HOW A CALIFORNIA SETTLER UNSETTLED THE PROSLAVERY LEGISLATURE OF ANTEBELLUM LOUISIANA

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INTRODUCTION

Slavery in the antebellum American South depended upon a set of laws designed to enslave and exploit individuals on the basis of their race, while protecting the owners of human property. A long line of literature has established this.[1] One might expect that those at the bottom of the hierarchy — enslaved women and girls of African descent — would have no hope of contesting their status. Recent literature demonstrates that there were in fact legal pathways to freedom.[2]

This paper was awarded first place in the California Supreme Court Historical Society's 2018 CSCHS Selma Moidel Smith Student Writing Competition in California Legal History.

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1 Derrick Bell, *Race, Racism, and American Law* (New York: Aspen Publishers, 2004); Eugene Genovese, *Roll, Jordan, Roll: The World the Slaves Made* (New York: Pantheon Books, 1974); Ulrich Bonnell Phillips, *American Negro Slavery: A Survey of the Supply, Employment and Control of Negro Labor as Determined by the Plantation Regime* (Baton Rouge: Louisiana State University Press, 1966); Thomas Morris, *Southern Slavery and the Law, 1619–1860* (Chapel Hill: The University of North Carolina Press, 1996); Kenneth Stampp, *The Peculiar Institution: Slavery in the Ante-Bellum South* (New York: Vintage Books, 1989).

2 Rosemary Brana-Shute and Randy Sparks, *Paths to Freedom: Manumission in the Atlantic World* (Columbia: University of South Carolina Press, 2009); Alejandro de

This article uncovers the little-known history of Judge John McHenry, a trial judge at the First District Court of New Orleans. During his time on the bench in Louisiana, McHenry interpreted proslavery laws so as to favor liberty for certain enslaved individuals. Relying on McHenry's personal and legal papers (preserved at the University of California, Berkeley's Bancroft Library), this article argues that a commitment to the rule of law, rather than a clear commitment to ending slavery, ultimately explains McHenry's unpopular opinions. In a context of heightened sectional tension over the legality of slavery, McHenry departed Louisiana for California, where he was called upon to help frame the state's first constitution.

A young upstart, McHenry's judicial appointment had been contentious. Applying the fundamental legal principle against retroactivity of the laws, McHenry found in favor of freedom for Arsène. A flurry of free soil suits followed in his court. McHenry continued to find in favor of freedom for eleven petitioners. These were all women and girls: Arsène, Sally, Milky, Fanny, Tabé, Aimée, Lucille, Aurore, Souri, Hélène, and Eulalie.[3] With the

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la Fuente and Ariela Gross, *Becoming Black, Becoming Free: The Law of Race and Freedom in Cuba, Louisiana, and Viriginia, 1500–1860* (New York: Cambridge University Press, forthcoming 2019); Kelly Kennington, *In the Shadow of Dred Scott: St. Louis Freedom Suits and the Legal Culture of Slavery in Antebellum America* (Athens: University of Georgia Press, 2017); Judith Schafer, *Becoming Free, Remaining Free: Manumission and Enslavement in New Orleans, 1846–1862* (Baton Rouge: Louisiana State University, 2003); Rebecca Scott and Jean Hébrard, *Freedom Papers: An Atlantic Odyssey in the Age of Emancipation* (Cambridge: Harvard University Press, 2012); Anne Twitty, *Before Dred Scott: Slavery and Legal Culture in the American Confluence* (New York: Cambridge University Press, 2016); Lea VanderVelde, *Redemption Songs: Suing for Freedom before Dred Scott* (New York: Oxford University Press, 2015).

[3] Arsène v. Pineguy, No. 434 (1st D. Ct. New Orleans 1846–1847), *New Orleans City Archives* [hereafter *NOCA*] VSA 290; Sally v. Varney, No. 906 (1st D. Ct. New Orleans 1847), *NOCA* VSA 290; Milky v. Millaudon, No. 1201 (1st D. Ct. New Orleans 1847), *NOCA* VSA 290; Fanny v. Poincy, No. 1421 (1st D. Ct. New Orleans 1847–1848), *NOCA* VSA 290; Tabé v. Vidal, No. 1584 (1st D. Ct. New Orleans 1847), *NOCA* VSA 290; Aimée v. Pluché, No. 1650 (1st D. Ct. New Orleans 1847–1848), *NOCA* VSA 290; Lucille v. Maspereau, No. 1692 (1847–1848), *NOCA* VSA 290; Aurore v. Décuir, No. 1919 (1st D. Ct. New Orleans 1848), *NOCA* VSA 290; Souri v. Vincent, No. 2660 (1st D. Ct. New Orleans 1850), *NOCA* VSA 290; Hélène v. Blineau, No. 4126 (1st D. Ct. New Orleans 1849–1850), *NOCA* VSA 290; Eulalie v. Blanc, No. 4904 (1st D. Ct. New Orleans), *NOCA* VSA 290. The remaining three are: Couvent v. Guesnard, No. 1786 (1st D. Ct. New Orleans 1848), *NOCA* VSA 290 (dismissed); Sarah v. Guillaume, No. 1898 (1st D. Ct. New Orleans 1848), *NOCA* VSA 290 (no extant disposition); Malotte v. Hackett, No. 2712

exception of Eulalie who had been to England, all of these women and girls had traveled to France.

Mary's was a test case and signifies a judicial-legislative divide in antebellum Louisiana on the question of slave transit. McHenry's departure for California in 1850 coincided with the end of the flurry of free soil suits in New Orleans. McHenry's civilian legal training under the Louisiana founding jurist François-Xavier Martin explains McHenry's reverence for the laws of sovereign nations, including France. His prior experience as a criminal defense attorney, as well as his patriarchal values, also help explain why he sided with particular enslaved women and girls. An examination of his complicated and evolving politics of slavery show that although most of his holdings resulted in freedom for individual petitioners, his opinions should not be interpreted as categorically anti-slavery. A commitment to the rule of law rather than a commitment to ending slavery explains his opinions.

LEGISLATIVE PROTECTION FOR THE RIGHTS OF SLAVE OWNERS (1846)

In 1845, the First Judicial Court of Louisiana granted Josephine freedom on the grounds that her mistress, the Widow Poultney, had willingly moved to and established residence in Pennsylvania, a state whose constitution did not recognize slavery.[4] Approximately one year later, attorneys on either side filed briefs at the Supreme Court of Louisiana.[5] This delay on the part of both attorneys provided ample opportunity for the public and the legislature to discuss the legal question of whether a slave freed in another territory would still be recognized as free upon return to Louisiana.

While the supreme court was deliberating, the legislature passed an act aiming to settle the legal question. Passage of the act signifies a power struggle between the legislative and judicial branches of the same slave

(1st D. Ct. New Orleans), *NOCA* VSA 290 (no extant disposition). Schafer posits that in *Sarah v. Guillaume* (1848), the enslaved petitioner was sold as a slave out of state as the legal decision was pending. Schafer, *Becoming Free, Remaining Free*, 23.

[4] Josephine v. Poultney, No. 5935, 1 La. Ann. 329 (1846), *Historic Archives of the Supreme Court of Louisiana* [hereafter *HASCL*]. A. M. Buchanan decided this case at the first instance.

[5] Josephine v. Poultney, No. 5935, 1 La. Ann. 329 (1846), *HASCL*, pp. 1220–21.

state. On May 30, 1846, the Senate and the House of Representatives of the State of Louisiana convened in General Assembly to pass an act "to protect the rights of slave holders in the State of Louisiana."[6] In choosing this title, the members of Louisiana's legislative body unabashedly announced that the law's role was not to abolish or erode slavery but to entrench further the rights of slave owners. The legislature ruled that "no slave shall be entitled to his or her freedom, under the pretence that he or she has been, with or without the consent of his or her owner, in a country where slavery does not exist, or in any of the States where slavery is prohibited."[7] Governor Isaac Johnson, House Speaker David Randall, and Senate President Trasimon Landry, all members of the Democratic party, signed their names to this law.[8]

The language of the act reads as a reaction to successful free soil petitions in previous years. His "or her" was not common linguistic usage in the nineteenth century legal world. "His" implicitly encompassed both men and women. But here the legislature found the need to emphasize that this law would apply to enslaved men and women alike. This indicates that the act was a direct reaction to free soil petitions, which tended to be brought by women and girls rather than men.

The Supreme Court of Louisiana (under the leadership of Justice François-Xavier Martin) had already held in favor of women and girls such as Josèphine and Priscilla because they had touched the free soil of France.[9] Legal professionals at the time suspected that the legislature passed its act in reaction to successful free soil petitions. For instance, Jean-Charles David requested that Jules Remit, who had been a member of the legislature in 1846 and allegedly played a leading role in the passage of this act, appear before the First District Court of New Orleans to

6 "An Act to Protect the Rights of Slave Holders in the State of Louisiana," 30 May 1846, Louisiana Acts, 163.

7 "An Act to Protect the Rights of Slave Holders in the State of Louisiana," 163.

8 "An Act to Protect the Rights of Slave Holders in the State of Louisiana," 163.

9 Marie-Louise v. Marot, No. 2914, 9 La. 473 (1836), *HASCL*; Smith v. Smith, No. 3314, 13 La. 441 (1839), *HASCL*. These cases built on the precedent of *Lunsford v. Coquillon*, 2 Mart. (n.s.) 401, and *Louis v. Cabarrus*, 7 La. 170 (both cases where the slave had traveled to Ohio, whose constitution outlawed slavery).

explain which free soil suit had prompted him to write this law.[10] Historians since have likewise understood this act as a direct reaction to successful free soil suits.[11]

Yet almost one month after the legislature passed its act, Chief Justice George Eustis handed down a contrary opinion on Josephine's freedom suit. He affirmed the lower court's decision to declare the plaintiff Josephine free, and condemned the defendant Widow Poultney to pay costs in both courts. He rested his opinion on several different legal grounds. First, Article 9 of the Constitution of Pennsylvania abolished slavery and declared slaves brought into the state and remaining there six months to be free. It also declared slaves brought by persons intending to reside there to be free immediately. Widow Poultney fell into both categories, because she had earlier testified that it was her intent to establish residence in Pennsylvania, and because she remained there for at least two years. Eustis reasoned that the laws of Pennsylvania had operated upon both the personal condition of the slave Josephine and the ownership rights of the mistress Poultney when they acquired residence in Louisiana.[12] Eustis also relied on three earlier cases decided by the Supreme Court of Louisiana under the leadership of Justice Martin: *Lunsford v. Coquillon* (1824), *Louis v. Cabarrus* (1834), and *Smith v. Smith* (1839).[13] Together, these cases had established the legal rule that once a slave's personal condition was fixed (that is, had switched from slave to free), that former slave could no longer be reduced

[10] Couvent v. Guesnard, No. 1786 (1st D. Ct. New Orleans 1848), *NOCA* VSA 290.

[11] Judith Schafer, *Slavery, the Civil Law, and the Supreme Court of Louisiana* (Baton Rouge: Louisiana State University Press, 1994), 264, 277–79; Schafer, *Becoming Free, Remaining Free*, 22. Schafer writes that a witness in Mary Guesnard's case testified that "he had authored the Act of 1846 as a result of hearing of the case of Arsène." However, I do not see this in the record. Rather, David asked Jules Remit whether the Act was a reaction to Arsène's case, but this timing does not make sense. Arsène did not even submit her habeas corpus petition to the First District Court of New Orleans until 24 October 1846, five months after the Act of 1846 had been passed into law. Arsène v. Pineguy, No. 395 (1st D. Ct. New Orleans 1846), *NOCA* VSA 290. Thus, I use this primary source only to show that lawyers suspected the law was passed in reaction to a freedom suit, but not to Arsène's suit specifically.

[12] Josephine v. Poultney, No. 5935, 1 La. Ann. 329 (1846), *HASCL*.

[13] Louis v. Cabarrus, 7 La. 170; Lunsford v. Coquillon, 2 Mart. (n.s.) 401; Smith v. Smith, No. 3314, 13 La. 441 (1839), *HASCL*.

to an enslaved condition.[14] I discuss below the possible reasons why Justice Martin had ruled in this way.

The French consul in New Orleans, Aimé Roger, noticed a judicial-legislative divide when he reported to the Ministry of Foreign Affairs in Paris on the Act of 1846. Although he had earlier "had the honor" of reporting that the Supreme Court of Louisiana had consecrated the free soil principle, he now remarked that the Louisiana legislature, mostly made up of slave owners, had created a law with the intention of putting an end to successful freedom litigation.[15] He noted, "tribunals loyal to their precedent have not yet applied this law."[16]

JUDGE JOHN McHENRY

Judge John McHenry was at the head of one of these tribunals loyal to precedent, the First District Court of New Orleans. Little is written about McHenry in existing literature, perhaps because his personal and legal papers are found not in Louisiana but in California, where he migrated before the Civil War.

John McHenry, c. 1845.

Courtesy The Bancroft Library, University of California, BANC PIC, K, Keith M-POR Box.

In December 1846, the same governor who had signed the Act to Protect the Rights of Slave Holders in the State of Louisiana offered John McHenry the office of judge of the First District Court of New Orleans. McHenry bragged to his then-fiancée Ellen Josephine Metcalfe that the position was "regarded as being one of the highest Judicial Stations in the State."[17] In 1846, a new system of courts replaced the first state system which had been in place since Louisiana's accession to the Union as a state

[14] Josephine v. Poultney, No. 5935, 1 La. Ann. 329 (1846), *HASCL*.

[15] "Correspondence politique des consuls, Etats-Unis," 10 December 1848, *Ministère des Affaires étrangères* [hereafter *MAE*]-Paris 16CPC/2, fol. 150.

[16] "Correspondence politique des consuls, Etats-Unis," fol. 150.

[17] "Letter, John McHenry to Ellen Josephine Metcalfe McHenry," 17 December 1846, Keith-McHenry-Pond Family Papers, The Bancroft Library, MSS C-B 595 [hereafter KMPFP], Box 15.

in 1813. Under the second state system, which would continue in place until 1880, New Orleans had a system of numbered district courts. Each of the courts exercised geographic jurisdiction over the entire parish of Orleans, which included New Orleans and immediate surrounding areas.[18] In theory, each court was to adjudicate different subject matter jurisdiction. The First District Court predominantly ruled on criminal matters, as McHenry's letters confirm.[19] The Second District Court oversaw probate; the Third, family matters; the Fourth and Fifth, all remaining general civil law matters.[20] Given that the parish of Orleans was one of forty-eight parishes in the state, there is reason to believe that McHenry's statement to his fiancée was something of an exaggeration.[21] However, it is true that New Orleans was the most important commercial center and the site of the state's supreme court sessions.[22]

Whether or not the position of First District Court judge was indeed "one of the highest" in the state, it was certainly a move up for McHenry. Thirty-seven years old at the time, McHenry had been practicing law as a licensed attorney in New Orleans since at least 1834.[23] Brimming with ambition at the age of twenty-eight, McHenry wrote to President Martin Van Buren inquiring about his application for the vacant judgeship in the U.S. District Court for the District of Louisiana.[24] This was not McHenry's first personal connection to a United States president. In his childhood, he lived next door to General Andrew Jackson's Tennessee plantation, called

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18 A parish is an administrative area that is roughly the equivalent of a county.

19 "Letter, John McHenry to Ellen Josephine Metcalfe McHenry," 17 December 1846; "A Brief Explanation of the Orleans Parish Civil & Criminal Court System, 1804–1926," New Orleans Public Library, City Archives, Special Collections, accessed March 1, 2018, http://nutrias.org/~nopl/inv/courtsystem.htm.

20 "A Brief Explanation of the Orleans Parish Civil & Criminal Court System, 1804–1926."

21 "Louisiana," 1840–1845, *LRC*, Tulane University, C4-D3-F7 (showing forty-eight counties).

22 Schafer, *Becoming Free, Remaining Free*, xviii.

23 "Biographical Sketches of John McHenry, Written by Ellen McHenry and Mary McHenry Keith," n.d., KMPFP, Box 14; "New Orleans City Directory," 1834, *NOCA*; "Letter, John M. Peltore to John McHenry," 10 February 1835, John McHenry Legal Papers Portfolio, BANC MSS C-B 308.

24 "A Copy of a Letter to the President," 16 September 1838, KMPFP, Box 14.

the Hermitage. Jackson referred to his friendship with McHenry as "long and tried."[25] All this suggests that McHenry was socially well-connected.

Despite these connections, or perhaps because of them, McHenry's appointment to the bench was far from smooth. He described the "harassing perplexities" of his judicial nomination process.[26] Governor Johnson formally sent his nomination to the state senate on January 15, 1846. Some insisted he was too young for the post, while others smeared his reputation in ways McHenry did not disclose to his then-fiancée Ellen, who as the daughter of a plantation-owning physician and scholar of Classics came from a family with considerable prestige.[27] In fact, he worried much about how the words of his detractors would affect his marriage prospects with Ellen. Ultimately, the legislators deemed McHenry fit for the post, a "cavalier sans reproche."[28] By unanimous vote, they affirmed him for judicial office.[29]

McHenry's contentious appointment should be understood in a broader political context. In the nineteenth century, the judiciary was under attack as the undemocratic branch of a representative government. A debate raged over whether judges should be accountable to the people directly through popular elections, or indirectly through election or appointment by the state legislature.[30] Louisiana had chosen the latter for the municipal judges of New Orleans, denying them life tenure and temporally limiting their terms.[31] This meant that McHenry was directly accountable to the legislature, most of

25 "Biographical Sketches of John McHenry, Written by Ellen McHenry and Mary McHenry Keith," n.d., KMPFP, Box 14.

26 "Letter, John McHenry to Ellen Josephine Metcalfe McHenry," 11 February 1846, KMPFP, Box 15 (where McHenry describes his nomination difficulties); "Miscellany," n.d., KMPFP, Box 16 (on Ellen's father: a physician who had been a scholar of Classics and who owned a plantation).

27 "Letter, Mrs. John McHenry to John McHenry," 6 January 1847, KMPFP, Box 15.

28 "Letter, Mrs. John McHenry to John McHenry," 6 January 1847, KMPFP, Box 15.

29 "Letter, Mrs. John McHenry to John McHenry."

30 Robert Cover, *Justice Accused: Antislavery and the Judicial Process* (New Haven: Yale University Press, 1975), 131.

31 "Letter, John McHenry to Ellen Josephine Metcalfe McHenry," 11 February 1846, BANC MSS C-B 595, Box 15;

Biographical Sketches of John McHenry, Written by Ellen McHenry and Mary McHenry Keith," n.d., KMPFP, Box 14.

whose members owned slaves. There was no structural incentive for him to rush to the aid of society's most oppressed: enslaved women and girls.[32]

Arsène: An Interpretation in Favor of Liberty

The case of Arsène (otherwise known as Cora) set off a flurry of freedom suits between 1846 to 1850 in the First District Court of New Orleans. Jean-Charles David, the same attorney who had successfully represented Josephine at the First Judicial District Court of Louisiana in 1845, represented Arsène at the First District Court of New Orleans in 1846–47. (The First Judicial District Court of Louisiana was part of the first state system of courts, which was overhauled in 1846. It should not be confused with the First District Court of New Orleans).[33] In the petition David wrote for her, Arsène admitted that she had been the slave of the defendant Louis-Aimé Pineguy, but claimed that "she had become free by being taken by her master to the Kingdom of France."[34] She alleged that the defendant still held her as a slave, and thus applied for a writ of habeas corpus.[35]

Arsène's case came before the First District Court of New Orleans in November 1846. McHenry's predecessor, Isaac T. Preston, reasoned that Arsène's habeas corpus petition was "substantially a suit for freedom by a person actually in slavery."[36] Therefore, a writ of habeas corpus was "not the proper remedy in this case."[37] David had cited the case of *Lucien Colly v. Charles Kock* to justify submitting a habeas corpus petition on behalf of an enslaved person who usually would have no legal standing. However, Preston had determined based on his own research that Lucien Colly, who had previously been a slave, "was a free man when the imprisonment occurred."[38] In order to apply for a writ of habeas corpus, the petitioner "must at all events, have been in the actual enjoyment of his [*sic*] freedom

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[32] "Correspondence politique des consuls, Etats-Unis," 10 December 1848, *MAE*-Paris 16CPC/2, fol. 150.

[33] "A Brief Explanation of the Orleans Parish Civil & Criminal Court System, 1804–1926."

[34] Arsène v. Pineguy, No. 395 (1st D. Ct. New Orleans 1846), *NOCA* VSA 290.

[35] Arsène v. Pineguy, No. 395.

[36] Arsène v. Pineguy, No. 395.

[37] Arsène v. Pineguy, No. 395.

[38] Arsène v. Pineguy, No. 395.

before the illegal detention or imprisonment of which she complains."[39] This switch between male and female pronouns appears in the original source, again demonstrating the prevalence of freedom petitioners who were women and girls, not men and boys. Arsène's enslaved status disabled her from applying for a writ of habeas corpus. However, Judge Preston did not leave Arsène without a remedy. Instead, he opined that "the application ought to be dismissed, leaving the plaintiff the right to sue for her freedom in a direct action."[40]

Shortly after Judge Preston penned these words, the court adjourned for winter holidays. In January 1847, McHenry replaced Preston.[41] Thus, when attorney David submitted a new claim on behalf of Arsène, this time as a direct lawsuit against her alleged master, the newly-appointed Judge John McHenry decided the case.[42] Not only was this one of McHenry's first decisions on the bench, it addressed a contentious social and political issue. In the period 1836–1861, the legality of slavery became an increasingly political issue throughout the United States. This political context further complicated legal questions of slave transit to free jurisdictions.[43]

McHenry explained that under Louisiana law, an enslaved person "remains in the condition of a slave until her freedom is established by law."[44] While courts were deciding a petitioner's lawful status, the presumption weighed in favor of slavery, not freedom. During this time, a petitioner would be "incapable of making any contracts but such as relate to her own emancipation."[45] As support for this opinion, McHenry cited the *Civil Code of Louisiana*, Article 174.[46] This provision established Arsène's legal cause

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39 Arsène v. Pineguy, No. 395.

40 Arsène v. Pineguy, No. 395.

41 "Letter, John McHenry to Ellen Josephine Metcalfe McHenry," 11 February 1846, KMPFP, Box 15.

42 Arsène v. Pineguy, No. 434 (1st D. Ct. New Orleans 1846–1847), *NOCA* VSA 290.

43 Paul Finkelman, *An Imperfect Union: Slavery, Federalism, and Comity* (Chapel Hill: University of North Carolina Press, 1981), 16.

44 Arsène v. Pineguy, No. 434 (1st D. Ct. New Orleans 1846–1847), *NOCA* VSA 290.

45 Arsène v. Pineguy, No. 434.

46 Edward Livingston, Pierre Derbigny, and Louis Moreau Lislet, eds., *Civil Code of the State of Louisiana* (New Orleans: Printed by J. C. de St. Romes, 1825), 52–53 (reading, "The slave is incapable of making any kind of contract, except those which relate to his own emancipation," and in French, "L'esclave est incapable de toute espèce de contrats, sauf ceux qui ont pour objet son affranchissement.").

of action. To contest her enslavement, and only to contest her enslavement, Arsène could temporarily act as a free person with legal standing in civil matters. Thus, freedom suits fell in the area of civil law, not criminal law. That David initially submitted Arsène's claim as a habeas corpus petition, and not as a freedom suit, explains why a civil matter ended up in a court that largely exercised jurisdiction over criminal matters.

McHenry formulated the legal issue as such: Should the First District Court of New Orleans establish Arsène's freedom on the basis that her master had taken her "to the Kingdom of France, where neither slavery nor involuntary servitude exists?"[47] For McHenry, several cases recently decided by the Supreme Court of Louisiana "settled" the following principle:

> The operation of the laws of France upon the personal condition of the Plaintiff and the right of the Defendant by a residence of the parties in France, released the Plaintiff from the dominion which the Defendant had over her person as a slave in Louisiana.[48]

As support, McHenry cited *Lunsford v. Coquillon* (1824) and *Marie-Louise v. Marot* (1836), but not *Josephine v. Poultney* (1846).[49]

In deciding the contentious political issue of whether a slave owner's trip abroad would jeopardize his property rights, McHenry applied a fundamental legal principle: no retroactive application of the laws unless otherwise specified by statute. As support, McHenry cited Article 8 of the *Civil Code of Louisiana*, which read that "a law can prescribe only for the future: it can have no retrospective operation, nor can it impair the obligation of contracts."[50] One factor in interpreting legal codes is the order in which articles are presented. In a code totaling 3,522 articles, the provision against retroactivity is clearly fundamental to all the other rules that follow.

Arsène traveled to France in 1836, and returned to Louisiana about two years later. Legislators did not approve The Act Protecting the Rights of Slave Holders until May 30, 1846. McHenry reasoned, "Its enactment, therefore, cannot affect in the slightest degree, or change the rights accruing to

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47 Arsène v. Pineguy, No. 434 (1st D. Ct. New Orleans 1846–1847), *NOCA* VSA 290.

48 Arsène v. Pineguy, No. 434.

49 Lunsford v. Coquillon, 2 Mart. (n.s.) 401.

50 Livingston, Derbigny, and Moreau Lislet, *Civil Code of the State of Louisiana*, 4–5 (in French, "La loi ne dispose que pour l'avenir; elle ne peut avoir d'effet rétroactif, ni altérer les obligations contenues dans les contrats").

the Plaintiff by her residence in France. A law can prescribe only for the future: It can have no retrospective operation."[51] Although McHenry's decision in effect freed one slave from the dominion of her master, it did not necessarily rest on an anti-slavery argument. Rather, McHenry's decision relied on a rule of law argument, averse to the retroactive application of laws. This would not only be illegal but also inherently unjust.

McHenry thus had reason to expect that the Supreme Court of Louisiana would affirm his decision, which indeed it did about six months later. Chief Justice Eustis, along with Associate Justices P.A. Rost, George R. King, and Thomas Slidell rejected the defendant's argument that in order to gain freedom through residence in France, Arsène should have to prove that her master had acquired domicile there. Even though Pineguy's absence from Louisiana was "but temporary," and he had never lost his original residence in Louisiana, Arsène could sue for her freedom.[52] The justices exemplified respect for another fundamental legal principle — national sovereignty — when they reasoned, "we cannot expect that foreign nations will consent to the suspension of the operation of their fundamental laws as to persons voluntarily sojourning within their jurisdiction for such a length of time."[53]

By setting aside the sojourn/transit distinction that was so crucial in freedom suits elsewhere in the United States at this time, the Supreme Court of Louisiana departed from the general trend of Anglo-American jurisdictions.[54] The Supreme Court of Louisiana's deference to the fundamental laws of foreign nations contrasts sharply with Chief Justice Roger B. Taney's opinion in *United States v. Garonne* ten years earlier that the French free soil principle was "not material to the decision" of whether the French ships *Garonne* and *Lafortune* had violated the 1808 and 1818 federal statutes prohibiting the importation of slaves when they allowed Widow Marie Antoinette Rillieux Smith to bring her domestic servant Priscilla

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51 Arsène v. Pineguy, No. 434 (1st D. Ct. New Orleans 1846–1847), *NOCA* VSA 290.

52 Arsène v. Pineguy, No. 459, 2 La. Ann. 620 (1847), *HASCL*.

53 Arsène v. Pineguy, No. 459, 2 La. Ann. 620 (1847), *HASCL*.

54 See, e.g., Somerset v. Stewart, 98 Eng. Rep. 499 (K.B. 1772); and Mark Steiner's discussion in *An Honest Calling: The Law Practice of Abraham Lincoln* (DeKalb: Northern Illinois University Press, 2006) of Bryant v. Matson (1847), a free soil case argued in an Illinois county court.

back to New Orleans as a slave.[55] For Taney, the deciding factor in these kinds of cases was whether the slave owner intended to establish permanent residence in a jurisdiction whose laws forbade slavery, or was only temporarily passing through.[56] In contrast, the Supreme Court of Louisiana had held one year earlier that slaves touching the soil of France experienced "immediate emancipation."[57] That the Supreme Court of Louisiana affirmed McHenry's decision in favor of Arsène demonstrates a local legal culture that ran counter to the prevailing legal opinion handed down by the Supreme Court of the United States.

A Flurry of Freedom Suits Follows

The Supreme Court of Louisiana's affirmation of McHenry's reasoning in Arsène's case helps explain why, in cases with similar fact patterns, McHenry simply held in favor of the enslaved petitioner without issuing a detailed account of his reasoning in these decisions.[58] With a busy case load, it sufficed to write something like:

> [F]or the reasons given in the case of Arsène alias Cora c.w. vs. Louis Pigneguy No. 434, It is therefore ordered, adjudged and decreed that the plaintiff be released from the bonds of slavery, and be deemed free, and it is further ordered that the defendant pay costs of suit.[59]

In keeping with the Supreme Court's ruling in Arsène's case, which corrected McHenry for not granting Arsène back wages, McHenry usually

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[55] United States v. Garonne, 36 U.S. 73.

[56] United States v. Garonne, 36 U.S. at 77.

[57] Louise v. Marot, 9 La. at 473 (1836).

[58] Sally v. Varney, No. 906 (1st D. Ct. New Orleans 1847), *NOCA* VSA 290; Fanny v. Poincy, No. 1421 (1st D. Ct. New Orleans 1848), *NOCA* VSA 290; Tabé v. Vidal, No. 1584 (1st D. Ct. New Orleans 1847), *NOCA* VSA 290; Aimée v. Pluché, No. 1650 (1st D. Ct. New Orleans 1848), *NOCA* VSA 290; Lucille v. Maspereau, No. 1692 (1st D. Ct. New Orleans 1848), *NOCA* VSA 290; Aurore v. Décuir, No. 1919 (1st D. Ct. New Orleans 1848), *NOCA* VSA 290; Souri v. Vincent, No. 2660 (1st D. Ct. New Orleans 1850), *NOCA* VSA 290; Hélène v. Blineau, No. 4126 (1st D. Ct. New Orleans 1850), *NOCA* VSA 290; Eulalie v. Blanc, No. 4904 (1st D. Ct. New Orleans 1850), *NOCA* VSA 290. I do not see a record of McHenry's holding in Fanny's case, but the sheriff's order refers to a judgment McHenry issued on May 25, 1848 in favor of Fanny.

[59] Hélène v. Blineau, No. 4126 (1st D. Ct. New Orleans 1850), *NOCA* VSA 290.

also granted a successful plaintiff back wages from the date the suit was initiated, to the conclusion of the suit.[60]

However, the precedent set in Arsène's case was narrow: only slaves who had been to France before May 30, 1846, could benefit from it.[61] This may explain why attorney David generally represented clients who had been to France before this time. Indeed, all but one of the fourteen freedom petitions that McHenry heard in the First District Court of New Orleans involved plaintiffs who had arrived in a free soil jurisdiction before the passage of the Act Protecting the Rights of Slave Holders.[62] Certain plaintiffs, such as Sally, Lucille, and Hélène, may have returned to Louisiana as late as 1847.[63] The deciding factor was not when a plaintiff left free soil, but when they first touched free soil.

MARY: A TEST CASE

Unlike Arsène, Mary had traveled to France after the passage of the Act of May 30, 1846.[64] Mary's case is particularly well-documented, both in American and in French archives. Once Mary returned to New Orleans, not one but two free men of color rushed to Mary's aid to help her legally contest her re-enslavement. Her case reveals how a freedom suit mobilized a community.

Attorney David would certainly have understood this case for what it meant legally: an opportunity to test the limits of how far the courts would stretch after the passage of the Act of 1846. At the time, David had successfully petitioned for freedom on behalf of five former slaves (Arsène, Sally, Milky, Fanny, and Tabé) in Judge McHenry's court.[65] Like many of

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60 Arsène v. Pineguy, No. 459, 2 La. Ann. 620 (1847), *HASCL*. See also, e.g., *Souri v. Vincent*, No. 2660 (1st D. Ct. New Orleans 1850), *NOCA* VSA 290.

61 Arsène v. Pineguy, No. 434 (1st D. Ct. New Orleans 1846–1847), *NOCA* VSA 290; Arsène v. Pineguy, No. 459, 2 La. Ann. 620 (1847), *HASCL* (affirming McHenry's ruling against the retroactive application of the Act of 1846).

62 An Act to Protect the Rights of Slave Holders in the State of Louisiana, 30 May 1846, Louisiana Acts, 163.

63 Sally v. Varney, No. 906 (1st D. Ct. New Orleans 1847), *NOCA* VSA 290; Lucille v. Maspereau, No. 1692 (1st D. Ct. New Orleans 1848), *NOCA* VSA 290; Hélène v. Blineau, No. 4126 (1st D. Ct. New Orleans 1850), *NOCA* VSA 290.

64 Couvent v. Guesnard, No. 1063, 5 La. Ann. 696 (1850), *HASCL*.

65 Arsène v. Pineguy, No. 434 (1st D. Ct. New Orleans 1847), *NOCA* VSA 290; Sally v. Varney, No. 906 (1st D. Ct. New Orleans 1847), *NOCA* VSA 290; Milky v. Millaudon,

these plaintiffs, Mary had sailed to France with her mistress, who was in poor health. Desperate to escape seasonal disease in the semi-tropical city of New Orleans, Jeanne-Louise Emma De Larsille took the enslaved Mary with her to attend to her during the transatlantic voyage.[66] Mary was about eighteen years old at the time.[67] In Paris, De Larsille, who was the daughter of a prominent lawyer, recorded with a notary her intent to send Mary back to New Orleans to be sold as a slave.[68]

Upon Mary's return, the free man of color Bernard Couvent immediately requested that the First District Court recognize him as Mary's ad hoc tutor (or legal guardian) so that he could petition for her freedom.[69] A clerk of the court granted the request on 7 December 1847.[70] The petition that David drew up demanded Mary's freedom, back wages in the amount of $12 per month, and the costs of suit. No doubt recognizing a similar fact pattern to Arsène's, McHenry ordered that, for the reasons on record, "the petitioner Mary c.w. be restored to her liberty and that the defendant pay costs of suit."[71]

However, there is no date on this ruling. The court must not have enforced its ruling because, as early as 17 January 1848, Couvent initiated a second suit on Mary's behalf. Here, the argument in the petition was stronger. As in preceding freedom petitions, David argued that the court should recognize Mary as free "because the slavery [*sic*] is not tolerated in France, and being once free she can not fall again in slavery by her involuntary

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No. 1201 (1st D. Ct. New Orleans 1847), *NOCA* VSA 290; Fanny v. Poincy, No. 1421 (1st D. Ct. New Orleans 1848), *NOCA* VSA 290; Tabé v. Vidal, No. 1584 (1st D. Ct. New Orleans 1847), *NOCA* VSA 290.

66 Couvent v. Guesnard, No. 1786 (1st D. Ct. New Orleans 1848), *NOCA* VSA 290.

67 "Sale, Emmeline Baylé, Widow of William Hurd Masson, to Emma Delarzille," 23 July 1840, *New Orleans Notarial Archives* [hereafter *NONA*], Notary Louis Thimelet Caire, vol. 77a, act no. 462.

68 "Pouvoir, Jean-Louis de Larsille, avocat et appliquant au juge," 9 June 1812, *AN*-Paris MC/ET/XII/821, Notary Pierre Lienard. "Sale, Jeanne-Louise Emma De Larsille, to Charles Lamarque," 23 May 1851, *NONA*, Notary Achille Chiapella, vol. 23, act no. 467 (reproducing a power of attorney notarized by the Parisian notary Cyprien Saint-Hubert Thomassin on 23 November 1847).

69 On tutorship, see p. 78 et seq. in Livingston, Derbigny, and Moreau Lislet, *Civil Code of the State of Louisiana*.

70 Couvent v. Lemoine, No. 1634 (1st D. Ct. New Orleans 1848), *NOCA* VSA 290. Since Mr. and Mrs. Guesnard were still in Paris, Couvent sued their agent, Pierre Lemoine.

71 Couvent v. Lemoine, No. 1634 (1st D. Ct. New Orleans 1848), *NOCA* VSA 290.

return from France to New Orleans."[72] David added that notwithstanding the Act of 1846, Mary was free. He argued that the act was unconstitutional because it impaired the "contract of freedom obtained by the said Mary c.w. in France."[73] He further asserted that the Act of 1846, which had no effect in France, could not "render slave a person who has been freed in France."[74] David did not cite a specific article or clause of the United States Constitution, perhaps preferring to refer to a vague principle. Preceding petitions had not addressed the constitutionality of the Act of 1846. Of course, there had been no need to do so, because it had been established that the act could not apply to people who had been to France before May 30, 1846.

In between Couvent's two petitions, a free man of color named Robert Rogers hired David to submit to the same court a different argument on Mary's behalf. Rogers first attested that he was the godfather of Mary, a claim that demonstrates the importance of the church as a forum for legal networking.[75] Rogers's signature on the petition attests to his literacy, another factor that enhanced access to justice.[76] In this petition, David argued that when Mrs. Jeanne Louise Emma De Larsille and her husband Dr. William Guesnard sent Mary, who had been freed by her presence in France, back to New Orleans, they violated the Act of 1830, which forbade freed slaves from re-entering Louisiana.[77] Any violator of this law was liable to pay $1,000.[78]

By passing the Act of 1830, Louisiana legislators had sought to limit the growth of Louisiana's already sizable free black population.[79] Here a free person of color cleverly exploited a law initially designed to oppress. Rogers and David clearly hoped that the court would recognize Mary to be free on the basis of the French free soil principle. Under the Act of 1830, they could then sue Mr. and Mrs. Guesnard in a civil lawsuit, or they could ask

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72 Couvent v. Guesnard, No. 1786 (1st D. Ct. New Orleans 1848), *NOCA* VSA 290.

73 Couvent v. Guesnard, No. 1786 (1st D. Ct. New Orleans 1848), *NOCA* VSA 290.

74 Couvent v. Guesnard, No. 1786 (1st D. Ct. New Orleans 1848), *NOCA* VSA 290.

75 Rogers v. Guesnard, No. 2362 (1st D. Ct. New Orleans 1848–1849), *NOCA* VSA 290.

76 Rogers v. Guesnard, No. 2362 (1st D. Ct. New Orleans 1848–1849), *NOCA* VSA 290.

77 Rogers v. Guesnard, No. 2362 (1st D. Ct. New Orleans 1848–1849), *NOCA* VSA 290.

78 "An Act to Prevent Free Persons of Color from Entering into this State, and for Other Purposes," 16 March 1830, Louisiana Acts, 1830, pp. 90–96.

79 Finkelman, *An Imperfect Union*, 211; Schafer, *Becoming Free, Remaining Free*, 6–7.

the district attorney or attorney general to initiate a criminal prosecution against the Guesnards for bringing a free person of color into the state. In the case of a civil suit, it is possible that Mary would have been paid $1,000. At the time, $1,000 would have been more than enough to purchase an enslaved girl like Mary. De Larsille had originally bought Mary, her mother, and her brother for $1,200 in 1840.[80]

McHenry did not issue an order in Mary's case until May 29, 1848.[81] Unlike cases where the plaintiff had been to France before May 30, 1846, it no longer sufficed to hold summarily that, for the reasons in *Arsène v. Pineguy* (1847), Mary was free.[82] So, despite his busy case load, McHenry wrote a detailed opinion on the distinctions between Mary's case and the preceding freedom petitions. His pace was deliberate; his tone extremely reluctant.

McHenry first asked whether the laws of France had operated upon Mary so as to produce an immediate emancipation. He held that of course they did. After reviewing cases such as *Marie-Louise v. Marot* (1836) and *Arsène v. Pineguy* (1847),[83] McHenry declared, "it is therefore certain that according to the jurisprudence of Louisiana, as settled by her highest tribunals, the minor Mary c.w. is entitled to her freedom."[84] Notably, McHenry added the modifier, "as settled by her highest tribunals" so as to underline that this was the state of the law according to the best opinion of the state's courts, although not according to the legislature of Louisiana.[85]

The defendant's lawyer protested that De Larsille had brought Mary to France after 1846, and had therefore acted under the authority of Act of 1846, which protected her property claim in Mary. McHenry's answer was clear:

> This court feels no hesitation in declaring if the plaintiff by the operation of laws of France upon her personal condition did become

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[80] "Sale, Emmeline Baylé, Widow of William Hurd Masson, to Emma Delarzille," 23 July 1840, *NONA*, Notary Louis Thimelet Caire, vol. 77a, act no. 462.

[81] Couvent v. Guesnard, No. 1786 (1st D. Ct. New Orleans 1848), *NOCA* VSA 290.

[82] Arsène v. Pineguy, No. 434 (1st D. Ct. New Orleans 1847), *NOCA* VSA 290.

[83] Marie-Louise v. Marot, No. 2914, 9 La. 473 (1836), *HASCL*; Arsène v. Pineguy, No. 434 (1st D. Ct. New Orleans 1847), *NOCA* VSA 290.

[84] Couvent v. Guesnard, No. 1786 (1st D. Ct. New Orleans 1848), *NOCA* VSA 290.

[85] Couvent v. Guesnard, No. 1786 (1st D. Ct. New Orleans 1848), *NOCA* VSA 290.

> free for one moment, then it was neither in the power of her former owner or the legislature of Louisiana to reduce her again to slavery, and any law passed with such a design, is against the plain and obvious principles of common right and common reason and is null and void.[86]

However, he continued, if by its act the legislature had intended to take away from the courts their power to decide such cases, it was within their scope of power to do so.[87] After all, the legislature had established McHenry's court only two years prior.[88] The Act of 1846, which "denie[d] the right to a person who has once been in a state of slavery to stand in judgment for his or her freedom," clearly "inhibit[ed] the courts of this State from passing upon the merits of such claims."[89] Where McHenry had clearly been willing to recognize the legal personhood of those slaves who had been to France before 1846, now he felt "constrained" and "compelled" to dismiss the case on the grounds that his court had no authority to pass upon the merits of Mary's claim.[90]

Although functionally this ended Mary's claim to freedom in the First District Court, McHenry did not stop there. Rather, he pontificated on the question raised in Robert Rogers's petition. Could the Act of 1830, which prohibited free people of color from entering the state of Louisiana, help Mary? Having become free in France, but subsequently returned into Louisiana, could Mary (through civil action) or could the state (on her behalf) criminally prosecute the person who had brought her back into Louisiana? Again, McHenry expressed extreme reluctance, observing, "the plaintiff was brought to this state in contravention of this provision of our law, and cannot be legally retained in bondage, but the court under the circumstances can do nothing more than dismiss her claim."[91]

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86 Couvent v. Guesnard, No. 1786 (1st D. Ct. New Orleans 1848), *NOCA* VSA 290.

87 Couvent v. Guesnard, No. 1786 (1st D. Ct. New Orleans 1848), *NOCA* VSA 290.

88 "A Brief Explanation of the Orleans Parish Civil & Criminal Court System, 1804–1926."

89 Couvent v. Guesnard, No. 1786 (1st D. Ct. New Orleans 1848), *NOCA* VSA 290.

90 Couvent v. Guesnard, No. 1786 (1st D. Ct. New Orleans 1848), *NOCA* VSA 290.

91 Couvent v. Guesnard, No. 1786 (1st D. Ct. New Orleans 1848), *NOCA* VSA 290.

In his opinion on Mary's case, McHenry employed a rhetorical device that Robert Cover calls "the judicial can't."[92] The anti-slavery judges Cover examines in his study knew that the results they reached were morally indefensible, but they wished their readers to understand the sense in which they had been compelled to reach it.[93] This is closely tied to another strategy that nineteenth century anti-slavery judges used when they felt compelled in their professional role to apply a law that conflicted with their personal morality: they ascribed responsibility elsewhere.[94] Judges such as Joseph Story, who were publicly anti-slavery but conceived of the fugitive slave clause as an indispensable element in the formation of the Union, would portray themselves as helpless to change the laws.[95] Under the doctrine of separation of powers, they reasoned, it was up to the people through their legislators to overturn unjust laws.[96] Likewise, McHenry portrayed himself as constrained by a legislature that had passed a clearly unjust law.[97]

However, it should not be assumed that McHenry believed the law to be unjust because he was categorically opposed to slavery. McHenry's personal and legal papers, which I examine below, reveal that his attitude toward slavery was much more complicated than this.

After McHenry handed down his decision in Mary's case, David continued to take on freedom petitions, but only on behalf of slaves who had been to France before the passage of the law on May 30, 1846. Between 1848 and 1850, McHenry held in favor of freedom for six more petitioners: Aimée, Lucille, Aurore, Souri, Hélène, and Eulalie.[98] Unlike Mary, all of these women and girls had first touched free soil before 1846. At the conclusion of Mary's case, David knew exactly where the limits of the law lay.

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92 Cover, *Justice Accused*, 119.

93 Cover, 119.

94 Cover, 236.

95 Cover, 236–43; Prigg v. Pennsylvania, 41 U.S. 539 (1842).

96 Cover, *Justice Accused*, 236.

97 Couvent v. Guesnard, No. 1786 (1st D. Ct. New Orleans 1848), *NOCA* VSA 290.

98 Aimée v. Pluché, No. 1650 (1st D. Ct. New Orleans 1848), *NOCA* VSA 290; Lucille v. Maspereau, No. 1692 (1st D. Ct. New Orleans 1848), *NOCA* VSA 290; Aurore v. Décuir, No. 1919 (1st D. Ct. New Orleans 1848), *NOCA* VSA 290; Souri v. Vincent, No. 2660 (1st D. Ct. New Orleans 1850), *NOCA* VSA 290; Hélène v. Blineau, No. 4126 (1st D. Ct. New Orleans 1850), *NOCA* VSA 290; Eulalie v. Blanc, No. 4904 (1st D. Ct. New Orleans 1850), *NOCA* VSA 290.

Mary's Appeal at the Supreme Court of Louisiana

Mary's legal auxiliaries — her tutor, her godfather, and her attorney — did not give up. They appealed to the Supreme Court of Louisiana. There, however, Chief Justice Eustis affirmed McHenry's judgment to dismiss Mary's case.[99] By the time Eustis handed down his decision in November 1850, McHenry had already departed New Orleans for California. Eustis explained that in cases of slaves traveling to a country or state where slavery does not exist, since the passage of the Act of 1846, the legislation would be "imperative."[100] Unlike McHenry who deliberated at length before he came to his decision to dismiss Mary's case and condemned the legislation as being "against plain and obvious principles of common right and common reason," Eustis easily deferred to the legislature without any indication of moral qualms.[101] He asserted, "there can be no question as to the legislative power to regulate the condition of this class of persons within its jurisdiction."[102] As support for this assertion, he cited several cases from Mississippi.[103] Jurisprudence handed down by the supreme court of another state was merely persuasive authority; it did not control the Supreme Court of Louisiana. The tightening of restrictions on pathways to freedom was now creeping in from the legislature to the courts.[104]

Eustis explained, "The statute merely enacts and establishes as law the rule laid down by Lord Stowell, in the case of the *Slave, Grace*, determined in the High Court of Admiralty of England."[105] Eustis had cited the case of the *Slave, Grace* before in *dicta*.[106] But here it functioned to help him reach his legal decision. The slave Grace James had accompanied her mistress Mrs. Allan from Antigua to England in 1822, resided with her there one

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99 Couvent v. Guesnard, No. 1063, 5 La. Ann. 696 (1850), *HASCL*; Conant [*sic*] v. Guesnard, 5 La. Ann. 696; Rogers v. Guesnard, No. 1507, Unreported case (1850), *HASCL*.

100 Conant [sic] v. Guesnard, 5 La. Ann. 696 (1850).

101 Couvent v. Guesnard, No. 1786 (1st D. Ct. New Orleans 1848), *NOCA* VSA 290.

102 Conant [*sic*] v. Guesnard, 5 La. Ann. at 697.

103 These are Hinds v. Brazeale, 2 Howard's Miss. Rep. 837, and Vick v. McDaniel, 3 Howard's Miss. Rep. 337, cited in Conant [sic] v. Guesnard, 5 La. Ann. at 697.

104 Paul Finkelman argues in his comparative study that Louisiana was more liberal than Mississippi and Missouri on questions of slave transit: Finkelman, *An Imperfect Union*, 216.

105 Conant [*sic*] v. Guesnard, 5 La. Ann. at 696.

106 Josephine v. Poultney, 1 La. Ann. 329 (1846); Eugénie v. Preval, 2 La. Ann. 180 (1847).

year, and had then voluntarily returned with her to Antigua in 1823.[107] With the support of abolitionists in both Antigua and England, the crown prosecuted Mrs. Allan for seizure.[108] For Lord William Scott Stowell of the High Court of Admiralty of England, the legal question became whether, upon return to Antigua, Grace returned to her original state of involuntary servitude.[109] He held that she did.[110] *Somerset* had established long before that, so long as slaves resided on English soil, their masters had no authority over them.[111] No one could force them to return to a place where slavery existed, and they could submit habeas corpus petitions if anyone tried.[112] However, *Somerset* had left unanswered the question whether, upon return to a slave jurisdiction, slaves could initiate legal suits.[113] Did they have the legal standing to do so as free persons?[114] Stowell held that they did not, because the freedom they temporarily enjoyed while residing in England, "totally expired when that residence ceased."[115]

Stowell presented several rationalizations for this opinion. First, slavery was good for the economy of the British Empire.[116] Second, the growth of a free black population was "highly dangerous" to the security of that empire.[117] Finally, like McHenry, Eustis, and the antebellum anti-slavery judges that Cover investigates, Stowell placed responsibility elsewhere: on the legislature.[118] But where McHenry had clearly done so with a heavy heart, Eustis and Stowell asserted the principle of legislative deference confidently. Stowell declared, "it is a known and universal rule in the interpretation of laws, that that sense is to be put on those laws which is the

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107 The Slave, Grace, 2 Hagg. 94 (High Ct. Admiralty 1827).

108 Stephen Waddams, "The Case of Grace James (1827)," *Texas Wesleyan Law Review* 13 (2007 2006): 783–94.

109 The Slave, Grace, 2 Hagg. at 94.

110 The Slave, Grace, 2 Hagg. at 94.

111 Somerset v. Stewart, 98 Eng. Rep.

112 Somerset v. Stewart, 98 Eng. Rep. 499; reaffirmed in The Slave, Grace, 2 Hagg. at 106; 117.

113 Somerset v. Stewart, 98 Eng. Rep. 499; reaffirmed in The Slave, Grace, 2 Hagg. at 110.

114 The Slave, Grace, 2 Hagg. at 110.

115 The Slave, Grace, 2 Hagg. at 101.

116 The Slave, Grace, 2 Hagg. at 115.

117 The Slave, Grace, 2 Hagg. at 116.

118 Cover, *Justice Accused*, 236.

sense affixed to them by the legislature."[119] When Stowell examined the laws of Antigua, he found that they had "uniformly resisted the notion that a freedom gained in England continues with return to the colonies."[120] Of course, this contrasted sharply with the legal culture of Louisiana in the 1820s and 1830s, which emphasized "immediate emancipation,"[121] that "once perfected, was irrevocable."[122]

Although Stowell's decision was met with public opposition in England, where abolitionism was growing, his reasoning continued to grow in popularity among judges in the United States, particularly in the years preceding the Civil War.[123] This coincides with a broader trend of antebellum courts explicitly renouncing the principle articulated in *Marie-Louise v. Marot* (1836), that jurists should always interpret the law so as to favor liberty.[124] Where in *Marot* the Supreme Court of Louisiana had deferred to French laws so as to favor liberty, here in *Couvent* the court deferred to English law so as to restrict liberty.

With the stroke of a pen, Chief Justice Eustis deployed violence.[125] As I discuss below, Eustis would later side with the Confederates during the Civil War. Although law is often understood as a nonviolent solution to social disputes, this is a striking example of what Robert Cover calls the violence of the word.[126] Mary's life changed dramatically after this. Six months after Eustis penned these words, Mr. and Mrs. Guesnard, who were still in Paris, arranged for their agent Pierre Lemoine to sell Mary to the professional slave broker Charles Lamarque, Jr. for $450.[127] Eight days later, Lamarque sold her for $740. That Lamarque made a profit of $290 in just over one week demonstrates that the Guesnards gladly rid themselves

119 The Slave, Grace, 2 Hagg. at 125.

120 The Slave, Grace, 2 Hagg. at 124.

121 Louise v. Marot, 9 La. at 476. See also *Lunsford v. Coquillon*, 2 Mart. (n.s.) 401; *Louis v. Cabarrus*, 7 La. 170; *Smith v. Smith*, 13 La. 441 (1839); Schafer, *Slavery, the Civil Law, and the Supreme Court of Louisiana*, 220–88.

122 Art. 189 in Livingston, Derbigny, and Moreau Lislet, *Civil Code of the State of Louisiana*, 29.

123 Waddams, "The Case of Grace James (1827)."

124 Louise v. Marot, 9 La. 473; Cover, *Justice Accused*, 62; 96–99.

125 Robert Cover, "Violence and the Word," *Yale Law Journal* 95 (1986): 1601–30.

126 Cover.

127 "Sale, Jeanne-Louise Emma De Larsille, to Charles Lamarque," 23 May 1851, *NONA*, Notary Achille Chiapella, vol. 23, act no. 467.

of Mary at a lesser amount than they could have sold her for. Mary was sold "fully guaranteed against the vices and maladies prescribed by law and free from all incumbrance in the name of said Seller."[128] That Mary had traveled to France where slavery was not tolerated, was no longer an encumbrance to slave owners under the laws of Louisiana.

The switch from deference to French law, to deference to English law, carried with it other restrictions: not only for slaves, but also for women. In *Smith v. Preval*, the court asked whether the slave owner Rosalba Preval (who had left Louisiana for France in May 1830 with her slave Eugénie) would be subject to the laws of France or to the laws of Louisiana. Once in France, Preval had married Adolphe Faure, an officer in the French army. She later returned to New Orleans, but Eugénie followed only in 1838. Eustis concluded that Preval had agreed to subject herself to the laws of France by taking up residence and domicile there.[129]

From Eugénie's point of view, this would have been a successful outcome. However, this was a restrictive precedent. Although it resulted in freedom for the individual slave in this case, not all slaves traveling to France would find themselves in the lucky situation that their mistresses would marry French men, thereby explicitly indicating that they had subjected themselves to French laws. More than establishing or protecting the rights of slaves, the reasoning restricted the rights of women to own property. *Smith v. Preval* (1847) therefore demonstrates tightening limitations on white women's rights to own separate property — a right that became especially precarious if they established residence in foreign nations.

A Judicial–Legislative Divide

Mary's case signifies a judicial–legislative divide. In it, McHenry confidently declared that "according to the jurisprudence of Louisiana, *as settled by her highest tribunals* [emphasis added], the minor Mary c.w. is entitled to her freedom."[130] He then excoriated the Louisiana legislature for taking away from Mary her right to sue in Louisiana courts, a power grab that was "against plain and obvious principles of common right and common

128 "Sale, Charles Lamarque Jr to Casimir Villeneuve," 31 May 1851, *NONA*, Notary Achille Chiapella, vol. 23, act 493.

129 Smith v. Preval, 2 La. Ann. 180.

130 Couvent v. Guesnard, No. 1786 (1st D. Ct. New Orleans 1848), *NOCA* VSA 290.

reason," and should be "null and void."[131] Schafer describes the state supreme court as "clearly reluctant" and "obviously disgruntled," but this confuses the supreme court decision with that of McHenry in the district court.[132] There is a major difference in the tone of the two opinions. Although McHenry at the district court was clearly reluctant to rule against Mary, Eustis at the supreme court exhibited no hesitation in deferring to the legislature.

Legislative opposition to McHenry was evident from the very beginning of his ascent to the bench. His fiancée Ellen wrote to him,

> Had your enemies succeeded in their nefarious designs, and defeated your appointment, they could not have changed you [*sic*] principles or upright integrity of purpose . . . . The kind heart, the cultivated and upright principles, which I believe you, dearest, to possess, are not dependant [*sic*] on the whims and caprices of Governors or Legislators.[133]

Clearly, Ellen admired McHenry for an unwavering commitment to principles of justice, just as she derided legislators for their whims and caprices.

In contrast to judicial rulings protecting the manumission rights of slaves, the Act of 1846 narrowed lawful pathways to freedom. This fits into a broader context of hardening laws on slavery. For instance, in 1830 freed slaves were to be sent out of Louisiana; by 1857 all emancipations were prohibited.[134] By the eve of the Civil War, Louisiana was no longer the relative liberator of individual slaves it had once been.[135]

Still, we should not put McHenry on the extreme opposite of the pro/anti-slavery political spectrum. In Louisiana, legislators and jurists alike

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131 Couvent v. Guesnard, No. 1786 (1st D. Ct. New Orleans 1848), *NOCA* VSA 290.

132 Schafer, *Slavery, the Civil Law, and the Supreme Court of Louisiana*, 277–79.

133 "Letter, Ellen McHenry to John McHenry," 28 February 1847, KMPFP, Box 14.

134 "An Act to Prevent Free Persons of Color from Entering into this State, and for Other Purposes," 16 March 1830, Louisiana Acts, 1830, pp. 90–96. "An Act to Prohibit the Emancipation of Slaves," Act of 6 March 1857, Louisiana Acts, p. 55. For a precise overview of all the relevant laws, see "Laws Governing Slavery and Manumission" in Schafer, *Becoming Free, Remaining Free*, 1–14. For a comprehensive chronology, see Vernon Palmer, *Through the Codes Darkly: Slave Law and Civil Law in Louisiana* (Clark, N.J.: The Lawbook Exchange, 2012).

135 Finkelman, *An Imperfect Union*, 216; Schafer, *Slavery, the Civil Law, and the Supreme Court of Louisiana*, 288.

endorsed slavery. Where legislators sought to preserve the institution through stricter and stricter laws, however, jurists like John McHenry and Christian Roselius effectively preserved the institution by safeguarding outlets for some. Perhaps they reasoned that this would make the institution more durable in the long-run.[136]

McHENRY DEPARTS FOR CALIFORNIA

The last freedom suit McHenry decided was *Eulalie v. Blanc* (1850). Since Eulalie had touched free soil before 1846, this was an easy decision with the same stock reference to "the reasons delivered in the case of *Cora alias Arsène vs. L.A. Pigneguy*."[137] By this time, McHenry had made enemies in Louisiana. He wrote to his wife, "the order of arrest issued against me, after a little contest I succeeded in having it set aside, to the great discomfiture of some of my enemies."[138] It is unclear whether the reason for his arrest had anything to do with his judicial decisions. It is possible that the order for his arrest stemmed from creditors, as McHenry explains in the next sentence, "I have settled with Messrs Maunsel White & Co. and with nearly all, to whom I am in any manner indebted, but I am without money."[139]

On 26 June, McHenry still resided in New Orleans, but by 22 July, he was on a boat to San Francisco.[140] He sought both fame and fortune in California. Already in California, McHenry's father-in-law observed,

> As to the question of Mr. McHenry being made Chief Justice, in case he comes to California, I can only say, that I think he is one of those go ahead sort of men, who are most apt to become Chiefs in whatever business they engage in, but everything in California depends on chance, and no one can tell today what tomorrow will bring forth.[141]

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136 Frank Tannenbaum, *Slave and Citizen* (Boston: Beacon Press, 1992); Alejandro de la Fuente, "Slave Law and Claims-Making in Cuba: The Tannenbaum Debate Revisited," *Law and History Review* 22, no. 2 (2004): 339.

137 Eulalie v. Blanc, No. 4904 (1st D. Ct. New Orleans 1850), *NOCA* VSA 290.

138 "Letter, John McHenry to Ellen McHenry," 15 June 1850, KMPFP, Box 15.

139 "Letter, John McHenry to Ellen McHenry," 15 June 1850, KMPFP, Box 15.

140 "Letter, Ellen McHenry to John McHenry," 26 June 1850, KMPFP, Box 14; "Letter, John McHenry to Ellen McHenry," 22 July 1850, KMPFP, Box 15.

141 "Letter, Asa Baldwin Metcalfe to Ellen Metcalfe McHenry," 30 December 1849, KMPFP, Box 16.

In California, McHenry's worldly fortune gradually increased. A venture in the importation of prefabricated housing undertaken with James Van Ness and a Mr. Rutherford yielded disappointing results, leaving him with a net profit of $500 on an original investment of $6,700.[142] In August 1850, he abandoned his friendship and business partnership with Rutherford, and instead posted a sign outside a rented office in San Francisco where he could begin practicing law.[143] By the end of September, he had already earned $700 and was able to rent a room at San Francisco's most luxurious hotel, the St. Francis.[144] This contrasts favorably to his days as a young judge in New Orleans, when he warned his fiancée, "I am without fortune, yet I hope to be able to provide for you."[145]

Once in California, McHenry was reportedly called upon to help frame the constitution of the new state.[146] His dream of becoming Chief Justice of the Supreme Court of California never did come to fruition. He practiced in the areas of commercial law, estate planning, probate, property law, and tax law, property law — clearly a career shift away from criminal law.[147] In 1868, McHenry retired from the practice of law, selling thousands of his legal books at public auction.[148] However, he maintained social ties with esteemed figures of the San Francisco legal scene, such as Judge Serranus Clinton Hastings, founder of the Hastings College of the Law.[149]

Upon his death, even "men who differed widely from him in politics and policies" eulogized him.[150] Judge C. T. Botts proclaimed,

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142 "Letters, John McHenry to Ellen McHenry," 22 July 1850, 31 August 1850, KMPFP, Box 15.

143 "Letter, John McHenry to Ellen McHenry," 31 August 1850, KMPFP, Box 15.

144 "Letter, John McHenry to Ellen McHenry," 29 September 1850, KMPFP, Box 15.

145 "Letter, John McHenry to Ellen McHenry," 24 February 1847, KMPFP, Box 15.

146 "Biographical sketch by Judge C. T. Botts, addressing the U.S. Circuit Court on McHenry's death," 1880, KMPFP, Box 14. Although McHenry's name does not appear as a signatory to the Constitution of California (1849), C. T. Botts's does, so it is mildly credible that Botts had consulted with McHenry informally, but it must have been before McHenry's arrival in California.

147 "Receipts," 1846–1877, John McHenry Legal Papers, Box 1, BANC MSS C-B 308.

148 "John McHenry — papers re: his law library," n.d., KMPFP, Box 14.

149 "Biographical Sketches of John McHenry, Written by Ellen McHenry and Mary McHenry Keith," n.d., KMPFP, Box 14; "McHenry Family — Invitations," KMPFP, Box 14.

150 "Biographical Sketches of John McHenry, Written by Ellen McHenry and Mary McHenry Keith," n.d., KMPFP, Box 14.

> He possessed a vigorous and highly cultivated intellect, and he pursued the cause he espouses (which to his mind, at least, was always the cause of justice) with an earnestness, a zeal, and an ardour seldom equaled, and never, in my opinion, surpassed.[151]

Rev. Dr. William Scott, who had fled Louisiana during the Civil War and declared that, "Jefferson Davis was no more a traitor than George Washington," officiated at McHenry's funeral.[152] McHenry is buried at Mountainview Cemetery in Oakland, California.

Liza: The End of a Flurry of Free Soil Suits

After McHenry's departure, attorney Jean-Charles David submitted a new freedom petition to the First District Court on behalf of the slave Liza. Liza's claim would have been successful in McHenry's court. Liza had traveled to France well before 1846, in 1820 or 1821. However, McHenry's successor John C. Larue quickly rejected the claim that Liza "became free by setting her foot on French soil."[153] In a sharp departure from previous cases, he stated that the key question was whether the slaveowner had intended to establish domicile in the nation where slavery did not exist. He found that Liza's owner at the time had gone to France with a specific purpose: not to establish residence, but to pick up his wife and relations there. He did not linger in France any longer than was absolutely necessary to accomplish this purpose. Larue reasoned that "as Louisiana was not at that time a French colony," he could not even "acknowledge" the laws of France on the subject of slavery.[154] Instead, Larue turned to the case of the *Slave, Grace* to support his assertion that "the mere fact of her having been there, [would not] work such a permanent change in her status."[155] Larue also cited *Commonwealth v. Aves* (1836) and *Strader v. Graham* (1850) as support for the general principle that "the laws regulating the status of the

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151 "Biographical sketch by Judge C. T. Botts, addressing the U.S. Circuit Court on McHenry's death," 1880, KMPFP, Box 14.

152 "Dr. Scott, of California, Rev. Dr. Scott," 18 October 1861, *The New York Times*; "Biographical Sketches of John McHenry, Written by Ellen McHenry and Mary McHenry Keith," n.d., KMPFP, Box 14.

153 Liza v. Puisant, No. 5632 (1st D. Ct. New Orleans 1851), *NOCA* VSA 290.

154 Liza v. Puisant, No. 5632 (1st D. Ct. New Orleans 1851), *NOCA* VSA 290.

155 Liza v. Puisant, No. 5632 (1st D. Ct. New Orleans 1851), *NOCA* VSA 290.

individual are confined to the territory over which they are operative, and the laws of France should have no more effect in emancipating a slave in Louisiana."[156]

David and his client would no doubt have been surprised at the outcome of this case: Liza's was a stock claim. But upon appeal, the Supreme Court of Louisiana affirmed Larue's decision. Writing for the court, Associate Justice Pierre Adolphe Rost affirmed Larue's emphasis on the length of the master's stay, as well as Larue's reliance on Anglo-American jurisprudence.[157] In a concurring opinion, Chief Justice Eustis stated his reasons for departing from *Marie-Louise v. Marot* (1836) and related cases, which had established the principle of immediate emancipation.[158] He explicitly blamed Chief Justice François-Xavier Martin for faulty reasoning in *Smith v. Smith* (1839).[159] Although Eustis would have reached the same decision in favor of Priscilla's freedom, it was not because the laws of France were at all relevant, but merely because Mrs. Smith had no intention of returning to Louisiana, where slavery was recognized.[160]

A major turning point in the Supreme Court of Louisiana's jurisprudence on slavery, Liza's case was the first time the court had applied the Act of 1846 retroactively.[161] The case also signifies a growing harmonization of Louisiana jurisprudence with the Supreme Court of the United States.[162] No longer did the court adhere to another nation's legal principle (which of course, it had no obligation to follow). Instead, the court looked to the binding authority of the Supreme Court of the United States that it had previously disregarded in *Smith v. Smith* (1839) and to persuasive authority from the English common law state of Massachusetts.[163]

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156 Liza v. Puisant, No. 5632 (1st D. Ct. New Orleans 1851), *NOCA* VSA 290; Commonwealth v. Aves, 35 Mass. 193 (1836); Strader v. Graham, 51 U.S. 82 (1850).

157 Liza v. Puissant, 7 La. Ann. at 81.

158 Liza v. Puissant, 7 La. Ann. at 80; Louise v. Marot, 9 La. at 473.

159 Liza v. Puissant, 7 La. Ann. at 82; Smith v. Smith, 13 La. at 441.

160 Liza v. Puissant, 7 La. Ann. at 82.

161 Helen Catterall, *Judicial Cases Concerning American Slavery and the Negro* (Washington, D.C.: Carnegie Institution of Washington, 1926), vol. 3, 389–91; Finkelman, *An Imperfect Union*, 212–14; Schafer, *Slavery, the Civil Law, and the Supreme Court of Louisiana*, 277–88; Schafer, *Becoming Free, Remaining Free*, 27–28.

162 Schafer, *Slavery, the Civil Law, and the Supreme Court of Louisiana*, 287; Schafer, *Becoming Free, Remaining Free*, 28.

163 Smith v. Smith, 13 La. at 441; Commonwealth v. Aves, 35 Mass. 193.

Eustis's opinion in this case has been described as a nearly inexplicable departure from his previous opinions.[164] Indeed, Eustis engaged in "judicial cheating" typical of other antebellum judges on questions relating to slavery.[165] The emphasis on the length of the master's stay was a sharp departure from the immediate emancipation precedent, but Eustis cast his opinion here as consistent with his previous opinions in *Josephine v. Poultney* (1846), *Arsène v. Pineguy* (1847), and *Smith v. Preval* (1847).[166] In fact, it was not. It was consistent with Anglo-American jurisprudence from other jurisdictions but not with the court's own line of reasoning.

McHenry's departure from the bench adds another layer of explanation. Although of course Eustis was never bound by McHenry's opinions, McHenry's receptiveness to freedom petitions led to circumstances in which a community could mobilize to push freedom petitions through the courts. McHenry's precise articulation of the Supreme Court of Louisiana's principle of immediate, irrevocable emancipation, and his refusal to apply the Act of 1846 retroactively, would have been difficult to overturn with professional integrity.[167] But when a new first-instance judge presented Eustis with different reasoning, based on Anglo-American common law rather than French and international law, Eustis seized the opportunity to affirm a new set of rules on slavery and freedom. In addition to symbolizing a harmonization with the Supreme Court of the United States, in other words, Eustis's decision signified a growing Anglicization of Louisiana law. This is part of a general trend in Louisiana legal history.[168] But of course complete Anglicization was never achieved, because Louisiana to this day is a mixed civil law–common law jurisdiction.

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164 Finkelman, *An Imperfect Union*, 213.

165 Cover, *Justice Accused*, 6.

166 Liza v. Puissant, 7 La. Ann. at 82; Arsene v. Pigneguy, 2 La. Ann. 620 (1847); Josephine v. Poultney, 1 La. Ann. at 329; Eugénie v. Preval, 2 La. Ann. at 180.

167 Arsène v. Pineguy, No. 434 (1st D. Ct. New Orleans 1847), *NOCA* VSA 290.

168 For the classic clash of cultures thesis, see George Dargo, *Jefferson's Louisiana: Politics and the Clash of Legal Traditions* (Cambridge: Harvard University Press, 1975); Judith Schafer and Warren Billings, *An Uncommon Experience: Law and Judicial Institutions in Louisiana, 1803–2003* (Lafayette: University of Southwestern Louisiana, 1997), 6; For revisions which seek to see Louisiana as more than "exotic or curiously amusing," see Mark Fernandez, *From Chaos to Continuity: The Evolution of Louisiana's Judicial System, 1712–1862* (Baton Rouge: Louisiana State University Press, 2001).

After this blow, David took no more free soil suits to the First District Court. A sparse number of freedom petitions made it to the First, Third, Fourth, and Fifth District Courts after this time, but different attorneys represented the claimants.[169]

EXPLAINING McHENRY'S OPINIONS

McHenry's Civilian Legal Training

In McHenry's opinions, the laws of France stood superior to both the individual rights of Louisiana property owners and to the power of the Louisiana legislature.[170] Why was McHenry particularly influenced by the laws of France? McHenry's last name does not suggest any personal connection to French culture. However, he received his legal training under the personal tutorship of François-Xavier Martin, at whose home he lived while studying law.[171] Martin is today remembered as a founding jurist of Louisiana who helped synchronize the state's many legal cultures.[172] His cosmopolitan life experience helps explain why he was particularly well suited for this task. Born in 1762 in Marseille to an established Provençal family, Martin learned Latin and studied Classics early in life. At about the age of eighteen, he moved to the French colony of Martinique to join his uncle on a business venture. The venture failed

169 Louisa v. Giggo, No. 6020 (1st D. Ct. New Orleans 1851), *NOCA* VSA 290 (represented by R. C. Me. Alpasse); Haynes v. Fornozals, No. 7091 (1st D. Ct. New Orleans 1852), *NOCA* VSA 290; Ajoie v. De Marigny, No. 10,443 (4th D. Ct. New Orleans 1856), *NOCA* VSA 290 (represented by Lewis Duvigneaud (Durigneaud)); Paine v. Lambeth, No. 2884 (5th D. Ct. New Orleans 1857), *NOCA* VSA 290; Barclay v. Sewell, No. 4622, 12 La. Ann. 262 (1857), *HASCL* (represented by Christian Roselius, on appeal from the Second District Court of New Orleans). For the case of Lucy Brown (1853), see Schafer, *Becoming Free, Remaining Free*, 29.

170 Couvent v. Guesnard, No. 1786 (1st D. Ct. New Orleans 1848), *NOCA* VSA 290.

171 "Biographical Sketches of John McHenry, Written by Ellen McHenry and Mary McHenry Keith," n.d., KMPFP, Box 14.

172 Glenn Conrad, *A Dictionary of Louisiana Biography* (New Orleans: Louisiana Historical Association, 1988), 1:551; Fernandez, *From Chaos to Continuity*; Janice Shull, "Francois-Xavier Martin," in *Encyclopedia of Louisiana*, ed. David Johnson (Louisiana Endowment for the Humanities, November 4, 2014), http://www.knowlouisiana.org/entry/franois-xavier-martin.

and Martin left Martinique destitute. He migrated to North Carolina, where he opened a printing press.[173]

Martin later studied law under the tutorship of Abner Nash and William Gaston.[174] In 1832, Gaston delivered an address to the graduating students of the University of North Carolina, urging them to take action against slavery. In 1833, Gaston was appointed to the Supreme Court of North Carolina.[175] Alfred Brophy argues that Gaston's jurisprudence signifies an "alternative vision of slavery" within Thomas Ruffin's own time and place.[176] Martin's course of study under Gaston helps explain why he, too, wrote decisions which limited the power of slave owners.

Martin's training in a common law jurisdiction, along with his fluency in French made him an attractive judicial candidate for the Territory of Orleans, a post to which President James Madison appointed him in 1809. He sat on the court for thirty years, through Louisiana's transition to statehood. Between 1836 and 1846, he served as the presiding judge of the court. He developed a clear expertise on the conflict of laws, otherwise known as choice of laws. This was an issue that arose perhaps more often in Louisiana than any other state because of its status as a mixed common–civil law jurisdiction. Upon his death, Martin was recognized as the eminent jurist whose decisions "threw great light upon the subject" of conflict of laws.[177]

In American history, choice of law questions frequently arose in disputes concerning slaves.[178] It has been argued that "courts were the principal forums in which societal values concerning slavery were expressed."[179] There were two situations where conflict of laws questions typically arose within the context of slavery: 1) a slave owner had spent time in a jurisdiction

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173 Bullard, Henry Adams, "A Discourse on the Life, Character, and Writings of the Hon. François Xavier-Martin," in *Historical Collections of Louisiana*, ed. Benjamin Franklin French, vol. 2 (New York: Wiley and Putnam, 1846), 3–40.

174 Bullard, Henry Adams; Janice Shull, "Francois-Xavier Martin."

175 Alfred Brophy, *University, Court, and Slave: Pro-Slavery Thought in Southern Colleges and Courts, and the Coming of Civil War* (New York: Oxford University Press, 2016), 206.

176 Brophy, 206.

177 Bullard, Henry Adams, "A Discourse on the Life, Character, and Writings of the Hon. François Xavier-Martin," 29.

178 Note, "American Slavery and the Conflict of Laws," *Columbia Law Review* 71 (1971): 75.

179 Note, 75.

where slavery was not legal and the slave brought a freedom suit; 2) a slave owner had willingly manumitted a slave in a free state, for some reason the promise had not been carried out, and the former slave brought suit to enforce that manumission.[180] In the antebellum United States, the authoritative source on choice of laws tended to be Joseph Story's *Commentaries on the Conflict of Laws* (1834).[181] In this treatise, Story directly addressed the question of slave transit, concluding that slaves traveling to free territory were subject to the laws of that territory and therefore enjoyed freedom while there.[182] He implied that this freedom, however, was merely temporary: a "parenthesis," much as it had been for Lord Stowell in the case of the *Slave, Grace*.[183]

Although the Louisiana Supreme Court eventually adopted this line of jurisprudence, Martin was well read in alternative approaches. In continental Europe, the experience of the Holy Roman Empire provided guidance for conflict of law questions. The jurisprudence that had developed during the period of the Holy Roman Empire conceived of divine law and natural law as superior, universally applicable legal sources. Under natural law, slavery was abhorrent. Roman law (particularly as codified in *Justinian's Institutes*) provided judges with persuasive authority. The law of nations came next on the hierarchy. Finally, judges could look to municipal, national, and state law. As a result, natural law could negate municipal laws on slavery.[184] But in the Anglo-American legal tradition, "concepts of 'natural law' and 'law of nations' were weak weapons with which to attack the institution [of slavery]."[185]

McHenry studied with Martin before opening his own law practice in New Orleans in 1834.[186] McHenry's law library reflects his legal training under this leading civilian. Although McHenry sold most of the thousands of volumes in his law library in 1868, a catalogue of a remnant of his library reveals a significant representation of books on civil and international law,

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180 Note, 75.

181 Note, 76.

182 Chapter 4, Section 96 in Joseph Story, *Commentaries on the Conflict of Laws, Foreign and Domestic* (Boston: Hilliard, Gray, and Company, 1834), 92–93.

183 Chapter 4, Section 106 in Story, 98–99; The Slave, Grace, 2 Hagg. at 131.

184 Note, "American Slavery and the Conflict of Laws," 80–85.

185 Note, 87.

186 "New Orleans City Directory," 1834, *NOCA*.

such as the *Code Napoleon or French Civil Code* (New York: 1841), the *Institutes of Justinian* (1841), and Henry Wheaton's *Elements of International Law* (Philadelphia: 1836).[187]

The slave transit cases for which Martin wrote the opinion, such as *Lunsford v. Coquillon* (1824), *Louis v. Cabarrus* (1834), and *Smith v. Smith* (1839), defer not only to the laws of slavery in France, but also in other American states.[188] Compared to judges deciding slave transit cases in other states, Martin took the comity of nations to another level. For Martin, respecting the laws of other jurisdictions was more than a mere courtesy: it was the solemn obligation of any jurisdiction participating in a smoothly functioning system of interstate or international law.[189] Martin also sat on the court when Chief Justice Mathews decided *Marie-Louise v. Marot* (1836), the case that established the obligation of Louisiana courts to recognize a slave's "immediate emancipation" upon touching free soil.[190]

During Martin's judicial tenure, the Supreme Court of Louisiana embraced a distinct jurisprudence on slave transit that contrasted sharply with the more restrictive laws of Anglo-American jurisdictions.[191] As Lord Stowell observed in the case of the *Slave, Grace* (1827), "France did not therefore do as [England] had done, put their liberty, as it were, in a sort of parenthesis."[192] In Martin's Supreme Court of Louisiana, the freedom that slaves had experienced in France would not be treated as temporary or fleeting, but as permanent and irrevocable.[193] Judge McHenry's training under Martin contextualizes his special deference to the laws of France.

Like McHenry, Martin's opinions on race-related questions suggest that his decisions in favor of freedom claimants was dictated more by his rule of law commitments — in his case to international law — than to aiding slaves. In *Adelle v. Beauregard* (1810), the court distinguished between "persons of color," who "may have descended from Indians on both sides,

187 "John McHenry — papers re: his law library," n.d., KMPFP, Box 14.

188 Lunsford v. Coquillon, 2 Mart. (n.s.) 401; Louis v. Cabarrus, 7 La. 170; Smith v. Smith, 13 La. 441.

189 Finkelman, *An Imperfect Union*, 209.

190 Louise v. Marot, 9 La. at 476.

191 See, e.g., Commonwealth v. Aves, 35 Mass. 193; Prigg v. Pennsylvania, 41 U.S. 539.

192 The Slave, Grace, 2 Hagg. at 131.

193 Art. 189 in Livingston, Derbigny, and Moreau Lislet, *Civil Code of the State of Louisiana*.

from a white parent, or mulatto parent," and persons of purely African descent.[194] The court in this case presumed persons of color to be free — a principle that many Southerners at the time derided as too liberal, and scholars today interpret as progressive.[195] But this is an incomplete interpretation, for it was accompanied by the presumption that persons judged to be purely of African descent — that is, persons with a darker complexion — were presumed to be slaves. The court further hardened this racial dividing line when it reasoned in *Miller v. Belmonti* (1845), "Slavery itself is an exception to the condition of the great mass of mankind, and except as to Africans in the slave-holding States, the presumption is in favor of freedom."[196] The principle of *in favorem libertatis* has deep roots in both Roman law and canon law.[197] Martin authored neither *Adelle* nor *Miller*, but sat on the court when these cases were decided.

Martin's decisions in race and slavery cases may have impelled the Louisiana legislature to search for a way to be rid of him. Shortly after the controversial *Miller v. Belmonti* decision in 1845, Louisiana legislators adopted a new constitution. The legislature dissolved the court, reinstituting it almost immediately without Martin as a member. Always a man who had lived to work, he now had little to live for and died shortly thereafter.[198] Nevertheless, there are other possible explanations for Martin's ouster. His management style was both idiosyncratic and inefficient. He insisted upon meeting litigants in person at a time when appellate courts were moving away from this tradition. This may have led to a better emotional understanding of the dispute, and is also understandable when we consider that Martin was functionally blind from at least 1836.[199] However, along with

194 Adelle v. Beauregard, 1 Mart. (o.s.) 183 (1810).

195 John Bailey, *The Lost German Slave Girl: The Extraordinary True Story of Sally Miller and Her Fight for Freedom in Old New Orleans* (New York: Atlantic Monthly Press, 2005); Carol Wilson, *The Two Lives of Sally Miller: A Case of Mistaken Racial Identity in Antebellum New Orleans* (New Brunswick: Rutgers University Press, 2007).

196 Miller v. Belmonti, 11 Rob. 339 (1845). For a critical interpretation of the decision focusing on how Sally Miller won her freedom by successfully performing the trope of white womanhood in court, see Ariela Gross, "Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South," *Yale Law Journal* 108, no. 1 (1998): 166–71.

197 Finkelman, *An Imperfect Union*, 187–90.

198 Janice Shull, "Francois-Xavier Martin."

199 Janice Shull.

the financial crisis of 1837, Martin's insistence upon trial-style deliberations led to a hopeless backlog of cases. In 1839, every judge except Martin abandoned the court. Four others were eventually recruited, but with the exception of Henry Bullard who had studied at Harvard School of Law, they were not among the top lawyers in the state.[200]

Whatever the reasons for Martin's ouster, both his and McHenry's departures from the Louisiana legal scene signify a growing Anglicization of Louisiana legal culture, which coincided with a closure of pathways to freedom. It was the newly reconstituted court that reversed Martin's decisions honoring the freedom of French soil, first in *Couvent v. Guesnard* (1850) and then in *Liza v. Puissant* (1852).[201] Unlike Martin, the new presiding justice of the court, George Eustis, was Boston-born, Harvard-educated, and sided with the Confederacy during the Civil War.[202] Eustis had served as associate justice on the court between 1838 and 1839, but he abandoned Martin's court in 1839.[203] When the legislature disbanded Martin's court, they reappointed Eustis, this time as chief justice, in May 1846.[204] Eustis could now proceed unfettered to overturn the French free soil precedent while embracing Anglo-American precedents such as the case of the *Slave, Grace* (1827).[205] Eustis thus brought Louisiana into line with neighboring Southern common law states. Other historical works on the Louisiana slave transit cases have not linked the restrictive turn in Louisiana jurisprudence to the departures of either Martin or his student McHenry.[206] Both deserve a place in explanations of the course of Louisiana law.

Criminality, Honor, and Masculinity

McHenry's opinions are best appreciated in the broader context of his professional life. Before he was appointed judge of the First District Court of New Orleans, McHenry practiced criminal defense. For example, Frances Mitchell hired McHenry to defend her son, who had been charged with

200 Bailey, *The Lost German Slave Girl*, 201.

201 Conant [*sic*] v. Guesnard, 5 La. Ann. at 696; Liza v. Puissant, 7 La. Ann. at 80.

202 Conrad, *A Dictionary of Louisiana Biography*.

203 Conrad; Bailey, *The Lost German Slave Girl*, 201.

204 Conrad, *A Dictionary of Louisiana Biography*.

205 The Slave, Grace, 2 Hagg. 94.

206 See, e.g., Cover, *Justice Accused*, 96–97; Finkelman, *An Imperfect Union*, 216.

manslaughter by a New Orleans court in 1846.[207] McHenry's professional experience representing alleged criminals further explains why he ruled the way he did in so many freedom suits. Representing an alleged criminal requires empathizing with some of society's most marginalized people. Branded by the state as deviants, convicted criminals were cut off from social ties in ways that undermine their personhood.[208] They experienced a form of the social death that Orlando Patterson argues is the hallmark of slavery.[209]

That McHenry shared the values of a patriarchal society helps explain why certain wealthy French planters beseeched him to stay rather than leave for California in 1850. When he warned, "I might have to decide against you again," they responded, "No matter, we need a man like you on the Bench."[210] Early in his judicial career, McHenry decided

> a case of some importance, and one which excited considerable interest at the time . . . . A beautiful woman who had been horsewhipped in the streets by an individual sufficiently prominent to employ as his counsel Pierre Soulé, at that time a leading member of the Bar and of the State Legislature, and afterwards a United States senator from Louisiana.[211]

This was the case of *State v. Carter, alias Manly*.[212] The fact that McHenry's court heard this prosecution at all is remarkable. In North Carolina, Judge Thomas Ruffin had already held that the state had no power to charge John Mann with a crime when he maimed the slave he was renting, named Lydia. Because slaves were considered property, not persons, the only recourse for

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207 "Agreement, Frances Mitchell and John McHenry," 23 September 1846, KMPFP, Box 14.

208 On crime as behavior that the state labels as "abnormal" such that the unaccused behave "normally," see Émile Durkheim, "The Normality of Crime," in *Classic Readings in Sociology*, ed. Eve Howard (Belmont, CA: Thomson Higher Education, 2007). On prisons as total institutions that strip inmates of personhood, see Erving Goffman, *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates* (Chicago: Aldine Publishing Company, 1962).

209 Orlando Patterson, *Slavery and Social Death: A Comparative Study* (Cambridge: Harvard University Press, 1982), 13.

210 "Biographical sketch by his daughter, Mary McHenry Keith," n.d., KMPFP, Box 14.

211 "Obituary — John McHenry," 17 November 1880, *The Daily Examiner*, KMPFP, Box 17.

212 "City Intelligence," 17 March 1848, *The Daily Picayune*.

Lydia's owner, Elizabeth Jones, was a civil suit against Mann for property damage.[213] However, in Louisiana, "a beautiful woman" garnered public attention as a sympathetic human victim.[214] Although the *Examiner* mentions neither this woman's race nor personal status, it seems likely that the victim of a horsewhipping would have been a slave. The description of the woman as beautiful suggests that like many cases in the antebellum South, this one played into tropes of tragic octoroons.[215] They were portrayed as almost "purely" white, suffering tragic fates because of their African blood.[216] That McHenry heard the case at all suggests that unlike Ruffin, he believed a master's power over his slave should be limited, but not dismantled, by the state.

The gendered aspect of this criminal case also raises the question of whether McHenry would have decided the freedom suits differently if they had been brought by plaintiffs who were men or boys. Perhaps when David and the community of free people of color handpicked certain litigants, they were playing into Southern notions of masculinity and honor. McHenry believed it was the solemn duty of men to protect women and children. In 1864, he bemoaned the fact that women and children had been left behind on Southern plantations without protection from the crimes of war.[217] According to his daughter who secretly attended the University of California, Hastings School of Law, from 1879–1882, McHenry

> had no sympathy whatsoever with the then revolutionary idea that a woman had a right to think of a career outside of a home and babies . . . . [He] believed, that no woman's brain is capable of understanding the intricacies of law.[218]

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213 State v. Mann, 13 N.C. 263 (1829).

214 "Obituary — John McHenry," 17 November 1880, *The Daily Examiner*, KMPFP, Box 17.

215 See, e.g., Hezekiah Hosmer, *Adela, the Octoroon* (Columbus: Follett, Foster, 1860); J. H. Ingraham, *The Quadroone, Or, St. Michael's Day* (New York: Harper, 1841).

216 For the best critical analyses, see Gross, "Litigating Whiteness;" Ariela Gross, *What Blood Won't Tell: A History of Race on Trial in America* (Cambridge: Harvard University Press, 2008); James Kinney, *Amalgamation!: Race, Sex, and Rhetoric in the Nineteenth-Century American Novel* (Westport, Conn.: Greenwood Press, 1985).

217 "John McHenry, speech, made in Sonoma," 1864, KMPFP, Box 17.

218 "Hastings College of the Law, University of California," 1882, KMPFP, Carton 4; "Widow of Artist is Suffrage Pioneer Determination Sharpened by Defeat," 16 March 1925, *San Francisco Examiner*, KMPFP, Carton 14.

Like other African-American female litigants throughout the antebellum South, the successful female claimants in McHenry's court may have had status deserving of protection, but they did not necessarily have rights.[219]

McHenry's Complicated Politics of Slavery

At first glance, the language in McHenry's opinions in Arsène's and Mary's cases might lead one to believe that he had abolitionist tendencies. Indeed, McHenry does not appear as a buyer or seller of human property in New Orleans between the years 1838 and 1850.[220] The conveyance books are meticulously archived, and this absence contrasts with other white men of McHenry's status and time period. Even the plaintiffs' attorney, David, bought and sold humans for profit.

Although New Orleans records suggest that McHenry personally abstained from buying and selling human beings, sources held in California, where McHenry died, tell a different story. In 1842, McHenry's mother wrote a letter informing him that "Weaver and Cason has [*sic*] filed a bill in the chancery court against you for the balance of the money you are behind with them for the purchase of three negroes."[221] The balance was $700, and the sheriff had seized the two children until McHenry would pay his debt.[222] Also in the 1840s, McHenry informed his new bride Ellen that he had instructed a certain Louis to pack up their room and pick up his mail from the post.[223] In the 1850s, he instructed his wife to bring a "faithful servant" to aid her along the voyage from New Orleans to San Francisco.[224] These letters fail to prove that McHenry, like so many legal professionals of his day, lived in New Orleans while managing a plantation from afar. Nonetheless, he participated in the trade in human property.[225]

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219 Laura Edwards, "Status without Rights: African Americans and the Tangled History of Law and Governance in the Nineteenth century U.S. South," *American Historical Review* 112, no. 2 (2007).

220 Vendor–Vendee Records, *NONA* Conveyance Books Index 38–51.

221 "Letter, Elizabeth McHenry to John McHenry, 12 May 1841," KMPFP, Box 14.

222 "Letter, Elizabeth McHenry to John McHenry, 12 May 1841."

223 "Letters, John McHenry to Ellen McHenry," n.d.; 14 June 1847, KMPFP, Box 15.

224 "Letters, John McHenry to Ellen McHenry," 1 January 1851, KMPFP, Box 15.

225 On legal professionals who owned and managed plantations, see Ariela Gross, *Double Character: Slavery and Mastery in the Antebellum Southern Courtroom*

Still, McHenry does not seem to have conceived of himself as a slave owner, referring not to his slaves but to "Louis" and his "servant."[226] Likely, in Louisiana he lacked the means to purchase a great number of slaves. Only in California could McHenry aspire to a lifestyle like that of a well-to-do Southern planter. A human interest piece written more than fifty years after McHenry's death describes the "slaves" that McHenry employed on his 160-acre property, Rancho Temescal, for $90 a month.[227] The quotation marks around the word "slaves" appears in the original, indicating that these were not truly slaves. But like many laborers in multiracial California, McHenry's laborers evade simple classification as either slave or free. More likely, they experienced degrees of unfreedom.[228]

Later in life, McHenry's personal and political views on slavery solidified. Whereas in the 1840s McHenry's attitudes toward slavery might be described as ambiguous, by the midst of the Civil War he had developed much sharper opinions. Speaking to members of the California Democratic Party on the eve of the 1864 election, McHenry condemned the "fanatical, fratricidal war" that had been waged "to free the Negro and subjugate the South."[229] The war for McHenry was not about states' rights, with little to do with slavery.[230] McHenry denounced Abraham

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(Princeton: Princeton University Press, 2000), 27–30. On the prevalence of absentee landlordism, see Ulrich Bonnell Phillips, *American Negro Slavery: A Survey of the Supply, Employment and Control of Negro Labor as Determined by the Plantation Regime* (Baton Rouge: Louisiana State University Press, 1966), 50; 62; 91; 251; 340–41.

226 "Letters, John McHenry to Ellen McHenry," n.d.; 14 June 1847, KMPFP, Box 15; "Letters, John McHenry to Ellen McHenry," 1 Jan. 1851, KMPFP, Box 15.

227 E.G. Fitzhamon, "The Streets of San Francisco: Taylor, No. 11," 14 April 1929, *San Francisco Chronicle*, in KMPFP, Box 14, "McHenry Miscellany" Folder.

228 Stacey Smith, "Remaking Slavery in a Free State: Masters and Slaves in Gold Rush California," *Pacific Historical Review* 80, no. 1 (2011): 28–63 (discussing the landmark case *Stovall v. Archy*; Stacey Smith, *Freedom's Frontier: California and the Struggle over Unfree Labor, Emancipation, and Reconstruction* (Chapel Hill: University of North Carolina Press, 2013) (on degrees of unfreedom in California). See also *In Re Perkins*, 2 Cal. 424 (1852).

229 "John McHenry, speech, made in Sonoma," 1864, KMPFP, Box 17. For the 1864 election, see David Long, *The Jewel of Liberty: Abraham Lincoln's Re-Election and the End of Slavery* (Mechanicsburg, PA: Stackpole Books, 1994); John Waugh, *Reelecting Lincoln: The Battle for the 1864 Presidency* (New York: Crown Publishers, 1997).

230 This explanation is put forward by William A. Dunning and his students. William Archibald Dunning, *Essays on the Civil War and Reconstruction*. (Gloucester,

Lincoln as a tyrant and a despot. He predicted that "the Washington Abolition tyrant" would go down in the annals of history alongside Charles, the Duke of Burgundy, and other "wretches who have disgraced mankind."[231]

McHenry's positions were not uncommon among Northern Democrats. In 1864, war-wary "Peace Democrats" readied themselves for negotiations to allow the Confederacy to be a separate American nation.[232] *The Lincoln Catechism*, a satirical piece published in New York similarly reaveals perception of Lincoln as an anti-slavery tyrant. It read, "III. By whom hath the Constitution been made obsolete? By Abraham Africanus

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Mass.: P. Smith, 1898); William Archibald Dunning, *Reconstruction, Political and Economic, 1865–1877* (New York: Harper & Bros., 1907). In *The Irrepressible Conflict, 1850–1865* (New York: Macmillan Co., 1934), Arthur Cole argues that social and economic differences between the North and South inevitably led to the Civil War. In so doing, members of the Dunning School downplayed or completely evaded the political significance of slavery. In "Lincoln's Election an Immediate Menace to Slavery in the States?," *The American Historical Review* 36, no. 4 (1931): 766, Cole asserts that "slavery was scarcely the crux of the sectional issue." See also Charles Beard and Mary Ritter Beard, *The Rise of American Civilization,* (New York: The Macmillan Company, 1933). In Nathaniel Wright Stephenson, "California and the Compromise of 1850," *Pacific Historical Review* 4, no. 2 (1935): 115, Beard is quoted as saying that slavery hardly deserves a footnote in the history of the Civil War. As Laura Edwards explains in *A Legal History of the Civil War and Reconstruction: A Nation of Rights* (New York: Cambridge University Press, 2015), 181, the Dunning School was marked by a "clear support for white supremacy." Revisionists of the 1930s–1940s instead focused on political factors, portraying Civil War era politicians as a blundering generation who had failed to compromise on compromisable issues, thereby leading to a needless, tragic loss of human life. See, e.g., Avery Craven, *The Repressible Conflict, 1830–1861* (Baton Rouge: Louisiana State University Press, 1939); James Randall, *Lincoln, the President.* (New York: Dodd, Mead, 1945); David Potter, *The Impending Crisis, 1848–1861* (New York: Harper & Row, 1976); David Potter, *The South and the Sectional Conflict* (Baton Rouge: Louisiana State University Press, 1968). Only beginning in the 1940s and picking up during the Civil Rights era of the 1960s did historians begin to focus on the moral issues of slavery and abolition as a cause of the Civil War. See, e.g., Allan Nevins, *The Emergence of Lincoln* (New York, 1950); Martin Duberman, *The Antislavery Vanguard: New Essays on the Abolitionists* (Princeton: Princeton University Press, 1965).

231 "John McHenry, speech, made in Sonoma," 1864, KMPFP, Box 17.

232 Charles Flood, *1864: Lincoln at the Gates of History* (New York: Simon & Schuster, 2009); Part III, "Slavery and the Crisis of American Democracy," in Sean Wilentz, *The Rise of American Democracy: Jefferson to Lincoln* (New York: Norton, 2005).

the First," and "XVI. What is the meaning of the word 'traitor?' One who is a stickler for the Constitution and the laws."[233]

McHenry's references to the "implacable and hellish spirit of Abolitionism," and the misguided "Abolition preachers [who] still continue to deliver political harangues" bear a striking contrast to his opinion in *Couvent v. Guesnard* (1848), where he had condemned the Louisiana legislature for taking away from Mary the right to sue for her freedom.[234] However, McHenry's 1864 speech is not irreconcilable with his earlier judicial opinions on freedom suits. First, creating one legal exception (manumission) solidifies the rule (enslavement for those perceived to be of exclusively African descent). Furthermore, in both his 1864 speech and his judicial opinions nearly two decades prior, McHenry's stated logic depends not on his personal or political views of slavery, but upon the rule of law. In this way, he is similar to the judges at the center of Lucy Salyer's *Laws Harsh as Tigers*, whom she describes as "captives of law."[235] Between 1891 and 1905, federal and circuit court judges in San Francisco often decided cases in favor of Chinese petitioners regardless of their personal or political views on immigration. Even Judge William Morrow, who had been a vocal proponent of the Chinese Exclusion Act (1882) during his time as a legislator, felt bound once he became a judge to honor certain sacred principles of Anglo-American law, such as habeas corpus and evidentiary standards. He thus allowed the Chinese to access courtrooms and indeed often ruled in their favor.[236] Like McHenry, these judges' "respect for institutional obligations trumped other personal and political loyalties."[237]

In 1848, McHenry had criticized the Louisiana legislature for deviously rejecting the laws of France, thereby reducing Mary again to slavery.[238] In 1864, he accused Lincoln of violating the "principles and theory of the

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233 *The Lincoln Catechism Wherein the Eccentricities & Beauties of Despotism Are Fully Set Forth: A Guide to the Presidential Election of 1864.* (New York: J. F. Feeks, 1864), 3–5. *Library of Congress* CTRG237336-B.

234 Ibid.; Couvent v. Guesnard, No. 1786 (1st D. Ct. New Orleans 1848), *NOCA* VSA 290.

235 Salyer, *Laws Harsh as Tigers*, 69.

236 Salyer, 72.

237 Salyer, 70.

238 Couvent v. Guesnard, No. 1786 (1st D. Ct. New Orleans 1848), *NOCA* VSA 290.

law of war, derived from Grotius, Pufendorf, Francesco Vittoria, and other Christian writers upon the subject."[239] Well-read in the subject, McHenry owned copies of Hugo Grotius's *De Jure Belli et Pacis*, as well as Emer de Vattel's *The Law of Nations*.[240] He described the pillage, rape, and other high crimes of war that had been committed upon women and children, only to go unpunished by the federal government. He also condemned what he saw as "the Abolition program for the overthrow of the Constitution."[241] Nevertheless, there is room in the logic of McHenry's speech for the South eventually to abolish slavery. Gradual abolition of slavery through popular referendum or through constitutional amendment would likely have been acceptable to him, but in his view, "forcible abolition" should not be contemplated for a moment.[242]

McHenry's virulent language toward Lincoln contrasts with his fellow jurist Christian Roselius's eulogy of Lincoln.[243] There is evidence that McHenry and Roselius shared collegial respect: McHenry owned a copy of Gustavus Schmidt's *Civil Law of Spain and Mexico* (New Orleans: 1851), dedicated to Christian Roselius.[244] McHenry and Roselius both saw the institution of slavery as integral to Southern livelihood. Clearly, however, their political views differed drastically: McHenry was a California Democrat who condemned Lincoln as a despot, while Roselius was a Southern Republican who eulogized Lincoln as a magnanimous leader.

McHenry's legal views on slavery are not to be explained easily by his political alignment with the Democratic party.[245] Indeed, given the complicated sectional politics of slavery, there is no simple correlation of party affiliation with pro- or anti-slavery opinions. Although most Abolitionists voted Republican, and "anti-slavery formed no small part of Republican ideology," many Republicans opposed slavery simply because slavery

239 "John McHenry, speech, made in Sonoma," 1864, KMPFP, Box 17.

240 "John McHenry — papers re: his law library," n.d., KMPFP, Box 14.

241 "John McHenry, speech, made in Sonoma," 1864, KMPFP, Box 17.

242 "John McHenry, speech, made in Sonoma."

243 Christian Roselius and J. S. Whitaker, *Louisiana's Tribute to the Memory of Abraham Lincoln, President of the United States* (New Orleans: Picayune Office Job Print, 1865), 25.

244 "John McHenry — papers re: his law library," n.d., KMPFP, Box 14.

245 "John McHenry, speech, made in Sonoma," 1864, KMPFP, Box 17.

threatened the Union.[246] As the French consul to New Orleans observed of the American political scene in 1848, the true dividing line was North-South, and both parties lacked a coherent policy on slavery. The consul explained to the French Minister of Foreign Affairs, "Whether among the Whigs and Democrats here, I only see partisans of slavery, and in the Northern states Abolitionism has as many apologists in one party as the other."[247] Likewise, in Louisiana Abolitionists had reason to fear for their lives and safety.[248]

The seeming incompatibility of McHenry's views on slavery with his judicial opinions demonstrates that successful freedom petitioners did not need the judges deciding their cases to be personally or politically opposed to slavery. After all, creating an exception to the rule merely solidifies the rule. Petitioners operated in a legal system constructed with the purpose of keeping the institution of slavery intact. Legislators designed manumission laws so as to make the power of the master even more absolute.[249] Nevertheless, the master's law had, built into it, openings that certain individuals could exploit. As Alejandro de la Fuente and Ariela Gross argue, based on their comparative study of manumission in Louisiana, Virginia, and Cuba from the sixteenth to the nineteenth centuries, even if those openings were small in number, they gradually became a very real threat to the authority of the master class.[250]

CONCLUSION

On 30 May 1846, the Legislature of Louisiana passed a statute constraining the ability of enslaved people from that day forward to seek liberty on the basis of having traveled to places such as France, where slavery was

246 Eric Foner, *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party before the Civil War* (Oxford–New York: Oxford University Press, 1995), 303; 304; 309.

247 "Correspondence politique des consuls, Etats-Unis," 6 July 1848, *MAE*-Paris 16CPC/2, fol. 93.

248 "Correspondence politique des consuls, Etats-Unis," 6 July 1848, *MAE*-Paris 16CPC/2, fol. 97.

249 Patterson, *Slavery and Social Death*, 209–39.

250 Alejandro de la Fuente and Ariela Gross, *Becoming Black, Becoming Free: The Law of Race and Freedom in Cuba, Louisiana, and Viriginia, 1500–1860* (New York: Cambridge University Press, forthcoming 2020).

illegal. This legislation was clearly a reaction to cases the Supreme Court of Louisiana had decided in favor of individual liberty from the 1820s to the 1840s. Even after the passage of the Act of 1846, however, enslaved people continued to submit freedom petitions to local courts on the basis of having touched free soil. Judge John McHenry of the First District Court of New Orleans continued not only to hear these petitions but also interpret the laws so as to favor individual liberty.

In a state with a legislature dominated by slave owners, McHenry's appointment to the bench was contentious. In the first freedom suit he decided, McHenry demonstrated his commitment to the fundamental principle prohibiting retroactive application of the laws. Although the legislature had clearly sought to put an end to successful free soil cases, McHenry concluded in favor of Arsène's freedom. A flurry of freedom suits followed. Because Mary had been to France after the passage of the act, her case presented an opportunity for her lawyer to test the limits of judicial interpretation in favor of liberty. With a heavy heart, McHenry declared there was nothing his court could do to help her. The legislature had stripped him of his power to pass on the merits of her claim. The gulf between local and appeal courts widened. While local courts sought to maintain pathways to freedom for individual slaves, a recomposed Supreme Court sided with a pro–slave owner legislature.

At a time when the issue of slavery increasingly polarized the nation, McHenry departed not only the bench but also Louisiana. His departure adds an explanatory layer to Liza's case, a major turning point in the history of freedom litigation in Louisiana, symbolizing both the growing Anglicization of law in Louisiana and the end of the *in favorem libertatis* principle. Personal and legal papers held in California, where McHenry died, further elucidate McHenry's opinions. McHenry's apprenticeship under the civilian jurist François-Xavier Martin, who himself trained under the anti-slavery William Gaston and wrote several opinions limiting the power of slave owners, goes a long way toward explaining why McHenry decided free soil cases in favor of individual liberty, despite clear legislative intent to shut off pathways to freedom. Additionally, McHenry shared the values of a patriarchal society where honorable men like him bore the responsibility of protecting women, children, and even slaves. A favorable ruling in his court was no doubt welcomed by the once-enslaved

petitioners. But it would be too simplistic to categorize him as anti-slavery. McHenry's politics on slavery, especially around the time of the Civil War, were complicated. Furthermore, by creating exceptions for some, McHenry implicitly condoned the legal system that was slavery.

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