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ESSAY

BEYOND BLACK AND WHITE: CULTURAL APPROACHES TO RACE AND SLAVERY

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This Essay surveys the new field of cultural-legal history, highlighting its promise and pitfalls for the study of race and slavery. It discusses several aspects of the new cultural approaches: the view of trials as narratives or performances; the emphasis on the agency of outsiders to the law, including people of color and white women; and a household approach to slavery and other "domestic relations." The Essay argues that these studies have begun to transform historians' understandings of old debates regarding the origins and nature of American slavery, the beginnings of Jim Crow, and the possibilities of resistance against white cultural hegemony. While there are dangers to the new cultural approaches, in particular the loss of an all-encompassing framework to understand law, race and slavery, and the limitations of a black-white model, cultural-legal history also holds great promise for rethinking the role of law in racial formation, the nature of legal change, and the relationship between law and extralegal norms.

INTRODUCTION

When I was a graduate student trying to pursue studies in both U.S. history and law, I was keenly aware of the institutional and intellectual divide that prevailed between social and legal history. Time after time, professors asked me to choose whether I would be "using legal records to study society" or "studying the history of law" (which could have no possible interest to students of society). As I became interested in race and slavery, I found that there was a deep gulf between the cultural and legal histories of the subjects.[1] Histories of African-American culture, and

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1. Slavery studies, unlike many areas of U.S. history, have not depended heavily on legal records to give a window into ordinary people's lives. Since the 1970s, colonial and women's historians have been using county and local court records to talk about marriage and family, crime, patterns of property ownership, and class relations, to name a few topics. For examples in women's history, see, e.g., Norma Basch, In the Eyes of the Law: Women, Marriage, and Property in Nineteenth-Century New York (1982); Linda K. Kerber, Women of the Republic: Intellect and Ideology in Revolutionary America (1980); Suzanne

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Southern culture in general, had been written as though law was largely irrelevant. Cultural historians of the South tended to assume that rituals of honor, for whites, and plantation discipline, for blacks, replaced law as mechanisms to resolve conflicts. Thus, histories of white Southern culture emphasized duels, lynching, and master-slave relations, drawing on literary sources as well as letters and personal papers to paint a picture of a society governed primarily by what contemporary legal scholars would call "extralegal norms."[2] Studies of slave culture suggested that law had little influence on slaves' lives because for most slaves, the master was the law. Studies of post-Civil War African-American culture also shined a spotlight on the lack of legal protection African Americans experienced from vigilante "justice" and a biased court system.[3]

On the "law" side of this divide, slavery was primarily a problem of intellectual history and moral philosophy. Historians and constitutional scholars were reading the published opinions of Southern high courts, as well as the laws enacted by Southern legislatures, for evidence of Southern whites' ideology—their beliefs and fears about the women and men

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Lebsock, The Free Women of Petersburg: Status and Culture in a Southern Town, 1784–1860 (1984). For examples in colonial history, see, e.g., Darrett B. Rutman & Anita H. Rutman, A Place In Time: Middlesex County, Virginia 1650–1750 (1984); Lois Green Carr & Lorena S. Walsh, The Planter's Wife: The Experience of White Women in Seventeenth-Century Maryland, 34 Wm. & Mary Q. 542 (1977); Russell R. Menard, From Servant to Freeholder: Status Mobility and Property Accumulation in Seventeenth-Century Maryland, 30 Wm. & Mary Q. 37 (1973). Slavery, however, has been one subject that for many years was thought not to require the use of legal records. To understand the Southern white world, one could read the voluminous papers of slaveholders: their plantation books, their diaries, letters, the newspapers they read and the writings they published, their agricultural journals, and so on. To understand the world the slaves made, one could read the narratives of slaves and ex-slaves: novels, newspapers, songs and folklore, and interviews conducted decades later of people who had once been enslaved.

2. See generally Edward L. Ayers, Vengeance and Justice 18, 32 (1984) (noting that "honor and legalism . . . [were] incompatible" and that the "'segment of life that was controlled by law' was circumscribed"); Bertram Wyatt-Brown, Southern Honor 3 (1982) ("Above all else, white Southerners adhered to a moral code that may be summarized as a rnle of honor."); Michael Wayne, An Old South Morality Play, 77 J. Am. Hist. 838, 862–63 (1990) (noting the influence of extra-legal actors on the investigation and prosecution of crime). For a longer discussion of this point, see Ariela J. Gross, Double Character: Slavery and Mastery in the Antebellum Southern Courtroom 22–71 (2000) [hereinafter Gross, Double Character]. Ayers, *Vengeance and Justice*, discusses legal trials extensively, recognizing the importance of both law and extralegal norms to Southern culture; nevertheless, he argues that affairs of honor were handled outside the legal system, treating the realms of law and honor as separate spheres. See Ayers, supra.

3. See generally Winthrop D. Jordan, Tumult and Silence at Second Creek 74 (1995) (demonstrating that slaves were deprived of an opportunity for a fair trial); Peter Kolchin, American Slavery 127–32 (1993) (looking only at legislation, and noting that most slave discipline took place on the plantation); Michael Wayne, The Reshaping of Plantation Society 15–17 (1983) (noting that each plantation had its own law); Christopher Waldrep, Substituting Law for the Lash, 82 J. Am. Hist. 1425, 1428 (1996) ("The state only reluctantly intervened in master-slave relations, regarding law as too burdened with procedure effectively to control human chattel. Owners realized law must be kept from their slaves.").

they held in bondage—and for insights into judging and the ethical basis of the common law.[4] In a reminiscence delivered about six years ago at a symposium entitled "Bondage, Freedom, & The Constitution," historian Stanley Katz described the North Carolina case *State v. Mann*[5] as the "central text" of Southern slave law.[6] His disquisition on *Mann* perfectly captured a generation's groundbreaking study of slavery and law. In this famous case, a slave named Lydia ran away from her hirer John Mann, who shot her in the back as she fled. Judge Thomas Ruffin of the North Carolina Supreme Court sanctioned Mann's action holding that "[t]he power of the master must be absolute, to render the submission of the slave perfect."[7] This extreme conclusion, the Court argued, was logically compelled by the institution of slavery.[8]

State v. Mann triggered extensive commentary by both legal philosophers and Southern historians.[9] Historians and moral philosophers alike were captivated by the *Mann* case because it posed so starkly the ethical question of how a "good" system, the common law, could do evil.[10] The Vietnam War and the civil rights movement sparked an intense interest among scholars in the moral responsibility of people within the "system" to defy unjust norms.[11] These scholars took the perspective of the judge in analyzing a case like *Mann*, viewing legal doctrine primarily as a reflection of white Southern ideology. Some suggested that Thomas Ruffin was an "anti-slavery" judge who pushed the logic of slavery to its limit to expose its horror. They debated whether Ruffin was constrained by the legal system, or whether he could (like Judge Gaston several years later) have decided the other way.[12] And they used the *Mann* case to draw conclusions about the essential nature of Southern law as an instrument of slaveholders' power, or about the constant tension in the law between the

4. See, e.g., Robert M. Cover, Justice Accused (1975); Eugene D. Genovese, Roll, Jordan, Roll 25–49, 68–69 (1974); Kenneth M. Stampp, The Peculiar Institution 141–236 (Vintage Books 1989) (1956).

5. 13 N.C. (1 Dev.) 263 (1829).

6. Stanley N. Katz, Opening Address, Bondage, Freedom & The Constitution, 17 Cardozo L. Rev. 1689, 1690 (1996).

7. State v. Mann, 13 N.C. (1 Dev.) at 266. Ruffin first established that he would treat Mann as if he were Lydia's owner although he was in fact hiring her from her master for a one-year term. See id. at 263.

8. Id. at 265–67.

9. See, e.g., Cover, supra note 4, at 77–78 (discussing *Mann* as the best articulation of the position that "the law must reflect the cruel origins" of the master-slave relationship and Harriet Beecher Stowe's critique of this position); Mark V. Tushnet, The American Law of Slavery 54–65 (1981) (critiquing various commentaries on *Mann* as incomplete because they ignore the important role sentiment played in the decision).

10. Katz, supra note 6, at 1690.

11. Id. at 1691–92.

12. James Oakes compared the *Mann* decision to one five years later by Judge Gaston in *State v. Will* which asserted the power of the community and the state to limit the absolute dominion of the master. James Oakes, Slavery and Freedom 137–39, 160–63 (1990).

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slaveholder's power over the slave and the state's power over the slaveholder.

Today there is no single case, no "central text," that has attracted as much scholarly attention as *Mann* or the *Dred Scott* case did two decades ago.[13] Cultural historians with an interest in law, and legal historians with an interest in culture, both of whom I will call "cultural-legal historians" for lack of a better name, have begun to look at trial records in order to view the law from other perspectives—not only that of the judge but those of witnesses, litigants, jurors, and even slaves. In a decade in which successive "trials of the century" (Rodney King, O.J. Simpson) have laid bare racial divisions and shaped the way we talk about race in our daily lives, historians have become interested in the cultural power of trial stories. Trial records are useful sources for the social history of ordinary people who kept no written records. They also represent moments of confrontation between ordinary people and the apparatus of the state, and thus provide an opportunity for historians to explore power relations at a level closer to people's actual lives. In the post-Vietnam, post-civil rights era, historians looking for the connections between the subject matter of social history (the daily lives of ordinary people) and that of political history (the relations of power that govern those lives), have turned to trial records in an effort to understand the diffuse loci of power.[14]

Trial records, in the hands of cultural-legal historians, provide data not only on the behavior or experience of ordinary people, but also on their consciousness, opening a window onto the ways law was understood not only by judges but by litigants, the spectators in the courtroom, and the slaves themselves. Increasingly, historians are looking at a broad range of everyday disputes that were decided by legal fora—contract, tort, property and inheritance disputes as well as petty criminal cases and cases involving the regulation of race, gender and sexuality—with particular attention to the role of gender and sexuality in the legal "construction" of race. These works draw on a variety of methods from other disciplines, particularly ethnography and performance studies.

The barriers between "legal history" on the one hand, and "social history using legal records" on the other (which were presented to me as a graduate student as two hermetically-sealed realms), are now breaking down. Cultural histories taking law into account from these new perspectives have already begun to have an impact on the study of race and slavery by changing the terms of older historical debates that had organized the field for decades, including debates over which came first, slavery or racism; whether American slavery was compatible with capitalism or

13. For examples of scholarship on the *Dred Scott* decision, see, e.g., Walter Ehrlich, They Have No Rights (1979); Don E. Fehrenbacher, Slavery, Law, and Politics: The Dred Scott Case in Historical Perspective (1981); Paul Finkelman, An Imperfect Union 274–84 (1981).

14. I am indebted to Laura Edwards for this point.

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whether it thrived only in a pre-bourgeois socioeconomic system of "paternalism"; and how Jim Crow practices originated. In all of these areas, blurring the law/culture divide has added specificity and complexity to debates that had taken on an "all or nothing" quality.

This blurring of boundaries extends to subject matter as well. Whereas earlier studies of race and slavery drew a sharp line between black and white, taking as their subject relations between white people and black people as two clearly defined separate groups, newer works increasingly explore "middle grounds" between black and white.[15] New studies of whiteness investigate the ways a variety of Europeans, Asians and Latin Americans became "white" when they came to the United States (or, in the case of Mexicans, when the United States came to them).[16] Yet most writing on *law* and race remains within a black-white framework. This Essay discusses the possibilities of moving beyond black and white in cultural-legal histories of race.

New ways of understanding the history of race, and new ways of looking at law, speak to legal studies as well. Contemporary scholarship on antidiscrimination law has already begun to explore notions of racial performance, drawing on historical work on the legal construction of race.[17] Recent literature on law and extralegal norms, some of it anthropological in focus, might productively draw on cultural-legal histories as case studies.

This Essay is an attempt to survey the new field of cultural-legal history, highlighting its promise and pitfalls for the study of race and slavery. Part I will explore several aspects of the new cultural approaches: the view of trials as narratives or performances; the emphasis on the agency of outsiders to the law (such as slaves, white women, and immigrants); and the household approach to slavery and other "domestic relations." Part II sketches the ways these studies have begun to transform historians' understandings of the role of law in American slavery, and, more broadly, in creating a culture of race and racism. Part III will discuss some of the dangers of the new cultural approaches, in particular the loss of a coherent, all-encompassing framework for understanding law, race and slavery, and the limitations of a binary model for understanding race in America. This Part will suggest ways to get beyond black and white in studies of law and race, with some preliminary research on Native Americans in the South. Finally, the Conclusion will address the promise of cultural-histor-

15. See,. e.g., Barbara Jeanne Fields, Slavery and Freedom on the Middle Ground xii (1985) (introducing the term "middle ground").

16. See, e.g., 2 Theodore W. Allen, The Invention of the White Race (1997); Displacing Whiteness (Ruth Frankenberg ed., 1997); Grace Elizabeth Hale, Making Whiteness: The Culture of Segregation in the South, 1890–1940 (1998); Noel Ignatiev, How the Irish Became White (1995); David R. Roediger, Towards the Abolition of Whiteness: Essays on Race, Politics, and Working Class History (1994) [hereinafter Roediger, Towards the Abolition of Whiteness].

17. See Devon W. Carbado & Mitu Gulati, Working Identity, 85 Cornell L. Rev. 1259, 1267–80 (2000).

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ical approaches for rethinking the role of law in racial formation, the nature of legal change, and the relationship between law and extralegal norms.

I. CULTURAL APPROACHES TO LEGAL HISTORY

A. *Trials as Narrative and Performance*

One important aspect of the new cultural-legal histories is methodological. Drawing on ethnography and performance studies, they pay particular attention to trials as cultural rituals and as arenas for the representation of identities. From one perspective, they utilize a narrative approach to law—not only by using the narrative form of exposition, but by studying stories, especially trial stories. Yet, unlike many legal scholars who have written about law and cultural narratives, cultural-legal historians have begun, like some anthropologists, to view trials as performances rather than narratives, emphasizing the event over the text.

1. *Legal storytelling.* — To legal scholars, unlike either historians or legal practitioners, the idea of "storytelling" is controversial and relatively new. The "storytelling movement" has been hotly debated in the pages of law reviews, even meriting its own symposia, review essays, and replies.[18] Advocates of narrative approaches to legal scholarship, in particular feminists and critical race theorists, make several claims about the narrative method, usually by contrast to a purely analytical, argumentative mode of organizing discourse. First, they argue that narratives add the perspective of powerless people to the law; they tell the stories of "outsiders," or stories "from the bottom up."[19] In doing so, narratives reveal the "relentless perspectivity" of the law; law is not neutral but usually represents the perspective of the powerful.[20] Second, narratives evoke empathy and self-recognition from the reader; emotionally, we respond differently to stories than to argnmentation. Third, narratives are concrete and particular rather than abstract, and individual rather than universal. These advocates do not claim that individual stories are necessarily typical, but instead argue that there are types of knowledge that may not be "generated or validated by scientific objectivity, through which we may nonetheless learn critical things about ourselves and our world."[21] Finally, some advo-

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18. See, e.g., Kathryn Abrams, Hearing the Call of Stories, 79 Cal. L. Rev. 971 (1991); William N. Eskridge, Jr., Gaylegal Narratives, 46 Stan. L. Rev. 607 (1994); Daniel A. Farber & Suzanna Sherry, Telling Stories Out of School, 45 Stan. L. Rev. 807 (1993); Symposium, Legal Storytelling, 87 Mich. L. Rev. 2073 (1989).

19. Mari Matsuda, for example, advocates "looking to the bottom" to hear the stories previously excluded from legal discourse. Mari J. Matsuda, Looking to the Bottom: Critical Legal Studies and Reparations, 22 Harv. C.R.-C.L. L. Rev. 323 (1987).

20. Abrams, supra note 18, at 976.

21. Id. at 1028.

cates claim that stories perform the important cultural function of creating bonds among "outgroups."[22]

Critics of legal storytelling demand that narratives be held to the same standards of verifiability and typicality as other forms of legal scholarship. They also reject the claim that there are "voices of color" or "women's voices" that are uniquely suited to narrative expression.[23] One critic cautions that calls for "empathy" and "storytelling" avoid normative choices about *whose* stories we want judges to listen to, and "which stories [law] should . . . privilege."[24] She also points out that "'legality,' as we actually experience it in American culture, is not the natural enemy of empathy."[25] Law can allow the voices of disenfranchised people not only to be heard but to "*prevail*."[26] Along similar lines, another observer of the debate over narrative in legal scholarship notes that both sides have constructed a set of false oppositions: concrete versus abstract; individual versus universal; emotional versus argumentative. There is no necessary correspondence between any one of these pairs and narrative or argumentative writing: Emile Zola wrote universal stories; many arguments are passionately emotional. Even more problematic is the tendency to consider "the first member of any one pair . . . as opposite to the second member not only of its own pair but of any other pair."[27] A good example of such false dichotomization is the use of body counts, which involve large numbers of people, but should not be mistaken for abstract numbers—indeed, body counts "are a form of language that rides as close to concrete bodily events as stories do (sometimes even closer)."[28] Thus, while it is true that narrative forms of legal scholarship have opened the academy to voices previously unheard, it is not necessarily the case that legal narratives are more individual, concrete and emotional than other forms of scholarship.

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22. See, e.g., Richard Delgado, Storytelling for Oppositionists and Others, 87 Mich. L. Rev. 2411, 2412–14 (1989); Eskridge, supra note 18, at 608.

23. See Farber & Sherry, supra note 18, at 809–19. For a discussion of "women's voices," see, e.g., Carol Gilligan, In A Different Voice (1982); Abrams, supra note 18, at 982; Robin West, Jurisprudence and Gender, 55 U. Chi. L. Rev. 1, 4–41 (1988). For a discussion of the "voice of color," see, e.g., Robert S. Chang, Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space, 81 Cal. L. Rev. 1241, 1268–86 (1993); Alex M. Johnson, Jr., Defending the Use of Narrative and Giving Content to the Voice of Color: Rejecting the Imposition of Process Theory in Legal Scholarship, 79 Iowa L. Rev. 803, 830–42 (1994); Alex M. Johnson, Jr., The New Voice of Color, 100 Yale L.J. 2007, 2043–52 (1991). The most prominent critics of the narrative approach, Daniel Farber and Suzanna Sherry, do suggest, however, that narratives may have some utility from the perspective of pragmatist theories of practical reason. Farber & Sherry, supra note 18, at 854–55.

24. Toni M. Massaro, Empathy, Legal Storytelling, and the Rule of Law, 87 Mich. L. Rev. 2099, 2110 (1989).

25. Id. at 2113.

26. Id.

27. Elaine Scarry, Speech Acts in Criminal Cases, *in* Law's Stories 165, 165 (Peter Brooks & Paul Gewirtz eds., 1996).

28. Id. at 166.

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The new cultural histories of law being written outside of legal academia answer a number of the complaints made by critics of the current storytelling movement in law. Robert Weisberg has analyzed legal narratives and argues that narrative projects of cultural "affirmance" do not attend sufficiently to the complicated interplay between law, narrative, history, and culture.[29] Yet Weisberg argues that narratives can be particularly useful "to illuminate the provenance of national or ethnic identity as the sustaining force in modern political conflict."[30] Guyora Binder and Weisberg point to a number of works of "cultural criticism" of law, such as James Clifford's *The Predicament of Culture*,[31] that approach law as "an arena for composing, representing, and contesting identity, and that treat identity as constitutive of the interests that motivate instrumental action."[32]

Cultural histories of law, and especially of trials, are particularly suited to the endeavor Binder and Weisberg recommend. Cultural histories may enhance our efforts to unite law and narrative because of the rigorous efforts of historians to attain verifiability and typicality, while still telling stories from the bottom up, giving voice to those often erased from the pages of history. Scholars of the history of race should be especially interested in this approach.

2. *Cultural historical narratives.* — The notion of "narrative" occupies a radically different symbolic place in historiography than it does in law.

29. Robert Weisberg, Proclaiming Trials as Narratives, *in* Law's Stories, supra note 27, at 61, 75.

30. Id. at 76.

31. James Clifford, The Predicament of Culture (1988).

32. Guyora Binder & Robert Weisberg, Cultural Criticism of Law, 49 Stan. L. Rev. 1149, 1149 (1997). For example, two historical narratives of Indian identity came into conflict in the Mashpee trials studied by James Clifford, in which the Mashpees, a Cape Cod, Massachusetts tribe who had recently experienced a great revival in cultural identification sought to have their former lands restored to them by surrounding owners. Clifford, supra note 31, at 277, 300–01. In the Mashpee version of their history, their people had survived precisely because they accommodated to white pressures at different times and reinvented themselves after moribund periods. Id. at 309–10. In the state version, the Mashpee claims could not be recognized because of the lack of a continuous, coherent identity as a tribe and the absence of the indicia of that identity—a tribal governance structure, regalia, and "racial" identity. Id. at 300–01. Clifford portrays the trial as an arena in which a variety of actors represented the Mashpee identity, and in the process, created competing narratives of Indian history. Id. at 341. As Binder and Weisberg see it, the Mashpee story does not yield an easy conclusion as to which claim of Indian identity should prevail. For if the Mashpee's land claim is endorsed "on the aesthetic ground that it enriches the expressive possibilities of culture," thereby giving the Mashpee "the opportunity to fashion an identity [they] could live without," then their claim to land will have to "suffer the aesthetic judgment of the majority." Binder & Weisberg, supra, at 1187. Just celebrating the Mashpee's "resistance and survival" does not acknowledge the difficulty of basing the rights of minority cultures on sucb shifting sands. Id. Clifford's account, a cultural criticism of ethnography, draws attention to this ethical indeterminacy. But see Gerald Torres & Kathryn Milun, Translating Yonnondio by Precedent and Evidence: The Mashpee Indian Case, 1990 Duke L.J. 625, 648–49 (1990) (supporting the Mashpee's claims).

Traditional political historical narrative, telling the story of a nation or a people through a chronicle of events such as wars and the comings and goings of political leaders, has cast a long shadow in historiography. Many people still associate narrative history with this top-down tradition. The "new social historians" of the 1960s and 1970s, using quantitative methods borrowed from the social sciences, discredited traditional narrative history as "great-white-man" history with its subject of elite politics. To them, the true subject of history, the lives of ordinary people, could only be approached through quantitative analysis of empirical data. Pure argumentation was as problematic as pure storytelling from the perspective of these quantitative social science historians.

Yet, as a number of commentators have noted, narrative has seen a resurgence in historical scholarship since the late 1970s;[33] what was then an early backlash against quantitative methods is now a torrent.[34] One historiographer argued as early as 1979 that after the "scientific history" of the Marxists, the Annales school and the American cliometricians, historians revived narrative in the 1970s—partly out of disillusion with economic determinism and the three-tiered model of economy/society/ideology; partly out of a recognition of the power of brute force and politics in world history; and partly because of the mixed record of quantification in explaining phenomena such as *why* political party systems changed, or *why* the Civil War took place.[35] The influence of anthropologists such as Clifford Geertz and Mary Douglas led to a resurgent interest in feelings, emotions, behavior patterns, values, and states of mind.[36]

Historians writing in the 1990s have looked more often to ethnography and literature than to science for their models. Unlike traditional narrative histories of elite politics, however, the new cultural narratives explore the political culture of mass movements and parties, the intimate lives of ordinary people, and the way people experience public or cataclysmic events—a trial for adultery, the Chicago Fire, or the Civil War.[37]

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33. See, e.g., Lawrence Stone, The Past and the Present 74 (1981).

34. The most influential early examples in U.S. history include: T. J. Jackson Lears, No Place of Grace: Antimodernism and the Transformation of American Culture 1880–1920 (1981); The Power of Culture (Richard Wightman Fox & T.J. Jackson Lears eds., 1993); Alan Trachtenberg, The Incorporation of America: Culture and Society in the Gilded Age (1982).

35. See Stone, supra note 33, at 79–86.

36. Stone, supra note 33, at 86. Hayden White, too, noted the rise in narrative history as scholars, dissatisfied with the inability of local social-history studies to account for the way people lived and what they thought about their lives, turned back to the narrative form. Hayden White, The Content of the Form x–xi (1990). White notes that "[t]o many of those who would transform historical studies into a science, the continued use by historians of a narrative mode of representation is an index of a failure at once methodological and theoretical." Id. at 26.

37. See, e.g., James J. Connolly, The Triumph of Ethnic Progressivism: Urban Political Culture in Boston, 1900–1925 (1998); Douglas B. Craig, Fireside Politics: Radio and Political Culture in the United States, 1920–1940 (2000); John D'Emilio & Estelle B. Freedman, Intimate Matters: A History of Sexuality in America (2d ed. 1997); Drew Gilpin

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In matters of race, where cliometricians tried to measure the diet, work output, and fertility of slaves,[38] the new cultural historians turn to the words of slaves and ex-slaves, as well as other fragments of the historical record—songs, physical evidence, recipes for medicines—to attempt to recapture the ways that slaves themselves interpreted their experience. Trial records have been invaluable sources for this kind of history. While some cultural historians use trial records as just another source through which to glimpse lived experience, others have self-consciously tried to study trials themselves as narratives, exploring what is unique about the trial and about legal actors, processes, and institutions.

3. *Trials as narratives.* — While there is a long tradition of narrative approaches to the study of legal opinions, historians, anthropologists and culturally-minded legal scholars have only recently turned to the study of trials as narratives. Legal scholar Paul Gewirtz has identified three ways to approach trials as narratives: "examining the relation between stories and legal arguments and theories; analyzing the different ways that judges, lawyers, and litigants construct, shape and use stories; evaluating why certain stories are problematic at trials."[39] A narrative approach to trials also suggests attention to both the "constative" and "performative" meaning of legal language, in J.L. Austin's sense of the word "performative": Legal language is made up of words that *do things*.[40] Saying "I do" *makes* you legally married, if the words are said in the right setting. A judge, in pronouncing a defendant "guilty" or "a negro" makes it so, with potentially dire consequences for the defendant.

A trial is a narrative in the most obvious sense because there is a trial record, a written text, that weaves a narrative out of many conflicting and discontinuous stories. During a trial, lawyers, witnesses, litigants and judges narrate different kinds of stories for different ends. While some cultural historians have looked closely at the relationship between trial stories and legal theories, or evaluated why certain stories are problematic, most have followed Gewirtz's second approach. Analyzing the stories of trial participants, the stories' cultural provenance and their cultural resonance can provide a window into the complex relationship between legal institutions and processes on the one hand, and the wider culture on the other.

To legal historians, trial records offer great promise because there are few historical documents in which ordinary people speak, or even

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Faust, Mothers of Invention: Women of the Slaveholding South in the American Civil War (1996); Richard Wightman Fox, Trials of Intimacy: Love and Loss in the Beecher-Tilton Scandal (1999); Karen Sawislak, Smoldering City: Chicagoans and the Great Fire, 1871–1874 (1995).

38. See, e.g., Robert William Fogel & Stanley L. Engerman, Time on the Cross (1974).

39. Paul Gewirtz, Narrative and Rhetoric in the Law, *in* Law's Stories, supra note 27, at 2, 3.

40. J. L. Austin, How To Do Things With Words (J.O. Urmson & Marina Sbisa eds., Harv. Univ. Press 1975) (1962); see also John R. Searle, Speech Acts 68 (1969) (discussing the "performative" and "constative" meanings of language).

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appear—beyond being counted in the census or having their births or deaths noted. Looking at trial evidence means getting at the lives of ordinary people, going to the local level. But of course "reading" a trial is a completely different enterprise than reading an opinion, a crafted continuous narrative intended to persuade, or at least to enunciate rules. There are many possible ways to "read" a trial. Social historians, hungry for evidence on the lives of slaves, for example, may use trial records for clues as to how slaves and their masters actually behaved. Trial records may tell us how people thought about how slaves and their masters *should* behave, or what lawyers thought would be a persuasive story about slaves' and masters' behavior. More abstractly, for those who feel uncomfortable about seeing trials as undistorted reflections of social behavior or ideology, trial records can be read to tell us about the interaction of legal and cultural narratives.

To take an example from my own work, about half of the litigation in a typical antebellum Southern county courtroom was made up of civil disputes involving slaves, and more than half of those were breach of warranty trials.[41] What was going on in a slave warranty trial? It is tempting, but dangerous, to read the record of a slave warranty trial as a mirror reflective of behavior. In a case where a buyer sued a seller because the slave ran away, we read stories about a slave who defied his master and defied the institution of slavery with remarkable fortitude. Yet it is impossible to know if this slave in fact behaved the way the plaintiff claimed. The defendant inevitably argued the opposite: This slave was obedient and well-behaved. Likewise, we cannot be comfortably certain that the stories witnesses or litigants told were reflective of general attitudes. People may not have believed literally the words they spoke in court, or wrote out in complaints. They were making arguments for a purpose, to win money or help a neighbor do so, and they did so on the advice of their lawyers. Yet there is no doubt that we can learn something about the culture—and about the law—of slavery from the stories that people told in court.

Historians offer somewhat different ways of reading trial narratives. One view is that slave trials were shaped by cultural narratives from outside the courtroom and that legal outcomes were shaped by religious and racial ideology.[42] Trial narratives, then, provide evidence of broadly-held ideologies. Another historian suggests that trial stories are credible historical evidence to the extent that they are stories lawyers believed would persuade a jury because they had cultural resonance.[43] While the stories may not have been literally true, they were believable, and they were believable because they resonated with the experience and ideology of the people who heard them. I have claimed that trial stories not only

41. Gross, Double Character, supra note 2, at 23, app. at 161, tbl. 1.

42. See William W. Fisher, III, Ideology and Imagery in the Law of Slavery, 68 Chi.-Kent. L. Rev. 1051, 1080 (1993).

43. Walter Johnson, Soul By Soul 12–13 (1999) [hereinafter Johnson, Soul by Soul].

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drew on familiar cultural narratives and were presented because of their cultural resonance, but that the legal forum often shaped these stories, winnowed out certain elements and emphasized others, and that the resulting narratives themselves made a difference in people's lives, both because of the lessons they learned in the courtroom and because the stories traveled beyond the courtroom.[44] Trials are not only a place where we hear particularized, individual narratives that we can celebrate or condemn. At trial, we observe the way "stock stories" and narrative abstractions—such as stereotypical images ("the good slave," "the bad master," "the lascivious black woman") or broad ideas of justice ("one man, one vote" or "the husband rules the home")—developed and operated. Indeed, what makes trials so interesting is that they required a confrontation between the particularized narratives of everyday life and the powerful abstractions of legal ideology in the courtroom—an ongoing dialectic between the concrete and individual on the one hand, and the abstract and general on the other.

4. *Trials as performances.* — While there is much to be learned from studying the stories people tell—and those they do not tell—at trial, the study of the trial as a performance may yield still more insight.[45] As the literary critic Julie Stone Peters and the legal scholars J.M. Balkin and Sanford Levinson have argued, legal scholarship, even the most "culturally inflected," is characterized by an "insistent *textual* focus . . . [a] focus on textual interpretation or verbal narrative alone."[46] Peters argues that this "almost willful obscuring of [the] performance elements" of legal events is part of the "historical suppression of the performance elements of law" that occurs through the very act of inscribing legal decisions into written tomes that come themselves to represent "the law."[47] To truly understand law in action requires a reversing of this procedure: Instead

44. See Gross, Double Character, supra note 2, at 73, 79–97, 105–21; Ariela J. Gross, Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South, 108 Yale L.J. 109, 180–81 (1998) [hereinafter Gross, Litigating Whiteness].

45. On courts as sites of performance, see generally Contested States 1–21 (Mindie Lazarus-Black & Susan F. Hirsch eds., 1994) (summarizing scholarship on the strategic use of the courts by the politically marginalized). Academic studies of "performance" draw on "two quite different discourses, that of theater on the one hand, of speech-act theory and deconstruction on the other." Eve Kosofsky Sedgwick, Queer Performativity, 1 GLQ: J. of Lesbian & Gay Stud. 1, 2 (1993) [hereinafter Sedgwick, Queer Performativity]; see also Performance and Cultural Politics 1–11 (Elin Diamond ed., 1996) (proposing a dialogue between performance and cultural studies); Performing Feminisms 251–327 (Sue-Ellen Case ed., 1990) (examining performance in the context of gender); Performativity and Performance 1–18 (Andrew Parker & Eve Kosofsky Sedgwick eds., 1995) (exploring the relationship between the performative aspects of language and theatrical performance).

46. Julie Stone Peters, Law and Performance/Law as Performance 5 (Mar. 1999) (unpublished manuscript, on file with the *Columbia Law Review*); see also J.M. Balkin & Sanford Levinson, Interpreting Law and Music, 20 Cardozo L. Rev. 1513, 1531 (1999) (comparing the problems associated with the performance of offensive texts to the problems associated with interpreting and enforcing unjust laws).

47. Peters, supra note 46, at 5.

of turning trials into texts to be read, the historian reading the traces of performances, the fragmentary documentary records, must turn texts back into performances by reimagining the setting, the stage, the audience, the mood, the program and the intermissions. What happened on the courthouse steps when court adjourned? Who attended the trial and how did they promulgate what happened there? How would the jury have heard the testimony given in court and the depositions read aloud? How were opening and closing statements presented? Trying to answer these questions provides insight into the ways trials resonated in the culture, as well as "a recognition of the larger role of spectacle and display in the shaping of the legal order."[48]

Especially when it comes to the maintenance of legal regimes of slavery and racial hierarchy, public displays of honor, shaming, and dishonor were crucial aspects of law. The legally-mandated disrobing of the slave, the courtroom descriptions of bodily examination, the display of the bloody clothes of a sick slave, the courtroom inspection of the racially-ambiguous person of color—all of these dramatic enactments were far more powerful than can be captured by a written text. When a person of color whose racial identity was at issue in the lawsuit presented himself to the jury for "inspection," turning in all directions, taking off his shoes for examination of his feet, opening his mouth to reveal his teeth, removing his shirt, showing his fingernails, he re-enacted the shaming rituals of the slave market, the rites that so many ex-slaves remembered as the defining moment of enslavement. The dishonor of the slave was a lesson that had to be taught and re-taught, and the courtroom was one of the most public, official places where this lesson was driven home.[49] In a recent article, Walter Johnson discusses Alexina Morrison's performance of "slave-market whiteness," in which an enslaved woman suing for her freedom claimed to be white but performed her whiteness through degrading rituals of bodily display that mirrored the slave market more than anything an "authentic" white woman would ever have to withstand. To prove her whiteness, she disrobed before numerous men who went on to testify in

48. Id. Attending to the trial itself as a drama, and considering its setting, stage, actors, and dramatic effect, is only one way to discuss the performativity of law, of course. This view of the trial performance draws most strongly on theater studies and legal anthropology for its understanding of "performance." An approach more concerned with the performativity of legal language might draw more heavily on speech-act theory to explore the way legal words do things. This has not been the concern of most cultural-legal histories, although some intellectual historians do take this approach. A number of cultural-legal histories do draw on theories of the performativity of race and gender, especially Judith Butler's work on gender performance, in studies of trials as the arena for performance of identity. I will discuss this aspect of performance in more detail in Section B, but for now I want to focus simply on the ways a trial *itself* is a performance.

49. For more on the dishonoring of the slave through law, see Gross, Double Character, supra note 2, at 76–83. On slaves' dishonor and its relationship to masters' honor, see generally Kenneth S. Greenberg, Honor & Slavery (1996); Kenneth S. Greenberg, Masters and Statesmen (1985); Orlando Patterson, Slavery and Social Death (1982).

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great detail about the intimate physical details.[50] Courts pronounced people black or white (doing things with words), but the words were not the only important aspects of their pronouncement. It also mattered how they were said and who heard them.

Trials could make a difference to the communities where they took place through the messages certain performances sent to different audiences. One concrete twentieth-century example is the public effect of civil rights trials as performances of African-American "accomplishment and courage." NAACP lawyers in the 1930s were well aware that black lawyers performing effectively in Southern courtrooms had important "moral" and "psychological effect[s]" on black audiences. According to Michael Klarman, litigation achieved its community-building goals in large part through this performative aspect of having black lawyers questioning white witnesses who had never confronted an African American on an equal footing before. Thurgood Marshall wrote to the NAACP office about his defense of W.D. Lyons, on trial for murder in Hugo, Oklahoma: "[White police witnesses] became angry at the idea of a Negro pushing them into a tight corner and making their lies so obvious. Boy, did I like that—and did the Negroes in the courtroom like it." Although W.D. Lyons was convicted, Marshall believed the trial was successful on another level.[51]

Not only was law practiced and enacted through performance, but law required performances of identity that were sometimes peculiarly legal themselves. Cultural historians like Johnson draw on this related but distinct sense of the term "performance" to describe what happened in the courtroom when individuals acted out their racial and gender identities. The notion of racial and gender performance originated with Judith Butler's theory of the performativity of gender, which she and other theorists have extended to discussions of racial "passing."[52] Butler's exposition of gender emphasizes the active and ongoing creation of gender

50. Walter Johnson, The Slave Trader, the White Slave, and the Politics of Racial Determination in the 1850s, 87 J. Am. Hist. 13, 20–29 (2000) [hereinafter Johnson, Politics of Racial Determination].

51. Michael Klarman, Is the Supreme Court Sometimes Irrelevant? Race and the Southern Criminal Justice System in the World War II Era 38–41 (2000) (unpublished manuscript, on file with the *Columbia Law Review*); see also Mark V. Tushnet, Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936–1961, at 61–64 (1994) (describing collateral benefits of the NAACP's defense).

52. Judith Butler, Bodies That Matter 1–23 (1993) [hereinafter Butler, Bodies That Matter]; Judith Butler, Gender Trouble 128–41 (1990) [hereinafter Butler, Gender Trouble]. In *Bodies That Matter,* Butler discusses Nella Larsen's 1929 novel *Passing* and notes the way Bellew, the husband of a woman who passes for white, "produces his whiteness" through "reiteration and exclusion [of blackness]." Butler, Bodies That Matter, supra, at 171, 275 n.4; see also Eric Lott, Love and Theft: Blackface Minstrelsy and the American Working Class 3–7 (1993) (passing in the context of race); Passing and the Fictions of Identity 1–16 (Elaine K. Ginsberg ed., 1996) (same); Werner Sollors, Neither Black Nor White Yet Both 246–84 (1997) (exploring racial passing as a literary theme).

identity, the "girling" of girls.[53] This creation requires participation by the individual "girl," but it can also be subverted by parodic performances, such as drag. Approaching trials as a place where people perform identities, an arena for the representation of self, tends to lead historians to emphasize individual agency in creating one's own identity, and even to hold out the possibility that historical actors were able to subvert the racial or gender order. This stands in contrast to earlier models of law as a hegemonic force in the drawing of racial lines and the enforcement of racial hierarchy.

Studying a range of trials in the nineteenth-century South, I discovered that over the course of the antebellum period, the law increasingly made the "performance" of whiteness especially important to the determination of racial status.[54] Doing the things a white man or woman did became the law's working definition of what it meant to be white. This definition of race as performance operated in a law-like fashion, prescribing certain rules of behavior for people of different races. One of the most important ways in which men in particular could perform whiteness was, paradoxically, through the exercise of legal rights. Witnesses at trial frequently proved a man's whiteness by reporting his performance of acts of citizenship—voting, mustering for the militia, sitting on a jury. Rightsholding thereby became part of the definition of whiteness for men. The trials thus reveal the implications of a racial ideology which decreed that "negro blood" made a person inferior in virtue, competency and behavior—that "blood" made a person act in certain ways. "The 'laws' of race could be subverted by people who followed all the rules of whiteness but 'hid' their intrinsic blackness."[55]

Whereas many historians of the social construction of race cite statutes and appellate opinions as evidence of social beliefs about race—for example, "one-drop-of-blood" rules of racial identification as evidence of the growing power of biological racism—I found that the legal rule articulated by statute or high court often made little difference at the local level. Ancestry rules did not usually decide actual cases. Courts consistently held that juries should have great discretion in finding the "facts" of race, and should be allowed to hear (and see) every kind of evidence, including hearsay reputation. Thus, evidence of racial performance was a crucial part of the legal determination of race in the nineteenth century, and that meant room for local contestation and negotiation over racial identity.[56]

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53. Butler, Bodies That Matter, supra note 52, at 7.

54. Gross, Litigating Whiteness, supra note 44, at 156–76.

55. Id. at 113.

56. Similarly, Ariela Dubler has found that performance played a crucial role in the nineteenth-century courtroom in "constituting and proving the existence of a marriage." Ariela R. Dubler, Wifely Behavior, 100 Colum. L. Rev. 957, 965 (2000). Yet Dubler shows that in the case of marriage, performance became *less* important to legal determinations of identity rather than more over the course of the late nineteenth and early twentieth centuries. What lay at the heart of legislative abrogation of common law marriage, she

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B. *Agency and Hegemony*

The most influential historical interpretations of the role of law in American society have emphasized its function as an instrument of cultural hegemony, drawing on the Marxist theorist Antonio Gramsci's work.[57] Law gave to force the stamp of legitimacy. Thus, the first histories of women and the law, slaves and the law, and immigrants and the law tended to portray white women, slaves, and immigrants as people "acted upon" by legal institutions, mostly unjustly, occasionally with surprising fairness.[58] Debate centered on the extent of injustice in their "treatment" by the law. Absent from these discussions was a sense of interaction between the "subjects" of law (judges and legislators) and the "objects" of law (usually white women and African Americans).

At the same time, a rich literature in women's history and the history of African Americans and Asian and Mexican immigrants portrayed women and people of color as agents in making their own history.[59] In the study of slavery, for example, historians in the 1970s reacted against views of the American slave as an infantilized "Sambo," as well as portrayals of slaves as workers responding positively to incentives in a profitable and relatively benign slave system, by uncovering and spotlighting slaves' day-to-day resistance, such as work slowdowns, tool-breaking, and running away; the defiance of slavery in slaves' songs, preaching, and secret writ-

argues, were "[a]nxieties over female performance" and its subversive possibilities. Id. at 996. "By exposing marital behavior as nothing more than patterns of performance, the doctrine of common law marriage threatened to reveal all marriage to be nothing more than a particular type of performance. . . . nothing more than artifice." Id. at 1008. For other recent cultural histories of trials regarding marriage and family law, see generally Richard Wightman Fox, Trials of Intimacy (1999); Michael Grossberg, A Judgment for Solomon: The d'Hauteville Case and Legal Experience in Antebellum America (1996); Hendrik Hartog, Man and Wife in America (2000).

57. For the most forceful statement of this position, see Genovese, supra note 4, at 25–49. But many scholars who do not endorse Genovese's theoretical statement of the "hegemonic function of law" and do not consider themselves Marxists still discuss Southern law in instrumentalist, functionalist terms. Legal doctrines were developed *in order to* further the interests of slaveholders, or *in order to* facilitate economic goals. For more examples of this school of thought, see Laura F. Edwards, Law, Domestic Violence, and the Limits of Patriarchal Authority in the Antebellum South, 65 J. Soc. Hist. 733, 734 nn.2–7 (1999) [hereinafter Edwards, Law, Domestic Violence].

58. See generally A. Leon Higginbotham, Jr., In the Matter of Color 3–16 (1978) (emphasizing the harshness of slave law); Arthur F. Howington, "Not in the Condition of a Horse or an Ox," 34 Tenn. Hist. Q. 249, 251, 257–63 (1975) (arguing that slaves received surprisingly fair trials); 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, 76–89 (1970) (same); A.E. Keir Nash, A More Equitable Past? Southern Supreme Courts and the Protection of the Antebellum Negro, 48 N.C. L. Rev. 197, 233–41 (1970) (same).

59. For early women's histories emphasizing women's agency, even in creating domestic ideology, see, e.g., Nancy F. Cott, The Bonds of Womanhood (1977); Kerber, supra note 1; Gerda Lerner, The Woman in American History (1971); Mary P. Ryan, Cradle of the Middle Class (1981). For histories of immigrant and African-American workers, see, e.g., Herbert G. Gutman, Work, Culture, and Society in Industrializing America (1976); David Montgomery, Workers' Control in America (1979).

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ings; slaves' elaborate efforts to maintain family and community ties through naming practices, marrying "abroad," "shouts," and other customs.[60] No less important was evidence of slaves' successes in carving out areas of control—owning chickens, guns, and liquor; hiring out their own time for wages; participating in a vibrant underground economy; taking off holidays and Sundays; and so on.[61] All of these "extralegal norms," as legal scholars would call them, have been described as evidence of an alternative world outside of law in which slaves exercised agency and maintained African culture. In the 1980s and 1990s, some scholars modified what they saw as too rosy a picture of slave community and culture, emphasizing the limits of slaves' control of their own lives, especially by comparison to other slave and serf societies.[62] But hegemony and resistance have remained important parameters for the study of slave society.

Yet slaves and other "outsiders" did not cease to be agents when they entered the courtroom or became subjects of legal dispute. Rather than portraying the agency of African Americans, white women, and other "outsiders" as something that could exist only outside the legal system, and the legal system as hegemonic within its sphere, newer histories show that "law" and "social life" were not necessarily "separate spheres." Reconceptualizing law as an element of culture—a source of cultural narratives and rituals—has allowed legal history to catch up with social history in recognizing people of color and white women as agents. This new work also challenges the idea that day-to-day resistance took place only on a private or unconscious level with no public or political dimensions. Indeed, resistance in the legal arena had political implications well before

60. See, e.g., John Blassingame, The Slave Community (1979) (discussing community-building, family, and resistance); Herbert Gutman, The Black Family in Slavery and Freedom, 1750–1925 (1977) (discussing naming practices, marrying abroad and other family and community-building practices); Lawrence W. Levine, Black Culture and Black Consciousness (1977) (studying slave stories, songs, jokes, and religious practices); Albert J. Raboteau, Slave Religion (1978) (exploring the origins and development of African-American religion); Sterling Stuckey, Slave Culture (1987) (revealing the survival of African traditions in slave culture); Peter H. Wood, Black Majority (1974) (discussing African influences in early American culture). The works they reacted against were Stanley M. Elkins, Slavery: A Problem in American Institutional and Intellectual Life (1959) and Fogel & Engerman, supra note 38.

61. See, e.g., Genovese, supra note 4, at 535–40 (describing slave gardens, ownership of chickens, and participation in underground economy); Raboteau, supra note 60, at 222–23 (describing Sabbath activities and participation in revival meetings); Wood, supra note 60, at 138–41, 208–10 (discussing the taking off of holidays and Sundays and hiring out for wages).

62. See generally Norrece T. Jones, Jr., Born a Child of Freedom, Yet a Slave: Mechanisms of Control and Strategies of Resistance in Antebellum South Carolina 37–64 (1990) (emphasizing the impact of the separation of families on slave society); Peter Kolchin, Unfree Labor: American Slavery and Russian Serfdom 1–46 (1987) (comparing slavery in the U.S. South to Russian serfdom); Anthony E. Kaye, The Personality of Power: The Ideology of Slaves in the Natchez District and the Delta of Mississippi, 1830–1865, at 1–14 *passim* (1999) (unpublished Ph.D. dissertation, Columbia University) (on file with the *Columbia Law Review*) (arguing against the concept of a unified "slave community").

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the Civil War. Ten years ago, James Oakes demonstrated the impact of escaped slaves on sectional conflict by chronicling the significance of the battle over fugitive slave laws.[63] Runaway slaves may have tipped the balance in the War itself as "contraband" soldiers went to fight for the Union, but day-to-day running away, even "petit marronage" as it was known in Louisiana (running away for a few days and returning), also took on public significance when it called into question the mastery and honor of white men.[64]

1. *White Women's Gossip Networks and Community Resources for Resistance.* — Some of the best-developed work on the agency of outsiders involves white women. This work reveals women as agents in bringing lawsuits in court as well as influencing what happened there. For example, Kathleen Brown, in a study of colonial Virginia, shows the ways that women shaped court cases by controlling certain aspects of trial and pretrial procedure. Courts called on "good wives" to examine women in cases of miscarriage, abuse, and rape. Through their examinations, these women had the power to shape the conduct and outcome of the trial. Midwives, for example, brought official testimony to county courts about the age, physical health or appearance and the paternity of children they delivered. Although court justices "hoped to redeem their own authority and lend stability to the social order through the sexual regulation of women," they depended on women to read other women's bodies. The women themselves were thus able to "draw[ ] justices into their networks of gossip about sexual and reproductive experiences," thereby helping to shape the legal proceedings.[65] Moreover, the women's world of gossip on which some jurists relied was not exclusively white. Indeed, in one 1714 infanticide case, the chief witnesses for the prosecution were Mary (an African slave) and an Indian servant who, although they did not testify directly, transmitted stories about a child in a chamber pot to several male neighbors who testified in court.[66]

Gossip was powerful speech. Historians who have studied slander suits note that women "excluded from formal participation in public life" such as voting, jury service, and office-holding, used gossip to "shape the rules of everyday living to which all members of the society were expected to conform."[67] Gossip was a weapon in battles over social and political position. One colonial historian has studied slander suits in the traditional social history fashion, in order to discover "the types of behavior a society most abhors. . . . the basic values of seventeenth-century Marylanders"; in other words, using legal records as a window into ideology

63. Oakes, supra note 12, at 183–94.

64. See Gross, Double Character, supra note 2, at 47–71, 98–121.

65. Kathleen Brown, Good Wives, Nasty Wenches, and Anxious Patriarchs: Gender, Race, and Power in Colonial Virginia 100 (1996).

66. Id. at 306–13.

67. Mary Beth Norton, Gender and Defamation in Seventeenth-Century Maryland, 44 Wm. & Mary Q. 3, 6 (1987).

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and social relations.[68] From this perspective, social gossip networks were an extralegal arena in which women wielded some power, and occasionally we can glimpse that world through legal records. Kathleen Brown goes further in suggesting the mutual constitutiveness of legal authority and women's gossip networks: She argues that "[t]he justices' dependence upon the matrons of their communities for crucial testimony in cases of sexual transgression may have served to increase the potency of other forms of female speech—for example, slander—imbuing it with a semilegal legitimacy."[69] Thus it may not be surprising that throughout the colonies women brought slander suits in disproportionate numbers in the seventeenth century and that women were prominent as defendants and witnesses as well as plaintiffs in these cases.[70]

In the nineteenth century, domestic dependents, including both wives and servants, litigated a surprising number of cases of domestic violence. Although "the law defined domestic relations in terms of isolated households in which individual white male household heads exercised unchecked authority," Laura Edwards demonstrates that households existed within "a dense web of social relations" that dependents could use as a resource in defying the supposedly all-powerful patriarch.[71] Domestic dependents not only used violence to challenge the authority of household heads, but they also used community resources to limit their husbands' and masters' authority.[72] For example, wives publicized their husbands' beatings in the hope of embarrassing them. Slaves sometimes fled to neighbors' houses to seek shelter from brutality. And white women went to local courts with charges of assault and battery in surprising numbers, swearing out peace warrants requiring their husbands to post bond to a magistrate that they would refrain from wife abuse. In cases where the husband was "poor and particularly troublesome," wives could get relief from magistrates.[73] Legal intervention of this kind was most likely at the lowest level of the court system.

It is not surprising that by looking only at appellate opinions, historians could get the impression that the law was a hegemonic force controlled by household heads in which women exercised little power. Only at the local level is contestation evident: women's gossip networks influencing litigation, their litigation sometimes disciplining violent husbands. The point of this work is not so much to paint a picture of glorious resistance and triumphant agency, but to show that even hegemony takes

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68. Id. at 7.

69. Brown, supra note 65, at 99.

70. See id.; Norton, supra note 67, at 5. Women participated as litigants or witnesses in 54.5% of defamation suits in seventeenth-century Maryland, although they constituted only one-quarter to one-third of the population. Id. at 5. For the nineteenth-century participation rates, see Andrew J. King, Constructing Gender: Sexual Slander in Nineteenth-Century America, 13 Law & Hist. Rev. 63 (1995).

71. Edwards, Law, Domestic Violence, supra note 57, at 741.

72. Id. at 745.

73. Id. at 751.

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work. As Edwards shows, "[t]he law had to assert *continually* the power of white male household heads precisely because, in practice, that power was neither complete nor stable."[74] The same point applies to slaves and the law.

2. *Slave agency.* — Unlike white women, slaves could bring only one form of litigation to court, a manumission suit. It is therefore more difficult to find the traces of slaves' own consciousness in legal records. By turning to other sources of African-American consciousness, however, it is possible to piece together evidence of slaves' attitudes to law and to commerce, and to speculate about how slaves might have understood or tried to influence legal transactions. Slaves were certainly keenly aware of the power of law in their lives. African Americans who fled slavery and went on to write or narrate their stories of bondage and escape often commented on the injustice of the white man's law—"*their* judges, *their* courts of law, *their* representatives and legislators."[75] Many, if not most, fugitive slave narratives listed the variety of ways that law made blacks into property and deprived them of rights, sometimes quoting statute books by section number and page.[76] Jon-Christian Suggs' wonderful study of law and African-American narrative, *Whispered Consolations*, highlights the centrality of law in African-American consciousness, and argues persuasively that writing by ex-slaves is obsessed with the law and with legal status.[77]

Slaves were also acutely aware of their own status as objects of property relations and commercial transactions; they could be mortgaged, put up as collateral in credit transactions, split between life estates and remaindermen, or just plain sold down the river. As James Lucas, an ex-slave from Adams County, Mississippi, who once belonged to Jefferson Davis, explained to a WPA interviewer, "[W]hen Marse Davis got nominated fur something, he either had to sell or mortgage us. Anyhow us went back down de country. . . . I bleeves a bank sold us next to Marse L.G. Chambers."[78] Richard Mack noted that when he was ten years old he was "not really sold, but sold on a paper that said if he didn't take care of me, I would come back—a paper on me—a kind of mortgage."[79] In

74. Id. at 740 (emphasis added).

75. Frederick Douglass, An Account of American Slavery, *in* I The Fredrick Douglass Papers 141 (John Blassingame ed., 1979) (emphasis added).

76. See, e.g., Henry Bibb, Narrative of the Life and Adventures of Henry Bibb, *in* Puttin' on Ole Massa 75–77 (Gilbert Osofsky ed., 1969); William & Ellen Craft, Running a Thousand Miles for Freedom 13–15 (1999). Of course, the quotations from statute books may suggest coaching or editing by white abolitionists; however, the importance of law in maintaining slavery pervades all of the narratives.

77. Jon-Christian Suggs, Whispered Consolations 28 (2000).

78. James Lucas Autobiography, *in* 8 The American Slave: A Composite Autobiography 1339 (George Rawick ed., 1977).

79. Richard Mack Autobiography, *in* 2 The American Slave, supra note 78, at 151; see also Jim Allen Autobiography, *in* 6 The American Slave, supra note 78, at 54 ("Mars John Bussey drunk my Mudder up. I means by dat, Lee King took her and my brudder George for a whiskey debt."); Sam McAllum Autobiography, *in* 9 The American Slave, supra note

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one dramatic incident, Solomon Northup told a tale of how his divisible status saved his life. When his cruel master, Tibeats, was about to hang him in a rage, Northup was saved by the overseer, Chapin. Chapin gave two explanations for his action on Northup's behalf: First and foremost, he explained that his "duty [was] to protect [William Ford's] interests . . . Ford holds a mortgage on Platt [Northup] of four hundred dollars. If you hang him he loses his debt. Until that is canceled you have no right to take his life."[80] Only as an afterthought did Chapin add that "[Y]ou have no right to take it any way. There is a law for the slave as well as for the white man."[81] Solomon Northup owed his life to the overseer who protected the mortgage interest in him against his owner.[82]

Slaves did their best to exert control over transactions in the marketplace involving commerce in their own bodies. In an excellent study of the culture of the slave market, Walter Johnson has demonstrated the ways that slaves tried to shape commercial transactions in which they themselves were the object of sale.[83] Slaves tried to undermine sales by making known their feelings about the sale, or by communicating physical defects or character flaws which they thought would be considered failings, to the buyer. Many ex-slaves wrote of their attempts to influence market transactions and the fear of the utter futility of such efforts. Charles Ball, for example, recounted his mother's attempts to prevent herself from being sold separately from her child. Yet, he also explains the danger of a slave "speak[ing] the truth and divulg[ing] all he feels."[84]

78, at 1352 ("Mr. Stephenson were a surveyor an' he fell out wid Mr. McAllum an' had a lawsuit an' had to pay it in darkies. An' Mr. McAllum had de privilege of takin' me an' my mother, or another woman an' her two; an' he took us."); Ephraim Robinson Autobiography, id. at 1852 ("[T]he Marster knew if he hurt you or killed you it was his loss. Once when a slave hand ran away and they were trying to catch him, another plantation owner shot his Marster's slave in the hip and magots got in the place. The slave died, and not only did the slave owner sue the other man but never spoke to him again."); Adline Thomas Autobiography, *in* 10 The American Slave, supra note 78, at 2094 ("She, her mother, sister, and a brother were put on the block and sold to settle the debt at Ripley, Mississippi.").

80. Northup Narrative, *in* Puttin' on Ole Massa, supra note 76, at 285.

81. Id.

82. In a subtle study of the ideology of slaves in the Old South, and in particular of slaves' understandings of power relations (including their relation to the state), Anthony Kaye argues that slaves drew important distinctions among various types of intimate relationships. While some scholars of the slave family have conflated "slave marriages" with cohabitation, Kaye reads long-ignored sources of slave consciousness, the records of the Southern Claims Commission and the pension bureaus, to show that slaves distinguished among "marriage," "living together," "taking up," and "sweethearting," not only "in terms of distinctive obligations and prerogatives," but also "by the particular way they enlisted others as third parties to it." Although there could be no legally-sanctioned marriage between slaves, slaves distinguished between infonnal arrangements and marriage which had been sanctioned both by a quasi-legal ceremony and recognition by an owner and by fellow slaves. See Kaye, supra note 62, at 6.

83. Johnson, Soul By Soul, supra note 43, at 176–88.

84. Charles Ball, Fifty Years in Chains; or, The Life of an American Slave 10–11, 70 (H. Dayton 1969) (1859).

When Ball himself was questioned by a prospective purchaser of whom he had "formed [an] abhorrent . . . opinion," he answered as neutrally as possible, that "if he was a good master, as every gentleman ought to be, I should be willing to live with him."[85] Ball hoped on the one hand to dissuade this "wretch" from buying him, and on the other, to save himself from "the violence of his temper" should he "fall into [the buyer's] hands."[86] Another former slave recounted the danger of voicing one's thoughts to an owner: "The mistress asked her which she loved the best her mammy or her daddy and she thought it would please her daddy to say that she loved him the best so she said 'my daddy' but she regretted it very much when she found that this caused her to be sold [along with her father] the next day."[87]

Given slaves' awareness of their own legal status as well as the many recorded instances of slaves running away to former owners to keep their families together or engineering sales to be closer to a spouse or relative, it would not he surprising if some slaves realized in certain instances that running away or contracting an illness could result in a legal suit whose outcome might be the rescission of their sale.[88]

There are a number of ways to address the question of slave agency and the law: several I've discussed already—slaves' conscious manipulation of litigation involving them; their extralegal efforts to control their own fate or to resist the institution of slavery by running away, defying orders, trying to shape their own or family members' sales, trying to control their own medical treatment, and so forth. But what is equally, if not more important, to emphasize, is the evidence of the fear and anxiety that white Southerners felt and expressed about slaves' resistance, moral agency and capacity to control their own fate. This *fear* of slaves' agency shaped litigation. That is, trials demonstrate not so much slaves' direct ability to influence the law, but rather their indirect influence through the efforts of judges as well as masters to *control* slaves' agency. Slaves acting as moral agents were able to throw into question the honor and character of white men in the courtroom, and in response, Southern lawyers and judges (unlike Southern witnesses and litigants) told stories about slaves' character that minimized or denied slaves' agency.

One South Carolina case in 1838 illustrates this point. In *Johnson v. Wideman*, there is evidence of a great deal of behavior by the slave Charles that contravened formal law—verbally and physically assaulting white men, defending his wife's honor against a white man, declaring that he wished he were a white man—but at least some of which accorded with

85. Id. at 70–71.

86. Id. at 70.

87. See Interview with Rose Russell, *in* 9 The American Slave, supra note 78, at 1903 (Rose "laugh[ed] as she t[old] how they fooled her away from the old plantation.").

88. See Gross, Double Character, supra note 2, at 44; Adam Singleton Autobiography, *in* 10 The American Slave, supra note 78, at 1946; Lewis Adams Autobiography, *in* 6 The American Slave, supra note 78, at 5–6.

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extralegal social norms—visiting a wife "abroad," owning a dog, drinking and gambling with white men.[89] He may or may not have done all of these things. However, it seems likely he did some of them because there is evidence given by both sides that affirms their occurrence. So, on one level, legal records give us some evidence of actual resistant behavior that may be surprising to some students of slavery. It is also possible, though we have no direct evidence of it, that Charles himself hoped to be returned to his former owner through this lawsuit, and that he misbehaved in order to be returned. Charles did not speak in court because of the ban on slave testimony; consequently, all of our evidence is indirect.

We do see the development in the courtroom of several stories about slaves' and masters' characters, and we see the way Charles's actions threw open for courtroom discussion the character of several white men—their mastery and, implicitly, their honor. Charles's buyer, Wideman, portrayed Charles as an insubordinate and vicious drunkard and runaway, while the seller, Johnson, claimed that Charles behaved badly only under bad government by a bad master—"a drinking, horse-racing man."[90] In this case, the Chief Justice of the South Carolina Supreme Court (who also sat as trial judge) articulated the theory of "like master, like man" in holding Charles's buyer responsible for his character.[91] In doing so, he accepted the theory of slave character most likely to deny Charles agency: Charles himself was reduced to a reflection of his master.

This effort to deny slave agency was constantly contested as slaves continued to assert their agency in the realms available to them. Slaveholders were anxious about slaves' ability to deceive and manipulate them by feigning illness or passing for white.[92] Judges were anxious about allowing matters of slave character to be discussed in the courtroom, where they could throw a white man's mastery into question. Fifteen years before the *Johnson* case, the South Carolina Supreme Court had tried to foreclose litigation of slaves' character by ruling that contracts for the sale of a slave for a good price did not imply a warranty of "moral qualities."[93] Judge Abraham Nott held that warranting slaves' good character would be like "opening Pandora's box upon the commu-

89. Johnson v. Wideman, 24 S.C.L. (Rice) 325, 327–40 (1839).

90. Id. at 334, 338, 340.

91. Id. at 342–43.

92. See Gross, Double Character, supra note 2, at 134, 140 (noting that agricultural journals and medical manuals alike were filled with advice to masters and doctors about the challenge of discerning slave deceit and citing instances of witnesses and litigants in court referring to their own ability to discover trickery and casting doubt on one another's character by suggesting that one was fooled by a slave).

93. Smith v. McCall, 12 S.C.L. (1 McCord) 220, 224 (1821); see also Ariela Gross, Pandora's Box: Slave Character on Trial in the Antebellum Deep South, 7 Yale J.L. & Human. 267, 271 (1995) [hereinafter Gross, Pandora's Box] ("Judges strove to keep [cases implicating slaves' characters] out of the courtroom.").

nity"; opening courtroom contests over slaves' character could give slaves the opportunity to indirectly influence the law.[94]

Some of the most problematic portrayals of individual agency involve historians' readings of performances of identity in the courtroom, in particular, efforts of slaves to "pass" for white or of women to pass as men. As Eve Sedgwick has pointed out, academic writing about performances like passing for white tends to become stuck on whether or not they reinforced the status quo: "The bottom line," she writes, "is generally the same: kinda subversive, kinda hegemonic."[95] How should we interpret the performance of whiteness by enslaved women suing for their freedom? For example, in the freedom suit of Sally Miller, who claimed to be a German redemptioner kidnapped into slavery, her lawyer, in his closing statement, dramatically called the attention of the jury to Sally's demure presence. He asked them to look at her—not only at her color, which could be the same as that of a "Quartronne" (a woman with one-fourth "African blood"), but at her "moral features"—her simplicity, sexual purity, industry, prudence.[96] Sally Miller's attempt to prove whiteness on the basis of moral character and sexual virtue no doubt confirmed to a wide audience the ideological connections between degradation and blackness on the one hand, and morality, virtue, civic ability, and whiteness on the other. Nor does her victorious freedom suit mean that the nineteenth-century South was a free-wheeling world in which people could "try on" racial identities as they pleased.

Such cases remind us of the circularity of the "hegemony versus resistance" debates that have sometimes dominated slavery studies. Recent historical work has emphasized the subversive aspect of slave behavior, partly in reaction to earlier work that came down so definitively on the side of hegemony. It would not be surprising if the next revisionist historians emphasize hegemony. It is valuable to recognize, however, that the unpredictability of courtroom battles over "race" allowed *some* enslaved women and their lawyers to fashion performances—and narratives about performance—that they used to win their freedom, however circumscribed that freedom might be. Their performances did not remain in the local courtroom; their trial narratives were broadcast to a wider audience through newspapers, novels, and fugitive slave narratives that traveled far beyond their "neighborhood." When a "white slave" like Sally Miller won her freedom, white Southerners might use the story as evidence of the fairness of the Southern legal system and the humanity of

94. Smith, 12 S.C.L. (1 McCord) at 224.

95. Sedgwick, Queer Performativity, supra note 45, at 15; see also Gross, Litigating Whiteness, supra note 44, at 181 (asserting that although race has been "more contested than previously thought, yet it still remain[s] the basis for the thoroughgoing social, legal, and political subordination of African-Americans").

96. Transcript of Trial, Muller v. Belmonti (La. New Orleans D. Ct. 1844) (No. 5623) (collection of Earl K. Long Library, Special Collections & Archives, Univ. of New Orleans, New Orleans, La., Supreme Court Records).

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slavery, but ex-slaves and abolitionists used the story to dramatize the possibility that enslavement could happen to anyone, even someone just like a Northern white middle-class reader. The cultural power of the tragic white-slave narrative that originated in Southern courtrooms should not be underestimated.[97]

C. *A Household Approach to Slavery and Law*

Just as local studies of trials and other lower-level legal proceedings have encouraged historians to approach individuals as agents in the negotiation of identities, they have also led scholars to explore the bonds and commonalities among different individuals who were all in some way outsiders to the law, especially when they shared the same domestic space. Important new work reexamines the regulation of slavery within the context of the regulation of the household. Historians of Southern women have already reshaped our understanding of Southern politics and class relations by disrupting old ideas of "public" and "private," and by revealing the political content of "private" matters such as intra-household relations.[98] Cultural-legal historians bring these understandings to law, pointing out that not only were white women and slaves part of the same household and the same web of social relations, but the relations of husband-wife, parent-child, master-servant, and master-slave were legally conceptualized as part of the same category of domestic relations.[99] These cultural-legal historians are careful not to equate the social and legal position of white women and slaves uncritically (in other words, they are not merely echoing nineteenth-century feminists who claimed that they were slaves), but they seek to put the study of law and slavery back into a contemporary context in which all domestic relations were perceived in terms of one's relation to the master of the household.

Some treatments of the household, primarily relying on statutes and appellate opinions, have tended to assume a static patriarchy with little room for legal contestation. Stephanie McCurry argues that households were made inviolable by law in antebellum South Carolina—heads of household were "masters of small worlds" with power over every aspect of

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97. See Gross, Litigating Whiteness, supra note 44, 113–23, 181–85.

98. See generally Elizabeth Fox-Genovese, Within The Plantation Household (1988) (discussing how women's confinement to the home can be seen as "women's acquisition of their own dominion" from which is drawn "a strong sense of their rights and responsibilities as women"); Stephanie McCurry, Masters of Small Worlds (1995) (arguing that "the customary arrangement of work and space" in South Carolina during the antebellum period confounded "bourgeois beliefs about the gender division of labor, space, and spheres of influence"); Over The Threshold: Intimate Violence in Early America (Christine Daniels & Michael V. Kennedy eds., 1999) ("[E]ven the definitions of the words 'public' and 'private,' when applied to families, mutated over time.").

99. See, e.g., Peter Bardaglio, Reconstructing The Household: Families, Sex, and the Law in the Nineteenth Century South 23–39 (1995); Laura F. Edwards, Gendered Strife and Confusion: The Political Culture of Reconstruction 6–7 (1997) [hereinafter Edwards, Gendered Strife]; Edwards, Law, Domestic Violence, supra note 57, at 741.

domestic relations, including incest, rape, child custody, and family property.[100] Peter Bardaglio, looking at appellate legal doctrine across the South, argues that a shift occurred from the pre-Civil War patriarchy that McCurry describes to what he calls "state paternalism," in which courts in the Reconstruction period were more likely to intervene on behalf of individual family members at the expense of the head of household.[101] Victoria Bynum portrays courts upholding the will of the master of households against married women and slaves, and taking the position of the patriarch against "unruly" single women when there was no head of household to discipline them.[102] All of these works tell an important part of the story of the law of domestic relations, but not the whole story.

Laura Edwards, whose recent work on domestic violence uses trial records from North Carolina, sees a more complicated and contested picture of Southern law. Edwards emphasizes the power available to domestic dependents—both white women and enslaved men and women—as part of a larger community. She puts violence against domestic dependents in the context of the limitations of violence against white men. In her view, change occurred at an earlier moment, the political moment of the Revolution: "After the Revolution, when the body politic became the white male citizenry—and was no longer the King—a whole range of 'private' injuries theoretically became 'public' wrongs."[103] While domestic dependents, including slaves, wives, and children, remained subjects, violence against whom was a private injury, white men became citizens against whom violence was a public wrong. In this view, the relevant shift is not so much from an eternal patriarchy to judicial patriarchy, but from a monarchy in which household members were subjects, to a republic in which white men became citizens and other citizens remained dependent subjects. Perhaps the Southern patriarchal household was a relatively new thing—which may explain its contestability.

Historians working with trial records have also begun to examine more closely cases of rape or sexual coercion of women in the antebellum era—comparing enslaved and free women, African and English, to discern both commonalities and contrasts. Recent research suggests not only that the roots of the myths that supported sexualization of politics and lynching in the post-Civil War era reach back to the antebellum period, but also that white servant women and enslaved African-American women shared many aspects of the experience of sexual exploitation.[104]

100. See McCurry, supra note 98, at 13–19.

101. Bardaglio, supra note 99, at 157–65; see also Grossberg, supra note 56, at 156 (describing the evolution of "judicial patriarchy").

102. Victoria E. Bynum, Unruly Women 90 (1992).

103. Edwards, Law, Domestic Violence, supra note 57, at 754.

104. See Peter W. Bardaglio, Rape and the Law in the Old South, 60 J. Soc. Hist. 749, 766 (1994); Sharon Block, Lines of Color, Sex, and Service: Comparative Sexual Coercion in Early America, *in* Sex, Love, Race 141, 141–63 (Martha Hodes ed., 1999); Diane Miller Sommerville, The Rape Myth in the Old South Reconsidered, 61 J. Soc. Hist. 481, 515 (1995).

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For example, Sharon Block compares the legal experience of a white servant woman who was raped, Rachel Davis, and that of Harriet Jacobs, the fugitive slave whose story of sexual coercion is well-known to students of Southern history as the narrative of Linda Brent. While the servant woman Block describes was able to use the legal system (through her father) to seek retribution against the rapist, which Harriet Jacobs could never do, Block found a number of parallels in the two cases.[105] The experience of sexual coercion itself was not dissimilar for the white servant and the enslaved African American: Both struggled to avoid their masters' overtures; both were beaten or otherwise abused by their mistresses when they tried to have them intervene; both hid the truth for a long time even from people close to them. Block suggests that although white and black women had very different legal resources available to them to resist their masters' domination, much can be learned from a comparative study of their experiences.

The household approach to slavery also leads historians to focus on the institution of marriage during Reconstruction as a vehicle for political transformation. Several recent histories of Reconstruction have emphasized African American assertions of the right to marry as a fundamental right of citizenship.[106] As a black corporal in the U.S. Colored Troops declared to his regiment in 1866, "The Marriage Covenant is at the foundation of all our rights. In slavery we could not have *legalised* marriage: *now* we have it . . . and we shall be established as a people."[107] This corporal recognized that marriage was "the entering wedge into a broad range of social privileges," including property rights and the right to enter into contracts.[108] While many newly freed people rushed to exercise their right to marry, they also resisted efforts by Freedmen's Bureau officials and the authors of the Black Codes to reduce marriage to a system of obligations, asserting the right not to marry and to end one marriage and begin another.[109] The different varieties of intimate relationships discovered among slaves by Anthony Kaye did not disappear immediately in 1866.[110] While marriage served the function of training freed people for citizenship, cultural-legal historians demonstrate resistance to this discipline.[111]

105. Block, supra note 104, at 143.

106. See, e.g., Edwards, Gendered Strife, supra note 99, at 45–47; Amy Dru Stanley, From Bondage to Contract 44–59 (1999); Katherine M. Franke, Becoming a Citizen, 11 Yale J.L. & Human. 251, 274–92 (1999).

107. Edwards, Gendered Strife, supra note 99, at 47.

108. Id. at 37.

109. See id. at 45; Stanley, supra note 106, at 44–59.

110. Kaye, supra note 62; see also Franke, supra note 106, at 274–92 (discussing resistance to postbellum marriage laws by the newly-freed slaves).

111. For work discussing the disciplinary function of marriage, see Franke, supra note 106, at 275–78. For work discussing African Americans claiming marriage rights on their own terms, see Edwards, Gendered Strife, supra note 99, at 54–60; Stanley, supra note 106, at 44–59.

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All of these works bridge the gap between legal history and the new historiography of women, slavery, and the American South. Just as the new scholarship emphasizing the agency of individuals in making law and contesting legal processes has challenged the assumptions of much Southern history that the courtroom was the place where elites exercised hegemony, the new work on households calls into question the idea that law uniformly bolstered the authority of patriarchal household heads. This writing also challenges us to think about "race relations" and "gender relations" together in the social locations where power is exercised, in particular the "private realm" of the household.

II. The Promise Of Cultural History: Reinterpretations

Seeing the "law" differently, as another arena for contestation over the representation of identities, suggests new ways to look at old historical problems such as the origins of slavery, racism, Jim Crow and the nature of Southern slave relations.

A. *Intersections of Gender, Sexuality, and Race*

Pioneers of critical race feminism such as Kimberle Crenshaw, Angela Harris, and Regina Austin, among others, have exposed the theoretical inadequacy of traditional approaches to legal theory that do not account for the "intersectionality" of women of color's experience and legal status as both women and people of color.[112] They have shown the ways in which courts have treated women of color as "women plus," or even denied their womanhood because they were not "representative" of all women. Critical race feminists have suggested that exploring the intersections of race and gender will lead to significantly revised historical and legal analyses. Their exhortations have inspired a new generation of historians who have provided the rich detail of daily life and legal practices affecting women of color through archival research.[113] As these scholars have shown, from the colonial era through the twentieth century, legal regulation of marriage and sexuality has played a central role in racial formation. Local court records, statutes and other documents demonstrate the way gender and sexuality helped to "make race," reorienting

112. See generally Regina Austin, Sapphire Bound!, 1989 Wis. L. Rev. 539, 539–46 (critiquing legal theory from a black woman's perspective); Kimberle Crenshaw, Demarginalizing the Intersection of Race and Sex, 1989 U. Chi. Legal F. 139, 139–41 (coining the term "intersectionality" to describe the legal position of women of color); Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 Stan. L. Rev. 581, 585–605 (1990) (critiquing white feminist theory for failing to account for women of color).

113. See, e.g., Gross, Double Character, supra note 2, at 3–9, 159–61; Stanley, supra note 106, at ix–xiii; Peggy Pascoe, Miscegenation Law, Court Cases, and Ideologies of "Race" in Twentieth-Century America, 83 J. Am. Hist. 44, 46–48 (1996); Barbara Y. Welke, When All the Women Were White, and All the Blacks Were Men, 13 Law & Hist. Rev. 261, 265 n.12 (1995).

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interpretations of cultural transformations such as the origins of slavery, the rise of biological views of race, and the beginnings of Jim Crow.

1. *The Rise of Racism and The Origins of Slavery.* — Many U.S. history students begin their study of slavery by reading a famous exchange between Carl Degler and Oscar and Mary Handlin over whether Europeans' enslavement of Africans followed from their early beliefs in racial inferiority and associations of "blackness" with evil, or whether modern racism derived from the experience of slave relations that had grown out of economic imperatives.[114] The question of how much weight to accord to race and how much to class in shaping the course of Southern history and the institution of slavery has animated many seminar rooms and lecture halls. Building on the magisterial work, *White over Black,* in which Winthrop Jordan demonstrated the early racial attitudes of the English and early Americans, and at the same time the gradual invention of the modern ideology of racism witbin an international and institutional context, legal historians have tried to add specificity to the study of the origins of race, racism and slavery, thereby endeavoring to avoid a reductive race versus class debate.[115] Walter Johnson suggests that "descriptions of the relation between economic exploitation and racial domination might be sharpened by attention to everyday life, to the specific historical sites where race was daily given shape," including church pulpits, medical and agricultural journals, as well as courtrooms and slave markets where buyers and sellers "marked" race in their discussions of the bodies and character of slaves.[116] Cultural-legal histories emphasize the importance of the courtroom as a site of race-making.

Kathleen Brown's study of race and gender focuses on colonial Virginia. It was in Virginia that Bacon's Rebellion occurred, a pivotal moment in the transition to slave labor.[117] The tobacco farms of the Chesapeake provided the earliest testing ground for plantation slavery. Brown's great contribution to the study of the beginnings of race and slavery is to forcefully inject gender into the analysis, highlighting legal records that draw attention to the intersections of race, gender, and sexuality. Brown essentially argues that gender relations provided the template for discriminatory race relations; the "subordination of African women to the needs of English labor and family systems . . . ultimately provided the legal foundation for slavery and for future definitions of

114. Carl N. Degler, Slavery and the Genesis of American Race Prejudice, 2 Comp. Stud. Soc'y & Hist. 49 (1959); Oscar Handlin & Mary F. Handlin, Origins of the Southern Labor System, reprinted in Colonial America: Essays in Politics and Social Development 230 (Stanley N. Katz & John M. Murrin eds., 3d. ed. 1983).

115. Winthrop D. Jordan, White over Black (1968).

116. Johnson, Soul By Soul, supra note 43, at 136.

117. Bacon's Rebellion in 1676 challenged Governor Berkeley's government in Virginia. Historian Edmund Morgan first put forward the argument that wealthy Virginians turned to African labor only after poor whites proved to be dangerously rebellious in Bacon's Rebellion. Edmund S. Morgan, American Slavery, American Freedom 295–315 (1975).

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racial difference."[118] For example, the first treatment of Africans as different under law in Virginia was a 1643 tax on African women.[119] Even English women who worked in the tobacco fields were legally classed as dependents on the assumption that, like children and old men, they were too weak to produce much; however, African women were classed as "tithables," individuals who performed taxable labor.[120] A 1668 statute clarified that even "negro women set free . . . ought not in all respects to be admitted to a full fruition of the exemptions and impunities of the English" and still had to pay the tax. Thus lawmakers gave English exemptions "an explicitly racial meaning."[121] Brown examined tax-exemption petitions in several county courts and found that a free black woman had to "demonstrate dependent status by proving her physical disability" in order to "enjoy the privileges of English women."[122]

Legal regulation of sexual relations and childbirth further contributed to the sharpening of racial difference. While fornication cases in the mid-seventeenth century appear to have been handled similarly whether the offenders were African, English, or an "interracial" couple, racial differentiation became evident when women serving life terms gave birth.[123] Beginning in 1662, legislation decreed that children followed the condition of their mother, and in the same act, that "if any christian shall committ fornication with a negro man or woman, hee or shee soe offending shall pay double the fines imposed by the former act."[124] "Christian" did not long remain adequate as a legal marker of difference; by 1667, baptism was no longer enough to free one who was born a slave.[125]

The earliest restrictions on sexual activity aimed their discipline at white women; in 81 percent of the cases enforcing a 1662 law banning interracial intimacy, white women bore the brunt of the expense and punishment for the transgression.[126] But existing laws regulating white women's sexuality were increasingly used by lawmakers "to refine the legal meanings and practical consequences of racial difference."[127] Over the course of the late seventeenth century, a shift occurred in punishments for bastardy, from penance rituals to secular punishments, espe-

118. Brown, supra note 65, at 116.

119. Id. at 116.

120. Id. at 119.

121. Id. at 122.

122. Id. at 125. Of course, Brown reminds us that the privileges of English womanhood actually accrued to husbands, fathers, and masters. Because of the laws of coverture, men received the benefit of their dependents' tax-free labor. The tax also acted as a disincentive to marry an African woman. Id. at 125–26.

123. Brown, supra note 65, at 131.

124. Id. at 132.

125. Id. at 135.

126. Id. at 199. Although the laws "defined white participation as the transgression," Brown notes that they thereby "impart[ed] to black sexuality the power to taint." Id. at 200.

127. Id. at 187.

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cially money damages to masters, treating sexual wrongdoing less as a sin and more as a crime. There was a "growing overlap between patriarchal privilege and racial domination."[128] In rape cases, women lost their suits against white men, but won against black men.[129]

Court records from the seventeenth century demonstrate the linkage made between race and sexuality, for example, in the insult that a woman was "such a whore that she would lye with a negro."[130] Over the course of the seventeenth and eighteenth centuries, the typical sexual slander suit changed from a white man suing a white woman after she claimed that he had slept with her and then abandoned her to a white woman suing someone, often another white woman, alleging that she had slept with a black man. Allegations of interracial sex were enough to threaten the white status of an English woman.[131]

Yet Brown does not portray law as a hegemonic force in creating the meaning of racial difference. She argues that "[r]acialized patriarchy and sexualized concepts of race created new ways for white men to consolidate their power in a slave society but did not suppress individual negotiations of behavior and identity."[132] Brown provides a close reading of the case of Thomas(ine) Hall, a seventeenth-century Virginian of ambiguous sexual identity, who at different times in his/her life passed as a man or a woman. Hall deeply disturbed the residents of Warraskoyack, Virginia, where he lived as a male servant to John Atkins. His dressing as a woman spurred Atkins and other neighbors to petition the General Court to punish Hall "for his abuse."[133] Hall told the justices of the General Court that he had lived his first twenty-four years as Thomasine in England, then dressed as a man to become a soldier. When he returned to England, he resumed his female identity, but became a man again in order to emigrate to Virginia in 1627. "For Hall," Brown writes, "the social expression or performance of gender identity was as malleable as a change of clothes and seems to have been partially motivated by opportunities for work."[134]

Hall was not the only one who sought to determine his gender identity; his neighbors in Warraskoyack had strong opinions about who he was as well. When plantation commander Nathaniel Bass ordered Hall into women's clothes after physically inspecting him, the married women of the neighborhood stringently objected and demanded to make their own inspection, claiming that he was a man. It was they who insisted his case

128. Brown, supra note 65, at 198.

129. Id. at 209.

130. Id. at 210

131. Kirsten Fischer, "False, Feigned, and Scandalous Words": Sexual Slander and Racial Ideology Among Whites in Colonial North Carolina, *in* The Devil's Lane: Sex and Race in the Early South 139–53 (Catherine Clinton & Michelle Gillespie eds., 1997).

132. Brown, supra note 65, at 211.

133. Id. at 76.

134. Id.

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be taken to the General Court. The justices reached a different conclusion than the women, Bass, or Hall himself: They sentenced him to a "permanent hybrid identity," wearing men's breeches but women's "Coyfe and Croscloth with an Apron before him."[135] Hall's identity, then, was determined by neither biology nor a single top-down definition, but by a long negotiation among officials, neighbors, and the individual himself. This, of course, does not mean that Hall succeeded in fashioning the gender identity he chose for himself; indeed, the justices' sentence was doubtless a humiliating punishment. But his performance, and the narrative he gave the court describing his performance, was an important part of the process of creating his identity.

In a variety of contexts, legal regulation of sexuality, and legal differentiation between African and English women helped to construct racial difference and enforce racial boundaries at the same time that the distinctions between slave and servant were becoming more pronounced. Kathleen Brown's work suggests that law was central to the process of negotiating racial identity, and that women played a crucial role in those negotiations. She asks us to turn our attention away from the question of whether slavery or racism came first to take a closer look at the way deepening racial differentiation in law and changing meanings of servitude reinforced one another, often through the regulation of sexuality and gender.

Those who have argued that slavery preceded modern racism claim that racism and the category of "race" as we know them only emerged in the nineteenth century. Historians of racial ideology such as George Fredrickson and Reginald Horsman have read literary sources and the writings of the master class to chronicle a shift in the justifications for slavery from "a necessary evil" to a "positive good" as Southerners felt themselves under attack by abolitionists beginning in the 1830s and 1840s.[136] The positive-good defense of slavery rested on a new articulation of race as a scientific category. This account, while extremely persuasive, equates nineteenth-century racism almost exclusively with a medical and scientific discourse of "racial science"—the notion of a "Chain of Being," the study of African and European crania, and so forth. My study of trials of racial determination suggests that this story of the social construction of "race," emphasizing the rise of racial science, is incomplete. Because, until recently, the role of law in the culture of race and racism has been obscured, important aspects of race have remained in the shadows.[137]

A variety of disputes litigated claims of whiteness in the nineteenth century. These ranged from suits for freedom on the basis of whiteness to criminal cases in which the defendant raised whiteness as a defense to

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135. Id. at 77–78.

136. George M. Fredrickson, The Black Image in the White Mind 74 (1971); Reginald Horsman, Race and Manifest Destiny 139–57 (1981).

137. See Gross, Litigating Whiteness, supra note 44, at 151–76.

an indictment, to inheritance disputes, suits for slander, witness disqualification cases, or suits against transportation companies who carried off runaway slaves passing for white. In these cases, litigants, witnesses, lawyers, judges and jurors wrestled with the determination of an individual's racial identity and with the proper basis for such a determination—in other words, not only with the question of who was black, white or Indian, but what made them so. In the courtroom, both medical experts and laypeople spoke of race as science, recounting their views of an individual's heels or hair follicles or fingernails as evidence of hidden African "blood"; but they also discussed race as performance, the way the person at issue held himself out, danced at a party, whom he married, whether he voted or sat on a jury. This discourse of race as performance rose *together* with the discourse of race as science, beginning in the 1840s, and retained its salience over the course of the nineteenth century. In a typical freedom suit based on a whiteness claim, science and performance evidence might work together, as in the case of Alexina Morrison who had doctors testify to her whiteness as well as lay witnesses testify about her performance at balls and her white character. Witnesses for her master saw her "negro blood" both in the shape of her heel and in her sexual transgression.[138] Occasionally, performance might trump science, as in those cases where evidence of ancestry was less persuasive to a judge or jury than reputation evidence.[139] But this suggests that legal discourse operated in the same cultural field as medical and other racial discourses and that both contributed to ordinary people's understanding of racial identity.[140]

Peggy Pascoe takes the relationship of law and racial ideology into the twentieth century, arguing for the importance of antimiscegenation law to modernist racial ideology. Pascoe shows that anthropologists of race appearing as courtroom experts in miscegenation cases made two kinds of "culturalist" arguments: (1) that "biological race [is] nonsense; and (2) that race is "merely biology," and therefore culturally insignificant.[141] Judges, frustrated with the complexity of the new cultural anthropological views of race, preferred the latter argument, which became the basis for modern-day "color-blind constitutionalism."[142] This helps to explain Ian Haney Lopez's finding that federal appellate courts in late

138. Transcript of Trial at 24–35, 156–58, Morrison v. White (La. New Orleans D. Ct. 1858) (No. 442). The case is discussed in Gross, Litigating Whiteness, supra note 44, at 171–76.

139. See, e.g., State v. Cantey, 20 S.C.L. (2 Hill) 614, 616 (1835) (holding that "it may be well and proper, that a man of worth, honesty, industry and respectability, should have the rank of a white man, while a vagabond of the same degree of blood should be confined to the inferior caste"); see also Gross, Litigating Whiteness, supra note 44, at 146–47, 163–66 ("[B]ehaving honestly, industriously, and respectably, exercising political privileges, and mustering in the militia qualified one for whiteness.").

140. Gross, Litigating Whiteness, supra note 44, at 151–76.

141. Pascoe, supra note 113, at 61.

142. Id. at 63.

nineteenth and early twentieth-century naturalization cases increasingly abandoned scientific expert opinion on racial identity and turned to a "common knowledge" test. While scientific discourse about race was important, trials gave rise to competing "scientific" views as well as competitors to science, such as "common knowledge."[143]

2. *Gender and the beginnings of Jim Crow.* — Another longstanding debate in the U.S. history of race relations originated with C. Vann Woodward's *The Strange Career of Jim Crow*,[144] which began as part of Woodward's research on behalf of the NAACP in *Brown v. Board of Education.* Woodward argued that Jim Crow had not been a foregone conclusion after the Civil War. Indeed, he argued that there had been a period of experimentation in the immediate postwar years, that there were "[f]orgotten [a]lternatives," and that the last two decades of the nineteenth century saw a failure of biracial coalitions, a hardening of white racial attitudes, and a new commitment to segregation on the part of whites.[145] Woodward claimed that the wave of segregation statutes and court decisions like *Plessy* were essential elements in the hardening of Jim Crow—that law had made a difference—and, by implication, that law could undo segregation in the 1950s, or at least push society towards racial change. Woodward's critics pointed out that custom acted as law in the South well before segregation statutes, and that social norms of segregation developed early on in most of the South.[146] Legal scholars who looked at the law of common carriers showed that Jim Crow was developing in railroad law well before *Plessy*.[147] Edward Ayers, in his excellent recent synthesis of post-Civil War Southern history, traced the rise of segregation statutes to "the growing ambition, attainments, and assertiveness of blacks, . . . the striking expansion and importance of the railroad system in the 1880s," and a variety of local contingencies, rather than to class politics or "new ideas about race."[148]

Building on this insight about the agency of people of color themselves in the course of legal development, two cultural-legal historians have shifted the focus to women of color. Barbara Welke, looking at the same period as Woodward, put gender and class identity into the picture and, in doing so, significantly revised the conclusions of both Woodward and his critics.[149] Explicitly building on work in critical race feminism as well as women's history, and drawing on all of the available trial records

143. Ian F. Haney Lopez, White By Law 63–64, 92–100 (1996).

144. C. Vann Woodward, The Strange Career of Jim Crow (3d rev. ed. 1974) (1955).

145. Id. at 13–47.

146. See, e.g., Howard N. Rabinowitz, Race Relations in the Urban South 333–39 (1978) (arguing that segregation developed as a compromise out of norms of exclusion); Joel Williamson, After Slavery 274–99 (1965) (arguing that segregation customs long preceded law).

147. See Charles A. Lofgren, The Plessy Case 7 (1987); Stephen J. Riegel, The Persistent Career of Jim Crow, 28 Am. J. Legal Hist. 17, 20 (1984).

148. Edward L. Ayers, The Promise of the New South 145 (1992).

149. Welke, supra note 113, at 262–65.

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of state, federal and ICC cases from 1855 to 1914, she showed that railroads had been divided from their earliest days along lines of gender and class—primarily into smoking cars and ladies' cars. This gender and class division was challenged, she argues, by "a person of color in the shape of a lady."[150] "Respectable" women of color, many of them members of the free elite in Louisiana, challenged the exclusion of people of color from first class and ladies' cars. Welke compared the lawsuits against railroads brought by women to those brought by men of color, and discussed the role of middle-class "respectability" in the cases. She concluded that the pre-*Plessy* period was not really fluid; although some women (and no men) won their cases, the larger trend was towards solidification of the fortress of white supremacy through an increasing fetishization of white womanhood. She significantly revised, however, Woodward's explanation of *why* and *how* statutory segregation developed in the 1880s and 1890s, showing how gender segregation developed into racial segregation by the "gendering of race," in which black women were excluded from "ladyhood" by smearing their characters.[151]

Kenneth Mack has built on Welke's work in his research on Tennessee, using trial records from that state as well as other sources to allow him to focus more deeply on one locality.[152] He draws on three arguments from new work in legal history: first, that "class" and "race" are not monolithic, but that historical actors fashioned and understood class and race identities in gendered terms; second, that blacks were agents in the creation of their identities and in using the law to effect social change; and third, that law is not merely a cause or product of social change, but that people can both use the law and legal categories to make change and find themselves "imprisoned by the identities that those categories constructed for them."[153] He traces the same development from ladies' and smoking cars to racially segregated cars, and discusses cases brought by black women in terms of respectability and the need to prove their "character."[154] Mack goes on to talk explicitly about the creation of racial identity and the agency of black men and women, not only in bringing suit, but in responding to segregation. While his stories about the challenges to the "character" of women of color riding on trains are familiar from Welke's work, Mack puts them in the context of an explicit discussion of the role of uplift ideology in the formation of black middle-class identity in the late nineteenth century. Mack also documents the responses of black Tennesseeans to segregation: streetcar boycotts; the for-

150. Id. at 266.

151. Id. at 307, 295–313.

152. Kenneth W. Mack, Law, Society, Identity, and the Making of the Jim Crow South, 24 Law & Soc. Inquiry 377, 380 (1999).

153. Id. at 380.

154. Id. at 387–93.

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mation of black transit companies; and other initiatives to resist and survive Jim Crow.[155]

Read together, the work of Mack and Welke suggests several conclusions. First, while whites began to make efforts to keep freed African Americans out of public life and to "put them in their place" in public spaces well before 1896, African Americans resisted those efforts. Litigation was one part of that resistance. Second, racial segregation in the railroads was modeled on the template of gender segregation—which was confounded by "a person of color in the shape of a lady." This cultural history of Jim Crow litigation puts the saga of *Plessy* in the context of a burgeoning literature on the culture of Jim Crow, illuminating the significance of myths of black sexuality as well as white manhood to white ideology; and of alternative middle-class images of black manhood ("The Best Men") to black ideology.[156] Twentieth-century white identity was forged in the crucible of Jim Crow iconography, from Aunt Jemima and Uncle Ben to blackface minstrels, the symbols that allowed the North and South to reunite in the romance of moonlight and magnolias and the myth of the "Lost Cause."[157] These myths masked the ugly violence of lynching, disenfranchisement, and segregation.

The development of Jim Crow practices in railroads parallels the "gender-based version of white supremacy" that Glenda Gilmore argues white Democrats "crafted and deployed" in the disfranchisement of African-American men.[158] Gilmore posits that white supremacist violence was, in part, a response to "growing assertiveness among white women, to urban and industrial social pressures, and to spectacular African-American successes."[159] Gilmore notes the "central roles black and white women played in the campaigns, both as actors and as objects."[160] Mack and Welke demonstrate the agency of African-American women in litigation as well, showing the currency of cultural narratives of gender and race in the courtroom.[161]

B. *Paternalism versus Capitalism*

Another debate that has bedeviled historians of slavery has been the longstanding controversy over Eugene Genovese's characterization of the South as a paternalist, prebourgeois society inserted into a world system

155. Id. at 401.

156. See, e.g., Gail Bederman, Manliness and Civilization 5–7 (1995) (tracing development of different ideologies of manhood); Glenda Elizabeth Gilmore, Gender and Jim Crow 61–89 (1996) (discussing "Best Man" and "New White Man" mythology); Hale, supra note 16, at 31–35 (discussing interaction of gender and race ideology in reinforcing segregation).

157. For work exploring these themes, see Lott, supra note 52, at 6; Nina Silber, The Romance of Reunion 6–7 (1993).

158. Gilmore, supra note 156, at xx.

159. Id.

160. Id.

161. See Mack, supra note 152, at 387–93; Welke, supra note 113, at 262–66.

of capitalist socioeconomic relations. Despite the fact that contemporary historians rarely endorse this view explicitly, and many take pains to revise or renounce it, it has been remarkably influential on work in fields outside Southern history. To take one example, Amy Dru Stanley's recent prize-winning work of legal history, *From Bondage To Contract*, which is centrally concerned with antislavery and Reconstruction, reproduces Genovese's stark contrasts between the South and the North in socioeconomic relations as well as culture.[162]

A generation of historiography has been animated by the effort to prove or disprove the Genovese thesis. This includes much of the legal history of slavery exploring the relationship between Southern law and economic development. Mark Tushnet, writing in 1981, presented the Genovesean position, arguing that Southern jurists attempted to divide the law into separate realms of humanity, into which master-slave relations fell, and "interest," in which market relations resided.[163] A series of articles by other authors compared the development of particular legal rules in the South and the North; if they developed differently, this was evidence that Southern judges sought to protect slaveholders rather than industrial developers, and that the South was in fact paternalist and precapitalist. If the rule developed similarly, then the South was capitalist like the North.[164] Either way, the fact that judges instrumentally chose rules to maximize the interests of the powerful class suggested the fundamental sameness of law in South and North. Thomas Morris's large study of slavery and the law seeks to show a movement *from* paternalism *to* capitalism in commercial and property law, interrupted by the Civil War, rather than the dominance of one system or the other.[165] A recent work by an economist on the subject concludes that in any given instance, no matter how the rule developed, it did so because that was the efficient result, and the common law tends towards efficiency.[166]

A cultural approach suggests ways to avoid this debate, by demonstrating what Walter Johnson has called the "obscene synthesis of humanity and interest."[167] As one comparative historian of slavery has argued,

162. Stanley, supra note 106, at 60–61.

163. Tushnet, supra note 9, at 68–69.

164. See, e.g., Andrew Fede, Legal Protection for Slave Buyers in the U.S. South: A Caveat Concerning *Caveat Emptor*, 31 Am. J. Legal Hist. 322, 328 (1987); Paul Finkelman, Slaves as Fellow Servants, 31 Am. J. Legal Hist. 269, 271 (1987); 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, 595 (1981–1982); James Logan Hunt, Note, Private Law and Public Policy: Negligence Law and Political Change in Nineteenth-Century North Carolina, 66 N.C. L. Rev. 421, 422–23 (1988).

165. Thomas D. Morris, Southern Slavery and the Law *passim* (1996).

166. Jenny Bourne Wahl, The Bondsman's Burden 1–3 (1998).

167. Walter Johnson, Inconsistency, Contradiction, and Complete Confusion: The Everyday Life of the Law of Slavery, 22 Law & Soc. Inquiry 405, 413 (1997) [hereinafter Johnson, Inconsistency]. "Humanity" and "interest" refer to the dichotomy set up by Mark Tushnet, in which "humanity" represents the total social relations of master and slave, and "interest" refers to the commercial economy. Tushnet, supra note 9, at 68–69.

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"paternalism" is most usefully defined as an ideology rather than as a system of social relations.[168] It is an ideology that can be found in very different societies. As Walter Johnson shows, within a given society like the American South, paternalism was "something slaveholders could buy in the slave market."[169] In the courtroom, paternalism facilitated sales law. In breach of warranty cases, a capitalist legal rule, like *caveat emptor* ("buyer beware"), was justified by the most paternalist language. The argument most frequently made by slave sellers, that a slave's character reflected his master's character ("like master, like man"), depended on paternalist imagery of the master as prudent father of a family giving his slaves firm moral guidance and setting a strong example. "Like master, like man" suggested that the buyer of a slave should bear responsibility for the slave's character because he could mold the slave in his own image if he were master of his own household and his own character. Thus, paternalist reasoning justified "buyer beware," the sales rule that facilitated capitalist exchange, according to historians of nineteenth-century contract.

What, then, does the new work teach us about the Southern economy and its relationship to law? For the most part, it bolsters the efforts of historians like James Oakes to show the importance of market relations to Southern culture and to slavery, but it also demonstrates that values of honor and patriarchy associated with paternalist ideology could co-exist comfortably with the marketplace. Looking at the culture of the slave market and the commercial dispute in the courtroom, rather than at particular doctrinal rules, makes it difficult to argue that the law could be separated into distinct realms of humanity and interest. The rule of *caveat emptor* was not experienced by slaveholders, sellers and buyers simply in rational, wealth-maximizing terms—who will be the most efficient bearer of the risk of sale based on information costs? Rather, the rule grew up in the context of trial stories about the character of masters and slaves. These stories were fought and felt more passionately—and more anxiously—than would make sense if we see these litigants as only rational economic actors. Unfortunately, slavery was all too compatible with market capitalism, but at the same time, market capitalism did not mean that everyone behaved simply as rational wealth-maximizers. They brought their culture of honor and whiteness into the courtroom with them.

"Humanity" and "interest" were also terms used frequently by Southern planters, who often remarked on the compatibility of humanity to slaves with economic self-interest, or "interest." I have argued that this compatibility stemmed from the slave's identity as a form of capital. See Gross, Double Character, supra note 2, at 102.

168. Shearer Davis Bowman, Masters and Lords 162–83 (1993).

169. Johnson, Soul By Soul, supra note 43, at 111.

III. Pitfalls of Cultural History

A. *Black/White Model*

Histories of whiteness drawing on a variety of literary and cultural sources are broad-ranging in their attention to relations among diverse groups and to constructions of race among Irish, Jewish and other European immigrant groups, Mexicans, and Asian-Americans.[170] These works break free of a black-white paradigm of race in important ways. First, they break down the traditional equation of "race" with "black," revealing that the category of whiteness has a history as well; second, they recast ethnic/immigration histories as histories of racialization, arguing that the Irish became American at the same time as the Celts became Caucasian, for example; finally, they destroy the assumptions that Asians or Mexicans or other groups can be simply fit into a white/black paradigm, or even that they can be understood as a "middle group," intermediate between black and white. From these histories, a great deal can be generalized about both the Western experience, and the Northeastern story.

Two lacunae remain. The first is the South: The history of race in the South after the colonial period is still told as a story of black and white. Although there has been magnificent attention turned to the "middle grounds" between black and white in terms of "interracial" marriage and sexuality, as well as the "mixed race" people who resulted from interracial intimacy, the spectrum portrayed in the region remains one from black to white.[171] The second is law: These cultural and social histories of whiteness do not look at the intersections of race and law the way black/white histories have.[172] Alexandra Harmon is exemplary in look-

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170. For excellent studies that explore the "racialization" of diverse groups of new Americans, see, e.g., Allen, supra note 16; Displacing Whiteness, supra note 16; Neil Foley, The White Scourge: Mexicans, Blacks, and Poor Whites in Texas Cotton Culture (1997); Hale, supra note 16; Ignatiev, supra note 16; Matthew Frye Jacobsen, Whiteness of a Different Color: European Immigrants and the Alchemy of Race (1998); Roediger, Towards the Abolition of Whiteness, supra note 16; David R. Roediger, The Wages of Whiteness: Race and the Making of the American Working Class (1991) [hereinafter Roedinger, Wages of Whiteness].

171. The term "middle ground" comes from Fields, supra note 15, at xii. For other important studies of black-white middle grounds see also Martha Hodes, White Women, Black Men 1–9 (1997) (exploring white responses to inter-racial relationships following emancipation); Lott, supra note 52, at 3–12 (discussing blackface in American working-class culture); Renee Romano, Crossing the Line: Black-White Marriage, 1935–1965 (forthcoming 2001) (manuscript at 1–25, on file with the *Columbia Law Review*) (describing shift in attitudes toward interracial marriage following World War II); Sex, Love, Race, supra note 104, at 1 (investigating "sex and love across racial boundaries in North America").

172. David Roediger's groundbreaking *Wages of Whiteness* argues that whiteness conferred on working-class whites in antehellum America not purely psychological but also real social gain: Whites received public deference, were treated better by legal institutions and obtained a better education. Furthermore, the "status and privileges conferred by race could be used to make up for alienating and exploitative class relations." Roediger, Wages of Whiteness, supra note 170, at 13. The creation of the white worker as "not-slave"

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ing at Native Americans in the Northwest through administrative and legal constructions of identity, as is Ian Haney Lopez, who studies the making of whiteness exclusively through immigration and naturalization decisions by federal judges.[173] My own recent research seeks to expand the story of litigating whiteness in the South to comprehend Native Americans' social and legal histories and identities during the period 1780–1840. Through this work I hope to unsettle old paradigms of Southern history and provide a map for the study of later periods.[174]

Alexandra Harmon's landmark study of Indians in the Northwest, *Indians in the Making,* merges social, cultural, and legal history. Her thesis, that "the marks and meanings of Indian identity have evolved through decades of negotiation between supposed races," emerges from a study of politics, culture, and law.[175] She shows that identity questions arose in "courtrooms, administrative offices, historical society meetings, publications, and schools."[176] She also discusses at length the legal efforts of whites to take over Puyallup land.[177] In some cases, whites denied that Indians were different; in other cases, they "depict[ed] Indians as people who operated outside the rules of American society."[178] Either way, "whites achieved the same results."[179] They "used law to pare down the economic opportunities available to people of indigenous descent."[180] Harmon also demonstrates the irony of government policies that both required government agents to decide who was Indian along rigid lines of racial demarcation and promoted "beneficial intercourse" among Indians and whites, blurring such distinctions.[181] Eventually, "official formulations of Indian identity emerged from complex, cross-cultural and intracultural dialogues," as Indian agents asked native peoples to identify their tribal membership at the same time they constructed definitions of categories such as "tribe" and "Indian."[182]

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was accomplished through politics, literature and culture, in Roediger's narrative; but law played little role. In a more recent study of racialization, Neil Foley studied Central Texas cotton farmers to show the "heterogeneity and hybridity of whiteness." Foley, supra note 170, at 7. His subject matter includes labor history topics such as land-tenure arrangements, landlord-tenant relations, and credit practices; the intellectual history of the eugenics movement; political history, such as the Socialist Party's efforts to organize tenant farmers, and the effect of New Deal programs; and the history of technology, such as the growth of cotton ranches. Foley examines race from the point of view of multiple racial groups, but does not consider law to play a role in the relations he studies. Id. at 1–16.

173. Haney Lopez, supra note 143; Alexandra Harmon, Indians in the Making *passim* (1998).

174. See Ariela Gross, Between "Race" and "Nation": Black/Indian Identity in the Southern Courtroom, 1780–1840 (USC Olin Research Series No. 6, SSRN #240510, 2000).

175. Harmon, supra note 173, at 4.

176. Id. at 132.

177. Id. at 134.

178. Id. at 136.

179. Id.

180. Harmon, supra note 173, at 136.

181. Id. at 138.

182. Id. at 144.

Harmon's approach to Indian identity in the Northwest can be usefully applied to the Southeast as well. Historians of the antebellum South have painted a picture of a culture increasingly obsessed with the line between black and white, especially after the 1830s. Yet Native Americans have to some extent been "missing persons" in antebellum Southern history. The undeniable and tragic fact of Indian Removal in the 1830s bas blinded us to the importance of the Indians who remained behind—not only those who *identified* themselves as Indian, such as the eastern band of Cherokee, but those who remained "mixed" with other groups so that their identity was more ambiguous. Furthermore, the Cherokee "trail of tears" did not happen until 1839; Indians retained a strong presence in the South until well into the nineteenth century. Shifting the focus to Native Americans brings a new perspective to those trying to understand racial meanings in the South. First, it puts a spotlight on groups who, although frequently the subject of anthropologists' interest, are often overlooked in Southern history. Sometimes called "tri-racial isolates," groups like the Lumbee, Melungeons, and Brass Ankles, demonstrate the complex social history of the *intersections* of black and Indian identity. But even more important, paying attention to the *contrast* between conceptions of black and Indian identity lays bare the political nature of racial definition, as we see courts choosing between identity as race and as national citizenship. Exploring the contrast between the litigation of black and Indian identity highlights what is distinctive about "race."[183]

My current research involves trials of racial determination in the early nineteenth century that revolved around questions of both black and Indian ancestry and identity. Because Indian identity was inherited from one's mother and did not depend on a fraction of "blood," cases involving claims of Indian-ness focused less on discerning "blood" through either spurious medical science or the evidence of performance than did cases involving only black versus white identity. Instead, black/Indian identity cases centered on questions of status and citizenship in Indian nations, using different modes of fact-finding.

183. As Etienne Balibar bas noted, "[t]he discourses of 'race' and 'nation' are never far apart." Nicholas Hudson, From "Nation" to "Race": The Origin of Racial Classification in Eigbteenth-Century Thought, 29 Eigbteenth-Century Stud. 247, 248 (1996). Yet, in their origins, the two are distinct: "[T]he first stage towards this modern combination was the gradual separation of 'race' and 'nation' during the Enlightenment." Id. As Immanuel Wallerstein asserts, each category fulfills a separate function:

> If we then ask what is served by having two categories—races and nations—instead of one, we see that while racial categorization arose primarily as a mode of expressing and sustaining the core-periphery antinomy, national categorization arose originally as a mode of expressing the competition between states in the slow but regular permutation of the hierarchical order and therefore of the detailed degree of advantage in the system as opposed to the cruder racial classification.

The Construction of Peoplehood: Racism, Nationalism, Ethnicity, *in* Race, Nation, Class 71, 82 (Etienne Balibar & Immanuel Wallerstein eds., 1991).

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For Native Americans, the conflation of "race" and "nation" offered some hope of avoiding being lumped together with African Americans as "people of color." In some cases, Indian tribal status allowed some measure of self-determination and escape from the legacy of slavery. Yet the greatest danger faced by Southeastern Indians in the 1830s was removal to "Indian Territory." In the removal controversy, whites persistently positioned Indian nationhood as the greatest threat to Indian survival. Only individuals who accepted "civilization" and broke away from their nations were allowed to survive in the South. Even in Oklahoma, after removal, pressure to abandon national status was strong. As one missionary in Oklahoma exclaimed in 1846, "*As tribes and nations the Indians must perish and live only as men!*"[184]

Identification as members of nations—"domestic dependent nations," in Chief Justice Marshall's fateful words—held dangers that persist to this day.[185] After 1830, escalating limitations on the rights of free blacks meant that U.S. citizenship was increasingly defined in racial terms, rather than in terms of status. For Indians, definition as separate nations meant the possibility of the denial of U.S. citizenship rights. Forcible removal of Indians from their lands allowed white Southerners to draw the line between free and unfree more and more clearly as a line between white and black.

Adding Indians to the picture changes our view of the history of race in the South. First, the history of Indian identity makes clear that we cannot understand the social or legal construction of race or racism without understanding the simultaneous social and legal construction of the idea of a "nation." By shifting our focus to an exploration of the overlap and conflict between identity as race and as nation, we gain a window on the ways nationalism and racism grew up together and apart. These questions have been widely explored in the colonial and post-colonial context, but rarely in the case of Native Americans. Looking at Indian identity in the South also contributes to the broader question of how the contours of citizenship are shaped by race and gender, a subject that has been receiving a great deal of attention in the last several years.[186]

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184. Robert F. Berkhofer, Jr., The White Man's Indian 151 (1978).

185. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 583 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831). For a discussion of these cases in the context of Indian sovereignty, see Sidney L. Harring, Crow Dog's Case 25–44 (1994).

186. See, e.g., Haney Lopez, supra note 143, at 1–48 (examining the legal construction of "whiteness" through decisions of immigration courts); Linda K. Kerber, No Constitutional Right To Be Ladies: Women and the Obligations of Citizenship xiv–xxiv, 303–10 (1998) (examining blurred distinction between duty and obligation and privileges and rights in the context of women's citizenship); Rogers M. Smith, Civic Ideals: Conflicting Visions of Citizenship in U.S. History 1–12 (1997) (characterizing U.S. immigration law as composed of "illiberal and undemocratic racial, ethnic, and gender hierarchies"); see also Franke, supra note 106, at 253 (exploring the use of the institution of marriage as a tool to "domesticate" African Americans as citizens).

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B. *Complete Confusion?*

Perhaps the greatest promise of cultural approaches to law and slavery is their evocation of the rich fabric of local life and the messiness of law as it was lived on a day-to-day basis by ordinary people. This localism also poses the chief hazard of cultural approaches: how to reach conclusions or sustain theoretical frameworks about law, race, and slavery save that of "complete confusion." Walter Johnson, whose own work is a shining example of cultural-legal history, has argued in a recent review essay that the overarching theme of the study of law and slavery should be neither contradiction (between liberal legalism and slave property regimes, capitalism and prebourgeois slave society, or slave as person and slave as property), nor transformation (from equitable paternalism towards capitalist formalism), but rather "complete confusion."[187] Johnson despairs of reaching general conclusions about the legal history of slavery, because, he argues, "[e]very case was an open contest over the pressing question . . . what is slavery?"[188] If hegemony was always locally contested, and rules articulated by high courts were always only partially enforced and locally negotiated, then how can historians identify any single pattern, whether a single contradiction, or a set of consistent transformations?

In part, Johnson's jeremiad for the field is the warning of the historian to the social scientist, insisting on the contingency of human agency against the determinism of any broad theoretical framework, whether it be Gramscian hegemony, neoclassical economic efficiency, or evolutionary functionalist legal history of economic development. Yet historians have generally provided synthesis through a master narrative of change over time. "Bottom-up" local studies in many fields have challenged our ability to fashion such a master narrative. In some fields, like civil rights, where new local histories revised the earlier narrative periodized in terms of the lives of great leaders and national organizations, it seems possible to produce a newly periodized master narrative reaching farther back in time and emphasizing the local roots of civil rights protest and organization.[189] Cultural-legal histories of race and slavery, in contrast, have not yet provided a new master narrative of change over time, perhaps pre-

187. Johnson, Inconsistency, supra note 167, at 430.

188. Id. at 422.

189. For works emphasizing national leaders and organizations, see generally David J. Garrow, Bearing the Cross (1986) (discussing Dr. King and the SCLC); Hugh Davis Graham, The Civil Rights Era (1990) (emphasizing the role of the Kennedy, Johnson and Nixon administrations); Harvard Sitkoff, The Struggle for Black Equality (1981) (discussing the role of the NAACP, SNCC, CORE and other organizations). For local studies with new periodizations of civil rights history, see, e.g., John Dittmer, Local People: The Struggle for Civil Rights in Mississippi (1994); Adam Fairclough, Race & Democracy: The Civil Rights Struggle in Louisiana, 1915–1972 (1995); Robert J. Norrell, Reaping the Whirlwind: The Civil Rights Movement in Tuskegee (Univ. of N.C. Press 1998) (1985); Charles M. Payne, I've Got the Light of Freedom: The Organizing Tradition and The Mississippi Freedom Struggle (1995).

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cisely because they have been so concerned with challenging the historiographic emphasis on origins stories.

A related concern to that of complexity regards causation. If earlier answers to the relationship of law and culture were too simple and overarching, at least the causal arrows usually pointed in one direction: Law reflected economic interests or racial ideology; alternatively, legal developments influenced people's lives; or both occurred at different times. But cultural histories of law resist the language of causation, at the same time as they repeatedly make claims that sound to many listeners like causation claims. Throughout this Essay, I have made arguments about cultural narratives that *shaped* trials, or stories told in the courtroom that had cultural *influence* outside the courtroom. On the one hand, this sounds at least similar to a "mutual causation" language, describing some kind of legal-cultural feedback loop. On the other hand, the work described here strives to avoid viewing "law" and "culture" as separate realms with causal arrows pointing from one to the other, even from each to each. Is it possible to avoid this dilemma, to portray law as truly part of culture, yet a distinctive institution within a particular culture, with its own language and tradition and ritual?

One strategy is to distinguish between "constitutiveness" and "causation." For law to be constitutive of social relations suggests the following: Law is part of the way people conceive of their identities, which make sense to them only in relation to others; those relations (husband-wife, parent-child, master-slave, black man-white woman) are regulated by law and understood (at least in part) in legal terms. As Hendrik Hartog wrote in his recent history of marriage in America:

> Perhaps you didn't need law to fall in love. But you needed law to know that you possessed a "private" life and the capacity to pursue a happiness or misery that was distinctively your own. . . . You needed law to know yourself as married "really," as committed beyond public conformity; you needed law to know that you possessed rights unasserted, legal opportunities forgone, virtue unqualified by strategic advantage.[190]

Trials as a cultural ritual are part of that constitutive process. People create identities through the performance of trials. While there are causal elements to this process of constituting identity, it is a fundamentally different *kind* of causation claim than those made in traditional law-and-society scholarship (such as "the law changed because powerful people lobbied the legislature" and "law reflects elite interests").

This approach to causation is not wholly satisfying to those who yearn for a null hypothesis. The skeptic asks: How could one disprove the "mutual constitutiveness" of law and culture? Of course, if one finds a legal phenomenon and a similar phenomenon in the wider culture, it is

190. Hartog, supra note 56, at 3.

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easy to say that they are "mutually constitutive"; but how would one know if they were not? Isn't this just a self-fulfilling prophesy?

And, if that were not enough, there is the more general problem of proof that comes with any narrative approach to history. How are we to know that these examples are the right ones? Isn't this history merely anecdotal and unverifiable? This last question is perhaps the easiest of the objections to answer, so I will start here. Briefly, the strongest aspect of the new cultural-legal work is its breadth of research. The mining of county-level archival data, the research into a broad range of sources, and in many cases, the rigorous quantitative analysis accompanying the narrative history, obviate these concerns. By looking at large numbers of records, and going to other sources such as manuscript census schedules and tax rolls, it is possible to give some backing to our claims of typicality and representativeness when we talk in depth about particular examples. Of course, historians still make choices about which examples to highlight in a narrative and determinations about which stories matter, but our choices can be informed by a large database of cases, and complemented by quantitative analysis of those cases. For example, Christopher Waldrep has been able to compare types of crimes before and after the Civil War, participation in Warren County, Mississippi courts by race, and to reconstruct literacy rates and property holdings of grand jurors over the course of the postbellum period.[191] In Adams County, Mississippi, I discovered that the majority of petit jurors in civil cases were nonslaveholding townspeople, and that they were two and a half times less likely to give a verdict for a wealthy planter who sued in circuit court than for one of more modest means. This quantitative finding influenced my readings of trials involving planters.[192]

As for complexity, confusion and causation: There will not be a single, satisfying answer here. Cultural-legal histories will not give general maxims of prescription or even of description on the level of "law should mirror community consensus" or "law reflects the interests of the elite" or (more simply still) "follow the money." Yet cultural histories offer real insights precisely because they break down easy assumptions based on monolithic models. And if there are no over-arching mantras to be applied to every problem, there are some generally useful heuristics: approach legal processes as cultural narratives and performances; attend to the negotiations between higher-level and lower-level actors; look for the ways that the relatively powerless nevertheless influenced the law. These ways of writing legal history do more than simply throw monkey-wrenches into others' carefully-conceived dichotomies (race/class, hegemony/resistance, capitalism/paternalism). Instead, they allow scholars to move to another level of exploration: Assuming that both race and class played a role in shaping the beginnings of slavery, what part did gender play?

191. Christopher Waldrep, Roots of Disorder 98–145 (1998) [hereinafter Waldrep, Roots of Disorder].

192. See Gross, Double Character, supra note 2, at 35–41.

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How, specifically, did legal regulation evolve to distinguish between African slaves and English servants? No matter what you believe about the primacy of race over class or vice-versa, it is important to know that the regulation of African *women* in particular played such a crucial role.

A cultural approach allows us to see that slavery (and, by implication, other forms of racial inequality or institutionalized racism) is unfortunately all too compatible with market capitalism and with "white men's democracy." By restoring people of color and white women as agents of historical and legal change, even as they faced tremendous obstacles in creating those changes, a cultural approach also makes clear that law cannot be understood outside its interpretations by ordinary actors in their daily lives, and that means taking into account all perspectives, not only those of white male judges and legislators. Enslaved and free African Americans initiated lawsuits, influenced cases to which they were not parties, and reacted creatively to legal developments they were powerless to influence. Colonial white women shaped cases involving rape, miscarriage and slander through their gossip networks and their control over the examination and investigation of women's bodies. And cultural approaches demonstrate that through the regulation of sexuality and marriage, as well as in litigation, law played an important role in forging racial categories and identities.

Conclusion

One burgeoning field of legal study to which the new cultural-legal history can speak is the literature on law and norms. Law and economics scholars as well as constitutional and democratic theorists have become preoccupied with the relationship between law and extralegal norms.[193] Early work in the field had a strongly anthropological cast, as with Robert Ellickson's study of Shasta County farmers or Lisa Bernstein's investigation of diamond merchants; other works are less empirical and more theoretical.[194] However, they share several features. First, most of this work defines "norms" narrowly as extralegal obligations or informal rules,

193. See, e.g., Lisa Bernstein, Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms, 144 U. Pa. L. Rev. 1765, 1768 (1996) [hereinafter Bernstein, Merchant Law]; Jason Scott Johnston, The Statute of Frauds and Business Nonns, 144 U. Pa. L. Rev. 1859, 1859 (1996); Symposium, The Legal Construction of Norms, 86 Va. L. Rev. 1577 (2000); Richard H. McAdams, The Origin, Development, and Regulation of Norms, 96 Mich. L. Rev. 338, 342 (1997); Richard H. Pildes, The Destruction of Social Capital Through Law, 144 U. Pa. L. Rev. 2055, 2057 (1996); Eric A. Posner, Law, Economics, and Inefficient Norms, 144 U. Pa. L. Rev. 1697, 1698 (1996); Cass R. Sunstein, On the Expressive Function of Law, 144 U. Pa. L. Rev. 2021, 2025 (1996) [hereinafter Sunstein, Expressive Function]; Cass R. Sunstein, Social Norms and Social Roles, 96 Colum. L. Rev. 903, 907 (1996).

194. See Robert C. Ellickson, Order Without Law: How Neighhors Settle Disputes 15–20 (1991); Lisa Bernstein, Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry, 21 J. Legal Stud. 115 (1992). A good example of a more theoretical approach is Johnston, supra note 193, at 1859.

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often excluding even the rules created by nongovernmental rulemaking bodies.[195] Second, this work tends to assume consensus around norms, and to downplay conflict. Finally, much (but not all) of the literature portrays "law" and "norms" as two separate, distinct realms (although most scholars recognize that one might influence the other), not unlike the way many social historians discuss "law" and "society."[196]

There are several views of how these two worlds influence one another. Some writers have emphasized the distance between the realm of law and the world of social norms. Ellickson, for example, portrays Shasta County farmers operating in a world of neighborly cooperation without resort to, or interest in, formal legal processes or institutions.[197] Other scholars, from Karl Llewellyn onward, have urged legal actors to seek to discover and give legal effect to business norms.[198] The Uniform Commercial Code is explicitly built on the idea of "immanent business norms" separate from law, which courts should look to in deciding commercial cases. In this view, law can and should reflect social norms, but norms develop independently of law. The writers Richard Pildes has dubbed "the Pennsylvania school" of law-and-norms scholars see state law and social norms "as parallel, separate domains; yet both are highly relevant to those they regulate . . . and nonetheless the regulated parties prefer ex ante to keep the two domains independent and distinct."[199] Lisa Bernstein cautions against trying to mirror business norms in commercial law, because changing legal rules will "alter the very reality they sought to reflect."[200] While Elizabeth Scott believes it is possible for legal reforms of marriage and divorce to influence social norms, she warns of the difficulty of using "norm management as a legal policy tool."[201] Peter Schuck catalognes a variety of ways that law, social norms, and markets interact: Law can support norms or markets, or cast a shadow over norms; norms

195. Robert Cooter, for example, defines a norm as "an obligation backed by a *nonlegal* sanction." Robert Cooter, Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms, 86 Va. L. Rev. 1577, 1580 (2000).

196. For an important theoretical discussion of norms from a Foucauldian perspective, see Francois Ewald, Norms, Discipline, and the Law, *in* Law and the Order of Culture 138, 153 (Robert Post ed., 1991) ("Just as norms can only exist socially, there can be no such thing as a norm that exists in isolation, for a norm never refers to anything but other norms on which it depends."). One of the confusing things about this field is that legal academics tend to use "norm" in the prescriptive sense, as an obligation or rule, something people *should* do, whereas most social scientists use "norm" in the descriptive sense, as something people *do.* Of course, these definitions are merged in arguments that the law *should* reflect what people *do.*

197. Ellickson, supra note 194, at 4–11, 40–64.

198. See Karl N. Llewellyn, The Common Law Tradition 122 (1960); Ian R. MacNeil, The New Social Contract 39–59 (1980); Robert D. Cooter, Decentralized Law for a Complex Economy, 144 U. Pa. L. Rev. 1643, 1646 (1996); Karl N. Llewellyn, The First Struggle to Unhorse Sales, 52 Harv. L. Rev. 873, 903–04 (1939).

199. Pildes, supra note 193, at 2055–56.

200. Bernstein, Merchant Law, supra note 193, at 1769.

201. Elizabeth S. Scott, Social Norms and the Legal Regulation of Marriage, 86 Va. L. Rev. 1901, 1970 (2000).

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can mimic markets more than law; and markets, especially if reinforced by norms, "may simply overwhelm law, distorting or disabling it."[202] In all of these complex interactions, however, law, norms, and markets remain separate spheres.[203]

Only two contributors to this literature, Cass Sunstein and Richard Pildes, have suggested that law and norms should be viewed as "mutually constitutive realms." Sunstein productively calls attention to the ability of law to shift norms and the social meanings of behavior, especially in the context of the "promotion of social equality,"[204] and Pildes examines the darker side of norm-shifting, using historical examples of unintended consequences of legal change that had the effect of destroying beneficial social norms.[205] Sunstein raises the useful empirical question, "To what extent have shifts in norms been a function of law?"[206] Historical studies are well suited to answer this question.

Even the work of Sunstein and Pildes is characterized by a focus on single, particularized norms—the norm against littering, for example, or norms of bargaining over diamonds—rather than entire cultures, such as the culture of honor, in which there are norms of extralegal violence, or the culture of lynching. Cultural histories offer a useful corrective to this legal literature because they remind us that particular social norms are embedded in particular cultures, from which legal culture cannot be easily separated out. Furthermore, they draw our attention to the inherent conflict over norms, complicating any suggestion that law can easily reflect community norms, because there may be no consensus to reflect.[207]

202. Peter H. Schuck, The Limits of Law: Essays on Democratic Governance 435–36 (2000); see also Saul Levmore, Norms as Supplements, 86 Va. L. Rev. 1989, 1989–90 (2000) (discussing the different kinds of interaction between law and norms and suggesting a view of norms as supplementing public and private law).

203. Another body of writing that suffers from the assumption that law and norms are separate realms is the literature on the question of whether liberal legal norms should be modified when they clash with the cultural norms of immigrants, as in the controversial "cultural defenses" in criminal law. Much of the writing on the clash between liberal legal norms and presumptively illiberal cultural norms also assumes that cultural norms are uncontested and easily discoverable—and that there will be one answer to these law/norm clashes. Cultural-legal histories caution against such blanket answers. See, e.g., Susan Muller Okin, Is Multiculturalism Bad for Women? 9–24 (1999); Doriane Lambelet Coleman, Individualizing Justice Through Multiculturalism: The Liberals' Dilemma, 96 Colum. L. Rev. 1093, 1096–98 (1996). Leti Volpp's Talking "Culture": Gender, Race, Nation, and the Politics of Multiculturalism, 96 Colum. L. Rev. 1573, 1573–76 (1996), highlights the contested nature of cultural norms.

204. Sunstein, Expressive Function, supra note 193, at 2052.

205. Pildes, supra note 193, at 2057.

206. Sunstein, Expressive Function, supra note 193, at 2052.

207. See Gross, Litigating Whiteness, supra note 44, at 123–32 (discussing lack of community consensus about racial identity and how to determine it); see also Dubler, supra note 56, at 973 (arguing that the idea that law reflects extralegal norms "implicitly accepts the unspoken—but highly improbable—premise of judicial opinions on common law marriage: that there existed a clear set of norms 'out there' in the social stratosphere that uncontroversially marked some relationships as marital and others as nonmarital.").

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The legal history of race and slavery may be seen as a case study of the relationship between law and social norms. Did a conception of "race" precede the legal establishment of slave relations? Was segregation already a foregone conclusion long before the Supreme Court decided *Plessy v. Ferguson*? Did extralegal norms of honor and violence supersede legal resolution of conflict in the South because of the Southern racial system? Cultural histories of these subjects do not yield a single answer to the law and norms relationship; they do point away from simple causation models and towards a more complicated interweaving of "law" and "norms."

As I noted in the beginning of this Essay, earlier work on Southern culture (like Ellickson's work on cattle farmers) argued that extralegal violence and the culture of honor negated the importance of law. The new cultural-legal history, however, demonstrates the coexistence and mutual constitutiveness of legal culture and honor, as well as the ways that law and legal values created the conditions for norms of extralegal violence. Christopher Waldrep, in a study of lynching, shows the way "law itself play[ed] a role in shaping the attitudes that encourage or discourage vigilantism."[208] He looked at the legal culture of Warren County, Mississippi both before and after the Civil War, and discovered a "shift in Mississippians' understanding of law. Courts had begun to change from a place where fights could be resolved to a place where the community regulated the behavior of individuals for the good of the whole."[209] Waldrep examined criminal cases disciplining slaves, in which whites developed "the belief that law could not effectively discipline African Americans"; it is this belief that Waldrep argues "established the roots of disorder" in Southern society, the tendency to turn to lynching and other forms of extralegal violence.[210]

Even Waldrep's approach, however, tends to reify two separate realms, law and "not-law," law and custom, law and social norms, and tries to relate the two. Similarly, Walter Johnson, in his brilliant discussion of the freedom suit of Alexina Morrison, a Louisiana slave who claimed freedom on the basis of whiteness, draws a distinction between the "local history" and the "legal history" of her case, arguing that the "legal history" of slavery proceeded along familiar, clearly demarcated lines of slaveholder power over slaves, whereas the "local history" of her case revealed conflict and contestation.[211] Johnson's "legal history" is the familiar law-in-books—the law of the Louisiana Legislature and Supreme Court, whereas

208. Waldrep, Roots of Disorder, supra note 191, at 2; see also George C. Wright, By The Book, *in* Under Sentence of Death: Lynching in the South 251–52 (W. Fitzhugh Brundage ed., 1997) (demonstrating the similarities between lynchings and "legal lynchings," cases in which the defendant received a brief, cursory trial and was summarily executed).

209. Waldrep, Roots of Disorder, supra note 191, at 43.

210. Id. at 59.

211. Johnson, Politics of Racial Determination, supra note 50, at 37.

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"local history" is law-in-action—the law made at trial by Alexina Morrison and her neighbors as well as the jury and judge. By defining law-in-action as "local history," or "not-law," we lose sight of what is *legal* about *local* history, and what is *local* about *legal* history.

In the study of Jim Crow, for example, the new cultural-legal history helps to change the terms of discussion. The law/norms question is not only the question of whether practices of racial segregation existed before 1896, but also the question of how litigation itself was part of the contestation and struggle over the terms of freedom and citizenship for African Americans and part of the creation of both white and African-American identity in the postwar South. The work of Barbara Welke and Kenneth Mack reveals both the way cultural narratives of race and gender shaped new norms of interstate travel and the way a litigation campaign by women of color was part of a new middle-class African-American assertiveness that challenged white Southerners and may have contributed to racial backlash.

The legal history of racial formation provides examples of the way trials draw on cultural narratives from other domains, such as the medical and religious spheres. Yet law necessarily shapes the stories told in litigation. Law creates new images, performances, stories, ways of understanding race and final determinations of people's status that have broad cultural impact. If law is fundamental to representations of self, then it precedes the self that has economic "preferences," or even "social roles" or "social meanings."

Cultural approaches to race and slavery provide opportunities for legal scholars and practitioners as well as for legal historians. Breaking down the black-and-white divide between law and culture, they pose an opportunity to give empirical backing to critical race theory, introducing individual agents into fields of study that had assumed the hegemonic force of law. They not only reshape historical debates by bringing law to the center, but reshape legal debates by historicizing them. At its best, history helps us to throw off tired stereotypes and preconceptions about the way things have to be and the way we assume they always have been. Nowhere is this re-examination more important than in talking about race and racism.

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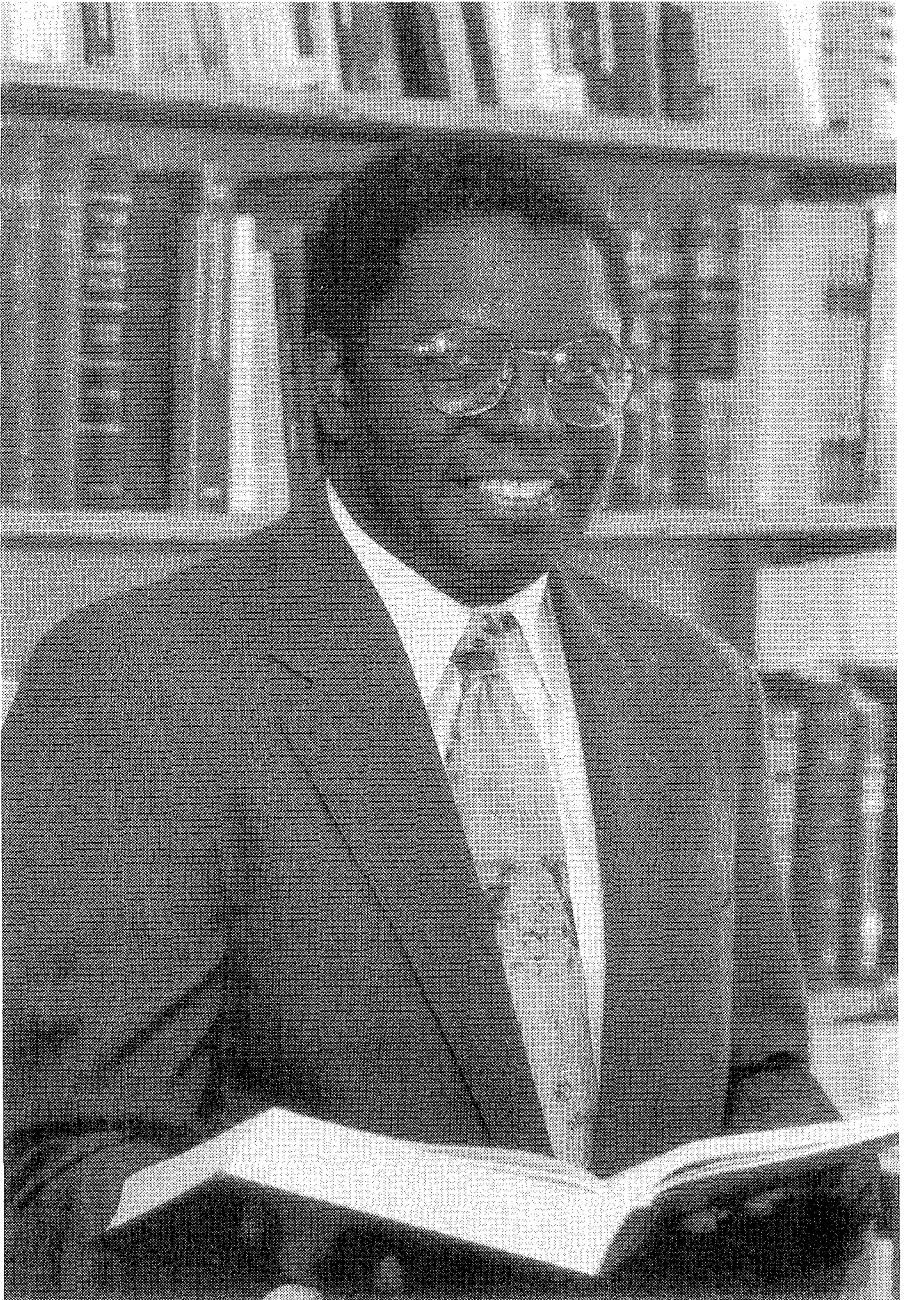

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