ARTICLES

HOW A CALIFORNIA SETTLER UNSETTLED THE PROSLAVERY LEGISLATURE OF ANTEBELLUM LOUISIANA

ALEXANDRA HAVRYLYSHYN*

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]

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* JD, PhD, 2018, University of California Berkeley School of Law.

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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RIGHT OF PUBLICITY IN THE ERA OF CELEBRITY:

A Conceptual Exploration of the California Right of Publicity, as Expanded in White v. Samsung Electronics, *in Today's World of Celebrity Glorification and Imitation*

SARAH ALBERSTEIN*

I. INTRODUCTION/BACKGROUND

Today's American adults spend more time interfacing with media than ever before.[1] An average American adult spends more than eleven hours per day interacting with media, with just shy of four hours spent on a computer, tablet, or smartphone.[2] Young adults between the ages of eighteen and thirty-four spend 43 percent of their time digitally consuming media.[3] Today, over 78 percent of the U.S. population has at least one social networking profile, and a substantial portion of media consumed by

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* JD student, University of Richmond School of Law, Class of 2020.

[1] Quentin Fottrell, *People Spend Most of Their Waking Hours Staring at Screens,* Market Watch (Aug. 4, 2018, 5:09 PM ET), https://www.marketwatch.com/story/people-are-spending-most-of-their-waking-hours-staring-at-screens-2018-08-01.

[2] *Id.*

[3] *Time Flies: U.S. Adults Now Spend Nearly Half a Day Interacting with Media,* Nielsen (July 31, 2018), https://www.nielsen.com/us/en/insights/news/2018/time-flies-us-adults-now-spend-nearly-half-a-day-interacting-with-media.print.html.

adults and young adults is social media, averaging about forty-five minutes per day spent on social networking for adults eighteen years old and older.[4]

Bred from this uptick in media consumption and broadening social networks is the rise of celebrity and social media influencers. Celebrities like Beyoncé, Ariana Grande, and Kylie Jenner, each with several million followers on popular social media platforms like Instagram and Twitter, have maximized social media to interact with fans and boost their personal brand.[5] Unlike celebrities with a preexisting fan base, other individuals, dubbed 'social media influencers,' have taken to social media to create and capitalize on a purely digital personal brand that gradually expands to the level of celebrity.[6] Much like their title suggests, social media influencers, and celebrities alike, are paid to influence their audience.[7] This can take the form of sponsored posts, advertisements, brand outreach, and general partnerships with businesses all intended to capitalize on the growing popularity of the celebrity or influencer themselves in addition to their particular brand or image.[8]

However, studies have shown that the influence of social media influencers and celebrities has more than a commercial impact. A study by the YMCA interviewed over 1,000 individuals between the ages of eleven and sixteen, finding that 58 percent identified celebrities, and 52 percent identified social media, as the source of their body image expectations.[9] Moreover, 62 percent of fifteen- to sixteen-year-olds, and 43 percent of eleven- to twelve-year-olds, identified individuals on social media as a source of

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4 *Id.*

5 Karla Rodriguez, *The Most Influential Celebrities on Social Media,* US Magazine (Oct. 20, 2017), https://www.usmagazine.com/celebrity-news/pictures/the-most-influential-celebrities-on-social-media/ariana-grande-2.

6 The Digital Marketing Institute defines 'social media influencers' as "a user who has established credibility in a specific industry, has access to a huge audience and can persuade others to act based on their recommendations." Carla Rivera, *9 of the Biggest Social Media Influencers on Instagram*, Digital Marketing Institute, https://digitalmarketinginstitute.com/en-us/blog/9-of-the-biggest-social-media-influencers-on-instagram (last visited Apr. 21, 2019).

7 *Id.*

8 *Id.*

9 *Young People Face Great Expectations to Look Perfect,* YMCA (Jul. 23, 2018), https://www.ymca.org.uk/latest-news/young-people-face-great-expectations-to-look-perfect.

pressure about their physical appearance.[10] A second study published in the *Journal of Social Media and Society* found that body image dissatisfactions in adolescents "have largely been attributed to the frequent depictions of unrealistic body images in the mass media . . . made more pervasive in social network sites . . . such as Facebook, Twitter, or Instagram."[11] The influence and pervasiveness of media has rewired youth consumer expectations of normative beauty standards to be those embodied by celebrities and influencers. Young consumers with such expectations are implicitly, and sometime explicitly, encouraged to mirror the appearance of celebrities as a means of fitting in or being accepted socially.

However, while adolescents may be seemingly more impressionable, the impact of celebrity on body image is not limited to the youth. Adults also experience body dissatisfaction spurred on by media portrayals of "unrealistic [body image] ideals."[12] This dissatisfaction results in behavior modifications like dieting and plastic surgery. Recent studies show that around forty-five million Americans diet each year, and that around $33 billion is spent on weight loss products in the United States each year.[13] Internationally, there has been growing use of anabolic steroids and in 2014, over twenty million cosmetic procedures were performed worldwide.[14] In this way, adult consumers of media also feel a pressure to adapt their appearance to normative beauty standards set by celebrities and influencers.

In fact, some individuals go so far as to utilize plastic surgery to attempt to imitate the appearance of celebrities and influencers they see in media.[15] Celebrity imitation plastic surgery has become a pervasive trend,

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[10] *Id.*

[11] Shirley S. Ho et al., *Social Network Sites, Friends, and Celebrities: The Roles of Social Comparison and Celebrity Involvement in Adolescents' Body Image Dissatisfaction,* 1 Social Media + Society 11, 1 (2016), https://journals.sagepub.com/doi/pdf/10.1177/2056305116664216.

[12] Sarah Grogan, Body Image: Understanding Body Dissatisfaction in Men, Women and Children xi (3d ed. 2017).

[13] *Id.* at xi.

[14] *Id.* at xi.

[15] For example, Jennifer Pamplona spent over $500,000 on around thirty plastic surgeries to resemble Kim Kardashian; Celebrity impersonator, Miki Jay, spent over $16,000 to look more like Michael Jackson; Celebrity impersonator Donna Marie Trego spent $60,000 to look more like Lady Gaga; and social media influencer, Justin Jedlica underwent over 300 cosmetic procedures to resemble a Ken doll. Elizabeth

with potential patients often making requests to look like a specific celebrity or to model particular bodily attributes after celebrity body parts.[16] Moreover, individuals who undergo plastic surgery to resemble particular celebrities often do so to further their careers in the arts and entertainment industry, wherein they are able to capitalize on their imitation of a particular celebrity's image.[17] This trend of celebrity imitation surgeries exists alongside the long-standing trend of celebrity imitation within the arts and entertainment industries, with some individuals making as much as $438,000 per year to impersonate celebrates.[18] As a result, there is a considerable financial incentive to receive imitation surgeries or capitalize on one's natural resemblance to a particular celebrity and subsequently commercialize and market that resemblance.

This celebrity imitation market may seem to have a limited impact, reflecting only the singular, autonomous choice of a specific individual. However, legislation and jurisprudence surrounding the right of publicity suggests that receiving plastic surgery or commercializing one's resemblance to a particular celebrity may be a legal liability, and that claims brought by celebrities against celebrity imitation surgery recipients and celebrity look-alikes to preserve exclusivity over the celebrity's image may be meritorious.

The ability to assert exclusivity over a celebrity's image has risen in tandem with the rise of social media and the marketability of celebrity image and branding. This assertion of rights was bolstered by the Ninth

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Narins, *What Happens when People Stop Wanting to Look like Kardashians?,* Cosmopolitan Magazine (Nov. 16, 2018), https://www.cosmopolitan.com/health-fitness/a23323882/plastic-surgery-trends-kardashian; *Plastic Surgery to Look like a Celebrity — What's That About?,* Dr. Tim R. Love M.D. Facts Blog, https://drtimlove.com/blog/plastic-surgery-to-look-like-a-celebrity-whats-that-about (last visited April 21, 2019); William Buckingham, *This Lot Spent £250,000 to "Look" like Celebrities,* The Sun (Apr. 5, 2016, 8:46 PM), https://www.thesun.co.uk/archives/news/245819/this-lot-spent-250000-to-look-like-celebrities.

[16] *Celebrity Plastic Surgery: 8 People Who Have Had Extreme Operations to Look like Their Favorite Stars,* Huffpost (Dec. 6, 2017), https://www.huffingtonpost.com/2013/10/24/celebrity-plastic-surgery_n_4151715.html.

[17] *Id.*

[18] Claire Gordon, *This Woman Has Raked in Nearly $500K by Impersonating Britney Spears*, Business Insider (Jan. 22, 2013, 6:09 PM), https://www.businessinsider.com/huge-earnings-for-celebrity-look-alikes-2012-12.

Circuit's broad recognition of the right of publicity in *White v. Samsung Electronics*. The court in *White v. Samsung Electronics* reasoned that such a broad publicity right would fuel investment in celebrity image promotion while simultaneously protecting the investment itself.

However, this reasoning has generated a paradox wherein the very promotion of celebrity which undergirds unhealthy body image and incentivizes subsequent unhealthy body modification simultaneously limits the copying of a celebrity's image through the enforcement of a celebrity's right of publicity. In other words, the promotion of celebrity protected by the *Samsung* right of publicity simultaneously incentivizes and bars individuals from coopting a celebrity's image. This article explores this paradox, and other downstream consequences of the *White v. Samsung Electronics* construction of the right of publicity, starting with a discussion of the right of publicity and its expansion in *White v. Samsung Electronics* and then applying this broad right to the current celebrity image market supercharged by the ever-increasing consumption of media.

A. RIGHT OF PUBLICITY

The right of publicity arose out of a recognition of commercial exploitation of celebrities that accompanied technological advances in photography, movies, and radio in the 19th century.[19] As technology advanced, the methods and means of unauthorized uses of celebrities' images became more accessible and prevalent.[20] While resistant at first, courts eventually acknowledged the prevalence of these unauthorized uses and the accompanying inability of celebrities to control the commercial use of their image.[21] Gradually, the courts formed a common law right of publicity generally defined as the right to control commercial uses of one's identity.[22]

Some of the justifications for right-of-publicity legislation are analogous to other intellectual property rights, including the prevention of

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[19] Reshma Amin, *A Comparative Analysis of California's Right of Publicity and the United Kingdom's Approach to the Protection of Celebrities: Where Are They Better Protected?,* 1 Case W. Res. J.L. Tech. & Internet 93, 97 (2010).

[20] *Id.* at 99.

[21] *Id.* at 99.

[22] Jonathan Faber, *A Brief History of the Right of Publicity*, Right of Publicity, http://rightofpublicity.com/brief-history-of-rop (last visited Apr. 21, 2019).

unjust rewards.[23] However, the right of publicity is a stand-alone intellectual property right with its own justifications independent of other intellectual property rights, like trademark or copyright.

One of the primary justifications for right of publicity is a recognition of the time and effort it takes to cultivate a personal brand and image that can be marketed and profited from.[24] Essentially, "a famous person who has 'long and laboriously nurtured the fruit of publicity values' should benefit from those values herself . . . [S]ince the celebrity spends time, money, and energy in developing a commercially lucrative persona, that persona is the fruit of the celebrity's labor and entitles her to its rewards."[25] Advertisers who appropriate celebrity personas are often conceptualized as having impermissibly reaped what the celebrity has sown.[26] The idea is that it would be unfair for a business to profit from the efforts a celebrity has put into their own image and brand, without crediting or compensating that celebrity.[27]

A second justification for the right of publicity is an economic incentive justification which "holds that protection of the celebrity's economic interest in her identity fosters creativity . . . [in that] assurance that the celebrity will be able to gain from what she produces will encourage artistic creation that enriches our culture."[28] In other words, without exclusivity over her image, a celebrity will be discouraged from further artistic creation that fosters popular cultural enrichment.

A final related justification for the right of publicity is protecting celebrities' creative and commercial control over the brand they built for themselves, and maintaining celebrities' abilities to choose whether and how to be commercialized at all.[29] This justification operates on the premise that celebrities "should have exclusive control of [their] right of publicity

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[23] *Id*.

[24] *Id*.

[25] Sudakshina Sen, *Fluency of the Flesh: Perils of an Expanding Right of Publicity,* 59 Alb. L. Rev. 739, 740 (1995).

[26] *Id*.

[27] Jonathan Faber, *A Brief History of the Right of Publicity*, Right of Publicity, http://rightofpublicity.com/brief-history-of-rop (last visited Apr. 21, 2019).

[28] Sen, *Fluency of the Flesh* at 740.

[29] Jonathan Faber, *A Brief History of the Right of Publicity*, Right of Publicity, http://rightofpublicity.com/brief-history-of-rop (last visited Apr. 21, 2019).

in order to protect consumers from possible misrepresentation, deception and false advertising."[30] Thus, not only should a celebrity have exclusivity over her appearance itself but also over whether and how she chooses to commercialize that appearance. As the U.S. Sixth Circuit Court of Appeals noted in their 1982 decision in *Carson v. Here's Johnny Portable Toilets,* an oft-cited right of publicity case, "[t]he right of publicity has developed to protect the commercial interest of celebrities and their identities. The theory of the right is that a celebrity's identity can be valuable in the promotion of products, and the celebrity has an interest that may be protected from the unauthorized commercial exploitation of that identity."[31]

B. CALIFORNIA STATUTORY AND COMMON LAW RIGHT OF PUBLICITY[32]

In California, there is both a statutory and common law right of publicity, though the statutory right of publicity is less expansive than its common law counterpart. The common law right of publicity bars appropriation of a celebrity's name, likeness, voice, signature, identity, and persona, whereas the statutory right of publicity is limited to name, likeness, voice, and signature.[33]

Moreover, the common law right of publicity does not have an intent requirement, as the statutory right of publicity does.[34] Mistaken or inadvertent appropriation of a celebrity's identity, name, or likeness does not provide a

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30 Sudakshina Sen, *Fluency of the Flesh: Perils of an Expanding right of publicity,* 59 Alb. L. Rev. 739, 741 (1995).

31 Carson v. Here's Johnny Portable Toilets, 698 F.2d 831, 835 (6th Cir. 1983).

32 This paper is limited to a discussion of California's right of publicity. This is because (1) there is no federal or uniform right of publicity statute, so it is impracticable and unnecessary for the aims of the paper to consider all fifty states' iterations of right of publicity legislation; (2) the central focus of the paper is on celebrities and social media influencers, of which there is a large concentration in California; and (3) the case this paper jumps off from, *White v. Samsung Electronics*, was a claim brought in California. This paper is also limited in scope to the common law right of publicity, rather than the statutory right of publicity because the common law right is much broader and grants celebrities the leeway which this paper seeks to argue against.

33 Reshma Amin, *A Comparative Analysis of California's Right of Publicity and the United Kingdom's Approach to the Protection of Celebrities: Where are they Better Protected?,* 1 Case W. Res. J.L. Tech. & Internet 93, 103 (2010).

34 *Id.* at 103.

valid defense against a common law right of publicity claim.[35] Finally, the common law right of publicity is ambiguous in regard to whether it requires the appropriation to be commercial. The "common law [right of publicity] stipulates that appropriation of one's identity is actionable if it is done 'commercially, or otherwise,'" but the courts have not yet defined which appropriations may fall under the category of 'otherwise.'[36] Much like the justifications for the right of publicity outside of California, the justification for such a broad common law right of publicity in California is that celebrities depend on their image, and their ability to maintain exclusivity over that image to make a living, and thus should receive expansive protection over the commercial and creative interests undergirding that image.[37]

However, this broad protection over celebrities' commercial and creative interests which spurred the inclusion of identity and persona in the California common law right of publicity was not established until the Ninth Circuit's 1992 decision in *White v. Samsung Electronics*. The court's decision in *White v. Samsung Electronics* broadened a celebrity's right of publicity beyond name and likeness, granting celebrities exclusivity as to their general appearance. This exclusivity generates a meritorious legal channel through which celebrities may be able to police the appearance of individuals who profit from their resemblance to a particular celebrity.

II. *WHITE V. SAMSUNG ELECTRONICS*

In 1992, Vanna White of the popular TV game show Wheel of Fortune, sued Samsung Electronics under California Civil Code Sec. 3344, California common law right of publicity, and the Lanham Act over a series of Samsung advertisements.[38] The advertisements were set in the twenty-first century, and featured a futuristic version of a contemporaneous piece of popular culture and a Samsung product.[39] The ad at the center of White's suit, referred to internally as the 'Vanna White Ad,' featured a robot

35 *Id*. at 104.

36 Under the California common law right of publicity, the second factor a plaintiff must prove in a right of publicity claim is "the appropriation of the plaintiff's name or likeness to the defendant's advantage, commercially or otherwise . . . ." *Id*. at 104.

37 *Id*. at 104.

38 White v. Samsung Electronics, 971 F.2d 1395, 1396–97 (1992).

39 *Id*. at 1396.

dressed in a wig, gown, and jewelry intended to resemble White.[40] The robot, mimicking White's famous pose and stance, was situated next to a Wheel of Fortune set with the caption "'Longest-running game show. 2012 A.D.'"[41]

In her suit, White claimed that Samsung Electronics intentionally used a robot resembling White, and did so without paying White and without White's permission.[42] The district court found for Samsung Electronics, rejecting each of White's claims under both California Code, California common law, and the Lanham Act.[43] On appeal, the Ninth Circuit court affirmed in part and reversed in part, finding that White's common law right of publicity was violated and that White was able to provide a genuine issue of material fact pertaining to her Lanham Act claim.[44,45]

A. WHITE'S COMMON LAW RIGHT OF PUBLICITY CLAIM

In California, prior to *White v. Samsung Electronics*, a successful suit under the common law right of publicity required proof of four elements: "(1) Defendant's use of Plaintiff's identity; (2) the appropriation of Plaintiff's *name or likeness* to Defendant's advantage; (3) lack of consent; and (4) resulting injury" (emphasis added).[46] Regarding White's claim under the California common law right of publicity, both the district court and Ninth Circuit

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40 *Id*. at 1396.

41 *Id*. at 1396.

42 *Id*. at 1396.

43 *Id*. at 1396–97.

44 While White was able to move forward with her Lanham Act claim, this paper focuses on her right-of-publicity claim. White's Lanham Act claim is mentioned here for narrative consistency, not as a point of analysis.

45 Section 3344 of the California Code states that "[a]ny person who knowingly uses another's name, voice, signature, photograph, or *likeness*, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling . . . without such person's prior consent . . . shall be liable for any damages sustained by the person or persons injured as a result thereof" (emphasis added). The district court found that Samsung's robot did not constitute White's "likeness" for the purposes of satisfying Sec. 3344, and this was affirmed on appeal by the Ninth Circuit court. White v. Samsung Electronics, 971 F.2d 1395, 1397 (1992).

46 *California Right of Publicity Law,* Digital Media Law Project, http://www.dmlp.org/legal-guide/california-right-publicity-law (last visited Apr. 21, 2019).

court held that White failed to prove that Samsung appropriated White's "name or likeness to [Samsung's] advantage."[47]

However, the Ninth Circuit splintered from the district court noting for the first time that "the right of publicity is not limited to the appropriation of name or likeness."[48] The Ninth Circuit instead took a stance that broadened the right of publicity to include "means of appropriation other than name or likeness."[49] The Court reasoned that "[a]lthough [Samsung] avoided the most obvious means of appropriating [White's identity], each of their actions directly implicated the commercial interests which the right of publicity is designed to protect."[50] In other words, despite not fitting neatly within a traditional right-of-publicity claim, the Court felt that White's commercial interests were usurped in a way that was intended to be, and ought to explicitly be, protected by the right of publicity.

By finding for White in her right-of-publicity claim despite finding that Samsung did not appropriate her name or likeness, the Court shifted focus away from the mechanism by which celebrity identity is appropriated, and instead focused on the existence of the appropriation itself.[51] Thus, the Court broadened the common law right of publicity to *general* appropriation of *identity,* rather than limiting the right to just name or likeness.[52,53]

The Court justified this finding by emphasizing that White's fame, along with the fame garnered by celebrities in general, is the product of immense effort and, thus, control of the exploitation and commercialization of this fame ought to be in the hands of the celebrity herself.[54] In doing so, the Court broadened, prioritized, and concretized celebrities' property

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47 White v. Samsung Electronics, 971 F.2d 1395, 1397 (9th Cir. 1992).

48 *Id.* at 1398.

49 *Id.* at 1398.

50 *Id.* at 1398.

51 *Id.* at 1399.

52 Ultimately, the case was remanded, and a jury awarded White approximately $400,000 in damages. *Id.* at 1399.

53 For ease, I will be referring to the right of publicity as it existed before *White v. Samsung Electronics* as the "pre-*Samsung*" right of publicity, and to the right of publicity as it existed after *White v. Samsung Electronics* as the "post-*Samsung* right of publicity." The pre-*Samsung* right of publicity is limited to name and likeness, whereas the post-*Samsung* right of publicity includes name, likeness, voice, signature, identity, and persona.

54 White v. Samsung Electronics, 971 F.2d 1399, 1397 (9th Cir. 1992).

rights over their image and brand such that their image and brand can be more readily protected, promoted, and commercialized.

B. CRITICISMS OF *WHITE V. SAMSUNG ELECTRONICS*

There has been palpable backlash due to the expansion of the right of publicity by the majority in *White v. Samsung Electronics*, including dissents by Judge Alarcon in the Ninth Circuit and by Judge Kozinski in response to a petition for a rehearing en banc. Both of these dissents provide arguments for limiting the post-*Samsung* right of publicity that have been mirrored and expanded by attorneys, lobbyists, and legal scholars alike.

i. Judge Alarcon's Dissent in White v. Samsung Electronics

In *White v. Samsung Electronics*, Judge Alarcon ("Alarcon") dissented from the majority opinion regarding White's right-of-publicity claim, relying primarily on statutory interpretation and lack of precedence to support his conclusion. Alarcon points out that the California Legislature had the opportunity to codify the conclusion the majority ultimately reached, but chose not to.[55] Twenty-four years after Dean Prosser posited that the right of publicity may be expanded beyond the appropriation of just name and likeness in a law review article that the majority subsequently relied on in their decision, the California Legislature amended the statutory right of publicity to include someone's voice or signature, in addition to name or likeness.[56] Alarcon concludes via *inclusion unius est exclusion alterius,* that if the California Legislature had intended to broaden the right of publicity to include a cause of action for the appropriation of another person's identity then they would have done so at the time of amendment.[57]

Additionally, Alarcon posits that while the majority claims that case law has borne out that the right of publicity is not limited to name or likeness, in fact, "the courts of California have never found an infringement on the right of publicity without the use of plaintiff's name or likeness."[58] Alarcon points out that even in their own opinion, the majority relied on

[55] *Id.* at 1403.
[56] *Id.* at 1403–4.
[57] *Id.* at 1404.
[58] *Id.* at 1403.

precedents that did not "include appropriation of identity by means other than name or likeness" as the majority eventually does.[59] In other words, the Court in *White v. Samsung Electronics* created a new right of publicity with no statutory or precedential basis.

Moreover, Alarcon distinguishes the cases cited by the majority in that White was appropriated by a robot whereas in the cases cited by the majority, the "advertisement affirmatively represented that the person depicted therein was the plaintiff."[60] Alarcon interprets the appropriation targeted by the right of publicity to mean that a juror would believe that the manifestation of the appropriation is the celebrity *herself* (or the celebrity's voice, name, etc.).[61] In White's case, Alarcon states, "[n]o reasonable juror could confuse a metal robot with Vanna White" and thus, her identity could not have been sufficiently appropriated as required by the right of publicity.[62]

Finally, Alarcon distinguishes White's *identity* from the *role* she plays, stating that "those things that Vanna White claims identify her are not unique to her . . . [and are], instead attributes of the *role* she plays . . . [which] do not constitute a representation of Vanna White."[63] Alarcon takes the stance that the alleged appropriation is not of Vanna White, nor her specific identity, but an amalgamation of characteristics that many different individuals could embody, "especially in Southern California," like blonde hair or a slim figure.[64] Alarcon posits that being famous for playing a particular role while embodying a set of characteristics is not sufficient to grant an individual a proprietary interest in that role. The majority by doing so effectively granted her, and celebrities like her, commercial exclusivity over the simultaneous presence of each of the characteristics she embodies.

Under Alarcon's conception of the right of publicity, celebrities would be unable to prevent plastic surgery look-alikes from embodying the characteristics of the celebrity and their brand simply because a look-alike is representing a celebrity's *role*, even if the look-alike is perceived as the

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59 *Id*. at 1403.
60 *Id*. at 1404–5.
61 *Id*. at 1404.
62 *Id*. at 1404.
63 *Id*. at 1404.
64 *Id*. at 1405.

celebrity herself. This conclusion depends on the distinction between identity and role. However, in the case of celebrity imitation, there may not be a clear role to play or imitate in the first place.

Vanna White's role was the hostess of Wheel of Fortune. In this role, she appeared in similar garb, poses, and demeanors each time she was on the show. But celebrity look-alikes and plastic surgery imitators are not limiting their imitation to a role; they are intentionally reworking their bodies to imitate the identity of the celebrities themselves, independent of any role the celebrity may or may not play. It would seem then that Alarcon's role-versus-identity analysis could not neatly apply to individuals who receive plastic surgery to imitate celebrities, or individuals who capitalize on their coincidental resemblance to a particular celebrity, in a way that would protect them from celebrity suit.

ii. Kozinski's "Separate Views"

However, even without a readily identifiable distinction between role and identity, protection available for celebrities guarding their brands and image under the right of publicity should not be unlimited. In 1993, Judge Kozinski's ("Kozinski") dissent accompanying the rejection of a petition for a rehearing en banc provides a strong policy argument for placing limits on the protections received by Vanna White and utilized by other celebrities since.[65]

One of the primary justifications for intellectual property is to incentivize creativity, innovation, and the exchange of ideas.[66] However, this protection must be balanced. Each incoming creator, inventor, and innovator depends on the innovations of the individuals who came before them. "All creators draw in part on the work of those who came before, referring to it, building on it, poking fun at it; we call this creativity, not piracy."[67]

The overprotection of the intellectual property rights inherent within these innovations can stifle the creative process by thwarting the additive nature of innovation. Kozinski categorizes the majority opinion in *White v. Samsung Electronics* squarely within this stifling overprotection. Under the majority's opinion, Kozinski states, "it's now a tort for advertisers to *remind*

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65 White v. Samsung Electronics, 989 F.2d 1512, 1512 (Cal. Ct. App. 9th Cir. 1993).

66 *Id.* at 1513.

67 *Id.* at 1515.

the public of a celebrity. Not to use a celebrity's name, voice, signature, or likeness; not to imply the celebrity endorses a product; but simply to evoke a celebrity's image in the public's mind. This Orwellian notion withdraws far more from the public domain than prudence and common sense allow."[68]

Kozinski laments the new right of publicity created by the majority as erasing the balance between public interest and the interests of the celebrity. He posits that the post-*Samsung* right of publicity strikes the wrong balance between exclusivity granted to the owner of the right and the maintenance of the public domain that undergirds all intellectual property law.[69] By favoring, and in fact expanding, White's right of publicity, the Court created a new proprietary interest which is too favorable to the celebrity and leaves too little for the public.

Kozinski takes into consideration individuals among the public who may be prevented from creating their own image and brand for fear that it too closely resembles a particular celebrity. "Future Vanna Whites might not get the chance to create their personae, because their employers may fear some celebrity will claim the persona is too similar to her own," and in this way the public will be robbed of parody, mockery, and the ability to model oneself according to trends in appearance incidentally embodied by celebrities.[70] Granting Vanna White exclusivity over her persona simultaneously grants White "absolute rights to control the conduct of others, unlimited by the idea-expression dichotomy or by the fair use doctrine."[71]

C. DO CELEBRITIES HAVE THE RIGHT TO EXCLUDE PEOPLE FROM LOOKING LIKE THEM UNDER THE BROAD *WHITE V. SAMSUNG ELECTRONICS* CONSTRUCTION OF THE RIGHT OF PUBLICITY?

These dissents provided compelling contemporaneous arguments against broadening the right of publicity from legal, political, and innovative perspective. Still, in spite of the vehement dissent and backlash following the *White v. Samsung Electronics* decision, the broad post-*Samsung* right of publicity continues to thrive today.

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68 *Id*. at 1514.

69 *Id*. at 1516.

70 *Id*. at 1516–17.

71 *Id*. at 1517.

i. The Right of Exclusivity

The Court in *White v. Samsung Electronics* found that White's right of publicity was violated in spite of the fact that neither her likeness nor name was appropriated because the Court deemed White's overall identity and general appearance to be subsumed within the right of publicity. Individuals who receive plastic surgery to look like celebrities are undoubtedly co-opting the desired celebrity's appearance, and career celebrity look-alikes are undoubtedly capitalizing on their resemblance to a particular celebrity in an analogous way. Thus, under the broad conception of right of publicity defined in *White v. Samsung,* whether the appropriation is via imitation plastic surgery or via birthright, both the look-alike and the plastic surgery recipient are appropriating the general identity of the celebrity. However, this is different from a robot, an image, a mask, or a costume. This particular appropriation comprises fundamental, physical characteristics embodied by a human being.

However, if the right of publicity as construed in *White v. Samsung Electronics* is intended to ensure that celebrities have control over the marketability of their cultivated brand, then it would seem that celebrities would have the ability to prevent celebrity look-alikes, individuals who have effectively co-opted the celebrity's image, from appearing in advertisements like the Samsung commercial or otherwise commercializing their resemblance.

In keeping with the holding of *White v. Samsung Electronics,* the right of publicity grants celebrities exclusivity over their appearance and image and thus a claim against any imitations of the celebrity's image, regardless of whether the imitation is embodied by a robot, a human being, or anything in between. Moreover, the current construction of the right of publicity grants a celebrity, just as it did White, a legal right of action to assert that exclusivity over their image.

ii. Kardashian v. The Gap

In fact, celebrities are already using the post-*Samsung* right of publicity as a mechanism for policing an individual's resemblance in order to maintain and protect exclusivity over the celebrity's image.[72] In 2011, celebrity

[72] Kim Kardashian is not the only celebrity who has sued over appropriation of identity under the post-*Samsung* right of publicity. In July 2014, Lindsay Lohan sued the

Kim Kardashian sued The Gap and Old Navy over a commercial which starred a Canadian actress resembling Kim Kardashian. The ripples of the *Samsung* decision can be seen in the complaint wherein Kardashian contextualizes her right of publicity as stemming from her status as "an internationally known celebrity . . . and pop culture icon . . . [who] has attained an extraordinary level of popularity and fame in the United States and around the world, and . . . is highly sought after to endorse commercial products and services using her name, likeness, *identity and persona*" (emphasis added).[73]

The complaint goes on to assert that Kim Kardashian has "invested substantial time, energy, finances and entrepreneurial effort in developing her considerable professional and commercial achievements and success, as well as in developing her popularity, fame, and prominence in the public eye."[74] This reasoning aligns with the prioritization of celebrity efforts in cultivating a brand that undergirded the opinion provided by the Court in *White v. Samsung Electronics*. More overtly, the complaint continuously uses the phrase "likeness, identity and persona" when describing the proprietary right that ought to be protected under Kim Kardashian right of publicity.[75]

Thus, the language and arguments in the *Kardashian* complaint demonstrate how attorneys have embraced the post-*Samsung* right of publicity and are adjusting their arguments to embrace, and reap the benefits from, the broad post-*Samsung* right of publicity. In this way, this post-*Samsung* right of publicity has granted celebrities much broader exclusivity than before *Samsung* such that celebrities are now able to bring a claim against a company simply for employing an individual who resembles a particular

makers of *Grand Theft Auto V* for featuring a character in their video game who allegedly resembled Lohan, though this was filed under the New York statutory right of publicity. Additionally, in July 2014, Panamanian dictator Manuel Noriega filed suit against Activision Blizzard, Inc. in California for appropriating his likeness in *Call of Duty: Black Ops II*. Jennifer Williams-Alvarez, *Why Celebrities like Lindsay Lohan Are Suing Video Game Studios,* ENGADGET (Nov. 18, 2014), https://www.engadget.com/2014/11/18/gaming-likeness-lawsuit-explainer.

[73] Complaint at 5, Kardashian v. The Gap, No. LACV11-5960 (C.D. California filed Jul. 20, 2011).

[74] *Id.* at 3–5.

[75] *Id.* at 5.

celebrity, or against an individual who otherwise commercializes their resemblance to a particular celebrity.[76,77]

D. SHOULD THE RIGHT OF PUBLICITY PROHIBIT, OR OTHERWISE CONTROL, CELEBRITY IMITATION VIA PLASTIC SURGERY OR LOOK-ALIKES?

Notably, however, this is not necessarily a desirable result. The right of publicity originally emerged in response to increased celebrity image appropriation spurred on by technological advancement. There still remains a legitimate desire to protect celebrities' exclusivity over their image and commercialization in the face of growing technological advances. However, in order to maintain exclusivity across modern technology, including advancements in plastic surgery and media production, which pervades almost all aspects of modern life today, the post-*Samsung* right of publicity must grant celebrities a more expansive propriety interest than the courts arguably could have anticipated when they established the right of publicity in the 19th century.

On the one hand, intellectual property rights like the right of publicity are intended to reward efforts expended on curating and marketing things like a celebrity's image, and intended to incentivize creativity and innovation. On the other hand, there are public policies in place which value a robust public domain and individual autonomy to make choices about one's own body.

i. The Paradox

The convergence of the post-*Samsung* right of publicity, the rise of media consumption, and the accompanying rise in celebrity imitation has created

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76 This claim was settled outside of court so we do not yet know how courts would interact with, and possibly limit, the post-*Samsung* right of publicity within the celebrity imitation context. Eriq Gardner, *Kim Kardashin Settles Lawsuit Over Look-Alike in Old Navy Ad (Exclusive)*, The Hollywood Reporter (Aug. 29, 2012, 8:30 AM), https://www.hollywoodreporter.com/thr-esq/kim-kardashian-settles-lawsuit-look-alike-old-navy-gap-366522.

77 Moreover, given the aforementioned remaining ambiguity regarding whether the appropriation must necessarily be commercial in order to violate a celebrity's right of publicity, and the courts' willingness to prioritize celebrity efforts, it is possible to imagine a celebrity suing an individual for appropriating a celebrity's image in a non-commercial context.

a paradox. The post-*Samsung* right of publicity further induces an already increasing rise of celebrity because it commodifies celebrities themselves, while simultaneously revealing the courts' prioritization of, and willingness to protect, a celebrity's efforts in crafting and marketing their image. This commodification and legal prioritization further instigate the already increasing proliferation of celebrity by creating financial incentives to create a profitable celebrity brand while simultaneously creating legal protections which reduce the risk of this investment. At the same time, this commodification and subsequent proliferation of celebrity is what incentivizes individuals to imitate celebrities so that they too can profit from the growing value of a celebrity's brand. In this way, the very same right that incentivizes celebrity imitation prevents individuals from acting on that incentivization as doing so would likely violate the celebrity's exclusive right of publicity.

ii. Querying the Value of Celebrity in the Public Domain

In today's entertainment industry, a celebrity's identity itself is an investment and a commodity that is arguably worth protecting because without this protection, and subsequent investment in celebrity image, celebrities are theoretically discouraged from creating their brand and, thus, from continuing to contribute to the public domain and public media. However, this argument depends on the notion that the contribution of celebrity is a public good that ought to be incentivized in the first place. Given the impact on societal conception of body image, health, and healthy behavior, it may not be taken for granted that a celebrity's branded contribution is a public good in the same way that arts, music, or invention might be. It is worth pausing to consider whether the right of publicity is still serving to incentivize contributions to the public good or whether it is merely encouraging unhealthy behaviors and simultaneously rewarding celebrities for this.

It is also worth querying the actual degree of financial impact a violation of a celebrity's right of publicity has on a particular celebrity, especially when the violating party is a smaller actor. Today, celebrities no longer rely exclusively on a particular skill or industry and often make money from a variety of industries and sponsorships. Celebrities often profit from mass business enterprises stretching from activism, investment, music, makeup, clothing, and technology, and in each of these industries they are protected by laws outside of the right of publicity, including other intellectual

property rights.[78] Thus, a celebrity imitator's presence in the arts and entertainment industry may have a relatively small financial impact when considered within the context of a diverse celebrity investment landscape.

iii. Impact on Individual Autonomy; Penalization

Finally, the right of action created by the post-*Samsung* right of publicity has odd consequences for an individual's autonomy, financial and/or career choices, and rights over their own body. An aspiring actress who receives plastic surgery to resemble Kim Kardashian, or so happens to resemble Kardashian due to the actress' genetic makeup, becomes more marketable as Kim Kardashian, the object of the actress' imitation, grows more marketable. However, under the post-*Samsung* right of publicity, should the actress then capitalize on her growing marketability she may be penalized for allegedly appropriating Kardashian's 'likeness, image, or persona.' In this way, it becomes a legal liability for the actress to commercialize her resemblance to Kim Kardashian. Thus, an actress, or any other individual in an appearance-driven career, incurs liability simply by looking the way they do while doing their job.

This creates an anomalous penalization function of intellectual property rights wherein celebrities can use the right of publicity to police another, remote individual's appearance. Unlike other intellectual property in the form of, for example, works of art, inventions, or logos, this gives the 'owner' of the post-*Samsung* right of publicity exclusivity over their embodied appearance. Thus, the targeted liability of a post-*Samsung* right of publicity claim is not of production without a license or copying a painting, but of someone existing in their corporal form.[79,80]

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[78] Meryl Gottlieb, *15 Celebrities You Didn't Realize Own Major Business Empires,* Business Insider (Aug. 13, 2016, 11:08 AM), https://www.businessinsider.com/celebrities-business-empires-2016-8#bono--elevation-partners-4.

[79] This also potentially creates an odd licensing scheme where celebrities could theoretically license bodily attributes or license the ability to work as a look-alike. This type of licensing scheme would give celebrities a rather dystopian ability to profit from autonomous choices individuals make about their bodies and careers. This is not the focus of this paper, but is worth mentioning.

[80] Additionally, there are arguably Thirteenth Amendment considerations regarding this particular impact of the post-*Samsung* right of publicity. This, again, is not the focus of this paper but is worth mentioning.

California courts "balance interests, but usually the needs of the celebrity are given higher regard than the public and media interests at stake."[81] In following this trend of celebrity prioritization by California courts, the expansion of the right of publicity in *White v. Samsung Electronics* decidedly favors celebrities and their efforts in creating and maintaining their brands. However, in doing so, the Ninth Circuit arguably went too far, creating a downstream tension between the social deification and promotion of celebrity, the legal bar to imitating celebrities, and individual autonomy.

III. RESTRUCTURING THE RIGHT OF PUBLICITY

It is possible that the majority in *White v. Samsung Electronics* could not have foreseen how their decision would interact with the media landscape today. However, given the aforementioned paradox and anomalous penalization function, the right of publicity ought to be narrowed or adjusted to address these consequences generated by the post-*Samsung* right of publicity's interaction with the contemporary media landscape.

A. RESTORING THE PRE-*SAMSUNG* RIGHT OF PUBLICITY

One alternative would be to narrow the right of publicity such that it does not include identity or persona. In other words, replace the post-*Samsung* right of publicity with the pre-*Samsung* right of publicity. This would address the concerns raised by Alarcon's and Kozinski's dissents in that celebrities would still be protected wherever their likeness, name, or voice was commercialized without their consent, but would strip celebrities of an exclusive proprietary interest in their overall appearance. In this way, a celebrity would still maintain exclusivity over the literal and tangible feature of their brand, thus preventing free-range, unadulterated, and unauthorized use of their likeness that the right of publicity was originally erected to protect against. But, this restoration of the pre-*Samsung* right of publicity would prevent celebrities from having such expansive exclusivity that

[81] *Reshma Amin, A Comparative Analysis of California's Right of Publicity and the United Kingdom's Approach to the Protection of Celebrities: Where Are They Better Protected?*, 1 Case W. Res. J.L. Tech. & Internet 93, 117 (2010).

they could prevent individuals from merely resembling them, or otherwise embodying particular, potentially recognizable attributes of the celebrity.

B. KEEPING THE POST-*SAMSUNG* RIGHT OF PUBLICITY WITH EXCEPTIONS AND CLARIFICATIONS

If courts are reluctant to revert back to the pre-*Samsung* right of publicity, another alternative would be to maintain the post-*Samsung* right of publicity but create exceptions for appropriation by human beings, rather than by robots or other inanimate objects. This would prevent celebrities from making claims of a violation of their right of publicity wherever the embodiment of the appropriation is by a human being who intentionally received plastic surgery to resemble a particular celebrity, or otherwise capitalizes on their natural resemblance to a celebrity. In this configuration of the right of publicity, celebrities will still be able to reap the benefits of exclusivity over their identity or appearance but it would prevent them from reaching beyond protection of the celebrity's identity or appearance and into the policing of other individuals' identities or appearances.

Additionally, the remaining ambiguity over whether the post-*Samsung* right of publicity is limited to only commercial appropriation ought to be addressed. In its current configuration, the post-*Samsung* right of publicity certainly creates a right of action for celebrities to police other individuals' bodies in commercial settings, and potentially does the same in non-commercial settings. The current combination of the broad post-*Samsung* right of publicity and the ambiguity over whether it applies exclusively in commercial settings has the potential to create wide-sweeping exclusivity over all combinations of attributes resembling a particular celebrity in all settings, commercial or otherwise. This is a glaring, and bordering dystopian, power granted to celebrities that extends much farther than the original intent of the right of publicity. Courts ought to clarify this ambiguity, and in doing so ought to establish that this proposed limited post-*Samsung* right of publicity only applies in commercial settings.

C. CONCLUSION

The right of publicity was originally established to protect a celebrity's investment and efforts to create and market their particular image or brand while simultaneously preventing unauthorized uses of a celebrity's likeness

in commercial settings. However, the right of publicity has evolved drastically since its inception. While the desire to protect and promote investment in celebrities and their contributions to the public is arguably still compelling today, they should not be assumed to be. Moreover, none of those concerns or justifications prioritizing celebrities' commercial exclusivity outweigh the potential power given to celebrities via the right of publicity as it exists today.

First, the current California common law right of publicity, as established in *White v. Samsung Electronics* — the post-*Samsung* right of publicity — furthers the prioritization and celebration of celebrity which contribute to unhealthy societal perceptions, norms, and behaviors. Second, the post-*Samsung* right of publicity creates a legal right of action which allows celebrities to prevent other human beings from resembling a particular celebrity, whether by plastic surgery or through natural resemblance, that is already being exploited by celebrities today. Finally, the broad post-*Samsung* right of publicity creates a paradox wherein individuals are simultaneously incentivized to participate in, and mirror, celebrity culture but are barred from doing so.

All intellectual property law must strike an appropriate balance between exclusivity and ownership, and allowing a free flow of creativity and ingenuity into the public domain. The right of publicity is subsumed within intellectual property law and is by no means an exception to this balance. The current configuration of the right of publicity strikes an inappropriate balance, disproportionally prioritizing celebrity exclusivity and ownership over the public. Whether by reversion to the pre-*Samsung* right of publicity or through clarifying and creating exceptions to the post-*Samsung* right of publicity, these consequences of the broad post-*Samsung* right of publicity are cause for concern, and should be addressed before they are taken to a potentially dystopian extreme.

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THE RIGHT OF FREE SPEECH IN PRIVATELY OWNED PREMISES:

Following up with the Robins v. Pruneyard *Judgment*

PARTHABI KANUNGO*

BACKGROUND AND REASONING

In the late 1970s, a group of high school students in Campbell, California sought to solicit signatures from passers-by in the central courtyard of a privately-owned shopping complex, in order to garner support for a political petition.[1] These students were asked by a security guard to leave, on the grounds that it was against the Pruneyard Shopping Center's policy to allow for any visitor to engage in a publicly expressive activity, including the circulating of petitions not directly related to the shopping center's commercial purposes.[2] The students went on to bring a suit against Pruneyard Shopping Center (*Robins v. Pruneyard Shopping Center*, hereafter *Pruneyard*), and the Supreme Court of California, in its 1979 judgment, held that soliciting at a shopping center for signatures for a petition to the

This paper was awarded second place in the California Supreme Court Historical Society's 2019 CSCHS Selma Moidel Smith Student Writing Competition in California Legal History.

* LLB student, Maastricht University Faculty of Law, The Netherlands, Class of 2021.

1 Pruneyard Shopping Center v. Robins, 477 U.S. 74 (1980).

2 Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899 (1979).

government is an activity protected by the free speech guarantee of the California Constitution.[3]

The Court's reasoning on the question of whether the California Constitution guarantees the right to gather signatures at shopping centers drew upon the wording of article 1, section 2 of the California Constitution, which, in the foremost sense, guaranteed a positive right of free speech to its citizens in addition to imposing a negative obligation upon the state not to create any such law that may restrain this liberty of speech. The Court acknowledged this distinction, as regards the First Amendment to the U.S. Constitution, which only places a negative obligation upon the U.S. Congress to make no law abridging free speech, in this regard.[4] The majority opinion issued by Justice Newman, with support from Justices Bird, Tobriner and Mosk, cited a previous decision from the very same Court, in *Wilson v. Superior Court* (1975), where it was noted that California's state constitutional guarantee of the right of free speech and press was more definitive and inclusive than the right contained in the First Amendment to the federal constitution.[5]

The particular situation involving solicitation of signatures and distribution of leaflets by individuals in privately-owned shopping centers was first brought before the California Supreme Court in the 1970 case of *Diamond v. Bland (Diamond I)*, where two volunteer workers for a non-profit had attempted, without success, to solicit signatures on an anti-pollution initiative in a shopping center called Inland Center, as the owner of the shopping center had refused to grant them permission for the same.[6] The Court had affirmed this right of the plaintiff to solicit signatures and distribute leaflets in the defendant's shopping center, by classifying it as a First Amendment concern.

Two years later, the United States Supreme Court, in *Lloyd Corp. v. Tanner* (1972), decided that the owners of a shopping center, Lloyd Center in Oregon, had the right to prohibit the distribution of political handbills unrelated to the operation of the shopping center.[7] The case involved the

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[3] *Id*.

[4] See *supra* note 2.

[5] Wilson v. Superior Court, 34 Cal. 3d 777 (1983).

[6] Diamond v. Bland, 3 Cal. 3d 653 (1970).

[7] Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

handing out of handbills for a protest meeting against the draft during the Vietnam War. The U.S. Supreme Court maintained that distribution of anti-war leaflets was not protected under the First Amendment, and such distribution on private property was in violation of the property rights of the owner.

In light of the *Lloyd* ruling, the defendant in *Diamond I*, the owner of Inland Center, appealed the decision to the California Supreme Court. The *Diamond II* ruling of the California Supreme Court followed, where the Court employed the *Lloyd* standard and opined that, as in *Lloyd*, the plaintiffs had alternative, effective channels to solicit these signatures, and customers and employees of the shopping center could be solicited outside of its premises in public sidewalks, parks, or streets adjacent to the center.[8] The California Supreme Court, in its majority judgment, reversed its earlier decision in *Diamond I*, by declaring that the defendant's private property interests outweighed the plaintiff's First Amendment rights in the said matter.

It was Justice Mosk's dissenting opinion in *Diamond II* that was later referred to in the *Robins v. Pruneyard* majority judgment.[9] Justice Mosk classified this act, by the majority bench, of surrendering the previously considered position of the Court in *Diamond I*, as a step that ignored the basic principles of the state constitution of California, and undermined the fundamental principle of federalism. One of his two primary arguments was that the declaration of rights contained within the state constitution was more embracing than the First, Ten, and Fourteenth Amendments to the federal constitution. The guarantees for every citizen to freely speak, write, and publish their statements provided under section 9 was one such relevant component, according to Justice Mosk.

In *Pruneyard*, the majority opinion, while noting the opinion reflected in this dissent of Justice Mosk, overturned the *Diamond II* judgment. This also points to the rapidly evolving nature of constitutional law to more adequately conform with the changing needs of society. In *Diamond II*, the liberty of speech clause of the California Constitution was excluded from the purview of the judgment, such an inquiry being barred by the federal

[8] Diamond v. Bland 11, Cal. 3d 331 (1974).

[9] *Id.*

and state Supremacy Clauses of the United States Constitution, as in the *Lloyd* judgment, where the Due Process Clause of the federal constitution protected the property rights of the shopping center owner.

The California Supreme Court, in *Pruneyard*, clarified that *Lloyd* was primarily a First Amendment case, and the scope of property rights of shopping center owners under the Fifth and Fourteenth Amendments, respectively, was not defined. *Lloyd*, the Court noted, when viewed in conjunction with *Hudgens* and *Eastex* did not preclude law-making in California which requires that shopping center owners permit expressive activity on their property. In *Hudgens v. National Labor Relations Board*,[10] the U.S. Supreme Court, while concluding that the First Amendment did not protect picketing in a shopping center, had recognized that statutory or common law may in some situations extend protection or provide redress against a private corporation or person who seeks to abridge the free expression of others. In *Eastex Inc. v. NLRB*, where the employees had sought to distribute a union newsletter, the U.S. Supreme Court, in its majority opinion, had upheld the *Hudgens* judgment, and acknowledged that the National Labor Relations Act could provide statutory protection for the activity involved.[11] The reasoning following from these two cases was incorporated into the *Robins* judgment, and the California Constitution was recognized as having the authority to accord protection to the freedom of speech of individuals in private shopping centers.

In *Pruneyard*, while a number of factors may have caused the appellants to base their claim on the free speech guarantee of the California Constitution, there is a suggestion that sometimes, dissents from judges aid litigants in their preparation for contesting similar cases in the future, which builds up a stronger possibility for a once-dissenting opinion to then become the Court's adopted reasoning within the course of a few years.[12] This trend is clearly reflective of the reversal of the *Diamond II* majority opinion in the *Pruneyard* judgment, which went to acknowledge the reasoning of Justice Mosk's dissent in *Diamond II*.

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[10] Hudgens v. NRLB, 424 U.S. 507 (1976).

[11] Eastex, Inc. v. NLRB 437 U.S. 556 (1978).

[12] Jesse W. Carter, *Dissenting Opinions*, 4 Hastings L.J. 118 (1953).

IMMEDIATE DEVELOPMENTS

When the defendant, Pruneyard Shopping Center, appealed before the United States Supreme Court in *Pruneyard Shopping Center v. Robins*, the highest federal court upheld the decision of the California Supreme Court. The federal Supreme Court affirmed that state constitutional provisions, as construed to permit individuals to reasonably exercise free speech and petition rights on the property of a privately owned shopping center to which the public is invited, do not violate the shopping center owner's property rights under the Fifth and Fourteenth Amendments or his free speech rights under the First and Fourteenth Amendments to the United States Constitution.

It was believed that *Pruneyard* had intensified the then-existing tension between private property ownership and freedom of speech, as it had set a precedent that might now allow each state to interpret its constitutional provisions more broadly than corresponding provisions in the federal constitution.[13] Thus, a state could now have the authority to elevate its freedom of speech to a "preferred position," especially when in conflict with rights of private property ownership. It is, however, to be taken into account that the California Supreme Court, while deciding *Pruneyard*, chose to repeatedly emphasize that the property or privacy rights of an individual homeowner or that of a proprietor of a modest retail establishment were not under consideration. The Court stressed that some twenty-five thousand individuals congregated at the shopping center daily to avail themselves of its numerous facilities, as a consequence of advertising and the maintenance of a congenial environment. A small group of additional persons engaged in soliciting signatures for a cause in an orderly manner, therefore, does not interfere with the normal business operations of the shopping center. The United States Supreme Court also reiterated the same view, when upholding the decision of the state Supreme Court.

In *Pruneyard*, the California Supreme Court had adopted a structural reasoning methodology, by analyzing the interplay between the public's right to free speech and that of private individuals over their property, in order to derive a structure that would have been intended by the framers of

[13] Steven D. Pidgeon, *Freedom of Speech: The Florida Implications of PruneYard Shopping Center v. Robins*, 35 U. Miami L. Rev. 559 (1981).

the California Constitution.[14] The Court was indeed quick to note that the framers of the state constitution had not adopted the free speech guarantee from the federal Bill of Rights because they wished this provision to be more embracing than the First Amendment to the Constitution.[15] In forming its interpretation of the interplay between free speech and property rights, the California Supreme Court maintained that prohibiting private shopping center owners from preventing public demonstrations on their property was necessary to give the full effect to the freedom of speech and expression, as enshrined in the California Constitution.[16]

THE EXPANSION OF *PRUNEYARD*

In 1982, the California Court of Appeal sought to expand the purview of the *Robins* standard in a case involving gated communities. In *Laguna Publishing Company v. Golden Rain Foundation of Laguna Hills* (hereafter *Laguna* case), the Court of Appeals decided that denying the live-carrier delivery of the plaintiff's giveaway newspaper in Leisure World, a gated community, when another giveaway newspaper had been permitted to make their delivery, was in violation of the plaintiff's free speech rights under the California Constitution.[17] Laguna Publishing Company had been denied access to Leisure World for delivering its giveaway newspaper, *Laguna News Post*, to the residents of this private, gated community. Another company, Golden West Publishing Corporation had been granted the exclusive privilege of entry into Leisure World, to deliver its giveaway type newspaper, *Leisure World News*.

The Court of Appeal interpreted the conditions of the case, in light of the *Diamond I* and *Pruneyard* standards, by affirming that, while these precedents did not provide any direct assistance, *Pruneyard* could be interpreted in a manner that made it applicable to the case at hand. Where in *Pruneyard*, the California Supreme Court had declared that the plaintiff's

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[14] David E. Somers III, *State Constitutional Law — Free Expression* — Pruneyard *Reloaded: Private Shopping Malls Cannot Restrict Protesters' Free Expression Rights*, 40 Rutgers L.J. 1017, 1026–31 (2009).

[15] Robins v. Pruneyard Shopping Center 23 Cal. 3d 899, 908 (1979).

[16] See *supra* note 5.

[17] Laguna Publishing Company v. Golden Rain Foundation of Laguna Hills 131 Cal. App. 3d 816 (1982).

free speech rights under the state constitution were being abridged by the private shopping center when the former is denied access to the latter's premises, the appellate court noted that the Supreme Court had not considered the phenomenon of "state action," except when discussing the *Lloyd* decision.

The "state action" doctrine contends that the United States Constitution and its provisions, most notably the First and Fourteen Amendments, apply only to state action and not to private action.[18] The concept, pertaining to the situation at hand, had perhaps first been addressed in the U.S. Supreme Court case *Marsh v. Alabama*, which dealt with the distribution of religious literature by the appellant near the post office of a company town, where a single company owned the town's property, distinguishing it from a municipality.[19] The U.S. Supreme Court observed that the company had opened up the township to free public access, and was therefore required to respect the statutory and constitutional rights of the public that it had invited onto its premises.

Pruneyard, as rightfully pointed out by the appellate court in *Laguna*, did not expressly address the relevance of the "state action" doctrine. The appellate court concluded from the *Pruneyard* reasoning that, because the public had been invited onto private property, their constitutional free speech rights would be deemed to remain protected, as long as these rights did not infringe on the property rights of the merchants conducting business in the private shopping center. This rationale resonated very closely with the *Marsh* conclusion. The appellate court took to heart *Pruneyard*'s passing comment that the power to regulate property was not static, but capable of expansion to meet new conditions of modern life. The appellate court, therefore, sought to redefine property rights in response to the social setting's demand that such rights be responsive to the collective needs of the society, such as health, safety, morals, and welfare. As the Court contemplated,

> [T]he gated and walled community is a new phenomenon on the social scene, and, in the spirit of the foregoing pronouncement,

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[18] Richard S. Kay, *The State Action Doctrine, the Public–Private Distinction, and the Independence of Constitutional Law*, 10 Const. Comm. 329, 330 (1993).

[19] Marsh v. Alabama, 326 U.S. 501 (1946).

> the ingenuity of the law will not be deterred in redressing grievances which arise, as here, from a needless and exaggerated insistence upon private property rights incident to such communities where such insistence is irrelevant in preventing any meaningful encroachment upon private property rights and results in a pointless discrimination which causes serious financial detriment to another.[20]

The appellate court was not hesitant in describing the two key factors by which the *Laguna* situation presented a stark difference to the *Pruneyard* circumstances. Having acknowledged that the public was not generally invited into gated communities like Leisure World, as against private shopping centers like Pruneyard, the Court remarked that the residents did indeed invite a variety of vendors and service persons into the premises, from electricians and plumbers to the carriers of newspapers to which the residents had subscribed. The most relevant factor acknowledged by the Court, however, was the significant discrimination that the plaintiff was subjected to, given that *Leisure World News* had unrestricted access to the community, even though not having been subscribed to by any resident. The Court referred back to the text of the judgment in *Lloyd*:

> In addressing this issue, it must be remembered that the First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on state action, not on action by the owner[s] of private property used *nondiscriminatorily* [emphasis added] for private purposes only. . . . The United States Constitution does not forbid a State to control the use of its own property for its own lawful *nondiscriminatory* [emphasis added] purpose.

The California District Appellate Court took a cue from this language of the *Lloyd* judgment, that if the United States Supreme Court had been asked to adjudicate on a discriminatory limitation of free speech on private property, it might have reached a different decision.

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[20] Laguna Publishing Co. v. Golden Rain Foundation, 131 Cal. App. 3d 816, 839 (1982).

THE WAY FORWARD?

The expansion of *Pruneyard*, among several concerns, once again highlighted the dilemma of the horizontal effect of constitutional rights. As the market economy continues to gain greater momentum, privatization becomes a reality of the political sphere, and hardly any domestic policy issue remains untouched by disputes over the scope of private participation in government.[21] Exactly when the action of a private actor is to be placed on the same pedestal as state action, with regard to constitutional restrictions, has not been concretely laid down. Whether imposing conventional governmental duties upon private actors is an act of social engineering, outside of the mandate of the judiciary, also remains open to debate.[22] The fact remains that in *Pruneyard*, and the cases preceding it including *Diamond I*, *Lloyd*, and all the way back to *Marsh*, the circumstances involved privately-owned areas that granted unrestricted access to the public. This factor was clearly absent from the situation in *Laguna*, and the appellate court might actually have gone a step too far, in reading between the lines, as far as the *Pruneyard* standard is concerned. The problem here is not the application of the *Pruneyard* precedent to cases with identical facts, as the California Supreme Court did in its *stare decisis* judgment in *Fashion Valley Mall v. National Labor Relations Board* (2006), but in a problematic broader interpretation of the *Pruneyard* standard to include private gated communities, which are far from an area of public access, and strictly an area of private residence. While the horizontal effect of constitutional standards can be empowering for private citizens, it would also mean the absolute blurring of boundaries between state and private action, which is not a healthy judicial outcome.

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[21] Gillian E. Metzger, *Privatization as Delegation*, 103 Colum. L. Rev. 1367, 1369 (2003).

[22] Gregory C. Sisk, *Uprooting the Pruneyard*, 38 Rutgers L.J. 1145 (2007).

GEMS FROM CALIFORNIA'S LEGAL HISTORY AT LA LAW LIBRARY

CHANNA CAJERO AND SANDRA LEVIN*

INTRODUCTION

LA Law Library, initially authorized by the state legislature and established in 1891 as the Los Angeles County Law Library, currently operates as an independent local government agency pursuant to the California Business and Professions Code.[1] For more than 125 years, the library has provided access to legal information and materials for legal professionals, government officials, the business community and the general public.[2] Over that time, the nature of legal resources has changed dramatically and the library has likewise evolved to serve multiple roles and functions.

Within the legal community, LA Law Library is known for its protection and preservation of rare and historical legal resources; the collection

* Channa Cajero is Collection Development Librarian, LA Law Library; Sandra Levin is Executive Director, LA Law Library.

[1] § 6300, *et seq*.

[2] Cal. Bus. & Prof. Code § 6360, subd. (a) (the law library "shall be free to the judiciary, to state and county officials, to members of the State Bar and to all residents of the county"). With nearly 1,000,000 volume equivalents (print, media, microfilm and microfiche), LA Law Library is second only to the Law Library of Congress in its role as the largest public law library in the United States.

is immense and comprehensive.[3] Among those striving to close the justice gap — defined by the American Bar Association and the Legal Services Corporation as "the difference between the civil legal needs of low-income Americans and the resources available to meet those needs"[4] — LA Law Library is known for its extensive efforts to educate and assist those who cannot afford representation in using the collection to understand their legal rights and responsibilities and navigate the judicial system. The latter task is challenging, not only because self-represented individuals span a broad range of educational backgrounds, language capacities, skill levels and mental, intellectual and emotional resource sets,[5] but also because California law is complex, obscure and ever expanding.

The following brief, general description of LA Law Library's collection and selected exemplars from it are intended to pique the reader's interest in the jewels and marvels of that collection, but also to demonstrate the relationship between the evolution of that collection and the evolution of the role of LA Law Library and public law libraries in general. The selections offered were chosen to illustrate at once the depth and breadth of the collection, the magnitude of the problem of providing public access to a body of materials that is simultaneously rich, diverse and often obscure, and the expansion of that problem over time as the law itself has exploded in volume and complexity.

ABOUT THE LA LAW LIBRARY COLLECTION

The Law Library strives to provide a collection that is authoritative and comprehensive and to acquire and retain resources that adhere to the standards set forth in statements from the American Library Association and

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[3] Gail H. Fruchtman, "The History of the Los Angeles County Law Library," *Law Library Journal* 84 (1992): 698.

[4] Legal Services Corporation, *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-income Americans*, prepared by NORC at the University of Chicago for Legal Services Corporation (Washington, D.C.: LSC, 2017), 9.

[5] Judicial Council of California, *Handling Cases Involving Self-Represented Litigants: A Benchguide for Judicial Officers* (San Francisco: JCC, April 2019), 1-9–1-10. Natalie Anne Knowlton et al., *Cases Without Counsel: Research on Experiences of Self-Representation in U.S. Family Court* (Denver: Institute for the Advancement of the American Legal System, May 2016), https://iaals.du.edu/publications/cases-without-counsel-research-experiences-self-representation-us-family-court (as of September 3, 2019).

the American Association of Law Libraries.[6] As long as print versions of the core collection of primary materials are available, LA Law Library acquires and selectively preserves print copies of these titles; if digital availability exists, the library endeavors to make these resources available to its users as well. Most subject areas, in particular subjects of special interest, expand and contract according to demand among the library's users for resources in these areas.

LA Law Library's comprehensive collection of California, federal and other domestic law is both current and historical in nature. It consists of primary law and secondary sources for United States federal, state, and territorial jurisdictions. Secondary materials include practice guides, form books, and bar association materials. As part of its commitment to serve users beyond the confines of its physical location, the library provides access to the electronic versions of U.S. legal materials via links provided in its online catalog and database subscriptions.

California Historical Materials

LA Law Library maintains a comprehensive collection of the statutes, session laws, and judicial opinions and decisions of California. The library also acquires and preserves a wide array of California, multi-jurisdictional, and subject-specific substantive treatises covering most legal subject areas in California law. LA Law Library is a selective depository for California government documents, including legislative history resources, such as Assembly and Senate journals, bills and analyses, and hearings and committee prints. LA Law Library is a depository for the California appellate courts, receiving, maintaining and, more recently, digitizing, the most complete collection of California appellate briefs in the country from 1858 to the present.[7] The library's collection of California ballot propositions and voter

[6] American Library Association, *Library Bill of Rights* (June 19, 1939; latest amendment, January 29, 2019), http://www.ala.org/advocacy/intfreedom/librarybill (as of Aug. 30, 2019). American Association of Law Libraries, *County Public Law Library Standards* (April 2015), https://www.aallnet.org/about-us/what-we-do/policies/public-policies/county-public-law-library-standards (as of Aug. 30, 2019).

[7] LA Law Library also serves as a depository for the U.S. Court of Appeals for the Ninth Circuit.

ballot pamphlets, which includes materials from 1908 to the present, is likewise unique and comprehensive.[8]

Los Angeles Historical Materials

LA Law Library acquires the local codes and ordinances for numerous cities and counties in California in accordance with demand and availability. The library collects and retains Los Angeles County legal newspapers, including the *Metropolitan News-Enterprise* and the *Los Angeles Daily Journal*; this collection dates from 1945 and is maintained in hard copy through the present, and in microform from 1888 to 2013. A diverse selection of materials from local agencies and organizations has been collected since the library's founding in 1891 and includes everything from materials concerning the desegregation process by the Los Angeles School Monitoring Committee to the crime and arrest statistics of the Los Angeles County Sheriff's Department.

Rare Books

As a result of its size, scope, and development, LA Law Library has obtained rare book materials that address the establishment of the continental United States, its colonies, individual states, and territories, with a special emphasis on the early history of California law, both before and after statehood. Also found in the library's Rare Book collection are documents that record the history and development of the legal community and the practice of law in Southern California. These items include such rarities as the criminal trial transcripts of defendant David Caplan, who was convicted of helping to bomb the *Los Angeles Times* newspaper building in 1910, and the subsequent trial of legendary attorney Clarence Darrow for attempting to bribe jurors in the case of Caplan's co-defendants, the McNamara brothers; a 1922 illustrated directory of members of the Los Angeles County bench and bar published by the *Los Angeles Daily Journal* newspaper, which includes attorney Clara Shortridge Foltz, the first woman to practice law in California; and a Spanish-language edition of the first

[8] LA Law Library participates in the California State Depository Library Program. Under the California Library Distribution Act, the library is required to keep basic legal state documents, including legislative bills, legislative committee hearings and reports, legislative journals, statutes, administrative reports, the California Code of Regulations, annual reports of state agencies, and other materials (Cal. Gov. Code § 14909).

without right to do so. Convicted violators of injunctions of contempt of court in labor case, L. A. Shipbuilding and Dry Docks Co., vs. Metal Trades Union before Judge Lewis R. Works. Mr. Forrest entered the law office of Gibson, Trask, Dunn and Crutcher in June 1909 as an office boy, later studied law in their offices, and remained with the same firm after the death of Walter J. Trask, until 1920, when he opened offices for himself.

MORRIS M. FERGUSON

Morris M. Ferguson with offices at 714 Pay Building, the son of Isaac H. Ferguson and Mary A. Ferguson was born in East St. Louis, Ill. June 16, 1887. After attending the common school in Ill., he finished his education at the Chicago Business Law School in 1904. Was admitted to the bar in Springfield, Ill., in 1904.; came to Los Angeles the year of 1909. Mr Ferguson is a married man and a member of East Gate 290 F. & A. M.; Court E. G. 22nd Forrester Security Benefit Association; Union League Club, Esperanza Chapter 167 Eastern Star; Lincoln Heights Club, Proxime Club. Public School teacher in Ill., for 12 years; Police Judge St. Jacobs, Ill., 4 years; Assistant States Attorney in Madison, Co. Ill., two years. Professor of real property, personal property, abstracts, and real estate law for American Extension University; also a member of this faculty. Public speaker and lecturer as a four minute man speaker during the world war.

W. J. FORD

W. J. Ford was born in Oakland, California, August 2, 1877. Now maintains offices at 412 H. W. Hellman Building. He is the son of John J. and Mary B. Ford, attended the Public and High Schools, Los Angeles, also the University of California, Berkeley, was admitted to the bar October 10th, 1899. Came to Los Angeles, from Oakland, April 1833. Mr. Ford is a member of U. S. War Veterans; N. S. G. W.; L. A. Athletic Club; Uplifters Club; Brentwood Country Club; American Bar Association; Calif. Bar Association; Los Angeles County Bar Association; Benevolent, Protective Order of Elks; University of California Alumni Association; Private, Company H, 6th California Infantry, 1898, Secretary Senate Judicial Committee, 1907; Deputy City Prosecutor, 1907, 1908; Deputy District Attorney, 1908-1911; Chief Deputy District Attorney, 1911-1914. Counsel for People Vs. McNamara; People Vs. Darrow; People Vs. Sebastian; People Vs. Danford; People Vs. Driggs; Burton Vs. Essanay Film Co., Hennessey Vs. Burley; Executor Estate Mary Regan; Walker Vs. J. Gamble Carson, Executor Estate Alpha O. Carson; Doane Vs. L. A. T. & Sav. Bank, Executor Estate Laura S. Hughes; Franklin Vs. Irvine; Earl Vs. Dutor; Earl Vs. Los Angeles Record; Stevens Vs. Stock (Santa Barbara Evening News); Monsch vs. Pollasker.

J. FRIEDLANDER

J. Friedlander, Assistant City Prosecutor, at 205 N. City Call, is the son of Joseph Friedlander and Rose L. Friedlander. He was educated in the New York City public schools, and graduated from the N. Y. University. Was admitted to the bar in Los Angeles in January, 1913, and to practice the same year. Mr. Friedlander is a married man, coming here in 1913 from New York City. Is a member of B'nai B'rith Lodge and Union League Club. He was counsel in sustaining the validity of the state tenement and lodging house act; the maintaining of quarantine by the City Health Department. Appointed Deputy Prosecutor in 1915; Chief Deputy in 1919, and Assistant City Prosecutor in 1922.

J. M. FURSEE

J. M. Fursee with offices at 1202 Pacific Mutual Building, the son of Adolphe and Getta Crossman Fursee, was born in N. York City, New York, Aug. 22, 1886. He attended the N. Y. City, Cleveland, Ohio, High School College Preparatory, Baldwin Univ., Cleveland, Ohio, and Graduated from the Univ. of Southern California. Was admitted to the bar at Sacramento, July 19, 1919. Came to Los Angeles Christmas Day, 1915 from Cleveland, Ohio. Mr. Fursee is a married specialising in corporation - Law Damages.

CLARA SHORTRIDGE FOLTZ

Clara Shortridge Foltz, one of the best known and most prominent women in California and in fact the entire United States, the daughter of Elias W. and Talitha Cami Shortridge, has a suite of offices at 929 South Broadway. Her early education was with private tutors and the public schools, then two years at Hastings College of Law, University of California. She was the first woman admitted to the California bar on the Pacific Coast, the first woman deputy District Attorney in the country; the first woman member of the Board of Trustees of the State Normal School. At the Columbia Exposition in Chicago, Ill., in 1893, she was present as the representative of the California Bar. Mrs. Foltz is a widow, a member of the State Bar Association, L. A. Bar Association, Friday Morning Club and the Womans Press Club. Engaged in general and miscellaneous practice; always advised against litigation wherever possible and in favor of arbitration. "Win with a smile" has always been her motto. She is the author of the prison parole system and organizer of numerous women's organizations throughout the state. Her judgment is sound and her counsel worth while. She was the means of obtaining chairs and stools for women clerks in stores and elsewhere.

HERBERT FRESTON

Herbert Freston son of Arthur W. Freston and Annie S. Freston, with offices at 504 Pacific Finance Building, Los Angeles was born in Kansas City, Mo. April 3, 1890. He attended the elementary and high schools of Kansas City, Mo. and Phoenix, Ariz., coming to Los Angeles September 1912, and graduated from the U. S. C. College of Law in 1913, he was admitted to the bar July 23, 1914. Mr. Freston is a single man,a member of the Delta Theta Phi Nat. Law Fraternity, L. A. City Club, Union League Club, Los Angeles Athletic Club, and California Country Club. He was a Lieutenant Air Service (Aviation Section) U. S. Army during the world war, and is a member of firm of McCarthy, Nolan and Freston.

JOHN D. FREDERICKS

John D. Fredericks who now has offices 1126 Pacific Mutual Building, Los Angeles, was born in Burgettstown, Pa., Sept. 10, 1869, being the son of Rev. James T. Fredericks and Mary Patterson. He attended the public schools of Burgettstown and Trinity Hall Military Academy, Washington, Pa., and Washington and Jefferson College, Washington, Pa. He came to Los Angeles in 1896 and was admitted to the bar in California in 1895. Mr. Fredericks married Agnes M. Blakeley in 1896, is a member of the California Club, Los Angeles Country Club, Union League Club, and L. A. Athletic Club. He was District Attorney from 1902 to 1914, conducted the most many important cases during that period, including the famous "dynamite case" and the bribery cases incident thereto. Successfully handled oiled roads patent litigation as one of the attorneys for various cities and counties of California. Served in Spanish American War with California Infantry. Now President of L. A. Chamber of Commerce. He entered private practice, January, 1915, with the firm of Fredericks and Hanna, and has been retained in a number of actions of local interest.

(Courtesy Murillo Studio).

ODA FAULCONER

Mrs. Oda Faulconer, being the daughter of Augusta and Mary E. Hunt, maintains offices at 1202 Locw State Building. She graduated from the U. S. C. Law College and was admitted to the Bar of L. A. 1913. Came to Los Angeles from Portland Ore. in 1902. Mrs. Faulconer is a widow; a member of the Friday Morning Club; Professional Women's Club. Press. Soroptemist Club. Woman Lawyer's Club; Republican Study, L. A. Co. Federation of Business and Professional Women's Club; Co. and State Bar Assoc. and Amer. Bar Assoc. Also a member of Republican County Central Committee, and Executive Committee of Republican State Central Committee. Admitted to practice in all State and Federal Courts of Calif. and the Supreme Court of U. S.

JOHN L. FLEMING

John L. Fleming who has offices at 8 Van Nuys Bldg., is the son of J. P. and Mary E. Fleming was born at Downey, Calif. Nov. 1, 1876. Educated in the Public Schools of L. A. County, Woodbury Business College and L. A. Law School. Admitted to the Bar at L. A. April 1909. Mr. Fleming is a married man; a member of Hollenbeck Blue Lodge Masons; East Gate Royal Arch Chapter; Ramona Parlor Native Sons; Past Patron Hollenbeck Chapter O. E. S.; Past Royal Patron Ramona Court Amaranth; City Club, Chamber of Commerce, and Pres. Calif. Country Club. Was Counsel for Arroyo Ditch and Water Co. cases; determining the right to the use of the waters of the San Gabriel River for irrigation purposes; acted as Judge Pro Tem in many cases. Has had appeals from decisions but no reversals by Supreme Court. His Father came across the plains in a desert schooner, riding a mule from N. Carolina to California.

E. L. FOSTER

E. L. Foster with offices at 1209-10 Pacific Mutual Building was born July 5, 1871, at Brighton, Illinois. He is the son of Cranville F. Foster and Mary J. Foster. Educated in the schools of Mass. and California and Harvard College. Was admitted to the bar of California June 1896; Mr. Foster came here Sept. 1921 from Bakersfield, Cal. He is a married man.

1922 ILLUSTRATED DIRECTORY OF MEMBERS OF THE LOS ANGELES COUNTY BENCH AND BAR PUBLISHED BY THE *LOS ANGELES DAILY JOURNAL* NEWSPAPER.

BOTTOM ROW: ATTORNEY CLARA SHORTRIDGE FOLTZ, THE FIRST WOMAN TO PRACTICE LAW IN CALIFORNIA.

California session laws of 1850–1851, the preface of which explains that the translation was ordered by the secretary of state, due to the lack of distribution of certain laws in Spanish, and that the translator was to be paid an amount not to exceed fifty cents per page.[9] The library's Rare Book Room is climate controlled and, in keeping with its California location, the shelving is designed to prevent books from falling in case of an earthquake.[10]

EXEMPLARS

California Codes Annotated, 1872

California's statutes were first codified in 1872, and the first annotated versions of the codes were published the same year. The codes originally included four titles: Civil Code, Code of Civil Procedure, Political Code, and Penal Code. Annotations were provided by Creed Haymond and John C. Burch of the California Code Commission and included cross-references to other code sections, case notes, and historical background, providing historical insight into the intent and purpose of the laws as adopted. For example, this 1872 note for Penal Code section 714 on hearings for persons charged with making criminal threats can be found in the original annotations:

> These proceedings are provided for securing a more perfect respect for the law than their mere existence carries to the person upon whom they are intended to operate. Every one [sic] is presumed to know the law, but in many instances, as a matter of fact, the existence of the law is unknown. By these proceedings, therefore, an actual breach of the law may be prevented where an ignorant violation would be punished.

In the nearly 150 years since their original publication, the California codes have grown to include twenty-nine titles, including Education, Labor, Harbors and Navigation, Streets and Highways, and Water.

The contrast between Haymond and Burch's annotated version of 1872 and the annotated codes of today is a striking illustration of the expansion

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9 *Leyes del Estado de California* (20 vols., 1850–1878), vol. 1 (Sacramento: Impresor del Estado, 1851), v.

10 Fruchtman, 700.

of California law. While the 1872 version included only seven volumes and requires only about one foot of shelf space to house, *Deering's California Codes Annotated* currently runs to over 200 volumes at nearly 35 feet of shelf space, and *West's Annotated California Codes* is more than 400 volumes, spanning over 55 feet of shelf space.

Interestingly, despite frequent code revisions, some sections have remained unchanged since 1872, such as Civil Code section 3821 on damages: "Every person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor [sic] in money, which is called damages." Meanwhile, hundreds, if not

TODAY, *WEST'S ANNOTATED CALIFORNIA CODES* (ON SHELVES AT LEFT) INCLUDES MORE THAN 400 VOLUMES, SPANNING OVER 55 FEET OF SHELF SPACE, WHILE THE 1872 VERSION OF THE CALIFORNIA ANNOTATED CODES (ON SINGLE SHELF AT RIGHT) INCLUDES ONLY 7 VOLUMES, REQUIRING ONLY ABOUT ONE FOOT OF SPACE.

thousands, of additional laws have been added, including such things as the California Public Records Act, the California Environmental Quality Act and, most recently, the California Consumer Privacy Act of 2018 (AB 375), which will go into effect January 1, 2020 and provides Californians with greater control over the personal information they share with businesses.

- The original, annotated 1872 California Codes, and over 1,000 subsequent annotated and unannotated editions of California's twenty-nine code titles, are available at LA Law Library.[11]
- *The Civil Code of the State of California* (2 vols.), *The Code of Civil Procedure of the State of California* (2 vols.), *The Penal Code of California* (1 vol.), *The Political Code of the State of California* (2 vols.; annotated by Creed Haymond and John C. Burch, 1st ed., 1872).

Municipal Code of the City of Los Angeles, Replaced Pages, 1955–Present

The Los Angeles Municipal Code was enacted by Ordinance No. 77,000, codifying all penal and regulatory ordinances, and went into effect November 12, 1936. Then and today, it is compiled and codified under the direction of the Los Angeles city attorney.[12] The first edition of the code covered nine subjects: zoning, business regulations, health and sanitation, public welfare and morals, public safety, public works, public utilities and transportation, traffic, and building regulations. Today, it covers twice as many subjects, including chapters on rent control, airports, water conservation, and environmental protection. Over the years, the format of the text and even the shape and size of printed volumes have changed according to the technologies and needs of researchers at the time, evolving from smaller, bulky volumes published in the 1950s that could be shelved in a standard bookcase to larger letter size pages more suitable for faxing and copying in 2002. Digitized versions are not archived by the publisher,

[11] LA Law Library retains all superseded volumes of *Deering's California Codes Annotated* and *West's Annotated California Codes*, as well as annual desktop editions for selected California code titles.

[12] Official City of Los Angeles Municipal Code: Ordinance No. 77,000: Effective November 12, 1936 As Amended Through June 30, 2019 / Compiled, Edited and Published Under the Direction of Michael N. Feuer, City Attorney.

making access to superseded code sections sometimes difficult to obtain, even for relatively recent dates.[13]

Fortunately, LA Law Library maintains a treasure trove of historical research materials relating to the Los Angeles Municipal Code. The collection includes complete print sets of the first through the sixth (current) editions, chronicling the expansion of the code from a single 2.5 x 10.5–inch volume in 1936 to a six-volume 1.5-foot x 11.5–inch set today. Since 1955, the code has been published in loose-leaf format, which requires that every time a fresh set of revised pages is released by the publisher, superseded pages must be removed from the loose-leaf binders and replaced with new pages. Most subscribers of this set would typically discard those out-of-date pages; the library has retained and organized them numerically and chronologically for ongoing public access.

This unique collection amounts to thousands of historical pages from the various editions of the Los Angeles Municipal Code, enabling researchers to reconstruct the code as it existed at any particular point in time from 1955 to the present. Today, the library's collection of replaced loose-leaf pages alone fills over eighty volumes and counting.

The library's archival collection also includes compiled ordinances and resolutions of the City of Los Angeles prior to the establishment of the Municipal Code, the oldest of which dates from 1855, five years after the city's incorporation.

- *Municipal Code of the City of Los Angeles* (3rd ed., 1955–1970, 4 vols., accompanied by superseded releases for 1955–1969, 9 vols.).
- *Los Angeles Municipal Code* (4th ed., 1970–1988, revised pages retained and bound in section number order, 25 vols., and release number order, 16 vols.).
- *Los Angeles Municipal Code* (5th ed., 1989–2001, replaced pages filed in release number order, 47 vols.).
- *Los Angeles Municipal Code* (6th ed., 2002–present, replaced pages filed in release number order, 34 vols.).

[13] Official City of Los Angeles Municipal Code (June 30, 2019), https://www.amlegal.com/codes/client/los-angeles_ca (as of September 3, 2019).

Opinions of the Attorney General of California, 1899–Present

An opinion of the California attorney general can be requested on any question of law by California government officials. While these advisory opinions of the California attorney general can provide both persuasive authority and historical insight, older issuances can be challenging to locate. More modern opinions from 1982 to the present are available on the California attorney general's website, and opinions from 1943 forward are available in printed book format at various libraries. Prior to 1943, though, opinions were issued individually, in an original series from 1899 to 1936, followed by the "New Series" for the years 1936 to 1943. These early opinions are not available online or in commercially printed sets; fortunately, they are available on microfilm and in the collection compiled by LA Law Library librarians from 1930 to 1943.

A 1940 opinion by Attorney General Earl Warren on the proper filing fee to be paid by candidates for the office of Judge of the Superior Court illustrates the advisory, as opposed to primary, nature of these opinions:

> While I know of no decision upon the question, it is my opinion that the filing fee should be one per cent [sic] of the annual salary to be received by the successful candidate, i.e., in this case $55. . . . While this office has never rendered an official opinion on the subject, this opinion has been expressed unofficially on several occasions in the past.[14]

Notwithstanding the advisory nature of the opinions, they range in length, detail and depth. An attorney general's stated opinion can be perfunctory, as in the opinion by Ulysses S. Webb in 1930 on the civil rights of probationers, the entirety of which reads:

> A person released on probation would not be sentenced to state prison, and it is therefore my opinion that there would be no suspension of civil rights.[15]

Others run to the more extensive or even expansive, such as the opinion of April 26, 2019 by Attorney General Xavier Becerra, which runs to seventeen pages with ninety-seven footnotes on whether a mayor of a municipality

[14] Op. NS2761.

[15] Op. 7272.

may serve as a member of the board of directors of the local fire protection district.[16]

LA Law Library's local print collection is bound in opinion number order while the library's collection of opinions on microfilm is organized by date. Both are available for use by patrons.

- *Opinions* (nos. 1–11,000, Jan. 18, 1899–Oct. 1936; New Series nos. 1–4708, Oct. 1936–Aug. 1943; 1899–1936, microfilm, 42 reels, 16 mm).
- *Opinions* (vols. 1–12 suppl., nos. 7153–10994, June 1930–Oct. 1936; New Series vols. 13–29, nos. 1–5024, Oct. 1936–Aug. 1943, issued individually in mimeograph format by the Office of the Attorney General and compiled by LA Law Library, 1936–1943, 43 vols.).
- *Opinions* (bound volumes kept up to date by official advance sheets, 1943–present, 105 vols., with indexes).

OPINIONS OF THE LOS ANGELES SUPERIOR COURT APPELLATE DEPARTMENT/DIVISION

The published opinions of the California Supreme Court and Courts of Appeal dating back to 1850 are readily available online and in print, but historical decisions of the Superior Courts can be more difficult to locate, given the changes to the court structure and the spotty nature of publication in the early decades of the courts.

Since the establishment in 1929 of the Appellate Departments of the Superior Court (now known as the Appellate Divisions), reported cases can be found in the "California Supplement" section of *California Appellate Reports*. Decisions issued prior to 1929 can be found in two separate sets published commercially by Henry J. Labatt, a San Francisco attorney, and Rufus Ely Ragland, also a San Francisco attorney and publisher. These volumes are housed in the library's Rare Book Room.

Ragland explains in the Preface to his publication that these volumes include "certain notable cases of general interest," including those from counties both large (Alameda, Los Angeles, San Francisco) and small (Butte, Siskiyou, Tulare), such as a 1921 ruling on the legality of chewing

[16] __ Ops. Cal. Atty. Gen. __ (April 26, 2019; filed Op. 17-1101), 39 (the opinion's conclusion: yes, but only if the mayor is the city's designated appointee and not serving simultaneously in another capacity, such as a public member).

In the Superior Court of the State of California,
In and for the County of Los Angeles.

JUDGMENT

No. 103,571

Charles Chaplin, Plaintiff,
vs.
Western Feature Productions, Inc., a corporation, F. M. Sanford, G. B. Sanford, A. J. Xydias, C. K. Xydias, Charles Amador, John One, John Two and Mary One, defendants.

JOHN L. HUDNER, Judge

Action by Charles Chaplin against Western Feature Productions, Inc., a corporation, and others. Judgment was entered dismissing the action as to the defendants, Western Feature Productions, Inc., a corporation, A. J. Xydias, C. K. Xydias, John One, John Two and Mary One and trial was had against the remaining defendants. Judgment for plaintiff, with costs.

1. INJUNCTION—USE OF TRADE NAME—SIMILAR NAME—UNFAIR COMPETITION.

In a suit by "Charles Chaplin," well known moving picture actor and producer, defendants held guilty of unfair competition and enjoined from selling, leasing, releasing, advertising or exhibiting a picture called "The Race Track," and from using the names "Charles Aplin" or "Charlie Aplin" or any other name similar to that of plaintiff in connection therewith or from advertising, leasing, releasing, selling, exhibiting or offering for sale any pictures in imitation of those of plaintiff and so likely to deceive the public.

This cause came on regularly for trial in the above entitled Court in Department 31 thereof,

Los Angeles Superior Court Appellate Department Opinion 103,571 from 1925. Plaintiff Charlie Chaplin won an injunction against Western Feature Productions, Inc. for unfair competition related to their release of a film called "The Race Track" featuring "Charlie Aplin."

gum vending machines in the City of Vallejo; a 1924 case concerning the location of a so-called "pest house" or "isolation hospital" for the treatment of patients with infectious diseases in the City of Pasadena; and a 1924 decision on searches and seizures of intoxicating liquor in Prohibition-era Los Angeles. One such opinion, from 1925 in Los Angeles County, concerns Charlie Chaplin, described as "well known moving picture actor and producer," who won an injunction against Western Feature Productions, Inc. for unfair competition, based on their release of a film called "The Race Track" featuring one "Charlie Aplin."[17]

LA Law Library has also collected the "Memorandum Opinions" of the Los Angeles Municipal and Superior Courts covering the years 1931 to 1990, most of which are unpublished items that cannot be found online or in *California Appellate Reports*. These are originals, mimeographs, or photocopies. Opinions are designated as either civil or criminal by the abbreviations "Civ.A" and "Cr.A." in the assigned number. One noteworthy item from this collection is an unpublished opinion from 1981 by Judge Florence Bernstein, a longtime Los Angeles Superior Court judge (her campaign slogans included "Go with the Flo" and "Put a Mensch on the Bench"[18]), who went on to become the first woman to serve as presiding appellate judge of the L.A. Superior Court. The case, *People v. Hauntz*, concerns a criminal matter involving a citizen's arrest, and Bernstein's opinion illustrates her thoughtful approach:

> Private citizens perform a public service in bringing to justice offenders who commit crimes in their presence. But generally, they are unskilled not only in the technicalities of the law but in the methods and procedures for controlling an arrested person, occasionally to their personal harm. We believe it the better policy to encourage private persons to enlist the aid of professional police officers to physically effect an arrest.[19]

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17 R. E. Ragland, *California Superior Court Decisions: Notable Cases*, vol. 2 (Sacramento: California Law Book Exchange, 1929), 73 (Op. 103,571).

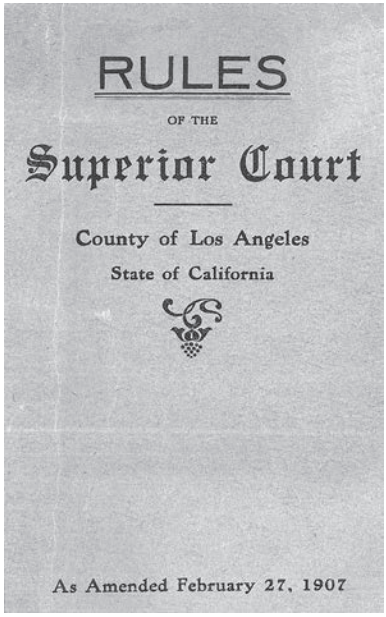
18 Myrna Oliver, "Florence Bernstein; 1st Woman to Be Presiding Appellate Judge," *Los Angeles Times* (Dec. 6, 1991), https://www.latimes.com/archives/la-xpm-1991-12-06-mn-620-story.html (as of Sept. 4, 2019).

19 *People v. Hauntz* (App. Dept., Super. Ct. L.A. County, 1981, No. 81-30, Super. Ct. No. Cr.A. 18264), 8.

- *Reports of Cases Determined in the District Courts of the State of California* (Henry J. Labatt, editor, 1857–1858, 2 vols.).
- *California Superior Court Decisions: Notable Cases* (compiled by R. E. Ragland, assisted by Charles E. McGinnis, 1921–1929, 2 vols.).
- *Memorandum Opinions, Civil* (Civ.A. 481–8416, 9586–18493, compiled by LA Law Library, 1932–1990, 25 vols.).
- *Memorandum Opinions, Criminal* (Cr.A. 481–27620, 1959–66 bound with civil opinions, compiled by LA Law Library, 1931–1989, 22 vols., with selective index and citator).

Pamphlet Collection

This collection's utility is matched by its charm. This wide-ranging variety of small printed booklets, pamphlets, reports, court opinions, and various legal ephemera includes over 1,200 items related to California and Los Angeles. For library patrons, this collection's special nature and organizational scheme requires the help of the library's reference librarians to locate materials: these items can be found separately by title in the library's catalog, but they were bound *by size* in a generally chronological order, which can create a research challenge for patrons. Included in this collection are a booklet of the Los Angeles Superior Court rules of 1907, which measures only 4 x 5.5 inches and includes only 37 rules, as opposed to over 600 today; a report on the Los Angeles Aqueduct following the year of its completion in 1913 by Dr. Ethel Leonard; and a booklet of short biographies of candidates running to be elected judge of the Los Angeles Superior Court in 1932.



Pocket-size booklet of the Los Angeles Superior Court rules of 1907. Includes only 37 rules. Today there are over 600.

- *Rules of the Superior Court, County of Los Angeles, State of California* [adopted Aug. 3, 1905, in effect Sept. 11, 1905], *As Amended Feb. 27, 1907* (California Superior Court (Los Angeles County), [1907?], 1 vol.).
- *Report of Sanitary Investigation of the Tributaries and Mountain Streams Emptying into Owens River from the Upper End of Long Valley via Owens River Gorge, Following the Course of Owens River and Los Angeles Aqueduct to Fairmount Reservoir* (by Ethel Leonard; Including the Chemical Sanitary Analysis of the Water by A. F. Wagner, [1914?], 1 vol.).
- *Biographical Sketches of Candidates for Office of the Superior Court of Los Angeles County* (by the Los Angeles Bar Association, [1932?], 1 vol.).

California Law Prior to Statehood

LA Law Library's collection of rare books includes several items from the period when Alta California (Upper California) was a territory of Mexico and later when it was ceded to the United States by the Treaty of Guadalupe Hidalgo, just prior to statehood in 1850. A translation of the Mexican Laws of 1837, still in force in California in 1849, describes the unsettled legal environment of the time:

> The Mexican Constitution of 1844, partially adopted in Mexico, was never regarded as in force in California, nor was it known here that these laws were materially modified by any decrees or orders of the Mexican Congress. It will be a question hereafter for the decision of courts, what modifications were legally made by Mexico, and how far they are actually in force under the existing circumstances of the country.[20]

The debates of the Constitutional Convention of 1849 in Monterey, California, which the library has collected in both English and Spanish, include reports by delegates on the advisability of statehood and a final congratulatory speech by the military governor of California, Brigadier General Bennet Riley wishing the participants "happiness and prosperity"

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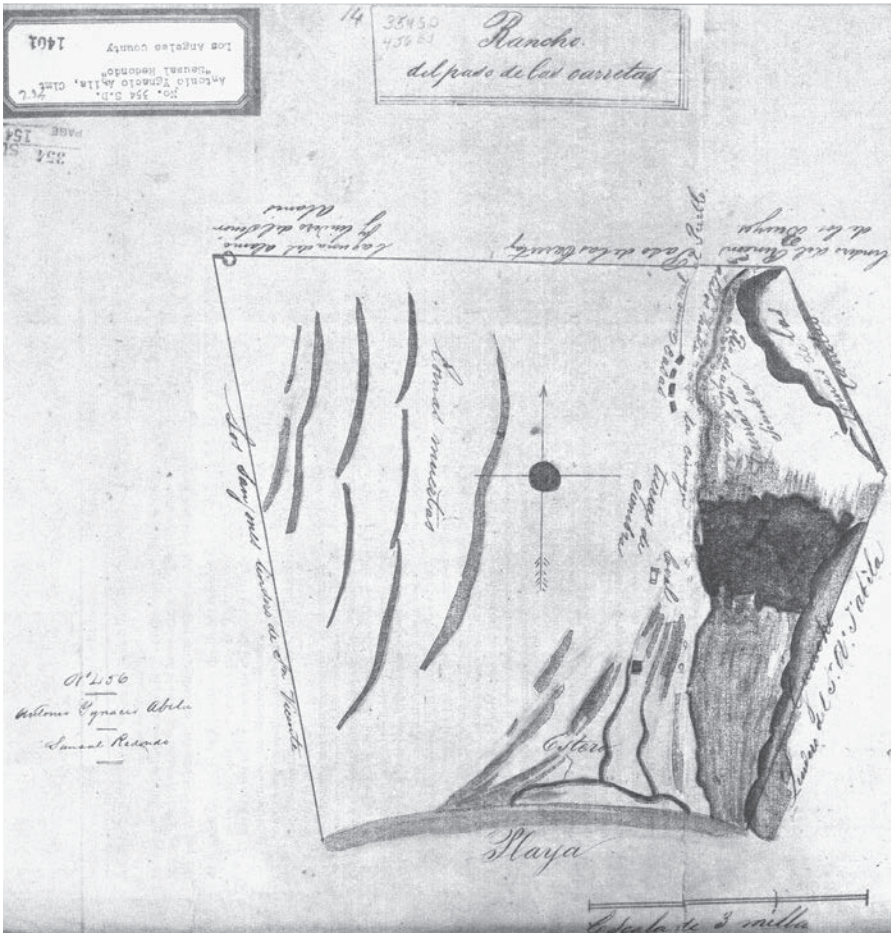
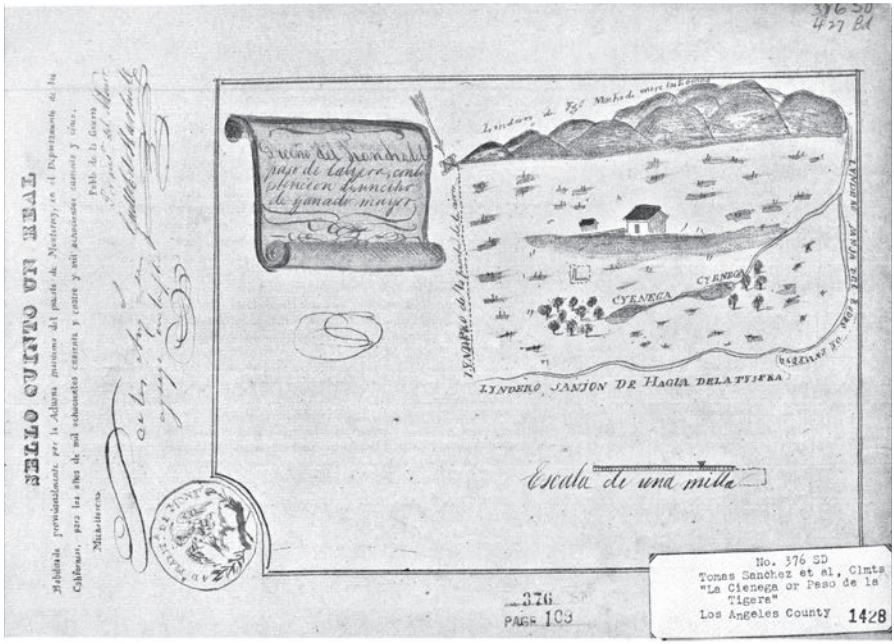
[20] J. Halleck and W. E. P. Hartnell, *Translation and Digest of Such Portions of the Mexican Laws of March 20th and May 23rd, 1837, as are Supposed to Be Still in Force and Adapted to the Present Condition of California; With an Introduction and Notes* (San Francisco: Office of the Alta California, 1849), 4.



Reproduction of hand-drawn map of Rancho La Ballona, the 1839 Mexican land grant in Los Angeles County, which includes the present-day Westside cities of Santa Monica and Culver City, and the Ballona Wetlands Ecological Reserve.

upon the successful conclusion of their "arduous labors."[21] The collection also includes several twentieth-century publications of early California legal documents, including rules and regulations for the *presidios* (military bases) on the frontier line of New Spain, ordered by King Carlos III of Spain in a decree of September 10, 1772, and the decree of President Santa Anna of

[21] J. Ross Browne, *Report of the Debates in the Convention of California, on the Formation of the State Constitution, in September and October, 1849* (Washington: 1850), 477.



Reproduction of hand-drawn map of Rancho La Cienega o Paso de la Tijera, the 1843 Mexican land grant in Los Angeles County, which includes the present-day neighborhoods of Leimert Park and Baldwin Hills, and the Kenneth Hahn State Recreation Area.

Mexico, May 22, 1834 establishing circuit tribunals and district courts.[22] An oversized volume of illustrated color maps of the California *ranchos* from 1822 to 1846 brings to life the early California landscape, both geographic and political, under Mexican rule.[23]

- *Translation and Digest of Such Portions of the Mexican Laws of March 20th and May 23rd, 1837, as are Supposed to Be Still in Force and Adapted to the Present Condition of California; With an Introduction and Notes* (by J. Halleck and W. E. P. Hartnell, government translator, 1849, 1 vol.).

[22] John Galvin, ed., *The Coming of Justice to California: Three Documents*, translated from the Spanish by Adelaide Smithers (San Francisco: John Howell Books, 1963).

[23] Robert H. Becker, *Diseños of California Ranchos: Maps of Thirty-Seven Land Grants, 1822–1846, From the Records of the United States District Court, San Francisco* (San Francisco: The Book Club of California, 1964).

- *Report of the Debates in the Convention of California, on the Formation of the State Constitution, in September and October, 1849* (by J. Ross Browne, 1850, 1 vol.).
- *Relación de los Debates de la Convención de California, Sobre la Formación de la Constitución de Estado, en Setiembre y Octubre de 1849* (by J. Ross Browne, 1851, 1 vol.).
- *The Coming of Justice to California: Three Documents*, translated from the Spanish by Adelaide Smithers, edited by John Galvin (1963, 1 vol., with appendices).
- *Diseños of California Ranchos; Maps of Thirty-Seven Land Grants, 1822–1846, From the Records of the United States District Court, San Francisco* (by Robert H. Becker, 1964, 1 vol., with folded color maps).

CONCLUSION

Those who revel in the intricacies, obscurities and complexities of California legal history, will find virtually endless opportunities to delve into that history in the LA Law Library collection. For those simply trying to put a best foot forward in understanding and advocating for their own legal rights, the scope and depth of the collection will be a sobering reminder of how daunting a task they face. In either circumstance, the support and assistance of the able librarians at LA Law Library will make the journey more manageable and, hopefully, rewarding.

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