

ARTICLES

"LIKE MASTER, LIKE MAN": CONSTRUCTING WHITENESS IN THE COMMERCIAL LAW OF SLAVERY, 1800-1861

Ariela J. Gross^{†*}

INTRODUCTION

In 1836, Leonard Wideman bought a slave named Charles from Jonathan Johnson, paying in part with a \$100 note.¹ Not long after, Johnson sued Wideman in the Circuit Court of Abbeville, South Carolina for failing to pay his note. In defense, Wideman argued that he should not have to pay Charles's price because Johnson had fraudulently represented Charles to be sober, honest, and humble, when, in fact, he was insubordinate, vicious, a drunkard, and a runaway. The trial turned not only on Charles's charac-

[†] A Paper delivered at the Symposium, *Bondage, Freedom & the Constitution: The New Slavery Scholarship and its Impact on Law and Legal Historiography*, at Benjamin N. Cardozo School of Law, Yeshiva University, New York, New York, February 1995.

^{*} Ariela J. Gross, Assistant Professor, University of Southern California Law School. I would like to thank Robert Gordon, Janet Halley, George Fredrickson, Jon Goldman, Michelle Aronowitz, Jack Rakove, and Chris Morris for reading and criticizing drafts of this Paper. This Paper was prepared while I was a Fellow at the Stanford Humanities Center and is a selection from a dissertation entitled *Pandora's Box: Slavery, Character, and Southern Culture in the Courtroom, 1800-1860* (1996) (unpublished Ph.D. dissertation, Stanford University). I am grateful for research funds provided by the Littleton-Griswold Research Grant of the American Historical Association, the Stanford Humanities Center, and the Center for Research on Legal Institutions.

¹ *Johnson v. Wideman*, 24 S.C.L. 325 (Rice) (1839). For a more detailed discussion of *Johnson v. Wideman*, see Ariela Gross, *Pandora's Box: Slave Character on Trial in the Antebellum Deep South*, 7 *YALE J.L. & HUMAN.* 267, 284-88 (1995). Although the actual trial records for this case no longer exist, Chief Justice John Belton O'Neill of the South Carolina Supreme Court, in an unusual opinion, reprinted in full the circuit judge's report of the trial, including the testimony and the briefs.

Typically, in Southern trial courts, usually presided over by judges riding circuit, either the judge or the court clerk kept a record of both the testimony given in court and all motions. Copies of written interrogatories and answers, a frequent alternative to courtroom testimony, were included in the record. Trial records also included subpoenas for witnesses and records of court costs. Lawyers' briefs and judicial opinions were added at the state supreme court level.

Since the records on which I based my research are collections of separate documents without page numbers, my citations refer to the archive where they can be found, the date, the docket number, and, if relevant, the drawer number. Because these documents are too fragile to reproduce, the *Cardozo Law Review* relied on my representations as to the accuracy of the citations, quotations, and related information herein.

ter, but also on the character of his masters: Johnson, Wideman, and others who had previously owned Charles. Johnson argued that Wideman himself was responsible for Charles's character and the circuit judge agreed. The judge's instructions to the jury warned that Charles's so-called vices "were easy of correction by prudent masters, and it was only with the imprudent that they were allowed to injure the slave. Like master like man [is] . . . too often the case, in drunkenness, impudence, and idleness."²

When Southern slave buyers believed their newly acquired human property to be "defective," physically or morally, they sued the seller for breach of warranty—just as they would over a horse or a machine. Similarly, slave owners sued hirers, overseers, and others for property damage when these people beat or neglected the owners' slaves. In these disputes over slaves as property, enslaved people nevertheless influenced the law in ways a horse or machine never could, because these cases challenged slaveholders' self-conception as masters and as statesmen. The philosophy of "like master, like man" meant that every time a slave's character came into question, his master's character went on trial as well.

Warranty trials, like *Johnson v. Wideman*, put mastery on trial when the litigants and witnesses portrayed slave character as a function of treatment or management by masters. Other private law cases, such as tort cases involving neglect or cruelty, offered parties and judges an opportunity to articulate standards of management even more directly, as juries decided whether a slave had been properly treated. In nineteenth-century law, witnesses could give character evidence by reporting on "the estimate attached to the individual by the community."³ In jurisprudence, explained Francis Wharton, "character is . . . convertible with 'reputation,'" provided that the witness could report on local, recent reputation.⁴ A trial could become the forum for a man's neighbors to discuss not only his local reputation for slave treatment, but all aspects of his plantation management: selling and trading, employing overseers, growing crops, and even breeding slaves.

Historical appraisals of the antebellum Southern slaveholder have been dominated in the last decades by the question of "paternalism." In Eugene Genovese's view, both slaveholders and slaves were committed to a paternalistic system, defined as a set of "mu-

² *Johnson*, 24 S.C.L. at 343.

³ 1 FRANCIS WHARTON, A COMMENTARY ON THE LAW OF EVIDENCE IN CIVIL ISSUES § 564 (3d ed. 1888).

⁴ *Id.*

tual obligations—duties, responsibilities, and ultimately even rights,” which allowed slaveholders to govern as a pre-bourgeois ruling class.⁵ In the opposing view, Southern slaveholders were profit-maximizing capitalists, whose words and actions can be analyzed as extensions of their economic interests.⁶ To some extent, it is useful to think about the image of the white master that emerges from “private law” trials in terms of paternalism—the phrase most often used as a standard for a good master was like “the prudent father of a family.”⁷

Yet witnesses and judges at trial conjured a good master more complicated than merely “the prudent father of a family”; he was a statesmanlike disciplinarian and a smart manager of a plantation—which meant being a shrewd businessman. This image of mastery suggests the importance of both honor and profit-making to the white man of the plantation South, and the extent to which both slavery and the law helped to construct “whiteness” in terms of honor and profit.⁸

Furthermore, while paternalist rhetoric was useful to help build up a master’s image, it only entered the legal doctrine at the point where the master’s own behavior was not at issue—when a hirer, overseer, or agent had charge of the slave. We need to move beyond the paternalism question to understand how the law worked to establish what it meant to be a master and, therefore, what it meant to be a white man in Southern plantation society.

Of course, no single ideal of mastery emerges from trials involving slaves as property. The legal “standard” of mastery set out by judges in these cases did not always match the admiring or disparaging comments witnesses made about particular masters. Just as judges tried to narrow the possible interpretations of slave character and behavior, judges emphasized different strands of South-

⁵ EUGENE D. GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* 5 (1974). See generally MARK V. TUSHNET, *THE AMERICAN LAW OF SLAVERY, 1810-1860: CONSIDERATIONS OF HUMANITY AND INTEREST* (1981).

⁶ See generally JAMES OAKES, *THE RULING RACE: A HISTORY OF AMERICAN SLAVEHOLDERS* (1982); ANDREW FEDE, *PEOPLE WITHOUT RIGHTS: AN INTERPRETATION OF THE FUNDAMENTALS OF THE LAW OF SLAVERY IN THE U.S. SOUTH* (1992).

⁷ See, e.g., *Mayor of Columbus v. Howard*, 6 Ga. 213, 219 (1848).

⁸ There is a growing body of literature on the “construction” of whiteness in American culture and, particularly, in the law. See, e.g., DAVID R. ROEDIGER, *THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS* (1991); DAVID R. ROEDIGER, *TOWARDS THE ABOLITION OF WHITENESS: ESSAYS ON RACE, POLITICS, AND WORKING CLASS HISTORY* (1994); Cheryl I. Harris, *Whiteness As Property*, 106 HARV. L. REV. 1707 (1993).

ern ideology about slave management and mastery than did those who came to testify in Southern courts.

In order to better understand the relationship between law and ideology, it is important to look beyond the published reports of appellate opinions, aimed at few and read by few. If we define "the law" broadly as one of the "great cultural formations of human life,"⁹ then the trial courtroom becomes an arena in which people create meaning. Buyers, sellers, hirers, owners, and overseers all told different stories about why slaves behaved as they did, all of which reflected on masters' character. In the courtroom, the parties drew on stories about mastery that were at large in antebellum Southern culture, but "the law" also helped to shape those stories. Furthermore, enslaved people, who were allowed no voice in the courtroom, nevertheless helped to create the law because their resistant acts forced these conflicts to the surface.¹⁰

This Article is based on research in the trial records of the five states of the Deep South, or what was known in the antebellum era as the "Black Belt": Georgia, South Carolina, Alabama, Mississippi, and Louisiana. These states were joined by the culture and economy of the cotton plantation; they were the greatest slaveholding and slave-importing states in the antebellum period. Thus, this Article's conclusions cannot necessarily be extrapolated to the South as a whole; they apply to the plantation Deep South.

In preparation for this Article, I read 503 published state supreme court reports of civil disputes involving slaves in the Deep Southern states from 1800 to 1870, all of the available trial records of those cases in four states (115 records), and all of the cases dealing directly with slave character in Louisiana (70 cases).¹¹ In order to insure the representativeness of the appealed cases, I surveyed extensively the unappealed cases in Adams County, Mississippi.

⁹ CLIFFORD GEERTZ, *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* 219 (1983).

¹⁰ Here, I cite to the extended argument James Oakes makes in *Slavery and Freedom* that slaves' "acts of resistance drove the decisive wedge" into the crack provided by liberal legal institutions. JAMES OAKES, *SLAVERY AND FREEDOM: AN INTERPRETATION OF THE OLD SOUTH* 139 (1990). Whereas for Oakes, slave resistance took on political significance only after the Fugitive Slave Act became a national political issue, I argue that slaves, by running away, shaped the politics among white Southerners because they shaped the public character of white men. The "crack" was provided not by liberal institutions, but by slaves themselves.

¹¹ For the remainder of my research on Louisiana cases, I relied on JUDITH K. SCHAFER, *SLAVERY, THE CIVIL LAW, AND THE SUPREME COURT OF LOUISIANA* (1994). See also Walter L. Johnson, *Masters and Slaves in the Market: Slavery and the New Orleans Trade 1804-1864* (1995) (unpublished Ph.D. dissertation, Princeton University).

For the 1850s, I looked at every cause of action in the Adams Circuit Court. For the years 1798 to 1850, I looked at one out of three drawers in which the records were housed for a total of 10,317 out of 30,000 causes. I found 177 trials involving slaves (the vast majority of the 10,317 were uncontested debt actions). This in-depth county study assured me that the cases which made it to the supreme court level were not atypical.

I. WHAT IS A GOOD MASTER?

A. *Paternalism*

Warranty cases put a master's management at issue because it could be an excuse for a slave's illness or vice. A slave with a bad character suggested a master with a bad character—weak, indulgent, perhaps drunk and dissolute. Therefore, lawyers for a master, whether buyer, seller, or hirer, posed interrogatories that would build a case for his good plantation management and solicitous treatment of slaves. Witnesses pointed to, sometimes without even being asked or prodded to do so, certain favorable aspects of the treatment of slaves, such as a sick slave being brought to the plantation house, the employment of good physicians, and good food and work hours for all of the slaves. This testimony helped to build the image of the good master as a kind father to his black "family."

In a typical interrogatory, a defendant's attorney asked, "What kind of a Master the Plaintiff is, whether he treats his slaves well, what is his character as regards the master of slaves, *good* or *bad*."¹² Testimony to prove a good master included:

That [Egerton] had the same allowance as the other slaves, three pounds and a half of meat a week with as much bread as they could eat—the rations of Egerton were doubled but he still complained. . . . After he was taken down the second time he was taken into the house of Mrs. Herring, where he was attended to by her and family night and day, and had as much attention paid him, as if he were one of her own family.¹³

¹² *Caldwell v. May*, bk. 21, No. 2210, at 108-30 (Greene Cir. Ct. Records, Jan.) (available in Alabama Department of Archives and History) [hereinafter *ADAH*], *aff'd*, 1 Stew. 425 (1828). The answer to this interrogatory was "I thought him a good master and used to [sic] much limits towards them." *Caldwell*, bk. 21, No. 2210, at 108-30. It is unclear whether this witness meant that the master used too much punishment, was too reserved in his punishment, or was accustomed to much punishment or accustomed to being reserved in his punishment.

¹³ *Herring v. James*, drawer 329, No. 169 (Adams Cir. Ct., Miss., May 1847) (available in Historic Natchez Foundation) [hereinafter *HNF*], *aff'd*, 12 Miss. (1 S. & M.) 336 (1849).

In other Adams County cases, Dr. Nathaniel Vanandigham testified that when he attended to a slave, "the girl was in a comfortable cabin"¹⁴ and Eliza Roach testified that "[t]hese negroes received immediately the attention of Dr. Hamilton who was living in the house of Benjamin Roach my husband after his leaving Dr. Cartwright was then called in to them."¹⁵ In answer to the interrogatory, "Was Armstead's food while sick, that of good wholesome food such as bread, meat, butter, coffee, tea, soup &c. . . . Did Armstead have sufficient warm cloathing [sic], lodging and other necessities suitable to his health, and his disorder while sick?"¹⁶ Elizabeth Dromgoole answered that "Armstead was comfortably lodged, cloathed [sic], dieted and nursed; that a physician was immediately employed."¹⁷ Comments to indicate good treatment included that "Silvia . . . was treated well—Kept in Mrs. Stroziers room all the time [that she was sick]."¹⁸

Masters attempted to prove that they treated their slaves well in order to show that slaves who ran away did not do so as a reaction to ill treatment. Thus, it became a trope to intone that a slave ran away "without cause" or "without provocation."¹⁹ For example, one slave buyer, Major Gatlin, complained "[t]hat on the 2d day of May 1858 the said slave without having been chastised or otherwise ill-treated, absconded and ran away."²⁰ When J.B. Milner, one of the buyer's witnesses, took the stand, he was asked "how . . . [the slave] was treated by Major Gatlin—how Major Gat-

¹⁴ *Kiern v. Carson*, drawer 208, No. 12 (Adams Cir. Ct., Miss., Apr. 1835) (available in *HNF*, *supra* note 13).

¹⁵ *Townsend v. Miller*, drawer 208, No. 12 (Adams Cir. Ct., Miss., Apr. 1837) (available in *HNF*, *supra* note 13). The doctor in this case was none other than the infamous propagandist of biological racism, Samuel Adolphus Cartwright. Cartwright is best known for his writings on "negro medicine" during the 1850s for *The New Orleans Medical and Surgical Journal* and *DeBow's Review*.

¹⁶ *Id.*

¹⁷ *Alston v. Rose*, drawer 112, No. 4 (Adams County Ct., Miss., Nov. 1822) (available in *HNF*, *supra* note 13).

¹⁸ *Strozier v. Carroll*, No. 3409 (Thomas Super. Ct., Ga. Sup. Ct. Records, June) (available in Georgia Department of Archives and History, Atlanta, Ga.) [hereinafter *GDAH*], *aff'd*, 31 Ga. 557 (1860). "Paternalism" often meant white *women* caring for slaves. It was not uncommon to hear testimony, such as that of Elizabeth Mayberry who vouched for her knowledge of Burrell's health by explaining, "I had nearly the same opportunities that a mother would have to ascertain the bodily and mental condition of the boy Burrell having nursed him while young and up to the time I sold him in 1850 . . ." *Hill v. Elam*, drawer 345, No. 83 (Adams Cir. Ct., Miss., Nov. 1852) (available in *HNF*, *supra* note 13).

¹⁹ *Hagan v. Rist*, No. 4503 (E. Dist., June) (available in Supreme Court Archives, Earl K. Long Library, University of New Orleans) [hereinafter *SCA-UNO*], *aff'd*, 8 Rob. 106 (1844); *see also* *Gatlin v. Kendig*, No. 6894 (New Orleans, Feb. 1866) (available in *SCA-UNO*).

²⁰ *Gatlin*, No. 6894 (New Orleans, Feb. 1866).

lin is in the habit of treating his slaves”²¹ Milner answered, “said boy Jim remained with said Gatlin about 2 month, when he Jim absconded without provocation. . . . As to the treatment of Mr Gatlin toward his negroes I think he is a reasonable man and treats his negroes very humanely.”²² In another Louisiana case, *Blair v. Collins*,²³ an overseer claimed that “I am certain that the boy ran away from no bad treatment, he was kindly treated, but he appeared incompetent to appreciate it.”²⁴ In answer to the question, “Do you know how said Wyatt treated his slaves—is he a very humane and kind master or is he rather a hard master—state all you know,”²⁵ one witness answered, “While Peter Wyatt owned Davy he lived at my house and I had the opportunity of knowing his course of treatment to David. He was humane and kind, nor do I think he ever gave him any cause to run away.”²⁶ Or, as one attorney summed it up, “Did Toney run away from bad treatment or the badness of the negro himself?”²⁷

While this evidence that masters and their witnesses competed eagerly to demonstrate kindness to their slaves could be read to uphold a “paternalist” ideal, it is worth noting that litigants used this evidence for highly instrumental purposes. Shows of paternalist concern for slaves could justify outcomes in favor of either buyers or sellers. For example, if, in the above illustration, Toney was “bad himself,” then a buyer who proved his kindness as a master should not be held responsible for Toney’s running away. However, if Toney’s new master treated him badly, he should be held responsible. The legal rule leading to the second outcome, *caveat emptor* (“buyer beware”), is considered the hallmark of capitalism in early nineteenth-century sales law.²⁸ Thus, paternalist rhetoric cannot necessarily be seen as evidence for a pre-capitalist socioeconomic system, as Eugene Genovese has characterized the antebellum South.²⁹

²¹ *Id.*

²² *Id.*

²³ No. 6449 (New Orleans, Dec.) (available in *SCA-UNO*, *supra* note 19), *aff’d*, 15 La. Ann. 683 (1860).

²⁴ *Blair*, No. 6449 (New Orleans, Dec. 1860).

²⁵ *Id.*

²⁶ *Wyatt v. Greer*, bk. 35, No. 1325 (Ala. Sup. Ct. Records, June) (available in *ADAH*, *supra* note 12), *rev’d*, 4 Stew. & P. 318 (1833).

²⁷ *Sessions v. Cartwright*, drawer 340, No. 142 (Adams Cir. Ct., Miss., Nov. 1851) (available in *HNF*, *supra* note 13).

²⁸ See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977).

²⁹ GENOVESE, *supra* note 5.

Professor Genovese's use of "paternalism" has generated controversy well beyond the scope of this Article. However, it is sufficient to note that recent work has contested his picture of a pre-bourgeois, pre-capitalist South by showing the coexistence of paternalism with capitalism in diverse societies, in part by defining paternalism more narrowly.³⁰ One critic, Shearer Davis Bowman, challenges Genovese's view of paternalism as a form of social relations involving reciprocal duties and obligations. Bowman, who compares Southern planters to Prussian junkers, maintains that "the label paternalism should be limited to a type of upper-class ideology, one that persists into the late twentieth century and was widespread in the nineteenth-century Western world, urban as well as rural, free as well as slave."³¹ The trials bear out Bowman's more limited definition.

Planters' paternalism coexisted comfortably with a vigorous interest in buying and selling slaves. Any litigant in a warranty case had, by definition, shattered the paternalist ethos of keeping his black "family" together. While judges referred derisively to "that class of society" when they wished to disparage "negro traders," masters who traded did not fare badly in Southern courts.³² As Michael Tadman has argued, Southern society needed "respectable merchants" of slaves just as Southern ideology needed "scapegoat 'evil' trader[s]."³³ The myth of the reluctant master and the evil trader allowed white Southerners to maintain both a paternalist ideal and a vigorous, often ruthless slave market.³⁴

³⁰ See, e.g., PHILIP SCRANTON, PROPRIETARY CAPITALISM: THE TEXTILE MANUFACTURE AT PHILADELPHIA, 1800-1885 (1983) (discussing the "factory paternalism" of Philadelphia textile mill owners); GERALD D. JAYNES, BRANCHES WITHOUT ROOTS: GENESIS OF THE BLACK WORKING CLASS IN THE AMERICAN SOUTH, 1862-1882, at 77-81, particularly at 79 (1986) (discussing the "paternalism of incipient industrializing capitalism"); SHEARER D. BOWMAN, MASTERS & LORDS: MID-19TH-CENTURY U.S. PLANTERS AND PRUSSIAN JUNKERS ch. 5 (1993) (discussing the literature on capitalist paternalism in Prussia and the United States).

³¹ BOWMAN, *supra* note 30, at 166.

³² *Riggin v. Kendig*, 12 La. Ann. 451, 451 (1857) (stating that traders are a "class of society [] not easily imposed upon").

³³ MICHAEL TADMAN, SPECULATORS AND SLAVES: MASTERS, TRADERS, AND SLAVES IN THE OLD SOUTH 210 (1989).

³⁴ Tadman argues that "the vast bulk of the Old South's literary output on black 'character,' family, and 'amalgamation' ingeniously constructed a framework of fable whereby masters could both separate families whenever they wished and regard themselves as paternalists whatever they did." *Id.* at 212.

Thomas Russell has shown one way in which "the law" operated to reinforce this Janus-faced approach to the slave trade. According to Russell, "court-supervised slave sales comprised one-half of all slave sales. . . . Slave sales by operation of law expressed social disregard for black families and slave humanity." Thomas D. Russell, *South Caro-*

Nor did witnesses in court betray any sense that being a good trader was dishonest for an ordinary planter. Witnesses often mentioned that a planter or farmer was a frequent buyer and seller of slaves. Examples of such testimony include: "Morgan . . . was in the habit of buying and selling for profit";³⁵ "He bought him to sell again";³⁶ "Mr. Johnson is a farmer and occasionally Buys them for his own use";³⁷ "I have always been a farmer and am a farmer yet but have been trading on negroes some for the last ten or twelve years."³⁸ It was also important for a master to know the value of slaves and to be able to negotiate a good deal in a transaction. As one agent for a planter explained, "witness has bought more than 500 negroes before this and has not been deceived in relation to the soundness of one of them."³⁹ Another planter wrote to his agent, "Everything . . . is left to your Judgment and discretion in both of which I have the fullest confidence. You know the value of negroes, you are a Judge of them."⁴⁰ Thomas Alexander deposed that Samuel Cartwright was "a man of good business habits and knows how to keep [of] servants."⁴¹

Paternalism was compatible with a profit-maximizing ideology because slaves were themselves capital in the antebellum South. Thus, as many planters explained, humanity coincided with eco-

lina's Largest Slave Auctioneering Firm, 68 CHI.-KENT L. REV. 1241, 1277-78 (1993). In other words, by allowing their slaves to be mortgaged and auctioned, or divided at estate sales, masters could profess paternalist concern for keeping families together while ignoring the real consequences of the system in which they participated.

³⁵ Hill v. Winston, drawer 336, No. 25 (Adams Cir. Ct., Miss., May 1849) (available in *HNF*, *supra* note 13).

³⁶ Herring v. James, drawer 329, No. 169 (Adams County Ct., Miss., May 1847) (available in *HNF*, *supra* note 13) (deposition of Nathaniel Glinn).

³⁷ Guice v. Holmes, drawer 347, No. 57 (Adams Cir. Ct., Miss., May 1854) (available in *HNF*, *supra* note 13) (testimony of Mr. Kendall).

³⁸ Mangham v. Cox, bk. 1856, No. 2952 (Ala. Sup. Ct. Records, June) (available in *ADAH*, *supra* note 12), *rev'd*, 29 Ala. 81 (1856) (deposition of John Sheperd).

³⁹ Dean v. Traylor, No. 549 (Bibb Super. Ct., Ga. Sup. Ct. Records, Aug. 1849) (available in *GDAH*, *supra* note 18).

⁴⁰ Daniel v. Lance, (S.C. Sup. Ct. Records, Jan. 1830) (available in South Carolina Department of Archives and History) [hereinafter *SCDAH*]. Of course, cheating was never an admirable trait. Therefore, a sure way to discredit a party was to suggest that he had said he "would not mind telling a lie to make a good trade." *Manes v. Kenyon*, No. 1552 (Ga. Sup. Ct. Records, Apr.) (available in *GDAH*, *supra* note 18), *aff'd*, 18 Ga. 291 (1855).

⁴¹ Sessions v. Cartwright, drawer 340, No. 142 (Adams Cir. Ct., Miss., Nov. 1851) (available in *HNF*, *supra* note 13). For an interesting discussion of the increasing penetration of the marketplace into Southern culture during the antebellum period, see Christopher Morris, *What's So Funny? Southern Humorists and the Market Revolution*, in *SOUTHERN WRITERS AND THEIR WORLDS* 9-26 (Christopher Morris & Steven G. Reinhardt eds., 1996). Morris discusses contests of character in the marketplace as told in Southern jokes, noting the growing emphasis not only on market savvy, but on cash exchange.

conomic self-interest. As one Mississippi planter wrote, it was better to "tak[e] care of our present capital . . . than [to] wear[] it out in quest of another, if even larger" ⁴² By following this policy, he wrote, "humanity and self-interest need not be separated." ⁴³ Another planter wrote that "throwing humanity aside," and considering the high price of slaves, "it behooves those who own them to make them last as long as possible." ⁴⁴ Wise planters harnessed humanity to serve the demands of capital.

B. "The Prudent Father Of A Family"

There was, however, one situation in which the interest/humanity equation was broken. When a slave was hired out to another person, usually for a year term, that person had far less economic incentive than the master to treat the slave kindly. What is fascinating about paternalism in the private law of slavery is that judges most often introduced paternalist rhetoric in the case of hirers, not masters themselves. Appellate doctrine sought to put the hirer in the position of the master by re-creating the incentives to conserve slave capital.

In hire cases, judges invoked the paternalist injunction that a slave should be treated as "the prudent father of a family" treats his kin. Paternalist rhetoric arose particularly in cases in which a slave fell ill or died during a hire term, and the owner and hirer disputed over who should bear the cost of lost labor and doctor's bills, or even whether the hirer should be held liable for the slave's full price. During a hire term, the hirer usually bore the risk of the slave falling ill or running away, but not dying, and, under normal circumstances, the responsibility for the slave's medical bills. ⁴⁵ As one judge stated:

In actions on contracts for the rent of houses, &c., or for the hire of slaves, it seems to have been uniformly held that the loss of the house by fire, or of the labour of the slave by sickness, or his running away during the term, does not discharge the tenant or hirer from the payment of any part of the sum to be paid on

⁴² M.W. Phillips, *The Best Means of Preserving Health on Plantations*, 5 S. CULTIVATOR 142, 143 (Sept. 1847), *quoted in* ADVICE AMONG MASTERS: THE IDEAL IN SLAVE MANAGEMENT IN THE OLD SOUTH 39 (James O. Breeden ed., 1980) [hereinafter ADVICE AMONG MASTERS].

⁴³ *Id.* at 40.

⁴⁴ P.T., *Judicious Management of the Plantation Force*, 7 S. CULTIVATOR 69 (May 1849), *quoted in* ADVICE AMONG MASTERS, *supra* note 42, at 40.

⁴⁵ See, e.g., *Hogan v. Carr*, 6 Ala. 471, 472 (1844) (stating that the hire contract included an implicit contract to "treat the slave humanely, and provide for his necessary wants," including medical aid when sick); *Latimer v. Alexander*, 14 Ga. 259 (1853).

such consideration. . . . The tenant or hirer is considered as a purchaser for a limited time . . . subject . . . to the same risks as if he were a purchaser of the fee simple. . . . As applicable to contracts for the hire of slaves, [these principles] appear to be supported by sound considerations of humanity and policy.⁴⁶

Interestingly, Judge Minor established the legal rule equating hirers with substitute masters for a term ("purchaser for a limited time") without resorting to the familial metaphor, although he did note that humanity supported the rule. Obviously, paternalist rhetoric was not necessary to justify rules against "waste" of slave property—yet it reappeared time and again.

Louisiana's standard of care for a hirer differed little from that of other states. For example, in *Buhler v. McHatton*,⁴⁷ the owner's lawyer argued that "[e]very dictate of humanity demands, that a slave, afflicted with a serious disease, should, in the hour of her affliction, be treated with the greatest care . . . it must be such as a prudent father possesses for his own child."⁴⁸ He went on to argue that even though the hirer's doctor "claims to be a regular practitioner," that "so far from regarding her as a patient, thrown upon his hands for treatment, he looked at her alone as a menial, and I think, but one single and isolated time, gave or attempted to give her, a dose of medicine. . . ."⁴⁹

The typical interrogatory in a hire dispute raised the charge that a hirer did not treat his hired slaves the same way a master would:

Did or did not the defendant feed and clothe the said hired negroes well and treat them in every respect like his own, in sickness and in health, and did or did not the manager on the said

⁴⁶ *Outlaw v. Cook*, Minor 257, 257-58 (1824). But see *Lennard v. Boynton*, 11 Ga. 109 (1852) (holding that a hirer bore the risk of death as well as illness, just as Georgia common law mandated that full rent was due on a house made untenable by a storm within a lease term).

Of course, owners could contract away the right to have hirers pay for time lost to illness. One pair of hirers refused to pay a note to the owner's estate, because they said that in return for their agreement to "deal tenderly with said negro," the owner had agreed "that the time which should be lost by said negro from labour on account of sickness was to be deducted from the amount of the [hire]." *Caldwell v. May*, bk. 21, No. 2210, at 108-30 (Greene Cir. Ct., Ala. Sup. Ct. Records, Jan. 1828) (available in *ADAH*, *supra* note 12). According to the hirers, the slave had been sick for the entire year.

⁴⁷ No. 3448 (New Orleans, Feb.) (available in *SCA-UNO*, *supra* note 19), *aff'd*, 9 La. Ann. 192 (1854).

⁴⁸ *Buhler*, No. 3448 (New Orleans, Feb. 1854).

⁴⁹ *Id.*

defendant's plantation treat the said negroes with as much forbearance and kindness as any other negroes on the plantation?⁵⁰

Inevitably, the witnesses for the hirer responded to the above questions in the affirmative.

In one such case, *Mosely v. Wilkinson*,⁵¹ the owner charged the hirer with "carelessness and negligence in treatment of a negro girl named Adeline the property of plaintiff whereby the said girl died," because he did not employ a physician for Adeline when she was sick.⁵² According to Robert Mosely, Beverly Wilkinson had promised to treat Adeline "in a careful proper and moderate manner and in the event of her sickness she should receive from him proper and careful treatment and attention suitable and necessary for her situation and if necessary he would employ a Physician to attend her."⁵³

Wilkinson had subhired Adeline to A.B. Hughes, who "himself was confined to his room by Sickness," when Adeline fell ill.⁵⁴ Adeline was treated by Hughes's overseer, Moore, who:

[G]ave medicines—that he bled her on Tuesday night and then applied mustard plasters to her wrists and stomach that the witness left her about twelve o'clock on Tuesday night apparently easy. . . . Moore stated that he had overseed some thirteen years and during that time he had treated all cases of sickness with all negroes under his charge that he thought he could manage and not to call in a physician unless the case was thought dangerous and that he did not consider the negro girl to be dangerously sick.⁵⁵

The jury found for Wilkinson. The Alabama Supreme Court, however, reversed and remanded the case twice, holding that Mosely, the owner, should recover the amount of hire—although not the full value of the slave. Despite the fact that Hughes had shown that he treated Adeline as he treated his other slaves, the court reserved a higher standard of slave treatment. This included the employment of a physician in the case of serious illness. The important factor, according to Judge Stone, was that a hirer use "that

⁵⁰ *Sessions v. Cartwright*, drawer 340, No. 142 (Adams Cir. Ct., Miss., Nov. 1851) (available in *HNF*, *supra* note 13).

⁵¹ Bk. 118, No. 2456 (Montgomery County Ct., Ala. Sup. Ct. Records, Feb.) (available in *ADAH*, *supra* note 12), *rev'd*, 14 Ala. 812 (1848), *rev'd*, 24 Ala. 411 (1854), *rev'd*, 30 Ala. 562 (1857).

⁵² *Mosely*, bk. 118, No. 2456 (Montgomery County Ct., Ala. Sup. Ct. Records, Feb. 1848).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

'degree of care used by the generality of mankind in relation to their own slaves.'" ⁵⁶

Juries were more reluctant to hold a hirer to an affirmative standard of disease prevention. In *Davis v. Wood*,⁵⁷ Samuel Davis sought \$2,000 damages from Philander Wood for refusing to deliver up a certain slave named Charles Clark after the contract of hire had expired. Davis further charged that Wood had breached his contract to "use the said slave in a moderate careful and proper manner" by exposing Charles Clark to a yellow fever epidemic.⁵⁸ Davis requested that the judge instruct the jury that Wood became liable for the loss of Charles when he refused to deliver him up on July 30, 1853, and that Wood was liable regardless of whether Charles's death from yellow fever occurred "from the negligence of said Defendant or not."⁵⁹ The judge gave both instructions. Wood asked the judge to instruct the jury that if he had held Charles as security for the payment of horses, he was not bound to deliver up the slave until Davis paid for the horses. Wood further requested an instruction that he could not be liable for Charles's death if he died "under medical treatment and the defendant took good and prudent care."⁶⁰ The judge gave these instructions as well. The jury found for Wood.⁶¹

It is somewhat surprising that official solicitude for the health and care of slaves emerges so strongly in disputes over hire. Analogies to real estate and other forms of bailment or tenancy should have been sufficient to create legal rules protecting owners from hirers "wearing out" their human property. Yet paternalist ideology provided the framework for the law and, therefore, provided the cues for litigants to argue their cases in terms of how well they conformed to a standard of good mastery.

II. THE MASTER AS STATESMAN

A. Statesmanship

When witnesses contested mastery in the courtroom, they drew on an ideal more complicated than merely that of a kind father. Witnesses valued a particular style of mastery which rein-

⁵⁶ *Mosely*, 30 Ala. at 575.

⁵⁷ Drawer 350, No. 40 (Adams Cir. Ct., Miss., May 1854) (available in *HNF*, *supra* note 13).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

forced slaveholders' authority in Southern society: good masters were passive rather than active, maintained a superior mien, and punished their slaves in the right way. The Southern system of honor called for the proper level of condescension to inferiors.

A good master not only gave his slaves solicitous treatment, especially when ill, but disciplined his slaves with a firm hand. He also knew the right amount of discipline to apply with difficult slaves. In one trial, a witness testified that the slave, Stephen, "was of bad and insubordinate character and difficult to manage and keep in proper subjection . . . defendant says he used only so much and such means as were necessary to keep said negro under control" ⁶² The master in the courtroom presented himself to be "as good a disciplinarian with his slaves as any of his neighbours." ⁶³

The goal of proper treatment was to get the maximum labor out of a slave. Both kind treatment and whipping were to be used only if they produced work from the slave. This principle is illustrated by the testimony of one overseer who explained that the slave, Billy, "was first put at the house and very mildly treated but nothing could be out of him," after which Billy was "put in the field he would leave his work and runaway without any cause he was then whipped but still nothing could be got out of him." ⁶⁴

A good master did not get overexcited. In *Borum v. Garland*, ⁶⁵ Garland hired Henry from Borum.

Henry was whipped by the patrol at the house of his wife, on the next day the plaintiff [Borum] at the request of the boy Henry gave him a pass to return to his wife's house: on that day or night the boy ran away without having returned to Garland's possession. ⁶⁶

The next day Garland and Borum met, and Garland "remarked that he did not blame plaintiff he expected under the same circumstances he would have acted similar but would have held himself answerable for his act." ⁶⁷ Borum, "whose nervous system was very much deranged remarked in a state of excitement that Garland

⁶² *Moran v. Davis*, No. 1561 (Ga. Sup. Ct. Records, Apr.) (available in *GDAH*, *supra* note 18), *aff'd*, 18 Ga. 722 (1855).

⁶³ *Kirk v. James*, drawer 348, No. 7049 (Adams Cir. Ct., Miss., Apr.) (available in *HNF*, *supra* note 13), *aff'd*, 29 Miss. 206 (1855).

⁶⁴ *McDermott v. Cannon*, No. 5706 (New Orleans, 1858) (available in *SCA-UNO*, *supra* note 19), *rev'd*, 14 La. Ann. 313 (1859).

⁶⁵ Bk. 79, No. 3192 (Macon County Cir. Ct., Ala. Sup. Ct. Records, Jan.) (available in *ADAH*, *supra* note 12), *aff'd*, 9 Ala. 452 (1846).

⁶⁶ *Borum*, bk. 79, No. 3129 (Macon County Cir. Ct., Ala. Sup. Ct. Records, Jan. 1846).

⁶⁷ *Id.*

should not have the boy again even if he came back.”⁶⁸ The jury found for Garland and the higher court affirmed.⁶⁹ By contrast, in *Maury v. Coleman*,⁷⁰ when Phillips’s slave, hired to Maury, ran away back to Phillips, “Maury demanded the slave being free from excitement and telling Phillips that the slave should go into no one’s hands but his own and should not be treated harshly.”⁷¹ Maury’s explanation of this encounter in his appeal convinced the Alabama Supreme Court to reverse the case in his favor.⁷² The Southern “Code of Conduct” required men of honor to treat equals as equals and inferiors as inferiors. To allow the ultimate inferior, a slave, to ruffle one’s calm, would be dishonorable.

Likewise, for a master to be duped by an inferior was perhaps the greatest dishonor of all. A good master could see through a slave’s trickery: “[D]id not the plaintiff order him to be whipped saying he pretended only to be deranged and that he would whip him out of his love fit, or words to that effect?”⁷³ Yet a master was not always in a hurry to administer punishment himself, as one hirer explained, “I did return him to his owner—the reason was that I did not want the trouble to correct him. I believe he was corrected by his master, who returned him to me”⁷⁴

As Kenneth Greenberg has shown, this style of Southern mastery both reflected and reinforced Southern statesmanship: “The statesman in the legislative hall and the master on the plantation exercised the same style of government.”⁷⁵ The ideal master and statesman was passive, eschewing overt shows of power; just as the statesman preferred to be *pressed* into service, the master bore the *burden* of his servants.⁷⁶ Further, “masters, like statesmen, also sought honor. They aimed to exercise authority through the public display of superior virtue and intelligence.”⁷⁷ The best master never inflicted punishment on slaves in anger. Instead, he used a low tone and avoided administering whippings himself, leaving it to

⁶⁸ *Id.*

⁶⁹ *Borum*, 9 Ala. 452 (1846).

⁷⁰ Bk. 174, No. 3063 (Ala. Sup. Ct. Records, Jan.) (available in *ADAH*, *supra* note 12), *rev’d*, 24 Ala. 381 (1854) (Coleman had bought Phillips’s note for the hire).

⁷¹ *Maury*, bk. 174, No. 3060 (Ala. Sup. Ct. Records, Jan. 1854).

⁷² *Maury*, 24 Ala. 381 (1854).

⁷³ *Perkins v. Hundley*, drawer 91, No. 25 (Adams Cir. Ct., Miss., May 1819) (available in *HNF*, *supra* note 13).

⁷⁴ *Id.* (deposition of Nimrod Dorsey on part of plaintiff).

⁷⁵ KENNETH S. GREENBERG, *MASTERS AND STATESMEN: THE POLITICAL CULTURE OF AMERICAN SLAVERY* 20-21 (1985).

⁷⁶ *Id.* at 21. See also GENOVESE, *supra* note 5, at 75-86 (“A Duty and A Burden”).

⁷⁷ GREENBERG, *supra* note 75, at 21.

an overseer. To allow himself to be inflamed by passion would bring him down to a lower level. This aloof style of punishment reinforced the master's authority in the same way as did a statesman's delivery of an oration. "Just as the oration, regardless of its subject, established the superiority of the orator, so the words of admonition to a slave established the superiority of the master."⁷⁸

This correspondence between mastery and statesmanship is the flip side of the relationship between slavery and dishonor, as uncovered by Orlando Patterson and others.⁷⁹ Slavery and honor were symbiotic in Southern culture; that is why contests over mastery mattered to white Southerners.

B. System

A recurrent theme in planters' published writings was the need for *system* in slave management. As one planter wrote, "the peace and harmony, if not the profits of the planter, might be greatly promoted by more rule and system in the regulation of the labor of the farm."⁸⁰ Southern agricultural periodicals constantly published various planters' "rules" for plantation management: rules for food, work hours, and so forth.⁸¹ As William W. Fisher, III observed, "the pride many Southerners took in the ability of masters and overseers to deal with most instances of slave 'misconduct' on their plantations was based partly on . . . their conviction that honor entails, among other things, 'policing one's own ethical sphere.'"⁸²

Judges, too, emphasized the importance of a good plantation manager having his own code of laws. As the Alabama Supreme Court noted in a case of an overseer who whipped a slave for theft, it was "quite as well, perhaps better, that . . . [the slave's] punishment should be admeasured by a domestic tribunal"⁸³ rather than

⁷⁸ *Id.* at 22.

⁷⁹ See generally ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY* (1982).

⁸⁰ Strait Edge, *Plantation Regulations*, 1 SOIL S. 20, 20 (1851), quoted in *ADVICE AMONG MASTERS*, *supra* note 42, at 41.

⁸¹ See, e.g., H.N. McTyeire, *Plantation Life—Duties and Responsibilities*, 29 DEBOW'S REV. 357, 361 (1860), quoted in *ADVICE AMONG MASTERS*, *supra* note 42, at 87 (presenting rules for proper plantation management and noting that "[s]ome masters have a code of laws as well understood as if written. Their household and plantation servants are well-governed communities. A tribunal exists where complaints are referred, grievances redressed, and disputes settled.").

⁸² William W. Fisher, III, *Ideology and Imagery in the Law of Slavery*, 68 CHI.-KENT L. REV. 1051, 1077 (1993) (citations omitted).

⁸³ *Gillian v. Senter*, 9 Ala. 379, 397 (1846).

by the state. Thus, the focus on "system" was not merely a reflection of Northern-style ideals of coolness, rationality, and modern managerial philosophy; rather, it reflected the belief in the honorable gentleman's ability to govern his own domain with system rather than passion.

This concept is illustrated in the case *Walker v. Cucullu*.⁸⁴ A.W. Walker bought a plantation from J.S. Cucullu, along with a gang of fifty-eight slaves. Walker sued because ten of the slaves "were afflicted with serious maladies, diseases, and defects of body."⁸⁵ The trial turned on the testimony of Walker's overseer, Antoine Landier, Sr., who had also been on the plantation for one month while Cucullu still owned it. He made the case that "this gang of negroes . . . appeared to him to be negroes enjoying all the benefit of health . . . a strong bodied set" when Cucullu owned them, but that when Walker took over, "it is his opinion that the said slaves have lost at least 25% of their value by the loss of their health and strength."⁸⁶ Landier contrasted the management prescribed by Walker with proper slave management:

[I]n the summer season negroes of well regulated plantations are turned out at work at 4 1/2 o'clock in the morning and returned to their quarter at 7 o'clock in the evening and in the summer are allowed of said time two hours or 2 1/2 to take their meals in winter they have one and a half for the same object . . . whilst the plantation belonged to Mr Cucullu, said Cucullu always allowed his negroes full time to take their meals . . .⁸⁷

Unfortunately, Walker did not live up to Cucullu's standard. Landier further testified that:

[W]hilst he was overseer of Walker's plantation and in the winter season he used to call the gang to work at about three and a half hours after midnight and that the gang were released from work at night not before nine or ten o'clock and this was done by the witnesses by order of the said Walker, the negroes says witness always took their meals in the opened field and whether the weather was good or bad, they were never allowed to go to their cabins to take their meals and were allowed just the necessary time to take said meals and witness says that since he has

⁸⁴ No. 326 (New Orleans, La. Sup. Ct. Records, Mar.) (available in *SCA-UNO*, *supra* note 19), *aff'd*, 18 La. Ann. 246 (1866). For a brief discussion of this case, see Walter L. Johnson, *supra* note 11.

⁸⁵ *Walker*, No. 326 (New Orleans, La. Sup. Ct. Records, Mar. 1866).

⁸⁶ *Id.*

⁸⁷ *Id.*

left overseeing said Walker's plantation, the same plan is always carried on⁸⁸

According to Landier, the contrast between Cucullu and Walker extended not only to food and working hours, but to discipline as well.

Witness says that Joseph Cucullu treated well his slaves, and when the said Cucullu's slaves for want of discipline misbehaved themselves he the said Cucullu used to shut them up in his lockup and rarely said witness was the said Cucullu had to make use of corporal punishment as his said slaves were orderly and well disciplined and that very little whipping took place on said plantation . . . Walker treats badly his negroes and that the corporal punishment made use by him in the chastisement of his slaves was by severe whipping and by locking them up in the cachot or dungeon and the said whipping consisted in making use of the strap or palette and very often inflicted as many as one hundred licks to one boy at a time⁸⁹

Not only was Walker too harsh a disciplinarian, but he transgressed the customary boundaries of time off allowed for slaves. Landier testified to the fact that:

[S]aid slaves were allowed neither sundays nor any other festival days, that they have not an hour to wash their clothes at any time that they are bound to wear their same clothes the whole time . . . are in a state of stealthiness inconceivable and the stench that comes from their bodies from their want of clothes from wearing unfit and dirty clothes . . . overworked, overstrained, and badly fed⁹⁰

Walker's ill treatment of the slaves had predictable effects, both physical and moral. Landier remarked that "the slaves belonging to said Cucullu and sold to Walker had no bad character or never ran away . . . since the sale . . . five negroes of the said gang ran away and this marronage was caused by the great restraint and severity of uncommon treatment inflicted" ⁹¹ Several other witnesses gave similar testimony. One witness testified that "he has seen the said Walker whip in a cruel manner his slaves and particularly a young girl 11 years old, whom he whipped or caused to be whipped at three different times the same day, eighty lashes each time and furthermore the said Walker overworked his negroes."⁹²

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

Thus, according to these witnesses, any illness or running away on the plantation since Walker bought it from Cucullu could be attributed solely to Walker's bad mastery.

Interestingly, the record of a criminal prosecution of A.W. Walker for "harsh, cruel & inhuman treatment towards his slaves," was in evidence for the civil trial.⁹³ Walker was found not guilty. The judge in the criminal case explained the flexible standard for punishment of slaves:

Here then is the measure of chastisement and the rule imposed to the master, the master can chastise; the slave is entirely subject to his will; the punishment must necessarily depend on the circumstances . . . if the case is a grave one, the chastisement will probably be severe, if the slave is of a robust constitution, the chastisement may be increased⁹⁴

In this case, the Louisiana court found Walker to be a good master, above all because he did not "strike[] at random with passion or anger"⁹⁵ but had a *system* for plantation management and discipline:

The Court now comes to the facts and what does it see, the Defendant has a pretty large gang of negroes on his plantation, he feeds them well, he clothes them well, he does not want that his overseers strike his slaves without consulting him, he never chastises his slaves without cause, they rise at daybreak, they have half an hour for breakfast and for dinner one hour in winter and one hour and a half in summer, they leave the field labour at dusk and are employed in the evening in putting order about the yard or quarters and in cleaning the mules . . . who can find fault in this manner of acting. . . . *It is childish to suppose that a master who is generally careful of his slaves . . . would have gone beyond the rules, which he has always imposed on him and so far would have exposed his own interests. This may be expected from a man who strikes at random with passion or anger and without cause, Mr Walker is quite another man . . .*⁹⁶

Walker v. Cucullu and *Louisiana v. Walker* presented two different stories about a good master. The first story was presented by the witnesses in the civil trial. The second story was presented by the judge who presided over the criminal trial of Walker. In the civil trial, the witness, Landier, argued that a good master gave his slaves enough to eat, did not work them too hard, gave them free

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* (emphasis added).

time in accordance with local custom, clothed them well, used only mild discipline, and, therefore, was able to rely on the general contentment of his labor force to keep problems to a minimum. Landier emphasized an important thread in the Southern ideology of mastery: the coincidence of humanity and "interest." In other words, humanity was good business. The judge in the criminal trial, sanctioning a much harsher regime, echoed other themes of the statesmanlike master. While he found evening work hours acceptable, though not in the field, he believed it most important that a master should have a regular system of "rules" which he "imposes on him[self]."⁹⁷ A master with such a system, who chastised only with cause, exercised supervisory authority over the whole plantation, never struck out in passion or anger, and would never break his own code—it would be "childish" to imagine that he would.⁹⁸ The judge's master here was the picture of the Southern statesman.

III. WHAT IS A BAD MASTER?

Perhaps the best way to reexamine the hypothesis that slavery law upheld paternalist ideals of mastery is to look at the contests over bad masters—masters who abused or neglected their slaves. Paternalists called for "reasonable correction"; deterring bad behavior through *certainty* rather than severity of punishment, never whipping out of passion or anger, and matching the severity of punishment to the crime.⁹⁹ Yet trials revealed the malleability of these standards. While those who abused slaves in passion or anger, out of proportion to their alleged crimes, were most likely to suffer some kind of penalty in court, as a general rule, the law on cruelty was quite lenient.

⁹⁷ *Id.*

⁹⁸ The jury accepted the witnesses' version and found for Cucullu. On appeal to the Louisiana Supreme Court, Walker's lawyer argued that evidence regarding Walker's slave management should have been excluded. The supreme court affirmed on other grounds. *Walker v. Cucullu*, 18 La. Ann. 246 (1866).

Both the judge's respect for a master's own code of laws and his assumption that a master who had such a code could be relied on to obey the law, has a modern counterpart in the Burger Court's approach to bureaucracies. As Mark Tushnet has shown, the Burger Court has distinguished between "self-contained bureaucracies governed by internal rules and internalized professional norms" and those, such as Southern prisons, which it views as haphazard and politicized. Mark Tushnet, *The Constitution of the Bureaucratic State*, 86 W. VA. L. REV. 1077, 1093 (1984).

⁹⁹ See *ADVICE AMONG MASTERS*, *supra* note 42, at 78-88 ("Discipline").

A. *Laxity*

Laxity by masters was of far greater concern than harshness. One planter observed that “[s]ome few persons are too strict with servants; but for every one who errs in this way, one hundred may be found who go to the opposite extreme, and let them idle away their time and do no more than half work.”¹⁰⁰ In published writings, planters expressed exasperation at the freedoms slaves had carved out for themselves: cultivating a garden patch, trading in an underground economy, drinking liquor, owning dogs or guns, visiting spouses “abroad” at night, visiting in town or on other plantations on Sunday, and staying away from work during Christmas week.¹⁰¹ They insisted that well-run plantations did not allow such freedoms.

Both witnesses and judges clearly saw laxity or neglect as a serious lapse in mastery. It was bad mastery to allow a slave to jump ship, to play with fire, to “run about,” to hire his or her own time, or to return to an owner on his or her own—in other words, to give a slave too much freedom.¹⁰² Witnesses often made comments implicitly disparaging a master’s management, such as “[a]ll she wanted was a master to look to her and not to allow her privileges to run about.”¹⁰³

In *Hill v. White*,¹⁰⁴ Sarah Hill placed her slave, Edmund, in James White’s hands to sell for a commission. Edmund ran away when White “carelessly and with the grossest negligence entrusted the said slave to the care of another slave and sent him thus accompanied to the wharf of steam boat landing of . . . New Orleans.”¹⁰⁵ The court found that “sending a slave nearly white down to the wharf under the charge of another slave is not the prudence which should characterize the action of an agent.”¹⁰⁶ Similarly, in *Barber v. Anderson*,¹⁰⁷ the judge ruled that a hirer giving a girl slave a pass

¹⁰⁰ W.W. Gilmer, *Management of Servants*, 12 S. PLANTER 106, 107 (1852), quoted in *ADVICE AMONG MASTERS*, *supra* note 42, at 44.

¹⁰¹ See, e.g., *id.*

¹⁰² In Louisiana, allowing a slave such freedoms was not an *absolute bar* to recovery. See *Boulin v. Maynard*, 15 La. Ann. 658 (1860).

¹⁰³ *Anderson v. Dacosta*, No. 996 (New Orleans, Feb.) (available in *SCA-UNO*, *supra* note 19), *aff’d*, 4 La. Ann. 136 (1849).

¹⁰⁴ No. 4489 (New Orleans, Mar.) (available in *SCA-UNO*, *supra* note 19), *rev’d*, 11 La. Ann. 170 (1856).

¹⁰⁵ *Hill*, No. 4489 (New Orleans, Mar. 1856).

¹⁰⁶ *Id.*

¹⁰⁷ (Chester County Ct., S.C. Sup. Ct. Records, Jan.) (available in *SCDAH*, *supra* note 40), *rev’d*, 17 S.C.L. (1 Bail.) 358 (1830).

to go back to her owner did not meet the standard of prudence for a hirer.

In warranty cases, sellers often portrayed buyers as lax masters. In *Ogden v. Michel*,¹⁰⁸ the seller answered a breach of warranty complaint by stating "that if [the slave] is now a thief or a runaway . . . the same had originated with him since he belonged to the said [buyer] and has been caused by the neglect and bad management of his master the [buyer]."¹⁰⁹ In this case, the seller charged that the buyer had allowed the slave, William, to hire his own time "in New Orleans, Baton Rouge and elsewhere . . . [and] upon steamboats."¹¹⁰ On cross-examination by Michel's attorney, the buyer's brother explained that he had:

[N]o knowledge of his permitting him to hire his own time other than giving him a writing to enable him to find a place . . . I have no knowledge of the plaintiffs permitting him to hire his time he did not do so at any time to my knowledge . . . but I have heard the plaintiff say that the Negro William once for a short time did hire his own time . . . the plaintiff on two occasions only to my knowledge hired the boy William on steamboats. . . . When the plaintiff came to New Orleans to reside in the winter of 1839 he left the negro William at Baton Rouge as I understood to take care of his house and lot at Baton Rouge and cultivate his garden¹¹¹

Similarly, in a hire dispute, William Randolph sued Israel Barnett, the owner of a steamboat, for the value and hire wages of a slave, Dempsey, who had been hired to the steamboat. Randolph accused Barnett of negligently allowing Dempsey too much freedom on board his boat, the result being that Dempsey was able to escape. Barnett answered that "the said negro in a fit of intoxication leaped from on board of the Steam Boat . . . and was drowned or escaped from the possession of said Defendant without any negligence or misconduct of him the said Defendant."¹¹²

In *Perkins v. Hundley*,¹¹³ Perkins complained that Hundley sold him a vicious and lunatic slave, Lawson. Hundley tried to

¹⁰⁸ No. 5127 (New Orleans, Mar.) (available in *SCA-UNO*, *supra* note 19), *aff'd*, 4 Rob. 155 (1843).

¹⁰⁹ *Ogden*, No. 5127 (New Orleans, Mar. 1843).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Randolph v. Barnett*, drawer 188, No. 38 (Adams Cir. Ct., Miss., Nov. 1832) (available in *HNF*, *supra* note 13). Unfortunately, only the interrogatories with no answers remain in this record.

¹¹³ Drawer 91, No. 25 (Adams Cir. Ct., Miss., May 1819) (available in *HNF*, *supra* note 13).

build a defense that Perkins had been a lax master, who had given Lawson too much freedom. In an attempt to weaken Hundley's defense, Perkins's attorney, on cross-examination, asked the overseer, Hugh M. Coffee, whether: "[T]he negro Lawson [was] permitted to sleep in the gin and to have a candle or fire therein? And if so, why was this permitted if he was subject to derangement?"¹¹⁴ Coffee answered that "[t]he plaintiff's negroes were plentifully fed and clothed and regular Work was required of them . . . Plaintiff was a very particular man in regard to Fire and did never permit this fellow Lawson or any of his Negroes to leave their cabins with fire or lights in the night to go to the gin or anywhere else."¹¹⁵

B. Cruelty

As we saw in *Walker v. Cucullu*,¹¹⁶ it was notoriously difficult to get a criminal conviction for cruelty to slaves, particularly of a master who beat his own slaves. William Fisher suggests that courts often justified this refusal to criminalize cruelty with the argument that "physical abuse of slaves was dishonorable behavior that would be condemned by the community" and that social sanctions were preferable to legal ones.¹¹⁷ Yet cruelty issues also came before courts in civil cases such as in the case of an owner, when witnesses accused the owner of causing a slave's bad behavior or illness by cruelty, and in the case of those other than the owner, when the owner brought a suit for civil damages for abuse to his slave. In both of these situations, it was more likely in the criminal context that the jury would be willing to agree that cruelty had taken place and witnesses would be willing to testify to cruelty. Nevertheless, the slave abuser could still justify the cruelty provided that he showed the badness of the slave.

It is worth remembering that the low judicial standard for cruelty to slaves was set in a legal context which permitted men to beat their wives, children, and free domestic servants. In divorce cases, the standard for cruelty in wife-beating remained the "rule of thumb" throughout the nineteenth century. Thus, whipping a woman with anything wider than a man's thumb was considered cruel. Courts hesitated to get involved, particularly in claims of mental cruelty, because of the perceived dangers of intruding into the domestic sphere which was the dominion of the master of the

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ See *supra* notes 84-98 and accompanying text.

¹¹⁷ Fisher, *supra* note 82, at 1077.

house. As for the children, a father had "power to chastise . . . [them] moderately."¹¹⁸ Children did have "rights which the law will protect against the brutality of a barbarous parent,"¹¹⁹ but, again, courts were very reluctant to interfere. Indeed, Tapping Reeve argued that the proper standard for a reviewing court should be that "the parent . . . be considered as acting in a judicial capacity, when he corrects"¹²⁰ Furthermore, the nineteenth-century master had the right "to give moderate corporal correction" to "apprentices and menial servants who are members of his family"; but "only while the master stands *in loco parentis*."¹²¹ Yet the standard for slave beating went beyond this "in loco parentis" standard of reasonable correction. It is hard to characterize as paternalist the outcomes of cases where any cruelty was condoned provided that the slave was "bad" enough.

In warranty trials, accusations of cruelty were something witnesses used against masters to disparage them and to suggest that they should be held responsible for slaves' illnesses or escapes, but these accusations rarely determined the outcome of the case. In one Georgia warranty case, *Mosely v. Gordon*,¹²² Silas Gordon sued Malcolm Mosely for selling him a boy slave, Daniel, who died of "dropsy." Mosely, however, contended that Daniel's disease was a result of cruel treatment by his new master. Mosely introduced a doctor who testified that "exposure to bad weather—over labor—late hours at night—with bad treatment and indifferent doctoring are well calculated to produce such a disease as Daniel's."¹²³ Several witnesses testified to "the general character and reputation of Silas Gordon the plaintiff for his [bad and cruel] treatment of his slaves."¹²⁴ The words "bad and cruel" are added to the transcript in pencil. Then the following words are crossed out: "[T]hat he was in the . . . unusual habit of treating his slaves with great cruelty—that he fed them badly, clothed them badly,

¹¹⁸ TAPPING REEVE, *THE LAW OF BARON AND FEMME, OF PARENT AND CHILD, GUARDIAN AND WARD, MASTER AND SERVANT* 286 (William Gould & Son 1867) (1816).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 374. This right to chastise servants remained in Reeve's 1846 edition.

¹²² No. 1392 (Ga. Sup. Ct. Records, July) (available in *GDAH*, *supra* note 18), *aff'd*, 16 Ga. 384 (1854).

¹²³ *Mosely*, No. 1392 (Ga. Sup. Ct. Records, July 1854). Gordon's attorney, on cross-examination, tried to get Dr. Ridley to admit that he had never examined Daniel and hence was unqualified to discuss his disease. Ridley countered that "there were many diseases which a physician could not understand properly without seeing them, and there were others which he could" understand without seeing them. *Id.*

¹²⁴ *Id.*

worked them hard and exposed them to labor at night, out in all kinds of weather”¹²⁵ Furthermore, the witnesses offered to prove that Gordon had been indicted for cruelty to his slaves.

Gordon, however, successfully objected to the admission of all the above evidence. Thus, on appeal, Mosely argued that Judge Warner, of Troup Superior Court, had erred in excluding evidence of cruelty. Justice Starnes of the Georgia Supreme Court rejected Mosely’s appeal, explaining that “evidence of *general character—reputation*; in other words, *hearsay* . . . [is] plainly inadmissible.”¹²⁶ In Georgia, at least, courts were reluctant to allow allegations of cruelty to determine the outcome of a warranty case.¹²⁷

Lawyers and litigants, however, still tried to use these allegations to their advantage. Sometimes, in a warranty case, the seller’s attorney would introduce allegations of cruelty that were not directly on point, but would impugn the credibility of the buyer. For example, in *Smith v. Meek*,¹²⁸ when Smith sued slave traders Meek and Johnson for breach of warranty in a sale of thirteen slaves, most of the testimony revolved around the question of whether the slaves had contracted the measles while they were stationed at Forks of the Road, Natchez, in Adams County, the major slave market of Mississippi.¹²⁹ The sellers posed the following cross-interrogatory to Smith’s witness, David H. Love: “Did you or not whip severely a slave by the name of Harry or Henry belonging to said Smith and cut his testicles and did he or not die from that cause?”¹³⁰ This question was clearly thrown in to impugn the witness’s credibility; all of the other interrogatories and cross-interrogatories concerned the illness of two slaves, Wiley and Betsy, who had apparently come down with the measles.

¹²⁵ *Id.*

¹²⁶ *Mosely*, 16 Ga. at 396.

¹²⁷ See *Hall v. Goodson*, 32 Ala. 277 (1858). In *Hall*, the trial judge excluded testimony from the owner’s witness who “had owned and governed slaves for the last forty years, and was well acquainted with the management of slaves, and knew what was reasonable and correct whipping for slaves” *Id.* at 279. Also excluded from evidence were the witness’s responses about whether the slave Simon had the appearance “such as a reasonable whipping would produce” after the hirer had whipped him with a cowhide and “whether the use of a cowhide in punishing a slave, so as to produce wales on the arms two or three inches long, and as large as his finger, which could be seen on him a year afterwards, was not an unusual and cruel whipping.” *Id.*

¹²⁸ Drawer 232, No. 766 (Adams Cir. Ct., Miss., Apr. 1838) (available in *HNF*, *supra* note 13).

¹²⁹ *Id.*

¹³⁰ *Id.*

The judicial approach to a master's cruelty was quite hands-off in Louisiana as well.¹³¹ An 1834 law created an exception to the rule that two runaway episodes proved a runaway habit if the slave ran away as a response to cruel and unusual punishment by a new master.¹³² In *Hagan v. Rist*,¹³³ a slave, John, had run away from the buyer, Hagan, twice within the two months after the sale and had been more than eight months in the state before the sale, giving rise to a presumption of a runaway habit.¹³⁴ The seller, Rist, invoked the 1834 law in defense, charging that the buyer's cruelty had caused the runaway episodes. The trial judge, however, refused to accept this excuse:

The evidence of Dr. Ker shews that a very severe flogging lacerating the back in its whole extent had been inflicted upon this slave when he was brought back to Defendant by the Plaintiff. But the evidence taken by Plaintiff shews that this flogging was inflicted after the slave had runaway many times, and could not therefore in any sense be considered as the cause of his running away. This case does not therefore enter into the intention and meaning of the proviso [that cruel treatment overcomes the presumption of a runaway habit]. . . . Perhaps it does not even enter into its strictest letter; because a flogging on the back although severe, can scarcely be considered an *unusual* punishment on a plantation for a slave who was, as proved a confirmed and obstinate runaway.¹³⁵

Cruelty became the central legal issue in a civil trial when someone other than the master beat or shot a slave. A typical owner's trespass complaint is presented in *Gillian v. Senter*.¹³⁶ The complaint alleged that:

¹³¹ See Judith K. Schafer, "Details Are of a Most Revolting Character": Cruelty to Slaves as Seen in Appeals to the Supreme Court of Louisiana, 68 CHI.-KENT L. REV. 1283 (1993) (examining criminal prosecutions for cruelty and finding little judicial protection for slaves against cruel masters).

¹³² LA. STAT. § 3 (Jan. 2, 1834).

¹³³ No. 4503 (New Orleans, La., June 1844) (available in *SCA-UNO*, *supra* note 19).

¹³⁴ LA. CIV. CODE art. 2505, bk. III, tit. 7, ch. 6, § 3 (1824) (codified as amended in LA. CIV. CODE ANN. art. 2527 (West 1992) (relating only to animals)).

¹³⁵ *Hagan v. Rist*, No. 4503 (New Orleans, La., June 1844) (available in *SCA-UNO*, *supra* note 19).

¹³⁶ Bk. 79, No. 3234, at 303-307 (Cherokee County Ct., Ala. Sup. Ct. Records, Jan.) (available in *ADAH*, *supra* note 12), *rev'd*, 9 Ala. 395 (1846). The supreme court reversed, noting that it was "quite as well, perhaps better, that [the slave's] punishment should be admeasured by a domestic tribunal [rather than by the State]." *Gillian*, 9 Ala. at 397. See also *Dearing v. Moore*, bk. 186, No. 4090 (Ala. Sup. Ct. Records, Jan.) (available in *ADAH*, *supra* note 12), *aff'd*, 26 Ala. 586 (1855) (Moore found not guilty for shooting runaway slave Bob who "said he would die before he was taken.").

[T]he form that the defendants with force and armes did seize and say hold of a certain Negro boy slave named Hamilton . . . did pull and drag the said slave about and then and there with their fists & sticks & cowhides & whips gave and struck the said slave a great many violent blows—and then not only greatly bruised and wounded the said slave but the said slave was thereby disabled for a long space of time to wit for the space of six days . . . from doing and performing his ordinary labor and in consequence of the many bruises and scars . . . rendered less valuable¹³⁷

In this case, the owner sued his overseer and his neighbor for beating his slave, Hamilton, sixty-one stripes while he was away in Kentucky after Hamilton was caught stealing from the neighbor. The jury assessed the overseer thirty-one dollars in damages and found the neighbor not guilty.

Overall, juries were quite skeptical of owners' complaints that overseers had abused their slaves. In suits which were appealed to a higher court, owners won in twenty-four cases and supervisors won in twenty-six cases at the trial level.¹³⁸ However, appellate courts were more sympathetic to owner's claims and overturned substantially more jury verdicts for supervisors than for owners. After appeal, owners had won thirty-three cases, and supervisors only half that number.¹³⁹

Juries' reluctance to award damages for injuries caused by beating a slave is illustrated by the fact that juries were willing to accept far-fetched medical evidence that something other than a beating caused death. In *Nelson v. Bondurant*,¹⁴⁰ Nelson (the hirer), his wife, and his overseer were all involved in a murderous struggle with the slave, Sam. Finally, according to the witnesses, Sam was subdued and whipped. Sam "suddenly died on Sunday morning after he had been whipped on Monday before."¹⁴¹ A doctor gave testimony that:

[T]he whipping alone did not cause the death . . . head striking a root on stump in the fall . . . might possibly have produced death . . . that the boy was exhausted to a considerable extent from his exertions running and resistance . . . that all contributed their

¹³⁷ Gillian, bk. 79, No. 3234, at 303-07 (Cherokee County Ct., Ala. Sup. Ct. Records, Jan. 1846).

¹³⁸ Gross, *supra* note 1, app. B at 300-09.

¹³⁹ *Id.*

¹⁴⁰ Bk. 186, No. 4031 (Ala. Sup. Ct. Records, Jan.) (available in *ADAH*, *supra* note 12), *rev'd*, 26 Ala. 341 (1855).

¹⁴¹ *Nelson*, bk. 186, No. 4031 (Ala. Sup. Ct. Records, Jan. 1855).

proportion, and that the whipping . . . did not of itself cause the death¹⁴²

The jury accepted the argument that Sam did not die from Nelson's cruel treatment, although the Supreme Court of Alabama reversed this verdict.¹⁴³

Many of the shooting cases involved slaves who fled, were chased by dogs, and then shot in the back. The jury was asked to determine whether flight constituted a form of resistance justifying death. It was difficult to argue that a fleeing man threatened one's own life, but, of course, in the minds of the jurors, he did threaten society at large. For example, in *Morton v. Bradley*,¹⁴⁴ John Morton, a slaveholder, gave James Holbert authority to shoot buck or large shot in hunting his slave, Spencer, with "trained negro dogs."¹⁴⁵ Holbert enlisted the assistance of John Bradley, who subsequently shot Spencer in the head. However, Dabney Duncan, a witness for Bradley, testified that "defendant said he meant to shoot him in the legs but just as the gun went off the negro fell or

¹⁴² *Id.*

¹⁴³ *Nelson*, 26 Ala. 341 (1855). Nelson was successful in this case because he presented a convincing case of Sam's savagery. Nelson illustrated that the trouble began when Sam disobeyed orders to stay home on Saturday night and, instead, went to visit his wife. According to one witness, Sam was "the most furious and worst looking negro he had ever seen"; Sam "was resisting to the utmost of his power. . . . That when he was partially untied he either did seize an axe or endeavor to." *Nelson*, bk. 186, No. 4031 (Ala. Sup. Ct. Records, Jan. 1855). The witness further testified that the "30 or 40 licks," administered by all the white men present, did not subdue him; and he even tried to cut Mrs. Nelson's face. *Id.*

In a similar case, Samuel Cox shot and killed a slave, Jake, who was the property of Andrew Brown. Brown sued Cox for \$2,000. Benjamin Swan testified for Cox that Jake had come to the door and:

[W]hen witness asked him what he wanted, he enquired did Mr. Stanton live there and as witness questioning him further he produced a paper which he said was a letter from his young mistress to Mr Stanton which she did not want every body to see, on examining the paper witness found it an old pass, dated Vidalia, witness then seized the negro, and a scuffle ensued

Brown v. Cox, drawer 354, No. 15 (Adams Cir. Ct., Miss., Nov. 1856) (available in *HNF*, *supra* note 13). Cox came to help Swan subdue Jake, and then shot him. In this case, Cox did not mount a strong case of Jake's viciousness and Brown won a \$1,500 verdict.

It is interesting to note that if Jake had been Brown's domestic servant, rather than his slave, Brown would have had no civil remedy because Cox would forfeit his life and estate as a felon; but there was a civil remedy for killing the enslaved Jake, precisely because the criminal punishment was so much less severe.

¹⁴⁴ Bk. 215, No. 4175 (Pickens County Ct., Ala. Sup. Ct. Records, June) (available in *ADAH*, *supra* note 12), *rev'd*, 30 Ala. 683 (1857). The Alabama Supreme Court, in remanding the case for further testimony on the issue of whether Spencer had actually threatened Bradley or had merely been fleeing, noted that "fleeing, even with a dangerous weapon in his hands, was not such resistance as authorized his shooting and killing." *Morton*, 30 Ala. at 686.

¹⁴⁵ *Morton*, bk. 215, No. 4175 (Pickens County Ct., Ala. Sup. Ct. Records, June 1857).

slipped into a hole that brought his head into range.”¹⁴⁶ Morton argued that the killing was not justified because Bradley was not in danger from Spencer. Bradley introduced evidence that a grand jury had refused to indict him for the crime and that he had followed the instructions Morton gave Holbert. The jury found for Bradley.¹⁴⁷

Merely pursuing runaways with dogs, however, never counted as cruelty. In *Moran v. Davis*,¹⁴⁸ a Georgia case, Gardner Davis hired Stephen from Augustus Moran. When Stephen escaped from Davis, Davis chased him with dogs “into the creek where he was drowned.”¹⁴⁹ The court charged that:

[U]nder ordinary circumstances the owner the hirer or the overseer of a slave, has the right to pursue the slave if he runs away with such dogs as may track him to his place of concealment, to follow him up until the slave may be captured, provided it be done with such dogs as can not lacerate or materially injure the slave.¹⁵⁰

The jury found for Davis.

C. Cruelty to Women

Cruel treatment could always be justified by proving that a slave was sufficiently incorrigible. Even cruelty to a woman was acceptable if she transgressed the line of propriety. In *Johnson v. Lovett*,¹⁵¹ Dinah, a dressmaker, “had not sent a Dress home which she was to send that day . . . she sent word back she would not send it until she got it done.”¹⁵² This act of “insolence,” sending John Lovett “insulting language and also his sisters in law,” justified Lovett’s beating Dinah severely.¹⁵³ One witness testified that Dinah, after the whipping, had “bloodblisters . . . on her rump[,] was bleeding profusely from her womb . . . [and] one of her teeth was

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ No. 1561 (Ga. Sup. Ct. Records, Apr.) (available in *GDAH*, *supra* note 18), *aff’d*, 18 Ga. 722 (1855). See also *Cooley v. Joor*, drawer 340, No. 36 (Adams County Cir. Ct., Miss., Nov. 1852) (available in *HNF*, *supra* note 13). In *Cooley*, the owner wrote to the hirer that “George appears to have run away from you and has been caught by the Negro Dogs and badly bitten and committed to the Jail of Woodville and now requires strict attention to make him able to attend business.” *Id.*

¹⁴⁹ *Moran*, No. 1561 (Ga. Sup. Ct. Records, Apr. 1855).

¹⁵⁰ *Id.*

¹⁵¹ No. 3415 (Ga. Sup. Ct. Records, July) (available in *GDAH*, *supra* note 18), *aff’d*, 31 Ga. 187 (1860).

¹⁵² *Johnson*, No. 3415 (Ga. Sup. Ct. Records, July 1860).

¹⁵³ *Id.*

knocked out.”¹⁵⁴ A doctor who examined her found her face bruised and her back whipped “but not as badly as lower down.”¹⁵⁵ Another physician, Dr. Knott, submitted an affidavit to the effect that he “considered her at the time [of his examination] seriously injured.”¹⁵⁶ However, witnesses to the whipping itself did not deem it cruel. One witness, S.G. Mitchell, testified that he had not seen Lovett personally whip Dinah, but he had seen Lovett order two male slaves to take hold of her. Mitchell noted that “she appeared to be making more noise than was necessary. After witness went off he heard her halloo murder.”¹⁵⁷ Another witness, WB Phillips, testified that he did see the defendant whipping Dinah “pretty severely,” but, when Lovett “pulled up her clothes to show WB Phillips how he had whipped,” it turned out that he “had given her a genteel whipping.”¹⁵⁸ The court looked favorably upon the fact that prior to administering the whipping Lovett “appeared to be trying to get her out of a public place to his house.”¹⁵⁹ In any event, Lovett won the suit.

Indeed, the trial records make quite clear that women were given no preferential treatment by overseers and masters. In cases where cruel whipping was at issue, solicitude for a slave’s gender arose in only one circumstance—when she was pregnant. Two cases, both Mississippi hire disputes, illustrate the contrast in treatment of non-pregnant and pregnant slaves.

In *McCoy v. McKowen*,¹⁶⁰ the defendant-hirer’s overseer whipped Mariah, who was not pregnant, with a “moderate-sized whip” 100 lashes; she died soon afterward. The defendant pointed out that:

[N]o slaveholder can say that this punishment was too severe—or that it exceeded the custom of the country. . . . Under the naval discipline code until recently modified, it was not at all unusual to impose upon the bare back of the *white* sailor at one time a hundred lashes with the cat o’nine tails—much severer than this negro whip.¹⁶¹

To compare a slave woman with a Navy man obviates the possibility of any chivalry. McKowen’s doctor also testified that Mariah

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ Drawer 99, rec. group 32, No. 6156 (June 1851) (available in Mississippi Department of Archives and History) [hereinafter *MDAH*], *rev’d*, 26 Miss. 487 (1853).

¹⁶¹ *McCoy*, drawer 99, rec. group 32, No. 6156 (June 1851).

might not have died from the beating, but rather “apoplexy intervened” and that Mariah “was of a habit predisposed to apoplexy,” as shown by the fact that Mariah “resisted and fought” her overseer, even taking “*violent hold of the private parts of his body*.”¹⁶² The jury found for the defendant-hirer. The Mississippi High Court of Errors and Appeals subsequently overturned the verdict on the sole ground that the hirer could not be held responsible for his overseer’s acts.¹⁶³

By contrast, in *Trotter v. McCall*,¹⁶⁴ the defendant-hirer whipped Betsey, a pregnant slave, 100 lashes on her bare back. Pregnancy brought forth the paternalist rhetoric mere black womanhood could not, for slave children were capital. Doctors testified to the dangers of miscarriage and Trotter offered a paean to the immorality of so mistreating a pregnant slave “for not other cause than making an attempt to runaway.”¹⁶⁵ Trotter hypothesized that “suppose under similar circumstances a man should hire out his Daughter . . . and the party to whom she was hired should give her one hundred lashes on the Bare Back . . . ought the father to pay Damages for refusing to surrender his daughter . . . I think not.”¹⁶⁶ McCall sued Trotter for detaining Betsey when she fled to him, and the jury awarded McCall \$100 in damages. The High Court of Errors and Appeals, however, reversed, noting McCall’s actions justified fears about “injury to the slave, who was then in a delicate condition peculiar to females.”¹⁶⁷

In *Thornton v. Towns*,¹⁶⁸ a number of slaves were hired to work in construction—an eight or nine-year-old boy, a man, and three women. The owner, Jesse Thornton, had reclaimed possession of the slaves prior to the hire term’s expiration and charged Andrew Towns with cruelty and “inhuman” treatment. Towns sued out a possessory warrant to recover the slaves and Thornton filed a bill to enjoin the warrant, alleging that Towns’s cruelty justified his keeping the slaves. Thornton’s bill alleged that:

[Towns] has forced the negro woman Chena while laboring under attack of rheumatism when she was unable to go and to

¹⁶² *Id.*

¹⁶³ *McCoy*, 26 Miss. 487 (1853).

¹⁶⁴ Drawer 100, rec. group 32, No. 6301 (Nov. 1851) (available in *MDAH*, *supra* note 160), *rev’d*, 26 Miss. 410 (1853).

¹⁶⁵ *Trotter*, drawer 100, rec. group 32, No. 6301 (Nov. 1851).

¹⁶⁶ *Id.*

¹⁶⁷ *Trotter*, 26 Miss. at 412.

¹⁶⁸ No. 3869 (Ga. Sup. Ct. Records, Jan.) (available in *GDAH*, *supra* note 18), *aff’d*, 34 Ga. 1225 (1865).

the great damage of said negro, and for cruel treatment to negro boy Golding by whipping and threatening to hang with a rope which whipping was excessive and cruel. By refusing to allow Ellen one of the negroes any time to attend to and suckle her infant child or of furnishing any nurse for the same, the said child having been born during the last year, and by his inattention to the infant children he suffering them to remain by themselves and without any person to attend to them, so much so that on one occasion one of the children to wit Julia's youngest child and infant fell into the fire and seriously damaged its arm by forcing the said woman Julia to hunt hogs on Sunday the 27 day of November and leaving her child for the whole or a large portion of the day without nursing it¹⁶⁹

Andrew Towns denied treating the slaves cruelly, "but on the contrary thereof he asserts unequivocally that he has treated them kindly and considered their wants and necessities more closely and conscientiously than complainant did" and, instead, accused Thornton of having neglected his own slaves "for that when they first came to Respondent's possession they were badly clad, some of them in tatters."¹⁷⁰ Towns explained that he only put Chena back to work during her pregnancy because "the doctor said she would improve if she got busy so he told her to get up and go to work" and that Chena then ran away and stayed in the woods for three or four weeks before returning to her original owner, Thornton.¹⁷¹ Towns claimed that he subsequently let her "lay up" for several more weeks and that he never "touched her a lick in his life."¹⁷² Towns explained his beating of the boy, Golding, as punishment for the boy having broken into the smokehouse. According to Towns, he:

[G]ave . . . [the boy] a moderate flogging to make him tell the truth as to what negro was with him . . . [and when the boy] would not tell truth . . . [Towns] told him in a gesting manner that if he did not tell the truth he would hang him . . . [Towns] says that no marks of the whip were left upon him and that the flogging was in Respondent's opinion more moderate than it should have been.¹⁷³

Towns also denied Thornton's charges that he did not allow Ellen to care for her baby, on the ground that "there was an old negro woman and two little negroes besides Respondent's wife to look

¹⁶⁹ *Thornton*, No. 3869 (Ga. Sup. Ct. Records, Jan. 1865).

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

after the child.”¹⁷⁴ The lower court refused Thornton’s injunction and allowed Towns to recover the slaves. The Georgia Supreme Court did not disturb the verdict.¹⁷⁵

D. *Going Too Far*

It was possible for owners to win against hirers if the hirer did not build a solid case supporting the slave’s vice. In one unreported Louisiana case, an owner recovered for cruel treatment when it led to the suicide of a slave hired to a steamboat as a fireman. The owner, also a fireman, accused the captain of the “Yalla Busha” of treating David so badly that he was driven to jump overboard. The owner’s complaint alleged:

[T]hat on the trip of said boat from New Orleans to Shreveport, said negro was taken sick with the fever . . . the negro was then forcibly compelled to go to work which he did but shortly afterward being exhausted by the heat of the fire he went back to his bed, when the engineer following the order of the captain went for him and whipped him back to the furnace and on the way said negro attempted to jump overboard, then the engineer forced him to go to work again but said negro being exhausted and unable to bear this cruel treatment jumped overboard and was drowned¹⁷⁶

The trial judge juxtaposed a paternalistic horror at this maltreatment with a concern for the property loss. He stated that “[b]esides the immorality and impropriety of the odious act which caused a man’s death, the perpetrators of that outrageous deed are liable unto the master for his pecuniary loss”¹⁷⁷

In *Townsend v. Jeffries’ Adm’r*,¹⁷⁸ an owner recovered for cruelty to his slave, Lewis, by a mob of white men. The recovery was based on numerous factors—an unrelated white witness testified on his behalf, the men had no contractual relation giving them power over the slave, and the beating was administered in a cruel

¹⁷⁴ *Id.*

¹⁷⁵ *Thornton*, 34 Ga. 1225 (1865).

¹⁷⁶ *McKinney v. “Yalla Busha,”* 3 La. Ann. xi (New Orleans, June 1848) (available in *SCA-UNO*, *supra* note 19) (appeal unreported).

¹⁷⁷ *Id.* On petition for rehearing, the steamboat captain argued that “[t]he slave being beaten, not violently but moderately, committed suicide . . . the suicide was not the consequence of the chastisement, but of the sullen and unmanageable temper of the slave.” *Id.* There is no record of whether he won on appeal. See also *McNeil v. Easley*, No. SG2803 (Marengo County, Ala. Sup. Ct. Records, Oct. 1850) (available in *ADAH*, *supra* note 12) (holding that “inhuman treatment” by a hirer justified the owner keeping a slave who escaped and returned to him).

¹⁷⁸ Bk. 174, No. 3068 (Ala. Sup. Ct. Records, Jan.) (available in *ADAH*, *supra* note 12), *aff’d*, 24 Ala. 329 (1854).

and unstatesmanlike fashion.¹⁷⁹ The defendants contended that Lewis had stolen and killed some hogs. According to one witness, Admiral Dale:

I saw them all—They came to the house of Willis Routt & wife where I live, on horseback, some of them had large hickory sticks, and Daniel Curry had a heavy Bull whip, one of the largest I ever saw, they called me out and I went down to the gate where they were. I did see the said defendants commit a trespass on said negro slave named Lewis, the property of said Alexander Jeffries dec'd on or about May 15 1848 on the premises of sd Estate.¹⁸⁰

Townsend's appeal rested on the attempt to exclude Dale's testimony, because of the words "did see the said defendants *commit a trespass*," which Townsend argued were impermissibly conclusory.¹⁸¹ Dale went on to recount that Townsend had accused four of the estate's slaves of killing his hogs. Dale challenged Townsend to prove the slaves' guilt so Townsend summoned Harrison Curry, who claimed that he had found "some negroes" by the hogs' pen, who ran from him. Dale expressed his disbelief, stating that:

I asked him if the negroes were riding or walking; he said he could not tell. I replied the moon near her full, a bright moonlight night, and you could not tell whether they were riding or walking? I then observed his evidence proved nothing against the negroes. I had called up some 8 or 10 of the negroes, and among them Lewis, Jacob, Solomon and Henry whom they charged with killing the hogs¹⁸²

At that point, Dale questioned the slaves, suggesting that he would take their word over that of Edmund Townsend. Townsend reacted violently. Dale recounted that:

I called on one of the negroes named George to state where Lewis was on the night the hogs were killed. George commenced saying that Lewis was in his mothers cabin sick, when Edmund Townsend jumped up, and with a large hickory stick raised, told him to shut his damned big mouth or he would split his damned brains out, and told him to clear himself a damned son of a bitch, and drove him off. He said he would have them whipped—if he couldn't do it he would have them before a Justice of the Peace.¹⁸³

¹⁷⁹ *Townsend*, bk. 174, No. 3068 (Ala. Sup. Ct. Records, Jan. 1854).

¹⁸⁰ *Id.*

¹⁸¹ *Townsend*, 24 Ala. at 331.

¹⁸² *Townsend*, bk. 174, No. 3068 (Ala. Sup. Ct. Records, Jan. 1854).

¹⁸³ *Id.*

Dale begged Townsend to wait until the owner's return, but "Edmund Townsend swore he would whip them *then*."¹⁸⁴ Townsend's brother, Parks, "said he thought they ought to have a light whipping."¹⁸⁵ Meanwhile, Dale saw the two Currys "sitting on the fence plaining a thong to the Bull whip."¹⁸⁶ Then, the Currys and Samuel Townsend, Jr. went out to where the slaves were, "leaving me arguing with Edmund Townsend and trying to persuade him to drop the matter."¹⁸⁷ When Edmund Townsend joined the rest, Dale "remained alone with my head hung down, not knowing what to do, and for the first time in a long life felt intimidated."¹⁸⁸ When he heard cries and "the crack of the whip," he went out to find:

Parks Townsend with Jacob tied on the lane, and Sam Townsend Jr and Harrison Curry were in pursuit of Solomon and Henry who had ridden off on their horses. . . . I found Daniel Curry whipping Lewis and Edmund Townsend standing behind him. Lewis' hands were tied together above his head, to the body of a small tree, with his face to the tree, his feet were also tied together, and a very large rail was placed between his legs and on the rope to confine his feet to the ground. His belly was against the tree and he was so tied that he could scarcely move. They had whipped him till the blood was streaming down his back.¹⁸⁹

Dale tried to stop Curry, who did not stop until Dale "put my hand into my pocket as if I were armed."¹⁹⁰ After Dale made another slave untie Lewis, "Edmund Townsend continued in a great rage and said that if he caught any of the negroes of this place on his premises, damned if he didn't shoot them or have them shot."¹⁹¹ At this point, Lewis "had some 8 to 10 severe gashes on his back and hips in some of which I could bury my finger."¹⁹²

The cruelty of this near-lynching impressed both jury and judge in part because of the manner in which it was carried out. Edmund Townsend *would not wait*; he whipped in passion and anger; he would not pretend at even a semblance of a "domestic tribunal" to discover the perpetrator of the hog-killing; and he did not care about fitting the punishment to the crime or the criminal.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

This mob behavior obviously offended the jury's sense of masterly conduct.

On the other hand, a hirer or master might have gotten away with what was a "trespass" by Edmund Townsend and his henchmen. The standard for a hirer seemed at once higher for good treatment and more lenient for cruelty, mirroring the more obliquely articulated standard for mastery—masters should be good, but, provided they ran their own show by their own code, could get away with amazing cruelty. Hirers, legally put in the position of masters, were allowed the same standard, but neighbors, common carriers, and other whites were not.¹⁹³ They were neither expected to watch over slaves the same way as masters and hirers, nor allowed to beat them to death. Of course, as in *Nelson v. Bondurant*,¹⁹⁴ if other white witnesses testified that death was accidental, juries would accept it. However, if other white witnesses testified to the abuser's passionate irrationality and inhumanity, that was going too far.

CONCLUSION: CONSTRUCTING WHITENESS

Just as "private law" disputes over slaves helped to create the meaning of blackness through the stories parties told about black character, they also helped to establish the cultural meaning of whiteness. To be a white man in Southern culture involved a set of meanings about honor and mastery, which were contested by litigants and witnesses in trials over the warranty and hire of slaves. If these cases turned only on the question of whether a man was a good paternalist, only the most devout Christian would have cared. But because the statesmanlike master represented the proper way to live up to the honorable "Code of Conduct" of Southern gentlemen, disciplinary style and plantation management became arenas of conflict. The volume of literature on Southern planters' shelves devoted to plantation and slave management suggests the importance of these conflicts to the culture as a whole.

The cases also show the symbiosis of definitions of black and white character. It comes as no surprise to the good Hegelian that blacks and whites should each have been defined in terms of the other. Wherever the argument appeared that black character depended on management by a white man, then that white man's

¹⁹³ See, e.g., *Tillman v. Chadwick*, 37 Ala. 317, 318 (1861) ("The hirer of a slave . . . is, for the . . . [hire term], armed with the power of the owner.").

¹⁹⁴ Bk. 186, No. 4031 (Ala. Sup. Ct. Records, Jan.) (available in *ADAH*, *supra* note 12), *rev'd*, 26 Ala. 341 (1855); see *supra* notes 140-43 and accompanying text.

character depended on showing the other sources of black character.

Yet, just as with slave character, the definitions and the arguments were not monolithic. Witnesses and litigants used descriptions of good and bad masters to gain advantage in disputes between buyers and sellers, hirers and owners. Judges, however, reserved paternalist language for the project of making hirers into substitute masters for a term. Likewise, while parties in the courtroom painted a picture of the good master as reasonable, detached, and humanitarian to the extent that it made good business sense, judges emphasized the aspect of Southern ideology that called for masters to govern their domains according to a system, preferably with a code of laws and a "domestic tribunal." Finally, despite paternalist rhetoric against cruelty, the only cruelty that led to liability, as a rule, was that committed by those other than masters or hirers, in a manner that violated ideals of statesmanlike mastery, or that committed against a pregnant woman.

Northern abolitionists always said that the worst thing about slavery was how it depraved white men's character. Slaveholders defending slavery tried in various ways to disprove this accusation and even to show that white character was improved through governing. By the last several decades before the Civil War, most Southern slaveholders were keenly aware of the relationship between their role as masters and their character. The courtroom was one arena in which slaveholders and other white Southerners worked out their hopes and fears for themselves and their future.

