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SLAVERY, ANTI-SLAVERY, AND THE COMING OF THE CIVIL WAR

ARIELA GROSS

Enslaved African Americans who escaped to freedom wrote bitterly of the role of law in maintaining the institution of slavery. Harriet Jacob emphasized the law's refusal to act on behalf of slaves. The enslaved woman or girl had "no shadow of law to protect her from insult, from violence, or even from death." Frederick Douglass focused on the way law did act, turning human beings into property: "By the laws of the country from whence I came, I was deprived of myself – of my own body, soul, and spirit . . . " Whether through its action or inaction, slaves recognized the immense power of law in their lives.[1]

Law undergirded an economic system in which human beings were bought, sold, and mortgaged and a political system in which two sections of the United States coexisted profitably, one a slave society and one not. As we know, this coexistence did not last, and it is tempting to read back into the antebellum period an instability in the legal edifice supporting slavery that made its collapse inevitable. Yet, as both Douglass and Jacobs realized, the law worked remarkably well for a long period to subordinate human beings one to another, though not without considerable effort in the face of contradiction, internal conflict, and external challenge. Southern slaves and Northern abolitionists, in very different ways, posed a threat to the law of slavery, and it took work to overcome those threats. Ultimately, however, it was a bloody civil war, and not a legal process, that resolved the contradictions of human property.

Students of Southern history once supposed that law was largely irrelevant to African American culture, and to Southern culture in general. Most cultural historians of the nineteenth-century South have assumed that rituals

[1] Harriett Jacobs, *Incidents in the Life of a Slave Girl* (Cambridge, MA, 1987), 27; Frederick Douglass, "I Am Here to Spread Light on American Slavery: An address Delivered in Cork, Ireland, on 14 October 1845," *The Frederick Douglass Speeches, 1841–1846* (New Haven, CT, 1999).

of honor for whites and plantation discipline for blacks replaced law as the mechanisms to resolve conflict and punish wrongdoers. Thus, histories of white Southern culture emphasized duels, lynching, and master-slave relations. Literary sources, letters, and personal papers all painted a picture of a society governed primarily by what contemporary legal scholars would call "extra-legal norms." Studies of slave culture suggested that law had little influence on slaves' lives, because for most slaves, the master was the law. And so the legal history of slavery focused on the extraordinary situation – the fugitive to the North, the slave who killed her master – not slavery's everyday life.

But no longer. First, law was in reality pervasive in slavery – in the social construction of race, in the regulation of daily life, in the workings of the slave market, and in the culture of slaves, slaveholders, and non-slaveholding whites. Second, the great paradoxes of slavery and freedom in the antebellum republic were all framed precisely in terms of claims to legal rights: the right to property and the right to liberty. Slaves occupied a unique position in American society – as both human and property. In constitutional terms, slavery could be viewed simultaneously in terms of both liberty and property rights. Abolitionists emphasized the liberty of all Americans; slaveholders emphasized the property rights of all white Americans, including the right to own slaves. It is a distinctive feature of slavery in the American South – slavery embedded in a system of political liberalism – that its defense was full of the language of property rights. It was the legal-political language of property, indeed, that rendered slavery and liberalism compatible. Nor were the property rights arguments of slaveholders simply defensive; they were also used aggressively and expansively. Not only did they justify holding slaves in the South, they justified carrying them into the new territories to the West and North.

The language of rights was the only language most Southerners had available to define slavery. Thomas Reade Cobb's *Treatise on the Law of Negro Slavery* defined slavery in pure Lockean terms, as rights denied: "Of the three great absolute rights guaranteed to every citizen by the common law – the right of personal security, the right of personal liberty, and the right of private property, the slave, in a state of pure or absolute slavery, is totally deprived."[2] Through the denial of legal rights, the slave was put outside society.

Thus, we can see that law worked on two levels during the antebellum era: below the radar, law facilitated the routine functioning of the slave system and mediated the tensions among slaves, slaveholders, and

[2] Thomas Reade Cobb, *An Inquiry into The Law of Negro Slavery in the United States of America (1858)*, §86, 83.

non-slaveholders. Above the surface, law was the object of contest between Southern pro-slavery and Northern anti-slavery forces over the future of slavery in the Union. Through a succession of constitutional "crises" involving slaves who fled to free states and migrants who brought slaves to new territories, competing views of the legality and constitutionality of slavery increasingly came into direct conflict in legal as well as political arenas. As slaves who resisted their masters or ran away pushed difficult issues of human agency into the courtroom, they also pushed the anomalous constitutional status of slavery into the forefront of political debate, adding to growing Northern fears of an ascendant "Slave Power" conquering not only political institutions but also the Constitution itself.

Increasingly central on both of these levels of legal activity was the ideology of race. The power of race in the law was highlighted in the Supreme Court's affirmation, in the *Dred Scott* decision, that even free blacks had no claim to rights or citizenship, but it had been building for years. By the 1820s, slavery had become the South's "peculiar institution." It had been successfully regionalized by Northern abolition despite pockets of continuing enslavement that contravened official law, like the slavery Dred Scott experienced on Army bases in the Northwest Territories. The regionalization of slavery brought the issue of "comity" between free and slave states to the fore, highlighting the political issues involved in every legal determination about the status of slaves brought to free jurisdictions. Race held the potential to explain and justify the line between free and unfree; in the slave states it mobilized non-slaveholding whites behind the institution of slavery, and in the free states it created a counterweight to abolitionist compassion for the enslaved. On the local level, Southern jurists' increasing preoccupation with justifying slavery in their jurisprudence led not only to legislative crackdowns on the regulation of free blacks and on many of slaves' "customary" rights but also to a more self-conscious effort to make law "paternalist" and thereby to prove that slavery was the best possible condition for poor, childlike "negroes." Race was central to this new justificatory legal enterprise. Law became ever more the forum for telling stories about black character and, through it, white character.

The essential character of Southern antebellum society and its laws has been debated endlessly. Was it a pre-capitalist paternalist socioeconomic system inserted into a bourgeois capitalist world or a market society of profit-minded individuals pursuing individual gain? Was law an instrument of slaveholder hegemony, a facilitator of capitalist markets, an object of contest among many makers, an arena for battles over honor? Ultimately, these attempts at global characterization of either "the South" or "Southern law" are less useful to an understanding of the way legal institutions operated both as cultural forms and as technologies of power than close attention to the more mundane, daily ways that slaves and masters, slaveholders and non-slaveholding whites, buyers and sellers of slaves framed and waged their encounters with law. We can agree with Walter Johnson: "Neither structural contradiction nor hypocritical capitalism fully describes the obscene synthesis of humanity and interest, of person and thing, that underlay so much of Southern jurisprudence, the market in slaves, the daily discipline of slavery, and the proslavery argument."

I. THE EVERYDAY LAW OF SLAVERY

At the level of the day to day, in local trials, whites worked out their relationships with slaves and with one another *through* slaves. White men rarely faced criminal prosecution for striking slaves, but they quite often found themselves in court for civil suits regarding property damage to the slave of another. At trials, non-slaveholding whites had the chance to exercise power as jurors and as witnesses, telling stories about the character and mastery of defendants who were far more likely to be wealthy planters. Slaves had no officially sanctioned opportunity to exercise agency, but they too both consciously and unconsciously influenced outcomes in court, despite the dangers inherent in outright efforts at manipulation. Lawyers, finally, played the role of transmitters of culture as they traveled from town to town. They made their careers in the legal practice of the slave market and invested the fruits of their careers in the slave market. In all these ways, the institutions of slavery, law, and the market grew intertwined.

The growing power of race in Southern society shaped all legal confrontations; courts had the power to make racial determinations, and the stories told about racial character in the courtroom helped "make race." Despite the overdetermined quality of white Southerners' efforts to make the boundaries of race and slavery congruent, the indeterminacy of legal standards made some legal outcomes contestable. Courts, as arenas for shaping identities, lent some power to slaves.

Who Can Be a Slave? The Law of Race

By the early nineteenth century, it was well-settled law in every state that only a person of some African descent could be enslaved. One's appearance as a "negro" raised a legal presumption of one's enslavement, but this presumption could be rebutted by evidence of manumission, whiteness, or another claim to freedom. Most states passed statutes setting rules for the determination of "negro" or, more often, "mulatto" status, usually in terms of fractions of African "blood." Before the Civil War, most states also stipulated either one-fourth or one-eighth African "blood" as the definition of "negro." Yet even statutory definitions such as these could not resolve disputes about the racial identity (and hence, vulnerability to enslavement) of many

individuals. Often, they just pushed the dispute back a generation or two as courtroom inquiry turned from the racial identity of the individual at issue to her grandmother. Still, the question remained: how could one *know* race?

In practice, two ways of "knowing" race became increasingly important in courtroom battles over racial identity in the first half of the nineteenth century, one a discourse of race as "science" and the other of race as "performance." During the 1850s, as the question of race became more and more hotly contested, courts began to consider "scientific" knowledge of a person's "blood" as well as the ways she revealed her blood through her acts. The mid-nineteenth century thus saw the development of a scientific discourse of race that located the essence of racial difference in physiological characteristics, such as the size of the cranium and the shape of the foot, and attempted to link physiological with moral and intellectual difference. Yet the most striking aspect of "race" in trials of racial identity was not so much its biologization but its performative and legal aspects. Proving one's whiteness meant performing white womanhood or manhood, whether doing so before the court or through courtroom narratives about past conduct and behavior. While the essence of white identity might have been white "blood," because blood could not be transparently known, the evidence that mattered most was evidence about the way people acted out their true nature.

Enslaved women suing for their freedom performed white womanhood by showing their beauty and whiteness in court and by demonstrating purity and moral goodness to their neighbors. White womanhood was ideally characterized by a state of legal disability, requiring protection by honorable gentlemen. In nineteenth-century legal settings, women of ambiguous racial identity were able to call on the protection of the state if they could convince a court that they fit this ideal of white womanhood. For example, in the "celebrated" freedom suit of Sally Miller, her lawyer sought to link white Southerners' confidence in the intangible but unmistakable qualities of white womanhood to identifiable acts of self-presentation and behavior his client performed:

"[T]he moral traits of the Quartronne, the moral features of the African are far more difficult to be erased, and are far more easily traced, than are the distinctions and differences of physical conformation," he informed the jury. "The Quartronne is idle, reckless and extravagant, this woman is industrious, careful and prudent – the Quartronne is fond of dress, of finery and display – this woman is neat in her person, simple in her array, and with no ornament upon her, not even a ring on her fingers."[3]

[3] Transcript of Trial, *Miller v. Belmonti*, No. 5623 (1845), Supreme Court Records, Earl K. Long Library, Special Collections & Archives, Univ. of New Orleans, La. "Quatronne" means person of one-fourth African ancestry, as in "quadroon."

The jury accepted the argument, and the Louisiana Supreme Court affirmed Sally Miller's freedom. Her case was covered heavily in local newspapers, and her trial narrative was repeated in novels and autobiographies by abolitionist ex-slaves, William Wells Brown and William Craft, as a dramatic representation of the power relations inherent in slavery, so little caring of the "sacred rights of the weak" that it could question even a fair, white maiden.

Men, on the other hand, performed white manhood by acting like gentlemen and by exercising legal and political rights: sitting on a jury, mustering into the militia, voting, and testifying in court. At trial, witnesses translated legal rules based on ancestry and "blood" into wide-ranging descriptions of individuals' appearances, reputation, and in particular a variety of explicit forms of racial performance: dancing, attending parties, associating with white people or black people, and performing civic acts. There was a certain circularity to these legal determinations of racial identity. As South Carolina's Judge William Harper explained, "A slave cannot be a white man." But this was not all that it seemed, for he also stated that a "man of worth, honesty, industry and respectability, should have the rank of a white man," even though a "vagabond of the same degree of blood" would not. In other words, "A slave cannot be a white man" suggested not only that status depended on racial identity but also that status was part of the essence of racial identity. Degraded status signified "negro blood." Conversely, behaving honestly, industriously, and respectably and exercising political privileges signified whiteness.[4]

Manumission and Free Blacks

As more and more people lived on the "middle ground" between slavery and freedom, black and white, they made it at once more difficult and more urgent for courts to attempt to draw those boundaries sharply and to equate race with free or unfree status completely.

By the 1830s, nothing had come to seem more anomalous to many white Southerners than a free person of African descent. Yet there was a substantial population of "free people of color" in the South, partly as a result of relatively lax manumission policies in the eighteenth and early nineteenth century. Legislatures hurried to remedy the problem, as free blacks were increasingly seen to be, with a plethora of laws governing manumission. Before Southerners felt themselves under siege by abolitionists, they had allowed manumission quite freely, usually combined with some plans for colonization. But by the 1820s serious colonization plans had died out in

[4] *State v. Cantey*, 20 S.C.L. 614, 616 (1835).

the South. In a typical Southern slave code of the latter decades of slavery, slaves could only be freed if they left the state within ninety days and if the manumitter followed other complicated rules. The rights of creditors were protected, and a substantial bond had to be posted for the care of the old or infirm freed slave.

Southern states also tightened restrictions on free blacks beginning in the 1830s and accelerating in the 1840s and 1850s. In part this was a reaction to the Denmark Vesey (1822) and Nat Turner (1831) insurrections, for Vesey was free, and Turner was a foreman, a near-free slave. But it was also part of the reaction, beginning in the 1830s, to anti-slavery sentiment in the North. In the late eighteenth century, most slaveholders spoke of slavery as a necessary evil – the Thomas Jefferson position. They were racists, but they did not pretend that blacks loved slavery; rather, they took the position that given current circumstances, slavery was the best that could be done. Blacks could not survive as free people in the United States – perhaps colonization would be a very long-range solution. By the 1830s, however, Southerners had developed a defense of slavery that pronounced it a positive good. For the most part, it was a racially based defense. According to Cobb and other pro-slavery apologists, blacks were inferior mentally and morally so that "a state of bondage, so far from doing violence to the law of his nature, develops and perfects it; and that, in that state, he enjoys the greatest amount of happiness, and arrives at the greatest degree of perfection of which his nature is capable."[5]

As Southerners articulated the positive-good defense of slavery more often in terms of race, they increasingly emphasized a dual image of the black person: under the "domesticating" influence of a white master, the slave was a child, a happy Sambo, as described by Cobb, but outside of this influence, he was a savage beast. As they strove to convince themselves and Northerners that slaves were happy Sambos, they more frequently portrayed free blacks as savages. With this emphasis on race, Southerners felt the need to draw the color line more clearly than ever. This placed the South's free people of color in an increasingly precarious position.

It is worth remembering that there were two quite distinct groups of free people of color. In the Upper South, where slavery was essentially dying out by the Civil War, and also in Maryland and Delaware, free black populations were largely the descendants of slaves manumitted during the Revolutionary era. As a group they were mainly rural, more numerous, and closer to slaves in color and economic condition than free blacks in the Lower South, who were light-skinned refugees from the San Domingo revolution, creole residents of Louisiana, and women and children freed as

[5] Cobb, *Inquiry into the Law of Negro Slavery*, 51.

a result of sexual relationships. Free blacks in the Lower South tended to be mixed racially; concentrated in New Orleans, Charleston, and a few other cities; and better off economically; some of them were large slaveholders themselves. The Upper South was more hostile to free blacks because they were more of an economic threat; in the Lower South, the cities recognized gradations of color and caste more readily.

Along with increased restrictions on manumission, the most important new limitations on the rights of free people of color were constraints on their freedom of movement. Free blacks were required to register with the state and to carry their freedom papers with them wherever they went. They were frequently stopped by slave patrols who mistook them for slaves and asked for their passes. If their papers were not in order they could be taken to jail or even cast into slavery. Mississippi required that, to remain in the state, free people of color be adopted by a white guardian who could vouch for their character. Increasingly, criminal statutes were framed in terms of race rather than status, so that differential penalties applied to free people of color as well as slaves, including banishment and reenslavement. In most of the new state constitutions adopted during the 1830s, free people of color were barred from testifying in court against a white person, voting, serving in one of the professions, or obtaining higher education. About the only rights that remained to them were property rights. Some managed to hold on to their property, including slaves. But by the eve of the Civil War, white Southerners had made every effort to make the line between slave and free congruent with the line between black and white. Free people of color and people of mixed race, both slave and free, confounded those efforts. It is no surprise that they were the target of so many legal regulations.

Slave Codes: "A Bill of Rights Turned Upside Down"

On paper, many aspects of slaves' lives were governed by slave codes. In practice, slaves were often able to carve out areas of customary rights contrary to the laws on the books. How, then, can we interpret the significance of the codes' detailed restrictions on every aspect of slave life? One way to read the statutes passed by Southern legislatures to regulate slavery, James Oakes has suggested, is as "Bill[s] of Rights [turned] upside down . . . a litany of rights denied." Slaveholders defined slavery in the terms they used to define freedom. Slaves had no right of movement, no right of contract, no right to bear witness in court, no right to own property.

The codes can also be read as timelines of every moment slaves resisted often enough to trigger a crackdown. The very specificity of the laws in Southern slave codes hints at this reading. Slaves were hiring out their own time and moving freely about towns frequently enough to merit a law; slaves

were selling spirituous liquors, holding dances, and gaming frequently enough to merit a law. County court records in Natchez, Mississippi, reveal that the most frequent criminal prosecutions of blacks or whites were for selling spirituous liquors to a negro, selling spirituous liquors without a license, and gaming. It is often possible to track insurrectionary scares simply by reference to the legislative enactments of a particular region. For example, after Nat Turner's revolt, South Carolina passed laws against burning stacks of rice, corn, or grain; setting fire to barrels of pitch, tar, turpentine, or rosin; and other very specific prohibitions.

The slave codes reveal the hopes and fears of slaveholders. Particularly after the Vesey and Turner revolts, whites feared the power of black preachers, particularly free black preachers, to move slaves to rebellion. Many states passed laws dealing overtly with slave conspiracies, punishable by death. Other statutes prohibited slaves from gathering for religious meetings or dances and prohibited slaves or free people of color from preaching.

State courts established enforcement mechanisms that made these legislative prohibitions real. Slave patrols, appointed by county courts or militia captains, were supposed to "visit the negro houses . . . and may inflict a punishment . . . on all slaves they may find off their owner's plantations, without a proper permit or pass . . . " Slave patrols were also supposed to "suppress all unlawful collections of slaves," catch runaways, and punish slaves for other infractions. Eighteenth-century slave patrols had tended to involve a wide cross-section of the white community, but by the 1820s higher status whites in some areas appeared to think the work beneath them and relied instead on their overseers. In general, however, local white elites stayed active in patrolling. Control of the Southern labor force was too important for them to delegate to others, and slave patrols were useful adjuncts to slaveholders' authority. Similarly, while many masters chose to punish their slaves on their own farms or leave punishment to their overseers, some local governments provided whipping houses where slaves could be sent for the customary thirty-nine lashes. Runaway jails housed escaped slaves who had been recaptured.[6]

Marriage and Family

The slave codes illuminate another important aspect of slavery: control over the slave's sexuality and family life. Slaves could not legally marry. Nor could a black slave marry or have sexual relations with a white female. The codes did not mention relations between white males and black slaves; slave status followed the mother and not the father. Despite the laws, whites

[6] Edward Cantwell, *The Practice at Law in North Carolina* (Raleigh, NC, 1860).

routinely recognized slave marriages – often even in courtroom testimony or in judicial opinions. Yet when it came to testifying against one another in court or charging manslaughter rather than murder in the case of a man who had caught his wife in bed with another man, judges refused to recognize slaves' marriage. In his treatise on *Slaves as Persons*, Cobb justified the non-recognition of slave marriage in racial terms, advancing the myth that slaves were lascivious and their "passions and affections seldom very strong," so that their bonds of marriage and of parenthood were weak, and they "suffer[ed] little by separation from" their children.[7]

In fact, family was a source of autonomy and retention of African culture for enslaved people. Some of the best historical work on slavery has brought to life the ways that slaves retained their own values despite slavery by uncovering the survival of practices of exogamy – that is, not marrying first cousins. White Southerners married their first cousins, but black slaves did not and persisted in the practice. Efforts to maintain African culture are also in evidence in naming patterns that sustained African names alongside owners' imposition of day-names and classical names, such as Pompey and Caesar. Native-born populations of slaves appear to have had more success in self-naming – keeping kin names, especially those of fathers, in a system that legally denied fatherhood – than the first generation. This suggests that family was a source of strength in slave communities. It was also a source of resistance and a means of communication. Slaves ran away to get back to families and conducted "abroad" marriages with spouses on other farms, creating a larger community of African Americans.

The importance of family made it at the same time a source of vulnerability: family breakup was a powerful threat that enhanced slaveholders' control. It was a threat backed by experience – one-fourth to one-third of slave families were separated by sale. Family was also a powerful incentive not to run away, especially for slave women. Enslaved women who ran with their children could not get far; far more common was truancy, staying out for several days and then returning.

Unmarried or married, enslaved women lived with the fear of sexual assault. Sexual assault on an enslaved woman was not a crime. While Cobb suggested that "for the honor of the statute-book," the rape of a female slave should be criminalized, such a statute was passed in Georgia only in 1861 and was never enforced. Cobb reassured his readers that the crime was "almost unknown," because of the lasciviousness of black women.[8] In one Missouri case in the 1850s, the slave Celia murdered the master who had been raping her since she was a young teenager. Her lawyer brought a claim

[7] Cobb, *Inquiry into the Law of Negro Slavery*, 39.
[8] Cobb, *Inquiry into the Law of Negro Slavery*, §107, 100.

of self-defense, using a Missouri statute that gave "a woman" the right to use deadly force to defend her honor. But the court in that case found that an enslaved woman was not a "woman" within the meaning of the statute; the law did not recognize Celia as having any honor to defend.

Slave law and family law also intersected in the law of property and inheritance. The most basic property question regarding slavery, of course, was the status of the slaves themselves as human property – how would that status be inherited? By the nineteenth century, it was well-settled law that slave status passed on from mother to child, guaranteeing that the offspring of masters' sexual relationships with their slaves would become the property of the masters. In transfers as well, the master owned the "increase" of his human property: "When a female slave is given [by devise] to one, and her future increase to another, such disposition is valid, because it is permitted to a man to exercise control over the increase . . . of his property. . . ."[9] Furthermore, as one Kentucky court put it, "the father of a slave is unknown to our law. . . ."[10]

By refusing to recognize slaves' marriages or honor their family ties, Southern courts and legislatures inscribed the dishonor of slaves into law. It should be no surprise that, in the immediate aftermath of emancipation, many freed African Americans saw marriage rights as central to their claims of citizenship. A black corporal in the Union Army explained to a group of ex-slaves, "The marriage covenant is at the foundation of all our rights. In slavery we could not have *legalised* marriage: now we have it . . . and we shall be established as a people."[11] By identifying marriage as the foundation of citizenship, the speaker dramatized the way slavery's denial of family ties had served to put slaves outside society and the polity.

In the Criminal Courts

Slaves who fought back against the injustices of their lives – especially against masters who raped them, beat their children, or separated them from their families – ended up in the criminal courts of Southern counties. In the famous case of *State v. Mann*, Lydia ran away from her hirer, John Mann, who shot her in the back as she fled. The question in the case was the right of the slave to life – to be safe from cruel treatment. This was the one right Cobb had said the law allowed the slave. Yet, Judge Thomas Ruffin,

[9] *Fulton v. Shaw*, 25 Va. 597, 599 (1827). [10] *Frazier v. Spear*, 5 Ky. 385, 386 (1811).
[11] Letter from J. R. Johnson to Col. S. P. Lee, 1 June 1866, Unregistered Letters Received, ser. 3853, Alexandra VA Supt., RG 105, National Archives, reprinted in Ira Berlin et al., eds., *Freedom: A Documentary History of Emancipation, 1861–1867, Series II: The Black Military Experience* (Cambridge, MA, 1982), 672.

in a stark statement of the nature of slavery, held that courts would not interfere with the owner's authority over the slave: "We cannot allow the right of the master to be brought into discussion in the Courts of justice."[12] Discipline was to be left to owners – or, as Mann was, hirers – and trust placed in their private interest and benevolence.

Four years later, in *State v. Will*, the same North Carolina court overturned Ruffin's decision. In this case, Will, like Lydia, resisted his master and walked away from a whipping. Like Lydia, Will was shot in the back. But Will fought back, stabbing his owner three times with a knife. Will was put on trial for murder, but the presiding judge, William Gaston, decided that he was guilty of the lesser crime of felonious homicide. In doing so, he upheld the principle that there were limits to the master's authority over a slave and that a slave had the right to resist the master who overstepped the limits. Gaston wrote that "the master has not the right to slay his slave, and I hold it to be equally certain that the slave has a right to defend himself against the unlawful attempt of his master to deprive him of his life."[13] Oakes comments, "It is pointless to ask whether Ruffin or Gaston correctly captured the true essence of slavery." The two cases "reveal the divergent trajectories intrinsic to the law of slavery – the one flowing from the total subordination of the slave to the master, the other from the master's subordination to the state."

Ordinarily, when a white person was put on trial for abusing or killing a slave, the grand jury would simply refuse to issue an indictment or the jury would turn in a verdict of not guilty. Some doctors gave abhorrent testimony offering alternative theories as to the cause of death when a slave had been whipped to death – that she might have had a heart attack or a sudden illness and that her vicious character and angry passion would predispose her to such a seizure. But an owner could win damages from a hirer, overseer, or other person who abused his slave in a civil case for trespass. In these cases, juries were much more willing to find that cruelty had taken place in order to compensate the slaveholder.

Civil cases could be a big deterrent, but not to a master for mistreatment of his own slave. Neighbors of Augustus W. Walker testified that they had seen him "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 they said Walker overworked his negroes." Walker also locked his slaves in a dungeon and frequently inflicted "as many as one hundred licks to one boy at a time" with a "strap or palette." He made his slaves work from three-thirty

[12] *State v. Mann*, 13 N.C. (2 Dev.) 263, 267 (1829).
[13] *State v. Will*, 18 N.C. 121, 165 (1835).

in the morning until nine or ten at night, without meal breaks or Sundays off. In a criminal prosecution for "harsh, cruel & inhuman treatment towards his slaves," Walker was acquitted. The judge explained the flexible standard for punishment of slaves: "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 increased . . ." In an accompanying civil case, in which Walker sued one Joseph Cucullu for selling him ten slaves "afflicted with serious maladies, diseases, and defects of the body." Cucullu argued that any problems with the slaves could be attributed to Walker's harsh treatment. However, the Louisiana court found for Walker in the civil case as well, above all because he did not "strike . . . at random with passion or anger," but had a *system* for plantation management and discipline. The most important thing was that a master should have a regular system of "rules" that he "imposes on him[self]."[14]

Criminal prosecutions of slaves like Will exhibit a trend toward greater procedural guarantees for slaves. The greatest unfairness slaves faced were white juries and the exclusion of slave testimony against a white person. Unfortunately, slave testimony was allowed against a black person, and it was not uncommon for slaves to be convicted on the basis of the testimony of other slaves. Yet slaves received real defenses, often by prominent lawyers, and their appeals and writs of habeas corpus were heard all the way up the state court systems. Procedural guarantees were grudgingly conceded by men who feared their consequences, but saw them as necessary to slavery in a liberal system. The conflicts between Lydia and Mann, Will and Baxter, Ruffin and Gaston, exemplified the problem of slave resistance in such a society. When slaves resisted, they forced the law to deal with them as people.

Slavery and Commerce

The courthouse was one of two institutions central to Southern culture., The other was the slave market. Civil trials involving slaves were routine events that brought townsfolk and planters together to fight over their human property and, in the process, to hash out their understandings of racial character. Through rituals invested with all the trappings of state authority, both white and black Southerners again and again made the journey from one institution to the other, slave market to courthouse.

[14] *Walker v. Cucullu*, No. 326 (1866), Louisiana Supreme Court Records, Earl K. Long Library, Special Collections & Archives, Univ. of New Orleans, La.

The slave markets that provided so many lawyers with their livelihoods – both as litigators and as slaveholding planters – did a vigorous business in the antebellum Deep South. Although importation of foreign slaves ended in 1808 as a result of constitutional prohibition, throughout the antebellum period the states of the Deep South continued to import slaves from the Upper South in ever greater numbers. Slave traders brought slaves from Virginia, Kentucky, and Tennessee to sell at the markets in Charleston, Natchez, and New Orleans. Overall, more than a quarter of a million slaves came into the Deep South from the Upper South each decade from the 1830s on. Local sales also accounted for a substantial part of the trade, probably more than half. Individual slaveholders sold slaves to one another directly or used local traders as intermediaries. And slaves were sold by the sheriff at public auction when a slaveholder or his estate became insolvent. In South Carolina, one state for which solid numbers are available, insolvency sales amounted to one-third of all slave sales.

Southern states periodically banned domestic importation, as Mississippi did, for example, from 1837 to 1846. Bans appear to have been prompted by both economic and security considerations: sectional tensions between older, established areas that had no need of more slaves and newer areas; temporary economic panics; and reactions to well-known slave insurrections. The bans, however, were always overturned and in any case made little impression on the trade. Mississippi was the first state to develop another form of regulation in 1831, again in reaction to the Turner rebellion in Virginia; it required imported slaves to register a "certificate of character" from the exporting state, guaranteeing that the slave was not a runaway or thief. This requirement was also quite simple to circumvent, as one trader explained: all one had to do was "to get two freeholders to go along and look at your negroes. You then tell them the name of each negro – the freeholders then say that they know the negroes and give the certificates accordingly."

Prices for slaves rose throughout the antebellum period, with the exception of the panic years of the late 1830s and early 1840s. "Prime male field hands" in the New Orleans market sold for about $700 in 1846; their price had more than doubled by 1860 to upward of $1,700. To own slaves was to own appreciating assets, as important as capital as for the value of their labor. Slaveholders were an economic class whose slave property was their key asset; they moved around frequently, investing little in towns or infrastructure. Even the high level of land speculation in Mississippi and Alabama suggests that slaveholders were not particularly attached to their land. Slaves were their most important form of capital.

Slaves were also the cornerstone of the Southern credit economy, for they were highly desirable as collateral for loans. Credit sales of slaves ranged from a high of 37 percent of all slave sales (1856) to a low of 14 percent (1859),

averaged 20 percent, and rarely had terms longer than twelve months; land mortgages lasted two to five years. Thus, slaves were the ideal collateral for debts. A complex web of notes traded on slaves existed, though it could, and often did, fall through in years of financial panic and high land speculation.

Other segments of the Southern economy also depended on slaves. Hiring, or leasing, provided an important way for both individuals and corporate entities, especially towns and cities, to obtain labor without making the major capital investment in slaves. Slave hiring may have involved as much as 15 percent of the total slave population. Hiring relationships also took place among private parties. Slaves, in fact, were fragmented property, with so many interest-holders in any particular slave that there was no such thing as a simple, unitary master-slave relationship for most slaves and most masters.

Market transactions, credit relations, and hires all led to disputes that had the potential to land the parties in court. In cases of hire, some owners sued hirers for mistreating a slave. More often, these cases resembled warranty suits in that hirers sued owners when the leased slave turned out to be "unsound," died, or ran away. In either situation, the trial revolved around the question of who should assume responsibility for the condition and character of the slave.

Most sales anticipated litigation at least indirectly by including an express warranty by the seller that a slave was "sound in body and mind and slave for life." Form bills of sale used by slave traders generally included spaces for the sex, name, and age of the slave and for the warranty, but left the language blank to allow variation. Some bills of sale explicitly excluded certain aspects of that particular slave's condition or character from warranty.

When slave buyers were dissatisfied with their purchases, they tried to recover for the problems directly. Usually this meant confronting the seller with a demand that he take back the slave and return the purchaser's money. Slave traders were more likely to settle such cases out of court than were private individuals. In their private writings, planters wrote of their frustration with the legal system. Benjamin L. C. Wailes, a prominent doctor and planter of Natchez, became embroiled in litigation when the life estate-holder of his plantation Fonsylvania sold and mortgaged a number of slaves without permission. After an unsuccessful suit for eight slaves sold through Miles and Adams, New Orleans commission merchants, he wrote in his diary: "Note. Never engage in a law suit if to be avoided or have anything to do with lawyers without a written agreement as to terms and compensation."[15]

[15] Benjamin L.C. Wailes, Diary, Sept. 2, 1859, available at Duke University Archives.

Buyers, sellers, owners, and hirers of slaves most often brought their disputes to the circuit courts of their county. They went to court primarily to win monetary damages. Their suits dominated the dockets of circuit courts and other courts of first resort at the county level. In Adams County, Mississippi, about half of the trials in circuit court involved slaves, mostly civil disputes among white men regarding the disposition of their human property. Of these civil disputes, a majority were suits for breach of warranty – for example, 66 percent of the appealed cases in the Deep South and 52 percent of the trials in Adams County. Suits based on express warranties could be pled as "breach of covenant" or as "assumpsit," both actions based in contract. In Louisiana, suits of this type were especially common, because the civil law codified consumer protections under the category of "redhibitory actions." One could obtain legal relief for the purchase of a slave who was proven to have one of a series of enumerated "redhibitory" vices or diseases, including addiction to running away and theft.[16] Although professional traders preferred cash sales or very "short" credit (notes payable in six months or one year), a significant number of buyers in local sales paid at least part of the slave's price with notes, some of them with much longer terms. In those cases, breach of warranty might be a defense to a creditor's lawsuit to collect the unpaid debt. Over the course of the antebellum period, litigation increased in the circuit courts because of the growing population and economy, but slave-related litigation increased grew even more quickly, indicating the rising economic centrality of slaves.

Commercial law appeared to be the arena in which the law most expected to treat slaves as property – in disputes over mundane sales transactions. When slave buyers felt 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 piece of machinery. In these and other commercial disputes, the parties brought into question and gave legal meaning to the "character" and resistant behavior of the enslaved, who persisted in acting as people. Take as an example *Johnson v. Wideman* (1839), a South Carolina case of breach of warranty, in which the buyer (Wideman) defended his note against the seller by claiming that the slave Charles had a bad character. According to Wideman, Charles was everything that struck terror into a slaveholder's heart: he owned a dog (against the law); he was married (unrecognized by law); he tried to defend his wife's honor against white men; he not only acted as though he were equal to a white man, he *said he wished he was a white man*; he threatened white men with

[16] "Of the Vices of Things Sold," La. Civ. Code, Bk. III, Tit. 7, Chap. 6, Sec. 3, arts. 2496–2505 (1824).

violence; he refused to work unless he wished to; and he did not respond to whipping.[17]

The plaintiff-seller's witnesses told a different story. According to them, Charles was a drunkard and an insolent negro only when he lived with Wiley Berry, a "drinking, horse-racing" man himself (from whom Johnson bought Charles). As one witness explained, "He had heard of [Charles's] drinking. He had borne the character of an insolent negro: but not in the time he belonged to the Johnsons." Others testified that Charles was humble and worked well, that when Johnson owned him, "he was not so indolent as when he belonged to Berry." Berry had exposed him to spirits and had whipped him frequently. Johnson's case rested on the contention that Charles was a good slave when managed well, and the only evidence of his insolence came from his behavior under Berry and under Wideman himself.

Judge John Belton O'Neall, Chief Justice of the South Carolina Court of Errors and Appeals, who presided over the trial on circuit, explained that he had instructed the jury as follows: "Generally, I said, the policy of allowing such a defence might be very well questioned. For, most commonly such habits 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 was, I told them, too often the case, in drunkenness, impudence, and idleness." O'Neall's "like master, like man" theory of slaves' character led him to find for the seller in this case.

Thus, even a court that wanted to exclude moral qualities from implied warranty, as did South Carolina's High Court of Errors and Appeals, still heard cases where the moral qualities of a slave were put on trial. In *Johnson v. Wideman* we see the range of behaviors and qualities permissible in a skilled slave. For example, when Charles confronted his first master, Wiley Berry, about Berry's behavior with his wife, he convinced Henry Johnson that he was in the right in this dispute with Berry. This case also offers a strong judicial exposition of a common theory of slave vice: "like master, like man." Johnson's argument, largely accepted by the trial judge and Justice O'Neall, was that Charles's misbehavior could be attributed to the freedom Berry gave him and the bad example Berry set. This theory removed agency from the slave, portraying the slave as the extension of his master's will.

By painting slaves as essentially malleable in character, courts could lay the responsibility on masters to mold the slave's behavior. Thus, sellers emphasized malleability and exploited the fear of slaves' deceitfulness to do so. Slaveholders constantly feared that slaves were feigning illness or

[17] *Johnson v. Wideman*, 24 S.C. L. 325 (Rice 1839).

otherwise trying to manipulate their masters; a good master was one who could see through this deceit and make a slave work.

Southern courts confronted the agency of slaves in other kinds of litigation arising out of commercial relationships as well, most commonly actions for trespass and other actions we would categorize today as "torts." Owners brought lawsuits against hirers, overseers, or other whites who had abused their slaves or to recover the hire price for slaves who had fallen ill or run away during the lease term.

All of the explanations of slave character and behavior outlined above – as functions of slave management, as immutable vice, as habit or disease – operated in some way to remove agency from enslaved people. Reports of slaves who took action, such as running away on their own impulse and for their own rational reasons, fit uneasily into these accounts. Yet because slaves did behave as moral agents, reports of their resistance persistently cropped up in court. At times, witnesses provided evidence of slaves acting as moral agents; on other occasions, the nature of the case required acknowledgment of slaves' moral agency.

Occasionally the courts explicitly recognized slaves' human motivations as the cause of their "vices." More often, these stories were recorded in the trial transcripts, but disappeared from the appellate opinions. Just as judges were reluctant to recognize slaves' skills and abilities, they feared giving legal recognition to slaves as moral agents with volition, except when doing so suited very specific arguments or liability rules. Recognizing slave agency threatened the property regime both because it undermined an ideology based on white masters' control and because it violated the tenets of racial ideology that undergirded Southern plantation slavery in its last decades.

Judges outside of Louisiana recognized slave agency most directly in tort cases, in which a slaveholder sued another for damage to a slave when under the other's control. Most commonly, the defendant in such a case was an industrial hirer or a common carrier, usually a ferry boat. Common carriers were generally held responsible for damages to property on board, which they insured. In *Trapier v. Avant* (1827), in which Trapier's slaves had drowned crossing in Avant's ferry, the trial judge tackled the question of "whether negroes, being the property damaged, they should form an exception to the general rule of liability in the carrier." He determined that slaves should not be an exception. "Negroes have volition, and may do wrong; they also have reason and instinct to take care of themselves. As a general rule, human beings are the safest cargo, because they do take care of themselves." According to the judge, the humanity of the slaves did not present enough of a problem to alter the general property rule. "Did this quality, humanity, cause their death? certainly not – what was the cause? The upsetting of the boat. who is liable fore the upsetting of the boat? The

ferriman; there is an end of the question." The dissenting judge, however, pointed out the problem created by slaves' human agency: if the slaves had run away or thrown themselves overboard before the ferryman had a chance to reach them, then holding Avant responsible would amount to converting his contract into a guarantee of the slaves' "good morals and good sense."[18]

In effect, not recognizing slaves as agents with free will meant holding all supervisors of slaves strictly liable for their character and behavior; recognizing slaves as agents, conversely, meant that supervisors were not required to "use coercion" to compel slaves' behavior. The first option created the equivalent of a warranty of moral qualities in the tort context, with all of its attendant difficulties. The second option threatened anarchy.

In the commercial, criminal, and family law contexts, courts wrestled with the dilemmas posed by human property. Lawyers and judges confronted slave resistance by promoting stories about the origins and development of slave character and behavior that removed rational agency from slaves. In this way, the law created an image of blackness as an absence of will, what Patricia Williams has called "antiwill."

Because the conflicts so often devolved into a debate over mutability or immutability of character, the focus inevitably shifted from slaves to masters. Mastery and the character of masters came into question directly under the dictum of "like master, like man," but indirectly as well in every decision about a slave's character that reflected in some way on her master's control, will, or honor. 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 men improved their character through governing. By the final 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.

II. SLAVERY, ANTI-SLAVERY, AND THE CONSTITUTION

Just as slavery was fundamental to the culture and economy of the South, slavery was pivotal to the compromises and conflicts of national politics throughout the early nineteenth century, and it was the central issue in the administration of a federal legal system. The constitutional compromise reached in 1787 did not hold. Increasingly, runaway slaves pressed

[18] *Trapier v. Avant*, Box 21, 1827, S.C. Sup. Ct. Records, South Carolina Department of Archives and History.

the legal system to confront the constitutional basis of slavery just as territorial expansion forced the political system to reckon with the conflict between slave labor and free labor. Pro-slavery and anti-slavery constitutional theories clashed as their advocates used the legal system to forward their political goals. The irreconcilability of their visions resulted in the ultimate constitutional crisis, civil war.

Anti-slavery constitutionalism faced an uphill battle in the American legal and political arena. From the controversy over anti-slavery petitions in Congress in the 1830s through the debates over fugitive slaves in legislatures and courts, radical abolitionist positions on the Constitution were increasingly marginalized. The contest over slavery became ever more the struggle of Northern whites to head off the "Slave Power's" threat to their own freedoms.

The Abolitionist Movement

The era between the American Revolution and the 1830s was the first great period of the abolitionist movement. The first white abolitionists were a group of Quaker lawyers in Pennsylvania who formed the Pennsylvania Abolition Society in 1775. These anti-slavery advocates were elite white men who worked within the political and legal system to achieve the gradual abolition of slavery. They used a variety of tactics, including petitioning state legislatures and Congress regarding specific issues, such as the domestic slave trade and slavery's westward expansion, and litigating cases of kidnapped free blacks or runaway slaves.

Although the lawyers who defended fugitives tried to work within existing law, rarely making broad arguments about the constitutionality of slavery, their legal strategies did lay the groundwork for a broader attack on the institution. Through such litigation, as well as campaigns for the rights of free blacks in the North, anti-slavery lawyers developed the legal and constitutional arguments that became the basis for abolitionism after 1830.

The Pennsylvania Abolition Society lawyers hoped that a buildup of judicial victories, not landmark cases, would eventually result in the national obstruction of slavery. Numerous complaints from African Americans concerned about kidnapping drove the Society's legal strategy, which initially targeted loopholes and technicalities in Pennsylvania's own Gradual Abolition Act in order to free slaves within and outside the state. A number of legal mechanisms were available to protect black people within the state's borders. The most important writ in the anti-slavery arsenal was the "great writ" of habeas corpus. The writ de homine replegiando was also used to win the release of captured fugitives and to gain jury trials for them. These writs required the recipient to "deliver the body [of a detainee] before" a

legal official. The writ de homine replegiando was even more useful than habeas corpus, however, because it required the fugitive to be released from custody until the resolution of the legal process. Abolitionist lawyers used these writs to fight for the freedom of individual slaves, case by case.

By contrast, black abolitionists developed strategies that sharply diverged from the legal activism of the early white abolitionists. Black anti-slavery activists used the early media, including pamphlets and newspapers, to appeal directly to the public, rather than merely lobbying and petitioning legislators. They also relied on social organizations such as churches and benevolent societies to disseminate information and build popular support. To further these activities, the American Society for the Free Persons of Color was formed in 1830, holding its first meeting in Philadelphia to discuss national tactics for combating racial prejudice and slavery.

By directly confronting the underlying racism of the colonization movement and demanding an end to slavery as well as rights for free blacks, black abolitionists spurred the advent of immediatism. White abolitionists in Massachusetts, especially William Lloyd Garrison and Amos Phelps, joined together with black activists to advocate "immediate" abolition and integration. Abolitionism stormed onto the national scene in the 1830s with the birth of a new national organization, the American Anti-Slavery Society. Two calls to action heralded the rise of militant anti-slavery: David Walker's 1829 *Appeal to the Colored Citizens of the World* and the first issue of William Lloyd Garrison's *Liberator*, on January 1, 1831. Walker's appeal exhorted African Americans to take up arms if necessary to fight slavery. In the inaugural issue of the *Liberator*, Garrison proclaimed, "I will not equivocate – I will not excuse – I will not retreat a single inch – AND I WILL BE HEARD."

The *Liberator* targeted all schemes for gradual emancipation, especially colonization. As criticisms of colonization's hypocrisy became more prevalent in the 1830s, many abandoned the movement and devoted themselves to immediatism: not only Garrison but Arthur and Lewis Tappan, Sarah and Elizabeth Grimke, Salmon P. Chase, Gerrit Smith, Theodore Dwight Weld, and many others. Black abolitionists had called for immediate abolition before the 1830s, but it was the trends among white abolitionist leaders in that decade that made immediatism a force in national politics.

The new wave of abolitionists fought for an end to segregated schools and other institutions within Northern states – winning important victories in Massachusetts – and began calling for mass action against slavery in the South. They drew in blacks and whites, women and men, establishing for the first time in an integrated movement. This new strategy of mass action revolutionized the legal work and legislative petitioning of early abolitionists. While abolitionists continued to represent fugitive slaves and

to petition legislatures, they refused to obey "political roadblocks or legal limitations" as their predecessors had. Instead they "used the people to circumvent the obstacles to abolition." Huge crowds of citizens who showed up at a trial might successfully keep a fugitive slave from being retried or "upset the cool course of the law [by] making an 'audience' for the judge and lawyers to contend with."[19] The American Anti-Slavery Society grew quickly in the 1830s, establishing 1,600 auxiliary branches by 1837 and collecting more than 400,000 signatures during the following year on anti-slavery petitions to Congress.

Southerners took the groundswell of 1830s abolitionism seriously. In response to the flood of anti-slavery petitions arriving on Congress's steps, Southerners responded with their own fierce legal and extra-legal action. A mob in Charleston, South Carolina, seized mail sacks containing American Anti-Slavery Society literature and burned them. John C. Calhoun endorsed a bill to prohibit the mailing of any publication "touching on the subject of slavery" to anyone in a slave state. These efforts to squelch free speech regarding slavery culminated in the "gag rule" controversy, in which Calhoun introduced numerous resolutions attempting to force the Senate's refusal of anti-slavery petitions.

Yet only a few years later, in 1840, the American Anti-Slavery Society split into factions, the political abolitionists forming the Liberty Party to directly effect their anti-slavery aims through political means and the Garrisonians continuing to insist that change could best be effected through public opinion. "Let us aim to abolitionize the consciences and hearts of the people, and we may trust them at the ballot-box or anywhere," declared Garrison.[20] During the 1840s, three anti-slavery groups emerged from the schism within the abolitionist movement, each with a different constitutional theory.

Pro-Slavery and Anti-Slavery Constitutional Theories

Of all of the constitutional theories of anti-slavery, the one that had the most in common with Southern perspectives on the Constitution was that of the ultra-radical William Lloyd Garrison. Southerners made the sound constitutional argument that the compact would never have been made if it did not recognize and support slavery; that the freedom of whites had been based on the enslavement of blacks, and that the Constitution protected property rights in slaves. Garrison declared the Constitution to be "a

[19] Richard S. Newman, *The Transformation of American Abolitionism: Fighting Slavery in the Early Republic* (Chapel Hill, NC, 2002), 144–45.

[20] *The Liberator*, March 13, 1840.

covenant with death, an agreement with hell" precisely for the reason that it *did* sanction slavery. Garrisonians, including Wendell Phillips, believed that slavery could not be overthrown from within the legal and constitutional order; extra-legal means would be required. Beginning in the 1840s, Garrison moved from his anti-political perfectionism to a constitutional program of disunion through secession by the free states and individual repudiation of allegiance to the Union.

Garrison's remained a minority perspective among abolitionists, but it was in some ways the most prescient view. Political and legal action within the constitutional system continued to be a dead end for abolitionists, who were continually put on the defensive by ever more aggressive and overreaching pro-slavery political forces wielding dubious theories of "nullification" – that the Constitution was a compact between states, which could "nullify" or withdraw from the compact whenever they chose.

The political appeal of the Southern rights argument to Southern nonslaveholders depended on several linked ideas, some of which also had resonance in the North, notably the notion of white man's democracy – that having a black "mudsill" class made possible greater equality among whites. Other Southern arguments, however, confronted the North and West with what looked like implacably expansionist claims, based in part on fear of what the South would be like without slavery – the threat that without the ability to expand its socioeconomic system into the territories, the South would be doomed to second-class citizenship and inequality in a Union dominated by an alliance of Northern and Western states. Under these conditions, Northerners for their part grew fearful that an expansionist octopus-like "Slave Power" would overwhelm and consume the free-labor North.

Within anti-slavery politics, radical constitutional abolitionists such as Frederick Douglas and Lysander Spooner began to argue after 1840 that, rather than endorse slavery, the Constitution in fact made slavery illegitimate everywhere, in the South as well as in the territories. Theirs was a minority position that relied on a textual reading of the Constitution, arguing that the document nowhere explicitly sanctioned slavery and that the "WRITTEN Constitution" should not be "interpreted in the light of a SECRET and UNWRITTEN understanding of its framers." The radicals argued that the federal government should abolish slavery in the states because it violated the Fifth Amendment due process guarantee, the Article IV guarantee of republican government, and other clauses of the Constitution. Spooner and Douglas also made originalist arguments about the founders' intentions to have slavery gradually wither away. They claimed that the slavery clauses of the Constitution had been written in such a way as to offer no direct support to the institution, even while satisfying

its supporters in the short term. According to this view, the Constitution had become perverted by acquiescence in pro-slavery custom, but its anti-slavery character could be redeemed by federal action: "The Constitution is one thing, its administration is another. . . . If, in the whole range of the Constitution, you can find no warrant for slavery, then we may properly claim it for liberty." Finally, the radicals relied on a natural law interpretation of the Constitution, insisting that it had to be read side by side with the Declaration of Independence and given the meaning that best expressed the ideals of the Declaration.[21]

The most popular anti-slavery position, held by moderate abolitionists like Salmon P. Chase, posited that the federal government lacked power over slavery, whether to abolish it where it existed or to establish it anew anywhere. Drawing on Lord Mansfield's famous decision in *Somerset's Case* (1772), they argued that slavery was established only by positive law and only existed in those places (the South) where it had been so created. The political theory that went along with this constitutional theory was that of "divorcement," the idea that slavery was dependent on support by the federal government and would wither away if separated from it. By 1845, divorce had given way to Free Soil, which in effect fully applied *Somerset* to American circumstance. This was the idea embodied in the Wilmot Proviso of 1846; it eventually became the Republican Party platform and the argument of Lincoln in his debates with Stephen Douglas. It was opposed by Douglas, whose theme of "popular sovereignty" held each new state could decide for itself whether to be slave or free. The Compromise of 1850 and the Kansas-Nebraska Act of 1854 embodied popular sovereignty's emphasis on state-by-state decision making, leading to terrible civil wars in the territory of Kansas between rival pro-slavery and anti-slavery governments, each with its own constitutions.

All of these constitutional theories came into direct conflict in a series of legal confrontations involving two sets of issues: the fate of fugitive slaves in free states and territories and the future of the territories themselves. The first set of controversies, regarding fugitive slaves, came to a head largely in state legislatures and courts, as Northern legislatures sought to protect fugitives and both Northern and Southern courts wrestled with the interpretation of those statutes and of the Fugitive Slave Laws passed by Congress to implement the Constitution's Fugitive Slave Clause. The second set of dilemmas, regarding the status of slavery in the Western territories, played out in Congress and in presidential politics in a series of short- (and

[21] Frederick Douglass, "The Dred Scott Decision: Speech at New York, on the Occasion of the Anniversary of the American Abolition Society," reprinted in Paul Finkelman, ed., *Dred Scott v. Sandford: A Brief History with Documents* (New York, 1997), 177, 181.

shorter) lived compromises. The two sets of controversies culminated and merged in the dramatic and infamous Supreme Court case of *Dred Scott v. Sandford* (1857), which represented the ultimate constitutionalization of political conflict – a case that the Supreme Court meant to resolve the conflict conclusively, but instead helped pave the way for war.

Personal Liberty Laws and the Rights of Fugitives in the North

Many slaves ran away, some with help from whites and free blacks; the so-called Underground Railroad had an estimated 3,200 active workers. It is estimated that 130,000 refugees (out of 4 million slaves) escaped the slave South between 1815 and 1860. By the 1850s, substantial numbers of Northerners had been in open violation of federal law by hiding runaways for a night. By running away, slaves pushed political conflict to the surface by forcing courts and legislatures to reckon with the constitutional problems posed by slaves on free soil. Later, during the war, slave runaways would again help force the issue by making their own emancipation militarily indispensable.

Southern slaves in the North – whether visiting with their masters or escaping on their own – raised a difficult issue of comity for the courts to resolve. Even so-called sojourning slaves could be considered free when they stepped onto free soil. The question of whether the Northern state should respect their slave status or whether the Southern state should bow to the rule became a heated issue throughout the states.

The state courts reached different answers to the question. The best precedent from the abolitionist standpoint was a Massachusetts case decided by Chief Justice Lemuel Shaw in 1836, *Commonwealth v. Aves*. Citing *Somerset's Case*, Shaw wrote that slavery was "contrary to natural right and to laws designed for the security of personal liberty." Therefore, any "sojourning" slave who set foot on Massachusetts soil became free; fugitives were the only exception. But *Aves* represented the peak of anti-slavery interpretation of comity. By the end of the 1830s, any agreement in the North about the obligations of free states to return slaves to Southern owners had dissipated. States had given divergent answers on the questions of whether legislation was necessary to secure the rights of masters and whether states could or should provide jury trials to alleged slaves.[22]

From the 1830s until 1850, many Northeastern states tried to protect Northern free blacks from kidnapping by slave catchers and to provide some legal protections for escaped slaves who faced recapture in the North. In most of New England, New York, New Jersey, and Pennsylvania, legislatures

[22] 35 Mass. 193 (1836).

passed personal liberty laws to limit the recovery of fugitive slaves from within their boundaries by forbidding the participation of state authorities or the use of state property in the capture of a fugitive. Other laws gave alleged runaway slaves procedural protections in court and created various obstacles to recovery by owners.

Some state statutes, such as that of Massachusetts, tied anti-kidnapping provisions to the writ of habeas corpus. One such law was the Pennsylvania personal liberty law, which gave rise to the famous Supreme Court case, *Prigg v. Pennsylvania* (1842). *Prigg* was a test case arranged by Pennsylvania and Maryland to determine the constitutionality of Pennsylvania's personal liberty law. For the Court, Justice Joseph Story held the Fugitive Slave Act of 1793 to be constitutional and therefore concluded that a Pennsylvania law prohibiting local collaboration with slave reclaimers was also unconstitutional. He read the Constitution with the assumption that the fugitive slave clause had been necessary to the compromise that secured the Union and the passage of the Constitution. Therefore, "seizure and recaption" of fugitive slaves was a basic constitutional right, and states could not pass laws interfering with that right. But *Prigg* left open important questions, some of which Story purported to answer only in dicta: Could states enact laws to obstruct recapture or provide superior due process to captured slaves? Did *Prigg* enshrine in American law, as Story later claimed, the *Somerset* principle that slavery was only municipal law? Justice Story's opinion argued that the power to pass legislation implementing the fugitive slave clause resided exclusively in Congress. Congress proceeded so to act in 1850, as part of the Compromise of 1850. For his part, Chief Justice Taney – concurring in *Prigg* – argued that the states, while they could not legislate to hinder recaption, could always enact measures to aid the rights of slaveholders to recapture fugitives.

Abolitionists were furious over the outcome in *Prigg*. Garrison wrote: "This is the last turn of the screw before it breaks, the additional ounce that breaks the camel's back!"[23] Yet many anti-slavery advocates used the essentially pro-slavery *Prigg* decision for their own purposes in the 1840s, picking up Story's hint that it could be read, or at least mis-read, to bolster the *Somerset* position, and insisting that free states must do nothing to advance slavery.

Northern states passed a new series of personal liberty laws in part out of increased concern for the kidnapping of free blacks given the lack of procedural protections in the 1850 federal Fugitive Slave Act, but also out of a growing defiance against the "Slave Power." For example, a new Pennsylvania Personal Liberty Law of 1847 made it a crime to remove a

[23] *The Liberator*, March 11, 1842.

free black person from the state "with the intention of reducing him to slavery" and prohibited state officials from aiding recaption. It reaffirmed the right of habeas corpus for alleged fugitives and penalized claimants who seized alleged fugitives in a "riotous, violent, tumultuous and unreasonable manner."[24] The Supreme Court overturned these laws in the consolidated cases of *Ableman v. Booth* and *United States v. Booth* in 1859, in an opinion by Justice Taney upholding the constitutionality of the 1850 Act and holding that a state could not invalidate a federal law.

Increasingly, slaveholding states specified that slavery followed a slave to free jurisdictions, whereas free states made the distinction between temporary sojourns, during which a slave retained slave status, and transportation to a free state or territory with the intent to remain, in which case the slave was emancipated. However, under the 1850 Fugitive Slave Law, blacks in any state, whether free or not, were in danger of being accused of fleeing from bondage. The law empowered court officials to issue warrants allowing alleged runaways to be turned over to any claimant with convincing evidence that the prisoner was a slave, without a trial. The law greatly enhanced slaveholders' power to recover their property anywhere in the country by annulling attempts by states to protect fugitives from recapture. Furthermore, the law allowed marshals to summon "bystanders" to help them, commanded "all good citizens" to "assist in the prompt and efficient execution of this law," and provided officials with an extra reward for determining the accused to be a fugitive.[25] Gangs of bounty hunters began kidnapping African Americans to sell southward. Captured blacks' opportunities to defend themselves were severely eroded. As many as 3,000 free blacks, fearing enslavement, headed for Canada, by the end of 1850. No longer could one be certain that free states were truly free; it now seemed to many Northerners as though the tentacles of the "Slave Power" reached to the Canadian border.

Comity – recognition of the validity of the laws of one state by the sovereign power of another – had seemed for a time to be a stable compromise between the rights of property and of liberty. Joseph Story wrote in 1834 that comity was rooted in "a sort of moral necessity to do justice, in order that justice may be done to us in return." Similarly, Cobb believed comity was necessary to "promote justice between individuals and to produce a friendly intercourse between the sovereignties to which they belong."[26] But that accommodation dissolved under the pressure of sectional conflict. Both

[24] Pennsylvania Session Laws, 1847, 206–08, "An Act to Prevent Kidnapping . . . and to repeal certain slave laws."

[25] 9 U.S. Statutes at Large 462–65 (1850), at 463.

[26] Joseph Story, *Commentaries on the Conflict of Laws* (Boston, 1846), 39–45; Cobb, 174.

Southern and Northern courts became increasingly aggressive. In *Lemon v. People* (1860), for example, New York's highest court freed a number of slaves who were merely in transit from Virginia to Texas on a coastal vessel and had docked briefly in New York City's harbor to refuel. Similarly, the Missouri Supreme Court, in *Scott v. Emerson* (1852), explained, "Times are not as they were when the former decisions on this subject were made. Since then not only individuals but States have been possessed of a dark and fell spirit in relation to slavery. . . . Under such circumstances it does not behoove the State of Missouri to show the least countenance to any measure which might gratify this spirit."[27] Missouri's refusal to apply principles of comity to the slave Dred Scott was ratified by the U.S. Supreme Court five years later.

Territorial Expansion

Just as the problem of fugitives increasingly brought sectional tension to the surface, so did the seemingly inevitable march of territorial expansion. Westward expansion of the United States raised the political question of whether slave or free states would dominate the Union. The Missouri Compromise of 1820 had decreed one new free state for each new slave state; Southerners worried about the balance of power in Congress between slave and free states. The succeeding decades saw a sequence of "compromises" struck, each lasting a shorter time than the previous one.

The Missouri Compromise admitted Maine as a free state and Missouri as a slave state and drew a line at the 36th parallel – all new states formed north of the line would be free, and all south would be slave. This was the most stable compromise of the antebellum period. It was upset by the annexation of Texas in 1846. Just three months after the start of the Mexican-American War, Congressman David Wilmot proposed an amendment to a military appropriations bill, which became known as the Wilmot Proviso. It would have barred slavery in all of the territories acquired from Mexico. Although the Proviso failed to pass, it marked the beginning of the Free Soil movement. Free Soilers wanted to check Southern power and keep slavery out of new territories to protect the "rights of white freemen" to live "without the disgrace which association with negro slavery brings on white labor." The Free Soil Party formed in 1848 to fight for free labor in the territories. Although the new party failed to carry a single state in the 1848 election, it did quite well in the North.

In the 1850s, "settlements" of the slavery question came fast and furious – each one settling nothing. The Compromise of 1850 resulted in the

[27] *Scott v. Emerson*, 15 Mo. 576, 586 *1852).

admission of California to the Union as a free state, while the other parts of the Mexican Territory came in under "popular sovereignty"; the slave trade was abolished in the District of Columbia; and the new, more stringent Fugitive Slave Law was passed. Under the 1850 law, suspected fugitives were denied the right to trial by jury and the right to testify in their own behalf.

In 1854, Senator Stephen Douglas introduced a bill to organize the Kansas and Nebraska territories on the basis of popular sovereignty, officially repealing the Missouri Compromise. Douglas hoped that the Kansas-Nebraska Act would focus the Democratic Party on internal expansion and railroad building. Instead, the passage of the act split the Democratic Party along sectional lines and led to the formation of the Republican Party, which was a coalition of Northern Whigs, dissident Democrats, and Free-Soilers who first came together in Michigan and Wisconsin. The Republicans emphasized a platform of free soil and free labor for white men.

In 1856, violence broke out in Kansas: the "sack of Lawrence" by pro-slavery forces was followed by the civil war that became known as "Bleeding Kansas" and John Brown's massacre of slaveholders at Pottawatamie. Preston Brooks' near-fatal caning of abolitionist Senator Charles Sumner on the floor of the Senate coincided with the Lawrence attack. All these events convinced free-soil Northerners that the "Slave Power" had grown impossibly aggressive. Likewise, Southerners began to believe that abolitionists' tentacles were everywhere.

It was in this overheated atmosphere that the Supreme Court decided the *Dred Scott* case in 1857. Chief Justice Roger Taney apparently hoped that his opinion might settle these roiling constitutional controversies. Instead, he probably hastened the resort to armed conflict.

The Dred Scott Case

Dred Scott v. Sandford addressed a question of comity that was similar to but not the same as that raised by *Prigg v. Pennsylvania*. In *Dred Scott*, the issue was not the fate of a fugitive to a free state, but rather of a sojourner in a free territory. Territorial expansion raised the new question of whether slaves who moved into new territories should be presumed slave or free. Chief Justice Roger Taney's infamous decision in *Dred Scott v. Sandford* represented only the second time to that point that the Supreme Court had overturned an act of Congress, and it was seen by many at the time as the first shot fired in the Civil War. It was in reaction to the *Dred Scott* decision immediately following the Kansas-Nebraska Act that Abraham Lincoln declared, "A house divided against itself cannot stand."

The case's long legal odyssey began when Dred Scott's owner, John Emerson, took Scott out of Missouri, a slave state, to Illinois, a free state, and

then to Minnesota Territory, a free territory. Emerson was an Army physician successively transferred to different stations. Scott's daughter was born somewhere on the Mississippi River north of Missouri, in either a free state or territory. Scott and his daughter returned to Missouri with Emerson, who died, leaving his wife a life interest in his slaves. Scott then sued for his freedom; he won in lower court in Missouri on comity grounds, supported by earlier Missouri precedent that a master voluntarily taking a slave for permanent residence in a free jurisdiction liberated the slave. However, in 1851, the Supreme Court decided *Strader v. Graham* (in an opinion by Taney), ratifying a turnaround in conflict-of-laws doctrine, whereby courts were to prefer the policy of the forum state – a holding first applied in Northern courts as anti-slavery doctrine, but one that Southern courts could use too.

When the Dred Scott case arrived at the Missouri Supreme Court, the Court applied Missouri law and found Scott to be a slave, noting that "[t]imes are not as they were when the former decisions on this subject were made." Sectional conflict had made comity impossible. Dred Scott found a new master, John Sanford (brother of the widow Emerson) and, in a collusive suit, sued for freedom from his new master in another state through a diversity suit in federal court. The federal district court found that Scott's status should be determined by Missouri law, which had already upheld his status as a slave, and he therefore remained a slave. Dred Scott appealed to the U.S. Supreme Court in December 1854, and the case was argued in February 1856. Interestingly, no abolitionist lawyers argued Scott's case. His attorney, Montgomery Blair, was a Free-Soiler concerned with the spread of slavery into the territories. George T. Curtis, who joined Blair for the December 1856 reargument of the case, was a political conservative opposed to anti-slavery but fearful that the Taney Court might overturn the Missouri Compromise and exacerbate sectional conflict.

The case presented two important questions. First, was Scott a citizen for purposes of diversity jurisdiction? Second, was Scott free because he had been taken into a free state and free territory? A third question, which could probably have been avoided, was whether Congress had the power to prohibit slavery in the territories. In other words, was the Missouri Compromise constitutional? In an era in which the Supreme Court usually strove for unanimity, there was little agreement on the Court on any one of these questions. The Court issued nine separate opinions in the case, including numerous overlapping concurrences and dissents, and many have argued that Taney's well-known opinion spoke for a majority of one. The opinions of Justice Daniel and Justice Campbell were, if such a thing is possible, even more extreme than Taney's. Nevertheless, Taney's high-handed effort to "settle" the sectional conflict on Southern terms certainly had a far-reaching influence.

The most infamous part of Taney's opinion was the first section, in which he held that Scott was not a citizen, because neither slaves nor free blacks could claim the privileges and immunities of citizenship. To reach this conclusion, Taney made an originalist argument that blacks were "not included, and were not intended to be included, under the word 'citizens' in the Constitution. . . . On the contrary, they were at [the time of the framing of the Constitution] considered a subordinate and inferior class of beings, who had been subjugated by the dominant race." In fact, blacks were "so far inferior that they had no rights which the white man was bound to respect." Even if some states, like Massachusetts, had bestowed rights on them, their state citizenship did not confer U.S. citizenship on them.

Taney might have stopped there, finding that Dred Scott had no right to sue in federal court and sending him back to Missouri court. Judge Nelson's concurrence argued more conservatively that slavery was a state question that should be (and had been) decided by the state of Missouri. But Taney was determined to answer the final question in the case, namely whether Congress could make a territory free by federal law. Taney held that the Missouri Compromise was unconstitutional and that the federal government lacked power over slavery except to protect property rights in slaves. He claimed that Article IV Sec. 3 of the Constitution, authorizing Congress to legislate for the territories, applied only to the public lands as they stood in 1789. According to this logic, the Northwest Ordinance was constitutional, but Congress had no power to legislate for the territories once people were able to legislate for themselves, reaffirming the "popular sovereignty" principle of the Kansas-Nebraska Act. A blistering, sixty-nine page dissent by Justice Benjamin Curtis attacked each and every one of Taney's premises. Curtis painstakingly recreated the history of free blacks in the late eighteenth century, showing that in a number of states, free blacks had been voters and citizens at the time of the founding. Curtis also argued forcefully that Congress had the right to regulate slavery.

Taney had hoped that his decision would lay to rest the political debate over slavery. He was not the only one to harbor this hope. In his inaugural address delivered just two days before the announcement of the decision, Democratic President-elect James Buchanan observed pointedly that the issue of slavery in the territories was "a judicial question, which legitimately belongs to the Supreme Court of the United States," to whose decision he would "cheerfully submit."[28] Many observers saw this agreement between Taney and Buchanan as more than happenstance – in fact, as a conspiracy.

[28] James Buchanan, Inaugural Address, March 14, 1857, in James D. Richardson, ed., *A Compilation of the Messages and Papers of the Presidents* (New York, 1897), 6:2962.

In his opening campaign speech to the Illinois Republican convention in 1858, Lincoln pointed to the fact that the *Dred Scott* decision was

> held up . . . till *after* the presidential election . . . Why the *outgoing* President's felicitation on the indorsement? Why the delay of a reargument? Why the incoming President's *advance* exhortation in favor of the decision? . . . We can not absolutely *know* that all of these exact adaptations are the result of preconcert. But when we see a lot of framed timbers, different portions of which we know have been gotten out at different times and places and by different workmen – Stephen, Franklin, Roger and James, for instance – and when we see these timbers joined together . . . in *such* a case, we find it impossible to not *believe* that Stephen and Franklin and Roger and James all understood one another from the beginning, and all worked upon a common *plan* or *draft* . . .[29]

Of course, the decision could not have had less of the effect Taney hoped for it. Frederick Douglass declared that his "hopes were never brighter than now," after the decision came down, because he believed it would incite the North to take a firmer stand against slavery. *Dred Scott* almost certainly contributed to the election of Abraham Lincoln in 1860 and the onset of the Civil War the following year.

Dred Scott was never overruled by the Supreme Court, although the Thirteenth and Fourteenth Amendments, passed by Congress in 1865 and 1868, ended slavery and guaranteed civil rights for African American citizens. Justice Frankfurter was once quoted as saying that the Supreme Court never mentioned *Dred Scott*, in the same way that family members never spoke of a kinsman who had been sent to the gallows for a heinous crime.

CONCLUSION

On the eve of the Civil War, slavery was a system that functioned quite smoothly on a day-to-day level. Law helped the institution function – enforcing contracts, allocating the cost of accidents, even administering sales. Slaves who fought back against their masters could sometimes influence the outcome of legal proceedings, and their self-willed action posed certain dilemmas for judges who sought to treat them solely as human property. But the legal system developed doctrines and courtroom "scripts" that helped erase evidence of slaves' agency and reduce the dissonance between what the ideology of white supremacy dictated relations between slaves and masters ought to be and what had actually transpired among slaves, slaveholders and non-slaveholders to bring them into the courtroom.

[29] Abraham Lincoln, Illinois State Journal, June 18, 1858, reprinted in Paul M. Angle, *Created Equal? The Complete Lincoln-Douglas Debates of 1858* (Chicago, 1958), 1–9.

Ultimately, it was politics that destroyed slavery. Slaves helped push sectional conflict over slavery to the surface by running away. Fugitive slaves forced the legal system to confront the issue of comity as well as the problem of territorial expansion. And because, in the United States, all major political conflict is constitutionalized, although slavery did not lead to a crisis in law, it did create a crisis for the Constitution. The Civil War was the constitutional crisis that could have ended the brief experiment of the United States. Instead, it led to a second American Revolution, a revolution as yet unfinished.