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## Symposium on the Law of Slavery: Book Reviews

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## THE SOUTH CONDEMNING ITSELF: HUMANITY AND PROPERTY IN AMERICAN SLAVERY

A Review of Andrew Fede, *People Without Rights*  
(Garland Press 1992)

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Abolitionism was not the monopoly of the North. With the examples of France and Santo Domingo as warning, and conscience as nag, there was a time in the 1790's when liberal men of Virginia thought the gradual emancipation of American slaves should commence. It was not a radical plan. Only the next generation would be born free, and then females only. But each mother would devise freedom to all her children. St. George Tucker published his plan for gradual abolition in 1796,<sup>1</sup> agreeing with William Blackstone that no convincing moral argument could justify slavery, warning that slavery would wash away belief in the inalienability of freedom. Tucker's plan attracted the attention due a judge of the Virginia Supreme Court of Appeals and Professor of Law at the College of William and Mary.<sup>2</sup>

Tucker confessed that he did not know the future after emancipation. He laughed at colonization schemes as impractical, and doubted that his Virginia neighbors would accept free blacks as coparticipants in political society, or even be content to grant them civil rights. But "some middle course"<sup>3</sup> must be possible, he put, between slavery and cocitizenship, for the present generation of men not used to living together as equals. The language of rights need not exclude compromise. Whites were unwilling to receive blacks in political and civil society, but this did not mean blacks must be held in bondage.<sup>4</sup> Basic rights of personality could be protected; emancipated blacks could have the right to contract and lease property, the right of personal security, and the right to keep the product of their own effort.<sup>5</sup> Many blacks would choose to emigrate,

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1. ST. GEORGE TUCKER, A DISSERTATION ON SLAVERY: WITH A PROPOSAL FOR THE GRADUAL ABOLITION OF IT, IN THE STATE OF VIRGINIA (Philadelphia 1796).

2. See generally CHARLES T. CULLEN, ST. GEORGE TUCKER AND LAW IN VIRGINIA, 1772-1804, at 151-53 (1987); ALISON GOODYEAR FREEHLING, DRIFT TOWARD DISSOLUTION: THE VIRGINIA SLAVERY DEBATE OF 1831-1832, at 90-96, 167-68 (1982).

3. TUCKER, *supra* note 1, at 90.

4. *Id.* at 88-89.

5. *Id.* at 93-96.

Tucker supposed, but “[t]heir personal rights, and their property, though limited, would whilst they remain among us be under the protection of the laws.”<sup>6</sup> In one extraordinary phrase, Tucker suggested that the prejudice of his own heart and of his white neighbors might reform. “Under such an arrangement we might reasonably hope, that time would either remove from us a race of men, whom we wish not to incorporate with us, or *obliterate those prejudices*, which now form an obstacle to such incorporation.”<sup>7</sup>

Slavery brought denial. By the light of nature, black and white were entitled to the “common privileges” of liberty, property, and security, said Tucker.<sup>8</sup> The easiest buffer for conscience was to reject slaves’ humanity. It “would be hard to reconcile reducing the Negroes to a state of slavery . . . unless we first degrade them below the rank of human beings, not only politically, but also physically and morally.”<sup>9</sup> Roman law equated freemen and persons, “putting slaves into the rank of goods and chattels,” and the “policy of our legislature, as well as the practice of slaveholders in America in general, seems conformable to that idea.”<sup>10</sup> Tucker worried that white Southerners would mistake legal fiction for moral fact, thinking of slaves as property, excluding them from any claim of human right.

Andrew Fede’s new book, *People Without Rights*,<sup>11</sup> treats the question raised by St. George Tucker—why slaves were treated at law as a form of chattel property and how this conceptualization helped to accommodate slavery within the common law of the South. Slaves were sometimes protected by law and referred to as persons, admits Fede, but their personhood was without legal substance for they had no cognizable rights; any reference to slaves’ humanity “constitute[d] a cruel irony that legitimized the power of whites over slaves” and merely “defined the relative rights of whites to slave property.”<sup>12</sup> The scruples of judges or legislators concerning a rock bottom standard for the governance of slaves masked the “overall property orientation of slave law.”<sup>13</sup> Conceiving slaves as human beings was only a legitimizing rhetoric, so long as slaves were “people without rights.”

6. *Id.* at 96.

7. *Id.* (emphasis added).

8. *Id.* at 50 (citing Spavan’s *Puffendorf*, vol. 1, ch. 17).

9. *Id.* at 50-51.

10. *Id.* at 51 (emphasis omitted).

11. ANDREW FEDE, *PEOPLE WITHOUT RIGHTS: AN INTERPRETATION OF THE FUNDAMENTALS OF THE LAW OF SLAVERY IN THE U.S. SOUTH* (1992).

12. *Id.* at ix.

13. *Id.* at 6.

The theme of Fede's book is venerable, but his argument is sometimes elusive. The conceptualization of slaves as property was a powerful sophistry that influenced how slaves were treated. But another view of slaves as human beings also had mitigating force. The moral truth dogging Tucker bothered others as well. There were Southern judges who spoke openly of the problem of protecting slaves against gratuitous violence, and cited their concern for the human claim of bondsmen, even in civil subordination.<sup>14</sup>

American slaves did not have political rights or civil rights. Still, in the view of some judges, they had natural or personal rights: the slave's natural right of self-defense, and his right to be free of malicious assaults, could mitigate, and even excuse the slave's use of force.<sup>15</sup> Fede dismisses these examples, explaining that these rights were not as fulsome as the civil rights of whites, and were subordinated to the needs of masters for control of their workforce, and the desire of white society to enforce black servility. The absence of full and equal protection does not establish Fede's claim that a rhetoric of rights meant nothing in slavery cases. The question remains what brought Southern judges to act as they did, in disputes concerning the situation of enslaved African Americans. In some cases, a naturalism that grounded protection in a bondsman's status as a human being had evident importance to the judges themselves.

Fede assumes that one cannot speak of rights or humanity absent the ability to go to court in one's own name. Rights, to Fede, mean individual standing. Now, to be sure, a realist will be tempted to dismiss rights talk if there is no practical remedy or source of limitation against men who wield power. But law can benefit indirectly; one may be the beneficiary of legal rules, even without legal personality; no single remedial form is prerequisite to use of the word "right". A *feme covert* could not sue directly, but was certainly the beneficiary of legal actions brought

14. Judge J.G. Clarke of the Mississippi Supreme Court wrote, for example, to distinguish Mississippi from Roman law. A defendant convicted of murdering a slave should be hung, for it would be a stigma upon the character of the state, and a reproach to the administration of justice, if the life of a slave could be taken with impunity, or if he could be murdered in cold blood, without subjecting the offender to the highest penalty known to criminal jurisprudence of the country. Has the slave no rights, because he is deprived of his freedom? *State v. Jones*, 1 Miss. (1 Walker) 83, 84 (1821).

15. See, e.g., *State v. Negro Will, Slave of James S. Battle*, 18 N.C. (1 Dev. & Bat.) 121, 165 (1834) ("It is certain that the master has not the right to slay his slave, and I hold it to be equally certain that the slave has a right to defend himself against the unlawful attempt of his master to deprive him of life."); *id.* at 172 ("The prisoner is a human being, degraded indeed by slavery, but yet having 'organs, dimensions, senses, affections, passions,' like our own."); *State v. Hoover*, 20 N.C. 413, 415, 417, 4 Dev. & Bat. 368 (1839) ("[T]he master's authority is not altogether unlimited. He must not kill."); *id.* ("Punishment thus immoderate and unreasonable . . . loses all character of correction in *foro domestico*.").

in her husband's name. She enjoyed consideration in the law, even though her husband enjoyed property in her, through control of her earnings, property, and consortium. Though this is intended only as example, it is enough to show the problem with Fede's argument. The invisibility of slaves to the law, as independent actors, does not mean they lacked all protection under the law. In his elegantly crafted book, *Roll, Jordan, Roll*, Eugene Genovese argues that relationships within an agricultural community could be unsettled by the behavior of an especially violent or sadistic master; neighbors might seek prosecution. Professor Genovese notes the stratagems some slaves used to bring a master's misconduct to the attention of other whites in the neighborhood.<sup>16</sup> Public prosecution for malicious assault upon a slave may not have endowed the slave with legal "rights" in some Hohfeldian sense, but it ran surely to his benefit and protected his person.<sup>17</sup> Fede argues that public prosecutions for mistreatment were undertaken to vindicate public justice, not individual rights. But criminal prosecution, in any context, vindicates a public interest.<sup>18</sup>

Fede also gives short shrift to customary law and customary rights. For Fede, law is made only in courts, not in the relationships of a community; this is a surprising statist positivism for a work treating a decentralized plantation economy and the evolution of common law. Professor Genovese has argued convincingly that a plantation or a neighborhood may have had a customary law to govern masters' behavior, a *modus vivendi* enforced by opinion among neighbors, by scorn or exclusion, even by the resistance of slaves whose labor power needed to be mobilized. It is demeaning to the resourcefulness of slaves as human actors to suppose that they were entirely without force in the relationship of slaves and master; they were not necessarily passive in the face of the legal claim that someone owned them. These *modi vivendi* do not count as law, Fede silently assumes. Southern law, in its regard for slaves as property or as persons, is to be calculated solely by the written texts of state institutions.

We can recognize variation in the law of American slave states with-

16. EUGENE D. GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* 38-43 (1974).

17. See also JAMES OAKES, *SLAVERY AND FREEDOM* 159 (1990) ("all but impossible for a liberal political culture to place limits on the masters' power without implicitly granting rights to slaves"); 1 JOHN C. HURD, *THE LAW OF FREEDOM AND BONDAGE IN THE UNITED STATES* 43 (Boston, Little, Brown & Co. 1858) ("So far as [the state] may hold the master and slave, as individuals, morally responsible to the state in their mutual relation, it so far recognizes the personality of the slave, and changes the property into a relation between persons.").

18. Action against a master served to legitimize slavery, argues Fede, *supra* note 11, at 11. This proves too much since human rights also legitimize a social system.

out demeaning the tyranny of slavery.<sup>19</sup> One of the most interesting Southern opinions sketches the limits of any command economy, the inefficiency of fear against hope: the humanity of slaves is recognized in the law's accommodation of personal incentives for work. In *Thomas Waddill v. Charlotte D. Martin*, Chief Justice Ruffin of the North Carolina Supreme Court approved an executor's payment of \$143.97 to a testator's slaves from the proceeds of a cotton crop harvested after his death. Allowing bondsmen to have a limited interest in a crop was "almost universal throughout North Carolina," said Ruffin.<sup>20</sup> "[H]umanity at first prompted" the "most beneficial usage," and experience had shown its utility as well. A bondsman allowed a small plot of land to provide something for his family was more likely to "exert[ ] his industry and honesty, and a spirit to make and save for the master as well as for himself."<sup>21</sup> "Those petty gains and properties . . . allowed to our servants by usage," said Ruffin, "may be justified by policy and law, upon the same principle, that the savings of a wife in housekeeping . . . are declared to be, by the husband's consent, the property of the wife."<sup>22</sup> The slave had no absolute property right, since his earnings could be confiscated by the master, but the executor's payment was maintained against the objection of the testator's co-executrix. It was the human nature of the bondsman as economic actor that justified the executor's practice to Chief Justice Ruffin. Fede overcharges that the "slave's humanity was never legally relevant."<sup>23</sup>

The humanity of slaves is also central in law's account of slave resistance. In its harshest dress, with ruthlessness and brutality to quell resistance, slave law necessarily admits that bondsmen are humans with strength of will, organizational acumen, and a sense of injustice. A legal metaphor of property was never enough to quiet the fear that the property might make claims of its own. In an ameliorative light, judges also

19. Cf. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 624-25 (1857) (Curtis, J., dissenting) ("[t]he *status* of slavery embraces every condition, from that in which the slave is known to the law simply as a chattel, with no civil rights, to that in which he is recognised as a person for all purposes, save the compulsory power of directing and receiving the fruits of his labor. Which of these conditions shall attend the *status* of slavery, must depend on the municipal law which creates and upholds it."); 1 HURD, *supra* note 17, at 358 ("[w]hen regarded as the condition of a legal person, slavery or bondage is a condition of infinite variety in respect to its incidental obligations and their correlative rights.").

20. *Waddill v. Martin*, 38 N.C. (3 Ired. Eq.) 562, 563-64 (1845).

21. *Id.* at 565.

22. *Id.* at 564. "[T]here is an universal sense pervading the whole community, of the utility, nay, unavoidable necessity, of leaving to the slave some small perquisites, which may be called his and disposed of by him as his, although as against a wrong doer the property must be laid in the master, for the sake of the remedy . . ." *Id.* at 565.

23. FEDE, *supra* note 11, at 22.

relied upon slaves' capacity to resist as lesson why decency was prudent. "Cruelty is ever bad policy," warned Chief Justice Martin Howard of North Carolina. "[N]othing will so effectually preserve us from the horrors of a BELLUM SERVILE, or rebellion of slaves, as a mild, humane and gentle treatment of them."<sup>24</sup> "[M]en . . . allowed to share the common rights of mankind . . . will in times of difficulty adhere to their superiors or masters."<sup>25</sup> Fede, hoping to prove that "no Southern case . . . can be understood as antislavery,"<sup>26</sup> that it "makes no sense to talk of slave 'rights',"<sup>27</sup> must startle at the straightforward lesson set out by the Chief Justice in 1771:

Slavery is an adventitious, not a natural state. The souls and bodies of negroes are of the same quality with ours—they are our own fellow creatures, tho' in humbler circumstances, and are capable of the same happiness and misery with us.

Excepting the fruits of his labour, which belong to the master, a slave retains all rights of subjects under civil government that are NATURALLY UNALIENABLE: Of this kind is self-defence, and personal safety from violence. No one has a right to take away his life without being punished for it. No civil law can confer such a right; it would confound every principle of nature.<sup>28</sup>

The importance of freedom, of full civil and political rights, does not require the belief that slavery denied all human claims. Indeed, it is perhaps most morally instructive that American citizens once believed the elements of liberty were complicated and divisible, distinguishing among personal, civil, and political rights.

At times, Fede shifts his ground, and seeks to argue the distinct thesis that the changing content of American antebellum slave law proceeded from an instrumental calculation of the economic and social advantage of slavemasters. Legal thought becomes unimportant in this account. Law enjoys no autonomy or constraining discipline of its own, and is determined solely by factors outside the "law box."<sup>29</sup> In this raw determinism, one may wonder what happened to Fede's earlier claim that legal rhetoric matters. One can recast Fede most attractively by asking whether the conceptualization of slaves as property made slave

24. *Part of a charge delivered to the Grand Jury, at a late Superior Court, by the Honorable Martin Howard, Esq.*, CAPE FEAR MERCURY (Wilmington, N.C.), Feb. 12, 1772; also in NEWPORT [Rhode Island] MERCURY, May 11, 1772, and in Don Higginbotham & William S. Price, Jr., *Was It Murder for a White Man to Kill a Slave? Chief Justice Martin Howard Condemns the Peculiar Institution in North Carolina*, 36 WM. & MARY Q. 593, 600 (1979).

25. *Id.*

26. FEDE, *supra* note 11, at 53.

27. *Id.* at 6.

28. *Part of a charge delivered to the Grand Jury, supra* note 24, at 601 (emphasis in original).

29. FEDE, *supra* note 11, at 23.

law especially receptive to instrumental arguments. But Fede does not puzzle over the link between legal theory and social circumstance. Nor does he answer why "instrumental" regulation of masters' property rights might not have flowed from some public sensibility about the condition of enslaved blacks.

Rather than rest content to argue that social and economic factors importantly influenced slave law, and planters preferred a law favorable to their interests, Fede trumpets his intention to prove that law enjoys no normative structure of its own. Every regulation, every protection of slaves within the harsh strictures of Southern law was designed *solely* to advance planters' economic calculus. This interior view of the heart is loudly claimed from one page to the next, in an argument that falls short of convincing standards of proof. Criminal trials in the antebellum period allowed a slave defendant increasing procedural protections. This may well have been influenced by the value of slave property, but it also may have reflected a conflicted sense of fairness toward the defendant. Fede only asserts and does not prove his claim of economic causality.

The reader remains genuinely puzzled at Fede's omniscience, his unwillingness to suppose that any Southern judge writing about slavery was ever sincere, or that words counted for anything. When he is forced face-to-face with a Southern judge who does speak of the awful truth of slavery with apparent feeling, Fede observes that the judge's observations were "dicta." Certainly for an intellectual historian or legal sociologist judging a mode of thought, this breathless distinction is out of place; all parts of a judge's opinion are meant to inform, explain, and guide parties in future cases, whether or not the observations enjoy the technical weight of *stare decisis*. A roadhouse realist such as Fede ought doubt the difference matters anyway, if decisions are not driven by ideas.

Fede wishes to characterize antebellum slave law in a single stroke, to deny the efficacy of any other element of Southern culture apart from planters' calculated interests. Even the self-regard of plantation paternalism is cast aside by the author. Antebellum Southerners understood the terrible logic of slaveholding: men are reduced to slavery by violence, and slave law will permit slavemasters to use enough violence to overcome the slave's resistance. But within those limits, as Professor Genovese has argued, masters might feel some empathy or interest in the welfare of their plantation workers. The economic ends of slavery, and the fears of black insurrection were sufficient impetus to harshness; one need not suppose that masters were devoid of all human nature as well. The record of plantation diaries, letters, and the recollection of African Americans who were enslaved, points to the complicated mixture of vio-

lence, self-interest, racial divide and human feeling that informed the relationship between slaves and the master. It would not be surprising to find the same mixture in the opinions of judges called upon to embrace the institution of slavery. Fede will have none of this. Every detail of the institution and law of slavery was calculated to advance economic interest, and everything else was porridge.

The unhappy consequence of this all-or-nothing strategy is that Fede loses the reader for the interesting points he does make. It is certainly plausible that as slave prices increased, masters would take increasing legal care to protect their slaves against assault and injury at the hands of unaffiliated whites. It is certainly plausible that social tensions between masters and poorer whites caused retaliation against masters' human property. A thesis that slave law may have changed in response to local problems of economy and police is unexceptional, but the delicacy of causality does not lend itself to the sort of quick-march survey of Fede's short book.