Property First, Humanity Second: The Recognition of the Slave's Human Nature in Virginia Civil Law*

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Our law in many instances recognizes a distinction between property in *things* and *persons*.[1]

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* Higginbotham and Kopytoff are equal co-authors of this manuscript. This Article is part of Higginbotham's twenty-year research effort that will be presented in two forthcoming volumes that attempt to define ten basic precepts of American slavery. This Article focuses on one of those precepts:

> Define the slave as the master's property, disregard the humanity of the slave except where it serves the master's interests, and deny slaves the fruits of their labor.

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Another precept is the subject of an Article by Higginbotham and Kopytoff. *See* Higginbotham & Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 Geo. L.J. 1967 (1989).

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1. Spencer v. Pilcher, 35 Va. (8 Leigh) 565, 583 (1837) (emphasis in original). For a discussion of nineteenth century Virginia cases viewing the slave as a person and as property, see Wren, *A "Two-Fold Character": The Slave as Person and Property in Virginia Court Cases, 1800–1860*, 24 S. Stud. 417 (1985).

I. INTRODUCTION

Today, when we speak of the law's recognition of the humanity or human nature of a person,[2] we tend to think in terms of the recognition of rights that we believe all human beings have, or should have.[3] From this perspective, when we speak of the law's treatment of slaves in colonial and antebellum Virginia, we say that it failed to recognize slaves as human beings. That is true in the sense that the law failed to recognize any rights of slaves, save their right to certain procedural protections in criminal trials and their right to sue for their freedom.[4] But there were other ways in which the law recognized slaves as human beings, ways that did not interfere with their owners' dominion over them as property or their economic value to their owners.

In a number of cases, the courts recognized the human nature of the slave as something that made him a unique and special form of property. As Judge Parker said in the 1837 Virginia case *Spencer v. Pilcher*, "Our law in many instances recognizes a distinction between property in *things* and *persons*."[5] He went on to quote Chief Justice Marshall as saying, "A slave has volition and feelings, which cannot be disregarded or overlooked . . . ."[6] But this recognition of the distinction between slaves and other forms of property benefited the slaves for the most part only incidentally. Instead, the recognition took forms that were meant to benefit their masters: for example, by allowing lawful owners to claim particular slaves rather than making them accept money damages; by requiring bailees to take special care of slaves; by allowing masters to use slaves as agents; by failing to hold masters liable for the willful wrongs of their slaves. Slavery in Virginia did not preclude the legal recognition of slaves as human beings except in those respects that were economically disadvantageous to the owner and incompatible with the assertion of his property rights in the slave. The recognition of a broad basis of rights in the owner constituted a rejection of all human rights that would have been important to the slave.

Orlando Patterson, in *Slavery and Social Death*, criticizes the traditional distinction between person and property frequently made in discussions of the law of slavery.[7] He points out that to say that a person is property is simply to say that others have unspecified rights over him and that there are many such rights that people

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2. *See infra*, text accompanying note 15, for a discussion of terminology.

3. For a statement of some of these rights, see *Universal Declaration of Human Rights*, G.A. Res. 217A(III), U.N. Doc. A/810 at 71 (1948). The resolution was passed by the United Nations in 1948 without a dissenting vote.

4. For a detailed analysis of the use of the law to perpetuate racial injustice as to both slaves and free blacks, see A.L. HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS (1978).

5. Spencer v. Pilcher, 35 Va. (8 Leigh) at 583 (emphasis in original). Compare this with Blackstone's pronouncement, "The objects of dominion or property are things, as contradistinguished from persons." 2 W. BLACKSTONE, COMMENTARIES *16.

6. Spencer v. Pilcher, 35 Va. (8 Leigh) at 583 (quoting Boyce v. Anderson, 27 U.S. (2 Pet.) 150, 154 (1829)). The case was brought against the owners of a steamboat as a common carrier of packaged goods to recover the value of slaves lost because of negligence. The Supreme Court held that the carrier could not exercise the same degree of control over slaves as over inanimate objects, and that they resembled passengers, rather than packaged goods. The law relating to common carriers carrying packaged goods therefore did not apply. *See* Smith, *Toward a Pure Legal Existence: Blacks and the Constituiton*, 30 How. L.J. 629 (1987).

7. *See* O. PATTERSON, SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY 21 (1982).

exercise over others who are not slaves.[8] Thus it is not enough to say that a person is property; one must specify those kinds of property rights exercised with regard to slaves that are not exercised with regard to other people.[9] The rights exercised over others are, by convention, usually not called property rights, though they may not be essentially different.[10]

Patterson's purpose is to develop a universal definition of slavery applicable to all slave societies, and thus it is not important to his point to elaborate the distinctions between property and nonproperty made in the law of any particular society. He is interested in concepts useful for cross-cultural analysis. For our purposes, however, it is very much to the point to know what pre-Civil War Virginians considered to be the rights of property and their application to slaves. The importance of the distinction is not diminished by the fact that there were rights over other people, such as wives, that Virginians did not classify as property in their law.[11]

The fact that Virginia law viewed slaves as property (sometimes chattel, sometimes real)[12] meant that a particular set of rights, privileges, immunities, and legal actions surrounded relations concerning them. The rights of property as they applied to nonhumans were well established and provided a starting point for the law of slavery.[13] Other human relationships that Patterson would say contained property rights, such as those between husband and wife and between parent and child, were not so classified by antebellum Virginians. This means that the starting point, the causes of action, the legal conventions, the nature of the rights, and the presumptions with regard to family members were all different from those with regard to slaves. When we ask Patterson's question as to what kinds of rights were exercised over slaves and were not exercised over other people in the civil law of Virginia, the short answer is that once slaves were classified as property,[14] all of the rights contained in the common law of property as it had developed over the centuries in England and

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8. *See id.* This idea is developed in Kopytoff & Miers, *Introduction*, in SLAVERY IN AFRICA: HISTORICAL AND ANTHROPOLOGICAL PERSPECTIVE 3–81 (S. Miers & I. Kopytoff eds. 1977).

9. *See* O. PATTERSON, *supra* note 7, at 21. Patterson credits Moses Finley with this idea. M.I. FINLEY, ANCIENT SLAVERY AND MODERN IDEOLOGY, 73–75 (1980).

10. Patterson gives as an example that an American husband is part of the property of his wife. "We never express it this way, of course, for it sounds quite ghastly. Nevertheless, in actual and sociological terms a wife has all sorts of claims, privileges, and powers in the person, labor power, and earnings of her husband—as every third husband in America has discovered in the divorce courts. We need hardly add that husbands also have proprietary claims and powers in their wives, powers that they all too frequently exercise with naked violence." O. PATTERSON, *supra* note 7, at 22 (footnote omitted).

11. Later in the 19th century, this traditional line between property and non-property began to blur as the concept of property was expanded to include rights and relations that had not been so classified earlier. *See* Vandervelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFFALO L. REV. 325 (1980).

12. "Chattel" is defined as "[a]n article of personal property, as opposed to real property. A thing personal and movable. It may refer to animate as well as inanimate property." BLACK'S LAW DICTIONARY 215 (5th ed. 1979).

"Real property" refers to "[l]and, and generally whatever is erected or growing upon or affixed to land. Also right issuing out of, annexed to, and exercisable within or about land." *Id.* at 1096.

The difference in inheritance rights that widows had in real and chattel property, *see* 3 Hening 371 (1705), prompted the legislature to declare slaves as real property during the first half of the 18th century. *See* 5 Hening 432 (1748); 4 Hening 222 (1727); 3 Hening 333 (1705).

13. *See* Morris, *"Villeinage . . . as it existed in England, reflects but little light on our subject:" The Problem of the "Sources" of Southern Slave Law*, 32 AM. J. LEGAL HIST. 95, 105–07 (1988) (footnote in title omitted).

14. This process is described in a manuscript in progress by A. L. Higginbotham, Jr. and S. Ginsburg.

Virginia for nonhuman property, land and chattel, came into play. These rights were either adopted as they were or modified as necessary to protect the interests of the master.

In this Article, we shall explore those contexts in the civil law of pre-Civil War Virginia in which the humanity of the slave was recognized and those in which it was denied. Generally speaking, it was recognized in those contexts in which it did not challenge the property rights of the owner.

A note on terminology may be helpful here. We use the terms "humanity" and "human nature" interchangeably in the Article. *The Oxford English Dictionary*[15] lists two primary senses of the word "humanity," the first connected with "human" and the second connected with "humane." Judges we quote sometimes used the term in the second sense, as in the quotation immediately below that begins the next Part of the Article. In our discussion, however, we use it in the first sense, which the dictionary defines as the "quality or condition of being human, . . . the human faculties or attributes collectively; human nature . . . ."[16] In the title phrase, "humanity" is meant to carry both of its primary meanings.

II. Recognition of the Slave's Humanity in Ways That Did Not Invade the Rights of Property

> Slaves are not only property but they are rational beings, and entitled to the humanity of the Court, when it can be exercised without invading the rights of property.[17]

The president of the court in the 1825 Virginia case of *Allen v. Freeland*[18] thus set out the priorities of the law of a slave state in dealing with human property. The court recognized the human nature of slave property and thought it was therefore entitled to special consideration by the court. But this consideration was to be extended only up to the point that it began to encroach on the property rights of the owner. Then it was to stop short. The priorities were clear: property first, humanity second.

A. *The Owner's Entitlement to Specific Slaves Versus Monetary Compensation*

One context in which the courts sometimes recognized explicitly the humanity of the slave was that in which particular slaves were claimed under contract, will, or execution of judgment. For example, when Foote sued Fitzhugh over the question of the proper number of slaves to be included in a widow's dower,[19] the court said,

> That an equal division of slaves, in number or value, is not always possible, and sometimes improper, when it cannot be exactly done without separating infant children from

15. 5 Oxford English Dictionary (1933).
16. *Id.* at 445.
17. Allen v. Freeland, 24 Va. (3 Rand.) 170, 178 (1825).
18. *Id.*
19. Fitzhugh v. Foote, 7 Va. (3 Call) 13 (1801).

> their mothers, which humanity forbids, and will not be countenanced in a Court of Equity: so, that a compensation for excess must, in such cases, be made and received in money . . .[20]

The property interests of the owners were well protected. The party who received less than his full share of slaves was to receive the balance in money. Moreover, the decision of the court further conserved slave property by ensuring that an infant was kept where it was likely to get the best care, with its mother. Concerns of humanity did not cause the courts routinely to forbid the separation either of husbands from their wives and children or of children beyond infancy from their mothers. That would have interfered too much with the "rights of property," with the ability of slave owners freely to dispose of their property in the most profitable ways, as they saw fit.

In *Fitzhugh v. Foote*,[21] the court recognized the slaves' human nature in a way that happened to benefit the slaves, namely the mother and infant. In another case, in which the court was asked to assign particular slaves to one or another litigant, there was no discernible benefit to the slaves whether the court decided for the plaintiff or the defendant; both were strangers to the slaves. In *Allen v. Freeland*,[22] quoted at the beginning of this Part, Allen had bought some slaves from Wright, but Freeland wrongfully seized them in satisfaction of a debt owed him by Wright. The question was whether Allen should recover the slaves themselves or money damages.

The court felt that money damages did not always fully compensate the owner for the loss of a particular slave. "[A]s regards the owner, [the slaves'] value is much enhanced by the mutual attachment of master and slave; a value which cannot enter into the calculation of damages by a jury."[23] In this case, however, Allen had bought the slaves at a public sale and had had them only a short time.[24] There was "[n]o sacrifice of feeling, no considerations of humanity . . . . These were not family slaves, but strangers to the plaintiff . . . ."[25] Allen had made no claim that they were especially valuable for their "character, qualities, or skill in any trade or handicraft."[26] He had not even paid for them yet. Therefore the court decided that money damages were sufficient.[27]

Here, the court indicated that it would have been willing to recognize the special attachment of master and slave, had there been one, or the special value of the slave to the master, had the master claimed it. The attachment was important to the court, however, only because it increased the value of the slave to the master, not for any benefit it conferred on the slave.

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20. *Id.* at 17.
21. *Id.*
22. 24 Va. (3 Rand.) 170 (1825).
23. *Id.* at 178–79.
24. *Id.* at 173.
25. *Id.*
26. *Id.*
27. The court was convinced that the sellers were guilty of fraud in the sale and that Allen had acted in collusion with them against Freeland. This may have influenced their decision against Allen. *Id.* at 176.

We see most clearly that the slave's unique qualities as a human being were appreciated only insofar as they affected his value to his master in the 1856 case *Summers v. Bean*.[28] In that case a widow sold her life interest in her late husband's slaves. The wife of the buyer was the daughter of the late husband and was due to inherit some of the slaves anyway on the widow's death. When the widow tried to rescind the sale, the court ordered specific performance of the contract. Judge Moncure discussed the unique quality of slaves that made delivery of the slaves, rather than monetary damages, the appropriate remedy. The judge criticized and rejected the only English case he found on point, *Pearne v. Lisle*,[29] as failing to appreciate that slaves were human beings. In *Pearne*, in refusing specific delivery of slaves under a contract for hire in Antigua, Lord Hardwick had written:

> As to the merits, a specific delivery of the Negroes is prayed; but that is not necessary, others are as good; indeed in the case of a cherry-stone, very finely engraved, and likewise of an extraordinary wrought piece of plate, for the specific delivery of which bills were brought in this Court, they could not be satisfied any other way; their value arose on circumstances peculiar to themselves; but in other things, as in diamonds, one may be as good as another.[30]

Judge Moncure said that *Pearne* could have no influence on the court's decision in *Summers* because Lord Hardwick's reasoning was flawed. "His lordship rightly considered negroes as property; but seems not to have considered them as human beings, of greater peculiar value than 'a cherry-stone very finely engraved,' or 'an extraordinary wrought piece of plate.' "[31]

Moncure himself did not make that error. He realized that "[s]laves are not only property but rational beings; and are generally acquired with reference to their moral and intellectual qualities."[32] That realization did not, however, cause him to interfere in any way with the rights of property exercised over slaves. It meant only that they were a special kind of property, indeed, like finely wrought objects. It meant that money damages were not an adequate remedy for their loss and that specific performance of a contract could be ordered. It meant that slave property was to be treated as land, rather than as chattel property, in a contract for sale. Moncure stated:

> The party need not show that the land is of peculiar value, or that he could not be adequately compensated in damages for the loss of it. It is enough that he so considers, and prefers to have the land in *specie*. And that he does so is conclusively shown by his suit for specific performance.[33]

The question before the court was whether slaves were, in their very nature, property for which money damages would not provide an adequate remedy in the event of a breach of a contract to sell and deliver them and whether specific delivery of the slaves should therefore be ordered. In *Allen v. Freeland*, a quarter of a century

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28. 54 Va. (13 Gratt.) 404 (1856).

29. 27 Eng. Rep. 47 (1749). For a discussion of this case in the context of the development of English law regarding slavery, see A.L. HIGGINBOTHAM, JR., IN THE MATTER OF COLOR 327–28 (1978).

30. *Pearne*, 27 Eng. Rep. at 48 (quoted in *Summers*, 54 Va. (13 Gratt.) at 411).

31. *Summers*, 54 Va. (13 Gratt.) at 411.

32. *Id.* at 412–13.

33. *Id.* at 412.

earlier, the court had required a special showing of value or attachment before it would order delivery of a particular slave.[34] Now, in *Summers v. Bean*[35] the court indicated that it would do so routinely because of the special human nature of all slave property. Judge Moncure criticized Lord Hardwick's insensitivity in failing to recognize the human nature of slave property. His own recognition of it led to a more sympathetic hearing of the would-be owner's claim for a particular human being as his slave. It did not lead to a sympathetic hearing, or indeed any hearing at all, for the slave, whose humanity was being valued above money by the owner and the court. The slave's voice, and his interests, were considered completely irrelevant. The slave's status was not improved by Judge Moncure. It was only the master who benefited.

B. *Slaves as Agents*

Owners regularly did business through slaves as their agents, and Virginia law implicitly recognized this fact. A long line of statutes, starting in 1705, penalized people who traded with slaves without the consent of the slaves' masters.[36] By implication, a person could freely "buy, sell or receive any coin or commodity from a slave" *with* the consent of the master.[37] Indeed, the Virginia Supreme Court of Appeals held an owner liable for such routine dealings when he tried to deny the agency.[38] This recognition of the human qualities of the slave facilitated the business dealings of the owner and thus enhanced the value of the slave as property, but it conferred no benefit on the slave. In *Gore v. Buzzard*,[39] Gore had for some four or five years sent raw hides to Buzzard's tannery and received back the tanned leather entirely through the agency of his slaves. He had never sent a written order nor spoken with Buzzard about the business; he had simply given verbal instructions to the slaves, who passed them on. Following Buzzard's death, Gore asked for an accounting of what he owed. He did not dispute the basic charges, but objected to paying any interest.[40] The dispute grew into a lawsuit, in which Gore claimed that the slaves were not his agents because he had not authorized them as required by statute.[41] But the court would not allow Gore to deny the agency, which the facts "furnish[ed] the strongest grounds to infer," simply because there was no written authorization.[42] The statute merely required "the leave or consent" of the master, not the written authorization,[43] and Gore's past dealings with Buzzard and with two other tanners had provided ample evidence of that,[44] as had his failure to object to any charges except the interest in the administrators' account.

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34. 24 Va. (3 Rand.) 170 (1825).

35. 54 Va. (13 Gratt.) 404 (1856).

36. *See, e.g.*, 1840 Va. Acts 82 (1841); 1830 Va. Acts 130 (1831); 12 Hening 182 (1785); 5 Hening 547 (1748); 3 Hening 447 (1705).

37. 3 Hening 447, 451 (1705).

38. *See* Gore v. Buzzard, 31 Va. (4 Leigh) 249 (1833).

39. *Id.*

40. *Id.* at 250–51.

41. *See* 1830 Va. Acts 130 (1831).

42. *Gore*, 31 Va. (4 Leigh) at 253–54.

43. *Id.* at 253.

44. *Id.* at 250.

One statute explicitly recognized the agency of slaves who ran illegal ferry boats for their masters. This 1840 act deemed ferriage paid to slaves who conducted such boats to have been paid to their owners.[45] The reason behind this statute may be that the owner of an illegal ferry tried to avoid prosecution by claiming that his slaves were not his agents. If so, then the legislature, like the court in *Gore*, was unwilling to let an owner who routinely did business through his slaves avoid liability by this sleight of hand.

Slaves as agents were sometimes entrusted with delicate tasks on which human life depended. In *Randolph v. Hill*,[46] Hill's slave had been hired out to work in Randolph's coal pits. One evening foul air was discovered in the pit where Hill's slave worked, and the workers were taken out. The next morning the overseer sent down one of Randolph's slaves to test the air. The slave was a foreman, one of the most experienced workers at the pits, and the overseer said that he placed as much confidence in the slave's report of safety as he would have in his own inspection. The slave found the air safe, but in fact it was not, and the workers became ill. Hill's slave died when he was overcome by the fumes, fell in some water in the pit, and drowned.[47]

Hill sued for the loss of his slave, and the trial court decided in his favor. Randolph appealed on the grounds that the verdict was contrary to the evidence. The appeals court was evenly split, and the verdict was therefore affirmed. Judge Brockenbrough had the following to say:

> The jury might have been satisfied, that a single examination, even by a careful and trustworthy person, with a single lamp, to ascertain whether it would be extinguished by mephitic gas in a pit seventy feet deep, was not sufficient; that where human life was to be risked, repeated and successive experiments should have been made . . . . The jury might fairly have inferred . . . that the defendant and his agents were guilty of the negligence charged.[48]

The agency of the slave foreman who tested the air was not questioned by either side, nor was his competence. It was the overseer, who had sent him down only once, and the owner, who had provided the coal pits with only one basket for escape, who were judged at fault by the jury and by those appeals court judges who voted to uphold the verdict.[49] There was no issue of agency, only one of negligence. The automatic acceptance of the slave's agency was a recognition of his peculiarly human qualities of expertise, judgment, and reliability, which allowed owners to undertake dangerous and difficult work with a labor force composed mainly of slaves. Far from conflicting with the owner's rights of property, such recognition of the humanity of the slave allowed owners to use their human property in the most profitable ways.

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45. 1840 Va. Acts 58 (1840).

46. 34 Va. (7 Leigh) 383 (1836).

47. *Id.*

48. *Id.* at 389–90.

49. *Id.* at 389–91. The other justices found that there was no fault and thought that there should have been no recovery from Randolph. *Id.* at 391–92.

The use of slaves as agents raises the question of *respondeat superior*.[50] Was the owner held responsible for the negligence of the slave as agent? No Virginia cases have been found on this issue, but we assume that he was.[51] It is hard to imagine that others would have been willing to deal with an owner through his slaves if they had to assume any losses caused by the mistakes of the slaves. Willful misdeeds or intentional wrongs of a slave acting as agent would have been outside the scope of the agency and therefore not attributable to the master under ordinary agency law.[52]

C. *Bailment: The Provision of Basic Necessities*

Another context in which the humanity of the slave was recognized was that of bailment.[53] Slaves held in jail had to be provided with the basic necessities required to sustain life. One might argue that no recognition of the slave's human nature was necessary for the courts to uphold such requirements; bailees would also be required to support animal life in a case of bailment of a horse or of cattle. The court went beyond that, however, in *Dabney v. Taliaferro*[54] and suggested that the jailkeeper had a responsibility to protect the slave as a human being.

Taliaferro's slave Bartlett, a runaway, had been captured and confined to jail under the care of Sheriff Dabney's servant Thornton. Dabney failed to provide proper heating and bed covering, as required by law.[55] As a result the slave became "diseased and frost-bitten from cold, crippled and maimed,"[56] and his value was destroyed. The trial court awarded Taliaferro damages, but Dabney appealed on the grounds that neither statute nor common law required that the jailkeeper provide a runaway slave with blankets and fuel.[57]

Judge Carr, for the court, roundly rejected the idea that a runaway slave was not entitled to the same basic protection while in jail as were other human beings. He went on to say that principles of the common law required such care of any prisoner:

> For I cannot for a moment suppose, that by the law of the land, a human being may be imprisoned in mid-winter, and yet the jailor not bound to provide him with covering or fire. I should as soon think that he was not bound to furnish him food . . . . I speak now not under the Act of Assembly, but on principles of the common law: and I am clearly of opinion, that

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50. Under this principle of vicarious liability, a master is liable in certain cases for the wrongful acts of his servant, and as a principal for those of his agent. *See* BLACK'S LAW DICTIONARY 1179 (5th ed. 1979).

51. An exception to *respondeat superior* was the fellow servant rule, which first appeared in the United States in the 1840s. It exempted an employer from liability in cases where one employee negligently injured a fellow servant. Courts in other slave states came down on both sides of the question of whether to extend this new rule to injury to slaves. *See* Note, *Slavery and the Fellow Servant Rule: An Antebellum Dilemma*, 61 N.Y.U. L. REV. 1112 (1986) (authored by Frederick Wertheim).

52. *See infra* Part II, section D, on civil liability for willful wrongs of the slave.

53. *See* Stanley, *The Responsibilities and Liabilities of the Bailee of Slave Labor in Virginia*, 12 AM. J. LEGAL HIST. 336 (1968).

Bailment is the delivery of personal property for some particular use, or simply to hold, according to an agreement, express or implied. After the purpose has been fulfilled, it is to be redelivered or reclaimed by the giver, or disposed of according to his directions. *See* BLACK'S LAW DICTIONARY 129 (5th ed. 1979).

54. 25 Va. (4 Rand.) 256 (1826).

55. *Id.*

56. *Id.* at 256–57.

57. *Id.* at 257–58.

> these principles do not warrant or excuse such omission and neglect. The genius of our law is not so cruel and unfeeling.[58]

Here, again, the humanity of the slave was recognized by the law in a way that was wholly consistent with the owner's property rights. To display its own humanity, the court took advantage of the fact that protection of the slave did not "invade the rights of property." They required consideration of the slave as a human being in a way that they did not when the owner himself was the person failing to provide basic necessities.[59] To do that would have been to invade the owner's property rights, and when legal recognition and protection of the slave's humanity conflicted with those rights, the priorities of the law were clear.

Apart from bailment in jail, slave property might be in the care of another in a conditional sale. That was the case in *Williams v. Moore*.[60] Williams and Moore had an oral agreement for the conditional sale of a slave woman, Peg, for 300 dollars. It was agreed that if Moore did not like her, he could return her in three or four weeks. While she was in Moore's possession, Peg lost several fingers and was otherwise disabled by frostbite. Moore then decided he did not want her, returned her, and cancelled the sale. Williams claimed that the damage was due to Moore's negligence, but, further, that Moore was liable whether or not negligent. The trial court disagreed. The judge instructed the jury that a bailee was not responsible for damage caused by accident unless the contract so specified, but that he was responsible if the slave were injured because of his neglect, even if it were only slight neglect. The appeals court agreed with the main proposition, but reduced the standard to ordinary care—"such care as any man of common prudence, and capable of governing a family, takes of his own concerns."[61]

This duty of care, applied to slaves and others alike, could be claimed only by owners for their human property, never by the human property itself. The failure to provide humane treatment to the slave was a breach of a right of the owner, but not a breach of the human rights of the slave, for he was recognized as having no such rights. The humanity of the slave, requiring that he be treated with the care due other humans and not like other forms of property, became *part* of the owner's property rights. Far from invading the rights of property, it protected and enhanced them. The primary beneficiary of the recognition of the slave's humanity was the owner. Occasionally the slave also benefited, but only incidentally.

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58. *Id.* at 261. This passage seems to suggest a duty of care toward the slave as a human being. If so, it was never one that the slave could claim for himself; only the owner could claim it for the slave as his property. And the owner himself had no such duty to his slave.

The court opened the way for damages to be awarded in *Dabney*, but the way in which they did it reveals that the judges' professed concern for the slave as a human being was merely rhetorical. Nineteenth century American courts recognized pain and suffering in consequence of a wrongful injury as a proper element of damages in tort cases, *see, e.g.*, Cooper v. Mullins, 30 Ga. 146, 152 (1860); Mason v. Inhabitants of Ellsworth, 32 Me. 271, 273 (1850), but in this case the slave, who endured the frostbite and the pain and suffering, could receive nothing. The master, who lived in a warm house and had no frostbite, received the compensation.

59. A manuscript in progress by A.L. Higginbotham, Jr. and A. Jacobs discusses the negligible protection provided to the slave against abuses by his owner in the criminal law.

60. 17 Va. (3 Munf.) 310 (1812).

61. *Id.* at 313. The case was remanded to the lower court with directions that the jury be instructed to apply the standard of ordinary care in deciding the case. *Id.*

D. *Civil Liability for the Willful Wrongs of Slaves*

Were owners ever held liable for the willful wrongs of their slaves? Morris[62] notes that in deciding whether to hold masters liable for the willful wrongs of their slaves, Southern jurists had several bodies of law on which they could draw. They could analogize slaves to cattle, in which case a strict liability could be imposed on the master under common law. They could see slaves as domestic animals with vicious habits, in which case the liability was less than strict; the owner had to have known of the bad character of the particular animal. Finally, they could treat slaves as servants in which case the master would not be held liable for the intentional wrongs of the slave unless the master had authorized them.[63] In all the slave states Morris surveyed, the last alternative was chosen and the victims of slave wrongs were therefore left without compensation.

Morris found no clear cases on this point for Virginia. Nor did we, but the evidence we did find supports his conclusions. The only appellate level case we have that raises this issue does not specify whether the Negro in question is slave or free. In *Barrett v. Gibson*, a storage house for tobacco was "maliciously burnt by a Negro Woman of the Defts [defendant's]."[64] She was convicted and executed, but that did not help Barrett, who had lost his tobacco in the fire. He sued Gibson, the owner of the storage house, but failed to collect "because the Master is not Chargeable for the wilful wrong of his Servant."[65]

The jury was unresponsive to Barrett's claim for compensation on the ground that Gibson could have saved some of the tobacco if he had tried to do so. They did find that some of the tobacco could have been saved, but concluded that Barrett should pay for the tobacco only if he were held liable for the willful burning of the storage house.[66]

We suspect that the "Negro Woman" was a slave because it was not specified that she was free and because she was referred to as a Negro woman "of the [defendant's]," which sounds like she was his property. There is no specific mention of slave status in the case, and all the case law cited refers to the master-servant relationship. We take this to mean not that she was a servant, but rather that, like other Southern jurists, the Virginia judges in this case had decided to treat slaves as servants in the question of the master's liability for the willful wrongs of his slaves.[67]

Assuming that the Negro woman was a slave, the recognition of her as a human being, who was for these purposes in the same position as servant, served to protect her master. If owners were held civilly liable for the intentional wrongs of their slaves, it would have put enormous power in the hands of any slaves who were angry and desperate enough to risk their own lives to harm their masters. The defendant in

62. Morris, *"As If the Injury Was Effected by the Natural Elements of Air, or Fire": Slave Wrongs and the Liability of Masters*, 16 L. & Soc'y Rev. 569 (1981–82).

63. *See id.* at 577–78.

64. 1 Va. (Sir J. Rand.) R70 (1731).

65. *Id.* at R72.

66. *Id.* at R70.

67. *See generally* Morris, *supra* note 62.

Barrett would not only have lost his storage house, but he would also have had to bear the losses of all who had stored their goods with him. If the law had granted the power to slaves to make their masters liable by reason of the slaves' negligence or willful misconduct, it is questionable whether many of them would have been aware of these common law implications. However, the irony and the danger would not have been lost on lawyers and judges, themselves slave owners.

The slaves' exercise of their free will often made it difficult for slave owners fully to exercise what they considered to be their rights over their human property. If that property were also capable of bringing untold civil liability to their owners, the owners may well have viewed a law conferring such a capability as incompatible with the exercise of their property rights.[68] As it was, the recognition of the slave's human nature in this context served to bring him under servant law, thus protecting the owner from civil liability. No one could force a slave to accept entirely his owner's dominion over him as property, but the law could at least shield owners from some of the consequences of the slave's refusal to accept it. It did so by recognizing him as a human being responsible for his own willful misdeed.[69]

Several statutes illustrate the protection the law afforded the slave owner when his property was bent on doing wrong. These statutes sometimes required owners to compensate private individuals, but for the most part only when the owners knew or should have known of the wrongs their slaves were committing. In those cases, owners were held responsible for losses to others occasioned by their own negligent supervision of their slaves.

The statutes concerning water mills are an example.[70] The statutes set up rules "for prevention of abuses, by evil-minded covetous, and exacting millers."[71] Every miller not grinding according to turn, not grinding the grain sufficiently, or charging more than one eighth part of wheat or one sixth part of Indian corn had to pay fifteen shillings to the party injured for each offense.[72] For violations in which the miller was a slave or imported servant, the owner was not liable for the first two offenses. Instead, the slave or servant miller received thirty lashes for the first offense, and forty for the second. The third time a slave or servant violated the act, the owner had to pay for that and all subsequent violations by the same miller.[73] In this context, the law recognized the human nature of the slave by failing to hold the owner responsible for his slaves' wrongs in exactly the same way that it failed to hold him responsible

68. *See id.* at 584–93. Morris notes that several Southern judges in North Carolina, South Carolina, and Louisiana advanced the idea that if owners were to bear the costs of accidents caused by their slaves, it could lead to economic ruin. Morris also raises the possibility that the master's liability was limited because his power over the slave was limited, but he found only one jurist who adopted that position. That was in a Missouri case. *See id.* at 589.

69. The slave was, of course, held personally liable for his criminal wrongs. *See, e.g., In re* Elvira, 57 Va. (16 Gratt.) 561 (1865). *See generally* A. SCOTT, CRIMINAL LAW IN COLONIAL VIRGINIA 293–313 (1930) (discussing criminal liability of slaves).

70. 1806 Va. Acts 12 (1807); 6 Hening 55 (1748); 3 Hening 401 (1705).

71. 3 Hening 401, 402 (1705).

72. *Id.* at 402–03.

73. *Id.* at 403–04.

for his servants' wrongs.[74] The fact that the slave was also the owner's property was not relevant in such a situation.

Other statutes made slave owners civilly liable for damage caused by their slaves if there was not adequate supervision of the slaves' living quarters. A 1692 act provided that "where it shall happen that any damage shall be hereafter committed by any negro or other slave living at a quarter, where there is noe christian overseer, the same damage shall be recompenced by the owner of such slave to the party injured."[75] The provision was reenacted in 1705.[76] The fact that the owner was explicitly made liable for any damage caused by his slaves when they were inadequately supervised suggests that he would not have been held civilly liable for their wrongs when supervision met the usual standard.

In an act to provide against misuse of a bridge over the Rivanna River, owners were not held liable for their slaves' improper use of the bridge.[77] The 1834 act fined persons who "willfully, wantonly and maliciously ride on or drive horse, cattle, mules or other things over Walker Timberlake's bridge . . . faster than in a walk."[78] Half the fine was to go to the Commonwealth and half to the bridge owner. Slaves were punished by whipping, unless their owners paid the fine.[79]

The statute against stealing hogs, passed in 1705, shielded owners only partially from civil liability for their slaves' wrongs.[80] Free persons convicted a second time of stealing hogs had to pay 400 pounds of tobacco, half to the owner of the hog and half to the informer.[81] In the case of indentured servants, the master paid the entire fine and the servant reimbursed him by additional service at the rate of 150 pounds of tobacco per month. If the hog-stealer were a slave, his owner had to pay 200 pounds of tobacco to the hog's owner, but nothing to an informer.[82]

Why was a slave owner required to compensate the owner of a hog the first time his slave stole, yet not made responsible for his slave miller's wrongs until the third offense? It may be because of the direct benefit his slaves received from the theft — a substantial amount of meat. The benefits to the slave and his owner are less clear in the case of the miller's violation of the regulations. This explanation would account for the fact that the slave owner had to pay only the hog owner, and not an informer.

There were a number of other statutes that fined owners for their slaves' misdemeanors only if the owners directed the slaves to do wrong, consented to their

74. The acts regulating milling applied to imported servants as well as slaves. *See* 1806 Va. Acts 12 (1807); 6 Hening 55, 59 (1748); 3 Hening 401, 403 (1705).

75. 3 Hening 102, 103 (1692).

76. 3 Hening 447, 460 (1705).

77. 1833 Va. Acts 170 (1834).

78. *Id.*

79. *Id.* at 171.

80. 3 Hening 276 (1705).

81. *Id.* at 277. There were significant differences in the treatment of free whites and nonwhites who violated the act. For a first offense whites had the choice of 25 lashes or 20 pounds current money. Negroes, Mulattoes, and Indians received 39 lashes. This was in addition to the tobacco they had to pay to the owner and the informer. *Id.* at 276.

82. *Id.* at 277. There could be no penalty of additional service for slaves, who served for life, but they did receive more lashes than did white servants. *Id.* at 276.

actions, or knew of the actions.[83] These statutes provided no civil damages and therefore are not considered here.

Apart from the master's liability for losses the slave willfully caused to others, there was also the question of who should bear the loss when the slave's negligence caused damage to himself. Usually there was no candidate save the owner, but when the slave was hired out, the question sometimes arose as to whether the owner or the hirer should have to bear the loss.

In *Harvey v. Skipwith*,[84] the court held a hirer liable for injury to a slave when he used the slave contrary to contract, notwithstanding that the slave might have been guilty of negligence that caused the injury. Skipwith had hired out a slave, Jefferson, to Harvey on the express condition that Jefferson would not be used in blasting. When Jefferson was blinded in a blasting accident, Harvey claimed that the overseer had done the blasting himself and had instructed Jefferson to stand back, but that the slave had come up behind the overseer, unbeknownst to him. The court held Harvey liable anyway because he had used Jefferson in blasting in violation of the contract. The court said that if the slave were injured while employed contrary to the contract in a dangerous way, "the hirer is liable for the damage, notwithstanding the slave may have been negligent or imprudent or have acted in disobedience of the orders of the hirer in respect to such employment, and notwithstanding such negligence or imprudence or disobedience may have been the proximate cause of the injury."[85]

The court, in acknowledging that the slave might have been negligent and that his negligence might have been the proximate cause of an injury, recognized some peculiarly human qualities in the slave. These were human qualities with particular consequences in tort law. The case, however, was decided on the basis of a contractual agreement. Slaves as human beings might be capable of negligence, but no one could recover from a slave, so the question then became which master was to bear the loss. The masters had an agreement as to how the human property was to be used, and that agreement superseded any willful actions on the part of the slave who caused the damage. If the hirer had used the slave as he had promised, neither the slave's negligence nor the injury would have occurred.

Thus, the humanity of the slave and his volitional capacity to be negligent in ways that injured himself and therefore damaged his owner's property were not allowed to supersede contractual relations and responsibilities concerning that property. As usual, the legal recognition of the slave as property precluded his recognition as a human being when the two led to contradictory results.

Generally speaking, the hirer had to bear the loss when, during the term of hire, the slave's own actions deprived the hirer of his services. But if the slave died a natural death, then the owner had to bear the loss. This can be seen in *George v. Elliott*,[86] when a slave who had been hired for a year died after five months. George, the hirer, claimed credit on his bond from the time the slave died until the end of the

83. *See, e.g.*, 1829 Va. Acts 23 (1830); 1814 Va. Acts 94 (1814); 12 Hening 174 (1785); 3 Hening 462 (1705).
84. 57 Va. (16 Gratt.) 393 (1863).
85. *Id.* at 405.
86. 12 Va. (2 Hen. & M.) 5 (1806).

year. The court noted that if a slave became ill or ran away during a term of hire, the hirer still had to pay. If, however, the slave died through no fault of the hirer, the loss fell on the owner, on whom it would have fallen had the slave not been hired. George thus got credit on his bond, for the court held, "it would be unreasonable to allow the owner hire — HIRE! — for what? — for a dead negro!"[87]

E. *Summary*

In all of the contexts discussed above in which the court gave recognition to the human nature of the slave, there was no invasion of what the law held to be the owner's rights of property. The rule of law supported and sometimes enhanced the rights of the owner. In the law's concern to maximize the owner's property interests, the slave might, in some rare instances, benefit also, as in *Fitzhugh v. Foote*,[88] when the court spoke out against the separation of a mother and infant, but the primary context was that of insuring the rights of the owner. The slave as such had no rights. Yet the court talked of the slave's humanity and the importance of human feelings. It evidently did not strike the judges as odd or hypocritical that the humanity of the slave was recognized only in the sense that it made the slave a special form of property, requiring special care and capable of special attachments. The recognition of the human nature of a person did not inevitably entail, as it does for us today, the granting of personal rights. That would have interfered with the rights of property, and property rights came first where slaves were concerned.

III. Failure to Recognize the Slave's Humanity in Ways That Would Invade the Rights of Property

> [P]ersons in the *status* of slavery have no civil rights, save that of suing for freedom when entitled to it: they can make no contracts, nor acquire any property: they can obtain no redress by action against their masters or others, for personal injuries: they are in truth *civiliter mortuus*, and without protection of public authority, except that of the criminal law.[89]

The law's failure to recognize the full human nature of the slave consisted of its failure to recognize the slave as having any civil rights. Any denial to a slave of rights enjoyed by free Negroes and Mulattoes of the same age and sex meant that it was the slave status per se that was the reason for the failure to give full legal recognition to his humanity. The law regularly denied such rights when they would have interfered with the exercise of the owner's property rights in his slave.

A. *The Incapacity of Slaves to Make Contracts*

One of the rights that most free adults enjoyed in pre-Civil War Virginia was the right to make a contract. Married women were excepted, as were children and those

87. *Id.* at 6.
88. 7 Va. (3 Call) 13 (1801).
89. Peter v. Hargrave, 46 Va. (5 Gratt.) 12, 17 (1848).

adults who were mentally incompetent. Indentured servants could make contracts with their masters, but only under court supervision, presumably to ensure that the contract represented the free will of the servant.[90] The relationship between master and indentured servant put in question the free will of the servant in making a contract. The relationship between master and slave made the exercise of such free will legally impossible. John Howard, the counsel for the appellants in *Bailey v. Poindexter's Ex'r*[91] argued,

> Nor, indeed, from the relation between master and slave, can any contract, by or with a slave, acting for himself, have any possible legal validity whatever. For the parties to every valid contract must be free agents; they must have an "agreeing mind;" but as the will of the slave is under subjection to that of the master, the requisite independence and freedom to make the contract or not, does not exist.[92]

Beyond the fact that the slave was in a subordinate position, Howard cited a second and to him a stronger reason for the slave's incapacity: "[S]ince the slave himself, and all the acquisitions of the slave, belong to the master, a contract by the master with his slave, is but a contract by the master with his own property concerning his own property."[93]

The courts consistently refused to enforce agreements made by slaves acting on their own, and not as agents of their masters. Slaves sometimes made agreements with their masters to buy themselves or their relatives, but such contracts had no legal standing and would not be enforced by a court of law or equity.[94]

In *Sawney v. Carter*,[95] Sawney, a "colored man," sued Carter to recover his freedom on the grounds that he had repaid his purchase price. He claimed that when Carter had bought him, they had agreed that when Sawney paid back his price, he

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90. 3 Hening 447, 450 (1705).

91. 55 Va. (14 Gratt.) 132 (1858).

92. *Id.* at 141.

93. *Id.* Howard went on to say:

> Nor is it any answer to say that, with the consent of the owner, the slave is competent to contract with third persons; for the slave in such cases is but the agent of the master, whose will and control appear in every such permitted act of the slave. The acts of the slave, indeed, are but the acts of the master, if authorized or ratified by him: otherwise, they are of no legal validity or effect.

Id.

94. Although they had no legally enforceable rights, slaves did make contracts with their owners and the owners did sometimes honor them. In 1792, the legislature passed an act emancipating "a negro woman named Rose and her three children" and acknowledged that she had bought herself and her children from their owners. 1792 Va. Acts 111 (1792). This was in spite of the fact that the law did not recognize her capacity to make a contract or to own property. In the eyes of the law, the money with which she paid her master belonged to him anyway. But since no one challenged the contract or its execution, the court acknowledged the custom of letting slaves buy their freedom or the freedom of their family members. The preamble to the statute read,

> Whereas it is represented that a negro woman named Rose, did on the twenty-ninth day of December, one thousand seven hundred and eighty-eight, pay to her then master and owner, Rice Parker, of the county of Caroline, the sum of fifty pounds in full for her future services and labor; and did also on the sixth day of March, one thousand seven hundred and eighty-nine, pay to the said Rice Parker the sum of twenty-five pounds for the future services and labor of two of her children named Judy and Katy; and did on the first day of March, one thousand seven hundred and ninety-two, pay to George Pickett, the sum of fifty pounds in full for the future services and labor of her son David; and the said Rose, alias Rosetta Hailstock, hath made application to this Assembly to pass an act emancipating not only herself, but also her said children David, Judy, and Katy which it is judged right to do . . . .

Id.

95. 27 Va. (6 Rand.) 173 (1828).

should go free. Judge Coalter, writing for the court, found that while proof of the contract was unclear, there was "perhaps proof enough in the record, of his master having received some property, to wit, a waggon and three horses, [from the slave] . . . to send the case to an account."[96] That is, there was some evidence of a transfer of property to sustain the claim of the contract if it could be proved and if such a contract could be enforced in equity.

The court decided that a contract of freedom could not be enforced in a court of equity. There were no cases supporting the jurisdiction of the court and one case against jurisdiction, which Judge Coalter had found to be "a very strong case for the [slave]" in terms of fairness and justice, presumably even stronger than that of *Sawney*.[97]

In that case, *Rose v. Haxall*,[98] John Rose claimed his freedom on the grounds that he had repaid his purchase price to Duncan Rose, who had bought him in an estate sale. When he was alive, Duncan Rose had told the same story, admitted that John was free, and paid him wages. When Duncan died intestate, having failed to emancipate John Rose formally by will or deed, the estate claimed John as a slave, and he sued for his freedom. The court found that John had not been emancipated in any of the ways prescribed by law and denied his plea. The administrator of Duncan Rose's estate, Haxall, whom John Rose sued, was charged with conserving the assets of the estate and could not emancipate estate property on his own initiative. But Haxall said he was not hostile to John Rose's claim of freedom and merely wanted to know whether the Court of Equity would recognize it, under either the contract or any other mode of emancipation established by law. The court refused to grant John Rose his freedom.[99]

In *Stevenson v. Singleton*,[100] decided a year after *Sawney v. Carter*, the court disposed of the case in a short paragraph, citing *Sawney v. Carter* as precedent and phrasing the holding of *Sawney* as, "[I]t is not competent to a court of chancery to enforce a contract between master and slave, even although [sic] the contract should be fully complied with on the part of the slave."[101]

There is the notion that courts of equity are to do equity and they have a broader latitude in assuring a fair and just result than do courts of law.[102] Despite their purpose and their broad powers, courts of equity, like those in *Rose* and *Sawney*, did not feel compelled to render justice to a slave suing for his freedom under a contract, even when they recognized the outcome as harsh and when the administrator of the estate to which the slave belonged did not object. In declaring itself not to have jurisdiction, the court was in effect saying that the law's recognition of a slave as property precluded the court's consideration of justice or fairness for him.

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96. *Id.*
97. *Id.* at 174.
98. This was apparently an unreported case; thus we have only the summary of the case given in *Sawney*.
99. *Sawney*, 27 Va. (6 Rand.) at 174–75.
100. 23 Va. (1 Leigh) 79 (1829).
101. *Id.* at 81.
102. *See, e.g.*, W. DEFUNIAK, HANDBOOK OF MODERN EQUITY 1–10 (2d ed. 1956).

A court of equity would have refused to enforce contracts made by minors or by persons who were mentally incompetent in order to protect those persons. When it refused to enforce contracts made by slaves, it was not motivated by any concern with the slaves' welfare. There was not even the claim or fiction that it was. Rather, the court's concern was that the rights of the master over his human property should not be disturbed. This can be clearly seen in the fact that courts did enforce contracts made by slaves as agents for their masters.[103] It was only contracts made by slaves acting on their own behalf that the courts refused to enforce.

The incapacity of a slave to make a contract also precluded his right to contract a marriage, as noted by the court in *Brewer v. Harris*.[104] Retha Harris was a free woman of color "whose husband was a slave."[105] She had three daughters whom the County Court had bound out as apprentices until the age of seventeen because they were bastards.[106] Harris challenged the indenture on a number of grounds but did not challenge that her daughters were bastards. That was the basis on which the County Court had acted to apprentice them. Judge Baldwin, in ruling that the County Court had acted within its jurisdiction, noted the fact that "their father being a slave, [he was] therefore incapable of contracting matrimony in the mode prescribed by our law."[107] Marriage involved the partners in rights and duties under English law that would have interfered with the rights that the law recognized an owner had over his slave property.[108]

B. *The Incapacity of Slaves to Own Property*

The first formal pronouncement that slaves could not hold property came in 1692, in "An act for the more speedy prosecution of slaves committing Capitall Crimes."[109] There, the legislature decreed:

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103. *See supra* Part II, Section B on slaves as agents.

104. 46 Va. (5 Gratt.) 285 (1848).

105. *Id.*

106. Judge Baldwin quoted Section 35 of Act 2, Rev. Code, ch. 239, which provided that "every bastard child may be bound apprentice, by the overseers of the poor . . . ; every male, until he attains 21 years, and every female until she attains 18 years, and no longer; . . . ." *Brewer*, 46 Va. (5 Gratt.) at 300. The court noted that the number of years the daughters were bound out was under the statutory limit. *Id.* at 297.

107. *Brewer*, 46 Va. (5 Gratt.) at 303. Judge Brooke went even further to speculate whether the children of all free blacks were not bastards. "Whether the children of free persons of colour are all to be construed bastards, it is not material to decide in this case. There is no form of marriage, as regards them, pointed out by our statutes." *Id.* at 307. By denying slaves the ability to marry, the whites could be assured that their children were all either slaves (if children of slave women) or free bastards (if children of free women and slave men) who might be bound out as apprentices.

If other judges had agreed with Brooke that no free colored could marry, then all of their children could have been apprenticed as bastards also. It would have been a convenient way for whites to dispose of free black children and to increase the labor supply. The reasoning has a Machiavellian twist to it: first make it impossible for blacks to marry and then penalize their children because they are bastards. The "act for declaring what shall be a lawful marriage," did not, in fact, contain any racial restrictions. 10 Hening 861 (1780). Brooke's judicial racism had no statutory basis.

Slaves sometimes did go through a ceremony of marriage, but the court would not honor it, as they show in the *Brewer* case.

108. In a Maryland case, this point was made explicit for female slaves:

> When the laws of *England*, and the essential and inseparable rights annexed by them to the civil institution of marriage are considered, either the master's property must give way for the support of the marriage of a female slave, or her marriage must be deemed invalid; in order to preserve her master's property.

Opinion of Daniel Dulany, 1 H. & McH. 559, 562 (Md. 1767).

109. 3 Hening 102 (1692).

> That all horses, cattle and hoggs marked of any negro or other slaves marke, or by any slave kept, and which shall not by the last day of December next, be converted by the owner of such slave to the use and marke of the said owner, shall be forfeited to the use of the poore of the parish wherein such horse, beast or hogg shall be kept, seizable by the church wardens thereof.[110]

This does not appear to have stopped the practice of slaves keeping livestock on their own, for the legislature addressed the question again in 1705, and this time the lawmakers did not allow the slave owners a grace period during which to convert the animals to their own use.[111] In the same year, they declared that indentured servants were allowed to hold their own property.[112]

Property of slaves other than livestock was not mentioned in these statutes, nor was the fact that slaves could not legally own any property, though the latter did appear as dicta in opinions such as *Peter v. Hargrave*.[113] One mid-19th century statute providing for the voluntary enslavement of a group of slaves who had been manumitted and given property by their master's will explicitly vested the property of the slaves in their new master.[114] Slaves who were freed after 1806 faced a hard choice. They had to leave Virginia and their families and friends there within a year, or face re-enslavement.[115] Some stayed illegally and faced possible enslavement if caught; others went through a formal process of voluntary enslavement, which allowed them to choose their masters.[116] The freed slaves of Archibald T. Gordon chose the latter option. The legislature approved and declared that the estate to which the former slaves were entitled under Gordon's will would become vested in their new master, "and he shall have the right to ask, demand, sue for and recover such estate for his own use."[117] While Virginia law never recognized any right of the slave to own property, custom did, and on occasion the court referred to such customary rights. In *Sawney v. Carter*,[118] Judge Coalter said, "[T]here is perhaps proof enough in the record, of his master having received some property, to wit, a waggon and three horses, which the pauper claimed as his own, and the proceeds of his earnings by waggoning, to send this case to an account."[119] Thus, although it was illegal for the slave to hold livestock[120] or to hire himself out for wages,[121] the judge implied that the court might have been willing to look at such evidence if it had been competent to enforce a contract between a slave and his master.

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110. *Id.* at 103.

111. *See* 3 Hening 447, 459–60 (1705).

112. *See id.* at 450. The statute stated,

> [I]f any servants shall, at any time bring in goods or money, or during the time of their service, by gift, or any other lawful ways or means, come to have any goods or money, they shall enjoy the propriety thereof, and have the sole use and benefit thereof to themselves.

Id.

113. 46 Va. (5 Gratt.) 12 (1848). *See supra* text accompanying note 89.

114. *See* 1861 Va. Acts 251, 252 (1861).

115. *See* 1805 Va. Acts 35, 36 (1806).

116. This option was first given by statute in 1856. *See* 1855 Va. Acts 37 (1856).

117. 1861 Va. Acts 251, 252 (1861).

118. 27 Va. (6 Rand.) 173 (1828). *See supra* text accompanying notes 95–97.

119. *Id.*

120. *See* 3 Hening 447, 459–60 (1705); 3 Hening 102, 103 (1692).

121. *See, e.g.*, 1807 Va. Acts 22 (1808); 1800 Va. Acts 37 (1801); 11 Hening 59 (1782).

C. *The Inability of Former Slaves to Collect Damages for Illegal Detention in Slavery*

One of the rights of a free person in Virginia was that he was entitled to damages when he had suffered a loss because of the wrongful actions of others. Slaves were not. A master could sue for damage to his human property, but one who was legally a slave could not sue on his own behalf. He did not have the necessary legal personality.

But what of persons who were illegally held as slaves, those who were entitled to their freedom and eventually won it through the courts? Could they sue to recover money they had earned for their masters while they were illegally detained?

Until 1850, the courts routinely denied damages to litigants who won their freedom, although they had allowed damages in colonial times for apprentices kept beyond their contracts, even black apprentices.[122] In one case, *M'Michen v. Amos*,[123] the appeals court allowed to stand a jury award of "one cent damages"[124] to someone held wrongfully in slavery. But when more than a token amount was involved, the court refused, even when they recognized, as in *Paup v. Mingo*,[125] that to do so went contrary to a sense of justice.

In that case, William Walker, who died in 1789, had stated in his will that he wanted his slaves to be emancipated after his debts were paid. Lawsuits by his creditors prolonged the settling of the estate, and some fifteen years after Walker's death the slaves had not yet been freed. Instead, they had been hired out to create a fund to pay the debts of the estate, so that they would not have to be sold to satisfy the creditors. In 1809, the slaves were freed by a decree of the chancellor on the grounds that ample reserve existed in the fund to pay the debts. When the estate debts were finally settled in 1827, a surplus remained in the fund, and the former slaves petitioned for it.[126]

The chancellor in equity granted them the profits, but the appeals court reversed. Two of the three judges acknowledged that the outcome was a harsh one, but claimed that the point of law was so well settled that it could not be overturned. In fact it could have been, but the court declined to use its broad powers in equity to render justice to former slaves. Judge Carr lamented,

> There is much in this argument, which addresses itself to our sense of justice, and to our feelings; but unfortunately for them, the point has been irrevocably settled against them. . . . There have been numerous cases of recovery of freedom by persons illegally held in bondage; and in many of them, the violation of freedom has been gross and palpable, and the public feeling strongly on their side; yet in not one single case, have damages for the detention been given.[127]

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122. West v. Negro Mary, McIlwaine 372, 373 (Va. 1674); Moore v. Light, McIlwaine 354 (Va. 1673).
123. 25 Va. (4 Rand.) 134 (1826).
124. *Id.*
125. 31 Va. (4 Leigh) 175 (1833).
126. *Id.* at 175–80.
127. *Id.* at 190.

Judge Tucker, who concurred, expressed no regret for the ruling.[128] He agreed that the law could not be changed, but even if it could, he doubted the wisdom of doing so.

> [T]here are many grave considerations which ought to be weighed . . . . [T]he slave, in his birth and his infancy, has been a burden, and . . . if the master could have foreseen his emancipation and his demand for profits, he might have been altogether averse from incurring such a charge.[129]

The most comprehensive justification for refusing to allow recovery of damages or *mesne* profits by those illegally held in slavery was given in *Peter v. Hargrave*.[130] In that case, the slaves were to have been set free by their master's will. When they were not, they sued for their freedom and claimed the profits of their labors since the death of their master on the grounds that "the defendants had detained them in slavery with a full knowledge of their right to be free; and had defended and protracted the suit upon pretexts that were entirely frivolous and groundless."[131]

The court rejected their claim and, far from lamenting their inability to collect damages, as did Judge Carr in *Paup*, found their claim entirely inappropriate. Judge Baldwin wrote for the court,

> Persons in the *status* of slavery are not entitled to any of the remedies of freemen: They are slaves whatever may be their right to freedom, and have no civil privileges or immunities. They are subject to the control, dominion and discipline of their masters, and must look to them for maintenance and protection. . . . In truth, while they remain in the *status* of slavery they have no personal rights, and of course no remedy by action for redress of injuries. The only suit they can bring is for the recovery of freedom; and even during its pendency they still continue slaves, in the care, service and custody of their masters, without any restraint upon the authority and power of the latter, except such as is necessary for a fair trial and adjudication of the controversy.[132]

Judge Baldwin's determination to keep slaves as slaves, even when they were entitled to their freedom, sprang from two sources, both of which were elaborated in the opinion. The first was a concern for the economic well-being of the slave owners:

> A rule giving *mesne* profits to slaves, after a recovery of freedom, would operate harshly and often ruinously in regard to the master . . . . The owner of slaves . . . is usually condemned to a constant . . . burden of care and expenditure. It seldom happens that more than a small proportion of them are capable of productive labour; while provision must be made for the food, clothing and shelter of all; for the helplessness of infancy, the decrepitude of age, the infirmities of disease; to say nothing of the heedlessness, slothfulness and waste natural to persons in their condition. Hence it is that the scantiness of net profit from slave labour has

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128. *Id.* at 197 (Tucker, J., concurring). Judge Tucker's position here is consistent with the one he took some years earlier in Hudgins v. Wright, 11 Va. (1 Hen. & M.) 133 (1806). In that case he disagreed with the lower court chancellor, who had ruled that freedom was the birthright of everyone under the Virginia Bill of Rights, and who said that the burden of proof was therefore always on the would-be owner in freedom suits. Tucker said the Bill of Rights was not meant to be "a side wind to overturn the rights of property," and held that the burden of proof was to be on the one claiming freedom, unless he or she looked white. *Id.* at 136, 140.

129. 31 Va. (4 Leigh) at 199.

130. 46 Va. (5 Gratt.) 12 (1848). *See supra* text accompanying note 89.

131. *Id.*

132. *Id.* at 13–14.

> become proverbial, and that nothing is more common than an actual loss, or a benefit merely in the slow increase of capital from propagation.[133]

The second source was a conviction that because of Negro inferiority, slavery conferred a benefit rather than a hardship on the slaves themselves. Therefore, the apparent harshness of the ruling was illusory:

> In point of abstract justice, it may seem reasonable enough that slaves recovering their freedom should be entitled to an account of *mesne* profits: but a slight examination will serve to shew that the question is anomalous in its character, and arises out of a peculiar organization of society, affecting the condition and rights of persons in a way unknown to the principles of the common law.[134]

Judge Baldwin went on to describe the "peculiar organization of society" that affected people in ways unknown to the common law. He saw slavery as a suitable status for an inferior population, for a "servile race."[135]

> Slavery is with us an institution founded upon a distinction of races, one of which is subject to the control and domination of the other. The servile race, from colour, and other physical traits, carry with them indefinitely the marks of inferiority and degradation; and even when relieved from bondage can never aspire to association and citizenship with the white population. Freedom to them is a benefit rather in name than in fact; and in truth, upon the whole their condition is not thereby improved in respectability, comfort or happiness. . . .[136]

He concluded that in most instances "no practical injustice will be done them, by striking an even balance of profit and loss between them and their former masters."[137]

In 1849, the legislature enacted a law allowing *mesne* profits to go to former slaves.[138] The law stated:

> When slaves are emancipated by will, the net proceeds of the aggregate of their hires and profits, with which the personal representative of the testator is chargeable, or so much thereof as may not be required for the payment of debts, shall, unless inconsistent with the manifest intention of the testator, belong to the persons so emancipated, and be apportioned among them as a court of equity having cognizance of the case may deem just.[139]

This statute applied only to slaves manumitted by will, not to those who claimed their freedom on other grounds, so it may be said to have been carrying out the will of the testator rather than offering a boon to individuals whom a slaveowner had wrongly considered to be his property. Nevertheless, it softened the harshness and injustice that some judges felt when denying former slaves such profits. It was not,

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133. *Id.* at 19.

134. *Id.* at 21–22.

135. When Judge Baldwin wrote, in the mid-nineteenth century, slavery was under increasingly strong attack from abolitionists. In addition, theories of scientific racism were being elaborated, both in the United States and in Europe. *See* W. STANTON, THE LEOPARD'S SPOTS: SCIENTIFIC ATTITUDES TOWARD RACE IN AMERICA 1815–59 (1960).

136. 46 Va. (5 Gratt.) at 22.

137. *Id.*

138. Code of 1849, ch. 106, § 8, p. 465 (quoted in Osborne v. Taylor, 53 Va. (12 Gratt.) 117, 117 (1855)). The statute was enacted in 1849 and took effect in 1850. Osborne v. Taylor, 53 Va. (12 Gratt.) at 126.

139. *Osborne*, 53 Va. (12 Gratt.) at 117 (quoting Code of 1849, ch. 106, § 8, p. 465).

however, a right recognized as belonging to slaves but, rather, a right of presumptively free persons who had not yet received final recognition of their free status.

D. *The Incapacity of Slaves to Sue Except for Their Freedom*

There was no statute saying that slaves could not sue, except for their freedom. We simply find no other kind of case in which a slave (or alleged slave) was the plaintiff. In addition, a number of cases offer as dicta statements that slaves cannot sue, as in *Peter v. Hargrave*, where Judge Baldwin said of persons in the status of slavery, "[T]hey have no personal rights, and of course no remedy by action for redress of injuries."[140]

Why then, were slaves allowed to sue for their freedom? We believe that it was on the assumption that they were not really slaves at all but, rather, free persons who were illegally held in slavery. The only way to make it possible for such persons to recover their freedom was to allow them to sue for it.

Even so, when the legislature acted in 1795 to regularize the procedure in freedom suits, it did so not to facilitate such suits, but to protect the masters. The statute was to consolidate several acts concerning slaves, free Negroes, and Mulattoes, and the preamble read:

> Whereas great and alarming mischiefs have arisen in other states of this Union, and are likely to arise in this by voluntary associations of individuals, who, under cover of effecting that justice towards persons unwarrantably held in slavery, which the sovereignty and duty of society alone ought to afford; have in many instances been the means of depriving masters of their property in slaves; and in others occasioned them heavy expences in tedious and unfounded law suits: To the end that a plain and easy mode may be pointed out by law for the recovery of freedom where it is unjustly and illegally denied, and that all such practices may in future be made useless and punished.[141]

The act next set out a procedure for suing and provided for punishing anyone helping in a suit that failed.[142] Later, the procedure for freedom suits was re-enacted, with minor changes, as one of a set of statutes helping poor persons in their suits. An 1818 act "providing a method to help and speed Poor Persons in their Suits"[143] contained the procedure for someone who wished to sue for his freedom.

The person was to go to the county court or to a magistrate, who then summoned the owner to appear and answer the complaint. The owner had to give a bond equal to the value of the slave, assuring that he would let the slave appear at the next court session to pursue his freedom suit. If the owner did not give bond, the petitioner was held by the court and the master was charged for his keep.[144]

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140. 46 Va. (5 Gratt.) 12, 14 (1848).

141. 1795 Va. Acts 16 (1795).

142. *Id.* at § III.

143. 1817 Va. Acts 71 (1818). A 1786 statute to help poor persons in their suits did not mention persons in the status of slaves but merely provided for writs and counsel without cost to the plaintiff. 12 Hening 356 (1786).

144. 1817 Va. Acts 71 (1818).

The protection this provision provided for the petitioner indicates the seriousness with which the legislature took such claims. Slaves were property and could expect very little help or protection from the law as persons; what protection they did receive was by way of protecting their master's valuable property. Free persons were another matter entirely. They had a right to their freedom, and if any of them had been illegally enslaved, a gross injustice had been done, and prompt action had to be available to correct it. The only practicable measure was to allow those in the position of slaves into court to sue for their freedom.[145]

Thus, the slave's right to sue for his freedom was not the right of a slave at all, but the right of a presumptively free person who was illegally held in slavery. People who were truly and legally slaves had no such right, but the only way to prove that they were legally enslaved was for a freedom suit to be decided against them.

E. *Summary*

The failure of the law to recognize any rights of the slave sprang from its view of the slave as property. A free Virginian had clear and inviolable rights with regard to his property, and once the slave was slotted into that legal category any rights given to him were a violation of the property rights of his owner. That is not to say that the courts or the legislature could not have created a legal position for slaves as inferior human beings rather than as a special form of property, but they did not. The slave became property, and the courts consistently refused to give legal recognition to his humanity in any way that would have interfered with his owner's rights of property in him. This refusal included the denial of a slave's right to make a contract, his right to own property, his right to sue, and even his right to collect damages if he had been illegally held in slavery. He could sue for his freedom, not as a slave but, rather, as a presumptively free person who had been illegally enslaved. In short, the slave had no personal rights at all.

IV. The Recognition of No Status Between Slave and Free

The status of a free person and that of a slave were antithetical in the eyes of the law. One kind of person could hold property and was entitled to the protection of the law in so doing; the other was property and had no rights that would interfere with his owner's dominion over him. One could sue and be sued; the other could not. One had the right to personal liberty; the other had none. One had the right of security and protection of his person; the other had not. A free person had all these rights and a slave had none. No middle ground was recognized. There was no status between slave and free.

The transformation of a slave into a free person marked such a dramatic change that Judge Carr, in *Fulton v. Shaw*[146] described it as a rebirth: "[W]hen she is made

145. There were statutes against illegally enslaving free persons, but these statutes would have been hard to enforce without allowing such persons to speak out and seek redress. *See* 5 Hening 547, 548 (1748); 6 Hening 356, 357 (1753); 12 Hening 531 (1787); 1847 Va. Acts 95, 97 (1847).

146. 25 Va. (4 Rand.) 597 (1827).

free, her condition is wholly changed. She becomes a new creature; receives a new existence; all property in her is utterly extinguished; her rights and condition are just the same as if she had been born free."[147] The case was one in which a slave owner, John Fitzgerald, freed his slave Mary Shaw and tried to reserve a right to her future children as his slaves. The court would not tolerate such an arrangement. Judge Carr said, "A *free* mother cannot have children who are *slaves*. Such a birth would be monstrous both in the eye of reason and of law."[148] The reservation of right was declared invalid, and Mary and her children born after the deed was executed were, simply, free persons.

In *Fulton*, the court's refusal to contemplate any status between slave and free worked to the advantage of the former slave and her children. In a number of mid-nineteenth century cases, similar refusals worked against the slaves with a terrible irony. A number of testators, aware of the statutes that would force emancipated slaves to leave the Commonwealth within a year,[149] tried to offer their slaves a choice of slavery in Virginia or freedom elsewhere. If the owner knew that a slave wished to remain in Virginia, he sometimes tried to make it possible for the slave to choose his master. Such bequests often resulted in a denial of freedom by the courts.

In one such case, Absalom Flowers, in his will, directed "that my negro man James have his choice to live with either of my children or grandchildren, whichever he may select; but he may have the privilege to change his home, if he think proper, if not well treated, and may live where he prefers."[150] James chose to live with Flowers' granddaughter, Lucy Adams, and did so for three years, when other relatives claimed that the clause in the will disposing of him was invalid. They said that James should be considered as intestate property, that he should be sold, and that the money should be distributed among Flowers' heirs.[151]

The court found that Flowers' intention to provide a comfortable and agreeable home for James was "very plain" but that he had

> attempted to confer upon him rights and privileges which are wholly inconsistent with a state of slavery . . . . The sole object of the testator seems to have been to confer these privileges on the slave, and to leave him in a condition between slavery and freedom — a condition unknown to our laws and against its policy.[152]

In trying to arrange for James' greatest comfort, Flowers had unwittingly left an opening, which some of Flowers' relatives used to claim a piece of James' value for themselves, thus entirely defeating the testator's intent. Flowers' solicitousness for James' comfort resulted in James being sold—the last thing the testator would have wished.

During the nineteenth century, the courts developed an increasingly hard line on

147. *Id.* at 599.
148. *Id.*
149. 1805 Va. Acts 35, 36 (1806).
150. Adams v. Gilliam, 1 Patton & Heath 161 (Va. Spec. Ct. App. 1855).
151. *Id.*
152. *Id.* at 164.

the question of a slave's capacity to make a choice under a will. In 1799, the court had carried out testator John Pleasants'

> desire . . . respecting my poor slaves, [that] all of them as I shall die possessed with shall be free if they choose it when they arrive to the age of thirty years, and the laws of the land will admit them to be set free, without their being transported out of the country.[153]

No question had arisen as to the slave's legal capacity to make the choice. Similarly, in *Elder v. Elder*[154] the court had honored the testator's wish to allow his slaves to choose freedom in Liberia or slavery under his brother in Virginia.

By mid-century, however, the court of appeals would no longer allow slaves to have the choice of slavery in Virginia or freedom elsewhere. In *Osborne v. Taylor*[155] a testator declared that his slaves were to be manumitted after the death of a Mrs. Johnson, for whose benefit they were to serve as slaves during her life. In a separate clause, he further stipulated that should any of them prefer to remain in Virginia, they could choose their own masters, serve during the life of the person chosen, and then have another opportunity to choose between slavery and freedom. The court declared invalid the clause that allowed the slaves to remain in Virginia, "in a condition intermediate between slavery and freedom," that is, with the future right to opt twice for their freedom.[156] It did, however, recognize the separate and earlier clause granting them freedom on the death of Mrs. Johnson. The slaves were freed; they could not choose to remain slaves.[157]

Three years later, the court refused to free the slaves of John L. Poindexter, when he did not in his will separate the grant of freedom from the wish that his slaves be allowed to choose freedom or slavery.[158] The court had allowed Pleasants' slaves to do so in 1799, but it would not in 1858. Poindexter's will stated, "The negroes loaned my wife, at her death I wish to have their choice of being emancipated or sold publicly."[159] Judge Daniel thought that "[t]he whole tenor of his will shows that he intended manumission of the slaves to depend on the performance by them of the precedent condition of electing to be emancipated."[160] He then asked, "Is the condition one which the slaves have the legal capacity to perform?"[161]

The question seems misconceived, for a condition precedent does not necessarily imply a legal capacity. As Judge Moncure noted in his dissent,

> The fallacy of the argument . . . consists in supposing that to make such an election would be to exercise a civil right or capacity. . . . It is said that a slave emancipated by an election given him by his master, would become free by his own act, and not by the act of his master. But this is not so. A slave can become free only by the act of his master; and the act must

153. Pleasants v. Pleasants, 6 Va. (2 Call) 319, 319 (1798).
154. 31 Va. (4 Leigh) 271 (1833).
155. 53 Va. (12 Gratt.) 117 (1855).
156. *Id.* at 128.
157. Slaves could, as free persons, voluntarily enslave themselves by statute to a master of their own choosing after 1856. 1856 Va. Acts 37 (1856).
158. Bailey v. Poindexter's Ex'r, 55 Va. (14 Gratt.) 132 (1858).
159. *Id.* at 186.
160. *Id.* at 189.
161. *Id.* at 190.

be done in a certain prescribed mode. When the act has been done in that mode, it may be made to depend on the willingness of the slave as well as upon any other condition.[162]

The majority of the court was unswayed by this argument and held that by the will the testator had "endeavored to clothe his slaves with the uncontrollable and irrevocable power of determining for themselves whether they shall be manumitted."[163] That endeavor, in turn, attempted to create a status between slavery and freedom and was therefore invalid. The slaves were to remain slaves. With regard to prior cases that had allowed slaves to choose, *Pleasants v. Pleasants* and *Elder v. Elder*, Judge Daniel said that the slave's legal capacity to choose had simply not been raised in those cases.[164]

In *Williams v. Coalter*,[165] decided later that same year, the court went even further in restricting bequests of freedom in which slaves were given a choice. In *Bailey*, the bequest and the choice were tied together in the same clause of the will—indeed, in the same sentence. In *Williams*, they were separated, as they had been in *Elder*. In one clause, Hannah Coalter directed that her slaves be emancipated on a specific date, January 1, 1858, and the executors were directed to raise a fund from her estate to send the slaves to Liberia or any other free state or country where they might wish to live.[166] In another, later clause she wrote, "[A]nd I further direct, that if any of my said servants shall prefer to remain in Virginia, instead of accepting the foregoing provisions, it is my desire that they shall be permitted by my executors to select among my relations their respective owners."[167] This second clause led the court to declare the bequest of freedom invalid. Citing *Bailey*, the court said, "[A]s there can be no intermediate condition between slavery and freedom in the *status* of the negro, so neither can there be an intermediate condition as to civil rights and capacities."[168] Judge Moncure, in a strongly worded dissent, wrote that he would have held the manumission valid and the later clause invalid, as the manumission was clear and was not made dependent on the slave's choice.[169] He found the case distinguishable from *Bailey* in the separation of the two clauses, though he still thought that case had been wrongly decided.[170]

During the nineteenth century, the courts drew an increasingly rigid line between slavery and freedom. The legal vision of the slave as property and as the antithesis of a free person in every respect concerning rights and capacities gained in strength, and one of the few choices open to a slave, that of choosing whether or not to accept a bequest of freedom, was closed. In some of the earlier cases, when the conflict was noted, it was resolved in favor of freedom.[171] In later cases, the attempt itself to give

162. *Id.* at 204 (Moncure, J., dissenting).
163. *Id.* at 199.
164. *Id.* at 194.
165. 55 Va. (14 Gratt.) 394 (1858).
166. *Id.* at 394.
167. *Id.*
168. *Id.* at 397–98.
169. *Id.* at 408–09.
170. *Id.* at 416–17, 421.
171. *See* Parks v. Hewelt, 36 Va. (9 Leigh) 511 (1838); Elder v. Elder, 31 Va. (4 Leigh) 271 (1833); Isaac v. West, 27 Va. (6 Rand.) 652 (1828); Fulton v. Shaw, 25 Va. (4 Rand.) 597 (1827).

slaves such a choice in a will resulted in a denial of their freedom. The law would not tolerate any suggestion of a status between slavery and freedom, and the courts increasingly used any such ambiguity to pronounce in favor of slavery. Slavery was under increasing attack, and the structure of the slave system might have been in danger of disintegrating, but the concept of slavery held by Virginia judges was, if anything, more rigid than ever.

V. Conclusions

There was a tension between the idea of the slave as a human being and the idea of the slave as property in the civil law of Virginia, but the categories were not mutually exclusive. Sometimes the recognition of the slave as a human being conflicted with his classification as property; in those cases his humanity did not receive recognition in the eyes of the law. In other cases, the slave's special qualities as a human being were what made him such valuable property. Then the law waxed eloquent on the subject of the slave's humanity. Any suggestion of civil rights for the slave was rejected because those rights would have endowed him with legal capacities that could readily have come into conflict with his owner's property rights. The law would recognize in the slave nothing capable of "invading the right of property."[172]

The opposition between the status of a slave and the status of a free person was also an important one in Virginia civil law, and, in this case, the categories were mutually exclusive. Moreover, there was no status in between; a person had to be one or the other. Free blacks had a legal position inferior to that of free whites, but they were another kind of being from slaves.[173] To be freed was to become a "new creature," to receive a "new existence," with rights to liberty and property.[174]

Within such a rigid system of statuses, there was still some room to recognize the slave as a human being. We have shown that the slave's human nature was recognized when it enhanced his value as property, enabled his owner to use him more effectively, or protected his owner from liability. It was also recognized when, in the late eighteenth and early nineteenth centuries, courts allowed slaves to choose whether or not to accept a bequest of freedom under a will that offered them the choice. In such cases the boundary line between statuses remained firm. Slaves were merely recognized as creatures with a human capacity to express a preference on this important question.

By the mid-nineteenth century, the courts refused to allow slaves the choice, saying that to do so conferred on them a legal capacity to free themselves. The decision was not easily predictable in terms of past Virginia slave law. On the one hand, allowing the slave the choice did not interfere with the rights of property, except for the rights of the heirs, who took by default if the bequest of freedom were declared invalid. The courts had regularly refused to recognize the humanity of the slave when

172. Allen v. Freeland, 24 Va. (3 Rand.) 170, 178 (1825).

173. The law relating to free Blacks in pre-Civil War Virginia is discussed in a manuscript in progress by A.L. Higginbotham, Jr. and G. Bosworth.

174. Fulton v. Shaw, 25 Va. (4 Rand.) 597, 599 (1827).

it interfered with the owner's property rights. On the other hand, allowing the slave to choose did not benefit the owner, as happened in other contexts in which the slave's humanity was recognized, such as agency and specific performance. Or, rather, it benefited him only in the sense that it carried out his wishes as a testator. It conferred no advantage.

The cases offering the slave the choice of slavery in Virginia or freedom elsewhere thus fell into neither of the two categories described in this Article: cases in which the slave's humanity was recognized because to do so conferred a benefit on the owner and cases in which the slave's humanity was not recognized because to recognize it would have invaded the owner's rights of property.

The will that offered the slave a choice recognized his humanity in a way that conferred an advantage on him, not on his master. Still, it did not invade the rights of property. In line with the logic of past cases, the courts could have gone either way, and they did. Initially, they construed such wills in favor of freedom and either allowed the choice or freed the slaves without allowing a choice. By mid-nineteenth century, they held such bequests invalid, thus ruling in favor of slavery.

On the eve of the Civil War, the Virginia Court of Appeals was unwilling to follow the dictum of *Allen v. Freeland*, which recognized that slaves were rational beings, "entitled to the humanity of the Court when it can be exercised without invading the right of property."[175] Instead, the court drew back from recognizing the slave's human nature in a way that was not directly beneficial to his owner.

The human nature of the slave had never had, in the eyes of the law, the same existential quality as did the human nature of a free person. The inalienable rights that in principle belonged to all human beings were not extended to slaves. Slaves were, it seems, not unqualified human beings, but only human beings when it suited the interests of their masters, or at best when it did not conflict with those interests. The self-evident truths regarding human equality and rights proclaimed in the Declaration of Independence were not self-evident when applied to slaves. Indeed, they did not apply to slaves at all. Nor did the Virginia Bill of Rights, which declared that "all men are by nature equally free and independent, and have certain inherent rights."[176] In human terms, the judges obviously recognized that slaves were human beings and marked that recognition with rhetorical flourishes on occasions when the legal recognition of the slave as a person caused no offense to the slave system. But that recognition fell by the wayside whenever it was likely to cause inconvenience or loss to slave owners or when it was thought to challenge the slave system. What legal recognition there was of the human nature of the slave served to support slavery and to make it more profitable and advantageous to the slave owners.

In reflecting on the slavery jurisprudence discussed in this Article, some readers might question its relevance to the America of today. After all, slavery was abolished well over a hundred years ago (in 1863 by the Emancipation Proclamation and in

175. Allen v. Freeland, 24 Va. (3 Rand.) 170, 178 (1825).

176. DOCUMENTS OF AMERICAN HISTORY 103 (H.S. Commager 8th ed. 1968).

1865 by the Thirteenth Amendment), and in one sense the laws we have been discussing are archaic.

In another sense, however, the material we have used is wholly contemporary, not in the specific content of the laws, but in the process it illustrates.

A legislature and an activist judiciary, primarily concerned with protecting property interests, recognized the human needs, aspirations, and suffering of the most powerless people in the society, the slaves, only when to do so served the interests of powerful whites like themselves. When such recognition ran contrary to those interests, they withdrew their human sympathies and turned to discussing the importance of property rights, economic hardship to vested interests, and settled rules of law, which they claimed even a court of equity could not overturn.

The judges and legislators turned a selective blind eye to the plight of the most powerless victims of their society. In some ways this seems almost as bad as not recognizing the slaves' humanity at all, for it shows that those in power made a calculation, even though it may at times have been an unconscious one, that some human beings were not worth protecting against vested interests.

That process is one we must even now watch for and guard against. To what extent do judges, legislators, and those in the executive branch of government today engage in such calculations when it comes to protecting the most powerless people in our society? To what extent do we go along with their judgments?

Because those in power in the past, particularly the judges, used their discretion to ignore the claims of humanity and to increase the harshness of racial oppression under slavery, is it not legitimate for us to question the ability and will of today's society, as reflected in our government, to be fair and just to the powerless of our society: women, children, the aged, the mentally impaired, the homeless, people of different ethnic and cultural backgrounds, and others suffering severe economic deprivation? Just as we judge the slave masters of the past, future generations will evaluate our actions. Will they conclude that those in power today are insensitive to the helpless victims of our generation, just as were many leaders to the plight of slaves in earlier periods of our nation's existence? That will surely be the judgment of the future unless we make certain that the rights of property are subordinate to the rights of humanity.