Tulsa Law Review

Volume 51 | Issue 2 Article 26

Spring 2016

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THE ROLE OF THE COURTS IN CREATING RACIAL IDENTITY IN EARLY NEW ORLEANS

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KENNETH R. ASLAKSON, MAKING RACE IN THE COURTROOM: THE LEGAL CONSTRUCTION OF THREE RACES IN EARLY NEW ORLEANS (NEW YORK UNIVERSITY PRESS 2014). PP. 272. HARDCOVER $ 44.46.

The racial history of New Orleans is unique among American cities, as is Louisiana's among the history of American states. In the antebellum period, there were more free people of color in New Orleans than in any other city in the South, and free people of color lived, and often prospered, throughout Louisiana. The presence of so many free people of color in New Orleans, and Louisiana more generally, arose from many factors, including the consequences of French and Spanish rule, the transportation of African slaves to and through this port city and the influx of refugees from the Caribbean in the wake of the Haitian Revolution and other events there. Free, light-skinned, French-speaking people of color occupied a special social status between that of whites and darker-skinned blacks, including, of course, slaves. The question is how did it happen? How did the social reality of three races occur?

I. INTRODUCTION

Kenneth R. Aslakson's fascinating recent book, *Making Race in the Courtroom: The Legal Construction of Three Races in Early New Orleans*, is an excellent telling of the tale of the third, middle, race in antebellum New Orleans.[1] Aslakson's study focuses largely on civil cases litigated in the New Orleans City Court, which existed from 1806 through 1813. As Aslakson explains, people of African descent were closed out of the political sphere and thus could not count on the legislative or executive branches of government to protect them or even recognize their claims to legal personhood. However, the courts remained open to free persons of color, women and men. They could sue, be sued and give testimony (even against white people, which was uncommon in the United States).

Aslakson's book illustrates how the legal status of free persons of color in New

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1. KENNETH R. ASLAKSON, MAKING RACE IN THE COURTROOM: THE LEGAL CONSTRUCTION OF THREE RACES IN EARLY NEW ORLEANS (2014).

Orleans was created and maintained in court cases about race and in cases having nothing whatsoever to do with race. The most interesting discussion in the book involves implications that arose from the judicial presumption that "people of color" were free while others, often denominated "Negroes," were presumed to be slaves.[2] This rule, first announced by a territorial court in 1810, was followed throughout the remainder of the antebellum period in Louisiana courts. The presumption resulted in legal victories for people claiming their freedom and also extended to allowing people of color to participate more fully in litigation not involving race as parties and witnesses.

Although the core of his argument rests on examination and analysis of court records, Aslakson does not confine his attention to how court cases affected the status of free persons of color in New Orleans. Aslakson often broadens his perspective to capture social phenomena not reflected in court records. He recognizes that slavery was a restive institution, with slave uprisings occurring or threatened throughout the history of slavery in North America,[3] and that racial classifications, and the disabilities that accompanied classification, were not passively accepted by non-whites.[4] In his discussion of intimate relationships across the color line, Aslakson argues that a popular story, that young women of color were, in effect, placed into relationships by their mothers at so-called "quadroon balls," is a myth.[5] He establishes that this institution of plaçage was much more complex than it is often portrayed.[6]

As Aslakson recognizes, the social and economic reality involving race in New Orleans and Louisiana was more fluid and nuanced than in most American cities and states. Aslakson is somewhat unclear on one central point. I was left uncertain over whether Aslakson was claiming that the court decisions he examines constructed a legal structure of three races or whether he was making the more ambitious claim that these court decisions helped construct a social reality of three races. In my view, the court decisions are reflective of this social reality and not significantly constructive of it. If he is making the more ambitious claim, I do not believe he has supported it sufficiently to be convincing.

The legal presumption that light skinned people of color were free may have helped maintain the special status of this small group of persons of African descent, but, contrary to the most ambitious reading of Aslakson's argument, it did not create that status. Rather, that status evolved within the social reality of the time, in which relationships between white men and women of color, including many who were not slaves and whose families had never been enslaved, were common and produced offspring that socially and economically were not grouped with darker, largely enslaved, people of African descent. Without disagreeing with Aslakson's interpretation of the legal decisions he examines, I would say that the third race emerged in early New Orleans out of a confluence of many

2. *Id.* at 154 (citing Adele v. Beuregard, I Mart. (o.s.) 183 (Superior Court, Territory of Orleans 1810)).

3. *Id.* at 72-73 (discussing a 1795 slave uprising in Point Coupee Parish).

4. *Id.* at 77.

5. *Id.* at 108.

6. ASLAKSON, *supra* note 1, at 108. For a more complete account, see Kenneth R. Aslakson, *The "Quadroom-Plaçage" Myth of Antebellum New Orleans: Anglo-American (Mis)interpretations of a French-Caribbean Phenomenon*, 45 J. SOC. HIST. 1 (2011).

factors and the courts, to an extent, recognized and reinforced this reality.[7]

This minor point of difference does not detract from the value or quality of Aslakson's study, which are both extremely high. Regardless of whether Aslakson succeeds in establishing his thesis (assuming I am not misunderstanding it), his book makes a substantial contribution to the literature on race in antebellum New Orleans. One significant area that he covers, which is not discussed much in this review, is the influence in New Orleans of people from St. Domingue and the legal concepts that travelled with them. In particular, his focus on City Court Judge Louis Moreau-Lislet, a refugee from St. Domingue, is extremely enlightening.[8] Aslakson has revealed important historical developments in a book that is a joy to read.

As Aslakson's brief epilogue recognizes, after the Civil War, the social and legal status of light-skinned persons of color in New Orleans changed. At first, the government was dominated by Republicans and included persons of color and darker skinned blacks, including freedmen. By the end of the 1870s, white conservatives had "redeemed" all of the Southern governments including that of Louisiana, expelling virtually all people of color from politics.[9] By and large, people of color lost their special legal and social status, which helps explain why the test case *Plessy v. Ferguson*[10] was brought by an alliance of lighter and darker skinned people of African descent. After this time, the most realistic avenue for claiming equal rights for lighter-skinned people of color was to pass as white, which many people did.

The remainder of this review proceeds as follows. Part II lays out the core of Aslakson's argument and discusses his presentation of the participation of non-whites in New Orleans City Court litigation. Part III discusses the change in social status for people of color that occurred after the Civil War and how that was reflected in some post-War cases litigated in the New Orleans courts, and also how one family's history was affected by the change. Part IV concludes.

II. ASLAKSON'S CASES

The role of race in the development of New Orleans does not lend itself to simplification, and Aslakson does not attempt to do so. Rather, Aslakson's book situates the race issue in New Orleans in the context of all the twists and turns in the history of that city, including ambivalent and conflicting feelings among whites toward the free people of color living and working there. Although they filled important roles in the New Orleans

7. One reason to doubt that the decisions of the New Orleans City Court constructed, as opposed to reflected, the three race reality in New Orleans is that the special status of French-speaking lighter-skinned people of color extended throughout Louisiana, for example to the largely rural parish of Point Coupee, where mixed-race families such as the Decuirs and Poydrases were prominent. *See* BRIAN J. COSTELLO, A HISTORY OF POINTE COUPEE PARISH, LOUISIANA 102-11 (2010). For an early more general look at Louisiana's free people of color, see RODOLPHE LUCIEN DESDUNES, OUR PEOPLE AND OUR HISTORY: A TRIBUTE TO THE CREOLE PEOPLE OF COLOR IN MEMORY OF THE GREAT MEN THEY HAVE GIVEN US AND OF THE GOOD WORKS THEY HAVE ACCOMPLISHED (1973). This volume was originally published in 1911 in French under the title *Nos Hommes et Notre Histoire*. The 1973 translation includes a forward by Charles E. O'Neill, S.J., which characterizes the free people of color as a "middle layer of society between [whites] and the black slaves[.]" *Id.* at xi.

8. Judge Moreau-Lislet's decisions are discussed throughout the book. His background as a refugee from St. Domingue is explored at ASLAKSON, *supra* note 1, at 174-75.

9. *See* NICHOLAS LEMANN, REDEMPTION: THE LAST BATTLE OF THE CIVIL WAR (2006).

10. 163 U.S. 537 (1896).

economy as tradesmen and service workers,[11] the authorities periodically took measures to restrict the immigration of free people of color, especially men,[12] perhaps sensing a threat to the stability of slavery or out of hostility from whites unhappy with the economic competition.

As Aslakson explains, the presence of a relatively large number of free people of color in New Orleans resulted from the confluence of a number of factors. The French created a slave-based economy in Louisiana, which resulted in the importation of a large number of African slaves. Among whites, males greatly outnumbered females, which led to sexual relationships between white men and black women. Under more liberal French and later Spanish law, father-masters frequently freed their slave-children and slaves had the right to purchase their freedom by paying their appraised value, which many did. Finally, numerous free people of color arrived as refugees from the Haitian revolution, either directly or after a stopover in Cuba.[13]

The most important event in New Orleans during the period of Aslakson's study was the Louisiana Purchase,[14] which may have resulted in part from France's need for cash to fund its futile attempt to prevent Haitian independence.[15] The Louisiana Purchase subjected the free people of color in New Orleans to American law, which, as they feared, was not as friendly toward them as French and Spanish rule had been. As Aslakson details, in the legislative arena, the efforts of free persons of color to retain the rights they had under prior law were largely unsuccessful.[16] They did, however, retain the right to sue and testify in court, which they employed with greater success than their efforts in the legislative and executive branches. This is the heart of Aslakson's story.

A. Domestic Relations Cases

The first category of cases that Aslakson tackles involves domestic relations law. This is an area in which harsh positive law was moderated by somewhat more benevolent court decisions. Even before the Louisiana Purchase, interracial couples could not marry, and the law prohibited those living in "open concubinage" from making gifts or leaving property to each other.[17] It also was difficult for parents in mixed-race, non-marital relationships to bequeath property to their illegitimate offspring, referred to at the time as their "natural children," especially if, as was often the case, the white father was married to a white woman.[18] Illegitimate children were further prohibited from inheriting via intestate succession from their mother if she left legitimate children or grandchildren, and from their father if he left any lawful heirs including collateral relations. Because they could not marry, the law made it difficult for interracial couples to provide for their children.

11. ASLAKSON, *supra* note 1, at 35.
12. *Id.* at 29.
13. *Id.* at 6, 28, 91, 105.
14. *Id.* at 61.
15. *See* ADAM HOCHSCHILD, BURY THE CHAINS: PROPHETS AND REBELS IN THE FIGHT TO FREE AN EMPIRE'S SLAVES 294 (2005).
16. ASLAKSON, *supra* note 1, at 66.
17. *Id.* at 110.
18. *Id.* at 111.

Under this positive law, when heirship was contested, white relatives of deceased white men often succeeded in preventing natural children from inheriting.[19] Although Aslakson does not provide details, he reports that when, as was true in most cases, a will went uncontested, white men were able to provide for their natural, mixed-race children. This might have involved a judge "looking the other way" and allowing a prohibited bequest to be carried out.[20] Aslakson also notes that in some cases, women of color "found creative (yet legal) ways around the laws of succession."[21] However, the examples he uses to support this point left me a bit queasy, because they seem to be built on gender stereotypes that women were unlikely to engage in non-domestic work and that they may have entered into intimate relationships for financial reasons.

Aslakson's primary example is a case in which a female, former slave named Marie Louis Dupre sued the estate of a white man named Nicholas Duquery, "claiming a partnership interest in Duquery's blacksmith business."[22] She alleged that she had invested $500 in the business in 1798, and that she worked with Duquery in the shop for the twelve years preceding his death under a partnership agreement with him. Dupre prevailed against several competing claimants who included in their arguments allegations that Dupre and Duquery were intimate partners and that the idea that "an intelligent businessman like Duquery would find himself so destitute as to solicit the measly sum of five hundred dollars possessed by an African wench" too absurd to be believed.[23]

Aslakson seems convinced that Dupre did put money into the business and that she also worked together with Dequery, which begs the question why he considers this a creative way around the laws of succession rather than simply the correct outcome recognizing an ownership interest in a business. Perhaps Aslakson does not believe Dupre's claimed oral partnership agreement. If Aslakson believes the whole case was a sham designed to avoid restrictions on inheritance, he does not come out and say so.[24]

The other cases Aslakson uses to make his point include instances in which colored women provided land, cash and inventory for their white intimate partners' businesses, or who labored in those businesses while also maintaining a household with their "employers." Aslakson points out that restrictions on interracial marriage and inheritance forced these women to make business-related claims to their partners' assets rather than claims based in family law.

In my view, Aslakson missed an opportunity to support a central thesis of his book: that these women were able to use the courts to gain access to the assets of their intimate

19. *Id.* at 113.

20. *Id.*

21. ASLAKSON, *supra* note 1, at 114.

22. *Id*. (discussing Mary Louise v. Saignal and Delinau, case no. 2087 (New Orleans City Court, Dec. 4, 1811)).

23. *Id.*

24. There have been more recent cases in which claims based on property have been used to avoid family-law based restrictions. For example, even though co-habitation is a criminal offense and common law marriage is not recognized, Mississippi courts have recognized claims to distribution of jointly acquired property upon the break-up of an unmarried cohabiting couple. *See* Pickens v. Pickens, 490 So. 2d 872, 875-76 (Miss. 1986). However, it may be that the rule of the *Pickens* case is limited to couples who unsuccessfully attempted to get married or who were married at one time, which was true in the *Pickens* case. *Id*. at 872; *see* Davis v. Davis, 643 So.2d 931, 934-36 (Miss. 1994) (denying equitable distribution of assets in part because the parties never married or attempted marriage).

partners in the face of legal impediments imposed by and large by the legislative branch. So long as the legislature had not gotten around to prohibiting business agreements between white men and non-white women, the courts were open to enforcing them even if they were inextricably tied to a prohibited domestic arrangement, and even in the face of social conventions under which the testimony of a person of color would not be credited as against testimony offered by whites.

B. Economic Disputes

Aslakson's second category of cases involves economic disputes including property rights, contract rights and economic fraud. While the fact that free people of color could litigate disputes even with white persons, free from discrimination, in the City Court is significant in itself, property cases, to Aslakson, were more important than other disputes. By law, slaves could not own property. Thus, "establishing one's legal rights to certain property was the equivalent of establishing one's status as free."[25] There were wealthy free people of color in New Orleans, in other areas of Louisiana, and in pre-revolution Haiti, and like any other group with substantial wealth, they found themselves in disputes that required judicial action to resolve.

Aslakson's description of the property, contract and fraud cases litigated in the New Orleans City Courts during the relevant time period shows that, for the most part, race was not a factor. Whites sued people of color and people of color sued whites, and the City Court appears to have ignored race. In fact, in one instance in which a white litigant attacked the court for even considering a case brought against him by a free woman of color, the trial judge entered judgment for the plaintiff and found the defendant in contempt of court, ordering him to jail for twelve hours, unless he paid the judgment.[26]

Once again, the description of these cases begs a key question. Assuming that people of color were treated the same as whites in these cases, does that support Aslakson's claim that this litigation helped construct the third race in New Orleans? He does not discuss whether the light-skinned free people of color were treated better than darker skinned litigants. In fact, skin color is not mentioned, perhaps because it is impossible to know, although it is more likely that anyone identified as a "free person of color" would be relatively light-skinned, while darker skinned people would be identified as "negroes" or "negresses."[27] Of course, slaves themselves were legally disabled from bringing claims to court, and even if they were considered capable of being sued, their lack of assets would likely render such suits highly unlikely.

Aslakson's account of the involvement of people of color in economic disputes does not establish anything more than that the courts, being neutral in these cases with regard to race, reflected the social and economic reality of the time. Whites had extensive economic dealings with people of color, and legal unenforceability would be damaging to

25. ASLAKSON, *supra* note 1, at 132.

26. *Id.* at 143.

27. *See id.* at 151 (identifying a "free negress" as a defendant in a slave property care). In antebellum legal papers, I have seen instances in which free people of color were required to note their status as such on the papers they filed in court. For example, the designation "fmc" would follow the name of a free man of color on all papers filed in a case.

both groups. Certainly, judicial willingness to treat people of color fairly reinforced their special social status, but in my view, it did not construct it.

C. Property in Slaves

Aslakson's description of cases involving slave property, i.e. conflicts over rightful ownership of slaves, in the New Orleans City Court is similarly illuminating on the question of access to courts for free people of color while unenlightening on any claim that the courts constructed the third race. Aslakson describes several cases in which free people of color litigated disputes over the ownership of slaves in which race does not seem to have been a factor in the City Court's decisions. There were nineteen such cases in which various parties claimed property interests in slaves either as heirs, purchasers or creditors.

Interestingly, women of color were parties to these cases more often than men of color: Aslaskon reports that free women of color were defendants in fourteen of the cases, which means that in those cases they were in possession of the slaves at the time the case was brought.[28] Women of color prevailed in a substantial number of these cases, even as plaintiffs against white men, establishing that the City Court did not discriminate against women of color.[29]

Aslakson recognizes that these cases reflect, rather than construct, the social status of the litigants. He states that "the City Court slave property disputes reveal a lot about the social position of free women of color in prerevolutionary St. Domingue [Haiti], where they 'were a major economic, social and cultural force.'"[30] Aslakson also acknowledges that free women of color were important to the social and economic structure of Louisiana.[31] He describes a slave property case involving a free woman of color named E. A. Burel who "lived for many years on the Louisiana plantation of Siery Mieullan as both his personal companion and the manager of his estate."[32] After Mieullan's death, Burel took possession of a slave named Marianne, and, when one of Mieullan's (presumably white) heirs sued Burel for the return of the slave, Burel alleged that Marianne belonged to her as payment for her management of the estate. She also argued that the heir waited too long to bring the case. Burel prevailed, although we do not know which argument the court accepted.[33] Aslakson views this case as evidence of the status of free women of color who were involved in the management of property held by white men who they, legally, could not marry.[34]

Aslakson concludes that "[i]t is too much to say that the decisions in these slave property cases represent the court's intentions to reestablish the social hierarchies of prerevolutionary St. Domingue."[35] I agree wholeheartedly with this conclusion and with his further observation that "the City Court normalized slave ownership for *gens de*

28. *Id.* at 146.
29. *Id.*
30. ASLAKSON, *supra* note 1, at 146.
31. *Id.*
32. *Id.*
33. *Id.* (discussing St. Amand and Cuvillier v. Burel, case no 2030 (New Orleans City Court April 17, 1811)).
34. *Id.* at 146.
35. ASLAKSON, *supra* note 1, at 146.

couleur and slave status for *noirs*."[36] Undoubtedly, had the City Court refused to recognize the legal claims of people of color to slave or other property, or had the court discriminated against people of color in disputes with white people, the status of people of color would have been transformed. If nothing else, this illustrates the importance of law to social and economic order. But again, I remain unconvinced by the claim that judicial action constructed the special status of people of color. Had that status not been in the economic interests of whites, I doubt that the courts would have been as willing to enforce the rights of people of color in a nondiscriminatory fashion.

D. Freedom Cases

The final category of case that Aslakson examines involves the question of freedom or slavery in cases in which a litigant claims freedom against a claim of enslavement by another party.[37] In these cases, Louisiana law, created by the City Court, explicitly recognized the tripartite understanding of race in New Orleans. As Aslakson reports, in *Adele v. Beauregard*, the court created a presumption of freedom for people of color while maintaining a presumption of slave status for "Negroes."[38] Aslakson argues that, by singling out people of color for special treatment, "the courts did something the census makers did not—they made race."[39]

After laying out the precariousness of freedom for people of color throughout the United States, Aslakson turns to the behavior of the New Orleans City Court in cases involving the question of freedom. He notes that this court entertained a relatively large number of such cases, exceeded only by those in St. Louis, Missouri and Dover, Delaware.[40] This was most likely true due to the large number of free people of color in New Orleans, and may also have arisen out of the chaos of the Haitian revolution. Louisiana did not recognize the revolution's declaration of freedom for all of St. Domingue's slaves, and, while many of those who travelled from the island to Louisiana claiming freedom were truly free, others escaped during the revolution and spent years looking over their shoulders in Cuba and Louisiana concerned that masters and masters' heirs would attempt to reclaim their slave property.

Aslakson reports that there were sixteen freedom suits adjudicated in the New Orleans City Court during the period studied, eleven of which involved claims of illegal enslavement.[41] Eight of these parties claimed to have been born free while the other three argued that they have been previously granted their freedom.[42] The cases, and Aslakson's account of them, are fascinating.

These were typically not cases in which an owner was asserting ownership of an

36. *Id.* at 151.

37. The most famous suit in this category in U.S. history is *Dred Scott v. Sandford*, 60 U.S. 393 (1857), which resulted in one of the most infamous opinions in the history of the U.S. Supreme Court, denying the possibility of U.S. citizenship for persons of African descent brought to the country as slaves, and their progeny.

38. ASLAKSON, *supra* note 1, at 154 (discussing Auger v. Beaurocher (also known as Adele v. Beuauregard), case no 1846 (City Court of New Orleans Sep. 16, 1808)); *id.* at 1 Mart. (o.s.) 183 (Superior Ct., Territory of Orleans 1811).

39. *Id.* at 29.

40. *Id.* at 165.

41. *Id.*

42. *Id.*

alleged runaway slave. Rather, most of the cases involved issues of contract, inheritance and the rights of creditors or heirs of the (allegedly former) owner. For example, in one case, a woman and her four children were seized by the creditor of her deceased owner's brother, apparently on the theory that the brother was the rightful heir to the owner's slave property.[43] The woman sued, claiming that she had purchased her freedom years earlier, that her former owner had promised freedom for her oldest child and that the younger three were born after she had been freed. Aslakson reports that the City Court decided only that the oldest child was slave property subject to seizure and that the mother and her three younger children secured their freedom in a different court.[44]

It is in Aslaskon's explication of these cases that, in my opinion, he most forcefully supports his thesis that the New Orleans City Court helped construct the third race, although I am still not convinced that the court decisions were more constructive of social reality than reflective of it. He reports that the result is known in fourteen of the freedom suits and in all twelve involving persons of color, the result was freedom while in the two cases involving "Negroes," the result was slavery.[45] This is striking, and I expect that this pattern must have influenced conduct beyond the courthouse doors, and led claimants to slave property to realize that in doubtful cases they were much less likely to prevail against light-skinned persons of color than against darker skinned people of African descent. It would likely also have tended to reinforce the separate status of people of color within New Orleans society. Similarly, the fact that the New Orleans City Court ruled in favor of many people claiming freedom based only on their own testimony[46] must have influenced views on the status of free people of color. Certainly, it reflected their relatively high social status.

There were also what Aslakson terms "enslavement suits," in which petitioners claimed "that the defendant was pretending to be free but was legally the petitioner's property."[47] There were eight such cases in the New Orleans City Court during the period covered, and the petitioners won four of them, presumably resulting in the re-enslavement of someone who had been living as a free person for at least some period of time.[48] This was a lower success rate for putative slaves than in cases in which the petitioner was suing for freedom, which is even more striking given that the burden of proof was on the petitioner in both sorts of cases. Aslakson reasons that people claiming ownership of slaves would likely sue only if they had a pretty strong case.[49] However, that does not really explain why so many more of the freedom suits were successful, since the incentive to sue for freedom would presumably be very high, leading persons with relatively weak cases to bring such cases. And yet, those petitioners had a very high success rate. Perhaps the difference is simply an artifact of the small sample size.

43. ASLAKSON, *supra* note 1, at 166 (discussing Metayer v. Noret, case no. 2093 (New Orleans City Court May 28, 1810)).

44. *Id.* at 167.

45. *Id.* at 173.

46. *Id.* at 170-71.

47. *Id.* at 172. The same presumption applied—persons of color were presumed free while those considered Negroes were presumed to be slaves. *Id.* at 173-74.

48. ASLAKSON, *supra* note 1, at 173.

49. *Id.* at 173-74.

E. Litigation and the Creation of Racial Identity

Aslakson concludes his chapter on freedom/slavery litigation with a discussion of the thesis of the book—how these cases contributed to the legal construction of the third race in New Orleans.[50] Here, Aslakson seems to double back on some of his earlier analysis, agreeing with Rebecca Scott that even though *Adele v. Beauregard* created a presumption that people of color were free, this presumption was rebuttable by "the most fragile oral evidence."[51] To Aslakson, the importance of *Adele* is that it "helped to create a particular racial identity."[52] His tactic here is to minimize the importance of *Adele* in litigation while claiming that the decision "shaped perceptions of race in antebellum Louisiana because the decisions that cited it reflected evolving perceptions of race in that era."[53] Although I am in complete agreement with Aslakson that the status of free people of color in New Orleans was unique, I remain unconvinced by the claims regarding the social importance of the court decisions he studied.

New Orleans at the beginning of the nineteenth century was a bustling metropolis, bursting at the seams with new arrivals from all over the world and teeming with commerce of many different kinds. Many of the new arrivals were free people of color (and some claiming to be free) arriving from St. Domingue directly or indirectly after stopping in Cuba. These people arrived with baggage that included their previous social and economic status. There were also numerous free people of color born in Louisiana, the product of unions between white men and women of color, slave and free. The average person in New Orleans would have been confronted every day with the important economic and social roles played by numerous free people of color in New Orleans. Litigated cases concerning the status of free people of color and those regarded as "Negroes" are likely to have barely registered in their consciousness.

The evidence Aslakson cites to support his view of the social effect of *Adele v. Beauregard* consists mainly of citations to the decision in the Louisiana Supreme Court.[54] Aslakson is correct that those decisions solidified and expanded the legal distinction between free people of color and Negroes, by explicitly holding that Negroes were presumed to be slaves and by finding people of color to be competent witnesses against white people.[55] But the use of the rule in *Adele v. Beauregard* in future litigation reveals very little about its importance in society at large. Perhaps I am unfairly applying legal evidentiary standards, but it is unclear how the way that legal elites treated a decision by other legal elites can be thought of as evidence of social practices more generally.

Thus, Aslakson is correct to cite the Louisiana Supreme Court's statement that "in the eye of Louisiana law, there is . . . all the difference between a free man of color and a slave, that there is between a white man and a slave."[56] In my view, however, the law

50. *Id.* at 180.

51. *Id.* (quoting Rebecca Scott, *Paper Thin: Freedom and Re-enslavement in the Diaspora of the Haitian Revolution*, 29 L. & HIST. REV. 1061, 1076 n.38 (2011)).

52. *Id.* at 180.

53. ASLAKSON, *supra* note 1, at 181.

54. *Id.* at 181-82.

55. *Id.* at 181.

56. *Id.* at 182.

reflected rather than constructed social reality. Although the law can certainly have a profound effect on society, especially when it works against prevailing understandings, instances in which the law helps to construct a social reality without significant preexisting social support are exceedingly rare, if they exist at all.

III. THE END OF THE THIRD RACE

Aslakson concludes his book with a brief epilogue entitled *From Adele to Plessy*. Here, Aslakson makes the simple point that "*Plessy* helped to establish a biracial system in postbellum Louisiana."[57] Aslakson is correct that the decision in *Plessy* signaled the end of the legal recognition of three races in New Orleans.[58] I am concerned, however, that he again overstates the importance of law to the construction of this social reality. Rather, in my view, *Plessy* reflected a new social reality under which the white establishment in New Orleans had decided to lump all persons of African descent into a single category and treat them as second-class citizens.

A pair of cases that arose in New Orleans in the 1870s, well past the period of Aslakson's study, can illustrate how social customs evolved before *Plessy* toward denying the existence of three races. The first arose in early 1871 when the sheriff of Orleans Parish, Charles Sauvinet, was denied service in a New Orleans coffeehouse.[59] This was during the period of Republican control of the Louisiana government, and the Louisiana Constitution of 1868 and a statute enacted in 1869 prohibited discrimination on the basis of race in all public accommodations. Sauvinet had been elected sheriff of Orleans Parish in 1870. Although he was listed as white in the New Orleans census,[60] could by appearance pass for white[61] and had long been served in establishments normally off limits to people of color, it was widely known that he was partially of African descent.[62]

Sauvinet went in his official capacity to the Bank Coffeehouse in the French Quarter of New Orleans to collect the Bank's rent as part of its receivership. After the owner, Joseph Walker, served Sauvinet a drink in the bar's office and handed over the rent, Walker asked Sauvinet to stop frequenting his establishment on the ground that Sauvinet was colored. Sauvinet ignored the request and after the bartender would not serve him, he sued Walker for violating Louisiana's antidiscrimination laws, requesting $10,000 in damages. Sauvinet won his case and was awarded $1,000 in damages.[63]

While this may have been a victory for Sauvinet, there is every indication that segregation and exclusion based on race continued in New Orleans even after this decision,[64] and that those who were considered "colored" were treated no better than those

57. *Id.* at 185.

58. ASLAKSON, *supra* note 1, at 185

59. Walker v. Sauvinet, 92 U.S. 90 (1875).

60. *See* JUSTIN A. NYSTROM, NEW ORLEANS AFTER THE CIVIL WAR 90 (2010).

61. Transcript of Record at 69, Sauvinet v. Walker, 27 La. Ann. 14 (1875) (No. 3513).

62. *See id.* at 50-59 (1875).

63. NYSTROM, *supra* note 60, at 90. This award was upheld by the Supreme Court of the United States in 1875, against a procedural challenge.

64. *See* Dale A. Somers, *Black and White in New Orleans: A Study in Urban Race Relations, 1865-1900*, 40 J.S. HIST. 19, 26 (1974); JOHN W. BLASSINGAME, BLACK NEW ORLEANS, 1860-1880 (1973); ROGER A. FISCHER, THE SEGREGATION STRUGGLE IN LOUISIANA 1862-77 (1974).

who were considered "Negroes." The importance of this case is not that the law prohibited discrimination—that law changed rather quickly in the 1870s when white Democrats re-took the Louisiana government. Rather, it shows that the social custom was to exclude even those without discernible African features from establishments reserved, socially, for whites.

The second case arose in 1872 when Madame Josephine Decuir was denied a room in the "Ladies' Cabin" on the Governor Allen, a riverboat serving a route from New Orleans to Vicksburg, Mississippi.[65] Madame Decuir was from the exact sort of higher-class mixed-race family that would have enjoyed greater privileges than darker-skinned persons of African descent. Her family, and her late husband's "colored" family, had always been free, except for one grandmother who was brought to Louisiana by her owner/husband and freed. Her brother, Antoine Dubuclet, was a wealthy planter who, at the time of the litigation, was the elected treasurer of the State of Louisiana.[66] Both families owned substantial numbers of slaves before the war.

Madame Decuir sued Captain (and owner) John Benson, requesting $75,000 in compensatory and punitive damages. Benson did not deny that he relegated non-white passengers to the "Bureau"[67] and would not allow a mixed-race woman like Madame Decuir to have a room in the Ladies' Cabin. In testimony, corroborated by several others with experience on the Mississippi River, Captain Benson claimed that segregation was the universal custom on the Mississippi River. He further claimed that his business would suffer if he did not follow the custom, because no whites would travel on a boat on which people of color were allowed to sleep in the same area as whites.

The issue of racial identity was in play in Madame Decuir's case. During the litigation, Madame Decuir was described as "copper colored" or a "little yellow" although apparently, on first meeting her, her lawyer did not realize that she was a woman of color. Madame Decuir, like Sheriff Sauvinet, was awarded $1,000 in damages, but her award was overturned on appeal to the Supreme Court of the United States on the ground that Louisiana's anti-discrimination law, when applied to a riverboat on the Mississippi River, interfered with interstate commerce.[68]

These cases provide evidence that by the 1870s, even in the face of state anti-discrimination laws, the social custom of providing special privileges to persons of color was being replaced by a custom of treating all persons of African descent as a single race. *Plessy* was the culmination of this not only because Homer Plessy lost his case, but also because the litigation was planned by a coalition of dark and light-skinned persons of color.[69] Madame Decuir did not want to ride on the Governor Allen with the darker skinned persons of African descent but by the time of *Plessy*, as Aslakson explains, there was no

65. Hall v. Decuir, 95 U.S. 485, 486 (1877).

66. The description of the events and litigation in this case is drawn from state court records and archival research underlying my work in progress, a book tentatively entitled *Madame Decuir's Journey: The Origins of "Equal but Separate"*?

67. The moniker "Bureau" may have been an attempt at irony, referring to the post-Civil War Freedmen's Bureaus established by the federal government.

68. *Hall*, 95 U.S. at 491.

69. This group was known as the Comite de Citoyens. Although many of its members were mixed race French speakers, there were also darker-skinned blacks involved. *See* KEITH WELDON MEDLEY, WE AS FREEMEN: *PLESSY V. FERGUSON* 123-26 (2003).

separate space in the social order for her or people like her.[70] For all persons of African descent, it was all or nothing for racial integration, and the *Plessy* Court's answer was "nothing."[71]

Another path for mixed-race, light-skinned people was to pass as white. This was the path chosen by many people, including members of the family of one of Madame Decuir's lawyers. In her litigation against Captain Benson, and in other matters relating to the succession of her husband's estate, two lawyers represented Madame Decuir, E.K. Washington, a white native of Pennsylvania, and Seymour R. Snaer, a French-speaking mixed race New Orleans native.[72] Snaer was one of very few non-white lawyers in Louisiana at the time, and after the *Plessy* decision, many members of his extended family self-identified as white[73] to avoid the restrictions placed by Jim Crow laws on people known to be of African descent of any degree.

Another path that was chosen by many Americans of African descent was migration. Many members of the Snaer family, like other families of African descent, left Louisiana and headed north and west.[74] The effects of Jim Crow and economic depression led to what has been termed the "Great Migration" beginning in the second decade of the twentieth century, when millions of African-Americans left the South, mainly for northern cities such as Chicago and Detroit.[75]

IV. CONCLUSION

Kenneth Aslakson's study of cases litigated in the City Court of New Orleans from 1806 to 1813 reveals fascinating details about life and the law in antebellum New Orleans. While people of color were largely excluded from politics and the professions, they could engage in trades and in agricultural pursuits, which led to disputes that necessitated legal resolution. The cases Aslakson examines provide an intriguing glimpse into race relations in New Orleans before the Civil War, reflecting the three-tiered racial structure of the time. The cases established that, in litigation, free people of color were treated as deserving of respect without regard to the other disabilities that afflicted non-whites during the period. The overarching principle was that people of color were presumed free and were treated as such in litigation, while "Negroes" were presumed to be slaves. After the Civil War and the failure of Reconstruction to protect the rights of non-whites, the weight of Jim Crow laws and social practices fell equally on all people in New Orleans known to be of African descent, and Aslakson's chapter of the racial history of New Orleans was over.

70. *Id.* at 186.

71. *Id.*

72. MARY FRANCES BERRY, WE ARE WHO WE SAY WE ARE: A BLACK FAMILY'S SEARCH FOR HOME ACROSS THE ATLANTIC WORLD 121 (2015).

73. *Id.* at 123.

74. *Id.* at 116-18.

75. ISABEL WILKERSON, THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA'S GREAT MIGRATION (2010).