur ter take de corn out der barril and put it into de kag. De barril 'longs to de marster and de kag 'longs ter de marster, dar-forth it ain't no diffunce when de darkie take de marster's pig out er de pen an put it into de darkie, case de darkie 'longs ter de martser, and de pig 'longs ter de martser." Cited in Levine, 131.
Socially produced space is necessary, even crucial to resistance - it is the point of fermentation for potential action. While slaves never mounted what could be termed formal political resistance to their enslavement (how could they?), they certainly resisted in a plethora of ways. They resisted by holding their own religious meetings at night in the woods, where they were not bombarded by the white man's insistence on preaching the morality of obedience; they went on go-slow in the fields; they sang songs and told tales of their ability to outwit "the Man"; they were defiant in word and deed; and occasionally they armed themselves and fought for their freedom against all odds. If slaves were able to produce a viable, and vibrant, social space under these conditions, a space that enabled them to resist this most extreme form of oppression, what must we think of the potential for creation and resistance inherent in the production of space itself?

Conclusions

Each of the topics I have discussed in this chapter played some role in the relations which constituted slavery in Louisiana. Slave codes were important, in that they delimited the outermost contours of slavery: while their only recognition of the legal personality of slaves was to hold them responsible for their criminal action, these codes also attempted to regulate the degree of physical force slaveholders could legitimately inflict on their slaves. Law also played a crucial role by establishing property rights. It
provided legitimacy to white ownership of slaves, but more importantly, it denied the right of property ownership to slaves: by doing so, law denied other civil rights which were believed to flow from the ownership of property in Western European and American political philosophy.

The textual strategy employed by Louisiana slaveholders to inscribe slavery as an institution into the landscape cast slavery in a depersonalized and anonymous mold, restricting and manipulating access to the machinations of slavery itself. These rhetorics echo the legal constitution of an equivalence between black and slave, permitting some insight into one possible geography of race, as well as to the moral geographies of Louisiana slavery.

I have tried to show that general theories of power do not fare well in the context of slavery. One of the difficulties of this type of analysis is the highly personalized relations of power that existed within the institution of slavery. While physical coercion seems to have been omnipresent in the master/slave relation, it was only one modality of power present in the web of relations which constituted slavery. How, for example, do we trace a history of the power of fear? On the other hand, European conceptions of a shift from sovereign to disciplinary modes of power are of limited value in an examination of slavery, and perhaps of the 'New World' in the nineteenth century. The *Code Noir* was a clear example of sovereign power, but its unambiguous position in Foucault's genealogy of power may stem from the fact that
it was a product of the French monarchical bureaucracy. Louisiana slavery was not a product of that bureaucracy, but rather developed on the ground in a specific colonial context.

I think the lopsided, personalized relations of power in slavery accentuate the importance of space. While slaveholders were aware that spatial design could be utilized to exert control over their slaves, slaves were nevertheless able to use white spatial design to their own advantage, and further, to produce their own spaces. I have tried to suggest the many types of space that could, and can, be produced, and to show space was not, and is not, always a material physical manifestation. But more, I have tried to point to the potential for resistance which is inherent in Lefebvre's spatial architectonics - his notion that bodies produce spaces. That notion is extremely suggestive, because it points not only to one possible conception of the relations of power and space in Louisiana slavery, but also because it speaks to present day relations between power and space, particularly in view of the histories of the present written by Foucault and Lefebvre. If slaves were able to resist the de-humanizing domination of whites to any degree, if they were able to produce spaces in the circumstances in which they found themselves, how much more this should say to our contemporary ability to resist the spread of disciplinary power into society as a whole, or to our ability to resist the increasing abstraction of space.
Thus far I have focussed on the myriad ways in which subjects are constituted by law: particularly the ways in which women, property, slaves, and property-owners were constituted differently under Civil and common law. In this chapter I have pointed to some of the ways that law constructed blacks as slaves. But I have also focussed on the importance of custom, largely to point to the gaps which existed between practice and law. But custom was also important in Louisiana because it had acquired an immense degree of authority and legitimacy. In the chapters that follow I show other ways in which the power of custom was manifested in Louisiana.
Chapter 4
The Territorial Court of Pleas

The Court of Common Pleas established by Governor Claiborne in the first ten days of his tenure is burdened with a legacy of blame in the legal history of Louisiana, even though there has been little detailed scholarship on the subject. Henry Plauché Dart declared that if it were not for the creation of the Court of Common Pleas, which Claiborne modelled after "his home system in Tennessee and Virginia", and the fact that its bench was composed of English speakers who imposed their language on the proceedings, as well as their common law experience, Louisianians "would possibly have slipped gradually into an acquaintance with the other system and in time have forgotten the mild sway of the past." In other words, the survival of the Civil law system in Louisiana can be traced to the animosity and opposition aroused by the Court of Pleas.

While I do not entirely agree with Dart's assessment, it is interesting for a number of reasons. First, as Dart stated, the Court did contribute to raising the level of awareness of the potential effects of the common law system in Louisiana. Second, the Court of Pleas was the first attempt at a dual

1 Henry P. Dart, "Courts and Law in Colonial Louisiana", LHQ 4 (1921): 255-289, 288. Most discussions of the Court cite Dart, who in turn cites Charles Gayarré's History of Louisiana, which, on this particular, does not seem to be entirely accurate.
jurisdiction in the Territory, by which I mean that a common law mode of procedure was shingled onto the substantive body of the Civil law. Third, it is possible to trace out some generalizations about Civil and common law conceptions of equity through an examination of some of the Court's decisions. Finally, while the Court was the source of some local criticism, it was not targeted as frequently or as sharply as was the Governor's appellate Court.2

More specifically, I focus on one case, Labie v. Baudin, to illustrate the confusion that was created by the Court of Common Plea's use of common law procedure in a traditionally Civil law court system. The Court was also illustrative of the divisions within New Orleans society, divisions which reflected various interests and preferences in the community. Broadly, there was a division between English-speakers and French-speakers which reflected a preference for one legal system or the other, English-speakers tending to prefer common law, French-speakers Civil law. This schism can also be traced through two geographies of equity which collided in Louisiana, a Civil law conception which saw equity as implicit in the legal dispensation of justice, and a common law conception which saw equity as a separate and formal process which could

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2 The majority of my information on the Court of Pleas comes from the Court of Pleas - Calendar of Cases, 1804. [Hereafter cited as Calendar]. The Calendar is a bound manuscript in the Louisiana Division of the New Orleans Public Library. It is a summary of all the cases that came before the court; each summary appears in both French and English. I have tried to supplement the information from the Calendar as much as possible with newspaper accounts and correspondence.
be called upon only in very specific circumstances. There was also a division between planters and merchants which was highlighted by Baudin's petition to President Jefferson, a division which marked differing views on debt collection. The criticism which targeted the Governor's Court also reflected the divisions within New Orleans society, in that most of it was produced by an Anglo-American newspaper - The Louisiana Gazette - with decidedly anti-Jefferson overtones. Much of this chapter, and the next, points to the ways in which the legal debates in Louisiana became highly politicized and contested arenas for larger economic, political and judicial questions.

The Court of Common Pleas: Jurisdiction

Governor Claiborne established the Court of Pleas by decree on December 30, 1803. The Court was a temporary measure taken in order to provide a minimal legal apparatus for the Territory while Congress debated the Louisiana Act, and to act in the interim between passage of the Act and the date it was to take effect on October 1, 1804. Although the Court of Pleas was to have civil and criminal jurisdiction, Claiborne explained to Madison that it had been established primarily in response to "the solicitude of the inhabitants for some Tribunals of Justice [which] appeared to be universal, and the General complaint was, that no debts could be recovered."

The Court could hear criminal cases in which the sentence did not exceed $200 and/or 60 days imprisonment, though this turned out to be a minor factor in the history of the court, as (to my knowledge) it heard only one criminal case, in which, according to Claiborne "a few of [its] members seem[ed] unwilling to act even as Conservators of the peace." The case was promptly dismissed, and Claiborne's assessment was probably quite correct, in view of the Court's declaration that it was a "cours de justice civile" which obviously considered its jurisdiction to extend only to civil cases.

In its civil capacity, the Court's jurisdiction was limited to cases involving no more than $3,000. Individually each judge could summarily decide cases involving less than $100, which included a right of appeal to the Court sitting en banc. In cases where the amount in dispute totalled over $500, either party could appeal to the Governor, from whom no further appeal could be made.

The Court Regulations were of a decidedly common law cast - by which I mean that the Court was intended to adjudicate according to common law procedures - using a plethora of writs (summons, capias, and attachment), as well as viva voce.

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4 The Court met on January 23, 1804, to examine 6 men, Gontier, Thiel, St. Avid, Robelot, Robert and Desforques, who were accused of "being concerned in a riot and breach of the peace last evening in the ballroom." The court, "finding no sufficient charge against them to pronounce them guilty, thought proper to discharge them." The judges sitting were Argoti, Mericult, Dorcière, Lanusse and Morgan. Calendar, 7. Also, Claiborne to Madison, October 19, 1804, Letter Books, 2: 368.

5 Calendar, 7.
pleading, all of which would have been unfamiliar to 'Civilians.' Thus, some doubt remains as to whether these regulations were designed by the Court or by Governor Claiborne. On the one hand, Claiborne stated in a letter to Madison that he had decided to organize a court "somewhat similar to the Tribunals of the United States"; but on the other hand, he claimed that, "the forms of proceedings I in a great measure left to [the Court's] own discretion." Whatever their source may be, the regulations themselves speak of a familiarity with common law proceedings. I have chosen to look at one case, rather than try to present a generalized overview for several reasons. First, I have chosen this particular case because more information, in the form of correspondence, is available for it than any other heard in the Court of Pleas. Second, focussing on one case is a tried and true approach in legal history, and I presume that it can be used to equally good effect in a geography of law. And third, I want to discuss the problems that common law forms created in a Civil law context in more concrete and explicit terms than would have been possible had I attempted an overview. Therefore, the story that follows traces out Alexandre Baudin's first encounter with the American legal system in territorial Louisiana.

Labie v. Baudin

6 Claiborne to Madison, October 16, 1804, Letter Books, 2: 356; and Claiborne to Jefferson, May 1, 1804, Ibid., 2: 120.
On January 23, 1804, Joseph Labie sued Alexandre Baudin, a sugar planter, for the recovery of a one thousand dollar debt. When Baudin failed to appear in court, the action was decided ex parte in the plaintiff's favor, Labie proving the debt by producing a note of hand signed by Baudin. The court issued a writ of execution on Baudin's property, which prompted him to appeal first to Claiborne, then to President Jefferson. Although both of Baudin's attempts to stop execution failed, the grounds on which he objected are of interest. First, he objected to the informality of the proceedings. Claiborne addressed this issue in a letter to Baudin, in which he states that he had not interfered in the judgment of the Court of Pleas because: "The claims of M. Labie against you were not disputed, and your objections went not to the justice but the forms of the proceedings against you." Precisely so - Baudin seems never to have contested the judgment of the Court, but rather their methods, and the speed with which they were carried out. Baudin was accustomed to the methods of Spanish tribunals, in which suits involving such a large sum of money would have been adjudicated in a set, written, and rather slower manner.

Under the Spanish judicial system, in cases involving large debts, the entire process would have been in writing. If the debt was fully established, for example by a ledgerbook entry, or by a note of hand, the creditor would draw up a

7 Calendar, 7.
declaration stating the claim, accompanied by the document which proved the claim. The plaintiff would submit these written proofs to the judge, moving that a writ of execution be granted by virtue of these documents. Upon granting the execution, the judge would then summon the debtor (whose presence had been unnecessary up to this point), and present the writ of execution, ordering payment. If the defendant could not pay, property equivalent in value to the debt would be seized. The debtor had three days to oppose the execution, and ten days to prove an opposition. If the opposition was not proved, time would pass as movables or immovables were appraised; more time would pass, because movables could not be sold before public notice was given three times in nine days, while immovables required public notice every nine days for thirty days. 9

Baudin's experience in the Court of Pleas was quite different. Doubtless he was issued a writ of summons, but failed to appear nonetheless. This may have been because he did not understand why his presence was necessary during a process which had formerly involved only the judge and the plaintiff: according to Spanish forms his presence would not have been required until the judge presented him with the writ of execution. This was not, however, the mode of procedure of the Court of Common Pleas - its regulations specified the procedure for a writ of execution:

9 Dart, Courts and Law, 285. This was the process for simple debt collection. The basic procedure for civil cases was far more complex.
"After judgment shall have been obtained, a writ of execution shall issue, commanding the sheriff to take or retain (as the case may be) in his custody the party against whom judgment shall have gone, and also to seize and sell all such property as he can find, and after satisfaction of all costs and charges occurring thereon, pay the net proceeds of the sales to the party who shall have recovered..."\(^{10}\)

Rather than being served by a judge, the writ was served by the sheriff. Further, a note of immediacy is struck by the phrase "take or retain in custody", in contrast to the Spanish procedure outlined above.

Baudin was called back to court on February 27, when Labie sued him for the interest due on his loan. The entire proceeding was viva voce, doubtless compounding Baudin's sense of the informality, and hence the invalid nature of the proceedings against him. Furthermore, Baudin had assembled his creditors, apparently at the New Orleans L'Hôtel de Ville where the Court was in session, in order to enter "into some agreement with them." Two of these creditors, Paul Lanusse (who also happened to be one of the presiding judges) and Lewis Fortin, petitioned the court to stay the execution, ostensibly so that some informal agreement could be reached by Baudin and his creditors. This request was refused, and Lanusse and Fortin declared their intention to appeal to the Governor's court.\(^{11}\) Claiborne would subsequently refuse to hear the case, thereby tacitly concurring with the Court's decision.

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10 Calendar, Regulations, 2-4.
11 Ibid., 21.
Second, and probably more importantly, Baudin objected to the fact that the writ did not specifically exclude sugar from seizure as security for the debt. This was the issue that prompted Baudin to petition Jefferson on February 14, 1804. According to Baudin, the Laws of the Indies (the Spanish laws) exempted his "terres, Negres, et Ustencilles Nécessaires aux travaux de [la] Sucrière", [lands, Negroes and implements necessary to the cultivation of sugar]. He suggested that the American government should extend these same exemptions to Louisiana sugar planters. While none of the above mentioned items appear to have been seized, the entire proceeding was evidently extremely disturbing to Baudin. He continued, complaining that the Court, "N'etant Compaussé que de Negotient... ne Conaissent nulemment les loix ni les cour de la Jurisprudence", and that Governor Claiborne

"ne veut faire attentio, malgré les Répresentacions que lui a fait le Suppliant Ainsy que plusieurs habitants, Alleguant qu'il ne peut Prendre sur lui les Pareilles chausse; et permet que la Cour qu'il à Elu fasse saisir les habitans debiteurs, qui sont journellement Condamné Sur les loix Americquaines à ce que disent les Membres compaissent la ditte cour de Justices, et sans les avoir fait promulguer avant de les mettre en vigeur, ce qui forme un désordre General, et entrainëra Une Ruine totalle de grands nombres d'habitans..."  

12 "being composed only of Merchants...[the Court] understands nothing of the laws or the courts of Jurisprudence," and Claiborne "does not wish to pay attention, in spite of the representations which the petitioner has made to him, as well as several other inhabitants, Alleging that he cannot take on himself such things; and that he permits the court that he has elected to seize resident debtors, who are daily condemned by the American laws to whatever the members of the court may say, and without having notified them before action is taken, all of which results in General disorder and will bring about the total Ruin of a large number of inhabitants..." Alexandre
One possible explanation for Baudin's petition to Jefferson is that under the Spanish system there was a right to appeal to Havana, and depending on the importance of the case, all the way to the Council of the Indies in Spain. Baudin must have been astonished when Jefferson referred him back to Claiborne, who smugly assured him that "no authority has as yet been established paramount to that of the Governor I mean as to Judicial decisions." Claiborne also pointed out that "every court has an inherent right to regulate their own forms of proceedings, provided they be not at variance with the substance and general principles of the Law of the Land."13

Claiborne raised an important point - the difficulty of administering law through the Court of Pleas was that the inhabitants, such as Baudin, did not understand the new procedures regulating their affairs. At the same time, the federal government, and more to the point, Claiborne, was unsure of the substance of the Civil law. What is more, the procedures of the common law did impinge upon rights which Louisianians presumed were guaranteed them by the Spanish laws. This was demonstrated clearly in Baudin's case - upon his understanding of the Spanish laws, none of his sugar establishment could be seized to satisfy debt, not even the finished product.

This point is further clarified if we take into account the rapidity - compared to the Spanish system - of the execution process. Baudin's reaction to the writ of execution was to call together his creditors in an attempt to settle with them in a more informal manner. Judging by the reaction of some of his creditors, who attempted themselves to have the writ stayed, this was not an extraordinary or unfamiliar procedure.

Baudin's complaint about the membership of the Court should also be taken seriously. The Court was composed almost exclusively of merchants, who were the source of most of the credit in Louisiana at a time when there were no banks or credit institutions: rapid and efficient debt recovery undoubtedly assumed primary importance. In the Louisiana economy, borrowers tended to be planters, who generally had ready cash only after the consignment and sale of their crops by the merchant houses. Lenders tended to be merchants, who lent on the basis of expected consignments by the planter. It is not surprising to find that a conflict of interests would arise between merchants and planters - a conflict that was to be adjudicated largely by New Orleans merchants. Indeed, this conflict mirrors the clash between debtors and creditors on a larger scale. Lawrence Friedman has noted that throughout American history, courts have tended to uphold creditors' rights, while legislatures have tended toward debtor relief.¹⁴

This certainly describes the situation in the first months of the Court of Pleas, at a time when Claiborne was virtually the legislature.

Regarding debt collection, Claiborne noted that debtors "have recently complained of the zeal and promptitude with which the justices discharge their duties, and beg that some delay in the hearing and determining causes be prescribed, I have endeavoured to accommodate Debtors on this point, in prescribing certain rules of proceeding for the Court which will produce in part the delay solicited." Claiborne, like many American legislators, altered the procedure of the court in order to protect debtors.

Merchants and Planters

Baudin had complained in his petition to Jefferson of the "elected" nature of a Court composed of merchants, who would naturally not understand the problems of a sugar planter. The Court was certainly composed predominantly of merchants, eight

15 Claiborne to Madison, March 2, 1804, Letter Books, 2: 15. Claiborne instructed the Court "que l'audience doit être ajournée de jour en jour jusqu'à trois jours consécutif," rather than meeting weekly. Therefore, on May 9 the Court adjourned until the first Monday of June. Calendar, 51. There are several examples in the Spanish Judicial Records of the length of execution procedures. In Pictet v. Raguet, Pictet sued on March 2, 1770. On May 12 of that year judgment found for the plaintiff. On June 27 the Assessor ordered Raguet to appear to verify his signature. On October 20 Raquet had not appeared, and the plaintiff could not continue the action. By January 13, 1772, Pictet had not recovered the money owed, and there is no more mention of the case. Laura Porteus, "Index to the Spanish Judicial Records of Louisiana V", LHQ 7 (1924) 145.
of the ten original judges were members of that profession.\textsuperscript{16} Of the two remaining members of the Court, Antonio Argotí had been a clerk and an attorney under the Spanish régime, while the profession of the other is unknown.\textsuperscript{17}

Information about many of the court members is scarce, but enough is available to hazard some general statements. Dart's claim that the Court had an English language and common law bent is certainly true if the proportion of Americans on the Court is compared to the proportion of Americans in the Territory at the time. However, it would not be fair to say that the Court was stocked with strictly English speakers. Six of the Court's members spoke French; three, and possibly four of them, had arrived in Louisiana before 1790. Another three were established by 1801, and one possibly much earlier. Garland was a relative latecomer, Guérin a mystery, and Dubuys was involved with an old firm from St. Domingue, and may have arrived in Louisiana during one of the influxes of immigrants from the Island during the 1790s. The Creole population was seriously under-represented. Mericult and probably Lanusse, were French, Dorsière was Swiss, Dubuys was probably from St.

\textsuperscript{16} Beverley Chew, Gaspard Debuys, Eugène Dorcière, Benjamin Morgan, William Kenner, Paul Lanusse, William Garland, and Jean Mericult.

\textsuperscript{17} There is a consensus in the literature that the Court was composed of seven members. I have found that this is not accurate, at least according to the Calendar. Each case in the Calendar records the judges sitting at the session recorded. Each of these men is recorded: the fewest number of sessions attended by any of them was 8 in a four month span. In addition, they are listed before the minutes of the first session.
Domingue (Haiti) or France, Morgan, Chew, Garland and Kenner were all American, Argoti was Spanish, and Guérin unknown.

According to Joseph Tregle Jr., the paucity of Creoles on the Court was not unusual. He has pointed out that the foreign French – refugees from St. Domingue, the French Revolution and Napoleonic oppression – provided much of the leadership in the "Gallic community", and were the Anglo-Americans' true rivals for political power. Tregle claims that the foreign French were better educated, more versed in politics and law, and generally possessed of more initiative than were the Creoles.¹⁸ This assessment, and particularly the claim that Louisiana Creoles were, as a rule, poorly educated, has been criticized by Paul Lachance, who claims that "by contemporary standards" literacy in New Orleans was high, with Creoles setting a higher standard of literacy than the foreign French.¹⁹ Lachance bases his literacy rates on an individual's ability to sign a marriage contract, rather than making a mark on it. David Cressy claims that the ability to make a signature constitutes "a cut-off point in the middle range, somewhere between a rude ability to read and actual fluency in writing." People who could sign their names could often read, Cressy argues, because reading was taught prior to writing.²⁰

²⁰ David Cressy, "Levels of Illiteracy in England, 1530-1730" in Harvey J. Graff, ed., Literacy and Social Development in
Lockridge sharpens this assessment, pointing out that in nineteenth-century Anglo-America 30% to 50% of men who made marks, as opposed to signatures, could read. But he lowers this figure to 10% in nineteenth-century France, where reading and writing were taught simultaneously. Neither of these assessments can genuinely be said to 'fit' Louisiana: literacy in Anglo-America was linked to Protestantism, while illiteracy in France was the result of the educational system. Louisiana had been a Spanish colony for over three decades, it was predominantly Catholic, and public education was not available. While Lachance's figures may be accurate, they do not account for the influence that the foreign French garnered in Louisiana, and given the bulk of evidence - travel accounts, correspondence, and the proportionately overwhelming dominance of foreign French in political and legal affairs, and newspaper publishing until 1824, Tregle's point is well taken.

The travel accounts which address literacy the most directly are written by visiting Frenchmen. Comments range from, "A Creole told me with great naïveté one day, that a never failing method to make him fall asleep, was to open a book before him", to, "But indeed, what is there to do in the evenings [other than gambling]? Converse? About what? Louisianians are strangers alike to art and science or even to the most ordinary items of knowledge." Berquin-Duvalon, *Vue de la Colonie Espagnole du Mississippi ou des Provinces de la Louisiane...en l'Année 1802* (Paris, 1803), 60; C.C. Robin, *Voyage dans l'intérieur de la Louisiane* 2 vols. (Paris, 1807), 56. Daniel Clark wrote to President Jefferson that "not above half the inhabitants can read or write the French, & not two hundred in the whole country with correctness", Clark to Jefferson, September 8, 1803, *Territorial Papers*, 9: 38. A few
The balance struck between French speakers and Anglo-Americans on the Court of Pleas bench did not last long. The composition of the court had shifted to a decided Anglo-American majority by mid-June. It is unclear precisely what occurred during June, but Claiborne appointed four new judges to the Court: three were British, one was American. Ostensibly, these four men were intended to replace four of the original members, but it is impossible to know exactly whom. Of the original ten, five did not appear on the bench after June 9, 1804, but it is not clear whether these new appointments were due to resignations, more time-consuming appointments, or dismissal from duty. The post-June 9th Court may have been the Court that drew so much fire from Louisiana historians, despite the fact that they sat for less than four months.

There was another change which took place during the session of the Court of Pleas which occasioned a great deal of public discontent: the licensing of lawyers, which began on March 20, 1804. Through April 9, 1804, twenty-three lawyers were licensed, and by September Claiborne estimated that there

examples of prominent foreign French include Louis Moreau-Lislet, longtime Superior Court judge and student of the Civil Code; Louis Guillaume Du Bourg, first bishop of the diocese of Louisiana; Louis Duclot and J-B Lesueur-Fontaine, editors of the first newspaper in Louisiana, Le Moniteur; and Joseph Roffignac, mayor of New Orleans.

23 The new appointees were Thomas Randall, Charles Patton, Andrew Burk and George Pollock. At least three of these men were merchants. Kenner, Chew, Garland (who had been appointed Surveyor of New Orleans), Lanusse, and Dubuys did not sit on the Court after June 9, 1804.
were over thirty in New Orleans.\textsuperscript{24} Half of the lawyers mentioned in the Calendar were Anglo-American.

One of the effects of this licensing can be seen in the Calendar. In February, the Court heard 105 cases. Assuming one lawyer per plaintiff and defendant, this leaves 210 slots that could have been filled by lawyers. Of the 210 possibilities, only 25 were filled. In May, (which was a shortened session due to Claiborne's decree), 38 cases were heard, leaving 76 slots for lawyers, of which 62 were filled.\textsuperscript{25} It appears that the services of a lawyer had come to be seen as vital to one's cause. This had the effect of raising the costs of litigation, and, as Claiborne explained, "the great influx of American and French lawyers, wearied, (by their pleadings) the patience of the Court, and occasion'd the Disgust of some of the members."\textsuperscript{26}

The dissatisfaction with lawyers in New Orleans soon spread throughout the Territory, following the spread of American law. Indeed, the American lawyers would make their presence keenly felt in late 1804, when they initiated a suit before recently arrived Superior Court Judge, J.B. Prevost.

'Les Americains' argued that the Northwest Ordinance had established "judicial proceedings according to the course of the common law", and that logically, the Orleans Territory was

\begin{itemize}
\item \textsuperscript{24} Calendar; Claiborne to Jefferson, August 30, 1804, Territorial Papers, 9: 286.
\item \textsuperscript{25} Calendar. It is interesting to note that of the 14 remaining cases, in 8 the defendant did not appear, 3 people represented themselves, 1 had been settled by "amicable agreement", 1 was in jail, and 1 was appealed straight to the Governor's Court.
\item \textsuperscript{26} Claiborne to Madison, October 16, 1804, Letter Books, 2: 356.
\end{itemize}
entitled to the same "privilege". The issue at hand was defining the meaning of the "course of the common law." Their argument was countered by the Civilian lawyers, most notably Edward Livingston, who argued that "the law in force in Louisiana was based on the Roman law, not on the English law and that the term 'common law' was to be construed as 'the common law of Louisiana' and not as the 'common law of England.'" Judge Prevost ruled against the Americans, who would file the same suit upon the arrival of Superior Court Judge George Mathews the following year.

The Court of Pleas was, then, the first court in Louisiana to juggle common law procedure and Civil law substance. Despite its common law procedure, the majority of the Court's decisions were not common law in substance. Many cases were obviously decided according to the content of the Civil law. Many of these cases were probate and family law cases. But far and away the largest class of suits the

28 For example, in Marie Louise Constant v. J. B. Plest, the court granted the plaintiff's request to change her tutor. There are several examples of individuals appearing in Court to solicit letters of administration for the estates of deceased family members or friends. In Widow Darby v. Edward Forstall and F. Darby, the Court declared that the will "made by the late Peter Darby is null and void and of no effect in consequence it is ordered that the property of the succession be returned to the legal heirs." While this summary is scanty, it appears that Darby's will was nullified because he had failed to observe the forced heirship principle of Civil law. Forced heirship limited the testamentary freedom of a parent to dispose of property, requiring that the bulk of property pass to the children and the widow. While it is possible that the will was nullified due to a technical error, this seems unlikely in Louisiana at this time: nuncupative wills, a form
Court heard were for the recovery of debts, and in the
majority of these, the plaintiff was a merchant, or the
representative of a mercantile house.

Most of these cases were settled summarily, as in Labie
v. Baudin. There were, however, several cases in which the
judgment bears no resemblance to typical common law decisions.
I have chosen two as particularly clear examples of this type
of judgment - both disputes involve slaves.

The first of these, J. Guillot v. J. Wiltz, reads:

"The parties present to the court articles of agreement
between them, in order to declare the nullity of the Sale
of a Negro woman named Madeleine bought by plaintiff at
the auction of the effects of the late Laurent Wiltz,
because the Negro woman is hysterical. The court in
consequence of the nullity of said sale, condemns
defendant to take back said Negro woman, and condemns the
plaintiff to pay her hire from the date of the sale to
this day, which hire the court rates at $170 which the
plaintiff shall pay in the following manner and without
interest, to wit, $100 in hand, and $70 in 6 months. The
court order beside that each party shall pay the costs
they have sustained to this day, and that those of the
present judgment be equally paid and divided by the
parties." [Judges: Garland, Dorsière, Guérin]

The other, Jean Gravier v. Cadet Déjan, reads:

"The plurality of the judges decree that in consequence
of the good faith with which defendant had acted in this
affair, and the particular circumstances which accompany
it, the parties shall share alike the loss of the Negro
of the plaintiff drowned in the service of the defendant
his value being estimated at $900. Appealed." [Judges:
Argoti, Randall, Garland, Patton, Dorsière]

Both judgments show a concern for "common-sense" fairness in
preference to strict legal reasoning. Guillot v. Wiltz
demonstrates the principle of redhibition, the nullification

frequently resorted to by isolated and illiterate inhabitants,
were common.
of a sale due to a defect in the article sold that rendered it virtually or totally unusable, or that would have prevented the purchase if known to the buyer. Rather than simply overturning the sale, the Court ordered Guillot to pay for Madeleine's time in his possession. Not only did it set the cost of Madeleine's hire, it also presented a detailed payment schedule, while ordering both men to pay court costs.

*Gravier v. Déjan* also demonstrates the Court's concern with fairness. Apparently, there were mitigating factors involved which precluded finding solely against the defendant. The Court seems to be determined to reward the defendant for his "good faith", which it does by assigning to him only half the cost of the 'Negro'.

Neither of these cases was settled by the formal appointment of arbitrators - a practice common in Louisiana - but both cases are similar to an arbitration process rather than to a strict, formal, legal proceeding. By this I mean that in formal legal settings, there is generally a winner and a loser. The loser alone pays, or performs acts of restitution. In arbitration, there are no winners or losers in a strict sense, because both parties are compelled to perform. In this sense, even the person who is compelled to perform more has extracted something from the other. In other words, many arbitration decisions can be seen as a compromise between the two parties, rather than as a strict application of the law. Bruce H. Mann has argued that in the small, agriculturally oriented towns of colonial Connecticutt
arbitration played a vital role in maintaining community cohesion by mediating economic and social relations. In other words, a sense of community was maintained by the use of an arbitration process because it resembled a compromise between the parties. The arbitrators, as 'representatives' of the community, decided disputes on the basis of "common sense" rather than through an adherence to abstract legal principles."

This was probably not the role played by the decisions in Guillot and Gravier. New Orleans was a large, commercial, port city. Its web of trade extended from Liverpool, Bordeaux and Baltimore to Havana and Brazil. Rather than adjudicating in a small, tightly-knit, agricultural community, the Court of Pleas was dealing with a merchant community based in New Orleans, a more peripheral but powerful planter class, Creoles, foreigners, Americans, and the everyday squabbles of a city of over 8,000 people. While the judgments do have some common ground with arbitration, they do not seem to me to be examples of that process.

I think that there are two, probably inseparable, accounts of the 'peculiar' process of adjudication illustrated by Guillot and Gravier. The first of these was the scarcity of copies of the Spanish code to which the Court could refer. While certain everyday procedures, such as conveyancing, were common knowledge, and never executed without a notary public

present, the finer points of the Civil law were probably not within the intellectual purview of the Court as a whole - the exception to prove the rule perhaps being Argoti, who must have had some familiarity with Spanish law. However, rather than assigning the Court's judgments solely to ignorance or to the unavailability of written texts, there is another possibility: the Court may simply have placed greater emphasis on equity than on strict legality. I will trace a brief genealogy of equity in order to suggest that there may have been geographies of equity, or more broadly, geographies of judicial emphasis, at work in territorial Louisiana.

Geographies of Equity

Equity has been, traditionally, the power to dispense with the rigidity and rigor of general laws in particular cases. Conceptions of equity, as well as its operation, have varied over time and through space. Modern American conceptions of equity are different from those that were being formulated at the beginning of the nineteenth century, while, at that time, there were distinctions between American and English conceptions of the role of equity, both of which differed from those of nations with Civil law traditions.

30 Argoti's knowledge of the Spanish system would have derived more from his position as Clerk of the Court, escribano, than from his work as an attorney. According to Dart there was a distinction in the Spanish courts between lawyers, who possessed legal knowledge, and attorneys, who were merely representatives of the litigant and did not necessarily possess legal knowledge. Dart, Courts and Law, 279.
Both Civil law and common law traditions of equity can be traced back to the Greeks, where Aristotle first attempted to formulate juridical equity. For Aristotle, equity meant looking to the spirit rather than the letter of the law in cases that involved misfortune or error, as distinguished from wrong acts. The Romans followed in the Greeks' footsteps, recognizing, as Aristotle had, that law and justice are not equivalent terms. Further, the Romans came to associate *ius gentium* with natural law - or right reason - while *ius civile* was regarded as man-made, written, law. The Romans eventually formulated a body of equitable law dispensed by the praetors. Equity and law were "formally fused" by the reforms of Justinian.31 Through the expansion of the Roman Empire, Roman law and equity were diffused throughout Europe, and remained influential for centuries.

In England, full-fledged equity courts had appeared by the fourteenth-century. They were the "Keepers of the King's Conscience" and their function was "to allow individuals who believed themselves without remedy or without adequate remedy before the common law to appeal to the king's conscience for a special dispensation."32 By the fifteenth-century these courts had been formalized as the Court of Chancery. These Courts soon came into conflict with the Courts of Common Pleas, the common law courts. Debates were triggered by

32 Ibid., 24.
questions surrounding the legitimate sources of legal authority. Sir Edward Coke, for example, believed that the common law was superior (in all respects) to equity law - he claimed that the common law was a science, the product of "artificial reason and judgment" - not the result of natural reason, while equity law was stigmatized as 'foreign'. Coke argued that in England, the legitimate source of the law was the judiciary, not the king or the Church, and Courts of Chancery had no business reviewing common law decisions. Various other positions in the debate were taken by Sir Francis Bacon and Thomas Hobbes. Bacon believed that the powers of review vested in the Courts of Chancery played a vital role in checking judicial discretion in the common law courts, while Hobbes believed that equity was a moral virtue, a law of nature which pre-dated civil society, which had become a (formal) law only after civil society had been formed, and could only be enforced through the power of the sovereign, the source of judicial power. Neither of these arguments, however, provided a rationale for the unchecked discretionary powers of the Chancery Court.

The publication of Lord Kames' *Principles of Equity* in 1776, provided a solution to many of these problems. Kames argued that equity was essential as a remedy to specific common law decisions, but he, too, worried over the issue of judicial discretion in the equity courts. He reasoned that only by systematizing equity could judicial discretion be
sufficiently limited - he counted on the power of precedent to curb the judges' powers.

The debate in England influenced American ideas of the law-equity relationship, largely in the theoretical realm. The American experience with colonial law, which did not always make a clear distinction between common law and equity jurisdictions, also played a role in the formation of the American judiciary. The creation of the judiciary, and the roles that law and equity would be assigned, assumed even greater importance in light of the need to effectively subordinate the common law to the more 'elevated' principles elaborated in the Constitution.

By the 1780's the issue for Americans was less one of the relationship between law and equity, than one of where equity power was to be exercised - at the state or federal level of the judiciary. The greatest fears arose in response to the possibility that state judiciaries would be wholly subordinated to federal courts if the latter were given equity powers. This fear was compounded by the potential of federal courts, upon receiving equity jurisdiction, to interpret the Constitution without being confined to its actual text - in other words according to its intention and not its words. Judicial discretion was also, therefore, recognized as a serious problem in the United States.

Congress addressed these issues in the Judiciary Act of 1789, and the Process acts of 1789 and 1792. The result was a clear distinction between the procedures of equity pleading
and pleading at law. At the same time, these Acts left both state and federal courts with jurisdiction over cases in both law and equity. The distinctions that were made between pleading procedures were intended to limit judicial discretion at the federal level by establishing a clear rule which limited the Court's equity jurisdiction to only those cases brought by a writ of error. At the state level, equity jurisdiction was to extend only to those cases where no remedy could be had at law. By these provisions, the Act extended federal control over equity proceedings in the states.

Clearly, then, in Anglo-American law, equity was a separate and formal process to which appeal could be made only to remedy decisions made previously in the course of the common law - equity followed the law and not vice versa."

Civil law conceptions of equity that lingered in Louisiana were quite different from those described above. Equity, particularly in France, never underwent the dramatic separation from positive law that had occurred in the Anglo-American legal systems. Indeed, the importance of equity in the French system may have been enhanced by the codification

33 There are numerous differences between American equitable relief in the 1790's and those of today. First, equitable and legal procedures have gradually merged. Two other notable changes include the judicial tendency to apply equity to broad social groups, rather than individual 'hard bargains', and the shift in focus from such concrete rights as property rights, to more abstract rights, such as equality. Ibid., 9.
movements, and particularly by the efforts at codification of the Revolutionary era.

The French legal codes of the Revolutionary period, which culminated in the Code Napoléon, were intended to be a complete and general body of rules. French codifiers were fully aware that they could not make codal provisions for the entire range of specific possibilities that would have to be adjudicated. There would be lacunae which could only be filled by judicial interpretation. They acknowledged their appreciation of this circumstance in the preliminary book of the Projet of Year VIII, stating that "in civil matters, the judge, in the absence of a specific statute, is a minister of equity. Equity is a return to natural law or to customs received into the statutory law." Despite the connotation of arbitrary action which lingered around the word equity - stemming from the abuses of the pre-Revolutionary parlements - it was still seen in France as a vital part of the administration of justice.

The process of judicial interpretation involved in a system of written law, as opposed to case law, is different. In the Civil system, the judge extrapolates from the statutes, or articles of the code, to the facts. The common law judge frequently abstracts the facts in order to follow precedent.  

The Civil law process implies a recognition of the specificity of the case, and, hence, the possibility that there is no codal provision that applies to it. To achieve justice the case must be decided according to equity, which can be seen as a mode of interpretation which serves as a bridge between the general and the specific - it concretizes the general principles upon which the entire code is founded. In this sense, equity is not an extra-legal factor but is a vital part of the judicial process. The irony of the interdependence between a written, codified system of law and equity is that it requires that judges be endowed with rather extensive discretionary powers, which the codes were originally intended to limit. 37

The problem with equity is that it allows judges to bypass or transcend formal legal norms, and to adjudicate according to their personal ethical or social norms. This allows a degree of subjectivity in a system that is geared toward the objective - impartial - administration of justice. 38 On the other hand, it allows a degree of justice-as-fairness that frequently is not present in more positivistic systems of law.

37 The more recent French civil codes have been careful to limit the discretionary powers of private law judges, but have still allowed them a great deal of latitude by refusing to define broad and crucial terms such as "bonnes moeurs" and "ordre public".
38 I think there is a potential inherent in equity powers for social engineering on a grand scale, particularly in courts of the last resort. The U.S. Supreme Court has occasionally realized this potential in rulings such as Brown v. The Board of Education.
These geographies of equity help to explain some of the distinctiveness of the judgments in Guillot and Gravier. They were not arbitration judgments, but depended on a similar conception of 'common sense' justice which is not typical in common law decisions. These geographies also help to account for a great deal of the criticism that was levelled at Governor Claiborne in his capacity as appellate judge.

The 'Laws of Justice'

While the Court of Pleas had raised eyebrows in New Orleans, particularly with the mushrooming of lawyers in the city, the Governor's Court was sharply attacked in the local press and pamphleteers in New Orleans. Several cases that came before the Court of Pleas, and subsequently before the Governor in his capacity as judge of the court of final resort, are mentioned scathingly in The Louisiana Gazette as exemplary of the seemingly arbitrary, and certainly confused, legal system of the time.

Two of the cases mentioned by The Louisiana Gazette are Morgan v. Paullet and Fortier, and Bonnet v. Roque. In both cases, credit had been advanced to the defendants by the plaintiffs. In both cases, the central question revolved around the payment of interest when war in Europe had interfered with the transaction. In the first case, Claiborne had ordered that the interest that had accrued during the period of the war was to be deducted from the plaintiff's
demand. In the second, he ordered the defendant to pay the entire amount of the interest claimed, including the period during which the defendant had been the captive of a European power. 39

These judgments prompted the author of the article to ask if Claiborne always judged by the laws of the United States, or by those of Spain, "or if not, by what law did he judge" - did he simply "trust to the guide of his own discretion"? 40 These questions bring two critical points to the fore - the system by which Claiborne judged, and the extent of his discretionary powers.

Claiborne himself answers, to some degree, the first question. In a situation that would be repeated frequently, Claiborne found himself in a defensive posture due to the criticisms of the New Orleans press and pamphleteers. Typically, he refused to respond to his local critics, preferring to justify his actions solely to Washington. In a long letter to Madison, Claiborne justified his conduct in the Governor's Court, claiming that "although I will readily acknowledge my want of Information of Spanish Law, yet I profess to be acquainted with the Laws of Justice..." 41 Claiborne, unacquainted with Spanish law and the French

39 The Louisiana Gazette, January 15, 1805. The other case mentioned was Dutan v. Cenas. I have not looked at the originals of these cases. I am not, however, as interested in reporting the cases with complete accuracy as I am in the public perceptions of them.
40 Ibid.
language, yet unable to rigorously apply the common law
training he had acquired as an attorney in Tennessee, was
appealing to his only alternative, to the "Laws of Justice."
In a word, Claiborne was in a legal bind.

There seem to be two possible readings of the phrase
'Laws of Justice'. One implies equity, but as we have seen,
equity in the common law world had a set of rules and
precedents which were definitively separate from common law
process. At the same time, as a remedial process, equity was
thoroughly imbued with common law principles, in the sense
that in order to remedy a common law decision, it was
necessary to understand that decision. It seems unlikely that
Claiborne's conception of equity was this formal. But
Claiborne's conception of the law, what it was and what it was
supposed to do, must have been shaped to a great extent by his
formal training in common law, and it is doubtful that he was
completely free of these assumptions when he sat as judge. A
second possibility was broached by the editor of the Gazette
article: that Claiborne decided cases with no fixed legal
system in mind, but solely according to his own "discretion".
I have pointed out above the connections between natural law
and equity, connections that certainly persisted into the
nineteenth century. It is not far-fetched to equate a phrase
like 'Laws of Justice' to natural law, and then to its
connotations in Anglo-American thought. Thus, Claiborne's
delicate position was complicated by the perception that his
legal stance was arbitrary, that he decided as it suited him,
rather than by fixed legal principles. Adding to the appearance of discretion run amok was the way in which he had acquired appellate jurisdiction in the first place - by proclamation. And, as Baudin had found to his chagrin, there was no recourse from the Governor's judgments: his decisions were final. It is also worth reiterating the frequency with which "arbitrary" was linked to "despotic" in the rhetoric of this period of American history. I suspect that the author, by using the first term, hoped to evoke the second. It was general knowledge that Claiborne was appointed by Jefferson, that he alone possessed executive and legislative powers, and that he was the commander of the Territorial militia. His position as the judge of the court of last resort completed his image as a despot.

Conclusions

The battle over procedure - which the Americans 'won' - became particularly acrimonious because most Louisianians did not understand what was expected of them, or what to expect, in the new Courts of law. While unfamiliarity certainly bred contempt, it also bred distrust. Both Americans and Louisianians were skeptical of Claiborne's Court for essentially the same reasons: they doubted that justice could be rendered without adherence to some agreed upon logic, as embodied in either precedent or written law. In the absence of

this logic, both were alarmed by Claiborne's potentially unlimited discretion, and by the political overtones of both the Court of Common Pleas and the Governor's Court.

Both Courts demonstrate the ways in which a legal system can become politicized. With a large contingent of merchants on the Bench, the Court tended to reflect the interests of that particular occupational group, interests which often conflicted with those of the Louisiana planters. Planters did not trust the Court to be an impartial arbiter of both rural and urban concerns, and planters and merchants parted company on the issue of debt collection. On the other hand, much of the criticism of Claiborne was produced by an Anglo-American newspaper which professed different political views from those of the Governor. How much of the Gazette's criticism reflected genuine concern over the Governor's legal competency, and how much was political hay-making is uncertain.

The records of the Territorial Court of Pleas also suggest that there was more at stake than a conflict of interests. Louisianians could not understand how justice could be achieved by a strict adherence to an unwritten law that did not incorporate equity. The concept of appealing to a separate court of equity for remedy to a legal decision must have seemed absurd to people with a conception of justice as fairness. The importance of equity to justice was expressed in the Louisiana Civil Code of 1808, which declared that "In civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide
equitably an appeal is made to natural law and reason, or received usages, where positive law is silent."^43 The differences between Civil and law conceptions of equity suggest that two histories, and geographies, of equity came face to face in Louisiana. I have briefly traced how these geographies may have arisen in the Civil and common law systems, and certainly the different expectations which Louisianians and Anglo-Americans had of the dispensation of justice reflected these geographies of equity. I also think these geographies of equity contribute to an understanding not only of the specific judgments in Guillot and Gravier, but also to the wider situation in Louisiana. Americans believed the Civil law system to be arbitrary (and hence despotic), while Louisianians believed the same to be true of the common law system, although for different reasons. The viva voce proceedings and decisions based on case law in common law courts made decisions seem whimsical, probably because there seemed to be no source from which they could be traced: to 'civilians' case law seemed to be an unwritten hidden law.

Unfamiliarity, Claiborne's (seemingly) unrestricted discretionary powers, and different conceptions of equity all contributed to render the administration of justice uncertain in the eyes of Louisianians. By this I mean that, for them, the legal system had ceased to function in a predictable way, and predictability is an essential quality for any legitimate legal system. This is particularly clear in Baudin's case. The

^43 Louisiana Civil Code of 1808, Chapter IV, Article 21.
combination of unfamiliar procedure, and the threat to seize
his sugar resulted in Baudin's conviction that the procedure
was illegitimate - it had been informal, and it had unforeseen
consequences.

The battle surrounding the legal system in Louisiana
would continue unabated until 1808, when the Louisiana Civil
Code was passed by the Territorial Legislature and received
Governor Claiborne's assent. In the next chapter I focus on
one of the last, but not the least, of the legal battlegrounds
in Louisiana: the St. Mary's Batture.
Chapter 5

The New Orleans Batture: Disputed Geographies of Jurisdiction

On May 23, 1807, the Superior Court of the Orleans Territory found for the plaintiff in Jean Gravier v. the Mayor, Aldermen, and Inhabitants of the City of New Orleans. The case centered on the ownership of the Batture, an alluvion formed of sediment thrown up by the Mississippi River over decades. It had been used by the public for wharfage and fill dirt until 1804 when Jean Gravier claimed it as private property and attempted to enclose it. In the courts, the batture debate revolved around issues of fact, but for the bulk of the Louisiana populace the issues at stake were more general, revolving around customary public rights of use. To the inhabitants of New Orleans and the rest of the Territory, this judgment was a powerful example of the ways in which the American legal system could deprive them of property 'rights'.

The Batture St. Mary became a vortex that first drew the New Orleans Municipality and the Territorial government into its grip, and eventually pulled in the federal government and received national attention. The case is of interest because all levels of government - municipal, territorial and federal - came to bear on it. At the local level, the Batture was predominantly a social issue, while at the federal level, in

1 I have never found a citation for Gravier v. The Mayor, et al.
Livingston v. Jefferson, it became extremely politicized. At all levels of debate, the participants assumed that these blossoming political and social questions could be handled by the legal system, but at every level, its methods and decisions were disputed.

The Batture Controversy, as it became known, turned on several important issues. First, it was a complex debate which encompassed private property rights and customary public rights of use. This debate was related to the different emphases which Civil law and common law placed on the legal protection of public rights, and suggests that there were geographies of public and private right. Second, the case was decided according to Spanish law, not French or common law. This, in essence, established Spanish law as the law in force in the Territory. And third, the case stood at the crux of several issues for the federal government and the Territory. The federal government seemed to be caught in a web of waning and rising trends: that of federal control and development of the newly acquired public domain embodied by the territories, contrasted with a growing impetus toward privatization of the public domain as a more effective means of development. Federal involvement also served to politicize the judicial process to an unconscionable degree. At the local level, Louisianians were confronted with the removal of a valuable public resource to a strictly private domain. Even though the judges based their decision on Civil Law, Louisianians

2 Livingston v. Jefferson, 15 Fed. Cas. 8411 (1811)
perceived the outcome as the result of judicial error, blaming the judgment in favor of Gravier on the American judges' unfamiliarity with the Civil law and with the customary rights of the country. The case also precipitated unlikely alliances, forged as participants and observers alike aligned themselves with the litigants.

Jurisdictional questions arose at each level of the case. The jurisdictions involved in the Batture stretched beyond a strict legal formulation of jurisdiction - the power and authority of a court to take cognizance of a case, or the spatial reach of the court. Legal jurisdiction is basically an agreed upon 'fiction', as for example, the distinction between trespass (a local action) and a suit for damages (a transitory action) demonstrates. But if we see legal jurisdiction as a fiction, as a spatial representation or demarcation of the agreed upon boundaries of power and authority, should we also see the exercise of power, or the recognition of authority as uniform throughout that area? I am suggesting that there are, and were, other networks of power and authority - other 'jurisdictions' - that overlap, and do not necessarily coincide with, legal jurisdictions. These networks may be recognizable through a refusal to acknowledge legally constituted authority, or through an emphasis on or recognition of other types of authority. One such source of authority was the importance of custom to Louisianians, and, to a lesser degree, its importance to the Civil legal system. Many of the legal decisions of the Territorial Superior Court
were not recognized as legitimate by Louisianians but custom frequently was. The legitimacy, and power, of custom in Louisiana was demonstrated in the Loppinot case discussed in Chapter 3, where custom took precedence over both Civil and ecclesiastical law. As E. P. Thompson has noted, "common right is a subtle and sometimes complex vocabulary of usages, of claims to property, of hierarchy and of preferential access to resources" which are local in nature, they are "lex loci", local laws, and I think that custom necessarily implies a jurisdiction of its own. The Batture was a locus of conflict between customary and legal jurisdictions.

Yet another example of disputed jurisdictions was the desire of Louisianians to shore up the jurisdictional boundaries between the common and Civil law systems - in the wake of the Gravier decision they became aware of the porous nature of these boundaries.

In this chapter I focus on the disputes surrounding jurisdiction, in both its legal and customary forms. These disputes include the particulars of the Gravier case, the reactions it precipitated, both in New Orleans and in Washington, and the movement of the Batture as an issue from the territorial court to the federal district court system. I also discuss the differing emphasis placed on public and private rights in the Civil and common law systems. These differences, and the legal decisions of Gravier and Livingston, contributed to a perception on the part of

3 Thompson, Customs in Common, 151.
Louisianians that justice could not be obtained from common law courts or judges, and generated an awareness and determination which contributed to the successful passage of the Civil Code of 1808.

**New Orleans Settings**

The Batture St. Mary was adjacent to and up stream from New Orleans proper, and was part of a grant made to the Society of Jesus by the French Crown in 1726 (see figures 7 and 8). When the Jesuits were suppressed in Louisiana in 1763 their property was divided into six large lots and sold at public auction. Jean Pradel bought the lot closest to the city, and at his death it went to his widow, Alexandrina de la Chaise. She in turn transferred the property to André Renard, who bequeathed all of his property to his wife, Maria Josepha Deslonde, who inherited in 1785. Maria married Bertrand Gravier, and willed him the property in 1792. Bertrand decided to subdivide the property and lay out a suburb (a faubourg), named after his wife. More than 150 lots were sold to numerous buyers on various terms throughout the 1790's. Bertrand died intestate in 1797, leaving four collateral heirs, three in France, and a brother, Jean, in New Orleans, who was able to acquire all of Bertrand's property.

4 The heirs in France did not attempt to establish their rights to the property until 1819, in Gravier et al. v. Livingston et al., 6 Martin (O.S.), 297-377 (1819). Most of my information about the Batture cases comes from ASP, Public Lands, 2: 6-99. The best account I have found of the Batture cases is William B. Hatcher's *Edward Livingston: Jeffersonian*
New Orleans and its Vicinity
Jean Gravier’s Property
In Louisiana, the Mississippi River deposited silt and other material along certain portions of its banks. Over time, enough alluvial material could accumulate between the levee and the bed of the river to produce a parcel of land which was above low-water level for several months of the year - a batture. When a batture reached a sufficient size, owners of riparian property traditionally enclosed it by moving the levee closer to the river, therefore increasing the size and value of their property. While technically private property, battures were traditionally open to public use; hence anyone could dock or store goods on battures, or transport goods over them. Since the Batture St. Mary had not been enclosed, its soil was used to elevate houses, streets and sidewalks, and to maintain the levee.

In late 1803 Jean Gravier, probably recognizing the increasing commercial value of the Batture St. Mary, started to enclose it.\(^5\) Because the Batture had been traditionally open to public use, its enclosure prompted an outcry from the inhabitants of New Orleans, and the subject of the enclosure was raised by the City Council in February of 1804.\(^6\) On October 22, 1805, Gravier petitioned the Superior Court for damages to the property resulting from the recurrent trespasses of the inhabitants of New Orleans. In the petition

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5 Unfortunately, I have found no details about Jean Gravier in my research - he does not appear to have been one of the 'notables' of New Orleans in this period.
6 Dargo, *Legal Codification*, 42.
he also asked to be 'quieted' in his possession of the property, which would have established his title to the Batture, his right to enclose it, and ostensibly removed any grounds for future litigation or controversy. Judge John B. Prevost, the only Superior Court judge present in the Territory, postponed a hearing of the case until a full complement of judges were present, and in the meantime granted an injunction which limited public use of the Batture to emergency repairs of the levee.' During the period that the injunction was in effect, Gravier conveyed approximately one third of the Batture property to Pierre Delabigarre, and one third secretly to Edward Livingston in December of 1806."

Gravier v. the Mayor et al.

After several postponements, Gravier v. the Mayor et al. came to trial in the Territorial Superior Court, presided over by the federally appointed Judges Joshua Lewis, George Matthews, and Lewis Sprigg. The Council for the City, John Gurley, Louis Moreau-Lislet, and Pierre Derbigny, failed to move for a jury trial and the case was tried by the judges en banc. Council for Gravier was led by Edward Livingston, who,

9 By the laws of the Territory, either party in a civil case involving such valuable property could have claimed the right to a jury trial, and certainly a jury composed of New Orleanians would have found for the defendants. Dargo attributes the failure of defendant's council to claim a jury trial to "their lack of familiarity with this procedure".
as owner of a portion of the Batture, had an interest in the outcome of the proceedings.¹⁰

The basic issue at stake was ownership of the Batture. The City attempted to establish its claim by alleging that Bertrand Gravier had abandoned the property, by the operation of Municipal law governing suburbs, and by right of prescription to the soil. It was therefore necessary for the plaintiff to establish satisfactory proof of his title, which he was able to do by producing records of the chain of conveyances by which he had ultimately obtained the property. The plaintiff's case was complicated by the nature of the sales made by Bertrand. Many of the lots he had sold were front lots - the lots closest to the river. These separated Gravier's back lots from the batture, and raised a more general question about the definition of riparian ownership. French, Spanish, Roman, and common law systems did not differ significantly on the rights of riparian owners to the alluvial accretions which developed adjacent to their property.¹¹ But

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¹⁰ Dargo, New Republic, 110. He underestimates the savvy of Moreau-Lislet, one of the most noted jurists in Louisiana history, however. Livingston explained that Moreau-Lislet did not request a jury because he "apprehended they would not be permitted to have a jury composed of inhabitants of the city (that is to say, of the parties to this cause.)" Orleans Gazette, November 16, 1807.
¹¹ Also representing Gravier were James Brown, Lewis Kerr, and A. L. Duncan.
¹² French law stated, "The same usefulness of navigation of rivers demands the free use of their banks...but the right of soil remains always in the proprietor of the adjacent soil." Domat, Books 1 and 2, no.9. Spanish law: "...although the banks of rivers belong, as to the dominion, to those to whose inheritance they are joined, yet, notwithstanding this, every man may use them..." 3 Siete Partidas 363, lib. 6, tit. 28.
¹³ Roman law: "The use of the banks is public by the law of
the separation of Gravier's back lots from the river by the front lots he had sold, and the City's contention that his property was bounded not by the river but by the highway that ran along the base of the levee, raised a question as to whether Bertrand was a riparian owner. 12

The case, therefore, turned on several points of fact: if the Batture existed at the time Bertrand Gravier acquired possession of the property; whether the property was bounded by the river or the highway; and if the Batture had been included in the sales made by Bertrand. The Court concluded that the "civil and Spanish laws...must form the rule of decision in the present case," and found the facts to be: 1) an alluvion had formed antecedent to Bertrand's acquisition of the property, and that it was sufficiently large to warrant annexation to his property; 2) Bertrand's property was, according to the "general usage of the country" bounded by the river; 3) the instruments conveying title in Bertrand's sales did not include the Batture, and therefore Jean Gravier remained the rightful owner. 13 The City moved for a new trial, on the grounds that title was in the United States rather than in the Corporation.

12 ASP, Public lands, 2: 23-32.
13 Ibid., 33.
Gravier's title, and by extension the titles of Delabigarre and Livingston, were thus judicially recognized. They were not, however, to be left 'quiet' in their possession.

Local Resistances

The Court's decision in favor of Gravier's claim created an uproar in Louisiana, initiating a series of pamphlets and newspaper editorials in New Orleans. In typical New Orleans style, each newspaper aligned itself with either the plaintiff or the defense. The Court itself was a favorite target, but Livingston also drew a great deal of fire.

Edward Livingston had come to New Orleans in 1804 to try to amass a fortune, in part because he had incurred a large debt to the federal government during his tenure as New York State Attorney General, where one of his underlings absconded with a large chunk of federal money. Livingston was well-versed in Civil law, and spoke French, both assets in New Orleans. He was a very successful lawyer, and made some lucrative land deals in Louisiana. Despite his unpopularity during the Batture controversy, he became a U.S. Senator in the 1820's, and made numerous important contributions to the Louisiana legal system. That Livingston was a target of abusive literature rather than Gravier is indicative of the ways in which Louisianians perceived the decision and the motives behind it.
Claiborne himself sums up the attitude that prevailed in New Orleans regarding Livingston's involvement with the Batture litigation, observing to Thomas Jefferson that "An important cause has been determined by the Superior Court of this Territory; It was one, in which Edward Levingston [sic] was the real plaintiff." The general opinion of the Creole populace seems to have been that Livingston himself had initiated the suit against the City, and that Gravier had been used merely as a blind for the real plaintiff. The *Louisiana Courier*, which strenuously defended the City's right to the Batture, noted this sentiment, adding,

"It is certain that a general and well-founded belief prevails in New Orleans that a conspiracy of lawyers is formed to rob the city of its property; and that the judges are of a conspiracy, their judgment in the cause of the Batture gives strong reason to suspect...Such dextrous lawyers can with ease, Twist law and judges as they please."  

The popularity of the view that the Court was somehow influenced by the Territory's American lawyers (and all the plaintiff's council were American) elicited a response from Livingston in mid-November. He complained that despite the "liberality bordering on imprudence" with which the Court had conducted the trial, "men are found [who] complain of the wiles of chicane; they speak as if their learned counsel had been over-reached, as if the bench had been deceived." He pointed out that not only were the characters of the judges "infinitely removed from beyond the reach of those factious

15 *Louisiana Courier*, November 4, 1807.
calumnies that have assailed them," but that personal attachments could not have swayed the bench in favor of the plaintiffs - during the course of the hearing, Gravier had been cited for contempt of Court, Delabigarre "was known to be the author of a libel on the administration of justice, for which the printer had been presented, and I...had spoken of the conduct of the majority of the bench in a manner certainly not calculated to conciliate their favor."

In the 'loftier' realm of pamphleteering, the accusations were more subtle, but possibly more damaging. Pierre Derbigny fired the first shot in August of 1807, laying out a rather undistinguished case for the City." Derbigny also noted that the court was

"In a country whose language, manners, usages, and sometimes whose laws are little familiar to [the judges]; ...the acknowledged integrity and information of those three judges are not always a solid security for the irrefragability of their judgment."

Derbigny questioned the ability of the American judges to arrive at proper decisions due to their common law training. This observation was a recurrent theme in both the press and in other pamphlets circulated in New Orleans. The Orleans Gazette declared its belief that "A fair trial of the cause could not be expected from three judges speaking a different

16 ASP, Public Lands, 2: 22.
18 Derbigny, Ibid., 286.
language...and bred under different laws, usages and
religion." Louis Moreau-Lislet also attributed the decision
in the Gravier case to the common law heritage of the judges,
arguing,

"Whatever be the integrity of the judges who rendered
this judgment, still we must deplore the situation to
which they have reduced New Orleans, possibly through an
imperfect acquaintance with our usages and laws, which
made it difficult for them to apprehend the arguments of
the Counsel for the city."20

The notion that the Court had erred in its decision was
widespread, as Claiborne noted during a trip to Concordia
Parish in October 1807.21

This widespread, and well publicized, belief that the
Superior Court had judged wrongly in the Batture case is
indicative of the level of sensitivity of Louisianians to the
potential injustices which could be wrought, not only by the
common law itself, but also by lawyers and judges who were
trained in it. There seems to have been a prevalent belief
that common law training rendered its practitioners incapable
of grasping the principles of the Civil law. This becomes most
evident in the plethora of organic metaphors used to describe
affiliation with a legal system. People were "bred" to their
legal system, they "imbibed this general and familiar
jurisprudence with [their] milk", it was an indispensable and
irrevocable part of them.22 I think this points to an

19 Orleans Gazette, October 1, 1807.
20 Cited in Dargo, Legal Codification, 161-162.
21 Claiborne to Madison, October 5, 1807, Territorial Papers,
9: 765.
22 The Louisiana Gazette, June 5, 1806.
awareness that a jurisdiction - in this case traditionally respected public rights - had been overlooked by the common lawyers and judges because they were ignorant of its existence, they were not saturated with the "tincture" of the Civil law. Thus the common lawyers brought with them, naturally, a tincture of the common law, a tincture which would, consciously or not, affect their decisions.

Custom also played an important role in Louisiana Civil law, to the extent that "where a person acts in accordance with custom under the assumption it represents the law, his action will be accepted as legal in many civil law jurisdictions, so long as there is no applicable statute or regulation to the contrary."23 France, in particular, cherished its customs: not only was there a long-lived movement to codify them in the fifteenth and sixteenth centuries, but there was also an attempt to incorporate many of them into the *Napoleonic Code*.24

In the minds of the general public, custom carried a far greater weight than did the legal arguments that had been used in the trial. As Livingston and the transcript of the trial itself have shown, the judges decided on the basis of Civil law evidence - according to the *words* of Civil law. To Louisianians, untrained in strict legal formulae, it was the judges' unfamiliarity with Civil Law, and with customary

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23 Merryman, 23.
24 Ibid., 12.
rights of usage, that had led to a decision which went against the grain of the spirit of the Civil law.

The Court's infringement of the boundaries of the "custom jurisdiction" provoked more than written responses - the battle of words was paralleled by active resistance on the part of New Orleanians.

In August 1807, Livingston hired several Negro workmen to dig a canal in his portion of the Batture. On their first day of work, the workmen were driven from the batture by a crowd that had gathered in the Faubourg Ste. Marie. The following day, Livingston went to the Batture in person to assure that his employees worked unmolested, but a crowd gathered to oppose him. Each day that Livingston attempted to exercise his right of ownership, a crowd prevented him from doing so.

Governor Claiborne, who had been out of town, returned to the City at about this time, and both Livingston and the City Council appealed to him to resolve the dispute, the latter urging him to initiate the prosecution of a claim to the batture in the name of the United States government. Claiborne does not appear to have taken any immediate action on either party's behalf, explaining to Madison that

"The opposition on the part of the people to a decision of the court is in itself so improper, and furnishes a precedent so dangerous to good order that it cannot be countenanced. But the opposition on the present occasion is so general, that I feel myself compelled to resort to measures the most conciliatory, as the only means of avoiding still greater tumult, and perhaps much bloodshed."25

In the meantime, Livingston threatened to institute civil action against all trespassers, and against anyone who sought to oppose him. On September 14, 1807 he again started work on the batture, having enlisted constables to protect the workers and to make a list of persons who attempted to interfere with them. Again, a large crowd gathered, drove off the workers and the constables, and confiscated and destroyed the constables' list. The following day, Livingston notified the Governor that he would commence work at the batture at noon, noting that bloodshed was likely. At mid-day, a dozen white men began work on the Batture. Four hours later a drum sounded, and several hundred citizens gathered at the construction site. Governor Claiborne arrived, and attempted to pacify the crowd. He urged them to keep the peace, assuring them that further inquiries into Livingston's title to the Batture were in order, and that he had already sent the pertinent information to the President. The crowd nominated Jean Baptiste Macarty to collect information on the Batture, and to present the inhabitants' grievances to the President. Livingston was forbidden to continue his construction on the Batture by the City Council, and the public was quieted by a City Council ordinance which authorized that earth from the Batture would be delivered gratis to those who needed it.

The continued refusal of the inhabitants to abide by the Territorial court's decision which deprived them of their

26 Ibid., 80.
customary right of commonage on the Batture forced the
Governor's hand, and involved Jefferson in litigation which
was potentially damaging both personally and politically. The
former President's situation did not improve with the passage
of time, and the Batture received a great deal of public
attention in the Eastern United States as well as in the
Orleans Territory.

'Sovereign' Spaces

Jefferson acted precipitously regarding the Batture. The
New Orleans City Council formally requested Claiborne to
appeal to Jefferson to intercede in the Batture case on
December 12, 1807, suggesting that the United States were the
legal claimants of the property. 28 Jefferson had not only
conferred with his cabinet and decided on his course of action
in November, but had also taken measures to implement his
decisions. On November 30, 1807, Madison instructed the U. S.
Marshals in New Orleans, Lebreton D'Orgenois, to evict
Livingston from the Batture, and D'Orgenois did so on January
25, 1808. 29 Jefferson based his original decision to evict
Livingston largely on the strength of a brief published by
Pierre Derbigny.

28 Hatcher, 149.
29 The Federal government had been empowered to evict
squatters from the public domain by a Congressional Act of
March 3, 1807, and it was under the auspices of this
empowerment that Madison and Jefferson acted. The date of
Madison's letter is mentioned in Livingston v. D'Orgenois
[sic], 7 Cranch (U.S.) 577 (1813), 578. The discrepancies
between the dates of the City Council's appeal and Jefferson's
action is pointed out in Dargo, Legal Codification, 147-148.
Derbigny believed that title had passed from the French Crown, to the Spanish, and hence to the United States by the right of sovereignty, and that the matter must be decided according to French law, which was in effect at the time of the sale of the Jesuits' property. He claimed that the Batture was royal property by virtue of the Royal Edicts of 1683, 1693, and 1710, which declared that alluvions on navigable rivers belonged to the King, and that royal decrees were the most "certain part of French jurisprudence" because they were "emanations of the sovereign." He traced the Spanish right to the Batture to "the firm resolution which the Spanish government always evinced, of keeping the Batture...for publick uses, by permitting no person to settle on it, and refusing any grant inconsistent with that resolution." Therefore, the sovereign right to the Batture was clear, no part of the property could have been made over to Jean Gravier, and the United States consequently had a "well founded and clear title to the property, as being part of the publick demesne." 30

In 1807 Jefferson believed that the United States had valid title to the Batture property according to Derbigny's arguments. Throughout his involvement in the matter, Jefferson would cling tenaciously to the arguments set forth in Pierre Derbigny's brief of 1807, despite the devastating rebuttals by Livingston and Pierre DuPonceau. Indeed DuPonceau's rebuttal of Derbigny's brief was so thorough and incontrovertible that

30 Derbigny in ALJ, 2: 296, 294.
no subsequent legal argument on the City's behalf ever attempted to duplicate Derbigny's position. DuPonceau pointed out that there were four edicts published by Louis XIV which dealt with riverine property and that only one mentioned alluvions. Since the edicts had as their sole object adding to the King's treasury, a struggle ensued "between the sovereign, or rather the fiscus or treasury, and the people." The king was subsequently denied a right to alluvions by the second title of Book 2 of the Napoleonic Code. DuPonceau continued to point out that the sovereign's pretended right to alluvions was based on the "principal of feudality" and that "the feudal system has vanished; it can no longer present an obstacle to the rights of riparious owners." He also showed that 1) the Royal Edicts did not apply uniformly to the colonies, and particularly not to Louisiana, where land was not held by feudal tenure but by allodial tenure, and thus that feudal rights were excluded from Louisiana; 2) that there was never a formal judicial act annexing the alluvion to the demesne of the Crown; 3) that French law could not be said to operate on an alluvion which may not have formed by 1769 when the Spanish took possession, and that therefore the laws of Spain must govern, wherein there were no rights to alluvions vested in the sovereign; and 4) that the United States' claim based on a "branch of the royal prerogative" was not founded on law or on fact, and therefore could not be supported. DuPonceau's argument contributed to a subsequent shift in the
Municipality's legal position regarding the Batture, a shift which was ignored by Jefferson. 31

There are numerous explanations given for Jefferson's haste in this matter. Dargo suggests that Jefferson believed he was correcting a "self-evident miscarriage of justice," and that this opinion was shaped in response to the only material he had available on the topic: Derbigny's brief. But this assessment of Jefferson's motives is dubious - Jefferson was a lawyer by profession; he must have been aware that every case has (at least) two sides, and that he was reading the brief prepared by the losing party. Dargo has also suggested that the federal government acted to take advantage of a political opportunity, but the greatest political advantage the administration could hope to gain by its eviction of Livingston was a greater popularity in New Orleans itself. 32 It is unclear whether a desire for popularity could have been sufficient to motivate Jefferson to involve the administration in such a local cause.

Given the dearth and poor quality of information Jefferson had received about the circumstances surrounding the Batture case, William Hatcher has concluded that he was motivated at least in part by personal reasons. He cites four possible sources of Jefferson's distaste for Livingston, both

31 Duponceau was a noted Philadelphia lawyer. He had been one of Jefferson's original choices for Orleans Territorial judge, but declined the post. His brief, "Opinion on the Case of the Alluvion Land or Batture, near New Orleans" is reprinted in ALJ, 2: 392-433.
32 Ibid., 148-150.
personal and political. First, Livingston had not actively supported Jefferson in his quest for the presidency in 1801 (while Claiborne had); second, Livingston was haunted by financial difficulties incurred during his tenure as New York Attorney General; third, Livingston was closely associated with the anti-Claiborne party in Louisiana; and last, Livingston's alleged association with Burr and his interference with Wilkinson's attempt to establish military rule in New Orleans during the Burr Conspiracy. This is a harsh portrayal of one of the most esteemed presidents in United States history, but it seems best able to shed light on Jefferson's subsequent actions.

Initially, Jefferson may have been confident that establishing U.S. sovereignty and earning the goodwill of the New Orleans populace were reason enough to become involved in the Batture in 1807 and 1808. But as the case received growing public attention, he began to see the personal disadvantages inherent in a highly publicized law suit. His increasingly intense personal concern in the case was reflected in the degree to which he was willing to use his political influence to forward his cause.

Livingston sued the former President in Federal District Court on January 25, 1808, alleging trespass and damages for which he held Jefferson personally liable. The case was to be heard by the District Court circuit to which Chief Justice John Marshall was assigned, Jefferson's feared and disliked

33 Hatcher, 150-151.
Jefferson believed he would not receive a fair trial in the District Court, and as he explained to Senator William Giles,

"Were this case before an impartial court it would never give me a moment's concern. The deep-seated enmity of one judge [Marshall] and utter nullity of the other [Griffin] with the precedent of Burr's case, lessens the confidence which the justice of my case would otherwise give me. Should the Federalists from Livingston's example undertake to harrass and run me down, with prosecutions before Federal judges, I see neither rest nor safety before me."  

Jefferson also used this reasoning to explain his request to Senator Giles and Representative Eppes (who received an identical letter) to prevent Congress from acting on Livingston's numerous petitions to that body. Jefferson was able to take advantage of the death of Cyrus Griffin, the second judge on the District court, manipulating the composition of the District Court by requesting President Madison to appoint the Governor of Virginia, John Tyler to the post. Through his political influence, Jefferson had put a judge on the Bench, and eliminated any potential problems which Congress may have presented.

*Livingston v. Jefferson* was heard by the Federal District Court December 5, 1811. Despite Jefferson's "regret" that the case was never publicly heard in open court, he concentrated on obtaining a dismissal on technical grounds.  

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35 Jefferson's "regret" is expressed in his "The Proceedings of the Government of the United States, in maintaining the public right to the beach of the Mississippi; adjacent to New Orleans, against the intrusion of Edward Livingston. Prepared for the use of Counsel" (New York, 1812). His determination to avoid judicial scrutiny of the case based on its merits is
abatement was entered which challenged the jurisdiction of a Virginia court to hear an action for trespass that had occurred on land in Louisiana. The case was heard by Tyler, appointed through Jefferson's auspices, and Marshall. Both judges agreed that the Court did not have jurisdiction over an action in trespass. Tyler promptly pointed out that the common law had "uninterruptedly for centuries past" acknowledged that trespass *quare clausum fregit* was a local, not a transitory action, and that the "cause must therefore go out of Court." Marshall, on the other hand, hemmed and hawed. Relying less on a time-out-of-mind argument, Marshall pointed to unsuccessful attempts in post-Revolutionary American courts to overthrow the distinction between proceedings *in rem*, where the thing must lie within the court's jurisdiction, and proceedings for damages, where only the person must lie within the reach of the court. He noted that Livingston had a clear right without a remedy, because

"only the court of that district in which the defendant resides, or is found, can take jurisdiction of the cause. In a court so constituted, the argument drawn from the total failure of justice, should a trespasser be declared to be only amenable to the court of that district in which the land lies, and on which he will never be found, appeared to me to be entitled to peculiar weight... [I]f, however, this technical distinction be firmly established, if all other judges respect it, I cannot venture to disregard it." 36

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36 The judges' decisions in *Livingston v. Jefferson* are cited in *ALJ*, 4: 78-87. The case has become a landmark in American civil procedure, setting a precedent for the local rather than transitory nature of trespass.
Livingston was trapped in a web of jurisdiction. He was unable to get a hearing in federal court because of the local nature of his action for trespass, but he had been unable to have the case tried in Louisiana "because a Louisiana court would have lacked personal jurisdiction over the ex-President." This was partially due to the territorial court system, which was intended to be limited in scope.

Between 1807 and 1812 the pamphlet war continued, involving more participants and a wider public arena. DuPonceau produced two briefs, the Philadelphia firm of Lewis and Tilghman, and two Philadelphia lawyers, Ingersoll and Rawls, produced opinions which supported Livingston's claim, and Livingston himself published several pieces for public consumption.

These publications were perused on the Eastern seaboard and in New Orleans, where they were often "exhibited on the Exchange and read for the instruction of the bye standers" and where they frequently evoked written responses. The most persistent critics of the Batture affair were J.B.S. Thierry and Julien Poydras, men who took different positions within the camp supporting the public right to the Batture. There is a common theme which wends its way through both of their arguments, a theme which revolves around the importance of public rights in Civil law.

37 Dargo, New Republic, 112 n. 3.
Geographies of Public and Private Right

Thierry, editor of the *Louisiana Courier*, was a consistent supporter of the public's right to the Batture. His writing on the subject reveals his awareness of both the political and the legal ramifications of the case. In December of 1808 Thierry wrote that

"Always faithful to his system of destruction, Mr. Livingston does not fear to call on his head all the suspicion of his complicity with Burr, by explaining himself thus: 'Where the destruction of personal liberty is permitted with impunity, the invasion of private property must be a venial crime.' It is very simple that he should speak of the destruction of individual liberty, when there was no alternative left between the momentary destruction of the liberty of some incendiaries and the destruction of public liberty, as is natural enough for him to cry out that private liberty is violated when there is in fact nothing more but that obstacle in his usurping the public property."

Despite the convoluted structure of the paragraph, Thierry was clearly making a connection between the Batture and Burrism. But more importantly, he evoked a Civil law tradition which tended to subordinate private rights to public interests.

Civil law is divisible into two legal categories, public law and private law, which have no parallels in common law. The distinction can be traced back fourteen centuries to the Glossators and Commentators, and perhaps back to the Justinian Code. Handed down through the centuries as part of the *jus commune* - law common to Europe - public law was concerned with protecting the rights of public usage of riverbanks, highways,

39 A stance which was rewarded by his appointment as Public Printer for the Territory in mid-1808.
40 *Louisiana Courier*, December 12, 1808.
the ocean, harbors, and the like. In France, the distinction became increasingly marked during the seventeenth and eighteenth centuries, partially due to the Enlightenment concern with the individual, and the private law emphasis on private property rights and freedom of contract. Public law seems to have been a logical corollary to the private law, ensuring that state action would defend public interest from private depredations. This trend was completed and formalized during the Revolutionary period, where private law and administrative law became separate jurisdictions.  

I will follow two of the trails suggested by this discussion. The first of these reflects the importance of legal categories to a Civil law mind. To 'civilians' the need for administrative law reflects the need for the state to protect public rights against the incursions of private interests. Underlying this logic is an assumption that public rights and private rights were not of the same degree of importance. As John Merryman has noted, "In private legal relations the parties were equal and the state the referee. In public legal relations the state was a party, and as a representative of the public interest (and successor to the prince), it was a party superior to the private individual."  

Special courts were established to handle cases involving public interest, known today as administrative courts. Hence, legal rules which were indispensable to the resolution of

41 Merryman, 92.
42 Ibid., 93.
conflicts between individuals were often seen as inappropriate when applied to larger, public, concerns. This may partially explain some of the outrage expressed by the citizens of New Orleans - that an issue so important to the public interest was adjudicated by an ordinary court, and treated as a matter of private law.

The second trail points to the lack of a mechanism in common law to protect public rights, or more specifically, the common law obsession with private property. Two examples will suffice. Locke clearly expressed the importance of private property when he argued that it was a fundamental reason for the rise of civil society, and that one of the primary functions of government was the protection of private property. This concern is reflected in the common law, where, as Blackstone has declared, "so great...is the regard of the law for private property that it will not authorize the least violation of it; no not even for the general good of the community." This difference in attitude toward public rights

43 This entire discussion demonstrates René David's claim that the French do not see law as a self-contained domain, but one of interest to everyone. David notes that the French see the law as a method of social organization (which means that the law is also political). Therefore, it is the "social science par excellence" which regulates conflicts in society and "provides for the ordering of relationships within society." David, viii-ix.
44 Blackstone continues, "If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without the consent of the owner of the land. In vain it may be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even a public tribunal, to be the judge of this common good, and to decide whether it be expedient or no. Besides,
can also be seen in various commentaries on alluvions. French and Spanish law differed slightly on the question of alluvions, but both agreed that the public retained rights of use, whether the property was privately owned or held in trust by the sovereign. On the other hand, Blackstone clearly established that alluvions were privately owned, but is unconcerned with public rights regarding them.

What Louisianians seem to have been aware of was the bias that a common law training - which placed so much emphasis on the sanctity of private property and had so little regard for public interest - was operating on a case that clearly involved public interests. This common law bias was made more noticeable by its presence in a society that had a long tradition of protecting public rights.

Julien Poydras, the Territorial delegate to Congress in 1810, took an active interest in this facet of the Batture case. His writing, and his speeches to Congress, reflect many of the issues I have discussed. He reiterated the point that the Gravier decision could never have been reached by judges familiar with the customs and laws of the Territory. But he also objected vehemently to any resolution of the Batture case by Congress or the federal courts, on the basis that only local knowledge and local judicial proceedings could reach a just decision in the Batture case. In a mysterious paragraph to a speech delivered to Congress, Poydras declaimed:

the public good is in nothing more essentially interested, than in the protection of every individual's private rights..." Blackstone, *Commentaries*, 2: 139.
"A spurious monster, the mongrel offspring of injustice and chicane, has been introduced into my country by our usurpers, who endeavor to pawn it on us as the lovely child of truth and justice; but we have with horror rejected this hideous imp, this illegitimate monster. Its foster parents are now attempting to have him regenerated, and legitimated, and for this purpose they pursue means which are new, circuitous and dark; but I ardently hope their schemes may once more prove abortive."

It seems that the illegitimate monster to which Poydras refers is the common law, its foster parents Livingston and the American bar, who have attempted to regenerate "him" through the Batture litigation, and subsequent federal involvement. While the rhetoric is extreme, Poydras seems to have summarized the general opinion of the Creole population of the Territory regarding the infringement of common law on Civil law matters.

Conclusions

The entire series of cases involving the Batture present numerous contradictions and inconsistencies. If, as Dargo has claimed, the American Revolution saw the beginning of a trend toward a federal commitment to economic growth and development that was reflected in a legal shift to privatization of public eminent domain uses, the Batture becomes a very sticky issue. The conflict is thus pitched in

45 "Speech of Julien Poydras, Esq., the delegate from the territory of Orleans, in support of the right of the public to the batture in front of the suburb St. Mary, Wednesday, March 14, 1810", in Annals of Congress, 11th Cong. 1st and 2nd Sess., 1551. I can only speculate that Poydras' hideous imp was the common law - certainly it was not something he could say openly to a committee of American Congressman.
terms of a joust between federal and local economic imperatives. On the one hand, the Territorial court's decision in favor of Livingston is consistent with this premise. On the other hand, Jefferson's stand in support of the public's right to the Batture, which was to be assured by establishing federal title to the land, is inconsistent with a federal commitment to privatization. "Certainly, economic pragmatism played a role in much of the conflict that took place in Louisiana throughout the territorial period, but I am not convinced that it offers a sufficient explanation for these events.

Another interpretation of the litigation involving riparian rights in Louisiana is proffered by Molly Selvin. She believes that the litigation surrounding the disposition of public and private rights is explicable through the "crucial distinction between the French and Spanish law regarding alluvion." 47 The crucial distinction to which she refers is based on the premise that the French Crown owned alluvions, rather than private individuals. This may have been the case in France, but it is uncertain at best that this law was applicable in Louisiana (see DuPonceau's argument), or that it explains the extensive litigation in Louisiana after its acquisition by the United States.

46 Dargo, New Republic, 32.
Neither of these explanations comes to grips with the entire problem. Jefferson's involvement in the controversy may have been prompted by his recognition of an opportunity to claim an important and valuable piece of property for the United States. On the other hand, he may have been largely motivated by his antipathy toward Livingston. It is also possible that he was simply trying to correct what he perceived to be an injustice to the inhabitants of New Orleans. And of course, it could be all of these things and more. Thus, explaining federal involvement, or the case itself in terms of national policies or broad legal trends is difficult, and suggests that the batture is most meaningful in its specific geographic and historic setting.

I think that much of the litigation in Louisiana surrounding public and private rights can be seen in terms of differing conceptions of these rights in Civil law and common law. These conceptions, which had developed throughout the different histories of the two legal systems, collided in the space of territorial Louisiana. The legal fictions of jurisdiction were at play through an oddity of territorial government. Territorial courts were generally courts of the first and last instance - there was no appeal from them, and no alternative to them. By virtue of these jurisdictional arrangements, the territorial court system seems to have reinforced the potential for a territory to define itself as unique, as a self-contained unit. Despite the federal government's confidence that it could control the legal life
of the territories through such mechanisms as federally appointed judges, the judicial arrangements in Louisiana may have contributed to the maintenance of alternative sources of authority, such as custom, or public rights, which did not derive their potence from governmental or strictly legal sanction.

At the most local level dispute centered on the seepage of common law attitudes toward public and private rights into a system that was ostensibly a Civil law jurisdiction. This particular dispute was aired most frequently as a belief that common law judges, even though adjudicating according to Civil law substance, were unable to comprehend customary rights and usages unique to Louisiana. If common law training was seen as such a taint, the continuation of the case in the federal courts, where common law judges, lawyers, and the common law itself reigned supreme, was considered unjust and meddlesome by Louisianians. Public versus private right to a piece of property in New Orleans came to represent in miniature the traditions of two legal systems: the common law emphasis on protecting private, individual rights and liberties against the encroachment of public power, and the Civil law, which traditionally favored public rights.

I think that today custom is either seen fondly through a mist of nostalgia, or contemptuously as the inexplicable rituals of backward peoples. In this chapter I have tried to suggest that custom was far more powerful than either of these views would suggest. Custom, in the case of the Batture, was a
way of using space. But more than this, custom was a means by which the ability to use space was transformed into a right of use and access. The public right to the Batture did not, apparently, depend on legal sanction for its validity - it was a right that seems to have accrued to, or developed from, a set of spatial practices.

The presence and strength of custom jurisdictions may have been reinforced by the legal jurisdictions in place in Louisiana. The strength of their presence flies in the face of the federal intention to bind the territories more tightly to the rest of the Union, and points up the unforeseen consequences of the centrifugal and centripetal legal forces at work on the American "frontier." But in Louisiana, the shadow jurisdictions of the early territorial period became formally legitimate legal jurisdictions during in 1808. This may in part be attributable to the Batture and the events it precipitated.
Conclusion

The threads which bind the chapters of this thesis together are delicate and tenuous. The concrete themes I have chosen to look at are land, law and slavery in the context of American territorial expansion to the Old Northwest and Louisiana. I have tried to use these fairly concrete issues to highlight three theoretical themes. The first of these themes is law-in-spacing, a process by which the extension of American common law to territorial populations with Civil law traditions brings the common law into sharp relief against the backdrop of already-present legal, social and spatial practices. I have tried to show that the presence of the Civil legal system in Louisiana and the Old Northwest was not the only factor involved in bringing the common law to light, there were also customs and customary uses which collided not only with the common law, but also with the Civil law. I have demonstrated that these customs were local in nature, and that they involved not only practices, but concepts as well. Hence, while the Batture may have revolved around threatened public customary use rights there were also legal conceptions which collided, conceptions which differed about the role of law in the protection of public and private rights. Chapter Four also charted a collision of legal conceptions through a geography of equity. While these conceptions of law may not have taken the concrete form often associated with custom, they were certainly sets of entrenched assumption and norms which are important to an understanding of events in Louisiana.
I have also tried to point to the different, often legally constructed, conceptions of property held by the U.S. government and the French populations of the Old Northwest, conceptions which suggested that different logics of space, or logics of visualizing space were at work. The struggle over communal property suggests the connections between legal concepts and social and spatial practice, and indeed, that legal definitions are one way of visualizing space.

The chapter on slavery is important for numerous reasons. First, it shows the importance of legal definitions to both slave owners and slaves, and the ways in which the latter, though technically excluded by the law, were instrumental in shaping it. Second, I have tried to show that the production of space is an essential human activity, and that this production is intimately connected to resistance. The case of slavery suggests that the production of space can take multiple forms, and that it may not necessarily be a material production. It also suggests that space can be produced with no legal sanction, and that law is often simply a way of seeing space.

I hope that this thesis has pointed to the multiplicity of geographies which can be mapped in both the past and in the present: geographies of law, of conceptions of justice, of resistances, and of the production of space.
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