# BOOK EXCERPT: ONLY PEOPLE WERE SLAVES†

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INTRODUCTION ..... 384
I. THE DECKERS IN THE NEIGHBORHOOD OF VINCENNES 386
II. FRANCIS HOPKINS ..... 391
III. THE VOYAGE TO NATCHEZ ..... 392
IV. THE SUMMER OF 1818 ..... 397
V. THE MAN OF THE CONSTITUTIONAL MOMENT ..... 398
VI. THE LEGAL LANDSCAPE ..... 402
VII. FREEDOM IN THE TRIAL COURT ..... 404
VIII. JUDGE CLARKE'S LEGAL ANALYSIS ..... 405
IX. A CASE OF FIRST IMPRESSION ..... 408
X. THE PROBLEMATIC INDIANA CONSTITUTION ..... 412
XI. POLITICAL THEORIST AND PRACTITIONER ..... 414
XII. CASES OF DOUBT ..... 417
XIII. A SLAVE RETAINED HIS HUMANITY ..... 419
XIV. THE "OUGHT" VERSUS THE "IS" ..... 422
XV. A FIRMER FOUNDATION ..... 424
XVI. DOES NATURAL LAW HAVE A PLACE? ..... 430
XVII. REFLECTIONS ..... 433
BIBLIOGRAPHY ..... 437

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*How should the Court decide, if construction was really to determine it? I presume it would be in favour of liberty.*

*— Judge Joshua Giles Clarke (1818)*[1]

## INTRODUCTION

*Harry and Others vs. Decker & Hopkins*[2] is one of the earliest known opinions of the Supreme Court of Mississippi. It is remarkable in many ways. Freedom-by-residence cases brought by slaves were not uncommon in the years leading into the 1850s. *Harry and Others* was the first known case where at the end of the day the court of last resort in a southern slave state had ruled that the slaves were free.[3] Likely from a very early age, perhaps from birth, Harry and two others whose gender is not known had been enslaved in Virginia. In 1784 their owner took them to lands which—three years later—became "free soil" as a matter of federal law. The Northwest Ordinance of 1787 included the lands that would become the southwestern area of Indiana, admitted to the Union as a free state the year before Mississippi was admitted as a slave state.

The core ground for the claims for freedom made by Harry and more than two others was that their owner had settled and lived with his family and possessions, including his slaves, in a part of the country where as a matter of positive law slavery could not be practiced. The owner and his extended family built homes, established businesses—usually related to farming and agriculture—and otherwise sought their fortunes there. They weren't just passing through. They enjoyed the benefits and protections of the law of their new home area. Conversely, these new citizens of the Northwest Territory were deemed to accept the burdens of that law, including laws made after they arrived, the same as settlers everywhere in the young nation.

Particularly was this so when such settlers did not leave after a reasonable time had passed, and after the passage of said-to-be-offensive new laws. Such a settled new residence rent the legal ties that had bound the slaves to their masters. Those ties were

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[1] Harry v. Decker, 1 Miss. 36, 43 (1818).

[2] *Id.* at 36.

[3] *Id.* at 43.

not resurrected where a former slave found himself or herself in another slave state. "Once free, forever free."[4] But would this argument prevail where slavery was not only legal but was also sanctioned and regulated by the new state's constitution?

Three years after Harry and his fellow slaves won their freedom in a Mississippi court, a white man killed a slave—a black man who was a stranger to the white man. Isaac Jones was that white man, and he had acted with malice aforethought. "The taking away the life of a reasonable creature, under the king's peace, with malice aforethought, . . . is murder at common law."[5] And so on July 27, 1821, the sheriff of Adams County, Mississippi, had Jones hanged. The humanity of the slave whose name is not known, and who was not so fortunate as Harry and the others, was vindicated posthumously.

Thirty-five years later, what little was left of the courage and hope of men and women who had been enslaved came crashing down when the U.S. Supreme Court decided the *Dred Scott*[6] case and fanned the flames that led to war. Mississippi had backpedaled in the 1830s. Its holdings were checkered for the next twenty-five years. *Harry and Others*[7] in 1818—and the trial that preceded it—are all the more memorable as a major constitutional encounter in Mississippi history. In the fullness of time a Natchez reporter told the nation of

> a decision alike honorable in our state and in humanity. It appeared that, some time in the spring of 1816, twenty-eight black persons, who were slaves for a certain period of time, were brought by the defendants from Indiana, and sold in this state as slaves for life. By the decision of the Court and Jury they were restored to entire freedom.[8]

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[4] Lea S. VanderVelde, *The Dred Scott Case in Context*, 40 J. SUP. CT. HIST. 263, 263 (2015).

[5] State v. Jones, 1 Miss. 83, 85 (1821).

[6] Dred Scott v. Sandford, 60 U.S. 393 (1857).

[7] 1 Miss. 36 (1818).

[8] The news reports published in 1819 say that there were "twenty-eight black persons" involved in the trial "in the case of Harry et al. vs. Decker & Hopkins." DAILY NATIONAL INTELLIGENCER (Washington, D.C.), July 20, 1819, vol. 7, Issue 2034, at 2; NEW-ENGLAND PALLADIUM (Boston, Mass.), July 30, 1819, vol. 49, Issue 9, at 1.

## I. THE DECKERS IN THE NEIGHBORHOOD OF VINCENNES

The story that led to the summer of 1818 in southwest Mississippi began in Virginia at a time when the ink was barely dry on the Treaty of Paris. Soon after Cornwallis refused to meet Washington at Yorktown, settlers from Virginia began moving into the lands north and west of the Ohio River, more than a few bringing slaves with them. John Decker (ca. 1719-1790) and his family were among such settlers.

The Deckers had come from Kingston in the Dutch country in New York, and into Hampshire County on the inverted shin of what is now northern West Virginia, adjacent to the mother state. They are thought to have had at least eight children, five sons and three daughters. The sons had biblical names like Abraham, Isaac, Jacob, Moses and Luke. All fought with the Indiana militia. John Decker also owned a number of slaves, male and female. Beginning in 1783, the Decker family picked up and left Hampshire County, stopped briefly in Kentucky, before making a new home in 1784 in what in time became Knox County, Indiana. They settled in "the neighbourhood of Vincennes" bringing with them Harry, Bob, Anthony, Rachel and many other slaves.[9] They established Decker Township, no doubt benefitting from the hard labor of their slaves, some acquired after they arrived in their new home. In time, John Decker lived below Deckertown, now Decker, south of White River. He was said to have been one of the first sheriffs of Knox County.

Decker Township was southerly but still in the neighborhood of Vincennes, on the lower Wabash River—in time the boundary between southwestern Indiana and southeastern Illinois—until it flows into the Ohio River, ending to the south against northwestern Kentucky. People settling in the area enjoyed ready access to the navigable inland waterways. John Decker's son, Isaac, occasionally ran flat-boats to Natchez and New Orleans. Because he had no practical alternative, Isaac would walk home along the Natchez Trace. Southerly flowing tributaries and then the mighty Mississippi itself would become avenues for

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[9] Harry v. Decker, 1 Miss. 36, 36 (1818). This assumes that Bob, Anthony and Rachel had been born prior to the Decker family's resettlement in 1784.

transportation quite important to the slaveholding Deckers over the years to come.

John Decker died in 1790 or possibly 1791, leaving four female slaves to his wife and children. Luke Decker (1760-1825), one of John's sons, became leader and spokesman for the family. Farmer, judge, and militia officer, Luke owned and traded slaves in the Northwest Territory, Indiana Territory, and the State of Indiana. Col. Luke Decker was said to have fought with William Henry Harrison in 1811 at the Battle of Tippecanoe against Tecumseh's American Indian Federation. Coincident with Indiana's imminent statehood, Decker suffered two slave escapes, one in his home area, and the other in Mississippi. Between 1816 and 1822, Luke was the pro-slavery protagonist in constitutional wars fought on two jurisdictional fronts. But this is getting ahead of the story.

Soon after Decker Township was established, the Congress enacted the Northwest Ordinance of 1787. *Article the Sixth* read "[t]here shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted . . . ."[10] To most who are familiar with the King's English these words are straightforward. If Article 6 had said "there shall be neither whiskey, vinous nor otherwise spirituous or intoxicating liquors in said territory," its meaning would have been clear, though likely few would have obeyed. Self-interest leads people to make funny arguments. This is particularly so when that self-interest is informed by prejudice and familiar practice, and where financial interests are substantial and at risk.

John Decker had been well aware of the problem this new federal Ordinance posed for his family's slaveholdings. Likely with the help of a lawyer, the Deckers found it easy to convince themselves that the new 1787 ban on slavery had no retroactive effect. John Decker and like-minded men could not be expected to dispense with valuable slaves they had brought to the neighborhood in Vincennes, all acquired before there was an Ordinance of 1787. They didn't think much more of the notion that they could not acquire as many new slaves as they liked. After the

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[10] NORTHWEST ORDINANCE OF 1787, art. VI.

death of his father John *circa* September of 1790, Luke Decker became an outspoken leader of the pro-slavery faction in what would become the free state of Indiana. In 1794, his brother Moses Decker assisted another New York Dutch country immigrant in kidnapping a slave and his wife so that they could not appear in a federal territorial court to present their petition for freedom.

In 1793, in his capacity as judge of the Court of Common Pleas in Knox County, Luke Decker received an opinion letter from Arthur St. Clair, governor of the Northwest Territory. St. Clair advised that Article 6 had no retroactive effect. In December of 1794, St. Clair reiterated his position, refusing to enforce an order of Territorial Judge George Turner that a slave be freed. The territorial governor went further and joined forces with pro-slavery forces in Knox County in forcing the judge's resignation on threat of impeachment based on trumped up charges of "demanding bribes and levying fines without trial."[11]

Slavery had found a firm foothold in Knox County and nearby areas along the northern banks of the Ohio River, including counties in the Illinois territory to the west. Luke Decker's group persisted—and was persistently unsuccessful—in petitioning the Congress that it should repeal Article 6 of the Northwest Ordinance. It would be hard to argue that John Decker, then Luke and their family, acquiesced in the notion that the family's slaves—and particularly those in being before the Ordinance of 1787—were eligible for freedom by their residence. It would be equally hard to argue that the Deckers were unaware of what their continued residence and extended roots in the neighborhood of Vincennes might portend for their slaveholdings.

On December 11, 1816, Indiana became the nineteenth state admitted to the Union. The Indiana Constitution was more elaborate and specific than the Northwest Ordinance. Article I, Section 1, in practical effect enshrined the "unalienable rights" clause in the Declaration of Independence in Indiana constitutional law.[12] This new Indiana constitution came to the attention of the Supreme Court of Mississippi in summer of 1818, and at its very first term. Judge Joshua Giles Clarke authored the

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[11] LEA VANDERVELDE, REDEMPTION SONGS: SUING FOR FREEDOM BEFORE DRED SCOTT 37 (2014).

[12] *See* IND. CONST. of 1816, art. I, § 1.

opinion handed down in that summer and reported as *Harry and Others vs. Decker & Hopkins*. The court read Indiana's new constitutional Section 1 thusly,

> Does not the first article of the constitution declare the condition of the people of Indiana free, and this condition, by the last section of the first article, is likewise declared to be out of the control of government, or to be a right reserved to the people.[13]

Completed on June 29, 1816, the Indiana Constitution had been a shot across the bow to men like the Decker clan. Statehood lay ahead, and it was certain to arrive in the not too distant future.[14] Theretofore, the Deckers and others had enjoyed the advantages of practical inaccessibility from Washington and of sympathetic officials like Gov. St. Clair and future President William Henry Harrison. In the nation's capital men from slave states like Virginia and South Carolina still wielded great political power. The federal government had not appointed a territorial judge until 1791, and that judge made no appearance in Vincennes until 1794. Pro-slavery forces benefited from the not always benign neglect of sympathetic officials like St. Clair and Harrison. The Indiana constitutional convention suggested that life was about to change for the slaveholders in the southern part of the soon-to-become new state.

With appropriate dispatch, Luke Decker and others gathered Harry and at least twenty-seven other slaves and began navigating downstream. There are no known records of the

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[13] Harry v. Decker, 1 Miss. 36, 42 (1818).

[14] Some thoughtful observers have argued that the Indiana Constitution became effective immediately, or at least by July of 1816. *See* ANDREW FEDE, ROADBLOCKS TO FREEDOM: SLAVERY AND MANUMISSION IN THE UNITED STATES SOUTH 297, 330 n.68 (2011). As a matter of federal law, this seems unlikely. Nothing the people of Indiana did had legal effect under federal law until statehood was formally bestowed by President Madison's signature on December 11, 1816. Of course, the Congress could have granted the Indiana Constitution effect on December 11, 1816, *nunc pro tunc* June 29, 1816, or any other date prior to December 11, 1816. No evidence of such congressional action has been produced. *State v. Lasselle* does not embarrass the point. 1 Blackf. 60 (1820). The slaves freed in *Lasselle* were all present on Indiana's free soil after statehood in December of 1816. For present purposes, the point is a non-legal one. By early July of 1816, Luke Decker and his family quite reasonably foresaw that their slaveholdings were in great and imminent legal jeopardy, particularly so long as their slaves remained on Indiana soil.

voyage. Luke put his son, Hiram Decker (1794-1863), in charge, along with other hands who knew the down-river course. As noted above, Luke had other and similar fish to fry at home in Indiana. Harry and the other slaves were removed from Indiana soil in July of 1816. Luke was calling the shots. Ownership papers on Harry and at least the older of the others may still have been in the name of John Decker, who had brought them to the neighborhood of Vincennes in the first place. As the Decker vessel headed south, those in charge had but one purpose—sell Harry and the others as soon as practicable and for the best price they could get.

The Deckers' destination was almost certainly Natchez, maybe New Orleans if the market opportunities in Natchez were not satisfactory. As early as 1801, Natchez was already becoming known as a slave trading center. Slavers were purchasing people cheaply in the old tobacco states and selling them at a premium in markets such as Natchez and New Orleans. "The Natchez slave market, along with [one other], became the most active in the whole South" in the years after the War of 1812.[15] This is consistent with Judge Michael P. Mills' relatively recent showing that, "[f]rom the beginning, the new state [of Mississippi] would be a major destination point for human cargo 'sold down the river' from the border states."[16] Nothing suggests this activity was not well under way prior to the formality of Mississippi's statehood on December 10, 1817.

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[15] WILLIAM C. DAVIS, A WAY THROUGH THE WILDERNESS: THE NATCHEZ TRACE AND THE CIVILIZATION OF THE SOUTHERN FRONTIER 74-75 (1995).

[16] Michael P. Mills, *Slave Law in Mississippi from 1817-1861: Constitutions, Codes and Cases*, 71 MISS. L.J. 153, 163 (2001).

## II. FRANCIS HOPKINS[17]

Everything known about Francis Hopkins (1770-1821) of McIntosh County, Georgia, suggests he was the sort of southern entrepreneur who in the second decade of the Nineteenth Century could and—if the price were right—would buy twenty-eight slaves at a market like that in Natchez. Likely, he was the buyer of Harry and the other twenty-seven. The 1820 Census Records show that Hopkins owned 183 slaves.[18] Other records show that in the decade prior to his death on May 5, 1821, Hopkins was dealing in slaves as often as in land.

Francis Hopkins was born in Beaufort County, South Carolina, on November 10, 1770. The family later moved to McIntosh County, a coastal county in Southeast Georgia, below Savannah and today near Brunswick. In time, Francis Hopkins owned as many as five plantations in the McIntosh County area, along with a large number of slaves. Likely that number would have been larger by twenty-eight had it not been for the judicial proceedings in Mississippi between and including 1816 and 1818.

Twenty-nine-year-old Francis Hopkins was commissioned as a lieutenant in the Georgia state militia in 1810. With the advent of the War of 1812, Hopkins was promoted to captain and then to major in the McIntosh County Battalion. In 1817, the war relegated to history, Hopkins was commissioned a brigadier general in command of the militia for eight Georgia counties, including Chatham and Savannah. This was a year before his eldest son's slave buying and legal appearance in Adams County, Mississippi. Between 1807 and 1816, Gen. Hopkins served as a representative and one term as a senator in the Georgia

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[17] Five witness subpoena forms completed by hand in mid-October 1816 name Francis Hopkins as the co-defendant in a prosecution brought in the Territorial Court of Adams County, Mississippi, wherein Hiram Decker is the first named defendant. Diligent search and inquiry suggests no one from the vicinity of Knox County, Indiana, named "Francis Hopkins" who might have been associated with Luke Decker or his son Hiram at the time. The circumstantial evidence suggests Hopkins as the buyer, coupled with the absence of evidence of any other substantial slave owner or trader of the time named Francis Hopkins.

[18] 1820 U.S. Census, Census Place: McIntosh County, Ga. at 26; *see also* David Hopkins, *Slaves of Francis Hopkins* (Apr. 30, 2007), http://www.genealogy.com/forum/surnames/topics/hopkins/6049 [https://perma.cc/BHU9-VJ4H].

legislature. He also served as a justice of the McIntosh Inferior Court from 1813 until his death in 1821.

John L. Hopkins (1795-1828), a lawyer and the eldest son of Francis Hopkins, would have been about twenty-one years old in 1816. That John dealt in slaves in Mississippi is suggested by a March 1819 transaction. A man named Thomas C. Vaughan bought two slaves from Elijah Morton, in exchange for Morton's $1,775 note payable and negotiable at the Bank of the State of Mississippi on March 6, 1819. John Hopkins and another, Andrew Montgomery, guaranteed the note. Before the note was due, Vaughan published notice on March 2, 1819, in the Natchez newspaper (Mississippi Republican) that he would not pay the note unless compelled by law, as the slaves had "proved unsound."

Francis Hopkins and his son were otherwise not strangers to lawless adventures. On March 27, 1819, not long after the problematic slave transactions near the Natchez area, John and his father became engaged in Darien, Georgia, in a verbal altercation with a family friend named McQueen McIntosh, a volatile member of the first family of McIntosh County. Long story short, John assaulted McIntosh with a cane and pistols and killed him. In short order, John was tried and found guilty of manslaughter. He was sentenced to three years imprisonment. In time, he escaped (or through family influence made a civil exit) from the prison. John then fled to England, returning to southeast Georgia a few years later to set matters straight. The governor granted a full pardon, whereupon John Hopkins moved to Tennessee to open a new law office, and in due course become a judge and establish a new family. As fate would have it, the Georgia governor's grant of peace was short lived. John made it only to the age of thirty-three, whereupon he was shot and fatally wounded by a party aggrieved by one of Judge Hopkins' rulings.[19]

## III. THE VOYAGE TO NATCHEZ

By 1811 there were the beginnings of steamboat traffic from Pittsburgh down the Ohio River then to the Mississippi River and

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[19] Betsey Fancher, *The Duel They Still Talk About*, ATLANTA J.-CONST., Nov. 2, 1964, at 21.

on to New Orleans. Flatboats or "broad-horn[s]"[20] were in use for transporting a variety of cargoes, including large numbers of slaves. Downstream navigation usually meant a float rate of about four miles per hour. Approximately 600 river miles lay between Cairo, Illinois, and Natchez. Commonly the slaves were confined by chains in steerage or on open decks. In the latter instance, slaves would be "forced to sit on open decks, usually surrounded by boxes of cargo and supplies."[21] One report has fourteen large broad-horns docking in Natchez in 1817 with cargoes of slaves to be marketed.

No known documentation describes the vessel Luke Decker sent south in the summer of 1816. Decker's human cargo-laden vessel likely arrived in Natchez in the late summer of 1816. Once disembarked and offloaded in Natchez, Decker sold at least twenty-eight slaves "as slaves for life." The sale and then escape[22] of Harry and his companions was surely in the late summer or early fall of 1816. These were men of practical reason, a point Judge Joshua G. Clarke would make with eloquence a few years later on behalf of a less fortunate slave.

Careful investigators have reported that lawyers found southwest Mississippi—territory and then state—an attractive place to establish a practice. Title and other land disputes are often mentioned. On the other hand, in the early 1820s, New Jersey immigrant lawyer Richard Stockton, Jr., (1791-1827) found that "nobody ever paid a circuit rider: only in Natchez was it

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[20] *See* J. F. H. CLAIBORNE, MISSISSIPPI AS A PROVINCE, TERRITORY AND STATE, WITH BIOGRAPHICAL NOTICES OF EMINENT CITIZENS 537-38 (1880).

[21] RONALD L.F. DAVIS, THE BLACK EXPERIENCE IN NATCHEZ: 1720-1880, at 74 (1993).

[22] Historian J. F. H. Claiborne has reported that, "when the territory of Indiana became a State, with a constitution prohibiting slavery[,] Decker immediately brought his negroes to Mississippi, and sold them. They instituted a suit for their freedom[,]" leading to the decision in *Harry*. CLAIBORNE, *supra* note 20, at 470. Claiborne cites nothing. The fact that Hiram Decker is the lead named defendant suggests that Decker still had an ownership interest that had to be extinguished before Harry and the others could be free. If title had passed to Hopkins, he likely had a claim against Decker, should that title be held defective. As a practical matter, the lawyer for Harry and the others thought it prudent to join as defendants both the prior owner and master of the slave vessel that docked in Natchez and, as well, the buyer, quite likely Francis Hopkins.

possible to build up a lucrative practice."[23] Still, finding a lawyer to help Harry and the others may have presented problems. There are many unanswered questions of how the Decker-sold slaves got to the courthouse. As a practical matter, they must have had assistance of white persons in the area. The fact that in time a jury found that Harry and the others should be granted their freedom is strong evidence that there were white persons in the area ready and willing to help.

The circumstantial evidence leaves little doubt but that at some timely point these slaves escaped and found counsel at the hands of lawyers like Lyman Harding and Tully Robinson. By late October of 1816 their case was formally before a trial court of the Mississippi Territory, called "a superior court holden at the court house in and for the county of Adams." This wording comes from a printed form in use in October of 1816 by way of which witnesses were subpoenaed and thus commanded to appear and testify. The presiding officer was ten-year veteran Territorial Judge Walter Leake, who had held that office since 1807.[24] Judge Leake would later become a delegate to the 1817 constitutional convention, representing Claiborne County. After statehood, Leake served briefly as a U.S. Senator and was then was elected the third governor of Mississippi. Governor Leake held office from January 1822, until his untimely death in late 1825 cut short his life and public service.

Witness subpoenas were issued for a trial set in Natchez for the third week in October of 1816. By their form these subpoenas were issued by the clerk of the superior court for a trial of the case brought by the Mississippi Territory against Hiram Decker and Francis Hopkins. This form suggests a prosecution in the public interest, that Decker and Hopkins were charged with committing an offense against the peace and dignity of the Territory. The charge is not specified in records that have surfaced to date. The known facts suggest that the prosecution may have been

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[23] ALFRED HOYT BILL, A HOUSE CALLED MORVEN: ITS ROLE IN AMERICAN HISTORY 84-85 (Princeton Univ. Press rev. ed. 1978).

[24] Judge Leake would later become a delegate the 1817 Constitutional Convention, representing Claiborne County. *See* DAVID G. SANSING, MISSISSIPPI GOVERNORS: SOLDIERS, STATESMEN, SCHOLARS, SCOUNDRELS 27-29 (2016); David G. Sansing, *Walter Leake, in* THE MISSISSIPPI ENCYCLOPEDIA 718-19 (Ted Ownby et al. eds., 2017).

commenced under the territorial law of 1808 regulating the importation of slaves.

At least five witnesses were subpoenaed by the Mississippi Territory. These included John Routh, one of the largest cotton planters in the world at the time. Another witness subpoenaed to testify against Decker and Hopkins was Natchez merchant Christopher H. Kyle, known to have freed his slaves. Court records in that territorial prosecution reflect subpoenas issued at the insistence of Decker and Hopkins for ten witnesses, including brothers Abraham Decker and Luke Decker.[25] Keep in mind that Hiram was the son of Luke Decker and the grandson of John Decker. Known facts and circumstances leave little doubt this earlier case involved the same persons and arose from the same events as gave rise to the petition for freedom-by-residence, the appellate version of which we know as *Harry and Others.*

Records available to date do not confirm whether the trial was held as scheduled. Then as now trial settings were often cancelled, with the case continued and a new trial date set at some point in the future. A news report from Natchez published in Washington, D.C. and in Boston almost three years later suggest a trial "during the late term of our Superior Court."[26] The dateline on both known published versions of the story reads "Natchez, June 20."[27] June 20 of what year? We know that in the late summer of its June Term 1818 the Supreme Court of Mississippi decided the case of *Harry and Others vs. Decker & Hopkins.* But that was the appeal. The news reports describe a trial and jury verdict granting the slaves their freedom. By the calendar, this means the Natchez news story was authored on June 20, 1817, referring to a trial at the most recent term of superior court prior thereto. A second puzzle is that the news reports refer to "the case of Harry et al. vs. Decker & Hopkins," not Mississippi Territory

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[25] Court records show that Abraham Decker was served with the subpoena compelling his attendance as a witness in the Circuit Court of Adams County on October of 1816. Luke Decker, however, was not served. Presumably this was because Luke was otherwise occupied back in Indiana with the escape of his slaves named Anthony and Bob.

[26] DAILY NATIONAL INTELLIGENCER (Washington, D.C.), July 20, 1819, vol. 7, Issue 2034, at 2,; NEW-ENGLAND PALLADIUM (Boston, Mass.), July 30, 1819, vol. 49, Issue 9, at 1.

[27] *Id.*

vs. Decker & Hopkins.[28] This fits with the opinion of the Supreme Court in *Harry and Others*, which in its very first sentence says the court is considering the "motion for a new trial" filed by Decker and Hopkins.[29] A territorial proceeding naming Hiram Decker, the person in charge of the slaves brought from the "neighbourhood of Vincennes," suggests a criminal or other public interest prosecution.[30] The case in the Supreme Court naming the long deceased John Decker suggests the legal ownership and title were involved in that case.

But how and why did the case get from the form of a territorial prosecution, which it was in October of 1816, to become a civil action, petitions for freedom of slaves, by the "late term of our Superior Court" prior to June 20, 1817?[31] A not unreasonable hypothesis here is that, once in the hands of lawyers like Harding and Robinson, the tactical decision was made to seek only freedom for the slaves. Sympathetic and savvy lawyers would have known of the substance and procedure for petitions for freedom by slaves. Any claim of illegal trafficking in slaves may have seemed problematic and, besides, freeing Harry and the others was much more important than sticking Decker and Hopkins with the monetary penalties authorized under the Act of 1808.

There is another question. *Harry and Others* decides the appeal brought by Decker and Hopkins regarding only three slaves, Harry and two others. What happened to the other twenty-five slaves who "by the decision of the court and jury were restored to entire freedom"?[32] Here the likely answer turns on a technical legal point. Harry and the two others had been Decker's slaves for three years before the July 13, 1787, effective date of the Northwest Territory Ordinance. This gave Decker a stronger position for his non-retroactivity objection, uncomplicated by the fact that the other twenty-five slaves had all been acquired after 1787, and after the anti-slavery clause of the Ordinance was in full force and effect. New buyer Hopkins was a necessary party,

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[28] *Id.*

[29] Harry v. Decker, 1 Miss. 36, 36 (1818).

[30] *Id.*

[31] DAILY NATIONAL INTELLIGENCER (Washington, D.C.), July 20, 1819, vol. 7, Issue 2034, at 2; NEW-ENGLAND PALLADIUM (Boston, Mass.), July 30, 1819, vol. 49, Issue 9, at 1.

[32] *Id.*

but almost certainly the laboring oar and expense of the appeal was borne by Decker, who in law was obliged to defend the title to the slaves that he had conveyed to Hopkins.

As much as we hope that these puzzles may at some point be answered definitively, by records of authenticity and detail, they cause no concerns for the central premise and achievement of this important constitutional encounter in Mississippi's history.

## IV. THE SUMMER OF 1818

The Supreme Court of Mississippi was still a gleam in the eye—an imminent gleam, to be sure—when Harry and his companions were force fed into the Natchez slave market in the southwestern Mississippi Territory. That court formally sat in the late spring and then through the summer of 1818. Statehood had been formally accomplished on December 10, 1817. Four judges served in that first term and year. They also served as circuit judges (trial judges, sometimes known as superior court judges).[33] These four were:

Presiding Judge John Taylor (1783-1820) of Adams County served from the Second District. Taylor was born in West Chester, Pennsylvania. His father had been a deputy sheriff, and John assisted him at the courthouse. By age eighteen John had begun to read law. In St. Louis in 1804 Taylor obtained his first license to practice law. In 1805, he came south to New Orleans, but soon moved back up river to Natchez. Taylor's first case in Natchez was a criminal case of some notoriety, and he won an acquittal. Within "a few weeks [he] had an extensive practice."[34] He had served as a delegate to the constitutional convention in the late summer of 1817. Taylor won his legislative election as Second District Judge in 1818. He died in 1820 while still on the bench.

Judge John P. Hampton (died in 1827) of Wilkinson County served from the Third District (Wilkinson County east to the Pearl River). A native of South Carolina, Hampton became Presiding Judge Hampton in 1820 succeeding John Taylor. Hampton was reported to have been "a lawyer of deep learning, and his decisions

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[33] *See* Michael H. Hoffheimer, *Mississippi Courts: 1790-1868*, 65 MISS. L.J. 99, 113-17 (1995) (providing an explanation of the original court system of Mississippi).

[34] CLAIBORNE, *supra* note 20, at 354.

were marked by a lofty and unswerving regard for equity and justice. He was accused of trying to enforce a standard of pure morality too lofty for practical use in the ordinary affairs of life."[35] Altogether John Hampton served for almost ten years, 1818-1827.

Judge Joshua G. Clarke[36] (1780-1828) of Claiborne County served from the First District (Warren, Claiborne and Jefferson Counties) until late November of 1821. Judge Clarke was front and center for an exquisite constitutional experience in the summer of 1818, and for another in June of 1821.

Judge Powhatan Ellis[37] (1790-1863) of Wayne County, and a native of Virginia, served from the Fourth District from 1818 until September of 1825, when he resigned to accept an appointment to represent Mississippi in the United States Senate.

## V. THE MAN OF THE CONSTITUTIONAL MOMENT

Little is known about the early life of Joshua Giles Clarke. It is believed that he was born in Maryland[38] in 1780. In time the family moved to Pennsylvania, where Clarke is said to have "received a competent education."[39] At some point Clarke came to Mississippi. In 1807 "he married Martha (Patsey) Calvit of Jefferson County."[40] The Calvit family had come to the southwestern corner of the Mississippi Territory after the American Revolution and had "become prominent plantation owners, slaveholders, and political figures."[41] An admiring descendant reports that "Clarke's family—his wife, children, nephews, and in-laws were slaveholders . . . . [H]e was a relatively

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[35] Anna Pittman, John P. Hampton (unpublished manuscript) (on file with the State Law Library, Supreme Court Building, Jackson, Mississippi).

[36] J. Calvitt Clarke III, *The Life of Joshua G. Clarke: Mississippi's First Chancellor*, 20 FCH ANNALS: J. FLA. CONF. HISTORIANS 1, 6 (2013), http://fch.ju.edu/fch_vol_20.pdf [https://perma.cc/R4XF-XL9F].

[37] *See, e.g.*, LeAnn W. Nealey, *Ellis Powhatan, in* THE MISSISSIPPI ENCYCLOPEDIA 386-87 (Ted Ownby et al. eds., 2017).

[38] *See Convention of 1817*, NATCHEZ GAZETTE (Natchez, Miss.), July 6, 1831, at 2.

[39] James Daniel Lynch, *The Bench and Bar of Mississippi*, MISS. GENEALOGY TRAILS, http://genealogytrails.com/miss/benchandbar.html [https://perma.cc/W88G-3XF6] (last visited April 13, 2018).

[40] *See* Clarke, *supra* note 36, at 3.

[41] *Id.*

small slave owner himself."[42] In 1810, six slaves lived in Joshua Clarke's household in Claiborne County, and also in 1816.

Politically, Clarke "was a Jeffersonian Republican, and in July 1817, he became a founding member and first secretary of the Washington Lodge of the Freemasons in Port Gibson," in time the county seat of Claiborne County.[43] In 1826 Chancellor Joshua G. Clarke played a leading role in establishing Mississippi's first Episcopal diocese, connecting with the Protestant Episcopal Church in the United States. In these latter years of his all too short life, Clarke "built Claremont, among the first of the larger homes near Port Gibson."[44] In 1979 the National Register of Historic Places added Claremont to its register.

In the summer of 1818, this man, this brand new first-term-of-court judge, in the first term of the court as well, would be called upon to adjudge the claims and defenses of three recently sold slaves from Indiana and their would-be masters of more than thirty years. This is the story of an early practical experience in the judicial aspect of constitutional government in the new state of Mississippi, and of the light it shone that had not quite been extinguished by 1857 when it was cited by U.S. Supreme Court Justice John McLean in dissent from the judgment in a case that lives in infamy.[45]

Joshua G. Clarke had a varied professional career. His lawyering days date back at least to January 7, 1804, when he was admitted to practice by Judge Peter Bryan Bruin in Claiborne County. In late November 1804, he made a filing in an estate matter. One historian described him as "a lawyer of ability, and a man of sterling qualities."[46] Another writing in 1891 said "Judge Clarke was not a brilliant lawyer, but was careful, well-read and solid. He was patient and amiable, and his opinions quite creditable."[47] In time he began to represent parties with land title claims, often complicated by purported sovereign grants from Spain or France. As late as 1817 Clarke appeared as counsel for

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[42] *Id.* at 1.

[43] *Id.* at 4.

[44] *Id.*

[45] Dred Scott v. Sandford, 60 U.S. 393, 561 (1857) (McLean, J., dissenting).

[46] Lynch, *supra* note 39.

[47] 1 BIOGRAPHICAL AND HISTORICAL MEMOIRS OF MISSISSIPPI 112 (Chicago, Goodspeed Publ'g Co., 1891).

defendant in a case that came before the formally brand-new state supreme court in the following year.[48]

Clarke represented Claiborne County in the Mississippi Territorial Legislature.[49] In the summer of 1817, he served as a delegate to the constitutional convention along with his future judicial colleague, John Taylor. Some thought Clarke had "one of the best legal minds in the Convention and did faithful service by his wise advice and counsel."[50] In short order Clarke would be called upon to construe and apply and lead the people in understanding the respect for humanity embedded within the Constitution he helped draft.

In January of 1818, the General Assembly considered Clarke for the office of Judge of the First District (Jefferson, Claiborne and Warren Counties). He was defeated, however, by William Bayard Shields, by a vote of 21 to 11. Before the new state supreme court could do much at its first term that began in mid-June of 1818, President James Monroe had appointed Judge Shields as the trial court judge for District Court of the United States for the district consisting of the new state of Mississippi. On July 2, 1818, Shields formally resigned his state judgeship. On July 9, 1818, Clarke accepted a commission from Governor David Holmes to replace Judge Shields.[51] Almost three-and-a-half years later—in late November of 1821—Clarke resigned his dual trial/appellate state judgeship to become the first Chancellor for the State of Mississippi. In time one of the state's preeminent chancellors would comment that "fortunately [Clarke] was selected as the first chancellor, the position being regarded as preferable to a place on the supreme court bench."[52]

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[48] Holt v. Briscoe, 1 Miss. 19 (1818).

[49] Andrew T. Fede, *Judging Against the Grain? Reading Mississippi Supreme Court Judge Joshua G. Clarke's Views on Slavery Law in Context*, 20 FCH ANNALS: J. FLA. CONF. HISTORIANS 11, 12 (2013), http://fch.ju.edu/fch_vol_20.pdf [https://perma.cc/R4XF-XL9F].

[50] Dunbar Rowland, *Mississippi's First Constitution and Its Makers, in* PUBLICATIONS OF THE MISSISSIPPI HISTORICAL SOCIETY 79, 89 (Franklin L. Riley ed., 1902).

[51] Governor Holmes acted in accordance with his authority whenever "a vacancy shall happen in any office[.]" MISS. CONST. of 1817, art. 4, § 13. Clarke's formal acceptance of the commission issued by Holmes is dated and signed July 9, 1818.

[52] V. A. GRIFFITH, MISSISSIPPI CHANCERY PRACTICE § 14, at 12 (2d ed., 1950).

Historian James D. Lynch had great praise for Clarke, the judge:

> [Clarke] possessed in a high degree that placid temper and amiable patience which comport so compatibly with the requisite character of a good chancellor and just judge . . . . His career upon the supreme bench, though short, gave eminence to his judicial character. His opinions are marked with learning, dignity, and force . . . .[53]

Professionally, Clarke's last six-and-a-half years were spent in service as Chancellor of Mississippi. "His learning and integrity first directed our system of equity jurisprudence into those channels through which it has flowed with increasing volume and utility."[54] One latter day observer says of Chancellor Clarke that "he presided for years with signal ability, purity of character and dignity."[55] In 1833, a new county in southern east central Mississippi along the Alabama state line was organized and given the name of Clarke County.[56]

The *Harry and Others* opinion was released by the Supreme Court of Mississippi in its very first term that began in late June of 1818. Then as now, as a practical matter, formal "terms" extended well beyond the month in which by law they should be convened. Word of Judge Shields' imminent appointment as federal judge was out at least as early as April of 1818. There is no reason to doubt that the first term of the state supreme court extended well past July 9 when Judge Clarke was commissioned and sworn in.

Adams County was a fortuitous venue. Warren, Claiborne and Jefferson counties may have been excluded if the suit had been brought after Judge Clarke took office. As the Judge for the First District, he would have almost certainly served as the trial judge, which would have precluded his sitting on the appeal. Practical realities plus the calendar, however, show this to have

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[53] Lynch, *supra* note 39.

[54] *Id.*

[55] ROBERT LOWRY & WILLIAM H. MCCARDLE, A HISTORY OF MISSISSIPPI FROM THE DISCOVERY OF THE GREAT RIVER BY HERNANDO DESOTO INCLUDING THE EARLIEST SETTLEMENT MADE BY THE FRENCH, UNDER IBERVILLE, TO THE DEATH OF JEFFERSON DAVIS 240 (1891).

[56] *Id.* at 460-61.

been impossible. The case first reached a territorial judicial docket before Mississippi's statehood and before there was a formal First District. As noted Hiram Decker's human cargo laden vessel would almost certainly have reached and passed Vicksburg on its downriver voyage by the late summer of 1816.

The opinion issued by the state supreme court in the summer of 1818 says John Decker and a man named Hopkins were the defendants in the suit filed by Harry and the others. But John Decker had been dead for twenty-eight years. Luke had inherited the bulk of his father's estate. In his opinion, Judge Clarke makes a reference to "old Decker", and then to "those who claim under him[.]"[57] The October 1816 witness subpoenas suggest that Hiram—son of Luke Decker and grandson of John Decker—was in fact the Decker defendant in Harry and Others' petition for freedom suit.

## VI. THE LEGAL LANDSCAPE

Mississippi was formally admitted to the Union on December 10, 1817. The twentieth state reached this goal one day short of a year after Indiana had achieved its statehood. Harry and his companions filed their petition for freedom before Mississippi became a state. What is known beyond any reasonable doubt is that writing a final decision on Decker's and Hopkins' appeal ultimately fell the lot of Judge Joshua G. Clarke.[58] Because "[t]he

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[57] Harry v. Decker, 1 Miss. 36, 42 (1818).

[58] Judge Clarke's name does not appear on the official report of the opinion. Circumstantial evidence shows beyond a reasonable doubt that Judge Clarke authored the opinion. Preliminarily, in those early years, most opinions were delivered orally. In that first year 1818, there were twenty published decisions by the Supreme Court. The author of only three of these is identified. One delivered by Judge Powhatan Ellis is a lengthy opinion concerning auditors accounts, having nothing in common with *Harry*. Judge John Taylor delivered a short opinion in December 1818 concerning issues of pleadings and process. He followed with a more lengthy opinion presenting a jurisdiction question and concerning a substantive controversy regarding public roads. Chief Judge John P. Hampton of Wilkinson County never authored an opinion of the style, substance or level of legal reasoning found in *Harry*. The unsigned opinions delivered in 1818 include *Harry*. The strongest evidence that Judge Clarke authored *Harry* is his 1821 opinion in State v. Jones, 1 Miss. 83 (1821), concerning the murder of a slave by a white man not the slave's master. The humanity and style of reasoning manifest in *Jones* are consistent with *Harry*. Three others have considered the authorship of *Harry*. After a careful analysis, U.S. District Judge Michael P. Mills concluded the *Harry* opinion "rendered anonymously . . . in 1818, could only have been

facts in this case are not controverted[,]" Judge Clarke spent little time with the factual or procedural details.[59] He said enough that, with all else that is known, what happened is clear in its broad strokes.

The legal landscape in Mississippi recognized the practice of slavery, before and after statehood. A discrete but unnumbered article labeled "Slaves," and containing two numbered sections, was included in the constitution drafted in the late summer of 1817.[60] Section 1 treats slaves as property in the eyes of the law in any number of contexts. Slaveholders were protected from legislative emancipations. No law granting slaves their freedom could be passed "without the consent of their owners, unless where a slave shall have rendered to the state some distinguished service, in which case the owner shall be paid a full equivalent for the slaves so emancipated."[61] What is more, the General Assembly was without power to prevent new settlers coming to Mississippi from bringing their slaves with them. These "slaves" included "such persons as are deemed slaves by the laws of any one of the United States, so long as any person of the same age or description shall be continued in slavery by the laws of this state."[62] After all, it was the loud and clear public policy of the new state that settlers from older parts of the country be encouraged to emigrate, bringing their slaves with them, and make their homes and fortunes in the new state.

There was no Northwest Ordinance for slaves in pre-statehood Mississippi to turn to for help. The Georgia Compact of 1798 established the Mississippi Territory and declared applicable the first five articles of the Northwest Ordinance. Article 6, however, was omitted. The Georgia Compact limited slavery only in the sense that the foreign slave trade was declared illegal in the

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penned by Justice Clarke." Mills, *supra* note 16, at 178. Andrew T. Fede has come around to this view after an appropriate initial reluctance. *See* ANDREW FEDE, *supra* note 14, at 298; *see also* Fede, *supra* note 50, at 18. Judge Clarke's great-great-great grandson has persuasively argued that Clarke authored *Harry*.

[59] Harry v. Decker, 1 Miss. 36, 36 (1818).

[60] The unnumbered article regarding "Slaves" in the Constitution of 1817 bears a marked similarity to the Constitution of Kentucky, Article VII (1799). KY. CONST. of 1799, art. VII. At many points the texts of the two are verbatim identical.

[61] MISS. CONST. of 1817, Slaves, § 1.

[62] MISS. CONST. of 1817, Slaves, § 1.

Mississippi Territory. Mississippi was still a territory at the time Decker's vessel descended the River until Hiram reached what he thought were the more amenable territorial waters of the not-quite-yet twentieth state. In time, the state constitution would grant the General Assembly of Mississippi "full power to prevent slaves from being brought into this state as merchandise."[63] At that moment, however, Luke Decker was more concerned with the constitution of the nineteenth state when his vessel—his son, Hiram at the helm—embarked from Knox County, Indiana, for more friendly waters, his valuable cargo and merchandise including Harry and the other slaves.

## VII. FREEDOM IN THE TRIAL COURT

Harry and twenty-seven others sued for their freedom in a territorial trial court. The Supreme Court concludes "that the petitioners are entitled to have the verdict confirmed." Judge Clarke's second sentence refers to "the court below."[64] There is every good reason to take the word "verdict" at face value.[65] Though not in effect at the time of trial, such common law practices were hardly a controversial aspect of the case. Lawyer and historian Andrew Fede has reasonably assumed "[a] jury verdict favored the plaintiffs." *Harry and Others'* dual references to "motion for a new trial" are consistent with a jury having returned a verdict favorable to those who had petitioned for their freedom. Knowing that Mississippi Territory vs. Hiram Decker

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[63] MISS. CONST. of 1817, Slaves, § 1.

[64] Harry v. Decker, 1 Miss. 36, 36 (1818). This reference should be understood in the context of the "fully developed, multi-level court system in the [Mississippi] territory" in place immediately prior to statehood. Hoffheimer, *supra* note 33, at 116.

[65] Two years later, this same terminology was used with its still customary meaning and effect. In *Hinds v. Terry*, as in *Harry*, the matter came before the Supreme Court on a motion for a new trial. 1 Miss. 80 (1820). The procedural question was whether, after a trial, the "verdict" should have been set aside. The term "verdict" is correctly used a number of times, in contradistinction from the term "judgment," also used correctly. *Id.* at 81-83. There is no reason to believe that in *Harry* Judge Clarke was using these terms in a different sense than that Judge Powhatan Ellis had in mind two years later in *Hinds*. Given that the term "jury" appears at least six times in *Hinds*, there is every good reason to take *Hinds v. Terry* to confirm that "motion for a new trial" and the other terms used in *Harry* collectively and equally connote a verdict at the end of a jury trial. After all, Judge Clarke was still on the court at the time of *Hinds* in 1820.

and Francis Hopkins was on the trial docket in Adams County in October of 1816 makes it almost certain that the trial preceding *Harry and Others* was held in Adams County, such that the jury hearing the case can be scrutinized against the backdrop of the particular mores and idiosyncrasies of the eligible jurors and the people of Adams County at large.

The reported opinion in *Harry and Others* opens with a puzzle.[66] Judge Clarke said that in what was to follow he would confine himself to those issues "as have occasioned a difference of opinion."[67] He added "that it is and always will be a source of regret, to me, when I am so unfortunate as to differ from my brethren of the bench[.]"[68] This suggested that there was a dissenting judge.[69] Judge Clarke wrote as though he was expecting one of his colleagues to dissent.[70] Yet no dissenting opinion, or other indicia of a formal dissent, have been found. In a more modern appellate court, this would likely mean that, when the judges discussed the case in conference, one judge disagreed with the majority, but, when the majority opinion was circulated, for one reason or another that judge changed his mind and decided not to dissent. All that the record published by official reporter Robert J. Walker reflects is that no judge dissented.[71]

## VIII. JUDGE CLARKE'S LEGAL ANALYSIS

Cases like *Harry and Others* are difficult to discuss today. Slavery was a monstrous evil. The level of moral wrong and harm

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[66] Harry v. Decker, 1 Miss. 36, 36 (1818).

[67] *Id.*

[68] *Id.*

[69] Some might think it odd that Judge Powhatan Ellis approved the opinion in *Harry*. The reason why this might be so is found in Judge Ellis' opinion in *Hinds v. Terry*. 1 Miss. 80 (1820). *Hinds* arose from a dispute over property rights in an unnamed slave. The decision is governed by the common law rules governing tenants in common and the common law action of trover against another. To be sure, the opinion coldly treats the slave as property and nothing more. Nothing in *Harry* suggests any judge approving that opinion should have legal objections to anything in *Hinds*, nor vice versa. The two cases are about two distinct dimensions of the existence of slaves in Mississippi in 1818-1820.

[70] *See Harry*, 1 Miss. at 36.

[71] The earliest dissents Walker noted in the early years were in 1824. One is recorded as simply "Judge Turner dissented." Bolls v. Duncan, 1 Miss. 161, 165 (1824). The other as "Judge Stockton dissented." Stark's Heirs v. Mather, 1 Miss. 181, 193 (1824).

from slavery in the antebellum United States is such that saying anything positive about participants in the practice invites opprobrium—from within the speaker and from without. Harry and his companions are the heroes of this story, if only more could be known about *their* story.[72] We know even less about the unfortunate slave whose loss of life led to *Jones v. State*.[73] These are like unknown soldiers. Indeed, it is not even known whether or how many of the "others" who accompanied Harry may have been women. As with Bob and Anthony back in Indiana, it took courage "to confront a man of [Luke] Decker's reputation."[74] All have earned a unique place of honor in history. This brings to mind an insight of Justice Evelyn Keyes of Texas. "The study of the humanities by lawyers and judges . . . acquaints us with different modes of perception and understanding of human predicaments and of the essential dignity and worth (or evil [or ambiguity]) of those caught within those predicaments . . . ."[75] Keyes points to "revelations of the dehumanizing experience of slavery captured by Toni Morrison's *Beloved*."[76] The constitutional experiences are presented here with every reasonable effort made that they be understood in the practical and legal and *human* contexts of the times.

In the summer of 1818 the Supreme Court of Mississippi affirmed the territorial court's judgment granting Harry and two companions their freedom.[77] Clarke began his opinion for the court with the fact that "the three negroes were slaves in Virginia[.]"[78] He never denied that slavery was lawful in

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[72] Lea VanderVelde has told the story of Dred Scott and his wife. *See* LEA VANDERVELDE, MRS. DRED SCOTT: A LIFE ON SLAVERY'S FRONTIER (2009); *see also* VanderVelde, *supra* note 4. It would be a great good fortune to history and humanity if some day something approaching that level of personal information will be found so that Harry's story and the stories of his companions may be told, at least as fully as the story of the Decker family is known.

[73] State v. Jones, 1 Miss. 83, 85 (1821).

[74] Merrily Pierce, *Luke Decker and Slavery: His Cases with Bob and Anthony, 1817-1822*, 85 IND. MAG. HIST. 31, 45 (1989).

[75] Evelyn Keyes, *The Literary Judge: The Judge as Novelist and Critic*, 44 HOUS. L. REV. 679, 699 (2007). Justice Keyes sits on the Texas Court of Appeals, First District. Keyes spent her early childhood and adolescent years in Greenville, Mississippi, *sub nom.* Evelyn Vincent.

[76] *Id.*

[77] Harry v. Decker, 1 Miss. 36, 43 (1818).

[78] *Id.* at 36.

Mississippi.[79] Clarke's subsequent opinion three years later in *State v. Jones*,[80] decided in June of 1821, equally accepted the legality of slavery in Mississippi. The constitution emerging from the Washington, Mississippi, convention in the late summer of 1817 never affirmatively said, "slavery is legally permissible in this state," but it assumed as much.[81] The lack of an affirmative constitutional blessing for slavery left room for Clarke's natural law argument that followed.

Clarke never suggested that Decker could not have legally owned Harry and the others in Mississippi, or that he could not have sold them in the state, if Decker had brought them to Mississippi by some strategy appropriate to their status.[82] If in 1784 John Decker and his family had left Hampshire County, Virginia, for example, and traveled directly to the Mississippi Territory,[83] never leaving slave states, and then settled in the territory, the legal premises of *Harry and Others* would have required a judgment for Decker. And, if the Decker family had stopped in the Mississippi territory, as sojourners in Mobile or at some settlement in what is now Alabama, and had lived there with family and slaves uninterruptedly until 1816, then moved on and resettled in Natchez, the same legal outcome would follow. Had any of these been the facts "not controverted," judgment would have had to be rendered for the Deckers who had taken under "old Decker's" will. If the 1816 voyage down the River had been a part of a *bona fide* effort by the Decker clan to resettle in Mississippi, the case for Harry and the others would have been harder, though the Deckers' knowing continued residence in the Indiana Territory from 1787 until 1816 would have provided a strong ground for freedom-by-residence.

Clarke accepted the above premises, albeit *sub silentio*. He had to. He argued, however, that these were not the facts and

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[79] *Id.* at 36-43.

[80] State v. Jones, 1 Miss. 83 (1821).

[81] *See* MISS. CONST. of 1817.

[82] *Harry*, 1 Miss. at 36-43.

[83] Paul Finkelman had employed four categories of presence on "free soil" to assist in analyzing freedom-by-residence cases. These categories are "transient, visitor, sojourner or resident." FEDE, *supra* note 14, at 288-89, 326 n.10 (quoting and discussing PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY 9 (1981)).

certainly not the outcome determinative facts before the court in the summer of 1818.[84]

## IX. A CASE OF FIRST IMPRESSION

There are always cases that have never arisen in a given jurisdiction in the precise form presented by a particular case at hand, cases where there is no applicable rule of the positive law, but yet the case must be decided.[85] In the summer of 1818, and the years that ensued, practically every case that came before the brand new Supreme Court of Mississippi was in some sense a case of first impression.[86] There was the common law to the extent it might apply.[87] The judges had been directed that the territorial law be followed, except to the extent displaced by the new Constitution.[88] More so than today,[89] early statehood judges of practical necessity relied in substantial part on their personal experiences, general learning and intuition. They had to. The appeal brought by Decker and Hopkins presented such a case of first impression. In *Harry and Others* Judge Clarke relied on his

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[84] Harry v. Decker, 1 Miss. 36 (1818).

[85] See my discussion in James L. Robertson, *Variations on a Theme by Posner: Facing the Factual Component of the Reliability Imperative in the Process of Adjudication*, 84 MISS. L.J. 471, 520 (2015).

[86] *See, e.g.*, Bolls v. Duncan, 1 Miss. 161, 161 (1824) (explaining the law of escheat and the administration of estates, where Chief Judge Hampton began "[i]t is a case of the first impression, arising under our own municipal laws, in the adjudication of which we are not to expect lights and precedents from abroad").

[87] The inhabitants of all new states coming into the Union were entitled to "judicial proceedings according to the [] common law[,]" guaranteed by *Article the Second* in the Northwest Territory Ordinance of July 13, 1787. Hoffheimer, *supra* note 33, at 103 n.12. This Ordinance established the Equal Footings Doctrine under which all new states were admitted "into the union upon the same footing with the original states." Act of Mar. 1, 1817, ch. 23, 3 Stat. 348; *see also* Act of Dec. 10, 1817, 3 Stat. 472, 472-73 (formally admitting Mississippi to the Union). The new state accepted these terms in the Preamble to the Mississippi Constitution of 1817.

[88] MISS. CONST. of 1817, Schedule, § 5.

[89] Even today judges are from time to time charged to decide cases of first impression. In cases where the legal materials are plentiful, "[i]t is a rare case on appeal when the judges are not influenced by some point not in the record, e.g., something remembered from prior similar cases, cases found by the judge or a law clerk on independent research (and not just on updating the research after the briefs have been filed), a point the judge remembers from prior practice of law, a lesson remembered from law school, etc. . . . At times judges are influenced by political, religious or moral beliefs, no matter how hard the judge may try to play it straight." Robertson, *supra* note 83, at 531 n.249.

experience as a delegate to the constitutional convention in the late summer of 1817.[90] His discussion of Rousseau's "social compact" political theory was almost certainly a product of his own education and general reading, rather than argument presented by counsel.[91] He likely relied as well on what in his view were "considerations of what [wa]s expedient for the community concerned."[92]

While freedom-by-residence cases became familiar in time, Joshua Clarke had no such precedent to guide him in the summer of 1818. Border slave state Kentucky would grant such a claim for freedom in October of 1820.[93] Virginia so held two months after that.[94] Louisiana's judicial acceptance of freedom-by-residence lay six years in the future.[95] The important Missouri jurisdiction—it wasn't even a state at the time *Harry* was decided—was more than six years away from formally recognizing freedom-by-residence.[96] In the summer of 1818, Clarke was on his own.[97] Still, he made it clear that he understood his responsibility to decide the case according to accepted legal methods, considering only legal premises known in those times and applied to the relevant facts. Clarke well knew that "the importance of the question is great[.]"[98] While the outcome determinative facts may have been undisputed, the proper reading of the controlling legal question was very much "controverted[.]"[99]

The basic rationale of freedom-by-residence cases was that, if, with the consent of his owner, the slave lived, resided on "free soil" for a significant period of time, the legal bonds of slavery were deemed expunged.[100] These bonds did not reattach if the former slave was later found in a slave state. This theme is found in

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90 Harry v. Decker, 1 Miss. 36, 41 (1818).

91 *Id.* at 40.

92 OLIVER WENDELL HOLMES, JR., THE COMMON LAW 35 (1881). This Holmes passage, give or take a few lines above or below, enjoys almost biblical authority.

93 Rankin v. Lydia, 9 Ky. (2 A.K. Marsh.) 467 (1820).

94 Griffith v. Fanny, 21 Va. (Gilmer) 143 (1820).

95 Lunsford v. Coquillon, 2 Mart. (n.s.) 401 (La. 1824).

96 Winny v. Whitesides, 1 Mo. 472 (1824).

97 Harry v. Decker, 1 Miss. 36 (1818).

98 *Id.* at 36.

99 *Id.*

100 For a full discussion of this point of slavery law in all of its complexities, and over time until *Dred Scott* in 1857, see FEDE, *supra* note 14, at 287-337.

*Harry and Others.*[101] No one moving to a new state or territory, establishing a new home and means of livelihood there, bringing his possessions with him, had a reasonable expectation that the laws of that state or territory would not someday be changed to his personal disadvantage. A new citizen was deemed to acquiesce in the law-making and law-altering processes of his new home jurisdiction. All were subject to what in time became familiar and known as the petty larceny of the police power.

Because Harry and the others were not just present but had in fact—and under the authority and direction of the Deckers—lived on free soil in the southwestern Indiana Territory for a substantial period of time, they had become free men in the eyes of the law. Their former legal subjugation to the Deckers was not resurrected in 1816 when they were brought into the Mississippi Territory against their will. This is particularly so here as Decker's undisguised purpose was to liquidate his assets that were threatened by the "free soil" clause in the looming new Indiana Constitution.

Clarke's reasoning was meticulous, elegant, philosophical and in the end practical and humane. Again, he began with the "facts . . . not controverted[.]"[102]

> [T]he three negroes were slaves in Virginia; that in seventeen hundred and eighty four they were taken by John Decker to the neighborhood of Vincennes; that they remained there from that time until the month of July, 1816; that the ordinance of Congress [was] passed in the month of July [of] 1787,[103] and that the constitution of the state of Indiana was adopted on the 29th [of] June, 1816.[104]

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[101] *Harry*, 1 Miss. at 36-43.

[102] *Id.*

[103] "An ordinance for the government of the territory of the United States, northwest of the river Ohio[,]" effective July 13, 1787. 2 THE PUBLIC STATUTES AT LARGE OF THE STATE OF OHIO: FROM THE CLOSE OF CHASE'S STATUTES, FEBRUARY, 1833, TO THE PRESENT TIME 86, 86-92 (Maskell E. Curwen ed., 1853-1861). The U.S. Supreme Court held the Ordinance unenforceable consistent with the U.S. Constitution in *Dred Scott v. Sandford*, 60 U.S. 393, 561 (1857) (McLean, J., dissenting). No state supreme court acting in 1818 should be faulted for not anticipating this ultimately tragic ruling.

[104] Harry v. Decker, 1 Miss. 36, 36 (1818).

The lands lying north and west of the Ohio River included "the neighbourhood of Vincennes."[105]

In 1787 Virginia granted its rights in these lands to the United States. Clarke looked carefully at Virginia's treaty of cession. Although these lands had been "conquered by the arms of Virginia. . . [he found] no evidence to show that the laws of Virginia [authorizing slavery] were ever extended to that country after its conquest."[106] Clarke then asked whether "the clause in the [Northwest] ordinance [Article 6] prohibiting slavery, or involuntary servitude, [is] a violation of the treaty of cession."[107] "I have endeavored to show, in what condition these people were after the conquest by Virginia, what rights they possessed, and the rights they acquired under the treaty of cession."[108] Judge Clarke viewed the Northwest Ordinance "as a compact between the original states, and the people and states of said territory."[109] He concluded that the "'titles, possessions, rights and liberties' . . . [these people] enjoyed, prior to the conquest, the *'lex loci,'* [were] not as citizens of Virginia, but as a provincial appendage."[110]

Then Clarke turned to Article 6. He noted and responded to Decker's argument that "those who were slaves at the passing of the ordinance, must continue in the same situation."[111]

> Can this construction be correct? Would it not defeat the great object of the general government[?] It is obvious that it would, and it is inadmissible upon every principle of legal construction.[112]

A pause is in order. Common sense suggests a reader of a legal (or most any other kind of) exposition should be careful when confronted with phrases such as "it is obvious," particularly when the question is so controversial and controverted. Such rhetoric—and even more, dramatic flourishes—were common 200 years ago, particularly in constitutional contexts. Still, Clarke's discussion

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105 *Id.*
106 *Id.* at 37.
107 *Id.* at 38.
108 *Id.*
109 *Id.* at 39.
110 *Harry*, 1 Miss. at 38.
111 *Id.* at 39.
112 *Id.*

would have been less provocative had he moved directly to his point that, if Article 6 were unenforceable, that might well mean that all other terms and provisions of the Ordinance were similarly unenforceable.

> Considering the six articles of compact equally obligatory and binding, made upon sufficient consideration, all the objection to the want of power in congress to make the compact with the people of the said territory must vanish.[113]

## X. THE PROBLEMATIC INDIANA CONSTITUTION

The newly adopted constitution of the state of Indiana was then called up and considered by Clarke as an independent and alternative ground on which Harry and the others may have become emancipated.[114] But there was a problem here. The Indiana constitution had no legal force or effect until the state was formally admitted to the Union on December 11, 1816.[115] Adopting a constitution was on the checklist of qualifications the applicant for statehood had to meet.[116] Indiana checked this one off as done on June 29, 1816, but that constitution remained inchoate until the other conditions of statehood—practical requisites such as surveying state boundaries, taking a census—had been met and formally accepted by the United States.[117]

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[113] *Id.* at 39-40.

[114] *Id.*

[115] On December 6, 1816, the U.S. Senate approved the act to admit Indiana as a state. On December 9, 1816, the U.S. House of Representatives approved the same bill. On December 11, 1816, President James Madison signed the act formally admitting Indiana as the nineteenth state of the United States of America. *See* U.S. CONST. art. IV, § 3, cl. 1 (describing the requirements for admission of states to the Union).

[116] On April 19, 1816, President Madison approved the Indiana statehood Enabling Act of 1816. Section 4 of that Enabling Act required Indiana to adopt a constitution, with two caveats. First, the new state constitution had to provide for a "[r]epublican [f]orm of [g]overnment," U.S. CONST. art. IV, § 4. Second, no clause in the new state constitution could be repugnant to the Northwest Ordinance of July 13, 1787.

[117] It appears that Indiana tried to make its constitution effective from its approval at the convention on June 29, 1816. *See* WILLIAM P. MCLAUCHLAN, THE INDIANA STATE CONSTITUTION: A REFERENCE GUIDE (1996); *see also* FEDE, *supra* note 14, at 297, 330 n.68. But Indiana could not have accomplished this without authorization from the Congress of the United States. This point of constitutional law is noted, though it does not detract (a) from Decker's strong incentive to remove his slaves from Indiana immediately so that he could sell them "down the river," or (b) from the reasonableness of Judge Clarke's course of discussing state sovereignty in *Harry and Others* to explain

Of course, we do not know the exact date when Decker's vessel left the territorial waters of Indiana headed south for its nefarious purpose. Clarke suggested it left the Indiana Territory in "the month of July, 1816."[118] We do know that all were in Adams County, Mississippi, in early October of 1816. The present point, of course, is that Decker's human-cargo-carrying vessel had long been far south of Indiana when statehood arrived on December 11, 1816.

The formal enforceability point aside, Clarke presented the case for state authority "to effect a general emancipation."[119] *Harry and Others* may have been the first time the courts of the new state of Mississippi would be called upon to adjudge a freedom-by-residence suit, but it certainly would not be the last. Lots of slaveholding men like Luke Decker lived in other states north of the Ohio River (or the Mason-Dixon Line). With improved technology in river navigation and transportation, any number of such men could be expected to use a Decker-like strategy to liquidate their assets on advantageous terms. To be sure, points the court might make on an issue not properly justiciable in the case *du jour* would be considered *dicta* and not binding precedents. An exposition of the law on the effect *vel non* of freedom-by-residence emancipation in another state could nonetheless be useful in future cases, if that discussion were well reasoned and persuasive. And not only in future Mississippi cases. The soon-to-follow decisions in Kentucky, Virginia, Missouri and adjacent Louisiana lay in the future.

In the years not too long after 1818, judges might see practical comity considerations for recognizing freedom granted to slaves in other states, and on a variety of particular grounds. It is not clear that Clarke foresaw this practice. He did see the need to engage the legal logic of freedom-by-residence by reason of constitutional emancipation in another state or elsewhere. He explained that and why other sovereigns just might have the authority to declare and really mean that all men were born free and possessed of unalienable human rights. At a time when people

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the point for judges likely to question the fact in the future, if not for other practical reasons as well.

[118] Harry v. Decker, 1 Miss. 36, 36 (1818).

[119] *Id.* at 40.

were exultant at having been accepted into the diverse and complex Union, the more broadminded among them likely sensed that respect for the laws of older states—not necessarily congruent with Mississippi law—was an obvious and practical step towards winning acceptance of Mississippi's law by other states.

According to Clarke, to engage this grounds for a freedom-by-residence suit, "we must first inquire into the source of sovereignty, as understood in these United States, to reside in the people."[120] The constitution that less than a year earlier he had helped write declared

> That all political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit; and, therefore, they have, at all times, an unalienable and indefeasible right to alter or abolish their form of government, in such manner as they may think expedient.[121]

This was not airy rhetoric to Joshua Clarke. Real, substantive and practical on-the-ground meaning flowed from this declaration, which he would proceed to explain.

## XI. POLITICAL THEORIST AND PRACTITIONER

The inquiry begins with the premise that, in all societies that are organized to the point where they have a government, there is an absolute power existing somewhere as a matter of social fact. As a practical matter, that power may be identified:

> In all governments whatsoever there must be of necessity, and in the nature of things, a supreme irresistible absolute and uncontroled authority, in which the "*jura summi imperii*," or the rights of sovereignty reside.[122]

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[120] *Id.*

[121] MISS. CONST. of 1817, art. 1, § 2. These sections of the Constitution of 1817 bear a marked similarity to the VIRGINIA DECLARATION OF RIGHTS, §§ 1-3 (1776) and to the KY. CONST. of 1792, art. VII.

[122] MEREDITH LANG, DEFENDER OF THE FAITH: THE HIGH COURT OF MISSISSIPPI 1817-1875, at 12 (1977) (emphasis added) (quoting *Harry*, 1 Miss. at 40). See *id.* for a further exposition of this text, published before some of the more recent findings regarding the facts and circumstances that have given rise to *Harry and Others*.

This absolute authority is to be understood "in contradistinction of the powers given under a constitution, or the powers of a limited government."[123] The power of the people is conceptually separate from a constitution. It precedes the existence of any constitution that might emerge.

> The people restrain the power under a delegated authority, but put no restraint upon themselves; the acts of the supreme power, though contrary to natural rights, are nevertheless binding. In every case under the social compact there must be an inequality to destroy the validity of the surrender? Among an ignorant and uninstructed people, what are the rights surrendered.[124]

Clarke answers with the teachings of Jean-Jacques Rousseau. Each person gives "all his rights and privileges to the whole community." "[A]ll are in the same circumstances, so no one can be interested in rendering burthensome their common connection."[125]

Clarke *qua* Rousseau follows with an incisive insight.

> [I]f anyone had a right distinct from another, which he pretended had not been surrendered, each individual might question the acts of the social compact, and if this was permitted, it would destroy itself, as there would be no common umpire to appeal to, a state of nature would exist, and the social compact be a splendid bauble.[126]

We read these words, and they immediately call to mind the first section in the Declaration of Rights in then new Mississippi constitution.

> That all freemen, when they form a social compact, are equal in rights, and that no man, or set of men, are entitled to exclusive, separate, public emoluments or privileges, from the community, but in consideration of public services.[127]

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[123] *Id.* at 12.
[124] *Harry*, 1 Miss. at 40.
[125] *Id.*
[126] *Id.*
[127] MISS. CONST. of 1817, art. 1, § 1.

Read together with Section 2, little doubt is left that Clarke was not just a delegate to the convention held in little Washington, Mississippi. He had in fact played a substantial drafting role at the convention. With or without the awareness of his fellow delegates, Clarke had infused the core political ideology of Jean-Jacques Rousseau at the heart of the new constitution.

A year later in *Harry and Others*, Clarke summarized and then applied Rousseau's thought. In doing so he may also have left another calling card that he was the author of the formally anonymous opinion in *Harry and Others*.[128] The Indiana constitutional convention had been "delegated by the people" with the power to adopt "articles of compact." One of those articles abolished slavery.

> Does not the first article of the constitution declare the condition of the people of Indiana free, and this condition, by the last section of the first article, is likewise declared to be out of the control of government, or to be a right reserved to the people.[129]

Clarke then described a "similar provision" in the Massachusetts constitution which abolished slavery, the concluding clause of that constitution declaring that "all laws conflicting with the provision of the constitution are repealed."[130] As this was so,

> Can it be that slavery exists in Indiana? If it does, language loses its force, and a constitution intended to protect rights, would be illusory and insecure, indeed. If the language is plain, saying there shall be neither slavery nor involuntary

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[128] Note the use of "social compact" in MISS. CONST. of 1817, art. 1, § 1 and in Harry v. Decker, 1 Miss. 36, 40 (1818), and on multiple occasions in the judicial opinion merely "compact." Most translate the title of Rousseau's famous work as "The Social Contract" published in 1762. Past this, the *Harry and Others* opinion misspells the great French political philosopher's name "Rosseau," omitting the first "u" which is otherwise universally used. *Harry*, 1 Miss. at 40. Of course, the blame here may lie with Robert J. Walker, the first official reporter of decisions of the Supreme Court who did not produce his volume of decisions until sometime in 1834, with *Harry and Others* being printed at pages 36-43. Accounts of Walker's service are told in both V. A. Griffith, *Mississippi Reports and Reporters*, 22 MISS. L.J. 37, 37-39 (1950), and JOHN RAY SKATES, JR., A HISTORY OF THE MISSISSIPPI SUPREME COURT, 1817-1948 (1973).

[129] *Harry*, 1 Miss. at 42.

[130] *Id.*

> servitude, does it comport with the constitution to say *there shall* be slavery? This dilemma cannot be got over, by those who give it a construction, that would make the petitioners slaves.[131]

Below the constitutional level were several other state statutory enactments regarding slavery. Clarke noted that Pennsylvania, Delaware, New Jersey, New York and the New England States—Massachusetts excepted—had legislated on the subject. These enactments were proper because there was no state constitutional clause denying that power to the state legislature. By way of contrast, Judge (and former Mississippi constitutional convention delegate) Clarke noted that on the matter of slavery, "so guarded was our convention upon this subject, that they inhibited the legislature from the exercise of the power."[132] Legislation regarding slavery was proper "when not restrained by the constitution, [as] is evident by the caution of our convention."[133]

## XII. CASES OF DOUBT

Legal questions of retroactivity remained. The Deckers argued that any such new laws could apply prospectively only. Otherwise vested property rights would be disturbed. This required the court to face a question of constitutional dimensions.[134] No one doubted that Harry and the others were in slave legal status before they were ever brought to land "in the neighborhood of Vincennes." And before there was an Ordinance of 1787. As this was so, neither the federal Northwest Ordinance, much less the pending new Indiana Constitution, could change

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131 *Id.*

132 *Id.* at 41.

133 *Id.*

134 Decker's and Hopkins' particular constitutional argument is not articulated in the opinion. Given the times and the brand new Constitution of Mississippi, one can easily see an argument based on one or more of the following: MISS. CONST. of 1817, art. 1, § 10 (stating no person "can [] be deprived of his . . . property, but by due course of law"); MISS. CONST. of 1817, art. 1, § 13 ("nor shall any person's property be taken or applied to public use . . . without just compensation being made therefor"); MISS. CONST. of 1817, art. 1, § 19 (providing "[t]hat no ex post facto law . . . shall be made"); MISS. CONST. of 1817, art. 6, § 10 (stating "shall pass no law impairing the obligation of contracts").

their status, or so the argument would go. When *Harry and Others* reached the Supreme Court of Mississippi in the summer of 1818, the meaning and effect of the positive law on retroactivity *vel non* was disputed, subject to differing constructions and applications.

In this setting Clarke answered,

> But it is contended that the provisions of the constitution admit of a different construction—that it is prospective, and to give it the meaning its language imports, would violate vested rights. What are these vested rights, are they derived from nature, or from the [positive] municipal law? Slavery is condemned by reason and the laws of nature. It exists and can only exist, through [positive] municipal regulations, and in matters of doubt, is it not an unquestioned rule, that courts must lean "*in favorem vitae et libertatis.*". . . How should the Court decide, if construction was really to determine it? I presume it would be in favour of liberty.[135]

It is easy to applaud Clarke's decision. Earlier in the opinion, he had articulated his understanding of the law of nature, providing the Mississippi Supreme Court's first and only discussion (to date) of Jean-Jacques Rousseau's social contract.[136] Such talk was still in the air in 1818, revered by many, though its heyday in Jefferson's introductory clauses of the Declaration of Independence was almost forty years in the past.

Judge Clarke implicitly followed the 1772 King's Bench opinion of Lord Mansfield in *Somerset v. Stewart*.[137] Slavery, according to Lord Mansfield, was "incapable of being introduced on any reasons, moral or political; but only [by] positive law[.]"[138] Harry and the others had lived on lands that in 1787 had been declared by the positive law of the United States to be free soil.

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[135] *Harry*, 1 Miss. 36 at 42-43.

[136] *Id.* at 40.

[137] Somerset v. Stewart, 98 Eng. Rep. 499 (K.B. 1772). Lawyer and historian Andrew T. Fede presents a helpful explanation of Lord Mansfield's opinion in *Somerset* and its use and influence in the United States, including Mississippi, in his book *Roadblocks to Freedom: Slavery and Manumission in the United States South. See* FEDE, *supra* note 14, at 289-308.

[138] *Stewart*, 98 Eng. Rep. at 510. Judge Clarke would repeat this point three years later in Jones v. State, 1 Miss. 83, 85 (1821). *See also* Fede, *supra* note 50, at 16 n.38.

Whatever *de facto* form of submission Harry and others may have endured after 1787, legally they had become free men. Whether the positive law may have reattached the bonds of slavery once Harry and the others entered Mississippi waters was sufficiently open to question that the case was controlled by the maxim "'*in favorem vitae et libertatis.*' . . . How should the Court decide, . . .? I presume it would be in favour of liberty."[139]

## XIII. A SLAVE RETAINED HIS HUMANITY

Three years later, in the spring of 1821, Judge Clarke drew another slave case. Isaac Jones, a white man, murdered an unnamed man who was a slave. Over the years, *Jones v. State*[140] has drawn considerable attention.[141] All seem to agree that Isaac Jones was a stranger to his victim. What else might Clarke have meant when in context he wrote "giving even to master, much less to a *stranger*, power over the life of a slave"?[142] Jones was not the owner or master or an overseer of the slave he killed.

The question of law before the court was whether a slave was a human being such that his death from an otherwise felonious homicide constituted the crime of murder. No statute addressed the point. Judge Clarke turned to the English common law. "The taking away the life of a reasonable creature, under the king's peace, with malice aforethought, express or implied, is murder at common law."[143] There is a constitutional experience in *Jones* in the sense that there is always the question whether the court has the judicial power to adjudge a particular case,[144] and whether the

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[139] *Harry*, 1 Miss. at 42-43.

[140] State v. Jones, 1 Miss. (1 Walker) 83 (1821).

[141] *See, e.g.*, ANDREW FEDE, PEOPLE WITHOUT RIGHTS: AN INTERPRETATION OF THE FUNDAMENTALS OF THE LAW OF SLAVERY IN THE U.S. SOUTH 73-75 (1992); Ruth Wedgwood, *The South Condemning Itself: Humanity and Property in American Slavery*, 68 CHI.-KENT. L. REV. 1391, 1392-98 (1992); Mills, *supra* note 16, at 163; J. Calvitt Clarke III, *A Path Not Taken: Joshua Giles Clarke of Mississippi, Supreme Court Judge and Chancellor*, ACADEMIA.EDU, https:/www.academia.edu/5660628 [https://perma.cc/EF7D-3FXM] (last visited Apr. 12, 2018). Clarke provides many useful citations. His title, however, is flawed. The question is whether and to what extent Judge Joshua Giles Clarke passes as a "humanist" and as a "liberal" only in the 19th Century sense.

[142] *Jones*, 1 Miss. at 84 (emphasis added).

[143] *Id.* at 85.

[144] MISS. CONST. of 1817, art. 5, §§ 1, 4.

state has the authority to order a man hanged once he has been found guilty of murder.[145] In adjudging *Jones*, Clarke held that the law extended to slaves a measure of humanity that others might have denied. His *a priori* legal premise—that a slave is a "reasonable creature" such that his death is murder when he is killed by another acting with malice aforethought—arguably stood in sharp relief juxtaposed aside the constitutional premise that "all freemen" and only "freemen" enjoy the protection and benefits of Mississippi's not quite five years old Declaration of Rights.[146]

As in the summer of 1818, Clarke's weapons were his powers of reason and expression. "[R]eason is the life of the law," Sir Edward Coke declared, "nay the common law itself is nothing else but reason . . . ."[147] Clarke understood that the common law was as much a process as it was a not altogether written body of law. He understood as well his authority and responsibility as a judge speaking with the acquiescence of his three colleagues. He began, "Because individuals may have been deprived of many of their rights by society, it does not follow, that they have been deprived of all their rights."[148]

> In some respects, slaves may be considered as chattels, but in others, they are regarded as men. The law views them as capable of committing crimes. This can only be upon the principle, that they are men and rational beings . . . . In this state, the Legislature have considered slaves as reasonable and accountable beings and it would be a stigma upon the character of the state, and a reproach to the administration of justice, if the life of a slave could be taken with impunity, or if he could be murdered in cold blood, without subjecting the offender to the highest penalty known . . . ."[149]

Speaking for the Supreme Court, Clarke continued, explaining that the slave

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[145] MISS. CONST. of 1817, art. 1, §§ 10, 16, 17.

[146] MISS. CONST. of 1817, art. 1, § 1.

[147] 1 EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 97b (Philadelphia, Robert H. Small 1853).

[148] *Jones*, 1 Miss. at 83-84.

[149] *Id.* at 84.

> is still a human being, and possesses all those rights, of which he is not deprived by the positive provisions of the law, but in vain shall we look for any law passed by the enlightened and philanthropic legislature of this state, giving even to the master, much less to a stranger, power over the life of a slave.[150]

From this Clarke invoked the human sense of fair play where the stakes are the highest, reasoning that "[b]y the provisions of our law, a slave may commit murder, and be punished with death; why then is it not murder to kill a slave?"[151]

Recurring to the backdrop of natural law as he had in *Harry and Others*, Clarke reiterated that "[t]he right of the master exists not by force of the law of nature or of nations, but by virtue only of the positive law of the state."[152] The positive law of the state included the common law of crimes, limited only as necessary to accommodate the practice of slavery as it was permitted by the constitution and laws of the state. But the positive law of the state of Mississippi did not declare any right in a master, much less a stranger, to feloniously harm or kill a man who also happened to be a slave. To the contrary, the general assembly was constitutionally vested with the authority "to oblige the owners of slaves to treat them with humanity[,] . . . to abstain from all injuries to them extending to life or limb, . . . ."[153] A century later a wise judge would remind us that "[t]he common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified."[154] The sovereign state of Mississippi, speaking through the articulate and authorized voice of Judge Clarke, in relevant part, declared that,

> The taking away the life of a reasonable creature, under the king's peace, with malice aforethought, express or implied, is murder at common law. Is not the slave a reasonable creature, is he not a human being, and the meaning of this phrase *reasonable creature* is a human being, for the killing a

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[150] *Id.* For a broader summary view of the practice of slavery in Southwest Mississippi at the time, see DAVIS, *supra* note 15, at 76-79.

[151] *Jones*, 1 Miss. at 85.

[152] *Id.*

[153] MISS. CONST. of 1817, Slaves, § 1.

[154] S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

> lunatic, an idiot, or even a child unborn, is murder, as much as the killing a philosopher, and has not the slave as much reason as a lunatic, an idiot, or an unborn child?[155]

Through the articulate *and authorized* voice of Judge Clarke, the Supreme Court of Mississippi had declared that Harry and his fellow slaves were free. As a matter of elementary legal understanding, that declaration thereby became a part of the positive law of the state. These three men were free by operation of the positive law of the state of Mississippi which recognized, honored and applied further federally obligatory positive law, Article 6 of the Northwest Ordinance of 1787.[156] Three years later, this same articulate *and authorized* voice declared that, as a matter of the positive law of the state, as a reasonable creature in fact, a slave was within the protection of common law of homicide.

## XIV. THE "OUGHT" VERSUS THE "IS"

There are legal problems—realities, if you will—with Judge Clarke's most famous opinion. Does he have a defense to the acrid criticism: that's just your opinion? Have you really rendered a judgment which emanated from a reasoned application of legal premises that satisfied the criteria for legal validity? In fairness, Clarke reasoned through the points in his opinion in the summer of 1818 more carefully than most appellate judges do today. But he found himself stuck in the end with the choice for which he is celebrated, "that courts must lean '*in favorem vitae et libertatis.* . . . How should the Court decide, if construction was really to determine it? I presume it would be in favour of liberty."[157] Clarke decided and adjudged in favor of what he thought the law ought to have been. Does this differ from *Olmstead v. United States*, more than a century later, an exclusionary rule search and seizure case, where Justice Holmes faced up to the fact that no law mandated this result or that, and then famously said, "We have to choose,

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[155] *Jones*, 1 Miss. at 85.

[156] "An ordinance for the government of the territory of the United States, northwest of the river Ohio," effective July 13, 1787. 2 THE PUBLIC STATUTES AT LARGE, OF THE STATE OF OHIO: FROM THE CLOSE OF CHASE'S STATUTES, FEBRUARY 1833 TO THE PRESENT TIME 86, 86-92 (Maskell E. Curwen ed., 1853-1861).

[157] Harry v. Decker, 1 Miss. 36, 42-43 (1818).

and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part."[158]

Considered today, was Clarke's reasoning any more acceptable to those who disagreed than are *Roe v. Wade*[159] and progeny[160] acceptable to those who believe abortion to be a great moral wrong? Conversely, a ruling that Harry and the others were still Decker's slaves—or Hopkins' after their sale—would have been just as outrageous as overruling *Roe v. Wade* would be to those who believe that it would be a great moral wrong to deny a pregnant woman the right to make the terrible choice whether to have an abortion. A more recent exemplar was provided on June 26, 2015. A person wishing to marry another of the same sex was held to have a right to do so. *Obergefell v. Hodges*[161] created a firestorm. Is it not likely, if not probable, that a hundred years from now most will honor Justice Anthony Kennedy for what he did in *Obergefell*[162] as we honor Judge Joshua Clarke for what he did two hundred years ago in *Harry and Others*? Each had the courage to decide.

In the early years of Mississippi's statehood, Clarke looked to what many enlightened men considered the law of nations regarding slavery. A generation later, Chief Justice William L. Sharkey took a very different view.[163] By the late 1850s the person of African descent had no standing under any law of nations that Mississippi must honor.[164] The last time the Supreme Court of Mississippi took note of a law of nations was in 1912. On that occasion, Justice Richard F. Reed "look[ed] back through the ages . . . [to] the laws of the nations" and found "[l]aws regulating the

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158 Olmstead v. United States, 277 U.S. 438, 469-71 (1928) (Holmes, J., dissenting).

159 Roe v. Wade, 410 U.S. 113 (1973).

160 *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

161 Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

162 For a cogent analysis of *Obergefell*, see RICHARD A. POSNER, DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY 390-400 (2016). I offered a Mississippi based historical perspective in *The Confession of Justice Thomas Pickens Brady*, CAPITAL AREA BAR ASS'N (Dec. 2015), http://caba.ms/newsletters/2015-dec.pdf [https://perma.cc/2F5A-KVQ8].

163 Hinds v. Brazealle, 3 Miss. 837 (1838).

164 *See* Heirn v. Bridault, 37 Miss. 209 (1859); Mitchell v. Wells, 37 Miss. 235 (1859).

time when men shall labor."[165] In more recent times, there has been passionate debate in the United States whether and to what extent we should regard the law of other nations. U.S. Supreme Court Justices Stephen Breyer and the late Antonin Scalia recently engaged in a high profile and public debate on the point.[166]

There are dozens of issues that divide people by reference to moral or religious scruples. Convincing a man or woman that he or she is wrong on one of these issues is next to impossible. Such is arguably none of our business *vis a vis* each other, except that we must find some way to get along. Sometimes, however, even when men disagree strongly at the pre-legal level, a socially helpful acceptance follows a court applying positive law that satisfies the criteria for legal validity.[167] Is this not necessary in a democratic society committed to the rule of law, however fuzzy, unmathematical and otherwise problematic that criteria may be?

With twenty-twenty hindsight, there may have been such a somewhat more neutral and reliable adjudicative route to the ultimate decision as in *Harry and Others*.

## XV. A FIRMER FOUNDATION

There is an elementary point that has not been considered. Article the Sixth of the Northwest Ordinance had been enacted by the Congress on July 13, 1787. No one suggests the processes by which the original thirteen states so agreed were improper. To be sure, all of this was done under the Articles of Confederation. The work that George Washington and the others had under way behind closed doors in Philadelphia was not completed until September of 1787, and ratification lay several years in the future.

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[165] State v. J. J. Newman Lumber Co., 59 So. 923, 929 (1912). In context, Justice Reed's reference is an argumentative ploy, not a source of law with precedential or other controlling force.

[166] *See, e.g., Constitutional Relevance of Foreign Court Decisions*, C-SPAN (Jan. 13, 2005), https://www.c-span.org/video/?185122-1/constitutional-relevance-foreign-court-decisions [https://perma.cc/LXV4-9LFC].

[167] *See, e.g.*, H. L. A. HART, THE CONCEPT OF LAW 100-10 (1961); *see also* James L. Robertson & David W. Clark, *The Law of Business Torts in Mississippi*, 15 MISS. COLL. L. REV. 13, 27-30 (1994); James L. Robertson, *Myth and Reality—Or, Is It "Perception and Taste"?—In The Reading Of Donative Documents*, 61 FORDHAM L. REV. 1045, 1056-59 (1993).

But once the Constitution had been ratified, "among the earliest laws passed under the new Government, is one reviving the ordinance of 1787."[168] All of this is set out and well explained in *Dred Scott*.[169] The new Supreme Court of Mississippi did not have Chief Justice Taney's exposition available in 1818. Still the records that Taney used in *Dred Scott* to explain the continued enforceability of the Northwest Ordinance of 1787 were extant and available in 1818, had it been thought appropriate to consult them.

In those early days of the country, there was nothing to limit the coverage of the due process clause of the Fifth Amendment to the processes of a court of competent jurisdiction. Congress had re-adopted and re-enacted the Ordinance governing the lands "North-West of the River Ohio." Assume *arguendo* that Harry and the others (who had been born) were slaves prior to July 13, 1787. On that day, the core premise of freedom-by-residence claims became law. It became law and in due course was applied to John and then Luke and then Hiram Decker (and no doubt many other slave owners in southwest Indiana and other parts of the Northwest Territory). This was due process of law as men knew it at the time. To be sure, the Mississippi due process clause[170] did not become effective until December 10, 1817. That clause conferred a right that necessarily required the court to look backwards to when the person says his property was improperly taken.[171] The eminent domain clause did not require that Decker be paid "just compensation," because Decker's property rights, if any, in Harry and the others were not "taken or applied to public use."[172]

This was an answer that Judge Clarke and the Supreme Court of Mississippi could have given Decker, that he was shorn of his said-to-be vested property rights by due process of law. The court could have said all of this in 1818. Had its successors had the courage to stay the course, "freedom-by-residence" for men such as Harry and the others may have even survived *Dred Scott*.

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168 Dred Scott v. Sandford, 60 U.S. 393, 438 (1857).

169 *Id.* at 433-41.

170 MISS. CONST. of 1817, art. 1, § 10.

171 *Id.*

172 MISS. CONST. of 1817, art. 1, § 13.

In the summer of 1818, this would have been a firmer legal foundation—grounded in solid positive law—for the freedom granted the former slaves, than that set out in the *Harry and Others* opinion.

There was a second firmer foundation on which Harry and the others may have been adjudged to be free. In the eyes of the law Harry and the others had been kidnapped by Decker prior to—and certainly at—the moment they were involuntarily taken from the neighborhood of Vincennes, headed southerly down the Wabash River. In 1821 Clarke taught us that a slave was within the protections of the positive common law of homicide. Nothing in that exposition excluded other crimes that a slave was legally protected from, consistent with the practical requisites of slavery. After all, in the eyes of the law, slaves were property with economic value to the largely agricultural communities where slavery was so prevalent. Of course, the factual grounds on which Harry and the others had ceased to be slaves were established at some time shortly after 1787. That these *de facto* grounds had not yet been converted into a *de jure* reality only goes to show that Harry and the others were more clearly entitled to the protection of the laws of kidnapping[173] than was the unfortunate unnamed slave slain by Isaac Jones. Nor did it matter whether Decker's crime was committed before or after December 10, 1817, or when the trial was held, or the appeal adjudged.

We know that the Constitution of 1817 granted the general assembly "full power . . . to oblige the owners of slaves to treat them with humanity[,] to provide them necessary clothing and provision, to abstain from all injuries to them extending to life or limb."[174] So what, that the general assembly had not yet acted. Or that this clause was not in effect in the latter part of 1816 when Decker's vessel brought Harry and the others—against their will—down the River. The constitution mandated a smooth transition from territorial status to statehood.[175] The common law

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[173] *See* Cuevas v. State, 338 So. 2d 1236, 1238 (Miss. 1976) (implementing the common law of kidnapping); *see also* Aikerson v. State, 274 So. 2d 124, 126 (Miss. 1973); 51 C.J.S. *Kidnapping* § 1 (2010) (explaining the elements of kidnapping at common law).

[174] MISS. CONST. of 1817, Slaves, § 1.

[175] MISS. CONST. of 1817, Schedule, §§ 1-5.

was in full force and effect in those territorial years and "continue[d] in [full] force as the laws of this state, until they . . . shall be altered or repealed by the legislature thereof."[176] Nothing had repealed the common law of kidnapping.[177] Article 6 of the Northwest Ordinance may not have been positive law in Mississippi. But it certainly was in the "neighbourhood of Vincennes"[178] where for the twenty-nine years—knowing well what the law was—the Deckers kept Harry and the others under their thumb, all the while sending regular petitions to Washington, D. C., demanding that Article 6 be repealed.

At its legal core, a property right has always included a right to exclude.[179] Given the known facts, beginning at some point reasonably after July 13, 1787, no rule of positive law[180] authorized the Deckers to exclude others from enjoying the benefits of the labor or services of Harry or any of the others. Nothing suggests there may have been any privately made law—such as a (written or oral) indentured servitude or a contract for employment—binding the Deckers and these former *de jure* slaves. Luke Decker and the others moved from false imprisonment to the more aggravated offense of kidnapping in July of 1816 when—with Harry and the others in tow, Hiram Decker at the helm—their vessel left the neighborhood of Vincennes, navigating southerly.

Hiram Decker entered the Mississippi Territory with Harry and the others under his ostensible control, and involuntarily so. The individual members of this human cargo were persons within the common law. They were "persons" within the contemplation of

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176 MISS. CONST. of 1817, Schedule, § 5.

177 *See supra* note 173 and accompanying text.

178 Harry v. Decker, 1 Miss. 36, 36 (1818).

179 2 WILLIAM BLACKSTONE, COMMENTARIES *2; *see, e.g.*, Corry v. State, 710 So. 2d 853, 855-56 (Miss. 1998) (upholding the right to exclude others from land an incidence of title or possession); Crenshaw v. Graybeal, 597 So. 2d 650, 652 (Miss. 1992) (upholding the right to exclude others from man-made body of water); eBay, Inc. v. MercExchange, L.L.C., 547 U.S. 388, 392 (2006) (upholding right to exclude via patents); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 673 (1999) (stating the "hallmark of a protected property interest is the right to exclude others"); Int'l News Serv. v. Associated Press, 248 U.S. 215, 246, 250 (1918).

180 Law is a social fact, albeit proof of such a fact is made by processes differing from those used for proving such evidentiary facts as that the Harry family settled in "the neighbourhood of Vincennes" in 1784 bringing slaves with them.

the constitution[181] which had become effective by the time the case reached the Supreme Court of Mississippi. On the facts presented, there could be no objective basis—grounded in the applicable positive law—for anyone believing that in the latter months of 1816 Harry and the others were "the bona fide property"[182] of Decker, or of Hopkins after their sale, though Hopkins would have had a right to recover what he paid Decker in the defective sale.

The Constitution of 1817 encouraged immigrants to come to Mississippi, and, if they wished, to bring their slaves with them. After December 10, 1817, such immigrants were required to show that "such person or slave" as was brought here was "the bona fide property of such immigrants."[183] This changed nothing in the laws that were in force in the Mississippi Territory in 1816.[184] Nothing known suggests that Luke Decker or his son Hiram could have qualified as immigrants. Nothing in the known facts suggested that the Deckers had any plans to settle in Mississippi. The Decker family's presence in Knox County, Indiana—rooted, built and enhanced since 1784—strongly suggested to the contrary. Luke Decker's undisguised motive to evade the consequences of the new constitution in his home land further eviscerated any hint of good faith in his actions. On the known facts Decker could never have shown to a court of competent jurisdiction in Mississippi that Harry and the others were his bona fide property.

It follows that putative slave owners like the Deckers, proposing to sell any "such person or slave"[185] at any time between 1816 and through 1818, had to make a strong showing in court of a bona fide right to exclude. Kidnappers like the Deckers could not show any rights at all. The common law of kidnapping was available had Judge Clarke chosen to use it.[186] More readily than the common law of murder he chose to apply in 1821, because Harry and his two companions enjoyed a de jure free status before they ever reached the courthouse. The Deckers—and later Francis Hopkins—could hardly have complained that the court used the

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[181] MISS. CONST. of 1817, Slaves, § 1 ("provid[ing] . . . [t]hat such person or slave be the bona fide property of such immigrants.").

[182] *Id.*

[183] *Id.*

[184] MISS. CONST. of 1817, Schedule, § 5.

[185] MISS. CONST. of 1817, Slaves, § 1.

[186] *See supra* note 173 and accompanying text.

lesser included common law offense of false imprisonment to free their captives, and not for their own conviction and imprisonment for the crime of kidnapping.

Moreover, the constitution had a no-merchandise clause. The general assembly was granted "full power to prevent slaves from being brought into this state as merchandise."[187] There can be little doubt that—while Harry and the others were in Mississippi—the Deckers regarded them as property to be sold, and in that sense they were "merchandise."[188] A common law court in 1818 had the authority to fashion a rule within the no-merchandise clause, and apply that rule given the case before it, albeit the general assembly had the prerogative at a future session of modifying or restricting that rule as it saw fit within the constitution. If the state was empowered to prevent enslaved persons being brought here as "merchandise,"[189] it was certainly empowered to respond appropriately to kidnap victims brought here, particularly after finding that they had been *de facto* free men for almost thirty years already.

There can be no reasonable doubt but that in July of 1816 and thereafter Decker was—without authority of law—seeking to enlarge and exercise his legal rights, if any, regarding Harry and the others. And that Decker—and in turn Hopkins—were acting to this nefarious end within the jurisdiction of the Mississippi Territory. The court would have been well within its prerogatives to draw upon the common law of kidnapping or false imprisonment, so long as that use and application did not impair the rights of *bona fide* slave owners residing in, immigrating to, or traveling though Mississippi. Luke Decker back in Indiana held no such rights, nor did Hiram Decker at the time his vessel entered the waters of the Mississippi Territory.

Given these premises, including all available and applicable positive law, before and after December 10, 1817, the Deckers and Hopkins had no legally defensible arguments that they may have marshalled to the end of a judgment against Harry and his fellow putative slaves.

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187 MISS. CONST. of 1817, Slaves, § 1.

188 Mills, *supra* note 16, at 182.

189 *Id.*

## XVI. DOES NATURAL LAW HAVE A PLACE?

Thoughts of natural law or the law of nature have long been interesting and at times uplifting, but no man may be hanged or enslaved by virtue of the natural law alone, nor may he be acquitted or freed. To be sure, we wish to celebrate Judge Clarke and in particular *Harry and Others*, as its 200th birthday approaches. A barely known human being named Harry and others utterly unknown were found and placed on the side of the angels by Justice John McLean in 1857 in his dissenting opinion in the *Dred Scott* case.[190] But time has taught that constitutional constructions "when the importance of the question is great" should be made of sterner stuff than Clarke brought to bear, if that is at all possible.

Clarke exposed the point in *Jones*. "Because individuals may have been deprived of many of their rights by society, it does not follow, that they have been deprived of all their rights."[191] What other "rights?" Either of two views grounded in positive law and presented above may well have carried the day for Harry and the others. But suppose those were not there, or that there might be some flaw in the positive legal logic leading to the two results explained above. "There is no mystic over-law to which even the United States must bow."[192] Nor has there ever been a "mystic over-law" enforceable in the state of Mississippi, except it satisfy the criteria for legal validity via legislation or judge-made law.[193] What source of valid and enforceable rights of reasonable creatures is there, except the positive law made by the authorized constitutional organs of organized society? That the philosopher might see each of us—that we might see ourselves—as free moral agents possessing a dignity and worth by virtue of our being affords us no claims against the state that may be enforced. The values articulated so well in the opening sentences of the Declaration of Independence cannot be proved. We fight fiercely over what the words mean and particularly how they should be applied. These values have force and effect when men understand them, believe them and are willing to act on those beliefs. It is the

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190 Dred Scott v. Sandford, 60 U.S. 393, 561 (1857) (McLean, J., dissenting).

191 State v. Jones, 1 Miss. 83, 83-84 (1821).

192 *In re* The Western Maid, 257 U.S. 419, 432 (1922) (Holmes, J.).

193 *Id.*

sobering lesson of history that all too often these values may only be declared.

There is a limited place for the idea of natural law[194] in a constitutional democracy. When the positive legal materials play out without producing a reliable decision, a judge has no choice but to look elsewhere. In *Jones*, the positive legal materials were the common law of homicide as accepted in Mississippi, any superseding statutory law, and ultimately the Constitution of 1817,[195] reliably applied, of course, to the relevant facts of the case, and according to the common law adjudicative process of reasoned elaboration (which is not to be confused with some imaginary process of mathematical or mechanical elaboration). Three years earlier in *Harry and Others*, the positive legal materials included the Northwest Ordinance of 1787, and implicitly the Supremacy Clause of the Constitution of the United States.[196] Judge Clarke thought it included the Indiana Constitution of 1816, although he may have erred in this. And the positive law of Mississippi included the "judicial power" identified and authorized in its constitution[197] and laws.[198] Within these, the court was charged to consider the legislative facts of "what [was] expedient for the community concerned."[199] Without arguable doubt, the legislative facts include the humanity of the affected community, the fears and prejudices that cause men to fail, the objectively foreseeable consequences of the case, and the reasonable reliance, if any, of persons affected.

The legal materials became scant when the court came to the retroactivity issue in *Harry and Others*, excluding the two firmer foundation points found via Monday morning quarterbacking and set out above. Luke Decker's defense was that he and his predecessor in title—his father—held property rights which had vested well prior to the Ordinance of 1787. A careful reading of the opinion of the court suggests that Clarke saw the seriousness of

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194 *See generally* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (2d ed. 2011) (explaining that there is so much more that is rich and complex in the idea of natural law than Joshua Clarke and so many others ever thought.).

195 *See* MISS. CONST. of 1817, Schedule, § 5.

196 U.S. CONST. art. VI, § 2.

197 MISS. CONST. of 1817, art. 2, § 1, & art. 5, §§ 1, 2.

198 *See* Hoffheimer, *supra* note 33, at 113-17.

199 HOLMES, *supra* note 93, at 35.

this defense, perhaps more so than do sympathetic readers 200 years later. He had tried to head this one off. Early in his opinion, Clarke analyzed the treaty of cession whereby Virginia has surrendered the Northwest Territory to the United States. Nothing that happened before July of 1787, Clarke argued, stood as an impediment to the confederated states enacting and the United States later recognizing and enforcing the Northwest Ordinance. A thinking lawyer reading this argument might find it a bit iffy. That slavery had never been imposed by positive law in the lands Virginia ceded in 1784 did not mean that, prior to their removal, Harry and the other two had not been slaves in Virginia proper. Remember, at that time, the lands we now know as the state of West Virginia were—until 1863—a part of Virginia proper. Clarke was smart enough to see this. So, in the end he turned to the maxim, "in matters of doubt, is it not an unquestioned rule, that courts must lean '*in favorem vitae et libertatis*' . . . How should the Court decide, if construction was really to determine it? I presume it would be in favour of liberty."[200]

Recall that just prior to presenting the maxim, Clarke had exclaimed "[s]lavery is condemned by reason and the laws of nature."[201] As a matter of fact he was surely correct, so long as he limited the source of condemnation to civilized men of reason and moral understanding. As a matter of enforceable positive law, something very different was happening in this penultimate paragraph of the opinion. Clarke had to decide the case. Judges have no authority not to decide cases within their jurisdiction.[202] Judge Clarke had to adjudge Decker's vested rights defense, and

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[200] Harry v. Decker, 1 Miss. 36, 42-43 (1818).

[201] *Id.* at 42.

[202] *See* Shewbrooks v. A.C. & S., Inc., 529 So. 2d 557, 560 (Miss. 1988); *see also*, Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1386 (2014) (("court's [duty] to hear and decide cases within its jurisdiction is virtually unflagging") (internal quotations omitted) (citing and quoting Sprint Commc'ns, Inc. v. Jacobs, 134 S. Ct. 584, 591 (2013))); Cohens v. Virginia, 19 U.S. 264, 404 (1821) (holding that a court's failure hear and decide cases within its jurisdiction is "treason to the constitution"). The federal cases are summarized in *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 358-59 (1989). The Supreme Court has recognized this judicial duty in civil actions against churches and their officials. *See, e.g.*, Roman Catholic Diocese of Jackson v. Morrison, 905 So. 2d 1213, 1223 (Miss. 2005).

to do so forthrightly. There was no legal premise of speed limit precision and application available to help. So he turned to the maxim, "in matters of doubt, . . . , that courts must lean '*in favorem vitae et libertatis*' . . . ."[203] Perhaps he gilded the lily with "is it not an unquestioned rule."[204] No matter. Clarke had to decide, and he decided well and legitimately. He honored his duty in exercising the constitutional judicial power to draw on the best premises he could find. Lest the point be overlooked, in doing so, "*in favorem vitae et libertatis*"[205] as a rule of construction became incorporated into the positive law of Mississippi. Judge Clarke did this and more, first and before any other state.

## XVII. REFLECTIONS

History tells us that Judge Clarke's *tour de force* did not last. Judge Mills has told that sad story. Others have placed Mississippi's story in the context of the hell-bent-on-self-destruction and practicably blinded South as a whole.[206]

First, recall that *Harry and Others* was not published until Walker's volume of Mississippi Reports, dated 1832, hit the streets in 1834.[207] The new Jacksonian-democracy-influenced Constitution of 1832 was already in place. Joshua G. Clarke had become the first Chancellor of Mississippi in late 1821 and had served with distinction until he died on July 23, 1828. Leading up to 1833 and the organization and naming of Clarke County along the Alabama state line just south of Meridian, no record confirms that much of anyone even knew of *Harry and Others* decided back in 1818 or of *Isaac Jones v. State* decided in 1821.

Fear and isolationism and their alter ego, southern nationalism, grew. And more fear, as Armageddon approached. *Dred Scott* in 1857 only accelerated the pace. The nation's survival of the fiery trial through which it passed, plus the Reconstruction Amendments to the U. S. Constitution, rendered *Harry and*

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[203] *Harry*, 1 Miss. at 42.

[204] *Id.*

[205] *Id.*

[206] Lawyer and historian Andrew T. Fede has told this story well and often, particularly in his *Roadblocks to Freedom: Slavery and Manumission in the United States South*. *See* FEDE, *supra* note 14, at 147-50.

[207] Robert J. Walker of Natchez became the first official reporter of decisions of the Supreme Court but did not produce his volume of decisions until sometime in 1834.

*Others* unnecessary. As we approached the Millennium the early work of Joshua Clarke was virtually unknown. *Harry* was decided in the very first term of the Supreme Court of Mississippi which has cited it for nothing since. A mark worth a pause. Judge Mills, a former justice of that court, turned the tide with his 2001 article in the Mississippi Law Journal. Still, a few phone calls to friends in Clarke County as this was being written leave doubts whether anyone there knew anything of *Harry* and *Jones* as the calendar turned towards the year 2018.

Joshua Clarke set a standard. Coming across Clarke's citation of Rousseau in *Harry and Others* brings to the mind Judge Learned Hand's jewel offered years ago in this context.

> I venture to believe that it is as important to a judge called upon to pass on a question of constitutional law, to have at least a bowing acquaintance with Acton and Maitland, with Thucydides, Gibbon and Carlyle, with Homer, Dante, Shakespeare and Milton, with Machiavelli, Montaigne and Rabelais, with Plato, Bacon, Hume and Kant, as with the books which have been specifically written on the subject.[208]

With little doubt, Hand would have assented to the addition of Rousseau, probably placed between David Hume and Immanuel Kant, and with an apology for his omission.

A few years back, Justice Evelyn Keyes of Texas argued that one can never become "a great judge without a thorough grounding in what the humanities, including literature, as well as law itself, really do have to teach us."[209] She closed with a more elaborate version of the same provocative point, *viz.*, with these "he has at least the possibility of becoming a great judge, which, without these attributes, he can never be."[210] The more modest "a very good judge" might taste better. That aside, the positive points made are persuasive.

The law and its centerpiece, the exercise of the judicial power, most assuredly are an inexorable dimension of the humanities. These have arisen from human experience and govern

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[208] Learned Hand, *Sources of Tolerance, in* THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND 66, 81 (Irving Dillard ed., 1952).

[209] Evelyn Keyes, *supra* note 76, at 680 .

[210] *Id.* at 701.

human behavior. Their end is nothing less than a society in which we should want to live. Keyes also notes the other side of the coin, "[O]nly a morally literate and humanistically informed people can maintain a free society against the dehumanizing forces of totalitarian ideology and destructiveness that constantly assail it, for only they will know what is at stake."[211] "[A]y, there's the rub."[212] Now, as it was 200 years ago.

Regarding Joshua Clarke, it would be hard to improve on what Judge Mills has had to offer. "Great-souled men and women must occasionally fret their hours on the stage and steer institutions aright. . . . Joshua G. Clarke, possessed the courage, idealism and will to"[213] do what was needed in 1818 and again in 1821. "Clarke establishes that men of good will and fair minds can speak the truth, even in the worst of times."[214] In the end, there can be no serious doubt but that "[t]he high point of antebellum Mississippi judicial sentiments supporting universal freedom and human compassion was clothed in the robe of one Joshua G. Clarke."[215]

There is a place for humanity in the use and application of our constitution and laws, albeit a limited one. Judge Clarke provided two instances—*Harry and Others* and *Jones*—where a court has turned to the humanities, ideas of our fleeting existence as well as insights from Rousseau, to enrich the quality of its adjudications. He enriched the quality of our history, and our lives. His lessons endure.

As does Hamlet's advice to the fearful Horatio, "[t]here are more things in heaven and earth . . . [t]han are dreamt of in your philosophy," with a respectful reminder that law and judging occupy but a practical and service-oriented corner of our philosophy, properly understood.[216] We have little or no authority outside that practical corner and should confine ourselves thereto. But we should never forget that this practical corner includes John Marshall's counsel that judges should never "decline the

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[211] *Id.* at 699.
[212] WILLIAM SHAKESPEARE, HAMLET, act 3, sc. 1, line 65.
[213] Mills, *supra* note 16, at 234-35.
[214] *Id.* at 235.
[215] *Id.* at 176.
[216] WILLIAM SHAKESPEARE, HAMLET, act 1, sc. 5, lines 167-68.

exercise of jurisdiction which is given," lest they commit "treason to the constitution."[217] And that this is and always has been true in Mississippi and in all states with a constitution that creates and upon a chosen few confers the judicial power. Men and women, lawyers and judges and jurors, citizens all, do have an opportunity that the proverbial blunt instrument—the process of adjudication—which they work with daily be made and seen a bit more discerning. With hopeful hearts, people pursue optimal permissible levels of humanity in adjudication, their opportunities for good legal practice made richer.

[217] Cohens v. Virginia, 19 U.S. 264, 404 (1821).

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