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## Ideology and Imagery in the Law of Slavery - Symposium on the Law of Slavery: Theories of Democracy and the Law of Slavery

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# IDEOLOGY AND IMAGERY IN THE LAW OF SLAVERY\*

WILLIAM W. FISHER III\*\*

## I. INTRODUCTION

In important respects, the rules used by the Southern colonies and states to administer the system of chattel slavery were consistent and coherent. For example, by the early eighteenth century, all jurisdictions had adopted the principles that a person's status as free or slave is determined by the status of his or her mother<sup>1</sup> and that only persons with at least some nonwhite blood can be slaves.<sup>2</sup> The law governing homicide of slaves by whites was also approximately the same throughout the region: during the colonial period, killers of slaves received only modest sanctions (typically a fine or short prison term, combined with an obligation to compensate the owner of the victim); between 1790 and 1820, the penalties were increased substantially (although executions remained rare, and many substantive and procedural rules were available to killers of slaves that were not available to killers of whites or free blacks); and during the remainder of the antebellum period, the law was relatively stable in all states.<sup>3</sup> During the colonial period, slaves everywhere were subject to severe criminal penalties for a wide variety of offenses; by the Civil War, the relevant rules had been softened a good deal, but remained harsher than those applicable to whites.<sup>4</sup> When dealing with sales of

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\*\* Professor of Law, Harvard University. This Essay was prepared while I was a Fellow at the Center for Advanced Study in the Behavioral Sciences. I am grateful for financial support provided by the Andrew W. Mellon Foundation. Drafts of the Paper were presented to the Stanford Law School Faculty Workshop and the Stanford Legal History Group; the reactions of the audiences at those sessions provoked significant modifications of the argument. The suggestions of Elizabeth Clark, Paul Finkelman, Robert Gordon, Joann Lisberger, Barry O'Connell, and Dorothy Ross also much improved the Paper.

1. See Wilbert Moore, *Slave Law and the Social Structure*, 26 J. NEGRO HIST. 171, 185-87 (1941). This rule represented a repudiation of the doctrine that governed the English law of villenage.

2. For discussions of the modest differences between the colonies and states concerning how racial status is to be determined and how much "black blood" is essential to expose a person to enslavement (and other legal disabilities), see William W. Wiecek, *The Statutory Law of Slavery and Race in the Thirteen Mainland Colonies of British America*, 34 WM. & MARY Q. 258 (1977); Paul Finkelman, *The Crime of Color*, TUL. L. REV. (forthcoming 1993).

3. See ANDREW FEDE, *PEOPLE WITHOUT RIGHTS: AN INTERPRETATION OF THE FUNDAMENTALS OF THE LAW OF SLAVERY IN THE U.S. SOUTH* 62-97 (1992); ALAN WATSON, *SLAVE LAW IN THE AMERICAS* 74-75 (1989).

4. See, e.g., A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD* (1978); PHILIP J. SCHWARZ, *TWICE CON-*

slaves, courts throughout the South eschewed the doctrine of caveat emptor that was coming to dominate commercial law in the North;<sup>5</sup> if a purchaser could show that a slave was defective (for example, ill, insane, or prone to running away) at the time of sale, he could secure rescission of the transaction.<sup>6</sup> Finally, in all jurisdictions slaves were deprived of many civil rights and liberties: they could not make contracts or other legally binding choices,<sup>7</sup> sue or be sued,<sup>8</sup> acquire property,<sup>9</sup> legally marry,<sup>10</sup> or (with rare exceptions) testify against whites.<sup>11</sup>

In several other respects, however, the law of slavery was inconsistent or incoherent. Many issues were handled differently in the various states. For example, in Virginia and South Carolina, slaves prosecuted for serious crimes received few of the procedural protections available to white defendants;<sup>12</sup> in Louisiana, Georgia, Delaware, and Maryland, slave defendants were given more protections but not as many as

DEMNER: SLAVES AND THE CRIMINAL LAWS OF VIRGINIA, 1705-1865 (1988); KENNETH STAMPP, *THE PECULIAR INSTITUTION* 206-16 (1956).

5. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1760-1860*, at 180 (1977).

6. See Andrew Fede, *Legal Protection for Slave Buyers in the U.S. South: A Caveat Concerning Caveat Emptor*, 31 AM. J. LEGAL HIST. 322 (1987); Judith Schafer, "Guaranteed Against the Vices and Maladies Prescribed by Law:" *Consumer Protection, the Law of Slave Sales, and the Supreme Court in Antebellum Louisiana*, 31 AM. J. LEGAL HIST. 306 (1987). For discussion of minor differences among the states concerning the kinds of defects that would justify rescission, see Ariella Gross, "Pandora's Box": Breach of "Moral Qualities" Warranty in Slave Law in the Deep South, 1793-1866, at 6-10 (1992) (unpublished manuscript, on file with author).

7. See, e.g., *Creswell's Ex'r. v. Walker*, 37 Ala. 229, 234-35 (1861); A. Leon Higginbotham & Barbara Kopytoff, *Property First, Humanity Second: The Recognition of the Slave's Human Nature in Virginia Civil Law*, 50 OHIO ST. L.J. 511, 525-28 (1989).

8. The one significant exception to this principle was that, in every state, slaves were permitted (usually through "next friends") to petition for freedom on the ground that they had been wrongfully enslaved. See, e.g., Act of 1740, § 1, S.C. Public Laws 163-64 (An Act for the Better Ordering and Governing Negroes and Other Slaves in this Province); Act of June 18, 1822, § 76, 1882 Miss. Laws 179, 198-99 (An Act to reduce into one, the several acts, concerning Slaves, Free Negroes, and Mulattoes).

9. See, e.g., Higginbotham & Kopytoff, *supra* note 7, at 528-33; William E. Wiethoff, *The Logic and Rhetoric of Slavery in Early Louisiana Civil Law Reports*, 12 LEGAL STUD. F. 441, 448 (1988). By contrast, although slaves in Rome technically could not own property, they frequently were permitted to earn money and thereby accumulate a fund, called *peculium*—and even to use the fund to purchase their freedom. See ALAN WATSON, *ROMAN SLAVE LAW* 90-101 (1987).

10. See Margaret A. Burnham, *An Impossible Marriage: Slave Law and Family Law*, 5 LAW & INEQ. J. 187 (1987).

11. See EUGENE GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* 33 (1972). The rare exceptions (seemingly inadvertent) are described in WATSON, *supra* note 3, at 73-74. This disability was explicitly based on race. Thus, free blacks and mulattoes typically were also forbidden to testify against whites, while slaves, free blacks and mulattoes were able to testify against each other.

12. See Daniel J. Flanigan, *Criminal Procedure in Slave Trials in the Antebellum South*, 40 J. S. HIST. 537, 540-45 (1974); A. Leon Higginbotham Jr. & Anne F. Jacobs, *The "Law Only as an Enemy": The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia*, 70 N.C. L. REV. 969, 984-1016 (1992).

whites;<sup>13</sup> and in Alabama, Florida, Mississippi, North Carolina, and Tennessee, the courts could claim with some plausibility that, "whenever life is involved, the slave stands upon as safe ground as the master."<sup>14</sup> The rules governing manumission of slaves were equally diverse. In Georgia, for example, the legislature severely restricted private emancipations early in the nineteenth century, and, in almost all ambiguous situations, the courts ruled against slaves whose masters had sought to free them.<sup>15</sup> In Tennessee, by contrast, slave owners until the mid-1850s continued to enjoy several ways of freeing their slaves.<sup>16</sup> The legal problems associated with the increasingly important system of slave leases provoked similarly divergent responses. In some states, if a leased slave ran away, became ill, or was injured or killed during the lease term, the lessee (in the absence of a relevant contractual provision) bore the resultant financial burden; in other states the lessor sustained the loss.<sup>17</sup> On the issue of a master's financial responsibility for injuries his slaves caused to third parties, the positions adopted by the various states ranged from absolute liability (Louisiana), to liability only for specified sorts of misconduct by slaves (Arkansas and Missouri), to liability only if the slaves were acting pursuant to the master's specific directions or had been put in positions of public trust (South Carolina).<sup>18</sup> The states divided along different

13. See Flanigan, *supra* note 12, at 545-46. In a recent article, Judith Schafer contends that, in Louisiana, slave defendants were treated very badly. *The Long Arm of the Law: Slave Criminals and the Supreme Court in Antebellum Louisiana*, 60 TUL. L. REV. 1247 (1986). However, many of her examples involve aspects of the criminal justice system that Louisiana inherited from the French and that were unfavorable to all defendants (not merely slaves), and she acknowledges that convictions of slaves were overturned with approximately the same frequency as convictions of whites. *Id.* at 1258-59. On balance, Flanigan's original assessment of the Louisiana system still seems accurate.

14. The quotation is from *Cato v. State*, 9 Fla. 163, 173-74 (1860). For documentation of the extensive protections provided slaves (especially at the appellate level) in these states, see Reuel E. Schiller, *Conflicting Obligations: Slave Law and the Late Antebellum North Carolina Supreme Court*, 78 VA. L. REV. 1207, 1222 (1992); Flanigan, *supra* note 12; A.E. Keir Nash, *The Texas Supreme Court and the Trial Rights of Blacks, 1845-1860*, 58 J. AM. HIST. 622, 628-29 (1971); A.E. Keir Nash, *Negro Rights, Unionism, and Greatness on the South Carolina Court of Appeals: The Extraordinary Chief Justice John Belton O'Neill*, 21 S.C. L. REV. 141 (1969); A.E. Keir Nash, *Fairness and Formalism in the Trials of Blacks in the State Supreme Courts of the Old South*, 56 VA. L. REV. 64 (1970).

15. See A.E. Keir Nash, *Reason of Slavery: Understanding the Judicial Role in the Peculiar Institution*, 32 VAND. L. REV. 7 (1979); Schiller, *supra* note 14, at 1235. *But cf.* David J. Grindle, *Manumission: The Weak Link in Georgia's Law of Slavery*, 41 MERCER L. REV. 701 (1990) (identifying various contexts in which the Georgia rules on manumission were not unusually harsh).

16. See Arthur F. Howington, "Not in the Condition of a Horse or an Ox:" *Ford v. Ford, the Law of Testamentary Manumission, and the Tennessee Courts' Recognition of Slave Humanity*, 34 TENN. HIST. Q. 249, 259-62 (1975); Nash, *supra* note 15.

17. See David J. Langum, *The Role of Intellect and Fortuity in Legal Change: An Incident from the Law of Slavery*, 28 AM. J. LEGAL HIST. 1, 3-4, 13-14 (1984).

18. See Terrence F. Kiely, *The Hollow Words: An Experiment in Legal-Historical Method as Applied to the Law of Slavery*, 25 DEPAUL L. REV. 842 (1976); Thomas D. Morris, "As if the Injury Was Effected by the Natural Elements of Air, or Fire:" *Slave Wrongs and the Liability of Masters*, 16 LAW & SOC'Y REV. 569 (1982); Schafer, *supra* note 13, at 1257-61.

lines on the question of the applicability of the fellow-servant rule to slavery: most courts refused to exempt from liability the lessors of slaves who were injured through the negligence of other workers, but those in North Carolina and Alabama took the opposite stance.<sup>19</sup>

Doctrinal dissonance was not limited to interjurisdictional disputes; lawmakers within a given state frequently disagreed on how major issues involving slavery should be resolved. For example, the Tennessee courts often upheld slave manumissions that plainly violated restrictions the state legislature had sought to impose.<sup>20</sup> In South Carolina, Mississippi, and Virginia, the judges were divided among themselves; some upheld highly questionable manumissions, while others denounced all efforts to free slaves.<sup>21</sup> Substantive criminal law as applied to violence between slaves and whites also provoked some degree of intrajurisdictional conflict. In North Carolina, for example, Chief Justice Ruffin usually advocated lenient treatment of whites who assaulted slaves and harsh treatment of slaves who resisted such assaults;<sup>22</sup> his colleagues, Justices Gaston and Pearson, were significantly more even-handed.<sup>23</sup>

Finally, the entire body of slave law was riven by three fundamental tensions. The first concerned the legal status of slaves. In most contexts,

19. See Kiely, *supra* note 18, at 871-76; Frederick Wertheim, *Slavery and the Fellow Servant Rule: An Antebellum Dilemma*, 61 N.Y.U. L. REV. 1112, 1129-36 (1986); Paul Finkelman, *Slaves as Fellow Servants: Ideology Law and Industrialization*, 31 AM. J. LEG. HIST. 269 (1987).

20. See Howington, *supra* note 16; Schiller, *supra* note 14, at 1235.

21. Until the mid-1840s, South Carolina law pertaining to manumission resembled that of Tennessee; the legislature adopted a series of statutes hostile to emancipation, which the judiciary resisted or narrowly construed. See Linda O. Smiddy, *Judicial Nullification of State Statutes Restricting the Emancipation of Slaves: A Southern Court's Call for Reform*, 42 S.C. L. REV. 589, 598-630 (1991). After the mid-1840s, however, the consensus among judges broke down. Compare e.g., *McLeisch v. Burch*, 35 S.C. Eq. 225, 3 Strob. Eq. 29 (1849) (upholding a bequest of a slave accompanied by instructions that he should be held in nominal service only—in defiance of an 1841 statute declaring such trusts invalid) with, e.g., *Gordon v. Blackman*, 19 S.C. Eq. 61, 1 Rich. Eq. 8 (1844) (Johnston, Ch.). *Gordon* bemoans the proliferation of cases in which:

The superstitious weakness of dying men, proceeding from an astonishing ignorance of the solid moral and scriptural foundations upon which the institution of slavery rests, and from a total inattention to the shock which their conduct is calculated to give to the whole frame of our social polity, induces them, in their last moments, to emancipate their slaves, in fraud of the indubitable and declared policy of the State.

*Id.* at 61. See also WATSON, *supra* note 3, at 75-82. For an analysis of the handling of the same problems in Mississippi, see MEREDITH LANG, *DEFENDER OF THE FAITH: THE HIGH COURT OF MISSISSIPPI, 1817-1875* (1977):

[S]chizophrenia within the high court . . . resulted in two conflicting lines of cases on the issue of manumission: one holding the policy of the state to be merely against the increase of free Negroes in Mississippi, but not against their manumission elsewhere; and the other, opposed to emancipation in any form, anywhere.

*Id.* at 91-92. The judges in Virginia were not quite so sharply divided, but still differed on substantial issues. See Nash, *supra* note 15, at 127-56.

22. See, e.g., *State v. Mann*, 13 N.C. 263, 2 Dev. 17 (1829); *State v. Caesar*, 31 N.C. 391, 9 Ired. 49 (1849) (Ruffin, C.J., dissenting).

23. See, e.g., *State v. Jarrott*, 23 N.C. 76, 1 Ired. 9 (1840); *Caesar*, 31 N.C. at 391 (1849).

they were treated as things—objects or assets to be bought and sold, mortgaged and wagered, devised and condemned.<sup>24</sup> Sometimes, however, they were treated as persons—volitional, feeling, and responsible for their actions.<sup>25</sup> In the words of the Supreme Court of Mississippi, “[i]n some respects slaves may be considered as chattels, but in others, they are regarded as men.”<sup>26</sup> The second tension concerned the relationship between slavery and the rule of law. In many connections, courts and legislatures took the position that the control and discipline of slaves were primarily the responsibility of their masters and that the law ought not interfere with masters’ exercise of their power.<sup>27</sup> In other settings, however, lawmakers insisted that slaves enjoyed the protection of—or were subject to punishment by—the state; private resolution of disputes with slaves was consequently discouraged.<sup>28</sup> The last tension pertained to interracial sexual relations. Lawmakers ostensibly sought to maintain a rigid separation of blacks and whites. So, for example, they banned racial intermarriage, established severe penalties for interracial fornication and adultery, and frequently in related contexts expressed repugnance for “commingling” of the races. In practice, however, both consensual and forcible sex between white men and black women were commonly tolerated. Prosecutions were rare, and conviction rarer.<sup>29</sup>

This complex doctrinal pattern has elicited a variety of reactions from legal historians. Some, impressed by the variations among the rules

24. See, e.g., STAMPP, *supra* note 4, at 201; WINTHROP JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812*, at 71-82 (1968); HIGGINBOTHAM, *supra* note 4, at 56-58. Initially, slaves were classified in some colonies as real property. By the middle of the eighteenth century, however, they were treated in all jurisdictions as chattels personal.

25. See, e.g., *State v. Simmons*, 3 S.C.L. 5, 1 Brev. 6 (1794) (“Negroes . . . have wills of their own, capacities to commit crimes; and are responsible for their offenses against society”); *United States v. Amy*, 24 F. Cas. 792 (C.C. D. Va. 1859) (No. 14,445); *Commonwealth v. Chapple*, 3 Va. 184, 185, 1 Va. Cas., 2A (1811) (upholding the conviction of a white defendant under a statute proscribing homicide of a “person” on the ground that “a slave in this country has been frequently decided to be legally and technically a person on whom a wrong can be inflicted”). For secondary studies emphasizing this tension, see Moore, *supra* note 1, at 191-202; Kiely, *supra* note 18, at 853-58.

26. *State v. Jones*, 1 Miss. 83, 84, 1 Walker L (1820).

27. See ROBERT FOGEL & STANLEY ENGERMAN, *TIME ON THE CROSS: THE ECONOMICS OF AMERICAN NEGRO SLAVERY* 144-47 (1974); EDWARD AYERS, *VENGEANCE AND JUSTICE: CRIME AND PUNISHMENT IN THE NINETEENTH-CENTURY AMERICAN SOUTH* 133 (1984).

28. See, e.g., Act of 1712, § 19, 1712 S.C. Public Laws 18 (An Act for the better Ordering and Governing Negroes and Slaves in this Province) (penalizing masters for failing to impose on runaway slaves statutorily prescribed penalties); *State v. Hale*, 9 N.C. 582, 2 Hawks 74 (1823); *State v. Jarrott*, 23 N.C. 76, 1 Ired. 9 (1840); *Doughty v. Owen*, 24 Miss. 404, 407-09 (1852); *Jordan v. State*, 32 Miss. 382, 387 (1856).

29. See Harvey M. Applebaum, *Miscegenation Statutes: A Constitutional and Social Problem*, 53 GEO. L.J. 49 (1964); Karen Getman, *Sexual Control in the Slaveholding South: The Implementation and the Maintenance of a Racial Caste System*, 7 HARV. WOMEN'S L. J. 115 (1984); A. Leon Higginbotham & Barbara K. Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 GEO. L.J. 1967 (1989).

applicable to slaves, contend that there was no such thing as a "law of slavery"; there were many incompatible *laws* of slavery, which can be understood only through close attention to the biographies of individual lawmakers and the socioeconomic and political forces at work in individual jurisdictions.<sup>30</sup> Other historians argue that the inconsistencies and contradictions are only apparent; careful analysis will show that all aspects of slave law were shrewdly designed to serve the interests of slave owners—specifically, to enable masters to extract as much labor as possible from their slaves, to enhance masters' ability to discipline their slaves, and to protect masters' property interests in their slaves.<sup>31</sup> Still others acknowledge that the law of slavery was riddled with genuine inconsistencies but contend that they were all the fruits of a single, fundamental contradiction—the incompatibility of slave socioeconomic relations (themselves the outgrowth of a mode of production centered around plantation-based cultivation of cotton and tobacco) and bourgeois socioeconomic relations (themselves the outgrowth of commercial capitalism and proto-industrialization).<sup>32</sup> A fourth group proceeds on the assumption that the bulk of all legal systems is borrowed from the laws of other jurisdictions; to explain the American law of slavery, consequently, one must identify the ingredients from which it was made—a dash of villenage, a splash of Roman law (strained through the civil law tradition), a sizable dollop from the slave code of Barbados, and a large portion of the common law and equitable principles in force in England.<sup>33</sup>

There is much to be said for all four of these interpretations. Southern lawmakers (many of them slave owners themselves) surely sought, among other things, to advance the material interests of the master class;

30. See Nash, *supra* note 15, especially 141-44, 184-218; Langum, *supra* note 17, at 16 (contending that much of the law of slavery was determined by the personal opinions of individual lawmakers or by "fortuity").

31. See, e.g., Andrew Fede, *Legitimized Violent Slave Abuse in the American South, 1619-1865: A Case Study of Law and Social Change in Six Southern States*, 29 AM. J. LEGAL HIST. 93, 150 (1985) ("[T]he changing law of white slave abusers represented the shifting accommodation of the interests of the white 'rulers' and 'despots,' and nothing more."); FEDE, *supra* note 3, at 3-12; Schaffer, *supra* note 13; Higginbotham & Kopytoff, *supra* note 7, at 525, 538.

32. See MARK TUSHNET, *THE AMERICAN LAW OF SLAVERY, 1810-1860: CONSIDERATIONS OF HUMANITY & INTEREST* (1978); cf. Eugene Genovese & Elizabeth Fox-Genovese, *Slavery, Economic Development and the Law: The Dilemma of the Southern Political Economists, 1800-1860*, 41 WASH. & LEE L. REV. 1 (1984) (commending Tushnet's analysis and arguing that the same fundamental contradiction largely paralyzed Southern political economists).

33. See, e.g., WATSON, *supra* note 3, at 1-21, 63-82; Thomas D. Morris, "Villeinage . . . as it existed in England reflects but little light on our subject." *The Problem of the Sources of Southern Slave Law*, 32 AM. J. LEGAL HIST. 95 (1988); Arnold Sio, *Interpretations of Slavery: The Slave Status in the Americas*, 7 COMP. STUD. IN SOC'Y & HIST. 289 (1965). Not all of the historians who adopt this approach agree, of course, on the ratios of the ingredients of American slave law, but the recipe set forth in the text would meet with at least qualified approval from most.

local circumstances and lawmakers' idiosyncrasies were undoubtedly important in shaping the rules in force in various parts of the region; it would be surprising if the contradictory character of the Southern economy were not reflected in some way in the legal superstructure; and much of American slave law was indeed modeled on the laws of other countries. But each of the four fails plausibly to make sense of important aspects of the pattern of slave law. Rather than detail those limitations—which have been adequately discussed elsewhere<sup>34</sup>—this Essay explores (and argues for the importance of) a set of forces all four of the prominent interpretations neglect. Specifically, it contends that we can understand better the law of slavery by examining its relationships to Southern ideology.<sup>35</sup>

Both the difficulty and the power of this approach arise from the fact that that ideology was neither stable nor coherent. Rather, Southerners—white Southerners in particular—struggled throughout the antebellum period to define and justify themselves and their society. Three problems provoked the most attention and debate: What are Negroes like? Why is slavery just? How should an honorable and moral person live? The following three sections describe the divergent responses Southerners developed to these questions and identify some of the ways their responses affected the rhetoric and content of the law of slavery.

## II. BLACK IMAGES IN WHITE MINDS

Two radically different images of the typical Negro slave figured prominently in the fiction and fantasies of white Southerners. The first was the childlike and undependable but loyal and unthreatening Sambo. "Indolent, faithful, humorous, . . . dishonest, superstitious, improvident,

34. On instrumentalism, see Robert Cottroll, *Liberalism and Paternalism: Ideology, Economic Interest, and the Business Law of Slavery*, 31 AM. J. LEGAL HIST. 359 (1987). On judicial idiosyncrasies, see Schiller, *supra* note 14. On scientific Marxism, see A.E. Keir Nash, *In re Radical Interpretations of American Law: The Relation of Law and History*, 82 MICH. L. REV. 274 (1983); Alan Watson, *Slave Law: History and Ideology*, 91 YALE L.J. 1034 (1982) (reviewing MARK TUSHNET, *THE AMERICAN LAW OF SLAVERY, 1810-1860: CONSIDERATIONS OF HUMANITY AND INTEREST* (1978)); Andrew Fede, *Toward a Solution of the Slave Law Dilemma: A Critique of Tushnet's 'The American Law of Slavery'*, 2 LAW & HIST. REV. 301 (1984). On borrowing, see Richard Abel, *Law as Lag: Inertia as a Social Theory of Law*, 80 MICH. L. REV. 785 (1982).

35. The notion that ideology helped shape the institution of chattel slavery is not new, of course; it has long figured importantly in the work of non-legal historians. See, e.g., GENOVESE, *supra* note 11; JOHN BLASSINGAME, *THE SLAVE COMMUNITY: PLANTATION LIFE IN THE ANTEBELLUM SOUTH* (rev. ed. 1979); GEORGE FREDRICKSON, *THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY, 1817-1914* (1971). Only recently, however, has it begun to color the study of legal history—most notably in the work of Kenneth Greenberg and Edward Ayers. See KENNETH GREENBERG, *MASTERS AND STATESMEN* (1985); AYERS, *supra* note 27. One of the goals of this Essay is to accelerate the trend.



and musical, Sambo was inevitably a clown and congenitally docile."<sup>36</sup> Southern social commentators repeatedly argued that the large majority of Africans fit this image. The comments of Dr. Samuel Cartwright were typical: "Africans are endowed with a will so weak, passions so easily subdued, and dispositions so gentle and affectionate that they have an instinctive feeling of obedience to the stronger will of the white man."<sup>37</sup> Antebellum Southern novelists concurred. Thus, slaves are commonly depicted as lazy, immoral (for example, mendacious, thieving, and sexually promiscuous or polygamous), highly impressionable, and easily corruptible—but also, if well treated, content, funny, musical, and fiercely devoted to their masters (willing, for example, to risk their own lives to save or protect their owners').<sup>38</sup> The less attractive of these various traits were generally believed to be immutable characteristics of the African race.<sup>39</sup> The more appealing characteristics were described as the results of "domestication"—the displacement by the system of slavery of Africans' savage impulses with "civilized" dispositions.<sup>40</sup>

Unredeemed savagery was the central trait of Nat—the second, opposing image of Negro slaves. Less common than the Sambo image, it was equally important to the white Southern psyche. A slave in this mode was fierce, rapacious, cunning, rebellious, and vindictive. In Southern fiction:

Nat was the incorrigible runaway, the poisoner of white men, the ravager of white women, who defied all the rules of plantation society. Subdued and punished only when overcome by superior numbers or firepower, Nat retaliated when attacked by whites, led guerrilla activities of maroons against isolated plantations, killed overseers and planters, or burned plantation buildings when he was abused.<sup>41</sup>

If freed, social commentators sometimes argued, all slaves would revert to this type. James Paulding, for example, contended that emancipation would lead to servile war: "the madness which a sudden freedom from

36. BLASSINGAME, *supra* note 35, at 225. See also Kenneth Greenberg, *The Meaning of Death in Slave Society*, 8 RES. IN L., DEVIANCE & SOC. CONTROL 113, 119 (1986). Stanley Elkins is now infamous in the historiography of slavery for assuming that this common image of slaves was accurate. See ELKINS, *SLAVERY* (1959); *THE DEBATE OVER SLAVERY: STANLEY ELKINS AND HIS CRITICS* (Ann J. Lane ed., 1971).

37. Samuel Carter, *On the Caucasians and the Africans*, 25 DEBOW'S REV. 45 (1858). Many similar comments are set forth in BLASSINGAME, *supra* note 35, at 225-28.

38. Slave characters of this sort abound, for example, in the work of William Gilmore Simms, the most prolific and popular antebellum Southern novelist. See *THE YEMASSEE* (1832); *THE PARTISAN* (1835); *MELLICHAMPE* (1836); *SOUTHWARD HO!* (1854); *THE FORAGERS* (1855).

39. See, e.g., JULIEN J. VIREY, *NATURAL HISTORY OF THE NEGRO RACE* 19 (1837).

40. See FREDRICKSON, *supra* note 35, at 53-54.

41. BLASSINGAME, *supra* note 35, at 225. See also John Campbell, *Review of Negro-Mania*, 1852 S. Q. REV. 163, 163-66 (depicting "the negro" as "roving, revengeful and destructive, . . . warlike, predatory, and sensual").

restraint begets—the overpowering burst of long buried passion—the wild frenzy of revenge, and the savage lust for blood, all unite to give the warfare of liberated slaves, traits of cruelty and crime which nothing earthly can equal.”<sup>42</sup>

The relationship between these two images was complex. Some Southerners seem to have believed that there were two types of Negroes—the majority fit the Sambo model; the minority fit the Nat model. For most white Southerners, however, the two images reflected a deep ambivalence in their attitudes toward their slaves. In their moments of confidence, they thought of them as gentle, childlike, and loyal; in their moments of doubt, they thought of them as furious, duplicitous, and homicidal.<sup>43</sup> Sambo, in short, was the central figure in white Southerners’ fantasies of safety; Nat was the central figure in their fantasies of rebellion.<sup>44</sup>

In view of the currency and power of these images, we should not be

42. *THE SOUTH VINDICATED FROM THE TREASON AND FANATICISM OF THE NORTHERN ABOLITIONISTS* 246 (Philadelphia, 1836) (This treatise was published anonymously. It was apparently written by James K. Paulding, a novelist and Secretary of the Navy under Martin van Buren.) For expressions of similar sentiments, see FREDRICKSON, *supra* note 35, at 54-55; SCHWARZ, *supra* note 4, at 194 (quoting a 1785 petition submitted by the residents of Amelia County to the Virginia legislature, contending that general emancipation would unleash “the Horrors of all the Rapes, Murders, and Outrages, which a vast Multitude of unprincipled, revengeful, and remorseless Banditti are capable of perpetrating”).

The deepest exploration in the fiction of the period of whites’ anxieties concerning the characters of slaves is Herman Melville’s novella, *BENITO CERENO* (1855)—in particular, the depiction therein of the credulous American, Captain Delano. At the critical moment in the story, “scales” drop from Delano’s eyes and he comes to see the central figure, Babo, not as the loyal and attentive slave he had pretended to be, but as a murderous rebel, whose “countenance, lividly vindictive, express[ed] the centered purpose of his soul.” For a fine treatment of the story and its subtle play on Americans’ perceptions of the successful slave revolt in San Domingo, see ERIC J. SUNDQUIST, *TO WAKE THE NATIONS: RACE IN THE MAKING OF AMERICAN LITERATURE* ch. 2 (1993).

43. See BLASSINGAME, *supra* note 35, at 230-38; GENOVESE, *supra* note 11, at 361-63. Many accounts of this ambivalence may be found in MARY BOYKIN CHESNUT, *A DIARY FROM DIXIE* (1949):

If they want to kill us, they can do it when they please, they are noiseless as panthers . . . We ought to be grateful that anyone of us is alive, but nobody is afraid of their own Negroes. I find everyone, like myself, ready to trust their own yard. I would go down on the plantation tomorrow and stay there even if there were no other white person in twenty miles. My Molly and all the rest I believe would keep me as safe as I should be in the Tower of London.

*Id.* at 147-48.

44. Richard Yarborough argues convincingly that, after 1850, Southerners’ images of blacks became more complex and that the publication of Harriet Beecher Stowe’s enormously influential novel, *UNCLE TOM’S CABIN* (1852), helped provoke that shift in thinking. Many of the black characters in the novel—such as the bumptious Sam and Andy, the easily corrupted and easily cured Sambo and Quimbo, and the impish and heathen but redeemable Topsy—readily conform to the prevailing stereotypes. But other characters—most importantly, the dignified and Christ-like Tom and the bitter, intelligent mulatto, George—did not fit the extant molds. The efforts of Southern novelists and commentators (as well as Northern white and black novelists) to come to terms with these new character types set off a reconsideration of the varieties of black personality that continues today. By the Civil War, however, that process had barely begun. See Richard Yarborough, *Strate-*

surprised to find that legislators and judges made frequent use of them. Sometimes, when shaping legal rules, they asserted or took for granted that most slaves conformed to the Sambo model. For example, in *State v. Boyce*,<sup>45</sup> Chief Justice Ruffin of North Carolina relied heavily on the image in overturning a planter's conviction for keeping a disorderly house. It appeared that, on Christmas each year, the defendant held a party for his own slaves and for a few slaves from other plantations. The revelers were permitted to drink and dance, and the defendant's daughter may have joined in the dancing. The attempt to suppress such affairs, Ruffin ruled, was entirely inappropriate. Such festivities were in no way harmful or dangerous for typical slaves. Indeed, he argued more subtly, they may help keep slaves playful and contented.

If slaves would do nothing, tending more to the corruption of their morals or to the annoyance of the whites, than seeking the exhilaration of their simple music and romping dances, they might be set down as an innocent and happy class. We may let them make the most of their idle hours, and may well make allowances for the noisy outpourings of glad hearts, which providence bestows as a blessing on corporeal vigor united to a vacant mind.<sup>46</sup>

At other times, lawmakers treated Nat as paradigmatic. Such imagery was especially common in the early, draconian slave codes. For example, a 1669 Virginia statute immunized masters from criminal liability for killing their slaves in the course of discipline partly on the ground that "the obstinacy of many [refractory servants cannot] by other than violent means [be] suppress."<sup>47</sup> Paranoia concerning the instincts of most slaves is even more apparent in the preamble to the 1696 Slave Code of South Carolina:

Whereas, the plantations and estates of this Province cannot be well and sufficiently managed and brought into use, without the labor and service of negroes and other slaves; and forasmuch as the said negroes and other slaves brought into the people of this Province for that purpose, are of barbarous, wild, savage natures, and such as renders them wholly unqualified to be governed by the laws, customs, and practices of this Province; but that it is absolutely necessary, that such other constitutions, laws and orders, should in this Province be made and enacted, for the good regulating and ordering of them, as may restrain

*gies of Black Characterization in Uncle Tom's Cabin and the Early Afro-American Novel*, in *NEW ESSAYS ON UNCLE TOM'S CABIN* 45-84 (Eric Sundquist ed., 1986).

45. 32 N.C. 536, 10 Ired. 66 (1849).

46. *Id.* at 541. For other invocations of the Sambo image, see *Sarter v. Gordon*, 11 S.C. Eq. 121, 135, 2 Hill Eq. P. Q (1835) (discussed *infra* text accompanying note 77); *State v. Caesar*, 31 N.C. 391, 9 Ired. 49 (1849); THOMAS R. R. COBB, *AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA, TO WHICH IS PREFIXED AN HISTORICAL SKETCH OF SLAVERY* (reprint 1968) (1858) (discussed *infra* text accompanying notes 79-85).

47. 2 Hening 270 (October 1669) (An act about the casual killing of slaves).

the disorders, rapines and inhumanity, to which they are naturally prone and inclined, and may also tend to the safety and security of the People of this Province and their estates; to which purpose . . . .<sup>48</sup>

Images of this sort by no means disappeared with the softening of slave law in the early nineteenth century; courts continued to invoke them when choosing between alternative doctrines. For example, the South Carolina Supreme Court ruled that, in view of the rebellious and vindictive impulses of blacks, masters ought not ordinarily be held liable for the torts of their slaves:

[Negroes] were in general a headstrong, stubborn race of people, who had a volition of their own, and the physical power of doing great injuries to neighbors and others, without the possibility of their masters having any control over them; especially when they happened to be at a distance from them; and experience had taught us how little they adhered to advice and direction when left alone. It would, indeed, under these circumstances, be a most dangerous thing, to make masters liable in damages for the unauthorized acts of their slaves . . . .<sup>49</sup>

The most intriguing doctrinal fields are those in which lawmakers drew simultaneously on both of the paradigms. A good example is the dissenting opinion of Chief Justice Ruffin in *State v. Caesar*.<sup>50</sup> The holding of the case (of which more will be said below)<sup>51</sup> was that a slave who, in a fit of anger, kills a white man who has just inflicted a "severe blow" on the slave's friend, is guilty of manslaughter, not murder. Ruffin argued that his colleagues were wrong to attribute to the defendant emotions and impulses a white person would have felt under similar circumstances. The large majority of slaves, he contended, are docile and obedient. Routinely humiliated by whites, they are almost impossible to provoke.

Negroes—at least the great mass of them—born with deference to the white man, take the most contumelious language without answering again, and generally submit tamely to his buffets, though unlawful and unmerited. Such are the habits of the country. . . . For it is an incontestable fact, that the great mass of slaves—nearly all of them—are the least turbulent of all men; that, when sober, they never attack a white man; and seldom, very seldom, exhibit any temper or sense of provocation at even gross and violent injuries from white men . . . . Crowds of negroes in public places are often dispersed with blows by white men, and no one remembers a homicide of a white man on such occa-

48. Quoted in JOHN B. BOLES, *BLACK SOUTHERNERS, 1619-1869*, at 23 (1983) (emphasis added).

49. *Snee v. Trice*, 3 S.C.L. 138, 1 Brev. 178 (1802). For decisions in other states reaching similar results for similar reasons, see *Boulard v. Calhoun*, 13 La. Ann. 445, 447-48 (1858) (refusing on this ground to award punitive damages); *Parham v. Blackwelder*, 30 N.C. 446, 8 Ired. 5 (1848).

50. 31 N.C. (9 Ired.) at 391.

51. See *infra* text accompanying note 130.

sions. . . . Such being the real state of things, it is a just conclusion of reason, when a slave kills a white man for a battery not likely to kill, maim, or do permanent injury, not accompanied by unusual cruelty, that the act did not flow from generous and uncontrollable resentment, but from a bad heart—one, intent upon the assertion of equality, social and personal, with the white, and bent on mortal mischief in support of the assertion. It is but the pretense of a provocation, not usually felt.<sup>52</sup>

The defendant, in short, had by his violent reaction revealed himself to be a Nat, not a Sambo. He had lifted his mask, shown himself to be one of the few inherently "bad" slaves—rebellious, cunning, and homicidal. Extenuation of the crime, under such circumstances, was of course inappropriate; the sensible penalty was death.

Disputes involving alleged breaches of warranties of fitness also frequently led to deployment of both stereotypes. As indicated above, all Southern jurisdictions refused to apply to sales of slaves the doctrine of caveat emptor; purchasers of slaves who proved to be in some way "defective" could rescind the sales.<sup>53</sup> As Ariella Gross has shown, the lawyer for the purchaser in a suit implicating this rule typically sought to portray the slave in question as rebellious, violent, vicious, dangerous, and incorrigible—in short, as a Nat.<sup>54</sup> Counsel for the defendant sought instead to show that the slave was pliable, loyal, childlike, humble, and obedient—in short, a Sambo. The case then hinged on the issue of which of the two images was more accurate.<sup>55</sup>

Cases implicating slaves' sexuality were frequently colored by special, gendered versions of the two stereotypes. Drawing on a long tradition in Western culture of depicting female negroes as promiscuous (willing, for example, to mate with orangutans), lawmakers typically depicted women slaves as wanton "Jezebels"—a female variant of the casually immoral Sambo.<sup>56</sup> For example, their supposed licentiousness and poorly developed parental instincts were commonly invoked to justify denying them the right to marry or to retain custody of their children.<sup>57</sup> Similar characterizations were used to justify the failure of almost all

52. 31 N.C. (9 Ired.) at 421-24.

53. See *supra* note 6 and accompanying text.

54. See Gross, *supra* note 6, at 13-24.

55. See *id.* The power of the two stereotypes was especially pronounced in appellate opinions; at trial, the lawyers would sometimes seek to demonstrate that the slaves had traits (e.g., honesty and industry) not found in either of the paradigms. *Id.* at 22.

56. For discussions of the tradition on which the lawmakers were drawing, see JORDAN, *supra* note 24, at 24-40, 155-60; ELIZABETH FOX-GENOVESE, *WITHIN THE PLANTATION HOUSEHOLD: BLACK AND WHITE WOMEN OF THE OLD SOUTH* 292 (1988); Frances S. Foster, *Changing Concepts of the Black Woman*, 3 J. BLACK STUD. 433 (1973); Evelyn Brooks Higginbotham, *African-American Women's History and the Metalanguage of Race*, 17 SIGNS 251, 262-66 (1992).

57. See Burnham, *supra* note 10, at 189, 204, 208, 212; Getman, *supra* note 29, at 116-17. Cf.

jurisdictions to criminalize rape of a slave woman: "[t]he regulations of law, as to the white race, on the subject of sexual intercourse, do not and cannot, for obvious reasons, apply to slaves; their intercourse is promiscuous, and the violation of a female slave by a male slave would be a mere assault and battery."<sup>58</sup>

Slave men were also typically depicted as sexually animalistic, but in a more threatening sense. Drawing on an equally deeply rooted image of the male Negro as oversexed (for example, possessing unusually large genitalia) and lustful for white women,<sup>59</sup> lawmakers commonly depicted them as rapacious and predatory. For example, the Supreme Court of North Carolina suggested on the following ground that the age of capacity should be lowered to permit the prosecution of Negro boys for rape:

A large portion of our population is of races from more Southern latitudes than that from which our common law comes. We have indeed an element of great importance from the torrid zone of Africa. It is unquestionable that climate, food, clothing and the like, have a great influence in hastening physical development. Whether it may not be advisable to move down to an earlier age than 14, the period of puberty, for a portion, if not for all the elements in our population, may be a proper inquiry for the statesman.<sup>60</sup>

The same anxiety concerning the sexual ambitions of black men prompted most colonial and state legislatures to mandate either death or castration for slaves convicted of raping or attempting to rape white women.<sup>61</sup> In short, it was the sphere of sexual relations that brought most vividly to the surface lawmakers' fear that all slaves were Nats.

Finally, the most circuitous but perhaps ubiquitous of the impacts of this imagery on the law of slavery was the use of adjectives conventionally associated with one or the other of the stereotypes to describe either

COBB, *supra* note 46, at ccxix (attributing "the want of chastity in female slaves" not to masters' abuse of their power, but to "the natural lewdness of the negro").

58. *State v. George*, 37 Miss. 316, 317 (1859) (counsel for the defendant). See also Burnham, *supra* note 10, at 220-21; Getman, *supra* note 29, at 142-44. The presumption that blacks are promiscuous continued to shape the content and administration of the criminal law after emancipation. Convictions of white men for raping black women remained rare, and, although prosecutions of whites for fornication, cohabitation, and seduction were reasonably common, prosecutions of blacks for such offenses were unusual. See Mary Francis Berry, *Judging Morality: Sexual Behavior and Legal Consequences in the Late Nineteenth-Century South*, 78 J. AM. HIST. 835, 840, 849 (1991); NEIL McMILLEN, *DARK JOURNEY: BLACK MISSISSIPPIANS IN THE AGE OF JIM CROW* 205-06 (1989).

59. See JORDAN, *supra* note 24, at 24-40, 154-60; Richard Yarborough, *The Construction of Black Sexuality in Early Afro-American Fiction* (1993) (unpublished manuscript, on file with author).

60. *State v. Sam*, 60 N.C. 300, 302, 1 Win. 7 (1864). For the persistence of this imagery in the postbellum period, see, e.g., THOMAS DIXON JR., *THE CLANSMAN* (1905).

61. See JORDAN, *supra* note 24, at 151-54; Getman, *supra* note 29, at 134-42; Jennifer Wriggins, *Rape, Racism, and the Law*, 6 HARV. WOMEN'S L.J. 103, 105-07 (1983).

a free person or an institution. For example, when a judge wished to express his contempt for a white defendant, he was likely to liken him (or compare him unfavorably) to a savage. Thus, in *State v. Hoover*, Chief Justice Ruffin denounced in the following terms a man convicted of torturing to death his female slave: "[T]he acts imputed to this unhappy man do not belong to a state of civilization. They are barbarities which could only be prompted by a heart in which every humane feeling had long been stifled; and indeed there scarcely be a savage of the wilderness so ferocious as not to shudder at the recital of them."<sup>62</sup> Similarly, judges who wished to criticize a proposed legal rule or result as excessively harsh frequently would refer to it as "savage." Thus, in *State v. Jarrott*, Justice Pearson insisted that, when assessing the guilt of a slave accused of murder, it would be wrong never to take into account the extent to which he or she had been provoked:

It is [the slave's] duty to submit—or flee—or seek the protection of his master; but 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.<sup>63</sup>

The thrust of this argument—and similar arguments by other judges in other states<sup>64</sup>—is that, to adopt the harsh rule would be to lower the law to the level of the people it is supposed to control—or, in other words, to deprive the law of the features that differentiated it from the slaves themselves.

### III. THE JUSTIFICATION OF SLAVERY

The efforts of white Southerners (and some white Northerners) to explain why it was not unjust to enslave Negroes began in the late seventeenth century. Until the early nineteenth century, they contented themselves with relatively casual and apologetic arguments. However, as abolitionist sentiment intensified in the 1820s and '30s, Southerners felt impelled to develop more formal and elaborate defenses of chattel slavery—to demonstrate that it was not merely a morally acceptable institution, but a "positive good." A host of clergymen, newspaper editors, and previously alienated intellectuals took up the task—and were rewarded with popular acclaim and reasonably wide audiences.<sup>65</sup>

62. *State v. Hoover*, 20 N.C. 413, 415, 4 Dev. & Bat. 365, 367 (1839) (Ruffin, C.J.).

63. *State v. Jarrott*, 23 N.C. 76, 86, 1 Ired. 9, 10 (1840).

64. See *State v. Jones*, 1 Miss. 83, 85-86, 1 Walker L. L. (1820) (Clarke, J.); *State v. Caesar*, 31 N.C. 391, 406, 9 Ired. 49, 50 (1849) (Pearson, J.).

65. See David Donald, *The Proslavery Argument Reconsidered*, 37 J. S. HIST. 3 (1971); DREW GILPIN FAUST, *THE IDEOLOGY OF SLAVERY: PROSLAVERY THOUGHT IN THE ANTEBELLUM*

Almost all of the many theories developed by this group fell into two broad categories: paternalist arguments and racialist arguments. The key to theories of the first type was the depiction of Southern society as a whole as patriarchal and humane. Social and economic relations in the region, so the argument went, are vertical and reciprocal. Inferiors obey and respect their superiors and are rewarded with support and sustenance. Slavery is just one component (albeit an important component) of this essentially feudal system. Masters enjoy the labor and obedience of their slaves, but provide them in return food, housing, moral and religious guidance, and care in their infancy and old age. The net result is a stable, familial, and mutually beneficial labor system—which contrasts favorably with the brutal and tumultuous wage labor system used in the industrializing North.<sup>66</sup>

In its most extreme form—for example, as elaborated by George Fitzhugh—this argument was relatively unpopular.<sup>67</sup> But less fiercely reactionary forms of the argument—for example, those of William Gilmore Simms, Edmund Ruffin, Nathaniel Beverly Tucker, and George Frederick Holmes—found favor with much of the Southern intelligentsia.<sup>68</sup> Many planters thought of themselves as patriarchs, who controlled but were also responsible for their families and their slaves,<sup>69</sup> and sought

SOUTH, 1830-1860, at 1-20 (1981) [hereinafter FAUST, IDEOLOGY OF SLAVERY]; DREW GILPIN FAUST, A SACRED CIRCLE: THE DILEMMA OF THE INTELLECTUAL IN THE OLD SOUTH, 1840-1860 (1977); LARRY E. TISE, PROSLAVERY: A HISTORY OF THE DEFENSE OF SLAVERY IN AMERICA, 1701-1840 (1987).

66. For secondary accounts of this group of theories, see PETER J. PARISH, SLAVERY: HISTORY AND HISTORIANS 142 (1989); FAUST, IDEOLOGY OF SLAVERY, *supra* note 65, at 12-14; Genovese & Fox-Genovese, *supra* note 32.

67. See, e.g., GEORGE FITZHUGH, CANNIBALS ALL! OR, SLAVES WITHOUT MASTERS (C. Vann Woodward ed., Harvard University Press 1960) (1857). The unpopularity of this variant of the argument is documented in JAMES OAKES, THE RULING RACE: A HISTORY OF AMERICAN SLAVEHOLDERS ch. 2 (1982).

68. The following excerpt from William Grayson's epic poem, *The Hireling and the Slave*, captures the essence of the popular version of the argument:

Taught by the master's efforts, by his care,  
Fed, clothed, protected many a patient year,  
From trivial numbers now to millions grown,  
With all the white man's useful arts their own,  
Industrious, docile, skilled in wood and field,  
To guide the plow, the sturdy axe to wield,  
The Negroes schooled by slavery embrace  
The highest portion of the Negro race.  
And none the savage will compare,  
Of Barbarous Guinea, with its offspring here. . . .

In SLAVERY DEFENDED: THE VIEWS OF THE OLD SOUTH 66-67 (Eric McKittrick ed., 1963) [hereinafter SLAVERY DEFENDED]. For documentation of the appeal of this outlook, see Genovese & Fox-Genovese, *supra* note 32, at 21; Greenberg, *supra* note 36; PARISH, *supra* note 66, at 126.

69. A good early illustration is the following excerpt from a letter written in 1726 by William Byrd (a prominent Virginia planter) to the Earl of Orrery:

I have a large Family of my own. Like one of the Patriarchs, I have my Flocks and my



in various ways to play the role of feudal gentry in their local communities.<sup>70</sup>

The key to arguments of the second type was the proposition that it is morally permissible and even mandatory for Caucasians to dominate and exploit Africans. The reasons supplied by the various exponents of this approach varied considerably, but all incorporated the notion that Negroes are inherently inferior to whites and thus are properly reduced to slavery. For example, proslavery clergymen often argued that black persons had been relegated by God to the status of servants because they are descendants of either Ham (cursed for his disrespect for his father) or Cain (cursed for his fratricide).<sup>71</sup> The developers of what (in retrospect) has been called the "herrenvolk" theory contended that there exists in all societies a laboring class, that it is natural that the brutish and subhuman Negroes should fill this role, and that the incidental advantages of such an arrangement for whites include democracy, solidarity, and prosperity.<sup>72</sup> Josiah Nott and others supplemented both arguments with studies of the skulls and bodies of blacks, which, they contended, demonstrated blacks' inherent inferiority.<sup>73</sup>

As was true of the competing images of slaves discussed in the preceding section, the relationship between the two lines of proslavery argu-

Herds, my Bonds-men and Bonds-women. [I must] take care to keep all my people to their Duty, to set the springs in motion, and to make everyone draw his equal share to carry the machine forward.

Quoted in WILLIE LEE ROSE, *SLAVERY AND FREEDOM* 21 (1982). For a later example, see M. Conway, *Testimonies Concerning Slavery* (1864), in *A DOCUMENTARY HISTORY OF SLAVERY IN NORTH AMERICA* 406-07 (Willie Lee Rose ed., 1976).

70. For example, they frequently made loans to their poorer neighbors to help them through difficult times, provided them assistance with the marketing and transportation of their crops, helped them with ginning and milling, supported the local schools, and put on annual banquets for the residents of their neighborhoods. See PARISH, *supra* note 66, at 128-29.

71. See, e.g., THORNTON STRINGFELLOW, *SCRIPTURAL AND STATISTICAL VIEWS IN FAVOR OF SLAVERY* (1856), excerpted in *SLAVERY DEFENDED*, *supra* note 68, at 86-98. For secondary accounts of this line of argument, see Greenberg, *supra* note 36, at 117-18; THOMAS VIRGIL PETERSON, *HAM AND JAPHETH: THE MYTHIC WORLD OF WHITES IN THE ANTEBELLUM SOUTH* (1978); FORREST G. WOOD, *THE ARROGANCE OF FAITH: CHRISTIANITY AND RACE IN AMERICA FROM THE COLONIAL ERA TO THE TWENTIETH CENTURY* ch. 3 (1990).

72. See, e.g., James Henry Hammond, *On the Admission of Kansas*, Speech Before the United States Senate (March 4, 1858), in *SLAVERY DEFENDED*, *supra* note 68, at 122-23. Secondary accounts of this approach include FREDRICKSON, *supra* note 35, at ch. 2-3; PARISH, *supra* note 66, at 126.

73. See, e.g., Josiah Nott, *Two Lectures on the Natural History of the Caucasian and Negro Races* (1844), in FAUST, *IDEOLOGY OF SLAVERY*, *supra* note 65, at 208-38; JOSIAH NOTT & GEORGE GLIDDON, *TYPES OF MANKIND: OR ETHNOLOGICAL RESEARCHES, BASED UPON THE ANCIENT MONUMENTS, PAINTINGS, SCULPTURES, AND CRANIA OF RACES, AND UPON THEIR NATURAL, GEOGRAPHICAL, PHILOLOGICAL, AND BIBLICAL HISTORY* (1854), excerpted in *SLAVERY DEFENDED*, *supra* note 68, at 127-38. For secondary studies of this line of argument, see STEPHEN J. GOULD, *THE MISMEASURE OF MAN* 69-72 (1981); WILLIAM RAGAN STANTON, *THE LEOPARD'S SPOTS: SCIENTIFIC ATTITUDES TOWARD RACE IN AMERICA*, 1815-59 (1960).

ment was complex. Although not strictly speaking incompatible, they certainly pointed in different directions. The second relied heavily on the notion that blacks are inherently inferior to whites; the first did not (indeed, some of its proponents went so far as implicitly to advocate enslavement of some portion of the white population).<sup>74</sup> The second emphasized equality and democracy among whites; the first celebrated hierarchy and deference. Historians once thought that the two arguments appealed to reasonably distinct social groups: tidewater aristocrats found the first more persuasive, while poorer planters, particularly in the southwest, were attracted to the second.<sup>75</sup> In recent years, however, most scholars in the field have concluded that "there was a good deal of interweaving of, and indiscriminate resort to, both the paternalist and the racial arguments."<sup>76</sup> Proslavery writers occasionally drew upon both approaches, and their readers almost certainly did.

The impact of these two lines of argument on legal doctrine was, as one might expect, equally complex. Feudal arguments and images seem to have had disproportionate sway in some contexts. For example, Chancellor Harper of South Carolina justified as follows his adoption of the rule that a contract for the sale of slaves is specifically enforceable:

[U]nless there be something very perverse in the disposition of the master or the slave, in every instance where a slave has been reared in a family there exists a mutual attachment between the members of it and himself. The tie of the master and slave is one of the most intimate relations of society. In every age the distinction has been recognized between the slave brought up in his master's household and one casually acquired. And it may be said that such an one is actually of more value to the master than he would be to a stranger. The owner better understands his qualities, and what he is capable of performing, and the slave will be more likely to serve with cheerfulness and fidelity. These considerations are greatly strengthened by those of humanity to the slave himself.<sup>77</sup>

This notion that slavery fosters (and is justified by) strong, reciprocal bonds of loyalty and affection prompted the courts in other contexts to disfavor doctrines that would facilitate the separation of slaves from their long-term masters. For example, in *Flowers v. Sproule*, the Supreme Court of Kentucky justified as follows its ruling that an ambiguous loan agreement should be deemed a conditional sale rather than a mortgage:

74. See FITZHUGH, *supra* note 67, at 69 (suggesting that one of every twenty people was naturally a master, the rest naturally slaves).

75. See, e.g., OAKES, *supra* note 67.

76. PARISH, *supra* note 66, at 143. See also FAUST, *IDEOLOGY OF SLAVERY*, *supra* note 65, at 10; JOHN MCCARDELL, *THE IDEA OF A SOUTHERN NATION: SOUTHERN NATIONALISTS AND SOUTHERN NATIONALISM, 1830-1860* ch. 2 (1979).

77. *Sarter v. Gordon*, 11 S.C. Eq. 121, 135, 2 Hill Eq. P, Q (1835).

When a contract of this sort is construed to be a mortgage, it follows that a redemption, and that, perhaps, after a great lapse of time, must often be attended with *injurious* and *afflicting* consequences. Injurious—as it relates to the fortune and prospects of the constructive mortgagee and his family. Afflicting—as slaves, though property, are intelligent and sympathetic beings—they interchange sentiments, mingle sympathies, and reciprocate, with their possessor and the members of his family, all the social regards and kind attentions which endear the members of the human family to each other, and bind them in the social state. The agonies of feeling, as well on the part of the slaves as those of their possessors, inseparable from a sudden disruption of those social relations, ought not to be lightly regarded by the judge . . .<sup>78</sup>

Analogous arguments suffuse the work of Thomas R.R. Cobb, the foremost Southern commentator on the law of slavery.<sup>79</sup> Cobb begins his influential treatise with a forthrightly paternal defense of the institution:

That the slave is incorporated into and becomes part of the family, that a tie is thus formed between the master and the slave, almost unknown to the relation of master and hireling, . . . that the old and infirm are thus cared for, and the young protected and reared, are indisputable facts. Interest joins with affection in promoting this unity of feeling. To the negro, [slavery] insures food, fuel, and clothing, medical attendance, and in most cases religious instruction. The young child is seldom removed from the parents' protection, and beyond doubt, the institution prevents the separation of families, to an extent unknown among the laboring poor of the world. It provides him with a protector, whose interest and feeling combine in demanding such protection.

To the master, it gives a servant whose interests are identical with his own, who has indeed no other interest, except the gratification of a few animal passions, for which purpose he considers it no robbery to purloin his master's goods.

In short, the Southern slavery is a patriarchal, social system. The master is the head of his family. Next to his wife and children, he cares for his slaves. He avenges their injuries, protects their persons, provides for their wants, and guides their labors. In return, he is revered and held as protector and master.<sup>80</sup>

This conception of the nature and merits of the institution prompts Cobb, in the body of his treatise, to highlight the more humane features of slave law and to call for the amelioration of its grimmer provisions. For example, like other exponents of the neo-feudal argument, he advocates tightening the restrictions on masters' power to abuse their slaves.<sup>81</sup>

78. 9 Ky. 54, 58-59, 2 A.K. Marsh. G, H (1819). For similar arguments in related contexts, see *Fitzhugh v. Foote*, 7 Va. 13, 17, 3 Call. 2, 2 (1801); *Summers v. Bean*, 54 Va. 404, 411, 13 Gratt. 51, 52 (1856).

79. For a study of Cobb's life and influence, see WILLIAM B. MCCASH, THOMAS R. R. COBB (1823-1862): THE MAKING OF A SOUTHERN NATIONALIST (1983).

80. COBB, *supra* note 46, at ccxvii-ccxviii.

81. The helplessness of a slave "when his master is placed in opposition to him," Cobb insists: [I]s one of the most vulnerable points in the system of negro slavery, and should be farther

Similarly, he suggests that the state legislatures consider criminalizing rape of a slave and providing that, if committed by the slave's master, the usual penalty be supplemented with a requirement that the slave be sold to someone else.<sup>82</sup> His discussion of the limitations the state legislatures had placed upon "[t]he right to manumit a slave" is uneasy; he is unqualifiedly enthusiastic only about curtailment of masters' power to free "the old and sick, who would become burdens on the community, and the young and feeble, incapable of supplying their own wants."<sup>83</sup> To be sure, Cobb is no radical. For example, he tempers his proposal for the criminalization of slave rape with the assertion that "the known lasciviousness of the negro, renders the possibility of its occurrence very remote."<sup>84</sup> The overall spirit of the treatise is aptly captured by the guideline he proposes for judges when interpreting statutory restrictions on manumission: "[o]ur course shall be 'the middle way, in which is safety.'"<sup>85</sup> Nevertheless, Cobb's strongly paternal outlook systematically biases—typically in the direction of a more humane regime—his treatment of almost every topic.<sup>86</sup>

A similar outlook helped shape the response of Chief Justice Lumpkin of Georgia to disputes arising out of leases of slaves. Lumpkin, like many of his contemporaries, believed that slaves leased to industries were often abused. For planters steeped in the paternal conception and defense of Southern culture, this conviction was commonly associated with a general hostility toward industrialization and its concomitant evil—wage labor.<sup>87</sup> Lumpkin did not go so far. He believed that industrialization would increase employment in the South and, in general, would improve the region.<sup>88</sup> He was convinced, however, that hired

guarded by legislation. Large compensation should be provided for informers, upon the conviction of the master of cruel treatment; and perhaps the best penalty that could be provided upon conviction, would be not only the sale of the particular slave cruelly treated, but of all of the slaves owned by the offender, and a disqualification forever of owning or possessing slaves.

*Id.* at 97-98. Similar arguments by lay exponents of the paternal line of argument are discussed in Genovese & Fox-Genovese, *supra* note 32.

82. COBB, *supra* note 46, at 99-100.

83. *Id.* at 278-316 (quotations are from pages 279, 282).

84. *Id.* at 100. *Cf. supra* text accompanying note 58.

85. *Id.* at 287.

86. A stronger bias in the same direction, likewise rooted in a paternalist conception and defense of slavery, also shaped the judicial opinions and the scholarship of Chief Justice John Belton O'Neill of South Carolina. See O'NEALL, *THE NEGRO LAW OF SOUTH CAROLINA* (1848); Tennent v. Dendy, 23 S.C.L. 83, 86-87, Dud. 7, 7 (1837); Smiddy, *supra* note 21, at 635-36.

87. See STAMPP, *supra* note 4, at 84, 318, 397-99; R. STAROBIN, *INDUSTRIAL SLAVERY IN THE OLD SOUTH* 132-34 (1970).

88. See Langum, *supra* note 17, at 10-11 (relying on Lumpkin, *Industrial Regeneration of the South*, 12 DEBOW'S REV. 41 (1852)). Langum goes on to argue that this attitude implies that Lumpkin's stance in cases involving slave leases cannot be explained on the grounds of his affinity for

slaves used in industry ran serious risks of injury, illness, and death. The law, consequently, must be structured so as to impel the lessees of slaves to fulfill their moral obligation to protect them. These sentiments are explicit in his famous opinion in *Gorman v. Campbell*, holding that, when a hirer permits a slave to engage in activities more dangerous than those contemplated by the lease and the slave is killed, the hirer is liable to the owner for the value of the slave:

We must enforce the obligations which this contract imposes, by making it the interest of all those who employ slaves, to watch over their lives and safety. Their improvidence demands it. They are incapable of self-preservation, either in danger or in disease.—This office devolves upon those who are entrusted, for the time being, with their custody and control. And if they fail faithfully to perform it, it becomes a high and solemn duty of all courts to enforce the trust by the only means in their power—a direct appeal to the pocket of the delinquent party.<sup>89</sup>

The same sentiments prompted Lumpkin to refuse to abate the rent when a hired slave was disabled or killed prior to the termination of a lease<sup>90</sup> and to reject application of the fellow servant rule to slaves injured through the negligence of fellow employees.<sup>91</sup>

Not all courts, however, saw the problem of leased slaves through the lenses of the paternal theory. For many, the notion that legal rules should be crafted to force hirers to take special care of their slave workers (better care, perhaps, than of their free workers) was altogether implausible.<sup>92</sup> A lease of a slave, they contended, is no different from a lease of any other kind of property. So, for example, if the law permits abatement of the rent when "a house, leased for a year, [is] rendered

the planter class and his sympathy for the ideology developed by that class. *Id.* at 8-11. But one need not subscribe to all portions of a belief-system in order to be swayed by it. The fact that Lumpkin was not committed to "the ideology of the *agrarian* tradition," *id.* at 11 (emphasis added), does not imply that he was unaffected by the more encompassing paternal defense of the institution of slavery.

89. 14 Ga. 137, 143 (1853). For a thorough study of the case, see TUSHNET, *supra* note 32, at 3-6, 51-54.

90. See *Lennard v. Boynton*, 11 Ga. 109 (1852):

Humanity to this dependent and subordinate class of our population requires, that we should remove from the hirer or temporary owner, all temptation to neglect them in sickness, or to expose them to situations of unusual peril or jeopardy. . . . Let us not increase their danger, by making it the interest of the hirer to get rid of his contract, when it proves to be unprofitable. Every safeguard, consistent with the stability of the institution of slavery, should be thrown around the lives of these people.

*Id.* at 113. *Cf.* *Latimer v. Alexander*, 14 Ga. 259, 267 (1853) (requiring a hirer to pay the medical expenses when a slave becomes ill during the lease term).

91. See *Scudder v. Woodbridge*, 1 Ga. 195, 199 (1846). Similar arguments underlay similar rulings in Florida, Kentucky, Louisiana, and South Carolina. See Wertheim, *supra* note 19, at 1131-32.

92. See Wertheim, *supra* note 19, at 1136-37.

untenantable by a storm," it ought to permit abatement of the rent when a slave is killed during the lease term.<sup>93</sup>

The racist conception and defense of slavery that one suspects underlay the latter line of cases is more overt in many of the judicial opinions that narrowed the scope of masters' power to manumit their slaves. For example, the dramatic pair of decisions by the Mississippi Supreme Court erecting multiple barriers against all forms of emancipation were founded on blunt assertions of the profound defects of one race and the political and economic needs of the other.<sup>94</sup> Negroes are "an inferior caste, incapable of the blessings of free government, and occupying, in the order of nature, an intermediate state between the irrational animal and the white man."<sup>95</sup> We do and must treat them as "alien enemies." So, for instance:

We enslave them for life, if they dare set their foot on our soil, and omit to leave on notice in ten days. And this not upon the principle, supposed by some, of enmity, inhumanity, or unkindness, to such inferior race, but on the great principles of self-preservation, which have induced civilized nations in every age of the world to regard them as only fit for slaves, as wholly incapable, morally and mentally, of appreciating or practicing, without enlightenment, the principles and precepts of the Divine and natural law . . . .<sup>96</sup>

The Georgia Supreme Court was equally forthright:

Neither humanity, nor religion, nor common justice, requires of us to sanction or favor domestic emancipation; to give our slaves their liberty at the risk of losing our own. They are incapable of taking part with ourselves, in the exercise of self government. 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.<sup>97</sup>

Vividly evident here are the central features of the second branch of the proslavery argument: the insistence on the inherent depravity of Negroes, the celebration of democracy, and the assertion that emancipation on a substantial scale would doom it.<sup>98</sup> But what is most remarkable

93. See *Bacot v. Parnell*, 18 S.C.L. 424, 425, 2 Bail. 53, 54 (1831) (describing the case involving the damaged house as "a perfectly analogous decision"); *Muldrow v. Wilmington & Manchester R.R.*, 30 S.C. Eq. 69, 70, 13 Rich. 5, 5 (1860) (same). For other decisions permitting abatement of the rent in similar circumstances, see Langum, *supra* note 17, at 13-14.

94. *Heirn v. Bridault*, 37 Miss. 209 (1859); *Mitchell v. Wells*, 37 Miss. 235, 249 (1859). The doctrinal history of which these cases are the terminus is described in LANG, *supra* note 21, at 77-91.

95. *Mitchell*, 37 Miss. at 262-63.

96. *Heirn*, 37 Miss. at 232.

97. *Vance v. Crawford*, 4 Ga. 445, 459 (1848).

98. See also *Gordon v. Blackman*, 19 S.C. Eq. 61, 1 Rich. Eq. 8 (1844); *Morton v. Thompson*, 24 S.C. 370, 6 Rich. Eq. 24 (1854).

about the passage is that it was written by Chief Justice Lumpkin, the same judge who, in the context of leases of slaves, vigorously advanced a paternalist conception and defense of slavery.<sup>99</sup> The general point suggested by this example is that the two lines of argument were not championed by discrete, rival groups of lawyers. Many (perhaps most) lawmakers invoked one of the theories at some times or in some contexts and invoked the other at other times or in other contexts.

On occasion, a judge would even deploy both theories in the same opinion. In *Fisher's Negroes v. Dabbs*, for example, the Supreme Court of Tennessee justified on the following grounds its ruling upholding manumission of a particular group of slaves only on the condition "that they be transported to the coast of Africa":

The [freed slaves] residing [in Liberia] are all from the United States, speak our language, pursue our habits, profess the christian religion; are sober, industrious, moral, and contented; are enjoying a life of comfort and of equality which it is impossible in this country to enjoy, where the black man is degraded by his color and sinks into vice and worthlessness from want of motive to virtuous and elevated conduct. The black man in these states may have the power of volition. He may go and come when it pleaseth him, without a domestic master to control the actions of his person; but to be politically free, to be the peer and equal of the white man, to enjoy the offices, trusts, and privileges our institutions confer on the white man, is hopeless now and ever. The slave who receives the protection and care of a tolerable master holds a condition here superior to the negro who is freed from domestic slavery. He is a reproach and a byword with the slave himself, who taunts his fellow slave by telling him "he is as worthless as a free negro." The consequence is inevitable. The free black man lives amongst us without motive and without hope. He seeks no avocation, is surrounded with necessities, is sunk in degradation; crime can sink him no deeper, and he commits it of course. This is not only true of the free negro residing in the slaveholding states of this Union. In the non-slaveholding states the people are less accustomed to the squalid and disgusting wretchedness of the negro, have less sympathy for him, earn their means of subsistence with their own hands, and are more economical in parting with them than him for whom the slave labors; of which he is entitled to share the proceeds, and of which the free negro is generally the participant, and but too often in the character of the receiver of stolen goods. Nothing can be more untrue than that the free negro is more respectable as a member of society in the non-slaveholding than the slaveholding states. In each he is a degraded outcast, and his fancied freedom a delusion. With us the slave ranks him in character and comfort, nor is there a fair motive to absolve him from the duties incident to domestic slavery if he is to continue amongst us. Generally, and almost universally, society suffers and the negro suffers

99. See *supra* text accompanying notes 87-91.

by manumission.<sup>100</sup>

Interwoven in this passage are important themes from both of the two lines of proslavery rhetoric. From the paternal theory, the court has taken the contrast between the supportive, humane labor system in the South (where slaves receive guidance and support from their altruistic masters) and the hard-hearted labor system in the North (where parsimonious employers are concerned only with maximizing their own incomes). From the racist theory, the court has taken the theme of the immutable inferiority of "the black man"—his inability ever to sustain a condition of political and social equality with whites. The arguments do not cohere well, and both are hard to reconcile with the image of prosperous, egalitarian Liberia that commences the passage. But such uneasy eclecticism was probably typical of the thought of many antebellum Southern judges.

#### IV. CODES OF CONDUCT

The last of the three axes of ideological controversy concerned how a decent person—more specifically, a decent white man—should conduct himself. Southerners could derive answers from either of two competing world views: The Code of Honor and Christianity.

Until recently, the cultural power of the idea of honor in the antebellum South was not well appreciated. The work of Bertram Wyatt-Brown, Edward Ayers, and Kenneth Greenberg has largely remedied the neglect. We now know that the establishment and maintenance of personal honor was absolutely vital to the self-worth of many white men. The organizing idea of the code of conduct to which they committed themselves was that a man has only so much worth as others confer upon him—or, put differently, that a man is what he appears to be. The principal guidelines for behavior that radiated from this idea were as follows: Be truthful (to call someone a liar was directly to impugn his honor); be brave (to call someone a coward was equally serious); defend your family and its reputation; never physically abuse the members of your household; defer to your social superiors; and condescend to your inferiors.<sup>101</sup> None of these injunctions was observed scrupulously, even by the Southerners most committed to the Code, but they defined a set of expectations against which behavior was measured and established "a frame-

100. 14 Tenn. 78, 86, 6 Yer. 119, 130-31 (1834).

101. These principles are distilled from BERTRAM WYATT-BROWN, *SOUTHERN HONOR: ETHICS AND BEHAVIOR IN THE OLD SOUTH* chs. 2-4 (1982); JOHN HOPE FRANKLIN, *THE MILITANT SOUTH, 1800-1861* (1956); AYERS, *supra* note 27, at ch. 1; Kenneth S. Greenberg, *The Nose, the Lie and the Duel in the Ante-Bellum South*, 95 AM. HIST. REV. 57 (1990).



work for handling social problems."<sup>102</sup>

A man whose honor was impugned had to defend it in person. Not to rise to the challenge (not to be willing, if necessary, to risk one's life to rebut the claim) was to "lose face"—to forfeit one's claim to have honor.<sup>103</sup> The importance of this principle explains the extraordinarily high levels of personal violence in the antebellum South—the no-holds-barred, eye-gouging brawling among backwoodsmen; the highly ritualized dueling among gentlemen.<sup>104</sup> It also helps make sense of many other distinctive aspects of Southern culture—the reluctance of white men to submit personal disputes to the courts for resolution;<sup>105</sup> the pug-nacious debating style;<sup>106</sup> the vendettas;<sup>107</sup> the elaborate rules of etiquette, the residues of which we know as "Southern hospitality";<sup>108</sup> the rapid escalation of sectional controversies, such as the Nullification Crisis and the Civil War itself;<sup>109</sup> and nearly suicidal tactics sometimes employed by the Confederate soldiers.<sup>110</sup>

How did it come to pass that so many Southern men organized their lives around the Code of Honor? Some historians emphasize the importance of honor (and the prevalence of violence) in the cultures of the ethnic groups that populated the South.<sup>111</sup> Others attribute the power of the belief-system to the "hothouse atmosphere" created by the system of chattel slavery combined with the highly localized, plantation-based agricultural system.<sup>112</sup> Still others contend that the Code of Honor and the system of dueling used to maintain it were economically efficient and survived because of their social value.<sup>113</sup> For our purposes, determination of which is the best explanation is less important than recognition of the extraordinary currency and influence of this set of interlocking ideas and customs.

The principal ideological competitor of the Code of Honor was the

102. WYATT-BROWN, *supra* note 101, at 64.

103. See Greenberg, *supra* note 36.

104. See WYATT-BROWN, *supra* note 101, at 350-61, 366-71; AYERS, *supra* note 27, at 10-12 (considering and rejecting alternative explanations for the prevalence of violence in the region).

105. See Greenberg, *supra* note 101, at 72-73. This reluctance is memorialized and parodied in MARK TWAIN, PUDD'NHEAD WILSON (1871). It did not deter white men from referring other sorts of disputes to the courts; antebellum Southerners were as litigious as their Northern contemporaries.

106. See Greenberg, *supra* note 36.

107. See WYATT-BROWN, *supra* note 101, at 351-52, 382.

108. See *id.* at 331-39.

109. See *id.* at 20-21, 40; Greenberg, *supra* note 36, at 114-15.

110. See GRADY McWHINEY, ATTACK AND DIE: CIVIL WAR MILITARY TACTICS AND THE SOUTHERN HERITAGE (1982).

111. See WYATT-BROWN, *supra* note 101, at 36-44.

112. For details, see AYERS, *supra* note 27, at 26-27.

113. See Warren Schwartz et al., *The Dual: Can These Gentlemen be Acting Efficiently*, 13 J. LEGAL STUD. 321 (1984).

complex set of prescriptions for social and spiritual life associated with Christianity. A broad spectrum of Christian denominations—from Catholics to Quakers—had significant followings in the antebellum South, but the largest and most culturally powerful groups were the evangelical Protestant sects: Baptists, Methodists, and Presbyterians. Donald Mathews, the leading historian of southern religion, describes as follows the central features of the evangelical outlook:

[T]he Christian life is essentially a personal relationship with God in Christ, established through the direct action of the Holy Spirit, an action which elicits in the believer a profoundly emotional conversion experience. This existential crisis, the *New Birth* as Evangelicals called it, ushers the convert into a life of holiness characterized by religious devotion, moral discipline, and missionary zeal. To achieve this remarkable transformation, Evangelical preaching rejects the appeal to reason and restrained sensibilities for a direct, psychological assault upon sin and the equally direct and much more comforting offer of personal salvation. The style, suited as it is to the democracy of emotion rather than the hierarchy of intellect, destroys the psychological and social distance between preacher and people, often evoking tearful, passionate outbursts.<sup>114</sup>

Beginning in the mid-eighteenth century, this message found favor with growing numbers of lower-class and middle-class whites in the South. In the second quarter of the nineteenth century, the nation-wide religious revival known as the Second Great Awakening accelerated the trend. By the eve of the Civil War, a substantial portion of all socioeconomic groups in the region—including slaves and planters—had committed themselves to the evangelical faith.<sup>115</sup>

The evangelical preachers found little of value in the Code of Honor. Many of the activities the Code commended or tolerated—materialism, ostentation, drinking, gambling, and (above all) dueling—they denounced as sinful.<sup>116</sup> Honor itself they characterized as a delusion, and the love of it as a form of bondage.<sup>117</sup> Piety, self-control, mercy,

114. DONALD B. MATHEWS, *RELIGION IN THE OLD SOUTH* xvi (1977).

115. See *id.* at 1-180; JOHN B. BOLES, *MASTERS AND SLAVES IN THE HOUSE OF THE LORD: RACE AND RELIGION IN THE AMERICAN SOUTH, 1740-1870*, at 6-7 (1988); ANNE C. LOVELAND, *SOUTHERN EVANGELICALS AND THE SOCIAL ORDER, 1800-1860* (1980); WYATT-BROWN, *supra* note 101, at 99-105.

116. See WYATT-BROWN, *supra* note 101, at 67-68; LOVELAND, *supra* note 115, at 180-85; OAKES, *supra* note 67, at 105-22; AYERS, *supra* note 27, at 29-30. The intensity of these sentiments is suggested by the following excerpt from an 1856 sermon by Reverend Arthur Wigfall:

The Pagan Temple of Honour is ruled by the same spirit which teaches the Hindoo to throw himself beneath the car of the Juggernaut . . . There exists in our country a privileged class, *soi disant* men of honor, who have established for themselves "a higher law." They put their foot upon the criminal code and trample it in the dust. They may and they do commit murder with impunity.

Quoted in AYERS, *supra* note 27, at 30.

117. AYERS, *supra* note 27, at 30; LOVELAND, *supra* note 115, at 180-81.

humility, and inner strength—not physical courage and self-advertisement—were the marks of a virtuous man.

The impact of Evangelicalism upon Southerners' attitudes toward slavery was more complex. A central tenet of the evangelical vision was the notion that God is no respecter of persons—that all men and women, slave and free, are capable of salvation.<sup>118</sup> In the late eighteenth century, a substantial number of evangelical preachers took this proposition to its logical conclusion. Freeing their own slaves, they declared the institution of chattel slavery "contrary to the laws of God, man, and nature, and hurtful to society, contrary to the dictates of conscience and pure religion."<sup>119</sup> After the turn of the century, however, three forces combined to blunt this abolitionist initiative. First, the reformist impulse that gave rise to the preachers' early stance was undercut by their yearning for respectability and hunger for more adherents. Second, the more members of the upper classes they recruited, the less receptive their audiences became to abolitionist arguments. Third, in ways sketched in the preceding section, Southerners as a group became more and more defensive of slavery as they perceived growing hostility to it in the North. The net result was that, after the 1820s, antislavery Evangelicalism was largely confined to poorer mountain regions in the South.<sup>120</sup>

The early emancipationist stance left two residues, however. First, evangelical Southerners were not as sanguine concerning the morality of slavery as their irreligious neighbors. In ways traced in the preceding section, "the dominant public ideology" of the region had come to be one of "arrogant assurance"; the stance of Evangelicals, by contrast, tended to be "characterized by ambivalence and guilt."<sup>121</sup> Second, evangelical preachers developed and defended a "slaveholding ethic"—a set of guidelines for moral masters. Adhering to their longstanding position that slaves could and should become full members of the Christian community, they urged their parishioners to afford slaves opportunities to worship. More broadly, they insisted that respect for the humanity and dignity of slaves required that they be treated decently—that they be provided adequate food, shelter, clothing, and health care; that they not be physically or sexually abused; that they be educated; and that their fam-

118. MATHEWS, *supra* note 114, at 67.

119. *Id.* at 68; BOLES, *supra* note 115, at 8-9.

120. See MATHEWS, *supra* note 114, at 67-80; John B. Boles, *Evangelical Protestantism in the Old South: From Religious Dissent to Cultural Dominance*, in RELIGION IN THE OLD SOUTH 13-34 (Charles R. Wilson ed., 1985); LOVELAND, *supra* note 115, at 186-207.

121. See MATHEWS, *supra* note 114, at 173; Clarence L. Mohr, *Slaves and White Churches in Confederate Georgia*, in BOLES, *supra* note 115, at 153, 158-72.

ily relations be protected.<sup>122</sup> In the words of the Reverend Richard Fuller of South Carolina, "[t]he right of the master places him under the deepest corresponding obligations to promote the interest, temporal and eternal, of his slaves."<sup>123</sup>

Both of these outlooks left myriad traces on the law of slavery. Signs of the Code of Honor were everywhere. Underpinning the ban on black testimony against whites, for example, were the notions that truthfulness is a mark of honor, and that blacks—permanently, ineradicably dishonored<sup>124</sup>—can be expected to lie.<sup>125</sup> A common justification for the rule that battery of a slave by a master (or hirer) is not a crime was that physical abuse of slaves was dishonorable behavior that would be condemned by the community, and that cruel (or potentially cruel) masters would succumb to such social pressure.<sup>126</sup> Similarly, the pride many Southerners took in the ability of masters and overseers to deal with most instances of slave "misconduct" on their plantations<sup>127</sup> was based partly on their general suspicion of the legal system as a forum for the resolution of disputes—their conviction that honor entails, among other things, "policing one's own ethical sphere."<sup>128</sup>

The doctrinal context in which the power of the Code of Honor can be seen in most detail is the criminal law. For example, in *State v. Jarrott*, Justice Gaston explained why the standards of provocation that would extenuate a homicide of one white man by another ought not apply when a white man kills a slave who has insulted him:

[T]he law shews its indulgence to that frailty of human nature which

122. See MATHEWS, *supra* note 114, at 179-84; Mohr, *supra* note 121, at 153-73; LOVELAND, *supra* note 115, at 206-11.

123. Quoted in MATHEWS, *supra* note 114, at 179.

124. On the importance of dishonor to the status of slavery, see ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH* (1982).

125. See Greenberg, *supra* note 101, at 65.

126. See *State v. Mann*, 13 N.C. 263, 267-68, 2 Dev. 17 1/2, 18 (1829) (contending that "the frowns and deep execrations of the community upon the barbarian who is guilty of excessive and brutal cruelty to his unprotected slave" renders criminalization of such conduct unnecessary). An analogous argument was used by the South Carolina Court of Appeals to buttress its ruling that in most circumstances a master should not be liable for torts committed by his slave. The proper course for a person injured or aggrieved by a slave, the court suggested, is "to complain to the master, or other person having the charge of such offending slave, who, if he was actuated by curtesy and civility to his neighbour, would on such application give him the necessary satisfaction for every insult or piece of improper conduct which a slave had offered." *White v. Chambers*, 2 S.C.L. 70, 75, 2 Bay I, K (1796) (discussed in this connection in Morris, *supra* note 18, at 579-80).

127. The best known expression of this view is that of J.D.B. DeBow: "On our estates we dispense with the whole machinery of public policy and public courts of justice. Thus we try, decide, and execute the sentences of thousands of cases, which, in other countries, would go to the courts." J.D.B. DEBOW, 2 *THE INDUSTRIAL RESOURCES ETC. OF THE SOUTHERN AND WESTERN STATES* 249 (New Orleans, 1853), quoted in RICHARD C. WADE, *SLAVERY IN THE CITIES: THE SOUTH, 1820-1860*, at 97 (1964).

128. See WYATT-BROWN, *supra* note 101, at 371-77; AYERS, *supra* note 27, at 135.

urges men, before they have an opportunity for reflection, to a compliance with those common notions of honour which forbid either to give way to, or acknowledge the superior prowess of, the other. Such notions spring from a sense of equality, and the horror of personal disgrace. They do not prevail—and they ought not to exist—between those who cannot combat with each other, without degradation on one hand, and arrogance on the other.<sup>129</sup>

The same concepts were deployed in a different pattern in *State v. Caesar* to justify the requirement that slaves submit to greater insults from white persons than other whites are obliged to tolerate:

[A]ccustomed as [the slave] is to constant humiliation, [a slight blow] would not be calculated to excite to such a degree as to 'dethrone reason,' and [deadly retaliation] must be ascribed to a 'wicked heart, regardless of social duty'. A blow inflicted upon a white man carries with it a feeling of degradation, as well as bodily pain, and a sense of injustice; all, or either of which, are calculated to excite passion: whereas a blow inflicted upon a slave is not attended with any feeling of degradation, by reason of his lowly condition, and is only calculated to excite passion from bodily pain and a sense of wrong . . . .<sup>130</sup>

Collating the two opinions, one gets the following rules: When one white man insults another, honor is at stake. Violence is thus predictable and (to some extent) excusable.<sup>131</sup> When a black man insults a white man, violence is less justified, because the white man under such circumstances should not feel dishonored. When a white man insults a black man, violence is also less justified, because black men have no honor to be challenged.

But reasoning of this sort was by no means the only mode of analysis familiar to the Southern lawmakers; religious arguments were equally common. Statutes or judicial opinions tightening the restrictions on physical abuse of slaves, for example, frequently overtly invoked Christian principles. Thus, in *State v. Hale*, Justice Taylor, in ruling that unjustified battery on a slave is an indictable offense, sought to join "the march of benignant policy and provident humanity, which for many years has characterized 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 enjoin."<sup>132</sup>

129. 23 N.C. 76, 85, 1 Ired. 9, 10 (1840).

130. 31 N.C. 391, 400, 402, 9 Ired. 49, 50 (1849).

131. The same attitude underlaid the adoption by several Southern states of the rule that a person, threatened with deadly force, need not attempt to retreat but instead may defend himself—and indeed may kill his attacker—without incurring criminal liability. See Paul Finkelman, *Exploring Southern Legal History*, 64 N.C. L. REV. 77, 104-05 (1985).

132. 9 N.C. 582, 583, 2 Hawks 74 (1823). See also Act of 1740, 7 S.C. Public Laws 397-417 (An Act for the Better Ordering and Governing Negroes and Other Slaves in their Province):

The expansion of the defenses available to slaves accused of murdering white persons was often justified on similar grounds. So, in *State v. Will*, Justice William Gaston (a devout Catholic)<sup>133</sup> insisted that a slave who kills an overseer who is attempting to kill him is guilty of no more than manslaughter:

Unless I see my way clear as a sunbeam, I cannot believe that [the contrary rule] is the law of a civilized people and of a Christian land. I will not presume an arbitrary and inflexible rule so sanguinary in its character, and so repugnant to the spirit of those holy statutes which "rejoice the heart, enlighten the eyes, and are true and righteous altogether."<sup>134</sup>

A preference for formal, legal resolution of disputes—a stance opposed to the bias in favor of plantation justice—was also commonly tied to Christian commitments. For instance, in *State v. Reed*, Judge Henderson responded as follows to counsel's observation that "by the laws of ancient Rome or modern Turkey, an absolute power is given to the master over the life of his slave":

I answer, these are not the laws of our country, nor the model from which they were taken; it is abhorrent to the hearts of all those who have felt the influence of the mild precepts of Christianity; and it is said, that no law is produced to shew that such is the state for slavery in our land, I call on them to shew the law by which the life of a slave is placed at the disposal of his master.<sup>135</sup>

The distrust of slave testimony associated (in part) with the Code of Honor<sup>136</sup> was offset, in the minds of some judges, by religious impulses—more specifically, by belief in the capacity of all persons, including Negroes, to appreciate Christ's essential teachings. Thus, in *Lewis v. State*,

And whereas, cruelty is not only highly unbecoming those who profess themselves christians, but is odious in the eyes of all men who have any sense of virtue or humanity; therefore, to restrain and prevent barbarity being exercised towards slaves, Be it enacted . . . That if any person or persons whosoever, shall willfully murder his own slave, or the slave of any other person, every such person shall . . . forfeit . . . seven hundred pounds. . . .

*Id.* § 37.

133. See J. HERMAN SCHAUINGER, WILLIAM GASTON: CAROLINIAN 200-09 (1949).

134. 18 N.C. 121, 171, 1 Dev. & Bat. 16, 22 (1834).

135. 9 N.C. 454, 456, 4 Hawks 58 (1823). See also *State v. Jarrott*, 23 N.C. 76, 1 Ired. 9 (1840), where Justice Gaston (whose Christian commitments were especially strong, see *supra* note 133) contends:

[I]t is not necessary . . . that a person who has received an injury, real or imaginary, from a slave, should carve out his own justice; for the law has made ample and summary provision for the punishment of all trivial offenses committed by slaves, by carrying them before a Justice, who is authorized to pass sentence for their being publicly whipped. This provision, while it excludes the necessity of private vengeance, would seem to forbid its legality, since it effectually protects all persons from the insolence of slaves, even when their masters are unwilling to correct them upon complaint being made.

*Id.* at 84; see also *State v. Hale*, 9 N.C. 582, 2 Hawks 74 (1823); *Jourdan v. Mississippi*, 32 Miss. 382, 387 (1856).

136. See *supra* text accompanying note 125.

the Mississippi Supreme Court rejected on the following grounds the prosecution's contention that the dying declaration of one slave ought not be admitted in the murder trial of another slave:

It is true that if the declarant had no sense of future responsibility, his declarations would not be admissible. But the absence of such belief must be shown. 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.<sup>137</sup>

Last but not least, Christian arguments helped sustain the line of judicial opinions favorable to the emancipation of slaves. For instance, in perhaps the most famous passage in this line of cases, Justice Green of Tennessee justified his ruling that putatively manumitted slaves have standing to defend the will that purports to free them, despite the fact that they have not yet been declared free:

A slave is not in the condition of a horse or an ox. His liberty is restrained, it is true, and his owner controls his actions and claims his services. But he is made after the image of the Creator. He has mental capacities, and an immortal principle in his nature, that constitute him equal to his owner but for the accidental position in which fortune has placed him. The owner has acquired conventional rights to him, but the laws under which he is held as a slave have not and cannot extinguish his high-born nature nor deprive him of many rights which are inherent in man.<sup>138</sup>

## V. CONCLUSION

Two generalizations may be gleaned from the foregoing analyses. The first and less controversial is that much of the rhetoric of the law of slavery was derived, not from the English or Continental legal heritages, but from the discursive systems of other sectors of white antebellum Southern society. The vocabularies, images, and arguments developed in Southern fiction, political economy, formal defenses of slavery, and popular political debate provided judges and legislators the materials and analytical tools from which they fashioned the rules that regulated the relations of masters and servants.

The second inference is that the content of antebellum Southern ideology helps account for the remarkable degree of inconsistency and instability in the law of slavery. On three questions explored in this Essay—the characters and proclivities of slaves, *why* slavery is just, and how a

137. 17 Miss. 115, 120, 9 S. & M. 10, 10 (1847). Cf. BOLES, *supra* note 115, at 13 (describing the willingness of the evangelical churches to admit the testimony of slaves in disciplinary proceedings).

138. Ford v. Ford, 26 Tenn. 71, 75, 7 Hum. 91, 95-96 (1846).

just and honorable man should behave—white Southerners were ambivalent or divided. Those divisions and uncertainties fostered corresponding divisions and uncertainties in legal doctrine. Some of the views lawmakers derived from the culture at large inclined them to be lenient or (moderately) protective on such matters as the scope of a master's power to manumit his slaves, the protections the law of torts should (indirectly) provide leased slaves, the exposure of slave families to break-up, and the sorts of physical or sexual abuse of slaves that would give rise to criminal liability; other views led them to take harsher stances. Some of their commitments led them to favor private resolution of disputes and the treatment of slaves as things; others led them to favor public, law-governed resolution of disputes and the treatment of slaves as persons. Shifts in the relative power or prominence of particular views (for example, the growing popularity of evangelical Christianity and the efflorescence of formal defenses of slavery) often precipitated related shifts in legal doctrine (for example, the softening of many of the rules of criminal law).

The linkage between Southern ideology and the law of slavery should not be exaggerated, however. Many ideas in general circulation in antebellum Southern culture did not find their way into legal discourse. For example, the slaves themselves had strong views on many of the issues addressed in this Paper: their sense of their sexual identities and family responsibility differed radically from the traits ascribed to them by their masters;<sup>139</sup> the Africanized versions of evangelical Christianity to which many slaves committed themselves differed equally sharply from the versions popular among whites;<sup>140</sup> and slaves' beliefs concerning the morality of slavery surely were not captured by the paternalist or racialist arguments.<sup>141</sup> None of these attitudes found expression in statutes or judicial opinions.<sup>142</sup> Nor were all aspects of white ideology

139. See FOX-GENOVESE, *supra* note 56, at 290-333; HERBERT G. GUTMAN, *THE BLACK FAMILY IN SLAVERY AND FREEDOM, 1750-1925*, at 60-75 (1976); John W. Blassingame, *Redefining The Slave Community: A Response to the Critics, in REVISITING BLASSINGAME'S THE SLAVE COMMUNITY: THE SCHOLARS RESPOND* 135, 151-55 (Al-Tony Gilmore ed., 1978); JACQUELINE JONES, *LABOR OF LOVE, LABOR OF SORROW: BLACK WOMEN, WORK, AND THE FAMILY FROM SLAVERY TO THE PRESENT* 29-43 (1985).

140. See BLASSINGAME, *supra* note 35, at 71-98, 130-47; GENOVESE, *supra* note 11, at 161-255; ALBERT J. RABOTEAU, *SLAVE RELIGION: THE "INVISIBLE INSTITUTION" IN THE ANTEBELLUM SOUTH* (1978); LAWRENCE W. LEVINE, *BLACK CULTURE AND BLACK CONSCIOUSNESS: AFRO-AMERICAN FOLK THOUGHT FROM SLAVERY TO FREEDOM* 3-135 (1977).

141. See GENOVESE, *supra* note 11, at 148-49; AYERS, *supra* note 27, at 124-31; LEVINE, *supra* note 140, at 54-55.

142. A much trickier question—and one beyond the scope of this Paper—is whether the slaves' views on such issues forced their masters in practice to alter significantly the administration of the law. Cf. FOX-GENOVESE, *supra* note 56, at 30-31 (suggesting that some such adjustments were made).



equally represented. For example, the Code of Honor was largely a construction of white men; the doubts of many white women concerning the violence and vanity it encouraged in men and the narrowness of the roles it assigned women<sup>143</sup> had little impact on the law. Finally, the lower-class whites did not agree with their superiors on all issues; they tended to have many more doubts concerning the merits of the institution of slavery, and, although some were ferociously racist,<sup>144</sup> others found a substantial degree of social interaction with blacks unobjectionable.<sup>145</sup> Again, few of these views found favor with judges and legislators. In short, it was a highly filtered version of Southern ideology that came to shape the law.

How did the filtration work? Some components of the process are obvious. All of the lawyers, legislators, and judges were white men; many were slave owners. Inevitably, in their arguments and edicts, they gave precedence to the beliefs of the groups from which they themselves were drawn. Not all of those beliefs were on their face self-serving; had they been, the slave-owning class would not have been able to sustain its position as the dominant group in the society, and the lawmakers who invoked them would not have been able to sustain popular faith in the legitimacy of the legal order.<sup>146</sup> Those beliefs, however, surely did not represent a cross-section of the attitudes of the community.

The foregoing account raises as many questions as it answers. How exactly were deviant views excluded or suppressed? (For example, how did it come to pass that lawyers and litigants—many of whom knew intimately slaves who did not conform to the Sambo or Nat stereotypes—were induced to use those paradigms so consistently when framing their testimony and pleas?) Did appellate opinions help to shape and sustain the belief-systems of the dominant groups, or were they merely parasitic upon non-legal discourse? Last but not least, if the dynamic of cultural hegemony explains why only a subset of Southerners' views came to dominate the law, why did not the same dynamic limit the degree to which slave owners and lawmakers disagreed on matters of fundamental importance? Much more research must be done on the ways in which

143. See *id.* at 365-71.

144. See, e.g., HINTON ROWAN HELPER, *THE IMPENDING CRISIS OF THE SOUTH: HOW TO MEET IT* xxxi, 97, 182 (George M. Frederikson ed., Harvard University Press 1968) (1857).

145. See RHYS ISAAC, *THE TRANSFORMATION OF VIRGINIA: 1740-1790* (1982); MATHEWS, *supra* note 114, at 67; Larry M. James, *Biracial Fellowship in Antebellum Baptist Churches*, in BOLES, *supra* note 115, at 37-57.

146. See ANTONIO GRAMSCI, *SELECTIONS FROM THE PRISON NOTEBOOKS* 12 (Quentin Hoare & Geoffrey Smith trans., 1971); T. J. Jackson Lears, *The Concept of Cultural Hegemony: Problems and Possibilities*, 90 AM. HIST. REV. 567 (1985).

law functions in Southern culture before any of these questions can be answered.<sup>147</sup>

A final cautionary note: The objective of this Essay is not to displace the four interpretations that currently dominate discussions of the topics addressed herein, but to supplement them. The thesis of the Paper is not that ideology alone is relevant to an understanding of the laws establishing and regulating chattel slavery in the United States. It is rather that, in trying to make sense of those laws, legal historians should not limit their attention to the material interests of the dominant classes, the idiosyncracies of individual lawmakers, the contradictory character of the Southern relations of production, and the laws of jurisdictions from which Americans borrowed ideas; they should also attend to the changing ways white Southerners conceived of and sought to justify their social world.

147. Promising work on the second of the questions is currently being done by Ariella Gross. For a preliminary view of her findings, see *supra* note 6.



# CONSTITUTIONAL LAW AND SLAVERY

