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Southern Free Women of Color in the Antebellum North: Race, Class, and a "New Women's Legal History"

Bernie D. Jones

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SOUTHERN FREE WOMEN OF COLOR IN THE ANTEBELLUM NORTH: RACE, CLASS, AND A "NEW WOMEN'S LEGAL HISTORY"

Bernie D. Jones∗

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I. CONFIGURING RACE, GENDER, AND CLASS IN AMERICAN LEGAL HISTORY

In thinking about the status of Southern slave women newly freed in the antebellum North, it is important to think about the ways in which they experienced race, gender, and class. According to Deborah Gray White, "[they] were slaves because they were black, and even more than sex, color was the absolute determinant of class in antebellum America."[1] These women were "[black] in a white society, slave in a free society, woman in a society ruled by men [as] female slaves [they] had the least formal power and were perhaps the most vulnerable group

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1. DEBORAH GRAY WHITE, AR'N'T I A WOMAN: FEMALE SLAVES IN THE PLANTATION SOUTH 15 (1999).

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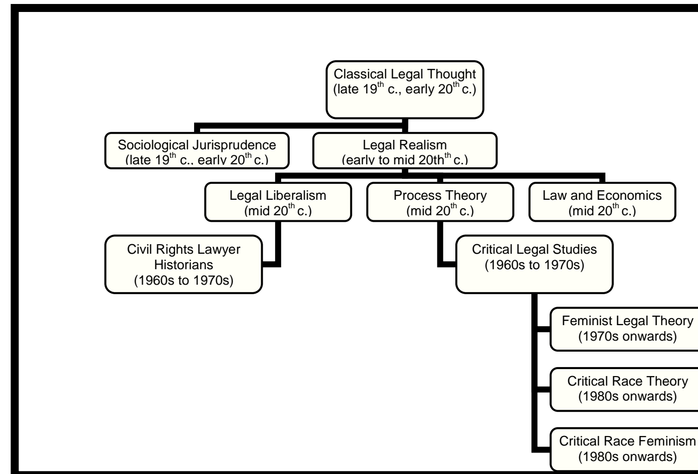
of antebellum Americans."[2] This was their reality, as a result of cultural and social practices founded in law. Legal elites developed as far back as the colonial period, a law of slavery based upon hierarchical notions of humanity seen as "natural." Blacks were inferior to whites, and it was natural that they should be enslaved, as a matter of organic law. Southern social and economic demands necessitated this legal order.[3]

In order to conceptualize race, gender, and class in American legal history today, it is important, first of all, to explain and discuss these topics within the contours of American legal thought. Race, gender, and class can be indicators of hierarchy and status in American society, especially when they are modulated through the institutional practices of politics and law. Within the realm of American legal thought over the past century, though, American lawyers have struggled with the extent to which they believed the law was indeed about power and politics. The following diagram, figure 1, "American Legal Thought, Late 19th Century into Today," lists the various schools of thought which have been significant, and demonstrates the relationships among them.[4]

2. *Id.*

3. *See, e.g.*, THOMAS R.R. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA (Univ. of Ga. Press, 1999) (1858). Richard Delgado and Jean Stephancic, in building upon their earlier works in critical race theory, i.e., Critical Race Theory: The Cutting Edge (Temple Univ. Press, 2nd Ed., 1999), focused in Critical Whiteness Studies: Looking Behind the Mirror (Temple Univ. Press, 1997), pp. 1-13, upon the ways in which whites historically defined themselves in relation to minority groups. Under African slavery, whites defined themselves in relation to the blacks in their midst. Blacks as slaves defined the opposite of whiteness: enslaved v. free, black v. white.

4. I developed the diagram based upon a study of various histories of American legal thought: NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE (1995); STEPHEN M. FELDMAN, AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM: AN INTELLECTUAL VOYAGE (2000); Bernie D. Jones, *Critical Race Theory: New Strategies for Civil Rights in the New Millennium?*, 18 HARV. BLACKLETTER L.J. 1 (2002).



In the late 19th and early 20th centuries, classical legal theorists, also known as formalists, believed the law to be beyond the realm of politics. Neutral principles animated judicial decision-making, while political considerations remained within the realm of legislatures. Judicial actors in the courts had the exclusive role of limiting the excesses of this political sphere. When legislative pronouncements infringed upon notions of "natural law," and for example, compromised property rights, threats of "class warfare" loomed in the face of regulatory regimes. Judicial actors were then called upon to intercede and shore up the buttresses.[5]

With respect to race and gender, this "natural law" presumed a universal order of hierarchy: male over female and black over white. Females were naturally subordinate to men (as a matter of Biblical interpretation) and because blacks were naturally inferior (as a matter of Biblical interpretation and logical reasoning) they were thus unequal to whites.[6] This type of rationale then remained a persistent theme in late 19th and early 20th century jurisprudence on questions of gender and race. Nonetheless, the hope of civil rights progress and equality persisted among those who would challenge discrimination, especially pursuant to the equal protection clause of the recently passed 14th amendment to the Constitution.[7]

5. For a general history of classical legal thought, *see, e.g.*, WILLIAM M. WIECEK, THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886-1937 (1998).

6. *See, e.g.*, FELDMAN, *supra* note 4. DAVID M. GOLDENBERG, THE CURSE OF HAM: RACE AND SLAVERY IN EARLY JUDAISM, CHRISTIANITY, AND ISLAM (2003).

7. U.S. CONST. art. XIV, § 1.

Justice Bradley, concurring in *Bradwell v. Illinois*, thus explained why a woman who met all the requirements to practice law could still be barred from obtaining a law license, as a matter of policy:

> [T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.[8]

With respect to the racial discrimination cases, the Court was quite clear that segregation was viable. Justice Brown, writing for the majority in *Plessy v. Ferguson*,[9] explained that segregation was a natural response based upon racial distinctions and the preferences of each group—white and black—not to meet each other on levels of social equality.[10] Justice Harlan explained in dissent, however, that the majority opinion upholding a Louisiana statute requiring segregation in public accommodations would lead to a setback in African American civil rights:

> If laws of like character should be enacted in the several states of the Union, the effect would be in the highest degree mischievous. Slavery, as an institution tolerated by law, would, it is true, have disappeared from our country; but there would remain a power in the states, by sinister legislation, to interfere with the full enjoyment of the blessings of freedom, to regulate civil rights, common to all citizens, upon the basis of race, and to place in a condition of legal inferiority a large body of American citizens, now constituting a part of the political community . . .[11]

For Harlan then, Supreme Court pronouncements on civil rights questions could not be divorced from their political implications. Oliver Holmes, one of the earliest critics of classical legal thought, explained that "behind the logical form [lay] a judgment as to the relative worth of and importance of competing legislative grounds, often an inarticulate

8. Bradwell v. Illinois, 83 U.S. 130, 141 (1872).
9. Plessy v. Ferguson, 163 U.S. 537 (1896).
10. *Id.* at 544.
11. *Id.* at 563.

and unconscious judgment . . ."[12] meaning that judicial decision-making has never relied exclusively upon eternal principles found in natural law, but has relied instead upon the pragmatic demands of the day—economic, social, cultural, political, and so forth. The followers of sociological jurisprudence, as Progressive era lawyers responding to this perspective, went further and argued in turn, that science could be used to ensure that the best types of legislation would be passed, and that judges would thus be enabled to make the best decisions in light of pragmatic societal demands.[13] In the eyes of the classicalists, these were the ones waging class warfare, with their interest in regulatory regimes and their rejection of laissez-fair principles in law, as indicated by *Lochner v. New York*, the opinion in which Justice Peckham, writing for the majority (with Justice Holmes in the dissent), rejected a New York state regulation that limited the number of hours an employee might work per week.[14] The majority grounded its reasoning in the classicalist doctrine of freedom of contract.[15]

By the 1930s, the legal realists were quite openly arguing for explicit judicial policymaking, in recognition that on some level, politics mattered in law. If judicial decisions can be seen as policy decisions, based upon judicial biases or their perceptions of social needs, economic interests and political perspectives, why not be open about it? Thus, the legal realist New Deal lawyers spearheaded the rise of an administrative state, where legislatures and administrative agencies could work in cooperation with a judiciary that saw itself as having an explicit purpose in formulating economic policies, as in *West Coast Hotel v. Parrish*,[16] where the Court upheld a minimum wage law to protect working women, or aimed to protect the rights of "insular minorities," according to footnote 4 of the *Carolene Products* decision.[17] Justice Stone indicated in this latter opinion that the Court was becoming interested in protecting the rights of minorities who had traditionally been locked out of the political process and who thus had not had recourse to the traditional means of protecting their civil rights.[18]

This legal realist perspective, which came to be known as "legal liberalism," was clear that judges might act as umpires in negotiating

12. Oliver Wendell Holmes, *The Path of the Law, in* THE CANON OF AMERICAN LEGAL THOUGHT 34 (David Kennedy & William W. Fisher III eds., 2006).

13. *See, e.g.*, DUXBURY, *supra* note 4; FELDMAN, *supra* note 4.

14. Lochner v. New York, 198 U.S. 45, 58 (1905).

15. *Id.* at 61.

16. West Coast Hotel v. Parrish, 300 U.S. 379 (1937).

17. United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938).

18. *Id.*

race, gender, and class interests. This legal liberalism animated *Brown v. Board of Education*,[19] a case which had been developed under the aegis of legal realist trained lawyers commissioned by the NAACP. The decision was a hallmark of sociological jurisprudence: the plaintiffs' brief relied upon the well known "doll studies" to prove that segregation damaged African American children.[20] The NAACP's Charles Hamilton Houston, a former student of Felix Frankfurter at Harvard once argued that the civil rights lawyer should be a "social engineer."[21] This legal liberalism, however, did not garner widespread support. Herbert Wechsler, as a process theorist, was an early critic of Brown, a decision which signified for so many, their hopes that race-based stratification would come to an end in the United States.[22]

The process theorists were those legal scholars who were troubled by legal realism in the 1930s. If law was only about policy, what prevented fascism from gaining sway? If anything, they believed that permitting judges to become policy makers and "legislators" only hastened democracy's demise by eviscerating the barriers between judicial and legislative functions. With judges acting as "legislators," there was no bulwark against legislative excesses because the judicial "legislators" only reinforced what the elected legislators did. By the 1950s, these process theorists argued that democracy could only be protected by reinforcing the boundaries between functions: executive, legislative, judicial.[23]

For the generation of lawyers and law students who comprised the New Left of the 1960s, the processes themselves were "illegitimate" insofar as the "processes of democracy" failed to recognize, explicitly, the politics of law and the power dynamics which animated them. Moreover, the politics of law supported the needs and demands of the

19. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

20. *See* Kennth B. Clark, Isidor Chein, & Stuart W. Cook, *The Effects of Segregation and the Consequences of Desegregation* (1952), *available at* http://www.psych.umn.edu/courses/spring06/lippmannb/psy4960/1954socialsciencestatement.pdf.

21. *See, e.g.*, Darlene Clark Hine, *Black Lawyers and the Twentieth Century Struggle for Constitutional Change*, *in* AFRICAN AMERICANS AND THE LIVING CONSTITUTION 38 (John Hope Franklin & Genna Rae McNeil eds., 1995); LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 230, 230-35 (1996) (discussing *Brown v. Bd. of Educ.* and its significance for legal liberalism in the United States).

22. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 22 (1959).

23. *See, e.g.*, DUXBURY, *supra* note 4. Adherents of law and economics viewed their approach as an attempt to reach a "pure" process, through reliance on universal rules, principles of economics, in guiding judicial decision-making. *See, e.g.*, NICHOLAS MERCURO & STEVEN G. MEDEMA, ECONOMICS AND THE LAW: FROM POSNER TO POST-MODERNISM (1997).

capitalist elite that held power at the expense of the non-elite. In the view of these critics of the law, notwithstanding any legal liberal interest in protecting the interests of the disempowered, the law only operated to reinforce class-based interests. These became known as the "crits," short for critical legal studies, their critique of law.[24]

Those with a particular interest in the politics of race became known as the "race-crits," critical race theorists, while the "feminist legal theorists" focused on gender. For each of the latter two groups, the politics of law meant the traditional disempowerment of women and minorities. Various women scholars of color argued though, that race and gender intersected, and that to limit inquiry to "race" or "gender" meant the experiences of women of color fell out of the equation, as women of color were forced to choose one over the other, never both at the same time.[25] Yet, a recently published canon of major works in legal theory over the past 100 years mentions themes of this "intersectionality" as they appear in critical race theory, but does not appear to present the larger movement specifically associated with—critical race feminism—as a significant development within either critical race theory or feminist legal theory: "[the] Critical Race Theory movement has experienced a wide number of divisions, and has spawned a number of spin-off efforts to develop the Critical Race Theory approach to other racial, ethnic, and sexual forms of domination."[26]

Critical race feminists have long cautioned against tendencies in feminist legal theory and women's history to focus exclusively upon women of majority race groups; at the same time, they argue against critical race theorists focusing upon race as the exclusive determinant of all issues faced by communities of color, to the detriment of gender. The intersections among them matters, they have argued: discourses of gender cannot ignore race and discourses of race cannot ignore gender.[27]

24. *See, e.g.*, MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987); Robert W. Gordon, *Some Critical Theories of Law and Their Critics*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 641, 641, 643-45 (David Kairys ed., Basic Books 3d ed. 1998).

25. *See, e.g.*, Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989).

26. Kimberlé Crenshaw et al., *in* THE CANON OF AMERICAN LEGAL THOUGHT 889, 898 (David Kennedy & William W. Fisher III eds., 2006). *See also id.* at 896 (discussing intersectionality).

27. *See, e.g.*, Evelyn Brooks Higginbotham, *African-American Women's History and the Metalanguage of Race*, *in* "WE SPECIALIZE IN THE WHOLLY IMPOSSIBLE": A READER IN BLACK WOMEN'S HISTORY (Darlene Clark Hine et al. eds., 1995); Elsa Barkley Brown, *"What Has Happened Here": The Politics of Difference in Women's History and Feminist Politics*, *in* "WE

To focus on gender and ignore race means that racial hierarchy can be ignored, and the critical race theory focus on race exclusively means that gender based differences within communities of color escape scrutiny: men can not fully represent women, and it is presumptuous to conclude that women of color are represented solely by their race. The thesis of this article is that critical race feminism, then, can be instrumental in shaping the contours of "a new women's legal history." Southern free women of color in the antebellum North, recently emancipated from slavery, can raise implications for this "new face of women's legal history," where race, gender, and class were not mutually exclusive, but were integrally connected.

Willard Hurst, credited with founding the field of American legal history, as a legal realist, was interested in thinking about the ways in which law became the means used by businessmen and industry leaders to formulate economic change within American society. Contrary to the classical type legal historians who predated him, he believed laws did not exist in a vacuum, divorced from their social and economic contexts. The law could be discovered "on the ground," in the arguments lawyers made in court, in the advice they gave their clients, or in the strategies they pursued, and not just within the court decisions and the doctrines formulated by appellate judges.[28]

Barbara Y. Welke has argued, though, that Hurstians traditionally failed to consider gender and the family when researching and writing legal history.[29] She once explained that this approach was wrong-headed. Women's historians' engagement with law had resulted in significant developments within legal history. Thus, she argued that legal historians should engage with gender:

> The serious engagement with gender and the legal order reflected in women's history scholarship has done more than simply shine a different light on the conditions of freedom in the nineteenth century; it has raised a series of fundamental challenges to the task of fully understanding law in society . . . First, in writing legal history, we ignore individual identity—whether of race, class, gender, or sexuality—at our peril. Second, in writing legal history we must be

SPECIALIZE IN THE WHOLLY IMPOSSIBLE": A READER IN BLACK WOMEN'S HISTORY (Darlene Clark Hine et al. eds., 1995); ADRIEN KATHERINE WING, CRITICAL RACE FEMINISM: A READER (2d ed. 2003).

28. *See, e.g.*, Carl Landauer, *Social Science on a Lawyer's Bookshelf: Willard Hurst's Law and the Conditions of Freedom in the Nineteenth-Century United States*, 18 LAW & HIST. REV. 59 (2000).

29. Barbara Y. Welke, *Willard Hurst and the Archipelago of American Legal Historiography*, 18 LAW & HIST. REV. 197 (2000).

> conscious of how law and gender, like law, and race, have been mutually constitutive. Law has been central in gender and racial formation as gender and race have been in shaping law. Third, dismissing "private" relationships like the family and marriage from broader discussions of public policy and state power ignores the process by which the law constructs such relationships as private in the first place and whose interests that construction serves.[30]

This article develops Welke's theme and proposes that in the field of legal history, the analyses can not be limited to "race, gender, or class," but that matrices of race, gender, and class must be considered at their intersections, "race, and gender, and class," where they might shed light on the significance of shifting legal modalities. It explores how race, gender, and class as legal policy in the 19th century could be crucial for the formation of family and marital relationships in the private sphere. The focus here is upon free women of color living in the antebellum North who had been the previously enslaved partners and biological children of their owners. The men made them bequests of manumission and property in their wills, because the law of slavery did not recognize them as spouses and members of the men's families. Trusts and estates law gave the men a loophole to force societal recognition of the women and children. Their status as slave women in the South limited their ability to defend their claims, however. Denied the legal status of white wives and children, moving to northern states was crucial for defining them as family members and for ensuring their change in class status from object of property to property owner. Legal institutions in northern jurisdictions like Cincinnati, Ohio, were instrumental in effectuating this change.

This study draws upon the methodologies of Hurst, in considering how abolitionist lawyers advised their clients and in explaining their use of strategy in representing these clients in family law matters. It also considers too, the methodologies of the critical legal historians who argued that the 'Hurstian historians' focus on what happened "on the ground" failed to consider the significance of what happened "above." Appellate courts were instrumental, they argued, in determining legal doctrines and formulating in turn, the policies that animated elite perspectives on race, gender, and class interests.[31]

30. *Id.* at 202. *See also* Bernie D. Jones, *When Critical Race Theory Meets Legal History*, 8 RUTGERS RACE & L. REV. 1, 2-4 (2006) (discussing the significance that critical race theory can bring to legal history work).

31. *See, e.g.*, Lawrence M. Friedman, *American Legal History: Past and Present*, 34 J. LEGAL EDUC. 563, 567 (1984); Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57

This study demands such an approach, because it is impossible to understand the strategies taken by an abolitionist lawyer like Jolliffe without taking into account the legal regimes his clients lived under. The Southern law of slavery, in the eyes of abolitionists, was a legal regime in which everything was turned upside down. Human beings, people, were considered property; women were not considered partners and wives, even though their reality said otherwise, and biological children were not considered progeny under the law. This was the legal order as formulated by state legislatures and reinforced by appellate courts. Strategizing to circumvent such practices and undermine them required ingenuity "on the ground" in an attempt to protect owners' prerogatives and the interests of those left behind: their partners and children.

II. African-American Women in the Antebellum United States: Enslaved and Free Women Facing the Law

Deborah Gray White in her study of enslaved women in the antebellum South explains quite clearly the significance of a critical race feminist perspective in American history:

> Race changed the experience of black womanhood. The rape of black women, their endless toil, the denial of their beauty, the inattention to their pregnancy, the sale of their children were simultaneous manifestations of racism and sexism, not an extreme form of one or the other. For black women, race and sex cannot be separated. We cannot consider who black women [were] as black people without considering their sex, nor can we consider who they [were] as women without considering their race.[32]

White considered the significance of black women's resistance to the oppression they experienced in their lives on a daily basis—fighting back when physically abused, refusing to accept verbal abuse, or running away, as significant for understanding the perspective on femininity developed by black women living under the regime of American slavery.[33] Aware that the traditional model of white femininity, of a woman protected on a "pedestal" did not fit their realities: "They did not see aggression and independent behavior as unfeminine," but saw them

(1984); Mark V. Tushnet, The American Law of Slavery, 1810-1860: Considerations of Humanity and Interest 121 (1981).

32. White, *supra* note 1, at 5-6.

33. *Id.* at 7-8.

instead as necessary tools in their arsenals.[34] Arguably too, using the courts, when they were enabled by law, whether through suits for freedom, or when coupled with the benevolence of a late slave owner partner or parent, can be seen as another means of resisting perpetual enslavement.

The legal scholarship on strategies of manumission has not tended to focus on gender, though. But the legal scholarship on slavery and gender has tended to focus instead on the legal perspectives of interracial sex that encouraged the rape of female slaves while punishing black men's sexual contact with white women. The law of slavery determined that the mixed race children of enslaved black women and white men would be considered black and enslaved like their mothers, but not free, like their fathers.[35] Civil rights "lawyer-historians" such as Higginbotham have tended to discuss slavery as the beginning of a long-standing pattern in American law to oppress African Americans as an aggregate whole, or to deny black men rights in particular, such as access to the franchise when white men routinely had such rights.[36] African Americans were thus constantly threatened by state-sanctioned discrimination reinforced by violent means, corresponding with denial of their civil rights. These "lawyer-historians," inspired to attend law school and become lawyers during the civil rights movement, were proponents of legal liberalism. Slavery was their starting point for arguing that African Americans had been "discrete and insular minorities" throughout the course of American history. These "lawyer-historians" inspired in turn, the critical race theorists who were their law students in the 1980s.[37]

Free women of color living in the North comprised a heterogeneous population. Some were born free, others bought their freedom, or were runaways, refugees from slavery in the South. As Wilma King indicates: "the slaveholder's status, marital and financial, was tangential

34. *Id.* at 8.

35. A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 40-47 (1978). *See also* A. Leon Higginbotham & F. Michael Higginbotham, *"Yearning to Breathe Free": Legal Barriers Against and Options in Favor of Liberty in Antebellum Virginia*, 68 N.Y.U. L. REV. 1213, 1243-44 (1993); THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW, 1619 – 1860, 22-25 (1996). Refer also to Delgado and Stephancic, supra, note 3, on the significance of "whiteness" in determining this demarcation line.

36. *See, e.g.*, A. LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM: RACIAL POLITICS AND THE PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS 7-10 (1996).

37. *See, e.g.*, Jones, *supra* note 30, at 10-12, n.2 (discussing A. Leon Higginbotham's significance in contributing to the legal history of African Americans in the United States and Derrick Bell's role as a founder of critical race theory).

to the possibilities of emancipation prior to an owner's death,"[38] just as the legal rules for manumitting, whether manumission was permitted, or not, or whether they were strict or easy, all were important in determining manumission strategies. She notes that "[unmarried] or widowed owners of means were more likely to free lovers than persons with legally recognized spouses and children, or an interest in avoiding scandals."[39] Moreover, "[emancipations] by wills, regardless of the deceased owners' marital status, were subject to challenges by money-hungry relatives or poverty-stricken heirs or relatives. It was not unusual for courts to overturn manumission decrees."[40]

Because of these factors, some free women of color in the antebellum North had been sent by their owners out of South to live as free women. Within this group of free women of color there were previously enslaved free women of color who had been the sexual partners of the white men who owned them, or their biological children. The men had never married, but, in opposition to social and legal conventions, lived openly with the enslaved women as though they were social equals. They then recognized the women and children in their last wills and testaments, hoping to leave them bequests of freedom and property. The men's wills, in turn, stirred up discontent among white relatives who felt entitled to the property; this made the women fearful for their lives. This fear could propel the women to flee to the North and remain there, where they might live in freedom and gain the resources to defend their rights to property in the South. Ohio, bordering the slave states of Kentucky and Virginia, was an important destination. The women relied upon lawyers in their new communities, like John Jolliffe, who represented their interests in fighting for their inheritance.

Recent scholarship on this topic of miscegenation and inheritance rights in the antebellum South is an example of this new horizon in the field of women's legal history: the complexities to be found in the intersections of race, gender, and class status in the law as it affected families.[41] The law treated different categories of women differently,

38. WILMA KING, THE ESSENCE OF LIBERTY: FREE BLACK WOMEN DURING THE SLAVE ERA 1, 15 (2006).

39. *Id.*

40. *Id.*

41. Bernie D. Jones, "*Righteous Fathers," "Vulnerable Old Men," and "Degraded Creatures": Southern Justices on Miscegenation in the Antebellum Will Contest*, 40 TULSA L. REV 699, 699-750 (2005), an article which is part of a forthcoming book: Bernie D. Jones, Fathers of Conscience: Mixed-Race Inheritance in the Antebellum South (University of Georgia Press, Studies in the Legal History of the South). Although the focus in this instance is on free women of color as the partners and daughters of elite men, it is important to note male children of testators

and in the 19th century, slave women experienced the sting of legalized discrimination, because they could not be legal wives and had no recognizable families that could be protected under law, while white women experienced protection as the daughters of white fathers and the wives of white husbands. Lack of protection made slave women vulnerable to those who would take advantage of their subordinate status, and that could include the men who owned them. These relationships were complex, built upon relationships of inequality and hierarchy. Even though the men tried to help the women and their children by mentioning them in their wills, slave women were denied the legal status that white women had through marriage.

Feminist legal theorists and women's historians have spoken of the ways in which white women in the 19th century could experience lack of equality in the private sphere of the home and denial of access to rights in the public sphere of work and government, for example, through coverture, the doctrine that made a married woman civilly dead.[42] In the view of the early common lawyers, this notion of "separate spheres" protected women in each,[43] forgetting the possibility that placing women under "protection" could leave them vulnerable to abuse, as was argued by many suffragists in the late 19th century. Thus, coverture merged a married woman's legal identity into her husband's; as the head of the household, he owned her property and was responsible for her. She was his dependent. He could file suit on her behalf, and chastise her in order to force her obedience.

The Married Women's Property Acts began protecting married women's separate estates, beginning in the 1840s.[44] The use of separate estates under the Act became the means by which men could ensure that their daughters' property interests were protected.[45] A woman could

could also be claimants. In all instances, gender mattered though--the identity of their mothers was of the utmost significance in their ability to assert their claims: was she white, a slave woman, or a free woman of color?

42. *See, e.g.*, DEBORAH L. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW 24-25 (1989); NANCY LEVIT & ROBERT R.M. VERCHICK, FEMINIST LEGAL THEORY: A PRIMER 163 (2006).

43. WILLIAM BLACKSTONE, BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND, BOOK THE FIRST – CHAPTER THE FIFTEENTH: OF HUSBAND AND WIFE 433, *available at* http://www.yale.edu/lawweb/avalon/blackstone/bk1ch15.htm (last visited July 31, 2007) ("These are the chief legal effects of marriage during the coverture; upon which we may obferve (sic), that even the difabilities [sic], which the wife lies under, are for the moft [sic] part intended for her protection and benefit. So great a favourite is the female fex [sic] of the laws of England.").

44. RHODE, *supra* note 42, at 24.

45. PEGGY A. RABKIN, FATHERS TO DAUGHTERS: THE LEGAL FOUNDATIONS OF FEMALE EMANCIPATION 21 (1980).

become secure from her husband's creditors; moreover, she could retain ownership of an inheritance from her family and her wages if her husband was a spendthrift.[46] By the mid 19th century then, elite women experienced a hybrid status: not fully equal, they were discriminated against, yet the claim was that they were protected in various ways. Notwithstanding any discrimination white women experienced, it is important to note, however, that in comparison to slave women, they were relatively privileged. Slave women were not protected. They did not have the same rights under law that married white women had to their husband's estates, because they did not have legally recognizable husbands. In the context of slave women claiming status as the heirs of white men in the South, white women (and their male relatives) who claimed status as the legitimate heirs-at-law of those slaveholding men, were even further privileged. They could claim ownership rights over slave women beneficiaries and their children.

Since the slave women's situation was precarious, their benefactors were compelled to use geography as a tool in developing effective legal strategies to protect their rights of inheritance: removal from the South into Northern free communities gave them status as free women capable of filing suits. The women saw themselves as being on par with white women; the men's behavior gave them that ability. The women thus posed to Southern institutions the danger of social and legal upheaval. At the same time, the women distanced themselves from slavery; they wanted freedom and the property cultivated from the slave labor of the slaves who might have once been their peers. This change in status points then, to the significance of class.

Of importance in the women's fight was a diverging American legal culture that developed in the antebellum period and contributed to this stratification within the population of African Americans. Slavery was dying out in the North and abolitionist fervor there favored the women seeking refuge and gaining new status as free women of color. Slavery had ended in Massachusetts since the late 18th century, with the decision in the Quok Walker cases involving the battery and capture of a black man alleged to have been an escaped slave. The Supreme Judicial Court held in *Commonwealth v. Jennison* that because the Massachusetts constitution declared all men free and equal, there could be no slavery in the state.[47]

46. *Id.* at 21-22.

47. *See, e.g.*, JOANNE POPE MELISH, DISOWNING SLAVERY: GRADUAL EMANCIPATION AND "RACE" IN NEW ENGLAND, 1780-1860 1-7 (1998) (discussing slavery's demise in New England).

Gradual abolition was the tendency in the mid-Atlantic, where states like New York and Pennsylvania banned the importation of slaves and determined that the generation of blacks born during the Early American Republic (the 1780s) would spend their youth as "servants" to their parents' masters and become free as they reached adulthood.[48] In these states, then, slavery was becoming less and less common as the older generations of slaves died.[49] The states of the old Northwest Ordinance had their own appeal, like Ohio, where slavery had been banned pursuant to federal statute. Ohio was a free state that bordered various slave states like Kentucky and Virginia. It was also along the Mississippi river, a conduit for those masters living in the states along its southern borders.

Successful claimants then relied upon a confluence of geographical factors in combination with shrewd strategy: living in the North as free women, they were in a position to fight for property rights in their home states. This strategy contained detriments, notwithstanding the benefits of freedom. These were free women of color in the North who faced hostility within their home states of the South. They dared not return home. As a result, they could only protect their interests from afar, which limited the effectiveness of their struggle to gain the property they believed themselves entitled to receive.

In the North then, the women were members of the population of free people of color; this community was developing into an antebellum elite. Recognizing that slavery endangered all blacks in the United States, leaders in the community were ardent abolitionists. These were people with freedom of movement, the right to own property and with corresponding rights to protect their property. Thus, the women could use the Northern courts as a sword against Southern jurisdictions. Nonetheless, in a state like Ohio, they experienced difficulties placed upon them by law in white communities fearful of free blacks.

Ohio, as one of the first states to be brought into the Union under the old Northwest Ordinance, was caught between two ideals: freedom versus slavery. According to the Ordinance, slavery could not exist within the jurisdiction, which caused tensions from the very beginning. If Ohio was to become a free state, how then should it relate to its slaveholding neighbors in a state like Kentucky? Did the ideal of freedom mean then that the entire state supported the rights of blacks to

48. PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY 71-72 (Morris S. Arnold ed., The University of North Carolina Press 2000) (1981).

49. *See id.* at 42-45.

remain free from slavery and its corresponding race-based subordination?

The evidence indicates that Ohio did not escape slavery's taint. Not only were many early Ohioans from southern states, but many were reliant upon financial and social ties to its slaveholding neighbors to the south. These Ohioans tended to support the rights of slaveholders and the return of fugitive slaves, which had been authorized by the Constitution:

> No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due. [50]

Thereafter, Congress passed the Fugitive Slave Act of 1793. It authorized the executive officers of each state to seek their corresponding officers in other states to have runaway slaves arrested upon an indictment or an affidavit sworn before a magistrate. The escapees could then be transferred to their states of origin or brought before a magistrate, and upon the slaveholder claimant's successful prosecution of the matter, s/he could be given an order permitting removal of the enslaved person. On the other hand, the Act indicated that tensions were already brewing between slaveholders in the South and their northern neighbors who opposed slavery. Those who sought to prevent and interfere with a claimant's removal of a fugitive slave could be fined $500 and jailed for a year in prison. This tension became exacerbated over time as Northern states in turn passed their own personal freedom laws in the hope of protecting those alleged to have been fugitives.

Thus, Ohioans were in a paradox: some wanted to protect fugitives, while others did not. In 1819, for example, the legislature passed a statute making it a crime to remove free blacks, with a particular emphasis on violence, fraud or deception.[51] Free blacks were in danger not only of being charged as fugitive slaves, but free blacks who were not fugitives could be kidnapped. On the other hand, the Black Laws of 1804 could be quite protective of slaveholder's rights, in the form of support for the fugitive slave laws; the statute set forth that any person

50. U.S. CONST. art. IV, § 2.

51. Stephen Middleton, *The Black Laws: Race and the Legal Process in Early Ohio*, *in* OHIO UNIVERSITY PRESS SERIES ON LAW, SOCIETY, AND POLITICS IN THE MIDWEST 52 (Paul Finkelman ed., 2005).

who prevented an owner's recapture of a fugitive could be fined.[52] Nothing in the statute indicated that blacks could testify in their defense.[53]

The Black laws were especially pernicious, insofar as they provided a further basis for limiting blacks' civil rights within the state of Ohio, notwithstanding their legitimate free status. They could not vote, could not testify against whites, and could not serve on juries. In order to remain in the state, they needed certificates from freedom signed by a court—any court in the United States—certifying their free status. By 1807, they needed to file a $500 bond for good behavior.[54] Supporters of the acts argued that they acted as a deterrent to black immigration into the state, in protection of free white labor. Opponents responded that they posed a danger instead to free blacks. The laws generated the high drama to be found in Ohio antebellum courtrooms over social and legal struggles between abolition and support for slavery. Denied rights to testify against whites, how could a black person in Ohio protect himself if a Southerner claimed him a runaway slave? How could blacks protect themselves from wrongful accusations and file lawsuits when they were wronged? How could they prevent kidnapping at the hands of unscrupulous whites? Prior to their repeal in 1849, the Black laws did not help them any.[55]

If anything, the Black laws indicate further the significance of race and class in "women's legal history," highlighting the ways in which black women could be disempowered as a matter of law. Mixed-race slave women were not always privileged by their ties to whiteness. If they had been enslaved, they could be returned to slavery if the relatives who owned them would deny them freedom, and when they were "free people of color," they could be denied access to public education if they did not look "white enough." A light-skinned mixed-race slave woman, Matilda Lawrence, from Missouri, accompanied her slave owner father in 1836 on trips into the North. She expressed an interest in becoming free, but he refused to manumit her. Easily passing as a white woman, she escaped into Cincinnati and found employment. Her father hired a professional slave catcher to capture her. Upon being apprehended, she

52. *Id.* at 49.

53. *See, e.g.*, Nikki M. Taylor, *Frontiers of Freedom: Cincinnati's Black Community 1802 - 1868*, *in* OHIO UNIVERSITY PRESS SERIES ON LAW, SOCIETY, AND POLITICS IN THE MIDWEST 205 (Paul Finkelman ed., 2005) (for a copy of the Black Laws, 5 Ohio Laws 63 (1804)).

54. *Id.* (for a copy of Black Laws of 1807, 8 Ohio Laws 53 (1807)).

55. *See, e.g.*, Middleton, *supra* note 51, at 132, 197.

was charged as a fugitive under the Act of 1793, and eventually removed from Cincinnati.[56]

Not only did the Black laws threaten blacks' interest in freedom and escaping from slavery, but it also denied them the chance to have their children educated in the public schools. These were for white children only. Thus, black children were to be educated privately. But those mixed-race black children who appeared "white" could go to school with whites, as happened in the case of the Williams family, headed by an octoroon man married to a white woman. He was of 1/8 black ancestry—one of his eight great-grandparents was black. Socially, the couple was taken to be white by all who knew them, but when they hoped to enroll their children in a local public school, they were barred, until the Ohio Supreme Court clarified what it meant to be "white." Whiteness was not limited to ancestry, but to appearance. The children appeared white, their parents lived in a white world; for the purposes of school enrollment, the children were white.[57]

The cases brought by formerly enslaved free women of color and their children for inheritances did not involve the drama of communities caught between abolitionist fervor and pro-slavery sentiment as found in the fugitive slave cases and the earlier cases which challenged the Black laws. It is of great significance, then, that these cases escaped the public scrutiny that the other cases generated, and as a result, have not been the focus of scholarly inquiry. They provide, however, another view of what abolitionist law practice entailed. The women were struggling to be defined as "free." State institutions in their home states had carefully defined and proscribed definitions of "family" which did not include them. The relatives of the white men to whom they had biological ties never saw them as "family," but saw them instead as property to be owned. Thus, lawyers and testators had to be resourceful at using legal institutions and doctrines.

Several cases decided by state high courts in the antebellum South indicate the existence of this phenomenon of black women's inheritance rights and the use of Ohio legal institutions by newly freed women.[58] These cases are not meant to be exhaustive, but are meant only to be instrumental in explaining the means by which formerly enslaved women could: claim status as free women of color; establish their status

56. *Id.* at 112-13, 167-68.

57. *Id.* at 86-88 (discussing *Williams v. Dir. of Sch. Dist.*, 1 Wright 578 (Ohio 1834)).

58. Mitchell v. Wells, 37 Miss. 235 (Miss. 1859); Jolliffe v. Fanning, 10 Richardson 186 (S.C. Ct. App. 1856); Willis v. Jolliffe, 11 Rich. Eq. 447 (S.C. Ct. App. 1860). These cases are more fully discussed in Jones, *supra* note 41, at 729-30, 741.

as "family," notwithstanding their white relatives in the South who rejected them; and lay a foundation for making claims to the inheritances they could never defend in their home jurisdictions. In making these crucial steps towards liberation, each relied upon legal institutions in Cincinnati and retained the services of the same abolitionist lawyer: John Jolliffe.

The issue of comity was overwhelmingly significant in determining how the cases would be resolved. Although the Constitution set forth that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State,"[59] the conflict over slavery tested that assertion and promise. Northerners who opposed slavery tended not to recognize slaveholders' rights to seize as fugitives, those blacks who escaped enslavement. The personal liberty laws attested to that and their rejection of comity. Southerners in turn, demanded that Northerners recognize comity and respect their rights to hold enslaved property, which they argued was required by the Constitution. As Northerners began to reject comity with respect to slaveholders' rights, Southerners began to reject it too, with respect to the rights of former slaves seeking to inherit property in their jurisdictions upon becoming free people of color in the North.[60]

Nancy Wells of Mississippi was alleged to have been the biological daughter of her slave owner father, Edward Wells, who brought her to Cincinnati, Ohio in the late 1840s for the purpose of manumitting her and enrolling her in a school for black youngsters. He was unmarried, and had no other children. Nancy's physical presence in Cincinnati, combined with specific procedures to manumit, indicate the process by which Southern slave women could become Northern free women of color. She was measured and described, for the purpose of drafting a certificate of manumission. She then stayed in Ohio for two years. Several years later, Edward wanted to recognize her among the other relatives who were to inherit pursuant to his will. As a result, he left her a bequest. The white relatives who served as executors and who received the bulk of her father's inheritance did not include her in the distribution of bequests, even though she was explicitly named to receive $3,000 in cash, a bed, and a watch.[61]

Nancy Wells was a young woman in her twenties when she initiated her lawsuit for her inheritance; John Jolliffe represented her.

59. U.S. CONST. art IV. § 1.

60. *See, e.g.*, FINKELMAN, *supra* note 48 (discussing comity).

61. Complaint at 7-8, Mitchell v. Wells, No. 8612 (Ch. Court Madison Co., Miss., 1857).

As a free woman of color, she claimed her right under the will to be defined as family, and used her father's behavior as evidence to establish her status. The bequest failed, however, because the state of Mississippi refused to recognize her as having rights to use their courts of law. Her father did not fulfill the requirements to manumit in the state, and it was immaterial that Ohio recognized her as a free woman of color. It was not in Mississippi's interest to do the same. In the state's view, her temporary sojourn in Ohio which ended in her return to Mississippi, where slavery was the primary status held by most blacks, indicated that the manumission in Ohio was a sham. The real intent was to have her remain in Mississippi, where she was not recognized as a free woman of color. Once Nancy realized that she could be claimed as a slave, she returned to Ohio, but without the inheritance to which she thought she was entitled.[62]

Amy Willis was more successful, however, in her attempt to gain an inheritance. She was from Barnwell, South Carolina and was alleged to have been the longtime partner of Elijah Willis, a planter, whose relationship with her was well known in their community. Like Wells, Willis was unmarried; he hoped to recognize Amy and their children in his will as comprising his legitimate family, something which the official law of slavery did not permit. Recognizing that South Carolina law had made it impossible for owners to manumit slaves in the state and leave them bequests of property, Elijah planned to liquidate and move to Ohio. But if he died in the meantime, he wanted his executors to take Amy and the children out of the state.

Elijah Willis intended to write a will in Ohio and manumit in that state. It is unclear why settling in Ohio appealed to him. As noted earlier, by this time, Massachusetts, New York, and Pennsylvania were also free states. Perhaps it was a matter of geographical preference? Ohio was a younger state, compared to those of the Northeast; it was still considered part of the "frontier," a place which beckoned to migrants with the hope of starting anew. This appeared to be what Elijah envisioned: he hoped to buy a farm there and settle with Amy and the children. He arrived in Cincinnati in February of 1854, and went around asking for the name of a lawyer to help him. John Jolliffe, as a well-known abolitionist lawyer, was suggested as an ideal choice; those knowledgeable of Jolliffe's practice pointed Willis in his direction. The will was drafted in Ohio on February 23, 1854. Pursuant to that will, Amy and her children were to inherit his full estate. A year later, in May

62. *Mitchell*, 37 Miss. at 236.

of 1855, he returned with Amy, the children, and her mother with the intention of settling them there. But he died upon arrival. He was then brought to the Dumas house and eventually buried in a black cemetery.[63]

The Dumas House, according to Taylor, was "the best-known black-owned boarding house in Cincinnati,"[64] and a station on the Underground Railroad. Was Willis brought there upon his collapse, and not to a white hotel because of the nature of his lifestyle? He was traveling with his black partner, Amy Willis, and their mixed race children. Her partner was dead, and she was the person to vouch for his identity. She was the one who had to deal with the lawyers and fight to gain her inheritance. She retained Jolliffe, who admitted the will to probate in Cincinnati; he served as the executor.

When Jolliffe tried to probate the Ohio will in South Carolina, Willis' white relatives balked. Not only was there an older will drafted in 1846 that made them his beneficiaries, but if the will were void, as the heirs-at-law, they would inherit as a matter of law. In their view, Amy and her family could never be legitimate beneficiaries. They claimed the will was void, and Jolliffe, as the executor of a void will, had no right to act. Thus, Jolliffe was the defendant in the first of two suits in South Carolina involving Elijah Willis' will. Pursuant to the 1856 decision, *Jolliffe v. Fanning*,[65] the will was valid. Willis was of sound mind; he had a plan in place to fulfill his desires to distribute his property, notwithstanding his rejection of the white relatives who laid claim to the estate.

In round two, Jolliffe was sued again, on the basis that he could not probate the will and distribute to Amy and her children, because they were still slaves. In this second action, the justices found that Willis intended that Amy, her children, and her mother, would remain in Ohio. It was irrelevant that he had not fulfilled his purpose to set them up in freedom prior to his death. By bringing them to a free state where he had made up a will designating them as beneficiaries, he made it clear to everyone that they were all to become free. Moreover, because Ohio did not recognize slavery within its borders, it was in its rights to recognize them as free people of color. As free people of color then, they were to inherit within South Carolina, even though they were not living there.[66]

In addition to representing private clients in matters of manumission and inheritance, Jolliffe had been known to handle high

63. *Willis*, 11 Rich. Eq. at 447.
64. Taylor, *supra* note 53, at 195.
65. Jolliffe v. Fanning, 10 Richardson 186, 186 (S.C. Ct. App. 1856).
66. *Willis*, 11 Rich. Eq. at 447.

profile cases involving the fugitive slave laws; the more notorious of which, the Fugitive Slave Act of 1850, further threatened the civil rights of all blacks in the state. The first Act generated its own controversy in the state, as evidenced by Ohio's legislative acts supporting "personal liberty." But the Act of 1850 was passed and enforced during a time when anti-slavery tensions were at a high point, in an effort to appease the demands of Southerners who objected to Northerners' refusal to respect comity and return fugitive slaves.

Recognizing that state courts and state officials had become unreliable because they refused to follow the provisions of the Fugitive Slave Act of 1793, the Act removed jurisdiction over such matters to federal marshals and included more stringent punishments of those who would practice civil disobedience. Most controversial though, was that the Act required local whites to aid the federal marshals working on the behalf of Southern owners and their agents in capturing alleged fugitives. Local whites were to turn in their friends and neighbors. If they obstructed the efforts of claimants, harbored individuals known to be fugitives, or aided them in escaping their owners, they could be fined $1000.00 or face a jail term of six months or less. They could also be held liable for civil damages of $1000.00 per lost fugitive. Those accused of being fugitives had no right to testify on their behalf, and commissioners received a higher fee for every order of repatriation: $10.00, as compared to $5.00 when there was no proof of the claim.[67] This provided, then, an incentive to find on behalf of owners. Abolitionists protested the seizure and threatened repatriation of blacks who were accused of being fugitives. Jolliffe's role as an abolitionist lawyer lay in challenging owners' prosecutions of those alleged to be fugitives, by arguing instead that they were free.

It is not infeasible that Amy Willis' case and that of Nancy Wells could have eventually involved the fugitive slave laws, where Jolliffe's expertise might have come in handy. What if the women's relatives claimed they were fugitives, notwithstanding the lawsuits to gain an inheritance and their lawyer's defense of their interests? It is important to note that there were Southern whites who ignored court orders that granted blacks rights as free people of color.[68] Beyond that, since blacks

67. Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462 (1850).

68. *See, e.g.*, Middleton, *supra* note 51, at 216-19; Paul Finkelman, *John Bingham and the Background to the Fourteenth Amendment*, 36 AKRON L. REV. 671, 677 (2003) (discussing the case of the Peyton Polly family, where members of a family of free blacks in Ohio were kidnapped into slavery as a result of disgruntled heirs who objected to their former owner's manumission of them in Kentucky, and the difficulties involved in liberating them).

could not appear and testify in fugitive slave actions, it was plausible that the women were in fear of being kidnapped. With a kidnapping, their cases would have disappeared, and that disappearance would have evaporated their claims to an inheritance, ensuring that their benefactors' wealth remained in white hands.

Amy Willis could definitely have been at risk. In the earlier last will and testament, Elijah Willis had given all his property to various heirs, his nieces and nephews. When Willis' estate in South Carolina was inventoried according to that will, Amy, her children and her mother were listed as property of the estate, but located in Ohio.[69] It was plausible that Elijah's relatives would have tried to seek and return Amy and her children to slavery, when their position all along had been that they were not beneficiaries, but property to be divided up among them, the heirs-at-law. More significant though, Amy Willis was at the heart of the litigation to determine the legitimacy of the Ohio will. Because the estate was substantial, she stood to inherit a lot of money if it were upheld: the personal estate, comprised of movable property and slaves, alone was worth about $23,000.[70] There might very well have been people in South Carolina who would have been quite pleased if she were brought back and enslaved.

Nancy Wells was just as vulnerable. She was denied an inheritance and her claims to legitimate family status were denied. Moreover, she was not a person to be protected by the laws of her home state of Mississippi; she was not a daughter worthy of her father's protection. What if she were kidnapped and enslaved by those who objected that she dared claim status equal to those of whites in the community? Would she have been protected if her relatives back home claimed her as a fugitive? Mississippi was no longer her home, she was a free woman of color living in the North; she might very well have been fearful of what they might have done if they ever tried to pursue her.

Although Amy Willis won both cases, did she really win, or was it a pyrrhic victory? Did merely winning the case guarantee that she gained all that she was entitled to? How could it? She used Ohio legal institutions to establish her legal identity as the heir of her biological father. But did Elijah Willis' white relatives recognize her as such? Their claim all along throughout the litigation was that she was enslaved, yet these were the people charged with securing her inheritance once the

69. Elijah Willis Estate Papers, Willis v. Joliffe, 11 Rich. Eq. 447 (S.C. Ct. App. 1860) (Bundle No. 126, Package No. 7, 1855 inventory).

70. Elijah Willis Estate Papers, Willis v. Joliffe, 11 Rich. Eq. 447 (S.C. Ct. App. 1860) (Bundle No. 126, Package No. 7, Feb. 7, 1861 inventory).

litigation ended and she won. They were in charge of managing all the property, real and personal. She was in Ohio, and could not protect her rights from afar as she might have done if she were in South Carolina. Her status as a free woman of color limited whether she could go back home, because if she returned, who knows what might have happened to her. She might have been kidnapped into slavery or might have experienced assault or even murder at the hands of those who resented her new status of property owner. Regardless of her ability to protect her interests, she gambled over her ability to win. Even if she lost, though, she was no longer enslaved, and notwithstanding the hardships, that liberty was priceless.

It is important to note that the women's use of Ohio legal institutions didn't raise the specter of prejudice to the interests of white Ohioans and the wrath of the Black laws, not only because the laws had been repealed by then, but because they were not suing Ohioans to enforce rights as free women of color. These were not light-skinned black women trying to "pass" by forcing Ohio to recognize their ties to whiteness as a means of gaining access to white institutions in the state. They were not seen as undermining the interests of whites. The Ohio courts were a tool instead for establishing rights in the South, and as many abolitionists in Ohio supported the use of local institutions to protect the rights of free blacks in the state, the women's use of local law was a courtesy given to previously enslaved Blacks eager to establish new lives in the North. The women's cases gave abolitionist lawyers in the North another means of undermining slavery: establishing enslaved women as free women of color meant they could assert rights to personhood in jurisdictions where they were never intended to have any. Abolitionist lawyers could force a redefinition of Southerners' notions of family by supporting the men's use of trusts and estates law and reinforce the women's rights to property, through what Davis spoke of as the "private law of wills."[71]

As for the women bringing suit, perhaps it was about more than the money; their cases were a means of officially validating relationships which had long been denied under the official guise of Southern slave law. But that did not mean that the money didn't matter. Nancy Wells' father had her trained as a seamstress. The $3,000 she was to inherit from him would have gone a long way towards improving her financial situation. Amy Willis, on the other hand, might have needed every

71. Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221, 223-28 (1999).

penny. Willis died before he could get their family settled in Ohio; it is unclear whether she had access to any funds while there.

Nancy Wells and Amy Willis were free, they had to make a new life for themselves, but it was not as though they were going to "rest on their laurels." However, they had a point to make. They knew who they were, the partners and biological children of their owners. To that extent, they shared an interest with their abolitionist lawyers in making a greater point. The men's wills explained their status, but their white relatives refused to recognize them. The law reinforced that perspective because there was no obligation under law for the whites to do so. But in escaping from slavery and gaining the ability to sue in the courts of their home states, they reinforced their humanity, gave themselves a legal identity, forced recognition of their status, and gained property rights, even though these might have been on "paper only" and thus difficult to enforce.

This ability to establish legal personhood was of particular importance, because of the specific ways in which women experienced gender in the antebellum United States. White as well as black women did not have political rights, but white women could have legal rights. As James Horton notes, free men of color were able to assert the language of manhood and masculinity in their efforts to gain rights equal to white men, and their political strategies, from the time of the Revolution, reinforced that interest in gaining freedom, property rights and the franchise: "Despite their significant presence in the American revolutionary forces, there were several early indications that the federal government did not consider them full citizens . . . Nor did the Constitution protect free blacks from limitations imposed by the individual states."[72]

While elite middle class white women espoused the ideal of the "cult of true womanhood" that celebrated security in marriage, domesticity, and protection from the public sphere, free black women fought to establish themselves as "women." King explains that during this time period, literate free black women in the North were engaged in a battle to define their own images: "[W]omen responded to misrepresentations about their manners and morals. These women shaped and adhered to their own standards of beauty, dress and behavior in defining womanhood in ways that sometimes challenged society's

72. JAMES OLIVER HORTON, FREE PEOPLE OF COLOR: INSIDE THE AFRICAN AMERICAN COMMUNITY 150-51 (1993).

expectations and beliefs about them."[73] Cases such as those discussed in this article can be seen as another means of women shaping their own images, as partners and daughters worthy of protection. These women did not leave behind written records, but their behavior, as indicated by filing lawsuits and explaining their stories, all in pursuit of an inheritance, put their histories into the public record.

III. FORMULATING AN ABOLITIONIST LAW PRACTICE: JOHN JOLLIFFE

Abolitionists came in different stripes, depending upon how they chose to prove their commitment to their cause, and the abilities they brought to their work. The fugitive slave cases are traditionally seen as the venue where abolitionist lawyers did the most work, at the front lines in fighting for freedom, when a judge's decision could result in a person gaining freedom or being returned to enslavement.[74] But what matters too, is that abolitionist lawyers could prove their dedication in other ways too: fighting to protect and gain property rights for the newly freed. In a legal system where property rights were the hallmark of freedom, protecting them was of paramount importance, and especially for those newly freed who were starting their new lives with little or no resources.

Who was John Jolliffe, and how did he become an abolitionist lawyer? Jolliffe was born in Frederick County, Virginia in 1803. His parents were William Jolliffe and Rebecca Neill. According to Stephen Weisenburger, his was a Quaker family that had long abandoned slave owning.[75] He studied law under St. George Tucker in Winchester, graduated and was admitted to practice thereafter. In 1830, he moved westward, and opened a law practice in Batavia, the county seat of Clermont County, Ohio. He worked as a "prosecuting lawyer" for the county from 1833-1837 and 1839-1841; during this period, he became an associate of Salmon P. Chase "in resisting the famous 'Fugitive Slave Law.'"[76] This type of practice did not endear him to his community: "Finding that the courts of Brown and Clermont Counties were prejudiced against him because of his very pronounced antislavery

73. KING, *supra* note 38, at 34.

74. *See, e.g.*, STEPHEN MIDDLETON, OHIO AND THE ANTISLAVERY ACTIVITIES OF ATTORNEY SALMON PORTLAND CHASE, 1830 -1949 114, 116, 118, 125, 127 (1990).

75. STEPHEN WEISENBURGER, MODERN MEDEA: A FAMILY STORY OF SLAVERY AND CHILD-MURDER FROM THE OLD SOUTH 91 (1998).

76. WILLIAM JOLLIFFE, HISTORICAL, GENEALOGICAL, AND BIOGRAPHICAL ACCOUNT OF THE JOLLIFFE FAMILY OF VIRGINIA, 1652-1893 115 (1893).

views,"[77] he dissolved his law partnership and moved to Cincinnati in 1841.

Jolliffe wrote two novels that indicate to some extent, his sentiments on slavery, and as intellectual histories, they offer some insight into what mattered to him as an abolitionist.[78] A study of such materials can indicate the nature of his perspectives, especially when the primary source documents are limited.[79] In a recent article, Daniel Wickberg writes of the significance to be found in the "history of sensibilities" arguing that historians should think about using literary texts that signify the "terms of representation, the generalized values and modes of perception and feeling in which various objects could be conceived and represented."[80] Within literary studies, this has been described as a "new historicism and cultural materialism," which "share[s] a common preoccupation with the relationship between literature and history, and share[s] an understanding of texts of all kinds as both products of and functional components of social and political formations."[81]

In the nineteenth century, sentimentalism provided an "underlying epistemological, moral, and aesthetic framework for comprehending reality" and as a rhetorical tool, it was used by antislavery writers, as an important part of liberal Protestant theology.[82] Sentimentalism could be used to awaken emotions to specific moral themes, as a means of swaying an audience. It was a tool used by Harriet Beecher Stowe in writing Uncle Tom's Cabin, for arguing that the system of Southern slavery was a blot upon the nation's conscience. For Jolliffe, then, literature could be a means of explaining legal themes and justifying a social cause he embodied in his legal practice.

In Belle Scott, the reader is confronted with a panoply of characters who were touched by slavery. From runaway slaves, to slave dealers, to owners and abolitionist ministers in the North, counterpoised against their brethren in the South. Aaron, an enslaved man, was imbued with

77. *Id.*

78. JOHN JOLLIFFE, BELLE SCOTT; OR, LIBERTY OVERTHROWN!: A TALE FOR THE CRISIS 240-41, 340-41 (1856) [hereinafter BELLE SCOTT]; JOHN JOLLIFFE, CHATTANOOGA (1858).

79. Not only did his personal papers burn in a fire, but the Hamilton County courthouse also experienced fires several times during the course of its history: during the War of 1812, in 1849, and in 1884. *See, e.g.*, JOLLIFFE, *supra* note 76, at 116; Steven McQuillin, *Hamilton County Courthouses*, http://www.probatect.org/courtrecords/history.htm (last visited on Jan.7, 2008).

80. Daniel Wickberg, *What is the History of Sensibilities?: On Cultural Histories, Old and New*, 112 AM. HIST. REV. 662 (2007).

81. JOHN BRANNIGAN, NEW HISTORICISM AND CULTURAL MATERIALISM 3 (1998).

82. Wickberg, *supra* note 80, at 662-63.

Christian faith, a quiet dignity and humility, and a fierce desire for the freedom that he knew was his birthright. His Bible told him slavery was wrong, but Southern ministers operated instead as apologists for the regime, arguing that a biblically sanctioned system could be a fair one for the enslaved. On his side, though, were the Northern abolitionist Christians who hid him in Ohio and tried to protect him from the Fugitive Slave Act of 1850.

In this world of slavery, Southern ministers enslaved men and women, claiming that the Northern abolitionist minister was wrong-headed. Arguing that slavery could be morally justifiable when owners were properly paternalistic and protective of their slaves, slavery fit into an ideal social order. Yet, the slave owners and slave dealers did not always listen to their ministers' advice on protecting the rights of slaves. They need not do so, because slavery was supported by law; owners' individual treatment of their slaves was left to their own personal conscience, and local courts tended not to interfere with owners' prerogatives. The abolitionists' only hope lay in their power to persuade. Perhaps individual slave owners could be urged to turn their back on the practice.

The Fugitive Slave Act of 1850 pitted Northern abolitionist Christians against the force of secular law. According to their interpretation of the Bible, there should be no slavery, because no man had the right to own another, and all were God's children, equal under the law. But the fugitive slave law required them to participate in secular legal processes that would return blacks to slavery. If they knew of fugitives but refused to turn them over, they could be charged with violating the law. Thus, Mr. Ives, a lawyer for Mr. Scott of Louisiana, retained for the purpose of resolving his client's estate matters in Virginia, was confronted with his conscience: could he as a man of faith be the hired gun for slave owners?

Mr. Scott's brother died in Virginia, and Mr. Scott was returning to probate the estate. He was the only heir; a daughter had died long before, and an enslaved woman, a caregiver, had been charged with her murder. Mr. Ives accompanied Mr. Scott and his daughter Mary on the trip back east. Among Mr. Scott's slaves in Louisiana was his daughter's companion, a mulatto enslaved woman named Belle, who could easily pass for white. Because of her complexion, she was believed to be the enslaved daughter of Mr. Scott from Louisiana. Accompanying them on the trip, Belle attempted to escape once they got to Ohio, but was captured. Locals in the community became incensed,

enraged that she would be returned to enslavement and denied her chance at freedom.

Mr. Ives experienced a crisis of conscience. Confronted with an enslaved woman determined to become free and in need of legal counsel, how did he feel about his role in this matter, that he was expected to represent Mr. Scott's interests? Upon hearing the persuasive arguments of an abolitionist, he became converted to the cause. He realized that he could not stay on the sidelines and he could not represent Mr. Scott. He decided to represent Belle in her attempt to become free, running the risk of jeopardizing his legal career, his relationship with his client, and his relationship with Mary, his client's daughter, whom he intended to marry. A whole chapter was dedicated to his anti-slavery arguments in favor of Belle's freedom.

> The inquiry then is, do the acts of 1793, and 1850, forbid any man to do anything that the Christian religion enjoins upon him? [O]r, command him to do anything that Christianity forbids? For if they either forbid or command any act inconsistent with loving God with the whole heart, and our neighbor as ourselves, they are contrary to the true intent and meaning of the [first] amendment, and are nullities.[83]

He argued that abolitionists had a first amendment right as a matter of freedom of conscience when they opposed slavery. According to their interpretation of the Bible, slavery was wrong and ungodly. The fugitive slave acts, as secular laws, interfered with their freedom of conscience because these laws demanded that they ignore their religious beliefs and cooperate with a system that undermined and opposed those beliefs. On that basis, the Fugitive Slave Act of 1850 was unconstitutional, and individual abolitionists should not be forced to obey. Finally, he argued, it was questionable whether Belle really was a slave.

Aaron, the enslaved man, once had a Bible owned by his partner, an enslaved woman named Minte, who was caretaker for the daughter of the Virginia-based Mr. Scott. Accused of killing the child, she was tortured, whipped into confessing, and tried before a panel of magistrates. The magistrates found her guilty and sentenced her to hang. But before her death, she wrote into a Bible all she recalled of the child and the circumstances of her disappearance. Belle shared various physical characteristics of the child described. Although the information in the Bible was inadmissible in court, other evidence from slave traders

83. BELLE SCOTT, *supra* note 78, at 240-41.

and whites living in the community at the time, indicated that Belle indeed was the long-lost white niece of her owner, Mr. Scott of Louisiana. She had been kidnapped into slavery. As a result of this kidnapping, her uncle was able to claim her father's entire estate. Confronted with the evidence of his treachery, the uncle, Mr. Scott, relinquished all claims to the property. Belle inherited and manumitted all those enslaved.

Mr. Ives, the former lawyer for slaveholders in Louisiana married Mary Scott. The couple decided that they would live in the North. They turned their back on their heritage as Southerners who supported and profited from slavery. Their slaves were liberated:

> They were not turned out among strangers, to begin the world for themselves without the means of a comfortable subsistence. They were brought to a free state, and there, upon well-stocked farms that Mary and her husband carefully aided them in selecting, were all settled. School-teachers, and the means of religious education were provided for them . . .[84]

Did Jolliffe see himself as a Mr. Ives? He was a Southerner, born in Virginia, who left as a young man to seek his fortune elsewhere. Why did he turn his back on the culture of slavery that his state promoted? Did he do so because of his religious heritage? Had he hoped to live in a new place where slavery would not be part of the culture? In his view, did the Southern culture of slavery threaten to overrun the Northern states through the tentacles of the fugitive slave laws? Did he see himself as a bulwark against that?

Jolliffe, as an abolitionist lawyer, arguably applied notions of sentimentalism in representing enslaved women like Nancy Wells and Amy Willis. Although they were similar to the fictional Belle, neither of the women were white, and they could not pass for white women. Nancy was the biological daughter of her slave owner father. Amy was her owner's long-term partner. Nancy Wells and Amy Willis were not white women put into slavery, a trope guaranteed to inflame the passions of men who saw white women as deserving of chivalric protection. Nonetheless, Jolliffe's arguments that these mixed-race black women were daughters and partners pushed them into the category of women worthy of protection. The white men who owned them, their fathers and partners, were dead, and they were left vulnerable in a world where they had no protection. Their white relatives were the threat.

84. *Id.* at 341.

It is important to emphasize too that these specific biological ties to whiteness placed the women into a different class from other enslaved women. Contrary to whites like Mr. Ives, who became enlightened to abolition, these men—Edward Wells and Elijah Willis—did not intend to liberate all the enslaved people they owned. Thus, the women were placed in a potential class conflict with the other enslaved people owned by the men, through their use of Ohio legal institutions. They were to become free, but not all the others would join them in liberty. Moreover, they could feasibly inherit enslaved property, or property earned through enslaved labor. In each case, their white relatives threatened their liberty and right to property by protesting the arrangements the men made for them in their wills. If the women did not inherit but remained in their home states, they would have remained enslaved. As Northern women in Ohio, they could live in freedom, whether or not they received their inheritance.

But that did not mean that they could easily forget their former slave status. Not only had they once been slaves, but as Horton notes, "[since] by 1860, four million blacks were slaves and only a half million were free, it was likely that every free black person had a friend of family member in bondage."[85] One can argue further, that the fugitive slave laws made the threat of enslavement real, regardless of one's free status. The times were just too precarious. Taylor explains that class divides were of less importance in cities like Cincinnati.[86] There were not many inordinately wealthy blacks, of whatever background: mixed race or not. Prior to their repeal in 1849, the Black laws made all blacks unequal to whites in their community, and the fugitive slave laws threatened everybody's liberty. An interest in abolition and a desire to protect themselves from the greater threats outside of the community forged a sense of cohesion, she suggests.[87] This sense of cohesion meant that free blacks had more in common with blacks of all backgrounds.

But although women like Nancy Wells and Amy Willis were arguably elite by nature of their status as free women of color, especially in comparison to enslaved women, they were not elite in the traditional sense of status linked through class to wealth. At the start, they were not women of independent means. Neither of them became wealthy upon their manumission; they had to work to support themselves, particularly

85. HORTON, *supra* note 72, at 160.
86. Taylor, *supra* note 53, at 104.
87. *Id.*

since their bequests were caught up in probate. Nancy Wells, for example, worked as a seamstress.[88] By the time of the 1870 census, Amy Willis was married to a mulatto man named Manuel Ash. He worked in a brickyard and she kept house.[89]

These cases point to the possible existence of other women who were similar to Nancy Wells and Amy Willis, in that they also inherited money and property from white male slaveholding partners and fathers, but not much is known about them. Taylor suggests there were wealthy free women of color who might have been given money from white partners and fathers in the South prior to their deaths, in order to start anew in the North.[90] Women in that category might not have required the intervention of Southern probate courts or even of the Ohio courts, and as a result, those women might not have experienced the difficulties Nancy Wells and Amy Willis did in trying to gain their inheritances. Without information from the public records, less is known about them.

IV. CONCLUSION

Recently published social and legal histories have focused on the fugitive slave cases, in an effort to understand the complexities of race in an antebellum Northern state like Ohio and its significance as an aspect of abolitionist legal practice. But the fugitive slave cases, although they have garnered the most attention, due to their dramatic nature, did not fully encompass all the attention of abolitionist lawyers. The private law cases mattered too, and they could be just as significant for the lawyers' practice. Private law cases like those involving Edward Wells and Elijah Willis and their interest in manumitting their enslaved partners and children, involved clients concerned about family matters. These cases provided another means of undermining slavery in the South. They flew in the face of Southern legal practices that would deny manumission and equality to enslaved people because Northern lawyers like Jolliffe were able to use local institutions to circumvent Southern laws.

Steven Weisenburger once noted that these types of cases handled by Jolliffe, the emancipations and wills, were an important part of his practice:

88. According to the 1860 census, Nancy Wells was known as Nancy Watts. She lived in the household of a black family headed by Thomas Colson and worked as a seamstress. Census place: Cincinnati Ward 15, Hamilton, Ohio; Roll M653_977; page 323; image 38. Source: http://www.ancestry.com.

89. According to the 1870 census, Manuscript Census returns, Clermont County Ohio, Ohio Twp, National Archives Microform Series M-653, roll 944, page 17.

90. Taylor, *supra* note 53, at 135.

> When Southern masters strode down the steamboat ramps leading slaves (often young mulatto women, sometimes with their children) brought North for emancipation, dockmen and passersby sent them to Jolliffe. Jolliffe drew up the documents and guided the masters and their former slaves through the city's Probate Court. He took the money of slaveholders only in those cases. Otherwise, he reviled them . . .[91]

Cases like those involving the inheritance rights of Nancy Wells and Amy Willis, provide, then, some context for the nature of his practice, and offers a fuller understanding of it. When the owners contributed indirectly to the abolitionist cause of ending slavery, by manumitting their slaves, Jolliffe supported their interests fully. But when they opposed his interest in manumission, he fought them. The money from his private clients paid for the worthy causes of abolition.

Edward Wells and Elijah Willis funded the fugitive slave cases that Jolliffe dedicated himself to, cases which more often than not, he handled on a pro bono basis. The former category of cases did not garner the attention of the public as much as the fugitive slave cases, but that does not mean they did not matter. If anything, they probably provided a respite from the drama. The high drama of the fugitive slave act cases pushed him into the public eye and left him open to scorn and violence, not only from owners resentful of his practice, but from Northern pro-slavery advocates.

By the time the first of Willis cases was decided in 1856, Jolliffe probably needed a break. Earlier that year, he was the attorney for Margaret Garner, the defendant in a well-known fugitive slave case. Escaping from slavery in Kentucky with her partner, Robert Garner, their children Thomas, Samuel, Mary and Priscilla, and his parents Mary and Simon, they were captured in Cincinnati, Ohio. But before Margaret Garner could be taken, she slit the throat of the three year old Mary, gashed the boys to the throat and head, and bashed the infant Priscilla with a shovel.[92]

The violence horrified; that alone could result in Margaret Garner being charged with murder in the state of Ohio. But the case was complicated by the Garner family's status as fugitives. Were they free people of color? If they were, could they be charged under Ohio law? On the other hand, if they were not free, they could be sent back to slavery and the control of their owner. Jolliffe claimed that earlier brief

91. WEISENBURGER, *supra* note 75, at 90.
92. *Id.* at 62, 72-73.

and consensual visits to Ohio established that all the adults had become free, and that the children were free because they were born after those visits. It had long been a strategy of abolitionist lawyers to argue that owners who permitted their slaves to enter free states lost the right to keep them in bondage; mere consensual presence in a state where slavery did not exist meant the owners waived their rights to retain their slaves.[93]

That tactic failed in the Garners' situation, however. Granted, Margaret Garner had once gone to Cincinnati as a child, and the others went there regularly as adults as they conducted their owner's business, none of them ever attempted to assert that they had become free, and none had ever resisted returning to slavery at the end of their sojourns. This was fatal to the Garners' case. Their owner permitted them to enter the state, but they returned to Kentucky, waiving their rights to claim free status. Ohio, in barring slavery within its limits, intended not to bar the rights of slave owners temporarily in the state with their slaves, but to deny the right of those residents who would own slaves in the state.[94] So in the end, Jolliffe lost, and the Garners returned to slavery. Not only did Jolliffe lose the case, but he was assaulted by Archibald Gaines, Garner's owner. Visiting Covington, Kentucky, across the border from Cincinnati, Gaines saw him, and began yelling at him and hitting him. He could have been lynched at the hands of irate slave owners and sympathizers to slavery who objected to his practice: "A deputy U.S. marshal drew his six-shooter, warned off the crowd, and guided Jolliffe back down Madison Street to the riverfront."[95]

The cases he handled for Edward Wells and Elijah Willis, on behalf of Nancy Wells and Amy Willis, were of a different ilk. Contrary to Nancy Wells and Amy Willis, Margaret Garner was not a favored slave to be sent out of the South, emancipated in the North and given a share of an estate. Weisenburger has argued that instead, she was abused and sexually exploited. In all likelihood, she provided sexual services: with the exception of her first child, all of her children were noted to be light skinned and almost white. Each of her pregnancies coincided with those of her owner's wife.[96] But during that time, her "husband" Robert had been hired out and did not live on the plantation. Yet, the fiction of her "marriage" provided room to explain away her children's paternity.

93. *See, e.g.*, FINKELMAN, *supra* note 48 (discussing comity and the circumstances under which blacks were deemed free by Northern jurisdictions).

94. WEISENBURGER, *supra* note 75, at 90.

95. *Id.* at 5.

96. *Id.* at 44.

This legal fiction masked what might have been the true reality, one noted by Adrienne Davis, that slave women's work and home spaces coincided, in that they worked in their homes and their homes were sites of dominance and control, where they were subject to sexual harassment and abuse.[97] According to Weisenburger, Margaret Garner was one of the few young female slaves on Gaines' plantation; she might have been responsible then, for domestic chores in the household. As a young woman who was regularly pregnant, she might have had wet nurse responsibilities too. As a young fertile woman, she birthed slaves for the plantation and increased her owner's wealth. By murdering her child, she killed a source of his wealth and protected her child from experiencing the abuse she did.

Those in the pro-slavery camp perceived it was immoral for her to kill her children, but it was not immoral for her to be in slavery. Pro-slavery apologists argued the old trope of a benevolent institution undermined by abolitionists who stirred up slaves' discontent. But what of those instances when enslavement was not benevolent? This was the message abolitionists tried to convey: that desperate slaves could be pushed to desperate measures because of slavery's despotism. Margaret Garner might have had scars from violence she experienced at the hands of her owner, and she might have been sexually abused, notwithstanding her "marriage." Lucy Stone, the well-known abolitionist, spoke of her observations and indicated why for some Garner was justified in her actions:

> The faded faces of the negro children tell too plainly to what degradation the female slaves submit. Rather than give her little daughter to that life, she killed it. If in deep maternal love she felt the impulse to send her child back to God, to save it from coming woe, who shall say she had no right to do so?[98]

The different experiences among Nancy Wells, Amy Willis, and Margaret Garner, the ways in which their legal claims were framed, relate back to their corresponding slave owners: the men's sense of morality determined their behavior and affected the women's fortunes. Although it is impossible to know the women's true feelings in these matters, the men's actions provided cues for the women's behavior, whether they were seeking to defend a will and gain an inheritance or run away. Edward Wells was the father of a slave he wished to protect.

97. Adrienne D. Davis, *Slavery and the Roots of Sexual Harassment*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW 457-78 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004).
98. WEISENBURGER, *supra* note 75, at 173.

Elijah Willis presented himself as a white man with a black female partner, raising mixed-race children. Margaret Garner's owner was her motivation for fleeing. Her desperation to escape slavery and ensure her children would never live under it, forced her to an extreme measure: infanticide. The three women's cases, then, point to the vulnerabilities of women under patriarchal control imposed by law, and in these instances, their vulnerabilities were more pernicious because of the intersections of gender with race. Race denied Nancy Wells' legal status as a daughter and Amy Willis' legal status as a wife. Race made it easy for Margaret Garner to experience sexual abuse on a regular basis, and the law forced her back into slavery once she escaped.

Wilma King has argued: "the time is now ripe for reconstructing the lives of ordinary and extraordinary free black women from a historical perspective."[99] It is important too, that scholars of women and the law with interests in legal history develop a "critical race feminist legal history." In considering a "new women's legal history" that addresses race, gender, and class among Southern slave women in the antebellum North, it is significant that women like Nancy Wells and Amy Willis were not of the well-known abolitionist elite, highly literate and politically involved. These were average women; they didn't leave many records. They were anonymous in their new communities, but they nonetheless comprised an elite class: one created through proximity to whiteness and the promise of access to wealth, predicated upon the significance of race, gender, and class status, and the ability to go from enslaved woman to free woman of color. Their cases are ones that might have escaped the attention of social historians, but they raise issues important for legal historians to address in the context of race, gender, and families in antebellum America.

99. KING, *supra* at note 38, at 1.