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## Under Color of Law

### *Siliadin v France and the Dynamics of Enslavement in Historical Perspective*

*Rebecca J. Scott*

When is it appropriate to apply the term ‘slavery’—a concept that appears to rest on a property right—to patterns of exploitation in contemporary society, when no state extends formal recognition to the possibility of the ownership of property in a human being?<sup>1</sup> Historians, who generally position themselves as enemies of anachronism, may be particularly resistant to the use of an ancient term to describe a twenty-first century reality. And jurists have often been understandably reluctant to employ a word whose historical meaning was so closely tied to a specific property relationship that has long since been abolished in Europe and the Americas.<sup>2</sup>

The case of Siwa Akofa Siliadin, a young Togolese woman held by a Parisian family as an involuntary domestic servant from 1995 to 1998, reflects this reluctance by courts to reach for the term ‘slavery’ in contemporary cases. Indeed, although the French court of first instance did find her exploiters to be guilty of obtaining unremunerated labor from a ‘vulnerable and dependent person’, that conviction was overturned upon appeal. Brought to France at the age of fifteen with a false promise of schooling and immigration assistance, Siliadin had been passed along to a couple who obliged her to labor as a housemaid and care for children for more than three years, without pay, ‘from 7.30 a.m. until 10.30 p.m. every day

<sup>1</sup> In writing this essay I have benefited from discussions with Malick Ghachem, Allison Gorsuch, Thomas A. Kelley, Christopher McCrudden, Peter Railton, Scott Shapiro, James Q. Whitman, and John Witt, as well as the members of the Research Network on the Legal Parameters of Slavery. Juliana Vengochea Barrios generously shared reference materials compiled for her own research on contemporary slavery. None of these colleagues, of course, should be held responsible for the idiosyncrasies of my interpretations. The staffs of the University of Michigan Law Library; the National Humanities Center; the City Archives, New Orleans Public Library; and the Historical Archives of the Supreme Court of Louisiana, Earl K. Long Library, University of New Orleans, provided crucial assistance in locating archival and other documentation.

<sup>2</sup> In his work, including an essay in this volume, Orlando Patterson argues convincingly from multinational evidence that slavery as a social practice need not rest on a property right. For the comparison suggested in the present article, however, between nineteenth-century Louisiana and twentieth- and twenty-first-century France, it is the *belief* that slavery rests on a property right that is at issue.

with no days off'. The couple confiscated her passport and generally did not allow her to leave their apartment except to accompany the children to school and, 'occasionally and exceptionally', to attend mass. Living without proper papers, the young woman believed that she risked jail if she spoke to anyone about her circumstances.<sup>3</sup>

The sequence of events illustrates the difficulty of adequately characterizing the offense in question. The *Comité contre l'esclavage moderne* (Committee Against Modern Slavery) assisted with the initial filing of a complaint on Siliadin's behalf. The Paris Tribunal de Grande Instance found the defendants to have violated the provision of the Criminal Code that prohibited insufficiently remunerating a person's labor by taking advantage of 'that person's vulnerability or state of dependence' (Art. 225–13), but acquitted them on the charge of subjecting a person in a vulnerable or dependent state to working or living conditions 'incompatible with human dignity' (Art. 225–14). The defendants were sentenced to several months' imprisonment, a substantial fine, and the payment of damages to the complainant.<sup>4</sup>

The defendants appealed, and the Paris Court of Appeal acquitted them of all the charges, expressing skepticism about the claim of vulnerability, citing the complainant's ability to speak French and her having accompanied the children to events outside the home. The prosecutor did not appeal further on the criminal charges, thus ending that portion of the case, but Ms Siliadin's lawyers appealed to the Court of Cassation on the question of damages. The Court of Cassation quashed the lower court's decision to acquit on the civil charges, and remitted the case to the Versailles Tribunal. In 2003, the Versailles court upheld the demand for compensation on the first count, but reiterated that the couple were not guilty of the imposition of conditions incompatible with human dignity, long hours of work caring for children being 'the lot of many mothers', hence not incompatible with human dignity when imposed on a domestic worker. Monetary compensation was later awarded by the Paris industrial tribunal.<sup>5</sup>

In the end, the French judicial system imposed no criminal penalties on the perpetrators, and the civil penalties were limited to the provision of back pay due to the complainant. In 2005, Ms Siliadin appealed to the European Court of Human Rights (ECtHR), seeking no further compensation but aiming to gain recognition that the circumstances under which she had been held, and the failure of the French state to provide proper judicial remedies, constituted a violation of Article 4 of the

<sup>3</sup> *Siliadin v France*, App no 73316/01 (ECtHR, 28 June 2005). For her own account of her experience, with some names altered, see Henriette Akofa, with the collaboration of Olivier de Broca, *Une Esclave moderne* (Michel Lafon 2000).

<sup>4</sup> The sequence is summarized in the ECtHR judgment, cited above. The case was also covered in the French press, and several newspapers published the name of the couple, Vincent and Yasmina [later corrected to Aminata] Bardet. See Françoise-Marie Santucci, "Des esclavagistes bon chic, bon genre ; *Libération* (Paris, 20 May 1999), at <<http://www.liberation.fr/societe/0101282719-des-esclavagistes-bon-chic-bon-genre-henriette-travaillait-7-jours-sur-7-de-l-aube-a-la-nuit-sans-salaire-au-tribunal-ses-patrons-s-offusquent>> (accessed 23 May 2012); and 'Henriette, Esclave des Temps Modernes', *Humanité*, 19 May 1999.

<sup>5</sup> See the summary of these findings in the ECtHR judgment cited above.

European Convention on Human Rights. In its decision, the ECtHR rebuked the French state for having failed to appropriately punish exploitation of this kind, and thus for having failed to protect Ms Siliadin's rights under the Convention. The ECtHR, however, declined to label as slavery the practices to which she had been subjected, preferring to use the term 'servitude'. 'Although the applicant was, in the instant case, clearly deprived of her personal autonomy, the evidence does not suggest that she was held in slavery in the proper sense, in other words that Mr and Mrs B exercised a genuine right of legal ownership over her, thus reducing her to the status of an "object"'. The Court therefore held that it could not be considered that Ms Siliadin had been held in slavery 'in the traditional sense of that concept', but did judge that French criminal law had proven inadequate to the task of imposing an appropriate penalty on those guilty of holding her in 'servitude'.<sup>6</sup>

For the purposes of determining the responsibility of the French state, the distinction between slavery and servitude was not an essential one, since both practices are prohibited by Article 4 of the Convention, without exception and without the possibility of derogation. The call for a change in the French criminal code stood, whichever term was used. As a definitional matter, however, the ECtHR's statement about slavery perpetuated the puzzle: what *would* constitute slavery in an urban, domestic context of this kind?<sup>7</sup>

Several legal scholars have criticized the decisions in *Siliadin* as flawed in the Court's interpretation of the relevant texts, and have observed that international law is now somewhat fractured on the definitional point concerning slavery. There is a notable divergence between the statements by the ECtHR in *Siliadin*—seemingly requiring the exercise of a 'genuine right of legal ownership' and reduction to the status of an 'object' for a finding of slavery—and those of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in *Prosecutor v Kunarac*, and even of the ECtHR itself in the 2010 decision in *Rantsev v Cyprus and Russia*—which both note that it is the 'exercise of the powers attaching to the right of ownership' rather than legal ownership itself that should be held to be determinative.<sup>8</sup>

What might a historian add to this debate? A close look at the actual process of status determination during the period of 'slavery in the traditional sense of that concept', as the ECtHR put it, suggests that the courts in *Siliadin* were also mistaken in a key dimension of their historical analysis. The ECtHR's discussion of slavery implies that status as a slave rested on a 'genuine right of legal ownership'.

<sup>6</sup> *Siliadin* (n 3) para 122.

<sup>7</sup> See Holly Cullen, 'Siliadin v France', *Human Rights Law Review* 6 (2006); and Cullen, 'Contemporary International Legal Norms on Slavery: Problems of Judicial Interpretation and Application', Ch 16 in this volume. Jean Allain also called attention to this case in the introduction to his edition of *The Slavery Conventions: The Travaux Préparatoires of the 1926 League of Nations Convention and the 1956 United Nations Convention* (Martinus Nijhoff 2008).

<sup>8</sup> See Jean Allain, 'The Definition of Slavery in International Law', *Howard Law Journal* 52 (2009): 239–275 (pointing out that in *Kunarac* the court observed that the definition of slavery has expanded to encompass the exercise of the powers 'attaching to the right of ownership', even absent ownership); Cullen, 'Siliadin'; and Jean Allain, 'The Legal Definition of Slavery into the Twenty-First Century', Ch 11 in this volume. *Rantsev v Cyprus and Russia*, App no 25965/04 (ECtHR, 7 January 2010).

But was a 'genuine right of legal ownership' actually a precondition for holding someone in slavery, even in the nineteenth century? The courts may in fact be using the wrong metric if they measure contemporary practices against a stereotype, rather than against an actual set of features of slavery in the past.

One challenge for legal/historical scholarship on this subject is thus to explore and delimit the concept of enslavement so that it retains a core, historically grounded meaning, while still enabling us to grasp a dimension of contemporary reality. A first step is to examine the ways in which slave status was determined during the period when property in human beings *was* acknowledged in law.

A key to this inquiry is the examination of nineteenth-century cases where *illegal* enslavement was alleged, that is, in which a person with a cognizable legal claim to freedom was reduced to the legal status of a slave. The 1839–1841 drama of the *Amistad* captives is perhaps the best-known example. A group of African men, women, and children who had been transported illegally across the Atlantic rose up against their captors during a voyage along the coast of Cuba, seized the schooner *Amistad*, and eventually came ashore in the United States. Once the US Supreme Court acknowledged that the alleged owners of the captives had been engaged in contraband slave trading in violation of international treaties, the claims to ownership of the Africans as 'slaves' became unsustainable. This, then, was illegal enslavement in a world in which legal enslavement remained permissible. The captives were freed.<sup>9</sup>

On its own, however, the *Amistad* case may leave the strong and quite misleading impression that in nineteenth-century slave societies, if the circumstances of a person's enslavement were illegal, the absence of a 'genuine right of legal ownership' would mean that the person could no longer be held as a slave. The evidence suggests that this was by no means the rule. It is now clear that in addition to the crime of contraband slave trading that ensnared the *Amistad* captives and many others, a large-scale enslavement of free persons 'under color of law' occurred in Cuba and in the United States in the early nineteenth century, and was marked by an outcome that contrasts sharply with the Supreme Court finding in the *Amistad* case. The dynamic of this process of enslavement reveals the disconnect between a 'genuine right of legal ownership' and the 'exercise of the powers attaching to the right of ownership'. It suggests that we may best avoid anachronism not by eschewing the use of the term 'slavery' to describe the modern exercise of certain powers over human beings, but instead by examining the interplay of the legal and the extralegal in both historical and contemporary instances.<sup>10</sup>

<sup>9</sup> It is perhaps not surprising that when film director Steven Spielberg sought to draw a modern audience into the problematics of slavery, he chose to dramatize this episode, in which those held as captives could in the end see their freedom vindicated under law. For new research on the mechanisms of the contraband trade by which tens of thousands of illegally enslaved persons were incorporated into the Cuban plantation economy without any legal recourse, see Michael Zeuske and Orlando García Martínez, 'La *Amistad* de Cuba: Ramón Ferrer, Contrabando de Esclavos, Captividad y Modernidad Atlántica', *Caribbean Studies* 37 (January–June 2009) 97–170.

<sup>10</sup> The phrase 'exercise of... the powers' draws on the language of the 1926 Slavery Convention, created under the auspices of the League of Nations. See the discussion and citations in Allain, *The Slavery Conventions* (n 7).

### A. The Dynamics of Enslavement: Santiago and New Orleans

It was the abolition of slavery in the French Caribbean colony of Saint-Domingue, now Haiti, that set the stage for the unfolding of this drama. In the course of the Haitian Revolution of 1791–1803 the holding of property in men and women was legally extinguished. Free citizens of the polity in which that abolition had taken place, however, might still find themselves at risk of enslavement if they left its borders. Their circumstances provide us with an early example of a situation in which the ‘powers attaching to the right of ownership’ might be re-asserted over those in whom ownership was no longer recognized by law.

Abolition in Saint-Domingue had been achieved as a result of armed challenge and then legally formalized by the state. In response to the massive uprising of slaves in the northern plain of Saint-Domingue, and to the threat that the rebels would ally with an invasion force from adjacent Spanish Santo Domingo, civil commissioners sent by the revolutionary government in France declared slavery ended by decree in the French colony in 1793. The National Convention in Paris ratified that abolition in 1794. When generals Toussaint Louverture and André Rigaud forced the withdrawal of British occupation troops from portions of the south and west of Saint-Domingue in 1798, the decrees of abolition could be made effective throughout the colony. Those who had once been slaves were now free citizens of France.<sup>11</sup>

That status came under threat with the ascent to power in France of Napoleon Bonaparte. Prodded by revanchist émigré planters who denounced abolition itself, and furious at the autonomy that Toussaint Louverture was managing to achieve for the colony, First Consul Bonaparte dispatched an expeditionary force to Saint-Domingue in 1801 to try to wrest authority away from the black generals who held power. Bonaparte publicly denied that he would seek to re-institute slavery in the colony, but his correspondence with his commanders suggests such an intent, and the conduct of his generals reinforces the impression. The Napoleonic expedition turned out to be a human catastrophe, bringing fire and war to the countryside and disease to the troops. The conduct and goals of the expeditionaries made enemies of nearly the entire population of the colony, and did not succeed in imposing either Bonaparte’s will or the institution of slavery. More than fifteen thousand civilians, white and black, sought refuge from the fighting by crossing the Windward Passage to the neighboring colony of Cuba.<sup>12</sup>

As they crossed from a land without slavery to territories where slavery flourished, some of those on the boats fleeing Saint-Domingue realized that they could try to assert a claim to ownership over others whom French law had considered to

<sup>11</sup> A succinct account of these events is Laurent Dubois, *Avengers of the New World: The Story of the Haitian Revolution* (Harvard University Press 2004).

<sup>12</sup> On the expedition, see Yves Benot, *La Démence coloniale sous Napoléon* (Éditions La Découverte 2006). On the flight to Cuba see Gabriel Debien, ‘Les colons de Saint-Domingue réfugiés à Cuba (1793–1815)’, *Revista de Indias* 13 (October–December 1953): 559–605.

be their fellow citizens. The possibility of holding property in men and women, in effect, loomed into view as these boats approached the shores of Santiago de Cuba and Baracoa. Many men and women who had been freed by the Haitian Revolution and the French National Convention suddenly risked re-enslavement at the hands of their fellow refugees or their new hosts.<sup>13</sup>

Close examination of the circumstances of these refugees raises questions about the historical assumptions that lie behind the judgment of the European Court in *Siliadin v France*. It turns out that in positing a ‘genuine right of legal ownership’ and reduction ‘to the status of an “object”’ as essential features of slavery, the ECtHR implied a definition that does not fit the process by which many of the Saint-Domingue refugees soon found themselves classified as ‘slaves’. These refugees were subjected to the ‘exercise of powers’ that had previously attached to the right of ownership, even though any ‘genuine right of ownership’ over them had been ruptured by abolition. When, six years later, another set of imperial disputes sent most of the refugees on to Louisiana, the same process would be repeated, with additional men, women, and children among them being swept into bondage. In the end, thousands of free citizens of France had been transformed into slaves. Would-be masters had discovered that by exercising the set of rights seen as *attaching* to ownership they could effect enslavement under color of law, quite independent of whether their claim to ownership was either ‘genuine’ or ‘legal’.

## B. The Case of Adélaïde Métayer/Durand

This process of enslavement may best be understood by looking closely at the case of a specific refugee who confronted such an effort to assert the ‘powers attaching to a right of ownership’ over her. The woman later called Adélaïde Métayer had been born into slavery in the household of a tailor named Charles Métayer, in Cap-Français, Saint-Domingue, around 1780. She was quite young at the time of the uprising of slaves in the northern plain of the colony, followed by the burning of Cap-Français in 1793. Her owner and his wife fled, and transported her with them as a servant (or slave) when they took temporary refuge in New York. Around 1800 the Métayers returned to Saint-Domingue. By then, the legal abolition of slavery had taken place in the colony. Perhaps by alleging that Adélaïde’s services were essential to their survival as an aged couple, and thus accessing a loophole in the regulations governing the new laws, her former master nonetheless managed to maintain control over her labor for some time.<sup>14</sup>

<sup>13</sup> For a detailed discussion of this migration, see Rebecca J. Scott, ‘Paper Thin: Freedom and Re-enslavement in the Diaspora of the Haitian Revolution’, *Law and History Review* 29:4 (November 2011) 1061–1087; and Ch 3 of Rebecca J. Scott and Jean M. Hébrard, *Freedom Papers: An Atlantic Odyssey in the Age of Emancipation* (Harvard University Press 2012).

<sup>14</sup> For details on Adélaïde’s background, see Rebecca J. Scott, “‘She . . . refuses to deliver up herself as the slave of your petitioner’: Émigrés, Enslavement, and the 1808 Louisiana *Digest of the Civil Laws*’. *Tulane European and Civil Law Forum* 24 (Spring 2009) 115–136. On the text and provisions of the various abolition decrees, see [Le G.G.], ‘Documents aux Origines de l’Abolition de l’Esclavage.

Once back in Saint-Domingue, however, Adélaïde could see that those around her had left the status of slave, and that she could do the same. In 1801, she proffered monies to Charles Métayer, and obtained in return a signed paper acknowledging the payment, releasing her from any obligation to labor, and recognizing her as free. Adélaïde apparently moved to a nearby town and worked as a *marchande*, a trader. But after the Napoleonic expedition landed in the colony in 1802, she and her young son fled from the renewed warfare on the island, first to Jamaica and then to Baracoa, in Cuba.<sup>15</sup>

Although some of the Saint-Domingue refugees found themselves reduced to slavery when they arrived in Cuba, Adélaïde by all accounts lived in Baracoa as a free woman. She gave birth to two daughters there, each baptized as a free child by the local parish priest, who inspected the receipt signed by her former owner and urged Adélaïde and her partner to have it certified. According to subsequent testimony of her neighbors, 'Adélaïde always enjoyed her freedom in Baracoa; she was very much at ease there' (*Adélaïde a toujours joui de sa liberté à Baracoa, elle y était for[t] a son aise*).<sup>16</sup>

In 1808, however, Napoleon's forces marched into Spain, and by 1809 France and Spain were at war. The Saint-Domingue refugees, as French nationals in a Spanish colony, were expelled from Cuba. Along with thousands of others, Adélaïde landed with her three children in New Orleans. Head of a household and apparently confident of her free status, Adélaïde persuaded those controlling the disembarkation that she was indeed a *femme de couleur libre*, a free woman of color. She and her three children soon settled into lodgings in the city, where she apparently went by the name Adélaïde Métayer.<sup>17</sup>

At some point in the first year after her arrival in New Orleans, Adélaïde Métayer crossed paths with a man named Louis Noret, who had been the business partner of her former owner back in Saint-Domingue, Charles Métayer. Noret claimed that he was owed money by Louis Métayer, the brother of Charles Métayer, and that Louis was the heir to the property of the now deceased Charles. On this thin thread of an alleged debt, Noret obtained authorization from the New Orleans City Court to seize any property of his debtor that he could find in New Orleans. Accompanied by the sheriff, Noret then seized Adélaïde and her three children. The sheriff promptly advertised the family for sale at auction.<sup>18</sup>

At the last minute before the scheduled sale, Adélaïde was able to file suit in the local court for assault and false imprisonment. This was a standard form for a

Proclamations de Polverel et de Sonthonax, 1793–1794, *Revue d'Histoire des Colonies* 37 (1949) 24–55, 348–423.

<sup>15</sup> On her itinerary, see Scott, "She . . . refuses" (n 14).

<sup>16</sup> This was the testimony of her neighbor Fillette Galbois, free woman of color, in Transcript of Record, *Peter Métayé v Adélaïde* f.w.c., Docket #318, Mss. 106, Historical Archives of the Supreme Court of Louisiana, Earl K. Long Library, University of New Orleans.

<sup>17</sup> For a discussion of the process of attribution of status during disembarkation, see Scott, 'Paper Thin' (n 13).

<sup>18</sup> The sequence of events described in this paragraph and in those below is reconstructed from testimony in the various case files generated by the legal struggle between Adélaïde Métayer and Louis Noret. See Scott, "She . . . refuses" (n 14) and Scott, 'Paper Thin' (n 13) for details.



freedom suit, and her (presumably court-appointed) lawyer succeeded in postponing the sale of Adélaïde and her two daughters while her claim to freedom was heard. Adélaïde's older son, however, had apparently been born before the date of the signature on the receipt for monies she had paid to Charles Métayer back in 1801—a document that was the one written proof she could proffer of her claim to freedom. The boy was not named in the receipt, and witnesses agreed that Charles Métayer had for a time retained control over him. There seemed to be no way to argue that the boy was covered by the document, which Adélaïde's lawyer was now characterizing as a freedom paper. The court judged the boy to be a slave who could be seized as property to cover the debt owed to Noret, and he was sold at auction on the steps of the Café de la Bourse.<sup>19</sup>

In theory, Adélaïde's lawyer could have argued that her seizure and that of all of her children was an act of illegal enslavement because they had been declared free under French law in 1793–94. The 1808 Louisiana Digest of the Civil Laws did hold that legal acts effectuated in another jurisdiction should be interpreted according to the law in that jurisdiction, so the abolition in Saint-Domingue was arguably determinative of their status. But it would be highly imprudent for a woman of color recently arrived from Saint-Domingue to vaunt the general abolition declared by the Revolutionary Commissioners Léger-Félicité Sonthonax and Étienne Polverel, legislated by the French National Convention, and subsequently ratified in the constitution of independent Haiti. Each of these figures was generally perceived by white Louisianans as an alarming symbol of revolution and bloodshed, anathemized by the white Saint-Domingue refugees and by the governing authorities of the territory of Louisiana. Even a white refugee holding public office in Louisiana, a man whose conduct in that office was said to be 'above reproach', was in the process of being disbarred on suspicion of having sided with the French Republican Commissioner Polverel back in Saint-Domingue 'in the year 1793, when the general freedom of the slaves was proclaimed'.<sup>20</sup>

In 1810, moreover, the implications of an argument based on the French revolutionary decrees of abolition would have been far-reaching. Although Adélaïde Métayer had entered New Orleans as a free woman, many of her fellow Saint-Domingue refugees of color had been deemed slaves upon their arrival in Louisiana, based simply on their color, or on the assertion by someone of the powers of ownership over them. Nearly every one of the persons of African descent from Saint-Domingue held as a slave in New Orleans—and they numbered more than

<sup>19</sup> The announcement of the seizure and offer at auction first appeared in the *Moniteur de la Louisiane* on 28 April and ran through 23 May 1810.

<sup>20</sup> 'The form and force of acts and written instruments, depend upon the laws and usages of the places where they are passed or executed'. *A Digest of the Civil Laws Now in Force in the Territory of Orleans* (1808) (Claitor's Publishing Division 2008), preliminary title, Ch 4, Art 10. On the disbarment, see Dormenon's Case, 1 Mart. (o.s.) 129 WL 841 (La. Terr. Super. Orleans). The Superior Court of the Territory of Orleans characterized Polverel's supporters as 'brigands'. I thank Fernin Eaton for having pointed out the relevance of Dormenon's case to that of Adélaïde Métayer.

three thousand—would have a claim to freedom if the decrees of 1793–94 were acknowledged as valid. No Louisiana court was going to go down that road.<sup>21</sup>

The only safe argument for freedom in 1810 was thus an individual one, based in Adélaïde Métayer's case on the signed receipt from Charles Métayer. As it turned out, the court did not have to rule on that claim, because the proceeds from the sale at auction of Adélaïde's son covered Noret's alleged debt. For the moment, Adélaïde and her daughters were free to return home, because Noret had been paid. Their legal status remained undetermined, but Adélaïde resumed the social status of a free woman of color, and as a practical matter no one for the moment claimed or exercised any of the powers attaching to a right of ownership over her. She prudently dropped the surname Métayer, presumably to distance herself from the ties through which Noret had made his claim, and adopted the surname Durand, under which she baptized her next child.<sup>22</sup>

Louis Noret, however, was not a man easily deterred. Apparently motivated by some combination of greed and vengeance, he continued his efforts to turn a claim of ownership of the family into hard cash. One day in 1816 when Adélaïde was away from her home, Noret again seized her daughters, along with her newborn son. This time Noret had obtained a signed power of attorney from Pierre Métayer, son and heir of Charles Métayer, and hence, Noret argued, the owner of Adélaïde and by extension her children. Again Adélaïde had to mobilize resources and allies to try to defend herself against this attempted enslavement, and the case began a tangled path through the Louisiana courts.<sup>23</sup>

The Dickensian quality of Adélaïde's experience, the blatant acts of force by those who sought to enslave her, and the loss of her son into slavery give this story a particular poignancy.<sup>24</sup> The jarring effect of the scene of the sale of Adélaïde's freeborn oldest son is heightened by the thinness of the legal process by which the tailor Noret had seized the children. At first glance one might guess that the New Orleans courts in 1810 and 1816 simply did not know of the French revolutionary acts of abolition in 1793–94, and of the evidence that any child born in Cap-Français, Saint-Domingue, after 1794 was born free. But in fact the judge in the New Orleans City Court who authorized the sale, Louis Moreau Lislet, knew the French abolition decrees well. He had himself been a jurist in Saint-Domingue,

<sup>21</sup> The material in this paragraph and the two that follow is drawn in part from Scott, 'Paper Thin' (n 13).

<sup>22</sup> The baptismal act of Luis Durand, 21 April 1816, described as the son of the *mulata libre* Adélaïde Durand, is in St. Louis Cathedral, New Orleans, Baptisms of Slaves and Free Persons of Color, 1816–17, vol 1, held in the Archives of the Archdiocese of New Orleans. I thank archivist and director Emilie Gagnet Leumas for having providing a scan of that record.

<sup>23</sup> The six lawsuits involving Adélaïde are enumerated and described in Scott, "She . . . refuses" (n 14).

<sup>24</sup> It has proven impossible to trace the fate of Adélaïde Métayer/Durand's elder son. A sheriff's sale did not generate the usual notarial record, and once acquired by purchase, an enslaved child would be unlikely to carry forward a surname in any subsequent written records. I thank Greg Osborn and Irene Wainwright of the City Archives, Louisiana Collection, New Orleans Public Library, for their patient assistance as I searched for some record of this sale.

and several other New Orleans attorneys and judges had also passed through the French colony during the revolutionary period.<sup>25</sup>

Nor was this a matter of jurisdiction or conflict of laws—Moreau Lislet was happy to acknowledge the property relations and contractual obligations from Saint-Domingue that underlay the debt Noret claimed to be owed by the brother of Métayer, and the *ancien régime* slave codes that had once conferred a right of ownership over Adélaïde to Charles Métayer. The judge was implicitly following the Louisiana Digest of the Civil Laws (which he had helped to draft) in treating legal arrangements from another jurisdiction as governed by the rules of that jurisdiction. He was simply unwilling to give any legal force to the decree that had subsequently *abolished* those property relations as applied to ownership of persons.

### C. Enslavement as Process

The case of Adélaïde, to whom we should by 1816 grant her chosen surname of Durand, enables us to re-frame the juridical puzzle of when, exactly, *enslavement* may be said to occur. In the enslavement of Adélaïde Durand's older son we can see an apparent 'legal right of ownership' being brought into being over the person of a particular child who had been born free. We are watching enslavement itself, on American soil, in the form of an act of violence that creates the relationship that law later formalizes, and which is then naturalized into a new status. And it is the *exercise* of one of the 'powers attaching to the right of ownership'—sale at auction—that causes that right of ownership to appear to be 'genuine' and 'legal'. No prior legal right of ownership in that child is demonstrated; the presumption of his slave status (in direct disregard of his free birth) is sufficient.<sup>26</sup>

The case of this unnamed boy in New Orleans in 1810 and the case of the girl named Siwa Akofa Siliadin in Paris in 1995–1998 are of course separated by the great divide that is the nearly worldwide abolition of legal slavery. The core of abolitionism and of abolition is to denaturalize the relationships on which slavery had long rested, and to persuade a wide public that the ownership of property in human beings lacks legitimacy from start to finish. It was the extraordinary achievement of the Haitian Revolution to make real that abolitionist possibility in the heart of the Americas. When war refugees who were former slaves arrived in Cuba or Louisiana they brought that new reality with them, even if they could make no open declaration of allegiance to the abolitionist process that had freed them.<sup>27</sup>

<sup>25</sup> On Moreau Lislet's time as a jurist in Saint-Domingue, see Alain A. Levasseur, *Louis Casimir Elisabeth Moreau Lislet: Foster Father of Louisiana Civil Law* (Louisiana State University Law Center Publications Institute 1996), pp 79–113.

<sup>26</sup> For an examination of the distinction between condition and status, see Allain, 'The Definition of Slavery in International Law' (n 8).

<sup>27</sup> For a subtle discussion of the nature of the example that Haiti provided see Ada Ferrer, 'Haiti, Free Soil, and Antislavery in the Revolutionary Atlantic', *American Historical Review* (February 2011).

We are now the heirs of that abolitionism, and that legacy may paradoxically make it more difficult to perceive slavery once the lines mooring it to a right of ownership sanctioned by the state have been cut. In the twenty-first century no one can ‘be’ a slave in the strictest nineteenth-century sense of occupying a legally-recognized status category of person as property. But as Allison Gorsuch’s study of indentures in Illinois demonstrates, already in the early nineteenth century the content of slavery could be replicated without the name of slavery, enabling masters in a ‘free state’ to exercise virtually all of the powers attaching to the right of ownership over a person. And as the case of Adélaïde Durand and her children suggests, in a slaveholding state the enslavement of a free person could occur in the absence of any prior ‘genuine right of legal ownership’.<sup>28</sup>

It is enslavement in this processual sense that modern international agreements prohibiting slavery seek to prevent. From this wider historical perspective we can see that the European Court of Human Rights, in grappling with the term ‘slavery’ in its decision in *Siliadin*, was looking for something it did not in fact need to find. The Court cited the Slavery Convention, and may well have been reaching for a way to evoke the violations of human dignity inherent in slavery when it spoke of reduction ‘to the status of an “object”’. But by using the phrases ‘genuine right of legal ownership’ and ‘the status of an “object”’, the justices set the bar unrealistically high. They seem to have imagined that the legality of the ownership of property rights in persons in the past—what they took to be slavery ‘in the proper sense’—had been simple and self-evident, rather than tangled and contradictory. By implication, they thought they would know a slave if they saw one in antebellum New Orleans. Hence when they were not sure how to know whether they saw one in modern Paris, they quickly retreated to what they took to be the more capacious term ‘servitude’.<sup>29</sup>

## D. Conclusion

When Louis Noret in 1810 propelled Adélaïde Métayer’s son out of her household and onto the auction block, we can see that he was enslaving a freeborn child. Modern forms of the exercise of powers that once accrued to the ownership of human beings as property appear to be radically different from slavery of this kind, because they are not enforceable by the state. But when a judge looks at an adolescent held in servitude in a modern metropolis, and wonders whether to call

<sup>28</sup> See Allison Mileo Gorsuch, ‘To Indent Oneself: Ownership, Contracts, and Consent in Illinois Territory’, Ch 7 in this volume.

<sup>29</sup> In response to the decision, the French legislature did subsequently amend the Criminal Code, although it has still not been brought fully into line with Article 4 of the European Convention on Human Rights. The modest revisions in the language of the Code may make it less likely that perpetrators will be able to avoid conviction by testifying to their own good intentions vis-à-vis the victim, but the acquittals in recent cases are not encouraging. See ‘Execution of judgment *Siliadin v France* (73316/01): are the general measures satisfying? [updated]’, *European Court of Human Rights News*, at <<http://echnews.wordpress.com/2011/03/01/siliadin/>> (accessed 23 May 2012).

what was done to her *enslavement*, a broader understanding of the relationship of law to slavery in the nineteenth century may provide some assistance.

There is no reason to measure the predicament of the young woman cooking, cleaning, and caring for children in a Paris apartment against the circumstances of a plantation slave in Mississippi in 1850 whose putative owner had both a whip in hand and a sheaf of bills of sale in his rolltop desk. It may be more useful to juxtapose the situation of the young woman from Togo to the circumstances of the son of Adélaïde Métayer, who had lived from birth as a legally free person, but who was seized one day to be sold at auction. Each would subsequently labor under compulsion in a stranger's household, wondering how this had ever come to pass.<sup>30</sup>

Across the centuries during which slavery was recognized as legal, those who held others as slaves succeeded in bringing into being a vast body of law that described in detail the permissible exercise of the powers attaching to the right of ownership. But the law did not generally see fit to establish a threshold for proving a genuine right of legal ownership of the person held as a slave, except insofar as ownership might be contested between two putative masters. It was in the interest of masters for the status of slave to be easy to impose on a certain category of persons, and almost impossible to disprove once the deed was done.<sup>31</sup>

In our own time, the illegality of slavery itself would seem to make challenge to enslavement more feasible than it was in the early nineteenth century, because the law no longer explicitly refuses legal personhood to the victims. Circumstance, friendships, and luck can nonetheless be more important than formal status, just as they were two hundred years ago. As it turned out, Adélaïde Métayer/Durand actually won her final legal appeal in New Orleans in 1818, establishing her definitive juridical freedom by invoking the doctrine of *prescripción* (prescription) as it had been codified in medieval Spanish law. By constantly battling against the tailor Noret, she had prevented him from exercising the powers attaching to ownership over her, and because her neighbors were willing to testify to her performance of free status in everyday life, Adélaïde could, after eight years of struggle, win freedom by virtue of an accumulation of long years lived in good faith 'as free'.<sup>32</sup> However, her victory only highlights the continuing enslavement of some 3,000 of her fellow refugees who had been freed by law in Saint-Domingue but made slaves once more with the change of jurisdiction entailed by their migration to Cuba and then

<sup>30</sup> For a full development of the 'fundamental distinction between the substance of ownership and the formal recognition of private property rights, countenancing the persistence of the former despite the eradication of the latter', see Hickey, Ch 12 of this volume.

<sup>31</sup> If one goes back as far as medieval Valencia, one can find at least the form of a test for such legitimacy, because captivity in a 'just war' was in theory required for enslavement to be legally rightful. See Debra Blumenthal, *Enemies and Familiars: Slavery and Mastery in Fifteenth-Century Valencia* (Cornell University Press 2009), Chapter 1. By the time of the large-scale enslavement of Africans in the Americas, such scruples had been jettisoned.

<sup>32</sup> Peter Métayer v. Adelaide f.w.c., 6 Mart. (o.s.) 16 (La. 1819). Louisiana had been a Spanish colony prior to its return to France, just before its acquisition by the United States. In the view of some jurists, including Pierre Derbigny, who wrote the final decision in Adélaïde's case, Spanish law remained in effect in Louisiana in those matters in which it had not been superseded by French law, Louisiana statutes, or US federal law. See the discussions in Scott, "'She . . . refuses'" (n 14), and Scott, 'Paper Thin' (n 13).

Louisiana. Without the allies, information, personal histories, and paperwork necessary to hold off those who claimed them as slaves, they were consigned to a situation that offered no exit.

We need not imagine that there is a single trans-historical meaning to the word 'slavery' in order to see the continuing value of the language of the 1926 and 1956 United Nations Conventions. Defining enslavement as the 'exercise of any or all of the powers attaching to the right of ownership over a person', the Conventions captured key elements of the complex relationship between slavery and law, even for the epoch of legalized enslavement that seemed to have been closed by the formal abolitions of the late nineteenth century. Powers that had once attached to the right of ownership over a person could re-emerge after the end of 'genuine' legal rights of ownership of this kind, whether the termination of an individual's enslavement had come within a single lifetime, as it did for the Saint-Domingue refugees, or within a new international legal regime, as it has in our own era. Several recent decisions suggest that some judges are indeed moving away from the chimera of requiring a 'genuine right of legal ownership' for a finding of slavery, and are invoking the language of the Conventions, with their emphasis on the 'powers attaching to the right of ownership' rather than the right of ownership itself. Under these circumstances, perhaps the timely appeal of another case may enable the European Court of Human Rights to replace the ambiguous language of the *Siliadin* decision with a clearer historical understanding of what it means to invoke slavery 'in the proper sense'.<sup>33</sup>

<sup>33</sup> Christopher McCrudden quotes the language of the English Court of Appeal in *R v SK* (2011) 2 Cr App R 34: 'To dismiss "slavery" as being merely reminiscent of an era remote from contemporary life in the United Kingdom is wrong'. See McCrudden, 'Slavery and the constitutional role of judges', on UK Constitutional Law Group blog, at <<http://ukconstitutionallaw.org/2011/11/02/christopher-mccrudden-slavery-and-the-constitutional-role-of-judges/>> (accessed 23 May 2012). For a general discussion of the uses of historical evidence concerning slavery in legal argument, see Ariela Gross, 'When is the Time of Slavery? The History of Slavery in Contemporary Legal and Political Argument' (2008) 96 *California Law Review* 283–322.