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SOURCES OF LOUISIANA'S LAW OF PERSONS:
BLACKSTONE, DOMAT, AND THE FRENCH CODES

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The movement of the progressive societies has been uniform in one respect The Individual is steadily substituted for the Family, as the unit of which civil laws take account. . . . [T]he change has not been subject to reaction or recoil, and apparent retardations will be found to have been occasioned through the absorption of archaic ideas and customs from some entirely foreign source.¹

The problem that brought codification to the front in Louisiana was that of the protection of the relations of production and of family life as they existed in Louisiana in the first quarter of the XIX century. . . .²

INTRODUCTION

The law of persons represents something of an intrusion by the public law into the domain of the private.³ It is the nexus of public order and private relationships: the most personal aspect of public law, the least individual of private law. As reflective of both realms, it is usually the most characteristic feature of any legal system, and as the least rational area of civil regulation—held together by the silent force of custom and presupposition—it is also the least receptive to innovation. We may easily imagine as less socially disruptive, for example, the adoption of a foreign law of contract than a foreign system of matrimonial property.

We do not expect to find as the constituents of status, then, seemingly incompatible notions, drawn from legal systems separated not only in time and place, but in the major premises of their social orders. The law of Persons in the Louisiana Civil Code of 1808 represents such a system, however; Book I of that code is a blend of concepts drawn from Domat's Roman law,⁴ the French

Projet of the Year VIII,⁵ the *Code Civil*⁶ and Blackstone's common law.⁷ This article will examine two of the principal "persons" of that code—the "father of family," who descends from the Roman law *paterfamilias*, and the free servant, who comes to us from the common law—their relationship to each other and their conceptual compatibility with the rest of Book I. Each concept will be considered, first, as an element of the system in which it developed and then, as it was received into Louisiana's system.

The article's focal point is the concept of Master and Servant embodied in the Louisiana law, and excursions into other areas of the law will be found justified as essential to the understanding of some aspect of that relationship. The *paterfamilias*, for example, must be considered because at civil law he replaces the master of the common law. However, although the particular subject of concern is the relationship of Master and Servant, the article attempts to consider the broadest implications of the Code's provisions, rather than limit consideration to this one relationship in isolation. Thus, in showing how servants are "persons" in the Code, the article also attempts to point out the elements of status and something of the significance of "Persons" as a civilian category. In treating of the *paterfamilias* as the free servant's legal antagonist, the aim has been to show also the rise and fall of the *familia* as a legal unit of social order. And in the conclusion, some problems raised by interpreting the Code with an eye to its sources are considered.

The approach of this article presupposes that nothing in the Louisiana Codes can be understood in isolation. The law of Persons cannot be understood apart from the law of Contracts, and vice versa, and neither can be completely understood apart from its historical antecedents. In this article, the law of Master and Ser-

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¹ H. Maine, *Ancient Law* 168-69 (14th ed. 1891).

² Franklin, *Observations on the Influence of French Law on Early Louisiana Codes*, in *Le Droit Civil Francais, Livre-Souvenir de Journees de Droit Civil Francais* 833, 838 (1934).

³ See W. Friedmann, *Legal Theory* 214-23 (5th ed. 1967); W. Friedmann, *Law in a Changing Society* 90-125 (1959); Gaius, *Institutes of Roman Law* 40-44 (Poste transl. 3d ed. 1890).

⁴ J. Domat, *Civil Law in Its Natural Order* (Cushing ed. Strahan transl. 1850) [hereinafter cited as Domat]. Domat contributed the General Distinctions of Persons which comprise Title I of Book I. See text at notes 87-109 *infra*.

⁵ *Projet de Code Civil, presente par La Commission Nominee par Le Gouvernement Le 24 Thermidor an VIII (1800)* [hereinafter cited as *Projet of the Year VIII*, by book, title, article]. From the French *Projet* and Code were taken the articles on lease of services (notes 56-62, 132-134 *infra*) and those on paternal authority (notes 40-47 *infra*).

⁶ *Code Civil des Francais* (1804). See note 5 *supra*.

⁷ W. Blackstone, *Commentaries on the Laws of England* (9th ed. 1783) [hereinafter cited as *Blackstone Comm.*]. Articles from Blackstone's *Commentaries* spot the whole of Book I. Those on the subjects of *Master and Servant*, and *Parent and Child* will be noticed herein; compare Book I, Title 10, Louisiana Civil Code of 1808 (Of Corporations) with 1 Blackstone Comm. 467 *et seq.* It seems likely that the theory of cause in contracts introduced by the 1825 Code was influenced by Blackstone's theory of consideration. Compare La. Civil Code arts. 1893-1900 (1870) with 3 Blackstone Comm. 445. In addition, Louisiana Civil Code arts. 14-18 (1870) (Louisiana Civil Code of 1808, I, Prel. Tit. 14-18), dealing with the interpretation of laws, are verbatim transcriptions of the rules of construction set out in 1 Blackstone Comm. 59-61.

vant is the excuse for considering its relation to the rest of the Code and to the sources whence it came.

The approach is necessarily historical,⁸ and no attempt has been made to treat it otherwise. The period under consideration covers the genesis and development of each concept, up to the time of its inclusion in the Louisiana Civil Code of 1808. In the sections below on Roman, French and English law, the aim has been less at "dating" a particular notion with historical precision than at outlining its general development as an element of its own legal order.

The analysis of the Louisiana law is limited, for the most part, to the 1808 Code for the obvious reason that its articles were the first to embody the concepts of their sources. Excepting the concept of slavery, which was purged in 1870, very few basic changes have been wrought in Book I since it first appeared in 1808. Although several alterations in form, of minor effect in themselves, have tended to obscure the presuppositions ordained as a system by the 1808 Code, most of the articles under consideration appear in the Codes of 1825 and 1870.⁹

EVOLUTION OF SOURCES PRIOR TO INCLUSION IN THE LOUISIANA CIVIL CODE

Patria Potestas and the Roman Law Familia Familia¹⁰

Because the Roman law concepts of *familia* and *paterfamilias* are predominant as elements of social order in the Louisiana Code,

⁸ A word should be added about using the document known as the *De La Vergne Manuscript* (See Franklin, *An Important Document in the History of American, Roman, and Civil Law: The De La Vergne Manuscript*, 33 Tul. L. Rev. 35 (1958)). Spanish authorities cited in that work proved to be, at best, only obliquely related to a given article; often they are totally irrelevant. For the articles under consideration, only the citations to Domat were accurate with any consistency. Ironically, the absence of cited authority for an article proved a fairly consistent indication that the article was either an original work, or that its source was the common law.

⁹ The Louisiana Civil Code of 1808 is cited herein by book, title, and article. As there was but one edition of this Code, it is frequently cited by article and page. Page numbers have been included so that correlation tables may be used to compare these articles with those of the 1870 Code. Source citations to the code articles considered are set out in the notes 40, 56, 84, 87, 116, 132, 133, 141-143 *infra*. Where the comparison may be fruitful to the text, both the article and the source have been quoted. See, e.g., notes 116, 132-133, 141-143 *infra*. Because the English text alone is usually misleading, significant terms and phrases from the French text have been bracketed into the quoted articles and sources.

¹⁰ See generally W. Buckland, *A Text-Book of Roman Law* 101 *et seq.* (3d ed. 1963) [hereinafter cited as Buckland]; B. Nicholas, *An Introduction to Roman Law* 65 *et seq.* (1962) [hereinafter cited as Nicholas]; H. Maine, *Ancient Law* 135 *et seq.* (14th ed. 1891) [hereinafter cited as Maine]; H. Jolowicz, *Roman Foundations of Modern Law* 181 *et seq.* (1957); W. Buckland & A. McNair, *Roman Law and Common Law* 38 *et seq.* (2d ed. 1965).

we must consider the development of these notions, first in themselves and then as they affected the contract, *locatio operarum*, or lease of services.

Life in the Roman Law was organized around the family. In its earliest periods, the individual was not noticed as the unit of civil society; law recognized the family and there the civil domain ended.¹¹ The head of the family, or *paterfamilias*, exercised a power (*patria potestas*) over its members which has caught the fancy of all writers on the subject. The *paterfamilias* was the only "person" recognized at private law; he owned all the property, and property included wife, children and slaves. All this was his *familia*. His children were recognized at public law (as citizens), but the *paterfamilias* had the power of life or death over them, could marry them, divorce them, and sell them.¹²

The *familia* was based on agnatic relationship (traced exclusively through the male line, somewhat as is Louisiana's surname system) and this in turn defined the extent of *patria potestas*. Later *potestas* could be extended through the fiction of extended agnation, or adoption.¹³ Thus, an adoptive son and a son both had the father's name and both were within his power. An emancipated son was both out of the power and out of the family, and he thus lost all of his rights to inherit. The *paterfamilias* was *sui juris*; all within his power were *alieni juris*.

At this time, sons and slaves were little differentiated as concerned *patria potestas*.¹⁴ Both were *filii familiae*. Both were susceptible of such disposition as pleased the *paterfamilias*. He could kill them or sell them. The slave's condition was unchanged by the death of the *paterfamilias* however, while the son then became *sui juris*. And at public law, the difference was that of free man and slave: a son could hold public office and vote, even while *in potestate*; a slave never could.

Sons and slaves were also alike in their rights to property.¹⁵ Originally the *paterfamilias* owned all. Gradually, first by custom, then by particular edicts, son and slave were allowed a *peculium*,

¹¹ The status of a Roman had three important aspects: *libertas, civitas, familia*—liberty, citizenship, family. See Buckland 56-61, 101.

¹² For a list of the chief elements of *patria potestas*, see Buckland 103-04.

¹³ Maine 131.

¹⁴ Nicholas 66;

When we speak of the Slave as anciently included in the Family . . . we merely imply that the tie which bound him to his master was regarded as one of the same character with that which united every other member of the group to its chieftain. This consequence is, in fact, carried in the general assertion already made, that the primitive ideas of mankind were unequal to comprehending any basis of the connexion *inter se* of individuals apart from the relation of family. Maine 164-65.

¹⁵ Buckland 278-80; Nicholas 68-71.

The object of the contract was the services (*operae*) of the *locator*. This distinguished *locatio operarum* from *locatio rei* (lease of a material thing) and *locatio operis* (letting out a job). Not all services could be the object of this contract, but only *operae illiberales*, or unskilled services, which were susceptible of valuation in money. This excluded the services of those schooled in the liberal arts, lawyers and teachers, for example.²⁷ What were illiberal or sordid arts to the Romans are not always so today; painting and medicine, for example, were not liberal arts to the Romans.

French Law

The Family²⁸

Until the 1804 Code, France was governed by two systems of law. The South of France had received the Roman Law, in classical form but bearing centuries of interpolation and adaptation. The principal private institution of classical Roman law, the *familia*, was no longer alone in the areas of its effects upon individuals. The church and feudal state had both imposed their influence in areas of mutual concern. Natural law became in a Christian state the ground for excision of inapplicable texts and the rationale for those retained. In a footnote to the definition of legitimacy, for example, Domat, citing *Deuteronomy*, said:

Marriage being the only lawful way appointed for the propagation of mankind, it is but just to distinguish the condition of bastards from that of children lawfully begotten.²⁹

Such a regard of the family necessarily closed its ranks.³⁰

The category of Persons was also expanded by the state for its own social distinctions. Thus Domat, though he did not include it as a Roman law status, admitted nobility as "being considered as belonging to the state of persons" and discussed it as such.³¹ And the law began to recognize duties owed by the *paterfamilias* to his

²⁷ "[I]t offended the Roman ideas of propriety that persons of good social standing should be paid a reward. The contract for their services was, if anything, mandate." Nicholas 184.

²⁸ See generally 1 Domat, prel. bk. 2; Brissaud, *History of French Private Law* §§ 154-168, in 3 Cont. Legal Hist. Ser. 178-201 (2d ed. 1968); H. Jolowicz, *supra* note 10, at 141 *et seq.*; Charmont, *Changes of Principle in the Field of Family, Inheritance and Persons* in 11 Cont. Legal Hist. Ser. 147 (2d ed. 1968); 1 M. Planiol, *Traité Élémentaire de Droit Civil* Nos. 1636-44 (A translation by the Louisiana State Law Institute 1959) [hereinafter cited as Planiol].

²⁹ 1 Domat, prel. bk. 2.76 n.*. Legitimacy was a feature of Justinian's law as well, but served another purpose; what is notable here is the justification ascribed to its continued force. H. Jolowicz, *supra* note 10, at 197.

³⁰ The evolution in Spanish law was similar. See for example Asso y del Rio & Manuel y Rodriguez, *Institute of the Civil Law of Spain* 74 (L. Johnston transl. 1825).

³¹ 1 Domat, prel. bk. 2.92.

family. He was allowed only the usufruct of his child's property³² and was bound "by the right of blood" to nourish and maintain the child.³³

By means of the law, the state began to interpose itself between father and family. The early Roman law regulated a civil confederation of *familiae*, each *familia* being a monadic unit which for most purposes the law could not penetrate. Domat's Roman law had penetrated it, and the formerly omnipotent "father of family" became an agent of the state in the exercise of his powers.³⁴

The parallel institution in the North of France was derived from the Germanic *mundium*.³⁵ The essential difference between it and the *familia* can be seen in the father's role in each. The *patria potestas*, at least in theory, was absolute. Some formality was required for its inception, and some cause for its demise, but during the period of its operation, it was largely unchecked. In the *mundium*, the father's authority was considered to exist only as a necessary concomitant to his duties as the family's protector.³⁶ In consequence of defining the paternal power in terms of the child's, and not the father's, welfare, the power terminated when the child was no longer in need of it.³⁷ The father merely managed the child's property. Also, both father and mother might exercise this authority, a notion alien to Roman law.

Though they were worlds apart in their premises, and actually remained so in some details, by the time of the French Revolution, the two concepts did not differ as much as might be expected.³⁸ Constant limits on the *patria potestas* had given purpose to what was formerly arbitrary. The *mundium*, however, had always been more outwardly directed, the father being positioned as mediator between *mund* and world; and his role was therefore more readily adaptable to the new order of things following the Revolution. Thus, the system of paternal authority for the *Code Civil*³⁹ was drawn from the customs of Northern France. The articles in the Code were, said Planiol, "hardly anything other than those set forth by Pothier in his *Traité [des personnes]*, Nos. 129-142."⁴⁰

³² 2 *Id.*, 2.2.2871.

³³ *Id.*, at No. 2881.

³⁴ The *patria potestas* nevertheless retained some of its characteristic features. It could never pass to the mother, for instance, and was prolonged indefinitely, regardless of the child's age. 1 Planiol No. 1637.

³⁵ *Id.* at 1638.

³⁶ R. Pound, *infra* note 64, at 27.

³⁷ From this comes our concept of emancipation upon reaching a certain age, which was unknown to early Roman law. H. Jolowicz, *supra* note 10, at 201-03.

³⁸ Brissaud, *supra* note 28, at 181.

³⁹ C. Civ. arts. 203-211, 371-404 (1804).

⁴⁰ 1 Planiol No. 1641. The articles of the *Code Civil* on paternal power

with the same subject was probably not coincidence. At any rate, the articles of the *Projet* were certainly modeled after the mentioned section of Pothier.

The lease of services envisioned by the *Projet* varied little in its essentials from its Roman law predecessor. Any refinements may be attributed more to the development of a general theory of obligations than of lease. It was, like sale,⁵⁷ a consensual, synallagmatic and commutative contract, requiring the concurrence of three things for its perfection: thing, price, and consent. Each of these essential elements was, generally speaking, subject to the same qualifications mentioned above for the Roman law *locatio operarum*. These will not be repeated here, but one feature peculiar to the French contract must be mentioned.

Pothier retained, as essential to the contract, the Roman law requirement that only certain services might be the object of lease.

[I]t is only services of a humble nature susceptible of valuation in money that may be leased, such as those of male and female servants, labourers, artisans, etc. [*serviteurs et servantes, des manouvres, des artisans, etc.*] Services that are not capable of valuation in money by reason of their excellence, or of the social status of the persons [*la dignité de la personne*] rendering them, are incapable of being leased.⁵⁸

Whenever the lease of services was distinguished in Pothier's *Traité* from the lease of a thing, it was only with reference to the three sorts of servants mentioned above, though the term, *serviteur*, seems to have been used interchangeably with *domestique*, and *manouvres* with *ouvriers*. These are the same three referred to in the *Projet*,⁵⁹ which used *domestique*, *ouvrier* and *ouvrier artiste*.

The *Projet*, however, placed no express qualification on what sort of services might be the object of this contract. Could the terms used imply this qualification? At least one commentator agrees that they do, and further that, in spite of the term *ouvrier*, or workman, this section of the French Code applies only to *domestiques*, or domestic servants, "as proved by the words 'master' and 'wages' used throughout."⁶⁰ If this is correct, we must

⁵⁷ Pothier, in fact, considers lease to be a specie of sale, in consequence of its object's definition as "the enjoyment of a thing during a certain time." Lease is the sale of the enjoyment. Pothier, *Lease*, No. 4. As a general proposition, according to Planiol, this is true of lease in the Code Civil. 2 Planiol No. 1664. The proposition is tenuous, even as to lease of a thing; there is less support for applying it to lease of services.

⁵⁸ Pothier, *Lease* No. 10.

⁵⁹ Notes 132-133 *infra*.

⁶⁰ 2 Planiol No. 1828. Planiol is referring to the articles of the Code Civil.

conclude that the French *Projet* and Code came very close to ordaining a status of service, to recognizing a class of servants. Planiol seems to have agreed that this is so, even in the *Code Civil*. In order to fall within the provisions of Article 109 of the *Code Civil*,⁶¹ he said, one must

[R]eally work in the capacity of a domestic, though it is not designated as such in the Code, through scruples probably, but which it describes beyond a doubt.⁶²

*Master and Servant in the Common Law*⁶³

If the draftsmen of the 1808 Civil Code had contented themselves with drawing from Blackstone interstitial material to close the gaps in some civilian institution, his influence might be directly explained. However, his effect was far more pervasive. The whole notion of a relationship between a master and a free servant as two classes of persons is foreign to the civil law. This concept was taken from the common law and, even after being pruned to fit a civilian system, it remains saturated with ideas from the fundamental relation of feudal England, that of lord and tenant.

Countries which received the Roman law in one form or another have traditionally ordered relationships between citizens in terms of two institutions, family and obligation. If we except the quality of citizenship, it may be said that the relationships formed by Romanist man were all grounded in one or both of these institutions. His relationship with his family was determined by law, it established his status, and this, in turn, qualified the relationships which he could make with those who were not family. Whatever the quality, the relationships formed with non-family persons were mere obligations, relationships formed between those who were presumed to be equals.⁶⁴ Even in the medieval period, when this notion vied with the feudal system as the basis for public order, it retained its identity, and a man's position within his family

According to the reasons which he gives for it, his conclusion would be the same for those of the *Projet*.

⁶¹ C. Civ. art. 109 (1804). This article gives to a domestic the domicile of his master. See La. Civil Code art. 40 (1870).

⁶² 1 Planiol No. 584.

⁶³ See generally R. Graveson, *Status in the Common Law* 7-33 (1953); 2 W. Holdsworth, *History of English Law* 460-66 (1923); 4 *Id.* at 379-387; 1 F. Pollock and F. Maitland, *The History of English Law* 398-415 (2d ed. 1898).

⁶⁴ Arising as the law of the city of Rome when it was a city of patriarchal households, and as a body of rules for keeping the peace among the heads of these households, its problem was to reconcile the conflicting activities of free men, supreme within their households but meeting and dealing with their equals without. R. Pound, *The Spirit of the Common Law* 21 (1921).

passed into the modern Roman law as the significant qualification to forming private legal relationships.

But in England, at the nascence of the common law, there existed no institution of comparable force to check the sway of the one relation basic to the law of the land.⁶⁵ One's position as lord or tenant did not necessarily affect his relationships with other individuals in the same way that one's position in the family did in the Roman law. "Lord" and "tenant" were not qualities, at least not such as carried a generalized effect into the individual's private relationships. The importance of the lord-tenant relation to the society of that time, its virtual monopoly as a concept of order,⁶⁶ established it in the private law of England to an extent never known in civilian jurisdictions. Long after the effective demise of the relation as such, it continued to be an analogical force in developing the private institutions of the common law.⁶⁷

The contract of service⁶⁸ in the modern common law is a descendant of the feudal relation of lord and tenant, and particularly its sub-category that of lord and serf. Prior to the Black Death (1348-49), however, there was no common law regulating the subject, for the simple reason that none was needed. Each manor had its own court, where a tenant could air his complaints, and there was little need to go beyond these courts, since there was no real

⁶⁵ What do we mean by feudalism? . . . A state of society in which the main social bond is the relation between lord and man, a relation implying on the lord's part protection and defence; on the man's part protection, service and reverence, the service including service in arms. This personal relation is inseparably involved in a proprietary relation, the tenure of land—the man holds land of the lord, the man's service is a burden on the land, the lord has important rights in the land, and (we may say) the full ownership of the land is split up between man and lord. The lord has jurisdiction over his men, holds courts for them, to which they owe suit. Jurisdiction is regarded as property, as a private right which the lord has over his land. The national organization is a system of these relationships. . . .

F. Maitland, *The Constitutional History of England* 143 (1961).

⁶⁶ We have now reached the point where the Manor became the prevailing social institution and all the main facts of local organization were made more or less dependent on its structure.

P. Vinogradoff, *The Growth of the Manor* 291 (1905).

⁶⁷ The first solvent of individualism in our law and the chief factor in fashioning its system and many of its characteristic doctrines was the analogy of this feudal relation, suggesting the juristic conception of rights, duties and liabilities arising . . . simply and solely as incidents of a relation.

R. Pound, *supra* note 64, at 20.

⁶⁸ The contract of *service* is opposed to the contract for *service* much in the way civilians oppose *locatio operarum* to *locatio operis*. In the former, the servant does the master's bidding, whatever that may be, and works under his control for the duration of the service; in the latter, it is a particular result which the servant agrees to accomplish that forms the object of the agreement (e.g., building a house), and the servant does not labor under the direct control of the master. 2 H. Stephen, *Commentaries on the Laws of England* 123 (21st ed. 1950).

problems of enforcing performance at the time. There was no labor market, because serfdom provided lords with all the labor they needed. What kept the serf bound to his lord was his lord's need of him, and the sure knowledge that no one else did.⁶⁹

The legal incidents of this relationship were curious. In the earliest stages of English law, distinctions existed between personal status and tenure in land. An individual might be free in one but unfree in the other. However, if one were unfree in either, he had to look to his lord for protection. The notion developed that:

Tenure is so much more important than status, . . . as a matter of manorial economy, that the 'extents' and surveys are not very careful to separate the personally free from the personally unfree.⁷⁰

So the concepts of status and tenure tended to merge.⁷¹

Moreover, the Crown began to impose the duties of free men on the personally unfree, and in return extended to them the protection in life and limb accorded free men. The result was that the serf continued to be regarded as the lord's property, but was considered a free man in nearly all other respects.⁷² The Black Death brought about a crisis in the manorial system, which had depended on a carefully structured system of estates, the fictional regard of the serf as a part of the estate and his immobility within the system. With half of the population gone after the plague, landowners who before had been able to rely on a plentiful supply of labor to work their estates could get neither tenants nor laborers. As landowners began to compete among themselves for such able-bodied men as remained, a labor market developed, and laborers, taking advantage of the situation, exacted the wages they pleased.⁷³

⁶⁹ [I]f they escaped from their lord it might be very difficult for him to prove them his "natives". On the other hand, while they remained in his power, they could have little hope of proving themselves free, and if they fled they left their all behind them.

1 F. Pollock and F. Maitland, *supra* note 63, at 415.

⁷⁰ *Id.* at 414-15.

⁷¹ The difficulty of isolating an idea or a right from material property is characteristic of early law. In matters of personal condition, therefore, one rightly expects to find a close connection with some material object

R. Graveson, *supra* note 63, at 9.

⁷² Serfdom with him [Bracton] is hardly a status; it is but a relation between two persons, serf and lord; as regards the lord the serf has at least as a rule no rights, but as regards other persons he has all or nearly all the rights of a free man; it is nothing to them that he is a serf.

1 F. Pollock and F. Maitland, *supra* note 63, at 398.

⁷³ 2 W. Holdsworth, *supra* note 63, at 460. The following account of the Statute of Laborers is drawn from Holdsworth and the conclusions as to its effects agree somewhat with his. For a different, though not really contradictory, point of view, see Jones, *Per Quod Servitium Amisit*, 74 L.Q. Rev. 39 (1958).

Fragmented as it was into more or less self-sufficient manorial units, each governed by its own customs, the old feudal order was ill-equipped to cope with the new economic conditions brought about by the labor shortage. There was no common law of serfage; the serf's relation to his lord was fixed by the customs of the particular manor, and one manor's customs held no sway in the court of another.⁷⁴

The Statute of Laborers,⁷⁵ enacted to correct this situation, applied only to hired servants; those who retained their land tenures were not a concern during the labor crisis. Four general principles formed the basis of the act: (1) all laborers who were able to work had to work; (2) laborers had to work for a reasonable wage; (3) refusal to work for a reasonable wage was an offense, as was paying higher wages than the law allowed; and (4) only the poor who were unable to work were allowed to beg. In addition to his civil remedy against a servant who left his service and against anyone who enticed him away,⁷⁶ the master also had the right to use force to capture a servant who departed from his service, or who refused to enter it after agreeing to do so.

The labor crisis created by the plague had removed the servant from the power of the master. In its efforts to restore order to the system, the state attempted to restore the parties to their former positions. The old order had looked upon the relation of master and servant as that of one *person* in the power of another *person*. Al-

⁷⁴ There was an action at common law against anyone who took or beat the plaintiff's servant, thereby depriving him of the servant's services. This was the action *per quod servitium amisit* (by which he lost his services). Its existence before the Statute of Laborers is one of the few points of agreement among writers on the subject. Compare 4 W. Holdsworth, *supra* note 63, at 383; Jones, *supra* note 73; Sayre, *Inducing Breach of Contract*, 36 Harv. L. Rev. 663 (1923); Wigmore, *Interference with Social Relations*, 21 Am. L. Rev. 764 (1887). Sayre traces its origin to the Roman Law *actio iniuriarum* (a sort of remedy for slander to the *paterfamilias*) and its reception in the common law to Bracton and through the following passage:

[S]o that if injury has been done to some one through those who are under his power . . . and [if someone] shall have beaten, wounded or evilly treated a person in his service against the peace . . . an *actio indirecta* lies for the lord in so far as it was to his interest not to be deprived of the services of his household servants nor of the labors of his slaves and of such like.

Id. at 663-64.

Cf. La. Civil Code arts. 174-75 (1870). It should be noted that Bracton adds the qualification, "of the services," to the Roman law in order to achieve the same result, protection of the status of the *paterfamilias* or lord. This addition was essential for Bracton's time and society. See notes 65 and 71 *supra*; note 78 *infra*.

⁷⁵ Statute of Laborers, 23 Edw. 3 (1351). The Statute was preceded by the Ordinance of 1349 on the same subject. The two were construed together and will be referred to throughout as one.

⁷⁶ *Contra*, Jones, *supra* note 73 at 41-45.

though recognizing the basis of the relation as now being a contractual one, the state nevertheless provided "incidents" to the contract which in fact restored the master to his former position of power. The master was given rights in the contract which could be asserted against third persons, a kind of *in rem* right in the services of his servant.

Subsequent periods of English law regarded the lease of service purely as a contract, and the action for its breach as an "incident" of the contract. But, as Holdsworth pointed out:

[H]istorically there was a good deal to be said for the view that, as a result of the statutes of Labourers, the common law recognized a right of action, not for procuring a breach of contract, but for disturbing a definite status. . . .⁷⁷

The nature of this status was no more purely personal than it had been before the Statute. The notion of estates in land and a material basis for all rights was so dominant in the medieval mind that a person with a superior relational status was considered as having an actionable proprietary interest in the maintenance of that status.⁷⁸

At the time for which Blackstone wrote, the master-servant relation was still regarded as one of the "three great domestic relations." Blackstone recognized its foundation in contract, just as had the legislators of the fourteenth century, but the relation was

⁷⁷ 2 W. Holdsworth, *supra* note 63, at 463. There was another effect of the Statute which has received little attention from English writers. Before the statutes, there was no "status" of serfdom. The relationship between lord and serf was a relation between this man and that one, not between this class of men and that. There were no more universal characteristics of the relationship between lord and serf than there were of the relationship between friends. There were, to be sure, certain incidents which we say are typical of the one, because they were customary. But it is precisely because these incidents were merely customary (and the "custom" was limited to a given lord's estate) that they cannot be said to describe a status. A serf was a serf on his lord's estate and to his lord, but at no other place and to no other. But the Statute of Labourers, by the sheer force of words, divided men into two sorts: those who hire out their services *are* servants; those who retain them *are* masters. After this, it could no longer be said that the relation of master and servant was merely relational. Those who were not parties to relationship were, by implication, third parties to it, and third parties might be affected by the relationship. Holdsworth was correct in saying that the statute regulated the relationship by ascribing status-like incidents to the contract. What he overlooked, however, is that the statutes also *created* the status. In the act of restoring the master to power, the state interposed itself between master and servant and usurped his power.

⁷⁸ [This was] characteristic of the medieval feeling of the need for a material basis of incorporeal rights. . . . The later action for enticement of a servant, so common under the Statute of Laborers, proceeded largely upon injury to the master's pecuniary right in the maintenance of a beneficial relational status.

R. Graveson, *supra* note 63, at 13-14. 2 Holdsworth, *supra* note 63, at 463, n.1. *Cf.* note 74 *supra*.

not yet viewed as merely the sort of agreement entered into by two of what Graveson calls "normal persons."⁷⁹ The relation once contracted was still enough colored by the ancient concept of status-estate to be regarded as the "property" of the master. Recurrent throughout Blackstone's treatment of the relation is the rationale:

The reason and foundation, upon which all this doctrine is built, seem to be the property that every man has in the service of his domestics; acquired by the contract of hiring, and purchased by giving them wages.⁸⁰

Blackstone classified servants into four categories: (1) menial servants, "so called from being *intra moenia*, or domestics;"⁸¹ (2) apprentices, who are "usually bound for a term of years by deed indented or indentures, to serve their masters, and be maintained and instructed by them . . . in order to learn their art and mystery;"⁸² (3) laborers, "who are only hired by the day or week, and do not live *intra moenia*, as part of the family;"⁸³ and (4) superior servants, "being rather in a superior, ministerial, capacity . . . whom however the law regards as servants *pro temporare*, with regard to such of their acts as affect their master's or employer's property."⁸⁴

LOUISIANA CIVIL CODE OF 1808

*Familia and the Law of Persons*⁸⁵

Before examining Louisiana's law, we might briefly summarize the influential developments in the three systems from which it is drawn.

⁷⁹ R. Graveson, *supra* note 63, at 2.

⁸⁰ 1 Blackstone Comm. 429. See also 3 Blackstone Comm. 142.

⁸¹ 1 *Id.* at 425.

⁸² *Id.* at 426.

⁸³ *Id.* at 426-27.

⁸⁴ *Id.* at 427. Blackstone provided the scheme of Book I, Title 6 of the Louisiana Civil Code of 1808, and was the immediate source of a number of its articles:

<i>La. Civil Code of 1808</i>	<i>Source</i>
Art. 1.6.1 (p. 36).	
Art. 1.6.2 (p. 36).	
Art. 1.6.3 (p. 36).	Act of 1806, § 1; cf. Pothier, Lease No. 10
Art. 1.6.4 (p. 36).	
Art. 1.6.5 (p. 36).	Act of 1806, § 5.
Art. 1.6.6 (p. 36).	
Art. 1.6.7 (p. 36).	1 Blackstone Comm. 426; Act of 1806 §§ 1, 2, 6.
Art. 1.6.8 (p. 36).	1 Blackstone Comm. 425, 426.
Art. 1.6.9 (p. 36).	Act of 1806, § 3.
Art. 1.6.10 (p. 38).	1 Blackstone Comm. 428.
Art. 1.6.11 (p. 38).	1 Blackstone Comm. 429.
Art. 1.6.12 (p. 38).	1 Blackstone Comm. 429.
Art. 1.6.13 (p. 38).	1 Blackstone Comm. 429.
Art. 1.6.14 (p. 38).	1 Blackstone Comm. 431.

The Act of 1806 referred to above is the act of May 21, 1806, entitled "An Act for the regulation of the rights and duties of apprentices and indented servants."

⁸⁵ See generally, 1 Domat, prel. bk. 2.69-105.

The Roman law developed as a system governing the relationships of families, not assuming that the individual had no legal existence, but that as a mere individual he could form no effective legal relationships. In theory at least, the father of family owned everything. All that was acquired by family members in his power was his; he was responsible—or rather his property, his *familia*, was responsible—for their debts and their damage. Therefore the contracts made by Romans were "qualified" by their positions in the *familia*. The father of family in his own power was the only completely "free" person, only he could obligate his property without limit. Sons and slaves, on the other hand, even in the late periods of the law, could never bind anyone (themselves or *paterfamilias*) for more than the combined value of their own *peculium* and persons. The law of contracts grew up as a sort of *exception* to the independence and self-sovereignty of the family.

By Domat's time, though the old forms and institutions were the same, the old presumptions which gave rise to them had been replaced. The old identity of *potestas* and property—the idea that they were coextensive, that the *paterfamilias* "owned" everything and everyone in his power—was gone. *Potestas* and property still had their place, but they were no longer defined in terms of each other. The father still had *potestas*, but property and ownership had become matters of state. This separation, and the influence of the Church, brought new emphasis to distinctions in the law of persons. *Filiusfamilia* were not necessarily property; sons and slaves were in every way distinguished. Wives and children might have their own property, which the father only managed. Distinctions of persons still had their basis in family, but the emphasis had changed, the justification for the difference was new. Thus, we see the beginnings of the distinction now drawn between one's "personality" (the capacity to acquire rights and duties) and one's "capacity" (the ability to exercise control over these rights and duties). Thus in Domat's time, the law of contracts was becoming the rule rather than the exception.

In the French Code, the exception became the rule. The basic notion of social order was no longer power, but rights and obligations. The individual had become the basic subject, the unit of the law. Family distinctions still existed, but it was the individual's relations to others to which the law gave form. The father's former power was reduced to a temporary obligation, owed both to family and state.

Somewhere between Domat and the French Code falls the family concept of the Louisiana Code of 1808. Most of Book I of the Louisiana Code of 1808 was drawn from the French *Projet* and

Code. Husband and wife, father and child,⁸⁶ tutor, and curator: these persons and their relationships were defined in terms of the juridical contributions of the French Codes. They were all inherently possessed of abstract free wills, which they might turn to the acquisition of rights and obligations, or patrimony. They were restrained only in the *exercise* of these rights, and among these restraints were the defined relationships of Book I.

However, Title 1 of Book I, which purports to establish a general theory for these several distinctions of persons, was drawn entirely from Domat.⁸⁷ Except for the exclusion of certain doctrinal material, the 19 articles of Title 1 are word for word Domat's. Most of the distinctions drawn by these articles, though not entirely consistent with, are at least inoffensive to, the more liberal presuppositions of the following titles. For that reason they have been retained in subsequent codifications. These were the distinctions based on sex,⁸⁸ legitimacy,⁸⁹ minority,⁹⁰ and mental infirmity⁹¹—what Domat called “natural” distinctions⁹²—and the effects of emancipation.⁹³ The justification for these distinctions still has its place in both the Louisiana and French Codes. Domat perceived, for example, that these distinctions by nature, and those following, which are based on “arbitrary laws,”⁹⁴ had two things in common. First,

[T]hat they render persons capable, or incapable, of all manner of engagements, or of some only, or of successions. . . . So that it may be said that the state of persons consists in this capacity, or incapacity⁹⁵

and, secondly, that

[T]hey are of such a nature, that every one of them is, as it were, in a parallel line to another that is its opposite; and

⁸⁶ See Note 40, *supra*, for general reference to the sources of this title.

⁸⁷

La. Civil Code of 1808
Arts. 1.1.1-1.1.12
(pp. 8-10) (Of
Distinctions by Nature).

Arts. 1.1.13-1.1.19
(p. 10) (Of
Distinctions by Law).

⁸⁸ *La. Civil Code of 1808*, 1.1.1-2 (p. 8). Distinction according to sex is no longer made, at least, not by definition.

⁸⁹ *La. Civil Code of 1808*, 1.1.3-8 (p. 8).

⁹⁰ *La. Civil Code of 1808*, 1.1.12, 18-19 (p. 10).

⁹¹ *La. Civil Code of 1808*, 1.1.9-11 (pp. 8, 10).

⁹² 1 Domat, *prel. bk.* 2.73.

⁹³ *La. Civil Code of 1808*, 1.1.17 (p. 10).

⁹⁴ 1 Domat, *prel. bk.* 2.90.

⁹⁵ *Id.* at 70.

1 Domat, *prel. bk. title 2*
Nos. 74-80, 84-86, 89.
(Of the State of Persons
by Nature).

Nos. 97-98, 100-02,
104-05. (Of the State
of Persons by Law).

there is always one of the two opposites to be met with in every person.⁹⁶

Speaking for the libertarian French Civil Code, Planiol recognized practically the same elemental bond to distinctions of status.⁹⁷

The distinctions “based on law,” however, are another matter. Articles 13-15 of the Louisiana Civil Code of 1808⁹⁸ distinguished free men, manumitted persons and slaves (not exactly a libertarian distinction). Freedom was the Roman definition,⁹⁹ slavery was not. At Roman law, non-liberty was absolute legal incapacity, and it was this quality which placed the slave “in the power of a master.” The second “legal distinction was made by article 16 of the 1808 Code:

The sons and daughters of family are persons who are subject to the father's authority [*la puissance paternelle*]; and the fathers or mothers of family, who are likewise heads [*chefs*] of family, are persons who are not subject to the said authority, whether they have children of their own or not and whether they have been freed from the father's authority, by emancipation or by the death of the father.¹⁰⁰

Taken literally, of course, the article makes no sense. How can one be a father of family if he has no children? To understand the article, we must remember the historical role of the family as the unit of civil society, and the fundamental distinction between *paterfamilias*, who alone was *sui juris*, and the members of his family, who were *alieni juris*. Only the *paterfamilias* was entitled to full legal recognition—complete civil capacity. As the law developed and the inherent conflict between contract and family became more pronounced, the tendency was toward extending civil capacity more and more to persons formerly under the power of another. But the law, as yet unable to generalize this tendency, extended civil capacity according to its old notion, by fictionally regarding those who were newly *sui juris* as *paterfamiliae*, whether or not they were in fact “fathers of family.”

What article 16 means then is that everyone is either subject to *patria potestas* or he is not, *i.e.*, he is either in the power of another or in his own. It contains the familial equivalent of the distinction between free men and slaves. Domat's comment following the identical passage in his treatise bears this out:

According to these two distinctions of free-men and slaves, of fathers and sons, there is no person who is not

⁹⁶ *Id.*

⁹⁷ 1 Planiol Nos. 419-30.

⁹⁸ *La. Civil Code of 1808*, 1.1.13-15 (p. 10); see also art. 1.6.16 (p. 40).

⁹⁹ Buckland 61.

¹⁰⁰ *La. Civil Code of 1808*, 1.1.16 (p. 10).

either under the power of another, or in his own; that is to say, master of his own rights.¹⁰¹

Article 16 goes a long way toward re-establishing a quasi-Roman *familia*, with a *paterfamilias* at its head, as the unit of law. And if we remember that the titles on husband and wife, on father and child, and the chapter on paternal authority were, for the most part, drawn from the French Codes, this seems curious indeed. Briefly put, how can this *potestas* be conceived, on the one hand, as merely coextensive with the welfare of wife and child—as onerous and responsible as it is powerful—and, on the other hand, as a sort of residual legal category¹⁰² which the law has yet to penetrate, and as sovereign in that area? The two concepts seem mutually repugnant.

In many respects they are mutually repugnant—especially as concerns the authority over children. There can be no doubt that to this extent, *potestas* was not arbitrary or without direction. The father's power was somewhat greater in the Louisiana Code than in the French Code, by virtue of the articles taken from Blackstone.¹⁰³ He had the express right of correction (which was limited in the French Code) and might even delegate this authority, to teachers, for example.¹⁰⁴ But even these concessions did not greatly expand his powers.

There are several possible explanations for the presence of article 16 in the 1808 Code. One was advanced above—that it was an archaic fiction, extended to cover contradictions not then apparent in the law. Actually, the father-of-family-even-without-a-family is so fundamental to the civil law that we find him even in the modern Louisiana Code.¹⁰⁵ However, the most likely explana-

¹⁰¹ Domat, prel. bk. 2.103.

¹⁰² In this respect, it is a kind of familial tenth amendment. The Louisiana *patria potestas* is, of course, only a shadow of its Roman self. What was said of the limits placed on the power by the French State applies with equal force here. In the beginning the *patria potestas* was the equal of the law; the spheres of their concern were as separate as the boundaries of two states. As the law developed, it pre-supposed the separate existence of the *potestas* as its own foundation. Eventually the existence of the *potestas* became too important to the continued order of the law to be allowed its own unchecked development. At that point, the law began to define the *potestas*, and so doing, each time appropriated it to that extent.

¹⁰³ See note 40 *supra*.

¹⁰⁴ La. Civil Code of 1808, 1.7.40-41 (p. 52).

¹⁰⁵ E.g., his is the standard of care which must be met by the *negotiorum gestor*. La. Civil Code of 1808, 3.4.8 (p. 318) (La. Civil Code, art. 2298 (1870)). The original term, "prudent father of family" now appears as "prudent administrator." Another instance of influence is the term "patrimony" which means literally "the world of the Father." How essential this notion of paternal power is to the public order may be seen from two other articles. One provides that even the insane and those interdicted for other infirmities "retain their estates, their capacity for inheriting, and such

tion (though not inconsistent with the first) is that the ancient Roman *familia*, which once signified everything—persons and property—under the power of the father, was taken by the draftsmen of the 1808 Civil Code and given a new meaning which conformed to their time and place.

In the 1808 Code, then, "family" had two meanings. The first was "family" as we understand the word today—wife and children, or perhaps all blood relations. The second meaning covered all who were in the power of another—relations, servants, and slaves. If there was any doubt about the existence of this double meaning in the Code of 1808, it was eliminated by the Code of 1825:

Family. Family in a limited sense, signifies the father, mother and children. In a more extensive sense, it comprehends all the individuals who live under the authority of another, and includes not only the servants [*les serviteurs*], but also the slaves of the father of family. It is also employed to signify all the relations who descend from a common root.¹⁰⁶

The draftsmen of the 1808 Code must have been familiar with this idea. Another article of that code expresses a similar idea,¹⁰⁷ and the source of the quoted articles seems to be *Las Siete Partidas*,¹⁰⁸ which one of the 1808 draftsmen helped translate.¹⁰⁹

branches of the paternal power, as are compatible with their situations." La. Civil Code of 1808, 1.1.11 (p. 10). The other provides that husband and wife may not by their matrimonial agreement derogate "from the rights resulting from the power of the husband over the person of his wife and children, or which belong to the husband as head of the family. . . ." La. Civil Code of 1808, 3.5.4 (p. 324).

¹⁰⁶ La. Civil Code, art. 3522(16) (1825). Art. 16 (La. Civil Code of 1808, 1.1.16) (p. 10) was somehow left out of the subsequent codes, though no mention of suppressing it appears in the Louisiana Project of 1823. Actually its provisions are more adequately covered by the various definitions contained in article 3522 of the 1825 code.

¹⁰⁷ La. Civil Code of 1808, 2.3.78 (p. 126). "The word *family* made use of in this section, is to be understood of the wife, children and servants [*domestiques*] of the person to whom the right of use or habitation is granted."

¹⁰⁸ *Las Siete Partidas* 7.1.6 provides, in relevant part:

[W]e likewise say that by the word *family*, is understood the husband and his wife and all who live with him, over whom he exercises his authority, as children, servants and other dependents. For that is called a *family* which is composed of more than two persons subject to the will of its head, but a less number would not make a family . . . And they are called the *servants (domesticos)*, of a man, those who are properly such; as also laborers who cultivate his fields, as well as his freedmen.

Laborers are here included in the family. As only those "who live with him" are in the master's family, however, "laborers," as used here, probably would be included within the Code's broader definition of "domestic." La. Civil Code, art. 3172 (1825). See note 134 *infra*.

¹⁰⁹ The draftsman was L. Moreau-Lislet, who with Henry Carleton authored *The Laws of Las Siete Partidas Which Are Still in Force in the*

Louisiana Law of Master and Servant

Thus, under its broader definition of family, the Louisiana Civil Code of 1808 considered the servant as a part of the family. This tends to explain his place in Book I, as a sort of person. But several questions immediately arise if we admit him as such. For example, if the distinctions of persons in Title 1 of the 1808 Code all "render persons capable, or incapable" in one way or another, in what way is the servant incapacitated? As to the slave, this is easy to answer: his condition is defined in Title 1 as absolute incapacity.¹¹⁰ But the first part of Title 6 of the Code¹¹¹ distinguishes and treats of "free servants" (*serviteur libre*), and the basis for their distinction as persons is not so obvious.

It might be argued that an agreement to serve another is the surrender to that person of a patrimonial capacity—i.e., the capacity to acquire rights and obligations through one's own enterprise. It is one's subjection to the will of another for the time of service. This is tenuous, however, except insofar as it implies that the servant is distinguished as a "person" because he is in the power of another. Article 16¹¹² of the 1808 Code does not mention "servant" among those under power, only sons and daughters. The idea seems to be implicit in the concept of father of family, however, and if the 1808 Code was not explicit, the Code of 1825 was.¹¹³

A comparison of these articles (on free servants) with their sources suggests another reason. We saw in the development of the Master-Servant relation in the common law the gradual merger of the notion of status as a personal condition with that of land tenure, until it became impossible to tell which depended on the

State of Louisiana (1820). See Franklin, *An Important Document in the History of American, Roman and Civil Law: The De La Vergne Manuscript*, 33 Tul. L. Rev. 35 (1958).

¹¹⁰ La. Civil Code of 1808, 1.1.13-16 (p. 10).

¹¹¹ La. Civil Code of 1808, 1.6.1 (p. 36) provides: "There are in this territory two classes of servants [*serviteurs*], to wit: Free servants and the slaves." La. Civil Code of 1808, 1.6.2 (p. 36) provides:

Free servants [*serviteurs*] are in general all free persons [*les personnes*] who let, hire [*vendent*] or engage their services to another in this territory, to be employed therein at any work, commerce or occupation whatever, for the benefit of him who has contracted with them for a certain price or retribution or upon certain condition[s].

La. Civil Code of 1808, 1.6.3 (p. 36) provides:

There are two sorts of free servants [*serviteurs*] in this territory, to wit:—Servants [*serviteurs*] properly so called, or those who let or engage themselves to another, to be employed at some ordinary or hard labor; such are [household domestics], workmen, laborers, [*tels que les domestiques de maison, les ouvriers, manoeuvriers*] and all those who engage to serve in husbandry or upon plantations; And apprentices, who are those who engage to serve some person for the purpose of learning some art, trade or profession.

¹¹² La. Civil Code of 1808, 1.1.16 (p. 10).

¹¹³ See text at note 106 *supra*.

other.¹¹⁴ Because the services owed by the man to the lord were considered as part of the land also, the idea arose that the lord had a *proprietary interest* in those services, or, what amounts to the same thing, a proprietary interest in his relation to the man. So when Bracton introduced the Roman law *actio iniuriarum* (which covered slander to the status or power of the *paterfamilias* through an offense to one in his power), he had to tack on the requirement "of services" to give it the same scope at common law that it had in the Roman law. Eventually the action was extended to cover offenses to any relation, as long as some loss of services, however small, could be proved. Thus, to bring the action against his daughter's seducer, the father had to allege loss of her service as a result of the offense.

It is in this sense that Blackstone referred to the "property" which every man has in his servants.¹¹⁵ It is not that the master "owns" the servant, or the services, but that having the services, or a right to them, is an attribute to his person—to his status, so to speak. This is also the signification of the phrase, "the master has an interest in his servant," which is found in article 12 of Title 6 of the Louisiana Civil Code of 1808.¹¹⁶ Because this article and article 11 were included in Title 6, it might be argued that servants are distinguished as persons by virtue of the value which they ascribe to the master, or, to the father of family, by being in his power.

This argument takes on considerable force if we remember that

¹¹⁴ See notes 65, 71, 74, 78 *supra*.

¹¹⁵ See text at note 80 *supra*.

¹¹⁶ La. Civil Code of 1808, 1.6.11 (p. 38). "The master [*maître*] may bring an action against any man for beating or maiming his servant [*serviteur*], but in such case, he must assign as a cause of action his own damage arising from the loss of his service [*la privation de son service*] and this loss must be proved upon the trial."

1 Blackstone Comm. 429. "A master also may bring an action against any man for beating or maiming his servant: but in such case he must assign, as a special reason for so doing, his own damage by the loss of his service; and this loss must be proved upon the trial."

La. Civil Code of 1808, 1.6.12 (p. 38). "A master [*maître*] may justify an assault in defence of his servant [*serviteur*] and a servant [*serviteur*] in defence of his master [*maître*]; the master because he has an interest in his servant, not to be deprived of his service [*qu'il est de l'interet du maître de n'être point privé de son service*]; the servant [*serviteur*], because it is part of his duty for which he receives wages, to stand by and defend his master [*maître*]."

1 Blackstone Comm. 429. "A master likewise may justify an assault in defence of his servant, and a servant in defence of his master: the master because he has an interest in his servant, not to be deprived of his service; the servant, because it is part of his duty, for which he received his wages, to stand by and defend his master."

slaves were identified by the 1808 Code as immovables by operation of law, "on account of their value and utility for the cultivation of lands."¹¹⁷ And the notion of defining the slave as a "servant" as opposed to defining him as merely a non-person, consistent with article 13 of Book I, Title I, implies his use. The same might be said of free servants.

If servants are admitted generally as a class of persons, does it follow that all of the several sorts of servants are considered as such? On its face, Title 6 purports to treat of three categories of free servants: (1) bound or indentured servants (*engagés*),¹¹⁸ (2) apprentices,¹¹⁹ and (3) "persons who merely let their daily services for certain wages."¹²⁰ This classification is made according to contract, or the manner in which the servant is bound.¹²¹ The contracts of the first two categories of servants are regulated by Title 6; that of the third category by Title 8 of Book III (Of Letting and Hiring).¹²² Turning then to the chapter on lease of services, we see two more servants mentioned—domestics¹²³ and laborers.¹²⁴ Are all of these servants "persons"? Are they all members of the family as discussed above?

The question becomes especially important when the applicability of articles 11-14 of the 1808 Code is considered.¹²⁵ The first three articles of Title 6 of the Code employ the generic term, *serviteur*, establishing general distinctions among the various sorts of servants.¹²⁶ As to the rules governing the *contracts* of servants,

¹¹⁷ La. Civil Code of 1808, 2.1.19 (p. 98). "Slaves in this territory are considered as immovable by the operation of the law, on account of their value and utility for the cultivation of lands, and therefore they may be mortgaged."

¹¹⁸ La. Civil Code of 1808, 1.6.4-10 (pp. 36-38).

¹¹⁹ La. Civil Code of 1808, 1.6.5-10 (pp. 36-38).

¹²⁰ La. Civil Code of 1808, 1.6.4 (p. 36); 3.8.55-60 (p. 382).

¹²¹ The classification is imperfect. Bound servants and apprentices, for example, are bound to their masters in the same way and for the same thing; their contracts differ in the nature of the reciprocal—the master's—obligation. To the former he owes only the price; for the latter he must provide instruction. In the 1825 Code this scheme was corrected. See notes 126, 127 *infra*.

¹²² La. Civil Code of 1808, 1.6.4-10 (pp. 36-38); La. Civil Code of 1808, 3.8.55-60 (p. 382).

¹²³ La. Civil Code of 1808, 3.8.57 (p. 382).

¹²⁴ La. Civil Code of 1808, 3.8.58 (p. 382).

¹²⁵ La. Civil Code of 1808, 1.6.11-14 (p. 38). See text of arts. 11-12 at note 116 *supra*. Article 13 refers one to Book III, Title 4 for rules governing the master's liability for his servant's delicts and quasi-delicts; article 14 binds the master for injury caused by objects thrown from his house, "in as much as the master has the superintendance and police of his home." This latter provision occurs in Roman, Spanish, French and English systems, but this particular form of it comes from Blackstone (*supra* note 84). As being placed at the chapter's end, these four articles also follow the order of Blackstone's treatment of the relation, first of the several sorts of servants (arts. 1-4); then of the relation of master to servants (arts. 5-10); lastly of the relation as it affects third parties (arts. 11-14).

¹²⁶ According to the definition of free servants given by article 1.6.2

article 4¹²⁷ divides servants into the three classes mentioned above—contracts of indenture being covered by articles 5-10 of Title 6,¹²⁸ and leases of services being covered by articles 55-60 of Title 8, Book III. Throughout articles 5-10 of Title 6, only the terms *engagés* and *apprentifs* (bound servants and apprentices) are used, clearly distinguishing these servants from those who lease their services. Beginning with article 11, however, and continuing throughout all the articles of Title 6 regulating the relation of master and servant as it affects third parties, the term *serviteur* is again employed. The question which therefore arises is, who is a *serviteur* within the intendment of these articles of Title 6?

Although the Code is not entirely consistent,¹²⁹ *serviteur* is ap-

(quoted at note 111, *supra*), four qualities of free servants result: (1) the obligor must be a free person; (2) the object of the contract with the master is the services of the servant (this distinguishes this contract from the contract of carriage and the letting out of a job); (3) the fruits of the services inure to the master's benefit; (4) the services must be menial.

¹²⁷ La. Civil Code of 1808, 1.6.4 (p. 36).

When a person has bound himself to serve another during a settled time, for a certain sum of money paid, such a contract being equivalent to a sale, the engagement [*les obligations*] resulting therefrom is much more strict and rigorous than that which is entered into by persons who merely let their daily services for certain wages.

The obligations of the latter, their extent and limits are defined under the title of *letting and hiring*.

In the 1825 Code, articles 3 (quoted at note 111, *supra*) and 4 were properly combined, and the article resulting was given its present form, dividing servants into three types according to the nature of their obligations and the reciprocal obligations: (1) those who lease their services, (2) bound servants and (3) apprentices.

La. Civil Code art. 167(1) (1825); La. Civil Code art. 164 (1870).

¹²⁸ Articles 5-10 dealt with the relation of (or contracts of) master and bound servant or apprentice. These are of little importance to the present consideration of the subject and it is enough to point out the master's right to specifically enforce the contract. For a discussion of the master's right, see note 131 *infra*.

When these articles were revised in 1825, a provision was added limiting the term of any indenture to five years. La. Civil Code art. 160 (1825). This passed into the 1870 Code as article 167 and has frequently been applied to limit *leases* of service. See, for example, *Thaxton v. Robertson*, 224 So. 2d 183 (La. App. 3d Cir. 1969). The problem thus created prompted the legislature to amend it recently, extending the limit to ten years. That the article was never intended to apply to any contract but indentures may be seen from the draftsmen's note in the *Projet* of 1823 (p. 12), which states:

The term formerly permitted was seven, but it is better for the person employed to renew his engagement, if he thinks proper, than be bound for so long a time.

The words "formerly permitted" refer to the Act of 1806 which regulated the contracts of bound servants and apprentices only.

¹²⁹ The slave is directly referred to as *serviteur* only once, in article 1.6.1, although the slavery articles are included in the title, *Du Maître et Serviteur*. In addition, article 1.6.3 (text at note 106 *supra*) includes among *serviteurs* "properly speaking," laborers and workmen; this inclusion was suppressed in 1825. See note 122 *supra*.

In its broadest sense, *serviteur* seems to refer to *all* servants (including slaves and laborers); in a more restricted sense, it is used almost interchangeably with *domestique*. This latter seems to be the sense given it by

parently a term which gauges the extent of the master's authority (*potestas*) over the particular type of servant. Whether or not the servant is a *serviteur* depends on the degree to which he necessarily becomes part of the master's *familia* as a result of his contract. Bound servants and apprentices, for example, are considered to have sold their services for the contract's term,¹³⁰ and as to them, the master is accorded a right of specific performance.¹³¹ They are clearly subject to the master's authority for the duration of service.

As to those who lease their services, the question is more difficult. If we compare the English and French texts of the Louisiana Code articles, we may perhaps see more clearly that these articles distinguish two sorts of servants: first is the domestic attached to

Pothier (text at notes 53-54 *supra*); this also seems to be the sense of it in article 1.6.11-14. (p. 38).

¹³⁰ La. Civil Code of 1808, 1.6.4-5 (p. 36). The analogy to sale is puzzling and unfortunate. Strictly speaking, the sale of a free man's services in the civil law ought to be a conceptual impossibility. Gaius did mention a problem presented by gladiators who were hired to fight and might not return. But this was clearly an exceptional circumstance and he cut the Gordian Knot by deeming those who returned to have leased their services, and those who didn't return to have sold themselves. 3 Institutes of Gaius 143 (Gaius might have been referring to *locatio servi* or lease of a slave).

Even apart from Pothier's later distinction between obligations to do and those to give, a sale of services is problematical; it is difficult to conceive of a man transferring all his interest in his own acts to another, without also selling his body as part of the deal.

There are two possible explanations for this bit of deeming. One is that it lays the theoretical groundwork for the master's right of specific performance (article 1.6.5 (p. 36)). The other is historical. Hire at common law was regarded as a sale for a time. Even today, the master at common law hires the *man*, not his services. Buckland & McNair, *supra* note 10, at 300. And in 1808, the incidents of the "hire" more closely resembled those attached to a civil law sale than to lease. In the translation of common law incidents to civil law form, perhaps that form was chosen which most nearly embodied the alien incidents. See note 131, *infra*.

¹³¹ La. Civil Code of 1808, 1.6.5 (p. 36). One wonders why the draftsmen chose the right of specific performance over the already integral English actions for wrongful departure and wrongful retainer. Whatever their motives, the choice must have been a conscious one since the latter are clearly exhibited in Blackstone. This may perhaps be taken to be further authority for the view that the Louisiana Codes rejected entirely the notion of tortious interference with contracts. *Moulin v. Monteleone*, 165 La. 169, 115 So. 447 (1928).

As a matter of economic expediency, the choice is perhaps easier to understand. The system of indentures which flourished until the 1830's was sanctioned by the law as a necessary means of populating a colonial territory. Impetuous European immigrants bound themselves for a term to masters willing to pay the price of their passage. The right to specific performance was the inducement accorded the master by governments constrained to encourage an influx of settlers. As the territory's population increased, coincident public resentment of this barbarous traffic produced ever more stringent regulations, which effectively discouraged the trade. See Deiler, *The System of Redemption in the State of Louisiana*, 12 La. Hist. Q. 426 (1929) for a rather charming rendition of the subject.

the person or family of the master;¹³² then there are those referred to in the English text as "laborers," "who let out their services to work on plantations or to work in all other manufactures."¹³³ It seems certain that this second category, the laborers,

¹³² La. Civil Code of 1808, 3.8.57 (p. 382). "A man is at liberty to dismiss a hired servant [*Les domestiques*] attached to his person or family [*la personne du maître, ou du service des maisons*], without assigning any reason for so doing. The servant is also free to depart without assigning any cause."

Projet of the Year VIII, 3.13.112. "Domestics attached to the person of the master, or to the service of his family may be dismissed at any time without cause, and may likewise leave their masters." The French texts of these articles are identical.

¹³³ La. Civil Code of 1808, 3.8.58 (p. 382). "Labourers who hire themselves out to serve [*Les personnes qui ont loue leurs services*] on plantations or to work in manufactures [*ou dans toutes autres manufactures pour y etre employees aux travaux qui s'y font*], have not the right of leaving the person [*le propriétaire*] who has hired them, nor can they be sent away by the proprietor, until the time has expired during which they have agreed to serve, unless good and just causes can be assigned."

Projet of the Year VIII, 3.13.113. "Domestics [*domestiques*] attached to farming [*a la culture*], yard maids [*servants de cour*], artisans [*les ouvriers artistes*], may not leave their masters [*maîtres*], nor may they be sent away, until the agreed time, except for serious cause."

La. Civil Code of 1808, 3.8.59 (p. 382). "If, without any just ground of complaint, a man [*le propriétaire*] should send away a labourer whose services he has hired [*la personne qui lui a loue ses services*] for a certain time, before that time has expired, he shall be bound to pay to said labourer, [*il doit lui payer*] the whole of salaries which he would have been entitled to receive, had the full term of his services arrived, whether said labourer was hired by the month or by the year."

Projet of the Year VII, 3.13.14. "If without just ground of complaint, the master [*le maître*] sends away a domestic [*domestiques*] or a workman [*ouvrier*] before the agreed time, he must pay him the salary agreed for the year or for the time expressed in his contract deducting the wages which the domestic or workman is likely to earn elsewhere during the unexpired term."

La. Civil Code of 1808, 3.8.60 (p. 382). "But if, on the other hand, a labourer [*la personne qui a engage ainsi ses services*], after having hired out his services, should leave his employer [*le propriétaire*], before the time of his engagement has expired, without having any just cause of complaint against said employer [*le propriétaire*], the labourer shall then forfeit all the wages that may be due to him and shall moreover be compelled to repay all the money he may have received either as due for his wages or in advance thereof on the running year or on the time of engagement."

Projet of the Year VII, 1.13.115. "If it is the domestic [*domestique*] or workman [*ouvrier*] who leaves without legitimate cause, he shall be bound to pay the master [*maître*] an indemnity which is based on the extra cost to the employer of obtaining another to perform the same services."

is not intended as a class of *serviteurs*. In the first place, the articles refer only to "*proprietaire*" or proprietor throughout, in place of "*maître*" or master; this could hardly be the result of inadvertence, since the articles from the *Projet* of the Year VIII, from which these articles are drawn, refer to the *maître* and *domestique*. In the second place, the service of the laborer is defined in terms of that which is done "on plantations or . . . in manufactures." This is a departure from the service required of all other servants, who are bound to serve their masters.

By the same test, however, the domestic must be classified as a *serviteur*, even though his contract with the master is terminable at the will of either party. Regardless of this control retained by him over the term of service, the domestic is *by definition* a part of the master's *familia* and, for as long as the relationship lasts, is thus subject to the master's authority.¹⁸⁴

We may include, then, as *serviteurs* (1) bound servants and apprentices, because the degree of control by the master to which their contracts subject them makes them a part of the family, and (2) domestics, because they are defined as part of the family, and are therefore subject to this authority for the time of service. And we may exclude laborers, as unrelated to the concepts of master or family, and thus not to be admitted as a class of servant or a Person within the intendment of Title 6 of the 1808 Code.

Classifying servants thus helps to explain, in part, the inclusion of articles 11 and 12 in the Louisiana Code of 1808.¹⁸⁵ We may suggest that they were intended to protect an offense to the power of the master, a slander to the integrity of the *paterfamilias*, more so than to provide mere pecuniary reimbursement. They were intended to function as had the *actio iniuriarum* in Roman law and the action *per quod servitium amisit* in the common law.¹⁸⁶ Thus, articles 11 and 12 would apply only to those servants who were within the authority of the master, i.e., were in one way or another, a part of his family.

In addition to intrinsic evidence, there is external authority for this classification of servants. If we rearrange the order of servants slightly, we may classify them thus:

¹⁸⁴ La. Civil Code of 1808, 1.2.8. (p. 12) gives to those "who labor constantly with, or serve others . . . the same domicile as those with whom they labor or serve . . ." In the 1825 Code, article 3172 was added, defining "servants or domestics" (*domestiques ou gens de service*) as "those who receive wages, and stay in the house of the person paying and employing them for his [personal] service [*service personnel*] or that of his family; such are valets, footmen, cooks, butlers, and others who reside in the house." La. Civil Code arts. 40, 3205 (1870).

¹⁸⁵ La. Civil Code of 1808, 1.6.11-12 (p. 38); *supra* note 116.

¹⁸⁶ See note 74, *supra*.

- (1) domestics—bound servants as well as domestics who only lease their services, as both "living under the authority of another" whom they are bound to serve;
- (2) apprentices—those bound to serve another in order to learn some art, trade or profession; and
- (3) laborers—those who form no part of the household.

These classifications of servants are the first three with which Blackstone dealt in his Commentaries.¹⁸⁷ And, although there seems to have been no authority for it,¹⁸⁸ Blackstone limited application of the equivalents of articles 11 and 12 to domestics. Immediately following these sentences in his text is the statement that:

The reason and foundation, upon which all this doctrine is built, seem to be the property that every man has in the service of his *domestics*¹⁸⁹

CONCLUSION

This article's comparative approach has incidentally raised several important questions of codal interpretation: what role, if any, should sources enjoy in codal interpretation? If sources may be employed in interpretation, what will be the effect of referring to common law sources to interpret code articles in a civil law system? By way of conclusion, this section will examine several of these questions within the framework of the Louisiana Civil Code's provisions on the subject.¹⁴⁰

Every civil code takes as its first premise the fiction of its self-sufficiency in every area of law which it treats. But rather than anticipating and providing for an infinitude of particular situations which might arise, a code includes general texts, and provides the means for their analogical extension. For problems of interpreta-

¹⁸⁷ Notes 80-84 *supra*.

¹⁸⁸ See Jones, *supra* note 73, at 53-58. However, compare the well-considered concurrence of Windeyer, J. in *Commissioner of Railways v. Scott* [1959] 33 A.L.J.R. 126, 144-55, which argues that "domestic" is used by Blackstone to signify "men's private affairs," as distinguished from their "public duties." This seems to be its sense in the phrase "domestic relations," but not as applied to servants.

¹⁸⁹ 1 Blackstone Comm. 429. By a curious historical coincidence, a relatively recent English case held, on the basis of this statement and the absence of any directly contradictory authority, that the action *per quod servitium amisit* was available at common law only to the master whose domestic was beaten. *I.R.C. v. Hambrook*, [1956] 2 Q.B. 641 (C.A.). *Noted in Jones, supra* note 68, at 53-58. *Cf. Bonfanti Industries, Inc. v. Teke, Inc.*, 224 So. 2d 15, 17 (La. App. 1st Cir. 1969). See also *Commissioner of Railways v. Scott* [1959] 33 A.L.J.R. 126.

¹⁴⁰ See generally La. Civil Code of 1808, 1 prel. tit. 1-21 (pp. 2-8); La. Civil Code arts. 1-21 (1870). Subsequent codes have retained both the substance and numeration of the 1808 articles without change.

tion, the Louisiana Code proceeds on the same premise: the answer is to be found within the code. Thus it sanctions reference only to the context of a provision,¹⁴¹ to laws *in pari materia*,¹⁴² and to "the reason and spirit of [the law], or the cause which induced the Legislature to enact it,"¹⁴³ as the only legitimate methods "of discovering the true meaning of a law, when its expressions are dubious."¹⁴⁴

Formulations such as these are essential to the continued viability of the Code. Unless it is to remain a static instrument, some means must exist for its coherent growth, and if it is to remain a code, this growth must be integral. In order to preserve its own integrity, then, a code cannot authorize source references for interpretation. It must presume its own comprehensiveness. This does not mean, however, that a study of sources can have no place in the code's expansion through interpretation. The problem with this presumed comprehensiveness is that it supposes a kind of infallibility in draftsmanship which can be embarrassing, as several of the articles taken from Blackstone illustrate.

Article 12 is one example.¹⁴⁵ Because the Louisiana Codes were originally drafted in French, then translated into English, a judicial rule of construction has developed, establishing the authority of the French text if it conflicts with the English.¹⁴⁶ Where the article was taken verbatim from Blackstone, however, a comparison of English text with source often indicates a similarity too

¹⁴¹ La. Civil Code of 1808, 1 prel. tit. 16 (p. 4). "Where the words of a law are dubious, their meaning may be sought by examining the context with which the ambiguous words, phrases and sentences may be compared, in order to ascertain their true meaning."

¹⁴² La. Civil Code of 1808, 1 prel. tit. 17 (p. 4). "Laws *in pari materia* or upon the same subject matter, must be construed with a reference to each other: what is clear in one statute, may be called in aid to explain what is doubtful in another."

¹⁴³ La. Civil Code of 1808, 1 prel. tit. 18 (p. 4, 6). "The most universal and effectual way of discovering the true meaning of a law, when its expressions are dubious, is by considering the reason and spirit of it, or the cause which induced the legislature to enact it."

¹⁴⁴ *Id.*

¹⁴⁵ La. Civil Code of 1808, 1.6.12 (p. 38); quoted at note 116 *supra*.

¹⁴⁶ *Sample v. Whitaker*, 172 La. 722, 135 So. 38 (1931).

1 Blackstone Comm. 60. "If the words happen to be still dubious, we may establish their meaning from the context, with which it may be of singular use to compare a word, or a sentence, whenever they are ambiguous, equivocal, or intricate."

1 Blackstone Comm. 60. "Of the same nature and use is the comparison of a law with which other laws, that are made by the same legislator, that have some affinity with the subject, or that expressly relate to the same point."

1 Blackstone Comm. 61. "But, lastly, the most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the *reason* and *spirit* of it; or the cause which moved the legislator to enact it. For when this reason ceases, the law itself ought likewise to cease with it."

precise to admit re-translation. The English text of article 1.6.12 is exactly that of Blackstone, whereas the French text of the same article differs from both the English text and Blackstone.¹⁴⁷ Which text should prevail? Abstract formulations of construction are of little help in such a situation; a proper answer can only come from careful analysis, comparing all code articles on the questioned subject with each other and with their sources.

However, such source analysis has its own limitations. To explain the meaning of a provision in the context of Domat or Blackstone is not necessarily to explain its meaning in the Louisiana Code; ultimately, articles of a code must be understood in terms of that code. Sources, then, may assist in our comprehension of, but should not be employed to limit, a concept's function as one element of a legal system. Sources may help us to perceive what was incompletely formulated by the draftsmen but they should not prompt us to complete the job or expand an unnecessary misconception.¹⁴⁸ Reformulation in this sense is legislation.

Perhaps the strongest admonition against codal interpretation by source reference comes from an examination of the articles of the Louisiana Code on interpretation of laws,¹⁴⁹ which were themselves drawn from Blackstone. If we must interpret the rules for codal interpretation in terms of the common law system from which they came, the sequence of possibilities presented becomes vicious.¹⁵⁰

¹⁴⁷ Where the English text reads: ". . . the master, because he has an interest in his servant, not to be deprived of his service;" the French reads (roughly): ". . . because it is of interest to the master not to be deprived of his services." See note 116 *supra*.

¹⁴⁸ For a very good example of an "unnecessary misconception," see note 130 *supra*.

¹⁴⁹ *Supra* notes 141-143.

¹⁵⁰ Compare Tate's approach to interpreting the Louisiana Code of Civil Procedure in Tate, *Amendment of Pleadings in Louisiana*, 43 Tul. L. Rev. 211 (1969).