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Reason of Slavery: Understanding the Judicial Role in the Peculiar Institution

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Reason of Slavery: Understanding the Judicial Role in the Peculiar Institution†

A. E. Keir Nash*

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INTRODUCTION

During the first century of the American republic, the South, besides losing the Civil War, fared poorly with respect to the avenging role of historiography.¹ Not merely did the inadequacies of Jefferson Davis,² southern industrial backwardness, noncompatible railroad gauges,³ and illusions about King Cotton's capacity to compel European support for the beleaguered Confederacy⁴ produce defeat for the cause of complete legal subjugation of black to white. In addition, despite claims that may strike later generations as excessive,⁵ southern *belles-lettres* ran a poor second to the writings of New England authors. It was not simply that—in the words of that *rara avis*, a Unionist South Carolina politician—the South, having miscalculated, had to endure sufferings “as no civilized people ever did in this Christian age [because] . . . [u]nder the . . . cruel

1. See H. BUTTERFIELD, *THE WHIG INTERPRETATION OF HISTORY* (1931). “It has been said that the historian is the avenger, and that standing as a judge between the parties and rivalries and causes of bygone generations he can lift up the fallen and beat down the proud” *Id.* at 1.

2. See D. POTTER, *THE SOUTH AND THE SECTIONAL CONFLICT* 263-86 (1968).

3. See R. BLACK, *THE RAILROADS OF THE CONFEDERACY* (1952).

4. See F. OWSLEY, *KING COTTON DIPLOMACY* (1931).

5. “In fiction Gilmore Simms stands pre-eminent, and ranks with Cooper ‘The Works of John C. Calhoun,’ in six volumes, are equal in merit to Aristotle’s *Politics* and *Ethics*. The writings of Hugh S. Legare . . . are unsurpassed for classical lore, style and interest.” B. PERRY, *REMINISCENCES OF PUBLIC MEN* 368 (1889).

rule of our national government, . . . former slaves, ignorant and semi-savage, were placed over us, led on by the most unprincipled adventurers, black and white, from the North . . .”⁶ Equally appalling for Benjamin F. Perry, and despite the amazing circumstance that in the entire history of prewar days so “moral and patriotic [a] tone . . . pervaded”⁷ South Carolina politics that “[n]o charge of bribery or corruption was ever made against any . . . legislators or public officers,”⁸ South Carolina and her allies were bested not merely in the rude encounters of sword but also in the future-conditioning interplay of word and pen. Whereas “[i]n Massachusetts, as soon as one of her prominent citizens [was] dead, some literary friend [stepped] forward to write his life,”⁹ in the South “scarcely a life of any of her eminent sons”¹⁰ was penned at all. Consequently, education gave to “New England . . . a controlling influence over the public sentiment of America. Her literature, her books, her newspapers and magazines, . . . are at this time . . . influencing and controlling our opinions and actions.”¹¹

Making due allowances for anti-Reconstruction and Victorian hyperbole, Benjamin F. Perry had a point—at the time. The literary and historical course of the century since he wrote has largely redressed the imbalance—at least in terms of fictional and historical composition in general. But for the specifics of the legal history of these United States, historiography’s avenging role has not been quite so equalizing. This is especially true with respect to what is central to any attempt to gain adequately the remembrance of southern legal things past—understanding the relationships between lash and law, comprehending the “reason of slavery.”¹²

One of the more intriguing aspects of the historiography of United States slavery is how slow it was to show systematic interest in the peculiar institution’s legal history. To be sure, during the early and middle 1800’s slavery did not lack legal compilers and commentators.¹³ Nonetheless, until the editorial labors of Helen

6. *Id.* at 364. Plainly, Perry suffered from not having read the Revisionist views on the matter. See, e.g., RECONSTRUCTION (K. Stamp & L. Litwack eds. 1969).

7. B. PERRY, *supra* note 5, at 366.

8. *Id.*

9. *Id.* at 368-69.

10. *Id.* at 369.

11. *Id.* at 373.

12. By “reason of slavery” I am analogizing to the idea of “raison d’etat.” See F. MEINECKE, *DIE IDEE DER STAATSRÄSON IN DER NEUEREN GESCHICHTE* (1924).

13. T. COBB, *AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA* (1858); W. GOODELL, *THE AMERICAN SLAVE CODE IN THEORY AND PRACTICE* (1853); J. HURD, *THE LAW OF FREEDOM AND BONDAGE IN THE UNITED STATES* (2 vols.) (1858-1862); G. STROUD, *A SKETCH OF THE LAWS RELATING TO SLAVERY IN THE SEVERAL STATES OF THE UNITED STATES OF AMERICA* (1827); J. WHEELER, *A PRACTICAL TREATISE ON THE LAW OF SLAVERY* (1837).

Tunncliffe Catterall during the 1920's and early 1930's¹⁴ there was no serious effort by post-bellum historians to assemble the case-law data. Even so, with two partial subsequent exceptions¹⁵ there was little systematic analysis until the 1960's. Catterall's labors initially did no more than cause later historians to make tip-of-the-hat dips into her congeries of data, using a case here and there much as one might employ an antebellum traveller's narrative to lend illustrative support to a social or political point.

There are two important reasons for this initial limited use. First, the early post-bellum historians fought the "paradigmatic battles" on other territory, where legal structures and case-law developments were pressed into the service of one side or the other in a largely ancillary fashion. Second, case-law data was used sparingly because of the rigid boundaries of inquiry set by traditional American legal history, particularly those that, by isolating law from society, polity, and economy, produced a narrow scholarly emphasis upon whatever seemed "autonomous about the legal order—courts, equitable maxims, motions for summary judgment,"¹⁶ and so forth. This separation of the internal "box"¹⁷ of the law from everything outside was hardly conducive to emphasizing the legal history of slavery, an area that derives its interest chiefly from the relationships between law and the larger sociopolitical world of antebellum America.

Although exploring these reasons might be a profitable exercise, on this occasion I wish to examine the analytic approaches taken by scholars of the past decade who have focused upon the judicial role in the institution of slavery.¹⁸ I propose to proceed in three parts. The first part attempts to summarize the driving explanations these scholars have advanced. It also attempts to isolate the points of disagreement among them. The second part examines slave manumission cases rendered by three southern appellate courts during the three decades immediately preceding the Civil War. It does so because most of the published work about the law of southern slav-

14. H. CATTERALL, *JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO* (5 vols.) (1926-1937).

15. C. EATON, *FREEDOM OF THOUGHT IN THE OLD SOUTH* 118-43 (1940); Sydnor, *The Southerner and the Laws*, 6 *J.S. HIST.* 1 (1940).

16. Gordon, *Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography*, 10 *LAW & SOC'Y REV.* 9, 10 (1975).

17. *Id.*

18. I shall also mention briefly a few other legal historians and historians of slavery whose research has carried them across the smaller historical stage, but giving short shrift to "past-roots-searchers" and "present-justice-seekers," see text accompanying note 64 *infra*, whose legitimate concerns lead nonetheless to sloppy reading of the work in the field that they appropriate. For a specific example, see note 34 *infra*.

ery primarily has addressed criminal trials of blacks and whites,¹⁹ and because such an examination will help to evaluate points of disagreement. Furthermore, manumission cases are more helpful than criminal decisions in evaluating two explanations for one of the more intriguing findings upon which there is some scholarly agreement—that if²⁰ slave felony cases reached the state supreme courts, most appellate judges increasingly seemed disposed to insist upon something that looks quite like a formally fair trial. One explanation of this finding lays it primarily to a “paternalist” desire to protect slavery—whether to protect the master’s property interest, to disprove abolitionists’ calumnies, or to discourage the worst white repressiveness that could, if not judicially restrained, encourage slave unrest or uprisings.²¹ The other explanation, though not denying the force of these motives, urges that the treatment of slaves on criminal trial cannot be wholly accounted for in this way. It seeks to adduce also, as an additional determinant of judicial behavior, sympathy for the slave as a human being. This second explanation doubts that all antebellum southern appellate judges were equally unrelenting advocates of the peculiar institution. To oversimplify now with the promise of making appropriate qualifications later: if the former explanation suffices, then one might expect to find relatively little tendency among the appellate judges to resolve close manumission cases in favor of freedom and against the claims of would-be heirs. If the latter explanation holds any water, then one should find an opposing tendency to resolve these issues in favor of freedom. Because the courts of Virginia, Tennessee, and Georgia produced di-

19. For extended discussions of other areas, especially manumission suits, see D. Morgan, *American Blacks and the North Atlantic State Supreme Courts: 1790-1860* (July 1970) (unpublished Ph.D. dissertation at the University of Chicago) and A. Nash, *Negro Rights and Judicial Behavior in the Old South* (September 1967) (unpublished Ph.D. dissertation at Harvard University).

20. It is important to emphasize the “if.” Most cases, of course, did not get so far, and there was almost certainly much greater variance among and within southern states’ lower court jurisdictions.

21. This perspective arguably is implicit in some of the published work. *E.g.*, K. STAMPP, *THE PECULIAR INSTITUTION* (1956). The best statement of this view, however, was by the late Mark DeWolfe Howe in a personal communication to me on September 26, 1966.

It might even be expected that those who were anxious to support the institution of slavery would see that its chances of survival would be increased if humanity rather than brutality should color it. These considerations any thoughtful student of the South would expect to find in the opinions of the judges of the highest courts in the Southern States I cannot help feeling . . . that many of the ‘enlightened’ pronouncements and comments . . . were the reflection of a natural conviction that the one hope of preserving the institution was to cast out as many of its brutalities as possible and also make sure that the gentle society of white fathers would not be distracted or endangered by the presence of free black children.

Letter from Mark D. Howe to A.E. Keir Nash (Sept. 26, 1966).

verse results in manumission cases, Part Two explores their holdings in detail.

The third part of the Article assesses the significance of Part Two with respect to the interpretations discussed in Part One. Principally, it is concerned with two questions. One asks to what extent there was a unified law of southern slavery. The other asks what assumptions about judicial attitudes, ideologies, and motives best explain the changing shape of the law of slavery during the nineteenth century. Part Three also makes a modest effort to link the findings of Part Two with three larger historiographical issues. The first, which has developed since Elkins' *Slavery*,²² is best characterized as the debate over the "comparative exploitativeness" of United States and Latin American slavery. The second issue is an older debate that, in spite of falling into the background during the past fifteen years, nonetheless still retains some vitality. It is the debate that in the 1930's and 1940's was characterized as the "repressible conflict vs. the irrepressible conflict" argument over the Civil War's origins.²³ The third issue pertains to changing interpretations in the burgeoning field of nineteenth-century American legal history, and especially to the question how well can one account for the evolution of American law from the Revolutionary era to the nineteenth century by organizing one's explanation around a particular concept. That concept, much used and discussed of late,²⁴

22. S. ELKINS, *SLAVERY* (1959). See, e.g., *THE DEBATE OVER SLAVERY* (A. Lane ed. 1971). A related issue deserves mention here. That is whether during the Jacksonian era southern attitudes on race, slavery, and politics bifurcated into two channels of sociological thought—one that advocated a seigneurial patriarchy and insisted on humane treatment of all members, white and black, of an essentially hierarchic sociopolitical order; and another, a *Herrenvolk* democracy that advocated equality for all whites but was quite uninterested in the human condition of the black. See P. VAN DEN BERGHE, *RACE AND RACISM: A COMPARATIVE PERSPECTIVE* 17-18 (1967); and G. FREDERICKSON, *THE BLACK IMAGE IN THE WHITE MIND* 43-70 (1971). To anticipate, on the whole, southern appellate judges' decisionmaking did not neatly divide into such a dichotomy.

23. See A. COLE, *THE IRREPRESSIBLE CONFLICT 1850-1865* (1934); A. CRAVEN, *THE REPRESSIBLE CONFLICT 1830-1861* (1939). For a discussion of competing interpretations of the origins of the Civil War, see H. Beale, "Causes of the Civil War," Soc. Sci. Research Council, Bull. No. 54 (1946); and T. PRESSLY, *AMERICANS INTERPRET THEIR CIVIL WAR* (1962).

24. See, e.g., L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (1973); M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977). See generally Nelson, *The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513 (1974); Scheiber, *Instrumentalism and Property Rights: A Reconsideration of American "Styles of Judicial Reasoning" in the 19th Century*, 1975 WIS. L. REV. 1; see also Holt, *Now and Then, The Uncertain State of Nineteenth-Century American Legal History*, 7 IND. L. REV. 615 (1974). Put succinctly, a "formalist judge" is said to think that he merely discovers what the law is and applies it, while an "instrumentalist judge" uses precedent, logic, and the facts of a given case to "reshape" the law in order to further some social, economic, or political end. The distinction, most fully developed in Horwitz' work, clearly goes back, though in different terminology, to Karl Llewellyn's *The*

is the idea of a shift from legal formalism to legal instrumentalism during the period from Yorktown to the early nineteenth century and back to formalism before the end of that century.

PART ONE: REFLECTIONS ON VARYING INTERPRETATIONS

A. *Four Reasons for Examining the Interpretive Differences*

How real and how important are the interpretive differences among the half-dozen scholars who have sought to analyze the development of the nineteenth-century case law of slavery and to explain the behavior of judges enmeshed in that development? If differences remain after inspection, does it become plausible to say that author *A* is right, *B* half-right, and *C* quite wrong? Most significantly, do the differences derive more from the data or from the explanatory models the authors find satisfying? These are the questions that this part of the Article addresses. I have four reasons for addressing them at the beginning, and for restricting my attention to those authors who have centered their research upon the judiciary and slavery.

First, during the past ten years there has grown up a small—though not always modest—literature on the subject, with some internal disagreement about findings. The principal essays on the subject are, in order of appearance rather than merit: Nash,²⁵ Flanigan,²⁶ Cover,²⁷ Tushnet,²⁸ Howington,²⁹ and Hindus.³⁰ Second,

Common Law Tradition, and behind him to Roscoe Pound's concept of a formative era of American law. K. LLEWELLYN, *THE COMMON LAW TRADITION* (1960); R. POUND, *THE FORMATIVE ERA OF AMERICA LAW* (1950). But whatever the terminology, there are at least two potential difficulties. Grant Gilmore puts one in another recent book, *The Ages of American Law*, stating that: "All generalizations are oversimplifications. It is not true that, during a given fifty-year period, all the lawyers and all the judges are lighthearted innovators, joyful anarchists, and adepts of Llewellyn's Grand Style—only to be converted en masse during the next fifty-year period to formalism or conceptualism." G. GILMORE, *THE AGES OF AMERICAN LAW* (1977). See also, Scheiber, *supra*. The other difficulty pertains to the nature and causes of a judge's determination to innovate or not.

25. Nash, *Fairness and Formalism in the Trials of Blacks in the State Supreme Courts of the Old South*, 56 VA. L. REV. 64 (1970) [hereinafter cited as *Fairness and Formalism*]; Nash, *A More Equitable Past? Southern Supreme Courts and the Protection of the Antebellum Negro*, 48 N.C. L. REV. 197 (1970) [hereinafter cited as *A More Equitable Past?*]; Nash, *Negro Rights, Unionism, and Greatness on the South Carolina Court of Appeals: The Extraordinary Chief Justice John Belton O'Neall*, 21 S.C. L. REV. 141 (1969) [hereinafter cited as *Negro Rights, Unionism, and Greatness*]; Nash, *The Texas Supreme Court and Trial Rights of Blacks, 1845-1860*, 58 J. AM. HIST. 622 (1971) [hereinafter cited as *Texas Supreme Court*].

26. Flanigan, *Criminal Procedure in Slave Trials in the Antebellum South*, 40 J.S. HIST. 537 (1974).

27. R. COVER, *JUSTICE ACCUSED* (1975).

28. Tushnet, *The American Law of Slavery, 1810-1860: A Study in the Persistence of Legal Autonomy*, 10 LAW & SOC'Y REV. 119 (1975).

while these authors would agree that there are differences both in the explanatory models they advance to account for the data studied and in the ways they relate their findings to the broader political, economic, and social aspects of the American slavery experience, there is less agreement as to the significance of these differences. Third, there are several obvious differences among these authors as to both the data examined and the larger debates about slavery to which the authors implicitly or explicitly related their inquiries. The authors examined the case law in widely divergent geographic areas: Nash, in all the seceding states, except Louisiana, which is not a common law state; Flanigan, in the South selectively, giving the greatest attention to Virginia and South Carolina; Cover, primarily in Massachusetts, Pennsylvania, New Jersey, Virginia, and North Carolina; Tushnet, in the secession South, except South Carolina, Tennessee, and Texas; Hindus, in South Carolina and Massachusetts; and Howington, in Tennessee. The authors also examined the case law at different judicial levels. All except Flanigan, Hindus, and Howington have considered primarily or exclusively state appellate cases. Moreover, there are differences in the legal areas studied. While Flanigan and Hindus based their conclusions primarily upon criminal trials of blacks and whites, Nash, Howington, and Cover dealt extensively with manumission cases as well. Tushnet examined, in addition to criminal cases, tort and contract decisions. There are substantial contrasts in the rigor with which the authors set clear boundaries on the type of data at which they did (and did not) look. Nash and Hindus proceeded the most self-consciously on this score. By contrast, Cover seemed the most willing to run the risks of selection. Furthermore, the type of analysis employed by the authors differs. Nash tried to think himself into the minds of the judges whom he was studying,³¹ and Cover sought a similar end.³² Flanigan and Hindus seemed to think that this "Collingwood-like" effort at "imaginative re-enactment"³³ was not

29. Howington, *Not in the Condition of a Horse or an Ox: Ford v. Ford, The Law of Testamentary Manumission, and the Tennessee Courts's Recognition of Slave Humanity*, 34 TENN. HIST. Q. 249 (1975).

30. Hindus, *Black Justice Under White Law: Criminal Prosecutions of Blacks in Antebellum South Carolina*, 63 J. AM. HIST. 575 (1976) [hereinafter cited as *Black Justice Under White Law*]. See also Hindus, *The Contours of Crime and Justice in Massachusetts and South Carolina, 1767-1878*, 21 AM. J. LEGAL HIST. 212 (1977) [hereinafter cited as *The Contours of Crime*]; M. Hindus, *Prison and Plantation: Criminal Justice in Nineteenth-Century Massachusetts and South Carolina* (1975) (unpublished Ph.D. dissertation, University of California at Berkeley).

31. See Nash, *supra* note 19, at Introduction.

32. That is not to assert that either wholly succeeded.

33. See R. COLLINGWOOD, *THE IDEA OF HISTORY* 39, 282-302 (1946). Collingwood argued that the historian must rethink the thoughts of the historical personages whom he is treating

required to reach their conclusions. Finally, the authors reacted to different aspects of the larger debates about the institution of slavery.

The fourth and final reason for addressing the questions with which this section began stems from the "wanton impressment" of the slavery case-law data into two of the larger debates. One is the debate over the comparative evils of Latin American and North American slavery, and its close companion, whether slavery was a capitalist or precapitalist institution. Because this debate is so embedded in the redress of current political, social, and economic inequities, clarity is important.³⁴

in order to evaluate those personages' decisions and behavior. To understand Caesar's decision to cross the Rubicon, the historian almost must become, momentarily, Caesar. Moreover, the historian should know he has succeeded in the "re-enactment." Although I have always been unclear exactly how all this is to be accomplished (particularly how one knows one has succeeded), nonetheless in the area of scholarship with which we are dealing there are two good reasons for attempting imaginative reenactment of past judicial thinking. First, when examining cases either as "mirrors" potentially reflecting social thought in general or as potential indicators of judicial attitudes and goals concerning slavery, one must "be able to re-think the logical possibilities genuinely open Unless we can decide which cases offered to the Judges genuine choices, . . . we cannot determine whether the Judge was bending the law to reach an outcome he personally favored." Nash, *supra* note 19, at 8. Second, such "imaginative re-enactment" is needed in an area of historical research frequently characterized by a tendency to impose present day standards of "racial progressivism" on the past. For development of this point, see text accompanying notes 84-94 *infra*.

34. It may be useful to give an example of what I mean by the embedding of historical research in the current search for redress and of what may happen to the cause of analytic clarity, apparently in consequence. Consider an article by federal District Judge A. Leon Higginbotham, Jr. Higginbotham, *Racism and the Early American Legal Process, 1619-1896*, 407 ANNALS 1 (1973). The article begins with the proposition that "an understanding of the early American legal process is central to dealing with the racial disparities of today." *Id.* The proposition is probably true, and the goal of dealing with racial disparities is important, but the effects upon dispassionate scholarship are not quite so laudable. At least one other scholar is set up as a strawman, misread, and put into an artificial debate. Thus, Higginbotham declares:

Professor [X] has written a series of articles generally extolling the treatment of blacks by the "State Supreme Courts of the Old South." After reviewing a relative paucity of cases, [Professor [X]] . . . said:

Yet, it is not quixotic to ask whether the black's existence was better aided by the judicial fairness and integrity of . . . judges such as Pearson and Green minus the mandate of the fourteenth amendment than by that mandate unaided by judicial compassion.

My answer to Professor [X] is: even with their degraded status after the termination of slavery and the impotence of the Fourteenth Amendment, blacks were inestimably better off than in their prior existence when slavery was a way of life and a few southern appellate judges made the chains a bit less cutting. It seems strange that one hundred years after the emancipation some scholars have to be reminded of Professor Litwack's comment that "the inherent cruelty and violence of Southern slavery requires no further demonstration."

Id. at 9. But, let us see what Professor X actually did and said. First, while he "extolled" some judges, he had less kind words for some others. Second, the "paucity of cases" that

The other debate derives from recent scholarly work in late eighteenth- and early nineteenth-century American legal history—particularly the work examining the changes in the judges' understanding of their own functions and of the role of law in economic and social development. There are two related difficulties here. First, the data of slavery case law are not well integrated into the central analysis. Sometimes, as in Lawrence Friedman's *A History of American Law*,³⁵ the data is used too peripherally. When it is drawn upon, it is too frequently made to subserve the work's driving explanation of economic development in the "vital center"—the Northeast. The number of factual errors in Friedman's discussion of southern appellate courts is so high that I assume it does not typify his handling of legal data coming from the geographic regions with which he is more concerned. For example, his *A History of American Law* mentions four justices, including three chief justices, who sat on the North Carolina Supreme Court before the Civil War. Friedman omits or states incorrectly the primary judicial positions or the birth and death dates of all four.³⁶

Professor X examined before publishing anything on the subject exceeded 3000. Third, the quotation refers plainly to the fourteenth amendment alone. The quotation says nothing whatsoever about the effects of the thirteenth amendment, which is what Higginbotham seems to be referring to and which, obviously, "did the major deed" of freeing blacks from slavery. Fourth, if there was any doubt it should have been dispelled by the sentences immediately preceding and following the one Higginbotham lifted out of context and misread. The sentence preceding: "Appellate insistence on the rule of law after the passage of the Civil War amendments would not by itself have guaranteed complete security from violence at private and public hands anymore than antebellum judicial behavior abolished inequity." The sentences following:

It is surely not too soon to ask for a return to enforcing in full measure the law of the land as it stands, whether or not it is distasteful to the personal sensibilities of those responsible for its application. . . . One can only hope that the apparent similarities of the 1960's and the 1850's do not develop further In 1856, Judge David S. Walker, standing as the nominee of the Know-Nothings, lost the Florida gubernatorial election by 400 votes. Ten years later, he became that State's Chief Executive, and in the bitter aftermath of war declared: "The colored man and the white man are now in the same boat: if she goes down, they both go down. . . ." Judge Walker's ethnic terminology may now be dated, but the same cannot be said of the substance of his sentiments.

Professor X thanks Judge Higginbotham for his reminder but notes that, as the grandson of a Derbyshire miner, he may not need reminding of the capacity of "master-classes" to exploit. Professor X is *myself*, and the article that Higginbotham misleadingly quotes, *Fairness and Formalism*, *supra* note 25, at 99-100.

35. L. FRIEDMAN, *supra* note 24.

36. Every one! To Thomas Ruffin he assigns wildly askew birth and death dates, "1752-1819." *Id.* at 118. These dates conceive Ruffin before George III ever thought of annoying the colonists, rather than correctly in the year of the Constitution's framing. They kill him off during Monroe's Presidency, before he ever got on the appellate bench, rather than appropriately entombing him in the second year of Ulysses Grant's Administration. Ruffin was included on Roscoe Pound's list of the ten leading judges of the Formative Era of American law. R. POUND, *supra* note 24, at 4. If Ruffin can be so untimely dismissed from this vale of

In pointing to Friedman's batting zero for four identifications, I do not wish to nitpick unduly. I do want to point up a historiographical problem. We know well what book reviewers would say of one who, writing a general history of American law, asserted that Lemuel Shaw's chief distinction was being Herman Melville's father-in-law, or that Thomas Cooley, by virtue of his name, must have been a Chinese magistrate. They would doubt the author knew Massachusetts or Michigan law frightfully well and perhaps question his generalizations about American law as a whole. It may be safer to follow the course of Morton Horwitz in *The Transformation of American Law, 1780-1860*³⁷—to me the most interesting and insightful book in the area, yet containing not one index entry to slavery. Arguably there is a problem of interregional imbalance in the historical treatment of American law—one that is not entirely overcome by relegating most of the United States to the status of periphery.

A second historiographical difficulty in integrating analyses of slavery law and other recent writings in nineteenth-century legal history focusing on the northern center springs from the neo-developmentalism that pervades those writings. When I read the recent literature in American legal history, I have two salient reactions. One is a fascination with what I take to be the field's most significant finding of late: the discovery of an early nineteenth-

tears, it is small wonder that his predecessor as chief justice is recognized by Friedman only as "a certain Leonard Henderson of North Carolina, who advertised in 1826 in the *Raleigh Register* that he had 'four offices for the reception of Law Students' and was on the verge of opening a fifth." L. FRIEDMAN, *supra* note 24, at 279. Similarly, he identifies Ruffin's next-but-one successor as chief justice, Richmond Pearson, merely as a law teacher "whose private law school lasted into the 1870's" and whom "[a]t least one student thought . . . 'the greatest teacher that ever lived on the earth.'" *Id.* at 529. I do not know much about Pearson's pedagogy, but I do know that along with Ruffin he was probably one of the two most important members of the mid-nineteenth-century North Carolina bench—a point that escapes Friedman. Pearson thus put on the periphery, it is even less wonder that another "teacher of the law," William Horn Battle, is identified as "a judge of the state's superior court." *Id.* at 528 n.13. That identification gets him at least part way to his position on the state's supreme court. I should add that Friedman by no means has a monopoly on misidentification of southern judges. Ira Berlin thus, in his interesting book, *Slaves Without Masters*, refers at page four to "William Gaston, the chief justice of North Carolina." Gaston never was chief judge of that court. I suspect that Berlin made a sensible gamble, that, in the specific case, lost—to wit, trusting Eaton's *Freedom of Thought in the Old South*. Eaton's work (which I have long admired and whose fifth chapter, "The Law and the Courts," caused me first, two decades ago, to sense that something might be amiss in the usual historical assumption about the southern judiciary and slavery, and then to inquire into the subject in this Article), almost always factually accurate, errs by saying that Gaston "was elected chief justice by the general assembly in 1833, and held this high position until his death in 1844." C. EATON, *supra* note 15, at 302. In fact, Thomas Ruffin was selected for the chief justiceship in 1833, on Leonard Henderson's death, and served as such until 1852.

37. M. HORWITZ, *supra* note 24.

century jurisprudential attitude that looks very much like a precursor of legal realism a century earlier than traditionally was thought to be the case. The other reaction is a curiosity in seeing the historiographical dominance, in 1975-1978, of a rigid, developmentalist paradigm. I feel doubts akin to those voiced by Richard Morris in his generally laudatory review of William Nelson's *Americanization of the Common Law*:³⁸ "One cannot regard the entire period from 1630 to 1760 as a seamless web."³⁹

To generalize: if Morris is right, the recent work in nineteenth-century legal history may, even as it pushes the legal changes that occupy its attention into a high peak of "progress-oriented" jurisprudence, tend unduly to flatten out, to discount the legal changes that occurred before and after the period of its focus. Perhaps there is a tendency here that is the temporal counterpart of the geographic one to which we have just alluded. Just as the concern with the relationship between American economic development and American legal evolution has led to over-focusing, to the neglect of the periphery, on the states where industrial growth proceeded most speedily, so too the same concern may result in highlighting the legal changes that occurred in the era of economic take-off, overshadowing the changes prior and posterior to that era.⁴⁰ Perhaps, in other words, too much legal fact is being force-fed into a single developmental model.⁴¹

B. Tushnet's View of the State of Scholarly Affairs

Both the foregoing observations and reasons of economy suggest that we begin our examination of agreement and disagreement among the findings and interpretations of the law of slavery by

38. Morris, Book Review, 21 AM. J. LEGAL HIST. 86 (1977).

39. *Id.* at 89. See also *The Contours of Crime*, *supra* note 30, at 219-21.

40. There may be an analogy to a weakness that beset political science in its treatment of political development during, roughly, 1955 to 1970. Peculiarly sure that new Third World polities of the post-World War II era could be described as developing from a traditional, premodern polity to one that bore a curious approximation to an idealized Anglo-American democracy, political development theory simply did not predict well what happened in the Third World. Nation-building, to use the jargon, hardly proceeded at all along the Anglo-American path, and eventually scholars began to question the theory itself. See, e.g., Ayres, *Development Policy and the Possibility of a Livable Future for Latin America*, 69 AM. POL. SCI. REV. 507 (1975); Moul, *On Getting Nothing for Something: A Note on Causal Models of Political Development*, 7 COMP. POL. STUD. 139 (1974); Nash, *Pollution, Population, and the Cowboy Economy: Anomalies in the Developmentalist Paradigm and Samuel Huntington*, 2 J. COMP. AD. 109 (1970).

41. One of the more interesting analyses of southern law, that by Mark Tushnet, *supra* note 28, and examined in the following section of this Article, finds quite a different direction of development in the law from that of "the North"—explicitly, in terms of shifts in legal reasoning styles, and implicitly, in terms of relationships between law and economy.

scrutinizing the views of the scholar most critical of the labors of others in the field—Professor Mark Tushnet. Hence I first set out his most important contentions about the law of slavery and its study, and then consider where others might take issue, and where they might agree.⁴² Laying out Tushnet's view of scholarly analysis of the law of slavery is best done by turning to his 1975 article in *Law and Society*, "The American Law of Slavery, 1810-1860: A Study in the Persistence of Legal Autonomy."⁴³ There he enunciates most clearly his objections to what has gone before, and seeks to put something more adequate in its place.⁴⁴

Tushnet believes that the cases have "been widely misused by previous students of the subject,"⁴⁵ including both abolitionists and more recent scholars. Tushnet's mode of objecting to "prior misuse," however, presents an initial barrier to drawing from the text the most important and insightful of his contentions. It would be easier if one did not first have to delve through the abundance⁴⁶ of

42. Professor Tushnet has greatly aided me by critiquing an early draft of Part One of this essay. Indeed, his comments have been most useful throughout the revision, and I thank him even as I stress that he may well not agree with all that I say. I should also note that a succeeding section of this essay, concerned primarily with the writing of Michael Hindus, the other scholar in the area whose interpretations seem most to diverge from my own, does not come with the benefits of a similar critique—inasmuch as an identical invitation was declined.

43. Tushnet, *supra* note 28.

44. See also Tushnet, Book Review, 20 AM. J. LEGAL HIST. 168 (1976) (R. COVER, JUSTICE ACCUSED); M. Tushnet, Approaches to the Study of the Law of Slavery (April 12, 1978) (paper presented at the Organization of American Historians Annual Meeting, New York City). My view of Cover's book is that it is better than Tushnet thinks it is.

45. Tushnet, *supra* note 28, at 125-26.

46. Before we are five pages into Tushnet's article, we have been apprised of the following: the simplicity of Stanley Elkins' treatment of the "law-making process as one form of pluralist politics" (*id.* at 120-21); that "at times" Frank Tannenbaum's exposition slipped somewhat (*id.* at 121 n.6); that Marvin Harris' "argument differs from Elkins' only in" offering "three collective forms of economic man," but that "difference is important in showing Elkins' relative sophistication" (*id.* at 121 n.4); and that Goodell, though "a perceptive abolitionist polemicist" (*id.* at 121) who noted that "parallels were drawn in the Southern cases to brood mares, horses, or dogs," (*id.* at 122) "failed to note" that "parallels were drawn" also to "adults, children, or lunatics." *Id.*

Similarly, in the next few pages we are told that Tannenbaum's "neat dichotomy" between Latin American slavery's recognition of a moral personality in the slave and Anglo-American slavery's failure to do so "is inaccurate," (*id.* at 124) that "[m]uch of the prior misconception of Anglo-American slave law derives from the failure of Tannenbaum or Elkins to offer a clear definition of moral personality," (*id.* at 124 n.20) and that "Stanley Elkins, who purported to set the argument on a new course" away from abolitionist arguments about the wrongs of slavery nonetheless "made nearly every mistake in the four pages that he devoted to 'matters of police and discipline' that Goodell had made a hundred years before." *Id.* at 128 n.33. Interstitially we also are informed of abolitionist error. Stroud, though "closer to the mark than Goodell in his emphasis on sentiment, . . . stood on shakier ground when he sought to use the codes as 'strong' evidence of practice." *Id.* at 127. "Goodell's inability

offhand critical comments that the text presents.⁴⁷ Nonetheless, once past the critical thicket one perceives five major contentions.

First, it is important that analysis of the law of slavery not begin by assuming a simple determinism in which the law merely reflects social, economic, or political forces. "[W]e cannot fully understand the development of slave law in America unless we are aware of the autonomous aspects of legal change."⁴⁸ This general contention seems unexceptionable—at least among the writers in the area.⁴⁹ Indeed, the analyses of Nash and Cover explicitly assume that the law and its judges are to some degree autonomous and separable from the larger society, polity, and economy. If there is an analytic difference, it is over the questions how, and to what degree, the law is autonomous.

Second, the distinctive aspect of southern legal change and the essence of antebellum slave law's autonomy lay in movement from initial uncertainty about how to deal with the "moral personality" of the slave (an uncertainty reflected in the judges' use of inadequate analogies to horses, cows, and other items of personal property) to the greater certainties of "categorical thinking" about slave law. The "movement from reasoning by analogy to reasoning from the assumed character of the relationship was, in all its essentials, what happened throughout the American South."⁵⁰ Although there was "a clear trend away from ordinary common law standards and toward standards that varied with certain gross categories,"⁵¹ nonetheless:

this shift . . . had no systematic impact on the courts' appreciation of the slaves' moral personality. Slaves were still regarded as human beings, but that recognition took a different form The cases show a confluence of the replacement of the common law by statutes with a still-muted but increasing concern for the defense of slavery against outside attack and with the uncomfortable reality that, whatever the law had to say about it, slaves were undeniably human beings.⁵²

to understand the more arcane aspects of standard legal propositions led him into more subtle errors." *Id.* at 128 n.33.

47. I should perhaps emphasize that it is the offhand and the inaccurate ones, those not really necessary to Tushnet's thesis, that I cavil at, not those that usefully advance it.

48. Tushnet, *supra* note 28, at 121.

49. It should be noted, as Mark Tushnet pointed out to me, that he was making no claim to "priority" on this point in the specific area, but rather was concerned with what he takes to be a more general tendency to conceive of law as nonautonomous, as determined, as well as with Elkins' assumptions, which he sees as taking just such a deterministic point of view. *See* note 41 *supra*.

50. Tushnet, *supra* note 28, at 144.

51. *Id.*

52. *Id.* at 137.

Part of this is familiar, but part is novel. The familiar part is indicated by the following quotations.

[U]ncertainty obtained precisely because the slave was not regarded as an ordinary article of merchandise and traffic. On the contrary, he was regarded as extraordinary—not merely because he was both perishable and expensive but because of uncertainty as to just how much of him was property and how much humanity.⁵³

In the antebellum judicial forum, four components of the southern ideological system struggled on unresolved: the supremacy of law, the supremacy of whites, the black man as human, and the black man as property.⁵⁴

What is novel is the pattern of case law development that Tushnet perceives, not the moral personality issue. The interest of Tushnet's piece resides largely in the picture he presents of doctrinal evolution from analogical to categorical jurisprudence.

So too, and to suggest Tushnet's third major contention, the value of this novel insight turns upon the plausibility of the account Tushnet offers to explain the differences he rightly perceives among the development of the various southern courts.⁵⁵ In Tushnet's view these differences are explained primarily by either of two factors. One factor, peculiar to Louisiana, was the presence of the *Code Noir* from before the start of her statehood and the consequent existence of "something quite close to a mature law of slavery, the point toward which the law throughout the South was moving."⁵⁶ As a result, the Louisiana courts avoided many of the juristic problems posed by a moral personality who was a captive.

The question of how slaves resemble free persons barely arose. Slaves could commit crimes because the statutes said so, and not because slaves had the sort of moral personality which justifies the attribution of criminal responsibility

Louisiana's criminal cases showed the same easy recognition that the slave is human as the Code provisions do. When faced with a case in which a free man had killed a slave, the court had no trouble.⁵⁷

The other factor was the comparative abilities of the various state courts. For Tushnet the "highly-accomplished judges of North Carolina"⁵⁸ displayed a finer touch in wrestling with the problem of

53. *A More Equitable Past?*, *supra* note 25, at 201-02.

54. *Texas Supreme Court*, *supra* note 25, at 642. Compare also Flanigan's view that although "[o]n the civil side . . . suppression of the [slave's] personality was nearly complete," it was far from that in criminal cases. Flanigan, *supra* note 26, at 537.

55. Tushnet, *supra* note 28, at 148. Tushnet omits discussion of Texas, whose mixed civil law/common law heredity might be thought to have contributed to something of the same "well-formedness."

56. *Id.*

57. *Id.* at 146-47.

58. *Id.* at 138.

slavery on their way from analogy to category. Thus, for example, the reason that the North Carolina Supreme Court's opinion on the applicability of the fellow-servant rule to slaves was of higher quality than "the more humane opinions rendered in Florida and Georgia" was "simply because the judges there were more skillful."⁵⁹ With respect to development more generally:

[A] law of slavery developed as judges attempted to devise a relatively simple theoretical framework However, that framework could not remain simple enough to meet the mediocre judge's need for sure and easy guidance. After the reconceptualization had occurred, cases continued to arise, and the theoretical structure necessarily became more elaborate as more cases had to be accommodated within it. When judges are careful, this accommodation of new cases to an old structure occurs, I suggest, by very close attention to detail, and by reasoning that makes fine distinctions plausible. Mediocre judges, though, try to avoid the difficulties inherent in this endeavor by grasping at whatever simplifying devices they find at hand—in the South, appeals to humanity This modification of my argument explains why North Carolina law diverged from the law elsewhere; we have independent evidence, for example from Roscoe Pound's evaluation of Judge Ruffin, that North Carolina judges were more talented than other Southern judges, and therefore had no need to retreat into abstractions.⁶⁰

Tushnet's analysis is also distinctive on this score.⁶¹

59. *Id.* at 162. Florida and Georgia ruled that the employer was liable for injury to a hired slave resulting from the negligence of another worker. North Carolina, following the northern courts, reached the opposite conclusion.

60. *Id.* at 169. I am not sure whether I understand the logic of the paragraph just quoted, or if I do, whether I agree. It seems to say the following. There are better judges and worse judges. Better judges make finer distinctions, pay more attention to detail, use tighter reasoning, and tend to produce the results they want by distinguishing precedent more than by retreating into abstractions or using simplifying devices. Worse judges make grosser distinctions, pay less attention to detail, use looser reasoning, grasp at the straws of simplifying devices, and retreat into abstractions and (perhaps) tend more to overrule or ignore prior cases than to distinguish them. In the slave South one simplifying device at hand was an appeal to humanity.

I have two points. First, it is not clear to me that the appeal to humanity always worked out as a simplifying device. Not infrequently, I suggest, it complicated matters. Second, I am not comfortable with all the paired opposites describing better and worse judges—especially attention to detail, and use of abstractions. Where, for example, would John Marshall be placed accordingly? There is detail, and detail. There are abstractions, and abstractions.

61. I am not altogether convinced, believing it makes too much of a single comment by Roscoe Pound and too much of the courts' treatment of the "fellow servant" rule. Moreover, I can imagine someone arguing the "finer quality" the other way in order to support the opposite conclusion. If anything distinguished Ruffin from some of his North Carolina colleagues, it was his tendency to go into abstractions. Underlying the particular difference here are, I think, two broader differences between my judgment and Mark Tushnet's. First, he sees more interstate unity in the southern law of slavery than I do. Second, his quest for that unity at times leads to leaps from and across the evidence that, although certainly dazzling (and perhaps even ultimately correct), leave me wondering whether there is a bit of insensitivity to the differences of attitudes among the southern judges, as individuals, that I believe I detect. I find myself asking, for example, whether he senses differences between judges Ruf-

Tushnet's fourth significant point is that it is important to integrate adequately the analysis of slave law with the larger social, political, and economic context of antebellum America.⁶² To do so we must avoid two pitfalls. One, a typical mistake of the abolitionists, is to examine cases with a "damned if they did, and damned if they didn't" attitude toward judges' decisionmaking. If a judge made a repressive decision, he both mirrored and proved to the abolitionists the harshness and perfidy of the peculiar institution. If a judge rendered a seemingly humane decision, he was hypocritically cloaking the political order with a veil of kind words transparent to the abolitionists.⁶³ The trouble with this abolitionist analysis, apart from its obvious a priori partiality, is that it does not explain much about the relationships between social order, economy, and polity, on the one hand, and the law, on the other.

Another pitfall, of more recent origin, is described by those historians who, Tushnet says, use the same analytic categories as the abolitionists to try to correct the abolitionist analysis. Two errors are involved. One is less important—the reanalysis tends to push the description of the judges' decisionmaking too far in the other direction. The more important error, however, is that like the abolitionists, the "counter-abolitionist" historians use a single-valued concept that cannot "adequately represent the complexity" of the relationships between law and society.⁶⁴ Should we, because

fin, Battle, Nash, and Manley (all of the North Carolina bench), or among judges Totten, Reese, and Green (of Tennessee). Of the "grosser differences," those between Joseph Lumpkin of Georgia and O'Neill of South Carolina, he is well aware. For further discussion, see note 227 and Parts Two(C) & (D) *infra*.

62. Tushnet, *supra* note 28, at 175-80.

63. Unfortunately, the abolitionists, and their successors, seemed to find evidence only of harsh and repressive attitudes, so that, while they examined the cases to discover the sentiments of the judges, they believed that the only sentiments honestly expressed were those consistent with what the abolitionists already "knew" about Southern slavery; everything else was hypocrisy, benevolent words concealing the horrors of slavery . . . hidden beneath the words . . .

Id. at 127.

64. The South was committed to the institution of slavery . . . Still, a judge might attempt to ameliorate some of the harshness of the institution, and that is what the abolitionists ignored. A recent student of slave law, Professor A. E. K. Nash tried to correct the abolitionists' analysis, but he used their own categories. Unfortunately, he went too far in speaking of the law's "essentially decent treatment of the black" and of its "libertarian policy."

The difficulty with the abolitionist and counter-abolitionist analysis, though, is not that Southern law has been located in the wrong place on a continuum between anti-slavery and proslavery, or between libertarianism and conservatism. The real problem is that the issue just cannot be analyzed in those terms, because they make sense only if an increase in authoritarianism or repression necessarily implied a decrease in paternalism or benevolence. In fact, Southern slavery could be at once extremely repressive and extremely paternalistic, and no single-valued concept can adequately represent the

of these pitfalls, avoid using the cases altogether? Tushnet answers no:

[W]e would lose important insights into the slave system if we did so. We would not know less about how slaves were treated, of course . . . Instead, we would know less about what responsible public officials thought they should say about slavery . . . In short, the law of slavery shows us the ideological structure of Southern society, and that is not to be ignored.⁶⁵

Whether the ideology is hypocritical does not much matter, “for, as Professor Genovese notes, we can assume that all ruling class ideologies are self-serving.”⁶⁶ To understand adequately the slavery case law we must understand the functioning of that law as a mirror and/or as a component of the southern ideological structure. “Cases are particularly useful tools with which we can obtain leverage on

complexity of the system. As the evidence presented in this article shows, we need a much more complex analysis of Southern paternalism, like Professor Genovese’s, to understand Southern slave law.

Id. at 176. I did not realize that I was engaged in exactly the enterprise that Tushnet describes me as engaged in. Perhaps I was, but note that Tushnet depicts a statement I made primarily about the Texas court as though it sought to embrace equally all southern courts, and also offers as well as one correct citation an additional citation where nothing of the sort attributed to me appears. Compare Tushnet, *supra* note 28, at 176 & n.197 with *Negro Rights, Unionism, and Greatness*, *supra* note 25, at 143. He also omits my qualifications as to the scope of the “essentially decent treatment” phrase quoted from *Texas Supreme Court*, *supra* note 25. “‘Fairness,’ ‘decency,’ and ‘equity’ must be understood with respect to both prevailing nineteenth-century racial mores and in light of the undeniable inequities of the statutory double standard of American law in the antebellum era.” *Id.* at 622 n.2. Note finally that my reference was solely to judge-made law, not to statutory law.

65. *Id.* at 129. I should note that the literal content of this quotation makes me pause on two counts. First, I am puzzled by the “of course.” At least to the extent that judicial decisions themselves amounted to slave treatment in particular cases (not to mention whether they had any impact more generally), it seems that neglecting the cases *would* mean we would know less. Second, and in light of Tushnet’s strictures about abolitionist analysis, I am puzzled by the two succeeding sentences. Using the verbal phrase—what the judges “thought they should say about slavery”—rather than something like “what the judges believed about slavery,” runs the risk of loading the analytic dice. Similarly, I am not sure whether Tushnet means in the next sentence quoted that the case law is useful only for showing us the ideological structure, or whether he means that that is just one of several possible advantages to be derived from studying the cases. That is what much of his own case law analysis seems to suppose. For, and this is one of his essay’s strengths, in fact his discussion frequently seems to get out of, and go beyond, the Procrustean Marxist bed in which here, and in the adjoining sentences, see quotations cited at notes 66 & 67 *infra*, he seems about to confine his approach. See note 68 *infra*.

66. Tushnet, *supra* note 28, at 129. Never mind what Professor Genovese says. Of course one may assume the self-servingness of all ruling class ideologies and let their analysis go at that, yet there are penalties in so doing. Without reaching the difficult questions of what one means by ideology, and of how it functions (questions considerably more complicated, for me at least, than some of the writers in the area we are discussing seem to think), let me just suggest that what makes interesting the study of many ruling class ideologies is how imperfectly they do in fact self-serve. I surmise this is the case with respect to the law of slavery and the ideology of the peculiar institution.

problems of ideology, because judicial opinions are public documents designed to convince."⁶⁷

Tushnet's fifth point is that although we should not resort to the abolitionist assumption that judicial pronouncements are always suspect, we should realize that when courts did make reference to humanity and other appeals to sentiment, they did not give these statements much effective legal force. Rather, the "literary style of these opinions provides the key to understanding what was happening. The opinions leave the impression that phrases like 'considerations of humanity and interest' were invoked ritualistically, and did not reflect any real sensitivity to the human aspects of slavery."⁶⁸ Throughout the antebellum period the ritualistic invocation of such considerations dominated any real attempts to give them effect. Despite rhetorical statements that "slaves were human beings who had human relationships with their masters . . . the quality of human relationships could not be made the subject of judicial inquiry, *and in this area, no change over time can be seen.*"⁶⁹

To recapitulate, as I understand Tushnet, he was saying that the future analysis of the slavery case law should be most fruitful if it accepts five propositions:

- 1—that the law of slavery displayed a certain degree of autonomy;
- 2—that the essence of its autonomous development is seen in an evolution from analogical to categorical analysis;
- 3—that interstate variances in the degree of development are explained by the presence or absence of a *Code Noir*, and by differing judicial abilities;
- 4—that the law of slavery cannot be successfully analyzed in single-value terms, or by using proslavery/antislavery, or liberal/conservative continua, but should be plumbed for its utility in understanding the self-serving ideology of the master class; and
- 5—that, in contrast to its changing style of legal reasoning, its invocations of humanity and the like were static—remaining from 1800 to 1860 more or less equally superficial.

67. *Id.*

68. *Id.* at 152. Tushnet informs me that he is less certain now than he was in 1975 that "considerations of humanity" were only superficially addressed by the judges. Hence there may be less distance between his view and my own than the discussion here suggests. Similarly, I should note that because the points raised in notes 64 & 65 *supra* occurred to me since our correspondence, he has not had a chance to concur or dissent concerning them.

69. *Id.* at 150 (emphasis added).

C. *"Black Justice" Below the Appellate Court Level, and Four Whiggeries*

Arthur Howington's 1975 essay, "Not in the Condition of a Horse or an Ox,"⁷⁰ and Michael Hindus' 1976 article, "Black Justice Under White Law: Criminal Prosecutions of Blacks in Antebellum South Carolina,"⁷¹ are the principal published acceptances of a suggestion I made a decade ago that someone ought to examine the slavery case-records below the appellate level.⁷² Howington puts the reason for this suggestion neatly: "State Supreme Court decisions have received the most adequate attention, but the behavior of these . . . tribunals resembles the tip of an iceberg An accurate appraisal of the law of slavery awaits a full and systematic examination of this total range of judicial activity."⁷³ Hindus has said much the same thing.⁷⁴ I group these two authors together, notwithstanding differences in the states of their research and in their analytic approaches,⁷⁵ because they both examine "black justice" at the local level. Both seemingly would add a sixth item to the list of five prescriptions I have imputed to Tushnet:

6—in order to understand completely the law of slavery, you must delve below the appeals court level.

This contention is difficult to dispute, especially if one is seeking an overall picture of how the judicial system affected the treatment of the slave. How then, if at all, do Howington and Hindus differ as to the five propositions? To begin with the similarities, both appear to accept the first proposition by rejecting a simple determinism and entertaining the possibility of autonomous legal change. Not unnaturally, given the focus upon individual southern states, neither author reaches the issue posed by Tushnet's second contention that the primary movement of southern judicial thinking

70. Howington, *supra* note 29. See also A. Howington, "According to Law": The Trial and Punishment of Black Defendants in Antebellum Tennessee (April 13, 1978) (paper presented at the annual meeting of the Organization of American Historians in New York City). Though not yet published, this paper is an extremely interesting analysis of trials of blacks in the lower courts of six Tennessee counties, and I rely on it substantially in the following discussion.

71. *Black Justice Under White Law*, *supra* note 30.

72. See *Fairness and Formalism*, *supra* note 25, at 93.

73. Howington, *supra* note 29, at 250.

74. *Black Justice Under White Law*, *supra* note 30. See also M. Hindus and D. Jones, *The Social History of American Law: What It Is and Where to Begin* (October 23, 1976) (paper presented at the Sixth Annual Meeting of the American Society for Legal History, Philadelphia).

75. Howington's 1975 article is a useful exploration of a single case, *Ford v. Ford*, 26 Tenn. (7 Hum.) 92 (1846), on, so to speak, the way to a dissertation. Hindus' article is a distillation, post-dissertation.

about slavery was from reasoning by analogy to reasoning by category. A fortiori, neither reaches the third proposition's explanation for such movement.

Howington and Hindus do differ, however, on another important issue: whether southern courts took seriously the implications of considering the slave as more than property. While Howington's writings suggest that at least some Tennessee courts did recognize and grapple with those implications,⁷⁶ Hindus argues that the South Carolina lower courts were little interested in any such enterprise. For Howington, it "is arguable that the measure of fairness which scholars have found at the appellate level of the judicial system was also present at the trial court level."⁷⁷ For Hindus, "[g]iven these cases it is hard to accept the arguments of scholars about the protection afforded blacks by the appellate courts."⁷⁸ Of South Carolina's law of slavery Hindus declares, "despite all its haphazard forms [and] incompetent magistrates . . . , the outcome—invariably supportive of white dominance—was not at all uncertain. The motive of preserving white dominance was so firmly ingrained . . . it survived all attempts by the most prominent jurists in the state to alter it."⁷⁹

76. Thus, after an exhaustive examination of the background and lower court trials as well as the appeals of a suit for freedom in *Ford v. Ford*, 26 Tenn. (7 Hum.) 92 (1846), Howington concludes: "The Tennessee Supreme Court, in the area of post-mortem manumission, did recognize and protect the humanity of slaves . . ." Howington, *supra* note 29, at 262. In his view, moreover, at least as noteworthy was the decisionmaking of the lower courts of two counties involved in the case. "These local tribunals, those closest to the social realities of the 'peculiar institution,' meted out justice which, no less than that of the Tennessee Supreme Court, accepted the humanity of the slave as point of departure." *Id.* at 263.

77. Howington, *supra* note 70, at 26. Howington also states that:
[s]uch evidence as does exist contains very little to indicate that the Grand Jury treated slave defendants any differently than white defendants.

. . . .
. . . Considering all the black defendants, slave and free, in this study (157 cases), only forty percent of them were convicted on their trials, five percent more than for the white defendants as a whole. Juries did convict seventy percent of the black defendants who stood at the bar, but they also convicted sixty-eight percent of the whites who stood there.

Id. at 10, 26.

78. *Black Justice Under White Law*, *supra* note 30, at 580.

79. *Id.* at 599. Hindus also makes the following points: "[F]ew whites were ever tried for murdering a slave." *Id.* at 579. "Black justice may have served some bureaucratic need for certification, while . . . soothing some slaveholders' consciences, but it was never intended to be just. And just it rarely was." *Id.* at 599.

Howington, in contrast, states:

Daniel J. Flanigan has suggested that where the regularly established courts had jurisdiction over slave crimes, they "were more likely to benefit from the entire procedural system that protected whites," to benefit from what the *Memphis Appeal* called the

A second difference between Howington's and Hindus' analyses pertains to Tushnet's fourth proposition about avoiding the pitfall of single-valued abolitionist or counter-abolitionist analysis.⁸⁰ Hindus' position is implicit, rather than explicit, and I suppose one could argue his location relative to the pitfall either way. One could say that he finds no "liberalism" worth speaking of, and thus locates South Carolina justice further to the abolitionist end of the spectrum than Flanigan, let alone Nash.⁸¹ But, although it can be argued that one falls into the analytic pit whenever one attempts to examine the content of southern justice from the standpoint of its moral characteristics, I expect that Hindus might say that he escapes because he is after something quite different—to wit, the ways in which the judicial system was used to preserve white dominance.

Be that as it may, Howington, at least in 1975, took his position squarely "in the pit," saying:

The treatment afforded slaves in a given case can be assigned to a position on a continuum. Court action which protected the property component of slavery at the expense of the humanity of the slave would occupy one extreme of that continuum. Judicial activity which emphasized the humanness of the slave at the expense of property considerations would occupy the opposite extreme. The property-oriented extreme can be labelled "pro-slavery" and the personality-oriented extreme "anti-slavery."⁸²

What accounts for these differences? Is one author right and the

"glorious uncertainty of the law." Flanigan's suggestion accurately describes the situation in Tennessee.

Howington, *supra* note 70, at 5.

80. See Tushnet, *supra* note 28, at 176.

81. Tushnet states that "Flanigan . . . uses the liberal-conservative dimension, simply relocating Southern law from the liberal end, as Nash suggested, to a point much closer to the conservative end. For what it is worth, were I required to use those categories, I would agree with Flanigan." *Id.* at 176 n.197. I did not think that I located southern law as a whole on the liberal end—for a number of reasons, not the least of which is that I did not think in terms of a unified southern law of slavery. The disparities among judges and courts struck me too forcibly to do that.

82. Howington, *supra* note 29, at 251. Note that Howington was referring to judicial behavior in manumission cases. Note also his qualification that the "term 'anti-slavery,' in this instance, emphatically does not imply judicial behavior consciously destructive of the peculiar institution . . . [r]ather, . . . the legal tension inherent when men owned other men." *Id.* at 251. He also speaks of a

third category of judicial behavior [which] occupies the middle ground of the property-humanity continuum The law as an institution perpetuated norms and values such as procedural fairness and equitable law enforcement. If judicial actors, in slave cases, responded primarily to the institutional demands of the legal establishment, their behavior, relative to the extremes of the pro-slavery—anti-slavery continuum, can be labelled as juridically neutral.

Id. at 251-52. More recently, however, Howington appears to be having second thoughts about such continua. Thus he states: "In my opinion, arguments about the liberality or illiberality of judges, about the pro- or anti-slavery bias of judges do not cut to the heart of the matter." Howington, *supra* note 70, at 27.

other wrong? Not necessarily. One possible explanation is simple: different state court systems produced different results. In looking at Tennessee, Howington is examining the southern judicial system in which, if one can safely make inferences from appellate decisions, one would expect the greatest degree of lower court procedural fairness. Hindus, by contrast, is studying a state whose lower court system one would expect to rank fairly low on this count.

Yet is such an explanation altogether sufficient? I think not. It rests entirely on a structural difference between two states' judiciaries, and it tells us little about the larger question of interpreting the evolution of slavery law in the South as a whole. That larger question is, after all, what mainly concerns us. Further, and with respect to that larger question, may it be that a "greater truth" can be found by drawing a homely analogy to the difference between the optimist's and pessimist's perceptions of a glass with some water in it? The former sees the glass as partially full. The latter sees it as partially empty. Although that cliché may seem to hold little promise in sorting out differences in a serious scholarly enterprise, I am going to argue that it does. In my judgment, many of the differences among the authors discussed here lie less in the evidence they examine, and more in the sociopolitical beliefs and psychological dispositions that they bring to the evidence. Some authors are surprised to find, and tend to make much of, any judicial efforts that go at all towards insisting upon fair procedures in slave trials. Others are struck by, and accordingly emphasize, any shortfall from full "colorblind" justice.⁸³

83. Something in the subject matter seems to bring out these beliefs and dispositions to an unusual degree. To revert to the earlier example of Mark Howe's view (*see* Howe, *supra* note 21), a few years earlier a distinguished southern historian had suggested almost the reverse—that my analysis was too harsh on the southern judges. Not long ago a commentator at a convention panel on the law of slavery was plainly relieved to find that my English birth laid to rest a suspicion that I might be descended from and hence partial to, a mid-nineteenth-century North Carolina chief justice with the same surname. That point settled, he seemed more disposed to take my views on the matter at face value. I mention this not to object, but to underline the degree to which the subject itself poses hazards. They are hazards, moreover, that one is sometimes propelled into by one's own beliefs and experiences, whatever they be. Thus, Howe (rebounding perhaps from a summer in the Deep South advocating integration) objected once to giving "a far larger significance . . . [to] the humanitarian reflections of Green, J., than they deserve." *Id.* at 1 (referring to the 1846 Tennessee case that later was the subject of Howington's 1975 article). "After all," Howe went on, "in the *Ford* case the Court, and Green, did nothing more humane than what the statute required them to do and they knew full well that emancipation of the slave would be followed by his banishment from the State." *Id.* Howe's beliefs seemingly led him to misread Tennessee law, or perhaps not to look at it thoroughly. Between 1842 and 1849, a statute was in force that permitted county courts to allow manumitted slaves to remain in Tennessee. Although I knew that at the time, I did not know until I read Howington's article that the slaves (there were a substantial number freed under the will), not merely were not banished from the state, but ultimately inherited a 112 acre farm. *See* Howington, *supra* note 29, at 258-59.

To say this is to intimate my central historiographical contention in this Article: at play in the analysis of law and slavery is an American analogue to what Sir Herbert Butterfield long ago criticized as the Whig interpretation of history.⁸⁴ Butterfield was concerned with the tendency of many late nineteenth- and early twentieth-century British historians to “draw lines through certain events, some such line as that which leads through Martin Luther and a long succession of whigs to modern liberty,”⁸⁵ to busy themselves “with dividing the world into the friends and enemies of progress,”⁸⁶ and to prefer those who extended liberty to those who curtailed it. The American analogue lies in two tendencies in historical scholarship about the peculiar institution, especially its legal evolution. Each has its characteristic ways of locating historical persons, events, processes, and institutions on a “line . . . which leads . . . to modern liberty.”⁸⁷ To make matters a bit more complicated, I suspect that each of the two tendencies comes in stronger and weaker versions, so that there are at least four subvariants.

Let me spell them out. Before doing so, however, let me clarify a point that might otherwise engender confusion. What I am about to say concerning “Whiggery” in the interpretation of history may appear to resemble closely what Tushnet has been arguing when objecting to scholarship that organizes case-law data along pro-slavery/anti-slavery, or liberal/conservative, continua.⁸⁸ Indeed, Tushnet, by adducing a different mode of explaining the law of southern slavery’s structure, one that emphasizes its evolution towards autonomy, may seem to be the only one among us who has avoided the pitfall of Whiggish analysis. Yet I expect that Tushnet’s explanations may escape Whiggery only by paying a potentially crippling price. The price is paid in two historiographical currencies. One is the currency for understanding the linkages among historical individuals, events, and social structures. The other is the currency for understanding the southern experience of slavery in relation to the rest of the North Atlantic community of nations. Furthermore, it was precisely the losses in understanding run up by Whig history that lay at the base of Butterfield’s concern about the Whig interpretation of history. In his view, Whig history “presentism” debilitated true understanding of the past. A “shortcut through that maze of interactions by which the past was turned into our present, . . .

84. H. BUTTERFIELD, *supra* note 1.

85. *Id.* at 12.

86. *Id.* at 5.

87. *Id.* at 12.

88. See text accompanying note 63 *supra*.

[Whig History] circumvent[ed] the real problem of historical study"⁸⁹—understanding how and why historical personages acted as they did. "Real historical understanding is not achieved by the subordination of the past to the present, but rather by our making the past our present and attempting to see life with the eyes of another century than our own."⁹⁰ The chief problem with Whig history was not that it made moral judgments about who did and who did not further the cause of liberty, or even that it studied "the past with reference to the present[;] . . . there may be a sense in which this is unobjectionable if its implications are carefully considered"⁹¹ Rather the problem is the pattern of abridgement that emerges. The Whig historian's moral judgments tend to put "a stop to his imaginative endeavour, . . . [to cut] short the effort of historical understanding."⁹² The upshot of the Whig approach is a "method and . . . kind of history that . . . would be impossible if all the facts were told in all their fullness."⁹³

Butterfield's observations, directed at quite a different school of historians than those we are considering, seem strangely on point. What Butterfield said of Lord Acton often applies equally well to the study of slavery: "[A] common feature of Whig historians . . . is the hint that for all this desire to pass moral judgments on various things in the past, it is really something in the present that the historian is most anxious about."⁹⁴ It is a similar process of presentism at work, a hyperactive moralizing, which leads to abridgements that, lacking fullness, also lack understanding. Because of a complication inherent in the study of the law of slavery, I am not sure that abjuring moral judgments in the formal analysis, which is what Tushnet alone among us seems largely to have managed, suffices to escape the difficulties to which Butterfield pointed. In a unique way, the study of slavery is the study of liberty versus nonliberty. This observation is so obvious that it seems almost silly to make, but it points to a complication that is perhaps less plain. To refer to Butterfield again:

The truth is that there is a tendency for all history to veer over into whig history There is a magnet for ever pulling at our minds, unless we have found the way to counteract it; and it may be said that if we are merely honest, if we are not also carefully self-critical, we tend easily to be deflected⁹⁵

89. H. BUTTERFIELD, *supra* note 1, at 25.

90. *Id.* at 16.

91. *Id.* at 11.

92. *Id.* at 119.

93. *Id.* at 24.

94. *Id.* at 111.

95. *Id.* at 6-7.

The complication is that in writing about slavery, especially about slavery in its last century in our hemisphere, we are terribly prone to veering. The magnet is then at its strongest—in part because it can work its way into almost any of the major questions about the problem of slavery. Moreover, it is difficult to answer these questions without asking about any number of historical personages' actions relating to slavery, and without in turn becoming involved in analyzing the relationships between these persons' belief structures and their actions. Almost inevitably one then asks how liberal or conservative, how pro- or anti-slavery, such persons were. So too with respect to institutions—including the institution of the law. Unless one is happy with severing the law from social, political, and economic structures, unless one is satisfied with analyzing law as purely autonomous, there are two choices.

The first choice is to hypothesize, or swiftly conclude, that a whole region was populated by persons who unanimously thought one way about slavery. One can then view the law merely as repressive, and entertain oneself with working out the fine details of that repression. The second choice is to realize that the magnet is just outside the historian's mental door, to try self-critically and carefully to ask about individuals, institutions, and events, and to become sensitive to their divergences on the nature of liberty and its relationships to slavery. One tries, if one makes this choice, to examine the content of moral beliefs without turning the examination into a moral evaluation of moral beliefs. In making this choice one is getting frightfully close to the magnet while trying to compensate for its power to make one veer. The balance required is difficult always to maintain. The difficulty of the balancing act explains in part the tendencies of two of the four varieties of "Whiggery" when analyzing southern slavery—to return to our earlier metaphor—to see the glass of water as partially full. That said, and the metaphors thoroughly mixed, let me turn to sketching out the four Whiggeries.

The first pair of Whiggeries do have, though in differing measure, a persistent habit of viewing the glass as partially full. I think it is this habit that Tushnet has in mind when speaking of a counter-abolitionist analysis.⁹⁶ But if it must be labelled I would prefer something such as the "search for the silent South" approach, or "other South" historiography.⁹⁷ The locus classicus is, of course, George Washington Cable's 1889 book, *The Silent South*,⁹⁸ but it

96. Tushnet, *supra* note 28, at 176.

97. See C. DEGLER, *THE OTHER SOUTH* (1974); M. SOSNA, *IN SEARCH OF THE SILENT SOUTH* (1977).

98. G. CABLE, *THE SILENT SOUTH* (1885).

has a more recent tradition, turning up, for example, in the 1930's in Avery Craven's *The Repressible Conflict*⁹⁹ as a view of the Civil War origins, in the 1940's in Clement Eaton's *Freedom of Thought in the Old South*¹⁰⁰ as a minor theme, and more recently in the writings of Carl Degler.¹⁰¹ Either label seems preferable to the term counter-abolitionist, which is more appropriately employed in two other locations, both of which have more directly to do with countering anti-slavery. One location is among those who in the antebellum era developed positive-good theories of slavery. The other location is historiographical, rather than historical. I have in mind those historians, chiefly of the early twentieth century, who gave a temporary respectability to the view that the peculiar institution was an uplifting, Christianizing, and civilizing school for savages. This view, often associated with U. B. Phillips, but of which a better example was the Mississippi historian, Dunbar Rowland,¹⁰² should not be confused with those who more recently have argued something different. What is the difference? Essentially it is between those who were saying that the South was not so bad because slavery was not, at least in its time, such a bad way of organizing black-white relations, and those who say that the South was not as unanimously "pro-slavery" as it is sometimes depicted because it contained some who thought there were things wrong with the institution in part or in whole. The latter view may contain an implicit, and Whiggish, stance that "the South was not so bad," but the reasons are not at all the same. To be very Whiggish for a moment: the former makes a partial virtue out of the vice; the latter makes a virtue out of the recognition of partial vice.

It is this latter view with which I am concerned. What of its two versions, or subvariants? The stronger version, as applied to the judiciary, would find "secret Jeffersonian liberals"¹⁰³ or even "secret abolitionists" manning the southern benches, judges seeking consciously to undercut the peculiar institution's defenses, seeking to hasten the Emancipation Proclamation. The weaker version, while

99. A. CRAVEN, *supra* note 23.

100. C. EATON, *supra* note 15.

101. See C. DEGLER, *supra* note 97. See also C. DEGLER, *NEITHER BLACK NOR WHITE: SLAVERY AND RACE RELATIONS IN BRAZIL AND THE UNITED STATES* (1971).

102. See the opening pages of the early twentieth-century Mississippi historian's two volume history of his state. D. ROWLAND, *HISTORY OF MISSISSIPPI* (1925). Rowland, at one time president of the Mississippi Valley Historical Association, surely penned the classic counter-abolitionist view—one that makes U. B. Phillips seem progressive by contrast.

103. The term "Jeffersonian" emphasizes, of course, only one side of Thomas Jefferson's split mind on the matter. For a critique of Jefferson's thinking on slavery, see R. MCCOLLEY, *SLAVERY AND JEFFERSONIAN VIRGINIA* (2d ed. 1973) (especially text beginning at 114).

not ruling out the possibility of finding a few individuals filled with malice preense toward slavery, is more inclined to explore judicial doubts and uncertainties about the institution as a whole, or more likely, about some of its features. While it might be surprised to find secret abolitionists, it would not be as surprised to find some individual judges who put union ahead of slavery, even though they might cotton to the institution as long as they did not have to make the choice. This version also is interested in exploring the possibility of judicial decisionmaking that might have the effect, though not the intent, of weakening the institution's defenses, or that might aim at diminishing its most oppressive excesses. Despite their differences, these versions have a common characteristic—a certain pleasure at finding southerners disposed to ameliorate the peculiar institution—that causes me for the present purpose to classify them together.

The other tendency, in its two "empty glass" versions, sometimes strikes me as having the strange misanthropy common to Calvin, Rousseau, and Marx—that peculiar reformer's misanthropy that loves mankind in the abstract but disdains individual persons and their foibles. That, I submit, amounts to another kind of Whig interpretation of history, the dismal Whiggery that is always reminding us how far short we are of perfect justice and ultimate equality.

As applied to southern history, the stronger version of this tendency has an immediate difficulty, though not one that often daunts it. The difficulty occurs in separating out the very dark grays of total perfidy from the dark grays of somewhat tempered evil, in distinguishing the very cruel master from the not so cruel one. For this version the overriding, indeed virtually all-obliterating, fact is that of one man's dominion over another. Slavery's abyss boggles the mind's capacities for moral differentiation. Dominion is dominion. It is all very wicked—and not to be given a moment's real historiographical understanding. This stronger version is close to what Tushnet objects to when criticizing abolitionists who in one moment saw explicit evil in, for example, the judicial pronouncements of a positive-good theorist such as Joseph Lumpkin, and in the next moment perceived pure hypocrisy in a judge who, venturing to speak of considerations of humanity, freed a slave.

The weaker version might be called Whiggish Fabianism.¹⁰⁴ It allows for some variations in the grays of the historical fabric,

104. Whiggish Fabianism is to be distinguished from Eberhard Fabianism, wherein *all* contrary facts are erasable.

but—to mix a metaphor again—remains keenly aware of the emptiness of the glass. It may well see some difference between hanging a slave without a trial at all and according him the formal dues of correct procedure first. It may agree that there is a difference between one court's saying that the slave, since he is a man, can elect between freedom and slavery, and another court's saying that since he is a chattel, he cannot. But this view will stress more strongly how often slaves were whipped on plantations without ever getting into the formal court system, and how many slaves never got the chance to choose freedom. Even more emphatically, it will point to the degraded state that freed blacks were expected to occupy. Or it will tell you that those who supported African recolonization in the early nineteenth century, far from being benevolent, were engaging in racism of the worst type.¹⁰⁵

The distinctive common denominator of these two subvariants, the one that warrants lumping them together just as we lumped together the first two subvariants for their pleasure in amelioration, is their displeasure in the shortfall from a more recent set of reference points. Sometimes that set consists of the standards of today, standards, it may be added, that not infrequently are idealized. At other times that set seems to consist, in somewhat utopian fashion, of the standards of a future good society in which true justice, not to mention complete equality and the brotherhood of man, become realized. But the displeasure at the shortfall is much the same.

To generalize, I suggest that our writing on the peculiar institution still tends to engage in what historians have done ever since the Civil War—judging the South and slavery. Whiggery persists in various shapes and guises. Thus, while at times I am impressed by calls to change the contours of the debate and by disputes over whether American slavery was precapitalist, proto-capitalist, or just plain raw-capitalist, something else impresses me more. It is something that derives less from whether the historian considers himself a Marxist or a liberal pluralist, less from whether he talks about the glories or the inglorious of Latin American slavery compared to our own, less from the specific subject matter and the evidence he is contemplating, and more from the analytic habits of driving that he exhibits. Two such driving habits, two tendencies to veer, are of particular import.

One is the Whiggish veering we have been discussing. Whether it takes the form of an empty-glass, shortfall Whiggery, or the form

105. See R. McCOLLEY, *supra* note 103, at 129-30 (a toned-down expression of this perspective).

of a full-glass, ameliorative Whiggery, it is a critical driving habit that affects our understandings of southern history. It is as if the historian's analytic vehicle always comes with wheels whose alignment is never quite true. Even if he gets his perceptual toe-in set just right so that he goes straight at the evidence (a rarity), his camber and even more his caster (set well to the negative and rearward-trailing, or set well to the positive and forward-referencing) are always characteristically askew one way or the other. Hence, for us to understand southern history, and more particularly the law of slavery, it becomes important that we understand also the alignment patterns of its historians.

The other important veering tendency to be clear about is as much a cause of the veering as it is a perceptual habit. In my judgment, at least in the historiography of slavery, sectionalism is not quite dead. And, as I have noted earlier, among American legal historians the old industrial-agrarian, city-frontier distinctions are very much alive in the center-periphery dichotomy and, underlying that, in these historians' decisions about what it is most important to study first, and most.

D. Hindus' South Carolina, Howington's Tennessee, and "Black Justice" in the Western Penal Tradition

By asking penetrating questions at the judicial level where study has been most needed, Michael Hindus' "Black Justice Under White Law: Criminal Prosecutions of Blacks in Antebellum South Carolina"¹⁰⁶ is an important essay. Because of its importance, and because I have two central questions about its conclusions and the way it reaches them, I want to examine it in detail. My two questions are: first, could any, some, or much of the evidence it utilizes plausibly subserve different, more ameliorative Whiggish conclusions?; second, would the conclusions look substantially different if, rather than scrutinizing antebellum South Carolina's system of black justice in the withering light of nineteenth-century Massachusetts' treatment of criminals, we compared it with the larger European penal tradition whence it sprang or with another slave state's judicial system?

Near the beginning of his essay, Hindus observes: "The position of the black defendant in South Carolina cannot be understood apart from the state's legal system."¹⁰⁷ That is certainly so. Moreover, it was a legal system that, most would agree, notwithstanding

106. *Black Justice Under White Law*, *supra* note 30.

107. *Id.* at 575.

Benjamin Perry's encomiums on the probity of her judges,¹⁰⁸ was hardly an innovative model that would have inspired visiting nineteenth-century penal reformers. As Hindus puts it, "justice for whites was mixed at best." Pointing to the State's archaic laws, to those laws' excessive penalties "far in excess of popular support," and to the "lack of facilities for long term confinement . . . ,"¹⁰⁹ Hindus next suggests that for whites, these circumstances:

were easily turned to a defendant's benefit. Cases ending in conviction were a small minority of those brought The convicted stood a good chance of being pardoned. The ambiguities of the South Carolina criminal justice system saved white lives and hides, . . . [b]ut justice for blacks, . . . might have been *completely* different.¹¹⁰

I have two potential problems with this passage. First, what will be the evidence brought to sustain the judgment that, for whites, harsh law produced lenient results? That is not, for example, how we generally think about English law of the period.¹¹¹ Second, what will be held sufficient to fulfill the description "*completely* different?"

After proceeding logically through the statutory disadvantages imposed on blacks in criminal proceedings, Hindus reaches what for me is the most interesting part of the essay, in which he measures local justice quantitatively by systematic use of district court records. The result is certainly far superior to the impressionistic generalizations that have filled the major historical works on the pecu-

108. See text accompanying note 8 *supra*.

109. *Black Justice Under White Law*, *supra* note 30, at 575-76. But we should be cautious about how far the penalties exceeded "popular support"—as well as about the meaning of that term in antebellum South Carolina. For a useful article, see Ely, *American Independence and the Law: A Study of Post-Revolutionary South Carolina Legislation*, 26 VAND. L. REV. 939 (1973). Ely suggests that (at least in Charleston) the bench and bar were more capable than one might surmise from Hindus' sentences (though note that Hindus does not state the contrary explicitly), and that there may have been relative satisfaction with the broad shapes of post-Revolutionary South Carolina law, with its conservative carryover of English tradition. For other studies of South Carolina law, see Bridwell, *Mr. Nicholas Trott and the South Carolina Vice Admiralty Court: An Essay on Procedural Reform and Colonial Politics*, 28 S.C. L. REV. 181 (1976); Harrison, *A Study of the Earliest Reported Decisions of the South Carolina Courts of Law*, 16 AM. J. LEGAL HIST. 51 (1972); *Negro Rights, Unionism and Greatness*, *supra* note 26; Senese, *Building the Pyramid: The Growth and Development of the State Court System in Antebellum South Carolina, 1800-1860*, 24 S.C. L. REV. 357 (1972).

110. *Black Justice Under White Law*, *supra* note 30, at 576 (emphasis added).

111. See, e.g., E. CALVERT, *CAPITAL PUNISHMENT IN THE TWENTIETH CENTURY* (1927). To be sure, the number of British capital crimes on the statute books in the early nineteenth century greatly exceeded those for which capital sentences were commonly imposed, and the capital sentences exceeded the actual number of executions. Nonetheless, the vagaries and severities of British law frequently disadvantaged the defendant sufficiently to bar extending Hindus' comment overseas. See 1 L. RADZINOWICZ, *A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750* (1948). See also text accompanying notes 142 & 175-81 *infra*.

liar institution.¹¹² The question I wish to satisfy myself about, however, is whether the evidence strictly requires all the conclusions that Hindus derives. Could any of the evidence be put equally well not to the service of Hindus' "Fabian Whiggery" but to the service of "ameliorative Whiggery?" In some instances, moreover, is there too little evidence to warrant firm conclusions of either type? Let me set out Hindus' conclusions that most interest me in this regard and discuss them in the order that they appear in his text. I shall continue the earlier proposition-numbering scheme, but shall group together closely linked contentions:

7a—In South Carolina, "few whites were ever tried for murdering a slave."¹¹³

7b—"[T]he conviction rate for slave murder was well below the average for South Carolina crime."¹¹⁴

7c—With respect to appeals from convictions, "only the most atrocious murders by men of the lowest standing resulted in conviction."¹¹⁵ Sixteen of the seventeen convictions were upheld.

7d—"Given these cases it is hard to accept the arguments of scholars about the protection afforded blacks by the appellate courts."¹¹⁶

Does all this necessarily follow? I can readily imagine an ameliorative Whig historian saying that what is really surprising regarding 7a is Hindus' discovery¹¹⁷ that there were as many as seventy-one prosecutions for slave murder in eighteen of the State's forty-six districts. He might further observe that if this rate held for the entire State, and if the black and white populations in the eighteen districts were representative of the whole State's demographic make-up, then there might well have been more than 200 such prosecutions over the whole State. As to 7b, he might declare that a thirty-two percent conviction rate was about thirty-two percent higher than he would have expected. As to 7c, he might argue that the evidence supporting the conclusion that only "men of the lowest standing" were convicted was incomplete for two reasons. First, appellate records show nothing about those convicted who did not appeal. Seventeen cases is a small number from which to conclude

112. See, e.g., K. STAMPP, *supra* note 21, at 217-36.

113. *Black Justice Under White Law*, *supra* note 30, at 579.

114. *Id.* at 579.

115. *Id.* at 580.

116. *Id.*

117. See *id.* at 579.

anything more than that those who were convicted and who appealed *apparently* were of "the lowest standing." Second, and more important, he could say that to form any hard conclusions one ought first to determine the distribution of murders among all standings in the population. After all, he might note, even today those convicted of murder, and thus whose appeals reach the United States Supreme Court, are typically persons of "low standing." Then he might express some puzzlement about the criteria for lowest standing. Without examining the cases, he could note that, according to the text, one of the appellants had murdered his own slave. Presumably no slaveholder was of the *lowest* standing, heinous though his character might have been.¹¹⁸

Finally, our "silent southerner" might say that the evidence does not entail the conclusion reached in *7d*. Whether the evidence be the seventy-one local prosecutions or the extremely high rate of affirmance in the higher court, it would not unassailably follow that it becomes "hard to accept the arguments of scholars about the protection afforded blacks by the appellate courts." On his reading of the statistics the inference could well go the other way. But, even accepting *arguendo* Hindus' interpretation of these cases, our ameliorative Whig could properly ask how one can get from one type of case in just over a third of the judicial districts in one state, especially one long considered "hawkish" on the peculiar institution,¹¹⁹ to any verdict about cases in the South as a whole? Is this not like, for example, inferring from a party preference poll of Orange County anything about the overall distribution of party affiliation in California or from a count of Catholics and Protestants in Vermont anything about the distribution of religious denominations in New England as a whole?

What, then, of Hindus' related conclusion as to the South Carolina legal system's handling of lesser injuries to slaves? Hindus states:

8—"The conviction of whites for cruelty to slaves, assaults on slaves, and undue correction was equally hard to obtain."¹²⁰

118. If the Whig knew the preexisting literature on the subject, he might observe that an earlier author had put forward figures showing that for the years 1830 to 1860 in 25% of South Carolina appellate cases involving homicide or attempted homicide of slaves the defendants were the slaves' owners—a figure somewhat below the 40% equivalent figure for the other southern states whose appellate courts heard such cases. See *Fairness and Formalism*, *supra* note 25, at 77 n.60. Despite the small overall numbers involved, the differences might usefully provoke speculation before rushing to judgment.

119. W. FREEHLING, *PRELUDE TO CIVIL WAR: THE NULLIFICATION CONTROVERSY IN SOUTH CAROLINA, 1816-1836* (1965).

120. *Black Justice Under White Law*, *supra* note 30, at 581.

I expect our silent southerner might note that the conviction-prosecution ratios of 18/71 and 31/83 for slave murder and slave cruelty suggest, as they work out to 22.5% and 37.3%, that it was considerably easier to obtain a conviction for slave cruelty than for slave murder. He might keep that to himself, but what he would almost certainly exclaim about is that there *were* eighty-three prosecutions and thirty-one convictions. That the state intervened at all short of murder might seem even more surprising than the number of prosecutions for murder.

Hindus' next finding, even though restricted to two of forty-six districts, would positively excite our half-full-glass Whig:

9—Contrary to conventional wisdom, the “[t]rial records of 1,076 slaves and free blacks . . . for two upcountry Southern Carolina districts, Anderson and Spartanburg” suggest that although “plantation justice existed” it “was far from the exclusive means of dealing with slave criminality in the upcountry [I]n any capital case, the owner was required to submit his slave for trial. Furthermore, any case that crossed plantation boundaries or involved race control . . . was likely to appear in these court records.”¹²¹

Certainly, I at least am astonished. If further research showed a similar incidence of cases in the rest of the State and in other slaveholding states, then the penetration of the formal legal system into the social system of slavery would appear much greater than almost anyone has suspected. This point deserves substantial elaboration, particularly given the ways that Hindus develops his two-district data—by examining and comparing the incidence of trials, conviction rates, and punishment rates among white and black populations. Our ameliorative Whig, while agreeing on the importance of proposition 9, might interpret the evidence differently. Let us see how he might proceed.

Hindus' central findings as to the law's degree of penetration are:

10a—“[C]omparison of rates of trials . . . indicates that blacks were tried at a lower rate per thousand of population than were whites.”¹²²

10b—7.2% of the Negro defendants were free blacks. Only a tiny fraction of the population, free blacks were prosecuted “at about six times the rate of slaves. Plantation justice . . . proba-

121. *Id.* at 582.

122. *Id.* (Table I).

bly accounts for part of this difference. But much of it represents harassment."¹²³

10c—For blacks, "average conviction rates were about twice those of whites in South Carolina."¹²⁴

What should be noted first is that, in comparing indictment and conviction rates among different groups or at different times, a closed analytic system can be used to produce adverse results regardless of what the rates may be. Thus, if the rate of black indictments is lower than that of whites, one can call this proof that the formal system of justice did not concern itself with the plantation subsociety, and that is "bad." Conversely, if the rate of black indictments is higher than that of whites, the difference may be attributed to persecution or white dominance. That also is "bad." Conviction rates can be interpreted in the same closed fashion. Lower conviction rates may be held to prove sloppiness of procedures, hypocrisy, or failing to treat seriously the moral personality of the slave. Conversely, higher conviction rates may be held to prove persecution, terror, and so on. Similarly, with respect to increasing or decreasing rates over time for the same groups, be they slaves or free blacks, an increase may be said to show increasing severity of treatment in reaction to fears of abolition and black unrest. A decrease may be said to show that "[a]ll over the South mob action began to replace orderly judicial procedure, as the feeling against abolitionists mounted and as Southern views on race became crystallized."¹²⁵

To what extent, if at all, might the ameliorative Whig plausibly argue that this is what happens in Hindus' essay? I think he might say the following. First, unless we attach a restriction, Hindus' Table I does not significantly prove his judgment that "blacks were tried at a lower rate per thousand." The restriction is that the statement is clearly true only for the decade before 1840, and possibly true after 1850. If our Whig is not statistically inclined, he might still perceive that the 1840's rate is slightly higher for blacks than for whites (2.3 versus 2.2 per thousand). If he is statistically inclined, he might say he is frustrated because the data are not displayed by year rather than by decade and thus in a fashion that permits him to test Hindus' contention in an optimum manner. And most of all, he might wonder whether a table for the other district Hindus studied in detail (Anderson) would show similar results.¹²⁶

123. *Id.* at 584.

124. *Id.* at 587.

125. J. FRANKLIN, *THE MILITANT SOUTH* 89 (1956).

126. This district also seems to be the one with more surviving case records. The text (*Black Justice Under White Law*, *supra* note 30, at 582) and Table II (*id.* at 583) state that

TABLE I
TRIAL RATES FOR WHITES AND BLACKS, SPARTANBURG DISTRICT, 1830-1860

Year	White Population	Black Population	White Cases (preceding decade)	Black Cases (preceding decade)	White Rate (per 1000 per year)	Black Rate (per 1000 per year)
1830	16,144	4904				
1840	17,924	5609	306	25	1.7	.5
1850	18,311	7608	399	152	2.2	2.3
1860	18,537	8567	511	144	2.8	1.8

Source: Hindus, *Black Justice Under White Law: Criminal Prosecution of Blacks in Antebellum South Carolina*, 63 J. A.M. HIST. 575, 582 (1976).

Having expressed his frustration, however, he might then note that with the data as presented we can still test one obvious question: For each of the decades, what measure of statistical association is there between race and trial rate? Employing Yule's Q, an easy measure to calculate without a computer,¹²⁷ he would find that: (1) for 1831-1840, Yule's Q works out to .586—moderately high, and suggesting that Hindus is right for that decade; (2) for 1841-1850, the rates are so close that the measure is useless—for that decade there is no association between race and likelihood of indictment; and (3) for 1851-1860, Yule's Q works out to .22—slightly positive but not sufficient to warrant any certain conclusion.¹²⁸

Having convinced himself that Hindus has not indisputably proved his entire point, our Whig might then declare that the more significant point is that black rates for the two decades before the

there were 1076 trials of blacks in the two districts between 1818 and 1860, the records of which have survived. Presumably the number of surviving Anderson district cases is 1076 minus the 1818-1830 Spartanburg cases (number not given, but probably quite small), and minus the 1831-1860 Spartanburg cases (321 according to Table I), equals 755 minus pre-1831 Spartanburg cases.

127. For a discussion of Yule's Q and Goodman and Krustal's gamma, see H. BLALOCK, *SOCIAL STATISTICS* (1960).

128. This is particularly true for any extension to South Carolina as a whole. The 1860 census enumerated 402,406 slaves and 9914 free blacks in South Carolina. Hindus' Table I shows that 8567 blacks lived in the Spartanburg district in the same year—or 2.08% of the total for the State. *Black Justice Under White Law*, *supra* note 30, at 582.

The equation for Yule's Q = $\frac{ad - bc}{ad + bc}$ where a, b, c, & d are the cell entries in a 2 × 2 matrix. In the specific instance, the cell entries (drawn from Hindus' table and approximating the average population for each decade as population at beginning of decade/2 + population at end of decade/2) are as follows:

(a) White Population Indicted	(b) White Population Not Indicted
(c) Black Population Indicted	(d) Black Population Not Indicted

Therefore:

$$\text{Yule's Q for 1831-1840} = \frac{(306)(5227) - (25)(16694)}{(306)(5227) + (25)(16694)} = .59$$

$$\text{Yule's Q for 1851-1860} = \frac{(511)(7943) - (17913)(144)}{(511)(7943) + (17913)(144)} = .22$$

A chi-square test does work out as significant at the .001 level for both of these decades. But given the size of the numbers in the lower cells (chi square is much affected by large numbers), and given the data base of only 2.08% of the whole State's black population, and since chi square measures only randomness, not association, I imagine our ameliorist Whig would want more before agreeing with Hindus about 1851-1860.

Civil War should have been as high as they were. To him, the more important point would be the degree of the formal law's penetration of slave life. And his overall interpretation of the evidence probably would be that sometime in the late 1830's or early 1840's that penetration became significant and remained so until the time of secession.¹²⁹

Turning next to the comparative rates of prosecution of free blacks and slaves, our Whig would probably say that, although the difference was intriguing, the small amount of data precluded certainty as to its larger significance.¹³⁰ Almost certainly, apportioning, on the basis of two anecdotal citations, *part* of the difference to "plantation justice . . . inapplicable to free blacks," and *much* of it to "harassment," would strike him as incautious.¹³¹ Because I

129. He might venture a final point in this connection. He would suggest that what Hindus really needs as his demographic measure is not total population by race, but rather total adult population. That is the population "at risk" of indictment. He would so suggest: (a) because he would suspect that differential fertility and mortality rates existed between the races in the Spartanburg district as they have elsewhere throughout United States history, and that there were more "nontriable" children among the black population; and (b) that with such demographic measures the results might work out differently. A very rough calculation suggests that the indictment rate for the adult populations of whites and blacks would be (per 1000 per year) about:

	<u>1841-1850</u>	<u>1851-1860</u>
blacks	4.2	3.2
whites	3.7	4.7

That calculation would only be true if the percentages of the two populations 14 years or younger in the judicial district were the same as those in the United States as a whole at the time of the 1850 census. Then, 44-45% of the black population and 39-40% of the white population were under 15 years of age.

130. This is so at least in terms of any generalizations from the two districts to the State as a whole, or to the entire South. Moreover, the text states that 7.2% of the black defendants were free. *Black Justice Under White Law*, *supra* note 30, at 584. The only table in the article that breaks apart the statistics by "slave vs. free" pertains to punishments by whipping. That table (it is numbered Tables VI and VII but is really the same table) mentions 37 free-black cases and 390 slave cases ending in punishment by lashing, which would work out to free blacks receiving 8.7% of such sentences. *Id.* at 588. Presumably the difference lies mainly either in differential conviction/acquittal ratios or in the proportions of the types of sentence imposed.

131. The interpretive apportionment may not be erroneous. The problem is that we do not have enough data to be sure. Here, as in several other places in the article (for example, where it is said that South Carolina's legal system was "never intended to be just," *id.* at 599), the language tells me almost as much about the author's attitude toward the subject as it does about the subject itself. The evaluating words veer toward a seemingly foreordained judgment. I am reminded of a statement recently made by Sanford Levinson (discussing the difficulties of drawing inferences from trial rates, conviction rates, and so on, given the prevalence of historical relativism today): "We are, presumably, grimly satisfied to discover those occasions when blacks are convicted more frequently than whites, since, of course, that surely counts as evidence for the discrimination we correctly believe to have existed in the

cannot determine exactly what Hindus means to conclude from the finding that average conviction rates for blacks “were about twice those of whites in South Carolina” and from a comparison to Massachusetts, where the conviction rate for all persons was seemingly almost exactly the same as that for South Carolina blacks,¹³² I am unable to guess what our liberal Whig might conjecture. Hence let me proceed to Hindus’ next major cluster of contentions, which pertain to relative severity of punishment and to changes in South Carolina justice over time. These contentions are more important anyhow. They are:

11a—Noncapital punishments of blacks were inequitable and fairly heavy—though on the average less so than they have sometimes been characterized.¹³³

11b—Capital punishment of blacks was frequent. “Although execution did not automatically follow a death sentence, blacks were still executed . . . at a high rate.”¹³⁴ Between 1800 and 1855, “at least 296 slaves were executed for criminal offenses in South Carolina.”¹³⁵ By contrast, in Massachusetts, with slightly more than twice the number of South Carolina blacks, between 1801 and 1845, “only twenty-eight executions

South.” S. Levinson (April 13, 1978) (comments presented at the Organization of American Historians Annual Meeting, New York City) (copy on file with *Vanderbilt Law Review*). The paper was a critique of, *inter alia*, Howington, *supra* note 70, and of an early draft of this article. Sometimes Hindus’ language reminds me of the attitude toward black defendants that he imputes to the South Carolina magistrates and judges—guilty unless proven innocent. That is not to say that on the merits Hindus is wrong—any more often than the South Carolina magistrates and judges were. It is just to point up the “empty-glass Whiggery.”

132. Part of my difficulty stems from trying to place this alongside the use of Massachusetts justice later in the article (in discussing punishments) as a “good standard for the generation,” and alongside other rates of conviction presented elsewhere in the article. To draw them together, we seemingly learn that the following rates existed:

<u>Jurisdiction</u>	<u>Crime</u>	<u>Conviction Rate</u>
S.C.	Murders of slaves by whites	32%
S.C.	All murders	46.7%
S.C.	All crimes	71.3%
S.C.	All crimes	34.3%
Mass.	All crimes	69.6%

The figures are drawn from *Black Justice Under White Law*, *supra* note 30, at 579 n.18 (top three figures in chart); *id.* at 587 n.43 (bottom two figures in chart). I cannot reconcile the difference between the page 579 and the page 587 “All S.C. crimes” conviction rates.

133. *Id.* at 589.

134. *Id.* at 595.

135. *Id.* at 596.

occurred. . . . This large number of executions calls into question economic self-interest as an ultimate guarantor of slaves' well-being."¹³⁶

11c—Changes over time in conviction and punishment rates are explained by “[t]he motive of preserving white dominance, . . . the function of law and authority in South Carolina. Black justice may have served some bureaucratic need for certification, while at the same time soothing some slaveholders’ consciences, but it was *never intended* to be just.”¹³⁷ Evidence for this is the way the Anderson and Spartanburg district “courts responded to South Carolina’s racial crises of the 1850s. Conviction rates, which had been declining, underwent a reversal in that decade Punishments became more severe [T]he average whipping upon conviction rose from thirty-three lashes in the 1830s to fifty-six lashes in the 1850s.”¹³⁸

This is very interesting. But does the evidence necessarily prove the conclusions? Because I have a better grasp here on Hindus’ interpretation of the evidence, I can venture a more certain ameliorative Whig series of conjectures. Next to Hindus’ view that convicted slaves fared far worse than either South Carolina whites or Massachusetts felons, our Whig would raise several points for debate.

One pertains to the Massachusetts comparison base. Now I am sure he would concede that there is nothing wrong with, indeed much instructive in, comparing the Bay State’s and the Palmetto State’s treatment of convicted criminals in the antebellum era. But may that not be like using a Rolls-Royce as the standard, against which almost any vehicle is bound to fall short, even a decently performing, moderately priced American sedan? Is not pre-industrial South Carolina’s legal horse-and-buggy bound to look quite slow and rough-riding? Our Whig might therefore urge the use of additional standards of comparison. The question then arises which additional standards are reasonable and which are practical?¹³⁹ Our Whig might sensibly propose the following: (1)

136. *Id.* at 596-97.

137. *Id.* at 599 (emphasis added).

138. *Id.* at 590.

139. The reasonable and the practical may not be the same because penal statistics of the eighteenth and early nineteenth centuries are frequently difficult to obtain. Even when available they may not be very useful. *See, e.g.,* W. BOWERS, EXECUTIONS IN AMERICA 201-402, app. A (1974) (since they omit all executions under local authority, and given the nineteenth-century decline in those executions, Bowers’ statistics could produce some very peculiar results if mishandled). *See also* J. TOBIAS, CRIME AND INDUSTRIAL SOCIETY IN THE 19TH CENTURY 256-60 (1967) (“proving” that in a large English industrial city—Leeds—“changes of chief constable had more effect on the rate of indictable crime than had anything else”).

another slave jurisdiction; (2) the system whence derived those of South Carolina and Massachusetts—that of Great Britain (for while it might be regrettable that South Carolina's system did not modernize as swiftly as that of Massachusetts, it would also be interesting to see whether it regressed when compared to the mother country's development); and (3) one or two other legal systems in the European-Atlantic community of nations and empires (slavery and punishment are, he might assert, problems of Western culture). To start the comparison correctly and to mark his distance from some underlying assumptions about the history of applied penology that seem as doubtful as they are dogged in studies of slavery, our Whig also should begin with some general propositions about how one ought to look at the severity of legally prescribed punishment, white versus black and slave versus free, in the antebellum South. Because I am not sure that he would,¹⁴⁰ let me make them on my own behalf.

Behind the writings on the subject, I detect a developmental penal paradigm that looks rather like the following. "In the Dark Ages punishments were arbitrary, cruel, and bloody. Then came the Renaissance and the Reformation and the beginnings of humanism and humanitarianism. But the Counter-Reformation set the clock back to the cruelties of the Dark Ages. Then came the eighteenth century. Capital crimes and sadistic punishments were reduced. This movement was spurred greatly by Enlightenment types such as Beccaria. Then ensued nineteenth-century penal reforms. Except in certain retrograde places (some or all slave states and Russia) doctrines of penal reform came to dominate over primitive notions of retribution and deterrence. Out went the barbarism of corporal punishment. In came humane—or at least less inhumane—penitentiaries. Again, except in certain retrograde places where chain gangs and prison guard savagery replaced earlier sadisms, the emphasis came to be on reform—or at least on dealing more fairly with criminals."

Now this is a caricature that few historians would believe in all its simplicities—at least as portraying what they really think about the subject when they are thinking hard about it. Nonetheless, on this occasion a page of caricature may be worth many pages of scholarly recital as a quick litmus test of the vague images of "punishment in Western history" that we, hardly any of us special-

140. That is because, depending on how much one permits within the designation "Whig interpretation" before considering the Whiggery transcended (or traduced), either the following comments are not Whiggish at all or they are the progeny of a rare subspecies of Whiggery.

ists in the subject of penology, carry about in the back of our minds, for it is within the terms of such vague images that we are likely to address the subjects within our expertise—be they the history of American law or of American slavery.

Whether I am right about the caricature's utility depends upon the reader's reactions to the following set of propositions. This alternate set—oversimplified though it is—seems to me closer to a minimally adequate depiction of the broad outlines of "punishment and prison in Western history" as it relates to our inquiry. To the extent that the reader finds he accepted the propositions before I put them, then I suppose the previous caricature is a straw man. But if it is that, then I am at a loss to account for the way in which the "severity of slavery" question has been typically discussed. I shall put this set as lettered propositions to distinguish them from the numbered list I have generated. If we are to discuss sensibly the broad outlines of penal development and to locate southern slavery's punishments within them, then we need, as a bare minimum, something like the following.

A. It is delusive, even false, to postulate a unilinear concept of a steady and progressive humanizing of legal punishments starting from an early point (be it located in the Middle Ages or in the post-Renaissance and Reformation), reaching a take-off point during the Enlightenment, and moving in an ascending arc through the nineteenth century and into our own era.

B. It is delusive first because it tends to attach itself to, and to be reinforced by, a larger Whig illusion. That is the illusion that all, or almost all, civil polities (both western and nonwestern) are somehow moving along a broad line toward a better end-point—whether the end-point approximates a pluralist Anglo-American democracy or a democratic socialist paradise. The unfortunate analytic consequence is a tendency to judge all polities, or all legal systems, either by their shortfall from the end-point or by their shortfall from the state, nation, or legal system that seems most advanced at the particular point in time the historian is considering.

C. It is delusive second because it misconstrues general developmental patterns of European-American punishment. It also fails to make sufficiently clear distinctions and changes over time among the following:

- (1) the formal law's punishment prescriptions (its statutory severity);
- (2) the execution of punishments (its severity in practice);

- (3) the varieties of corporal, noncorporal, and borderline corporal/noncorporal punishments—again in form and in practice;
- (4) the extension and discriminatory nature of the law's punitive power (whom it reaches, and whom it does not, or, whom it reaches more, and whom less, severely);
- (5) the functions of punishment; and
- (6) the relationships between the power of the central state, and penetration of the society by the legal system.

D. To be more specific, the laws of the country whence sprang South Carolina's laws, England, did not progress in a clear direction from more severe to less severe during the centuries that were formatively influential on the colonies, the seventeenth and eighteenth centuries. In fact, as Table II shows, most of the capital crimes still

TABLE II¹⁴¹

ENGLISH CAPITAL STATUTES AND REIGNS OF ENGLISH MONARCHS

Time Span During Which Statutes Added	Number Added	Number In Force
Edward III through Henry VII (1327-1509)	6	
Accession of Henry VIII to Charles II (1509-1660)	30	
Total Number in Force in 1688	approximately	50
Charles II through George I (1660-1727)	91	
George II (1727-1760)	33	
George III (1760-1810)	63	
Total Number in Force in 1819		200+

on the English statute books as late as 1820 were products of the "Enlightenment century." In other European countries, too, humanizing the law did not proceed steadily from the Enlightenment on.¹⁴² Just about the time that the post-American Revolutionary wave of "permissivism" concerning manumission of slaves turned to the ebb,¹⁴³ European countries began to doubt the Enlightenment

141. The figures in this table are derived from 1 L. RADZINOWICZ, *supra* note 111, at 4-5.

142. See M. FOUCAULT, *DISCIPLINE AND PUNISH* (1977).

Furthermore, throughout the eighteenth century, one can observe a certain increased severity . . . [;] in France, the legislation on vagabondage had been revised in the direction of greater severity on several occasions since the seventeenth century; a tighter, more meticulous implementation of the law tended to take account of a mass of minor offences that it once allowed to escape more easily

Id. at 76.

143. For an account of slippage away from "promanumission" legislation passed in the Revolutionary era during the 1790's and early 1800's, see W. JORDAN, *WHITE OVER BLACK* (1968). For another view of the relationships between the ideals and political structures of

wisdom, and the French Revolutionary enthusiasm, that had resulted in codified liberalizations. For example, in Switzerland some cantons went back to the penal laws of Charles V—enacting in effect the views of a Zurich judge who, replying in 1802 to a government questionnaire about the effects of recent penal reforms, “bitterly attacked the humanitarian effeminacy of the age . . . , made ironic remarks about the dream of a possible elevation of mankind . . . , [and] recommended the reestablishment of a qualified death penalty and corporal punishment.”¹⁴⁴ Prussia, under Frederick the Great and particularly under Frederick William II, had had a comparatively mild set of criminal statutes,¹⁴⁵ but at the end of the eighteenth century she brought back whipping, branding, and the pillory. Austria, rejecting the Enlightenment reformism of Joseph II in respect to criminal matters, reintroduced capital punishment in 1803.¹⁴⁶ It is against that larger comparative backdrop, not simply against what was happening in some other ex-British colony, that the penal habits and capital dispositions of an American slave-state should be projected. The Constitution of the new Republic, whatever its other efficacies and virtues, and despite its temporal attendance by calls for rejecting English common law so to extirpate the baneful influence of monarchic despotism, did not unmake the past or entirely remove the legacy and influence of European penal conventions.¹⁴⁷

E. A more adequate, if too quickly sketched, backdrop of relevant European punitive arrangements would (ignoring what in the contours of society, economy, and polity gave those arrangements the characteristics they possessed) resemble a composite (and aes-

the American Revolution and slavery, see D. MACLEOD, *SLAVERY, RACE, AND THE AMERICAN REVOLUTION* (1974).

144. G. RUSCHE & O. KIRCHHEIMER, *PUNISHMENT AND SOCIAL STRUCTURE* 98 (1939).

145. *Id.* at 99.

146. For a readable and interesting general account of Joseph II, see S. PADOVER, *THE REVOLUTIONARY EMPEROR: JOSEPH II OF AUSTRIA* (1967). But for some caveats as to how much Joseph's Enlightenment reformism improved the prisoner's lot, see J. SELLIN, *SLAVERY AND THE PENAL SYSTEM* 66-69 (1976).

147. For discussions of the fight in some ex-colonies over whether the English common law was best received or rejected wholesale as antithetical to American independence, see E. BROWN, *BRITISH STATUTES IN AMERICAN LAW, 1776-1836* (1964), and L. FRIEDMAN, *supra* note 24, at 93-100. At times the issue provoked intense feelings, not to mention silly legislative enactments, that are hard to understand now. But, and this is my central point, despite an American penchant for changing history that seems to persist (such as the naming and renaming of Cape Canaveral), there is simply no way that the contemporary historian can properly detach South Carolina's legal tradition, or that of any other of the original thirteen colonies, from all its trans-Atlantic links. Moreover, the practice is less excusable now than it was in the early days of the Republic when Americans were trying to figure out what it meant to be American, and hence avoiding foreign entanglements.

thetically outrageous) triptych, in which the left panel sums the Boschian horrors typifying the pre-eighteenth-century practice, the central panel depicts *à l'Ingres* the doubtful rationalisms of the Enlightenment century, and the right panel shows Daumier-like the nineteenth-century punitive progress. The left-hand panel would illustrate at least these main features of the pre-eighteenth-century past:

(1) Extending the applicability of corporal punishment under state aegis from the lowest classes upwards through the social strata;¹⁴⁸

(2) Introducing galley slavery in the fourteenth and fifteenth centuries, and widespread branding in the sixteenth century—the latter for obvious reasons of identification and the former, diffusing from southern Europe to central and northern Europe in the sixteenth and seventeenth centuries,¹⁴⁹ to turn punishment to governmental profit;¹⁵⁰

(3) Substituting, as sailing vessels replaced rowed galleys in warfare, penal slavery at naval bases;¹⁵¹

(4) Introducing houses of correction (first, in England, the Bridewell, but more important as an influence and model for the rest of Europe, the Amsterdam Tuchhuis in 1596), which, like galley slave ships and *les bagnes*,¹⁵² sought to reap a profit from

148. See J. SELLIN, *supra* note 146. To me this is the most interesting thesis of an otherwise slightly disappointing book, a book very long on the horrors and rather short on analysis. Sellin sets out to explore and winds up confirming Gustav Radbruch's contention, in a 1938 essay, *Der Ursprung des Strafrechts aus dem Stande der Unfreien*, reprinted in G. RADBRUCH, *ELEGANTIAE JURIS CRIMINALIS* (1950), that "[t]o this day, the criminal law bears the traits of its origin in slave punishments," and that "punishments originally reserved for those in bondage were later inflicted for crimes committed by low-class freemen, and ultimately on offenders regardless of their social status." J. SELLIN, *supra* note 146, at viii. "By the end of the twelfth century, the slave punishments of earlier days had been enshrined in public penal law and made applicable to free and unfree alike." *Id.* at 41.

149. Convict oarsmen were used in the Danish galleys in the seventeenth century. Even the landlocked states of central Europe saw galley slavery as an attractive means of ridding the community of undesirables. In the middle of the sixteenth century, the Swiss canton of Lucerne had a galley for convicts on Lake Lucerne, and Bern had one on Lake Geneva
Id. at 54-55. Not long after, these Swiss communities decided that it was more profitable to sell their galley convicts south to Mediterranean polities.

150. The exact date and place of the beginning of galley slavery as a specific punishment for crimes committed is obscure. A 1348 Castilian ordinance mentions it, but it does not seem to have become "big business" until the following century. See *id.* at 43-55. "Branding began to be used in the middle of the sixteenth century. At first, a fleur-de-lis was burned into the shoulder . . . but later . . . the use of the letters GAL became common practice." *Id.* at 49-50.

151. See *id.* at 83-104.

152. Convict prisons. THE NEW CASSELL'S FRENCH DICTIONARY 72 (1973).

punishment by means of forced labor, but unlike these institutions, had in mind the notion of reforming criminals before they became worse;¹⁵³ and

(5) Introducing, as a commutation of capital punishment, transportation to penal colonies overseas in the seventeenth century.¹⁵⁴

If the principal features of this pre-eighteenth-century part of the triptych are extension and inventiveness in new modes of retribution as well as the glimmerings of the idea of reforming, what then of the middle part, the eighteenth century? As our quick look at English capital statutes suggested, humanizing was not the sole order of the British day; nor was it on the continent. One example will suffice: a criminal was sentenced to be taken in a cart to a scaffold before the front door of a church where,

the flesh will be torn from his breasts, arms, thighs, and calves with red-hot pincers, his right hand, holding the knife with which he committed the . . . parricide, burnt with sulfur, and, on those places where the flesh will be torn away, poured molten lead, boiling oil, . . . and then his body drawn and quartered by four horses and his limbs and body consumed by fire, reduced to ashes and his ashes thrown to the winds . . .¹⁵⁵

153. J. SELLIN, *supra* note 146, at 70-82.

154. *Id.* at 97. For a detailed study of two penal colonies in Australia roughly contemporaneous with the period of our concern in the slave South, see J. RITCHIE, *PUNISHMENT AND PROFIT* (1970).

155. The sulphur was lit, but the flame was so poor that only the top skin of the hand was burnt . . . [T]he executioner . . . took the steel pincers, which had been especially made for the occasion, . . . [but] found it so difficult to tear away the pieces of flesh that he set about the same spot two or three times, twisting the pincers as he did so . . .

. . . [T]he same executioner dipped an iron spoon in the pot containing the boiling potion, which he poured liberally over each wound. Then the ropes that were to be harnessed to the horses were attached with cords to the patient's body . . .

. . . .
The horses tugged hard, each pulling straight on a limb After quarter of an hour, the same ceremony was repeated . . . , [and] after several attempts, the direction of the horses had to be changed Two more horses had to be added . . . , which made six . . . in all. Without success.

Finally, the executioner . . . said . . . that there was no way or hope of succeeding, and told him to ask their Lordships if they wished him to have the prisoner cut into pieces. [The prisoner] . . . told them . . . to carry out their task and . . . asked the parish priest . . . to pray for him

. . . [T]he executioner . . . cut the body at the thighs instead of severing the legs at the joints; the four horses gave a tug and carried off the two thighs after them, . . . then the same was done to the arms . . . ; the flesh had to be cut almost to the bone

When the four limbs had been pulled away, the confessors came to speak to him, . . . the truth was that I saw the man move his lower jaw . . . as if he were talking. One of the executioners even said shortly afterwards that when they had lifted the trunk to throw it on the stake, he was still alive.

The date of this lay not in the darkest Middle Ages, nor even in the religious strife of the Counter-Reformation.¹⁵⁶ Nor was the place Russia or some other polity of backward infamy. Rather, it occurred during the height of the Enlightenment, and at its physical intellectual center, Paris.

Of course it may be objected that this public spectacle of torture, designed both to deter and as punishment worse than mere speedy death, was precisely what the Enlightenment reformers objected to. But for two reasons this objection is not entirely convincing. The first reason is that whatever the motives of Enlightenment objections in theory, the practice remains as part of the penal backdrop of slavery in the American colonies. It was only two years before the French execution just described that Georgia shaped her slave code. The second reason arises from the motives behind, and curative modes of, the Enlightenment theorists' proposed reforms. To be sure, humanizing, softening, and eliminating excessive punishments were aims. But at least three other characteristics were also present that we should not forget.

First, alongside the humanizing tendencies was that other strain of Enlightenment thinking—rationalizing. Hence arose one of the novelties of the Enlightenment's approach to penology—an assiduous concern for making the punishment fit the crime, for graduating the penal harshness by fine degrees. But there came out in the effort a side of rationalism that today looks slightly bizarre. Katherine Preyer¹⁵⁷ has recently analyzed perhaps the most indicative American example—Thomas Jefferson's 1776-1779 proposal¹⁵⁸ in the Virginia legislature for the reform of the Commonwealth's laws. Revulsed at their "sanguinary hue," Jefferson wanted to rework them into proportioned penalties. But, to the twentieth-century eye at least, the proportioning was a bit odd. Cutting down drastically on the number of capital crimes, and thus escaping the English

M. FOUCAULT, *supra* note 142, at 3-5 (the account of an officer of the watch). My abbreviations have considerably toned down the disgustingness of the process.

156. Rather it occurred in the year when Edmund Burke's first literary triumph, *A PHILOSOPHICAL ENQUIRY INTO THE ORIGIN OF OUR IDEAS OF THE SUBLIME AND BEAUTIFUL* (1757) was published, the year in which George Washington turned twenty-five and Frederick the Great defeated the French at Rossbach, and two years after the publication of Rousseau's *DISCOURSE ON THE ORIGIN AND FOUNDATION OF INEQUALITY AMONG MEN* (1755) and Diderot's great *ENCYCLOPEDIA* (1755). Voltaire was already 63 at the time.

157. K. Preyer, *Reforming the Criminal Law in Virginia* (Oct. 22, 1976) (paper presented at the Annual Meeting of the American Society for Legal History) (copy on file with the *Vanderbilt Law Review*).

158. The proposal was made to the Virginia legislature in 1776, and a legislative committee, of which Jefferson was a member, was formed in that year, but the presentation of the draft bill was not made until June 1779. It failed to pass. *Id.*

inheritance in part, Jefferson advocated, for instance, death by burying alive for high treason, death by poison for murder by poison, death by hanging and gibbeting for murder by duel,¹⁵⁹ castration for buggery, and maiming the offender in the same fashion that he maimed his victim.¹⁶⁰

Second, proportionalizing punishments downward from death did not necessarily mean, even when the proportionalizing eliminated the death penalty, just humanizing by establishing a more pleasant punitive limit short of that sentence. Beccaria is generally thought of as the *locus classicus* of the anti-capital punishment movement and as the real start of modern penology's deemphasis of retribution and emphasis on deterrence. That much is correct. It is well to remember, however, that Beccaria objected to capital punishment not because it was inhumane but because it did not deter. What Beccaria wanted was effective punishment whose "painfulness only just exceed[s] the benefits derived from the crime."¹⁶¹ But at the peak of his pyramid of punishments, having taken away the capstone of capital punishment, he substituted, and quite explicitly justified, a deterrent punishment that he thought would be viewed as worse than death—lifelong slavery accompanied by painful treatment. For Beccaria, one of the reasons that the death penalty did not deter was because "[m]any look on death with a firm and calm regard—some from fanaticism, some from vanity, . . . some in a last desperate attempt . . . to escape misery . . ."¹⁶² What he proposed as a substitute did not have this punitive flaw. Penal slavery for life "among fetters and chains, under the rod, under the yoke or in an iron cage"¹⁶³ did not permit the exercise of fanaticism or vanity. And, as long as suicide was guarded against, escape from misery was prevented also. "Were one to say that perpetual slavery is as painful as death and therefore equally cruel I would reply that . . . the former would be even worse."¹⁶⁴ This is an interesting humanitarianism, and as practiced by Beccaria's royal disciple, Joseph II, at least in Austria the way that Beccaria

159. This punishment applied only to the original "challenger" if he won. The "winning defendant" was merely to be hanged.

160. Jefferson thus was proposing to revive the *lex talionis*. In other sections of his proposed bill the Anglo-Saxon notion of restitution to the victim's kin returned. As Preyer notes, the proposal has embarrassed some later Jefferson scholars. See M. PETERSON, THOMAS JEFFERSON AND THE NEW NATION 124-33 (1970).

161. J. SELLIN, *supra* note 146, at 65 (quoting from C. BECCARIA, OF CRIMES AND PUNISHMENTS (1764)).

162. *Id.* at 66.

163. *Id.*

164. *Id.*

puts the trade-offs may well have been correct.¹⁶⁵

Third, if rationalization did not necessarily mean less cruelty, neither did the shift at the turn of the century from retribution and deterrence to reform and deterrence. To say that brings us to the third part of the triptych—the nineteenth-century backdrop against which the punishments of American penology, in both slave state and free, were evolving. Although during the nineteenth century the law shifted from prescribing one set of physically agonizing punishments to a different set of punishments, the shift was not simply one from punishment of the body to punishment of the spirit,¹⁶⁶ or a replacement of more barbarous punishment with less barbarous punishment, or a movement from less humane punishment to more humane punishment. If we so view the shift, then we fall into gross dichotomies conditioned by, and perhaps too uncritical of, modern penal practices¹⁶⁷—dichotomies that lead us into lining up countries and states along a developmental line, preferring one system and disparaging another. Although there is some truth in these depicted shifts, especially if we are comparing the beginning and the end of the nineteenth century, we should keep in mind the following qualifications.

(1) While the nineteenth century witnessed a diminution in the mutilation-branding-whipping trio of direct violent assaults on the body prescribed by formal judicial sentence, it also saw at least two expansions of physical punishments. One was the use of whipping to control and punish in the prisons.¹⁶⁸ That the judge did not sentence a convict to a whipping did not mean the convict would

165. One Josephine substitution for the death penalty was barge-towing in the Hungarian portion of the Danube. I say "in" advisedly. The criminals were placed in foot-irons and neck-irons, "harnessed in rows to the vessels, often to the waist or even to the neck in water, wading through swamps and constantly forced to labor, . . ." *Id.* at 67 (quoting the military commander there). Of 1175 criminals so sentenced between 1784 and 1791, 721 died at their toil. Life expectancy was about two years "on the job." That works out to about a 30% mortality rate per year, which is comparable to death rates in the worst of New World slavery conditions. See P. CURTIN, *THE ATLANTIC SLAVE TRADE* (1969); C. DEGLER, *supra* note 101. Irons used to short-chain prisoners in Graz weighed about 50 pounds, and according to a 1790 governmental report "hinder them in working and sleeping [such that] [e]ven the healthiest and strongest man could not last under this extreme kind of punishment more than four years." J. SELLIN, *supra* note 146, at 68 (quoting from Kaut, *Leibes und Freiheitsstrafen*, in *STRAFRECHTSSAMMLUNG DES NÖ. LANDESMUSEUM IM SCHLOSS GREILLENSTEIN* 52 (Vienna Museum)).

166. See M. FOUCAULT, *supra* note 142, at 7-8.

167. Of the abolition of torture as a public spectacle, Foucault remarks, "perhaps it has been attributed too readily and too emphatically to a process of 'humanization,' thus dispensing with the need for further analysis." *Id.* at 7. I am inclined to agree.

168. All this says nothing of the many twentieth-century nations that, especially in the last 30 years or so, have reintroduced torture, or substantially expanded it from a lesser late nineteenth-century base, and moreover have invented new techniques for punishment.

not be whipped later by the guard. The other expansion amounted to new inventions, for the nineteenth century was by no means unimaginative in its penal thoughts. One innovation, for example, was hooding the criminal, making it impossible for him to see anything, and forcing him to scrutinize his inward soul until he repented. This "humane" reform may or may not have worked well, since often the prisoner went mad.¹⁶⁹ But, results aside, even if the intent was to translate the punishment from torture of the body to reform of the soul, the means was not wholly noncorporal. Though in one sense gentler, the assault was extended drastically over time, and in some cases lasted the entire prison sentence. A similar point can be made about the nineteenth-century modifications of penal labor—the treadmill, the crank, and oakum picking. With Becarian logic, a new futility is introduced. And, the very pointlessness of being made to turn a crank or a treadmill that had no product output (in contrast to the older forms of Tuchthuis labor that at least produced something, repulsive to the worker though the tedium and labor might have been) must have increased the physically punitive impact of the labor.¹⁷⁰ It is well to remember that this form of punishment reached its peak in Great Britain under the Du Cane regime of the last quarter of the nineteenth century.¹⁷¹ That is the

169. See L. FRIEDMAN, *supra* note 24, at 259-60.

170. The treadmill appears to have been reinvented in the early nineteenth century, for that was when it really caught on as a punishment, though one had been installed in the very first London house of corrections in the 1580's. See J. SELLIN, *supra* note 146, at 107. William Cubitt, an Ipswich engineer, designed one for Suffolk County jail in 1820, and within 12 years 87 of England's 93 local prisons had installed them. By midcentury the real novelty of the nineteenth-century version, that the "labor produced nothing except sweat and fatigue," was in full sway. *Id.* at 109. Here, abbreviated from Sellin are typical workday assignments computed in vertical feet that prisoners were required to climb in the 1830's. *Id.* at 109.

Prison	Hours on Wheel		Daily "Climb"	
	Summer	Winter	Summer	Winter
Durham Jail	9	6	10,867	7560
Exeter House of Correction	8	7	9860	8612
Reading Jail	8	8	12,564	12,564
Worcester Jail	10	8	13,600	10,880

According to Sellin, the usual requirement for the hand-crank (in which the prisoner was required to turn round and round a crank with a friction device to make the turning difficult—a crank that produced nothing at all) was 10,000 revolutions per day. *Id.* at 110. If forced to the choice, and other things being equal (hours and years of service), some of us might prefer picking cotton in the open air.

171. The British prison system was centralized in 1877 and placed under the control of the Home Office's Prison Commission, whose chairman was one Colonel Edmund Du Cane, "a strict militarist." *Id.* at 112. A much later occupant of the same position, Sir Lionel Fox, wrote of Colonel Du Cane's chairmanship in 1951: "Our prisons for twenty years presented

underside of the nineteenth century—the side we forget when we look at a Monet landscape.

(2) There is something close to a twentieth-century historian's penal faith that may not make sense at all—that even a small number of lashes is a less humane punishment than almost any number of months or years in prison. One hundred thirty years ago, Charles Dickens, visiting Philadelphia's model prison, Cherry Hill, thought otherwise.¹⁷² He may have been right, and we should be cautious in making the contrary assumption, even if we do not know the exact trade-offs.

(3) A third qualification is needed because of a danger when engaging in the newly fashionable historiographical pastime of "lash-o-metrics,"¹⁷³ producing a variation of the Gertrude Stein fallacy that a rose is a rose is a rose: thirty-nine lashes is thirty-nine lashes is thirty-nine lashes.¹⁷⁴ Assuming, *arguendo*, that corporal

the pattern of deterrence by severity of punishment, uniformly, rigidly, and efficiently applied. For death itself, the system had substituted a living death. It became legendary . . . even in Russia." *Id.* at 112. I shall have to confess I had not heard the legend before reading Sellin. *But see* J. TOBIAS, *supra* note 139, at 204 (quoting S. WEBB & B. WEBB, *ENGLISH PRISONS UNDER LOCAL GOVERNMENTS* (1963)). The regime was characterized by "a uniform application of cellular isolation, absolute non-intercourse among the prisoners, the rule of silence, oakum-picking, and the tread-wheel." *Id.* at 207.

172. CHARLES DICKENS, *AMERICAN NOTES* (1842), *cited in* L. FRIEDMAN, *supra* note 24, at 260 n.28.

173. That seems as appropriate a linguistic barbarism as any, given its origin in "cliometrics." *See* R. FOGEL & S. ENGERMAN, *TIME ON THE CROSS* 144 (1974).

174. And the assumption sometimes seems to be that such a sentence is 62.5% more painful, cruel, barbaric, and regressive than a sentence of two dozen lashes. Marvin Harris verges on the point, although writing in another connection—taking Elkins to task for arguing that proof of greater physical leniency in North American (as opposed to Latin) slavery would be largely irrelevant, even if forthcoming. For Elkins they would be irrelevant because they overlook a fact more significant to Elkins: since the Latins recognized the slave's moral personality, in the case of Latin American slaves we are "dealing with the cruelty of man to man," S. ELKINS, *supra* note 22, at 78 n.113, whereas in the case of United States slavery we are dealing with the behavior of men towards slaves considered "legally and morally *not* men." *Id.* (emphasis in original). Harris observes: "It is devoutly to be hoped that Elkins shall never be able to test his exquisite sense of equity by experiencing first thirty lashes dealt out by someone who calls him a black man and then a second thirty from someone who calls him a black devil." M. HARRIS, *PATTERNS OF RACE IN THE AMERICAS* 75 (1964). This passage occurs as part of a long section in which Harris appears to be arguing two things at once. One is that comparison of the severities of different slave systems is a waste of time. "Better to dispute the number of angels on a pinhead . . . The slaves, wherever they were, didn't like it . . ." *Id.* at 74. The other is that Elkins' and Tannenbaum's argumentation and evidence for the lesser nastiness of Hispanic and Brazilian slavery are defective. I think that Harris is right on the latter issue. But with respect to the former, his righteous indignation leads to throwing out the historiographical baby with the immoral bathwater. Great vibrant phrases make for vague analysis. For example: "What the laws of the Spanish and Portuguese kings had to do with the attitudes and values of the Spanish and Portuguese planters, however, baffles one's imagination. The Crown could publish all the laws it wanted, but in the lowlands, sugar was king." *Id.* at 76. That is closer to a statement

cruelty is worth measuring, then we ought to measure it properly. It is plain that there are at least three relevant variables besides the number of lashes administered and the frequency with which whippings took place.¹⁷⁵ These variables are: the condition of the victim, the instrument used, and the manner of its application. Although I do not pretend to have much expertise on the subject, even a cursory browsing among some of the weirder tomes in penal literature shows that the mental picture most "lash-o-metricians" seem to have of the matter will not do. As far as I can see, and drawing also on our previous comments, the mental picture looks rather like this:

COMPARATIVE SEVERITY/HUMANENESS OF NONCAPITAL PUNISHMENTS

<p>-----</p> <p>Totally Barbaric</p> <p>MUTILATION</p>	<p>-----</p> <p>Very Barbaric</p> <p>BRANDING</p>	<p>-----</p> <p>Quite Retrograde</p> <p>WHIPPING</p>	<p>-----</p> <p>More Humane</p> <p>INCARCERATION</p> <p>-----</p>
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The mental picture is seemingly composed of four neat little Whig boxes, with (apart from some ambiguities about the separateness of the two left-hand boxes, and some shadowiness about the way in which the right-hand box shades into contemporary penal practices) order-of-magnitude differences and no overlap between the boxes. And, at least with respect to the "Quite Retrograde" box, there is little internal differentiation. A bit of browsing and a bit of thinking make clear why this mental picture will not do. First, as to the condition of the victim, there are obvious physical and mental differences—whether he is plied with rum beforehand, whether he feels he deserves the punishment, whether he derives expiation from it, whether (at one extreme) the punishment severely degrades his sense of status and self-esteem, leaves it unchanged, or (at the other extreme) enhances it; and the state of his health.¹⁷⁶ Second, with

of a problem for historical explanation than it is to a solution.

Consider also Fogel's and Engerman's discussion of whipping and the slaves' absorption of the Protestant ethic in *Time on the Cross*, where they begin by noting that whipping "could be either a mild or severe punishment." R. FOGEL & S. ENGERMAN, *supra* note 173, at 144. Most of the discussion, however, reads as if this comment had not been made. See also H. GUTMAN, *SLAVERY AND THE NUMBERS GAME: A CRITIQUE OF TIME ON THE CROSS* 14-41 (1975). But note that the emphasis on the frequency of whipping in Gutman's critique arises from his objections to Fogel and Engerman's statistical inferences on the matter.

175. Unlike Hindus, who does both numbers and frequencies, most of the "lash-o-metricians" so far have simply concerned themselves with the matter of frequency.

176. Without going into much detail here, let us make a few observations. First, some of the "luckier" sailors were made drunk before flogging. Second, some criminals do want to be punished. Third, the unspoken historians' assumption that all slaves, or all European whites, whipped for crimes in the eighteenth and nineteenth centuries felt as degraded as we would now or as would have members of the ruling class or the bourgeoisie of the time may

respect to the instrument used, there are substantial differences in the amount of pain and punishment of which each is capable. For example, it appears that some of the most common produced very different results—ranging from the Russian knout and the bastinado (frequently lethal or permanently crippling), through the English cat-o'-nine-tails (which could be, but usually was not, lethal or permanently crippling), to the whips prescribed in southern slave law. Third, there were customary and officially prescribed differences in the manner of application—the locus on the body (which is what made the bastinado so injurious), how powerful the strokes were (in the British navy a fuller swing was taken than in the British army, with more devastating effects), and whether the sentence continued, or was halted until recovery and then resumed, or simply cut short if the victim fainted or seemed on the point of death. These are not particularly pleasant details. Yet we cannot sensibly approach the question of punitive severity in the legal systems of southern slavery without a coherent picture of the western penal tradition, a picture of which these unpleasant details are an integral part. Bearing those qualifications and details in mind, let us consider some illustrative comparisons that put the formal penal prescriptions of South Carolina black justice in better perspective.

(a) *A Non-Anglo-Saxon, New World Slavery.* A runaway slave, found guilty of an assault upon a soldier (having “almost killed him, . . . broken his jaw, his teeth and almost blinded him,”—but only after the soldier “ill-treated him”) was “condemned . . . to be flogged *every day and on Sundays* . . . his

not always be accurate. See, e.g., 1 G. RAWICK, *THE AMERICAN SLAVE: A COMPOSITE AUTOBIOGRAPHY* (1972). “But dem whippin’s done me good. Dey break me up from thievin’ and make de man of me.” E. GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* 65 (1972) (quoting from 4 G. RAWICK, *supra*, at 55). The viewpoint of the ex-slave quoted is as different from that of Frederick Douglass or Solomon Northrup as it is from our own. Fourth, I am not sure how much to make of the last phase in the quote. But is the attitude altogether different from the white-American tradition that makes a male virtue of taking your punishment, “your medicine,” like a man? As long as we are debunking the myth of Sambo these days, we ought not to rule entirely out the possibility that some recipients of corporal punishment gained more status from the way they “took it” than they lost with their reference groups whose members were all subject to the same cruelties. Finally, we should not, when we say “x” corporal punishment is barbarous, or utterly cruel, ignore two factors that recent medical research tells us make for substantial differences in the amount of pain experienced, and presumably in the felt cruelty. The first is the surrounding expectations and circumstances. For example, “wounded soldiers are said to feel far less pain than equivalently injured civilians because for the soldier the wound means the war is over . . .” *Los Angeles Times*, Sept. 4, 1978, at 3, cols. 1-2. The second factor is that a person’s psychological attitude towards pain is linked to his body’s release of endorphins, chemicals apparently “involved in the body’s natural system of pain control.” *Id.* at 20, col. 1. I do not presume to offer any answers with these speculations, but merely to underline some reasons why I think insufficient the conventional historian’s approach to matters of punitive severity.

right ear to be cut off, and to carry a chain on his foot . . . *for the remainder of his days . . .*"¹⁷⁷ The place was French Louisiana, and the date, 1742. Although the incident occurred long before the nineteenth century, I mention it in part to give a sense of the eighteenth-century base from which nineteenth-century slave systems evolved, and in part to help correct the notion that non-Anglo New World slavery was always more humane than Anglo-American slavery.¹⁷⁸

(b) *The "Mother Country."* Suppose that our ameliorative Whig thought to compare South Carolina black justice with justice in the British navy, taking the navy as the closest British analogue to slavery for Englishmen. He might well anticipate that English sailors, though mistreated, would fare better than South Carolina slaves. If so, he would be in for a surprise about the punishments doled out as lawful retribution. Drawing together Hindus' statistics on corporal punishment in Massachusetts and South Carolina with those in a recent article on the Royal Navy,¹⁷⁹ he could derive Table III.

TABLE III
WHIPPINGS TYPIFYING THREE ANGLO POLITIES

Place & Dates	Crime	Average Lashes
Massachusetts State Prison, 1840's	felonies	not more than 10
S.C. slaves 1818-1860 (Anderson & Spartanburg districts)	property	52.7
	against person	45.9
	against morality	39.7
	sexual crimes	127.3
	threatening authority	72.8
	Average of All Trials of Slaves	45.4
British navy, 1768-1770	desertion	184
1790-1791	desertion	208
1812	desertion	197
1793-1809	homosexual offenses	425
1755-1797	mutiny	283
Average (Unweighted) of all Sailors' Punishments for Above Offenses		259

177. 11 LA. HIST. Q. 288, 292 (1928) (emphasis added).

178. I have not come across in any of the English-American colonial or post-independence appellate court cases anything like prescribing daily whippings for the remainder of one's days.

179. Gilbert, *Buggery and the British Navy, 1700-1861*, 1976 J. Soc. Hist. 72.

He might go on to observe that maximum South Carolina slave whipping sentences paled by comparison with some representative British navy yearly "highs." Thus:

British navy,		
1760 high	desertion and theft	700
1761 high	drunkenness, disrespect, mutiny	600
1762 high	buggery	1000

These highs—and perhaps also some of the averages above—were in fact, if not in legal form, capital sentences. Few sailors would have lived through that many strokes of the cat.

If our Whig were thoughtful, he might be intrigued by the comparison and yet not be wholly satisfied by the results. Should he not look further to the civilian population of England, and the administration of justice to it, both capital and noncapital? Comparing Hindus' South Carolina statistics with the British period that saw the separation of crown and colony, beginning with the accession of George III in 1760, he could derive Table IV.¹⁸⁰

TABLE IV
LAGGED TABLE OF LATE EIGHTEENTH-CENTURY ENGLISH
AND EARLY NINETEENTH-CENTURY SOUTH CAROLINA
CAPITAL SENTENCES

London & Middlesex			South Carolina	
Decade	Capital Convictions	Executions	Decade	Executions (Slaves)
1760-1769	428	224	1800-1809	37
1770-1779	776	356	1810-1819	35
1780-1789	1189	534	1820-1829	87
1790-1799	745	211	1830-1839	42
1800-1809	821	110	1840-1849	59

180. A word of explanation is needed as to why the dates in the Table are "lagged comparisons," as to why the same decades are not compared. First, the ideal solution, comparing South Carolina and British rates 1760-1810, is not possible because there are no South Carolina statistics available for the earlier decades. Second, comparing the same decades in the nineteenth century would not suit our ameliorist Whig for two reasons. One, as the dismal Whig would doubtless note, the results of such a comparison would not suit the ameliorist Whig, because, especially following the reforms of English penal statutes during the third and fourth decades of the nineteenth century, the English rates would look much "better" than the South Carolina ones. Two, as the ameliorist Whig would respond, the first reason is not a very good one because it turns his argument into an argument he is not trying to make. He is not, he would emphasize, trying to suggest that South Carolina kept up with northern and

Regretting that earlier statistics for South Carolina are not available, what might our Whig nonetheless be struck by? Could he safely conclude that allowing for the lagged time, slaves in South Carolina were less likely to receive capital sentences than were their free English counterparts in London forty years earlier, or more likely? One test would be to correct for differences in total population size, and thus to construct a table such as Table V.

TABLE V

Decade	Number of Slave Executions	S.C. Slave Population*	Percent of Slave Population Executed per Decade
1800-1809	37	171,258	0.022%
1810-1819	35	227,420	0.015%
1820-1829	87	286,938	0.030%
1830-1839	42	321,220	0.013%
1840-1849	59	356,011	0.017%
1850-1854	27 × 2 = 54 equivalent	389,340	0.014%

*Computed on a straight-line basis between censuses
(Census n + census n + 1)

2

Equally accurate statistics for London during the late eighteenth century are not obtainable, but it would seem safe, given the city's growth rate from the first decennial census in 1801 through the nineteenth century, to conclude that during the eighteenth century,

English capital punishment reforms of the nineteenth century. He is trying to compare South Carolina justice with the system of justice from which it split off at the time of the Revolution, with, so to speak, its base-line. The point is related to a more general one—which of five ways is the most accurate way of thinking about southern slavery law: (a) as regressive, as actually “going backwards;” (b) as static, as somehow struck in a pre-Enlightenment phase; (c) as diverging, as taking a different (autonomous) evolutionary course, from that of the American North, England, and/or Europe; (d) as moving forward (but more slowly) along essentially the same Enlightenment and liberalism influenced-path as those other places took, or; (e) as a complete mixture of the above. For further discussion, see Part Three (A) of this Article *infra*.

Much the same considerations apply to the construction of Table VI, *infra*. The year 1785 is chosen because that is the year for which data are readily available, and Radzinowicz declares that it is fairly representative. The South Carolina data are from *Black Justice Under White Law*, *supra* note 30, at 595. The London and Middlesex data are from L. RADZINOWICZ, *supra* note 111, at 147, 152. There are no major perturbations in the annual data displayed in Radzinowicz that would, if we divided the ten-year spans differently, produce substantially different trends than those apparent in Table IV, to wit: (1) a peak of both capital sentences and actual executions in the 1780's; (2) a slight increase in the number of capital sentences, but; (3) a downtrend in the number of actual executions.

her population never exceeded one million.¹⁸¹ Thus, alongside the range of South Carolina rates of execution per decade (from the 1830-1839 low of 0.013% or thirteen per 100,000, to its Denmark Vesey influenced 1820-1829 high of 0.030%, or thirty per 100,000) he could place the London range of eleven per 100,000 (1800-1809) to fifty-three per 100,000 (1780-1789). He might be content to leave the matter there, and as long as we did not forget his caveat of comparing two forty-year lagged half-centuries, then we could agree that he had demonstrated his case. But what of the one decade when there is overlap, 1800-1809? There, if the comparison is corrected for population, the Londoners fare better. Does this undercut his case? No, he probably would reply, "because of the way I am constructing my case. I am not saying that year for year South Carolina slaves always fared better. Moreover, I want you to see for what crimes Londoners were hanged during the relevant period. Let me give you a representative year, 1785." So saying, he would construct Table VI.

TABLE VI
CRIMES FOR WHICH LONDONERS WERE EXECUTED IN 1785

Murder	1
Sex	0
Serious battery	0
Burglary	43
Robbery	31
Unlawfully returning from transportation	4
Horsestealing	5
Other Property Crimes	13
Total	97

Having constructed Table VI, our Whig might ask whether South Carolina slaves were ever hanged in these proportions for crimes against property.

(c) *Another Slave State—Tennessee.* A well-rounded comparative evaluation of South Carolina's legal system should include at least one other slave state. Only very recently, however, with the appearance of Howington's work on the Tennessee judiciary, has research similar to Hindus' been done at the lower court level. Although Howington's work is still incomplete, his study of six Ten-

181. London population was 960,000 in 1801 and 2,400,000 in 1851. E. WOODWARD, *THE AGE OF REFORM, 1815-1870*, at 1 (1938).

nessee counties¹⁸² (including the one with the largest free Negro population) is sufficient to permit some interesting contrasts with Hindus' findings.

Although I cannot make all the comparisons I would like because of differences in how the two scholars analyze their data, black justice in these six Tennessee counties looks, in Whiggish terms, substantially better than South Carolina's. It evolved further along nineteenth-century lines: serious crimes were brought into the regular lower level court system; the "racial gap" with respect to prosecution rates and sentencing patterns was narrower; and the types of punishments to which free Negroes were subjected came to approximate, as the nineteenth century wore on, those doled out to whites. Let us examine these points briefly.

Hindus, it will be recalled,¹⁸³ found that 7.2 percent of the South Carolina black defendants were free, a proportion of the prosecutions about six times the proportion of free to slave blacks in the population as a whole. He attributed part of the difference to a system of plantation justice for slaves and much of it to white harassment of free blacks.¹⁸⁴ Was there a similar pattern of harassment in Tennessee? Data in Howington's paper allow us to construct a slightly different, though at least as useful, percentage comparison—the percentage of all prosecutions of free persons that were brought against free blacks versus the percentage of the total free population that was black. Consider the figures he gives for Davidson County (Nashville), where there are enough prosecutions to be statistically meaningful. Howington states that there were 1006 felony prosecutions between 1826 and 1861, of which fifty-three, or 5.26 percent, were prosecutions of free blacks.¹⁸⁵ In 1860 there were 1209 free blacks in Davidson County, or 3.74 percent of the county's total free population.¹⁸⁶ At least superficially, the percentages suggest that perhaps some, but probably not much, racially based harassment can be fairly attributed to the Davidson County judicial system.¹⁸⁷

182. Howington, *supra* note 70.

183. See text accompanying note 123 *supra*.

184. See text accompanying note 131 *supra*.

185. The percentage figure is my calculation from his raw data presented at Howington, *supra* note 70, at 19.

186. My calculation is from Table II. SUPERINTENDENT OF CENSUS, STATISTICS OF THE POPULATION OF THE UNITED STATES 61-63 (1872) (state of Tennessee) [hereinafter cited as 1870 POPULATION STATISTICS].

187. Certainly, at any rate, much less racially based harassment can be attributed to Davidson County than to the Anderson and Spartanburg judicial districts of South Carolina. My own suspicion is that if we could control for income levels, we would find that, given the

What, if anything, can be learned by comparing South Carolina and Tennessee conviction rates? Hindus found that average conviction rates of blacks were about twice those of whites in South Carolina, and argued that this buttressed his conclusion that justice for blacks was not the intent of the State's judicial system.¹⁸⁸ Assuming, *arguendo*, the legitimacy of this inference, what of Howington's results for Tennessee's court system? Table VII sets out the comparative conviction rates over similar time spans, and given the different modes of data presentation in the two texts,¹⁸⁹ for as nearly comparable categories of crime as possible. The "A" columns show the conviction rates using Howington's method—including cases dismissed prior to trial, grand jury refusals to return a true bill of indictment, and unknown outcomes. The "B" columns show the same data using Hindus' method—including only trials that reached an acquittal or a conviction. Three points emerge. First, using Howington's method we find that a majority of Tennessee prosecutions against slaves, but only a quarter of South Carolina prosecutions, never reached the stage at which a verdict was rendered. Second, and in consequence, over seventy percent of the Tennessee slaves, but just under half of the South Carolina slaves, escaped a guilty verdict—receiving the benefits of the law's delays as well as of its due process. But third, does this entail the conclusion that Tennessee slaves fared on the whole better—or that one system produced fairer, or alternatively, less exploitative, results? Not necessarily, as the computations in the Hindus mode indicate—at least if the two systems' trials of blacks are alone compared—for the differences (59/41 versus 66/34) are, given the case numbers, not really telling. It may be, in other words, that Tennessee had a higher propensity to initiate prosecution on flimsier evidence (as an empty-glass Whig would view it) or to accord the black the benefits of the formal legal system (as an ameliorative Whig

higher tendency of low-income individuals to be subjected to the criminal, as distinct from the civil, litigation system, a substantial part of the variance in free black vs. white prosecution rates could be as readily explained by such income-level differences as by harassment.

188. *Black Justice Under White Law*, *supra* note 30, at 599.

189. The capital crimes to which the Howington figures pertain are broader than those listed here from Hindus. Compare Howington, *supra* note 70, Table 1, at 13, with *Black Justice Under White Law*, *supra* note 30, Tables III, IV, V, at 585-86. The conviction rates for other offenses reported in the same tables by Hindus, however, are sufficiently similar to suggest that the difference does not matter here. Howington's figures cover the following offenses: murder, 39 prosecutions; attempted murder, 13 prosecutions; rape, 9 prosecutions; arson, 7 prosecutions; burglary, 10 prosecutions; unknown, 12 prosecutions. Seemingly (unless some were included among the unknowns) there were no prosecutions for the other two capital offenses on Tennessee's statute books at the time—robbery and assault with intent to rape.

would view it). Or, it may be that the differences are to be explained more by the quality of the records kept, and by the vagaries of history's preservation of records.

TABLE VII

	Howington's 6 Tennessee Counties 1826-1861		Hindus' 2 South Carolina Counties 1818-1860	
	A Capital Prosecutions	B	A Murder, Assault, Poisoning, Sex	B
Convicted	29%	59%	53%	66%
Acquitted	20%	41%	26%	34%
No Bill/Dismissed	39%			
Other Outcome	12%		23%	

Is there no more satisfactory way to leave the discussion? Three further comparisons permit us to probe a bit further, though not to resolve the issue. First, Davidson County population and capital prosecution statistics suggest a considerable post-1835 penetration by the legal system into the peculiar institution akin to that which Hindus found in South Carolina. Excluding free black prosecutions, 69.7% of the capital prosecutions in Davidson County during the years that Howington studies were brought against whites, and 30.3% were brought against slaves.¹⁹⁰ Again excluding free blacks, the white population climbed from 59% of the total population in the 1840 census, to 63% in 1850, and 68% in 1860.¹⁹¹ Because Howington has not yet reported the distribution of the cases over time, and because of differences in the types of offenses for which slaves and whites were capitally punishable, we cannot be absolutely certain. Nonetheless, the Davidson County population/prosecution proportions appear fairly similar.

Second, while Howington does find different conviction rates and punishments of whites, slaves, and free blacks, the differences do not all cut in the same direction. For example, slaves prosecuted for murder of whites were seemingly acquitted more often than

190. These percentages are derived from Howington, *supra* note 70, Table III, at 15.

191. 1870 POPULATION STATISTICS, *supra* note 186, at 61-63. It should perhaps be noted that the changing population composition of Davidson County during these decades was somewhat unusual for the antebellum South. Percentage-wise, the free blacks were growing in population much the most rapidly, followed by whites, with the slave growth rates being the smallest. I assume that Nashville must have already begun to function demographically as an urban center, drawing in free blacks from more rural counties.

slaves prosecuted for the murder of other slaves. But, if they were found guilty, the former were almost twice as likely to receive a sentence of death. Again, almost the same percentages of white and slave defendants were acquitted in capital cases, 48% and 45% respectively. Yet, except in Davidson County, there was a much higher tendency to convict whites for an offense lesser than that named in the indictment—in large part, conceivably, because of differences in the applicable law.¹⁹²

Third, the most striking set of statistics, the one that, inadvertently perhaps, best captures the quality of Tennessee black justice in the state's capital city, pertains to the sentences given to convicted whites and free blacks by the Davidson County criminal court. The modal and the median sentences were identical for both groups—three years. Blacks fared better with respect to the second most frequent sentence (one year as opposed to five years for whites), but slightly worse in average sentence (4.5 years versus 3.8 years for whites). These were sentences following high, but not very different, rates of conviction (82% for free blacks, and 75% for whites).¹⁹³ Whether one should interpret these Tennessee statistics as pointing toward *essentially equitable* behavior by judges and juries or interpret them as showing a *certain amount* of inequitable treatment,¹⁹⁴ is debatable. But two points seem plain, unless Howington's further research greatly shifts the balance of the facts he has so far uncovered. First, the Tennessee data do not sustain the common view of historians that free blacks rarely received justice.¹⁹⁵ Second, although South Carolina black justice does not look quite so dreadful when set against its European origins, it fares almost as badly in comparison with Howington's Tennessee as it did in comparison with Hindus' Massachusetts.

Where, then, does all this get our Whig? And, where does it get us and the legal history of slavery? Where it gets our Whig is clear: brimming over with the partial fullness of the southern glass, and perhaps incautiously forgetting to address Hindus' last major propo-

192. Prior to 1854, there was no category of second degree murder for slaves, and manslaughter, not being a capital offense, did not fall within circuit court jurisdiction. See Howington, *supra* note 70, at 17. Howington suggests that if the pre-1854 juries had been able to convict slaves for second degree murder, the acquittal rates might have been lower. *Id.* at 18 n.32. He is probably right, but the statistics for post-1854 cases (only six cases in all) are insufficient to be sure.

193. See *id.* at 24.

194. The statutory inequalities are plain enough, but are not on point here, other than as marking the bounds within which judge and jury had to act.

195. See generally, I. BERLIN, *SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH* 317-18, 334-36 (1974).

sition—that increasing tensions over slavery were reflected in higher lash-rates as the Civil War approached.¹⁹⁶

196. Supposing, however, that our Whig were not so incautious, but rather diligent almost to the point of tediousness, he might go on to note the following points. Critical to Hindus' overall conclusion that the function of law in South Carolina was "preserving white dominance" and that black justice in the State "was never intended to be just" are, besides the evidence already discussed, two additional types of information. One is statistical data going to show that punishments became more severe, and conviction rates increased in response to, the "crises of the 1850's." *Black Justice Under White Law*, *supra* note 30, at 590. The other amounts to a few pieces of impressionistic evidence about the attitudes of individual judges and about the resolutions of a case or two.

I expect that our Whig, were he fairly knowledgeable about the matter, would take up the latter first. While he might agree with Hindus on a number of the "bits of impressionistic evidence," he might want to enter the following reservations. He might say that he was puzzled by what seemed oddly uneven extrapolations from cases to judicial attitudes and motives, depending on whether there was a white on trial for murder of a black or a black on trial for murder of a black. In the former instance (*see id.* at 580 n.22), in the case of *State v. Posey*, 35 S.C.L. 54, 4 Strob. 103 (1849), he might say that he was not clear that Hindus approved the court's finding that a technical flaw warranted reversing a conviction. By contrast, in the latter instance, Hindus, in discussing the case of *State ex rel. Matthews v. Toomer*, 25 S.C.L. 44, 1 Chev. 106 (1840), seemingly thought that the court's similar use of a technicality to reverse a conviction of a black was obviously what it should have done. *Black Justice Under White Law*, *supra* note 30, at 592 n.54. The reversal of the white's conviction, our Whig might think, seemed to warrant in Hindus' mind a possible minus point, but the reversal of the black's conviction would warrant no equivalent plus point. Second, our Whig might think it peculiar to use as evidence of the general judicial tenor of mind when confronted with the Denmark Vesey "insurrection," a declaration made some six or seven or eight years later in a very different connection—one made, moreover, by a semi-retired septuagenarian judge, a judge never prized by his colleagues for undue attention to the niceties of procedure. *See* note 236 *infra* (for my reasons for this judgment). Third, he might think it peculiar to state that the principal proposal for slave reform—one ventured by the State's leading jurist, John Belton O'Neill, "was not even discussed"—when in fact its publication was the occasion of something of a brief editorial battle among two South Carolina newspapers, albeit one of them a minor one and perhaps a "house-organ" for O'Neill. *See Negro Rights, Unionism, and Greatness*, *supra* note 25, at 177-87.

Be that as it may, I think our "silent southerner" would turn his chief attention to the data Hindus adduces in favor of a response to the crises of the 1850's and would raise two questions. First, is it plain that the data on conviction rates require Hindus' conclusion? While it is true, as Hindus states, that "conviction rates, which had been declining" increased "in that decade," it also seems true both that capital punishment rates did not increase (at least during the years for which Hindus gives us the data, 1850-1854), and that the increase in conviction rates during the 1850's still left them below those of all previous decades but one. *Black Justice Under White Law*, *supra* note 30, at Table VIII, at 590. Is that a significant reversal? To reenlist Yule's Q, the association between decade and conviction rate for the 1840's and 1850's yields only an unimpressive .199. Our Whig might be forgiven for wanting more proof. If, however, he sought to make the best case possible on behalf of finding a strong associational relationship, and that he therefore standardized the cases in the matrix so as to correct them for the circumstance that the black population was growing more swiftly than the white, he would come up with a case-number standardized-on-population matrix such as this, and with the values for the measures of association printed immediately below the matrix:

Where it gets us and the legal history of slavery is a bit different. Whether we agree or disagree with the substance of our Whig's assessment, we should concede the following procedural points. First, from comparing what our Whig and Hindus and Howington have said about the data, it is hard to resist the conclusion that there is a strong tendency to veer into one type of Whig history or another. Second, we may feel fortified in our earlier suspicion that to an unusual degree the interpretive differences stem less from the data base and more from the kinds of explanations that the various historians in the field find satisfying, less from the evidence and more from the dispositions and principles of selection that please the various scholars.¹⁹⁷ Third, if we are at all cautious, we must

	1840's	1850's
WHITE	399 indictments	503 indictments
BLACK	152 indictments	118 indictments

Uncertainty coefficient:

symmetric — 0.00841

with race as the dependent variable—0.00959

with decade as the dependent variable — 0.00748

Kendall's Tau B — -0.10176

Gamma — -0.23777

These results tend in Hindus' direction, but only slightly. They are not sufficient to clinch the case. Second, what of the increase in the severity of punishment for those who were convicted? Hindus considers this important, citing seemingly in approval, one "northern jurist" (John Codman Hurd) who "decried the kind of justice these courts provided as 'acts of unlawful assemblies.'" *Id.* at 591. That is arguable, since even though what the courts did may or may not have been much better than acts typical of unlawful assemblies, the courts were lawful. Hindus then suggests, adducing in support the statements of two individuals, "[f]ew South Carolinians disagreed." *Id.* That is getting an opinion survey out of not very many respondents. Be that as it may, more central are the following "mean lashes per sentence": 1818-1830, 16.7; 1831-1840, 33.2; 1841-1850, 44.5; 1851-1860, 56.1. *Id.* On its face, the change is quite impressive, even though the numbers remain very low against an eighteenth-century European backdrop. I expect Hindus is right—something was happening in the data. Yet a contrary argument can be made.

If one looks separately at the nine types of crime that Hindus reports, the change is less impressive. For example, relative to 1841-1850, for 1851-1860 lash-rates go up in five categories (crimes against property, verbal crimes, sexual crimes, moral crimes, and threats to white authority) and down in four (crimes against the person, against order, crimes of slave status, and discretionary prosecutions). To reach a firm conclusion one would have to know at least three things one does not know from the information given. First, what were the year-by-year totals? Second, what were the medians, the modes, and the standard deviations? Averages (means) have the obvious defect that they are disproportionately swayed by extreme cases. Third, what is the evidence that if (on closer inspection of the data) the severity of punishment did indeed increase significantly, the reason was response to crisis? On this Hindus offers no evidence. And while we may guess that he probably is right, we really do not know.

197. See text accompanying note 26 *supra*.

admit that as yet there are not sufficient data bases of trial level black justice to form any safe generalizations about its functioning across the South as a whole. Fourth, there is nothing particularly distressing or peculiar about finding these veering tendencies. Just as half a century ago it was not surprising that historians tended to deprecate Black Reconstruction and to emphasize the "good side" of slavery, so it is not surprising to find today many historians taking a grim satisfaction in looking at things past the other way on. Historians, after all, like to tell stories. Stories need plots and audiences. The tastes of succeeding audiences for southern stories change usually in relationship to each generation's perceptions of the sensible political arrangement of black and white relations. The post-*Plessy v. Ferguson*¹⁹⁸ generation of whites, having decided on "separate but equal," found U. B. Phillips plausible. Since *Brown v. Board of Education*¹⁹⁹ we have thought more of equality between the races, and less of separation. And many of us are less happy than our historian forebears were with other nonracial inequalities—issues of wealth, distribution of power, and so on. So, and equally naturally, stories of a different sort are more plausible and, possibly, a bit more true. Although a later generation may disagree with us, it is impossible to foretell. In the meantime let us continue our examination of the matter at hand by turning to those writings in the field we have not yet assessed.

E. Understanding Appellate Decisionmaking: Flanigan, Nash, and Cover

In the view of one scholar, the writings of Nash and Flanigan, the two earliest venturers among the group we are considering into the area of law and slavery, exhibit substantial similarity in approach. According to Michael Hindus, Flanigan's work, "in its use of appellate court records and its emphasis on procedural matters, . . . fits into the Nash mold."²⁰⁰ I am not altogether sure what the Nash mold is,²⁰¹ despite, as we have noted earlier,²⁰² Mark Tushnet's location of its products along a single-valued continuum constructed from the abolitionists' categories,²⁰³ and despite his location of Flanigan's writings "closer to the conservative end" of the same

198. 163 U.S. 537 (1896).

199. 349 U.S. 294 (1954).

200. Hindus, *supra* note 30, at 576 n.4.

201. Although I do have the sense that Hindus does not think it is the fine sort that produces intellectual brie, plainly it is not the mold that explains Hindus' cast—which, given his Berkeley Ph.D., must be the Stamp die.

202. See note 63 *supra* and accompanying text.

203. Tushnet, *supra* note 28, at 176 n.197.

spectrum.²⁰⁴ Arguably, some of the objections leveled against Robert Cover's fascinating explorations of (chiefly) northern judicial reactions to the Constitution's compact with slavery generate from using a similar continuum. Ronald Dworkin²⁰⁵ and Derrick Bell²⁰⁶ seem to be perched on Tushnet's continuum, if anyone is, when suggesting Cover is not accusatory enough in *Justice Accused*²⁰⁷ and too sympathetic with the dilemmas of these northern judges. There is, furthermore, lack of agreement on Cover's position. Thus, James Ely²⁰⁸ is not convinced that Cover has proved the firmness of the initial ground on which he stands—that these judges really did suffer any severe doubts over the question of slavery's immorality versus the judge's duty to administer the law. By contrast, Eugene Genovese suggests that Cover comes close to taking a "cheap shot"²⁰⁹ in discounting too greatly the genuineness of the value placed by those judges on "Union."

It is not my intent at this juncture to undertake an adjudication among Cover's various critics, despite the fact that some of them appear more disposed to snipe at Cover than to reexamine the evidence that led to his judgments. The latter task I shall undertake, but in Part Two of this Article where it more appropriately belongs—because it pertains, to the extent I shall assay it, to the slavery adjudications of one of the three courts we will there be principally concerned with. I have two purposes in this section. The major purpose is to explain why I have difficulties with Flanigan's analysis, especially with his interpretation of the juridical behavior of two courts—those of North and South Carolina—that were particularly influential in the formative years of slavery jurisprudence.²¹⁰ The minor purpose is to indicate briefly why I think Cover's analytic approach is so useful. Flanigan's essay, to be sure, begins very much where I came out earlier: "The legal status of slaves was anomalous; they were at once property and persons."²¹¹ That is similar to my view that Roger Taney oversimplified when, in *Dred Scott*,

204. *Id.*

205. Dworkin, *The Law of the Slave Catchers*, THE TIMES (London) LITERARY SUPPLEMENT 1437 (Dec. 5, 1975).

206. Bell, Book Review, 76 COLUM. L. REV. 350 (1976).

207. R. COVER, *supra* note 27.

208. Ely, Book Review, 1975 WASH. U.L.Q. 265.

209. Genovese, Book Review, 85 YALE L.J. 582, 587 (1976). Otherwise the review is generally laudatory.

210. See also D. Flanigan, *The Criminal Law of Slavery and Freedom, 1800-1868* (1973) (unpublished dissertation at Rice University); Nash, *supra* note 19. My impression is that the author of the former had not read the latter, since I expect that some of his judgments discussed below would have been different if he had.

211. Flanigan, *supra* note 26, at 537.

he intimated that from the time of the Revolution on there was a southern consensus on viewing the slave as mere property.²¹² But Flanigan diverges from my view almost immediately by saying on the same opening page, "[o]n the civil side of the law the suppression of the personality was nearly complete,"²¹³ by citing an 1861 case as "a classic exposition of the law of slavery"²¹⁴ (an Alabama case stating that the slave "has no legal mind, no will which the law can recognize"),²¹⁵ and by asserting that:

In criminal matters, however, the personality of the slave became more evident In a criminal trial the law considered the slave a responsible individual and meted out its harsh punishments accordingly. Ironically, the law demanded a greater degree of responsibility from the slaves than from their masters, since most states punished slaves more severely than whites for a large number of crimes.²¹⁶

I have three difficulties with this opening page—a page that is important because it sets the stage for and characterizes much of the rest of the analysis. First, I do not think that the degree of required legal responsibility can be simply prorated from the severity of punishments.²¹⁷ More is at stake in the setting of punishments. Second, Flanigan is in a certain sense correct that the slave's personality was more suppressed in civil, than in criminal, cases. I am not sure, however, that suppression of personality is an analytically fruitful phrase. May it be, like Elkins' phrase, "moral personality,"²¹⁸ a term that creates as much fog as it does clarity? Its salient characteristic is the strength of its normative overtones relative to its analytic precision. Strictly speaking, the question to be addressed is what legal rights, inequalities, and obligations did southern statutes and case law create and foster during the antebellum period? But do not the terms "suppression of personality" and "moral personality" contain powerful allusions to late twentieth-century values—*e.g.*, "fulfillment of self" and "positive freedom"²¹⁹

212. See *A More Equitable Past?*, *supra* note 25, at 201-02.

213. Flanigan, *supra* note 26, at 537.

214. *Id.*

215. *Creswell's Ex'r v. Walker*, 37 Ala. 229, 236 (1861), *quoted in* Flanigan, *supra* note 26, at 537. But note that he also mentions the 1846 Tennessee case, *Ford v. Ford*, 26 Tenn. (7 Hum.) 92 (1846), as an exception. Flanigan, *supra* note 26, at 537 n.2.

216. *Id.* at 537-38.

217. See Part One (D) *supra*.

218. See generally S. ELKINS, *supra* note 22, at 81-139.

219. See, *e.g.*, *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1 (1973) (especially the values accepted by the minority and explicitly rejected by Justice Powell writing for the Court). *Rodriguez* contended for a constitutional right requiring equal per capita state and local expenditures on Texas public school systems. His attack on Texas' heavy reliance on property taxes, and its resulting interdistrict disparities in per capita school spending, depended on a "positive freedom" base reflected in Justice Marshall's dissent, in which an

—that may obscure the precise ascertainment of things past? My third difficulty with Flanigan's opening page is that I am unsure why *Creswell's Executors v. Walker*²²⁰ is judged "a classic exposition of the law of slavery." One of several possible alternatives to *Walker* is *Ford v. Ford*,²²¹ the mid-1840's decision in which the Tennessee court said that a slave has "mental capacities, and an immortal principle in his nature, that constitute him equal to his owner, but for the accidental position in which fortune has placed him."²²² Another is *Guardian of Sally v. Beaty*,²²³ a South Carolina decision of the 1790's in which the judge permitted one slave to purchase and free another despite the seeming conflict of the purchase with the slave code.²²⁴

The leading South Carolina judge from the 1830's to the Civil War, John Belton O'Neall, actually on one occasion urged that *Guardian of Sally* should be the reference point for slavery jurisprudence. Thus, in 1848 he stated:

The first thing which ought to be done, is to get back alongside of such men as C.J. Rutledge . . . in the case of the *Guardian of Sally v. Beatley (sic)*, . . . an expression of the benevolent feelings which had been tried in the crucible of the revolution; there was perhaps no very correct notion of law in the ruling of the case, yet it spoke what, I think, always belongs to Carolina—a love of mercy, or right, and a hatred of that which is mean or oppressive.²²⁵

It may of course be argued that sentiments such as O'Neall's were rare, that O'Neall's expressions came in dissent, that the majority opinion refused to grant freedom, and therefore that the earlier case to whose sentiments he vainly appealed could not possibly be regarded as a classic. This argument, cheering as it may be to the empty-glass Whig, misses the main point, which is to inquire into the meaning of the term "classic" and into the analytic consequences of the meaning intended. There are at least three possible meanings of the word "classic" as used here, each of which has analytic consequences. First, *Walker* may be called a classic because it is deemed representative of the southern case law of slavery over the whole antebellum period. Second, the term may be applied because the case is considered representative of the point to which

equally good education is lifted to the status of a prerequisite for equal enjoyment of other constitutional rights. See I. BERLIN, *TWO CONCEPTS OF LIBERTY* (1958).

220. 37 Ala. 229 (1861).

221. 26 Tenn. (7 Hum.) 92 (1846).

222. *Id.* at 96.

223. 1 S.C.L. 104, 1 Bay 260 (1792).

224. *Id.* at 105, 1 Bay at 262.

225. *Vinyard v. Passalaigue*, 33 S.C.L. 249, 254, 2 Strob. 536, 549 (1845) (dissenting opinion). For a fuller treatment, see *Negro Rights, Unionism, and Greatness*, *supra* note 25, at 172-75.

the law of slavery had developed by the time the case was decided, at the outbreak of the Civil War. Third, *Walker* may be regarded a classic in much the same way as is Thomas Ruffin's opinion in *State v. Mann*²²⁶—because of its logic's purportedly ruthless elegance in laying down the requirements of dominion inherent in the peculiar institution.²²⁷

226. 13 N.C. (2 Dev.) 263 (1829) (reversing lower court holding that the employer of a slave could be indicted for committing assault and battery against the slave). The defendant had shot and wounded the slave, who had run off in the midst of chastisement and had refused to halt when so ordered by the defendant.

227. See, e.g., E. GENOVESE, *supra* note 176, at 35-36.

Never has the logic of slavery been followed so faithfully by a humane and responsible man. As Ruffin knew, no civilized community could live with such a view . . . The court had to reconsider its attitude.

In 1834, in *State v. Will*, the liberal Judge Gaston, speaking for the same court, handed down a radically different doctrine at once infinitely more humane and considerably less logical.

Will had killed an overseer who, similarly frustrated at the slave's running away during a whipping, tried to shoot him. Genovese goes on to say, the "Supreme Court, under Judge Gaston's leadership, overturned Will's conviction . . . Judge Ruffin must have been relieved; he remained silent and did not dissent from a ruling that so clearly contradicted the philosophy inherent in his own previous judgment." *Id.* at 36. But compare Cover on the same judge:

[Ruffin] was extraordinary (really very much like Holmes) in his eagerness to confront the reality of the unpleasant iron fist beneath the law's polite, neutral language. Ruffin's unusual refusal to clothe an exploitative and brutal relationship with the trappings of anything save power and force led him to infer a legislative policy of the utmost brutality from the mere existence of slavery.

R. COVER, *supra* note 27, at 78. Compare also Harriet Beecher Stowe:

No one can read this decision, [*Mann*] so fine and clear in expression, so dignified and solemn in its earnestness, and so dreadful in its results, without feeling at once deep respect for the man and horror for the system. The man . . . has one of that high order of minds, which looks straight through all verbiage and sophistry . . . There is but one sole regret; and that is that such a man, with such a mind, should have been merely an expositor, and not a reformer of law.

H. STOWE, *KEY TO UNCLE TOM'S CABIN* 78-79 (1853), *quoted in* R. COVER, at 77 n.*

I have been a bit uncomfortable with the conventional view of Ruffin's slavery jurisprudence for some time. See *A More Equitable Past?*, *supra* note 25, at 221-23. For one thing, *State v. Mann* seems to be more of an aberration than a norm in the North Carolina court's decisionmaking. Chief Justice John Louis Taylor had just died, with Ruffin replacing him (as associate justice until 1833, when he succeeded Leonard Henderson as chief justice). I am not at all sure that Taylor's court would have said anything of the sort. For another thing, Ruffin's later jurisprudence, when it differed from his colleagues, almost invariably was harsher. See, e.g., *State v. Caesar*, 31 N.C. (9 Ired.) 391 (1849) (in which Ruffin dissented from his colleagues' reversal of a slave's conviction for homicide). The slave had killed a white who had assaulted a Negro friend of his. Ruffin believed that the reversal set a politically dangerous precedent by allowing slaves to "assume to themselves the judgment as to the right" of resistance to white authority. "First denying their general subordination to the whites, it may be apprehended that they will end in denouncing the injustice of slavery itself, and, upon that pretext, band together to throw off their common bondage entirely." *Id.* at 428. Frederick Nash (Associate Justice, 1844-1852, and Chief Justice, 1852-1858) and Richmond Pearson (Associate Justice, 1849-1858, and Chief Justice 1859-1878) thought differ-

Each of these meanings has difficulties, at least if we want disinterestedly to examine the case law of slavery in its full variety. If the first meaning is intended, the error is plain: *Walker* simply does not characterize the varied flows and ebbs of nineteenth-century slave law's evolution.²²⁸ If the second meaning is intended, there is room for argument about *Walker's* representativeness.²²⁹ If the third meaning is intended, there is a clear historiographical danger that the historian may slide imperceptibly from what is a fairly narrow definition toward a broader definition, and in turn forget the limits of the original meaning. Taking on a wider life of its own, the analytic term begins to force the evidence this way and that, measuring cases and opinions by their perceived proximity to, or distance from, the classic case, rather than approaching them with abundant caution for their potential uniqueness, each having an equal *ab initio* right to the historian's understanding.²³⁰ This happens, I think, primarily when the historian wants it to happen because the consequent ordering of the evidence fits his predispositions on the subject.

The results of such an approach can be selective readings of the evidence and, ultimately, conclusions on important matters that are doubtful or just plain wrong. Let me illustrate my point by examining Flanigan's treatment of the early nineteenth-century slavery jurisprudence of the North Carolina and South Carolina appellate courts. First, consider Flanigan's assertion that South Carolina's "high court was far more interested in convictions than in the methods trial courts used to obtain them."²³¹ Since this sweeping indictment of the South Carolina judges' motives comes just after Flanigan mentions two cases in which the high court overruled lower court convictions of blacks because of defects in the trial courts'

ently. Objecting strongly to Ruffin's view that "reason of slavery" required slaves to put up with physical abuse by any and all whites, Nash stated: "Necessity is the tyrant's plea, and policy never yet stript, successfully, the bandage from the eyes of Justice." *Id.* at 409. Pearson asked: "Does this show he has the heart of a murderer? On the contrary, are we not forced . . . to admire, even in a slave, the generosity, which incurs danger to save a friend?" *Id.* at 406. Lastly, with respect to *State v. Mann*, I am not convinced that the Ruffin opinion really was that well honed. It presupposes that the employer of a slave must have the same extent of "absolute authority" as the master of the slave if the institution is to survive. (The conventional treatment of the case overlooks the circumstance that Mann was not the slave's master.) Query whether this is really so.

228. See Tushnet, *supra* note 28.

229. That is to say, and as I shall argue in Part Two of this Article, I do not think that *Creswell's Executor* represents the average views of southern appellate judges on manumission, even on the point in question—whether slaves could make an election between freedom and slavery if their master provided in his will for such a choice.

230. See H. BUTTERFIELD, *supra* note 1.

231. Flanigan, *supra* note 26, at 541.

procedures,²³² the reader anticipates that what follows will be supporting evidence. Yet what follows is this:

In 1830, when a master objected that the magistrates had tried his slave more than six days after the offense, allegedly insurrection, and that other slaves were allowed to testify against him without oath, the Court of Appeals was not disturbed. One judge remarked that "when the dreadful . . . consequences of the insurrection of slaves in South Carolina, are taken into consideration, it appears to me, that the judges of the superior courts ought to be extremely cautious in interfering with the magistrates and freeholders . . . and that they ought not to be eagle eyed in viewing their proceedings, and in finding out and supporting every formal error or neglect, where the real merits have been duly and fairly attended to, and determined according to justice."²³³

Flanigan next offers an even broader generalization: "South Carolinians' general disregard for the rights of slaves (and also of free blacks) was most spectacularly revealed in the events surrounding the discovery of Denmark Vesey's conspiracy in 1822. Large numbers of Charleston free blacks and slaves went to the gallows after secret trials."²³⁴

How much of this bears scrutiny?²³⁵ Because the high court never ruled on the fate of Vesey and his co-conspirators, we must rely upon the prior, and seemingly damning, quote abjuring sharp scrutiny (being too "eagle-eyed") of trials of blacks in the magistrates-and-freeholders courts.

While I have other objections to this passage²³⁶ (especially that

232. *Ex parte Richardson*, 16 S.C.L. 136, Harp. 308 (1824) (prohibition granted because one of the triers of fact was not a resident of the county where the crime occurred); *Scott v. Hudnall*, 11 S.C.L. 168, 2 Nott. & McC. 419 (1820) (reversing because the slave court had not tried the slave within the six-day limit required by the law).

233. Flanigan, *supra* note 26, at 541-42 (quoting Bay, J., in *Kinloch v. Harvey*, 16 S.C.L. 224, 228 Harp. 508, 517 (1830)).

234. *Id.* at 542.

235. I do not wish to spend time, although some full-glass Whig may, questioning how large the "large numbers" were that "went to the gallows" (of 131 persons arrested, ultimately 35 were executed and 32 were deported). One could ask, for example, whether the numbers sentenced were large, not so large, or moderate, and note that the conclusion may depend upon one's perspective as to what really is a mass horror. Moreover, it should be noted that at the time some South Carolinians objected, and more did later. *See, e.g.*, D. MORGAN, JUSTICE WILLIAM JOHNSON: THE FIRST DISSENTER 127-34 (1954) (narrative of the objections of Justice William Johnson of the United States Supreme Court). But the genuinely important point relevant to our immediate analytic concerns is different. It pertains not to the fate of Denmark Vesey and his would-be comrades in arms, if in fact insurrection was what they were about, but rather to the evidence that Flanigan adduces for his generalization about the South Carolina high court.

236. I have four additional comments on the use of that quotation. First, is the quotation used fairly—that is, with appropriate emphasis on the judge's qualification when one ought not be too eagle-eyed ("where the real merits have been duly and fairly attended to, and determined according to justice")? In other words, is the judge indicating a genuine "hang 'em" mentality, or is he objecting to the same purportedly excessive appellate court attention to formal detail that many twentieth-century critics of nineteenth-century proce-

the judge Flanigan quotes was not a member of the court of appeals at the time), my main objection points to a larger historiographical moral. My objection is that Flanigan's method of selection results in a more general failure to penetrate to the really interesting questions about a curiously intriguing bench. These include questions about the causal linkages among: (a) judicial motives; (b) the

dures have leveled—and that Flanigan elsewhere draws our attention to?

Second, is there any good evidence to believe that what this judge said typified the thinking of the South Carolina high court? For two reasons it is interesting here that Flanigan quotes from Catterall, rather than going to the original case report. 2 H. CATTERALL, *supra* note 14, at 340-41. See Flanigan, *supra* note 26, at 542 n.12. One is that he does not tell the reader that the case in which the quote occurs was a civil suit, not a criminal one, brought by a slave-owner opposing not capital punishment, but deportation of a slave found guilty of insurrection. To the judge it was important that deportation "was an act of mercy" (as opposed to execution). *Kinloch v. Harvey*, 16 S.C.L. 224, Harp. 508 (1830). The other reason is that the immediately preceding case in Catterall is *State v. Scott*, 17 S.C.L. 136, 1 Bail. 294 (1829), in which the high court unanimously reversed what it took to be the lower court's defective proceeding against a person suspected of Negro-stealing. Note the comment in the case by Judge David Johnson: "The question, whether the prisoner is intitled to be tried by a jury, . . . or in the summary, and in some degree arbitrary manner, authorized by the act under which he was arrested, is, of itself, of little less importance than that of life and death." *Id.* at 138, 1 Bail. at 298.

Third, the judge whom Flanigan quotes—Elihu Bay—never was a member of the three-judge high court that South Carolina created in 1824 to replace the previous arrangement of two en banc appellate courts (one in law and one in equity). Rather, on account of his age Bay was relieved from riding circuit and permitted in semiretirement to hear occasional cases in Charleston. Taking Bay's views as representative of the high court in 1830 therefore makes little sense. If one takes as relaxed a position about who constituted the "high court" as Flanigan does, then one ought not ignore opposite-tending judicial statements bearing on judicial aims. For example, in *State v. Hudnall*—one of the very cases cited by Flanigan in asserting that South Carolina's court preferred convictions over fair trial methods—Judge Richard Gantt stated:

Would it not be in direct violation of the principles of natural justice, as well as the order of civil government for unauthorized individuals to usurp jurisdiction . . . and carry into execution the solemn and awful sentence of death?

. . . .

. . . Every feeling of humanity and justice revolts at the idea, that any other mode of trial, less formal and substantial than what the act has prescribed, should be sanctioned.

11 S.C.L. 170, 2 Nott. & McC. 423-24 (1820).

Fourth, even if the 1824 judicial reorganization had not taken place, it is doubtful that Elihu Bay's views of optimal judicial procedures indicated much more than his own predilections. Bay was not given to niceties of procedural detail as long as in his judgment substantive justice was done. For example, see Bay's dictum in *Kinloch v. Harvey*, 16 S.C.L. 224, 228, Harp. 508, 517 (1830). Another case that predated *Kinloch* was *State v. Gee*, 1 S.C.L. 65, 1 Bay 163 (1791), in which Bay sentenced a slave-murderer to the maximum penalty that South Carolina's law at that date allowed—seven years at hard labor—notwithstanding defendant's arguments that could have been adduced to reach a less punitive conclusion. If I may quote myself from some eleven years ago: "Elihu Bay seems to have been more interested in punishing persons whom he thought wicked and letting off those whom he thought innocent, than in how he did it." Nash, *supra* note 19, at 132 n.41. For the reasons underlying my judgment, see *id.* at 73-82, 167.

judges' sense of their role; (c) the case-law results in various areas of decisionmaking within slavery jurisprudence; and (d) judicial attitudes concerning other issues such as states' rights versus the principles of Union. Because I have addressed these questions elsewhere,²³⁷ I shall not do so here at length. Suffice it to say that the reader of Flanigan's essay would not have the slightest inkling that the court about which he hands down his peremptory judgment was a court whose majority: (a) used procedural technicalities to void convictions under the oppressive South Carolina Colored Seamen's Acts;²³⁸ (b) solidly favored nationalism in a conflict between a United States Supreme Court Justice's claim about the dictates of his occupation and the demands of a South Carolina slave-patrol law;²³⁹ (c) voided the oath of superior allegiance to the South Caro-

237. See *Negro Rights, Unionism, and Greatness*, *supra* note 25.

238. See *State v. Shaw*, 15 S.C.L. 181, 4 McCord 480 (1828); *Calder v. Delieesseline*, 16 S.C.L. 84, Harp. 186 (1824); *Negro Rights, Unionism, and Greatness*, *supra* note 25, at 146-48.

239. *Johnson v. Martindale*, 17 S.C.L. 77, 1 Bail. 163 (1829). In this case a court-martial fined Supreme Court Justice William Johnson \$100 for failing to perform slave patrol duty as required of all slaveholders by an 1819 state statute. He also refused to avail himself of the permitted alternative to serving—hiring a substitute. Unsuccessful, he next sought to obtain a writ from a circuit judge to prohibit the fine's collection, on the ground that the law's enforcement collided with a 1792 federal statute excusing all federal officers from militia duty. Unsuccessful in obtaining this writ, he appealed to the state supreme court, which split two to one. The court majority, David Johnson writing the opinion, insisted that in the collision between two mutually inconsistent laws, the state provision had to give way. Colcock, in the minority, argued that the South Carolina law established the primary duty (not in terms of importance but in terms of prevailing in case of conflict) "that the general government has no right to interfere in the domestic concerns of the States . . . and that the right to elect a Judge" did not give the federal government the power to free Johnson from his local duties as a slaveholding South Carolina citizen. *Id.* at 170-71. The circuit judge, incidentally, who denied the writ and was overruled was Elihu Bay.

240. *State v. Hunt*, 20 S.C.L. 1, 2 Hill 1 (1834) (decided by the court together with the case of *State v. M'Meekin*). Bay once again was overruled in his refusal to issue a mandamus in favor of individuals whose state military commissions had been withheld for refusing to subscribe to the oath of office requirement set by the 1833 Nullification Convention: "I . . . do solemnly swear . . . that I will be faithful, and true allegiance bear, to the State of South Carolina." *Id.* at 2, 2 Hill at 3. One of the majority judges, John Belton O'Neall, wrote an opinion that still must stand as something of a record for combined purple prose, nationalism, and opposition to the whole business of allegiance and oath-taking. To Robert Barnwell Rhett, the grandfather of secessionist fire-eating and counsel for the pro-nullification side, O'Neall's words must have been infuriating. Objecting to Rhett's tracing back to feudal England the concept of the citizen's duty of allegiance, O'Neall stated that the Norman conquerors had imposed feudalism at sword's point and forced "the free spirit of the Saxon to meditate in darkness at the sound of the curfew." *Id.* at 124, 2 Hill at 211. Then he went on to argue that the American revolution had freed from the "phantom of allegiance" the "sturdy republican wanderer, clothed in the skins won by his bow and spear, drinking from the bubbling brook, and eating the bread produced by the sweat of his brow . . ." *Id.*, 2 Hill at 212. In O'Neall's view the very idea of allegiance was "an unfit garb to clothe the republican, . . . like putting on the statue of Washington the robe of the Caesars." *Id.* at 125-

lina (as opposed to the federal) Constitution that the Nullifiers of the early 1830's enacted;²⁴⁰ (d) so undermined South Carolina statutes against manumission that the legislature passed another statute in effect overruling the court;²⁴¹ (e) upheld a large majority of convictions of whites who injured blacks, while reversing a slight majority of felonious convictions of blacks;²⁴² and (f) continued up to the eve of the Civil War (quite in contrast to some other southern appellate courts, not to mention some northern ones), to insist that comity between the states took precedence over anti-freedom South Carolina statutes.²⁴³ I am not saying, of course, that South Carolina black justice was exemplary, or that the South Carolina appellate court was on balance enormously "progressive" in defining the relationships between law and slavery. There is, however, something seriously defective in an analytic approach whose "dismal Whiggery" leads to ignoring all these points.

The other example of dismal Whiggish veering that I wish to examine is Flanigan's discussion²⁴⁴ of one of the most influential judges in the early nineteenth-century development of the law of southern slavery, Chief Justice John Louis Taylor of North Carolina. Flanigan's interpretation of Taylor's jurisprudence, which strikes me as quite odd, is instructive for two reasons: first, for further demonstrating the need to look in some detail at doctrinal developments and judicial motivations on particular courts; and second, for again showing the power of the historian's analytic approach in selecting and distorting the evidence.²⁴⁵ In discussing the problem of providing reasonably fair-minded triers of accused blacks—whether judges and jurors in the regular court system or

26, 2 Hill at 214. For O'Neill the political obligations of the citizen were not properly defined as allegiance at all. "It is allegiance in the dominions of the Autocrat of all the Russias: it is here constitutional obedience." *Id.* at 128, 2 Hill at 220. Regrettably I am not doing justice to O'Neill's opinion, chopping up its rhetoric so. For a fuller treatment, see *Negro Rights, Unionism, and Greatness*, *supra* note 25, at 151-54, or better still see the original, in which O'Neill goes on to give an extraordinary number of reasons why, whatever the South Carolina Nullifiers might erroneously think, the federal constitution's requirements of constitutional obedience to its provisions prevailed over the theory and practice of nullification. In retrospect, it still is one of the great opinions of nineteenth-century American political jurisprudence, and it contributed in no small measure to the legislative decision to reorganize the courts.

241. For an analysis of this process see *Negro Rights, Unionism, and Greatness*, *supra* note 25, at 154-66. Note that I am referring to the post-1835 law, rather than equity, court.

242. Respectively, the percentages were 87.5% and 58.3%. See Nash, *supra* note 25, at 213-15.

243. See *Willis v. Jolliffe*, 32 S.C. Eq. 161, 11 Rich. Eq. 447 (1860).

244. Flanigan, *supra* note 26.

245. Because Flanigan's comments on Taylor are interspersed with other concerns, I shall have to draw them together, leaving it to the reader to go back to the original in order to see whether my elisions introduce any inaccuracies.

freeholders and magistrates in the irregular court systems—Flanigan seems to approve of the sensitivity to the problem of some states,²⁴⁶ including North Carolina, which provided that slave-triers must be slaveholders. He quotes John Louis Taylor to the effect that there were two purposes behind this provision: first, “to surround the life of the slave with additional safeguards;”²⁴⁷ and second, “more effectually to protect the property of the owner.”²⁴⁸

Following these quotes are two surprising assertions. First, Flanigan states that in the 1826 case quoted from, *State v. Jim*,²⁴⁹ Taylor held that the slaveholder requirement was still valid because he “fear[ed] that the nonslaveholding class might harbor a dangerous hatred of the masters’ human property.”²⁵⁰ This is possible, although Taylor does not appear to me to have been a particularly fearful man.²⁵¹ Second, Flanigan asserts that the “requirement of a slaveowner jury was actually a form of disfranchisement directed at those who did not own slaves, but . . . most states were democratic enough to allow nonslaveowner juries.”²⁵² Suddenly the argument’s central concern has shifted from protection of blacks to the master-class’ ill treatment of disadvantaged whites. After several pages Flanigan seeks to tie up this loose end, returning to the subject of Taylor and the North Carolina court, and the question under what circumstances would slave testimony be accepted in trials of other slaves. According to Flanigan, five years before *State v. Jim*, the North Carolina Supreme Court had dispensed, in *State v. Ben*,²⁵³ with a previous requirement that slave testimony be given credence only if it were supported by “pregnant circumstances.” For Flanigan, Taylor’s reasoning in the earlier case was not at all convincing. Taylor, says Flanigan, believed that a 1793 legislative act extending the right of trial by jury to slaves repealed whatever in the previously existing slave code differed from common law rules of evidence.²⁵⁴ But in so reasoning, Taylor was, according to Flanigan, “blinded by superficial equalitarian rhetoric to the realities of slavery and slave law.”²⁵⁵ For Flanigan, the dissenting judge in the case,

246. See Flanigan, *supra* note 26, at 550.

247. *Id.* at 551.

248. *Id.*

249. 12 N.C. (1 Dev.) 142 (1826).

250. Flanigan, *supra* note 26, at 551.

251. But see Taylor’s comment about a “bellum servile” in *Trustees of the Quaker Society of Contentnea v. Dickenson*, 12 N.C. (1 Dev.) 189, 203 (1827). On the whole, Ruffin fits Flanigan’s bill of particulars better in this respect.

252. Flanigan, *supra* note 26, at 551.

253. 8 N.C. (1 Hawks) 434 (1821).

254. Flanigan, *supra* note 26, at 557.

255. *Id.*

John Hall, "maintained a more sensible attitude."²⁵⁶ Hall realized that what appeared superficially to be an extension of equality in fact withdrew "an important statutory protection" from slaves. Therefore he dissented, and "Ben went to his death, a sacrifice to 'equality' in North Carolina."²⁵⁷ Flanigan concludes: "Five years later Chief Justice Taylor destroyed his own credibility on the issue by refusing to extend the reasoning of *State v. Ben* to abolish slaveowner juries."²⁵⁸ Flanigan, finding Taylor inconsistent, even inhumanitarian, in two cases, seems to consider the chief justice a "bad" judge, or at least one blind to the realities of slavery.

That sounds convincing, and quite damning, but is it really? The perceptive reader might spot a curious omission: with whom did Taylor destroy his credibility? We are nowhere told. Certainly not among his contemporaries—there were no newspaper editorials about his perfidious decisionmaking; his fellow judges did not rise against his leadership; William Lloyd Garrison did not berate him. Obviously, Taylor has destroyed his credibility only with Flanigan. It is clear that what we have before us is a classic illustration of Whiggish "presentism," one that abbreviates and selects in a way that inadvertently bars adequate understanding of the past.

I want here to pursue this issue a bit further by offering an alternate explanation of Taylor's behavior in *Jim* and *Ben* as an example of the type of analysis that I think necessary in order to avoid Whiggish veering and to reach "adequate understanding." It seems to me that three analytic steps are necessary, which, if taken, leave us much less certain than Flanigan that Taylor's decisionmaking was altogether reprehensible.

The first step consists in filling in two gaps of information left by Flanigan. One, although Flanigan emphasizes that Taylor's reasoning in *Ben* sent a slave to his death whereas Hall's reasoning would have saved him, he nowhere tells us that in the other case, *Jim*, the result was exactly the opposite. Two, whatever we may initially think of the results of these two cases, we should look at a bit of potentially relevant biographical detail: Taylor, far from being a scion of the southern master class, was born in London of impoverished Irish parents, came to the colonies as a child with his brother, worked his way through William and Mary, and as a young man was elected to the North Carolina legislature where he unsuccessfully sponsored bills to make it easier for masters to free their slaves. Those gaps filled in, we may be somewhat reluctant to con-

256. *Id.*

257. *Id.*

258. *Id.* at 558.

clude swiftly anything about Taylor's credibility.

The second step consists in seeking to place the particular decisions that confront us within the larger slavery issues that the Taylor court wrestled with. As I have discussed these issues elsewhere,²⁵⁹ I shall only summarize them swiftly here. The principal issues were three: (1) the circumstances in which the court should permit manumissions, given restrictive legislative statutes; (2) whether common law, as distinct from statute, protected the slave at all; and (3) the extent to which slaves on trial should receive due process similar to that guaranteed to whites. On the whole the Taylor court tended to generous emancipatory decisionmaking except in one critical area—manumission that sought to evade state law.²⁶⁰ With respect to the issue of common law protection, Hall and Taylor were divided for almost a quarter of a century, with Hall taking the view that common law did not protect slaves in places where slavery had been established by custom or positive enactment.²⁶¹ Hall took a very rigorous "Continental absolutist" position:²⁶² any restraints on absolute power over the slave were "the consequence of positive laws He that was taken in battle remained bound to his taker forever, [who] . . . could kill him with impunity."²⁶³ Taylor rejected Hall's position passionately:

Upon what foundation can the claim of a master to an absolute authority over the life of his slave, be rested? The authority, . . . is not . . . in the law of nature . . . , not the necessary consequence of the state of slavery . . . [whose] natural inconveniences ought not to be aggravated by an evil, at which reason, humanity, and policy equally revolt.²⁶⁴

For Taylor, whatever legislatures might say about killing a slave: "the crime is unchanged in its essence, undiminished in its enormity. The scale of its guilt exists in those relations of things which are prior to human institutions, and whose sanctions must remain forever unimpaired."²⁶⁵

Even if we did not know that Taylor's doctrines on the issue of common law protection were to become something of a touchstone for judges in other states inclined to "ameliorate" the slave's condition, and to be disparaged as meaningless natural law "twaddle" by

259. See Nash, *supra* note 19, at 52-64. To avoid possible confusion, the reader should note that the name was changed to the Supreme Court 13 years before the actual structural change was accomplished.

260. See *id.* at 34-68.

261. *State v. Reed*, 9 N.C. (2 Hawks) 454 (1823); *State v. Boon*, 1 N.C. (1 Tay.) 103, 106-07 (1801).

262. See Nash, *supra* note 19, at 88-93.

263. *Id.* at 107.

264. *Id.* at 112.

265. *Id.*

thoroughgoing pro-slavery fire-eaters on the southern benches, these sentences might make us think twice about the positions attributed to Hall and Taylor by Flanigan, and search for an alternate explanation.

That explanation can be derived by adopting alternate motivational assumptions about Taylor's and Hall's decisionmaking, assumptions that moreover link two issues—protection of blacks, and trial rights of blacks. The assumptions are these: both judges were unavoidably engaged in a knotty enterprise, seeking to “domesticate” slavery beneath a rule of law. Both were at least somewhat uncomfortable with the task. Neither judge much liked the peculiar institution, feeling southern society was somehow trapped in it. But there was a critical difference: Hall's sense of the incompatibility between the common law tradition and an absolutist view of slavery, coupled with a fairly strong sense of judicial self-restraint, made him at times both logically unable and aesthetically unwilling to force law and absolute dominion together in the absence of positive statute. Taylor, by contrast of a more activist bent, was bound and determined to force the peculiar institution under the common law as much as he could. In most criminal cases pertaining to blacks the results were the same, and as I have elsewhere argued²⁶⁶ the period of Taylor's tenure, from 1800-1829, saw the North Carolina court advancing much further than any other South Atlantic judiciary of the same generation towards extending trial rights and protection against abuse. But on occasion, the two judges' decisionmaking values produced opposite results in particular cases.

To say this is to indicate the third step that we need to take toward adequate understanding. That is to see if, by making these assumptions, we can plausibly explain their differences. Two cases prior to *Ben* require such explanation. About one, *State v. Sue*²⁶⁷ I shall regretfully have to be brief, and simply say that I think Taylor's reasoning was more convincing.²⁶⁸ *State v. Washington*²⁶⁹ raised a dozen years later a critical question seemingly forgotten in *Sue*: did a slave have any right to appeal from the county court to the state supreme court? The prosecution argued that because no appeal had been allowed from the magistrates-and-freeholders courts created in 1741, the same limitation applied to the 1793 jurisdictional transfer of some slave cases to the county court. On this

266. See *A More Equitable Past?*, *supra* note 25, at 204-11.

267. 1 N.C. (1 Tay.) 189 (1800).

268. For an explanation of why I so think, see Nash, *supra* note 19, at 145-48.

269. 6 N.C. (2 Mur.) 100 (1812).

occasion, however, it was Taylor, rather than Hall, who rejected the prosecution's arguments. For Taylor and the court majority, the transfer allowed the slave to avail himself of the benefits of a 1777 law permitting defendants dissatisfied with county court judgments to appeal. Hall, dissenting, objected to the court majority's imputation to the 1793 legislature of an anomaly of justice, one that arose since the 1793 act only provided for trying blacks in county court when the defendant was arrested just prior to, or during, regular county court terms. Slaves arrested at other times were subjected to trials before three justices-of-the-peace, from whom everyone agreed no appeal lay. Thus the anomaly: the timing of the arrest determined the slave's right to appeal. Hall (*quaere*, "maintaining a more sensible attitude?") favored sending Washington to his death rather than attributing the anomaly to the legislators. What can we make of this? I am strongly inclined to think that Hall's was the more neutral, if very chilly, reading of the relevant statutes, and to think that on this critical occasion Taylor's usually meticulous reading of statutory intent gave way to his determination to extend the rule of law over slavery. If he had agreed with Hall in *Washington*, his court would have been put abruptly out of the business of deciding appeals from slave trials. Absent jurisdiction, he would have been powerless. I freely concede that my imputation of motives is debatable. Much less debatable, however, is the conclusion that *Sue* and *Washington* together afford little support for any suggestion that Hall regularly favored the slave and that Taylor did not. Hall's and Taylor's decisionmaking did not fall on any simple liberal-conservative continuum. These precedents in mind, we can sensibly consider alternate explanations for Taylor's positions in *Ben* and *Jim*.

There is, indeed, a very plausible alternate for Taylor's conclusion in *Ben* that the 1741 statutory requirement of "pregnant circumstances" to corroborate the testimony of one slave against another was, by 1821, no longer in effect. It is that he read the relevant statutes neutrally. Most of the argument in the case pertained to whether the 1793 act providing to slaves tried in county court the right to a jury trial and an 1816 act giving to superior courts (one level above the county courts) exclusive original jurisdiction in slave capital cases operated as a repealer of the 1741 requirement. Taylor, joined by Leonard Henderson, said they did. The 1816 act stated, after all: "the trial shall be conducted in the same manner, and under the same rules, regulations, and restrictions, as trials for free men" ²⁷⁰ Hall disagreed, saying that the 1816 Act was quite

270. Quoted in *State v. Ben*, 8 N.C. (1 Hawks) 434, 436 (1821).

silent "as to the competency . . . of witnesses: that, as I apprehend, was left to the law . . . of 1741."²⁷¹ For Hall, and for Flanigan, "a humane policy forbade that the life of a human being (one of themselves) should be taken away upon testimony coming from them, unless some circumstance appeared in aid"²⁷²

But there was another relevant act, one that Flanigan does not bother to mention, but that for Taylor and Henderson (and for myself) was dispositive. An 1802 act specifically declared that in trials for insurrection the testimony of one slave against another had to be supported by "pregnant circumstances."²⁷³ In Taylor's view, if the 1793 jury trial act had not repealed the pregnant circumstances requirement, then this provision of 1802 would have been entirely unnecessary. So must the 1802 legislators have thought, and surely they, nine years after the fact, were in a much better position to know the 1793 legislators' intent than were the judges a third of a century later. So thought Taylor, and not, I think, simply because he was blinded by egalitarian rhetoric.

Finally, what of Jim's case? In my judgment, four aspects provide solid ground for an alternate to Flanigan's conclusion that in *Jim* Taylor destroyed his credibility. First, as we noted earlier, the result was not to hang Jim, but to give him a new trial.

Second, Jim had two grounds for his appeal—one, his objection to a nonslaveholder being on his jury, which Flanigan tells us about, and another, which Flanigan omits. That other ground was the indictment's failure to allege that the assault and attempted rape for which Jim was being tried had been committed "violently . . . and against" the victim's will. The 1823 statute under which the prosecution had been brought had made carnal assault a capital offense only for nonwhites. For whites, such an assault continued to be no more than a misdemeanor. In Taylor's view the very fact of a novel and racially discriminatory punishment constituted "an additional reason for . . . adhering to the established forms,"²⁷⁴ requiring express allegations in the indictment.

Third, there was an excellent statutory reason why Taylor did not do what Flanigan suggests he ought to have done in order to maintain his credibility—extend "the reasoning of *State v. Ben* to abolish slaveowner juries."²⁷⁵ The reasoning of *Ben*, we recall, turned on the intent of the 1793 jury trial statute, which Taylor had

271. *Id.* at 441.

272. *Id.*

273. *Id.* at 438-39.

274. 12 N.C. (1 Dev.) 142, 144 (1826).

275. Flanigan, *supra* note 26, at 558.

declared "was a virtual repeal of so much of the . . . [previous 1741 code] as differs from the Common Law rule of evidence . . ." ²⁷⁶ Flanigan argues that Taylor was inconsistent, five years later, in not seeing the 1793 statute as abolishing slaveowner juries. The 1793 statute, however, expressly directed "the Jury to be composed of owners of slaves." ²⁷⁷ How is it, then, that the spirits of *Ben* and the statute should have led to abolishing the statute's explicit provision?

Fourth, inasmuch as the court granted Jim a new trial, and inasmuch as Jim objected to the procedures of his new trial as well as of his former one, he appealed his case again to Taylor's court. In the second trial, which also reached a verdict of guilty, the principal witness had varied in parts of her testimony, primarily as to what she had been doing in her house when, she alleged, Jim had entered it. Jim's counsel had moved in the lower court for complete rejection of her testimony, which would have ended the case. The judge, however, had instructed the jury that they could reject whatever parts of the testimony they disbelieved and "act on such part as they did believe." That judicial instruction was the core of Jim's objection. And, when his case reached Taylor for the second time, Jim was ultimately successful. Taylor ruled that the entire testimony should have been rejected, adducing as a principle of common law the maxim, "*falsum in uno, falsum in omnibus.*" ²⁷⁸ This was hardly "hang 'em jurisprudence." As one of his successors as chief justice was to observe three decades later:

Any one, upon the first blush, after reading *Jim's case*, would suppose that he could hardly open an English law book without meeting with the general rule "*falsum in uno, falsum in omnibus,*" yet, strange as it may seem, he will not . . . find the rule laid down in any English book of reports or by any writer upon evidence . . . there is full positive proof that there is no such rule. *King v. Teal and others*, 11 East. Rep. 307 (1809). ²⁷⁹

So much for the particulars of Flanigan's explanations of judicial motivations and attitudes on the high courts of the two Carolinas, and so much for my efforts at elaborating why I think Flanigan's explanations evidence an undue veering into dismal Whiggish historiography. Do the specific interpretive differences I have laid out suggest any broader morals about the study of the legal history of slavery? I believe they suggest four that, picking up our earlier numbering scheme, I shall put as propositions. They are:

276. 8 N.C. (1 Hawks) 434, 436 (1821).

277. 12 N.C. (1 Dev.) 142, 144 (1826).

278. *State v. Jim*, 12 N.C. (1 Dev.) 508, 510 (1828).

279. *State v. Williams*, 47 N.C. 257, 263 (1855) (Pearson, J.)

12—If we are to understand thoroughly the law of slavery, it is not sufficient to treat all the relevant statutes and cases as if they were emanations of a South united in self-conscious defense of the peculiar institution. That might be our conclusion, but it should not be our beginning.

13—In consequence, a high investigative priority should be given to examining cases embedded, not within a unitary matrix for the South as a whole, but rather within the actual jurisdictional units that existed, especially those that were primary in southern legal thinking—the states' court systems.

14—At an early analytic stage we should try to fathom the lay of the judicial land in each state court system, particularly the major factors that might serve to differentiate, from one slave state to another, judicial behavior on the issue of slavery. These factors potentially include: (a) statutes that judges may have seen as limiting their decisional freedom; (b) precedents that judges may have seen as similarly limiting; (c) concepts of the judicial role that judges may have perceived as more and less appropriate; (d) factors in particular states' politics that judges may have taken as more or less limiting upon their freedom to decide—such as whether they were subject to periodic election or had life tenure, or whether they belonged to the dominant political party; (e) the personal factors of social and economic background that may or may not have affected their decision-making; and (f) the broader political beliefs that they valued, as well as the uncertainties they may have felt about those beliefs—such as the value of "Union," the value of a "rule of law," the value of comity among states in sustaining law and Union, the values, conversely, of keeping blacks in total subjection, or of limiting the extension of greater political power to white lower classes.

15—If, again, we are really to understand the law of southern slavery and how it evolved, we ought to examine it against the backdrop of developing northern abolitionism and against the backdrop of changing Euro-Atlantic concepts of mere political superordination and subordination, as a matter of North-South United States tensions, and as a matter of changing Euro-Atlantic norms as to who gets what, when, and how.

To say this is to intimate why I find Cover's work considerably more valuable than have some critics. As I have said earlier, I do not intend to enter into a lengthy analysis of *Justice Accused*, in part because it has been amply reviewed elsewhere, in part because most of its content pertains to northern judicial reactions to slavery,

and in part because I shall take up my doubts concerning his analysis of the Virginia court in Part Two of this Article. Nonetheless, it is appropriate to specify briefly that which seems most useful about his book. I have in mind three aspects of his approach. The first is that he keeps his judges, so to speak, within the Atlantic community of nations, rather than putting them on an American island bereft of any intellectual or political ties to the European tradition.

The second useful aspect of his approach lies in his intentions both to get inside the minds of the judges he is dealing with and to use the insights of role theory in seeking to get inside. The third aspect that appeals to me is that Cover restores to the active agenda of research a number of issues that concerned me some years ago but that threatened to be tabled by default, given the exploratory paths that other writers pursued. Moreover, he advances them from where I had left them. These are chiefly the relationships between judicial role and political ideas, the relationships among conflicting demands posed by the judicial vocation, the political vocation, the capacities of political institutions to solve problems, and the central role of manumission decisions as indicators of variance in judicial thinking about the fit between law and slavery.

The work of other writers has advanced considerably our understanding of black justice at the local level and has given us a possible framework for thinking about the autonomous development of a unified law of slavery. We have not, however, advanced similarly in our understanding of the southern appellate judiciaries—especially not with respect to their functioning during the decades of greatest political strife over the peculiar institution, the 1830's through the 1850's. To say this is to point ahead to what will occupy our attention in Parts Two and Three of this essay. Before proceeding there, however, we should round out our reflections on varying interpretations by putting in summary comparative form what the various authors have sought to explain, and how; and by drawing from that summary comparison and our previous inquiries whatever analytic differences may remain that are not attributable to variance in focus, evidentiary level, and data base. The most useful way of summarizing what the various authors have sought to explain, and how, is to divide them up as follows: (1) according to what they are seeking to explain; (2) according to what they consider the necessary components of satisfying explanations and of further research; and (3) according to their underlying assumptions as to what can and cannot be taken for granted in the debate—as to where, in other words, they place the boundaries of sensible or respectable debate. Let me try such a summary, author by author,

in the order that each chronologically joined the debate.

A. *Nash. What is to be explained:* Southern appellate decisions in three areas—manumission, trials of blacks, and trials of whites for felonious injuries to blacks. *Major components:* Appellate records in ten seceding states, 1800-1860, and judicial biographies that show considerable variance among the southern judges with respect to attitudes and decisionmaking on manumission, and with respect to taking seriously “the slave’s humanity,” but much less variance with respect to providing trials as fair as the law permitted in criminal cases. The evidence shows a pervasive, but not universal, inability to resolve an ideological tension among “four components of the southern value system . . . supremacy of whites versus the supremacy of law, . . . Negro as property versus the Negro as human.”²⁸⁰ The judicial variance is closely related to “Unionism vs. Secessionism,” but not to indices of socioeconomic status. *Principal assumptions:* Southern attitudes may have been less hegemonic about slavery than commonly assumed. Overt attitudes of “political gladiators” may or may not be representative of other southerners. There is not necessarily a direct correlation between “intent” to support the peculiar institution, and “result.” Role theory is useful in accounting for judicial decisions, but it is difficult to explain them adequately without bringing in questions of “liberalism/illiberalism/conservatism/radical reaction,” and “pro-slavery/anti-slavery.” It is necessary to set at the start plain boundaries delimiting what one will and will not examine, in order to minimize the effects of one’s assumptions about the nature of southern slavery upon the data. It is necessary to look at the development of each court separately, as a small group, and to analyze the judges’ reasoning in order to try to “get into” their minds.

B. *Flanigan. What is to be explained:* The difference between the law’s “suppression of personality” in civil cases and the movement of nineteenth-century southern law away from suppression in criminal cases. *Major components:* Appellate court records and scattered lower court records of criminal trials that show it is a mistake to think of “pro-slavery” versus “libertarian” courts, because “almost all southern judges worked within the confines of the proslavery mentality, but . . . realized that full recognition of the slave’s humanity in a criminal trial did not endanger his status as the master’s property or undermine the peculiar institution.”²⁸¹ These judges, turning “their backs on the brutal colonial past,”²⁸²

280. *A More Equitable Past?*, *supra* note 25, at 240.

281. Flanigan, *supra* note 26, at 548.

282. *Id.* at 564.

made "a remarkable attempt to reconcile fairness and even a degree of legal equality with slavery as a dynamic and perpetual institution."²⁸³ *Principal assumptions*: It is not very useful to go into the judges' minds or to speak of "pro-slavery," "anti-slavery," and "libertarianism." It is useful, however, to speak of "substantial equality with whites,"²⁸⁴ "greater procedural fairness,"²⁸⁵ and "embark[ing] very often on an unmistakably equalitarian course."²⁸⁶

C. *Cover. What is to be explained*: The judicial reaction to anti-slavery, why "earnest, well-meaning pillars of legal respectability" collaborated "in a system of oppression—Negro slavery,"²⁸⁷ the dilemma of the anti-slavery judge. *Major components*: Appellate records in a selection of (largely northern) state supreme court cases and a sprinkling of United States Supreme Court cases that show, with few exceptions, anti-slavery judges solving their moral dilemma by formalist decisionmaking when asked to enforce fugitive slave laws. Escalating the worth of the values other than freedom promoted by an antifreedom decision, these judges ascribed the responsibility for the decision elsewhere (to federal or state statute or constitution). *Principal assumptions*: It is not necessary to set clear boundaries as to what evidence is and is not to be examined, or to study various courts as decisionmaking units (as distinct from particular judges). "Liberal/conservative" and "pro-slavery/anti-slavery" distinctions are useful, analyzing legal reasoning is important, and role theory and cognitive dissonance theory are the most powerful "explainers."

D. *Tushnet. What is to be explained*: The distinctive development of southern slavery appellate case law, how it is distinctive, and what is the most fruitful use that historians can make of case law and statutory materials in this area. *Major components*: The type of legal reasoning used by southern appellate judges, and its change over time from analysis by analogy to analysis by category; judicial determination not to go more than superficially consists in "the slave as a moral personality;" the most fruitful approach equals historians' applying the case law and the statutory law to understanding the ideology of the "master class." *Principal assumptions*: A Genovese-like model of southern society is essentially correct. There were not sufficient attitudinal differences about

283. *Id.*

284. *Id.* at 540.

285. *Id.* at 564.

286. *Id.* at 568.

287. R. COVER, *supra* note 27, at 6.

slavery among the various courts or among particular judges to render fruitful explanations that depend in whole or in part on "liberal/conservative," or on "pro-slavery/anti-slavery," distinctions.

E. Hindus. What is to be explained: What antebellum South Carolina "black justice" was like below the appellate court level. *Major components:* Lower court records of criminal trials in two of forty-six judicial districts in one state and some "statewide evidence" that, compared with Massachusetts justice, shows that slaves were dealt with by formal local process far more than has customarily been believed, and that the function of law and authority in South Carolina was to preserve white dominance, and that the law was never intended to be just. *Principal assumptions:* They are largely similar to Tushnet's except disbelieving Genovese; the style and content of the legal reasoning is less important than Tushnet believes; it is not critical to examine manumission decisions.

F. Howington. What is to be explained: Same as Hindus, but generalizations more clearly restricted to the state studied (Tennessee). *Major components:* Extensive analysis of circuit court records in six counties (including the two largest in terms of slave populations) that shows results in criminal trials of slaves closer to those Nash and Flanigan found at the appellate court level than to those Hindus found in the lower courts of South Carolina. *Principal assumptions:* Speaking of judges' "liberality/illiberality," or of their pro-slavery/anti-slavery bias is not very useful;²⁸⁸ neither is an explanation depending primarily upon interest in protecting the master's property; "role theory" provides the clue to an adequate explanation.

We have now reached the point at which we can attempt some tentative answers to the central questions that we posed at the beginning of Part One—how important and real are the interpretive differences among these authors; whether close inspection of what they have said makes their differences seem larger or smaller; and whether the differences that remain are traceable more to variance in the data studied or to the explanations that "satisfy" the authors. It is plain that no author has taken a genuinely extreme interpretive position. No author is so "empty-glass" as to argue that the southern judges, whether at the trial or appellate court level, behaved in the fashion of Nazi judges underwriting Hitler's inferno, or even of Soviet judges taking their cues from the Party in determining the

288. Note that I am here relying on Howington's 1978 paper, *supra* note 70, rather than on the somewhat different views on this matter expressed in his 1975 article, *supra* note 29.

“guilt” of dissidents engaged in “hooliganism” or other heinous deviations. At the same time, no author is so “full-glass” in his Whiggery as to argue that southern judges seeking to interface law and slavery consciously set out to exacerbate the internal contradictions of the peculiar institution. Considered within the narrow ideological spectrum of American political history, however, differences do remain—essentially due in varying measure to one or more of three factors: data differences, rigorousness of setting boundaries on the data included or excluded, and “explanatory satisfyingness.”

Those differences in interpretation attributable wholly or largely to data differences—for example, those between Tennessee and South Carolina lower court procedures, or those arising out of the circumstance that more appellate than lower court decisions are available for analysis—are the least troublesome in an important sense. In theory at least, further research at the lower court level in different states would give us a better sense of the whole pattern of southern black justice. It is the differences grounded more in data boundary-setting and explanatory satisfyingness, that are more troubling. The chief outstanding issues appear to be six:

(1) whether there were significant variations among judges and among different southern court systems in attitudes and behavior concerning the appropriate relationship between law and slavery, or with respect to the desirability of the peculiar institution itself;

(2) whether the essential course of the case law of southern slavery is from reasoning by analogy to reasoning by category, and concomitantly toward a unified and more or less autonomous shape of doctrine and decision;

(3) whether judges consciously or unconsciously set out to bolster the peculiar institution’s defenses as opposed to “doing justice,” and whether such tendencies increased or became universal in the decades before the Civil War;

(4) whether adequate explanation is aided or confused by trying to distinguish between judicial liberalism and judicial conservatism, or between pro-slavery and anti-slavery;

(5) whether role theory accounts completely, largely, or little for judicial behavior; and

(6) whether more is to be gained than lost by adopting the natural and social scientific practice of setting clear initial boundaries at the outset of inquiry as to what evidence will and will not be assessed, and by making sure that such evidence is either completely enumerated or randomly sampled, as distinct from the traditional historian’s approach of gathering as many evidentiary rose-

buds as he may find.

With one exception, because I prefer to let our conclusions concerning these issues grow as much as possible out of the evidence we shall consider in Part Two, I do not propose to elaborate further on these issues at this juncture. The exception pertains to the sixth issue. Whatever else may be true about studying the law of slavery, one proposition seems indispensable if we are to minimize the dangers of extracting from the evidence what we are disposed to believe when we go in. That proposition is that we must clearly establish the evidentiary boundaries at the outset. While I am far from sympathizing with those ardent preachers of the gospel of "scientific history" who would have us always quantify the data of human existence, nonetheless it seems plain that, notwithstanding the brief history of the legal historiography of southern slavery, it is an area already beclouded by loose approaches to the boundaries of data-gathering. Absent firm historiographical rules of evidence, we just do not know about the correctness of the verdicts that emerge about the law of slavery.

PART TWO: FINDING THE JUDICIAL CONSCIENCE OF KING COTTON: A
THREE-STATE COMPARISON OF APPELLATE SUITS FOR FREEDOM

A. *Posing the Critical Questions: Were There Significant
Differences Among Judicial Attitudes?*

Our central task in Part Two will be to address the issues about the nature, shape, and essential course of judicial decisions concerning slavery that Part One left unresolved. As late as the year 1787, and despite the slave codes legislated during the colonial era, southern slavery was an institution of social domination whose judicial contours remained ill-defined. The statutory law was much more certain than the judge-made law. It was not clear whether the common law gave any protection of its own force to the slave, whether the slave possessed any substantial rights to a fair trial, or whether, in suits for freedom, judges would resolve uncertainties in favor of liberty or in favor of putative owners. By the eve of the Civil War the appeals judiciaries in all states with substantial slave populations had wrestled extensively with these issues. Of that there is no doubt. Doubt obtains, rather, with respect to the motivations, intents, and achievements of the judges who so wrestled to fit law and slavery together—and especially with respect to whether consensus existed as to judicial aim and purpose among the various slave-state jurisdictions, and whether consensus waxed or waned as the Civil War approached.

The critical questions, in other words, are these: were there significant differences among judicial attitudes towards non-whites and towards the peculiar institution, and did such differences persist throughout the antebellum era? I am going to argue: (a) that such differences existed; (b) that they did persist; and (c) that the best evidence of such diversity lies not in criminal cases concerning blacks but in manumission cases, in suits for freedom.

Two reasons explain why the best evidence lies there. First, depending on who is doing the interpreting, appellate reversals of convictions of blacks and appellate upholding of convictions of whites for inflicting bodily injury on blacks can, as prior writing in the field has shown, be interpreted in several ways. A single decision may be attributed to one or more of the following judicial motives: (1) a praiseworthy determination to be fair to the black; (2) a less praiseworthy determination to put a good front on the peculiar institution and thereby demonstrate to northerners that it was not so bad as abolitionists asserted; (3) a judicial conviction that the master's property investment in the black needed protection against poor and unruly whites who injured him or provoked him to crime; (4) a fussy old-fashioned formalist jurisprudence that insisted compulsively on adherence to the law's forms; or (5) a mechanistic following out of perceived legislative intentions. The sheer number of possible motivational combinations affords, thus, fertile ground for inconclusive interpretive debate.

Second, the less well-studied area of judicial reactions to manumission is likely to be more telling both because it put the southern judge closer to the political firing line on the future of the peculiar institution than did other issues in slavery jurisprudence and because, in consequence, it affords to both dismal and ameliorist Whigs less room to maneuver interpretively, less opportunity to slide conveniently from one explanation for judicial behavior to another.

Accordingly, in this Part we shall analyze the manumission holdings of three courts from the time that each began to experience a substantial manumission caseload to the end of the antebellum decades—Virginia from the early nineteenth century to 1860; Tennessee from the late 1820's to 1860; and Georgia from 1845 to 1860. I select these courts (a) because I suspect that previous analyses of these courts (including my own) have been at least partially erroneous; (b) because all three courts tackled most of the major knotty problems arising in the area; and (c) because, in my judgment, the three courts' reactions to the question of liberty for slaves offer the clearest evidence in favor of the thesis that significant differences

among the southern judges did arise and did persist. If the thesis cannot be sustained by such a comparison I doubt it can be sustained anywhere.

Before proceeding to the comparison we should pin down two matters. One arises from my insistence in Part One that our tendencies to Whiggish veering should be minimized by requiring the historian to spell out in advance what primary evidence he will and will not use in arguing his thesis. Accordingly, let me so specify. The condition for inclusion is that admissible primary evidence be of the following types: (1) appellate case reports in the three states; (2) available biographical data concerning the judges who decided these cases; (3) appellate cases decided by, and biographical data pertaining to, other southern appeals judges faced with similar issues; or (4) statutes and relevant legislative journals or newspaper accounts of proceedings in legislatures pertaining to manumission issues.

The other matter arises from two needs: (a) to minimize both my opportunity and that of the reader to slide back and forth on the definition of significant difference; and (b) to minimize the likelihood that we slide back and forth on a related matter—the extent to which discriminations against nonwhite minorities are a particularly southern, as distinct from a national, theme of American history. As Part One has made clear, it is my conviction that sliding back and forth on these matters of definition and regionalism is at least as responsible for interpretive variations in the analysis of the law of slavery as is the legal evidence itself. That is why it is crucial to be as clear as we can about our analytic reflexes on these matters before we approach the evidence.

Accordingly, I am now going first to quote and then to identify four paired excerpts from some leading nineteenth-century state appellate court decisions concerning the rights and appropriate treatment of racial minorities. I pair these excerpts because in my judgment they constitute strong *prima facie* evidence for the existence of significant attitudinal difference on the parts of nineteenth-century white judges toward minorities. Moreover, in some instances the locations and times of these attitudes' expressions are not at all what would be anticipated by someone predisposed to think that "greater racism" or "lesser liberalism" are regionally specific southern phenomena. The reader can usefully test his own Whiggish reflexes by reading the paired excerpts and then, before reading my identifications, trying to guess which quote is attributable to a Deep South, Upper South, or non-southern judge, and the approximate date of such quote.

Pair A—Equality and Inequality in Trial Procedures

A-1: "The law of the case . . . is precisely the same as if the accused were a free white man, and we cannot strain the law even 'in the estimation of a hair,' because the defendant is a slave . . ." ²⁸⁹

A-2: "The difficulty in such cases is to ascertain the truth . . . [S]uch as we have among us can rarely be trusted in such matters. Those of the race . . . have generally exhibited a total disregard of virtue, candor, and integrity, and have shown . . . a propensity to cunning, deception, and perfidy . . ." ²⁹⁰

Both quotations pertain to the degree of equality that nonwhites should receive when in court. The first was used by the Texas Supreme Court in 1860 to reverse a black's conviction for murder because his court-appointed defense attorney and the prosecution had mutually agreed to an alteration in the wording of the indictment under which he was tried. The second was a justification used by the Oregon Supreme Court in 1890 to discount the testimonial credibility of the Chinese relatives of an orphan, and thus to uphold a lower court decision to put the Chinese orphan in the custody of a Presbyterian orphanage rather than having him brought up by the relatives.

Pair B—Resolving Doubts for or Against Liberty

B-1: "An aged man . . . is about to descend to the grave. Between him and his slaves exists a tie . . . [T]he aged man looking about him, asks himself, 'then, whose shall these be?' He does what he can to confer upon them the boon they hold most dear! [A]t length it is discovered that the records are silent on the subject; immediately, the birds of prey are upon the wing . . . It would indeed be a reproach to the law, if there was no way in which it could correct the evil . . ." ²⁹¹

B-2: "The act creates a forfeiture of property in case of a defective registry . . . where there appears to have been an intent to comply honestly with all its directions, the construction should be liberal in favour of the master." ²⁹²

The first quotation comes from an 1855 North Carolina case in which Chief Justice Frederick Nash upheld a claim to liberty by ordering lower court records amended fifty years after the fact to cure a defect—namely the circumstance that these records contained no formal order for the emancipation of the claimant blacks, as required by state law. The second quotation comes from an 1817 Pennsylvania case wherein Pennsylvania Chief Justice William Tilghman enunciated his principles for deciding suits for freedom arising under his state's gradual emancipation of law.

Pair C—Perceptions About Innate Capacities of Whites and Nonwhites

C-1: "[H]e is made after the image of the Creator. He has mental capacities . . . that constitute him equal to his owners . . . [T]he laws under which

289. *Calvin v. State*, 25 Tex. 789, 797 (1860).

290. *In re North Pac. Presbyterian Bd. of Missions v. Ah Won*, 18 Ore. 339 (1890).

291. *Mayo v. Whitson*, 47 N.C. (2 Jones) 231, 239 (1855).

292. *Wilson v. Belinda*, 3 Serg. & Rawl. 396, 397-98 (Pa. 1817).

he is held as a slave have not and cannot extinguish his high born nature²⁹³

C-2: "The same rule which would admit them to testify . . . might soon see them at the polls, in the jury box, upon the bench, and in our legislative halls. This is not a speculation which exists in the excited and over-heated imagination, . . . but an actual and present danger, . . . a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point, as their history has shown"²⁹⁴

The first quotation should be familiar from our discussion of Howington's research in Part One.²⁹⁵ It is of course Judge Nathan Green of Tennessee rejecting in 1846 the argument that as a chattel a slave could not sue for his freedom. The second quotation was part of the reasoning advanced by California's Chief Justice Murray in 1854 to deny the right of Chinese to testify in the murder trial of a white.

Pair D—The Demands of Comity and the Legal Status of a Freed Black

D-1: "[A]ccording to the doctrine here asserted . . . a portion of the people of one of the States of this confederacy are without remedy as individuals . . . to enforce a legal right in a co-State of the Union"²⁹⁶

If so, there is no restraint in our law against taking his life [H]e must be regarded as an alien enemy was by the barbarian rules which prevailed in the dark ages, and which the majority of the court appear to sanction"²⁹⁷

D-2: "The State of Ohio, forgetful of her constitutional obligations . . . and afflicted with a *negro-mania*, . . . inclines . . . to her embrace, as citizens, the neglected race . . . occupying, in the order of nature, an intermediate state between the irrational animal and the white man.

. . . .
Suppose that Ohio, still further afflicted with her peculiar philanthropy, should determine to descend another grade . . . and claim to confer citizenship on the chimpanzee or the ourang-outang (the most respectable of the monkey tribe), are we to be told that 'comity' will require of the States not thus demented, . . . to meet the necessities of the mongrel race thus attempted to be introduced into . . . this confederacy?

The doctrine of comity is not thus unreasonable."²⁹⁸

Both quotations come from the same 1859 Mississippi case, in which the court majority heatedly denied the right of an ex-Mississippi slave, duly freed at her master's wish in Ohio, to collect a bequest left to her by him in Mississippi, and in which the minority equally heatedly accused the majority of taking an absurd position.

There is no need here to go into detailed assessments of these cases, but only to ask the reader to determine if he or she agrees with me that, at least on their face, the first quotation in each pair

293. Ford v. Ford, 26 Tenn. (7 Hum.) 92, 95-96 (1846).

294. People v. Hall, 4 Cal. 399, 404-05 (1854).

295. See Part One (C) *supra*.

296. Mitchell v. Wells, 37 Miss. 235, 285 (1859) (Handy, J., dissenting).

297. *Id.* at 281-82.

298. *Id.* at 262-64 (Harris, J.).

appears significantly less reactionary or less racist than the second. If he or she agrees about at least three of the four pairs²⁹⁹ then the following analysis of manumission decisions in the Virginia, Tennessee, and Georgia courts may be persuasive. If he or she does not, I anticipate that nothing I might say would bridge the Whiggish gap in our perceptions of southern judicial behavior.

B. Major Issues in Suits for Freedom

To the southern courts, suits for freedom posed a set of issues rather different from those that formed the bulk of the related dockets of the northern judiciaries—enforcement of the Fugitive Slave Laws and consideration of state Personal Liberty Laws.³⁰⁰ To be sure, the issues overlapped, especially in respect to conflict of laws, the demands and just expectations of interstate comity, and the effects of a slave's residence in a free state. Moreover, occasionally southern courts acted with considerable vigor, even imagination in thwarting or punishing would-be kidnappers of free blacks.³⁰¹ None-

299. Pair B appears to be the pair in which room for argument exists, because of the nature of the *Belinda* case.

300. See R. COVER, *supra* note 27. See also T. MORRIS, *FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH, 1780-1861* (1974). Morris treats thoroughly the politics of these laws and their judicial administration in five states—Massachusetts, New York, Pennsylvania, Ohio, and Wisconsin.

301. See, e.g., *Welborn v. Little*, 105 S.C.L. 106, 1 Nott & McC. 263 (1818); *State v. Greenwood*, 8 S.C.L. 111, 1 Mill 420 (1817). In *State v. Greenwood*, David Johnson, speaking for the South Carolina court, refused to reverse the conviction of a Charleston constable for assault and false imprisonment. Constable Greenwood apparently dreamed up a get-rich-quick scheme which ran awry. He slapped two free blacks into jail on trumped-up charges. Playing upon their ignorance, he persuaded them to indenture themselves to another white named Hasket who offered to pay their bail and future court costs. They were then released to Hasket who, after paying the constable some seventy or eighty dollars *sub rosa*, removed them from the Charleston area—probably out of state, where he sold them as slaves. Shortly after this transaction the Charleston police learned of the scheme and instituted an unsuccessful search for Hasket and the Negroes. Failing, they confronted Greenwood, who confessed and was brought to trial.

By the time he stood in the prisoner's dock, Constable Greenwood had reconsidered his confession and had unsuccessfully prayed to have all of it barred from the trial save that part which tended to exculpate him—namely the fact that he was acting, both at the time of his "arrest" and "release" of the Negroes, under a magistrate's warrant. Rejecting Greenwood's appeal, David Johnson observed: "the charge against these men was founded in the basest falsehood, fabricated by the defendant, for the nefarious purpose of enslaving them for life, in which, it is feared, he has been but too successful, with a view, to use his own language, 'to make money of them.'" *Id.* at 111, 1 Mill at 422.

In *Welborn v. Little* the South Carolina court overlooked irregularities in police procedure and upheld a jury's miniscule award of damages in order to effect substantive justice. A free boy of "very dark color" originally had been apprenticed with the consent of his father and the local commissioners of the poor to one Little. About a year before the commencement of the suit, Little sold the unexpired apprenticeship to Welborn. Six or eight months later Welborn delivered the boy to an acquaintance named Garrison, who then set out with him

theless, absent statutes providing for general emancipation, the basic southern adjudicative problems pertaining to freedom boiled down to seven issues: (1) whether fair hearings of claims to liberty were to take place; (2) whether damages should be permitted for wrongful detention in slavery; (3) what kinds of proof were admissible or controlling, and what presumptions arose from particular types of evidence (such as skin color); (4) how to resolve cases in which there was doubt about a former master's intent; (5) the effects of restrictive statutes when there was little question about the master's desire to free but considerable question about its legality; (6) the weight that should be given to "fourth party claims;"³⁰² and

for Kentucky, presumably intending to sell him into slavery there. One of the commissioners, "on hearing of it, and suspecting . . . that foul dealing with him was intended, issued a process of his own manufacturing," 10 S.C.L. at 106, 1 Nott & McC. at 264, under which Garrison was apprehended before he got across the South Carolina border, and the boy returned into the custody of the commissioner.

Welborn, who had not yet been paid by Garrison, then sought to obtain the boy from the commissioner, but the commissioner refused on the ground that the original transfer of indenture from Little to Welborn had been illegal since neither he nor the boy's father had underwritten it. Welborn then brought an action against Little to recover money paid to him on a consideration that had failed. Welborn had the letter of the law on his side, and the jury recognized this by finding for him. But the jurors apparently felt that the law's spirit lay on the other side of the balance, for they awarded him only 1¢ damages! *Id.* at 107, 1 Nott & McC. at 265.

From this verdict Welborn appealed, adducing two arguments. First, he urged that the original taking of the boy from Garrison was illegal: the commissioner had no right to go around inventing writs and having them served on people as if he were a judge. Second, Welborn argued that there was no fair proportion between the sum allowed by the jury and the amount that he had paid to Little in anticipation of several years' services.

The constitutional court treated these arguments with righteous disdain. David Johnson dismissed Welborn's contentions about the writ's illegality by judicial fiat, saying "it is not necessary to consider, as it answered the purpose for which it was intended, and . . . subverted the cause of justice and humanity . . ." *Id.* at 107, 1 Nott & McC. at 264. Perhaps it was not necessary since Welborn was seeking to coerce the commissioner not into returning the boy, but into returning the money from Little. Yet if that is so, the lack of necessity stemmed from the nature of the suit, not from the fact that the writ had "answered the purpose for which it was intended." Rubber hoses frequently answer their purposes too, but that does not make third degree legal.

Reaching Welborn's second argument, Justice Johnson admitted that there had been a partial failure of consideration, and that the jury's award was low. Would he, therefore, order a new trial? No:

[U]nder the particular circumstances of the case, I do not feel disposed to disturb their verdict . . . [T]here was the strongest probability that he never would have been disturbed in the possession, . . . but for the transfer made by himself—leading to apprehensions dishonorable to humanity—and that to a stranger, who, to his knowledge, was about to carry him out of the state, in direct violation of a positive law.

Id. at 108, 1 Nott & McC. at 267-68.

302. This analysis defines the wishes of the master, of the slave, and of those who would have inherited the slave had not the master sought to free him, as respectively, first, second, and third party claims. Fourth party claims, then, are those such as the claims of creditors owed by an estate saddled with debts.

(7) the weight that should be given to other states' constitutions, statutes, and judicial decisions in conflict of law situations, in which arguably the slavery policies were not four-square with those expressed in the domestic jurisdiction's constitution, statutes, and prior holdings. Plainly these categories are not altogether discrete.³⁰³ Still, it will be helpful to our analysis if we view these issues as, potentially at least, posing choices for the judges in which their private predilections on the subject of slavery might come to the fore. So too might come their views about related political issues—especially their reactions to gathering North-South frictions concerning the Constitution's compact with slavery.

Did the course of larger political events substantially affect southern appeals courts' resolutions of these issues? Particularly, did the raising of southern defenses against Yankee abolitionism in the late 1820's and early 1830's lead to a sharp decline in any previously existing judicial tendencies to resolve these issues in favor of freedom? Did, in other words, southern appellate judges join in a "concert of defense" of the peculiar institution?

Perhaps the leveling force of Jacksonian democracy would make itself felt on the bench in the form of newly appointed judges echoing mass intolerance and demanding hegemonic support for an institution that kept several million Negroes lower on the societal totem pole than "poor white" farmers and mechanics. Moreover, regional differences between Upper and Lower South might find reflection in judicial decisions. Perhaps in the Upper South some judges still would be appointed from old, established families who, though abandoning personal "Jeffersonian" doubts about the morality of slavery and construing it more and more as a cherished, aristocratic, agricultural order threatened by crass northern industrialism, would hesitate to inform their decisions with either righteous "positive-good" hyperbole or absolutist ideological justifications of plantation-capitalism. Joining them might be a few cunning supporters of the order of exploitative, purely profit-seeking, bondage from the cotton states. "Aristocratic" judges might well still feel a moral imperative that power be exercised with grace and believe that slavery's chances of survival would be increased should humanity rather than brutality color it. Cunning supporters of King Cotton, though uninterested in grace or morality, might agree—at least to the extent of dressing their decisions in the rhetoric of humanity and thus making more elusive the abolitionist's target. In-

303. For example, what a master intended when he took his slave out of the state to further his aim merged the fifth and seventh issues.

deed, either sort of judge might render occasional decisions in favor of freedom—particularly if precedent should make a decision for bondage logically “sticky.”

Such judges, however, would limit their generosity. While doubtlessly reaping the rhetorical most of such rare liberality, they would at the same time probably be moving the general contours of slave law towards a more tightly closed caste-structure—slowly at first as, reasoning from a more or less blank state of precedent, they groped for appropriate analogies, and then more quickly later as the juristic categories of a unified law of the peculiar institution came into being. Almost certainly, these judges would be both less than favorably disposed to the free Negro and anxious to ensure that freedom only be granted to slaves on condition of removal from the South, so that the gentle society of white fathers would not be endangered by the presence of free black children. They might, then, limit their benevolence to freedom effected far from arenas of possible trouble. The North might be slightly better than the South—though not much so, particularly as abolitionists began to make propagandistic use of free Negroes. Canada would be somewhat safer, but Liberia would be quite out of harm’s way. Such judges, then, might look with favor only on liberty in Africa. To be sure, granted the onslaughts of abolition and the rise of King Cotton, not all—or even a heavy majority of—judges would be motivated by considerations of grace or cunning. Surely judges would appear in increasing numbers to defend slavery loudly and furiously, whether in terms of Calhoun’s contractualism, Fitzhugh’s feudalism, or Fundamentalist scripturalism. Perhaps, finally, the post-1830 limits of judicial diversity would be drawn narrowly between the lines circumscribing blatant, tactless pro-slavery and those delineating gracious, cunning pro-slavery. Perhaps—but what actually happened?

Most southern state supreme courts took fairly uniform positions on the issues of hearings and damages for wrongful detentions. These issues produced less controversy than questions of the master’s intent to free and of that intent’s legality. All judges—even the most “reactionary”—seem to have insisted on fair hearings of claims to freedom.³⁰⁴ Generally this was accomplished by requiring

304. Consider, for example, South Carolina Chancellor George Dargan, whose life and attitudes match almost too neatly to be credible the stereotype of the fire-eating southerner. Dargan was a keen Baptist and a South Carolina college graduate, a Nullifier who volunteered in 1832 for the state militia because he feared Andrew Jackson would send federal troops, and then was a Secessionist in 1850. Dargan died of a fit of apoplexy in 1858, but not without first becoming a keen believer in spirit rappings and clairvoyance and taking to addressing Unionists as “old fogies.” “His boast for many years was, that he had never been beyond the

a master to post a bond. Occasionally, however, southern courts went even further to insure fair hearings. In both South Carolina and Arkansas a court threatened a dilatory master with contempt.³⁰⁵ The Tennessee judges upheld a chancery court that had bodily removed slaves from their owner in order to foreclose the possibility of their sale prior to trial.³⁰⁶

Damages for wrongful detention likewise generated little controversy. Most courts followed South Carolina practice.³⁰⁷ Thus if a slave who won his freedom had simultaneously sought a monetary award and the jury had granted it, the courts let the verdict stand. If he had not sought both in the same suit, they generally refused to permit a later suit seeking damages. Only the Virginia court expressly denied damages.³⁰⁸ The Tennessee court diverged in the

limits of South Carolina, and hoped never to be under the necessity of going out of the State." B. PERRY, *supra* note 5, at 63. Yet even this arch-provincial, bitterly opposed to emancipation, apparently did not seek to deny hearings on circuit.

305. J. O'NEAL, *DIGEST OF THE NEGRO LAW OF SOUTH CAROLINA* 9 (1848) (discussing *Spear v. Rice*, 16 S.C.L. 8, Harp. 20 (1823)). The court report, however, does not mention this fact. In the Arkansas case, the executor actually was imprisoned for contempt. *Campbell v. Campbell*, 13 Ark. 513 (1853).

306. *Sylvia v. Covey*, 12 Tenn. (4 Yer.) 247 (1833).

307. See *Pepoon v. Clarke*, 8 S.C.L. 32, 1 Mill 137 (1817), (a case which arose from an attempt to convert an apprenticeship into slavery for life). As a small child in Baltimore, Phebe was hired out by her mother, a free woman of color, to work for a certain Mr. and Mrs. Alexander Gibson. In 1806 the Gibsons moved from Maryland to Charleston and, unbeknownst to Phebe's mother, took the girl along. Gibson appears to have regretted his action and made preparations to send her back almost immediately. He died shortly thereafter, however. Mrs. Gibson had no such qualms. Marrying Clarke a few months after Gibson's death, she took to whipping Phebe whenever she claimed she was "born free." At maturity Phebe finally found someone, Pepoon, to bring suit against Clarke.

The unlawfulness of the conversion was manifest enough to the jurors, who awarded Phebe both freedom and \$400 damages. Clarke then appealed on the ground that he had had no reason to believe Phebe's claim, that he had trusted in his wife's assertions, and that consequently the damages were unfairly high. Judge Johnson, speaking for a unanimous Court of eight judges, rejected Clarke's appeal:

So far from thinking that the damages in this case are so excessive as to authorize the granting of a new trial, I cannot forbear to declare my own conviction, that there has been a base attempt to consign to slavery, for life this unfortunate being, whose very situation called loudly for the protection of every feeling and honest man. With this view of the case, I should not have been disposed to grant a new trial, if the damages had been much greater.

Id. at 33, 1 Mill at 141-42.

308. In *Paup v. Mingo*, 31 Va. (4 Leigh) 163 (1833), a testator who died in 1789 bequeathed freedom to his slaves to take effect after his affairs were "settled and all his debts paid." *Id.* Twenty years elapsed before the slaves received their liberty, by virtue of a court ruling, and another eighteen years passed before the debts were completely settled in 1827. The freed blacks, discovering a surplus of profits in the final settlement, sought to claim it. The court ruled against them, but some variation in the tones of the opinions delivered existed. Thus Dabney Carr stated:

It was strongly contended for the freedmen, that this fund having been raised from their labours, after they were entitled to their freedom, ought of right to go to them.

other direction—toward favoring the Negro. In *Matilda v. Crenshaw*³⁰⁹ the court held that a Negro, having won a first suit for freedom, could bring a second suit to recover from his ex-master both court costs and wages for the time lapsed during the pendency of the first suit. Seven years later, in December 1840, the Tennessee court expanded this doctrine in the face of two facts that might well have caused a judiciary made hostile to the cause of freedom by abolitionism to back off.³¹⁰ Sweeper, once a Maryland free Negro, had been convicted in 1826 for “persuading and conveying slaves out of . . . Maryland into . . . Pennsylvania”³¹¹ For this activity on behalf of the cause of liberty the Maryland court had sentenced him to permanent banishment from the state and to sale for the term of seven years. Undeniably Woodfolk, his purchaser, had kept him too long. Nonetheless, Woodfolk’s attorney made an argument which provided a golden opportunity for the Tennessee judges to condone informal additional punishment for Sweeper’s abolitionist activities: he pointed out that the original suit for freedom had been an action of ejectment, a mixed action under Tennessee law,³¹² and that consequently Sweeper should have claimed damages in that first suit. Having missed his chance, the attorney continued, Sweeper now would have to be satisfied with just his liberty. Certainly the court could have accepted this line of reasoning. Formal neutrality would have lent its aid to that end. Moreover, *Matilda’s* doctrine could, as Woodfolk’s counsel observed, lead to

There is much in this argument, which addresses itself to our sense of justice, and to our feelings; but unfortunately for them, the point has been irrevocably settled against them. Suits of this kind have been very frequent . . . for more than a century In many . . . the violation of freedom has been gross and palpable, and the public feeling strongly on their side; yet in not one single case, have damages for the detention been given Hard as the case may seem upon the freedmen, I for one, can never think, at this day, of breaking through this settled course and policy of the country.

Id. at 176. By “country,” Carr meant, of course, Virginia. Compare William Cabell’s tone: “I consider it the settled law . . . that a person held in slavery . . . cannot recover damages . . . for his illegal detention I deem it unnecessary to inquire into its policy or abstract justice.” *Id.* at 180. Court President Henry St. George Tucker issued an opinion whose tone is much like Cabell’s. The tonal differences may not be wholly insignificant.

309. 12 Tenn. (4 Yer.) 249 (1833).

310. *Woodfolk v. Sweeper*, 21 Tenn. (2 Hum.) 88 (1840).

311. *Id.* at 89.

312. Ejectment was an action brought for the recovery of land, which by the end of the eighteenth century had largely displaced earlier modes of trying title—such as *mort d’ancestor* or *novel disseisin*. Such actions were purely “real,” that is, they determined only the right of title. A separate, subsequent personal action for damages was necessary if the wrongfully dispossessed party wished damages for “time and profits lost.” The popularity of ejectment lay in the fact that as a mixed action, combining the real and personal, both title and damages could be secured in one litigation. See BLACK’S LAW DICTIONARY 49-50, 607 (4th rev. ed. 1957).

“ruinous consequences”³¹³ for masters in general. If hire could be recovered here, in other instances it could be “recovered for fifty years.”³¹⁴ Masters who had inherited or purchased an apparently valid title might, its defectiveness proved in court and damages assigned, be ruined. But the Tennessee court rejected this bid to adopt the Virginia view and affirmed the *Matilda* doctrine. The Tennessee judges could see “no reason for changing the practice, but on the contrary, believe it to be greatly better, than to mingle up in one suit a contest for the right of liberty, and damages for the violation of it.”³¹⁵ Yet over the long run surely it was “greatly better” for only one party, the slave. Juries trying both freedom and damages probably would be more cautious about awarding liberty and less disposed to award high monetary amounts than would separate juries, one trying freedom and the other assessing damages.

What, if anything, of larger significance is suggested by the Virginia and Tennessee courts’ different holdings on the issue of damages? The Tennessee opinions imply a curious lack of anxiety about defending the master class’ property and about the threatening depredations of abolition. The Virginia court’s position appears more infused with concern for the rights of property; yet the justifications advanced by its judges stopped well short of espousing a positive-good theory of slavery. Were there, then, no post-abolitionist courts that did set out consciously to defend slavery as a beneficial institution? If none existed, then given the post-1830 popularity of that “gospel” in other branches of the southern state governments and in the southern press, we well might be inclined to think that there was something very peculiar about the relationship between the appellate judicial role and “reason of slavery.” Fortunately for our analytic purposes, one such court exists—that of Georgia, to whose slavery jurisprudence we now shall turn. The Georgia court provides a useful base against which to compare the decisionmaking of other southern courts concerning the peculiar institution.

C. *Ardent Pro-Slavery and the Georgia Supreme Court*

If all southern state supreme courts had fashioned the laws of slavery as did the Georgia Supreme Court, dismal Whig analysis of

313. 21 Tenn. (2 Hum.) at 93 (1840).

314. *Id.* at 95. However, the court did require a new trial in the instant situation because the lower court had virtually instructed the jury to find damages and thus determined as law what was an important matter of fact—Woodfolk’s culpability. He was not the original purchaser, yet he was required to pay \$743.50.

315. *Id.* at 96.

those laws would have an easy, long, and successful life. Although the Georgia legislators ignored for several decades a constitutional provision calling for the formation of a separate appellate court, the Georgia court, once established in 1845, more than made up for its tardy beginning by speedily becoming a staunch exponent of the positive-good theory of slavery. The nine men who sat on the three-judge court from its formation to the outbreak of the Civil War formed by far the most politically active, articulate, and doctrinaire southern bench in support of the peculiar institution. Table VIII indicates the periods of service of each judge. This "triumph" of ardent pro-slavery was in some measure due to the force of personality of one man, Joseph H. Lumpkin, whose *de facto* dominance of the court received *de jure* cognizance from the state legislators in 1859, when, again tardily, they bestowed the title of Chief Justice upon him.³¹⁶

To say this is once again to take issue with Daniel Flanigan, who seemingly considers it misleading to single out the Georgia court as being especially pro-slavery.³¹⁷ In my judgment, the Georgia court was just exactly that. Examination of the personal attributes and life experiences of the judges suggests some possible sources of their unusually keen and overt pro-slavery. An unusually high proportion of the Georgia judges (eight of the nine) played active roles in party politics, before or after, and sometimes during, their tenures on the court. Three were staunch Democrats. The choleric Henry Benning, whose "immortality" resides appropriately enough not in judicial memory but in the military fort named after him,³¹⁸ and Charles J. McDonald, a successful candidate for governor in 1839 and 1841, though unsuccessful in 1851, were fire-eaters a decade before Lincoln's election. As leaders of the Georgia delegation to the Nashville Convention in 1850, they urged secession. The third Democrat, Ebenezer Starnes, though ultimately a Unionist elector on the Douglas ticket in 1860, considered secession a virtual inevitability as early as 1855.

Three of the five Whigs³¹⁹ experienced tension between the Unionist ideological position of their national party and their own Georgian perspectives. Richard Lyon crossed party lines during the 1850 constitutional crisis and was elected to the court as a states

316. See 3 H. CATTERALL, *supra* note 14, at 5, discussing Memorial to Joseph Henry Lumpkin, 36 Ga. 19, 19-42 (1867).

317. See Flanigan, *supra* note 26, at 548.

318. Benning formed a regiment in the earliest stages of the War, fought for four years, and had two horses shot from under him at Chickamauga.

319. In Georgia, as elsewhere in the South, Whigs secured a number of judgeships disproportionately greater than their statewide political strength.

TABLE VIII
 GEORGIA JUDGES (1845-1860)

1845	Joseph H. Lumpkin	Hiram Warner	Eugenius A. Nisbet
1846	Joseph H. Lumpkin	Hiram Warner	Eugenius A. Nisbet
1847	Joseph H. Lumpkin	Hiram Warner	Eugenius A. Nisbet
1848	Joseph H. Lumpkin	Hiram Warner	Eugenius A. Nisbet
1849	Joseph H. Lumpkin	Hiram Warner	Eugenius A. Nisbet
1850	Joseph H. Lumpkin	Hiram Warner	Eugenius A. Nisbet
1851	Joseph H. Lumpkin	Hiram Warner	Eugenius A. Nisbet
1852	Joseph H. Lumpkin	Hiram Warner	Eugenius A. Nisbet
1853	Joseph H. Lumpkin	Ebenezer Starnes	Eugenius A. Nisbet
1854	Joseph H. Lumpkin	Ebenezer Starnes	Henry L. Benning
1855	Joseph H. Lumpkin	Ebenezer Starnes	Henry L. Benning
1856	Joseph H. Lumpkin	Charles J. McDonald	Henry L. Benning
1857	Joseph H. Lumpkin	Charles J. McDonald	Henry L. Benning
1858	Joseph H. Lumpkin	Charles J. McDonald	Henry L. Benning
1859	Joseph H. Lumpkin, C.J.	Linton Stephens	Henry L. Benning
1860	Joseph H. Lumpkin, C.J.	Charles J. Jenkins	Richard F. Lyon

rights Democrat. Joseph Lumpkin favored secession at least by November 1860. Even the reputedly brilliant Eugenius A. Nisbet had difficulties reconciling Whiggery and slavery. After graduating first in his class at the University of Georgia at the age of sixteen and attending Judge Reeves' Litchfield, Connecticut, "law school" for two years, Nisbet became by special act of the Georgia legislature the only person granted permission to practice law while still a minor. He followed "strange gods" when the Whig party disintegrated in 1854; psychologically unable to vote Democratic, he cast his ballot for the Know-Nothings.³²⁰

Only two Whigs—Linton Stephens, the younger half-brother of the vice-president of the Confederacy, and Charles Jones Jenkins, governor from 1865 to 1868—did not favor secession merely on the grounds of Lincoln's election. Jenkins' Unionism was sharply qualified, however; he simply advocated waiting to secede until Lincoln committed an act of coercion against the slave states. As Table IX suggests,³²¹ compared with the appeals courts in the states compris-

320. E. COULTER, *GEORGIA: A SHORT HISTORY* 311 (rev. ed. 1947).

321. The sources for the data from which the percentage figures are calculated for the non-Georgia judges may be found in Nash, *supra* note 19, app. II, at 536-56. I have excluded from the percentage calculations those judges whose birthplace or education is unknown and those who did not attend college or law school. The numbers of judges for whom the data are known, and not known respectively, are as follows: *Birthplace*: Alabama, 18 known, 4 not known; Florida, 9 & 3; Georgia, 9 & 0; Mississippi, 11 & 2; Texas, 5 & 0. The information gaps concerning state of birth are likely not large enough to affect substantially my generalizations.

The gaps are larger with respect to higher education, and of course some judges did not

ing the southernmost tier of Anglo-American slavery jurisdictions—those bordering the Gulf of Mexico—the Georgia bench was almost certainly the most homogenous in terms of background and life experience. Only one of the Georgia judges, Hiram Warner, was born outside the South. Of the remainder all except two were native-born Georgians.³²² By contrast, fourteen of the seventeen judges in Alabama during this period came from the Upper South, the North, and abroad,³²³ only three came from the Deep South—two from South Carolina, and one native-born Alabamian. Similarly, from 1845 to 1850 the Florida court actually consisted of at least half northerners.³²⁴ A similar homogeneity characterized the college and professional training of these Georgia judges.³²⁵ The fact that four of the Georgia judges attended college or law school outside the Deep South³²⁶ appears to have made at most a small difference in their attitudes toward Unionism in 1860—or, as we shall see, in their views on freedom for blacks. To be sure, with the exception of Lumpkin, they were less “fire-eating” than the two whose higher education was entirely southern. But their support of southern slavery was simply a bit more genteel.

Any attempt to analyze Georgia appellate decisions should recognize that from an early date Georgia legislators were hostile to manumission. On November 19, 1801, a law prohibiting post-mortem manumission passed the Georgia Senate without a recorded

have any formal higher education, so greater caution is in order. The numbers of judges are: *Education*: Alabama, 6 higher education known, 16 not known; Florida, 4 known, 2 known that they did not attend college or law school, 6 no data available (n.d.a.); Georgia, 7 known, 2 known did not attend, 0 n.d.a.; Mississippi, 4 known, 2 known did not attend, 7 n.d.a.; Texas, 3 known, 2 known did not attend, 0 n.d.a. In the percentage calculations, I have “prorated” in instances in which part of the higher education took place in one state, or region, and the remainder took place in another. For example, Nisbet’s college education in Georgia and his Litchfield, Connecticut, “law school” education is weighted ½ in-state, ½ out-of-state.

322. These two—Charles Jenkins and Charles McDonald—were born in South Carolina and graduated from the University there.

323. These judges came from England (1), Massachusetts (2), New York (1), New Jersey (1), Kentucky (2), Virginia (6), Tennessee (1), and North Carolina (1).

324. These judges were: (1) Thomas Douglas, born Connecticut, 1790; died 1855; no college; Whig; Episcopalian; (2) George S. Hawkins, born New York, 1808; died 1878; Columbia University; Democrat; (3) Thomas Baltzell, born Kentucky, 1804; died 1866; no college. For the fourth judge sitting during that half-decade, J. B. Lancaster, no data are available.

325. The comparison cannot be pushed too far since the number of non-Georgia judges about whom no educational data are available is much greater than the number for whom no information exists regarding birthplace.

326. Nisbet attended Judge Reeves’ Litchfield, Connecticut, law school; Lumpkin was an honors graduate of Princeton; Jenkins was third in his class at Union College; and Stephens studied under Joseph Story at Harvard after graduating as valedictorian both at the University of Georgia and at the University of Virginia Law School.

TABLE IX
 HETEROGENEITY AND HOMOGENEITY OF BACKGROUND OF MEMBERS OF
 THE GULF STATES' SUPREME COURTS
 1830-1860

Percentage of Judges Born					
	In State	Out Of State	In Deep South	In Upper South	In The North Or Abroad
ALABAMA	6%	94%	18%	53%	29%
FLORIDA	0%	100%	33%	33%	33%
GEORGIA	67%	33%	89%	0%	11%
MISSISSIPPI	0%	100%	20%	70%	10%
TEXAS	20%	80%	80%	0%	20%

Percentage of Judges Attending College or Law School					
	In State	Out Of State	In Deep South	In Upper South	In The North Or Abroad
ALABAMA	20%	80%	33%	17%	50%
FLORIDA	0%	100%	50%	25%	25%
GEORGIA	43%	57%	64%	7%	29%
MISSISSIPPI	0%	100%	25%	75%	0%
TEXAS	33%	67%	33%	17%	50%

dissent.³²⁷ In 1815 and 1816 the Senate majority was unwilling to open even the narrow gate to freedom that theoretically remained—special private bills in the legislature. The Senators rejected the two such bills seeking liberty for individual slaves.³²⁸ In 1818 they increased the penalties for violating the substance of the 1801 prohibition. Thus, while some authority exists for Judge Lumpkin's proposition that before 1824 most Georgians were not hostile to foreign manumission,³²⁹ the legislative records of the early nineteenth century corroborate his judgment that "public opinion has never wavered in the State, for the past fifty years, so far as *domestic* manumission was concerned."³³⁰

327. See 1801 GEORGIA SENATE JOURNAL 25.

328. Abraham Manzo's hopes were dashed by a vote of 25 to 12, 1814 GEORGIA SENATE JOURNAL 16; one year later the slave Caesar was turned down 19 to 12. See 1815 GEORGIA SENATE JOURNAL 37.

329. See *Sanders v. Ward*, 25 Ga. 109, 118 (1858).

330. *Cleland v. Waters*, 16 Ga. 496, 513 (1854).

Georgia lower courts of the 1830's, however, handed down two decisions that considerably lessened the law's restrictive implications. In 1830 *Jordan v. Bradley*³³¹ determined, first, that the post-mortem manumission laws did not void a will directing out-of-state freedom, and second, that the will was valid even though it allowed the slaves to choose between freedom and slavery. Seven years later, in *Roser v. Marlow*,³³² another superior court judge ordered an executor to remove Negroes to a free state if the legislature refused on application to allow their remaining in the state as freedmen. The result of these decisions when similar cases came before the post-1845 supreme court was an argument over their rightful strength as precedent. Though in 1848 and 1851 the "first court"—and the only dominantly Unionist one—of Lumpkin, Nisbet, and Warner twice upheld the "remove-then-free" doctrine of *Jordan v. Bradley*,³³³ three years later a new court began a movement toward restriction. Warner's replacement by Ebenezer Starnes was not so significant as was Eugenius Nisbet's 1854 defeat for re-election by Henry Benning.

*Cleland v. Waters*³³⁴ in 1854 and 1855 presented once more the question whether slaves could exercise an option to go free. Benning argued from civil law that slaves had no legal capacity to choose. Lumpkin, while almost certainly not pleased at liberating the Negroes, found this line of reasoning "too technical to commend itself to my approval,"³³⁵ and contrary to precedent in other states. Lumpkin *could* have followed the technique of a South Carolina judge to argue that the 1845 change in Georgia's judicial structure meant that prior cases were not binding.³³⁶ Yet while he viewed the peculiar institution as "wisely ordained by a forecast high as heaven above man's, for the good of both races,"³³⁷ he felt that any policy changes "should be by the lawmaking, rather than by the law-administering department of the government."³³⁸ Lumpkin³³⁹ was not yet prepared to undertake judicial legislation in order to impress the law of slavery with the stamp of his own attitudes—at least not where precedent stood athwart any such desires. Where it did not, Lumpkin was

331. 1 Ga. 443 (1830).

332. 1 Ga. 309 (1837).

333. See *Cooper v. Blakey*, 10 Ga. 263 (1851); *Vance v. Crawford*, 4 Ga. 445 (1848).

334. 19 Ga. 35 (1855), *enforcing* 16 Ga. 496 (1854).

335. *Id.* at 40.

336. See *Lenoir v. Sylvester*, 17 S.C.L. 289, 293, 1 Bail. 632, 641-42 (1830) (O'Neill, J.) (discussion of the effect of South Carolina cases antedating the 1824 judicial reorganization in that state).

337. *Cleland v. Waters*, 16 Ga. 496, 514 (1854).

338. *Id.* at 520.

339. Probably Starnes—who concurred with Lumpkin—was not prepared to undertake judicial legislation either.

by no means so restrained.

During the latter half of the 1850's, then, the Georgia judges rejected every type of claim to freedom, except one, brought before them. In so doing, they staked out positions that can hardly be characterized as anything other than determinedly pro-slavery.

First the court took a narrow view of foreign manumission. In 1855, in *Hunter v. Bass*³⁴⁰ the judges voided a will directing that the testator's slaves be removed from Georgia and taken to Illinois or Indiana to enjoy freedom. Their ground for voidance of the will was that those two states had passed statutes prohibiting free Negroes from settling. This was true enough, but the Georgia court could have applied the *cy pres* doctrine to designate some other place that permitted freedom. The North Carolina court, faced with the same issue two years later, went out of its way to effect manumission, even though that involved making policy decisions concerning which slaves left, where they went, and how they paid for their passage.³⁴¹ The Georgia court, however, rejected this approach. As Benning stated heatedly: "[T]he monstrous doctrine of *Cypres [sic]* is not to have given it one inch of ground beyond the *possessio pedis*."³⁴² North Carolina also generally rejected *cy pres*, and I suspect that Benning's annoyance well may have resulted from the particular substance of the bequest. In balancing between preservation of slavery and fulfillment of testamentary intent, then, the court pressed its judicial thumbs hard on pro-slavery's side of the

340. 18 Ga. 127 (1855).

341. In 1857, *Hogg v. Capehart*, 58 N.C. (5 Jones) 71 (1857), reported as a note to *Feimster v. Tucker*, 58 N.C. (5 Jones) 64 (1859), confronted Chief Justice Frederick Nash with a will whose very simplicity would have doomed its testator's purpose in Georgia. It stated simply: "I give to my slaves their freedom." *Id.* at 72. The would-be white heirs of the slaves advanced three arguments against liberty: (1) the will was too vague as to the manner in which freedom was to be effected, and since North Carolina law forbade in-state manumission and the will gave no inkling that it was the testator's desire for the slaves to be removed from the state, it should be annulled; (2) the estate possessed insufficient funds to provide for the costs of any such removal; and (3) the will provided no option for slaves not wishing to leave the state.

Frederick Nash dealt with these arguments swiftly. It was, he said, "the duty of the executor to free the slaves"—and, impliedly, to find the means of doing so. *Id.* The court would help the executor with respect to choosing a place: "[W]e appoint Liberia." *Id.* at 73. The transportation costs could be paid by hiring the slaves out to provide necessary funds if they were not available from the estate. Nash was not impressed with the idea that so hiring them out amounted to illegal quasi-emancipation. The question whether a slave could choose between freedom abroad or continued bondage in the Tarheel State was no problem either; the Chief Justice had another ready solution. He proposed to select a commission and assign them the task of finding out which adult blacks wished to leave. Further, if "there are children under the age of fourteen, their parents must elect for them." *Id.* at 74. And lastly, "[I]f there are any who have no parents, or whose parents elect for them not to go, they must have liberty, on coming of age, to make their election." *Id.*

342. *Hunter v. Bass*, 18 Ga. 127, 129 (1855).

scales. Ex-slaves in Canada, after all, would not constitute a great danger to the future of slavery in Georgia. Thus this decision appears more pro-slavery—even (dare I say the word?) less “libertarian”—than the North Carolina court’s holding in *Hogg v. Capehart*.³⁴³

The second restrictive position adopted by the Georgia court concerned “quasi-emancipation,” which in its original formulation was a term meant to cover a practice that amounted to letting slaves go about as if free while their masters technically retained title to them.³⁴⁴ Favored by late eighteenth- and early nineteenth-century Carolina Quakers as a means around restrictive statutes, though by no means used only by them, the practice was intended to skirt requirements for legally sanctioned manumission that the slaves might not fulfill—typically requirements permitting freedom only to blacks who had performed extraordinarily meritorious services or requiring removal from the state as the price of freedom.

Judges could, and did, react to this phenomenon in one of two ways. They could—as did the North Carolina justices between 1816 and 1850³⁴⁵ and as did some of the South Carolina chancellors in the

343. See note 341 *supra*.

344. Similarly, title to lands or improved property might be vested in a white owner on the express stipulation that he would permit the slaves to use them for their own benefit.

345. See R. COVER, *supra* note 27, at 75-82. Cover’s discussion illustrates both the usefulness and the dangers of his selective and thematic psychological approach. This approach allows him to cover a great deal of territory quickly and in an insightful fashion. But by focusing almost exclusively on the North Carolina court’s consideration of “the Quaker trusteeship scheme in *Trustees v. Dickenson* (1829)”, *id.* at 76, he underplays how the court got to the position it did, and perhaps slightly overstates the personal objections of some post-1830 North Carolina judges toward quasi-emancipation. He says, “[A]nd, by the late 1840’s Ruffin’s brethren were not only in full agreement; they were also overtly impatient with the now seemingly endless line of cases coming before the court with minor variations on the Quaker theme.” *Id.* at 79. *Trustees of the Quaker Soc’y of Contentnea v. Dickenson*, 12 N.C. (1 Dev.) 189 (1827), was not as Cover has suggested “one of the first of a long line of North Carolina cases in which the competing factions of this court would articulate their positions on slavery in terms of the broadest possible principles.” R. COVER, *supra* note 27, at 77. The North Carolina judges had been articulating their positions in just such a broad fashion for over a quarter of a century before they decided *Trustees v. Dickenson*, but these articulations had been made primarily in connection with criminal trials of whites and blacks. Before the 1840’s the disagreements were not caused by court factionalism but were primarily one-on-one affairs between Hall and Taylor on specific issues. This was true particularly after 1818, when there were only three judges on the court and Leonard Henderson held the balance of power.

One can make a somewhat better case for factions in the South Carolina judiciary. *Dickenson* was the eighth, rather than the first, of a series of related cases. That series began eleven years before, with *Haywood v. Craven’s Ex’rs*, 4 N.C. (2 Car. L. Rep.) 360 (1816). In succession the judges voided a will directing executors to “set them free by the laws of the State,” *id.*; annulled a private bill passed by the legislature freeing an intestate’s slaves, *Administrator of Allen v. Peden*, 4 N.C. (2 Car. L. Rep.) 442 (1816); prohibited an executor’s efforts to remove slaves to the North in order to effect a will, *Turner v. Whitted*, 9 N.C. (2

1810's and 1820's³⁴⁶—pry suspiciously into such trusts and void them

Hawks) 613 (1823); and frustrated executorial attempts at delaying the sale of Negroes until a more generous manumission law should be passed, *Pride v. Pulliam*, 11 N.C. (4 Hawks) 49 (1825). See also *Wright v. Lowe's Ex'rs*, 6 N.C. (2 Mur.) 354 (1818). In only one case did the would-be heirs fail to lock the Negroes into slavery. In *James Ex'rs v. Masters*, 7 N.C. (3 Mur.) 110 (1819), the testator's executors succeeded in recovering slaves from legatees under his wife's will. She had a life-tenure in them, and the court probably intended only to prevent the tenure being converted into an absolute estate. By the end of the sixth decision the judges had closed all the loopholes open to executors, and all but one open to masters. That was to bequeath slaves outright to individuals whom the master could trust either to send the Negroes to the North or to treat them as if free—to "quasi-emancipate" them. Moreover, in the seventh and eighth cases North Carolina closed this loophole, too. Thus the seventh case, *Huckaby v. Jones*, 9 N.C. (2 Hawks) 120 (1822) (which Cover does mention) and the eighth, *Trustees v. Dickenson*, did not arise out of the blue.

The North Carolina results may seem not dissimilar to those the Georgia court might have reached. Some years ago I attributed the North Carolina results largely to neutrality and deference to restrictive legislative intent. See Nash, *supra* note 19, at 52-68. What Cover has said more recently on this score is not too different. The tone of the North Carolina court, however, is very unlike that of the Georgia judges. See, e.g., *Trustees of the Quaker Soc'y of Contentnea v. Dickenson*, 12 N.C. (1 Dev.) 189 (1827) (Taylor, C.J.) (where the parties fighting against freedom had the weakest case). Speaking of the Quakers, Taylor indicated his certainty that, rather than holding the blacks as slaves until they had performed meritorious services and then seeking (as the law allowed) their manumission, the Quakers would give them de facto freedom forthwith. To presume otherwise, he said, would be

to presume that a Society not less remarkable for the purity of its principles, than for an unshaken steadfastness in maintaining them, will at once degenerate from their long tried morality. The whole history of the people called Quakers, shows that neither prosperity nor adversity, favor or persecution, . . . has ever interrupted the even tenor of their ways

Id. at 202. For, as he had stated earlier, "if a sense of religious obligation dictates . . . the exercise of . . . benevolence, which however virtuous and just in the abstract, the policy of the law . . . has forbidden, . . . a transfer of property so directed must be void." *Id.* at 202.

346. For example, see the decisions of Chancellor DeSaussure (a highly conservative South Carolina jurist regarded by later judges as the first great figure in that State's equity jurisprudence) who as early as 1795, in a series of public lectures, opposed redistributing and eliminating property qualifications for whites on the ground (*inter alia*) that such political reform would enforce the (as he put it) mistaken idea of equality and in turn lead to freeing the slaves and the ruination of both races. In *Bynum v. Bostick*, 4 S.C. Eq. 107, 4 Des. 266 (1812), the chancellor put himself clearly on the Hall-Ruffin-Georgia court side of the issue whether slaves had any common law rights. No, he said, "[t]he condition of slaves in this country is analogous to that of the slaves of the ancients, . . . and not that of the villeins of feudal times." *Id.* at 107-08, 4 Des. at 267. As a circuit judge in the 1830's (he had a long judicial career), he ruled against an attempt to transport slaves out of the country to liberate them. The executors of the will in question argued almost exactly what the North Carolina court later was to accept in *Hogg v. Capehart*, that the removal from the South did not clash with legislative policy against intrastate post-mortem manumission. Calling the executors' argument frail, he went on—in a rather Lumpkin-like fashion—to reject their point that the testator had not sought to skirt the law but rather requested the assistance of government in his aim. He said:

Besides, what government is meant? . . . [T]he State government . . . has no foreign relations with St. Domingo If the government of the United States be meant . . . neither the State nor . . . its citizens, would ever permit the interference . . . with that subject, on which . . . the United States has no right to intermeddle, and on which, if it made any attempts . . . a disruption of the bonds which bind and unite the States,

as contrary to state policy as expressed by the legislature. Or they could—as did David Johnson, John Belton O’Neill, and some of their associates on the South Carolina bench in the 1830’s and 1840’s—variously turn their backs on the practice, winking at it judicially, even coming frightfully close to aiding and abetting the practice.³⁴⁷ Both types of juridical responses to quasi-emancipation are susceptible to two interpretations. The dismal Whig can argue that the early nineteenth-century North Carolina reactions amounted to judicial expressions of pro-slavery, whereas the ameliorist Whig can attribute them largely to judicial deference to legislative intent. Similarly, the dismal Whig can discount the activities of O’Neill in sapping the intent of the restrictive 1820 South Carolina emancipation statute (a less plausible discounting endeavor, I think, than with respect to the North Carolina judges), while the

would necessarily take place. It is the *noli me tangere* subject.

Frazier v. Executors of Frazier, 11 S.C. Eq. 149, 151, 2 Hill Eq. 304, 307 (1835). For the reversal of DeSaussure in this case, see note 347 *infra*.

Another example is the opinion of Judge A. P. Butler (later one of the more fire-eating South Carolina senators) in *Rhame v. Ferguson*, 24 S.C.L. 83, Rice Eq. 196 (1839). At the original trial in a quasi-emancipation suit Judge Butler charged the jury that the will amounted to “a palpable attempt to . . . evade the laws of the State . . .” *Id.* at 85, Rice Eq. at 201. The jury nonetheless found that the blacks were not yet free, despite considerable contrary evidence, and the appeals court refused to award a new trial. For a fuller discussion, see *Negro Rights, Unionism, and Greatness*, *supra* note 25, at 154-64.

347. See *id.* at 154-56 (discussion of *Linam v. Johnson*, 18 S.C.L. 66, 2 Bail. 137 (1831)) (David Johnson, for the appeals court, ruled that a master could not use an action of trover to recover a black with whom he had made an unofficial deal to let him “moonlight” and go about on his own). See also *Carmille v. Pringle*, 27 S.C.L. 190, 2 McMul. 454 (1842); *Frazier v. Executors of Frazier*, 1 S.C. Eq. 149, 2 Hill Eq. 304 (1835); *Cline v. Caldwell*, 19 S.C.L. 171, 171, 1 Hill 423, 423 (1833) (the appeals court barred caption of a quasi-free slave, although in *Linam* it had said that caption might lie, and observed that a contract “absolute on its face, but with a secret trust, to let the negro go at large as a freeman . . . is no violation . . .”).

Overruling DeSaussure in *Frazier*, O’Neill asserted that the chancellor’s reading of the letter of the law amounted to a “strange misapprehension” of it and clashed with the law’s spirit. *Carmille v. Pringle*, 27 S.C.L. 190, 2 McMul. 454 (1842). In my judgment O’Neill read the law in a decidedly non-neutral fashion. In *Carmille*—the most intriguing case from the standpoint of O’Neill’s “libertarianism”—O’Neill overruled another Chancellor, Benjamin Faneuil Dunkin, who had said of a gift of slaves on the express stipulation that they be permitted to work for themselves, paying only one dollar a year to their nominal new masters, “[i]t appears . . . too clear of argument, that the bill of sale . . . [was] an undisguised attempt to evade the law . . . forbidding emancipation.” 27 S.C.L. at 191, 2 McMul. at 456. What made O’Neill’s overruling of Dunkin particularly striking was that it came just after the state legislature (partly in response to the surgical manumission jurisprudence that O’Neill was practicing “on” the 1800 and 1820 laws) passed another law designed to remove all doubt. I find it hard to disagree with what later chancellors said of O’Neill’s decisions, especially *Carmille*. For example, Chancellor George Dargan stated in 1854: “It is impossible to deny that this decision afforded a precedent, and a form by which the Act . . . might be practically annulled and the policy of the State baffled.” *Morton’s Heirs v. Thompson*, 27 S.C. Eq. 146, 147, 6 Rich. Eq. 370, 375 (1854).

ameliorist Whig can make much of them:

In *Drane v. Beall*,³⁴⁸ however, the Georgia judges took up a position that leaves no room for disagreement about its significance among Whiggish optimists and pessimists. The court's intimations about quasi-emancipation admit of no real analytic doubt: the judicial intent was repressive, iniquitous, unreasonable—almost any pejorative one wishes to apply. To be sure, the failure of the *Drane* bequest is not altogether surprising since the testator made the technical mistake of directing that his slaves *first* be freed and *then* be taken out of state—“to Liberia, California, or any free State or Territory . . . as they choose to elect.”³⁴⁹ Still, neutrality hardly required the court to adduce the additional and flimsy reason for voiding the bequest—that another provision of the will, which stipulated that the slaves work for four years on the testator's plantation to raise the money needed for their transportation, set up an illegal state of “quasi-emancipation.”

Putting aside the question whether the word order of liberation and removal should have mattered, let us look at how the Georgia judges interpret the meaning of the term “quasi-emancipation.” The *Drane* court stretched the term considerably from its original “Carolina meaning.” The testator in *Drane* plainly had no intention of contributing tinder to the Georgian domestic powderkeg, no intention of permitting his slaves to go about indefinitely in Georgia in a twilight status between bondage and freedom and thereby raising other slaves' dissatisfaction with their own less fortunate lots.³⁵⁰ Beall, the testator, instead created a carefully controlled temporary mechanism to remove slaves from the state.³⁵¹ Moreover, he adopted a mechanism whereby the slaves' freedom minimized the burdens on the estate's other legatees. Surely the policy trade-offs were very different than in, for example, *Trustees of the Quaker Society of*

348. 21 Ga. 21 (1857).

349. *Id.* at 27.

350. That, of course, was the “evil” that bothered John Louis Taylor but not John Belton O'Neall. Differences of opinion on the likely results of such practice existed. If you thought the way Taylor did, you worried quite a lot about legislative intent and somewhat less about the socially disruptive potential of the practice. If you thought the way O'Neall did, you guessed that perhaps in-state quasi-emancipation was not such a bad idea after all: “If it was so that a man dared not make provision to make more comfortable faithful slaves, hard indeed would be the condition of slavery. For then no motive could be held out for good conduct; and the good and the bad would stand alike.” *Carmille v. Pringle*, 27 S.C.L. 190, 197, 2 McMul. 459, 470 (1842). That kind of “quasi-emancipation” and the policy motives behind sitting on it, or winking at it, differ substantially from the situation in, and the motives behind the disposition of, *Drane*.

351. Beall even prescribed that, for slaves electing to go to California or Liberia, the profits of their labors would only be paid to them once on board the ships to take them there.

Contentnea v. Dickenson.³⁵² I find it hard to resist the conclusion that *Drane* turned out the way it did because, at bottom, Lumpkin, Benning, and McDonald did not want any slaves to gain freedom, at any time, in any place, or in any manner.

The only advantage *Drane* gave to Georgia slavery jurisprudence was that it made easier the next push in closing the gate to freedom. That push came just two months later when, in *Pinckard v. McCoy*,³⁵³ Benning stretched the meaning of illegal quasi-emancipation yet further. In *Pinckard* the testator avoided any word-order mistake by carefully instructing that the blacks be conveyed while still slaves to a free state. But the testator's estate was saddled with debts, and Judge Benning found that the testator's plan to hire out the slaves first to pay off the debt and then to raise transportation moneys amounted also to an illegal quasi-emancipation.

The hint of something close to pro-slavery hysteria in these two cases became plainly evident as the Georgia judges dealt with other suits for freedom. *Bivens v. Crawford*³⁵⁴ involved a "remove-then-free" will request that almost any other southern court would have upheld without question. The testator provided that after his wife's death his executors should

take all of my slaves and their increase, . . . to some State or Territory . . . which will admit them, where slavery is not tolerated; to the end that my . . . slaves be free; and in the event that no State or territory will admit . . . slaves as residents, to be free, then . . . transport . . . to . . . Liberia³⁵⁵

In Lumpkin's eyes, the bequest failed because at the instant of the wife's death, the slaves became "freemen in this State."³⁵⁶ Surely that interpretation of the will's effect is a strange one. Clearly the testator intended his slaves to leave Georgia as slaves and be freed by entering a free state. Otherwise what is the significance of the phrase "which will admit them, where slavery is not tolerated?" Yet Justice Lumpkin went on to make a statement both curious and extreme: "But were this not so, we are inclined to think, that policy forbids . . . such a construction . . . as to allow negroes to remain . . . who are ultimately, after . . . one or more lives, entitled to their freedom."³⁵⁷ On first flush, this reads as a hypothetical. It may be more than that, however: "we are inclined to think" seems peril-

352. 12 N.C. (1 Dev.) 189 (1827). See note 345 *supra*.

353. 22 Ga. 28 (1857).

354. 26 Ga. 225 (1858).

355. *Id.*

356. *Id.* at 227.

357. *Id.*

ously close to "we would rule." If one interprets this statement as indicating applicable judicial policy, then in one fell swoop Lumpkin short-circuited any potential for resolving a question that plagued other courts—what to do with children born to a slave with a grant to future freedom.³⁵⁸ The Georgia judges apparently would have ruled void *any* bequest that sought delayed freedom—that is, a bequest that awarded freedom after the death of the donor's wife. *Bivens* appears to take from the master any right to establish such a conditional, temporary bequest of slaves by converting such a grant of life tenure in the slaves into outright ownership.

The pro-slavery attitudes of the post-1855 Georgia judges were so extreme that they rejected both the possible assistance of a moderate manumission society and comity—not only with northern states, but also with slave states whose laws were less harsh than their own. In *American Colonization Society v. Gartrell*,³⁵⁹ Lumpkin voided a manumission bequest on the flimsy technicality that the Society's charter of incorporation, which forbade it to hold or transport Negroes as slaves, made anything other than illegal domestic manumission impossible. This was dubious logic: after all, the judges could have ordered the executors to transport the Negroes as slaves to a northern state and there set them free. No other court except the Mississippi court in its last two antebellum years chose that technicality to prevent transportation to Liberia. Lumpkin even suggested that state policy might prohibit *any* suit by the American Colonization Society—apparently even a suit brought on behalf of a free Negro unlawfully detained or being denied a monetary bequest. The sociological reflexes underlying this decision have an almost suicidal quality. By failing to allow foreign manumission, the Georgia judges barred the one "solution" to southern slavery that—no matter how impractical or utopian—would have placed black freedmen where they would be least likely to "infect" slaves with temptations to escape.

No less startling is the doctrinal pitch of another significant Georgia case. In *Knight v. Hardeman*³⁶⁰ the court refused liberty to a slave woman due under the terms of a Maryland will to be freed at age thirty. Before she came of age, she had been transported to Georgia. When she reached thirty she brought suit by next friend. In an opinion that for its readiness to jettison interstate comity is almost without parallel, Lumpkin turned her down. Her counsel's

358. See Part Two(D)(3) *infra* (for the importance of the question and the difficulties its resolution posed for the Virginia court).

359. 23 Ga. 448 (1857).

360. 17 Ga. 253 (1855).

references to Virginia and Tennessee decisions that allowed equity courts to grant freedom were in vain. Lumpkin's disdain for other southern courts' rulings was transparently clear in his very wording: "[these] decisions . . . from Virginia, Tennessee, and several other of the slave or quasi slave States"³⁶¹ had not discussed the questions "with that thoroughness which either principle or their intrinsic importance demanded."³⁶² He was strongly inclined to opposite conclusions. The laws of Maryland were prejudicial to Georgia's rights and interests. "No one pretends that negroes can be carried to New York . . . and held there in perpetual bondage With what more propriety can slaves be brought here and emancipated?"³⁶³ It would be one thing if the woman had claimed under a Massachusetts or an Ohio will; Lumpkin's irritation would be more understandable, though his logic no more convincing. Yet here he was denying effect to the laws of another slave state. He was doing so, moreover, when no good reason existed why she could not be returned to Maryland to receive her liberty. The South Carolina court five years before³⁶⁴ had paid more heed to the laws of Ireland than Lumpkin in 1855 granted to those of a sister slave state.

At best, Lumpkin in these cases was rejecting the wisdom of the adage that "mine enemies' enemies are my friends." At worst, he was attempting to nail down every possible escape hatch from slavery. True, even in 1858 he was—unlike Benning—still a little troubled by the force of contravening precedent within his own state. Thus, when *Sanders v. Ward*³⁶⁵ presented a will explicitly directing the executors to remove the testator's slaves to "some free State . . . and there . . . manumit them,"³⁶⁶ a situation analagous to that in the old pre-supreme court case, *Jordan v. Bradley*,³⁶⁷ Lumpkin was willing to uphold the bequest. Benning, by contrast, would have

361. *Id.* at 261-62.

362. *Id.*

363. *Id.* at 263.

364. See *Guillemette v. Harper*, 38 S.C.L. 75, 4 Rich. 186 (1850). In *Guillemette*, O'Neill held that a Georgia slave taken as a boy to Ireland by his master (who also freed the boy in his will) and later returned to the South (by the widow) was free. "According to *Somerset v. Stewart* . . . he became thereby free. [T]hat case carries the law further than I should willingly acknowledge But if the master carries a slave to Great Britain . . . [and] while there assents in any way to his freedom, there can be no objection to the . . . freedom thus acquired." *Id.* at 77, 4 Rich. at 190. For analyses of *Somerset's* case, see D. DAVIS, *THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION, 1770-1823*, at 469-501 (1975); Wiecek, *Somerset: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World*, 42 U. CHI. L. REV. 86 (1974).

365. 25 Ga. 109 (1858).

366. *Id.*

367. 1 Ga. 443 (1830).

voided the will as contrary to state policy.³⁶⁸ Although Lumpkin did not undertake judicial legislation quite in the way that Benning proposed, he advised the Georgia legislature in no uncertain terms of what he thought should be done, and who should do it. The Georgia legislature duly responded by passing a restrictive statute one year later.³⁶⁹ After that statute was passed one other very tiny escape hatch remained open—and that just for slaves liberated by wills drawn before the 1859 statute.

In March 1860 the Georgia court did its best to close that escape hatch too. Confronted with a pre-1859 will that permitted slaves either to choose a master in the state or to be removed and liberated in the North, Richard Lyon, former Whig turned States Rights Democrat, expressing Lumpkin's views as well as his own, overruled *sub silentio* the earlier holding that slaves could make such an elec-

368. *Sanders* involved the issue referred to earlier as the only post-*Cleland v. Waters* type of suit for freedom that a Georgian slave won during the late 1850's. On this occasion, however, Lumpkin decided to take a position more activist than that he adopted in *Cleland*, since the *Sanders* testator got his word order on removal and liberation the right way round, and directed removal to a place or places that did permit in-migrant blacks. See also *Myrick v. Vineburgh*, 30 Ga. 161 (1860); *Walker v. Walker*, 25 Ga. 420 (1858).

369. A year after observing that he thought the American Colonization Society's purposes might well be fundamentally antithetical to true policy in Georgia, fundamentally at odds with "reason of slavery," Joseph Lumpkin came clean on his own views about the peculiar institution's appropriate "foreign policy." On the one hand, he could see nothing technically against the letter of Georgia law as it stood even if "a testator bequeaths his slaves to Stephen A. Douglas . . . or [worse] Rufus Choate . . ." *Sanders v. Ward*, 25 Ga. 109, 120 (1858). On the other hand, he had "no partiality for foreign any more than domestic manumission . . ." *Id.* at 124. Particularly he objected "to the colonization of our negroes upon our northwestern frontier. They facilitate the escape of our fugitive slaves. In case of civil war, they would become an element of strength to the enemy . . ." *Id.* This is a judge, a pillar of appellate reason, speaking in 1858—and before the Lincoln-Douglas debates got well under way. Already, however, he divines the military future. Here was a certain mad prescience. What was to be done? "If this . . . demands a new policy to be introduced—and for myself I think it does—let it . . . be inaugurated by the Legislature . . ." *Id.* at 118. Let all post-mortem manumission be prohibited, in Georgia, in Ohio, in Timbuktu. Now this is an interesting sort of a thing for a judge to be advising, particularly in view of the contemporaneous southern insistence that had just borne constitutional fruit in the *Dred Scott* majority's insistence on the substantive due process right of a master to take his slave, his property-in-man, wherever he pleased in the territories of the Union. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). In his lifetime he may take where he pleases, and of course he has the right to convert property-in-man into man-in-man as he wishes. But, at the very moment of death, "reason of slavery" requires the master's due process right to be cut short very quickly—quite unlike his last wishes in respect to property-in-property. This view is quite extraordinary. It is the more so, as a judicial suggestion, inasmuch as Lumpkin had "been informed by a . . . Representative" of the lower house of the Georgia legislature that such a bill had been proposed in the State Senate "and voted down by an overwhelming majority . . ." 25 Ga. at 119-20. Extraordinary Lumpkin's suggestion might have been, but it was successful. On December 14, 1859, the legislators, heeding his advice, passed an act prohibiting all post-mortem manumission.

tion. In *Curry v. Curry*³⁷⁰ Lyon held that because slaves were chattels they possessed no legal capacity to make such an election.

This was true-blue pro-slavery, unabashed and ardent. The extent of Lyon's ardor is most evident when compared with the statements of a contemporary North Carolina judge on the same issue. The North Carolina judge whom I have in mind is not one of that crew of "namby-pamby-on-slavery" types that came to populate the North Carolina court after 1830,³⁷¹ but is, rather, our old friend Thomas Ruffin, that rigorous expounder of the absolutist theory of slavery.³⁷² In 1858, in *Redding v. Findley*,³⁷³ North Carolina faced precisely the same question posed to the Georgia court in

370. 30 Ga. 253 (1860).

371. Thus I am not thinking of J. J. Daniel (1832-1848), who persuaded his younger colleague, Frederick Nash, to join him in decisions acquitting criminal blacks (thereby distressing Thomas Ruffin) and who argued against removing Free Negroes' rights to vote at the 1835 North Carolina Constitutional Convention. For a discussion of these cases, see Nash, *supra* note 19, at 465-70. For details on the North Carolina judges, see S. ASHE, *BIOGRAPHICAL HISTORY OF NORTH CAROLINA* (1925). The 1835 convention vote was very close. Daniel, Gaston, and the free Blacks lost 66 to 61.

Nor am I thinking of that "liberal Catholic," William Gaston (1833-1844), who also opposed removing the free Negro's right to vote, and who wrote the decision in *State v. Will*, 18 N.C. (1 Dev. & Bat.) 121 (1834) ("a monument to the cruelty of an overseer, and to the humanity of the court toward a slave," 2 H. CATTERALL, *supra* note 14, at 2). Gaston viewed a grant of freedom to take effect in Liberia as overriding a contrary charitable purpose to donate the slaves to a white hospital. See *Cameron v. Commissioners of Raleigh*, 36 N.C. (1 Ired. Eq.) 436 (1841). He told a graduating class at his alma mater point-blank:

On you . . . will devolve the duty which has been long neglected, . . . the ultimate extirpation of the worst evil that afflicts the southern part of our Confederacy

Disguise the truth as we may, and throw the blame where we will, it is slavery which, more than any other cause, keeps us back in the career of improvement. It stifles industry and represses enterprise . . . and poisons morals at the fountain-head

W. Gaston, Address Delivered Before the Dialectic and Philanthropic Societies at Chapel Hill, N.C., June 20, 1832 (4th ed. 1849), reprinted in *LIVES OF DISTINGUISHED NORTH CAROLINIANS* 176-77 (W. Peele ed. 1897). "Although he openly advocated the abolition of such an unwise system . . . he was enthusiastically cheered by his audience. So popular was this speech . . . five editions . . . were published, the last in 1858. Not long after . . . he was elevated to the Supreme Court . . . by the legislature." C. EATON, *supra* note 15, at 200.

Nor, further, am I thinking of Frederick Nash (1844-1858), whom we have recently quoted; nor of Richmond Pearson (1848-1878), who was closer to an orthodox middle-of-the-southern-road position on slavery than were Gaston and Nash, believing that blacks may well have been worse off in freedom than in slavery, though extending any number of trial benefits to them; nor of William Battle (1852-1868), whose ground on slavery lay fairly close to Pearson's. See generally Nash, *supra* note 19, at 322-30.

372. How could I have Ruffin in mind when speaking of a North Carolina judicial comment almost contemporaneous with *Curry v. Curry*—given Ruffin's retirement nearly a decade earlier? The answer is simple. Although Ruffin retired in 1852 and began to describe the peculiar institution as something going mutually to benefit both races (somewhat in contrast to his 1829 *Manns* view that any man "in his retirement" must repudiate slavery as a moral way of doing business among men), he was brought back briefly out of retirement in 1857-1858, when his successor, Frederick Nash, took ill.

373. 57 N.C. (4 Jones Eq.) 216 (1858).

Curry v. Curry: could slaves elect among continued slavery in the South, freedom in Liberia, or freedom in a free state? Ruffin said:

[I]t is not true in point of fact or law, that slaves have not a mental or a moral capacity to make the election . . . and, if needful . . . , to go abroad for that purpose. From the nature of slavery, they are denied a legal capacity to make contracts . . . ; but they are responsible human beings, having intelligence to know right from wrong, and perceptions of pleasure and pain, and of the difference between bondage and freedom, and thus, by nature, they are competent to give or withhold their assent³⁷⁴

To be sure, argued Ruffin, a state legislature might, as part of its power to control the conditions of manumission, pass a statute that explicitly took away the legal capacity of slaves to elect between bondage and freedom. But a court could not properly take away the right for “no one ever thought that it required a municipal law to confer the right . . . or the capacity They pre-exist, and are founded in nature, just as other capacities for dealing between man and man.”³⁷⁵ Perhaps Ruffin *should* have said that no one exercising any good sense thought a law necessary to confer the capacity to choose. But if *we* say that, though it may lessen any mounting irritation with Joseph Lumpkin that we may feel (it is hard not to), we will be succumbing to the magnet of our Whiggery, rather than addressing the questions that we ought.

The principal question is whether we can adequately account for the substance and tone of the Georgia decisions without resorting to distinctions such as more and less “pro-slavery” or more and less “illiberal.” It will hardly come as a surprise that I find it difficult not to resort to such distinctions even when examining only Georgia decisions. The *American Colonization Society* case and *Curry v. Curry*, for example, simply appear to me more pro-slavery and illiberal than *Jordan v. Bradley* in exhibiting a determination to wall off the peculiar institution from any contrary influences, to put slavery off by itself as a perpetual societal island. I find it even more difficult not so to characterize Georgia slavery jurisprudence when making interstate comparisons, even those of the selective sort such as we have so far been essaying.

My saying that, however, does not prove that the feat of adequately explaining southern slavery jurisprudence without recourse to such distinctions cannot be performed. To be fair we should consider at least briefly two alternate explanations that do not require using them: (1) an explanation that assumes a much narrower span of judicial attitudes toward the task of interfacing law and

374. *Id.* at 218-19.

375. *Id.* at 219.

slavery than I have assumed may have obtained among the southern judges, an explanation that assumes one end of that span to be what we have earlier described as cunning pro-slavery and the other end to be fire-eating pro-slavery; and (2) an explanation along the lines that Tushnet suggests,³⁷⁶ one that is concerned primarily with examining the evolution of southern slavery jurisprudence toward unity and autonomy and with the changing types of judicial reasoning characterizing that evolution.

To take up the former alternative first, its plausibility in explaining the cases we have examined rests upon solving two sets of difficulties inherent in its assumptions and applications. The first and less problematic set springs from inclarity as to exactly what is meant by cunning pro-slavery and as to how it supposedly operated to achieve its purported central aim—convincing northerners that southern slavery was humane and debrutalized.³⁷⁷ The second and

376. See Part One (B) *supra*.

377. Thus, does "casting out brutalities" include permitting the reward of freedom in none, a few, or quite a few circumstances? Can we, in other words, imagine a seriously credible de-brutalized slavery that did not include some sort of an escape hatch for roughly the reasons that O'Neill was thinking of as well as for reasons of "political saleability" outside the South—for remember that political saleability is assumed by this explanatory model to be a critical intent. If we answer that we can imagine a de-brutalized slavery without such an escape hatch, then we shall have to say that the manumission case-data are not substantively helpful to characterizing the Georgia court's pro-slavery, and defer our judgment until we look at other more useful data such as trials of blacks, instances where whites are punished for maltreating blacks, or judicial suggestions to the legislature urging, say, the passage of statutes on maximum hours, setting holidays, limiting permitted punishments by the master, and the like. If we say that of course some kinds of escape hatches to freedom for at least the particularly meritorious bondsman would have to be built into a de-brutalized slavery, then the explanatory model (though not the Georgia court) appears a bit better off.

We seemingly could characterize the Georgia judges as nonpractitioners of this de-brutalizing to-save-slavery politics—as, rather, somewhere close to the other exploitative pole assumed to exist by the explanatory model. In addition, we will have made the explanatory model itself more plausible, for it is in fact frightfully difficult to think that a de-brutalized but no-escape-hatch slavery would have amounted to a preserved slavery program that its hypothetical southern judicial salesmen would have believed saleable. And too, we will again be able to label the Georgia court as a nonpractitioner of this mode of enhancing the public relations of slavery. For, whatever else Joseph Lumpkin was doing when he went into his flights of rhetoric on the peculiar institution, he was not selling anything at all to the North. When he said, for example, that it "is a vain thing . . . to fight against the Almighty. His ways are higher than ours . . . ! Let our women and old men, and persons of weak and infirm minds, be disabused of the false . . . notion that slavery is sinful," *American Colonization Soc'y v. Gartrell*, 23 Ga. 448, 464-65 (1857), he was hardly putting forward the kind of societal teleology likely to be popular north of the Potomac. The fact is that in the manumission cases he usually was not talking to the North at all. And when he did, it was typically as an aside, as a back of his non-cotton-picking hand warning to the North to keep its non-cotton-picking hands off the peculiar institution, in the middle of his main sermon, so to speak, to the Georgia troops. It was mainly they whom he was addressing—to make sure they had their minds right on the subject. If you are trying to assuage or divert the North you do not say the sort of thing that Lumpkin said up to 1824 in *Cleland v. Waters*:

more problematic set consists in the following four difficulties that arise in trying to apply the explanation to the cases. One, it “mispredicts” both the tone and the apparent primary audience of the Georgia decisions.³⁷⁸ Two, it does not explain why the Georgia judges—particularly so influential and reputedly great-hearted a man as Joseph Lumpkin—took the path they did.³⁷⁹ Three, it requires considerable stretching to cover at all some of the holdings and off-the-bench statements of other judges.³⁸⁰ Four, to work, the explanatory model requires some rather curious mental gymnastics with respect to the relationships among the actions it ascribes to judicial practitioners of cunning pro-slavery, the political sources of those actions, and the likely political and sociological effects of those actions.³⁸¹ In sum, it is not clear to me that using this explana-

The true character . . . of slavery had not been fully understood . . . at the South; . . . she looked to emancipation . . . in the uncertain future . . . Thanks to the blind zealots of the North, for their unwarrantable interference . . . [t]he result is, a settled conviction that it was wisely ordained . . . for the good of both races, and a calm and fixed determination to preserve and defend it, at any and all hazards.

Cleland v. Waters, 16 Ga. 496, 519 (1854).

378. While one misprediction does not of course collapse the model, it may make us a little wary.

379. Were they, in other words, simply conscious, brutal exploiters of slaves? More particularly, why did Lumpkin not adopt a cunning pro-slavery strategy of decisionmaking? While we may chalk up “uncunning” behavior among some southern judges to stupidity, callousness, or just plain ill temper toward the North, it is harder to do so with a judge who, over the whole range of his activity, was regarded as a pivotal figure in the development of Georgia law. See Suttler, in 2 MEN OF MARK IN GEORGIA 302 (W. Northern ed. 1910).

Chief Justice Joseph Henry Lumpkin is one of the great figures in Georgia history, . . . one of the few greatest American judges . . . Judge Lumpkin’s cry was always justice [and] [h]e devoted himself to the labor of stripping off . . . whatever might conceal the core of natural justice . . . not cankered by technicality or by harmful legislation. In this . . . he was the leader and conductor . . . He delivered but one dissenting opinion in the first twenty volumes of the reports . . .

Id. at 306. See also Memorial to Joseph Henry Lumpkin, 36 Ga. 19, 19-42 (1867) (which even making allowances for nineteenth-century “occasional” rhetoric, is suggestive).

380. The explanatory model, to work at all, must assume that substantial attention would be paid in the North to these opinions, and it cannot very well assume that only the cunningly gracious ones would be read, while the kind of thing that Lumpkin was saying would slip by unnoticed. While there are problems with the assumption itself, let us grant it arguendo, for so doing leads us to a plain difficulty posed by Lumpkin’s and similar opinions for our hypothetical cunning judges. That is to say, if they were as cunning as all that, surely they also would have realized that a few pages of Lumpkin or Harris or Benning could undo hundreds of pages of their own. Furthermore, the explanatory model, to work, must—even if, again arguendo, we say that it explains the Georgia court by itself—also account for the kinds of positions that we have come across in making our running comparison with other southern judges *without* crediting the *genuineness* of pronouncements—such as Gaston’s University of North Carolina Commencement Day address—that on their face appear different from (more “liberal” than?) the Georgia opinions.

381. That is, the model must engage in some rather fancy footwork both about the meanings of actions in relation to their apparent normative source in modern Western liberalism *and about* the likely sociopolitical effects of such actions in a slave society. How so?

tion gives us much more than some pejorative labels to apply to the Georgia decisions and possibly to decisions in other courts we are about to examine.

What then is the apparent utility of the second alternative, the type of explanation that Tushnet has advanced? I expect that it may have greater explanatory power in understanding the jurisprudence of the Georgia court than in understanding the decision-making of some other courts, but I also expect that we may find we need to make at least three qualifications. First, we may find in the courts that (using my terminology for a moment) look most pro-slavery a greater shift toward formalistic categorizations than among those that look less ardently devoted to the peculiar institution. The second qualification is that the tendency towards formalistic abstractions may appear in the area of manumissions more pronounced than a shift away from analogy. The third qualification is that we may find the law of slavery across the South as a whole less unified than Tushnet suggests. But to say this is to indicate the need for deferring judgment on these possibilities until we can test them against the evidence offered by the manumission jurisprudence of the Virginia and Tennessee courts.

D. "A Vexed and Perplexing Question:" *Manumission Before the Tennessee and Virginia Courts*

(1) Politics, Pro-Slavery, and the Bench—Two Examples

Writing in 1853, a Tennessee Judge, Robert L. Caruthers, sought to explain the frequent shifts in Tennessee law on the issue

Consider again Gaston's speech, this time along with Nash's decision in *Hogg v. Capehart* and Ruffin's decision in *Redding*. Are these "actions" all indistinguishable from each other, and from the Georgia decisions, except insofar as we can array them along some sort of continuum from straightforward pro-slavery to graciously cunning pro-slavery? If we try this, we shall have to say something to the effect that Benning and Lumpkin were very honest about what they said, that Ruffin was probably a tad less so, while Nash and, especially, Gaston were heinously deceitful—in going around talking about "the boon of liberty" and claiming that the peculiar institution was the "worst evil that afflicts our part of the Confederacy." On this showing, they were borrowing the very values and words of modern liberalism, and putting them into the service of a deceitful aim—perpetuating slavery. Would not it be much simpler, in the absence of strong contrary evidence, to take the words and actions more nearly at their face-value, and surmise that what probably was really happening was that indeed the values of Western liberalism were slipping here and there into the administration of justice in the peculiar institution? Is there not a likely further difficulty in making the cunning-straightforward continuum do all the explaining? If we do, we have to assume that the judges assumed they could very graciously and cunningly go around de-brutalizing slavery, by introducing ameliorations based on liberal norms, while at the same time somehow preventing any diffusions into the structure of the slavery system of these values as real, rather than merely propagandistic, entities. That in turn assumes either a most curious blend of cleverness and stupidity in the judges themselves, or some very odd notions of our own about the way in which social structures and social processes behave over the long run.

of in-state manumission of slaves. "It is," he said, "a vexed and perplexing question, upon which public opinion . . . has been subject to much vibration between sympathy and humanity for the slave, and the safety and well-being of society."³⁸² This comment deserves our attention on at least three counts.

The first significant point is the date of the statement. Judge Caruthers made this comment in Tennessee at just about the same time Lumpkin and his Georgia colleagues began to fulminate on the positive glories of the peculiar institution, and almost half a century after the time when Lumpkin dated the achievement of virtual unanimity in Georgia public opinion against domestic (meaning in-state) manumission.³⁸³ The Tennessee legislature, though reasonably consistent in permitting foreign manumission, never consistently forbade domestic manumission. That a slave-state judge, and more so that a slave-state legislature, still, as late as the 1850's, did not believe that "reason of slavery" required forbidding domestic manumission, is striking.

The second point of interest lies in the Tennessee court's disposition of the problem posed in the case that evoked Caruther's observation, *Bridgewater v. Legatees of Pride*.³⁸⁴ Pride's will expressly divided his slaves into two groups. To one group of about thirty he bequeathed freedom if they could be emancipated either in Tennessee or in Illinois. If not, they were to be sold. To another, more favored, group of eleven he bequeathed freedom, but with an important difference. If they could not be freed in either state, they were not to be sold but were "to be . . . taken care of by the executor, or such person for him as will treat them kindly . . . to have their freedom at as early a time as practicable."³⁸⁵ The Tennessee judges found no difficulty with the indefinite state of quasi-emancipation that resulted from the circumstance that neither Illinois nor Tennessee law permitted such emancipations. The judges directed the executor to hold the slaves "reserved from sale . . . until they can be set free by a compliance with the law . . ."³⁸⁶ I doubt that the

382. *Bridgewater v. Legatees of Pride*, 33 Tenn. 135, 137, 1 Sneed 194, 197 (1853).

383. *Cleland v. Waters*, 16 Ga. 496, 513 (1854).

384. 33 Tenn. 135, 1 Sneed 194 (1853).

385. *Id.* at 138, 1 Sneed at 200.

386. *Id.* at 139, 1 Sneed at 200.

387. Apparently he was quite a keen one, as indicated by his reaction in a private letter to Tyler's 1841 veto of the bill to revive the United States Bank:

Our most gloomy forebodings have been realised. The *Whig* President has this day sent into the Senate his veto of the Bank Bill. Now comes the "Winter of our discontent." No one can yet tell what course things will take. . . . The great Whig party defeated & put to shame in the face of their enemies by a Whig President! Is not this a new case in the history of parties in our country? Is not this the first time a gallant army was basely

Georgia judges would have reached the same conclusion.

The third point of interest derives from its potential for undercutting my earlier intimation in seeking to account for the peculiar extremity of Georgia decisions—namely, that it was perhaps related to the judges' high degree of political activity off the bench. Caruthers was himself not entirely remote from politics. An early Jackson supporter, he had become a Whig by the time he was elected to the House of Representatives in 1840.³⁸⁷ A generation later, and almost a decade after his election to the Tennessee bench, Caruthers once more sought to affect the course of national politics, just at the same time as did his Georgia counterparts. But there was a critical substantive difference in their goals. In Georgia the drive toward secession began almost immediately after Lincoln's election with "a series of speeches by prominent Georgians, including Benning and Nisbet."³⁸⁸ By contrast, Robert Caruthers went to the Nation's capital as one of the Peace Commissioners who sought to prevent disunion by backing the substance of the Crittenden Compromise.³⁸⁹

betrayed to an enemy? . . . Let him resign or carry out the will of those by whom he was elected

Letter from Robert L. Caruthers to W. P. McClain (Aug. 16, 1841) (Manuscripts Section, Tennessee State Archives and Library, Nashville, Tennessee).

388. M. JOHNSON, TOWARD A PATRIARCHAL REPUBLIC: THE SECESSION OF GEORGIA 17 (1977). The lead-off speaker, on November 6, 1860, was none other than our good (and volatile) friend, the judicial militarist, Henry L. Benning. The "meaning of Mr. Lincoln's election to the presidency is," said Judge General Benning to the Georgia House of Representatives, "the abolition of slavery as soon as the Republican party shall have acquired the strength to abolish it." *Id.* at 30. Self-preservation required secession forthwith, he told "the cheering legislators." *Id.* Eugenius A. Nisbet, "who, according to Alexander Stephens, was 'regarded as the embodiment of conservatism,'" *id.* at 114, and was a supporter of Douglas during the 1860 presidential campaign, announced his conversion to the cause of secession a month later in an address to the people of Macon: "If [secession] is, as I esteem it, revolution, then I am for it," he told them. *Id.* at 28. Why? Because

[o]ur merchants, artisans, day laborers and small farmers are sustained and grow in wealth through the general prosperity of the country; and that springs from slave labor. . . . It is not too much to say that we love the institution of slavery, as we love . . . our sunshine and our showers—our soil and its fruits. This feeling pervades all classes. It has grown up with our polity . . . it is an heirloom . . . part of our religion.

Id. at 42. After a visiting truth squad of fire-eaters confirmed that Nisbet's new politics was "for real," he ran successfully for the secession convention. There he introduced both the secession resolution that ultimately won out over Herschel V. Johnson's cooperationist substitute (by a vote of 166 to 130) and the resolution of unanimity pledging both supporters and opponents of secession in the convention to support the will of the majority. *See id.* at 98, 114-19.

389. With him went one of his two colleagues on the Tennessee bench, Robert J. McKinney, an Irish-born Democrat but a strong Unionist, and moreover an individual who twenty-seven years earlier, at the Tennessee Constitutional Convention of 1834, had voted in favor of an unsuccessful amendment to end slavery. The Commission originated when Virginia, initially rejecting secession after Lincoln's election, asked other states to join in sending delegates to a Peace Conference in Washington. Twenty-one states responded. Its

When it came to "slavery versus union" the politics of the Tennessee judges were not quite the same as those of the Georgia bench. What about their judicial behavior when confronted with suits for freedom? And, what of the Virginia judges' decisionmaking on the same score? Four similarities in the political positions and structures of the Virginia and Tennessee courts might lead us to expect similar judicial reactions to emancipation in the post-abolitionist decades, and perhaps to anticipate that both would display slightly different perspectives from those of the Georgia bench. First, until the early 1850's, judges were appointed to both benches by the legislatures and had effective life tenure—the Virginia judges by law and the Tennessee judges in practice, for Tennessee legislators, unlike the Georgia electorate, always seemed willing to renew the twelve-year judicial terms. Second, relatively strong two-party systems existed in both states until the collapse of the Whigs in the middle 1850's. Third, both polities rested on more diverse economic bases than did most of the single-staple cotton states of the Deep South. Fourth, the mountain areas of both states were less committed to slavery as an economic institution than were their lower-lying territories, the Virginia Tidewater and western Tennessee.

Yet, and as our consideration of their handling of damages and fair hearings already has suggested, their judicial behavior was far from identical. The differences were manifested primarily in their treatment of four questions dealing with what masters intended and four questions about the legality of clear intent. Doubt as to intent arose principally in four ways: First, when some procedural flaw in, or lack of proof of, a manumittory conveyance existed; second, when the master seemed to condition freedom on a particular destination to which it was impossible to take the Negroes; third, when the master failed to make clear what he wanted done with children of slaves whom he freed at a future date; and fourth, when the master's sanity was challenged by residuary legatees. The legality of clear

recommendations resembled those advocated by Kentucky Senator Crittenden in Congress to provide guarantees to the South against Congressional abolition of the D.C. slave trade or interference with the interstate slave trade, and compensation to slaveowners unsuccessful in recovering fugitive slaves because of violence. The chief differences were (1) that Crittenden's proposals applied the "free-north-of-36° 30', slave-south-of-36° 30'" prescription to all present and future territorial acquisitions, whereas the Peace Commission limited the formula to present territories, and (2) that the Peace Conference recommendations would have required majority approval from both North and South for any future acquisitions. Republicans and secessionists united in voting down the recommendations in Congress. For a useful discussion, see K. STAMPP, *AND THE WAR CAME: THE NORTH AND THE SECESSION CRISIS 1860-1861*, at 103-30 (1950). To our late twentieth-century eyes both sets of recommendations look reactionary, but that is not the point.

intent also came under fire, chiefly at four points: First, when the master ignored or attempted to skirt restrictive domestic laws by taking slaves to a free state, manumitting them there, and returning South with them; second, when he attempted to place them in a qualified state of freedom; third, when he willed to them freedom conditional on their making a choice to accept or reject his offer; and fourth, when he attached some other restrictions to the grant of freedom. In general, the Tennessee court settled these questions with remarkable alacrity and libertarianism, while the Virginia bench tacked back and forth to an extraordinary degree. Let us examine these differences, comparing as far as is feasible contemporaneous courts in the two states while trying to develop some sense of each of these courts as separate small groups reacting to the issues in terms of different legacies of law and precedent. We shall look first at the Virginia court inasmuch as that court's burden of precedent loomed larger and inasmuch as a "legacy" of previous writing on the subject also exists.

(2) Precedent and the Make-up of the Virginia Court in 1830-1831

In the winter of 1830-1831 the Virginia legislature selected a socially prominent new president³⁹⁰ to head the five-man court of appeals. Henry St. George Tucker was a member of a family of diverse views on slavery. His father was St. George Tucker, a former member of the court who a third of a century earlier had authored the one "full-dress" antebellum scheme for emancipation of Virginia's slaves.³⁹¹ His younger brother, Beverley Tucker, was a positive-good theorist.³⁹² The new court president seemingly in-

390. The position of president was the equivalent of Chief Judge.

391. St. George Tucker's scheme began with a 1795 letter to the corresponding secretary of the Massachusetts Historical Society (Jeremy Belknap, who sent it to a number of prominent Massachusetts politicians including John Adams) for comment. The idea wound up as Note H in Tucker's 1803 edition of *Blackstone's Commentaries*—a work that Cover considers "the most interesting and original of American legal works (excluding the *Federalist*) from the Revolution to Story's *Conflicts*." R. COVER, *supra* note 27, at 37 n.* Freeing female slaves and their children as each reached 28 years of age, and following Tucker's own calculations, it would have taken 105 years to free the last Virginia slave. From a dismal Whig viewpoint that is an awfully long time. But that calculation ignores two things: (1) the fact that 105 years is not very long relative to the length of slavery's existence in Christendom; and (2) if any contrafactual historical supposition is safe, the fact that, had Virginia adopted such a scheme, long before 1900 (1795 + 105 = 1900), political pressures would have forced an advancing of the timetable. As is plain enough from Western imperialism's post-1945 experience in Africa and Asia, gradual decolonization schemes or emancipation schemes do not hold still that long.

392. It is a minor curiosity of southern historiography that many historians describe, as a paradigm of the supposed generational shift from Jeffersonian liberalism to pro-slavery, the contrast between St. George Tucker and Beverley Tucker—yet never mention Henry St.

clined more to his father's point of view. While hardly an avowed abolitionist, Henry Tucker regarded manumission as a "benevolent design."³⁹³ Left to his own devices, Tucker might well have tended to a jurisprudence that leaned in favor of liberty. Two sets of circumstances, however, initially restricted his opportunity for so doing.

The first was that, in assuming the seat of his brother-in-law and former tutor, John Coalter, he also was displacing Francis Taliferro Brooke as president and was advancing over the other three continuing members of the court. Table X indicates the make-up of the court from 1831 to 1860.³⁹⁴ While we cannot be certain, it is

George, Beverley's elder brother. See, e.g., C. EATON, *THE GROWTH OF SOUTHERN CIVILIZATION, 1790-1860*, at 303-04 (1961). Beverley Tucker's pro-slavery essays and passionate novel, *The Partisan Leader*, hardly gave him the standing of his elder brother. Beverley was a professor in Missouri. Henry St. George had served as Congressman from 1815 to 1818. Not long after his appointment to head the Virginia Court he was offered a post in Andrew Jackson's Cabinet that (rather foolishly, in my view) he turned down. The post was Attorney-General—one that, it will be recalled, led Roger Taney on to becoming a household word in certain circles, and perhaps the only household word to be, in Charles Sumner's words, "hooted down the page of history." CONG. GLOBE, 38th Cong., 2d Sess. 1012 (1865). One of the reasons for my continuing sense of fascination with the Virginia Court of the 1830's is the contrafactual supposition that if Tucker, not Taney, had become Attorney General, fought Biddle and the Bank, Calhoun and Nullification, and so forth, and succeeded (what could be more natural) John Marshall, then the United States Supreme Court's course in regard to slavery might not have been quite the same.

393. *Elder v. Elder's Ex'r*, 31 Va. (4 Leigh) 252, 261 (1833). Interestingly, Tucker preferred to use the word "man" rather than the paternalistic "boy" to describe Negro adults. See, e.g., *Nicholas v. Burruss*, 31 Va. (4 Leigh) 289, 302 (1833).

394. John Coalter: born 1763 in Rockbridge County, Virginia; studied at William and Mary; was so poor as a young lawyer that he "walked to his courts with his clothes and papers in a bag on his shoulders;" wedded by his third marriage to Frances Bland Tucker, sister of Henry St. George Tucker; became attorney general of Virginia; sat on the Court of Appeals of Virginia, 1811-1830. His resignation from the court of appeals may have been voluntary, for the other four judges were reelected.

Henry St. George Tucker: born 1780 in Virginia, son of Judge St. George Tucker; elected to Virginia House, 1807, U.S. Congress, 1815-1819; declined appointment by Jackson as Attorney-General; served as Professor of Law, University of Virginia, 1841-1845; moved adoption of the Honor System as Chairman of the Faculty; died 1848. Writings: *Commentaries on Law of Virginia*, 1836; *Lectures on Constitutional Law*, 1843; *Lectures on Natural Law and Government*, 1844.

William Cabell: born 1772 in Virginia; attended Hampden-Sydney, 1785, William and Mary (law), 1790-1793; served in Virginia Assembly 1796, 1798, 1804; elected Presidential Elector, 1800, 1804, and governor, 1805; died 1853. Cabell was reelected governor twice (the maximum number of terms allowed).

Francis Brooke: born 1763 in Virginia; never attended college; served as Speaker of Virginia Senate, 1804; died 1851.

John Green: born 1781 in Virginia; died 1834.

Dabney Carr: born 1773; attended Hampden-Sydney; politically inactive; died 1837.

William Brockenbrough: born 1778 in Virginia; studied law at William and Mary College, 1798; appointed judge of the Virginia Supreme Court of Appeals, 1834; died 1838.

Richard Parker: born 1783 in Virginia; elected to U.S. Senate as a Democrat in 1836;

possible that being brought in from the outside suggested to Tucker the wisdom of discretion.³⁹⁵

The second and more significant set of circumstances was comprised by the legacy of statute and precedent pertaining to freedom. While Virginia in 1782 had assumed an "open" position on manumission, by 1805 legislators opposed to this view had garnered just enough votes to restrict manumission to that which would take effect outside the state.³⁹⁶ Of primary importance was the legacy of precedent. Unlike their Tennessee contemporaries, the Virginia judges of the 1830's did not begin with a virtual juridical blank slate in suits for freedom. Quite the contrary, from the turn of the century on the Virginia Court of Appeals had been faced with a substantial manumission docket.

Consequently, to understand the post-1830 Virginia appellate judicial role in the peculiar institution it is critical first to understand the pre-1830 manumission decisions. It is the more so in view of an apparent interpretive difference between two authors, Robert Cover and myself, about the pre-1830 cases—especially about those of the 1820's.

Focusing on the early nineteenth century, Cover has argued recently that during its first decade, the Virginia judges inclined to "eclectic use of equitable, common law and statutory devices all . . . infused with a favorable attitude toward manumission."³⁹⁷ Al-

served two months and resigned to accept court position; declined Van Buren's offer of Attorney-General in 1840; died 1840.

Robert Stanard: born 1781 in Virginia; served as member of the Virginia Constitutional Convention 1829-1830; died 1846.

Briscoe Baldwin: born 1789 in Virginia; father of Colonel John B. Baldwin, "leader of Union Party in the Secession Convention of 1861;" died 1852.

John J. Allen: born 1797 in Virginia; educated at Washington College and Dickinson College; served in Congress, 1833-1835; died 1871.

William Daniel: born 1806 in Virginia; adhered to secessionist ideology; died 1873.

William Moncure: born 1805 in Virginia; died 1882.

Green B. Samuels: born 1806 in Virginia; elected as a Democrat and served in Congress 1839-1843; died 1859.

George Lee: born 1808 in Virginia; known as a secessionist.

William Robertson: born 1817 in Virginia; died 1898.

See generally *DICTIONARY OF AMERICAN BIOGRAPHY* (20 vols.) (1929); L. TYLER, *ENCYCLOPEDIA OF VIRGINIA BIOGRAPHY* (5 vols.) (1915).

395. His older associates had the advantage of considerably more judicial experience, and if he was successfully to lead these men—some of whom would continue their tenures after his departure—Tucker well might have felt that a delicate, rather than a vigorous, guiding hand might constitute the best initial approach to his task.

396. See, e.g., An Act to amend the Several Laws Concerning Slaves, ch. 63, § 10, 1805 Va. Acts 35 (1806).

397. R. COVER, *supra* note 27, at 69. Robert Cover suggested that American courts of that era could adopt one of three stances in interpreting manumission statutes: (1) perceiving the statute as intended to further freedom, and hence furthering "these ends without conflict

TABLE X

VIRGINIA JUDGES 1831-1860

1831	Henry St. G. Tucker	William Cabell	Francis Brooke	John Green	Dabney Carr
1832	Henry St. G. Tucker	William Cabell	Francis Brooke	John Green	Dabney Carr
1833	Henry St. G. Tucker	William Cabell	Francis Brooke	John Green	Dabney Carr
1834	Henry St. G. Tucker	William Cabell	Francis Brooke	Wm. Brockenbrough	Dabney Carr
1835	Henry St. G. Tucker	William Cabell	Francis Brooke	Wm. Brockenbrough	Dabney Carr
1836	Henry St. G. Tucker	William Cabell	Francis Brooke	Wm. Brockenbrough	Dabney Carr
1837	Henry St. G. Tucker	William Cabell	Francis Brooke	Wm. Brockenbrough	Richard Parker
1838	Henry St. G. Tucker	William Cabell	Francis Brooke	Wm. Brockenbrough	Richard Parker
1839	Henry St. G. Tucker	William Cabell	Francis Brooke	Robert Stanard	Richard Parker
1840	Henry St. G. Tucker	William Cabell	Francis Brooke	Robert Stanard	Richard Parker
1841	Henry St. G. Tucker	William Cabell	Francis Brooke	Robert Stanard	Richard Parker
1842	Briscoe Baldwin	William Cabell	Francis Brooke	Robert Stanard	J. J. Allen
1843	Briscoe Baldwin	William Cabell	Francis Brooke	Robert Stanard	J. J. Allen
1844	Briscoe Baldwin	William Cabell	Francis Brooke	Robert Stanard	J. J. Allen
1845	Briscoe Baldwin	William Cabell	Francis Brooke	Robert Stanard	J. J. Allen
1846	Briscoe Baldwin	William Cabell	Francis Brooke	Robert Stanard	J. J. Allen
1847	Briscoe Baldwin	William Cabell	Francis Brooke	Robert Stanard	J. J. Allen
1848	Briscoe Baldwin	William Cabell	Francis Brooke	Robert Stanard	J. J. Allen
1849	Briscoe Baldwin	William Cabell	Francis Brooke	Robert Stanard	J. J. Allen
1850	Briscoe Baldwin	William Cabell	Francis Brooke	Robert Stanard	J. J. Allen
1851	Briscoe Baldwin	William Cabell	Francis Brooke	Robert Stanard	J. J. Allen
1852	George Lee	Green B. Samuels	Richard Moncure	William Daniel	J. J. Allen
1853	George Lee	Green B. Samuels	Richard Moncure	William Daniel	J. J. Allen
1854	George Lee	Green B. Samuels	Richard Moncure	William Daniel	J. J. Allen
1855	George Lee	Green B. Samuels	Richard Moncure	William Daniel	J. J. Allen
1856	George Lee	Green B. Samuels	Richard Moncure	William Daniel	J. J. Allen
1857	George Lee	Green B. Samuels	Richard Moncure	William Daniel	J. J. Allen
1858	George Lee	Green B. Samuels	Richard Moncure	William Daniel	J. J. Allen
1859	George Lee	William Robertson	Richard Moncure	William Daniel	J. J. Allen

though not dealing with the case of the 1810's and 1820's in much detail, Cover states that "[b]y 1821 decisions in the area of conflict of laws . . . foretold a decisive shift In 1824 . . . that shift manifested itself."³⁹⁸ Cover further seems certain that the shift away from favoring freedom became permanent (until the Civil War) with an 1831 case. Though he does not examine cases after that date, he states: "If any doubt might have remained about an explicit rejection of earlier standards, they were certainly dispelled by the court in *Gregory v. Baugh* in 1831"³⁹⁹

Writing some years before Cover, and focusing on the period 1831-1860, I argued that during the 1830's some Virginia judges, ultimately a majority, attempted with only modest success to lay down a more liberal jurisprudence than had characterized that of the 1820's. "Passivists, whose personal liberal tendencies were seemingly overcome by judicial self-restraint, they sought diligently to distinguish earlier Virginia decisions against liberty."⁴⁰⁰

Reviewing the evidence again, I am inclined to think that both of us erred, myself primarily in putting too much weight on a particular 1824 case as representative of pre-1830 jurisprudence,⁴⁰¹ and Cover in skating selectively from one case to another during the period 1799-1809; dismissing cursorily the decade of the 1810's; and extrapolating a post-1830 future from his analysis of four cases between 1820 and 1831, rather than proceeding systematically through these decades. Without seeking to judge whether my "hedgehog" analytic technique or his "fox-like"⁴⁰² one resulted in more serious error, let me now present a re-analysis that seems more adequate than either earlier effort as a prerequisite for understanding Virginia jurisprudence from the beginning of Tucker's court presidency.

Essentially my re-analysis has three parts, to each of which ideally I would give equal attention. For reasons of economy, however, I shall reduce my comments about them in the text to two observations. One is that three cases of the first decade of the nineteenth century deserve a bit more attention than Cover gave them,

with positivist principles," *id.* at 62, limiting the judges' role to neutral rule application; (2) in gray areas, where a neutral reading of the statute gave no clue to the right result, asserting "a principled preference for liberty as one of those larger principles of law which are the basic stuff out of which rules of decision are formed," *id.*; and (3) asserting "a sort of bend-over-backward principle by which there is an obligation to achieve a profreedom result unless there is very specific, concrete positive law that prevents it." *Id.*

398. *Id.* at 74.

399. *Id.*

400. *Fairness and Formalism*, *supra* note 25, at 92.

401. *Maria v. Surbaugh*, 23 Va. (2 Rand.) 228 (1824).

402. The hedgehog, reputedly, burrows down deeply and knows a lot about a little, whereas the fox, allegedly, covers the territory rapidly and knows a little about a lot.

especially *Woodley v. Abby*,⁴⁰³ the outcome of which causes me to suspect that, relative to some post-1830 slavery jurisprudence, especially that of Tennessee and Texas, the 1799-1809 Virginia pro-freedom "peak" is less lofty than Cover implies.⁴⁰⁴ The other is that the Virginia court's manumission docket from 1810-1819 simply is not very useful in determining whether the Virginia judges' attitudes were moving during that decade in an anti-freedom direction.⁴⁰⁵ Hence we arrive at the really crucial task—imaginatively

403. 9 Va. (5 Call) 336 (1805).

404. Two of them go toward sustaining his estimate of judicial inclinations—Pegram v. Isabell, 11 Va. (1 Hen. & M.) 390 (1807) (holding that hearsay evidence that a slave's ancestor was free could be introduced in court); and Wilson v. Isbell, 9 Va. (5 Call) 425 (1805) (indicating judicial willingness to free a slave unlawfully brought back into the state after residence elsewhere). Cover discusses *Woodley v. Abby* briefly, using it to show that one should "not . . . make too much of the phrases favoring liberty in these opinions," R. COVER, *supra* note 27, at 74, inasmuch as Roane, confronted with a conflict between the rights of slaves and of creditors, chose for the creditors. We may be able to extract a little more from the case, given its facts and given a 3 to 2 split on the outcome. In *Woodley, Abby* and others had been slaves of one David Bradley, who had emancipated them in 1792. They enjoyed freedom for over a decade, but were returned to slavery in 1805. Why? Because a year before he had freed them, he had become the second husband of one Eliza Harrison whom, it appeared, a year before that, as administratrix of her first husband's estate, had squandered it. Harrison's estate's representatives charged a *devastavit*, and succeeding, received *de bonis propriis* Bradley's freed slaves. So ruled Roane, Court President Lyons, and Judge Fleming. Judges Carrington and St. George Tucker objected in vain, arguing unsuccessfully that "a person *de facto* free, either by birth, as in the case of the children, or by actual emancipation in due form of law, as in the case of the parents, cannot be taken in satisfaction to satisfy any judgment, or decree in any suit to which he is not a party." 9 Va. (5 Call) at 342.

Comparing this case's result with others prior to 1810 in Virginia, what is the consequence? First, with this exception, and possibly Roane's dissent from the majority's 1799 holding in *Pleasants v. Pleasants*, 6 Va. (2 Call) 319 (1799), that the increase of future-free mothers did not go free at the same time as their mothers but had to wait until they too reached the appointed age of freedom, the regular judges on the high court itself—though generous when all that lay against freedom were the wishes of would-be heirs—never really wrenched the claims of property or the property orientation of the governing statutes. The "wrenchings" that took place that genuinely put the phraseology of "natural rights to liberty" into serious competition against the rights of property, came from the pen of Chancellor Wythe in lower court trials. His holdings only prevailed on appeal when the appellate judges found other, less "radical" grounds on which to sustain them.

405. With one exception, the cases of the 1810's continue past doctrines by upholding claims to freedom based on illegal importation by the master and turning down claims when the white importer was not the master. The exception is *Abraham v. Matthews*, 20 Va. (6 Mun.) 159 (1818). That case shifted the *onus probandi* in an illegal importation case onto the plaintiff slaves on the ground that twenty years had elapsed before they sought to take action in the courts. *Abraham*, however, is a slender reed on which to place much reliance as evidence for a serious shift against freedom between 1810 and 1818, especially since the slaves' counsel filed no written brief and gave no oral argument. It is the more so in light of *William and Mary College v. Hodgson*, 20 Va. (6 Mun.) 163 (1818), handed down just a month later. In that case the college president and (horribile dictu!) the professors, who had been bequeathed 500 bushels of Indian corn annually by the will of William Ludwell Lee to help support a free school, argued that their bushels took precedence over the grant of liberty Lee had bequeathed to his slaves in another clause of his will. In 1808 Chancellor Creed Taylor

trying to re-enact the thinking about slavery of the judges of the 1820's, trying to determine whether Cover is correct in perceiving a decisive shift away from favoring freedom at, or between, any of the three dates he somewhat ambiguously gives—1820-1821, 1824, and 1831.

Emphasizing the contrast between the judicial style of the Virginia court and the Kentucky court,⁴⁰⁶ Cover argues that a shift away from freedom occurred in the former judiciary between *Griffith v. Fanny*⁴⁰⁷ in 1820 and *Lewis v. Fullerton*⁴⁰⁸ in 1821. Looking at verbal style is one way of interpreting substantive result. Let us try a second approach—one that ignores whether judges allude to natural rights to liberty and concentrates rather on the substance of the different facts in the two Virginia cases, one that seeks to determine whether the factual differences suffice to explain the different outcomes in *Griffith* and *Lewis*.

In *Griffith*, if anything was “suspicious,” it was the behavior of various owners of the slave Fanny. Fanny’s original Virginia master, Kincheloe, had sold her to Skinner, an Ohio resident, delivered her to Ohio, “and received the purchase money.”⁴⁰⁹ Not more than one month later Kincheloe had executed a bill of sale not to Skinner but to Griffith, a third party from Virginia. How did this happen? It appears that Skinner and Griffith made a private agreement to this effect because Skinner, “by the laws of Ohio . . . could not hold a slave in his own right.”⁴¹⁰ For eighteen months after execution of the bill of sale Fanny “was at different times seen at” Skinner’s Ohio residence; clearly she had resided in Ohio for a time. Later she was returned to Virginia and into the possession of Griffith, “who claimed her under the bill of sale.”⁴¹¹ Fanny brought suit for her freedom. The “section of the Ohio Constitution, prohibiting invol-

had rebuffed the (hungry?) pedagogues, saying “that liberty secured to [the blacks] by . . . benevolence and humanity . . . is supposed to have been an act no less meritorious than the establishment of a free school.” *Id.* at 165. The court of appeals affirmed on March 2, 1818.

406. Cover stresses the natural rights phraseology of *Rankin v. Lydia*, 9 Ky. (2 A.K. Marsh) 467 (1820). See R. COVER, *supra* note 27, at 95-98.

407. 21 Va. (Gilmer) 143 (1820).

408. 22 Va. (1 Rand.) 15 (1821).

409. 21 Va. (Gilmer) at 143.

410. *Id.* at 144.

411. *Id.* Fanny’s lawyer, I find on going to the original report of the case after penning these paragraphs on the basis of Cover and Catterall’s brief excerpting of the case, argued exactly what I surmised was an alternate possibility—namely, that the whole transaction was, “on its face a fraud” that aimed at deliberately avoiding the laws of Ohio and of Virginia. Only Roane, John Coalter, and Francis Brooke heard the case—Cabell was absent for unstated reasons, and Court President Fleming (on the court from its inception in 1789 until his death in February 1824) was ill for much of his last years.

untary servitude, was inserted into the verdict"⁴¹² on her behalf, and the court of appeals agreed she should go free.

Contrast *Lewis*. Lewis' mother was Rodgers' slave. Seemingly, Rodgers had taken her into Ohio, although for what total length of time is not evident. There was only one occasion prior to Lewis' birth, however, when Milly was seen in Ohio, "on a Sunday, working at a sugar camp therein, in the absence of her master, and without any evidence that it was with his permission."⁴¹³ Later Milly had obtained a writ of habeas corpus and shortly thereafter an Ohio county court judgment. Subsequently Rodgers persuaded Tupper to convince Milly that if she would agree to serve Rodgers for two years, as an indented servant, Rodgers would not appeal the Ohio county court's action to a higher Ohio or federal court, and he would execute in return an Ohio deed of manumission. This deed was indeed executed and attested in Ohio. Shortly afterward Milly was brought back into Virginia, where Lewis was born and sold to Fullerton. On reaching maturity he brought suit against Fullerton but was denied freedom.

Are these cases quite the same? Or might it have been that in *Griffith*, but not in *Lewis*, the Virginia court saw a palpable attempt to evade the laws of Virginia against bringing slaves back into the Commonwealth after their residence elsewhere? In *Lewis* did the court perhaps see no permanent Ohio residence intended by the master, but rather an Ohio lower court decision that, putting him in a bind, induced him to make a deal under duress, which once he had got his slave back safely into Virginia, he sought to avoid? Might it be, then, that the Virginia court, rather than shifting from respect for the Ohio Constitution in 1820 to disrespect in 1821, was really applying the same criteria in relationship to different masters whose behaviors struck the Virginia judges differently.

Now let us ask whether there is an alternate reading possible of *Maria v. Surbaugh*,⁴¹⁴ the pivotal case that arose three years after *Lewis*. Cover thinks *Maria* "might have gone either way"⁴¹⁵ and that, going against the blacks' claim to freedom, it manifested "a decisive shift in the attitude and technique of the Virginia Court."⁴¹⁶ I am not sure that is true for several reasons.

First, it is less clear to me than to Cover that *Maria*, dislikable though the result surely is, contravened relevant Virginia preced-

412. *Id.*

413. 22 Va. (1 Rand.) at 22.

414. 23 Va. (2 Rand.) 228 (1824).

415. R. COVER, *supra* note 27, at 74.

416. *Id.*

ents such as *Pleasants v. Pleasants* and, at least "in spirit" on a related matter, *Woodley v. Abby*.⁴¹⁷ Second, I am not certain that *Maria* denoted a fundamental substantive or stylistic shift because were I so to conclude, I would be at a loss to account for other cases of the 1820's that Cover does not discuss. Yet it seems to me important to consider them before leaping ahead seven years to the conclusion that *Gregory v. Baugh*⁴¹⁸ in 1831 removed any doubt that a shift of either sort occurred. It is the more important since three of the four continuing judges who greeted Tucker in 1831 sat on the *Maria* case, since the fourth joined the court just after *Maria*, and since he wrote the court's opinion in its very next manumission case. That opinion, interestingly, came down in favor of liberty.⁴¹⁹

On balance, I find it hard to extrapolate any major substantive shift from the cases of the late 1820's. Three cases could be adduced by a fertile dismal-Whig imagination, but two of them offer very weak evidence indeed.⁴²⁰ Against those cases, one needs to balance

417. In *Maria* the will bequeathed the slave Mary to the testator's son "with a declaration that she shall be free as soon as she arrives at the age of thirty-one years." 23 Va. (2 Rand.) at 228. The question posed was, what happened to Mary's children born after the testator died but before Mary became 31? Did they go free also? Judge Green, taking a lengthy look at *Pleasants v. Pleasants*, concluded that they did not. In *Pleasants* the will had freed a group of "slaves, . . . together with their increase, . . . immediately on their coming to the age of thirty years." 6 Va. (2 Call) at 321.

The decision of the 1799 court of appeals majority (reversing Wythe) determined, over a dissent by Roane, that they too had to wait until reaching thirty. In effect, Roane wanted to hold that the right to freedom was complete and vested in the parent slaves—that only the timing was delayed, not the right. Hence he would have had any of their children born after the "vesting" go free with the parents. As we have noted, six years later, in *Woodley*, Roane opposed Tucker's related view that once freed, slaves and their children could not be brought back into slavery to pay for a wasteful executor's ways. Even if the reader does not accept my analogy to the spirit of *Woodley*, is it not evident that the children in *Maria* stood on a less favorable footing than those in *Pleasants*? In *Maria* there was no mention of the increase at all. Had the Virginia court majority adopted Roane's view in *Pleasants*, and even more had the majority adopted Tucker's view in *Woodley*, we would be on much safer ground in viewing *Maria* as not merely an unpleasant result, but as a newly wooden result *contra* the spirit of liberty.

418. 29 Va. (2 Leigh) 665 (1831).

419. See *Ben v. Peete*, 23 Va. (2 Rand.) 239 (1824) (Carr, J.) (Green, J., not sitting).

420. *Sawney v. Carter*, 27 Va. (6 Rand.) 173 (1828) (Green, J., not sitting); and *Stevenson v. Singleton*, 28 Va. (1 Leigh) 72 (1829) are weak. Both involved a novel argument—that a court of equity should intervene to enforce an alleged contract between master and slave whereby the latter would "moonlight" and earn his freedom by paying the former an agreed-upon sum from those earnings. When I say "weak," I mean of course relative to the general shape of southern slavery jurisprudence. For a society that genuinely decided both to encourage the rights of (the master's) property and to maximize the cause of freedom, allowing such contracts could have been a principal mode of permitting societal change.

The "not so weak" case is *Moses v. Denigree*, 27 Va. (6 Rand.) 561 (1828). *Moses*, which as far as I know has been surprisingly overlooked by all the "empty-glass" Whigs, is a bit of a bombshell for any "full-glass" Whig. Dabney Carr turned down a deed of emancipation signed on November 13, 1781—just a few months prior to the 1782 Act—on the ground that

a larger number that suggest continuity with the past.⁴²¹

Similarly, with respect to a stylistic shift, firing as does Cover directly from Judge Green's 1824 *Maria* declaration that judges should approach slavery cases neutrally toward Judge Carr's 1831 *Gregory* dictum that earlier judges had relaxed the rules of law too greatly *in favorem libertatis* has an unfortunate effect. It shoots at the head of another declaration by Judge Green about "good" slavery decisionmaking that stands squarely between *Maria* and *Baugh*. That is his 1828 opinion in *Isaac v. West's Executor*.⁴²² There, seemingly aware that the way he had construed a deed in the course of reaching a pro-freedom result was less convincing than it might be, he declared:

If this construction is doubtful, some weight is due to the maxim, that every Deed is to be taken most strongly against the grantor, and to the spirit of the Laws of all civilized nations . . . "In obscura voluntate manumittentis, favendum est libertati." (citations omitted) And for the Common Law, see *Coke Litt.* 124, b.⁴²³

that Act only took effect prospectively after May of the latter year. Technically, Carr was correct; the 1782 Act stated that "it shall *hereafter* be lawful . . . to emancipate" without proving meritorious services. True, Carr seeks to distinguish *Moses* from *Pleasants*, which did look forward "to the passage of a Law as a condition." *Id.* at 565. Nonetheless, and especially as I have previously described Dabney Carr as "probably the most liberal Judge appointed between Tucker's father in 1804 and Peter Stanard in 1838," Nash, *supra* note 19, at 207, the result in *Moses*, seemingly short of *Charles v. Hunnicutt*, 9 Va. (5 Call) 311 (1804), disconcerts me about my former judgment.

421. On the one hand, in *Hunter v. Fulcher*, 28 Va. (1 Leigh) 172 (1829), the Virginia court plainly was unwilling to uphold lower court decisions where depositions in favor of freedom surprised the defendant master. On the other hand, in *Fulton v. Shaw*, 25 Va. (4 Rand.) 597 (1827), the same judges were equally unwilling to permit a master to grant freedom to a particular female slave while reserving to himself "an absolute . . . claim to all . . . children . . . born of her body." *Id.* at 598 (Brooke and Coalter were absent in both cases). This deed is surely a little grotesque. Dabney Carr, neutrally following, so to speak, the obverse side of *Maria*, told the grantor that he could not make any such reservations. "A free mother cannot have children who are slaves." *Id.* at 599. Other decisions of the decade look doctrinally continuous with those of the preceding decades. *Dunn v. Amey*, 28 Va. (1 Leigh) 465 (1829), continues the earlier tradition of *Patty v. Colin*, 11 Va. (1 Hen. & M.) 519 (1807), by temporarily selling slaves granted freedom for a sufficient term of years to pay off estate debts. *Spotts v. Gillaspie*, 27 Va. (6 Rand.) 566 (1828), warrants, given our prior consideration of alternate readings of *Lewis v. Fullerton*, more attention. In *Spotts* (rather in contradistinction to Cover's reading of *Lewis* and *Fanny*) Francis Brooke (whom, some years ago and without looking at these 1820's cases, I argued was the most conservative and least pro-freedom of the judges to sit between 1830 and the middle 1850's, Nash, *supra* note 19, at 227-28) held that the law of Pennsylvania controlled the outcome in Virginia. For Brooke the effect of Pennsylvania's 1780 gradual emancipation law was to free, in Virginia, the daughter of a Pennsylvania slave born in 1786 and brought, as part of a bequest, by the Virginia resident legatee to the Dominion State. Comity, though not natural law rights to freedom, had more effect eight years after *Lewis* than in *Lewis*. That was, perhaps, not because the Virginia court had suddenly turned back to embracing the Enlightenment in a way that Wythe would have approved, but rather because nothing in the master's behavior indicated the propriety of a contrary result.

422. 27 Va. (6 Rand.) 652 (1828) (Brooke, J., not sitting).

423. *Id.* at 657.

There is a further major reason why I am not convinced that the Virginia judges shifted as a group decisively away from favoring freedom even by 1831, the year of *Baugh*. It is that I do not agree with Cover that, examined closely, *Baugh* itself suggests an "explicit rejection of earlier standards."⁴²⁴

To begin with, the court was divided on three of the four issues presented in the case, and retiring Judge Coalter was absent. On the first issue, Brooke, Cabell, Carr, and Green did agree: *Baugh's* attempt to gain his liberty by proving descent from a female Indian with a right to freedom would have to be remanded for another trial because the circuit judge had erroneously paraphrased to the jury what witnesses had said about the status and appearance of the female ancestor. On the second issue, the court split three to one. Only Francis Brooke believed that, notwithstanding the passage of over half a century, the doctrine of *lis mota* still applied as a barrier to introducing evidence favorable to Gregory's claim. Dabney Carr, stating that his initial inclination had been to agree with Brooke's view, voted with Green and Cabell.

On both the third and fourth issues the court split two and two. Brooke concurred with Carr's positions, while Cabell stated that he agreed with "my Brother *Green*, in all points."⁴²⁵ The issues were intimately related. The third issue pertained to the admissibility of hearsay evidence both as to the plaintiff's descent from his putative ancestor and as to whether she had in fact been an Indian. The fourth issue concerned where lay the *onus probandi*, on the slave or on his owner, with respect to two further questions, assuming that Gregory could prove his Indian descent: (a) the date when his Indian ancestor had been imported into Virginia; and (b) the place from which she had been imported.⁴²⁶

I have two difficulties with Cover's belief that the passage he quotes from Carr's opinion opposing the admissibility of hearsay

424. R. COVER, *supra* note 27, at 74. Since the court was divided two to two (Coalter absent) on some aspects of the cases and three to one (in favor of "libertarian" pro-freedom) on another, I become more puzzled each time I look at the case as to whether Cover studied it closely.

425. 29 Va. (2 Leigh) at 693.

426. Without going into all the historical complexities here, considerable doubt obtained as to whether and when late seventeenth-century and early eighteenth-century Virginia statutes: (a) prohibited enslaving Indians brought into the Commonwealth; and (b) whether a presumption in favor of liberty was created if it could be proved that an Indian had been brought in by land (and hence perhaps taken from a friendly tribe) as opposed to a presumption in favor of slavery if it could be proved that the Indian had been brought in by sea (in which case, the assumption was, from places such as the West Indies, where Indian slavery was lawful). For a fuller discussion of this issue, see 1 H. CATTERALL, *supra* note 14, at 61-71.

evidence shows an explicit general rejection of earlier standards on the part of the court as a whole—two objections besides the obvious one that Carr spoke only for one other judge.

First, I am not sure that Carr meant his rejection as broadly as Cover interprets it. This we can see if we add (and italicize) what comes immediately before and after the passage (not italicized) that Cover quotes from Carr. Thus:

[T]he decisions of this court, in several cases, have gone to let in hearsay to prove descent from an indian woman; and this is the consideration which I have found it most difficult to get over; for I am exceedingly reluctant to unsettle what is at rest. But all who have examined the earlier cases in our books, must admit, that our judges (from the purest motives, I am sure) did, in favorem libertatis, sometimes relax, rather too much, the rules of law, and particularly the law of evidence.⁴²⁷

To me it looks arguable that Carr's concern was less general, and more specific about, primarily, the rules of evidence.

Second, before we reach any conclusions about a major shift away from earlier pro-freedom standards, we ought to compare Green's reasons for objecting to Carr's wish to "firm up" the evidentiary rules. Said Judge Green:

[I]t is important to the descendants of all female indian servants, many of whom are still legally bound to a temporary service, and to a large stock of emancipated slaves, who are bound to service in all generations to the age of thirty years, under Pleasant's will All of the former class now, and all of the latter in a few years, must be reduced to unconditional slavery, if it shall become the settled law, that the identity and condition of their remote ancestors cannot be proved by hearsay evidence or traditionary reputation.⁴²⁸

Equally, we should note Green's objections to moving away from the old pro-freedom rule of transferring the burden of proof from the

427. 29 Va. (2 Leigh) at 680 (emphasis added). See also R. COVER, *supra* note 27, at 74.

428. 29 Va. (2 Leigh) at 690-91 (emphasis added). Catterall's excerpting of the cases makes one minor, understandable omission, and one major, less understandable, omission. The minor one is that Green apologizes for spending as much time as he does on the hearsay evidence rule before arguing that the result is important to Indian servants' children and Pleasants' slaves' increase. That is not the sort of thing on which Lumpkin and Benning would have bothered to spend time, or the sort of thing about which a "de-brutalizing hypocrite" would have bothered. The major omission is her not telling us that Green tackles John Marshall's holding on the issue, adverse to slaves, in *Queen v. Hepburn*, 11 U.S. (7 Cranch) 290 (1813), saying, "I do not comprehend the rule laid down in the cases in the supreme court of the U. States," 29 Va. (2 Leigh) at 687-88, and pointing out that as a Maryland citizen the dissenter, Gabriel Duval, was the justice who presumably knew what was what in Maryland legal practice. Such have been my sentiments about *Queen* for a number of years, and I confess to some Whiggish pleasure at finding a southern judge taking the same line. For useful discussions of the United States Supreme Court and slavery, see Roper, *In Quest of Judicial Objectivity: The Marshall Court and the Legitimation of Slavery*, 21 STAN. L. REV. 532 (1969); Wiecek, *Slavery and Abolition Before the United States Supreme Court, 1820-1860*, 65 J. AM. HIST. 34 (1978); P. Finkelman, *A More Perfect Union? Slavery, Comity, and Federalism, 1787-1861* (1976) (Ph.D. dissertation, University of Chicago).

slave, once he had proved his Indian descent, to the master with respect to the time and place of the ancestor's importation. Distasteful of the colonial practice of holding the children of Indian servants to the age of thirty-one plus one additional year for each offspring born to such children, Green stated:

No possible contrivance, short of reducing the whole race to absolute slavery, could be better calculated to obscure and confound their right to freedom, and to destroy the evidence of it.

Considering these facts, . . . I cannot for a moment doubt the propriety of the former decisions of this court . . . that proof that a party is descended in the female line from an Indian woman, . . . without anything more, is *prima facie* proof of his right to freedom⁴²⁹

As indicators of the Virginia judges' attitudes on slavery jurisprudence at the beginning of the 1830's, Green's views on hearsay and burdens of proof warrant as much attention as Carr's. What I perceive, then, is not a general shift but rather disagreement and disunity. Indeed, two other cases decided in 1830, just before Tucker's appointment, suggest that some of the judges were not even entirely consistent in their thinking about suits for freedom.

In *Thrift v. Hannah*,⁴³⁰ Francis Brooke decided that the marriage of a slave mistress, after she had drawn up a witnessed deed of manumission to take effect at her death but before its probate, terminated the deed. Thus the slaves passed to her husband. Dabney Carr dissented on the ground that the act of drawing a witnessed deed ended the mistress' right to perpetual property in the slaves; only state action remained possible. The slaves possessed a grant valid save insofar as the state legislature might nullify it by passing a prohibitory general law. On this occasion John Green⁴³¹ agreed with Carr. But Brooke carried with him two other judges, Coalter and Cabell.⁴³² In Brooke's view, two considerations militated a different conclusion. First, the testator could have revoked her deed prior to probate simply by tearing it up. Second, upon her marriage she ceased to be *feme sole*. Once *feme covert*, her husband rightfully owned the slaves, and she retained no independent power to manumit them. Brooke's argument was clearly the more neutral one. Curiously, Carr's reasoning appears an attempt at libertarian intervention on behalf of the slaves and rather at variance with his posi-

429. 29 Va. (2 Leigh) at 686.

430. 29 Va. (2 Leigh) 300 (1830).

431. Green served on the court from 1822-1834. Little is known about his background except that he served in the War of 1812.

432. The latter was a popular Republican ex-governor who had been re-elected twice, the maximum legal number of times. See 3 DICTIONARY OF AMERICAN BIOGRAPHY 390 (1929); 2 L. TYLER, *supra* note 394, at 47.

tion in *Gregory v. Baugh* a year later. Thus, from the standpoint of assessing personal attitudes (as distinct from jurisprudential behavior), *Thrift v. Hannah* is suggestive only about the minority judges, Carr and Green.

The second 1830 case, however, was somewhat more indicative of the other judges' predilections. *Walthall's Executor v. Robertson*⁴³³ required the court to interpret a will whose wording was undeniably ambiguous:

[I]f it be agreeable to the laws . . . after the death of my said wife Mary it is my will . . . , that the following slaves owned by me, *viz. Joan senior, Gary, Jack, Tom, and Peter*, shall as soon as they attain the age of thirty-one years, shall be freed; and I appoint . . . , trustees for the liberation . . . , and for them to make the necessary application to court . . . , both as to their freedom and their remaining in the state. If the laws of the state be against such procedure, then my will . . . is, that the said slaves shall be equally divided among my children⁴³⁴

The issue involved testamentary intent in light of relevant state law. Since the Acts of 1805 and 1819 required the removal of freed slaves from Virginia,⁴³⁵ the court had to decide whether Walthall's primary intent was manumission or retention of the blacks in the Commonwealth. For John Green and the three judges who concurred with him, the words "if the laws of Virginia be against such procedure" referred "both to the emancipation of the slaves, and procuring permission to them to remain in the state"⁴³⁶ Green reasoned that Walthall must have known of the laws, and known further that since his slaves had not "done any act of extraordinary merit"⁴³⁷ the laws would not permit their remaining. He must, therefore, have been gambling on a change by the time of his death. Since change had not come, he wished his children to inherit the slaves. In dissent Dabney Carr reached the opposite conclusion, arguing first that the defendant was "an ignorant, illiterate man,"⁴³⁸ who only "had an idea, that some application to court was necessary,"⁴³⁹ and second that the wording clearly showed two separate purposes. The court,

433. 29 Va. (2 Leigh) 189 (1830).

434. *Id.* at 189-90.

435. Note the early date of the prior act relative to the concert-of-defense "schedule." In 1778 the legislators' liberalism on this issue had peaked in the enactment of a law that allowed illegally imported slaves to be freed. In 1805 the legislators changed positions radically—they enacted a law that allowed such slaves to be seized from their owners and sold at auction, the proceeds to go to the State Treasury! The 1819 Act moved back to a slightly less "closed" position, allowing slaves of extraordinary merit to remain in the Commonwealth once freed. But this could not help Walthall's slaves.

436. 29 Va. (2 Leigh) at 194.

437. *Id.* at 195.

438. *Id.* at 193.

439. *Id.*

said Carr, should send the slaves out-of-state to freedom.

Neither analysis wholly dispels the will's ambiguity. Walthall was not obviously gambling on a statutory change. Nor do his words clearly show "two distinct and independent things; the freedom first, the residence afterwards."⁴⁴⁰ Neither Green's nor Carr's opinion appears entirely neutral. Indeed, the difficulty of *Walthall* lay in the virtual impossibility of writing a neutral opinion. The situation almost encouraged the judges to write their private beliefs into law. In company with *Maria*, *Thrift*, and *Baugh*, however, the result in *Walthall* suggests some inferences about the attitudes and behavior of the four judges whom Tucker met in 1831.

It reinforces a suspicion raised by Carr's handling of *Thrift* that pro-freedom personal views at times motivated his decisionmaking. Particularly suggestive is the sentence with which he prefaces his detailed analysis of Walthall's will: "Reasoning *a priori*, we should hardly suppose, that the testator who wished to confer the boon of freedom on his slave, would make that dependent on his residence in this or that quarter of the globe."⁴⁴¹ Given the lack of compelling logic in the argument with which Carr followed this observation, it may be correct to perceive at least an underlying reflex of sympathy with Walthall's efforts to free his slaves. That much seems clear.

The difficulty arises in trying to square Carr's position in these three cases with his holding in *Baugh*. A similar difficulty arises with respect to attempting to derive John Green's views on the peculiar institution from his positions in these cases. Yet it would be helpful if we could define somehow the attitudinal space that these two judges and their colleagues, Brooke and Cabell, "occupied," so to speak, when Henry Tucker assumed leadership of the court.

There appear to me four ways to try to do so, and they are not all equally satisfactory. The least satisfactory way is to content ourselves with some broad covering label, with thinking of them as all one nasty pro-slavery lot of white supremacist magistrates, differentiated only amongst themselves and from the Georgia judges by the extent to which they minced their words about the peculiar institution. Besides amounting to a premature moral evaluation, however, such an approach forfeits any fineness of perception in order to generalize.⁴⁴²

440. *Id.* (Carr, J., dissenting).

441. *Id.* at 192-93.

442. We would not be very impressed with this kind of analysis in an area where our contemporary ethical feelings were less interwoven with our subject matter. For, as a technique of legal history, it is rather analogous to an art historian's coming along and telling us that to understand Rembrandt's paintings all we need to realize is that they are almost all

A second way of attempting to define the Virginia judges' attitudinal space seemed to me, some years ago, more satisfactory than it does now, although I would still prefer it to the first.⁴⁴³ Its drawbacks are three: (1) its use of terms such as "liberal" or "conservative," or "pro-slavery" and "anti-slavery," makes it susceptible to misreading;⁴⁴⁴ (2) it plays down unduly the autonomy of judge-made law;⁴⁴⁵ and (3) it may be too rationalist in its assumptions about the nature of the judges' personal attitudes about the peculiar institution.⁴⁴⁶

The third way would be the closest to traditional legal history, as Robert Gordon defined it.⁴⁴⁷ This approach would bring into the foreground for scrutiny the "inner logic of the law," the distinctly legal and judicial values and doctrines, with personal attitudes towards the peculiar institution taking a secondary place in the analysis. The advantages that it would have are two. First, it would provide us a better picture of the evolution of the formal uniquenesses of slavery law against the background of, and in relationship with, doctrinal developments in nineteenth-century law in gen-

brown. We would probably not be too satisfied with that. And we would not be much more satisfied if he further observed that the differences among the browns did not matter much because the "real truth" about Rembrandt's work, the underlying cause of the brownness, was that the similarity of hue and tone reflected the infra-structure of early Dutch capitalism. That of course sounds fatuous—but it sometimes seems that we are asked to put up with something a bit like that in analyzing American legal history.

443. It has had two manifestations. One is Cover's attempt at differentiation of attitudes over time—and I have already indicated why I think this insufficient. The other is my own earlier effort. In that effort I thought it plausible, largely (and carelessly) ignoring *Baugh* and the 1820's cases other than *Maria* and *Isaac*, to place the four continuing judges on a left-right continuum with Carr farthest to the left, most libertarian, and most pro-freedom, Green near to him, Cabell to the right of him, and finally Brooke farthest to the right.

444. Even if the terms are carefully stipulated in a relativist fashion suitable to the nineteenth-century South, there is a tendency to read back definitions of the twentieth century or of the North.

445. That is particularly true with respect to the dimensions of judicial respect for precedent as a value in itself *and* as a value different from judicial restraint in the face of legislative intent, and of judicial desires for symmetry between slavery law and other overlapping areas of the structure of law (such as rules of evidence).

446. That is chiefly so in regard to its assumptions: (a) that each judge had, as an individual, a well worked-out position on each slavery issue; (b) that these positions all hung fairly closely together; and (c) that the "oomph" that this "slavery value" would have relative to the oomphs of other values entering into the decisionmaking process would be relatively constant from case to case. In dealing with a judge whose pro-slavery values are very clear and who is given to enunciating them in his opinionwriting, these disadvantages do not matter greatly. But when it comes to judges such as Green and Carr, it is at least arguable that the approach tends to push round the data a bit, drawing more certainty than should be drawn at particular points and then being confounded by an irregularity that emerges at another point.

447. See Gordon, *supra* note 16, at 10.

eral.⁴⁴⁸ Second, it would help us in explaining some of the apparent anomalies in the case law of slavery with which the second approach leaves us—for example, Carr's position in *Baugh vis-à-vis* other cases. If, thus, we could ascribe it to a primary feeling on Carr's part for the desirability of symmetry between the rules of evidence in slave law and the rules in other, non-slavery, matters (for example, title to real property), to a formalist feeling that overcame whatever sentiments he might have about the "boon of freedom,"⁴⁴⁹ then we would be farther on in explaining the judge's attitudinal space. The disadvantages to this "black box" approach are, for our present purposes at least, two. First, if done in the traditional black box way, in focusing on doctrinal development it shunts our attention away from the judicial mind in relationship to slavery.⁴⁵⁰ Second, its analytic consequence is putting second things first on the agenda of research priorities.⁴⁵¹

Hence we come to the fourth approach, which we have in fact been taking without saying so but about which we now should be explicit—because some of what we are going to infer is tenuous and it is well to be clear both that that is so and why it is so. This approach tries, more or less artfully, to build some of the concerns

448. For example, it might explain why the *writ de homine replegiando* maintained a fitful vitality in the law of slavery while becoming obsolescent elsewhere—or if not why (for "why" is always the weak point of this traditional legal history), at least in what manner. Or, and contrariwise, it might lead us to understand why some of the changes in nineteenth-century American law that we look on now as desirable reforms began in what Friedman calls the legal periphery of the South—for example, the reform of married women's property rights, of which the first instance of change occurs in 1839 in Mississippi. L. FRIEDMAN, *supra* note 24, at 185-86.

449. 29 Va. (2 Leigh) 189, 192 (1830).

450. If there is anything that all who examine the law of slavery might agree upon it is that substantive concern for the terms, conditions, and future of the peculiar institution—in a large number of judges, at any rate—simply must have been the central component pushing the outcomes reached in a large number of the cases that arose. To put it another way, whatever the third approach might gain on the swings, as it crosses the middleground of doctrines, cases, and judges aiming at symmetry as a formal virtue in the law, it loses on the turns out over the territories of doctrines, cases, and judges aiming either at the perpetuation of slavery or alternately at opportunities for helping a natural law of rights and liberties, or the common law, affect, infuse, and subsume the institution. More than loses, we must say, since the middleground is relatively so small. One cannot easily explain, for example, Benning's attack on the "monstrous doctrine" of *cy pres* with a formalist, nonsubstantive, approach. Nor can we explain why, in different territory, O'Neill did what he did in *Carmille* or why Wythe said what he said in *Pleasants*.

451. At some point in the future it may amount to a useful gain in our knowledge of things past if we have a clear formalist portrait of the doctrinal developments of the law of slavery. But, that, it seems to me, has to come after we have learned as much as we can about individual judges' responses to the interface between slavery and the rule of law. And that requires trying to get at, to catch the conscience of the king, not only in the obvious cases (the Lumpkins, and the Bennings) but also in the less obvious ones (the Carrs and the Greens).

of the third approach for purely formal legal values into what is basically a derivative of the second approach. It keeps as central the task of trying to understand the individual judges' attitudinal space. It continues the assumption that, absent rebutting proof, the primary determinants of that attitudinal space are personal attitude toward the peculiar institution, perceptions of state policy as expressed in statute and precedent, and perceptions of what the judicial role properly did, and did not, encompass.

What I am going to say next, and in specific, about these Virginia judges may seem a bit deflated, but I do want to be frightfully careful and not hoodwink the reader with this fourth approach for two reasons. One, intrinsic to the approach, and a carryover from the second approach, is a flaw, a Whiggish driving habit, that does not beset the first or the third approaches. It is that a succession of tiny errors in locating a particular judge, occurring from case to case, by extracting from the data just a bit too much by way of personal attitude to slavery, can build up to a substantial error—if the tiny errors are all or almost all in the same direction.⁴⁵² The second reason for being careful springs from trying to incorporate part of the third approach. That is because it provides the opportunity for ascribing an attitudinal anomaly about slavery appearing in a particular case to another set of formalist, legal values. If we are careful about this then we will probably enjoy a distinct explanatory advantage. But if we are not, we may inadvertently stumble into using a closed explanatory system which, notwithstanding its greater degree of evaluative fineness, is no less closed and self-fulfilling than abolitionist analysis or than extremes of dismal Whiggery.

Those cautions stated, what can we say about the judges whom Henry Tucker met as he took up the reins of court leadership? Five propositions seem safe:

1. The judges were not of one mind, and certainly not jointly rushing headlong to embrace a positive-good theory of slavery.
2. Of the seven major issues that we have earlier described as making up the primary docket of southern slavery jurisprudence, between 1824 and early 1831 the judges had been called to rule upon aspects of all but the second, damages for wrongful detention.

452. That is a difficulty that the "all Rembrandts are brown" approach does not have to worry about, because it does not try any fine-gauged attitudinal analysis of the judicial mind. Nor does the third approach, by itself, have to worry since it does not try any attitudinal analysis at all.

3. On three of the issues—#1 (fair hearings), #6 (fourth parties), and #7 (conflict of laws)—they experienced no disagreement.⁴⁵³
4. The judges agreed on some aspects of the three other issues—#3 (rules of evidence and presumptions), #4 (uncertainty as to master's intent), and #5 (doubt as to lawfulness of clear intent).⁴⁵⁴
5. The judges disagreed on other aspects of these three issues.⁴⁵⁵

What, if anything, can we safely say in generalizing from these cases to broader attitudes concerning slavery and slavery jurisprudence? First, I think a conclusion is warranted about the judge whose tenure on the bench went back closest to the days of Tucker *père* and Roane, closest to Cover's heyday of *in favorem libertatis* jurisprudence, Francis Brooke. Though Brooke was well short of adopting a Benning-like stance, it is not unduly simplistic to describe Brooke as occupying the attitudinal position farthest to the right among the Virginia judges of the late 1820's. Second, two interpretations about Carr and Green seem arguable. One interpretation, which is more cautious, is that we simply cannot tell from the evidence which of four types of practitioners of the judicial art they were: (1) neutralists who personally were pro-slavery (though not enormously so); (2) neutralists who were personally anti-slavery (though not so strongly as to go very far in jettisoning contra-

453. Unfair surprise of one party (*Hunter*, in that case the would-be heir) or inaccurate summary by the judge of witnesses' testimony (*Baugh*) required a new trial. Where a plaintiff acquired a right to freedom under a northern state's gradual emancipation law, the northern state's law controlled (*Spotts*). Estate debts did not permanently frustrate a bequest of freedom; instead the court, as before (*Patty v. Colin*, 1807), delayed freedom only until such debts could be paid off (*Dunn*).

454. A deed of freedom was not frustrated by a prior deed conveying the slaves to a third party which seemingly had been lost, and was hence not recorded until after the deed of freedom had gone into effect—and the original master's acknowledgement that the earlier deed was genuine had no probative effect (*Ben*). A will that said nothing about the children born to a slave free *in futuro* made them slaves (*Maria*—and note that this was the one case Carr did not sit on). But, a master could not free a slave and reserve as slaves children born after the effective date of freedom (*Fulton*). A will that sought to give freedom, drawn up at a date when the manner sought for giving freedom violated state law, and that did not look forward to taking effect when such law might be changed, was void (*Moses*). But, where a master's intent seemed to be to accomplish two inconsistent aims, one lawful and one seemingly setting up a limited or a quasi-emancipation, the lawful aim of full liberty prevailed (*Isaac*).

455. Green and Cabell argued that hearsay evidence and the burden of proof should both favor the plaintiff seeking freedom; Carr and Brooke argued the contrary (*Gregory*). Both Green and Carr, but not Brooke, Cabell, or Coalter, would have granted priority to an unprobated deed of manumission over the legal disabilities of a *feme covert* (*Thrift*). Carr, alone, would have held that where the master's will was ambiguous as to whether he conditioned a grant of freedom on the possibility of his slaves' remaining free in Virginia, the court should hold that freedom for the slaves was a separable and superior intent (*Walthall*).

freedom precedent or statute); (3) pro-freedom types restrained by precedent and statute on some occasions but not on others; or (4) magistrates who were just plain muddled in their slavery jurisprudence. The other interpretation, slightly less cautious, would describe them as "natural but restrained libertarians." It would "explain" Green's *Maria* position as following from precedent, and his *Walthall* position as springing from legitimate caution about testator's intent rather than from personal pro-slavery. It would describe Carr's position as generally the most libertarian, leaning, so to explain, heavily on *Walthall* and *Thrift*, and discounting his motivation in *Gregory* as indicating a craftsman-like unease at the lack of symmetry between rules of evidence in general and those applying to a particular type of slave-litigant, those claiming freedom from Indian ancestry. My own preference, if forced to make an election, would be slightly for the latter view—but that may be simply because I am aware of what the same judges did during the 1830's in shaping further the law of slavery. And, it may be that I am wrong.

That leaves Coalter and Cabell. As Coalter left the bench when Tucker *files* came on, it is not necessary here to try to pin down his position closely. I am inclined to designate Cabell as a neutralist, but one willing to give more weight to the value of freedom when not constrained by precedent or statute than was Brooke.

(3) Liberal Gropings of the 1830's?—The *Maria* Tangle

Henry St. George Tucker's appointment did not bode immediate change toward more libertarian judicial behavior. Indeed, during his first year on the bench Tucker's manumission decisions suggested that he might pursue a more conservative direction than most of his colleagues. At his first court session Tucker heard a case involving the validity of oral wills made when the master was near death.⁴⁵⁶ In company with Brooke, Tucker wished to void *all* oral bequests of freedom. Dabney Carr, however, persuaded them to limit their decision to voiding the instant will on the much narrower ground that the dying master had not clearly been aware of what he was doing.⁴⁵⁷

In the same session the court unanimously refused to recognize a state of partial emancipation as grounds for a right of freedom.⁴⁵⁸

456. *Winn v. Bob*, 30 Va. (3 Leigh) 140 (1831).

457. "[T]hey thought, slaves could not be emancipated by a *nuncupative* will, and had intended to give that opinion on that point; but . . . yielded to the suggestion of Carr, J. that the point should be left open for consideration when it should be necessary to decide it." *Id.* at 146.

458. *Rucker's Adm'r v. Gilbert*, 30 Va. (3 Leigh) 8 (1831).

Gilbert, a mulatto slave, had been willed a piece of land, and the testator's executor had been instructed to allow him to settle on it and to "enjoy the benefit of his labour."⁴⁵⁹ The court rejected Gilbert's contention that because such quasi-emancipation was illegal under Virginia law, he should be allowed to move to a free state. Here the Virginia judges invoked jurisprudence of the sort practiced by the North Carolina court under John Louis Taylor. Even Dabney Carr was unprepared for the libertarianism that Gilbert sought.⁴⁶⁰

A "concert of defense" explanatory model would read these actions of the post-1831 judges as symptomatic of a hardening pro-slavery viewpoint. Doing so, however, would fail to account for the quality of their *obiter* expressions of opinion and their growing, if modest, tendency during the next two decades to decide for the slave. Thus antebellum Virginia decisions are conspicuously short on general justifications of slavery. Until 1858 no majority opinions indicated bounding enthusiasm for the peculiar institution—or, for that matter, resentment of northern abolitionism. Instead, declarations of attitude tended to be fairly realistic about slavery. Thus, rather than paint gloomy pictures of "wage-slaves at the North" and romantic pastels of happy Negroes strumming in the tobacco fields, Tucker would frankly concede that the declaration of the Massachusetts Constitution "all men are born free and equal" was "less . . . an abstraction, than . . . that which is contained in our own bill of rights."⁴⁶¹ And, interestingly, he insisted on this difference in *Betty v. Horton* not to turn down a bid for liberty but rather to uphold a claim to freedom based on a Virginia slave's one year residence in Boston, Massachusetts. Here Carr and Tucker moved toward agreement. Carr almost casually assumed that comity and the Massachusetts Constitution controlled the outcome, saying that his impression was that from it "the paupers derive a good claim to their freedom."⁴⁶² Tucker felt no reticence in stating, "the construction of the constitution of *Massachusetts* by its courts . . . we would of course respect and follow, if we were sufficiently advised of them."⁴⁶³

These two statements warrant pausing over, and not just because they differ from the positive-good preachings and scorn for the laws of quasi-slave states of Joseph Lumpkin⁴⁶⁴ and the clap-trap

459. *Id.* at 9.

460. For decisionmaking virtually as libertarian, however, compare the behavior of the South Carolina court during the same decade. See *Negro Rights, Unionism, and Greatness*, *supra* note 25, at 154-66.

461. *Betty v. Horton*, 32 Va. (5 Leigh) 615, 622 (1833).

462. *Id.*

463. *Id.* at 623.

464. See text accompanying notes 360-64 *supra*.

about Ohio and orangutans in which Mississippi Judge Harris indulged.⁴⁶⁵ These statements by Carr and Tucker are interesting as they relate to four interpretive matters that concern us: (1) Tushnet's contentions about a developing autonomy of southern slavery law;⁴⁶⁶ (2) Hindus' assertion that South Carolina black justice was never intended to be just and that consequently one must doubt the claims of other scholars that other southern states' appeals courts defended the rights of blacks;⁴⁶⁷ (3) Cover's psychological explanatory model of northern judges' decisionmaking;⁴⁶⁸ and (4) the "attitudinal space" of the Virginia court of the 1830's.⁴⁶⁹

With respect to the issue of an autonomous law of slavery: either *Betty*⁴⁷⁰ suggests that there was not yet in Virginia jurisprudence any push toward separating the relevant aspects of the judge-made law into two systems, one distinctively slave-state and the other distinctively free-state; or *Betty* was anomalous. It was not, as we shall see. With respect to the question of judicial intentions pertaining to doing justice, it looks to me as though in the instant case Carr and Tucker, not to mention their brethren (even Brooke) who concurred with them, *did* intend to be just—notwithstanding their being part of the white power structure. With respect to Cover's dissonance-reducing explanation for northern judges' decisionmaking, what intrigues me is the apparent absence of an equivalent tension in the Virginia judges' "attitudinal space." Although Cover's anti-slavery northern judges ruled against liberty for reasons of constitutional necessity, and hence resolved in an uncomfortable fashion a tension between personal attitudes and comity, Tucker and Carr ruled for liberty and comity at one and the same time. But that fact itself is a bit curious for those assuming that all southern judges must have been pro-slavery.⁴⁷¹

465. See text accompanying notes 296-98 *supra*. That is plain—and plain enough to cause me, at least, to turn a doubting eye on anyone who wants to tell me that they just amount to different ways of oppressing blacks, more and less subtle. That is just about as helpful as someone's declaring that Justices McReynolds and Brandeis simply had different constitutional prescriptions for preserving the tyranny of the capitalist ruling classes over the common man, or that all Rembrandts are brown.

466. See text accompanying notes 42-69 *supra*.

467. See text accompanying notes 106-24 *supra*.

468. Cover's model reduces the cognitive dissonance created by a tension among personal anti-slavery sentiments, the values of the Union, and the values of formalist judicial neutrality by escalating the formal values of judicial self-restraint and positivist construction of the constitutional compact with the peculiar institution. See R. COVER, *supra* note 27.

469. See notes 530-51 *infra* and accompanying text.

470. 33 Va. (5 Leigh) 615 (1833). See text accompanying notes 461-63 *supra*.

471. No less curious is what Judge Cabell said in another case in 1833. Given a chance to choose among the various prior dicta about good juridical policies—Green's "neutralist" *Maria* observation, Carr's *Baugh* dictum about too relaxed rules of law, and Green's contrary-

What was happening? Were, conceivably, the Virginia judges, rather than moving away from earlier natural law sensibilities toward an anti-freedom stance, doing exactly the opposite—even becoming unhappy with the chilly neutralism of *Maria*? Let us look further. Neither John Green's death in 1834 nor Dabney Carr's demise in 1837 cut short the seeming movement to the "left." First, Green's successor, William Brockenbrough, though perhaps not greatly different from Green in personal convictions about the peculiar institution, had less respect than Green for the civil law school of slavery theorists. As a member of the general court before his promotion, Brockenbrough had been the only judge sitting in *Commonwealth v. Turner*⁴⁷² to take the "John Louis Taylor side" in a replay of the North Carolina argument over the question whether the common law was sufficiently all-encompassing to support a common law indictment of a white for assaulting a black. In *Turner* the Virginia defendant was not merely "any old white," but the slave's master; the indictment was not for homicide, but for "cruelly beating his own slave."⁴⁷³ The general court majority, although it greatly "deplored that an offence so odious and revolting as this, should exist to the reproach of humanity,"⁴⁷⁴ thought, in the absence of a statute covering the offense, that common law could not cover the master's behavior, and that the court had no jurisdiction.

Brockenbrough disagreed strongly with the majority's contention that the issue posed a "question of great delicacy and doubt,"⁴⁷⁵ whether correction of the evil should be corrected "by legislative enactments, or . . . the tribunal of public opinion."⁴⁷⁶ He thought the general court exactly the right tribunal and he was quite pre-

tending *Isaac* assertion about favoring liberty in cases of uncertainty—Cabell chose *Isaac* and improved upon it. Dropping the maxim about construing deeds against the grantor, and omitting the qualifier "some weight," he stated: "I approve of the principle declared by this Court in *Isaac v. West*, . . . that every instrument conferring freedom, should be construed liberally, in favor of liberty." *Elder v. Elder's Ex'r*, 31 Va. (4 Leigh) 252, 260 (1833). Possibly Cabell was simply trying to be misleading. But if that is true, it is odd that he joined in upholding a manumission despite two strong arguments brought against it by would-be heirs. First, they advocated the continental argument adopted by the Georgia and Alabama courts that as chattels, the slaves had no legal capacity to make the choice required by the will—going to Liberia or remaining in slavery. Cabell stated flatly: "It can, therefore, be no objection . . ." *Id.* Second, the would-be heirs argued that children born while the slaves had been hired out to pay estate debts fell under the *Maria* rule that interim children of manumitted slaves remained enslaved. The court held that the rule would not apply when the testator indicated a desire to free all his Negroes immediately—even if he forgot to mention their children.

472. 26 Va. (5 Rand.) 678 (1827).

473. *Id.*

474. *Id.* at 686.

475. *Id.*

476. *Id.*

pared to expand its jurisdictional scope. Construing doubtfully, but humanely—I should add—the relevant colonial statutes that had expressly made nonfelonious a master’s killing of his slave while whipping or otherwise “correcting” him as merely having suspended the common law, he declared that the repeal of “this ferocious and sanguinary system of legislation”⁴⁷⁷ in 1788 had “expressly revived” the common law.⁴⁷⁸

Turning to the question whether so permitting liberal sentiments to determine case law would weaken the peculiar institution, Brockenbrough asserted that the result would not be “injurious to the peace of society.”⁴⁷⁹ In his view the fact that courts and juries generally were composed of masters made it impossible to “conceive that any injury can accrue to the rights . . . of that class of the community.”⁴⁸⁰ Sounding uncannily like John Belton O’Neill twenty years later, he went on, “with respect to the slaves, whilst kindness and humane treatment are calculated to render them contented and happy, is there no danger that oppression and tyranny, against which there is no redress, may drive them to despair?”⁴⁸¹ Whether Brockenbrough’s words amounted to a “cunning” effort to debrutalize slavery or whether they displayed a deep-seated need somehow to try to bring a liberal sentiment into the peculiar institution that would have made possible some sort of peacable evolution away from an absolute and perpetual dominion of white over black, is an issue I shall not try to resolve here. What is relevant to our

477. *Id.* at 689.

478. There is no need here to go through a critique of Brockenbrough’s logic, for it had the difficulties generally common to the side he took in the common-law-versus-continental-absolutism argument. What is worth noting are his sentiments and what he thought should be the Virginia general court’s jurisprudential behavior: “by that repeal, that [common] law again extended its aegis over the slave to protect him from all inhuman torture though that torture should be inflicted by the hand of a master. I had not supposed that I was stretching the principles of the common law to an unreasonable extent.” *Id.* Brockenbrough perhaps knew he was stretching them a bit. In any event, he next made a statement that, besides pointing to the moral enormity of the absolutist version of the peculiar institution, did two things: embedded the South and slavery squarely in the Western liberal tradition, and (inadvertently) illustrated exactly why I have insisted throughout this Article that in order to assess adequately southern slavery jurisprudence one should neither separate it out *ab initio* from that tradition or abjure the possibility that liberal sentiments at times influenced it. Said Brockenbrough:

I had supposed that if, in England, the mere *attempt* . . . to commit a felony . . . be a misdemeanor, if an Indictment will be allowed in Massachusetts for poisoning a cow, or in Pennsylvania for killing a horse, an Indictment might be sustained in Virginia for maliciously and inhumanely beating a slave almost to death.

Id.

479. *Id.* at 690.

480. *Id.*

481. *Id.*

analytic concerns is that a judge with such views came onto the court of appeals in 1834. Such a judge well might lean toward liberty in manumission cases—if he were not just trying to pull the wool over northern eyes.

This brings us to a second circumstance that boded possible change. By 1836 President Tucker was more inclined to push for liberty than he had been in his first term. In that year his patience wore thin when confronted with the circumstance that for forty years the “benevolent intentions” of a Methodist master to free his slaves had been frustrated. In *Manns v. Givens*⁴⁸² the lower court had first refused the slaves freedom on the ground that the instrument of manumission had never been proved and recorded in court.⁴⁸³ A second court had rejected the instrument on the ground that evidence of its validity was “inadmissible and insufficient.”⁴⁸⁴ Some time later, a superior court had initially granted a writ of mandamus. Responding, however, to a return by the executor who still held the slaves, that court had reversed itself and refused to issue the mandamus. On appeal, Tucker waxed angry: “[I]t would be monstrous,”⁴⁸⁵ he asserted, should the failure to prove the original instrument before the testator’s death permit holding the slaves in bondage. He could not “unite in” telling the slaves that they could not later have the instrument proved. Tucker believed the evidence “admissible and satisfactory,”⁴⁸⁶ and he awarded a peremptory mandamus. Would Judge Lumpkin or Chancellor de Saussure have approved?

In *Manns* Tucker made himself reasonably clear as to where he stood on manumission. Speaking of the 1782 Act, he declared:

That act was passed at the close of the revolutionary war, when our councils were guided by some of our best and wisest men; men who looked upon the existence of slavery among us not as a blessing but as a national misfortune, and whose benevolence taught them to consider the slave not as property only, but as a man.⁴⁸⁷

I doubt that Tucker made these remarks merely for the benefit of northern readers of his opinions. In the further course of his reasoning he travelled across ground that looks, to me at least, rather libertarian in its implications for future decisionmaking:

One would suppose that a slave, who is capable of nothing else, is at least capable to take his freedom, and that the grant of it is just as susceptible of

482. 35 Va. (7 Leigh) 689 (1836).

483. *Id.* at 690.

484. *Id.* at 693.

485. *Id.* at 718.

486. *Id.* at 719.

487. *Id.* at 709.

gradations in its progress to perfection, as a bargain and sale of land, or a feoffment by the custom. . . .

. . . .
 . . . [N]ot only will an inchoate and imperfect right to freedom in a slave be recognized, but even a modified *quasi* state of freedom is sanction [*sic*] by this court⁴⁸⁸

To what extent were his views shared by other court members? In *Manns*, Tucker carried the entire court with him. But in another 1836 case he did not. In *DeLacy v. Antoine*⁴⁸⁹ some slaves, allegedly free-born citizens of the island of Bravo,⁴⁹⁰ brought against their will into Virginia and enslaved, sought a writ of habeas corpus from the circuit superior court. Conceding "at once that under our law the *habeas corpus* is not the proper method of trying the right to freedom,"⁴⁹¹ Tucker finessed the point, and over Brooke's dissent upheld their liberty. Tucker observed: "A free negro, as well as a free white man, must be entitled to the benefit of the *habeas corpus* act [O]therwise, that wretched class would be altogether without protection from the grossest outrages, and their personal liberty would be an insubstantial shadow."⁴⁹² To my way of thinking Tucker's rhetoric looks more like a product of judicial libertarianism than of either ardent or cunning pro-slavery. I would further hazard the guess that Brockenbrough and Tucker were getting on well together in their slavery jurisprudence, drawing Carr and Cabell not too reluctantly along with them, leaving Francis Brooke off on a neutralist or pro-slavery limb by himself.

On only one issue of import in 1836 did more conservative inclinations carry the day, and the result was short-lived. *Emory v. Erskine*,⁴⁹³ involving a will granting *futuro* freedom, brought back the ghost of *Maria v. Surbaugh* for a second time. As we have noted earlier,⁴⁹⁴ three years before, in *Elder v. Elder's Executor* the Tucker court had delimited *Maria* by holding that where a testator had provided for the freedom of "all his slaves," their children born after his death also went free. But *Elder* had given no intimation as to how the Tucker court would construe a will granting *futuro* freedom

488. *Id.* at 714, 717.

489. 35 Va. (7 Leigh) 438 (1836).

490. One of the Cape de Verde Islands.

491. 35 Va. (7 Leigh) at 443.

492. *Id.* at 444.

493. 35 Va. (7 Leigh) 267 (1836).

494. In *Maria v. Surbaugh*, 23 Va. (2 Rand.) 228 (1824), the pre-Tucker court held that the children of slaves who received *futuro* freedom by the terms of their master's will did not go free if they were not expressly provided for in the will. See note 417 *supra* and accompanying text. *Elder's* 1833 delineation of the *Maria* rule gave no intimation as to how the *new* court would interpret such a bequest. See note 471 *supra*. *Emory* presented the first opportunity to reach this question.

to the mother. *Emory* presented the first such opportunity, for by the bequest that gave rise to the suit the testator, Abraham McCoy, had freed "all his slaves" following a life tenure in his wife, Rachel. At her death her executor had seized the slaves born during the tenure, claiming them as a part of her estate. The Negroes argued in the circuit court that they should go free with their parents, but the circuit court held they were slaves coming under the *Maria* rule, and the appellate court denied their application for a *supersedeas*.

Left there, the story of McCoy's slaves would suggest that we had been fooled a bit in thinking that the post-1830 court was inclining more toward liberty—at least when confronted with contrary precedent. But at this juncture Abraham McCoy's heirs entered the dispute, claiming that indeed the slaves were not free but that a correct reading of *Maria* would deliver the slaves to them, rather than to Rachel McCoy Crouch's heirs. By the time that this suit reached the court of appeals in 1838,⁴⁹⁵ three judges had changed their minds.⁴⁹⁶ President Tucker, speaking of the earlier denial of freedom, stated: "Let me here express my deep regret at that refusal I am now satisfied of the error" ⁴⁹⁷ Tucker announced that it was obvious that McCoy "designed to exonerate from slavery every one bound to him by that time."⁴⁹⁸ Brockenbrough refused to apply *Maria* for "it seems to me, that the *right* of the *child* to freedom is identical and contemporaneous with that of the *mother*; and that when Mrs. *Crouch* died, *eo instanti* the will of M'Coy operated to confer freedom on both."⁴⁹⁹ There, thus, was Brockenbrough sounding almost exactly like Roane, dissenting in *Pleasants*, or Tucker *père*, being libertarian in vain in *Woodley v. Abby*, thirty years later. Dare we say, good old Brockenbrough—and good older Cabell—for, lo and behold, Cabell agreed, and the astonishing—and certainly not neutral—result was that neither heir got the slaves. Despite the fact that the slaves were not party to the suit, the court held that they should receive their freedom.

The next case suggested that the court might sail off on an extended libertarian tack. *Parks v. Hewlett*,⁵⁰⁰ inverting a rule laid down in Brooke's *Maria* concurrence,⁵⁰¹ reached a position hardly

495. *Erskine v. Henry*, 37 Va. (9 Leigh) 188 (1838).

496. They were Tucker, Brockenbrough, and Cabell. Francis Brooke was ill and took no part in the decision, and Carr's successor, Richard Parker, disqualified himself since he had rendered the lower court decision just before his promotion.

497. 37 Va. (9 Leigh) at 198.

498. *Id.* at 197.

499. *Id.* at 193.

500. 37 Va. (9 Leigh) 511 (1838).

501. 23 Va. (2 Rand.) at 245-46 (Brooke, J., concurring).

redolent with *Maria's* solicitousness for property rights. Tucker asserted that the obverse of Brooke's rule holding the interim child born to bondage "in exclusion of any future right to liberty"⁵⁰² was that any child born after the grant was due to take effect went free "in exclusion of any future obligation to servitude."⁵⁰³ This sounded reasonable on its face. The conclusion which Tucker drew from it, however, was dubious—that such a child could not be hired out to pay off estate debts. Thus while the mother would have been liable, the child was not. Since the mother was dead, the debts went unpaid. Again the 1830's court, if anything, expanded upon a pro-freedom past.

Following on *Elder, Erskine, and Parks, Crawford v. Moses*⁵⁰⁴ accordingly comes as a surprise. Crawford's will freed certain slaves at the age of twenty-one and further provided that their interim children should go free at the same age. Fairly clearly the testator was trying to avoid the *Maria* result. Yet the court believed the testator had made a fatal slip. Because he had not set the children free at the same time as their mothers, the grandchildren born while the children were under twenty-one fell under the *Maria* rule.

What was going on? Had the judges suddenly repented their leftward tack and jibed sharply towards pro-slavery? The opinion of Brockenbrough's successor, Robert Stanard, indicates a qualified negative response.⁵⁰⁵ Something less, but still something, had happened. In appointing Stanard the legislature had selected a judge who believed in the passive virtues. Personally he had doubts about *Maria*: "[M]y judgment has never been convinced of the correctness of the decision"⁵⁰⁶ He felt judicially bound, however, by its authority. In voting against freedom Stanard apparently ran his personal principles aground on the shoals of judicial deference to precedent. I suspect that Brockenbrough would not have been so deferential. What of the other judges? Were they also personally unhappy with the *Maria* decision, but not quite willing to overrule it directly? The correct answer appears to be yes—with one exception. Between 1839 and 1849 all the judges except Brooke were unanimous concerning the extent to which they would undercut *Maria*. *Maria's* rule would hold *only* if the testator had freed fewer than all of his slaves—if, in other words, his bequest was to favorites.⁵⁰⁷ When he manifested an intention to grant liberty to all his

502. 37 Va. (9 Leigh) at 525.

503. *Id.*

504. 37 Va. (10 Leigh) 277 (1839).

505. Brockenbrough died December 10, 1838.

506. 37 Va. (10 Leigh) at 283.

507. *E.g.*, *Ellis v. Jenny*, 41 Va. (2 Rob.) 623 (1844); *Henry v. Bradford*, 40 Va. (1 Rob.) 57 (1842).

slaves, *Maria* was not to apply.⁵⁰⁸ This narrowing of the *Maria* rule was applied even to a set of facts that at first glance closely resembled *Crawford v. Moses*.⁵⁰⁹ In *Anderson's Executors v. Anderson*⁵¹⁰ proof that the testator had intended "not to dispose of any of the slaves as slaves, but to emancipate all"⁵¹¹ secured the freedom of the original slaves' *grandchildren*.

Only Francis Brooke disagreed. He had two quarrels with the court majority. First, he did not perceive any merit in the distinction that his brethren made in order to free Anderson's slaves' descendants. The four-man majority insisted that the *Anderson* will opened two avenues to freedom—one, via inheritance from the mother's prospective right to freedom at the slave's birth; and two, via the phrase "all my slaves." *Maria*, the majority declared, only closed the first. In Brooke's view the distinction was bogus, and *Maria* should apply. Brooke's second problem was that *Erskine*—on which his brethren relied—had been decided by a bare three-man court.⁵¹² Had he not been ill at the time, he intimated, matters might have been different. He himself would never have agreed to *Erskine's* undercutting of *Maria*. As far as he was concerned, the court was making bad law.

In one respect Brooke perhaps was right. *Maria*, for all its continental conservatism, at least had the virtue of relative certainty: only slaves mentioned by a testator went free.⁵¹³ Even Tucker admitted that legislative policy did not seem to favor future bequests. Furthermore, the Tucker court's efforts to limit *Maria* undeniably produced in clarity in the law. A master of the early 1840's who wanted to free his slaves but who wished first to protect his wife's comfort after he died, had to be very careful in drawing up his will. If he wished to have his slaves raised under the protection of the plantation, and free them at maturity, their descendants would likely end up in bondage. If judicial decisions should inform the citizen how to accomplish a legal end, the court was making poor law.

508. *E.g.*, *Lucy v. Cheminant's Adm'rs*, 43 Va. (2 Gratt.) 36 (1845); *Anderson's Ex'rs v. Anderson*, 38 Va. (11 Leigh) 646 (1841). The distinction between a general intent to free that yields freedom for the increase, and a specific intent with respect to favorites that does not, can be argued two ways. On the one hand one can say, "Yes, if the master wanted to free the favored slaves' increase, why did he not say so?" On the other hand one can say, "Surely he would have wanted the progeny of his favorites, for the sake of their feelings, to go free." No completely satisfactory solution exists.

509. 37 Va. (10 Leigh) 277 (1839).

510. 38 Va. (11 Leigh) 646 (1841).

511. *Id.* at 653.

512. See note 496 *supra*.

513. If a testator sought to create a perpetuity—as by establishing that each generation was to go free at a certain age—then like any other estate perpetuity it would be void.

Ultimately the Virginia legislators had to bail out the judges. The 1849 legislature took what, from a "concert of defense" standpoint, was a curiously humanitarian step. It passed a law providing that after July 1, 1850, all children would go free simultaneously with their mothers.⁵¹⁴

(4) North Carolina's and Tennessee's Alternate Solutions to *Maria*

Could the Tucker court in the *Maria* chain of cases have taken a less confusing path? From a doctrinal standpoint, the answer clearly is yes. Two paths were possible. The first would have been to stick rigidly by the *Maria* position. That, indeed, was what the Ruffin court of North Carolina did. In December 1842, confronted by *statu liberi*, Chief Justice Ruffin adopted the position of the 1824 Virginia court.⁵¹⁵ Ruffin cited Green's opinion at length and concluded that it would "be generally looked to, as the leading and most authoritative one upon this point,"⁵¹⁶ ignoring the fact it already was losing its authority "at home." Ruffin observed that "[t]here is a natural inclination in the bosom of every Judge to favor the side of freedom . . ."⁵¹⁷ Nonetheless, not only the Virginia court but also the Kentucky, Louisiana, and Maryland benches had assumed the restrictive *Maria* position.⁵¹⁸ Even the United States Supreme Court adopted *Maria* in 1834.⁵¹⁹ The judges' personal inclinations might be violated but Ruffin and his brethren could console themselves: "[T]he sentence is not ours but that of the law, whose ministers only we are."⁵²⁰ Ruffin's statement sounds like something from the book of northern judges who, though personally opposed to slavery, took refuge in ascribing responsibility elsewhere. But Ruffin's views—and this point is overlooked by most historians—shifted to out-and-out pro-slavery by the middle 1850's. This statement may simply reflect the shift in process.

A second possibility for the Virginia court would have been to reject *Maria* outright and to accomplish immediately what the 1849 statute eventually did. The Supreme Court of Tennessee took just this step.⁵²¹ Confronted with a claim by a slave freed at twenty-five

514. See An Act making appropriations for the removal of free persons of color, and for other purposes, ch. 6, § 2, 1849 Va. Laws 7 (1850).

515. *Mayho v. Sears*, 25 N.C. (3 Ired.) 224 (1842).

516. *Id.* at 228.

517. *Id.* at 226.

518. See, e.g., *Ned v. Beal*, 5 Ky. (2 Bibb) 298 (1811); *Frank v. Milam's Ex'r*, 4 Ky. (1 Bibb) 615 (1809); *Catin v. D'Orgenoy's Heirs*, 2 La. 59, 8 Mart. (n. s.) 218 (1820); *Chew v. Gary*, 10 Md. 431, 6 H. & J. 526 (1824).

519. *McCutchen v. Marshall*, 33 U.S. (8 Pet.) 139 (1834).

520. 25 N.C. (3 Ired.) at 232.

521. *Harris v. Clarissa*, 14 Tenn. (6 Yer.) 153 (1834).

that her three interim-children should also be manumitted, future United States Supreme Court Justice John Catron discounted the would-be heirs' arguments. The heirs, represented by the attorney general of Tennessee, argued that Justinian's Institutes and the precedents of Kentucky, Louisiana, Virginia, and Maryland all applied to their situation.⁵²² Since the mother had been freed under the provisions of a Maryland will, the heirs believed Maryland precedent in particular applied. Catron accepted none of the attorney general's arguments. Speaking also for two other judges, Robert Whyte and Jacob Peck, Catron dismissed one Kentucky precedent summarily: "With the reasons for this decision we are not satisfied."⁵²³ The tone is like Lumpkin's, but the result exactly the opposite. Furthermore, Catron rejected the contention that civil law based on the Justinian Code would deny the interim-children their freedom.⁵²⁴ And, of *Maria*, Catron declared: "It is a most strict construction, not to say a strained one, in prejudice of human liberty, and is in conflict with the opinions of Chancellor Wythe and Judge Roane, in the cause of *Pleasants v. Pleasants*."⁵²⁵ Finally, said Catron, the Maryland case should not apply because under Maryland law "issue" was not "an accessory" but rather "a part of the use."⁵²⁶ In Tennessee, as in North Carolina, the reverse was the rule. This observation was true enough, but it did not describe the whole truth. First, the distinction would not convince the North Carolina court. Second, and more important, Tennessee and North Carolina estate laws were paralleled in this respect by Virginia's.

On balance, the decision in *Harris v. Clarissa* seems at least as "prejudiced" in favor of "human liberty" as *Maria* was against. Yet the Supreme Court of Tennessee followed *Clarissa* even after three of the four pre-1830 appointees were replaced by successors elected during the "Decade of Reaction."⁵²⁷ Indeed, by 1842⁵²⁸ the lone doubter in *Clarissa* had changed his mind.⁵²⁹

522. See note 518 *supra* and accompanying text.

523. 14 Tenn. (6 Yer.) at 163.

524. *Id.* at 162-63.

525. *Id.* at 163.

526. That is to say, in a case in which a life tenure was given to one person and the property in slaves or other chattels to another upon the death of the first, the heirs of the life tenant received any interim children.

527. See Table XI *infra*.

528. In 1842 the question was presented again in *Hartsell v. George*, 22 Tenn. (3 Hum.) 243 (1842).

529. Judge Nathan Green joined the majority in *Hartsell*.

(5) The Distribution of Virginia Judicial Behavior and Attitudes,
1831-1849

The failure of the Virginia judges to hew out as libertarian a jurisprudence in settling the *Maria* difficulty as did the Tennessee court suggests several generalizations about the relationship between Virginia jurisprudential behavior and the personal attitudes of its judges. First, it may show that the judges' expressions of discomfort were matters of appearance rather than reality. If they were genuinely unhappy with *Maria*, why did they not overrule it? Perhaps they merely made enlightened announcements about, for instance, the Massachusetts Bill of Rights in order to confuse Yankees. The strength of this interpretation—because of its logical self-enclosure—is that it does not admit of refutation. Ultimately, however, one is forced to choose between this interpretation and others that order the data differently.

Comparison with the North Carolina Taylor court's handling of post-mortem manumissions suggests a second possibility—deference to legislative intent. Such a view might urge that the equivalents of the North Carolina Acts of 1741 and 1778 were found by the Virginia bench in the Virginia Statutes of 1805 and 1819. Whatever the initial validity of the 1799 *Pleasants* decision, its restrictiveness fit well with legislative attitudes less than a decade later. Certainly this view is not without its attractions, yet it has an air of incompleteness about it. It leaves something unexplained—the qualifications placed on *Maria* by the decisions of the 1830's and 1840's, as well as Tucker court decisions on other manumission issues.

A third explanation offers a more satisfying solution. Such an alternative would accept as *prima facie* genuine both the judges' expressions of uneasiness and the existence of a gap between their private views and their decisionmaking. While not altogether discounting the restraining effects of perceived legislative intent, it would argue that the Virginia judges tended to stress more the similar effect of precedent even when they did not much care for the precedent's rationale. This theory would accept as true not merely that the Tucker court's conception of proper deference to past adjudications limited liberal behavior despite the appearance of liberal attitudes, but also that the specific continental ideological base of *Maria* limited liberality and produced discomfort. On this showing, the Tucker court majority was caught in the *Maria* tangle between, and frustrated by, the conflict of two values—procedural self-restraint and pro-freedom results.

The advantage of this explanation—besides the fact that it does

not require minimizing either judicial dicta or the shifts from *Maria's* strictness that did occur—is that it makes more understandable the Tucker court's discontinuity of behavior among different areas of manumission jurisprudence. Assuming as it does that tensions and ambivalences engender discontinuity, this theory does not have to smooth over quite so much the rough edges of apparently divergent decisions—a problem for other explanations whether they attempt to minimize pro-freedom or anti-freedom loose ends of the Virginia court's slavery decisionmaking.

Nonetheless, a potential difficulty with this explanation exists. It requires some demonstration that the judicial attitudes were not those which a "concert of defense" theory would anticipate. It also requires a showing that the judges of the 1830's were at least as liberal in personal attitudes toward slavery as their predecessors. Although the evidence is not as abundant as one might wish, it seems sufficient to conclude that this third alternative is tenable, because the connection between behavior and attitude is relatively easy to establish. Since Virginia legislation during the period tightened the restrictions on slavery, it is likely that whatever liberal decisions were made stemmed in considerable part from personal views.

What, then, appear to have been the shifts in judicial behavior between 1831 and the legislative solution to *Maria* in 1849? An examination of the post-1831 positions of each judge answers that question.

Until 1831 Dabney Carr was the judge who—with the notable exception of his position in *Baugh*, the "Indian ancestry hearsay" case—appeared the most inclined to pro-freedom decisionmaking. After 1831, he refused in *Rucker's Administrator v. Gilbert* to sustain the slave's request that the court transpose quasi-emancipation into liberty "at the North."⁵³⁰ That refusal and his *Baugh* position suggest that one would be more correct in describing him as a partial rather than an out-and-out pro-manumission judicial activist. Similarly indicative is his regretful refusal to allow damages for wrongful detention.⁵³¹ Furthermore, there is other evidence that his attitude was not pro-slavery and that his judicial behavior was neither that nor neutralist—besides his pre-1831 minority positions, the very regretfulness of his position on damages, and his delimitation of the *Maria* rule in *Elder*.⁵³²

530. *Rucker's Adm'r v. Gilbert*, 30 Va. (3 Leigh) 8 (1831).

531. *Paup v. Mingo*, 31 Va. (4 Leigh) 163, 176 (1833).

532. *Elder v. Elder's Ex'r*, 31 Va. (4 Leigh) 252, 256 (1833); see note 471 *supra*.

John Green's death in 1834 deprives us of substantial post-1831 evidence of his views. Yet the evidence that exists—his tendency to agree with Carr, balanced against his *Maria* opinion and his majority stance in *Walthall*—argue for his characterization as personally lukewarm toward slavery but not always as a successful neutralist practitioner.

The position of William Cabell is more complex. On the one side, he concurred in *Maria*, *Thrift*, and *Walthall*, and refused damages in *Paup's Administrator*. Moreover, his refusal contained nothing of Carr's reluctant tone. On the other side one must balance his approval in *Elder* of Green's *Isaac* dictum, his participation in the narrowing of *Maria* in *Emory v. Henry*, and his agreement in *Betty v. Horton* that the Massachusetts Constitution freed a Virginia slave. Additionally, he was willing to accept presumptions in favor of liberty that: (1) a below-market sale price indicated a conveyance in order to free after a term of years,⁵³³ and (2) a testator was not legally insane.⁵³⁴

What of Francis Taliaferro Brooke? If any of the judges appointed before 1830 were keen proponents of the peculiar institution, it was surely he. Yet even the evidence supporting this view is slight. Because of the value he generally placed on judicial self-restraint and neutrality, it consists largely and not irrefutably in his *Baugh* dissent concerning the *lis mota* doctrine's applicability, in his desire to void all oral manumissions, in his *DeLacey* dissent, and in his objections to liberalizing *Maria*. Had his illness not kept him from the cases limiting *Maria* and *Thrift*, analysts would be in a better position to judge him. As it is, certainty is clouded by the fact that his neutrality usually, though not always, happened to reach a pro-slavery result.⁵³⁵

533. *Nicholas v. Burruss*, 31 Va. (4 Leigh) 289 (1833) (concurring with Tucker and Carr, JJ.) (Brooke and Green, JJ. were absent).

534. *Coalter's Ex'r v. Bryan*, 42 Va. (1 Gratt.) 18 (1844). *Coalter's Ex'r v. Bryan* was a ticklish case in that it required the court to determine exactly when Tucker's peppery Jeffersonian half-brother, John Randolph of Roanoke, had gone insane—if indeed he had. Strongly opposed to slavery in early life, Randolph, who owned roughly four hundred slaves, had become anti-abolition by the time of the Missouri Compromise—at least on the level of federal action. Nonetheless he had freed his slaves in a will drawn up in 1821 and in codicils of 1826 and 1831. In 1832, about a year before his death, he wrote a will revoking his slaves' emancipation and changing the executor. After his death the original executor, Bishop Meade of Virginia, sought enforcement of the emancipation, arguing that Randolph had gone mad prior to drafting the final codicil. The court concluded that Randolph had been *compos mentis* in 1821, 1826, and 1831 but—very luckily for the slaves—not in 1832. Cabell was not forced to agree: he could have pointed to the fact that Randolph was capable of running for reelection to Congress in 1832 and denouncing Jackson with his old buoyant irascibility in early 1833. Two judges did not sit: Brooke (a relative) and Stanard (a former counsel).

535. *But see Henry v. Bollard*, 34 Va. (7 Leigh) 19 (1836) (Cabell, J., absent) (holding a

The four appointees of the 1830's probably were at least as liberal as their predecessors. Tucker, who initially showed signs of following Brooke's lead, shifted by the middle 1830's toward the libertarianism of Brockenbrough and Carr.⁵³⁶ Tucker's liberalism probably peaked just after the first *Erskine* case in February 1836.⁵³⁷ At that time the court refused to curtail *Maria*. By 1838, Tucker had become "deeply regretful" of that refusal.⁵³⁸ Furthermore, in the fall of 1836, four justices—Tucker, Carr, Brockenbrough and Cabell⁵³⁹—refused to extend *Thrift's* 1830 rule that an unproved deed was void. In *Thrift*, marriage had intervened. In *Manns v. Givens*,⁵⁴⁰ the master died suddenly after drafting the deed. *Thrift's* rule had been announced in general terms, but the court in *Manns* proceeded to create a distinction between the effects of marriage and of death. All four judges present agreed on the distinction, but Tucker went further than he needed to free the slaves, commenting on the liberalizing Act of 1782 and ascribing it to the "best and wisest" of the Revolutionary generation.⁵⁴¹ Having delivered himself of these sentiments, Tucker went yet one step further. He announced his disapproval of *Thrift* and asserted point-blank that he would have voted with Carr and Green.⁵⁴²

This pronouncement is particularly helpful to an interpretation perceiving gaps between decisional behavior and personal attitude, and between pre-1830 and post-1830 judicial attitudes. First, by

manumitting testator *compos mentis*, though denying profits during detention).

536. Of course Tucker was never as pro-slavery as his brother Beverley, or even as ambivalent as his half-brother, John Randolph, became. Although Randolph moved from active support of African colonization schemes in the 1810's to rejection in the middle 1820's, see R. KIRK, *RANDOLPH OF ROANOKE* 131 (1951), quoting the letter from John Randolph to John Brockenbrough (January 30, 1826), Tucker approved of the African Colonization Society's aims throughout the 1830's and apparently until his death in 1848. This approval was evident in his *Elder* opinion of 1833. Six years later his attitude led him to take an activist stance to uphold a will sending slaves to Liberia. *Maund's Adm'r v. M'Phail*, 37 Va. (10 Leigh) 199 (1839). The will was very vague, naming as taker the agent of the "new colonization society in Africa," one "J.M." Tucker, however, allowed the introduction of parol evidence to prove that a former agent of the African Colonization Society, one John M'Phail, was the "J.M." designated to take the Negroes personally and send them to West Africa. The proof consisted largely in the testimony of the Norfolk Herald's editor that M'Phail had advertised himself as such in the paper between November 1827 and September 1833. It does not require much speculation to determine what the Georgia court would have thought of Tucker's decision-making on this issue.

537. An alternative and perhaps more plausible reading would see less of a shift, or date it back at least to *Elder* and *Betty* in 1833, and ascribe "first *Erskine*" to a mistake.

538. *Erskine v. Henry*, 36 Va. (9 Leigh) 188, 193 (1838). See text accompanying notes 493-98 *supra*.

539. Brooke was absent from *Manns v. Givens*, 34 Va. (7 Leigh) 689 (1836), as well.

540. 34 Va. (7 Leigh) 689 (1836).

541. *Id.* at 709.

542. *Id.* at 708.

distinguishing rather than overruling *Thrift*, *Manns* intimated a judicial deference similar to the Tucker court's handling of *Maria*. Second, inasmuch as Brockenbrough's opinion⁵⁴³ displayed a similar dislike of *Thrift* whereas Cabell's⁵⁴⁴ rests solely on the distinction, it strongly implies that all of the first three post-1824 appointees were more liberal than their predecessors.⁵⁴⁵ Had *Thrift* appeared six years later than it did, in 1836 rather than in 1830, the slaves in the case would have gone free because Tucker, Brockenbrough, and Carr would have formed a three-man majority.

What of the two other judges appointed during the 1830's—Richard E. Parker (1837-1840) and Robert Stanard (1839-1846)? Because Parker died after only three years on the bench, little information exists that helps to define his position. He never dissented from a slavery decision. The only indication that suggests he was less inclined to find for freedom than his colleagues of the 1830's is his lower court decision in the second *Erskine* suit,⁵⁴⁶ and it may be that as an inferior court judge he undertook simply to apply *Maria*. It is impossible to be sure.

Robert Stanard clearly belongs at least as far on the pro-freedom side as Tucker, and was perhaps as far over as Brockenbrough. Both his express lack of faith in the correctness of *Maria*⁵⁴⁷ and his cohesion with the Tucker-led majority of 1841, which defended *Erskine*'s limitation of *Maria* against Brooke's counter-attack,⁵⁴⁸ suggest the correctness of this characterization. A third piece of evidence, however, justifies placing him further left than any of his contemporaries. In *Crawford v. Moses*⁵⁴⁹ Stanard made an *obiter* suggestion beyond anything to which Tucker would agree: that the court consider excepting manumission bequests from the general rule against perpetuities.⁵⁵⁰ Had the court ever taken his advice, the slaveowner would have been able to do what *Maria* prevented. He could have provided that each future generation of slaves go free when they reached twenty-one (or any age, for that matter). An individual "plan of gradual abolition" would then have been possible, with each child brought up "properly" on the plantation. The political likelihood of such a result is irrelevant. It would

543. *Id.* at 696.

544. *Id.* at 706.

545. *See* Table X *supra*.

546. *See* notes 493-98 *supra* and accompanying text.

547. *See* *Crawford v. Moses*, 37 Va. (10 Leigh) 277, 283 (1839). *See also* text accompanying notes 505-06 *supra*.

548. *See* text accompanying note 512 *supra*.

549. 37 Va. (10 Leigh) 277 (1839).

550. *Id.* at 284.

probably have created innumerable difficulties—and certainly irregularities—in property law. The point is that Stanard's suggestion was surely not that of a fire-eating slavery enthusiast, or even that of one as concerned about symmetry between the law of slavery and other related jurisprudential domains as Carr had been eight years earlier in *Baugh*.⁵⁵¹

Only three new judges were appointed during the 1840's: John J. Allen (1840-1865), Briscoe L. Baldwin (1843-1851), and William Daniel (1846-1865). Allen, who replaced Parker, apparently shifted from an originally neutralist, perhaps covertly pro-slavery, position to an activist pro-slavery one during the 1850's.⁵⁵² During the early 1840's, however, his decisionmaking was indistinguishable from Tucker's. Similarly, Baldwin, who filled the vacancy created by Tucker's resignation in 1842 to become law professor at the University of Virginia,⁵⁵³ followed the court majority. Actually the Virginia court made no pathbreaking decisions during the 1840's. No good opportunities for so doing were presented to it. That decade, unlike both its predecessor and its successor, saw little jurisprudential activity on the Virginia bench in relation to slavery. The cases are so few that all one can surmise is that two judges elected during the 1840's were not at the time of their election far to the anti-manumission right. The most helpful index to their views is, curiously enough, found in a brief discussion of the 1849 law overruling *Maria* by the compiler of a digest of Virginia statutes published in 1857: "This section is designed to annul . . . *Maria v. Surbaugh*. That decision has since been adhered to, though it is not believed that any court since would have made the decision. If the policy of emancipation be sound, consistency with that policy requires"⁵⁵⁴ that the children of freed slaves be liberated with their mothers. As we shall see later, there is good reason to think that William Daniel, the last appointee of the 1840's, was an exception to this generalization.

To conclude, the interpretation that seems most readily capable of explaining Virginia judicial behavior is that which perceives two salient characteristics: first, a disjunction between personal attitudes toward manumission and behavior in some particular decisions—a disjunction caused primarily by judicial self-restraint; and

551. *Gregory v. Baugh*, 29 Va. (2 Leigh) 665 (1831). See text accompanying notes 424-26 *supra*.

552. See notes 633-42 *infra* and accompanying text.

553. Cabell succeeded Tucker as President of the Virginia court.

554. *Matthew's Digest* 738, quoted in 1 H. CATTERALL, *supra* note 14, at 75 n.160. It is interesting to find a southern codifier such as Matthews regarding the wisdom of emancipation as an open question in the late 1850's.

second, a shift in a liberal direction during the 1830's. The occasional incongruities of the Tucker court's shaping of the law of slavery are best accounted for by assuming a slight degree of tension between the ideal of judicial modesty and ideas about liberty. Finally, during the 1820's the court seemed more dominated by a purist neutrality than during the 1830's, when it inclined to pro-numission jurisprudence. Never, however, did it reach and maintain the position of activist libertarianism evidenced in the decisions of the Tennessee court.

(6) Precedent and the Tennessee Court to 1835

Eleven men sat on the Tennessee Supreme Court between 1831 and 1860. As Table XI shows,⁵⁵⁵ the court enjoyed a fairly high

555. John Catron: born Pennsylvania but moved to Virginia when young; 1778-1865; admitted to the Tennessee bar in 1815; on the Tennessee court 1824-1836; Van Buren's first appointment to the United States Supreme Court (1837-1865). Catron was a very strong Jackson supporter and active in his behalf while on the Tennessee bench. *See, e.g.*, letter from John Catron to Andrew Jackson (Jan. 2, 1833) (confidential) (in the John Catron Papers, Tennessee State Library and Archives, Accession No. 97). The letter reported the results of a Nashville meeting engineered by Catron and others to ensure that Tennessee public opinion came down solidly against South Carolina in the Nullification controversy:

[i]t is deemed of the utmost importance that . . . public opinion should be fixed on the side of the Union party, so that if it comes to open rebellion, a force can be readily commanded by the Federal government, so very large as to deter resistance at the onset If we are to have a civil war in S.C., I wish to see . . . overwhelming military force at once brought out to suppress the rebellion.

Catron then asks Jackson to inform him through an intermediary "[s]hould I be in any respect mistaken as to the views of the Executive [Jackson] . . . it is . . . of importance that the advocates of the measures of the government should not misunderstand it, in reference to this particular transaction." *See also* letter from John Catron to Martin Van Buren (December 12, 1835) (in the John Catron Papers, Tennessee State Library and Archives, Accession No. 97) (describing his efforts to present a Tennessee Cherokee case to the United States Supreme Court so that the Jackson position rather than the Marshall-Story one would win out, and apparently encouraging the Vice President's ambition to succeed Jackson); letter from John Catron (from Washington) to Andrew Jackson (then retired in Tennessee) (February 5, 1838) (in the John Catron Papers, Tennessee State Library and Archives, Accession No. 97). The latter letter is interesting for its laudatory view of Taney, its assertion that being on the United States Supreme Court presented "few of the difficulties I had apprehended; the legal questions . . . depend more on common sense than any deep legal knowledge;" and finding

political tendencies . . . just as strong . . . as they are in any other department of the Government. . . . Division is just as natural and almost as common, as in the Senate, and why it escaped the West, they needed no *representation here*, is most strange: I would as soon think of having no Senators in Congress, and we must have more Judges. Of this anon.

Nathan Green: Virginia; 1792-1866; moved about 1816 to Tennessee; probably no college; Jacksonian but became Whig; state senate 1827; defeated for Confederate Congress; pro-"internal improvements;" Unionist; Presbyterian.

William Turley: born Virginia; 1800-1851; moved about 1808 to Tennessee; Cumberland College; Mason.

degree of continuity. For a quarter of a century after 1835 two of the three seats were filled by only four judges,⁵⁵⁶ all of whom except Robert McKinney were Whigs. With the fitful assistance of the occupants of the third seat, these judges created what in absolute terms formed the most generous emancipatory jurisprudence of any southern court.⁵⁵⁷

William B. Reese: born Tennessee; 1793-1859; went to college but not known where; Whig, lost in race against Bell for Whig senatorial nomination; "high morals" but no church mentioned; president East Tennessee University, 1850; "the most scholarly of all the Supreme Judges of Tennessee, except perhaps, John Haywood." J. Cisco, "Public Men of Tennessee" (1907) (unpublished biographical sketches, manuscript section, Tennessee State Library and Archives).

Robert J. McKinney: born Ireland; 1803-1875; immigrated to Tennessee at age 6; part way through college; Democrat; Unionist, one of ten county representatives to vote against slavery at 1834 constitutional convention; peace commissioner in 1861; Presbyterian.

A.W.O. Totten: born Tennessee, 1809-1867; Secessionist.

Robert Caruthers: born Tennessee; 1800-1882; one year at Cumberland College (according to one source), at Columbia College or Washington College (according to another); newspaper editor, 1827-1832; married Jackson's niece; Jacksonian but became Whig before 1840; Congressman 1841; declined reelection; Clay elector in 1844; considered for Whig gubernatorial nomination in 1851; Unionist; peace commissioner in 1861; elected governor in 1863 but never took office because of occupation of state by Union Army; Presbyterian; Temperance.

William Harris: born Tennessee; 1803-1858; killed when steam boat blew up (one of his predecessors, Turley, killed by impaling himself on his own walking stick—therefore, clearly a jinxed seat); Democrat (his brother was governor); Presbyterian.

Archibald Wright: born Tennessee; 1809-(?); Democrat; early and zealous Secessionist. See generally W. BONE, A HISTORY OF THE CUMBERLAND UNIVERSITY (1836); J. CALDWELL, SKETCHES OF THE BENCH AND BAR OF TENNESSEE (1898); J. GREEN, LIVES OF THE JUDGES OF THE SUPREME COURT OF TENNESSEE, 1796-1947 (1947); W. SPEER, SKETCHES OF PROMINENT TENNESSEANS (2 vols.) (1888).

556. The first seat was occupied by Nathan Green (1831-1852) and Robert Caruthers (1852-1860), and the second by William Reese (1836-1847) and Robert McKinney (1847-1861).

557. A relativist may argue that they were not quite as libertarian as some of their Mississippi and South Carolina colleagues, both because their statutory starting points were more favorable to liberality and because, unlike the Mississippi and South Carolina judges, they never outraged the legislature by their decisionmaking. Laws enacted in North Carolina prior to her cessation of Tennessee continued in force in the new state except as modified by its legislature. Most of the lacunae left in the North Carolina Negro Code were filled during the early nineteenth century. Tennessee legislative activity was far less constant of purpose. Reading and writing were never proscribed for slaves, and the legislators never seemed able to stick to one point of view about manumission. In 1831 they declared that all slaves manumitted *in futuro* would have to leave the state. Act of Dec. 16, 1831, ch. 102, § 2, 1831 Tenn. Pub. Acts, reprinted in A COMPILATION OF THE STATUTES OF TENNESSEE OF A GENERAL AND PERMANENT NATURE 279 (Caruthers & Nicholson eds. 1836) [hereinafter cited as CARUTHERS & NICHOLSON]. But in 1833 they excepted "any slave, or slaves, who had *bona fide* contracted for his, her or their freedom, previous to the passage of said act" and "all cases of emancipation . . . by persons who died previous to . . . 1831." Act of Nov. 23, 1833, ch. 81, 1833 Tenn. Pub. Acts, reprinted in CARUTHERS & NICHOLSON, *supra*, at 279. In the same session the legislature passed a law, Act of Nov. 26, 1833, ch. 64, 1833 Tenn. Pub. Acts, cited in C. MOONEY, SLAVERY IN TENNESSEE 75 (1957), designed "to aid the colonization society" by giving it \$10.00 for each Negro removed from Tennessee to Africa—a sum more substantial than it seems, amounting, according to the American Colonization Society, to about 50% of the ocean transportation cost. AMERICAN COLONIZATION SOCIETY, A FEW FACTS RESPECTING THE AMERICAN

TABLE XI
TENNESSEE JUDGES 1831-1860

1831	John Catron	Nathan Green	Jacob Peck	Robert Whyte
1832	John Catron	Nathan Green	Jacob Peck	Robert Whyte
1833	John Catron	Nathan Green	Jacob Peck	Robert Whyte
1834	William Turley	Nathan Green	William B. Reese	(seat vacated
1835	William Turley	Nathan Green	William B. Reese	and court
1836	William Turley	Nathan Green	William B. Reese	reduced to
1837	William Turley	Nathan Green	William B. Reese	three seats)
1838	William Turley	Nathan Green	William B. Reese	
1839	William Turley	Nathan Green	William B. Reese	
1840	William Turley	Nathan Green	William B. Reese	
1841	William Turley	Nathan Green	William B. Reese	
1842	William Turley	Nathan Green	William B. Reese	
1843	William Turley	Nathan Green	William B. Reese	
1844	William Turley	Nathan Green	William B. Reese	
1845	William Turley	Nathan Green	William B. Reese	
1846	William Turley	Nathan Green	William B. Reese	
1847	William Turley	Nathan Green	Robert J. McKinney	
1848	William Turley	Nathan Green	Robert J. McKinney	
1849	William Turley	Nathan Green	Robert J. McKinney	
1850	A.W.O. Totten	Nathan Green	Robert J. McKinney	
1851	A.W.O. Totten	Nathan Green	Robert J. McKinney	
1852	A.W.O. Totten	Robert Caruthers	Robert J. McKinney	
1853	A.W.O. Totten	Robert Caruthers	Robert J. McKinney	
1854	A.W.O. Totten	Robert Caruthers	Robert J. McKinney	
1855	William Harris	Robert Caruthers	Robert J. McKinney	
1856	William Harris	Robert Caruthers	Robert J. McKinney	
1857	William Harris	Robert Caruthers	Robert J. McKinney	
1858	Archibald Wright	Robert Caruthers	Robert J. McKinney	
1859	Archibald Wright	Robert Caruthers	Robert J. McKinney	
1860	Archibald Wright	Robert Caruthers	Robert J. McKinney	

Pre-1835 judicial precedent favored liberality on three counts—its procedural bent for judicial activism, its substantive opting for common law rather than civil theories of slavery, and its ambiguous estimate of the peculiar institution as a social order.

COLONIZATION SOCIETY AND THE COLONY AT LIBERIA 9 (1830). I assume the accommodations were not exactly first class. In 1842 the legislature further exempted legally emancipated slaves who had not left the state and free blacks who had migrated to Tennessee prior to January 1836 on condition that they satisfy the courts of their good character. Act of Feb. 4, 1842, ch. 191, § 1, 1841-1842 Tenn. Pub. Acts, *reprinted in* STATUTE LAWS OF THE STATE OF TENNESSEE OF A GENERAL CHARACTER 16 (Nicholson ed. 1848). In 1849 the legislators reverted to their 1831 position. Act of Dec. 31, 1849, ch. 107, 1849-1850 Tenn. Pub. Acts. But in 1854 they qualified it once more by allowing elderly or unrobust Negroes to remain in the state after manumission—a position which was in one respect more lax than the position taken by some other states much earlier—for example, South Carolina in 1800. Act of Feb. 24, 1854, ch. 50, 1853-1854 Tenn. Pub. Acts. The South Carolina law prevented masters from freeing such Negroes at all. However, note a possible quite different, “paternalist” reading, of the two statutes. That is, one *could* say that South Carolina law was humane in preventing unprincipled masters from discharging aged slaves “onto the streets,” whereas Tennessee, more “raw capitalist,” permitted this. From what I know of the two states’ legislative and popular climates of opinion, however, I do not credit this view with much substance.

First, judicial activism on the pre-1835 court was high. Of the four leading pre-1835 judges—John Haywood, Jacob Peck, Robert Whyte, and John Catron—only Catron seemed to value judicial modesty when it collided with substantive justice. A criminal law example is especially telling on this point. In *Bob v. State*⁵⁵⁸ a slave sentenced to death in 1826 asked the supreme court to grant certiorari although an intermediate appellate judge had refused to do so.

John Catron perceived three serious flaws in Bob's conviction. First, "I would say that in the course of a life of some considerable experience in criminal prosecutions, I have never known any person convicted of a crime, upon evidence so slight . . ." ⁵⁵⁹ Second, Bob had been subjected to three trials because of the first jury's inability to reach a verdict and the second jury's failure to appear. Third, the second and third trials had been convened by four justices of the peace rather than the legally proper three. To Catron the procedure was "as highly criminal as any society can institute."⁵⁶⁰ Yet as much as he objected to the procedure, the future United States Supreme Court Justice did not feel he could grant an appeal. The relevant statute of 1811 declared that "either party in any suit . . . depending in any of the circuit courts . . . may . . . pray an appeal."⁵⁶¹ The circuit court judge's refusal to grant a writ meant that the case was still in the lower court. In Catron's view the statute did not allow the supreme court to act so early.

The other two justices, however, refused to be constrained by such a legislative limitation on appellate judicial power, and granted his appeal only one day before he was to be executed. The two justices saw red at the recalcitrance of the circuit judge. Jacob Peck stated flatly: "*Color, rank or situation can make no difference: even the slave has such rights as the statutes of the country have afforded him.*"⁵⁶² The circuit court judge might have discretion to grant appeals, yet his "[d]iscretion must not be arbitrary . . ." ⁵⁶³ Peck's gargantuan 350-pound colleague John Haywood⁵⁶⁴ agreed:

558. 10 Tenn. (2 Yer.) 155 (1826) (known as *Bob's Case*).

559. *Id.* at 171.

560. *Id.* at 170.

561. *Id.* at 168 (quoting ch. 72, § 11, 1811 Tenn. Pub. Acts, reprinted in CARUTHERS & NICHOLSON, *supra* note 557, at 93).

562. *Id.* at 164 (emphasis added).

563. *Id.* at 165.

564. North Carolina-born, a Tarheel Conference judge from 1794 to 1801, and in 1826 sitting for his fifteenth and final year on the Tennessee bench, Haywood was a man with at least four pronounced characteristics—wit, political activism, atrocious penmanship, and obesity. On one occasion, sitting on the Tennessee bench, he challenged an attorney for his authority on a point in the law. The attorney replied with a smile, "[A]n eminent judge of North Carolina, Judge Haywood." Dead-pan, Haywood countered, "Yes, . . . I knew that

Shall it be said that a human being shall be condemned to death by a wrongful sentence, and that there is no power residing in the law to rescue him from it? Does the law delight in cruelty? Will it inflict punishment where it is not deserved? Will it give no power to avoid the unjust sentence?⁵⁶⁵

To Catron's neutralist objection that the discretion to permit an appeal unfortunately was vested by statute in the circuit judge, Haywood offered a reply much like Peck's. The discretion, according to Haywood, was "[n]ot an arbitrary one, to do as he pleases; but to discover by the right rule of law what is right, and so do that. If he does otherwise, his unrighteous discretion shall be purified"⁵⁶⁶ Embarking on righteous purification not only of the circuit judge's arbitrariness but also of the statute, Haywood bolstered his emotions with precedential authority. Asking if the court could interfere, he observed, "[t]he subject is discussed in Peck's Reports, 337, 338; and the opinion thereupon given is, in my judgment, a correct one."⁵⁶⁷

The pre-1835 court unanimously took a liberal position concerning the applicability of common law versus civil law to slavery. In the 1829 case of *Fields v. State*,⁵⁶⁸ judges Whyte and Peck adopted

young man. He was put on the bench of North Carolina when he was quite young and he made many mistakes. Judge Haywood of Tennessee overrules Judge Haywood of North Carolina." J. GREEN, *supra* note 555, at 67. For an example of his political activism and atrocious penmanship, see undated letter from John Haywood to Judge Robert Whyte (located in the Robert Whyte Papers, Tennessee State Library and Archives, Accession No. 141, Box No. 2, Folder No. 11, Item No. 2) (encouraging Whyte's ambition for office).

565. 10 Tenn. at 158-59. He continued in sentences that, notwithstanding any doubts that dismal Whigs may have, look to me like a bit more than a ritualistic invocation of considerations of humanity:

Then where is the justice of the law, and where is its boasted humanity? And for what good and purpose is it, that the arm of the law should be lengthened to strike the fatal blow, but made too short to save an unfortunate victim who is unjustly doomed to suffer?

It is enough to ask the question, and every heart will respond that it should not be so. *Id.* at 159.

566. *Id.* at 160-61.

567. *Id.* at 160. That he should judge correct the court's discussion of discretionary appeals in *Sevier v. Justices of Washington County*, 7 Tenn. (1 Peck) 268 (1824), was not too surprising. The decision was penned in 1824 by Judge Haywood of Tennessee—who in *Bob's Case* saw no reason to overrule his younger self or even to note explicitly his authorship. See note 564 *supra*.

568. 9 Tenn. (1 Yer.) 141, 156 (1829). The court held that a white man acquitted of the statutory crime of slave murder still could be convicted for common law manslaughter. Interestingly, Catron concurred in this decision. The results in *Bob's Case* and *Fields* suggest an intriguing point about the Tennessee court in comparison with other southern courts—for example, the North Carolina Supreme Court and the General Court of Virginia. As we have seen in these judiciaries, the main absolutist/nonabsolutist debates occurred over the effect of the common law in situations in which statutory law did not clearly cover an injury. The Tennessee judges assumed that the Taylor-Brockenbrough position was right, and were willing to go one step farther to allow abstract principles of justice to override clearly applicable, though inhumane, statutory provisions.

John Louis Taylor's position but with much less ado. Whyte short-circuited the defendant's elaborate argument that the common law had no application since "slavery never subsisted in England"⁵⁶⁹ by remarking that the villeinage and slavery exhibited "a strong resemblance."⁵⁷⁰ Peck at least addressed himself directly to a main point of the defendant's brief—the continental theory that the master had via caption a right to his slave's life. Arguing that the defendant was misconstruing Vattel, Peck asserted that such was "a doctrine too monstrous for my mind."⁵⁷¹ Paraphrasing Taylor, Peck concluded, "The law . . . protects the slave. Law, reason, christianity and common humanity, all point one way."⁵⁷²

Twenty-two years later Eugenius A. Nisbet, the most brilliant antebellum Georgia judge and, until Lincoln's election, no fire-eater by that state's standards, characterized *Fields* as resulting from a "fervid zeal in behalf of humanity to the slave"⁵⁷³ and resting upon a legal ground that was "wholly untenable."⁵⁷⁴ The libertarianism displayed by the Tennessee majority of the late 1820's is consistent with the tenor of the manumission decisions of the early 1830's that we have considered: the 1833 guarantees of fair hearings and damages in *Sylvia* and *Matilda* and the 1834 rejection of the *Maria* doctrine in *Harris v. Clarissa*. Moreover, three other decisions of the early Thirties reinforce the impression of liberality (or, if you prefer, "extreme cunning"). First, *Loftin v. Espy*,⁵⁷⁵ in an interesting display of "paternalism," forbade the sale of *A*'s slaves to pay *B*'s debts

569. *Id.* at 143.

570. *Id.* at 144. The most cogent antebellum "refutation" of this theory of resemblance is Eugenius A. Nisbet's extraordinary opinion in *Neal v. Farmer*, 9 Ga. 555, 559 (1851), which includes a dissection of Lord Mansfield's use of precedent, an attack on England for discouraging Colonial attempts to restrain the growth of slavery, and an amusing side-swipe at the late medieval clergy for convincing the laity of the wickedness of villeinage while refusing to free villeins bound to church manors: "This conduct of the Holy Fathers was certainly characteristic." *Id.* at 564.

571. 9 Tenn. at 148. The citation given in Peck's opinion is "Vattel, 421." I can find nothing in my edition of M. DE VATTEL, *THE LAW OF NATIONS* (1787) at that page, and there is no section with so high a number. However, Book III, Chapter 8, § 152, at 531, seems more susceptible to Peck's view. True, Vattel says that if one takes a prisoner of war and makes him a slave "I still continue with him the state of war." *Id.* In isolation this implies the defendant's claim. But Vattel precedes his comment by stating, "The ancients used to sell their prisoners of war for slaves. They indeed thought they had a right of putting them to death. In every circumstance, when I cannot innocently take away my prisoner's life, I have no right to make him a slave." *Id.* And he has just previously limited the right to kill to those who "have rendered themselves personally guilty of some crime deserving death." *Id.*

572. *Id.* at 165.

573. *Neal v. Farmer*, 9 Ga. 555, 583 (1851).

574. *Id.*

575. 12 Tenn. (4 Yer.) 68 (1833). See *Woodley v. Abby*, 9 Va. (5 Call) 336 (1805) (the early 1800's Virginia case, particularly Spencer Roane's position). See notes 403-04 *supra* and accompanying text.

to *C*, even though *A* was in debt to *B* and had no other assets. Second, *Fisher's Negroes v. Dabbs*⁵⁷⁶ declared unconstitutional an 1831 statute limiting the debrutalizing (or libertarian) effect of one passed two years earlier. The 1829 law had allowed slaves to file bills in equity by next friend if the executor tarried in obtaining the state's assent to a bequest of freedom. The 1831 Act barred applying this rule to all pre-1829 wills, and ordered equity chancellors to strike such pending cases from the dockets. This limitation, the court declared, violated due process of law.⁵⁷⁷ Third, *Blackmore v. Negro Phill*⁵⁷⁸ took the court to a position regarding comity beyond that of the Tucker court.⁵⁷⁹ In *Negro Phill*, the Tennessee court held that Tennessee Negroes emancipated in the symbolically appropriate town of Equality, Illinois, remained free even after their return to the South. Arguably, the Tennessee court was here more liberal than the United States Supreme Court was to be in *Dred Scott v. Sandford*⁵⁸⁰ two decades later. True, Phill, unlike Dred Scott, asserted his freedom with his master's compliance while still in free territory. The more important indicator of Tennessee judicial attitudes, however, was Judge Peck's view that northern emancipation would be valid in Tennessee even if the master's acts were mere forms, undertaken to evade the operation of Tennessee laws and policy. Such a view was miles removed from Georgia justice.⁵⁸¹

These cases bequeathed to the post-1835 court libertarian (or, if one still prefers, "cunning pro-slavery") precedents in criminal trials, manumission hearings, detention damages, and evasions of restrictions on manumissions. In setting these precedents only one judge—Catron—ever made a neutral decision that did not favor the black. One could seek to render this record somewhat less striking by stressing that some of the cases presented "forced choices," with no apparently neutral options available to the judges. But that interpretation still would leave unexplained why the judges, when forced, never opted for a conservative over a liberal alternative. Nor would it explain the rejection of neutrality in the three suits in which it lay available—*Bob's Case*, *Sylvia*, and *Negro Phill*. I find it hard to ascribe the majority's result in *Bob's Case* to anything

576. 14 Tenn. (6 Yer.) 78 (1834).

577. *Id.* at 106. Is this perchance "paternalistic" due process?

578. 15 Tenn. (7 Yer.) 297 (1835). This case was a continuation of an earlier suit, *Hadley v. Latimer*, 11 Tenn. (3 Yer.) 426 (1832).

579. Recall that in *Betty v. Horton*, 33 Va. (5 Leigh) 615 (1833), the effect of the Massachusetts Bill of Rights had been to free a slave by virtue of her residence in Boston. See text accompanying notes 461-63 *supra*.

580. 60 U.S. (19 How.) 393 (1857).

581. Catron and Green concurred in *Negro Phill*. Whyte had left the bench in 1834 and under the new constitution adopted that year the court thereafter had only three seats.

except "gut-feelings" requiring fundamental fairness to an "unfortunate," but still "human," being. Similar tendencies may have lain behind the rejection in *Sylvia* of reliance on other remedies to assure a hearing, and behind the failure in *Negro Phill* to take into serious account the master's seemingly evasive motives.⁵⁸² The pre-1835 course of Tennessee decisions is, in sum, so consistent that the only sensible room for dispute about the court majority's behavior consists in whether to describe it as full-fledged pro-freedom libertarianism or as only close to it. On balance, the former description appears more tenable—despite the absence of explicit declarations of attitude that one might expect to accompany such behavior. The differences between the consistency of the Tennessee judges and the cleavage from issue to issue of the Tucker court appears too manifest to ignore.

Finally, in line with this judgment we do have relatively clear expressions of attitude by the one judge who chose neutrality, John Catron. Shortly before he was elevated to the federal Supreme Court he made two statements not at all indicative of abolitionism but also not at all indicative of single-minded positive-good pro-slavery.

The first statement rejected the "raw capitalist" attitude toward blacks that Stanley Elkins has argued characterized nineteenth-century southern views.⁵⁸³ Catron observed in *Loftin v. Espy*:⁵⁸⁴

Nothing can be much more abhorrent to . . . every benevolent individual, than to see a large family of slaves sold at sheriff's sale; the infant children, father and mother to different bidders. To treat them as other domestic animals would be to declare, that, as a people, we had, in reference to this class, sunk all feelings of humanity, and that the slave was not elevated in his sensibilities over the lower classes of animals As a fact, and as a theory, this is untrue.⁵⁸⁵

This statement is important in that Catron used it not merely as *obiter* theory, but in practice to prohibit the sale of slaves.

The second statement makes it clear that at least at the time Catron held to a nonromantic, conditional approval of the peculiar institution. In *Fisher's Negroes*⁵⁸⁶ he took a gloomy view of the free

582. The court's rejection elsewhere of continental doctrines suggests the discounting of another possibility—interest in the master's absolute property rights.

583. I do not wish to suggest a U.B. Phillips' view of the peculiar institution—that is, that benevolent paternalism characterized the institution. Indeed, one can find similar expressions of regrets about "breaking up" a slave family which, regretfully, "break it up" in the name of capitalism. See, e.g., *Cannon v. Jenkins*, 16 N.C. (1 Dev. Eq.) 426 (1830) (Ruffin, J.). The point is that neither the Phillips nor the Elkins view alone sufficiently describes slavery.

584. 12 Tenn. (4 Yer.) 68 (1833).

585. *Id.* at 78.

586. 14 Tenn. (6 Yer.) 78, 85 (1834).

Negro's lot in the South. He argued that it was and probably always would be less pleasant than that of "the slave who receives the protection and care of a tolerable master."⁵⁸⁷ This statement is in a sense pro-slavery. The exact sense, however, is important—it is conditional on the "tolerable master." It does not suppose that southern slavery was an improvement over northern "wage-slavery." Still more crucial are his approval of colonization schemes and, explicit in that approval, his rejection of the view that Negroes were an inherently "shiftless lot."

The [colonization] society has formed a colony of free blacks at Liberia, . . . The people residing there . . . speak our language, pursue our habits, profess the christian religion; are sober, *industrious*, moral, and contented; *are enjoying a life of comfort and of equality which it is impossible in this country to enjoy*, where the black man is degraded by his color . . . his fancied freedom . . . a delusion.⁵⁸⁸

Thus attributing the American degradation of the Negro more to the fact of living in a racially prejudiced white society than to inherent inferiority, the least libertarian Tennessee judge of the 1830's stood in his understanding of the societally produced causes of black "inferiority" closer to many abolitionists of the 1850's than to Josiah Knott or James Henry Hammond.⁵⁸⁹

(7) The Tennessee Court and Manumission, 1835-1860

Notwithstanding the liberalism of the Tennessee court to 1835, its liberal course from then until the Civil War was extraordinary, particularly since the legislature must have known the attitudes of two of the five major post-1835 judges prior to electing them: William Reese and Robert McKinney. William Reese's behavior on the equity bench was hardly a model either of deference to the legislature or of pro-slavery. Sitting as chancellor at the initial hearing of *Fisher's Negroes v. Dabbs*⁵⁹⁰ Reese had refused to follow the dictates of the 1831 law and to drop the Negroes' case from the docket. Instead, anticipating the ruling of the supreme court, he had declared the law unconstitutional.⁵⁹¹ The will's administrator conse-

587. *Id.* at 86.

588. *Id.* at 85-86 (emphasis supplied).

589. And one might even argue that he stood to the left of Lincoln, at least prior to Lincoln's Emancipation Proclamation. See Current, *The Friend of Freedom*, in RECONSTRUCTION 25-47 (K. Stamp & L. Litwack eds. 1969).

590. 14 Tenn. (6 Yer.) 119 (1834).

591. It should be noted that Reese concludes his opinion by declaring his own personal hostility to domestic emancipation under then present circumstances. *Id.* at 139. *Quaere*, was he being wholly genuine, or was he seeking to "get right by" the legislature? The declaration comes at the end of an extended apology for ruling the law unconstitutional. In that apology he manifests considerable anxiety for the independence of the judiciary. His later judicial behavior hardly denotes *great* personal hostility. See note 594 *infra*.

quently had been forced to take the slaves before another chancellor who proved to be more cooperative. In *Henderson v. Vault*⁵⁹² Reese had prohibited the removal of various slaves to Mississippi by a life tenant. Ostensibly, his argument turned on the ground that the future heirs might not be able to recover them from Mississippi: “[W]e know not their system of laws.”⁵⁹³ Probably Reese’s underlying motive is expressed in a passage contrasting slavery in the two states:

We have a mild penal code, as regards slaves, as well as others; they might be taken where this would be otherwise. We have a much greater proportion of free than of slave population; and the slave, without severity, is kept in a due and safe subordination; they might be taken where the proportion is the other way . . . Here there is a liberal philanthropy and protective public sentiment to the slave—there it might be otherwise. Here the . . . interest is on the side of humanity, and he may not be over worked—there the annual profit may be one third of his entire value, and the temptation would be to overwork him. Here . . . mothers and children are tenderly treated—there a different state of things may produce a different feeling and a different course. Here we have a temperate, healthful climate—there the climate may be less favorable to life.⁵⁹⁴

Protecting the slaves seems to be the real goal of Reese’s decision—one that he finally admitted he had reached “by the aid rather of principle than of authority.”⁵⁹⁵ But with what principle—if not one at least partially derivative from the better side of Enlightenment Liberalism?

A further reason why the legislature should have been aware of both Reese’s and McKinney’s perspectives was that they had played an active anti-slavery role off the bench during the prior decade.⁵⁹⁶

592. 18 Tenn. (10 Yer.) 30 (1836).

593. *Id.* at 38. But it would not have been very difficult for Reese to ascertain Mississippi law; he should have been able to deduce a conclusion anyhow. Mississippi would have had to allow recovery. Otherwise she would run afoul of both the contract and the full faith and credit clauses of the United States Constitution.

594. *Id.* at 39-40. I think that a remarkable passage—not because we would today agree with Reese’s definition of “liberal philanthropy” or that slavery could be dominated by “humanity”—but rather on three counts. One, the difference Reese perceives between Lower and Upper South slavery is, whether accurate or not, significant enough to him to control his decision in the case. Two, no plausible way of ascribing the result to cunning pro-slavery rather than real conviction exists. The de-brutalizing, aristocratic, would-be preserver of the peculiar institution (whatever else he might say in trying to persuade the North that, while “peculiar,” the institution was not all bad) would not (assuming he had any common sense at all, which Reese plainly possessed in abundance) likely set up, by way of a political tactic, so sharp a division between better and worse southern slaveries. Three, and rather like his *Fisher’s Negroes* opinion apologizing for holding legislative action on a touchy subject unconstitutional, Reese’s statement strikes me as precisely what an intelligent, sensitive, and on-balance judicially daring man who had moral difficulties living in, and deciding the fate of blacks subjugated beneath, a system of inequitable law, might say.

595. *Id.* at 40.

596. See 1 P. HAMER, TENNESSEE: A HISTORY 1673-1932, at 464 (1933). In my view

Robert McKinney, in fact, was one of the ten county representatives at the 1834 Constitutional Convention who voted to abolish slavery.

As far as I know, the other three major post-1835 judges—Nathan Green, William Turley, and Robert Caruthers—did not display public hostility to slavery before their appointments and thus their personal attitudes are not susceptible to easy categorization. Some clues, however, do exist. In 1858, after retiring from the court and becoming president of Cumberland University, Nathan Green wrote and circulated throughout the state an open letter defending Congress' right to abolish slavery in the District of Columbia. While Green's action may have stemmed from a desire to exercise his "first amendment" right⁵⁹⁷ to free speech in the face of pro-slavery extremists, or solely from his Whig constitutional views rather than from any underlying doubts about the peculiar institution, it is not probable. Neither is the theory that Turley and Caruthers *may* have been ardent proponents of slavery. As we have noted earlier, Caruthers went with McKinney to Washington in early 1861 to try unsuccessfully to work out a *modus vivendi* between the Gulf States and the Lincoln Administration. More notably, the consistent voting of the major judges for pro-freedom solutions in slave cases suggests that the gulf in attitudes between those for whom we have off-the-bench evidence of strong doubts about the justice of slavery and those for whom we do not, was not very great.⁵⁹⁸

This majority tendency can be seen most economically by restricting our attention here to three sorts of freedom cases—ones directly comparable to other states' adjudications, ones in which attitudes are most in evidence, and ones in which slavery attitudes seem significantly linked to liberal views on other matters. From

historiography has insufficiently stressed the fact that agitation against slavery in the late Twenties and early Thirties accomplished as little in Tennessee as it did in Virginia. In 1827 abolitionists showered the state legislature with 2818 anti-slavery petitions; in 1829 they presented 1327 documents. In 1829 a bill to provide for gradual abolition was defeated in the state senate by a vote of 18 to 11. If only four state senators had changed their minds the vote would have been 15 to 14 for abolition. At the Constitutional Convention of 1834 the delegates appointed a committee to look into the possibilities of general emancipation. Its report was defeated 44 to 10. The vote on a constitutional clause precluding future legislative abolition of slavery without the master's consent and without providing compensation passed by a much closer vote, however—30 to 27. Moreover, a motion to forbid compensated emancipation—put forward by a group wishing to "lock" the state permanently into the institution—was defeated.

597. I place the term "first amendment" in quotations in light of *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

598. I certainly would not include the short-term occupants of the third seat during the 1850's—A.W.O. Totten (1850-1855), William R. Harris (1855-1858), and Archibald Wright (1858-1860)—in these generalizations. Totten and Wright seem to have been secessionists.

this examination an additional motif will emerge: Tennessee judges became, if anything, increasingly libertarian as the Civil War approached. Three cases requiring the judges to construe the master's intent illustrate comparative liberality and the linkage between attitudes and behavior. In 1849 *Lewis v. Daniel*⁵⁹⁹ presented almost the same question that the Virginia judges had decided in *Walthall*: did the master intend his slaves to go free if they could not remain in the State? Their master had declared:

[M]y said executor shall, in due form, emancipate and set at liberty, each and every one of my said slaves before mentioned; provided, however, and upon condition, that said slaves mentioned shall be permitted by law to remain in the State of Tennessee. In case my said slaves cannot, by the laws of Tennessee, be emancipated, . . . then I do will and bequeath each and every one of the negroes above mentioned, to W. F. Daniel, who is the executor to the will.⁶⁰⁰

What could be a more explicit conditioning of freedom on a geographic permission? The Virginia justices, faced with that devise, surely would have awarded the slaves to W. F. Daniel.⁶⁰¹ Directing the slaves to be freed and removed from Tennessee, however, William Turley asserted that manumission should be considered the primary object and should prevail over a secondary object impossible of fulfillment. The difficulty with the argument is that it rests on an unproved point—that the primary intent *was* to free the slaves at all costs. It appears to me that the primary intent was to liberate *in* and have the slaves remain *in* Tennessee, while the secondary intent was not what Turley asserted—to have them remain in the state—but rather to give them to the executor. Such would seem to be a neutral reading. If the testator really had in mind Turley's primary-secondary distinction, he chose an extraordinarily clumsy way of expressing it. I am not sure that even William Brockenbrough would have reached Turley's result.

The second case of intent implies a linkage between liberal judicial attitudes concerning religious beliefs and pro-freedom views of slavery.⁶⁰² In July 1842 William Turley upheld a devise of freedom

599. 29 Tenn. (10 Hum.) 305 (1849).

600. *Id.* at 308-09.

601. The Virginia judges, with only Dabney Carr dissenting, had construed an undeniably ambiguous will to mean that the slaves were to remain in bondage. *Walthall's Ex'r v. Robertson*, 29 Va. (2 Leigh) 189 (1830). See notes 445-51 *supra* and accompanying text. Yet in *Lewis*, in which the would-be heirs had a far stronger case, the Tennessee court reached the opposite result.

602. In the context of an 1807 holding that "no man who did not believe in a future state of existence, rewards, and punishments," *State v. Cooper*, 2 Tenn. (2 Overt.) 95 (1807), could be a witness, and an 1852 decision reversing that holding, *Bennett v. State*, 31 Tenn. (1 Swan) 411, 413 (1852) (*semble sub silentio*), the result in *Gass' Heirs v. Gass' Ex'rs*, 22

against the contention that its maker had been insane. The would-be heirs in *Gass' Heirs v. Gass' Executors*⁶⁰³ proved that John Gass was an elderly eccentric who:

entertained the opinion that there were degrees of happiness in a future state of existence; that in whatever circle a man moved in on earth, he would move . . . in the second state of existence; and that . . . pre-eminence . . . in his future existence depended in some measure upon the amount of estate he should acquire, and the charitable purposes to which he should contribute it.⁶⁰⁴

Turley saw no proof of insanity in this strange combination of Dante and Calvin. Turley admitted that he would think insane a "man who fancied he was Jesus Christ,"⁶⁰⁵ or one "who imagined he corresponded with a princess in cherry juice."⁶⁰⁶ But he could not "comprehend a delusion upon a point of belief as to the nature of future rewards and punishments."⁶⁰⁷ While he considered it "a dreadful error" not to believe in a God, he was sure that the nature of the after-life was "a subject beyond the ken of mortal men, and . . . perhaps, every individual is laboring under a delusion who attempts to solve it."⁶⁰⁸ Warming to the subject, Turley observed that there was no way of adjudging the relative truth of the Muhammedan's "heaven of sensual enjoyment" and the Christian's "intellectual points of faith."⁶⁰⁹ This was hardly repressive fundamentalist Protestant Christianity of the sort that supposedly blanketed Dixie at the time that the pro-slavery concert of defense began to play the symphony of positive goodness.

The final case of intent arose only eighteen months before the Civil War and suggests that even at so late a date the Tennessee judges had not abandoned liberal inclinations. In December 1859, in *White v. White*,⁶¹⁰ they were asked to rule void a bequest of freedom drawn up by a Tennessean who had moved to Mississippi about six months before his death. The would-be heirs argued that since Mississippi law forbade post-mortem manumission, comity required that the Tennessee court forbid the liberation of a Missis-

Tenn. (3 Hum.) 278 (1842), suggests further that the Tennessee court became more, rather than less, liberal in its perspectives as the Abolitionist decades wore on.

603. 22 Tenn. (3 Hum.) 278 (1842).

604. *Id.* at 279.

605. *Id.* at 284.

606. *Id.* Whether Turley would have thought insane a man who, like Lumpkin, believed that slavery had been ordained by Jahweh, is another matter about which I shall not infer—merely insinuate—here.

607. *Id.* Regrettably, he had nothing to say about the more difficult question of the sanity of Methodists' thinking that transubstantiation can be accomplished with grape juice.

608. *Id.*

609. *Id.*

610. 40 Tenn. (3 Head) 404 (1859).

issippi citizen's slaves. As evidence of the decedent's domicile the heirs pointed out that he had gone to Bolivar City, Mississippi, in October 1857, had bought land there, and had built a house. Moreover, he had died in Bolivar City. Judge Caruthers, however, refused to admit this change in domicile. Most of his furniture remained in his old home and office in Giles City, Tennessee; therefore, his legal residence was still in Tennessee. The slaves went free. *White v. White*, then, turned on the percentage of furniture in White's two abodes at the instant of his sudden death, not on what was apparently his intention as to residence. Had the movers been more efficient, the blacks might have remained slaves. I have no doubt whatsoever that pro-slavery enthusiasts such as Judge Benning of Georgia or the men who had just taken control of the Mississippi and Virginia benches would have delivered the slaves to the heirs.

White's intimation of continued liberality is strengthened further by cases whose central question was adequacy of proof rather than intent. The clearest example of this was the court's policy of permitting suits to substantiate claims to freedom by introducing hearsay testimony—a practice that the common law did not generally allow in property suits, that the United States Supreme Court specifically rejected in slave cases, and that divided the Virginia judges in 1831. In 1835 the Tennessee court admitted that it had extended “the right to introduce hearsay evidence to the utmost limit, and further than other courts of high authority have gone.”⁶¹¹ Yet it did not seem to care. In fact, on the related issue of direct oral testimony the court became progressively *more* liberal. In 1839 Reese disallowed parol proof that a bill of sale absolute on its face actually had conveyed merely a life-tenure, after which the slaves were to be freed.⁶¹² Yet twenty years later, in 1859, the court allowed just such an exception to free a Negro who had been sold absolutely in a written conveyance with a verbal understanding that he would be liberated after eight years.⁶¹³ Caruthers appeared much less enamoured than Reese of regularity in the law. Admitting that

611. *Miller v. Denman*, 16 Tenn. (8 Yer.) 233, 236 (1835); see *Vaughan v. Phebe*, 8 Tenn. (1 Mart. & Yer.) 5 (1827).

612. *Richardson v. Thompson*, 20 Tenn. (1 Hum.) 151 (1839). Rejecting the slaves' bid for freedom, Reese observed that all the exceptions allowing such verbal evidence which had crept gradually into the law to overcome fraud, accident, or mistake probably had been a bad idea: “[I]t may well be doubted whether the interest of society, and the honor of the law as a science claiming a reasonable degree of certainty, would not have been . . . promoted by a rigid adherence to the severe simplicity of the general rule.” *Id.* at 155. These parol exceptions threatened legal chaos in which cases would have different and unpredictable results “according to the peculiar cast of thought or state of legal metaphysics of each individual judge.” *Id.*

613. *Isaac v. Farnsworth*, 40 Tenn. (3 Head) 275 (1859).

"[p]erhaps in no case was the proof ever more irreconcilably conflicting,"⁶¹⁴ he freed the slave anyhow, observing: "It is revolting to see to what an extent some men will go against the rights of the weak, in the eager pursuit of gain."⁶¹⁵

The Tennessee court's concern for claimant blacks was particularly evident in its treatment of dilatory executors. A Kentucky executor who attempted to avoid his duty to manumit by carrying slaves from Kentucky to Tennessee forfeited the slaves and was required to pay them both the money contained in the Kentucky bequest and adequate compensation for their labor.⁶¹⁶ Similarly, the court found a Tennessee executor who removed Tennessee slaves to Mississippi instead of freeing them guilty of contempt.⁶¹⁷ Executors who tried this tactic were subjected to tirades from irritated Tennessee judges. Typical was Green's statement in 1846 accusing an executor of "gross violation of duty and a corrupt disregard of . . . high trust . . . guilty of the grossest fraud, and in this case the more culpable, because of the helpless condition of the complainants."⁶¹⁸ And if these remedies of removal of power, forced damages, contempt, and denunciation did not suffice, the court had a final weapon: letting slaves propound a will for probate themselves. On being told by the executor's counsel in *Ford v. Ford*⁶¹⁹ that this action amounted to jettisoning the whole notion of the slave as chattel-property, Green countered with a view of the black that would be "liberal" for too many Americans today. Of course a slave could sue, he said; the fact that a slave's liberty was restrained and under the control of his master did not mean that he was "in the condition of a horse or an ox" because the slave "is made after the image of the Creator," and has a "high-born nature" that cannot be extinguished by "the accidental position in which fortune has placed him."⁶²⁰ Nathan Green likely was influenced in his conclusion by a law unique to Tennessee that allowed slaves to contract for their freedom. Yet he did not have to make a further flourish of egalitarianism that outdid Jefferson and Lincoln: "He has mental capacities, and an immortal principle in his nature, that constitute him equal to his owner"⁶²¹

Though it is impossible to offer irrefutable proof, one may sus-

614. *Id.* at 277.

615. *Id.*

616. *Reuben v. Parish*, 25 Tenn. (6 Hum.) 122 (1845).

617. *In re Underwood*, 21 Tenn. (2 Hum.) 46 (1840).

618. *John v. Tate*, 26 Tenn. (7 Hum.) 388, 391 (1846).

619. 26 Tenn. (7 Hum.) 91 (1846).

620. *Id.* at 95-96.

621. *Id.*

pect that sympathy for freedom and approval of masters who freed their slaves motivated Green as much as did the positive law itself. No less did anger at the executors, who were the slave's half-brothers, underlie Green's rhetoric than it had Reese's declarations the previous year in *Elias v. Smith*.⁶²² Elias was a free Negro who some years earlier had been allowed to purchase his slave wife and child for ten dollars, on an understanding with the owner's administrator and heirs that he would emancipate them. Though he had treated them as free, however, he had never posted the required bond or secured the county court's consent. Elias fell into debt and his creditors attempted to take his wife and child in payment. Technically the creditors were right; they were still slaves. But Judge Reese would have none of their technicalities, arguing that the administrator and heirs would certainly not have sold the wife and child, worth at least \$600, to Elias "with the view of conferring . . . a pecuniary advantage."⁶²³ Had they been selling to a stranger, they would have demanded written commitment to "an express trust in favor of the emancipation." Ignoring the fact that he was subscribing to something that looked suspiciously like quasi-emancipation, Reese waxed rhetorical. The administrator and heirs trusted

to the heart of the husband and the father, as being at least equivalent to the deed of another. If he, stifling the voice of nature, and severing the paternal tie, had been such a barbarian and monster as to have meditated a sale of them for his pecuniary advantage, upon the strength of his mere legal title, is there a chancery court in Christendom . . . which would not have promptly interposed . . . and enjoined him from . . . so flagrant a wrong?⁶²⁴

Sure of the behavior of all Christendom's chancery courts—perhaps unduly so—Reese enjoined the defendants from further action, stating that their doings were "little short in . . . enormity of that supposed."⁶²⁵

Such was Tennessee appellate justice. To say that this type of justice sprang, not at all from a genuine, if faulted, linkage with all the Euro-American liberal tradition, but merely from paternalism or from intent to perpetrate slavery by debrutalizing it, would be to manifest an utter failure to apprehend what in fact was going on in the judicial minds that wrought that justice.

(8) Populism and the Virginia Switch of 1858

Virginia and Tennessee cases of the 1850's offer an interesting test of the theory that the ascent of the "lower orders" to southern

622. 25 Tenn. (6 Hum.) 33 (1845).

623. *Id.* at 35.

624. *Id.*

625. *Id.*

political power contributed markedly to the rise of pro-slavery extremism. The Virginia Constitution of 1852 abolished the general court and vested civil and criminal appellate jurisdiction in the judges of the court of appeals, who were thenceforth popularly elected to twelve-year terms. At almost the same time a Tennessee statute terminated the legislature's appointive power and vested it in the people, who elected judges for eight-year terms. Conceivably these "Jacksonian" changes might have induced judicial shifts toward reaction. Judges popularly elected to limited terms might reflect public attitudes more proximately than men enjoying life-tenure unless they ran strongly athwart legislators' wishes. Yet, in neither state did electoral change produce an immediate shift toward conservatism.

In Virginia, the initial result was a battle over manumission doctrine in which two liberals popularly elected in the 1850's out-gunned the conservative William Daniel, originally chosen by the legislature in 1846. Richard C.L. Moncure, elected after Francis Brooke's death in 1851, and Green B. Samuels, who replaced Briscoe Baldwin, formed a two-man bloc. Their initial success in holding the court to liberalism⁶²⁶ was demonstrated in two decisions from which Daniel strongly dissented.

In 1853 in *Forward's Administrator v. Thamer*,⁶²⁷ the court freed a black woman despite her failure to carry out an apparently integral condition of her emancipatory bequest. Her former master had stipulated that she leave Virginia within six months or be given to his residuary legatee; yet, ten years after his death, she still resided in Virginia. Samuels justified his refusal to return her to bondage on grounds that could equally have been offered by the Tennessee judges: "The conditions . . . are in their nature, conditions subsequent [H]e [the testator] could annex no condition subsequent repugnant to the freedom conferred."⁶²⁸

This tendency toward generosity continued in *Foster's Administrator v. Foster*.⁶²⁹ In *Foster* the Virginia court actually faced an

626. This moderate liberalism fell short of that practiced by the Tennessee court inasmuch as the Virginia judges did not try to change Virginia precedent voiding quasi-emancipation and barring damages for illegal detention. See *Smith's Adm'r v. Betty*, 52 Va. (11 Gratt.) 752 (1854).

627. 50 Va. (9 Gratt.) 537 (1853).

628. *Id.* at 539. The liberal thrust here is highlighted by comparison with a similar South Carolina case of 1803, *Maverick v. Stokes*, 2 S.C.L. 203, 2 Bay 511 (1803). In *Maverick*, the Negro's return to Maryland contrary to his master's direction sufficed to place him back in slavery.

629. 51 Va. (10 Gratt.) 485 (1853). Compare *Jincey v. Winfield's Adm'r*, 50 Va. (9 Gratt.) 708 (1853) (in which Moncure declared illegal the absolute sale of *statu liberi* slaves

instance of deliberate fraud on the state's emancipation law that Jacob Peck of Tennessee had hypothesized nineteen years earlier in *Negro Phill*. Francis Foster was pinched with particular severity by the law since he had had several children by one of his slaves. In November 1831 he took them to New York City, executed a deed of manumission before the mayor, and a few days later brought them back to Virginia. At the trial following his death it was proved:

That Foster's reason for carrying his slaves to New York to be there emancipated, rather than to emancipate them in Virginia, was . . . that they might remain in the state of Virginia; he supposing that the law requiring emancipated slaves to leave the state in twelve months would not extend to the case which he had devised.⁶³⁰

Samuels, rejecting the would-be heirs' claim to the slaves, argued that "[t]here was nothing in the law to prevent Foster from taking his slaves whithersoever he chose."⁶³¹ That fact was clear enough, but what Samuels said next was less so: "[I]t is impossible to perceive a reason why an emancipation [made] without the state . . . should not be fully recognized here [T]he evidence did not . . . prove such fraud upon the law as would justify . . . avoiding the transaction."⁶³² Certainly the Georgia court would have found a justification. Indeed, given the circumstances of *Foster* it is very difficult to perceive here what reason would have constituted a sufficient fraud to Judge Samuels. Certainly Samuels can hardly be accused of deciding *Foster* in neutral accordance with the spirit of the laws of 1793, 1834, 1838, and 1847—all of which prohibited free blacks from entering the state to settle.

Justice William Daniel believed the court majority was in fact violating precisely that spirit. Four times in the past sixty years the legislature had indicated its unwillingness to swell the burden of free Negroes with newcomers. Foster's action was an express attempt to evade this state policy by artificially turning Virginia slaves into "newcomers." Yet Daniel's objection was no more successful in *Foster* than it had been in *Forward's Administrator v. Thamer*.⁶³³ At the time his position seemed a lonely one. Five years later, however, his pro-slavery logic convinced two of his brethren, George N. Lee and the new Court President, J.J. Allen.

*Bailey v. Poindexter's Executor*⁶³⁴ and *Williamson v. Coalter's*

to pay estate debts, and directed that they be hired out only for the minimum time necessary to meet outstanding claims) *with Pinckard v. McCoy*, 22 Ga. 28 (1857) (contrary result).

630. 51 Va. (10 Gratt.) at 486.

631. *Id.* at 490.

632. *Id.* at 491-92.

633. 50 Va. (9 Gratt.) 537 (1853).

634. 55 Va. (14 Gratt.) 132 (1858).

*Executors*⁶³⁵ mark the turning-point in Virginia slavery jurisprudence. Discussion in the conference chambers must have been heated, for the judges' lengthy⁶³⁶ opinions were bitter in tone. In both cases would-be heirs successfully attempted to seize slaves freed by will.⁶³⁷ In *Bailey* William Daniel argued that the slaves had no legal capacity to make the choice offered on the ground that "nothing short of the exhibition of a positive enactment, or of legal decisions having equal force, can demonstrate the capacity of a slave to exercise an election in respect to his manumission."⁶³⁸ President Allen agreed that "[manumission] is the exercise of a power conferred on the owner by the law, with which the slave has nothing to do."⁶³⁹ Lee concurred with Allen and Daniel. In the eyes of Moncure and Samuels, the result of this decision was to throw over the whole tradition of moderate Virginia liberalism dating back to Spencer Roane, Chancellor Wythe, Dabney Carr, John Green, William Brockenbrough, and the two Tuckers. Prior adjudications only made sense on the supposition that slaves had the capacity to choose. Furthermore, to suggest the contrary was to violate common sense. If they could not choose, how could they be held responsible for criminal acts? Finally, Moncure and Samuels stressed that even the strictest Continental Absolutism did not require such a result. If the master possessed all rights over the slave except those taken away by statute, surely he could give back what *he* chose unless Virginia statutory law explicitly forbade it.

Judge Daniel ignored the latter two points and focused on the question of precedent. In his view, prior cases had merely *assumed* a capacity to elect. Thus the issue had never been bindingly decided. Against the liberal bloc's protests, the three judges stood firm for slavery. Moncure objected vainly:

A master may emancipate his slaves *against* their consent. Why may he not make such consent the condition of emancipation?

. . . .
It is as competent for a slave emancipated on condition that he elects to be free . . . as it is for a slave absolutely emancipated to propound the deed or will for probate, appeal from the sentence, or sue for his freedom. Such right

635. 55 Va. (14 Gratt.) 394 (1858).

636. Together these opinions were nearly as long as those of the United States Supreme Court in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

637. In *Bailey* the testator allowed the slaves to choose freedom or public sale. In *Williamson* the mistress stated: "I direct . . . that they shall be manumitted on the 1st day of January 1858." 55 Va. (14 Gratt.) at 394-95. She directed her executors to raise funds to transport the slaves to Liberia, and finally prescribed that if any slaves should wish to remain they were to choose masters from among her relatives.

638. 55 Va. (14 Gratt.) at 197.

639. 55 Va. (14 Gratt.) at 398-99.

of election is incident, as such remedies are incident, to the legal capacity of the slave to receive his freedom.⁶⁴⁰

Bailey's slaves, however, remained in bondage until the Civil War loosed their fetters.

Samuels and Moncure fared no better in *Williamson v. Coalter's Executors*. The other three judges simply refused to accept the distinction which they urged between the two cases. Bailey, Samuels argued, had made a flat option open to his slaves; Williamson had *directed* their freedom. That was an absolute act. The further direction to choose among her relatives was subsequent and subordinate to it. No, Daniel, Allen, and Lee replied implacably; *Bailey* controlled. Williamson's slaves were to remain in bondage, too.

It is hard to be sufficiently critical of the majority's behavior. Not merely did they adopt an extremely restrictive view of the slave's capacity and turn to Continental Absolutism of a peculiarly twisted sort. Had they approached the issue in a vacuum—as for instance the Alabama court of the 1830's did—one could argue for the neutrality of their result with some show of plausibility. But they did not. At the very least, their decision made prior Virginia judges seem forgetful, careless men who should have reached the point rather than merely assuming it. Beyond that, one of William Cabell's opinions clearly intimates that the point had indeed been raised before. In 1836 in *Elder v. Elder's Executor*⁶⁴¹ Cabell, speaking of election, had stated: "It can . . . be no objection."⁶⁴² Why did he make that comment if the issue had not been raised? It must have been. Allen's, Daniel's, and Lee's decisions in *Bailey* and *Williamson* warrant placing these three judges in company with Benning of Georgia and Harris of Mississippi.

From 1858, then, the Virginia court was narrowly but surely in the hands of unabashed pro-slavery extremists. That is a circumstance redolent with two ironies. First, the shift in position was not the direct result of popular election of judges. The result was reached by two *appointees* from the 1840's in combination with one elected first in 1852. The two liberals were both popularly *elected* in the 1850's. Second, as late as 1855 five judges sitting on a special appellate court⁶⁴³ for the capital city of Richmond had unanimously

640. 55 Va. (14 Gratt.) at 201, 205. Samuels argued unsuccessfully along similar lines.

641. 31 Va. (4 Leigh) 252 (1833). See note 471 *supra*.

642. 31 Va. (4 Leigh) at 260.

643. The legislature created this court in 1848 to speed hearings of the particularly heavy Richmond docket which the regular appellate judges were unable to handle. It had final jurisdiction if both litigants agreed before trial. Its constitutionality was upheld by the court of appeals in 1849 with—perhaps typically—only Daniel dissenting. *Sharpe v. Robertson*, 46 Va. (5 Gratt.) 518 (1849).

allowed slaves to elect.⁶⁴⁴ Had the distribution of judges among the special court and the court of appeals been slightly different, the latter might never have embraced pro-slavery reaction. The men who comprised both courts favored by seven votes to three permitting slaves to elect. Had their distribution been different, the Virginia bench's slavery jurisprudence would have been as unaffected by the adoption of popular election of judges as was the Tennessee court's.

The Tennessee court's continuing liberality is adequately indicated by one of Robert Caruthers' last opinions, in which he and his colleagues, like their North Carolina counterparts, rejected the newly expressed Virginia view that slaves could make no legally cognizable decisions until the moment of their freedom. In December 1859 he allowed *statu liberi* to sue the testator's wife, who had a life-tenure in them. The slaves' purpose was to prevent her frittering away money allocated in the bequest to send them to Liberia on her death. Caruthers upheld their suit for estoppel, observing that if recent scholarly works on slavery and recent decisions of other courts asserted that "slaves . . . cannot come into a court . . . in a case like that now before us, we cannot adopt them."⁶⁴⁵ After all, slaves could only assert their rights through next of friend or through themselves. Otherwise they would have no recourse. "Surely there can be no principle that would prevent"⁶⁴⁶ their coming to court. "It would be entirely inconsistent with *our* liberal slave and emancipation Code, let *others* be as they may."⁶⁴⁷ The Virginia court majority might have swung to reaction, but the Tennessee court was not prepared to follow.

PART THREE: SHAPE, CHANGE, AND INTENT IN THE LAW OF SLAVERY

At the conclusion of Part One of this Article, I stated that Part One's analysis of writings in the legal history of slavery left unresolved six troublesome interpretive issues. One of these issues, that pertaining to the need for fixing at the outset the investigative

644. *Young v. Vass' Ex'r*, 2 Va. Rep. Ann. 511, 1 Patt & H. 167 (Spec. App. 1855). More precisely, the election was whether to go to Liberia or to a Free State, since the will set up an impossible bequest—giving the slaves 250 acres and their freedom in North Carolina. It seems extremely unlikely that the five general court judges—Richard H. Field, Lucas B. Thompson, John B. Clopton, George H. Gilmer, and John W. Tyler—would have thought slaves could select their destination but could not choose between bondage and freedom. Thompson saw no objection to applying humane principles analogous to *cy pres* even though that doctrine was not part of Virginia law. Compare Thompson's statement with Benning's comment on *cy pres*. See text accompanying note 342 *supra*.

645. *Stephenson v. Harrison*, 40 Tenn. (3 Head) 728, 732 (1859).

646. *Id.* at 733.

647. *Id.* (emphasis supplied).

boundaries, I "solved" by fiat—by asserting that if the historian did not declare and stick to a certain set of rules for admitting and excluding historical evidence then there was no way of evaluating, indeed no reason for trusting in, the verdicts rendered about the legal history of slavery. I also argued that proceeding further towards resolving the other five issues required examining the judge-made law of manumission. Having undertaken that examination in Part Two, our task in Part Three is set: it is to decide what further conclusions, if any, about these five remaining issues the evidence we have been considering permits us to reach.

The correct dispositions of two issues are, in my judgment (and despite my expectation that not everyone will concur), so clear that, save insofar as they arise in connection with the disposition of other issues, virtually all that is required now is their statement. First, there *were* significant variations among southern judges and courts concerning the appropriate relationships between law and slavery and with respect to the desirability of the peculiar institution. Second, although distinctions between various degrees of judicial liberalism and conservatism and between various degrees of pro-slavery and anti-slavery may be confusing (if we lapse into the dismal Whig error of confounding early nineteenth- and late twentieth-century meanings of these terms), adequate explanation of the significant variations in the judge-made law of slavery is virtually impossible without adverting to them.

So saying, I am left with three issues whose further discussion constitutes our remaining agenda. These are (to restate them in a fashion suitable to the point to which our inquiries have now advanced): (1) the extent to which the southern law of slavery was, or became, unified or autonomous; (2) the extent to which the judge-made law reflected and was an instrument of the master class's oppression of the black, as well as the extent to which that law was intended to be just; and (3) the extent to which role theory or other explanatory models of human behavior current in modern social science and psychology account for the ways in which southern judges shaped and changed the law of slavery.

Thorough examination of all three issues would complete the transformation of this modest Article into a book-length essay. Consequently I shall here have to accord them different levels of treatment, concentrating on those aspects whose resolution is most feasible at this juncture, and limiting myself to a few reflections about other more problematic aspects. Accordingly, Section A of this Part probes the issue of slavery law's unity and autonomy in substantially greater detail than Section B addresses the last two issues.

A. *Unity and Diversity in the Law of Slavery*

Was there a unified law of southern slavery? For me, this common enough way of putting the issue poses a problem of meaning. So, too, do some alternate wordings—particularly, “was the southern law of slavery developing towards (greater) autonomy?” If the question is intended only to ask, “were there more statutes in 1860 than in 1800 designed to protect the peculiar institution from outside influence” or “were there more judges in 1860 than in 1800 who thought that slaves had no legal capacity to elect between freedom and slavery?” then I can give an affirmative answer. So relaxed a standard for unity and autonomy, however, makes the finding virtually empty. Because more is usually intended by the question, I have a more serious problem with it: it forces together many components of the law that ought to be looked at separately and does not stipulate with respect to what we are to determine whether it was or was not unified, or autonomous.

A sensible way of approaching the issue needs to begin by distinguishing (a) between statutory law and judge-made law; (b) with respect to statutory law, between the activities the statutory law attempted to regulate, encourage, discourage, or prohibit, and the penalties or disincentives it set up for its violation (its scope versus its severity); and (c) with respect to judge-made law, among the following aspects—its scope, its penetration, and the extent to which judges did or did not attempt to do more than merely apply legislative will and precedent. What, in other words, drove their jurisprudence? In addition, we need to ask, with respect to both statutory and case law, whether there was unity or disunity, within and between particular substantive areas of the law. Making these distinctions, what do we find?

(1) *Scope, Penetration, and Severity in Statutory Law*

With respect to the statutory law of slavery, it seems safe to say that there were three broad trends, marked, however, by considerable “untidy” variation. The first trend was towards greater legal penetration of society and economy. Statutes covered and proscribed more activities of more people, black and white, in 1860 than they did in 1800. The second trend was dominantly toward relaxation of penalties, except for “direct subversion” of the peculiar institution (by activities such as slave stealing, or by advocating the overthrow—violent or not so violent—of the institution). Fewer crimes were capital in 1860 than in 1800, and southern law did not become enamored with the Beccarian logic of inventing punishments worse than “mere speedy death.” Corporal punishment by

mutilation and branding went out, and although corporal punishment by flogging continued (especially for slaves), there were some diminutions in severity. With respect to whites, and to free blacks in some states, fines and prison terms were prescribed more often (lacking, however, the "objectless non-productive work punishments" and "reform of the soul by hooding the head" techniques of nineteenth-century British and northern United States penal "reforms"). The third trend was towards differentiation in punishments for slaves, whites, and to a lesser but quite noticeable extent, free blacks, coupled with in the latter case growing divergence between the substantive rights of whites and free blacks.

The question whether southern statutory law became unified, or more unified, and autonomous, or more autonomous, is thus not an easy one. The question is better rephrased by substituting another (much more elaborate) wording. That is: "Did the slavery laws of the southern states have some or all of the following characteristics: (a) protecting and bolstering the peculiar institution; (b) debrutalizing it, or conversely, increasing its harshness; (c) foreclosing the possibility of status change in the system—and especially closing opportunities for blacks to move from slavery to freedom; (d) doing either (a), (b), or (c) in response to abolitionist attacks on the slavery system; and (e) thereby separating themselves from the content, procedures, or values of either the law of origin, the English law, or the evolving laws of the northern and western states?" That wording is more onerous, but it allows more accurate answers.

First, all southern states sought to protect and bolster the peculiar institution by statutory enactments—and it would have been odd if they had not. Second, in four areas there was considerable variation among the states and over time as to debrutalizing and making more harsh the law of slavery. These were: (1) the extent to which the law sought to control injuries to blacks; (2) the extent to which the "doors to freedom" were closed; (3) the extent to which the preconditions for "escaping to freedom" were closed and the major "civilizing" rationalization for theories of pro-slavery thus made nonsense of; and (4) the types of protections that the law afforded to blacks on trial. Some states, Georgia, for example, provided very little statutory protection; Louisiana provided a bit more—such as prohibiting sale of young children away from their mothers. No state produced what one could call a really humane set of working conditions and protections for blacks. But then many northern states, once they had made the quantum leap to emancipation, rested on their "laurels" and did not produce a humane set of laws for free blacks either. There was also considerable variation

as to the preconditions and conditions of freedom. As we have seen, Tennessee had great difficulty deciding whether to allow domestic manumission, and, like Maryland and Kentucky, never proscribed teaching slaves to read and write. South Carolina and Georgia, in contrast and well before the rise of strong abolition, sought to prevent freedom and its preconditions, thus making a farce out of any pretensions about "civilizing" and "Christianizing" imported Africans, by denying them the opportunity to read the Bible.⁶⁴⁸ The most respectable, or least indecent, records of the southern legislatures pertained to rights of blacks on trial. But even here there was considerable variation, as between Virginia's and South Carolina's relatively regressive stance on the matter, and North Carolina's and Tennessee's relatively progressive legislation.

Third, with respect to change over time, and the causes of change, two main points need to be made. One point is that while it is certainly true that much legislation was enacted during the 1820's and 1830's in response to abolitionist agitation, it is not very satisfactory to blame the abolitionists for this. Not too long ago that view was fashionable,⁶⁴⁹ but the timing of repressive legislation in the South comports more with the newer scholarly view that the Revolutionary Era's permissiveness on manumission was shorter lived than we used to think.⁶⁵⁰ We have already discussed some of the Virginia and Georgia legislation. That of North Carolina in the 1790's presents a good, though less frequently noticed, example.⁶⁵¹ The other point is that just before the Civil War there clearly was a spate of repressive legislation—such as North Carolina's forbidding all post-mortem manumission in 1860, and Arkansas' 1858 law permitting free blacks to select masters and return to slavery.

Fourth, as the nineteenth century progressed, the content of these laws, except for those pertaining to protection and criminal procedures, diverged, relatively speaking, from those of the rest of the Atlantic community.⁶⁵²

648. See J. O'NEALL, *supra* note 305, at ch. 2, § 42.

649. See, e.g., R. OSTERWEIS, *ROMANTICISM AND NATIONALISM IN THE OLD SOUTH* 21 (1949).

650. For a good example of the newer view, see W. JORDAN, *supra* note 143.

651. Just after the Revolution the Tarheel slave-code began to tighten up. Concomitantly, free Negroes . . . found their rights being slowly infringed. An act of 1787—which also prohibited masters of boats from allowing slaves on board after dark—penalized free Negroes who entertained slaves during the night time . . . and fined those who married slaves. In the next few years legislation came thick and fast: anti-gambling statutes (1788, 1791, 1794, 1798, 1799, 1800, 1801); increases in the penalty for trading with slaves, and a £50 fine for encouraging slaves to abscond (1791); a death penalty for ship-masters who carried runaway slaves out of state (1792); an anti-hiring-out law (1794)

Nash, *supra* note 19, at 118.

652. I stress "relatively speaking" for a purpose. Not infrequently, one gets the impres-

To make these comments is to indicate three things about the law of the peculiar institution and our perceptions of it. First, these comments indicate why, earlier in Part One, I was wary about using developmental terminology at all, although I concede that it is difficult never to do so. My reluctance springs in part⁶⁵³ from a general unease at imposing any linear order upon the blooming and buzzing disparities of data. The consequence of using developmental terminology is that one is likely to prize a departicularized ordering of historical data⁶⁵⁴ over understanding the particularities of what the historical characters, be they politicians or judges, thought they were up to. In our search for order and pattern, we may end up disregarding how they thought about the life of the law and politics, misconstruing what actually happened to the shape of southern law, and misunderstanding where it did and did not change.

Second, it seems to me that there were at least three especially important characteristics of the antebellum southern law of slavery. One was, not "retrogression," but rather, uneven change; the law was static here and dynamic there—with considerable disjunctiveness, even doctrinal disunity. A second characteristic was the consequent growth of what a Marxist historian might call "false resolutions" of internal tensions in the "ideology of the ruling classes." These were resolutions that, far from entirely throwing out the values and rhetoric of Enlightenment and English liberalism, kept them here and dismantled them there, with a most unsatisfactory

sion that historians think of nineteenth-century southern legal development as going backwards. There is a limited sense in which this is true. But I think it mistakes the principal vectors, much in the way that, sitting in a train stopped at a station and looking at the windows of another one similarly stopped, we may be misled if our own train starts very gently and imperceptibly to glide forward. We may think that we are still stationary and that the other train has begun to move backward. Exactly why this happens when we look at southern law is a matter too complex to explore here. It may, however, spring from the circumstance that most of us feel substantial distaste for the ethical "motion" of nineteenth-century northern law, which we tend to think of as primarily devoted to permitting the economically strong to exploit the economically weak. Being reluctant to think of northern law as developing in a morally progressive direction, and disapproving of slave-traders even more than of Jay Gould and Commodore Vanderbilt, we find it easy to misperceive the direction of the southern legal locomotive. Or, to be more accurate, we tend to misperceive the directions of all the various southern engines in the southern legal railway system and to be annoyed that the system did not contain at least as much "progressiveness" as the northern one.

653. I also have a more specific dissatisfaction about what seem to me two not altogether consistent positions that Whig analysis tends to adopt. One is thinking kindly things about the northern developmental path when speaking of the creativity of early and early-middle nineteenth-century instrumentalist judges. The other is thinking less kindly things about "exploitation" and "railroad lawyers on the bench" when speaking of later nineteenth-century northern law.

654. It is, moreover, a method of ordering the data whose plausibility (unless we are determinists) rests upon a fairly close contingency that might have worked out the other way—to wit, the outcome of the Civil War.

legal untidiness. Still another characteristic was the lack of strong consensus with which these disparate legal results were "achieved" in at least some legislative battles.⁶⁵⁵ Third, to whatever extent it may nonetheless be meaningful to talk about a unified or autonomous statutory law of southern slavery, it is less meaningful with respect to our primary concern in this Article, the shaping of the law by judicial decisions.

(2) Unity and Diversity in Judge-Made Law

The conclusions we reach about the extent to which southern law was unified and autonomous—or, as I have preferred to put it, the extent to which the various laws of the southern states protected, debrutalized, made harsher, or foreclosed status-change in, the peculiar institution—and so became separated from English law and contemporary northern law are conclusions that should depend considerably upon our verdicts concerning the shape and direction of judge-made law. I want to address our attention to three matters that help illuminate how unified, or disunified, the law of slavery was, and how much the unity or disunity may have changed over time. The first matter is variance in the extent of penetration of the peculiar institution by judicial rule-application in different southern states. The second matter concerns continuities and discontinuities between the area that occupied us in Part Two of this Article, manumission, and other major areas of decisionmaking, chiefly criminal trials of blacks and of whites who unlawfully harmed blacks. The third matter pertains to continuities and discontinuities between the doctrines and techniques, as well as the values underlying them, of southern judges shaping the law of slavery and of northern judges shaping both the law of slavery and the law of northern economic development.

If the southern law of slavery was entirely unified, if indeed it is convincing to speak of *a southern law* of slavery rather than of *the laws of fifteen different slave states*, then we should expect to see roughly similar legal penetration of the customs and brutalities of slavery, as well as reasonably similar judicial dispositions of the case-law questions posed. The kinds of questions raised, the protection (or lack of it) afforded to slaves, and the styles of jurisprudence displayed by the judges, ought to be fairly similar. So, too, should

655. See, e.g., 1806 VIRGINIA SENATE JOURNAL 67 (the critical vote on the 1806 Virginia statute requiring emancipated slaves to leave the state, on pain of being sold back into slavery, was passed eight votes affirmative, six votes negative); 1849 TENNESSEE SENATE JOURNAL 25 (on November 2, 1849, the Tennessee Senate vote to require emancipated slaves under 50 years of age to leave the state was close—13 to 11).

be the likelihood that a controversy arising out of slavery should reach the supreme court.

To be sure, we should not be surprised to see differences at the outset caused by variations in the inheritance from pre-nineteenth-century judicial systems and decisions, as well as differences caused by variations in rate of settlement (by population, and into slavery) among the older and newer slave states. Nonetheless, similarities in penetration ought to increase over time. As the Civil War drew nigh, divergences ought to have diminished, if not to nothing, at least to substantially less than they were at the time of the Missouri Compromise or the Mexican War. Penetration should have tended to equalize over time. Two types of evidence suggest, however, that this was by no means entirely true.⁶⁵⁶ Let us now turn to this evidence.

The first type of evidence pertains to the kinds of disputes that appellate judiciaries did or did not address, as well as to the curious ways that they sometimes resolved the disputes, including the political values that seemingly engendered the results reached. That type of evidence goes to the quality of penetration. The second type of evidence pertains to the quantity of penetration. How likely was it that a slavery dispute would reach the appellate courts? Most significantly, did the various slavery jurisdictions converge or diverge on this matter as the nineteenth century wore on?

As to the qualitative issue, I shall state flatly what I have been strongly intimating all along—that somehow Tennessee slavery jurisprudence was substantially different from Virginia or Georgia slavery jurisprudence. Quite apart from the manumission cases we have discussed and the inclination of Tennessee judges to support the Union while the Georgians and the post-1858 Virginia majority were tearing it apart, the jurisdictions differed primarily in three jurisprudential areas, two of which I have discussed on another occasion. One area is criminal trials of slaves. The Virginia court of appeals lacked criminal jurisdiction until the 1850's, and the Georgia court was, with the exception of the one anti-secession judge, less inclined than most Deep South jurisdictions to extend fair trials.⁶⁵⁷ The second area is the protection of blacks against both

656. I say this without, let me emphasize, intending to argue that there was no similarity at all, or that the dissimilarities increased over time.

657. See, e.g., *Hill v. State*, 28 Ga. 604 (1859). Linton Stephens dissented from Lumpkin's and Benning's refusal to award a new trial to a slave convicted as principal for a murder when the evidence tended to prove that someone else had inflicted the mortal blow, and that defendant was an inadvertent accomplice. Lumpkin and Benning took the "pragmatic" position that whether a slave be "convicted as principal in the first or second degree, the offense is murder and the punishment the same . . ." *Id.* at 607. Linton Stephens thought this a

lynch law and particularly oppressive anti-free-black local ordinances.⁶⁵⁸ The third area pertains to civil liability for abuse of

gross miscarriage of justice. I agree. In his view, no evidence whatsoever was admissible under Hill's indictment

to show that the accused was guilty as principal in the second degree . . . [Because] [t]he indictment does not give notice of the nature of the proof, and so, does not afford the accused opportunity to prepare his defense. He comes to trial prepared to meet the case stated in the indictment, but he is met by a different case of which he has had no notice.

Id. at 607-08.

Debate must have been intense in the court chambers, for after discussing the differences between murder and manslaughter, and principals in the first and second degrees, Stephens remarked bitterly that "I am told that this is all *theory*—that *practically* there is no difference between a principal in the first and second degrees—that 'murder is murder' after all." *Id.* at 610-11. Stephens agreed that there was no practical difference, but then, he observed [s]o, too, there is no *practical* difference, after conviction, between a conviction for murder and a conviction for arson in a town, but I apprehend that *on the trial* of an indictment for arson, the accused would have a very *practical* surprise, if he should be met with proof, not that he had burnt a house, but that he had killed a man.

Id. at 611. Stephens had a second objection, namely that the proof to him

clearly and confessedly shows the accused not to have been the *perpetrator* of the crime. He struck no blow upon the deceased, and had nothing to do with her, but was engaged in a scuffle with other persons, while the murderer performed his deed upon a helpless woman. I do not think the proof shows even that the two negroes had any common intent of murder. Their mission was probably one of lust, to be gratified peaceably if possible, forcibly if necessary.

Id. at 612. Hill did not help the other Negro kill the woman, but "was himself engaged with another woman, whom he neither killed nor tried to kill, and who was a witness against him on the stand. The evidence is far from satisfying me that Hill was guilty of murder in either degree . . ." *Id.* In Stephens' view the verdict was against the evidence. "The verdict is not the 'truth.' I do not know what more can be said against any verdict, or any better reason for setting any verdict aside; and I think this one ought to have been set aside." *Id.* at 612-13. I do not know what more can be said either—except that *Hill* convinces me that Stephens was far more genuinely interested in fair trials than either Lumpkin or Benning, and that southern judges were not all cut from the same cloth.

658. I have found nothing exactly equivalent in Georgia or Virginia jurisprudence to Tennessee cases such as *Kirkwood v. Miller*, 37 Tenn. (5 Sneed) 455 (1858), or *Polk, Wilson & Co. v. Fancher*, 38 Tenn. (1 Head) 336 (1858), or *Mayor v. Winfield*, 27 Tenn. (1 Hum.) 707 (1848). In *Kirkwood*, the court objected strongly to a lynching and insisted on strict enforcement: slaves "are property—but have souls and feelings. Those who take it upon themselves, in periods of groundless panic, to slay and destroy, must do so at their peril." 37 Tenn. (5 Sneed) at 459. In *Polk*, it awarded a new trial to a lynched slave's owners, calling the lower court's acquittal of the defendants "a mockery of justice." 38 Tenn. (1 Head) at 341. "But no man whether bond or free, is to be condemned . . . without a hearing—a fair and impartial trial. There is neither valor nor patriotism in deeds like these." *Id.* at 338. In *Mayor*, it struck down a Memphis 10 p.m. curfew law applying only to free blacks. The Tennessee court said that if there had been any attempt to "enforce such an ordinance against a free white person, public indignation would have been aroused, and the corporation would not only have been sued to recover back the fine, but also for false imprisonment." 27 Tenn. (1 Hum.) at 709. The free black "is not, it is true, a citizen of full privileges in our own state, but still he is a free person . . . The lot of the free negro is hard enough at best . . . and it is both cruel and useless to add to his trouble by unnecessary and painful restraints in the use of . . . liberty." *Id.* For a fuller discussion, see *A More Equitable Past?*, *supra* note 25, at 229-33. *But see Cooper v. Mayor*, 4 Ga. 68 (1848) ("pre-Benning" Georgia case).

slaves.⁶⁵⁹

While this is not the place for a large-scale examination of these cases, I shall point to one that is particularly instructive because it shows southern judges in a degree of penetration of the peculiar institution, and in a manner of resolving the particular issue, that goes utterly counter to conventional wisdom. The case is *James v. Drake*,⁶⁶⁰ which arose, relative to the assumptions made by the "dismal Whig" school, at the extraordinarily late date of September 1858. In *James* the one secessionist judge on the Tennessee court at the time, Archibald Wright, spoke for a unanimous, and dominantly Unionist, court, in holding that the hirer of a slave was liable for failing to give the slave a small-pox vaccination. Although the hirer vainly protested that the master should have had the slave vaccinated, and thereby prevented his falling victim to the disease, Judge Wright stated, with Robert Caruthers and Robert MacKinney concurring, that the master's omission to do so "furnishes no excuse whatever to the defendant."⁶⁶¹ Notwithstanding proof that the defendant had given the slave due care as soon as he had contracted the disease ("there is not . . . the least evidence of a want of care in the treatment . . . after he was attacked. On the contrary, . . . Mr. James remained on his farm during the whole time of the slave's illness, and visited him several time [sic] a day"⁶⁶²), Wright stated: "[I]t was gross neglect . . . not to have had him vaccinated. He was as much bound to protect the slave from danger, and the taking of the disease, before he was attacked, as in the treatment of him afterwards"⁶⁶³

Not only do I think there is nothing similar to that in the jurisprudence of the positive-good slavery southern courts, I do not imagine that there is anything quite like that describing the duties of employer to employee in the cases arising from "wage-unslavery" in the North. Moreover, *James* supports the argument I have been espousing about the development of the Tennessee court in particular, and more generally about the pitfalls of trying to subsume too much of the southern case law under the moral rubric of twentieth-

659. This is an area that, until recently, prodded by the comments of Tushnet and Levinson, I had put largely aside, not as wholly unimportant, but as less important than those that previously concerned me. This may, I shall have to concede, have been a mistake. Notwithstanding the analytic difficulty that these cases pose (sorting out the "interest of master" from the "interest of slave") and that led me to drop them from top priority, they do comprise a large fraction of slavery litigation.

660. 24 Thomp. Cas. 170 (1858), excerpted in 2 H. CATTERALL, *supra* note 14, at 567-68.

661. *Id.* at 172, excerpted in 2 H. CATTERALL at 567-68.

662. *Id.* at 173, excerpted in 2 H. CATTERALL at 567-68.

663. *Id.* at 172, excerpted in 2 H. CATTERALL at 567-68.

century values that we usually use to castigate those of the nineteenth century. *James* should make us more cautious than we sometimes are about estimating the extent of unity among the jurisdictions in terms of quality of penetration.

With respect to the quantity or degree of penetration, the more unified the law of southern slavery was, the more similar⁶⁶⁴ ought to have been the probabilities that the various state supreme courts would ultimately be appealed to in order to resolve slavery issues. Further, we might reasonably anticipate that whatever the quantitative differences among the states in propensity to appeal in the formative years of slavery jurisprudence, as the nineteenth century went on unification of slavery law would be reflected in at least two patterns: (1) convergence among the slave states as to the legislatively and precedentially determined conditions of appeal; and (2) in consequence, increasing similarity with respect to changes in the rates of appeal (and intervention) over time. But did either convergence come to pass—if, that is, similarity did not obtain from the start? Table XII, which is nothing more than a listing of the twenty heaviest annual slavery jurisprudence dockets, suggests not. The ten heaviest antebellum dockets all appeared in just two states' supreme courts—seven in North Carolina's and three in Louisiana's.

What is the result if we expand our examination to the top twenty? North Carolina and Louisiana continue to "dominate," with four and three of the second ten, respectively. The North Carolina court had a fifty-five percent majority of the top twenty. Add Louisiana's six, or thirty percent, and we have accounted for eighty-five percent of the total with two judiciaries. Only four states of the fifteen slaveholding jurisdictions even "achieved" one entry among the top twenty dockets. Only three achieved more than one entry. It is unlikely that one would obtain these results by random chance.⁶⁶⁵

664. It goes without saying that one needs to make due allowances for variations in the amount of judicial intervention encouraged by legislation and by variations in precedents. But I suspect that such allowances would not account for most of the variation that is to be found.

665. Nor do the odds improve if we correct for relative black populations and for courts whose jurisdiction was limited so as to exclude some of the types of cases that might arise. The former correction does not help much inasmuch as, in the pertinent decades of the 1840's and 1850's, North Carolina stood fourth and sixth respectively among the slaveholding states, and Louisiana stood similarly seventh and seventh. The latter correction is no more helpful since the consequence is to give only a partial explanation for Virginia jurisprudence up to 1850 and for Georgia jurisprudence up to 1845, which made it into the "top twenty" shortly thereafter anyway.

Let me be cautious. I do not want to argue that minor differences in raw (or corrected)

We ought to explore this quantitative disparity further, particularly as to changing patterns over time. Tables XIII and XIV omit three of the seceding states (Florida, Arkansas, and Texas) because their late settlement and decade-discontinuous slave populations, coupled with the novelties of a supreme court in frontier territory, could produce peculiar statistics. The data depicted in Tables XIII and XIV suggest a tentative answer to the question whether in the sufficiently long-settled slave states, tendencies to litigate to the highest appellate level converged or diverged over time. Table XIII presents the raw numbers of appeals per year to each high court. Table XIV displays the results of a crude measure⁶⁶⁶ I have worked out to correct for population. The measure shows the chances, per 100,000, that a case involving a black would be appealed to the highest state appellate court. As a glance at Table XIV will verify, the variation in the measure as applied to the various state supreme courts is intriguing.

numbers of this sort prove, without more, that there were significant differences in degree of the law's penetration of the peculiar institution. Less able judges, after all, might fail to resolve simple issues, thereby creating more litigation—although both Tushnet's verdict on the quality of the North Carolina judges and our own explanations seem to rule out this explanation. (While Tushnet and I might disagree as to the precise ranking of the North Carolina judges in terms of ability, we would certainly agree that they were among the most able.) So too, Tushnet's view of the advantages to efficient judicial decisionmaking afforded by the existence in Louisiana of a prior code does not help explain Louisiana's heavy dockets. Finally, while the oft-noted positive correlation between urbanization and tendency to litigate may help explain the heavy dockets in Louisiana (with New Orleans), it is of little use for the Tarheel State, which lacked any large city before the Civil War.

666. Though crude, it is here adequate given the limited point I wish to make and the extreme interstate disparities that would emerge equally plainly were we to use a more sophisticated demographic measure. This measure of "propensity to litigate to the top," which I am going to argue is a measure of the law's tendency, state-by-state, to penetrate the peculiar institution, is nothing more than the number of appeals per decade divided by the midpoint-straight-line black population and multiplied (so that we do not become confused by decimal points) by 100,000.

This crude measure is similar to that used in discussing Hindus' calculations in Part One *supra*. A more sophisticated measure would, besides separating out free Negro and slave cases: (a) lag the population estimates relative to the caseload (since, for example, if on the average it took three years for a North Carolina case to get from the commission of the alleged wrong through the lower courts and up to the supreme court, then the caseload of 1841-1850 should be related to the population of 1838-1847); (b) separate out the nonadult population "not at risk;" and (c) employ a continuous rate of increase function. For a useful related discussion, see Eblen, *On the Natural Increase of Slave Populations*, in *RACE AND SLAVERY IN THE WESTERN HEMISPHERE: QUANTITATIVE STUDIES* 211-18 (S. Engerman & E. Genovese eds. 1974).

TABLE XII
 THE TWENTY HEAVIEST ANNUAL
 DOCKETS OF SLAVERY APPELLATE CASES

Number of Slavery Cases Occuring in a Given Year	State Supreme Court(s) in Which Occuring	Year(s)
52	North Carolina	1859
50	Louisiana	1860
48	North Carolina	1850
42	North Carolina	1849
41	Louisiana	1841
39	North Carolina	1855
39	North Carolina	1858
38	Louisiana	1856
38	North Carolina	1857
37	North Carolina	1851
36	Louisiana	1851
36	North Carolina	1853
36	North Carolina	1856
36	Georgia	1858
35	Louisiana	1844
35	Tennessee	1858
35	Georgia	1860
35	North Carolina	1860
34	North Carolina	1854
34	Louisiana	1857

TABLE XIII
NUMBER OF APPEALS CASES CONCERNING BLACKS, PER YEAR, 1801-1860

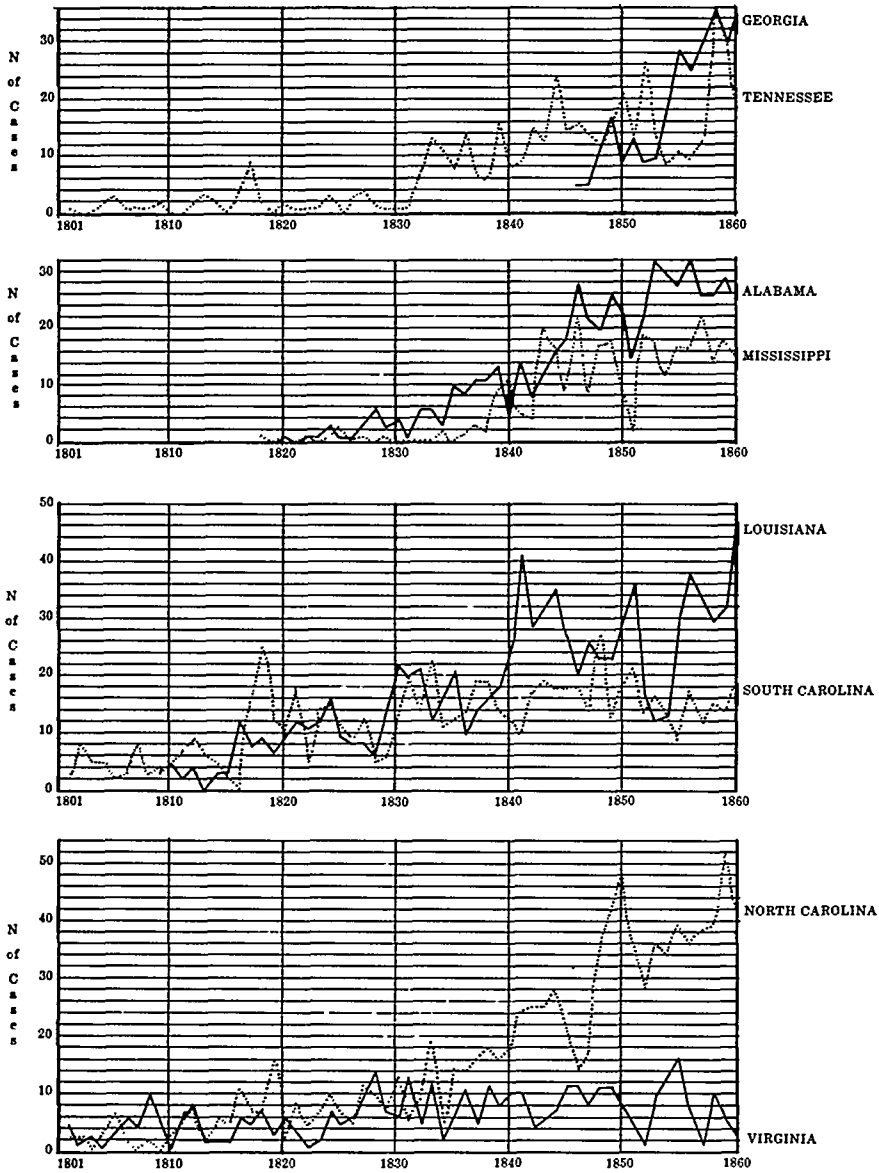
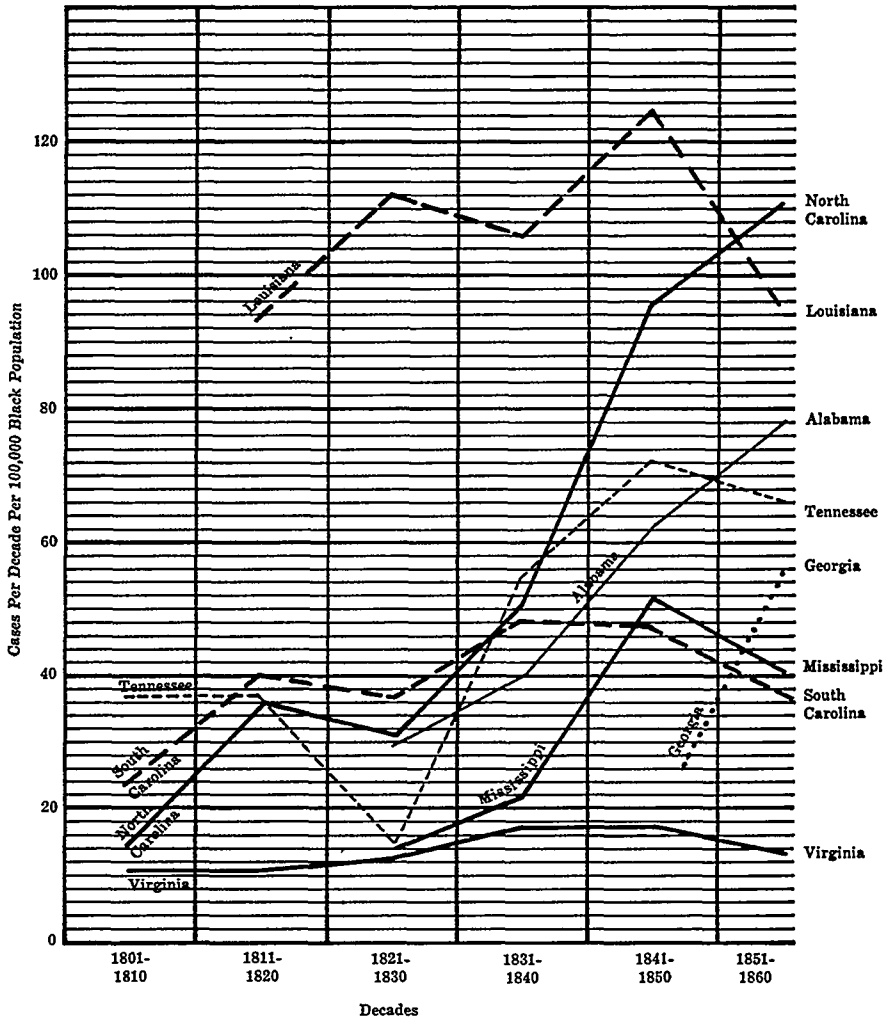


TABLE XIV
 APPEALS OF CASES CONCERNING BLACKS
 STANDARDIZED FOR POPULATION, BY DECADES
 1801-1860



Let us consider this briefly by comparing Tennessee and the three South Atlantic jurisdictions functioning during the first decade of the nineteenth century, and then by comparing all eight states over the ensuing decades up to the Civil War. I suggest that the various states' statistics point to different patterns of penetration. At the outset of the nineteenth century, standardized litigation rates in the three Atlantic states are fairly similar, with Tennessee's rate somewhat higher. But then what happens? The Virginia rate remains essentially static for the next half-century. South Carolina's rate doubles by the 1831-1840 decade and then tails off slightly. Tennessee's and North Carolina's rates describe an entirely different course, both climbing—the one, of course, more rapidly than the other—throughout the antebellum decades. By the end of the antebellum period North Carolina litigation is occurring at roughly the same rate as Louisiana's, much higher than other states', while Tennessee and Alabama wind up close together, occupying a middle-high ground. Georgia, Mississippi, and South Carolina cluster below that, and Virginia remains distinctively at the bottom.

It does not do to push the data too hard in making fine distinctions. For example, for two reasons I am not at all sure whether the declines in five states during the 1850's, or the gains in three are significant. The first and lesser reason is that the data base may give a larger underestimate in some states than in others.⁶⁶⁷ The second and major reason is that, with the exceptions of South Carolina and Virginia, the raw number of cases continued to climb in each state supreme court. And, as a cursory examination of the various courts' reports attests, it is possible that many of these courts were reaching a point of case overload, primarily in nonslavery cases.⁶⁶⁸ Nonetheless, some gross distinctions, including those we have made, probably are valid. Consider thus that during the 1850's the likelihood that a case involving a North Carolina black would reach the state supreme court was, corrected for population, eight and one-half times as great as the likelihood that a case involving a Virginia black would do the same.⁶⁶⁹ I suspect that we would be on fairly safe

667. The data base is simply a count of all state cases concerning blacks in H. CATTERALL, *supra* note 14. It is possible, though not probable, that the percentage of Catterall's omissions of cases varies significantly from state to state.

668. By "overload" I mean relative to what the judges were used to—not relative to caseloads typical of the late-twentieth century.

669. During the 1851-1860 decade the North Carolina court heard 374 cases concerning blacks; the Virginia court heard 69. Dividing the black-population-standardized figure (110) for the more litigious state by that for the less litigious state (13) = 8.46. The reader may calculate comparisons among other states similarly. It should be understood, however, that

ground if we tentatively concluded that the two states experienced quite different trends in the appellate law's penetration of the peculiar institution.

Let us now turn again to the qualitative side of the issue of southern law's unification—specifically to the question of inter-jurisdictional doctrinal similarity and dissimilarity. Although we have already examined in detail a major area of doctrine—manumission—we have yet to summarize the area so that we can decide how much unity there was. Table XV provides this summary for the three states that we have focused upon as well as for the other two states to whose judicial decisions we have frequently alluded, the two Carolinas. The summary sets forth the courts' dispositions of thirteen manumission issues. On only one of the thirteen did all five courts agree with each other—assuring fair hearings of manumission claims. On ten of the other twelve issues, not only was there dissensus among the jurisdictions, but there also was dissensus within individual states' appellate systems. Considered thus statically, there does not appear to be a very high degree of unity. What happens if we consider changes over time? Did greater unity of manumission doctrine emerge as the Civil War approached, and was it a unity of greater hostility to manumission?

It is certainly true that some southern courts, or at least their majorities, became more defensive of slavery. We saw that defensiveness in the Virginia court of 1858, just as we saw it when the Georgia chief justice worked up to the point of persuading the state legislature to change the law in an anti-freedom direction. So too, the Mississippi and Alabama courts turned, both in 1859, toward greater defensiveness. We need to be careful, however, not to attribute too much to these changes in direction. With respect to the Mississippi court, the change came in a two-to-one split decision, while the change of the Alabama court was its second change of direction in five years. Until 1854 the Alabama court had required that to be valid, a manumittory bequest had to direct out-of-state freedom, although, unlike the Georgia court, it did not make dubious formalistic distinctions in examining the word order of "liberate and remove" wills. In 1854, a late date for a move towards favoring freedom, the Alabama Supreme Court explicitly overruled an earlier case⁶⁷⁰ and directed executors to free slaves out-of-state

although this Table is drawn as a line graph (in order to give a sense of inter-decade trends), the data displayed are derived from decade totals. Thus, to read a particular state's decade-case-figure the reader should examine the mid-decade dots.

670. *Prater's Adm'r v. Darby*, 24 Ala. 496 (1854), *overruling* *Trotter v. Blocker*, 6 Port. 269 (1838).

TABLE XV
 UNITY AND DISUNITY IN MANUMISSION JURISPRUDENCE

Issue	Dispositions by Various Courts				
	Georgia	Tennessee	Virginia	N.C.	S.C.
Should the Judiciary:					
Assure fair hearings?	yes	yes	yes	yes	yes
Allow damages for wrongful detention in slavery?	—	yes	no	—	yes
Restrict the presumption against freedom of skin-color?	—	yes	split	yes	split
Permit "relaxed" rules of evidence in relation to hearsay?	—	yes	split	yes	yes
Presume freedom from lapse of time, ignore defects in the manumission documents, court-records, etc.?	no	yes	split	yes	split
Rule for freedom where the location stipulated is impossible (send to another destination)?	no	yes	split	yes	split
Award liberty to increase of statu liberi?	—	yes	split	no	—
Rule for freedom against allegations of testator's insanity? Allow nuncupative wills?	—	yes	split	—	—
Permit master to skirt state laws by freeing out of state?	no	yes	split	—	split
"Wink at" quasi-emancipations?	no	yes	usually no	no	split
Permit slave to elect freedom, or destination?	no	yes	yes to 1858 no after	yes	split
Observe comity in giving effect to other states' laws on freedom and inheritance of property by freedman?	no	yes	yes	yes	split
Permit manumission society to receive bequest of slaves and take to free state or nation?	no	yes	yes	yes	—

although the relevant documents made no mention of any such intention. It was on that issue that the court reverted five years later to its earlier doctrinal position.⁶⁷¹ Yet at the same time that these shifts were occurring, the courts of four other states—North Carolina, South Carolina, Tennessee, and Texas⁶⁷²—were explicitly rejecting these doctrinal shifts. In sum, it requires more capacity than I have for forcing untidy facts into neat rows to conclude that by the eve of the Civil War there was a well-unified law of manumission.

What about the question of unity—or better, relationship—between the manumission area and other areas of slave law? I will just make two propositions based upon my own earlier work. First, in terms of results in criminal trials of blacks, there was considerably greater similarity among the various jurisdictions than we have seen in manumission jurisprudence. But, and second, it does not follow that consequently there was an autonomous criminal law of slavery. The criminal law of slavery of one southern state not only increasingly resembled, as the nineteenth century went on, in its procedural essentials, the criminal law procedures of another southern state. Both also increasingly resembled criminal procedures in nonslaveholding jurisdictions and modern criminal procedures. If, in terms of what it punished, southern law differed considerably, in methods of reaching a verdict, it differed much less. Indeed, it appears that in contrast to the manumission cases (in which the northern courts were leaving the eighteenth-century legal station at a rapid rate, while some southern courts were inching forward, others were staying put, and still others were being rammed into reverse by fire-eating judges), in the criminal procedures area the southern courts were all leaving the eighteenth-century procedural station, albeit at different rates. Moreover, some courts passed through the expansive territory of common law protection in the absence of statutory law, while others skirted that landscape assiduously.

I expect that at this juncture some doubting Thomas of a reader is going to raise four objections about the logical garden-path I am attempting to lead us along. *Objection #1*: Surely the motives of southern (“slavery-loving”) judges were very different from those of northern (“freedom-loving”) judges. *Objection #2*: What about the differences in severity of punishments prescribed for whites, slaves, and free blacks? *Objection #3*: The most important procedural rule

671. See *Evans v. Kittrell*, 33 Ala. 449 (1859), *overruling* *Prater's Adm'r v. Darby*, 24 Ala. 496 (1854).

672. For a discussion of the Texas court's manumission rulings, see *Texas Supreme Court*, *supra* note 25, at 630-37. Note also that the generalization in text applies to the majority of the South Carolina appellate law judges, and not to the majority of appellate chancellors in equity.

difference has been omitted, one that fundamentally set "Reason of Slavery" apart from free-state jurisprudence—the rule that barred blacks from testifying against whites. *Objection #4*: Surely there were some significant differences among southern judges with respect to criminal procedures for whites and blacks.

I have responses to all four objections, but I am going to defer my response to *Objection #1* until the next section, because the matter of motivation is best handled in conjunction with the questions posed earlier pertaining to the law as a reflection of master class oppression and to the problem of just or unjust judicial intentions. I have four responses to *Objection #2*: (1) The different penalties were primarily legislatively imposed differences that we should not attribute to judge or jury, save to the extent that differences accrued from discretionary sentencing. (2) We are principally concerned here with judicial, not legislative, behavior. (3) Following from our discussion in Part One of the European penal tradition, it simply is not clear that if defendant A was fined, defendant B was jailed, and defendant C was whipped, all three for the same offense, then A always came off best, B next best, and C worst. (For example, if A, who happened to earn \$300 a year in 1850 dollars, was fined \$100, while B received six months in prison, and C received thirty-nine lashes, then it seems plain, from what I know about incomes,⁶⁷³ prices, prison conditions, and whipping practices in the 1850's, that C well may have come out ahead.) (4) Addressing the question of judge and jury inclinations, where (as in Nashville, Tennessee) there was something close to "inter-race and inter-crime parity," the punishments doled out simply do not appear enormously different between the races.

My response to *Objection #3* is that there was nothing uniquely southern about a procedural rule barring testimony by nonwhite against white.⁶⁷⁴ Doubts about the wisdom of extending to "lesser

673. R. STAROBIN, *INDUSTRIAL SLAVERY IN THE OLD SOUTH* 100 (1970) ("free white workers in the South between 1800 and 1861 earned on the average about . . . \$310 per year."). See also D. SCHOB, *Hired Hands and Plowboys* 254-66 (1975) (discussion of northern agricultural workers' hours and incomes). "The length of the working day approximated twelve hours . . . although the working day's length in New York and Illinois was thirteen to fourteen hours . . . Several states followed the lead of New Hampshire in 1847, legalizing the ten-hour day . . ." *Id.* at 254-55. Compare O'Neill's 1848 *Digest* recommendations for reducing by statute the fifteen hours summer and fourteen hours winter working days for slaves to twelve and ten hours respectively. J. O'NEALL, *supra* note 305, at ch. II. Daily wages (without board) for farm laborers in the North in 1850 varied from 78 cents in Ohio and Indiana to \$1.37 in Minnesota, with, according to my calculations, a median of 89 cents (New York, Michigan, and New Jersey). D. SCHOB, *supra*, at 259.

674. See *People v. Hall*, 4 Cal. 399 (1854). For later nineteenth-century white sensibilities on the issue, see *North Pac. Presbyterian Bd. of Missions v. Ah Won*, 18 Or. 339, 15 P. 280 (1890).

breeds without the Law”⁶⁷⁵ the right to testify that could bring them fully “in the law” were not limited to the South. It was, furthermore, not a slave-state but a free-state judiciary that so imaginatively expanded a prohibition against one minority group to encompass another. Judge Murray of California used the “new science” of ethnology to prevent Orientals from testifying;⁶⁷⁶ Judge Moncure of Virginia protested against using the same science to prohibit blacks from making a choice.⁶⁷⁷

To *Objection #4*, I have, not a series of counter-arguments, but an oblique agreement and a generalization. In the judicial shaping of southern criminal law there was one critical attitudinal cleavage and a host of lesser related ones. With few exceptions the judges who came down on one side of that cleavage also were the judges who extended the benefit of the procedural doubts in other matters, who supported Union over secession and nullification, and who gave the benefit of the doubt to the slave seeking freedom. Conversely, and notwithstanding any pretensions to the effect that slavery’s crowning glory was its equitable treatment of slaves on trial, with few exceptions, the judges who settled the manumission issues against the blacks seeking freedom were also the judges who, at the margins in criminal procedures, ruled against the rights of the defendant and who ruled that only statutory law protected the slave. To say that is to state the primary cleavage—which had little to do with reasoning by analogy or reasoning by category, but rather was delineated by judicial responses to the substantive issue whether common law protected the slave in the absence of explicit statutory protection. That was in effect the southern transposition of the issue whether natural law and rights had any force in a slave society, and that in the unique Tennessee transposition became the question whether, given an apparently contravening statutory provision, natural justice and common law were controlling.

To give a few illustrations, thus it was that: (1) The single Georgia dissent on the issue of fair trials of slaves was that of the lone post-Lincoln’s-election Unionist, that of Linton Stephens in *Hill v. State*.⁶⁷⁸ (2) The weakest Florida position on coerced confessions came, not from the dominantly Unionist and northern-born judges of the 1845-1850 period, but from the southern-born judges of the years 1851-1853.⁶⁷⁹ (3) The Georgia judges refused to award a

675. R. Kipling, *Recessional*, stanza 4, line 4, reprinted in RUDYARD KIPLING’S VERSE: 1885-1932, at 380 (1934).

676. *People v. Hall*, 4 Cal. 399, 404-05 (1854).

677. See Moncure’s dissent in *Williamson v. Coalter*, 55 Va. (14 Gratt.) 394 (1858).

678. See note 657 *supra*.

679. It was a minority position taken by Chief Justice Wright, who, in *Simon v. State*,

new trial for murder of an overseer when one of the jurors prior to empanelling had said that he thought the defendant ought to be hanged, whereas the Tennessee judges reversed when nothing more corrupting to the jury's purity had occurred than separation during empanelling and being permitted to go home for a weekend when the trial was in progress.⁶⁸⁰ (4) The North Carolina judge who dissented from the court majority's decision that a slave whose (black) friend was set upon by a white had a right to aid his friend, rather than standing by, was the judge who earlier had laid out the most absolutist doctrines of slavery of any mid-century judge on that bench.⁶⁸¹

So much for the question of the unity and autonomy of the southern law of slavery—a law that I see as much less unified and autonomous, at least in its case law, than as disparate, and as displaying as much continuing dependence on the larger English and western legal and political traditions as it did autonomy. So much for the “what” of the “law of slavery,” or as I would prefer it, of the “laws of slavery”—laws in which two unresolved dichotomies struggled on—the rule of law versus the supremacy of whites over blacks, and the black man as human versus the black man as property. Let us now turn to the issue posed by *Objection #1*. That issue fundamentally amounts to the “why” of that law—to its purposes.

B. The Law's Intent and Functions: Using and Abusing the English Language in Order To Generalize

My purpose in this final section of the Article is to explore exactly what we mean when we ask about the intent of the law of slavery or, as in *Objection #1* above, about the motivations of the judges who administered it. I do so because the language we use in answering our queries sometimes strikes me as unintentionally a bit careless, making assumptions that ought to be thought about and functioning as both prelude and vehicle to generalizations about law, society, and economy in pre-Civil War America that resonate nicely but tell us little about the past. To say that is appropriately to restate a persistent concern of this Article, for the problem of meaning reaches its most acute stage when we try to generalize about slavery law's purposes, functions, and external relationships.

5 Fla. 285 (1853), saw no undue coercion in a confession induced by the suggestion of the city mayor to a slave in jail with a lynch mob outside that they might not hang him if he would confess and turn state's evidence. The court majority rejected both this confession and a confession made the next day to the slave's master.

680. *Compare Jim v. State*, 15 Ga. 535 (1854) *with Wesley v. State*, 30 Tenn. (11 Hum.) 502 (1851).

681. *State v. Caesar*, 31 N.C. (9 Ired.) 391, 421 (1849) (Ruffin, C.J., dissenting).

Let me paraphrase as questions four generalizations that one runs across in the literature on law and slavery. Putting them in the interrogative will help us to focus on problematic aspects of their meaning. With the same purpose in mind, I shall italicize words that I find particularly troublesome and shall discuss.

- A. Did *the law of slavery reflect the ideology of the master class*?
- B. Was it an *instrument* of racial oppression?
- C. Was it ever *intended to be just*?
- D. Were its judges (northern and/or southern) *collaborators* in *perpetuating the most brutal* socioeconomic system of modern times?

I expect that many late-twentieth-century students of the history of race relations in the United States, if they were willing to give quick answers, if they were not on their guard, and if they had not been alerted by seeing particular words italicized, would answer "yes" to the first two questions, "no" to the third, and declare their willingness to agree to the fourth on the condition that "most brutal" be changed to "one of the most brutal." My inclination is to give two sets of answers to the above questions. The first set consists in saying that, in a very vague sense, the short answer to each of the first three questions is: "Yes. The law *did* reflect the master class' ideology, *was* an instrument of oppression, and *was* sometimes—perhaps frequently—intended to be just." To the fourth question my answer would be: "No, because most of the judges did a very poor job of perpetuating the peculiar institution, if that was their aim, and because slavery, though very brutal, was far from the most brutal sociopolitical system of modern times."

My second, and more serious, set of answers begins by objecting to the wording of the questions. They may be characteristic of the historiography of slavery in general and of its legal institutions in particular, reflecting both moral outrage at the American polity's continuing inability to solve its interracial problems and the recent determination of American legal history to break away from its traditional lack of concern for the inequitable distributive consequences of statutory and case law. Yet, moral outrage and distributive concern are no sufficient substitute for analytic precision. For the historian of the law of slavery it may be tempting to imagine that he does his duty to the present by avenging the wrongs of yesteryear in his reconstruction of the past. The first duty as historian, however, remains to understand the past on its own terms.

Understanding the southern legal past requires attempting to

lessen six muddles in the language that we use in speaking of the law of slavery. These are what we mean by speaking of: (1) the "law of slavery;" (2) the law as "reflecting" something else; (3) the law as "an instrument" of something else; (4) the law as "intending" some effect, result or (reflexively) state of being, for example, being just; (5) the law as representing (dominant) public opinion; and (6) the law's administrators as collaborators in a social system that we do not approve of. I have difficulties with the ways in which we frequently speak of all six.

The first muddle I perceive arises when we speak of the "law of slavery." Do we mean that some single entity called the "law of slavery" had a real and discrete existence in a past and real antebellum world? Or do we mean only that we are, for convenience, summing up in a single phrase many different statutes and cases in different jurisdictions and existing at different times, because we would find it terribly cumbersome to convey what we meant if we always had to enumerate exhaustively everything that we were referring to? If that is all we mean, if we stay clearly aware that the existence of the "law of slavery" is real, if anywhere, only in our minds and on the printed paper, and if we think of it only as a convenient mental construct, then my difficulty fades away. Frequently, however, no such restricted meaning is intended. Even if the term is initially used that way, it quickly loses its restrictions, with unfortunate consequences. Moreover, the extraordinary number of elisions or summations the term entails warrants singular caution.⁶⁸² The "law of slavery" contains no less than four major elisions and summations—of statute and case law, of place (jurisdiction), of time, and of subject matter (containing, at least, real and personal property issues, contracts, negligence, and criminal law). That is a sufficient number to make us cautious before attributing to it, as a unit, any characteristics, intentions, causes, or effects.

A second muddle tends to develop when we speak of the law as reflecting something—for example, "economic interests"—or, as in Sentence A above, "the ideology of the master class." Let us examine Sentence A because, despite its brevity and despite the blithe-

682. This term is not like the phrase "the 1820 South Carolina manumission law," which is specific and begins to create difficulties only when we talk about its intent or its effect. Nor is it like the phrase "Pennsylvania tort law in the 1850's," which, though summing both laws and cases, is still reasonably clear with respect to jurisdiction, subject, and time. Nor is it like phrases such as "property law" or "admiralty law" where at least the subject matter or jurisdictions are explicitly or implicitly fairly well defined. It is more like "the law of capitalism" or "the law of Europe" or "the law of nations"—all of which terms most of us would be fairly cautious in flinging about.

spirited fashion in which it purports significantly to link the law's structures with sociopolitical ideals and purposes, it contains for me two difficulties besides the one already alluded to, the elision of laws into Law. One of these difficulties I shall merely allude to, then relegate to the footnotes—not because it is unimportant, not because I imagine that it arises only when we venture into the Marxism that the phrase, “ideology of the master class,” vaguely smacks of, but rather because unraveling that difficultness would lead us far afield, profitably perhaps but at undue length.⁶⁸³ Let me here focus just on the verb “reflect.” Perhaps my problem is just that I am a bit slow, but even if I put aside all the dazzling ways that “reflect” is used by historians other than in connection with the legal history of slavery, I cannot account for the awe that the word seemingly inspires—or what it is supposed to explain, and how. My difficulty is this. I can think of three types of use in connection with the antebellum South that I can understand, wherein what is being linked to what, and how, are all fairly clear. Let me give two instances of each: (1) “Judge Haywood’s almost illegible handwriting reflected the onset of Parkinson’s disease” or, and similarly, “[a]s he urged his men into battle at Chickamauga, Henry Benning’s polished spurs reflected the brilliant southern sun;” (2) “Judge Taylor’s opinion in *Trustees of the Quaker Society of Contentnea v.*

683. Even if I could make the somewhat optimistic assumption that all could agree as to the constituent members of “the master class,” the concept of ideology needs greater specification as to its shape and functions than historians of slavery and of American law frequently give to it. Saying that master class ideology infused the law of slavery is not by itself very helpful. The problem is somewhat analogous to trying to explain southern judicial behavior by characterizing the judicial role as both giving rise to, and providing the opportunity for, reducing “cognitive dissonance” in the psyches of the judges. That is to say, speaking vaguely of a cognitive-dissonance-reducing mechanism as explaining southern judicial decisionmaking is not very helpful unless we are clear that such dissonance exists, about the sources of the dissonance, and about the manner in which the reduction is achieved.

Making the concept of ideology analytically useful requires specifying how one is thinking about it on at least five counts: (1) what one is implicitly or explicitly opposing it to (is there such a thing as nonideological thinking or, do different types of ideological thinking clash with each other?); (2) whether one is thinking of it as deliberately misleading, as inadvertently misleading, or more innocently as merely simplifying (is it accompanied by *mens rea*?); (3) what its principal function is (is it to mislead, to persuade someone else, to further one’s own interests, or to reduce one’s own psychological strain?); (4) from whom and to whom it is primarily directed (is it a matter more of institution-to-person communication, or of person A communicating with person B, or of person A talking to himself?); and (5) how it affects the case law result (does it dictate or control its substance, or does it merely affect the substance and/or the style?).

That is not a small set of needed specifications, and working them out adequately would require a lengthy essay in itself. Consequently, I propose here only to note the analytic problem. See also Clifford Geertz, *Ideology as a Cultural System* in IDEOLOGY AND ITS DISCONTENTS 47 (D. Apter ed. 1964).

*Dickenson*⁶⁸⁴ reflected primarily concern for legislative intent and secondarily anxiety about slave uprisings," or, and similarly, "Judge Nash's opinion in *Mayo v. Whitson*⁶⁸⁵ reflected his annoyance with the 'birds of prey;' " and (3) "The contrasting manumission decisionmaking of the Georgia and the Tennessee courts reflected the different attitudes of those courts toward the values of 'humanity' and 'preservation of slavery,'" or, and not quite similarly, "Joseph Lumpkin's becoming Georgia's Chief Justice reflected his will to dominate the Georgia court." I have put these three pairs in order of increasing abstraction. While I find it easier to comprehend and—hypothetically at least—to determine the truth or falsehood of the first pair than of the second, and of the second than of the third, they all appear to me more or less manageable as propositions about the past. That is to say, I can set out to determine whether I am right or wrong as to my explanation for Haywood's handwriting (which *was* atrocious), and to verify whether Benning had spurs and whether Chickamauga was fought on a sunny day—all quite easily. Whether or not I succeed, there is not much doubt as to what constitutes appropriate evidence. I can also think fairly easily about the probabilities of the assertions about Judges Taylor and Nash. Even if my conclusions are wrong, they are susceptible to discussion with other legal historians. I can attach some meaning to the propositions contained in the third pair, though of course they are more difficult than those contained in the second pair. All three pairs seem to me somehow different, as propositions, from Sentence A. Why? Because, and despite the circumstance that all except the first pair are metaphors rather than plain, common, garden-variety statements, nonetheless each fulfills at least one of the following conditions: (1) The meaning of "reflects" is clear, its functions are literally plain (what spurs do when they reflect does not puzzle us). (2) The meaning of "reflect" is, though metaphorical, still fairly clear (we can read the words of Taylor's or Nash's decisions and determine whether they seem to manifest the quality, tone, or content that the predicate assumes the subject would have if the statements are true). (3) The subjects and objects are discrete, clearly bounded, if no longer extant, "singular" entities (despite the circumstance that we have before us only their "historical tracks," there is not much difficulty determining at what point Taylor stopped and "non-Taylor" began, or which was a Lumpkin opinion and which was not). (4) Though not singular enti-

684. 12 N.C. (1 Dev.) 189 (1827).

685. 47 N.C. (2 Jones) 231, 239 (1855).

ties, they are still relatively well-bounded entities (it is not too taxing to determine which persons sat on the Tennessee court, and which did not, or which were, and which were not, manumission decisions). (5) Though abstract and collective terms, they are still marginally well-bounded sets of phenomena (for example, phenomena that together we recognize as going to preserve slavery, or as indicating a will to dominate).

The difficulty with Sentence A is that it fulfills none of these conditions: what "reflected" means is not clear, nor are the boundaries of "the law of slavery" and of "ideology." Yet, and this is what always astounds me when I find sentences of a similar sort in the literature on slavery or on its legal history, not infrequently the authors of such sentences appear to believe that the "truth value" of such sentences is, if not identical to those of my first pair, at any rate not much more uncertain than those of my second and third pairs. By contrast, what I think I am reading or hearing is not that a well-bounded (X) of whose beginning and end I am fairly clear, was in some well-bounded fashion linked dependently (for that is what "reflect" abstracts into) to some well-bounded (Y). What I think I am reading or hearing is that some (X), about whose beginnings and ends the statement's maker is much less clear than he thinks he is, is being placed in some very vague dependent relationship with (Y), whose beginning and ends are equally unclear. Now I do not mean to suggest that it is quite out of the question that such (X)'s and (Y)'s and their predicate relationships could not ever be reasonably well bounded. I suggest only that in practice they do not seem to be. Consequently, I am left in a verbal muddle.

Speaking about the law as "an instrument" of something else appears to be an almost equally popular habit when it comes to "understanding the greater significance of legal decisions," when it comes to forging links from law to society, economy, and polity. There appear to me to be two current habitual ways of speaking about the law as an instrument. One is very similar to "reflects" with respect to the muddles that I perceive in its usage. Does Sentence B mean, for example, that the law was "an instrument" of racial oppression (begging, for the purpose of this discussion, the meaning of "racial oppression") in the same way that any of the following were "instruments?": (1) in the way that the piano of the antebellum Louisiana composer, Louis Moreau Gottschalk, was "the instrument" on which he composed his Opus 67, *Grand Tarantelle for Piano and Orchestra*,⁶⁸⁶ (2) in the way that the New Orleans

686. Louis Moreau Gottschalk, born in New Orleans in 1829 and died (while on tour)

slaves of the first modern chess master, Paul Morphy, were "the instruments" by which he developed his skill at the Ruy Lopez opening;⁶⁸⁷ or (3) in the way that the whip of a recently much written about Louisiana slaveowner, Bennet H. Barrow, and his slaves were the "instruments" of his having on September 4, 1837, "a general Whipping frolick [*sic*]?"⁶⁸⁸ Often it seems to me that such is what the historian assumes when he speaks of the law as an instrument of racial oppression. But for almost exactly the same reasons that I have spelled out concerning Sentence A, Sentence B leaves me in a muddle.

The other recently popular way of speaking about nineteenth-century American law and "instruments" (that described by the contrast between legal formalism and legal instrumentalism) deserves more attention for two reasons. One is the circumstance that so speaking has produced some interesting ways of organizing the data of those laws. The other reason springs from the intimate relationship between such organization of the data and the concept of development (about which as I have earlier indicated I am, perhaps inordinately, suspicious). Unfortunately, deservingness cannot here be justly rewarded without, again, unduly prolonging this Article. Hence I shall have to limit myself to two types of comments about this contrast between two nineteenth-century jurisprudential styles, one formalist and the other instrumentalist.

First, while I am undeniably fascinated by the research fruits of this dichotomy, I am not altogether convinced that the dichotomy is logically sound. What it seems to say, initially, is this: there were two types of nineteenth-century judges (or, if you prefer, it does not much matter for the purposes of this discussion, there were two poles of nineteenth-century judicial behavior between which nineteenth-century judges situated themselves). One type predominant before and after the period of "grand style jurisprudence" (roughly 1810-1865), was essentially formalist—believing, or at least writing decisions as if believing, that the law's truths were absolute,

in Brazil in 1869, was, it will be recalled, the South's and the United States' first serious composer.

687. For Morphy's skill, see I. KÖNIG, *CHESS FROM MORPHY TO BOTWINNIK* (1950). For Morphy's "slave chessboard," go to the Andrew Jackson Restaurant in New Orleans. The restaurant is located in Morphy's New Orleans home. Morphy, who "flourished" in the mid-nineteenth century is generally regarded as the first modern chessmaster—a point that seems to have been neglected by southern culture "apologists." As far as I know, unlike the Red Chinese protagonist in Kurt Vonnegut's, *All the King's Horses*, in K. VONNEGUT, *WELCOME TO THE MONKEY HOUSE* 84 (1970), Morphy did not execute captured "slave-men."

688. Barrow's diary entry of September 4, 1837, is reproduced at H. GUTMAN, *supra* note 174, at 22. Barrow's diary has been a major item of evidence in the recent debate over the humaneness, or inhumaneness, of penal practices in southern slavery.

whether contained in natural law, common law, statutory law, or constitution, and that the judicial task lay in discovering such truths and applying them to specific cases. Such was formalist jurisprudence, and the formalist judicial role. The other type, predominant during most of the Marshall and Taney judicial eras, assumed rather that judges should, at least on occasion, use their decision-making powers to further certain economic ends—especially industrialization and economic “development.” Such was instrumentalist jurisprudence, and the instrumentalist judicial role. My problem with this dichotomy pertains to the way in which it defines formalism and instrumentalism. Formalism is said to be “mere discovery” of pre-obtaining truth by the judge. Instrumentalism is said to be jurisprudence with purpose aforethought. I am not sure that such a dichotomy amounts to a really parallel or exhaustive definition, or that it altogether escapes the faults of those apocryphal medical Chinese dictionaries with entries such as:

Earth: 1, a flat surface; 2, fading into the distance; 3, what aristocrats do not get under their fingernails; 4, having nothing to do with the word “cousin;” 5, not polysyllabic.

How so? Let us try some equivalent definitions that, as fairly as possible, contain the main features of what exponents of the formalist-instrumentalist dichotomy seem to be attributing to the two types of jurisprudence:

Formalist jurisprudence: 1, current before 1800 and in the late nineteenth century; 2, believing that the judge discovers pre-existing legal truths; 3, having no meta-legal, political, social, or economic purposes; 4, relying heavily on natural law in cases of statutory doubt; 5, not a grand style of jurisprudence.

And, similarly:

Instrumentalist jurisprudence: 1, current when formalist jurisprudence is not current; 2, not believing that judges discover pre-existing truths; 3, relying not on natural law; 4, aiming to further economic development; 5, resulting in transferring the costs of industrialization from the entrepreneur to the public, especially the employee; 6, a stylistically grand, but perhaps ethically defective, jurisprudence.

There are several nonparallelisms here that it might well be useful to explore, but I shall only focus on one. It is contained in the contrast between formalist jurisprudence definition #3 and instrumentalist jurisprudence definition #4. Why is it, in other words, assumed that if the instrumental aim is not economic development, or somehow closely related to it, that there is no instrumentalist aim? So thinking of instrumentalism seems to me to lock up “instrumentalist law,” without good reason, within the confines of a particular (economic) purpose. I am not sure why that is done. A

more closely parallel understanding would stipulate differently in two ways. First, it would strip the concept of instrumentalism of any particular purposive referents, such as economic development, and of any particular decisionmaking styles, such as grand or not very grand, and of any particular dispositions about the appropriate reference points, about the types of law to which instrumentalist or noninstrumentalist judges might advert. Second, it would "allow" the category of instrumentalist jurisprudence to any type of decisionmaking in which merely "declaring law" did not seem the judge's only motivation. Hence, a parallel definition of instrumentalism would allow at least the following as "instrumentalist:" (1) the recently customary definition, based on economic purpose; (2) any other form of decisionmaking in which the judge appeared to have some ulterior and general motive (that is, not merely a motive of personal gain—fame, for example, or being bribed)—be it bolstering the divine right of his monarch, perpetuating slavery, or ushering in the day of the glorious people's socialist republic. All that looks to me at least as instrumentalist as furthering American economic development, and I am not clear why anyone should think the contrary. Formalism, by contrast, seems to me to have a different "natural verbal opposite," one that appears to have been lost in the verbal shuffle of recent American legal history. The obvious opposite is legal informality—which might run the gamut from lynch law to laziness about citations. More seriously, the "natural and serious verbal dichotomy" would seem to me to be largely embraced in the contrast of styles, between, for example, a Marshall and a Taney, and more importantly, in their attitudes to a constitution. I would, in other words, be much happier if we could redefine formalism back to its natural contrast as, in this example, between those who think that a constitution means what social, political, and economic circumstances "need" it to mean (that is informality) and those who think that, no matter how inconveniently, it means what it says (formalism). So redefined, albeit redefined back to the normal meaning of language, it would be quite possible for a judge to be instrumental and formalist, or noninstrumental and nonformalist, as well as the two opposite permutations of these pairs of designations recently prominently in use.

Because I do not expect to restore the normal use of language to legal history merely by making an essentially deductive appeal to the virtues of plain meaning, let me give an empirical reason or two on behalf of the same aim. Consider, thus, Joseph Lumpkin's and John Louis Taylor's jurisprudence. If anyone's jurisprudence was instrumentalist, it was surely Lumpkin's: he used the law as an

instrument to his aim, defending the peculiar institution. Moreover, he used—in the short run quite well—natural law and Christianity (two noninstrumentalist reference-sources, if I understand correctly recent literature based on northern legal evolution) in order to further his instrumentalist aims. Conversely, though not quite oppositely, Taylor was, in my judgment, eminently instrumentalist when he sought to pull slavery under the common law. Taylor, like Lumpkin, used both natural law and Christianity to accomplish his aim—but he had a very different understanding of the jurisprudential relevance of both law and religion, as well as a very different aim.

To say this is to indicate my second empirical objection to the current instrumentalist-formalist dichotomy. In fact, the types of law to which appeal was or was not made by southern judges did not dovetail neatly with whether they were instrumentalists or not. Instrumentalism, rather than going hand-in-hand with particular points of appeal, pulls upon whatever plausibly lies to hand.

I turn now to my fourth semantic problem, to that exemplified in Sentence C, to the question whether the law of slavery was ever intended to be just. The sentence contains, relative to Sentences A and B, two new difficulties: (1) the meaning of the “law’s intention;” and (2) the meaning of “being just.” I am here going to finesse the meaning of “being just” in the same fashion that I did in discussing the semantic problems of prior sentences (where I put aside the meanings of “master class,” “ideology,” and “racial oppression”), and instead concentrate on the question of what is meant when it is asserted that “the law intends” something, or when it is asked whether “it was intended” that the law be just, or anything else. The latter passive construction strikes me as either a hopeless vacuity (since there is no feasible way of pinning down who, or what, intended the law to do anything at all) or a convoluted way of attributing intention to the law without quite saying so. I shall focus on the latter, reading Sentence C as if it said, “Did the law intend to be just?,” for that is what frequently seems to be meant. So reading, my muddles compound. Not only am I confronted with the excessive summation of the first difficulty (how the laws came to be the Law) and the vagueness attendant upon the takeover by metaphor constituting the second muddle. In addition, we are now confronted with the problem of attributing volition and purpose to an inanimate entity. Now obviously there is a sense in which it is useful to speak of a law as intending something. Thus, suppose a law that states, “no slaves shall be manumitted by will,” or another that declares, “it shall henceforth be unlawful for slaves to carry fire-

arms." I have no great difficulty understanding what is meant when the statement is made that Statute A intends to forbid post-mortem manumission and that Statute B intends to prevent slaves from packing guns. I can even stay with the concept of intention when it is said that Statute A "intends" to effectuate an anti-freedom policy or that Statute B "intends" to diminish the likelihood of a successful slave uprising, though we should note that, as we have seen,⁶⁸⁹ some judges might not similarly read at least Statute A. But there is an imminent difficulty. It comes when we attribute any intention to such an inanimate entity beyond what it literally says—its stated intention. What we are really saying when we speak of the intent of Statute A is that at a certain time at least a majority of two legislative houses and (absent an unsuccessful veto) the governor of a particular state had intentions that produced a statute making certain declarations about permissible human conduct, and that after enactment no majority of legislators felt strongly enough to vote to repeal the statute.

I have here belabored the obvious because of what tends to happen next in our analysis if we are not careful. It consists in taking a number of such statutes and any cases that may have arisen under them and "summing" them so as to emerge with a personified Law, a collective noun that begins to display astonishingly human-like characteristics—growing, developing, and even "intending" to effectuate this and that. All sorts of difficulties can emerge from so personifying the Law. I shall comment on just one type of personification here, which I choose because this personification is so tempting when we try to determine the larger significance of our area of legal history for the study of slavery. We try to use the entity we have come to call and personify as the "law of slavery" to delineate the antebellum climate of opinion, or at least to aid in that task. We look at all the bits and pieces of statute and decision out of which we "compose" the law of slavery as a whole, and then seek to translate the findings back to the attitudinal domain. If we do that, however, something very curious and unfortunate is bound to happen unless the divisions of opinion that make up the statutes and case law were extremely close or extremely varied over time and jurisdiction. As we go through a process of increasing abstraction in order to get to something called the "law of slavery," we have been dropping out the evidence of the attitudes of all dissenting minorities. Thus we fit into the law of slavery the 1835 North Carolina constitutional convention's withdrawal of voting rights from free

689. See text accompanying notes 224-25 *supra* (O'Neall's reading of the South Carolina manumission statute).

blacks as a single racially oppressive act when what in fact was there by way of relevant opinion was a 52% to 48% split. Thus we fit into the law of slavery the 1857 Georgia decision against allowing the freedom of slaves bequeathed to the American Colonization Society⁶⁹⁰ and the 1858 Virginia decisions against permitting slaves to elect.⁶⁹¹ We put them into the imposing edifice, the "law of slavery," as if they are similarly repressive case law decisions. And so they are, as legal rules. But, when we take them out to use them as evidence about public opinion, we forget that, as opinion, they are not at all the same. One was a unanimous registry of "anti-freedom" views. The other, as we recall, was a three-to-two decision in the Virginia court against election, a 60% to 40% split—or, if you indulged me in my contrafactual hypothesis that let me include the five special court judges who had just taken a position similar to that of the two dissenting supreme court justices—a 70% to 30% opinion split, in favor of election. In other words, using the law of slavery as any index of the climate of opinion, even if we are only talking about opinion among an elite, is a tricky business indeed, unless we have been frightfully careful all along not to wipe out the minor cross-currents of intent and motivation that went to make up statute or case outcome. When we are not thus careful we readily say things such as, "the law mirrored the ideology of the master class," or "the law embodied the exploitative aims of the master class," and believe that we have fully caught the judicial or legislative conscience of the matter. The results of using such summations, however, can be very odd and very partial estimates of both public and elite opinion in the antebellum South, not to mention judicial aims and intentions with respect to justice and the rule of law.

The results most relevant to the concerns of this Article are of course the effects upon how we judge the judges—for almost always we are sufficiently Whiggish to attempt such a judgment, either explicitly or implicitly. At times the consequence of so summing can be to imagine that one catches the judicial conscience by asking questions phrased as Sentence D's query, whether the judges "collaborated" in a system of racial oppression. When we put the question this way, two unfortunate things happen. First, we create a verbal and historical muddle, for if anything ought to be clear by now it is that "collaborating" is a word whose adverse effects upon dispassionate understanding of the past on its own terms are enormous. Where we should, as historians, be going back and asking whether the judges thought they were doing justice or not, and if so,

690. *American Colonization Soc'y v. Gartrell*, 23 Ga. 448 (1857).

691. See notes 634-42 *supra* and accompanying text.

why, and if not, why not, instead we are imposing a retrospective Whiggish verdict of guilty as presumed—a verdict whose Whiggery is not less for its being done up in radical verbiage. As I have remarked earlier, when we engage in this sort of practice (or equally, and to expand the point now, when we assume that those who, analyzing the judicial past, do not fling around such verbal epithets are engaged in mere apologetics on behalf of an unjust past), when we project our contemporary moral righteousness back upon a complex past incapable of response, then we forget our prime duty of understanding the past on its own terms.

Second, and to conclude this Article, we are setting up a moral double-standard whereby we hold the past, for which we have no culpability, to a stiffer standard than we hold the present in which we live, and for which in varying measure we have some culpability. Thus, when we make these sorts of muddling sentences about judges' complicity in slavery and assume that they pose sensible questions, we use an analytic terminology that we would rarely think to apply seriously to more recent judges or to ourselves. Consider for a moment the following propositions, propositions whose wordings are parallel in their moral loadings to Sentences C or D:

1. "Justice Hugo Black never intended to be just."
2. "Did Thurgood Marshall compromise himself morally by failing to resign from the United States Supreme Court when Nixon appointed Chief Justice Warren Earl Burger?"
3. "Do law school professors who accept grants of tenure and high salaries as well as generous xeroxing privileges act as instruments of Wall Street for oppressing the underprivileged of academe and of the Third World?"
4. "Are the editors of this *Law Review* committing acts of injustice: (a) in contributing to the impending natural resources crisis by publishing so lengthy a tome as this particular *Vanderbilt Law Review* issue and thus using up paper at an inordinate rate; (b) by working hard to insure that all the footnotes in this issue are correct, and thereby enhancing their chances for good post-graduation jobs in a declining young lawyer's economy, rather than manning the battlements on behalf of prisoners currently being tortured in Argentina; or (c) by telling the author of this Article that he may not violate the canons of proper law review style and content by introducing issues of this sort?"

We would all, I imagine, be quite hasty to say that these sentences, despite any partial truths they might contain, are on balance a bit preposterous.

But why is it that they strike us as preposterous? Because they violate our sensibilities as to what is proper in connection with this Article? Or because they raise some issues that we would really prefer not be raised? I am sure that the latter is predominantly the case. That is to point to the limitations of our own existential conditions that cause us not to be saints or to take vows of poverty or even to seriously challenge the fundamental power relationships and evils of our own era. Yet, is it not a little odd that we should be so ready to castigate the past, that we should be, on the one hand, so certain that it is quite sensible and proper to judge the past, but on the other hand, so unwilling to believe that our own actions should receive equivalent moral attention?

Our Whiggery consists thus in our certainty that it is fine to hand down moral judgments about an antebellum nineteenth-century southern low from a late-twentieth-century American high. But that suggests the ethical rub. When we pass adverse judgments upon nineteenth-century Americans who actively or passively accepted slavery, we are able to do so in large measure because by the mid-nineteenth-century the great preponderance of opinion in the Atlantic community of nations condemned the institution and because, sharing those sentiments, we join in condemning places and persons that lagged in their moral awakenment. Are we equally prepared to join the great preponderance of late-twentieth-century opinion in the Third World that our current national way of life, consuming thirty to forty percent of the world's resources, constitutes iniquitous collaboration in a brutal exploitation of a small and finite planet, in taking for ourselves far too much of what should be shared among all nations and all humans fairly? The plain fact, I submit, is that most of us do not have trouble sleeping at night because two billion human beings live out lives of desperate poverty, or because American national power is so supine with respect to a world-wide human condition that in some ways is at least as iniquitous as was the peculiar institution. Our moral indifference is, I suggest, not very different from the moral attitudes of most pre-Civil War white southerners. Quite possibly, a century from now historians will write of us as "collaborators" in an international system shot through with wrong and brutality. Are we prepared to concede in advance that such Whiggish historiography of the twenty-first century will thereby have understood our present, and that century's past—and will thereby have understood us?