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QUANTITATIVE LEGAL HISTORY—EMPIRICS AND THE RULE OF LAW IN THE ANTEBELLUM JUDICIARY

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INTRODUCTION: THE CONFLICT OVER THE RULE OF LAW

This symposium asks how we can quantify and evaluate what judges do. Some of the papers are skeptical of attempts at quantification.¹ These questions are of importance to legal historians, who frequently seek to link judicial behavior to larger cultural, economic, and political trends. This essay suggests some ways that one might quantify and thus measure an important and central issue for legal historians: how did appellate judges define, work with, and alter the “rule of law”?

DEFINING THE RULE OF LAW IN ANTEBELLUM JURISPRUDENCE

In 1856, four years after *Uncle Tom’s Cabin*,² Harriet Beecher Stowe despaired at the fortunes of the antislavery forces. Though many people throughout the country had wept upon reading of Tom’s death

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1. See, e.g., Marin K. Levy, Kate Stith & José A. Cabranes, *The Costs of Judging Judges by the Numbers*, LEGAL WORKSHOP (DUKE L.J., Feb. 25, 2010).

2. HARRIET BEECHER STOWE, *UNCLE TOM’S CABIN* (Mary R. Reichardt ed., Ignatius Press 2009) (1852).

at the hands of Simon Legree at the end of the novel, the abolitionists had seemingly won few converts to their cause. The end of slavery seemed as far away as ever. A majority of politicians, voters, and judges supported the ideas that fugitive slaves must be returned to their owners, that Congress should refrain from interference in the institution of slavery, and that a utilitarian calculus of the costs of abolition and the benefits of slavery favored the continuation of slavery. Especially in the courts, the rhetoric that this nation must uphold the rule of law and return fugitive slaves to their owners—and otherwise support the law of slavery—proved compelling. Stowe wondered why this was: how could people feel the inhumanity of slavery and yet uphold the slave law? Her novel, *Dred: A Tale of the Great Dismal Swamp*, addressed adherence to the rule of law by judges, politicians, and religious leaders, and thus offered something of an answer.³

One important subplot of *Dred* derived from North Carolina Supreme Court Justice Thomas Ruffin's 1829 opinion in *State v. Mann*.⁴ In that case, Ruffin freed Mann from criminal liability for abusing a slave in his custody.⁵ Yet Ruffin acknowledged that the decision he had made was a hard one. He wrote of the conflict he felt between his feelings and his duty as a magistrate. "The struggle," Ruffin observed in the first paragraph of the opinion, "in the Judge's own breast between the feelings of the man, and the duty of the magistrate is a severe one, presenting strong temptation to put aside such questions, if it be possible."⁶ Yet, he told his readers he had to issue a decision against liability. "[I]t is criminal in a Court to avoid any responsibility which the laws impose. With whatever reluctance therefore it is done, the Court is compelled to express an opinion upon the extent of the dominion of the master over the slave in North-Carolina."⁷ Ruffin emphasized that the master (or possessor in this case—Mann had rented the slave he abused) must have uncontrolled authority over the body of the slave. "The power of the master must be absolute, to render the submission of the slave perfect," Ruffin grimly observed.⁸

3. HARRIET BEECHER STOWE, *DRED: A TALE OF THE GREAT DISMAL SWAMP* (Robert S. Levine ed., Penguin Books 2006) (1852).

4. *State v. Mann*, 13 N.C. (2 Dev.) 263 (1829).

5. *Id.* at 268.

6. *Id.* at 264.

7. *Id.*

8. *Id.* at 266.

Judge Ruffin's honesty caught the attention of Stowe and of other abolitionists, too, for they realized that Ruffin had exposed the difficult truth at the heart of the law of slavery. And they exploited Ruffin's honesty. Stowe wrote in 1853, in the nonfiction *A Key to Uncle Tom's Cabin*, that she was sorry that "such a man, with such a mind, should have been merely an expositor and not a reformer of law."⁹ She came to the conclusion that Ruffin was not a reformer because judges followed legal logic: "[i]t is often and evidently not because judges are inhuman or partial but because they are logical and truthful, that they announce from the bench in the calmest manner, decisions which one would think might make the earth shudder and the sun turn pale."¹⁰ It was the cold logic that led to so many perverse conclusions: "Every act of humanity of every individual owner is an illogical result from the legal definition The decisions of American law-books show nothing so much as this severe, unflinching accuracy of logic."¹¹

Stowe explored this adherence to legal logic in more depth in *Dred*. In that novel, she constructed a fictional judge, Justice Clayton of the North Carolina Supreme Court, who was antislavery in private, yet issued a proslavery decision.¹² The decision Stowe put into the fictional Justice Clayton's hands almost exactly replicated the text of *State v. Mann*. The morning before Justice Clayton issued his decision, he spoke with his wife about it. When she asked why he was ruling in favor of the abuser, he said "[a] Judge can only perceive and declare. What I see, I must speak, though it go against all my feelings and all my sense of right."¹³ Although antislavery advocates were unhappy retreating to the terms of legalist logic, this behavior was a recurring theme of the antebellum judiciary.¹⁴

Stowe seemed perfectly willing to concede that there is something of a common-law method of legal logic and that applying that logic—which included a utilitarian calculus of the costs and benefits of a rule that protected slaves against abuse—yielded proslavery results. Proslavery literature often advocated such analysis. For instance,

9. HARRIET BEECHER STOWE, *A KEY TO UNCLE TOM'S CABIN* 79 (Boston, John P. Jewett & Co. 1853) (emphasis omitted).

10. *Id.* at 82.

11. *Id.*

12. STOWE, *supra* note 3, at 16.

13. *Id.* at 350.

14. *See, e.g.*, STOWE, *supra* note 9, at 104 (discussing *State v. Mann*).

Thomas R.R. Cobb's *An Inquiry into the Law of Negro Slavery*¹⁵ combined two lines of thought. First, a historical interpretation of slavery made it seem close to universal and also humane. For instance, Cobb argued that enslaved people produced more and often led better lives than free workers. Under Cobb's worldview, slavery was better for the slaves, as well as their owners. The second line of thought held that judges should decide cases according to principles of logic and law, which he believed were distinct from passions favoring slaves. Those principles were based often on the seeming ubiquity of slavery and on its purported utility as well. There was a strong sense, even among abolitionists, that the law was proslavery and that abiding by the rule of law would yield a proslavery result.¹⁶

Yet others interpreted the meaning of "the law" differently. They did not think that the law was so firmly proslavery as did Ruffin or Cobb. For instance, Ralph Waldo Emerson's 1852 speech in Concord, Massachusetts against the Fugitive Slave Act of 1850 expressed surprise at the number of law books that seemed to contemplate introducing natural justice—what was commonly called at that time the "higher law." Emerson read the legal literature as supporting—rather than opposing—a doctrine of "higher law," which had been so heavily criticized by legal thinkers:

15. THOMAS R.R. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA (Univ. of Ga. Press 1999) (1858).

16. The first part of Cobb's treatise ("An Historical Sketch of Slavery"), *id.* at xxxv–xxxvii, was grounded in the extensive literature on the contemporary practice of slavery. Cobb's utilitarian argument about the necessity of slavery and the impracticality of emancipation suggest that his scholarship was an early form of legal realism. These arguments appeared in many places in Southern legal writing, including in Georgia Supreme Court Justice Ebenezer Starnes's novel, *The Slaveholder Abroad*, which included an appendix comparing crime rates in slave and free states. See EBENEZER STARNES, THE SLAVEHOLDER ABROAD 465–512 (Philadelphia, J.B. Lippincott & Co. 1860). The focus on proslavery empiricism came just as antislavery writers also turned toward empiricism. Thus, William Goodell's *The American Slave Code in Theory and Practice* looked to the law as it was on the books (proslavery) and in operation (even more proslavery). See WILLIAM GOODELL, THE AMERICAN SLAVE CODE IN THEORY AND PRACTICE (Negro Universities Press 1968) (1853).

The latter part of Cobb's treatise develops the law internally, but he draws upon the historical sketch when discussing comity. He suggests that slavery is so ubiquitous that it exists before and without positive law and that states should, therefore, recognize the property rights of slaveholders traveling through free jurisdictions. COBB, *supra* note 15, at 168–71 (critiquing *Somerset v. Stewart*, (1772) 98 Eng. Rep. 499 (K.B.), for its origins in excitement and sentiment rather than legal logic and concluding, "{w}ithout desiring in any manner to disparage the deservedly great reputation of the great jurist that delivered this opinion, it is nevertheless unquestionably true, and so admitted by his biographers and eulogists, that a prominent defect in his character was a want of that moral courage (that my Lord Coke possessed in such an eminent degree) that could withstand every influence when the law demanded his obeisance").

A few months ago, in my dismay at hearing that the Higher Law was reckoned a good joke in the courts, I took pains to look into a few law-books. I had often heard that the Bible constituted a part of every technical law library, and that it was a principle in law that immoral laws are void.

I found, accordingly, that the great jurists, Cicero, Grotius, Coke, Blackstone, Burlamaqui, Montesquieu, Vattel, Burke, Mackintosh, Jefferson, do all affirm this. I have no intention to recite these passages I had marked: such citation indeed seems to be something cowardly (for no reasonable person needs a quotation from Blackstone to convince him that white cannot be legislated to be black), and shall content myself with reading a single passage. Blackstone admits the sovereignty “antecedent to any positive precept, of the law of Nature,” among whose principles are, “that we should live on, should hurt nobody, and should render unto every one his due,” etc. “No human laws are of any validity, if contrary to this.” “Nay, if any human law should allow or enjoin us to commit a crime” (his instance is murder), “we are bound to transgress that human law; or else we must offend both the natural and divine.”¹⁷

Out of these conflicting viewpoints emerged serious discussion of what “the rule of law” meant and the origins of law in positive legislation, in the long-term customs of people around the world, and in natural moral sense. Despite the frequent invocations of it by judges, we still have a difficult time deciding whether a decision represents the rule of law—or something else, like the rule of sentiment.

Among legal historians in particular, there has been surprisingly little consideration of the quantifiable aspects of the question of just what “the rule of law” means and how to measure whether judges adhere to the rule of law. Yet some of the key questions that legal historians have asked about judges’ behavior are susceptible to quantitative exploration. In particular, I am interested in how to measure what “the rule of law” means and in how expressions of ideology may be measured in judicial opinions. I will discuss below several examples of how to begin to do this.

17. RALPH WALDO EMERSON, *The Fugitive Slave Law*, in 11 THE COMPLETE WORKS OF RALPH WALDO EMERSON 178, 190 (Edward Waldo Emerson ed., 1903) (emphasis omitted).

I. ASSESSING JUDGES: HISTORY'S METHODS

Legal historians frequently view judges as dependent variables—as gauges of larger intellectual and cultural movements, or, alternatively and more rarely, as gauges of how cultural movements do not penetrate law. Perhaps because legal historians have focused so much attention on law as an artifact of culture (Lawrence Friedman's *American Law in the 20th Century*¹⁸ comes to mind here), they have had relatively little concern for the assessment of whether judges are good at what they do. Thus, instead of focusing on judges as autonomous individuals, they analyze judges' output as it is affected by external factors, like ideology, culture, and economy.

In some models, judges (and judges' opinions) may be the vehicles for implementing changes impelled by economic and cultural thought. One tradition sees judges as reshaping law to promote positive economic results.¹⁹ Some of Richard Posner's earliest work, in which judges are more or less fungible, provided a quantitative assessment of the changes in nineteenth-century tort law.²⁰ The same is true for more recent work in economic history, like Jenny Wahl's *The Bondsman's Burden: An Economic Analysis of the Common Law of Southern Slavery*,²¹ which treats judges as a homogeneous group as it reveals the economic orientation underlying Southern law across forty years of opinions.

In each of those instances, there is an account of judges remaking the law. But there is no sense of whether they have made those changes according to the rule of law or on an ad hoc basis. Nor is it clear which judges do this well and which poorly: even when judges are the independent variables who remake law to promote economic growth, we have little sense of judges themselves—they do not emerge as individual actors. Instead, the judiciary appears as an undifferentiated group of men. One can read for pages in Professor Morton Horwitz's *Transformation*²² and in Professor William Novak's *The People's Welfare*,²³ both books centered on common-law adjudication, without

18. LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE 20TH CENTURY* (2002).

19. See, e.g., MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860* (1977).

20. RICHARD A. POSNER, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972).

21. JENNY BOURNE WAHL, *THE BONDSMAN'S BURDEN: AN ECONOMIC ANALYSIS OF THE COMMON LAW OF SOUTHERN SLAVERY* (1998).

22. HORWITZ, *supra* note 19.

23. WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE: LAW & REGULATION IN NINETEENTH CENTURY AMERICA* (1996).

seeing the name of any judge. Judges, despite their differing political and religious orientations, and their differing skills and training, are seemingly interchangeable.

Historians have sometimes looked closely at what judges contribute as independent actors, though even in these instances the picture often emerges that judges are vehicles for expression of their culture. We hear about individual judges through biographies, which are the legal historians' form of "thick description." Yet such a massive work of judicial biography as Professor Kent Newmyer's *Supreme Court Justice Joseph Story*²⁴—brilliant legal history as it is—threatens to lose the larger story in the details of individual cases and arguments around them. Thick descriptions may, nevertheless, help provide a reasonable level of generalization about how judges reason.²⁵ For example, Judge Posner's jurisprudential biography of Justice Benjamin Cardozo²⁶ and Richard Polenberg's Cardozo biography²⁷ focus on Cardozo's ideas without getting lost in so much detail of the lives of judges. Along those lines, collective biographies, like Professor G. Edward White's *The American Judicial Tradition* and, more recently, Professor Timothy Huebner's *Southern Judicial Tradition*, employ a similar methodology that focuses on ideas in opinions.²⁸

While one is talking about "thick description" and analysis of judges in history, one book stands out. Among the leading legal-history studies of the last several decades that deal with judges and judicial methods is Professor G. Edward White's *Marshall Court and Cultural Change*.²⁹ It links the decisions of the Marshall Court to larger trends in American culture, which emphasized the value of the union and the

24. R. KENT NEWMYER, *SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC* (1986).

25. Jack Knight, *Are Empiricists Asking the Right Questions About Judicial Decisionmaking?*, 58 DUKE L.J. 1531, 1554 (2009); H. Jefferson Powell, *A Response to Professor Knight*, 58 DUKE L.J. 1725, 1727 (2009) (focusing on the desire for generalization and empiricists' ability provide it).

26. RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* (1990).

27. RICHARD POLENBERG, *THE WORLD OF BENJAMIN CARDOZO: PERSONAL VALUES AND THE JUDICIAL PROCESS* (1997).

28. G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION* (2d ed. 1988); TIMOTHY HUEBNER, *THE SOUTHERN JUDICIAL TRADITION* (1999); *see also* Richard A. Posner, *Judicial Biography*, 70 N.Y.U. L. REV. 502, 520 (1995) ("[T]he obvious alternative to studying the judge's life is studying his opinions."); *A Conversation with Judge Richard A. Posner*, 58 DUKE L.J. 1807, 1821 (2009) (suggesting that studying judges' opinions is a more useful way to understand judicial behavior than conventional biography).

29. G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE, 1815–1835* (1988).

promotion of economic growth. White views Marshall's opinions as important supports for those missions. He does this through a comparison of Marshall's opinions with other key cultural expressions, such as James Fenimore Cooper's novels.³⁰ The question remains, though, whether there are some quantitative tools that scholars can employ to bring more precision to judicial decision-making.

II. ASSESSING JUDGES: QUANTITATIVE METHODS

Because of the nature of questions that legal historians have asked in recent years, they have rarely made wide-ranging assessments of judges' quality or of their adherence to key principles, like the rule of law (or even what people might mean by it). Perhaps, though, a systematic, quantitative approach can bring more precision to the two key issues: how judges operate (that is, how they find and use precedent, and how they write opinions) and what determines (or at least correlates with) outcomes.³¹

Maybe we can begin to understand and measure the quality of judges with some assessment of their peers' assessments (in part by citations and maybe also by how often they are mentioned by name in opinions). Or we may look to the energy judges expended on their jobs: in terms of the number of opinions they write; their longevity on the court; the length of their opinions; and the number of their concurrences and dissents.³²

Further, one might look to their learning and aspirations: what cases they cite, how far afield to they look for sources of law, how often they reach beyond their own jurisdiction's opinions. One might even consider whether they look to other countries' opinions, or beyond readily available treatises, and even to non-legal sources. There are other ways to try to tease out judges' aspirations, such as how often they use key phrases. A search for these phrases might reveal examples of judges' creativity in language. For instance, a search for "Daguerreotype" (an early form of photography) reveals how quickly

30. *Id.* at 40–48 (1988). G. Edward White's *The American Judicial Tradition* makes a similar, though broader, claim about the centrality of certain principles (like the rule of law) to American judges throughout history.

31. Knight, *supra* note 25, at 1554.

32. See, e.g., Stephen J. Choi & G. Mitu Gulati, *Ranking Judges According to Citation Bias (As a Means to Reduce Bias)*, 83 NOTRE DAME L. REV. 1279 (2007).

mid-nineteenth-century judges adopted allusions to the new technologies of their era—to light, darkness, and natural right.³³

There are, yet, some finer distinctions a quantitative legal history might make in terms of assessing the project of judging. As the vignette with which I began this Essay illustrates, persistent questions remain about what it means to judge according to the rule of law. And so I would like to see some quantitative precision brought to the exploration of whether judges abide by the rule of law.

I would like to suggest two places in particular that we might attempt to bring quantitative precision to understand the meaning of “the rule of law.” First, I hope to return to Professor Robert Cover’s ground: of judges who interpreted the proslavery nature of the common law and the Constitution. Cover’s key question in *Justice Accused: Anti-Slavery and the Judicial Process*³⁴ was why judges who were antislavery in private issued proslavery opinions. The answer turns on a constellation of arguments, which the judges themselves advanced, about the meaning of the Constitution and about the utility of a proslavery interpretation to the preservation of the Union. These arguments appeared in Fugitive Slave Act cases, as well as in state cases interpreting the rights of enslaved people who traveled with their owners to free states and then back into slave states, and in cases interpreting slaveowners’ wills that attempted to free their enslaved property. We need to graph them over time: how frequently were they invoked, how central were they to the result, and which opinions were subsequently cited? Moreover, what are the geographic, temporal, and factual determinants of a conclusion that the utility of slavery trumped considerations of the humanity of individual slaves? That is, in what states and when did judges refer to the utility of slavery? In what kinds of cases did they reference the utility of slavery? This would bring

33. There were several references to Daguerreotype images in the years before the Civil War. See, e.g., *Clark v. Pendleton*, 20 Conn. 495, 505 (1850) (construing the exchange of Daguerreotypes as evidence of promise to marry); *Maddox v. Simmons*, 31 Ga. 512, 531 (1860) (Lumpkin, J.) (noting that Judge Harris’ opinion, which was reprinted at the end of Judge Lumpkin’s, “will daguerreotype to posterity the peculiarities of our most excellent brother far better than any post-mortem eulogy of ours” (emphasis omitted)); *Ezekiel v. Dixon*, 3 Ga. 146, 157 (1847) (“Is not, I ask, the transfer from Lichten to Dixon & Lichten the Daguerreotype likeness of the one prohibited . . . ?”); *Tritt v. Crotzer*, 13 Pa. 451, 454 (1850) (“{T}here are cases in which the law is portrayed by a daguerreotype from nature and feeling, and approved by the impulses of a sound conscience; and does not result from abstractions of positive institute, found and established in a different and incongruous state of society . . .”).

34. ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975).

greater precision to what judges meant by “the rule of law” in fugitive-slave cases.

Second, I suggest matching the reasoning styles of judges across similar cases at a similar time as a more ambitious piece of a project to quantitatively gauge the ways that political ideology linked to judicial opinions.³⁵ For example, William W. Fisher has suggested that Whig political theory predominated in vested-rights cases in the years between the Revolution and the Civil War.³⁶ To investigate this claim, one could compare the political affiliations of judges against the appearance of Whig or Democrat doctrine in their opinions. Whigs, for instance, viewed expansively the contracts that corporations made with the government and argued that an expansive contracts-clause jurisprudence was necessary to protect investments in corporations and encourage technological and financial progress.³⁷ Democrats, by contrast, invoked arguments about the inalienability of certain governmental powers, like the right of eminent domain. Particularly helpful are cases in which there are dissents, which highlight the disjunction between reasoning styles.³⁸

There are two things to focus on in this analysis of Whig and Democrat judges. First, we need to look at the reasoning styles of judges, not just the outcomes. And, closely related to that, we need to develop systematic ways of measuring rhetoric in judicial opinions to assess reasoning styles. This may bring more precision to judicial reasoning styles than a “yes/no,” or “agreement/disagreement” variable.

A lot of data is buried in the hundreds of volumes of state and federal case reports before the Civil War. It is awaiting the systematic

35. See Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1905 (2009) (noting the difficulty of disentangling judges’ views on ideology from their views on law). As Judge Edwards and Professor Livermore note, some factors are quite difficult to code for. When these factors appear, studying judicial rhetoric in conjunction with citation patterns appears more promising.

36. William W. Fisher, *Ideology, Religion, and the Constitutional Protection of Private Property: 1760–1860*, 39 EMORY L.J. 65, 112–20 (1990) (detailing Whig styles of reasoning).

37. Justice Story’s dissent in *Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837), is the best-known of a long series of vested-rights cases that prominently featured Whig ideology and economic arguments, *see id.* at 584 (Story, J., dissenting).

38. Among the many state vested-rights cases with dissents in the antebellum era, which present the opportunity for highlighting disjunctions between Whig and Democrat ideology, are *Fisher v. Cokerill*, 21 Ky. (5 T.B. Mon.) 129, 133 (1827) and *Commercial Bank of Rodney v. Mississippi*, 12 Miss. (4 S. & M.) 439 (1845).

study made possible by quantitative methods. For instance, although there are some prominent Whig jurists—Justice Joseph Story and Judge Lemuel Shaw come to mind—a systematic study may provide a sense of how much the political doctrine of one party appears in the reasoning of the adherents of the other party. A systematic study may provide a better understanding of whether there was a unified judicial mind on such a critical and highly contentious area as vested rights. Did Democrats and Whigs largely think alike on vested rights, or, as one might expect from studying the statements of Democrat and Whig politicians, did they think differently? One way to approach this question is to look at several vested-rights opinions that were decided by Southern state supreme courts almost simultaneously during the Civil War. In 1864, the Confederate Congress passed a statute that made men who had already provided a substitute for military service subject to the draft. The statute was challenged in several states as a violation of the property rights of the men who provided substitutes. Five state supreme courts issued nearly simultaneous opinions on this issue. All upheld the statute; only one judge dissented. Those opinions contain recurrent issues of law, economics, and politics, and they provide a view of how Democrat judges reasoned differently from Whig judges. The Democrats were more comfortable retreating to arguments about the state's power to compel service than were the Whigs, who took narrower approaches to the question and narrowly construed the initial "contract."³⁹

Some important quantitative work of this kind has been done already by those looking at judges' use of economic analysis in the nineteenth century.⁴⁰ A substantial body of work already considers

39. One might contrast, for instance, the Georgia opinion, *Daly v. Harris*, 33 Ga. Supp. 38 (1864), written by Whig Justice Charles F. Jenkins, which construed narrowly the contract, with the bolder arguments of Democratic justices Mathias Manly of North Carolina and John Phelan of Alabama, see *Gatlin v. Walton*, 60 N.C. (Win.) 325, 333 (1864); *Ex parte Tate*, 39 Ala. 254, 255 (1864). For some initial explorations, see Alfred L. Brophy, *The Intersection of Property and Slavery in Southern Legal Thought: From Missouri Compromise Through Civil War* chs. 3, 6 (June 2001) (unpublished Ph.D. dissertation, Harvard University) (on file with the *Duke Law Journal*).

40. Dean David Levi reminds us that, although Judge Posner recommends that judges modify the law in ways that produce societal benefit, it is a mighty difficult task to know how a change might affect society: “[J]udges who think that they know what is sensible or beneficial merely by dint of education or intellect are just as formalist as the ‘legalists’ to the degree that they rely upon a fixed set of theories of human nature, economics, history, or political economy out in the ether to deduce rules of law, rather than building such rules from the ground up by responding to the particular facts of a particular situation and dispute.” David F. Levi, *Autocrat of the Armchair*, 58 DUKE L.J. 1791, 1805 (2009) (reviewing RICHARD A. POSNER, *HOW JUDGES*

whether judges self-consciously seek economic efficiency (or utility, to use the parlance of the antebellum United States). But my hope is to look more quantitatively across a spectrum of decisions to answer the question: to what extent was the “rule of law” understood to be a stable or a dynamic construct? It is an issue of identifying facets that can be quantified and aggregated so that we can have a fuller picture of a very complex system of thought and action. As we begin to understand how judges thought, perhaps that can illuminate “how judges think.”

THINK (2008)). This critique is increasingly raised against law-and-economics interpretations of the common law: judges may not have known how their decisions would affect welfare. *See, e.g.,* Gillian Hadfield, *Bias in the Evolution of Legal Rules*, 80 GEO. L.J. 583, 616 (1992).