THE AMERICAN LAW OF SLAVERY, 1810-1860 A STUDY IN THE PERSISTENCE OF LEGAL AUTONOMY*

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I. INTRODUCTION

In 1821 the Mississippi Supreme Court held that a white person could be indicted for the common law crime of murder when the victim was a slave:

> 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.
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> 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.
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> . . .
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> 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 to the criminal jurisprudence of the country. Has the slave no rights, because he is deprived of his freedom? He 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 a stranger, power over the life of a slave. Such a statute would be worthy the age of Draco or Caligula, and would be condemned by the unanimous voice of the people of this state, where, even, cruelty to slaves, much less the taking away of life, meets with universal reprobation. By the provisions of our law, a slave may commit murder and be punished by death; why then is it not murder to kill a slave? Can a mere chattel commit murder, and be subjected to punishment?
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> . . .
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> Is not a 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 lunitic [*sic*], an idiot, or even a child unborn, is murder, as much the killing a philospher, and has not the slave as much reason as a lunitic, an idiot, or an unborn child?[1]

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* My work on this subject was stimulated by Professors Eugene Genovese and C. Vann Woodward, who pressed me to clarify and reformulate my original presentation. I have substantially modified my argument in the years since they commented on what I had done, and of course they bear no responsibility for its present form. Elizabeth Alexander, Professor Genovese, Judah Ginsberg, J. Willard Hurst, John Robertson and David Trubek made helpful comments on more recent versions.

1. State v. Jones, 1 Miss. (Walk.) 83, 83-85 (1820).

In 1859, that same court held that, because the common law did not deal with slaves at all, a slave could not be indicted for the common law crime of raping another slave.[2] Had something happened in the intervening years? Or was the earlier decision simply an aberration, decided by judges unfamiliar with the legal requirements of a slave regime and "founded mainly on the unmeaning twaddle, in which some humane judges and law writers have indulged," as the later court said? Of course, something considerably more intricate and interesting was happening. By showing what actually occurred, I hope to provide us with a deeper understanding of the American law of slavery and to shed some light on more general problems of legal change.

Changes in the law of slavery must be seen, I suggest, both as aspects of Southern history and as an incident in legal history. The development of the substantive criminal law in Mississippi illustrates these two elements, and, as the more detailed examination in a following section shows, in that instance, the influence of purely legal considerations predominated. Later sections of this article show that, in other areas of the law and in other states, the judges' concern to articulate precisely the way in which slaves were treated as both persons and property was more important. However, even in those areas, some influence of trends in legal development can be seen.

The best studies of the subject have recognized that some theory of the relationship between law and social change was needed in order to make sense of Southern law. For example, Stanley Elkins treated the law-making process as one form of pluralist politics, in which contending social groups fight each other and the strongest group or coalition prevails. As Elkins presented it, this model treats the law as a reflection of other institutions. He moved from a discussion of the "Dynamics of Unopposed Capitalism," which dealt with the inability of religious institutions and the central government to control capitalist tendencies in the American South, to a discussion of four major aspects of the legal status of the American slave.[3] This structure was intended to imply a causal relationship. To Elkins, "What it came to was that three formidable interests—the crown, the planter, and the church—were deeply concerned with the system, that these concerns were in certain ways competing, and that the product of this balance of power left its profound impress on the actual legal and customary sanctions governing the

2. George v. State, 37 Miss. 316 (1859).
3. Stanley Elkins, *Slavery* 37-80 (1959), hereinafter Elkins, *Slavery*.

status and treatment of slaves."[4]

The problem with applying this model to the material discussed in this article is that it is too simple.[5] Differences between substantive rules might be explained by a model like Elkins'. But when the differences lie in the way lawyers reason, the model must recognize that, to an extent that varies with varying social circumstances, intellectual operations have a life of their own, an internal dynamic, which, when coupled to a specialized institution like the law, may lead to results largely independent of the pressures from other institutions. Frank Tannenbaum, on whom Elkins relied, seemed to adopt the view that the law is a relatively autonomous institution,[6] but he did not specify or even speculate about how the law develops according to its own dynamic.[7] This article demonstrates, I believe, that we cannot fully understand the development of slave law in America unless we are aware of the autonomous aspects of legal change.

I have already touched on the central theme that can be found in legal development seen as autonomous change. When the legal regulation of slavery was novel, the law drew upon a wide range of analogies to determine the proper rule with respect to slaves. As a perceptive abolitionist polemicist who

4. Id., at 71. Elkins recognized that particular institutional interests, not always coincident with the material self-interest of the institution or of those within it, are involved. *Compare* Marvin Harris, *Patterns of Race in the Americas* 17-18 (1964). As Genovese has noted, "Materialism and Idealism in the History of Negro Slavery in the Americas," 1 *J. Soc. Hist.* 371 (1968), Harris' argument differs from Elkins' only in that Harris "offers us three collective forms of economic man;" though the underlying determinism is the same, the difference is important in showing Elkins' relative sophistication.

5. For a similar criticism of Elkins, see Eugene Genovese, "Rebelliousness and Docility in the Negro Slave," 13 *Civil War Hist.* 293, 891, 395 (1967). I must emphasize that I am concerned here with the validity of Elkins' *model*, not with the accuracy of his use of it. In fact, recent studies of Cuba and Brazil indicate that Elkins' interpretation is not consistent with the facts. See, e.g., Franklin Knight, *Slave Society in Cuba in the Nineteenth Century* (1970); Stanley Stein, *Vassouras: A Brazilian Coffee Country (1850-1900)* (1957).

6. See Frank Tannenbaum, *Slave and Citizen* 62, 103 (1946). At times, his exposition slipped somewhat, *id.*, at 48-52, but in a way that showed his determination to treat intellectual work as autonomous from other institutions. Tannenbaum, "The Balance of Power in Society," 61 *Pol. Sci. Q.* 481 (1946), clearly shows that Tannenbaum was concerned with the impact of autonomous institutions, with their own internal demands, on what happens in society. This essay was published shortly after the publication of an early version of *Slave and Citizen.* Tannenbaum, "The Destiny of the Negro in the Western Hemisphere," 61 *Pol. Sci. Q.* 1 (1946). (I am grateful to Professor Genovese for directing me to these essays.)

7. *Slavery in the New World* (Foner & Genovese eds. 1969) collects the most important articles generated by the work of Tannenbaum and Elkins. See also Genovese, *The World the Slaveholders Made* 3-115 (1969); *The Debate Over Slavery: Stanley Elkins and the Critics* (Lane ed. 1971).

studied the law of slavery in the South noted, parallels were drawn in the Southern cases to brood mares, horses, or dogs, when courts considered questions of the law of sales involving slaves.[8] As he failed to note, parallels were drawn to adults, children, or lunatics, when courts considered other questions.[9] Similarly, slaves were sometimes considered real property and sometimes considered personal property. To the extent that courts wished to permit the use of slave property to satisfy a decedent's creditors, they treated slaves as personal property that passed to the executors; to the extent that courts wished to preserve the life-style of a decedent's heirs, they treated slaves as real property subject to the heirs' indefeasible shares.[10] At the outset, courts had to look to cases dealing with land or jewelry, because there were no cases dealing with slaves. In a sense, each case involving slavery could be considered only as a contract case, or a tort case, or whatever.

Relatively quickly, however, a body of cases about slavery grew up. The judges could treat new questions as part of the law of contracts as it particularly applied to slaves, thinking that other cases could be easily distinguished if necessary. Finally, a full-fledged law of slavery emerged, with subcategories dealing with contracts and torts. This transformation of the law of contracts and torts to a law of slavery was supported, not only by the difficulties judges had in holding in mind both the general law of contracts and torts and the peculiar needs of the institution of slavery, but also by increasing extrajudicial concern for the defense of the institution in a world and nation fundamentally at odds with the American South. Thus, the development of the American law of slavery was influenced by some general characteristics of legal argument in a precedent system, and by the particular setting in which the Southern judges found themselves.

Two brief examples will serve as an introductory contrast between the different ways of analyzing the legal problems posed by the existence of slavery. In some ways civil law systems are the conclusion of the development that I have outlined,[11] and Louisiana law does indeed show the influence of purely legal de-

8. William Goodell, *The American Slave Code in Theory and Practice* 51 (1853) hereinafter Goodell, *Slave Code*. *Cf. id.*, at 36, 239, 245, 248.

9. Cf. text at note 44, *infra*.

10. See Goodell, *Slave Code*, at 24, 29-30; Hill v. Mitchell, 5 Ark. 608 (1844); Gullett v. Lamberton, 6 Ark. 109 (1845); Bob v. Powers, 19 Ark. 424 (1858).

11. This is one construction of the argument of *Max Weber on Law in Economy and Society* (Rheinstein ed. 1954).

velopments. Instead of troubling over the difficulties of considering slaves as sometimes real property and sometimes personal property, the Civil Code simply provided that "slaves, though movable by their nature, are considered as immovable by the operation of law."[12] But, of course, slaves, unlike land, did move around. The Louisiana Supreme Court acknowledged this by writing, ". . . being considered as men, they cannot (strictly speaking) be held to be immoveables situated in any particular parish of the state."[13] Precisely because slaves were seen as distinct from all other subjects of legal regulation, judges in Louisiana did not trouble themselves over the fact that it would be considered "illogical" to say that horses were both movable and immovable.

In contrast, an early case in which conceptual problems about slavery were raised but inadequately answered shows how a common law court might be unable to cope with the legal consequences of having a slave society. The Alabama Supreme Court held in 1835 that the owner of a slave was not liable for injuries caused by the slave's negligence, if the slave was not in the owner's employ or under his authority at the time. Recognizing that such a rule meant that those injuries would go unredressed because it was both legally and practically impossible to collect a judgment against a slave, the Court nonetheless said, "I feel bound to adopt in this case, the principles of the Common Law, as applied to master and servant."[14] The court noted the apparent injustice of this rule, the fact that common law principles had developed in a society unfamiliar with slavery, and the lower court's instruction that, because of the nature of slavery, slaves were never, in a legal sense, beyond the master's authority, but in its holding the Court ignored these factors. It seems clear that this resulted from uncertainty about the proper way for lawyers to think about slaves, about which analogies were appropriate in this area, due to the novelty of legal regulation of slavery.

II. THE CONCEPT OF MORAL PERSONALITY

The transition from a system which dealt with slave-related

12. *La. Civ. Code*, § 461 (1853, first enacted 1808). *See also id.*, §§ 3256, 3314-34.

13. Monday v. Wilson, 4 La. 338, 341 (1832). *See also* Hyams v. Smith, 6 La. Ann. 362, 363 (1851) ("Slaves, although generally immovable by destination of law, are movable by their nature and are held in law to be so"); Penny v. Weston, 4 Rob. 165 (La. 1843); Michel v. Dolliole, 1 La. Ann. 459 (1846); Girard v. New Orleans, 2 La. Ann. 897 (1847). Sometimes slaves were held to be immovable. *See* Harper v. Destrehan, 2 Mart. N.S. 389 (1824); Cox v. Myers, 4 La. Ann. 144 (1849).

14. Cawthorn v. Deas, 2 Port. 276 (Ala. 1835).

problems using terms developed in other contexts to a system with a unified law of slavery, which might be called a transition from an analogical to a categorical system of law, is not always easy to discern.[15] To bring out the changes, I will use the concept of "moral personality," already a celebrated notion in the literature on slavery. Frank Tannenbaum's *Slave and Citizen*[16] argued that Spanish-American slave societies recognized the slave's moral personality while Anglo-American slave societies did so much less forcefully.[17] He used this concept to explore the tensions inherent in all slave societies;[18] in such societies individuals are property, and yet we ordinarily use different concepts when we think about individuals than when we think about property. Because the law helps define the attributes of property and personality, legal reasoning must explicitly attempt to reconcile these differing concepts.[19] The notion of moral personality, then, helps us to cut into the cases even if, as the evidence in this article shows, the neat dichotomy that Tannenbaum proposed is inaccurate.

In this article, slave law is examined to see to what extent, and in what manner, the moral personality of the slave was respected.[20] In contrast to the claims of Tannenbaum and Elkins, this inquiry shows that Anglo-American slave law did respect

15. For some other examples of a related phenomenon, see, *e.g.*, David Cavers, *The Choice-of-Law Process* 59-87 (1965) (conflict of laws); Robert Bork, "The Rule of Reason and the Per Se Concept: Price Fixing and Market Division," 74 *Yale L.J.* 775 (1965) (antitrust); O.W. Holmes, *The Common Law* 89-95 (Howe ed. 1963) (torts); Note, "Civil Disabilities and the First Amendment," 78 *Yale L.J.* 842, 851 n.39 (1969) (constitutional law).

16. (1946).

17. The phrase "moral personality," and similar terms, can be found in *id.*, at vii-viii, 42, 97-98, 100, 104.

18. See David Brion Davis, "Slavery," in *The Comparative Approach to American History* 121 (Woodward ed. 1968); Davis, *The Problem of Slavery in Western Culture* 60, 62 (1965).

19. Clearly, the reconciliation occurs in other areas of intellectual work, and the particular resolution discussed in this essay can be fully understood only in relation to the many other ways in which the tension was resolved. But no such full-scale intellectual history of the South exists, though it is badly needed. The narrow focus of this essay probably distorts the general framework of Southern thought. I hope, however, that the essay will illuminate some aspects of Southern thought and, further, that it will show some of the complexities involved in the larger and more interesting study.

20. Much of the prior misconception of Anglo-American slave law derives from the failure of Tannenbaum or Elkins to offer a clear definition of moral personality. I will follow the use that seems to come closest to Tannenbaum's idea: social arrangements recognize a being's moral personality when participants use words like "obligation" or "duty," terms appropriate to ethical discourse, with respect to him. In the United Sates, treating the slave as having moral personality generally amounted to acknowledging that he was rational. In Spanish America, where the Christian heritage was stronger and Englightenment influence weaker, moral personality meant, essentially, that the slave had a soul. See Appendix *infra*.

the moral personality of the slave in ways very much like those of Spanish-American slave law. There were differences in shading and detail, but there were no significant differences in specific legal rules. Tannenbaum and Elkins mights accept this similarity in substantive rules and still contend that Spanish-American slave law had moral overtones that showed respect for the slave's moral personality, and that Anglo-American slave law did not. But as this article shows, states whose law was firmly in the Anglo-American legal tradition and where slavery was particularly brutal, such as Mississippi and Arkansas,[21] did treat the slave as having a moral personality. Perhaps this is because the slave system, both as a legal institution and as a network of human relationships, carried with it so many structural requirements for legal regulation and moral acceptability that the scope of variation in substantive rules of law and their articulation in morally acceptable terms could only be rather narrow.[22]

Even if there were few differences in the treatment of moral personality, there were differences in the predominant styles of reasoning.[23] Judges did not choose to use one mode in one case and another in the next, nor were a judge's preferences idiosyncratic. Instead, the choice of one style or the other was part of a legal culture.[24] This is another reason for attempting to make explicit the model of the role of law in society that guides this inquiry. Perhaps more important, it makes very close attention to the details of the law of slavery necessary, because legal culture is rarely apparent on the surface of the cases.

III. WHAT CAN WE LEARN FROM CASES?— A QUESTION OF METHOD

Before pursuing the story of the development of the law of slavery in more detail, I must clarify the purpose for which I am using the cases, since cases have, I believe, been widely mis-

21. See Charles S. Sydnor, *Slavery in Mississippi* (1933); Orville W. Taylor, *Negro Slavery in Arkansas* (1958). For Louisiana, see Joe G. Taylor, *Negro Slavery in Louisiana* (1963).

22. The material presented in this article does not, however, go far enough to permit me to claim this as one of my conclusions.

23. Though the modes correspond roughly to the accepted difference between the common law and the civil law, the identification is misleading. In Mississippi, for example, a common law jurisdiction, a shift from analogical to categorical reasoning occurred. See text at notes 11-20, *infra*. It is better to see the modes, as Llewellyn did, as competing legal "traditions" rooted in the way lawyers argue.

24. This article skirts the problem of identifying separate legal cultures, by focusing on particular jurisdictions. There seem to be differences among the jurisdictions, so that easy reference to a common law or a civil law tradition, or to an Anglo-American legal tradition, seems unjustified at this time. Examining other jurisdictions and other areas of the law would help in identifying the cultures.

used by previous students of the subject. Abolitionist writers, for example, found the law of slavery a useful source for their polemics. William Goodell thought that slave law was a faithful reflection of actual practice, or at least provided a description of the best behavior that we might expect of slaveholders.[25] But if the legal realists taught us anything, they taught us that the law in action ordinarily differs significantly from the law on the books. Cases and statutes, that is, do not faithfully reflect the whole of actual practice, and, while they may have some relation to practice, that relation varies substantially from one area of law to another; the law on the books may be either more permissive or more restrictive than the behavior it purports to regulate. Thus, Goodell, along with other abolitionists, excoriated the slave code for its refusal to acknowledge the right of a slave to marry.[26] We know, however, that some slaves maintained nuclear families over long periods of time,[27] so that the slave code obviously did not define the upper limit of respectable behavior in this instance. Goodell hinted at the response he would have made to this criticism, when he noted the differences between recognizing a right to marry, which the codes did not do, and extending permission to marry, which many individual slaveholders did. Marriage, he said, entails mutual promises of protection and respect, promises that slaves subject to the whims of their masters cannot meaningfully make.[28] Rights and privileges differ, he suggested, because they have different psychological overtones. While this was indeed true, it shifted the ground significantly. Goodell was no longer concerned with overt action, but rather with the emotions and meanings that slaveholders and slaves attached to action, a quite different matter.[29] As I argue below, I think that the shift is essential in the definition of what we can learn from cases, but it must be recognized for what it is.

25. Goodell, *Slave Code*, at 17.
26. *Id.*, at 107-08. *Compare* Smith v. State, 9 Ala. 990 (1846) (since law does not recognize slave marriages, "wife" of slave may testify against husband) *and* State v. Samuel, 19 N.C. 170 (1836) *with* William v. State, 33 Ga. Supp. 85 (1864) (by statute, rules of evidence in trials of slaves are the same as those in trials of whites, and contubernal relation is recognized in criminal trials where it is important to advancement of justice; testimony of slave's wife should not be admitted against him).
27. See, e.g., John W. Blassingame, *The Slave Community: Plantation Life in the Antebellum South* 77-82, 90-91 (1972); Robert W. Fogel & Stanley Engerman, *Time on the Cross*, I, 126-44 (1974); Eugene D. Genovese, *Roll, Jordan, Roll* 450-58 (1974).
28. Goodell, *Slave Code*, at 108. This point is made explicit in connection with religious rights. *Id.*, at 251-52.
29. See Genovese, *Roll, Jordan, Roll*, at 471-72 (summarizing psychological impact of uncertainty on sexual attachments between slaves).

Another abolitionist, George Stroud, was more cautious than Goodell in his reliance on the slave codes as evidence of practice.[30] He wrote, "In representative republics, . . . like the United States, where the popular voice so greatly influences all political concerns, . . . the *laws* may be safely regarded as constituting a faithful exposition of the sentiments of the people and as furnishing, therefore, strong evidence of the practical enjoyments and privations of those whom they are designed to govern."[31] Stroud was closer to the mark than Goodell in his emphasis on sentiment, although he stood on shakier ground when he sought to use the codes as "strong" evidence of practice. We can indeed find, in the cases, expressions of *what* the judges thought about slaves and slavery, and indications of *how* they went about thinking about slaves and slavery. Unfortunately, the abolitionists, and their successors, seemed to find evidence only of harsh and repressive attitudes, so that, while they examined the cases to discover the sentiments of the judges, they believed that the only sentiments honestly expressed were those consistent with what abolitionists already "knew" about Southern slavery; everything else was hypocrisy, benevolent words concealing the horrors of slavery that close observers could see hidden beneath the words.[32]

30. These writers shared my concern for the rules and ways of arguing embodied particularly in reported cases. In addition, the cases are, of course, sources for particular incidents illustrating what actually happened to slaves in the South. I hope that I provide enough factual detail to convey some flavor of this, but it is not my primary concern, nor was it Goodell's or Stroud's. Instead, I focus on rules and arguments.

31. George Stroud, *A Sketch of the Laws Relating to Slavery* v (2d ed. 1856), hereinafter Stroud, *Slavery Laws*. I believe, from textual indications, that Stroud reprinted the first edition with no revisions in the body of the text, but adding some footnotes. See *e.g., Slavery Laws* at 70 n.

32. For example, nearly every Southern state had laws limiting the master's treatment of his slaves, to avoid abuse. Abolitionists dealt with these protective statutes in several ways. First, they said, the laws were obviously unenforceable. Slaves themselves were, in general, the only witnesses who could establish that some protective law had been violated, but slaves could not testify against their masters, or indeed against any white person. See, *e.g., id.*, at 13-14; Goodell, *Slave Code*, at 157-59. See also Elkins, *Slavery*, at 56-57 (1959). Second, since slaves could not sue, enforcement of the law depended on the willingness of some outsider to come forward to bear the costs of litigation. The only people with resources adequate to the chore were slaveholders, and they could not be expected to engage in what amounted to an assault on the right of another master to treat his slaves as he wished. See, *e.g.*, Stroud, *Slavery Laws*, at 19-20. Third, putting aside the law, there was other evidence of mistreatment of slaves. Thus, the protective laws had no effect on what masters actually did. See, *e.g.*, Goodell, *Slave Code*, at 141-48. Finally, as Goodell put it, "Slaves are better protected as property than they are as sentient beings." *Id.*, at 201. See also Elkins, *Slavery*, at 58-59.

There are difficulties with these points that the abolitionists apparently did not realize. Stroud cited a case in which a master was

If the law was hypocritical, however, it is simply impossible to use the cases as evidence of sentiment and belief, which is what the abolitionists said they were using the cases for. That is, the deprecation of certain apparently benevolent expressions amounts to an abandonment of the attempt to rely on case law for evidence of sentiment and belief.[33] Therefore, I believe, we

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penalized for not supplying his slaves with adequate food or clothing. Stroud, *Slavery Laws*, at 18, *citing* State v. Bowen, 3 Strob. 574 (S.C. 1848). An overseer provided the evidence supporting the charge. Before we could dismiss the protective laws as unenforceable for want of testimony, we would have to know how often whites saw maltreatment, either as overseers, neighbors, or bystanders. Similarly, we might infer from the fact that these laws did not provide for the reimbursement of the costs of litigation, not that the laws were designed as shams, but that the legislators were confident that the social conscience of most slaveholders would lead them to defend slaves mistreated by other masters. And, of course, the protection of the masters' property interest in slaves surely benefited the human interests of the slaves.

33. Two additional points about prior uses of case law should be noted. First, while I have focused on the abolitionist polemicists, whose errors might be forgiven because of their noble purposes, Stanley Elkins, who purported to set the argument on a new course, *Slavery*, at 24, made nearly every mistake in the four pages that he devoted to "matters of police and discipline" that Goodell had made a hundred years before. For example, both Goodell and Elkins quoted extensively from Judge Ruffin's opinion for the North Carolina Supreme Court in *State v. Mann*, discussed text at note 120, *infra*. See Goodell, *Slave Code*, at 169-74; Elkins, *Slavery*, at 57. The opinion was shot through with distinctions between the moral and legal constraints on masters, and concluded with a reference to the legislature's power to enact a law making cruel treatment of slaves an offense, but Ruffin's appeal to policy clearly announced his commitment, and that of his court, to a harsh legal regime. Ruffin apparently had second thoughts, for ten years later he upheld a master's conviction for murdering his own slave, State v. Hoover, 20 N.C. (4 Dev. & Bat.) 500 (1839). Neither Goodell nor Elkins referred to the later views of Judge Ruffin, nor to the possibility he held out of legislative modification of the result in State v. Mann. Even putting such things aside, we still have no reason to think that the views of the North Carolina Supreme Court in 1829 were typical of Southern law as a whole, and, indeed, there were a fair number of cases, contemporaneous with State v. Mann, holding precisely the opposite and explicitly conflating the moral and legal constraints on masters.

Second, previous writers have selectively and inaccurately cited the cases. My favorite example of this comes from Goodell. In discussing the legal restraints on masters, he cited four cases from South Carolina. His source was Jacob Wheeler, *Practical Treatise on the Law of Slavery* (1837), a simple compilation of cases. Goodell accurately reproduced a statement that no common law offense of assault and battery against a slave existed because the peace of the state was not broken thereby, Goodell, *Slave Code*, at 168, *quoting* State v. Maner, 2 Hill 453 (S.C. 1834). He then stated that this rule was applied in "the case that next follows," State v. Mann. *Id.*, at 169. The only problem is that the case that "next follows" in Wheeler's book was a further quotation from the South Carolina cases holding that, while the common law did not recognize an offense in assault on a slave, "yet by the act of 1821, an assault with an intent to murder a slave is indictable," Wheeler, *supra*, at 244, *quoting* State v. Maner, 2 Hill 453 (S.C. 1834). The distinction between common law and statutory offenses is important, but the cases hardly establish what Goodell thought they did, a total failure of Southern law to protect slaves from assaults. See also Elkins, *Slavery*, at 57.

Goodell's inability to understand the more arcane aspects of

must take the cases at face value, at least initially, as evidence of emotions and the ideas that promoted or rationalized them[34] if we want to use cases at all. We might, of course, ignore the cases, except for the fact-patterns they reveal, precisely because we think that the judges were probably hypocrites, but I think that we would lose important insights into the slave system if we did so. We would not know less about how slaves were treated, of course, but that is not what Stroud, at least, thought he was presenting. Instead, we would know less about what responsible public officials thought they should say about slavery, within the formal constraints of a statute or a judicial opinion. In short, the law of slavery shows us the ideological structure of Southern society, and that is not to be ignored. The hypocrisy of this ideology is largely irrelevant for, as Professor Genovese notes, we can assume that all ruling class ideologies are self-serving.[35]

Cases are particularly useful tools with which we can obtain leverage on problems of ideology, because judicial opinions are public documents designed to convince.[36] They often try to per-

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standard legal propositions led him into more subtle errors. He sharply attacked as a sham a North Carolina statute defining as murder the malicious killing of a slave, in part because it excluded deaths resulting from moderate correction. This, he thought, indicated that moderate correction was so severe that it might take away the life of a slave. Goodell, *Slave Code*, at 180-82; see also Elkins, *Slavery*, at 58. I would have thought that the exclusion was designed to eliminate liability for killing the thin-skulled or hemophiliac victim beloved of law professors, the victim who would succumb to correction that would only discipline, but not kill, the general run of slaves. *Cf.* Wayne LaFave & Austin Scott, *Criminal Law* 392-93 (1972).

34. See also Genovese, *Roll Jordan Roll*, at 48: the "positive value [of the slave codes] lay not in the probability of scrupulous enforcement but in the standards of decency they laid down in a world inhabited, like most worlds, by men who strove to be considered decent."

35. Genovese, *supra*, note 7, at 119.

36. I examined every case mentioned in Helen Catterall, *Judicial Cases Concerning American Slavery and the Negro* (1926-32) in which a legal rule concerning slavery appeared to be at issue. Many of the cases there were included solely because the report of the facts indicated that a slave had been owned by one of the parties, even though the case did not involve the law of slavery. These were eliminated by a preliminary screening. Many of the cases that survived did not, in fact, involve the law of slavery in any interesting way, which I discovered only after reading the cases. I examined cases from Virginia, North Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, and Arkansas. In addition, I examined the laws of those states, insofar as they were easily available at the law libraries of Yale University, the University of Wisconsin, and the Law Library at the Wisconsin State Capital. This did not result in a comprehensive treatment of statutory developments, so that statutory law is not a major focus of this article. Finally, I have been told that Catterall does not include every case on slavery. However, for the period between 1810 and 1860, there is no reason to believe that she omitted anything of importance. Other sources relating to legal matters can, of course, be employed with great effect. James John-

suade the losing party, for one, but where the losing party represents an insignificant portion of the public, opinions appeal to the most important segments of the public. They set out premises accepted quite widely, and attempt to gain assent to a particular result by showing how that result can be derived from those premises. Plainly, the most important target of the opinions of Southern judges on issues of slave law was the master class; a secondary target may have been respectable (i.e., non-abolitionist) opinion leaders in the North.[37] Southern case law,

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son, *Race Relations in Virginia and Miscegenation in the South 1776-1860* (1970), for example, uses petitions to the legislature for permission to manumit slaves to demonstrate how widespread miscegenation was and to show what kinds of personal relations frequently developed between master and slave.

37. For examples of opinions rather clearly directed Northward, see Anthony v. State, 9 Ga. 264, 268 (1851) (statute giving slaves and free persons of color same rights in capital cases as white person shows "the humanity of our laws" and refutes "the slanderous imputations of the ignorant, the fanatical, or the wilfully base"); Jim v. State, 15 Ga. 535, 541 (1854) ("The legal principles which we shall deem it necessary to assert . . . may shock those who are prejudiced against the institution of slavery—who are unmindful of the causes and the means which influenced, and the men who established that institution in our country—who are blind to the difficulties in dealing with the subject on the part of those whose interests are involved in it, and *their right* to deal with it for themselves, according to their consciences, and in view of the solemn responsibilities under which they rest to their Maker"); Sanders v. Ward, 25 Ga. 109 (1858) (certain cases decided before "the fell demon—abolitionism—had . . . reared its monster head"); Barclay v. Sewell, 12 La. Ann. 262 (1857) ("present policy is hostile to indiscriminate manumission" in consequence of "injudicious and impertinent assaults from without upon an institution thoroughly interwoven with our interior lives").

Cf. Vance v. Crawford, 4 Ga. 445, 459 (1848) (". . . while we concede that the condition of our slaves is humble, still it is infinitely better than it would have been but for this very system of bondage, better than the lower orders of Europe, and better far than it would be, if they were emancipated here, 'destroying others, by themselves destroyed' "); Neal v. Farmer, 9 Ga. 555, 582 (1851); Peter v. Hargrave, 46 Va. (5 Gratt.) 12, 19 (1848):

> A rule giving *mesne* profits to slaves, after a recovery of freedom, would operate harshly and often ruinously in regard to the master. The arrangements, management and expenditures of slave owners are, in a great measure, essentially different from those of persons who employ free labour in their occupations and service. The latter are, for the most part, in the habit of engaging individuals, from time to time, as the occasion may seem to require, and of dismissing them when found unsuitable or unnecessary; and are in no wise bound to provide gratuitously for their wants and comforts, or the maintenance of their families. The owner of slaves, on the contrary, is usually condemned to a constant, permanent and anxious burthen of care and expenditure. It seldom happens that more than a small proportion of them are capable of productive labour; while provision must be made for the food, clothing and shelter of all; for the helplessness of infancy, the decrepitude of age, the infirmities of disease; to say nothing of the heedlessness, slothfulness and waste natural to persons in their condition. Hence it is that the scantiness of net profit from slave labour has become proverbial, and that nothing is more common than an actual loss, or a benefit merely in the slow increase of capital from propagation.

These citations are significant in light of the frequent use in Southern

then, illuminates the ideological structure of Southern society by setting out the generally accepted premises of that society.

Interestingly, there appears to have been very little change in that structure from 1810 to 1860, the period considered in this article. There were shifts in emphasis, the most important of which was a more strident assertion of the racist justification for slavery in the 1850's, but on the whole the ideological structure did not change substantially.[38] What did change was the method of presenting arguments from premises to results; instead of stating premises applicable to a wide range of social relations and giving arguments from policy to justify a particular result, as judges did between 1810 and, roughly, 1840, judges later on stated premises peculiar to the relation of master and slave and gave arguments from the nature of the institution to justify a particular result. This shift did not occur at the same rate throughout the South, nor did every state court arrive at the same point by 1860, but the trend is clear, as I will show.

IV. FROM A COMMON LAW OF CRIMES TO A STATUTORY LAW OF SLAVERY—MISSISSIPPI, GEORGIA, VIRGINIA

With all this as background, we can return to the puzzle I posed at the outset: what explains the change in the law of slavery in Mississippi from 1821 to 1859? The later view, that slaves could not commit or be the victims of common law offenses, is supported by cases from Virginia and North Carolina in the 1820's, holding that slave owners could not be indicted at common law for battery on their slaves, even if the beating was far in excess of what a reasonable master would do to discipline his slaves.[39] The Georgia Supreme Court went even further, holding that it was not a felony at common law for a stranger to kill a slave.[40] All this seems to suggest that the Mississippi Supreme

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propaganda of the comparison between slave and free labor. See, *e.g.*, George Fitzhugh, *Cannibals All!* 15-20 (Woodward ed. 1960); William Grayson, *The Hireling and the Slave* (1856). Excerpts from the latter can be found in *Slavery Defended: The Views of the Old South* 57-68 (McKitrick ed. 1963).

38. In light of the general understanding that Southern society underwent a marked reactionary change after 1831, *cf.* Genovese, *Roll, Jordan, Roll* at 50, 399-400 (1974), it is important to get this point clear. The cases do assert the moral value of slavery more vigorously after 1831, though similar assertions were made in gentler tones prior to that time. But the lines of development were apparent before 1831, and one can see the shadowy outlines of what later was made explicit even in the earlier cases. Cf. *id.*, at 52.

39. Commonwealth v. Turner, 26 Va. (5 Rand.) 678 (1827); State v. Mann, 13 N.C. 263 (1829).

40. Neal v. Farmer, 9 Ga. 555 (1851).

Court in 1821 had simply made a mistake, placing it outside the accepted bounds of the general law of slavery. But the picture is complicated by other cases. In Alabama, killing a slave was a felony at common law, whether committed by a stranger, by the slave's overseer, or by the slave's owner himself.[41] Even in Virginia and North Carolina, masters could be prosecuted for killing their own slaves.[42] Are these cases reconcilable with the cases on beating simply because in the beating cases death did not result?[43] A comprehensive look at all these questions is required for us to grasp the factors that influenced legal change in the law of slavery.

We can begin by noticing that the Mississippi Supreme Court, in deciding *State v. Jones* in 1821, acted as an ordinary common law court. After acknowledging that the precise question posed by the case was not resolved by prior cases or existing statutes, the court searched for relevant analogies. Although the court might have analogized slaves to horses or cows, it chose instead to emphasize the similarities between slaves and other dependent persons, such as unborn children and even lunatics, who can only perversely be called "reasonable creatures."[44] By 1859 the range of analogy had narrowed significantly. The transformation of the theoretical basis for criminal responsibility was accomplished largely by Mississippi's codification of the criminal law in 1824.[45] Codification, in the judges' eyes, required them to deduce results from precise statutory words rather than to seek answers by drawing analogies to some arguably parallel situation. If the words did not logically require them to say that a slave had moral personality, judges could not look to anything else, especially not to the ways in which slaves actually resemble free persons or lunatics, to supply that personality.

Codification made it possible to overrule *State v. Jones*, with-

41. Morgan v. Rhodes, 1 Stew. 70 (Ala. 1827); State v. Flanigin, 5 Ala. 477 (1843); State v. Jones, 5 Ala. 666 (1843). *Flanigin* and *Jones* were prosecutions under statutes that the court held were simply declarative of the common law.

42. Souther v. Commonwealth, 48 Va. (7 Gratt.) 673 (1851); State v. Reed, 9 N.C. 454 (1823); State v. Hoover, 20 N.C. 500 (1839).

43. *Cf.* State v. Hale, 9 N.C. 582 (1823) (stranger may be indicted for common law offence of battery committed on a slave).

44. The court adverted to a legislative decision that slaves could commit crimes, but that decision does not compel the conclusion that slaves are reasonable creatures whose killing amounts to murder. A court might have read the legislative decision only to establish the necessity for disciplining slaves and protecting society, a necessity that could then be used as Judge Ruffin used it, to show the impropriety of judicial inquiry into the treatment of slaves.

45. *Miss. Rev. Code*, ch. 54, 73 (1824). See also Thomas Cobb, *An Inquiry Into the Law of Negro Slavery in the United States of America* 88-90 (1858).

out coming into conflict with prevailing theories of law; political events made overruling *State v. Jones* attractive. In a series of cases decided in 1859, the Mississippi Supreme Court rather clearly indicated the connection. The court first held that, despite a statute extending the writ of error to all criminal cases, the writ was unavailable to review convictions of slaves for non-capital offenses.[46] Citing Thomas R.R. Cobb, a Georgia law-writer, and the Georgia Supreme Court's decision in *Neal v. Farmer*, which I will discuss below, the Mississippi Supreme Court held that a general statute would not be interpreted to include slaves. It ignored its earlier decision in *Jones* almost completely,[47] although *Jones* would seem to have something to say about the question, does "person" in a statute extending the writ to "all persons" include slaves? The next decision, holding that a free person of color living in Ohio could not take a bequest in Mississippi, was obviously influenced by general political trends; a majority of the court joined in a hysterical opinion justifying slavery and criticizing Ohio for infringing on the institution of slavery in Mississippi by, of all things, not permitting slavery in Ohio.[48] Finally, in *George v. State*, described at the beginning of this article, the court held that the common law of crimes did not apply to slaves.[49] Merely paraphrasing Cobb and *Neal v. Farmer*, the court said that, since the common law protected those to whom it applied in their security, liberty, and property, it could not apply to slaves who necessarily lacked all three.[50] Slaves and free persons were totally distinct classes of subjects for legal regulation: "Masters and slaves cannot be governed by the same common system of laws: so different are their positions, rights, and duties."[51] By this time, then, a law of slav-

46. Minor v. State, 36 Miss. 630 (1859).
47. *Jones* is cited only in the middle of a quotation from Cobb.
48. Mitchell v. Wells, 37 Miss. 235 (1859).
49. George v. State, 37 Miss. 316 (1859). Some erosion occurred in the course of deciding a confusing set of cases on the distinction between implied and express malice, where express malice was an essential element of the statutory crime. *See* Act of Jan. 28, 1829 (assault with intent to kill). *See also* Anthony v. State, 21 Miss. (13 Sm. & M.) 263 (1850) (express malice not alleged; conviction reversed); Ike v. State, 23 Miss. 525 (1852) (express malice alleged but not an element of offense of assaulting overseer in resisting chastisement); Jesse v. State, 28 Miss. 100 (1854) (malice an element of common law crime but not alleged; conviction reversed); Sarah v. State, 28 Miss. 267 (1854) (express malice not alleged; conviction for preparing poison with intent to kill reversed).
50. George v. State, 37 Miss. 316 (1859). The argument was drawn from Cobb, *supra*, note 45, at 83-84.
51. George v. State, 37 Miss. 316, 320 (1859). In Cobb, *supra*, note 45, the passage, quoting from Neal v. Farmer, 9 Ga. 555, 579 (1851), reads: "Experience has proved what theory would have demonstrated, that masters and slaves cannot be governed by the same

ery had emerged from the codification of the common law; though codification was designed primarily to transfer authority from the courts to the legislature,[52] it had an incidental but significant substantive impact as well.

Codification, though, did not wholly conquer the common law, nor was the law of slavery so easily separated from the general law of crimes. A case reported within ten pages of *George v. State* indicates the difficulty. It involved a slave's conviction for murdering his overseer. The slave attempted to prove that he acted in self-defense, and in support of the claim, he offered evidence that the overseer had a violent disposition. The court, affirming the trial court's refusal to admit the evidence, said,

> [T]he real question . . . is not whether, in prosecution for murder, it is competent . . . for the defendant to prove the general revengeful and dangerous character of the deceased. It is whether the general management of slaves, on a plantation, as characterized by violence and cruelty, and whether specific acts of severity and cruelty committed by him, while acting in the capacity of an overseer, may be proved as circumstances going to justify a homicide, committed upon him while acting as such overseer . . . . It is scarcely necessary to say that this proposition is utterly untenable. It lays down a rule which, if recognized by the courts, would produce the most disastrous consequences . . . . [T]he slave population . . . will be incited to insubordination and murder. . . .[53]

This certainly appears to set apart, as quite distinct questions, issues of self-defense raised by slaves and those raised by free persons. And yet this vigorous justification of a special rule for slaves is bracketed in the opinion by extensive discussion of the general law of self-defense, establishing, to the court's satisfaction, that the common law defense could not be proved by showing the victim's general disposition. If the lesson of *George v. State* had been taken to heart, such a demonstration would have been unnecessary.

The Mississippi Supreme Court in *George v. State* said, explicitly, that its decision did not mean that slaves were totally without legal protection. Since a comprehensive code respecting offenses committed by and on slaves had been enacted, the rhetorical excesses of *Jones* could be abandoned without totally transforming the substantive protection given slaves. My emphasis on the importance of statutory protections is confirmed by the fact that the Mississippi legislature, hard on the heels of the Supreme Court's decision in *George*, made it a statutory

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laws. So different in position, in rights, in duties, they cannot be the subjects of a common system of laws."

52. See Note, "Swift v. Tyson Exhumed," 79 *Yale L.J.* 284, 297-98 (1969).

53. Wesley v. State, 37 Miss. 327, 347-48 (1859).

offense for one slave to rape another.[54]

The Georgia Supreme Court was comforted by the existence of protective statutes, too, when it decided *Neal v. Farmer*, on which the Mississippi Court relied. There a slave owner sued to recover the value of his slave from a person who had killed the slave. It would not seem, at first, that this case would raise questions about the common law's coverage of slaves. But the defendant claimed that, because he had not been prosecuted for an offense, the master could not sue him for damages, a valid defense if what he had done constituted a felony at common law.[55] In *Neal v. Farmer*, then, the plaintiff could not recover if killing a slave *was* a common law felony, but he could recover if it was not. However, killing a slave was a statutory offense. Therefore, given the posture of the case, slaves would probably be better off if killing a slave was *not* a common law felony than if it was; potential wrongdoers would face criminal liability under the statutes and civil liability under the common law, the latter unencumbered by rules promoting delay, whereas if the offense had been a common law felony, civil recovery would inevitably be delayed. The irony of this may have contributed to the Georgia court's lyric on slavery in that state:

> It is the crowning glory of this age and of this land, that our legislation has responded to the requirements of the New Testament in great part, and, if let alone, the time is not distant when we, the slaveholders, will come fully up to the measure of our obligations as such, under the christian dispensation. . . . Conceding that there are violations occasionally on the part of the master, of the obligations of humanity, it may be asserted, with truth, that the relation of master and slave in Georgia, is an institution subject to the law of kindness to as great an extent as any institution springing out of the relation of employer and employed, any where existing amongst men.[56]

Masters were prosecuted under the statutes in Georgia for killing their own slaves,[57] and the definition of various crimes

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54. *Acts* 102, ch. 62 (1860).

55. The rule that a complainant could not sue for damages resulting from the defendant's felonious acts unless he had pursued the criminal action to conviction or acquittal was a relic of the time when all criminal actions were prosecuted by private parties. The rule meant that the private parties could not settle their claims without satisfying "the justice of the country," Middleton v. Holmes, 3 Port. 424 (Ala. 1836).

56. Neal v. Farmer, 9 Ga. 555, 582 (1851).

57. *See, e.g.*, State v. Abbott, 1 Ga. (1 R. Charlton) 244 (Super. Ct. Ga. 1822) (denial of bail to master affirmed); Bailey v. State, 20 Ga. 742 (1856) (voluntary manslaughter); Bailey v. State, 26 Ga. 579 (1858) (murder; rejects plea of autrefois acquit from prior reversal of conviction for voluntary manslaughter reversed on appeal). *Cf.* Jordan v. State, 22 Ga. 545 (1957) (overseer convicted of voluntary manslaughter, with court regretting that it cannot do more than affirm in this case of clear murder); Camp v. State, 25 Ga. 689 (1858).

was taken from the statutes, not from the common law.[58] The theory of *Neal v. Farmer* persisted, too, in private actions. For example, one white man could not sue another for slander without alleging special damages, though the defendant had said, "Negroes have been with your wife, and I can prove it," because the statutes did not define a crime of fornication by black men with white women, perhaps on the theory that consensual relations of that sort just could not occur.[59] But the cases also reveal a continuing tension between the view that slaves were not persons covered by the principles of the common law and the view that general principles of law were applicable to slaves.[60]

Just as the apparent harshness of *Neal v. Farmer* and *George v. State* can be explained by looking closely at the circumstances of the cases and the path of legal development, so can the Virginia cases be dealt with. In 1827, the Virginia General Court held that a master could not be indicted for malicious and excessive beating of his own slave.[61] As a preface to a long historical excursion on the limits of the master's power to punish his slaves, the court said, "In coming to a decision upon this delicate and important question, the Court has considered it to be its duty to ascertain, not what may be expedient, or morally, or politically right in relation to this matter, but what *is the law*." The historical inquiry shed little light on the problem, and, from the lack of support it found for imposing liability on masters, the court concluded, "[G]reat changes are not to be made by the Courts," which could not create novel common law offenses "without an alarming encroachment upon the liberty of the subject or citizen."[62] The decision thus turned on hostility to judicial creation of criminal offenses, an old Jeffersonian fear,[63] and not on a refusal to recognize that slaves were human beings.[64]

58. William v. State, 18 Ga. 356 (1855).
59. Castleberry v. Kelly, 26 Ga. 606 (1858).
60. *See, e.g.*, Hill v. State, 28 Ga. 604 (1859) (general principles on variance between indictment and proof relied on in case involving slave convicted as principal in murder). *Cf.* Baker v. State, 15 Ga. 498 (1854).
61. Commonwealth v. Turner, 26 Va. (5 Rand.) 678 (1827). The court had avoided the question in Commonwealth v. Booth, 4 Va. (2 Va. Cas.) 394 (1824), involving beatings by a person who had hired a slave. The court held that a variance between indictment and proof was fatal; because the indictment did not state that the defendant had hired the slave, the gravamen of the offense charged was beating without a right to inflict blows, whereas the gravamen of the offense proved was an excessive beating.
62. Commonwealth v. Turner, 26 Va. (5 Rand.) 678, 679, 686 (1827).
63. *See* Note, *supra*, note 52, at 286-87.
64. *See also* Commonwealth v. Turner, 26 Va. (5 Rand.) 678, 686 (1827) ("It is greatly to be deplored that an offense so odious and revolting as this, should exist to the reproach of humanity. Whether it may be wiser to correct it by legislative enactments, or leave it to the

Even this ground proved none too solid, for in 1851, the Virginia General Court, relying on another reading of history, held that a master could be indicted for murdering his own slaves. "The principles of the common law in relation to homicide, apply to his case, without qualification or exception . . . ."[65] The earlier case was distinguished on the ground that there death had not resulted from the master's use of force to discipline his slave.

The changes in Mississippi and Georgia law can be understood, I think, primarily as the product of technical legal concerns. In both states, the existence of statutes defining crimes played a central part, but not because legislative activity was more appropriate than judicial creativity in this area of law. Rather, the statutes made it possible for the judges to separate the criminal law respecting slaves from other aspects of criminal law; a category of slave law had fallen out of the general law of crimes. I must emphasize what the quotations already given should make clear: this shift in the method of analyzing problems had no systematic impact on the courts' appreciation of the slaves' moral personality. Slaves were still regarded as human beings, but that recognition took a different form. Because the transformation in the theoretical basis for criminal liability made analogies between slaves and other persons simply irrelevant, recognition of the slaves as human beings appeared in digressive essays like that in *Neal v. Farmer*. As I have already argued, there is no reason to treat such discourses as hypocritical rhetoric, although, as rhetoric, they may have been easier to discard under conditions of acute sectional tension than analogies central to a court's conclusion would have been. The cases show a confluence of the replacement of the common law by statutes with a still-muted but increasing concern for the defense of slavery against outside attack and with the uncomfortable reality that, whatever the law had to say about it, slaves were undeniably human beings.

V. THE PROBLEMS OF A COMMON LAW OF SLAVERY—NORTH CAROLINA

The first impression one has of the North Carolina cases on

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tribunal of public opinion, which will not fail to award the offenders its deep and solemn reprobation, is a question of great delicacy and doubt. This Court has little hesitation in saying that the power of correction does not belong to *it* . . . ."). The dissenting judge thought that history provided a firm basis for the indictment, so that judicial creation of crimes was not the issue, and that nothing "injurious to the peace of society" would result from affirming the conviction; after all, he noted, juries were composed of slave owners, and without legal redress for cruelty, slaves might revolt. *Id.* at 690.

65. Souther v. Commonwealth, 48 Va. (7 Gratt.) 673, 680 (1851).

the criminal law of slavery is that they announce a confused collection of rules that defy arrangement into some rational scheme. The difficulty arose from the judges' successful defense of the common law against the assaults of the codifiers.[66] Their victory left them with nothing to guide them in establishing legal rules relating to slavery, except some irrelevant English cases on villeinage, and Roman law, whose rules were said to be "abhorrent to the hearts of all those who have felt the influence of the mild precepts of Christianity."[67] The judges were at large, constrained only by their sense of propriety: "As there is no positive law decisive of the question, a solution of it must be deduced from general principles, from reasonings founded on the common law, adapted to the existing condition and circumstances of our society, and indicating that result which is best adapted to general expedience."[68] What they had to do, therefore, was to adapt rules developed on the assumption that all human beings were equally responsive to the dictates of conscience and the imperatives of passion to a society in which that assumption could not be acted on without imperiling its fundamental arrangements; slaves could not, for example, be permitted to respond to provocation by striking a white person, even though any white person would have been enraged to the point of blows. The outcome was a set of rules, uncomfortably coexisting, that attempted to resolve this tension by creating pigeon-holes into which each case could be inserted. Instead of the open-ended analogizing typical of classical common law courts, we find a much more restrictive technique, though one used with a fine touch by the highly-accomplished judges of North Carolina.

We can see the judges struggling to devise a set of rules in a long series of cases involving the limits on inter-caste violence. The cases developed from disputes in which one person struck another. At common law, the only issue, ordinarily, was whether the defendant was justified in his striking.[69] But in a slave society, other variables intruded: what was the relation between the victim and the defendant? How serious was the blow? Should the available justifications vary with the relationship or with the severity of the provocation? At the outset, the judges were plainly uncomfortable as they devised rules for master-slave or stranger-slave violence that were different from those

66. *See, e.g.*, State v. Jowers, 33 N.C. 555 (1850); Note, *supra*, note 52.
67. State v. Reed, 9 N.C. 454, 458 (1823). *Cf.* Murphy v. Clark, 9 Miss. (1 Sm. & M.) 221, 223 (1843); Kelly v. State, 11 Miss. (3 Sm. & M.) 518, 525-26 (1844).
68. State v. Hale, 9 N.C. 582 (1823).
69. W. LaFave & A. Scott, *supra* note 33, at 608 (1973).

for master-apprentice violence. But by 1860, isolating the cases into distinct categories had become routine; though the judges did not themselves rationalize the cases, an underlying structure can be discovered. In contrast to states like Mississippi, though, this result was not easily achieved, and, at the end, the law of slavery that had emerged still rested on a shaky theoretical foundation.

For convenience, I will discuss the cases in which the relationship between the parties was central, and then will examine problems of justification and provocation. Even in the earliest cases, the North Carolina Supreme Court was aware of the difficulties arising out of the slave system. In 1798, for example, the court set out the general rule that a master may commit murder when his servant died as a result of an excessive beating. But, the court said, "with respect to slaves it is somewhat different." Without exploring the differences in detail, the court returned to the free-servant analogy. Killing a servant who refused to obey an order and offered to resist force with force would be justifiable homicide; *a fortiori*, the court held, it was justifiable homicide to kill a slave who actually used force in resisting.[70] Picking up the hint on variable standards, the court held unconstitutionally vague a statute imposing "the same punishment" given to one who killed a free person on a person who killed a slave, because the statute did not specify how the punishment was to vary with aggravating or mitigating circumstances unique to the position of slaves.[71] This decision was, in effect, overruled twenty years later. Adopting a position urged in dissent in the earlier case, the court noted that the master did not need absolute physical power over his slaves in order to command their labors, to which he was indeed absolutely entitled.[72] This result was consistently followed. Judge Ruffin, in a case mentioned earlier, did little to develop the analysis when he suggested that though the master's power to punish was limited by the requirement that he stop short of killing, still it might be an extenuating circumstance that death resulted from moderate correction.[73]

Logic exerted some pressure to carry this analysis further than Judge Ruffin wished, however. The court had said that

70. State v. Weaver, 3 N.C. 54 (1798).
71. State v. Boon, 1 N.C. 246 (1801).
72. State v. Reed, 9 N.C. 454 (1823). The court relied on a minor change in the wording of the relevant statute when in was reenacted in 1817.
73. State v. Hoover, 20 N.C. 500 (1829). *Cf.* State v. Robbins, 48 N.C. 249 (1855).

absolute physical power was unnecessary, as the master could elicit obedience by less drastic methods. What, though, were those methods? The obvious answer was that the master could use reasonable force to secure obedience. This answer was supported by *State v. Hall*, upholding an indictment against one not the owner for striking a slave.[74] Certainly the tone of the opinion suggested that the court would not be insensitive to the claims of humanity:

> It would be a subject of regret to every thinking person if courts of justice were restrained by any austere rule of judicature from keeping pace with the march of benignant policy and provident humanity, which for many years has characterised every legislative act relative to the protection of slaves, and which Christianity, by the mild diffusion of its light and influence has contributed to promote; and even domestic safety and interest equally join.
>
> The wisdom of this course of legislation has not exhausted itself on the specific objects to which it was directed, but has produced wider and happier consequences in securing to this class of persons milder treatment and more attention to their safety, for the very circumstance of their being brought within the pale of legal protection has had a corresponding influence upon the tone of public feeling towards them; has rendered them of more value to their masters, and suppressed many outrages, which were before but too frequent.[75]

The Court then gave its reasons for upholding the indictment.

> The instinct of a slave may be, and generally is, tamed into subservience to his master's will, and from him he receives chastisement, whether it be merited or not, with perfect submission; for he knows the extent of the dominion assumed over him, and that the law ratifies the claim. But when the same authority is wantonly usurped by a stranger, nature is disposed to assert her rights, and to prompt the slave to a resistance, often momentarily successful, sometimes fatally so.
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> The public peace is thus broken as much as if a free man had been beaten, for the party of the aggressor is always the strongest, and such contests usually terminate by overpowering the slave and inflicting on him a severe chastisement without regard to the original cause of the conflict.[76]

In addition, because these offenses were, the court thought, ordinarily committed by men of dissolute habits, slave owners would be unable to secure civil redress. Self-help by assault was unnecessary, too, because insolent slaves would be punished by public authorities. *State v. Hall* suggests an emerging accomodation of the needs of the slave system and the dictates of humanity.

The celebrated case of *State v. Mann* cut that development short, before it could limit the behavior of the slave-owner himself. *Mann* held that a master could not be prosecuted for beat-

74. State v. Hale, 9 N.C. 582 (1823).
75. *Id.*, at 583.
76. *Id.*, at 584.

ing his own slave, no matter how severe or unreasonable the master was. Judge Ruffin wrote:

> A Judge cannot but lament, when such cases as the present are brought into judgment. It is impossible that the reasons on which they go can be appreciated but where institutions similar to our own exist, and are thoroughly understood. The struggle, too, in the Judge's own breast between the feelings of the man and the duty of the magistrate, is a severe one . . . .

Judge Ruffin rejected analogies to cases involving domestic relations, where, for example, a tutor could be prosecuted for beating a student excessively, because there the end sought was the child's happiness, whereas in slavery the end in view was the master's profit:

> What moral considerations shall be addressed to [a slave], to convince him, what is impossible but that the most stupid feel and know can never be true, that he is thus to labor upon a principle of natural duty, or for the sake of his own personal happiness? Such services can only be expected from one who has no will of his own; who surrenders his will in implicit obedience to that of another. Such obedience is the consequence only of uncontrolled authority over the body. There is nothing else which can operate to produce the effect. I most freely confess my sense of the harshness of the proposition . . . . And, as a principle of moral right, every person in his retirement must repudiate it. But in the actual condition of things it must be so. There is no remedy. This discipline belongs to the state of slavery. They cannot be disunited, without abrogating at once the rights of the master, and absolving the slave from his subjection. It constitutes the curse of slavery to both the bond and the free portions of our population. But it is inherent in the relation of master and slave.

After conceding that there probably were cases of "deliberate barbarity," Judge Ruffin concluded that, even so, it would be dangerous to permit judicial inquiry into the master's treatment of his slaves. "The slave, to remain a slave, must be made sensible that there is no appeal from his master. . . ."[77]

In *Mann* there were only the faintest echoes of praise for "the march of benignant policy" and "the mild diffusion" of Christianity. The attempt to accommodate competing concerns disappeared. Instead, Judge Ruffin put *State v. Hall* to one side, noting that, because it dealt with an assault by a stranger, it was irrelevant to the case of an assault by a master. The factual difference was there, of course, but, as the excerpt from the opinion in *State v. Hall* should make clear, the earlier decision scarcely turned entirely on the difference between strangers and masters. Then, too, what reason was there to think that a slave would suppress nature's "assertion of her rights" simply because

77. State v. Mann, 13 N.C. 263, 265-67 (1829). In Alabama, a master could be indicted for mayhem on a slave, committed while the slave was retreating; in the case at bar, the force used was inappropriate to the slave's offense. Eskridge v. State, 25 Ala. 30 (1854).

he was attacked by his master?[78] Finally, Judge Ruffin said in *State v. Mann* that judicial inquiry into the master's behavior would undermine the authority he required to keep his slaves pacified. If this was so, how could the court continue to permit prosecutions of masters for killing their slaves? Such prosecutions inevitably called the master's authority into question. Perhaps an individual slave would accept his punishment; whether he survived or died, he would have no appeal to the courts. Looked at in that way, prosecution for murder would not undermine the master's immediate authority. But in *State v. Mann*, Judge Ruffin was concerned with the slave system, not with individual slaves or masters, and he could not both lament his inability to protect individual slaves and justify prosecutions for murder on the ground that individual slaves would not be able to challenge their masters. His argument in *State v. Mann* dealt as much with the effect of prosecutions on other slaves as with its effect on the victim himself. Thus, the cases on murder and assault must be seen as fundamentally inconsistent.

The simple factual differences, that is, were seized upon as convenient ways to limit the earlier decisions. Judge Ruffin in *State v. Mann* did not justify his reliance on the factual differences as he might have, for example, by noting that *Hall* involved an invasion of the integrity of the slave owner's productive assets whereas *Mann* might be considered a case where the owner himself decided that his assets would be best used, his other slaves best motivated, by a physical assault on one slave. Thus, the factual differences did not lead to a distinction framed in terms of policy; they simply gave judges an opportunity to persevere in their inconsistency by narrowing their vision.

A similar narrowing occurred, though less dramatically, in cases attempting to describe varying standards of justification for assaults. The court worked from the framework of a statute providing that murders committed by and on slaves were to be determined by the "same rules" as in cases involving free whites. Thus, a white who killed a slave after being provoked by the slave might be convicted of manslaughter. This did not mean, however, that provocation by a slave was to be measured by the strict standards developed in cases involving whites. "It exists in the nature of things, that where slavery prevails, the relation between a white man and a slave differs from that, which subsists between free persons; and every individual in the community feels and understands, that the homicide of a slave may be

78. See text at notes 80-82, *infra*.

extenuated by acts, which would not produce a legal provocation if done by a white person."[79] If one white person reproached another for his behavior, killing would not be extenuated, for example, but the murder might be extenuated if the same words were said by a slave known to be sullen and sometimes rebellious.

The North Carolina court also dealt with the converse situation, attempts by slaves to mitigate their killings of whites. Suppose an overseer sought to punish a slave, and the slave attempted to run away. Would it be murder if the slave killed the overseer who was trying to restrain him? In a remarkably double-minded opinion, the court said that this was manslaughter, not murder. The court first noted that "[u]nconditional submission is the *general* duty of the slave; unlimited power is, in general, the *legal* right of the master."[80] Though there were exceptions to this rule, such as the slave's right to defend himself when threatened with death, the case under consideration did not involve such an exception; the slave had a duty to submit to punishment. Still, the court said, his attempt to escape did not amount to resistance or rebellion, which would have justified killing the slave. The law had to recognize that slaves had human feelings; they were "degraded indeed by slavery, but yet having 'organs, dimensions, senses, affections, passions' like our own."[81] The prosecutor overreacted in considering the slave's understandable attempt to avoid punishment to be wilful homicide, the court thought.

The simultaneous recognition of the slave's duty and his humanity ran through the cases, leading to results sometimes at odds with the rhetoric of the opinions justifying the results. Consider a case where a slave was insolent to a white. Because the slave's "passions are, or ought to be tamed down to his lowly condition," the court said, "what might be felt by [a free white] as the grossest degradation, is considered by the other as but a slight injury." The white responded to the slave's insolence by attacking him with a knife and a fence rail. "The superior rank of the assailant—the habits of humility and obedience which belong to the condition of the slave—habits which are not less indispensable to his own well-being than required by the inveterate usages of our people—clearly forbid that an ordinary assault or battery should be deemed, as it is between white men, a legal provocation. The law will not permit the slave to resist.

79. State v. Tackett, 8 N.C. 210, 217 (1820).
80. State v. Will, 18 N.C. 121, 165 (1834).
81. *Id.*, at 172.

. . ." Given the court's assertion of dual standards, one might think that this assault was justified. But, when the slave struck back and killed the white, it was, according to the court, manslaughter under provocation, for it "is impossible, if it were desirable, to extinguish in him the instinct of self-preservation; and although his passions ought to be tamed down so as to suit his condition, the law would be savage, if it made no allowance for passion."[82]

North Carolina law did not display the transformation of a law of crimes into a law of slavery as visibly as did the law elsewhere. But a clear trend away from ordinary common law standards and toward standards that varied with certain gross categories can be seen. This movement from reasoning by analogy to reasoning from the assumed character of the relationship was, in all its essentials, what happened throughout the American South. As in Mississippi and Virginia, the law in North Carolina never arrived at intellectually satisfying solutions; it proved difficult to resist the temptation to blur the lines distinguishing one category from another on the ground that, after all, each of the cases involved assaults by one human being on another.

VI. AN ATTEMPTED SOLUTION TO THE PROBLEMS—ALABAMA, ARKANSAS, LOUISIANA

The tensions within the law of slavery were not always as apparent as the cases already discussed suggest. In Alabama, for example, ordinary rules of the general common law of crimes were routinely applied in cases involving slaves.[83] The sole ex-

82. State v. Jarrott, 23 N.C. 76, 82, 86 (1840). *Cf.* State v. John, 30 N.C. 330 (1848) (slave killed another slave who had been having an affair with assailant's wife; court said that it might have mitigated offense had assailant discovered them in flagrante delicto); State v. Caesar, 31 N.C. 391 (1849) (Ruffin, C.J., dissenting: since slaves are ordinarily subservient, it shows malice when they strike back). The court never applied rules to free persons of color different from those applied to slaves, see State v. Jowers, 33 N.C. 555 (1850), but it hinted that in some cases different rules might be appropriate, State v. Davis, 52 N.C. 52 (1859). *But cf.* State v. Fuentes, 5 La. Ann. 427 (1850).

See also State v. Abram, 10 Ala. 928 (1847) (slave's conviction for mutilating a white person's ear by biting off a small part, while defending himself against assault by white, reversed; "Slave though he be and as such bound to obedience, and forbidden to resist those having lawful authority over him, he is nevertheless a human being").

83. *See, e.g.*, Ned v. State, 7 Port. 187 (Ala. 1838) (explicitly declining to decide whether different rules on double jeopardy apply in slave cases); Ex parte Vincent, 26 Ala. 145 (1855); Bob v. State, 29 Ala. 20 (1856) (applying general principles to decide that involuntary manslaughter cannot be proved under indictment charging slave with murder; in addition, overruling *Bob v. State* but without adverting to questions of slavery).

ception was an off-hand comment in *Godfrey v. State*,[84] where the court affirmed the conviction of a twelve-year-old slave for murder, noting that, while he was prima facie incapable of murder, that presumption could be overcome by showing that the defendant knew the nature of the act done, "after allowing due consideration to the fact that the accused was a negro and a slave."[85]

In Arkansas, slaves were both held to and protected by criminal standards without hesitation.[86] As the state Supreme Court said, "for the purposes of the criminal code, the law regards the slave as a person capable of committing a crime, and against whom offenses may be committed."[87] In another case, a slave was held criminally liable for an act that his master had ordered him to do, despite the slave's duty to obey his master.

> The slave, however, is a human being—he is regarded as a rational creature—a moral agent. He, as well as the master, is the subject of government, and amenable to the laws of God and man. In all things lawful, the slave is absolutely bound to obey his master. But a higher power than his master—*the law of the land*—forbids him to commit crime. The mandate of the law extends to every rational subject of its government. None are high enough to claim exemption from its penal sanctions, and none too low to be reached by them. Where the mandate of the law, and the command of the master, come in conflict, the obligation to obey the law is superior to his duty of obedience to his master.[88]

The slave was a rational being who, like every person, might at times have conflicting obligations. General moral principles had to control him as they controlled everyone else.

Yet this method of attaching criminal responsibility to slaves proved unstable. On the same day that the Arkansas Supreme Court called the slaves "rational subjects" like every other per-

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84. 31 Ala. 323 (1858).

85. Professor Genovese has shown that twelve-year-olds were generally regarded as children, and that masters did not requre of them what was required of older slaves. Genovese, *Roll, Jordan, Roll*, at 502-03 (1974). *Godfrey* suggests that the legal system had not adapted to this fact, and still treated slave children under ordinary common law rules. *See, e.g.*, LaFave & Scott, *supra* note 33, at 351-52.

86. Convictions of slaves for crimes were often reversed on grounds not denying that they were persons. *See, e.g.*, Sullivant v. State, 8 Ark. 400 (1848) (attempted rape); Charles v. State, 11 Ark. 389 (1850); (rape, reversed on evidence that slave simply touched woman); Pleasant v. State, 13 Ark. 360 (1853), 15 Ark. 624 (1855) (rape); Bone v. State, 18 Ark. 109 (1856) (assault).

87. Henry v. Armstrong, 15 Ark. 162, 166 (1854).

88. Sarah v. State, 18 Ark. 114, 117 (1856). The fact of the master's orders might lead a court to mitigate the penalty, but it did not absolve the slave of responsibility. *Id.* In this case the court analogized slaves and servants but refused to do so in another, McConnell v. Hardeman, 15 Ark. 151 (1854), holding masters not liable for the unauthorized trespasses of their slaves. *See also* Graham v. Roark, 23 Ark. 19 (1861).

son, it suggested that they were different too. The problem the court faced was that punishing a slave was something which masters ordinarily did, and imprisoning slaves deprived the masters of valuable property.[89] So the court compromised: in misdemeanors, the slave could be prosecuted only if the master and the injured party did not agree on some punishment; but felonies were too serious for the state to abandon to private parties:

> It would neither comport with the spirit of our laws, nor with the sentiments of our people, to treat slaves as mere chattels in all respects. Though inferior in mental and moral endowments to the white race, and occupying a subordinate position, in the order of Providence, yet they are rational beings, and as such, are not only responsible for crimes committed by them, but are under the protection of the laws. . . .[90]

Slaves were treated differently from free persons, though the court was unwilling to articulate clearly the justification for different treatment. But the reference to inferiority showed the court's sense that slaves ought not be considered just like free persons even with regard to the crimes they committed.

The most striking contrast to the problems faced by the North Carolina court, and by other courts as well, occurred in the decisions of the Louisiana Supreme Court. The question of how slaves resemble free persons barely arose. Slaves could commit crimes because the statutes said so, and not because slaves had the sort of moral personality which justifies the attribution of criminal responsibility. The extensive Black Code, which specified what a slave could and could not do, was taken to define what a slave was; it was not used as a description of some aspects of slavery, whose other aspects might be revealed by analogy to other situations, like the relationship between employer and employee.

Only a few sections of the Black Code even hinted at the problems faced elsewhere in the South. The Code provided that slaves could be prosecuted, though in special courts, because "the natural purport of justice forbids that any person, let their situation be what it may, should be condemned without a legal hearing."[91] The natural order of justice, not some conclusions derived from analogy to free persons, required that slaves be criminally liable, and no one could argue that they could not be liable because they were property. The issue was handled easily and without its becoming a problem.

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89. See text at notes 134-137, *infra*.
90. Bone v. State, 18 Ark. 109, 111 (1856).
91. *La. Digest* (1928), *Black Code*—Crimes, § 1, *See also id.*, §§ 17,18 (slave's duty to obey master qualified when ordered to commit a crime).

Louisiana's criminal cases showed the same easy recognition that the slave is human as the Code provisions do. When faced with a case in which a free man had killed a slave, the court had no trouble. "Slaves are regarded both as persons and as property; and the intention of the lawgivers must undoubtedly have been, to discharge the obligations which humanity and sound policy imperatively imposed upon them, of giving the most ample protection both to the person of the slave, and to the property of the citizen."[92] In another case the court said it found it "difficult to conceive how a crime can be committed by a slave, unless he be considered in law a person."[93] These cases directed attention to the treatment of slave personality in the Codes, and such attention did away with any need for the court to define the slave's moral personality itself. The court thus took the class "slaves" as naturally given and treated it as one whose attributes had to be deduced from the words of the statute bearing directly on the class: the court noted that a slave had committed what the statute said was a crime, and concluded that the slave therefore had to be considered a person.

The court's way of reasoning meant that slavery was a special institution to which legal rules having no implications beyond that institution applied. The Louisiana court, for example, did not exercise great care in framing rules of evidence. After initially applying standard rules of evidence to confessions by slaves,[94] the court withdrew.

> . . . Too much strictness has been observed on this subject [of confessions], as to free persons.
> . . . We are not prepared to say the same strictness should be observed, so as to exclude the confessions of slaves as evidence; humanity and charity ought to extend to them; but if their confessions are obtained without a violation of either, . . . they should be received as evidence.[95]

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92. State v. Moore, 8 Rob. 518, 521 (La. 1843) "Slaves were considered as persons enjoying all the rights and privileges of citizens, of which they had not been deprived by express legislation." *Id.*, at 522.

93. State v. Dick, 4 La. Ann. 182 (1849).

94. *See, e.g.*, State v. Gilbert, 2 La. Ann. 244 (1847) (confession made while being beaten inadmissible); State v. Isaac, 3 La. Ann. 359 (1848) (master interrupted confession; incomplete statement inadmissible); State v. Nelson, 3 La. Ann. 497 (1848) (overseer ordered slave to confess by saying, "It will be better for him to confess," but fact that slave was held in stocks at the time is irrelevant). *Cf.* State v. George, 15 La. Ann. 145 (1860) (confession to private individual who arrested slave is inadmissible). For further discussion of slave confessions, see text at notes 159-164, *infra.*

95. State v. Jonas, 6 La. Ann. 695, 698-99 (1851). *See also* State v. Adeline, 11 La. Ann. 736 (1856); State v. Kitty, 12 La. Ann. 805 (1857). *Cf.* Gregory v. Baugh, 29 Va. (2 Leigh) 665 (1831) ("our judges (from the purest motives, I am sure) did, *in favorem libertas*, sometimes relax, rather too much, the rules of law, and particularly the law of evidence. Of this, the court in later times, has been so sensi-

Similarly, the Louisiana court said that technicalities in trials of slaves could be ignored. "The law . . . does not demand on the trial of slaves, in the tribunals established for that purpose, an observance of the technical rules which regulate criminal proceedings in the higher courts."[96] Failure to arraign the accused slave, trial outside the ward in which the slave lived, and various other technical defects were not grounds for reversal.[97]

In other states the analogies would not stay so easily confined, and rules stated in cases involving slaves might be applied to cases involving free persons. The Mississippi court, for example, insisted firmly on strict compliance with technical rules. In reversing the convictions of some slaves for conspiracy to murder a white man, because the record failed to show the indictment, it said, "As much as we regret the impunity of crime arising from the neglect or incapacity of persons engaged in the administration of the law, and as little as we feel disposed to regard objections to form, we are nevertheless bound, in cases which, like the present, are of a highly penal character, to enforce with strictness the rules which the laws of the State have imposed."[98] Rules it articulated in cases involving slaves might later be applied by analogy to cases involving free persons, so the court had to define the rules with care. The rules in Louisiana could be applied only to slaves; less care was needed because there was less at stake.[99]

The Louisiana cases, I suggest, present something quite close to a mature law of slavery, the point toward which the law throughout the South was moving. As in Mississippi, codification let the courts turn away from the search for relevant analo-

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ble, that it has felt the propriety of gradually returning to the legal standard, and of treating these precisely like any other questions of property"; dissenting opinion).

96. State v. Kentuck, 8 La. Ann. 308 (1853).

97. *See, e.g.*, State v. Jerry, 3 La. Ann. 576 (1848); State v. Jackson, 6 La. Ann. 593 (1851); State v. Lethe, 9 La. Ann. 182 (1854); State v. Bob, 11 La. Ann. 192 (1856); State v. Oscar, 13 La. Ann. 297 (1858). *See also* State v. Bill, 15 La. Ann. 114 (1860), *overruling* State v. George, 8 Rob. 535 (1844) (juror who says he will insist on death penalty if slave convicted cannot be discharged for cause).

98. Laura v. State, 26 Miss. 174, 177 (1853). *See also* Peter v. State, 4 Miss. (3 How.) 433 (1839) (conviction reversed because prosecutor's name not on indictment). *Compare* State v. Peter, 14 La. Ann. 521 (1859) (judge who participated at former trial as judge and juror can preside again).

99. *But see* State v. Henderson, 13 La. Ann. 489 (1858), for an expression of the Louisiana court's concern that procedural rules on taking appeals might affect both slaves and free men. *See also* State v. King, 12 La. Ann. 593, 595 (1857) ("We regret to be obliged to set the prisoner at liberty, but it is far wiser and safer for society, and the rights of the citizen, to allow him to be liberated, than to violate a great principle in the interpretation of statutes"; slave's conviction for stabbing white man reversed).

gies, but, unlike Mississippi, in Louisiana comprehensive codification occurred at the very start of legal regulation of slavery; the Black Code was enacted in 1808.[100] When the Louisiana court turned to consideration of problems of criminal law,[101] it had at hand a fully developed conception of the nature of slavery, drawn from long experience and close attention to statutory provisions. As I have already suggested, the narrowing of vision permitted courts to ignore logical inconsistencies in what they did. Because of the Louisiana court's method of reasoning, it never confronted the problems faced by courts elsewhere, and so, in a sense, may be said to have solved the problems that are apparent, for example, in the North Carolina cases.

VII. "CONSIDERATIONS OF HUMANITY AND INTEREST"

Masters often claimed that the social system of slavery generated feelings of obligation on the part of the master class toward their slaves, and legal decisions spoke of those feelings as worthy of recognition.[102] Appeals to feelings of humanity were, however, routinely coupled with appeals to interest; it was said that, in protecting slaves from abuse, legal rules also guaranteed that the owners would be able to get the maximum value from their ownership. This dual justification was provided most often, of course, in cases involving the duties of hirers of slaves, but it also occurred in a few cases involving masters. In holding that a master could use only enough force to gain the slave's obedience, for example, the Mississippi Supreme Court said:

> Unconditional submission and obedience to the *lawful* commands and authority of the master is the imperative duty of the slave, as well as the undoubted right of the master. And the wisdom and origin or this rule is to be traced to the humane reason that upon its proper observation the happiness and welfare of both races, in that relation, necessarily depend.[103]

Ordinarily, however, the courts were concerned with protecting

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100. See generally George Dargo, *Jefferson's Louisiana* (1975).

101. The Louisiana Supreme Court did not have jurisdiction over criminal appeals until 1846. *La. Const.*, art. IV, § 2 (1812); *La. Const.*, tit. IV, art. 63 (1845). For attempts before 1845 to appeal criminal cases, see State v. Judge of Commercial Court, 15 La. 192 (1840); State v. Williams, 7 Rob. 252 (La. 1844) (including a long discussion of appeals in criminal cases).

102. Again it is important to emphasize that I am here concerned with ideology, not behavior. A pattern of brutal behavior does not itself show that slaveowners believed that slaves lacked moral personality. People often act in ways contrary to their beliefs and values, just as they often say things that they do not believe. If slaveowners did in fact systematically beat their slaves beyond what was needed to command them, the cases would only show the inevitable hypocrisy of ideology. See text at note 35 *supra*.

103. Oliver v. State, 39 Miss. 526, 540 (1860).

the master's investment;[104] if he himself chose to abuse his slaves, that was, quite literally, his business.

In non-commercial contexts, "humanity" alone was invoked. Yet, while the courts gave rhetorical recognition to the fact that slaves were human beings who had human relationships with their masters, they rarely progressed beyond a very rough categorization into an examination of the details of those relationships. Somehow, it seems, the quality of human relationships could not be made the subject of judicial inquiry, and in this area, no change over time can be seen. The courts' reluctance to look closely at the actual relationships did not derive, I think, from a belief that such matters cannot easily be examined in a manner that conformed to the requirements of judicial proceedings, for the cases show matters revealed that give more than hints of what went on between masters and slaves. Rather, I suggest that two elements were involved. First, detailed inquiry might reveal more about slavery than the courts would find comfortable. Second, if decision turned on the specifics of each relationship, the result would be a proliferation of particularized rules, and most judges simply could not handle a system of law that complicated.

Three groups of cases can illustrate the courts' concern for protecting the master's investment in his slaves. The first group includes cases dealing with the liability for injuries to a hired slave occuring outside the scope of the contract of hire. In one, a slave hired out on a boat helped to free the boat from grounding, a task ordinarily not performed by hired slaves. Although the ship's captain, after seeing what the slave was doing, had called out and told the slave to stop, the slave was too engaged in the work, and ultimately drowned. The Georgia Supreme Court, holding the hirer liable to the master, said, "[H]umanity to the slave, as well as a proper regard for the interest of the owner, alike demand that the rules of law . . . should not be relaxed. We must . . . mak[e] it the interest of all who employ slaves, to watch over their lives and safety. Their improvidence demands it. They are incapable of self-preservation, either in

104. *See also* Gibson v. Andrews, 4 Ala. 66 (1842) (master "is under both a moral and legal obligation to supply [slave's] necessary wants," doctor can therefore recover from master for providing medical care while master absent); Mitchell v. Tallapoosa County, 30 Ala. 130 (1857) (doctor must recover from master's estate, not from county, for providing care to slave jailed for master's murder); Hendricks v. Phillips, 3 La. Ann. 618 (1848) (Civil Code § 173, saying that master may correct slave "though not with unusual rigor, nor so as to maim or mutilate him, or to expose him to the danger of loss of life, or to cause his death," said to be "dictated by considerations of humanity, and restricts the authority of the master").

danger or in disease."[105] The Georgia court adhered to the notion that slaves could not be relied on to protect themselves:

> A negro is an intelligent human being, having the power of thought and volition, and capable of ministering to the cravings of his appetite, and providing for their gratification, but does not generally have judgment to direct him in what is proper for him, or prudence and self-denial to restrain him from use of what is injurious. He cannot be shut up and controlled and managed as a horse or cow, but from the necessity of the case, he must be left, under orders for the best, with power, if he disobeys, to do wrong.[106]

The logic of this argument is hardly compelling; if the slave does have a will, why cannot he be held responsible for his misdeeds? It may be significant that the preceding statement was made in order to reject a lessee's contention that the slave's overeating, contrary to a physician's orders, was an intervening cause relieving the lessee of liability for the slaves' death; the slave might well not have appreciated the danger that he faced if he overate. Where the danger was more apparent, courts generally did not hold the lessee responsible, because the slave's sense of self-preservation should have been enough to protect the slave,[107] and because the master could have provided by contract so that the lessee would, in effect, act as a self-insurer against obvious dangers.[108] Even where a slave's actions might transfer liability from lessee to owner, then, Southern courts were careful to justify the rules they applied in ways that would permit the master to protect his investment.

The same concern for the master can be seen in the second group of cases, involving the lessee's liability when the slave died or ran away during the term of hire. Southern courts almost uniformly held that the lessee was not entitled to an abatement of the rental price.[109] Although the cases generally applied set-

105. Gorman v. Campbell, 14 Ga. 137, 143 (1853). *See also* Collier v. Lyons, 18 Ga. 648 (1855); Spencer v. Pilcher, 35 Va. (8 Leigh) 565, 584 (1837) ("Humanity to the slave requires this, and the security of the rights of property imposes other restrictions on the bailee, for the sake of the owner").

106. Collins v. Hutchins, 21 Ga. 270 (1857).

107. Heathcock v. Pennington, 33 N.C. 640 (1850); Couch v. Jones, 49 N.C. 402 (1857). *Cf.* George v. Smith, 51 N.C. 273 (1859).

108. *Cf.* Seay v. Marks, 23 Ala. 532 (1853); Green v. Allen, 44 N.C. 228 (1853) (explaining recent change in statute by reference to increasing use of hired slaves in mines, railroads, etc.); Alston v. Balls, 12 Ark. 664 (1852).

109. *See, e.g.*, George v. Elliot, 12 Va. (2 Henn. & Munf.) 5 (1806); Ragland v. Parish Cross, 4 N.C. 121 (1815); Outlaw v. Cook, Minor 257 (Ala. 1824); Perry v. Hewlett, 5 Port. 318 (Ala. 1837); Berry v. Diamond, 19 Ark. 262 (1857). The hirer was not, however, liable for the value of the slave, unless, of course, he caused the slave's death. One case suggests that jury nullification of the rule requiring the hirer to pay the full rental amount sometimes occurred. Brooks v. Smith, 21 Ga. 261 (1857) (verdict for owner in amount of one-sixth

tled rules on contracts to lease any kind of property, occasional justifications in terms of humanity and interest appeared.[110] The Georgia Supreme Court, for example, said that no abatement should be allowed, in order to protect "this dependent and subordinate class" by eliminating any inducement for lessee to place slaves in situations of peril.[111] The lessees would not be relieved even if the slave ran away, since good treatment might have kept the slave docile.[112]

Finally, lessee's duties of care, in providing shelter or medical aid, were widely justified by appeals to humane feelings.[113] Such duties, of course, benefited the owners as well as the slaves; this may have been so obvious as to require no comment. One case, though, did make the concern for benefit to the master explicit: the Alabama Supreme Court held that, if the owner refused a slave tendered to him by a purchaser who had properly rescinded the contract, the purchaser could work the slave moderately, as a bailee, since moderate labor, by promoting the slave's health and preserving his discipline, also preserved his value.[114]

With a few exceptions, each of these cases could have been decided solely by determining which rule would best advance the master's interest, and it may be that the exceptions could have been decided by determining which rule would advance the interest of the master class in having a slave class not bent on rebellion. An observation on the literary style of these opinions provides the key to understanding what was happening. The opinions leave the impression that phrases like "considerations of humanity and interest" were invoked ritualistically, and did not reflect any real sensitivity to the human aspects of slavery.[115]

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of rental amount, for slave who ran away after two months of one-year term of hire).

110. *See* Outlaw v. Cook, Minor 257, 258 (Ala. 1824) ("As applicable to contracts for the hire of slaves, [the settled rules] appear to be supported by sound considerations of humanity and policy").

111. Lennard v. Boynton, 11 Ga. 109 (1852).

112. Curry v. Gaulden, 17 Ga. 72 (1855). *Cf.* Thompson v. Young, 30 Miss. 17 (1855) (in recapturing runaway, pursuer may not kill in absence of danger to himself).

113. *See, e.g.*, Tallahassee R.R. v. Macon, 8 Fla. 299 (1859) ("spirit of enlightened humanity"); Latimer v. Alexander, 14 Ga. 259 (1853); Dabney v. Taliaferro, 25 Va. (4 Rand.) 256 (1826). *Cf.* Copeland v. Parker, 25 N.C. 513 (1843); Meeker v. Childress, Minor 109 (Ala. 1823); Hogan v. Carr, 6 Ala. 471 (1844); Nelson v. Bondurant, 26 Ala. 341 (1855); Walker v. Smith, 28 Ala. 569 (1856); Wilkinson v. Moseley, 30 Ala. 562 (1857); Governor v. Pearce, 31 Ala. 465 (1858); Watkins v. Bailey, 21 Ark. 274 (1860).

114. Rand v. Oxford, 34 Ala. 474 (1859).

115. I am endebted to David E. Kendall for this observation. For further examples, see Kiper v. Nuttall, 1 Rob. 46 (La. 1841) (duty to provide medical treatment as a condition for rescinding sale on ground that slave had pre-existing illness derived from "the course

This impression comes, I think, from two sources. First, the cases did not involve disputes arising within a single owner's community, where the basic human relationships betwen master and slave developed. Rather, they arose from explicitly commercial transactions, between owners and lessees, for example, or from transitory relations, such as that created when a pursuer captured a runaway slave. In such situations, considerations of humanity were not in fact likely to affect how anyone behaved. It is significant, too, that lessees were considered to be rational economic calculators, whose treatment of slaves would be affected by rules imposing liability on them. This consideration helps to explain why such terms as "humanity and interest" were recited half-heartedly, but it does not explain why they were recited at all.

Here we must take into account another source of the impression that reference to "humanity" was no more than ritual. The genre "judicial opinion" imposed certain demands on those who employed it. Like tellers of folk tales,[116] judges may have had to insert some fixed elements into each opinion so that it would be persuasive to some portion of the relevant community to which it was addressed. They had to show why the result would promote the happiness of the slaves; they had to demonstrate how slaveowners were motivated not only by economic interest but also by the dictates of conscience. One task of the ideology of Southern law, that is, may have been to beautify the ugly reality of commercial concern by painting it in the glowing colors of "humanity." Slaveowners would have their consciences clear, and Northerners might be more sympathetic to the peculiar institution. If viewed in this light, the ritualistic recitation of stock phrases gives some support to the thesis argued in preceding sections, that over time the vision of judges narrowed sharply.[117] By focusing solely on the crude dichotomy "slave or free," the judges could use those stock phrases without elaborating their meaning in concrete situations, and so became less sensitive to individual variations within the slave system as a whole than they had been before.

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and duties prescribed by humanity"; purchaser's duty is such "as might be expected from a prudent father of a family"); Bayon v. Prevot, 4 Mart. 58 (La. 1815) (it would violate "the plainest dictates of humanity" to require person who recaptured runaway slave to confine him closely when, because of dysentery, slave could not safely be so confined).

116. *Cf.* Albert Lord, *The Singer of Tales* (1960).

117. As before, text at note 99 *supra*, I treat Louisiana law as a mature system of law even in the early years of the century.

As I have indicated, the cases discussed so far arose in a commercial context. Masters who rented out their slaves *prima facie* considered their slaves as important assets on which they could secure economic returns, and perhaps it should not be surprising that courts decided cases in ways consistent with the masters' economic interest and gilded the opinions over with purely verbal concerns for "humanity." It is therefore worthwhile to look at cases arising within the master-slave community to see if there was a trend to homogenize all relationships and to invoke "considerations of humanity" to justify results that are inconsistent, one would think, even with a sensible slaveowner's notions of humanity.

A tension between rhetoric and result can indeed be seen in cases arising on the plantation. For example, in Louisiana, one who injured a slave was liable only for the value of the slave before the injury, and not for the entire future cost of maintaining the slave. Having paid the value to the owner, the injurer could take possession of the slave. One would think that a totally disabled slave would thereafter be in real danger; his former owner might have developed human feelings for him, but now he was in the hands of a stranger who had, after all, injured him before. But the Louisiana court wilfully closed its eyes to the problem: "The principle of humanity which would lead us to suppose that the mistress, whom he had long served, would treat her miserable, blind slave with more kindness than the defendant . . . cannot be taken into consideration, in deciding this case. Cruelty and inhumanity ought not to be presumed against any person."[118] A lessee of slaves might be treated as a rational economic man, but, according to the court, not someone who had full title to the slave. In another case, the same court acknowledged that female slaves were subject to special sexual pressures, but refused to base rule of law on that knowledge:

> A master's power is a lawful power, such as is consistent with good morals. The laws do not subject the female slave to an involuntary and illicit connection with her master, but would protect her against that misfortune.
>
> It is true, the female slave is peculiarly exposed, from her condition, to the seductions of an unprincipled master. That is a misfortune, but it is so rare in the case of concubinage that the seduction and temptation are not mutual that exceptions to a general rule cannot be founded upon it.[119]

Decisions relating to a master's responsibility when his slave was accused of a criminal act show again that when Southern

118. Jourdan v. Patton, 5 Mart. 615, 617 (La. 1818). *Cf.* Tonnelier v. Maurin, 2 Mart. 206 (La. 1812).
119. Vail v. Bird, 6 La. Ann. 223, 224 (1851).

law confronted a conflict between interest and humanity, it ordinarily resolved it by upholding interest in the name of humanity, a perfectly sensible way of dealing with the problem, and one that should not be derided. In *Ingram v. Mitchell*, for example, a slaveowner whose slave had been arrested for attempted rape had Mitchell take the slave out of the county and sold, in order to avoid the slave's being tried. Mitchell refused to pay over the proceeds of the sale, and, when the slaveowner sued him, defended on the ground that his agreement with the slaveowner was void because it was designed to frustrate prosecution. Although Mitchell prevailed at trial the Georgia Supreme Court reversed, saying:

> I am fully sensible of the gross impropriety of endeavoring to screen a slave from merited punishment, especially for offenses committed against white females. I am not insensible to the fact, however, that, prompted by humanity, and from no mercenary motives, masters are sometimes induced to put their slaves out of the way to prevent them from becoming the victims of popular excitement, until the tempest of passion is past and reason has resumed her sway. And while this motive even cannot justify the act, it goes far to mitigate its criminality.[120]

In the end, an owner said to be without mercenary motives had his economic interest protected.

Another Georgia case, deciding that a master has no duty to furnish his accused slave with defense attorneys,[121] illustrates a point made earlier in the commercial context, that by recognizing human relationships between master and slave, courts could advance the master's economic interests without looking closely at what they really were doing. The case involved a slave tried for arson; after the slave was acquitted, the attorneys who defended him sued the master for payment. Rejecting the claim the court said:

> *Every* master has an interest to prevent his slave from being punished, an interest that increases with the increase of the punishment to which the slave is exposed. *Nearly* every master . . . has also an affection for his slave.
>
> This being so, it may be pretty safely assumed, that if in any case, the master refuses to employ lawyers for his slave,

120. Ingram v. Mitchell, 30 Ga. 547 (1860). *Contra*, Doughty v. Owen, 24 Miss. 404 (1852) ("Any other rule would place the criminal code as to slaves completely at the mercy of their masters, and society could only be protected against the enormities of this class of our population in those cases in which the private interest of their masters would not be prejudiced by consenting that the law might be administered, and its penalties inflicted on the guilty").

121. *But cf.* State v. Leigh, 20 N.C. 126 (1838) (master who is also magistrate cannot be prosecuted for dereliction of public duty for refusing to issue warrant for arrest of one of his slaves who had killed another of his slaves; "[p]assing by the interest of the owner, their relation imposes on him the obligation of the slave's defense . . . . Prosecution and defense are so incompatible that the two duties cannot be incumbent on the same person").

> the case is one in which the master ought not to be required to employ them. It may be pretty safely assumed that every such case will be a case in which the master, a juror biased, by both interest and affection, to acquit, has convicted.[122]

In the abstract, this reasoning may be persuasive, but in the case at hand, it is not. Presumably through the attorneys' efforts, the slave was acquitted, and the master's admitted economic interest advanced. One would think that principles of *quantum meruit* would require the master to pay for his presumably erroneous assumption about the slave's guilt. The judges, though, preferred to protect the interests of the master class even at the expense of attorneys.

Dealing with another facet of the master's responsibility, Southern law did display some sensitivity to variations in the masters' control of slaves. But this sensitivity was only implicit in a statutory scheme for compensating masters when their slaves were executed, and rarely received direct expression in judicial opinions. In Mississippi, owners received one-half of the value of a slave executed for a crime, as assessed by a jury of slaveowners.[123] Since slaveowners contributed most of the state's revenues through the property tax, this scheme acted as a crude system of social insurance, some masters paying others to aid the recipients in recovering from a severe financial loss. In addition, by removing the master's incentive to protect his slaves, compensation might expedite prosecution.[124] Partial compensation may have been a way to meet these ends without excessive cost. But it also showed that the master could not escape the burden of the slave's crime; because he had failed to control the slave, the master suffered.[125] Alabama's rule made this even

122. Lingo v. Milerr & Hill, 23 Ga. 187, 190 (1857).

123. *Miss Rev. Code*, ch. 37, art. 20 (1948). *See also La. Rev. Stat.* 57 (1845) (master may receive up to two-thirds of slave's assessed value; repeals earlier statutes, *e.g., La. Digest, Black Code—Crimes*, § 12, requiring compensation of full value up to $500, which may be a judgment that no slave executed for crime could possibly be worth more than $500).

124. State v. Jim, 48 N.C. 348 (1956) (question of whether master's pecuniary interest disqualifies him as witness on behalf of his slave would not arise where master compensated for execution); Flora v. State, 4 Port. 111 (Ala. 1836) (compensation "promote[s] public justice, by making it compatible with private interest"). See also Genovese, *Roll, Jordan, Roll*, at 632-33 (1974).

125. *Cf.* Atchison v. Potter, 14 Miss. (6 Sm. & M.) 120 (1846) (statute making master liable for costs of prosecuting slave is designed to make immediate controller of slave watchful and thereby to prevent consequences arising from slave's "ignorance of moral obligation"). *See also* State v. Hyman, 46 N.C. 59 (1853) (master's permission for slaves to buy liquor at any time during year is no defense to prosecution of selling liquor to slaves without master's permission; since liquor leads to vice, crime, insubordination, and weakness, slaves "should be guarded well, both as moral agents and as objects of property").

clearer; there the master could receive up to one-half of the slave's value, apportioned with respect to the master's blame.[126]

"Considerations of humanity," without any reference to considerations of interest, were invoked everywhere when questions were raised of equity's power to compel or restrain the transfer of slaves. Ordinarily, that power would be exercised only in cases involving unique objects.[127] Obviously, in some situations, a master's feelings of affection for particular slaves made them unique enough to justify the intervention of equity; equally obviously, in other situations slaves were treated by their owners as ordinary articles of commerce. To what extent were these variations recognized? Was it enough to allege that a slave was the property in controversy? Must the master state in some detail the reasons he had for thinking the slave unique? Courts in the Southern states gave varying answers to these questions, but running through all the opinions was the belief that the questions were to be resolved by considering only some very gross descriptions of the slaves. Once again, then, Southern law makers refused to look in much detail at the particular facts at issue, confining themselves to large generalizations. The courts did, in general, look beyond the single question, "slave or free," in these cases, but they did not look very much farther.

In the mid-1820's, the Virginia Supreme Court decided several cases on equity's powers that set the framework for discussion of the problem throughout the South. In the first of these cases, three judges articulated three possible rules for determining when equity might act to compel the transfer of slaves.[128] None made the straight-forward argument that, because slaves were real property, the standard rule allowing specific performance in land cases should be invoked. One argued that equity would act only where "family slaves" were involved.[129] The case before him, he thought, arose in a purely commercial setting;

126. Flora v. State, 4 Port. 111 (Ala. 1836); State v. John, 2 Ala. 127 (1841).

127. *Cf.* Dan Dobbs, *Remedies* 884-85 (1973).

128. Allen v. Freeland, 24 Va. (3 Rand.) 170 (1825).

129. Earlier the Virginia court had recognized that equity would not order that slave families be separated under a will requiring an equal division of the estate. Fitzhugh v. Foote, 7 Va. (3 Call) 13, 17 (1801) (". . . an equal division of slaves, in number or value, is not always possible, and sometimes improper, when it cannot be exactly done without separating infant children from their mothers, which humanity forbids, and will not be countenanced in a Court of Equity"). *See also La. Digest* (1828), *Black Code*, § 9 (considerations of humanity forbid sale of children under ten years of age away from their mothers). Nonetheless, the child's interest was to be protected even if it required a separate sale. Kellar v. Fink, 3 La. Ann. 17 (1848). *Cf.* Montan v. Whitley, 12 La. Ann. 175 (1857).

the plaintiff, claiming the slaves under a prior purchase, sought to enjoin the sale of those slaves to execute a judgment obtained by another against plaintiff's vendor. Here, he said, "[n]o sacrifice of feelings, no considerations of humanity, are involved."[130] Thus, the purchaser's legal remedies were adequate. The second judge agreed with this result, but for different reasons. He said:

> Slaves are a peculiar species of property. They have moral qualities, and confidence and attachment grow up between master and slave; the value of which cannot be estimated by a jury. . . . I should incline to think that slaves ought, *prima facie*, to be considered as of peculiar value to their owners, and not properly a subject for adequate compensation in damages, as land is considered to be to a purchaser; but that this presumption may be repelled, as in the case of a person purchasing slaves for the avowed purpose of selling them again.[131]

The third judge would have gone further:

> Slaves are not only property, but they are rational beings, and entitled to the humanity of the Court, when it can be exercised without invading the right of property; and as regards the owner, their value is much enhanced by the mutual attachment of master and slave, a value which cannot enter in the calculation of damages by a jury. . . . In this case, though Allen purchased the property at a public sale, and was but a short time in possession of it, in his opinion, he may have gotten a bargain; he may have set a higher value on the moral qualities of the slave (of which he may have been informed by others) than a jury would have compensated him for.[132]

The next cases did not have to resolve the problems of burdens of pleading and proof,[133] but it took only three years for the intermediate position to prevail and be transformed into a rule very similar to the third judge's. Although the first judge persisted in his contention that, since the owner alone can speak from special knowledge about the slave's moral qualities, he must allege peculiar value, a majority joined the middle position. One judge added, "I have known slaves who could not be sold for $20, and whose masters ought to consider themselves bound by ties of real gratitude to avert [the] calamity [of 'a violent seizure and sale, which may terminate in the destruction of his happiness, and in breaking asunder all his family ties and connec-

130. Allen v Freeland, 24 Va. (3 Rand.), at 173.

131. *Id.*, at 176.

132. *Id.*, at 178-79.

133. Bowyer v. Creigh, 24 Va. (3 Rand.) 25 (1825) (general discussion of equity, followed by statement that "[i]t must be obvious to every one, that various causes may exist, to give slaves a value in the eye of the master, which no estimated damages could reach. The slave may have been raised by him, and may possess moral qualities, which, to his master, render him invaluable. He may have saved the life of the master or some one of the family, and thus have gained with them a value above money and above price"); Almond v. Almond, 25 Va. (4 Rand.) 662 (1826) (wife entitled to alimony, but not to specific woman slave, on separation from husband where it is unsafe for her to return to him).

tions'], if able to do so, at the expense of hundreds. Surely, such considerations ought to receive the attention and countenance of the Courts."[134] Very quickly, the rule came to be that a slave-owner could obtain an injunction "though he neither alleges, nor proves peculiar value of the property."[135] The Virginia court moved from the belief that many masters placed special value on particular slaves to a general rule that special value need not be proved.[136]

The path in Mississippi, though not as well marked, was similar. The court there began by permitting an equity court to order the delivery of a slave described only as a family slave, as "an indulgence which has long been extended to the claims of attachment which may have grown up between the slave and his owner."[137] After a few years, Mississippi courts allowed such actions "without any allegation of peculiar and special value,"[138] because, except in cases where a person bought with resale in mind, it was reasonable to prefer the property over money.[139]

Because Louisiana, with its civil law heritage, did not distinguish between common law and equitable relief, the precise issue of when equitable relief should be available did not arise there, but a hint of the underlying problem, the uniqueness of particular slaves, can be seen in a case involving an attempt to rescind the sale of a family of slaves after the mother and a child had died. At first the Louisiana court said that the sale could be rescinded because a family of slaves would probably work "more cheerfully and harmoniously together" than the same number of unrelated slaves, and so would be more valuable. On rehearing, though, the court reconsidered, denying rescission because, when used as field hands, the value of one slave was not totally dependent on the existence of the rest.[140]

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134. Randolph v. Randolph, 27 Va. (6 Rand.) 194, 201-02 (1828). The passage includes the following as well: "The master has not only his *pecuniary interest* to consult, and his own affections and predilections to gratify . . . but, he owes a duty to the slave, as well as the slave does to the master, and which he ought to perform . . ."
135. Harrison v. Sims, 27 Va. (Rand.) 506, 507 (1828). *See also* Summers v. Bean, 54 Va. (13 Gratt.) 404 (1856).
136. It could of course be disproved by the opposing party, but given the owner's special knowledge and the irrationality of feelings, it can be assumed that this would rarely happen.
137. McRea v. Walker, 5 Miss. (4 How.) 455, 456 (1840). *See also* Williams v. Howard, 7 N.C. 74 (1819). *Cf.* Sanders v. Sanders, 20 Ark. 610 (1859).
138. Sevier v. Ross, Fr. Ch. Rep. 519 (Miss. 1843).
139. Murphy v. Clark, 9 Miss. (1 Sm. & M.) 221 (1843).
140. Bertrand v. Arcueil, 4 La. Ann. 430 (1849).

Before attempting to draw a single thread from all these cases, it is worth considering the situation in Alabama, which rejected the Virginia rules on equitable intervention. The Alabama courts acknowledged the attachment for slaves "raised or long used in a family,"[141] but required more than the allegation that a slave was a "family slave" before equity would act.[142] It said that equity would sometimes act, because "attachments of the strongest kind, sometimes grow up between master and slave, having its origin not infrequently in early infancy, and strengthened in after life by dutiful service and obedience, on the one hand, and care and protection on the other." But there was no special attachment shown in the case before the court, where the alleged family slave had been sold to the defendant eight years earlier, at the age of six.[143]

In all the cases discussed in this section, the courts struggled to determine what legal consequences should flow from the fact that slaves were human beings with whom their owners had ordinary human relationships. The courts generally paid lip-service to that fact but refused to attach legal consequences to it. By and large, once the courts recognized that property interests were involved, they refrained from any further inquiry into the details of the human relationships. They went as far as they would go in the cases on equitable intervention; in Louisiana and Alabama that was not very far at all, and even in Virginia and Mississippi, no real inquiries were made because the label "slave" or "family slave" was enough to trigger the power of the equity court. These cases modify my earlier argument about the narrowing of vision only slightly. Here, though the change over time was small, the direction of change is consistent with the argument that a specialized but rather rudimentary law of slavery emerged in the South from a general common law. It was specialized, because as a law of slavery developed, courts were less and less inclined to look at cases involving other types of relationships to derive rules appropriate to the institution of slavery. It was rudimentary, though, because detailed attention to small variations in cases is possible, I suggest, only where courts have a very large body of similar cases to draw on. Southern courts had not decided enough cases on slavery before 1860 for such cases to be an adequate source of refining the rules.

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141. Moore v. Dudley, 2 Stew. 170 (Ala. 1829).
142. Baker v. Rowan, 2 Stew. & P. 361 (Ala. 1832).
143. Hardeman v. Sims, 3 Ala. 747, 749 (1842).

VIII. THE SLAVE'S "CAPACITY TO CHOOSE"

Every human being has the ability to prefer one thing to another, and to manifest that preference by some external sign. Slaves had this capacity to choose, yet their power to act in accordance with their preferences was sharply limited. Slave law therefore was faced with a tension between general rules of law premised on a person's voluntary choice and the restrictions on choice inherent in the slave's status. I have selected three aspects of Southern law—the fellow-servant rule in tort law, the ability of slaves to choose between foreign emancipation and local slavery when authorized to do so by a will, and the voluntariness of confessions—to illustrate how those tensions were resolved. In general, whether the rules of law acknowledged the slave's capacity to choose or not, the situation placed the rules under such pressure that the tendency to flee from the problematic notion that slaves were human beings to the more secure confines of the "nature" of slavery was very strong.

Questions of the applicability of the fellow-servant rule to slaves arose infrequently in the South, where the kind of large-scale industrial endeavor that made the rule attractive was rare. By the 1840's, when the first cases were decided,[144] the general rule had been established that an employer is not liable for injuries to employees that were caused by the negligence of other employees.[145] Two arguments for the fellow servant rule were that it induced each employee to stimulate others to diligence, and that it was not unjust to refuse to carve out an exception to the general rule of no liability without fault, since any employee, finding himself working beside a careless person, could simply quit the job. Southern judges recognized that these arguments were inapplicable to slaves, who could neither walk away from the job nor properly reprove a free employee for his carelessness. In Florida and Georgia, the courts buttressed their refusal to invoke the fellow-servant rule with appeals to policy and humanity. The Florida Supreme Court stated:

> Apart from the views we have presented, considerations of public policy, the interest of the master, and humanity to the slave, require that he should be excluded from the [fellow-servant]

144. See generally Leonard W. Levy, *The Law of the Commonwealth and Chief Justice Shaw* 166-82 (1957). *Cf.* Williams v. Taylor, 4 Port. 234 (Ala. 1836) (employer not strictly liable for injuries to hired slave, but is liable for ordinary neglect; applies assumption of risk theories).

145. *But cf.* Walker v. Bolling, 22 Ala. 294 (1853) (avoids ruling on fellow-servant rule by finding direct negligence in employing grossly negligent engineer); Cook & Scott v. Parham, 24 Ala. 21 (1853) (evenly divided on fellow-servant rule, but agreed on direct negligence in failing to employ competent officers).

> exception to the rule [of *respondeat superior*], and that he should be shielded from the unrestricted control and oppression of irresponsible subordinates. The liability of the employer, *civiliter*, for the misconduct of his subordinates, will naturally add to the personal security and protection of the slave. Public policy emphatically demands that the owners of boats, railroads, and other public conveyances, should employ careful and capable agents in their respective business.[146]

Much of this argument could have been made with respect to free employees as well. The Georgia Supreme Court added an observation relevant to slaves only, that if the fellow-servant rule applied, "the life of no hired slave would be safe. As it is, the guards thrown around this class of our population are sufficiently few and feeble. We are altogether disinclined to lessen their number or weaken their force."[147]

The North Carolina Supreme Court saw the problem, not as an abstract issue of whether the fellow-servant rule "applied" to slaves, but in more concrete and realistic terms as whether a master who hired out his slaves could recover from the lessee for injuries caused by the negligence of other employees. Posing the issue in this way naturally led the court to recognize that these lawsuits were for the master's benefit, not the slave's. It was easy to argue from this, as the North Carolina Court did, that the master could have inserted a provision in the lease making the lessee an insurer. The court thought it irrelevant that the slave did not have the option, available to free employees, of quitting the job, since the slave had no choice in taking the job in the first place.[148] Therefore, the fellow-servant rule worked no hardship on slaves; to the extent that it was a rule of loss-distribution, it could be modified in the very contracts of hire that required the slave to work away from his master. It hardly needs to be said that this analysis was subtler and more aware of the actual operation of rules of tort law than the more humane opinions rendered in Florida and Georgia. Although North Carolina faced the issue several years after the other courts had, I find it difficult to believe that the opinion's quality reflects any time-related phenomenon. Rather, I suspect that the North Carolina court's opinion was of higher quality simply because the judges there were more skillful.

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146. Forsyth v. Perry, 5 Fla. 337, 344-45 (1853).
147. Scudder v. Woodbridge, 1 Ga. 195, 200 (1846). The court also alluded to the fact that many of the fellow-employees of hired slaves were free persons of color, who might well be judgment proof. *See also* Howes v. Steamer Red Chief, 15 La. Ann. 321 (1860).
148. Ponton v. Wilmington & W.R.R., 51 N.C. 245 (1858). This was the first case in North Carolina applying the fellow-servant rule to *any* employees, slave or free.

The slave's capacity to make choices with legally binding consequences was drawn into question in disputes over wills providing that certain slaves could choose between foreign emancipation, generally in Liberia, or local slavery.[149] Early cases upheld such provisions without discussion,[150] but by the 1850's, in response to fears that abolitionist attacks on slavery might indirectly succeed by persuading slaveowners to manumit their slaves, the legality of emancipation by will became a serious question.[151] I will discuss the general issue in the next section of this article, but for present purposes it is enough to note that the technical wedge for invalidating wills giving slaves the opportunity to choose between slavery and freedom was the general agreement in the South that there were only two permissible statuses, slavery or freedom; there was no such thing as qualified slavery or limited freedom. But, the argument went, a slave with the power to change his status by making a choice was neither slave nor free; his slavery was qualified by his ability to make a legally binding decision to change his status, and his freedom was limited by his duty to obey his owner until he made the choice. For this reason, the majority of the sharply-divided Virginia Supreme Court declared such a will void: "No man can create a new species of property unknown to the law. No man is allowed to introduce anomalies into the ranks under which the population of the state is ranged and classified by its constitution and laws."[152] The minority joined issue on the majority's

149. The same principles were applied to wills allowing slaves to choose their new masters. *See, e.g.*, Harrison v. Everett, 58 N.C. 163 (1859). One reason that some slaves might decide against foreign emancipation was that they would have to abandon their friends and neighbors. Indeed, Leary v. Nash, 56 N.C. 356 (1857), held that a female slave, given the election of freedom, would have to leave behind her children born between the making of the will and the testator's death, because, until he died, the will was revocable and had no effect. This, however, was quickly changed by statute. *N.C. Rev. Code*, ch. 119, § 27 (1858). *Cf.* Catin v. D'Orgenoy, 8 Mart. 218 (La. 1820).

150. *See, e.g.*, Elder v. Elder, 31 Va. (4 Leigh) 252 (1833); Cox v. Williams, 39 N.C. 15 (1845) (since American Colonization Society's charter permits transportation only of slaves who consent to go on to Liberia, slaves given to Society must be asked if they desire to leave); Leech v. Cooley, 14 Miss. (6 Sm. & M.) 93 (1846) (refuses to distinguish "liberate and send elsewhere" from "send elsewhere and liberate"); Wade v. American Colonization Society, 15 Miss. (7 Sm. & M.) 663 (1846). *Cf.* Nicholas v. Burruss, 31 Va. (4 Leigh) 289 (1833) (Tucker, J., presents own view that slave must assent to emancipation).

151. The earliest case invalidating a will allowing slaves to choose between freedom and slavery appears to be Carroll v. Brumby, 13 Ala. 102 (1848), which decided the question without much discussion.

152. Bailey v. Poindexter, 55 Va. (14 Gratt.) 132, 197-98 (1858). *See also* Williamson v. Coalter, 55 Va. 14 Gratt.) 394 (1858) invalidating will freeing slaves unconditionally, because of provision in will saying that any slave who stays in Virginia may choose own master); Creswell v. Walker, 37 Ala. 229 (1861).

ground, arguing persuasively that prior cases had upheld similar wills, and less persuasively that no intermediate status was in fact created in the wills:

> [S]laves have some capacity to *choose*, though it may, generally, be very weak and imperfect. They are responsible for their criminal acts; and may incur, and have to suffer the heaviest penalty of the law. The moment they become free they are legally capable, without any increase of intelligence, of making contracts. . . . To [permit them to choose freedom or slavery] is not to create that middle state between slavery and freedom, which is unlawful. It is merely to propound a question to a slave requiring a categorical answer.[153]

This was not a terribly satisfactory response to the majority's position, for the majority's answer was all too apparent: the issue was not whether slaves could make linguistically appropriate responses to a question, but whether legal consequences could flow from the slave's words. A better way to assert that those wills were valid was to say that the majority's position was overly technical and inhumane,[154] and then to talk about the slave's nature. The opinion of the North Carolina Supreme Court on this issue illustrated the approach. In upholding a deed giving slaves in trust for the grantor during her life, and then permitting them to choose foreign emancipation, the court said:

> [I]t is not true in point of fact or law, that slaves have not a mental or a moral capacity to make the election to be free and, if needful to that end, to go abroad for that purpose. From the nature of slavery, they are denied a legal capacity to make contracts or acquire property while remaining in that state; but they are responsible human beings, having intelligence to know right from wrong, and perceptions of pleasure and pain, and of the difference between bondage and freedom, and thus, by nature, they are competent to give or withhold their assent to things that concern their state. . . . [The capacity to choose] pre-exist[s], and [is] found in nature, just as other capacities for dealings between man and man.[155]

The maneuver here was to refer implicitly but clearly to other types of legal incapacity, such as infancy or lunacy, indicate that

153. Bailey v. Poindexter, 55 Va. (14 Gratt.), at 202. *See also* Girod v. Lewis, 6 Mart., O.S. 559 (La. 1819).

154. *See, e.g.*, Cleland v. Waters, 19 Ga. 35, 41 (1855) ("True, slaves are property—*chattels* if you please; still they are rational and intelligent beings. . . . In the absence of all legal restraint, and upon a point affecting the owner and his slaves only, and where no considerations of public policy intervene, we do not see the paramount necessity of establishing a doctrine so stringent"); Harrison v. Everett, 58 N.C. 163 (1859) ("humane" to permit slaves to choose new masters); Reeves v. Long, 58 N.C. 355 (1860) (no qualified slavery in permitting slave to choose new master; to hold otherwise "would be to exclude from the system of slavery every indulgence in its management, or at least, so to hedge it about, in this respect, as to make it stiff and harsh, and thus impart to it an aspect it does not now possess").

155. Redding v. Findley, 57 N.C. 216, 218-19 (1858). *See also* Alvany v. Powell, 54 N.C. 35 (1853) (slaves may take property in state prior to departure pursuant to a will emancipating them).

the justification for those incapacities was inability to distinguish between right and wrong, and then show that that justification was inapplicable in the case of mature slaves.

The court's willingness to authorize an extended period during which the slave could anticipate his liberation was remarkable. Even the Georgia Supreme Court, which had permitted a slave's election of freedom under an immediately operative instrument in 1855,[156] balked at that, saying that such a will proposed local emancipation by requiring the slave to remain in the state for an extended period.[157] The analysis here put some strain on the earlier ruling, though, because slaves given the choice between remaining as slaves or departing to become free necessarily would remain in Georgia for some time even after they chose freedom. The strain could have been relieved by distinguishing between short-term residence for only so long as necessary before removal, and longer-term residence. The Georgia court instead moved in the direction of prohibiting elections entirely. Although by 1860 it had done no more than void a will unconditionally manumitting the slaves but giving them the choice of selecting a master under whom they would remain slaves in the state, it did so on the ground that "as slaves, they could not elect," foreshadowing future developments that were forestalled by the Civil War.[158]

When slaves confessed to crime, questions inevitably arose concerning admissibility.[159] Southern courts began by applying the general rule against coerced confessions.[160] Although

156. Cleland v. Waters, 19 G. 35 (1855).

157. Drane v. Beall, 21 Ga. 21 (1857).

158. Curry v. Curry, 30 Ga. 253, 260 (1860). The court also said, "Should such a bequest be sanctioned by this Court as a legal disposition of these slaves, there would be no end to which the system would be carried," *id.*, at 259, and cited cases invalidating wills authorizing the choice of foreign emancipation.

159. On a related issue, slaves' dying declarations were treated as being as solemn as any other such testimony. The Mississippi court said, "The simple, elementary truths of christianity, the immortality of the soul, and a future accountability, are generally received and believed by this portion of our population. From the pulpit, many, perhaps all who attain maturity, hear these doctrines announced and enforced, and embrace them as articles of faith." Lewis v. State, 17 Miss. (9 Sm. & M.) 115-120 (1847).

160. The court called it a "basic principle of criminal jurisprudence," Jordan v. State, 32 Miss. 382 (1856). It was sensitive, too, to the pressures a white man could exert without using force on a slave. *See, e.g.*, Dick v. State, 30 Miss. 593 (1856). *Cf.* Jordan v. State, 32 Miss. 382 (1856) (threats used); Simon v. State, 37 Miss. 288 (1858) ("you had better tell the whole truth" is threat); Brister v. State, 26 Ala. 107 (1855) (improper to admit confession given as answer to questions assuming guilt); Dinah v. State, 39 Ala. 359 (1864) (confession inadmissible when given as answer to questioner asking why she was in jail; acknowledges fear of punishment for changing story). At the same time, however, the courts required some par-

they did not at first articulate rules of law peculiar to cases involving slaves, very soon the formulations explicitly took into account the fact that the defendant was a slave, as something bearing on the credibility of the confession.[161] In its most far-reaching form, this meant that a presumption of inadmissibility was created. Thus, the Mississippi Supreme Court followed the general rule that a confession before a magistrate was admissible even if a prior confession had been extracted by threats, unless the defendant showed that those threats had had a continuing impact on him, on the theory that the magistrate's official position dissipated the defendant's fears. The Mississippi court, though, modified that rule in cases involving slaves, and presumed that the taint would not be dissipated, because "being a slave, he must be presumed to have been ignorant of the protection from sudden violence, which the presence of the peace afforded him, and he saw himself surrounded by some of those before whom he had recently made a confession."[162]

But if coercion by a third party invalidated a confession, what about the coercion inherent in the master-slave relationship, because of which the slave might confess to please his master? In general, such confessions were held to be admissible. The Mississippi court's argument was typical:

> The relation which the slave bears to the master is certainly one of dependence and obedience but it is not necessarily one of con-

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ticular inducement to confess, and would not infer such an inducement from a climate of fear. *See* Peter v. State, 4 Miss. (3 How.) 433 (1839) (lynch mob surrounding jail; conviction reversed on technical ground); Frank v. State, 39 Miss. 705 (1861) (slave heard another being whipped); Mose v. State, 36 Ala. 211 (1860) (confession admissible because taint dissipated). For another instance where a technical defect invalidated a conviction, see Laura v. State, 26 Miss. 174 (1853). *See also* Stephen v. State, 11 Ga. 225 (1852); State v. Gilbert, 2 La. Ann. 244 (1847); State v. Nelson, 3 La. Ann. 497 (1848).

161. *See, e.g.*, Seaborn v. State, 20 Ala. 15, 17-18 (1852) ("The facts that they were slaves, and ignorant, and to some extent unacquainted with the consequences which may attend the making of such admissions, go not to the admissibility of the evidence, but should be weighed by the jury in connection with the admissions in ascertaining the weight to be given them"); Simon v. State, 5 Fla. 285, 298 (1853) (holds inadmissable confession given to mayor in office surrounded by large crowd, which mayor said was sure of defendant's guilt; "the fact that the accused is a slave, and the confession to, and at the instance of his master, are circumstances entitled to the most grave consideration; the ease with which this class of our population can be intimidated, and the almost absolute control which the owner does involuntary [*sic*] exercise over the will of the slave, would induce the Courts at all times to receive their confessions with the utmost caution and distrust").

162. Peter v. State, 12 Miss. (4 Sm. & M.) 31, 38 (1844). *See also* State v. George, 50 N.C. 233 (1858); Bob v. State, 32 Ala. 560 (1858). *Cf.* State v. Clarissa, 11 Ala. 57, 61-62 (1847) ("[slaves'] condition in the scale of society, throws a certain degree of discredit over any confession of guilt they may make, and renders it unsafe if not improper, to act upon such evidence alone").

> straint and duress. It is not to be presumed that the master exercises an undue influence over his slave to induce him to make confessions tending to convict him of a capital offense, because besides the feelings of justice and humanity, which would forbid such efforts, it would be against the interest of the master that the slave should make confession which would forfeit his life; for he would thereby sustain a loss of one-half of the value of the slave. Nor is it to be presumed, that the slave will make confessions to his master, tending to convict him of a crime for which he would suffer death, with a view of yielding to the wishes of the master, and when he was aware of the consequence of the commission of the crime, for that would be in opposition to all the promptings of self-preservation, the most powerful of all motives. It is rather to be presumed that he would deny his guilt, relying on the protection of the master, in the absence of inculpatory evidence. For the hope of protection from the master, in consequence of the denial, is a much more natural and reasonable motive, and far more just to the humane feelings of the master, than that of self-sacrifice to the master's cruelty.[163]

The rule in Louisiana was the same, but the mode of reasoning differed. There the court wrote:

> The proposition seems to us inadmissible, that the relation of the master to his slave is such, as to render objectionable [these confessions]. On the contrary, as it is alike the interest and duty of the master to protect and defend his slaves, confessions made to the master and voluntarily deposed to by him, ought to have the highest moral weight as evidence. . . . To exclude entirely confessions made to the master on the ground of his relation to the accused, is not required by any motive of justice or humanity to the slave, and is opposed to sound reason and public policy.[164]

The court's focus was on the character of the relation of the master to the slave, not on comparisons between coercion in that relation and coercion in other situations. In Mississippi, in con-

163. Sam v. State, 33 Miss. 347, 351-52 (1857). The court acknowledged that the master-slave relation might impair the credibility of the confessions, but argued that slaves rarely confessed except to masters. If these confessions were inadmissible, slaves would be punished summarily and outside the legal system, "which should operate, both in its protection and in its punishment, upon them, as well as upon the white man." *Ibid.* *See also* Smith v. Commonwealth, 51 Va. (10 Gratt.) 734 (1853). In Alabama, the rule was that confessions to masters were to be examined with caution, since the relation of "ownership and dominion on the part of the master, and subjection and dependence on the part of the slave . . . may be supposed to exert an influence over the mind of the slave, with respect to such admissions, when considered in connection with the declarations made by the master, which might not attach to declarations made by strangers or persons having no connection with the slave in any way. The slave naturally looks to his master for protection: he is accustomed to throw himself on his leniency and mercy, and, it may be, by honest confessions of his guilt, to mitigate the chastisement which may await him as the punishment for his misconduct." Wyatt v. State, 25 Ala. 9, 12 (1854). One North Carolina judge would have excluded all confessions to masters because a slave, in confessing, spoke "with a view to propritiate his master. His confessions are made, not from a love of truth, not from a sense of duty, not to speak a falsehood, but to please his master." State v. Charity, 13 N.C. 543, 548 (1830) (Henderson, J.).

164. State v. Hannah, 10 La. Ann. 131, 132 (1859).

trast, the court implicitly compared coercion in these cases to coercion in others. Thus, even when the courts reached identical results, the mode of reasoning in one involved analogies, in the other involved an inquiry into the "nature" of slavery.

The reciprocal problem, whether a master was disqualified by his pecuniary interest from testifying on behalf of his slave, was easily solved in most Southern states. The prevailing rule, and its rationale, was stated by the Mississippi Supreme Court:

> As a question of common humanity, the master has custody of his slave, and owes to him protection. . . . What would be the condition of the slave, if that rule, which binds him to perpetual servitude, should also create such an interest in the master, as to deprive him of the testimony of that master? The hardship of such a rule would illy comport with that humanity which should be extended to that race of people. In prosecutions for offences, negroes are to be treated as other persons; and although the master may have had an interest in his servant, yet the servant had such an interest in the testimony of his master as will outweigh mere pecuniary considerations; nor could he be deprived of that testimony by the mere circumstance that, in a civil point of view, he was regarded by the law as property.[165]

Even in North Carolina, where masters could not be compelled to testify against their slaves,[166] the suggestion that the master be prohibited from testifying in a capital case in support of his slave "shock[ed] all the best feelings of our nature," because "frail as human nature may be, dollars and cents should not be weighed in the balance with life."[167] The logical extreme of arguments finding coercion inherent in the social relationship was to consider all confessions of slaves to white men suspect. The Georgia Supreme Court flatly rejected the argument,[168] and the sole limitation on the rule was that a slave's failure to respond when a white man exclaimed that the slave was guilty could not be treated as an admission by silence, because the slave's relation to whites made it impossible for him to contradict the assertion without being impertinent or insolent.[169]

As we have seen before, there was no uniformity on the sub-

165. Isham v. State, 7 Miss. (6 How.) 35, 41-32 (1841). See also Cobb, *supra*, note 45, at 271-72. The Louisiana court said, "Slaves are prosecuted as persons, and they ought not to be deprived of the testimony of their owners, because the verdict may injury them in a pecuniary way." State v. Peter, 14 La. Ann. 521, 529 (1859). *See also* Spence v. State, 17 Ala. 192 (1850); Austin v. State, 14 Ark. 555 (1854).

166. State v. Charity, 13 N.C. 543 (1830).

167. State v. Jim, 48 N.C. 348, 351 (1856). The court emphasized the inconsistency between prosecuting a slave as a person and excluding testimony on the ground that the slave was property.

168. Jim v. State, 15 Ga. 535 (1854).

169. Bob v. State, 32 Ala. 560 (1858).

stance of any of these rules of slave law, though there were identifiable majority and minority rules. Instead, the only unifying theme is a stylistic one, the tendency to invoke abstractions, like the slave's "nature," in cases where closer attention to detail would have severely strained the judges' sense that they were moderate and humane men. This point suggests a modification of the primary argument of this article. I have argued that a law of slavery developed as judges attempted to devise a relatively simple theoretical framework to deal with a large number of disparate cases involving slaves. However, that framework could not remain simple enough to meet the mediocre judge's need for sure and easy guidance.[170] After the reconceptualization had occurred, cases continued to arise, and the theoretical structure necessarily became more elaborate as more cases had to be accommodated within it. When judges are careful, this accommodation of new cases to an old structure occurs, I suggest, by very close attention to detail, and by reasoning that makes fine distinctions plausible. Mediocre judges, though, try to avoid the difficulties inherent in this endeavor by grasping at whatever simplifying devices they find at hand—in the South, appeals to humanity, a conception of the nature of slavery, or any other formula that was arguably appropriate to the situation. This modification of my argument explains why North Carolina law diverged from the law elsewhere; we have independent evidence, for example from Roscoe Pound's evaluation of Judge Ruffin,[171] that North Carolina judges were more talented than other Southern judges, and therefore had no need to retreat into abstractions.

IX. THE QUESTION OF RACE

I have said little so far about the influence of race on legal rules, despite the obvious fact that slavery in the South was Negro slavery. Except in some narrow areas of law, however, the Southern states did not often rely on racial grounds to justify the rules they announced. The fact that slaves were blacks was so obvious that it never had to be stated, but lurked always in the cases. Everywhere, of course, blacks were presumed to be slaves.[172] Yet even on this, Southern courts were occasionally

170. Cf. David Little, *Religion, Order, and Law: A Study in Pre-Revolutionary England* 21-22 (1969).

171. See Roscoe Pound, *The Formative Era of American Law* 4, 30n. 2 (1938) (Ruffin one "of the ten judges who must be ranked first in American judicial history").

172. See Cobb, *supra*, note 45, at 254; Jackson v. Bob (1861); Gary

hesitant. A Georgia court refused to apply the presumption to blacks living in other states;[173] the North Carolina Supreme Court held that the presumption did not arise from a shade darker than "mulatto," whatever that was, saying, "to carry [it] into shades, would lead us into darkness, doubt and uncertainty, for they are as various as the admixture of blood between races, and against the rule that presumptions are always in favor of liberty."[174] The Louisiana court went even farther, holding that colored persons in possession of their freedom, a much larger group in Louisiana than elsewhere, were presumed to be free.[175]

Although free persons of color were subjected to special regulations,[176] some courts refused to consider slaves and free

v. Stevenson, 19 Ark. 580 (1858). *But see* State v. Alford, 22 Ark. 386 (1860) (presumption does not apply to criminal cases when race determines either the crime or the punishment). *Cf.* Thurman v. State, 18 Ala. 276 (1850) (child of white mother by mulatto father is not a mulatto and so cannot be convicted of crime of mulatto raping white woman).

173. Hunter v. Shaffer, Dudley 224 (Super. Ct. Ga. 1830).

174. Nichols v. Bell, 46 N.C. 32, 34-35 (1853).

175. Adelle v. Beauregard, 1 Mart. 183 (La. 1810); State v. Cecil, 2 Mart. 208 (La. 1812). After these cases, possession of freedom rather than color seemed to give rise to the presumption. *Compare* Pilie v. Lalande, 7 Mart., N.S. 648 (La. 1829) *with* Forsyth v. Nash, 4 Mart. 385 (La. 1816) *and* Hawkins v. Vanwickle, 6 Mart., N.S. 418 (La. 1828). But this was not the evolution of a rule independent of color. *See* Miller v. Belmonti, 11 Rob. 339 (La. 1845); State v. Powell, 6 La. Ann. 449 (1851). Rather, it seems to have been a change in emphasis on the various factors suggesting that a presumption should be invoked.

176. The following is a compilation of Louisiana statutes and cases dealing with free blacks. It gives an indication of the range of regulation, perhaps wider in Louisiana, with its large free colored population than elsewhere. Free persons of color had to carry a certificate of their status when they carried arms. *La. Digest* (1828), *Black Code*, § 21. They could not insult whites "nor presume to conceive themselves equal to the white." *Id.* § 40. *See* State v. Fuentes, 5 La. Ann. 427 (1850). Their right to emigrate was closely regulated. *La. Digest of Penal Law* 115-16 (1841) (Act of 1830); *La. Rev. Stat.* 287-89 (1852) (Act of 1842); *La. Acts* 70 (1859). Neither slaves nor free persons of color could immigrate if they had committed a serious crime. *La. Digest* (1828), *Slaves*, Act of 1817. Free persons of color could, however, testify against whites. State v. Levy, 5 La. Ann. 64 (1850). Members of both groups could be executed for arson, poisoning, and rape. *La. Rev. Stat.* 50 (1856). Marriage across racial lines was prohibited. *La. Civil Code*, § 45. (This was a civil disability; no laws made intermarriage criminal. *Cf. id.* sec. 182. *See also* Dupre v. Boulard's Exec'r, 10 La. Ann. 411 (1855).) To enforce the ban on intermarriage, illegitimate mulatto children could prove their descent only from a Negro father. *La. Civil Code*, § 226 (1853). *See also* Robinett v. Verdun's Vendees, 14 La. 542 (1840) (fact of white father can be proved against colored children). (The Civil Code imposed special requirements on the acknowledgement of colored children. *See* Thomassin v. Raphael's Exec'r, 11 La. 128 (1837); Compton v. Prescott, 12 Rob. 56 (1845). *Cf.* Turner v. Smith, 12 La. Ann. 417 (1857) (acknowledgement by white man of his children by his slave is null).) Some corporations were open only to whites. *See* Boisdere v. Citizens' Bank, 9 La. 506 (1836) (such a limitation cannot destroy rights already vested in free persons of color); African Methodist Episcopal Church v. New Orleans, 15 La. Ann. 441 (1860) (free persons of color cannot form incorporated churches).

blacks as members of a single class. The Louisiana court, for example, held unconstitutional a general codification of laws "relative to slaves and free colored persons" because it embraced more than one subject. "In the eye of the Louisiana law, there is, (with the exception of political rights, of certain social privileges, and of the obligations of jury and military service,) all the difference between a free man of color and a slave, that there is between a white man and a slave."[177] Slaves thus formed a distinct class, set apart, not by their race, but by the fact of their enslavement. To the Louisiana court, legal rules could not turn on the fact of race because nothing in the nature of slavery required that it be racial.

Where this categorical method of reasoning was well-established, courts did not bring to a clear focus the issue of race, for judges did not have to specify how and why slaves were different from free persons: they were different just because they were slaves. As we have seen, though, judges in other states did not settle easily into the categorical style; they found that they had to devise ways of restraining analogies that tended to go beyond what the judges wished. Race provided a relatively clear line of defense.[178]

The cases decided by the Arkansas Supreme Court provide the best collection of expressions that legal rules must turn on questions of race, perhaps because Arkansas law borrowed heavily from other Southern states, perhaps because the court came relatively late to the problems of slave law, at a time of increasing sectional tension over slavery. One illustration of the Arkansas court's reliance on racial arguments was its justification for the prohibition on the immigration of free blacks: "[T]he two races, differing as they do in complexion, habits, con-

177. State v. Harrison, 11 La. Ann. 722 (1856). *See also* State v. King, 12 La. Ann. 593 (1857). *Compare* State v. Henry, 15 La. Ann. 297 (1860) (act "relative to crimes committed by slaves" is not unconstitutional). *See also* State v. Philpot, Dudley 46, 50-52 (Super. Ct. Ga. 1831) (it would be "absurd" to deny habeas corpus to free blacks "for then the benefit of this salutary writ would be made to depend upon the particular complexion of the individual, and not upon his political or social relations. . . . The law has never ceased to consider slaves, though thus subject to the government and service of a master, as human beings, subject to its protection, and bound to obey its requirements. . . . [T]hough slaves have no political rights, nor rights of property, they have many personal rights, and are very far from being considered mere things, brutes, and [*sic*] beasts of burden. . . . [F]ree persons of color, though they lack civil rights "enjoy in the fullest extent personal liberty"). *Contra*, Field v. Walker, 17 Ala. 80 (1849). *Cf.* Union Bank v. Benham, 23 Ala. 143 (1853).

178. *But see* Daniel v. Guy, 19 Ark. 121, 23 Ark. 50 (1861), *sub. nom.* Daniel v. Roper, 24 Ark. 131 (1863). These cases illustrate the occasional factual problems in establishing a person's race.

formation and intellectual endowments, could not nor ever will live together upon terms of social or political equality. A higher than human power has so ordered it, and a greater than human agency must change the decree."[179] Even in very minor areas the court was conscious of racial factors. For example, slave patrols sometimes whipped slaves without justification. The court held that the patrols would be liable only for malicious whippings because other rules would provoke insolence by the slaves. "The elevation of the white race, and the happiness of the slave, vitally depend upon maintaining the ascendancy of one and the submission of the other. The rights of individuals must yield to the necessity of preserving the distinction between races."[180] And in a case of interracial rape, the court indicated its doubts about the use of derogatory evidence about the woman's character; ordinarily such evidence might give rise to a presumption of consent, but the court thought that no white woman was likely to consent to intercourse with a black man.[181]

Finally, the Arkansas Court held that free blacks could not own slaves. They could in general own property: "The negro, though morally and mentally inferior to the white man, is nevertheless, an intellectual being, with feelings, necessities and habits common to humanity." Property supplied his needs and gave him incentives, and so would eliminate idleness and depravity,[182] but only the "inferiority of race" justified slavery. Since the bondage of one black to another did not have this foundation, it could not be permitted.[183]

In my judgment, the most racist opinion delivered by any Southern court came in 1853, when the Georgia Supreme Court held that free blacks could not own slaves. The court harped on "the social and civil degradation, resulting from the taint of blood, [that] adheres to the descendants of Ham in this country, like the poisoned tunic of Nessus."

> In no part of this country . . . does the free negro stand erect and on a platform of equality with the white man. He does, and must necessarily feel this degradation. To him there is but little in prospect, but a life of poverty, of depression, of ignorance, and of decay. He lives amongst us without motive and without hope. His fancied freedom is all a delusion. All practical men must admit, that the slave who receives the care and

179. Pendleton v. State, 6 Ark. 509, 512 (1846).

180. Henry v. Armstrong, 15 Ark. 162, 168-69 (1854).

181. Pleasant v. State, 15 Ark. 624 (1855).

182. *Cf.* Leiper v. Hoffman, 26 Miss. 615 (1853); Tannis v. Doe, 21 Ala. 449 (1852).

183. Ewell v. Tidwell, 20 Ark. 136, 143-44 (1859). *See also* Heirn v. Bridault, 37 Miss. 209 (1859). *Cf.* Hunter v. Shaffer, Dudley 224 (Super. Ct. Ga. 1830).

> protection of a tolerable master, is superior in comfort to the free negro. . . . Civil freedom among the whites, he can never enjoy.
>
> . . . [T]he courts of this country should never lean to that construction, which puts the thriftless African upon a footing of civil or political equality with a white population which are characterized by a degree of energy and skill, unknown to any other people or period.[184]

Free blacks were treated as "wards" or "infants."[185] Such characterizations sometimes led to condescension,[186] but they often induced courts to be more rigorous in guaranteeing procedural protection to free blacks.[187] More important, thinking of slaves and free blacks in such terms inevitably meant that notions of hierarchy entered the law. Thus, in justifying separate and more severe criminal punishment of slaves and free blacks than of whites, while dismissing an improperly drawn indictment of a slave, the Florida Supreme Court said:

> The perpetuation of the institution, indeed the common safety of the citizens during its continuance, would seem to require that the superiority of the white or Caucasian race over the African negro, should ever be demonstrated and preserved so far as the dictates of humanity will allow—the degraded caste should be continually reminded of their inferior position, to keep them in a proper degree of subjection to the authority of free white citizens.[188]

I must emphasize, however, that explicitly racist language was rare, and indeed, in cases on wills directing foreign emancipation, we can see how limited the reach of the racial aspect of Southern slavery was. Although by the 1850's, strong dissents began to be registered,[189] wills providing for emancipation out-

184. Bryan v. Walton, 14 Ga. 185, 198, 205-06 (1853).

185. Cooper v. Mayor of Savannah, 4 Ga. 68 (1848) (failure to pay tax on free blacks moving to city can be penalized only by fine, not by imprisonment); Scranton v. Demere, 6 Ga. 92 (1849).

186. *See, e.g.*, State v. Lane, 30 N.C. 256 (1848) ("Degraded as are these individuals, as a class, by their social position, it is certain, that among them are many, worthy of all confidence"). *Cf.* State v. Boyce, 32 N.C. 536, 540-41 (1849) (permitting slaves to have holiday dance does not constitute keeping a disorderly house; "It would really be a source of regret, if, contrary to common custom, it were to be denied to slaves, in the intervals between their toils, to indulge in mirthful pasttimes. . . . One cannot well regard with severity the rude pranks of a laboring race, relaxing itself in frolic").

187. *See, e.g.*, State v. Jacobs, 47 N.C. 52, 55 (1854) (personal service of notice to free black to leave city is required; "the legislature never intended to act so oppressively towards a race to whom stern necessity has compelled it, in other respects, to deny so many of the privileges of freemen"). *Cf.* Davenport v. Commonwealth, 28 Va. (1 Leigh) 588 (1829) (knowledge that victim is free is unnecessary to establish offense of "stealing" a free person of color).

188. Luke v. Florida, 5 Fla. 185, 195 (1853).

189. *See, e.g.*, Adams v. Bass, 18 Ga. 130 (1855); Sanders v. Ward, 25 Ga. 109 (1858); Walker v. Walker, 25 Ga. 420 (1858). Courts did seize on alternative grounds to invalidate wills of this sort. *See, e.g.*, Adams v. Bass, *supra* (refusing to apply *cy pres* to will directing emancipation in Northern states where free blacks could not live);

side the South were nearly universally upheld, in the face of absolute prohibitions on or strict regulations of local emancipation.[190] Courts refused to find that these wills were void because against public policy, which, they said, was aimed solely at preventing an increase in the numbers of free blacks within the state's borders. The Florida Supreme Court, for example, characterized the policy in this way:

> The conviction upon the public mind is settled and unalterable as to the evil necessarily attendant upon [the] class of [free blacks], and although treated by our laws humanely, they have ever been regarded with a distrust bordering on apprehension—a class of people who are neither freemen nor slaves, their presence at all times deleterious and often dangerous to the public welfare.[191]

Ideas of hierarchy also pervaded the legal disapproval of the existence of statuses between slavery and freedom, created by promises of future freedom.[192] Judges thought that slaves, knowing that they were to be free, would become unruly, and other slaves would become envious of them, promoting insubordination and rebellion among the entire slave population.[193] But,

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American Colonization Society v. Gartrell, 23 Ga. 448 (1857) (Society's charter, limiting it to transportation of free blacks, bars it from taking bequest of slaves); Lusk v. Lewis, 32 Miss. 297 (1856) (same); Myers v. Williams, 58 N.C. 362 (1860) (will for future emancipation void because particular terms of will create perpetuity). *But cf.* Walker v. Walker, *supra* (although American Colonization Society cannot act as trustee for slaves transported to Liberia, Chancellor should appoint trustee who will carry out testator's wishes).

190. *See, e.g.*, Charles v. Hunnicutt, 9 Va. (5 Call) 311 (1804); Myrick v. Vineburgh, 30 Ga. 161 (1860); Vance v. Crawford, 4 Ga. 445 (1848); Jordan v. Bradley, Dudley 170 (Super. Ct. Ga. 1830); Cameron v. Commissioners of Raleigh, 36 N.C. 436 (1841); Ross v. Vertner, 6 Miss. (5 How.) 305 (1840); Atwood v. Beck, 21 Ala. 590 (1852); Pool v. Pool, 35 Ala. 12 (1859). *Cf.* Prater v. Darby, 24 Ala. 496 (1854), *overruling* Trotter v. Blocker, 6 Port. 269 (Ala. 1838); Thompson v. Newlin, 41 N.C. 380 (1849). *Contra, Miss. Code*, ch. 37, art. 17, Sec. 11 (enacted Feb. 26, 1842) (1848), *applied*, Mahorner v. Hooe, 17 Miss. (9 Sm. & M.) 247 (1848) (will made in Virginia, where foreign emancipation legal, ineffective as to slaves in Mississippi). *See also N.C. Acts*, ch. 37 (1860) (emancipation by will prohibited).

191. Bryan v. Dennis, 4 Fla. 445 (1852).

192. *See, e.g.*, Thornton v. Chisolm, 20 Ga. 338 (1856); Bivins v. Crawford, 26 Ga. 225 (1858); Francois v. Lobrano, 10 Rob. 450 (La. 1845). *But see* Anderson v. Anderson, 38 Va. (11 Leigh) 616 (1841); Abercrombie v. Abercrombie, 27 Ala. 489 (1855). Acts more limited than promises of freedom did not, it was thought, establish a qualified state of slavery. *See, e.g.*, Washington v. Emery, 37 N.C. 32 (1858); Harden v. Mangham, 18 Ga. 563 (1855).

193. *See, e.g.*, Myers v. Williams, 58 N.C. 362 (1860); Vance v. Crawford, 4 Ga. 445, 459 (1848) ("the impropriety of tolerating domestic manumission, which cannot fail greatly to corrupt the other slaves of the country, and to render them dissatisfied with their condition of servitude—leading in the end to insubordination and insurrection"); Stanley v. Nelson, 28 Ala. 514, 518 (1856) (statutes barring slaves from going at large were "to prevent the demoralization and corruption of slaves, resulting from a withdrawal of discipline and restraint from them, and to prevent the pernicious effect upon the slave com-

except for a few outbursts by Judge Joseph Lumpkin of Georgia,[194] the hierarchy was of free over slave, not white over black, except, of course, that no blacks could ever be superior to any whites. This suggests that when racial differences were mentioned, they were handy rhetorical devices to limit the force of analogies, but were not essential components of the ideology articulated by Southern judges. In short, I believe that Professor Genovese was right to argue that the logical extension of Southern philosophy would justify a labor system based on the enslavement of whites as well as blacks;[195] at least as far as Southern law was concerned, the racial elements of that philosophy were expedients adopted to confine the law of slavery before it had fully matured into a wholly self-contained system.

X. CONCLUSION

The American law of slavery has a dual aspect. As a part of Southern history, it must be viewed in relation to other parts of that history; as an instance of legal development, it must be viewed in relation to other instances of legal change. This conclusion attempts to draw together some of the strands that have appeared in the preceding analysis.

Traditionally, historians of the South have used simple dichotomies to characterize Southern law. To the abolitionists,

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munity of the anomalous condition of servitude without a master's control"); Anderson v. Anderson, 38 Va. (11 Leigh) 616, 624 (1841) (Brooke, J., dissenting: "The rights of the master must be controlled, the moral influence that subjects the slave to the master disregarded, and a spirit of hostility engendered while they continue to be slaves, calculated to diminish their value as slaves: the property of the master is to be invaded in a manner subversive of the institution of slavery, and likely to have an influence on those who are slaves for life; and the next step may be to interfere with the master in their cases also, if the humanity of the court is appealed to"). *Cf.* Roger v. Marlow, R. Charlton 542, 548 (Super. Ct. Ga. 1837) (increase in number of free blcaks prohibited because they "ravag[e] the morals, and corrupt . . . the feelings of our slaves. Experience had taught our legislators, that such a class, lazy, mischievous and corrupt, without any master to urge them to exertion, and scarcely any motive to make it, was extremely dangerous to our naturally indolent slaves"); Thomas v. Palmer, 54 N.C. 249 (1854) (while free blacks "seldom prosper so well as to become objects of envy," slaves protected by masters but given control over own time do cause envy). See also Genovese, *Roll, Jordan, Roll*, at 51, 412 (1974).

194. *See, e.g.*, Vance v. Crawford, 4 Ga. 445, 459 (1848) ("To set up a model empire for the world, God in His wisdom planted on this virgin soil, the best blood of the human family. To allow it to be contaminated, is to be recreant to the weighty and solemn trust committed to our hands. Republican institutions cannot exist in Mexico, or the *commingled* races of South America"); American Colonization Society v. Gartrell, 23 Ga. 448, 464 (1857) (Liberia is filled with "a few thousand thriftless, lazy semi-savages, dying of famine, because they will not work! To inculcate care and industry upon the descendants of Ham, is to preach to the idle winds").

195. See generally Genovese, *supra* note 7.

one was either an abolitionist or a defender of slavery, and all Southern judges were defenders of slavery.[196] This is, of course, hardly surprising. The South was committed to the institution of slavery, and it would be odd to find responsible public officials who both tried to undermine the institution and retained their public offices. Still, a judge might attempt to ameliorate some of the harshness of the institution, and that is what the abolitionists ignored. A recent student of slave law, Professor A.E.K. Nash, tried to correct the abolitionists' analysis, but he used their own categories. Unfortunately, he went too far in speaking of the law's "essentially decent treatment of the black" and of its "libertarian policy."[197] At best, judges tinkered at the edges of the institution, making minor adjustments to relieve particularly oppressive and often unnecessary aspects of the system.

The difficulty with the abolitionist and counter-abolitionist analysis, though, is not that Southern law has been located in the wrong place on a continuum between antislavery and proslavery, or between libertarianism and conservatism. The real problem is that the issue just cannot be analyzed in those terms, because they make sense only if an increase in authoritarianism or repression necessarily implied a decrease in paternalism or benevolence. In fact, Southern slavery could be at once extremely repressive and extremely paternalistic, and no single-valued concept can adequately represent the complexity of the system. As the evidence presented in this article shows, we need a much more complex analysis of Southern paternalism, like Professor Genovese's,[198] to understand Southern slave law.[199]

196. See, *e.g.*, Stroud at v, 12-13; Goodell, *Slave Code*, at xi-xii (letter from William Jay to Goodell), 394-96, 403.

197. Nash, "The Texas Supreme Court and Trial Rights of Blacks, 1845-1860," 58 *J. Am. Hist.* 622, 624 (1971); Nash, "Negro Rights, Unionism, and Greatness on the South Carolina Court of Appeals: The Extraordinary Chief Justice John Belton O'Neall," 21 *S. Car. L. Rev.* 141, 143 (1969). See also Nash, "Fairness and Formalism in the Trials of Blacks in the State Supreme Courts of the Old South," 56 *Va. L. Rev.* 64 (1970); Nash, "A More Equitable Past? Southern Supreme Courts and the Protection of the Antebellum Negro," 48 *N. Car. L. Rev.* 197 (1969); Senese, "The Free Negro and the South Carolina Courts," 68 *S. Car. Hist. Mag.* 140 (1967); Clavice, "Aspects of the North Carolina Slave Code," 39 *N. Car. Hist. Rev.* 148 (1962). See also Flanigan, "Criminal Procedure in Slave Trials in the Antebellum South," 40 *J. South. Hist.* 537 (1974). Flanigan too uses the liberal-conservative dimension, simply relocating Southern law from the liberal end, as Nash suggested, to a point much closer to the conservative end. For what it is worth, were I required to use those categories, I would agree with Flanigan.

198. See also Genovese, *Roll, Jordan, Roll*, at 49-70 (1974).

199. Recently, Professor William Nelson has tried to provide new analytic categories from the perspective of legal history: Nelson, "The Impact of the Antislavery Movement Upon Styles of Judicial Rea-

I have identified the basic change in Southern slave law, seen from the perspective of legal history, as a shift from analogical to categorical methods of reasoning. I have also called attention to the function of opinions as documents designed to persuade, and have suggested that differences in judicial ability affected the shape of Southern law. Now, as a conclusion, I want to sketch a more general theory linking all of these elements. That theory, like every one that attempts to explain legal autonomy, is derived from some aspects of Max Weber's discussion of law and society. Because I have examined only one topic, this article can stand as nothing more than a case study in a type of Weberian theory, but, because Southern slave law was law under internal moral and external political pressure, there is reason to think that if legal autonomy can be found there, it can be found anywhere.

Suppose a new subject for legal regulation comes to the attention of courts with the responsibility for reasoned disposition of cases. A subject may be novel for a number of reasons: pre-

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soning in Nineteenth Century America," 87 *Harv. L. Rev.* 513 (1974). His categories are instrumentalism and formalism. The primary difficulty with using those categories in the area discussed in this article are two. First, a fair number of cases cannot easily be identified as using one or the other style. *Cf.* State v. Philpot, Dudley 46, 53 (Ga. 1831) ("Here [questions of expedience] can have no place; the only question being whether such is the law, not whether it is expedient or politic that it should be so. It should never be forgotten, however, by any, that there can be no true and sound policy which is opposed to strict and impartial justice; and that both individual and general happiness and security are best attained by a prompt and cheerful obedience to just and humane laws"); Peter v. Hargrave, 46 Va. (5 Gratt.) 12 (1848) (the best extended illustration of the difficulties); Maranthe v. Hunter, 11 La. Ann. 734 (1856). Second, though Professor Nelson noted a change in style from the antebellum period, in which instrumentalism prevailed, to the post-war period, in which formalism prevailed, something that looks very much like formalism can be seen in antebellum Southern opinions. *See, e.g.*, Harris v. Maury, 30 Ala. 679 (1857); Dargan v. Mayor of Mobile, 31 Ala. 469 (1858); Commonwealth v. Turner, 26 Va. (5 Rand.) 678 (1827) (quoted supra TAN 28); Anderson v. Anderson, 38 Va. (11 Leigh) 161 (1841) (majority completely ignored dissenter's instrumental argument). See also Scheiber, "Instrumentalism and Property Rights: A Reconsideration of American 'Styles of Judicial Reasoning' in the 19th Century," 1975 *Wisc. L. Rev.* 1 (arguing that instrumentalism persisted after Civil War).

Finally, in light of Professor Nelson's argument that the change he discerned was rooted in the marriage of antislavery jurisprudence to a preoccupation with legal science, *op. cit.*, at 519, 560, his use of evidence from the South approaches the bizarre. He quoted Southern courts twice, *id.*, at 544, apparently unaware of the anomaly of attributing ideas "associated with the antislavery movement," *id.*, at 553, to a Louisiana court in 1882 and a Mississippi court in 1898. I can conceive of an argument from the era's *Weltanschauung* that would explain the anomaly, but Professor Nelson did not give it. Instead, he relied essentially on simple biographical data: post-war formalism is explained by the antislavery jurisprudence of judges who had been advocates of antislavery policies before the war. *Id.*, at 551-53. This really will not do to explain the behavior of Mississippi judges.

vious institutional arrangements may have concealed the legal rules governing the subject, as when juries have decided all the issues;[200] the subject may emerge as the result of a reconceptualization of topics previously seen as parts of other areas of law;[201] technological change may lead to the creation of a novel social institution. Two important consequences flow from novelty. First, if we put aside special rules regulating the distribution of law-making authority, the only way to decide these new cases in a principled way is by analogizing them to more familiar situations. Thus, the analogical method arises naturally. Second, ordinarily, only a few legal questions must be resolved in the first cases dealing with a new subject of legal regulation, at least once the hurdle of recognizing the subject as novel has been passed. Because there is no need to rationalize an entire body of law, the first cases are easy to decide, so that, at the outset, the differential impact of judicial talent is small.

As time goes on, though, trouble occurs. First, more and more rules accumulate, and it becomes harder to articulate a unified body of law. At this point, mediocrity does make a difference, because mediocre judges will seize upon any devices at hand that may simplify their job; as we have seen, race and "considerations of humanity" had that function in the South. Second, the social institution to which the legal rules refer becomes buried beneath the rules. Because law is only relatively autonomous of other social arrangements, legal rules cannot, over long periods of time, diverge too widely from the institutions that they purport to regulate. But, to many, piercing through the legal encrustations to the social institution may be a very difficult task; they will, I suggest, seek to characterize the institution only with the largest abstractions without articulating what ends are served by the rules that they apply, because they cannot perceive what ends really are served. Both of these processes combine to create a tendency to simplify by creating neat categories into which the cases can be placed.

As I have said, this is only a sketch, consistent with the evidence from the South, of a general theory. A more complete elaboration would deal with at least two additional points. First, the theory would have to indicate what would happen when opinions could not be addressed to an audience with a shared ideology. Judges tend to be recruited from a relatively homogenous

200. Cf. William E. Nelson, *Americanization of the Common Law* 28-29 (1975); Commonwealth v. Sullivan, 146 Mass. 142 (1888).

201. Cf. Samuel D. Warren & Louis D. Brandeis, "The Right to Privacy," 4 *Harv. L. Rev.* 193 (1890).

group; they may have difficulty in persuading others that the interests of the group to which the judges belong ought to be advanced. My guess is that, under such conditions, judges will emphasize the purely logical component of legal argument, but because of the ideological unity of the slave South, this article does not provide evidence supporting that guess. Second, the theory would have to specify the influence of varying political-moral-economic settings on the tendency toward categorical reasoning. Certainly the moral ambiguities and consequent political vulnerability of Southern society supported the judges who used categorical reasoning to screen off problems arising from those ambiguities, although I think that the evidence is clear that legal autonomy played its own role. Again, as a case study, this article cannot go further.

The argument that I have sketched derives from one construal of Max Weber's concept of formal rationality. Weber defines formal rationality as a method of reasoning in which "only unambiguous general characteristics of the facts are taken into account [in formulating and applying legal rules]."[202] When a case arises, the judge identifies certain aspects of the fact-situation, calls these "unambiguous general characteristics," and formulates a rule which takes only those characteristics into account. Of course, no characteristics are "inherently unambiguous and general. As Maitland wrote, "heirship may at one time have seemed to be a simple physical fact, until we have perceived that the only sonship with which the law is, as a general rule, concerned involves a definition of marriage."[203] Thus, characteristics are *said* to be unambiguous and general. Formal rationalization is the process by which judges progressively identify more and more facts as the basis for legal rules. But as more facts are pointed to as the foundation of a rule, cases present increasingly narrow questions. Cases therefore fall into categories whose definition is narrow: a rule that can be invoked only when many specified events have occurred covers far fewer cases than a general rule.

Formal rationalization, then, is an inherent tendency in any legal system: the law is continually "polished by the friction of nice cases"[204] until many precise rules each govern a very particular area of human activity. Formal rationalization may,

202. *Max Weber on Law in Economy and Society* 63 (Rheinstein ed. 1954). See also *id.*, at 349-56.

203. Frederick Pollock & F.W. Maitland, *The History of English Law*, II, 630 (2d ed. 1898).

204. *Id.*, at 582

indeed, be compelled by the nature of language. Legal rules are typically stated in general terms. For example, the slave owner was said to owe a "father's duty of care" in providing medical treatment for his slaves.[205] Such a rule provided only the slightest guidance in deciding a case. Thus, judges look to the fact-patterns and results in earlier cases.[206] As cases accumulate, judges and lawyers may discern in them more detailed subsidiary rules that specify what facts are to count in what ways in determining a result. Thus, general rules are refined by cases whose facts become the foundation of more precise rules. Indeed, if general rules are supposed to guide decision, they can be useful in specific cases only if the judge has some way of knowing what bearing the facts before him have on the general rule, and subsidiary rules give him that knowledge.

I have said enough, I think, to suggest that what happened in the American South might be considered an instance of formal rationalization. Weber finds social sources for formal rationality in the way lawyers are recruited and trained, and in the structure of the academic study of law.[207] This too is suggestive,[208] but my research has not taken a direction that could provide support for or refute Weber's argument. Finally, though Weber's ideas cannot be followed blindly, the task of modifying them could carry me too far astray from my primary concern in this article. I believe that I have demonstrated at least that concepts drawn from both Southern history and legal history are necessary for a full understanding of the American law of slavery.

205. *See, e.g.*, Kiper v. Nuttall, 1 Rob. 46, 47 (La. 1841).

206. Thus, the mere existence of widely-available law reports enhances the tendency toward formal rationality. *But cf.* Nelson, *supra*, note 199, at 516-18.

207. See, *e.g.*, Weber, *supra*, note 202, at 198-223, 275-78.

208. On the replacement of a legal aristocracy of merit by an elected judiciary, see Perry Miller, *The Life of the Mind in America*, Book II (1965). On unregulated entry to the practice of law, and the consequent fragmentation of the bar, see Willard Hurst, *The Growth of American Law: The Law-Makers* 250-52, 277 (1950); Daniel H. Calhoun, *Professional Lives in America* (1965). On the development of academic law, see Hurst, *supra*, at 259; Gerald Dunne, *Justice Joseph Story and The Rise of the Supreme Court* 310-15 (1970).

APPENDIX

Las Siete Partidas, the Spanish codification of the fourteenth century, provides an interesting contrast with later law. The gross differences in the social setting provide a test of whether attention to the legal system alone can provide a sufficent explanation of variations in legal rules and in legal reasoning. In addition, Tannenbaum and Elkins relied exclusively on the *Partidas* for their discussion of Spanish-American slave law. Though the discussion which follows cannot explain the interesting variations, it will attempt to characterize more precisely than Tannenbaum or Elkins did the contours of slave law in the *Partidas*. The substantive rules, once again, are not much different from those in the American South, though the *Partidas*, naturally enough, show no concern for racial differences between masters and slaves. Although there are some clear difficulties in making useful comparative judgments,[A-1] the *Partidas* do

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A-1. First, statutes are less focused on conflicting values than are cases, thus complicating the task of inferring the choices among values which law-men made. Second, the *Partidas* are an expression of the values of a society which had little experience with a slave system as a central aspect of the society. These difficulties can be discounted to some degree. The *Partidas* show that the learned men and priests who drafted them did have some particular focused problems in mind. How else can one explain *Las Siete Partidas*, Partida 7, title 15, law 29 (Scott trans. 1930) [hereafter cited as *Partidas*, partida number/title number/law number; e.g., *Partidas*, 7/15/29]:

> Where a slave who is a painter is killed, although during the same year in which he lost his life he may have lost a thumb of his right hand through disease or accident, the party compelled to make reparation must, nevertheless, pay for him just as if his thumb had been sound at the time he was killed.
>
> . . . .
>
> We also decree that where a person has two slaves who sing well together and some person kills one of them; he shall not only be bound to make reparation for the dead slave, but he shall also pay as much as it shall be decided that the other has depreciated in value on account of the one who was killed.
>
> What we have mentioned above in the cases aforesaid applies to all others similar to them; so that the party who causes an injury to any other property of this kind, is not only bound to make reparation for that which was depreciated in value or killed, but also for the loss sustained by the master resulting from the property being killed.

See also Partidas 5/14/45, 7/15/30. Some provisions included statements of justification. *See, e.g., Partidas* 3/5/4, 3/29/3 3/30/16, 3/31/22, 5/5/46. While the *Partidas* may show the undeveloped law of an immature slave system, they hint at the general mode of reasoning which that system used. It cannot be certain whether contrasts with Southern law should be attributed to the immaturity of Spanish law or of Spanish slavery. But the American cases seem to show the law of a developed slave society in two forms, rudimentary, for example in Mississippi, and mature, in Louisiana. This should make the contrasts suggestive of what can fairlv be attributed to factors internal to the law. Finally, emphasis on differing styles of reasoning should indicate that the key differences among systems of slave law lie in those styles and not in the specific rules of law.

show another way in which the dualisms of slave law were expressed.

Slaves in early Spanish law were not subject to special rules as articles of commerce.[A-2] Most commercial rules dealt with the rights of creditors affected by a slave's emancipation.[A-3] Nor is the criminal law particularly important; slaves were subject to the criminal law with few differences from free men.[A-4]

What is most striking about the *Partidas* is the condemnation they contain, not only of slavery as an institution, but also of slaves as morally deficient. One introductory provision states:

> Servitude is the vilest and most contemptible thing that can exist among men, for the reason that man, who is the most noble and free among all the creatures that God made, is brought by means of it under the power to another, so that the latter can do with him what he pleases, just as he can with any of the rest of his property living or dead. And slavery is such a contemptible thing, that the party who is subject to it, not only loses the power of disposing of his property as he desires, but he has not even control of his own person, except under the orders of his master.[A-5]

At the same time, the *Partidas* encouraged emancipation, for "all creatures in the world naturally love and desire liberty, and much more do men, who have intelligence superior to that of the others, especially such as are of noble minds, desire it".[A-6] Emancipation was extensively regulated.[A-7]

But talk of "noble minds" implicitly recognizes a natural hierachy, and slaves, even when freed, were inferior. "[The master] always retains an original natural quality, which is indicative of superiority; that is to say, the freedman is always bound to obey him, honor him, and avoid causing him sorrow, and if he violates this rule the master can reduce him to slavery. . . ."[A-8] Another aspect of this hierarchy was the assumed viciousness of slaves. Although they could not testify under oath, they "should, however, be tortured . . . . because slaves

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A-2. Some commercial provisions deal with slaves as agents of their master. *See, e.g., Partidas,* 3/2/9, 5/5/60.

A-3. *See, e.g., Partidas,* 5/13/37, 5/14/38, 5/14/45, 6/3/24, 6/3/25, 6/9/6, 5/5/45, 1/11/1, 1/14/7.

A-4. *Partidas,* 7/1/3. Slaves could not accuse anyone of crime. *Partidas,* 7/1/10. A master should not prosecute his slave but should punish the slave himself. *Partidas,* 3/2/8. See also *Partidas,* 4/21/6 (master "should not" kill slave, except for intercourse with master's wife or daughter). Slaves were incompetent in criminal cases, *Partidas,* 3/16/12, and were subject to special rules about torture, *Partidas,* 7/30/6.

A-5. *Partidas,* 4/4/preface.

A-6. *Partidas,* 4/22/preface.

A-7. See *Partidas,* 4/22/1-4/22/6, 5/13/37, 5/14/38-5/14/45.

A-8. *Partidas,* 4/16/5. *See also Partidas,* 4/22/9 (emancipated slave who shows ingratitude toward former master may be re-enslaved).

are, as it were, desperate men, on account of the condition of servitude in which they are, and every person should suspect that they will easily lie and conceal the truth when some force is not employed against them."[A-9] Then, too, they were "naturally accustomed to commit offenses against their masters . . . ."[A-10] Even the inability of slaves to hold property was justified by an appeal to hierarchical principles. "This is the case because it would not be consistent for anyone to exercise ownership over other property who cannot do so over himself."[A-11]

Slaves, then, had a place in the moral hierarchy of the world below masters, just as sinners were below righteous men.[A-12] Much of the *Partidas* is concerned primarily with locating the slave in a system of ranked statuses.[A-13] Thus, the provisions on emancipation state the conditions under which a person can move from one status to another. The title defining slavery follows that on the duties of those reared in a master's house though not part of his family,[A-14] and other sections link slaves with minors, idiots, and the insane,[A-15] with slanderers, minors, and heretics,[A-16] and with children.[A-17]

Hierarchy is, of course, a concern of almost all systems of slave law, but *Las Siete Partidas* are far more centrally concerned with hierarchy as part of the general order of nature than even the law of Arkansas, where the racial emphasis makes hierarchy a principle governing only a small area of life. Yet the central role given hierarchy emphasizes the slave's place in

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A-9. *Partidas*, 3/16/13. *See also Partidas*, 7/30/6 (limitations on use of torture to elicit evidence against master).

A-10. *Partidas*, 5/5/46.

A-11. *Partidas*, 3/29/3. *See also Partidas*, 3/30/16. This hierarchy did distinguish sharply between men, even slaves, and animals. The children of a female slave belonged to the owner, not to the usufructuary.

> There is the following reason for this, namely: though all the increase of flocks and herds ought to belong to the parties to whom the usufruct of the same is granted, nevertheless, with regard to the child of a slave this is not true, because, according to nature, the fruits of all property were given and granted for the service of man, and therefore it would be neither proper nor right, that he, for whose service the increase of all other property was established, should be included in the usufruct of another party.

A-12. *See Partidas*, 4/22/8. *See also Partidas*, 4/21/4 (wicked Christians who aid Moors can be enslaved), 4/21/3 (children of priests are slaves of Church).

A-13. Some provisions regulated other aspects of the coordination of the slave's status with other statutes. *See, e.g., Partidas*, 1/6/18 ordination of slaves), 4/22/4 (slave freed when put in brothel).

A-14. *Partidas*, 4/21/1-4/21/6. *See also Partidas* 5/11/6 (contracts cannot be made between father and son or master and slave).

A-15. *Partidas*, 3/11/7.

A-16. *Partidas*, 6/1/16.

A-17. *Partidas*, 7/14/22.

the moral order of the world. Where hierarchy was not a principle which made the world one, it might be easier to see slaves as outside the moral order; such tendencies seem implicit in the ambivalence about the slave's moral status in Louisiana. It seems clear that the ranking of categories in the *Partidas* derived from a rather different base, probably in Pauline theology, than those in Southern law, which seem rooted in the particular needs of the legal systems of the time.

Yet precisely because slaves existed within a moral order in which movement from one category was not only possible but expected, the category "slave" could not be one totally set off from all others. Rather, that category contained people whose characteristics were in many ways like those people in other categories. Thus medieval Spanish law, because it was part of an intellectual system centrally concerned with hierarchy, adopted a mode of reasoning with important analogical overtones.