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Thomas R.R. Cobb and the Law of Negro Slavery

Paul Finkelman*

From the Revolution until the Civil War Southern intellectuals, professionals, and politicians developed and articulated elaborate defenses of slavery. The most significant proslavery legal scholar was Thomas R.R. Cobb, a Georgia attorney, law professor and one-time reporter for the Georgia Supreme Court. His treatise, *An Inquiry into the Law of Negro Slavery in the United States of America*,¹ profoundly illustrates the way antebellum Southern lawyers and judges used their learning and talents to support slavery.

Proslavery advocates, such as Cobb, emphatically insisted on the justice and morality—the essential rightness—of slavery. Cobb believed that racially based slavery was a prerequisite for a truly “republican equality”² because only in such a system were all whites equal in status, regardless of their wealth, property, or station in life. Thus, according to Cobb, racially based slavery allowed all white citizens of the nation to “imbibe freedom with their mother’s milk.”³ Under Cobb’s view of the world, slavery was not an evil, but a positive good that preserved American liberty, and without slavery, freedom in America would be threatened.

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1. Thomas R.R. Cobb, *An Inquiry into the Law of Negro Slavery in the United States of America. To Which is Prefixed, An Historical Sketch of Slavery* (Paul Finkelman ed., Univ. of Georgia Press 1999) (1858) [hereinafter Cobb, *Inquiry*].

2. *Id.* at ccxiii.

3. *Id.*

But, Cobb also knew that the North, and indeed most of the rest of the Western world, believed slavery was fundamentally wrong and immoral. Thus, one of Cobb's goals in his *Inquiry* was to convince lawyers outside the South that slavery was consistent with American law, good public policy, Christian morality, and the natural order of things.⁴ Cobb did not merely collaborate with a system of evil, he worked hard to recast the very notion of evil to remove slavery from within its definition.

I. THE PECULIARITY OF AMERICAN SLAVERY

To understand Cobb and other proslavery legal theorists, lawyers and judges, it is important to first consider the peculiar nature of American slavery. In the years preceding the Civil War, Americans, North and South, called slavery a "peculiar institution."⁵ Slavery of course had been found in most other cultures and civilizations.⁶ Thus, the sociologist Orlando Patterson argues that "[t]here is nothing notably peculiar about the institution of slavery. It has existed from before the dawn of human history right down to the twentieth century, in the most primitive of human societies and in the most civilized."⁷ With only slight exaggeration, Patterson noted that slavery has been in every "region on earth" and claimed that "[p]robably there is no group of people whose ancestors were not at one time slaves or slaveholders."⁸

Despite slavery's presence in most cultures and most eras, slavery in the Americas was fundamentally *different*; and slavery in the United States was even more unique and *peculiar*. There

4. There were, of course, numerous Southern clergymen who argued that the Bible supported slavery and that in turn, masters were obligated to take care of the bodies and the souls of their slaves. See, e.g., Rev. H.N. McTyeire, et al., *Duties of Masters to Servants: Three Premium Essays* (1851). This volume was published in Charleston, South Carolina by the Southern Baptist Publication Society.

5. Kenneth M. Stampp, *The Peculiar Institution: Slavery in the Ante-Bellum South* 3 (1968). Southerners often referred to slavery as "a 'peculiar institution.'" *Id.*

6. For global coverage of slavery in all times and all cultures, see 1 *Macmillan Encyclopedia of World Slavery* (Paul Finkelman & Joseph C. Miller eds., 1998); 2 *Macmillan Encyclopedia of World Slavery* (Paul Finkelman & Joseph C. Miller eds., 1998).

7. Orlando Patterson, *Slavery and Social Death: A Comparative Study* vii (1982).

8. *Id.* The only exception to this seems to be among the Eskimo and Inuit peoples of the far North and among the aboriginal people of Australia. See Finkelman & Miller, *supra* note 6.

were two reasons for this: the racial nature of slavery in the Americas and the presence of human bondage in a society predicated on political democracy, republican government and fundamental equality.

A. *The Racial Basis of Slavery in the Americas*

The most distinctive aspect of American slavery was its racial basis. This was unique to the New World. Certainly, most cultures enslaved rival ethnic and racial groups—foreigners and barbarians as they often called them—but this enslavement was not necessarily because of the ethnicity, color, or religion of the enslaved. Rather, they were enslaved because they were rivals or enemies. Thus, in ancient Rome there were slaves from all cultures known to the Roman world. Most slaves in Rome were defeated enemies and barbarians from the fringes of the Empire. However, many of these enslaved “barbarians” were racially no different from their masters. Sometimes the foreigners were culturally similar as well. In addition, throughout the ancient world residents and citizens of all countries were enslaved for crimes, for debt or because of unfortunate twists and turns in their lives. As the great classical scholar Moses I. Finley observed, “There were Greek slaves in Greece, Italian slaves in Rome.”⁹ In fact, everywhere in the ancient world people of any color or race could conceivably be slaves or masters or both.¹⁰ The same was true in other times and places. In China, Africa, the Indian subcontinent, pre-Columbian Mexico, South America, Hawaii, and the Pacific Northwest people regularly enslaved their neighbors. Europeans enslaved each other from antiquity to the modern period.¹¹ The word “slave” itself is derived from the Slavic peoples, who were commonly en-

9. M.I. Finley, *Ancient Slavery and Modern Ideology* 118 (1980).

10. As historian Carl Deglar notes “[t]here was a time in antiquity when anyone, regardless of nation, religion, or race, might be a slave.” Carl N. Deglar, *The Irony of American Negro Slavery, in Perspectives and Irony in American Negro Slavery* 3, 19 (Harry P. Owens ed., 1976).

11. In the 1940s, Germans enslaved their fellow countrymen (as well as Russians, Poles, and other Europeans). Those sent to German industries as slaves or sent to German slave labor camps (as opposed to death camps like Auschwitz) were often physically indistinguishable from those who commanded their labor. However, under German theories of race, those enslaved were designated as members of different races or as politically corrupted.

slaved by other Europeans in the early Middle Ages.¹² Indeed, nowhere in the pre-Columbian world was color or race a mark of slavery nor was enslavement tied to race.

But, in the Americas slavery was *always* tied to race. In the Spanish colonies the first slaves were Indians, but after 1517 Spain began to shift to African labor. A few native people were also captured and sold as slaves in the British mainland colonies, but by the end of the seventeenth century slaves in British America were almost exclusively of African ancestry. As early as 1806, Virginia's highest court had asserted that blackness created a presumption of slavery.¹³ By the antebellum period every slave state but Delaware¹⁴ accepted the legal concept that "the black color of the race raises the presumption of slavery."¹⁵

This Africanization of slavery led the English colonists to associate slavery with race. This in turn led to concepts of racism in what became the United States.¹⁶ For antebellum Southerners, like Cobb, the connection between slavery and race seemed obvious and natural. Part of Cobb's mission as a legal scholar was to explain that connection to non-Southerners and to use the connection to justify slavery to Northerners, especially Northern lawyers. For Cobb and other proslavery theorists the central aspect of slavery was race, which justified Southern legal practices that dramatically departed from Anglo-American legal traditions.

12. Webster's Third International Dictionary of the English Language 2139 (3d ed. 1986).

13. *Hudgins v. Wrights*, 1 Hen. & M. (Va.) 134 (1806).

14. *State v. Dillahunt*, 3 Del. (3 Harr.) 551 (1840). See generally Thomas D. Morris, *Southern Slavery and the Law, 1619-1860*, at 21-22 (1996) (noting that Delaware no longer recognized that blackness was a presumption of slavery).

15. Cobb, *Inquiry*, *supra* note 1, § 69, at 67 (footnote omitted).

16. The debate over the origins of slavery and racism is the most important "chicken or egg" issue in American history. See generally Winthrop D. Jordan, *White Over Black: American Attitudes Toward the Negro, 1550-1812*, at 44-98 (1968) (arguing that racism preceded slavery and that English settlers of the New World were predisposed to believe Africans were inferior to whites). I believe that this argument is deeply flawed, and that the early legal records of Virginia and elsewhere suggest that in fact the English in North America were far more egalitarian than later Americans. See Paul Finkelman, *The Law of Freedom and Bondage: A Casebook* 1-25 (1986). The most important work along these lines is Edmund S. Morgan, *American Slavery American Freedom: The Ordeal of Colonial Virginia* (1975).

B. *Slavery in a Nation Dedicated to the Proposition that All Men are Created Equal*

While its racial basis made New World slavery different, notions of egalitarian democracy made slavery in the United States truly peculiar. Before the American Revolution there was no deep contradiction between American slavery and Anglo-American culture. Although the practice of slavery ran counter to the laws and customs of England, there were few strong ideological arguments that threatened slavery in the colonies. Except for a few religious arguments against slavery,¹⁷ there was no real theoretical attack on slavery until the eve of the American Revolution.¹⁸ The British world, after all, was built on concepts of hierarchy and status. Thus, there was no need to create an ideological defense of slavery because "slave" was just one more status in this hierarchical regime of the British Empire.

True, the English common law presumed freedom and certain legal protections, which bondage denied to slaves. In 1772, Britain's highest court, in *Somerset v. Stewart*,¹⁹ ruled that slavery violated the fundamental right of liberty guaranteed by English law and traditions. Speaking for the Court of King's Bench, Chief Justice Lord Mansfield held that "the state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political," but could only be created by "positive law."²⁰ Under Lord Mansfield's ruling, a slave brought into England could claim liberty.

Although the reasoning of *Somerset* might logically apply to the American colonies,²¹ the decision itself was narrowly directed

17. In 1688, a Quaker meeting in Pennsylvania issued the first religious attack on slavery in the modern era. See *Germantown Protest Against Slavery, 1688*, reprinted in Kermit L. Hall et al., *American Legal History: Cases and Materials* 35, 35-36 (1991). Similarly, in 1700 the Puritan lawyer published a religiously based attack on slavery. See Samuel Sewall, *The Selling of Joseph* (Sidney Kaplan ed., Gehenna Press 1969) (1700).

18. See David Brion Davis, *The Problem of Slavery in the Age of Revolution, 1770-1823*, at 48 (1975).

19. 98 Eng. Rep. 499, Lofft 1, 20 How. St. Tr. 1 (K.B. 1772).

20. *Id.* at 510.

21. During and after the Revolution some northern states accepted the logic of *Somerset*, but, did so initially by adopting legislation to suspend its force. Thus, in 1780 Pennsylvania allowed visiting masters to keep their slaves in the state for six months before they could become free and in 1817 New York passed a similar law

at the metropolis²² and not intended to remake social and economic relations in the colonies. *Somerset* would have no effect on the African slave trade or the commerce in slaves in the New World colonies. In his opinion, Lord Mansfield specifically noted that “[c]ontract for [the] sale of a slave” in another jurisdiction “is good here; the sale is a matter to which the law properly and readily attaches, and will maintain the price according to the agreement.”²³ Mansfield clearly understood that the British Empire was capable of banning slavery at home, while allowing it, and even encouraging it, in the colonies. During the colonial period, both the Crown and Parliament were content to let the planter leadership of the American colonies create a new legal regime that allowed slavery to develop, despite the fact that its very essence was contrary to English common law.²⁴ Once the colonists had created their own form of slavery, and especially after the formation of the Royal Africa Company in 1672, the British government actually encouraged the development of the institution. Indeed, the elite of England, including members of the Royal family, invested in the African slave trade and in the slave-based plantations, especially those in the Caribbean.

However, the Revolution changed the ideological playing field. The new nation’s self-proclaimed political credo made American slavery especially problematic. The ideological peculiarity of American slavery emerged out of the conflict between human bondage and the philosophical basis of the United States as a nation-state: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”²⁵ On its face Jefferson’s fine phrasing seems to be the essence of anti-slavery rhetoric. If Americans took this rhetoric seriously, and applied it to slavery, the Declaration would pose a potential threat to the institution.

with a nine month grace period. See Paul Finkelman, *An Imperfect Union: Slavery, Federalism, and Comity* 46-47 (1981).

22. See William M. Wiecek, *Somerset: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World*, 42 U. Chi. L. Rev. 86 (1974).

23. *Supra* note 19, at 509.

24. See Jonathan A. Bush, *The British Constitution and the Creation of American Slavery*, in *Slavery and the Law* 379 (Paul Finkelman ed., 1997).

25. The Declaration of Independence (U.S. 1776).

Since slavery existed in all the colonies, the Revolution did not initially appear to threaten slavery. But, by the end of the Revolution the threat to slavery was palpable. It came from the ideology of the new regime, the growing religious opposition to slavery, especially from Quakers and Methodists, and the dislocations of the war itself.

The preamble to Pennsylvania's Gradual Emancipation statute of 1780 demonstrates the effect of the Revolutionary ideology on slavery.²⁶

When we contemplate our abhorrence of that condition, to which the arms and tyranny of Great-Britain were exerted to reduce us, when we look back on the variety of dangers to which we have been exposed, and how miraculously our wants in many instances have been supplied, and our deliverance wrought, when even hope and human fortitude have become unequal to the conflict, we are unavoidably led to a serious and grateful sense of the manifold blessings, which we have undeservedly received from the hand of that Being, from whom every good and perfect gift cometh. Impressed with these ideas, we conceive that it is our duty, and we rejoice that it is in our power, to extend a portion of that freedom to others, which hath been extended to us, and release from that state of thralldom, to which we ourselves were tyrannically doomed, and from which we have now every prospect of being delivered.²⁷

The Pennsylvania legislators noted that it was their duty to end bondage, because the institution deprived "Negro and Mulatto slaves . . . of the common blessings that they were by nature entitled to" and also led to the "unnatural separation and sale of husband and wife from each other and from their children, an injury, the greatness of which can only be conceived by supposing that we were in the same unhappy case."²⁸ With less flowery language, Massachusetts incorporated the theory of the Declaration into its 1780 Constitution, which declared, "All men are born free and

26. *An Act for the Gradual Abolition of Slavery: Act of March 1, 1780*, reprinted in Finkelman, *supra* note 16, at 42-45.

27. *Id.* at 42.

28. *Id.* § 2, at 43.

equal."²⁹ The Massachusetts courts quickly interpreted this clause to end slavery in the state.³⁰

Thus, Massachusetts and Pennsylvania led the way towards abolition in the North. By 1804, Massachusetts, New Hampshire and the new states of Vermont and Ohio had abolished slavery outright, while Pennsylvania and the rest of the North had passed gradual emancipation statutes which placed the institution on the road to extinction.³¹ From the adoption of the Pennsylvania Gradual Emancipation statute, until the eve of the Civil War, opponents of slavery would turn to the *Declaration of Independence* to support their cause. For these visionaries, at least, American slavery was peculiar because freedom and equality were the true basis of the nation.

C. *The Southern Solution to the Revolutionary Ideology*

In the end, the *Declaration of Independence* and the Revolution created a powerful challenge to slavery. In the North, the events and ideology of the era helped bring about an end to slavery and a heightened sense of the fundamental evil of human bondage. Thus, the task for Southerners was to protect slavery and accommodate it within this new ideology of liberty and equality.

During the Revolution, Southerners responded to this threat with a variety of defenses of slavery, usually based on necessity, economics and history. As early as 1775, Thomas Lynch of South Carolina told the delegates to the Continental Congress, "[T]he confederation was finished" if there was to be a debate over "whether or not slaves were property."³² A decade later, South Carolina's Charles Pinkney told the Constitutional Convention, "[I]f slavery be wrong, it is justified by the example of all the world. He cited the case of Greece Rome & other antient [sic] States; the sanction given by France, England, Holland & other modern

29. Mass. Const. of 1780, Declaration of Rights, art. I.

30. See John D. Cushing, *The Cushing Court and the Abolition of Slavery in Massachusetts: More Notes on the "Quock Walker Case,"* 5 Am. J. Legal. Hist. 118, 133 (1961).

31. These laws were adopted in Pennsylvania (1780), Connecticut (1784), Rhode Island (1784), New York (1799) and New Jersey (1804). The history of this is discussed in Arthur Zilversmit, *The First Emancipation: The Abolition of Slavery in the North* (1967).

32. Donald Robinson, *Slavery in the Structure of American Politics, 1765-1820*, at 148 (W.W. Norton & Co. 1979) (1971).

States.”³³ Pinkney asserted, “[I]n all ages one half of mankind have been slaves.”³⁴ He warned that any attempt to prevent the importation of slaves would “produce serious objections to the Constitution which he wished to see adopted.”³⁵ His cousin, General Charles Cotesworth Pinkney, added, “S. Carolina & Georgia cannot do without slaves.”³⁶

Starting in the 1820s, Southerners would make similar arguments as they moved from a defensive posture to the more aggressive stance that has been characterized as the “positive good” theory of slavery. Some of this argument was still economic. “Cotton is king,” thundered Senator James Henry Hammond, of South Carolina, in his famous “Mud-Sill” speech, and “you dare not make war on cotton.”³⁷ But the economic arguments only went so far. At its heart, the positive good defense of slavery rested on notions of race. By the 1820s, Southerners would use racial arguments to assert that the enslavement of blacks was a blessing to the slaves and a moral duty for the masters.

Supporters of slavery helped lay the groundwork for this theory in the late Eighteenth Century. The primary author of the *Declaration of Independence*, Thomas Jefferson, also articulated one of the first racially based defenses of slavery in his book, *Notes on the State of Virginia*.³⁸

For Jefferson, equality for blacks was impossible because he thought “the real distinction which nature has made” between the races went beyond color and other physical attributes.³⁹ Race, more than their status as slaves, doomed blacks to permanent inequality. In *Notes on the State of Virginia*, Jefferson asserted that a harsh bondage did not prevent Roman slaves from achieving distinction in science, art or literature because “they were of the race

33. 2 The Records of the Federal Convention of 1787, at 371 (Max Farrand ed., 1966).

34. *Id.*

35. *Id.*

36. *Id.*

37. James Henry Hammond, “Speech on the Admission of Kansas,” March 4, 1858, “The Mud-Sill” Speech, in *Slavery Defended: The Views of the Old South* 121 (Eric L. McKittrick ed., 1963).

38. Thomas Jefferson, *Notes on the State of Virginia* (William Peden ed., 1954); see also Paul Finkelman, *Slavery and the Founders: Race and Liberty in the Age of Jefferson* 105-37 (1996) (discussing Thomas Jefferson’s proslavery beliefs, policies and actions).

39. Jefferson, *supra* note 38, at 138.

of whites;" American slaves could never achieve such distinction because they were not white.⁴⁰ Jefferson argued that American Indians had "a germ in their minds which only" lacked "cultivation;" they were capable of "the most sublime oratory."⁴¹ But, he had never found a black who "had uttered a thought above the level of plain narration; never see[n] even an elementary trait of painting or sculpture."⁴² He found "no poetry" among blacks.⁴³ Jefferson argued that blacks' ability to "reason" was "much inferior" to whites, while "in imagination they are dull, tasteless, and anomalous."⁴⁴ In Jefferson's view they were "inferior to the whites in the endowments, both of body and mind."⁴⁵ Thus, blacks were ideally suited for slavery and peculiarly unsuited for any other status.

Throughout the first half of the Nineteenth Century countless other Southerners followed in Jefferson's steps, arguing that slavery was legitimate and proper because blacks could never be anything but slaves. They bolstered this argument with references to the Bible, modern science, history, economic theory and all other fields of knowledge.⁴⁶

II. COBB'S TREATISE

In 1858, on the eve of the Civil War, Thomas Reade Rootes Cobb added to this proslavery literature with his treatise on slave law, *An Inquiry into the Law of Negro Slavery*.⁴⁷ The *Inquiry* is the most comprehensive antebellum restatement of the law of slavery and the only treatise on slavery written by a Southerner.⁴⁸ As

40. *Id.* at 142.

41. *Id.* at 140.

42. *Id.*

43. *Id.*

44. *Id.* at 139.

45. *Id.* at 143.

46. See William Sumner Jenkins, *Pro-Slavery Thought in the Old South* (1935).

47. See Cobb, *Inquiry*, *supra* note 1.

48. A few other lawyers wrote about the law of slavery to defend the institution. A good example is George S. Sawyer, *Southern Institutes: Or, An Inquiry into the Origin and Early Prevalence of Slavery and the Slave-Trade: With an analysis of the Laws, History, and Government of the Institution in the Principle Nations, Ancient and Modern, From the Earliest Ages Down to the Present Time. With Notes and Comments in Defense of the Southern Institutions* (photo reprint 1969) (1858). Sawyer has an essay of nearly one hundred pages on *The Political and Judicial Attitude of Slavery in the United States*. Furthermore, his book is filled with discussions of law in Rome, Biblical Israel, Europe and the United

such, it was an important practical source for attorneys and judges at the time of its publication and a vital tool for scholars of slavery and legal historians ever since. It was also a significant addition to proslavery legal theory. Finally, Cobb's treatise was a major work of proslavery propaganda, aimed at the minds of Northern lawyers and judges.

The timing of its publication—on the eve of the Civil War—prevented the *Inquiry* from greatly influencing the development of American slave law. Nevertheless, the volume provided legal guidance and intellectual ammunition for some Southern jurists in the years immediately preceding secession. Had the War not come when it did, it is likely that Cobb's book would have become the standard source for finding the law of slavery in the United States, as well as the main tool for teaching that body of law to new attorneys. Indeed, even after the demise of slavery, courts still cited it when considering the lingering effects of the peculiar institution.⁴⁹ More than a century after its publication, a United States Supreme Court justice found it useful for explaining what slavery was, and therefore, for understanding the meaning of the Thirteenth Amendment that abolished slavery.⁵⁰

Had the War not come, the book would also have served a second, and in Cobb's mind, more important purpose. Cobb hoped it would become a key text in convincing American lawyers—especially in the North—that slavery was not evil and that the Southern legal system was consistent with Anglo-American concepts of fairness.

As a treatise in law and a work of proslavery propaganda, the *Inquiry* is really two books in one.⁵¹ Part I is a 228 page preface

States. But this work contains no systematic discussion of the law of slavery. Unlike Cobb's subtle defense of slavery, this is an unsophisticated wholesale assault on the North and the antislavery movement combined with a dogmatic defense of *Dred Scott v. Sandford* and other proslavery decisions.

49. See *Brooke's Case*, 2 Ct. Cl. (U.S. Court of Claims) 180 (1866); *Morris v. Williams*, 39 Ohio St. 554 (1883); *Irving v. Ford*, 179 Mass. 216 (1901); *Merrick v. Betts*, 214 Mass. 223 (1913); *In re Estate of Campbell*, 12 Cal. App. 707 (1910).

50. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 444 n.1 (1968) (Douglas, J., concurring).

51. The prefatory material asserts that this is "Volume I" of what was to be a multi-volume treatise. There is, however, no record that Cobb ever planned to write a second volume. Perhaps he initially planned the *Historical Sketch* to be Volume I and the *Inquiry* to be Volume II. Oddly, the only other reprint of Cobb, done by Negro Universities Press in 1968, deleted all of the original publication

which Cobb titled *An Historical Sketch of Slavery*.⁵² Following this is a 317 page, twenty-two chapter treatise on *The Law of Negro Slavery*.⁵³ Perhaps aware of the intellectual difficulties of some of his technical discussions of law, and doubtless trying to increase his royalties and the distribution of his proslavery arguments, Cobb subsequently published the *Historical Sketch* and the first two chapters of the *Inquiry* as a separate volume.⁵⁴

III. THOMAS R.R. COBB: SOUTHERN LAWYER AND CONFEDERATE LEADER

The importance of Cobb's treatise is in part tied to its author: a leader of the Georgia bar, a prominent figure in Southern legal education, a key legal theorist of the secession movement, and the central figure in the writing of the Constitution of the putative Southern nation. Cobb was born in Jefferson County, Georgia on April 10, 1823, the son of Colonel John Addison Cobb and Sarah Rootes Cobb. His father, a wealthy planter, saw his cotton crop fail in 1832 and then lost most of his remaining fortune in the depression that followed the Panic of 1837. Nevertheless, there was enough money for Thomas to enter college in 1837, with his older brother Howell paying for his last two years. In 1841, Cobb graduated first in his class at Franklin College, the precursor of the University of Georgia. A year later, at age eighteen, he gained admission to the bar and began practicing in Athens.⁵⁵

information from the title page, including "Volume I" on the title page. This has led to confusion among scholars, some of whom have used the original edition with Volume I, and others who have used the incomplete 1968 reprint. This confusion is avoided in the most recent reprint edition, cited in note 1, which both contains the confusing original title page as well as an introduction which explains it.

52. See Cobb, *Inquiry*, *supra* note 1. Cobb separately paginated this part with Roman numerals.

53. See *id.*

54. Thomas R.R. Cobb, *Historical Sketch of Slavery, From the Earliest Periods* (Philadelphia: T & J.W. Johnson Co., and Savannah: W. Thorne Williams, 1858). This book is entirely paginated in Roman numerals. The first two chapters of the *Inquiry* were appended to the end of the original *Historical Sketch*. These pages were then repaginated, starting with page ccxxix and running to page cccii, including the index.

55. Biographical information in this introduction comes mostly from William B. McCash, *Thomas R.R. Cobb: The Making of a Southern Nationalist* (1983). See also Robert K. Krick, *Cobb, Thomas R.R.*, in 1 *Encyclopedia of the Confederacy* 362-65 (Richard N. Current ed., 1993) (elaborating on the life and times of Cobb);

A. Cobb's Antebellum Career

Thomas Cobb's politically-connected relatives dramatically shaped and influenced his career. His brother Howell served in the United States Congress (1843-1851; 1855-1857), including one term as Speaker of the House, as governor of Georgia (1851-1852) and as Secretary of the Treasury under President James Buchanan (1857-1860). After financing the last two years of his younger brother's education, Howell helped Thomas obtain patronage jobs within Georgia. But equally important for his career was Thomas' marriage, in January 1844, to Marion Lumpkin, the daughter of one of the most important attorneys in the state, Joseph Henry Lumpkin. This connection helped secure Cobb's future, and eventually set the stage for his role as the South's foremost commentator on the law of slavery.

The importance of his family connections first emerged in 1842, when Cobb's cousin, James Jackson, became the Secretary of the Georgia Senate. Jackson immediately appointed Thomas, who was only nineteen at the time, as a clerk for the Senate. A year later he was the Assistant Secretary of the Senate, a promotion secured with the aid of his future father-in-law, Joseph Lumpkin, a powerful force in the Whig party, and his brother, Howell, a powerful Democrat.

In November 1845, he became the Secretary of the Senate, largely through the influence of Howell. At the same time, he was building a successful law practice, in part as a result of his political connections, but also because of his rising reputation as one of the smartest and most able attorneys in the state.

In late 1845, Georgia created its first state-wide supreme court and Cobb's father-in-law became Chief Judge. Lumpkin appointed Cobb to be the assistant reporter for the court. In 1849, Lumpkin elevated his twenty-six-year-old son-in-law to the position of reporter for the Georgia Supreme Court. By this time, Cobb was well on his way to economic security and even wealth. He owned a farm in Cobb County, more than a dozen slaves, a fine carriage, town lots in Athens, and timber land just outside the city.⁵⁶ In addition to his job as reporter, he had a growing private law practice. In

Biographical Dictionary of the Confederacy 142 (Jon L. Wakelyn ed., 1977) (summarizing the early years and distinguished career of Cobb).

56. See McCash, *supra* note 55, at 32-33.

1851, Cobb published his *Digest of the Statute Laws of the State of Georgia*,⁵⁷ which earned him more money, fame and new clients.

By 1852, he owned seventeen slaves, hundreds of acres of farm land, town lots, two carriages, and various financial assets.⁵⁸ He was now one of the most successful lawyers in the state, earning as much as \$7,000 a year from his legal practice, \$1,000 a year as the reporter for the state Supreme Court and “[e]normous profits . . . from his *Digest*.”⁵⁹ In 1857, he resigned as Supreme Court Reporter, perhaps because he no longer needed the prestige, professional contacts or salary associated with the position. By the end of the decade his wealth had tripled, and he was worth more than \$100,000,⁶⁰ an enormous sum at that time. With twenty-three slaves he was a bona fide planter.⁶¹ Thus, when he wrote the *Inquiry*, Cobb had a huge personal stake in the system of slavery, and equally important, a good deal of personal experience dealing with slaves.

In 1859, he was appointed to help codify the laws of Georgia. The end result, which did not become law until January 1, 1863, is generally known as the Cobb Code, even though others had participated in its preparation and Cobb himself died twenty days before the Code went into effect.⁶²

In 1859, shortly after he agreed to help prepare the state Code, Cobb joined his father-in-law and a family friend, William Hope Hull, in organizing the Lumpkin Law School in Athens. This was the first law school in the state and one of the few in the deep South.⁶³ About twenty-five students enrolled in the fall of 1859,

57. 1 Thomas R.R. Cobb, *A Digest of the Statute Laws of the State of Georgia, In Force Prior to the Session of the General Assembly of 1851* (1851); 2 Thomas R.R. Cobb, *A Digest of the Statute Laws of the State of Georgia, In Force Prior to the Session of the General Assembly of 1851* (1851).

58. See McCash, *supra* note 55, at 53-54.

59. *Id.* at 53.

60. See *id.* at 66-67 n.102.

61. See *id.* at 67. Most historians consider twenty slaves to be the minimum necessary for a farm to be a “plantation.”

62. See *The Code of the State of Georgia* (R.H. Clark et al., codifiers 1861); McCash, *supra* note 55, at 63-66.

63. Other law schools in the South included the University of North Carolina (1845), Louisville (1846), Tulane (1847), Cumberland (1847), and the University of Mississippi (1854). See David J. Langum & Howard P. Walthall, *From Mainstream to Maverick: Cumberland School of Law, 1847-1997*, at 4-10 (1997); Robert Stevens, *Law School: Legal Education in America from the 1850s to the 1980s*, at 5, 13 (1983).

and by 1861 the school had already awarded diplomas to forty-nine graduates.⁶⁴ The Lumpkin Law School, which was the forerunner of the modern University of Georgia School of Law, was on track to becoming a major training ground for Southern, proslavery lawyers. But, the pressures of secession and the disruptions of war forced a temporary closing of the school after the spring semester in 1861. Ultimately, Southern defeat, and the battlefield death of Cobb in 1862, made this closing permanent, although some years after the war the remnants of the school would reemerge as the University of Georgia School of Law.

B. *Confederate Leader*

Throughout the 1850s both Cobb brothers were staunch Unionists. As Speaker of the House, Howell helped steer the Compromise of 1850 through Congress. This earned him the hatred of many Democrats in the state, but it also helped get him elected governor as an independent in 1851. Both Howell and Thomas believed that the best way to protect slavery was to remain in the Union. Both correctly read the Constitution as being proslavery.⁶⁵ Doubtless they understood that the South was better off in a union that protected slavery than it was as a small and vulnerable nation, surrounded by a larger United States where there was no slavery.

The Cobbs were clearly aware of the political power of slavery within the Union. Since the creation of the national government under the Constitution, slaveowners had been actively involved in the national government, and in the 1850s, they remained powerful players in national politics. With the exception of John Adams and John Quincy Adams, every American president had either been a slaveowner or a Northerner who thoroughly supported slavery. The Northern presidents who protected slavery, such as Martin Van Buren, Franklin Pierce and James Buchanan, did so because they depended on Southern votes for their political success.⁶⁶ The Cobb brothers knew, from personal experience, that

64. See McCash, *supra* note 55, at 128-29.

65. See Paul Finkelman, *Affirmative Action for the Master Class: The Creation of the Proslavery Constitution*, 32 *Akron L. Rev.* 423 (1999).

66. With the exception of the Adamses, the only non-slaveholding presidents were Martin Van Buren, Millard Fillmore, Franklin Pierce, and James Buchanan. None served more than one term. Van Buren, Pierce and Buchanan were Demo-

the South in fact had enormous power and influence in the national government. In the 1850s, Howell was both a Speaker of the House of Representatives and a member of a president's cabinet. Both men hoped that the Democrats would unite in 1860, with Howell Cobb as the party's nominee for President. Indeed, Thomas believed that only the nomination and election of his brother could save both the party and the nation from the crisis building over slavery in the 1850s.⁶⁷

But, Lincoln's election changed the political and constitutional equation. After November 1860, both Howell and Thomas became ardent secessionists. They vociferously argued for disunion during the campaign that led to the election of Georgia's secession convention in January 1861. In his first attempt at elective office, Thomas successfully ran as a delegate to that Convention, where he chaired the "Committee on the Constitution of the State, and the Constitution and Laws of the United States."⁶⁸ In this role Cobb helped shape secession in Georgia.

Thomas soon had greater responsibilities when the Georgia secession convention elected both Cobbs to the Montgomery Convention that wrote the Confederate Constitution. Howell chaired the Convention and then served as President of the Provisional Confederate Congress. Thomas served in both bodies as well.

Cobb's political activities disrupted the law school and led to a radically truncated academic year. In June, the school closed as its students went off to war. Even if the students had returned in the fall, they would not have found Cobb there to teach them. He too had left academia for Confederate politics and ultimately, Confederate war-making.

At the Montgomery Convention, Thomas became the leading draftsman of the Confederate Constitution, and in a sense, became the "James Madison of the Confederacy." Thomas continued to serve in the Confederate Congress until that body recessed in June 1861. At that point he returned to Georgia to organize what he called the "Georgia Legion," but what was later known as "Cobb's Legion." In July, he returned to Congress, which was then meet-

crats, and their party was controlled by Southerners. Fillmore, a Whig, nevertheless looked to the South for his support, especially after he signed the Fugitive Slave Law of 1850.

67. See McCash, *supra* note 55, at 179 (footnote omitted).

68. *Id.* at 206 (footnote omitted).

ing in Richmond. By the end of August the various companies of the "Georgia Legion" had arrived in Richmond, and on August 28, Cobb was commissioned as a colonel in the Confederate army. On September 5, 1861, he took command of his Legion. He returned to Congress briefly in November, but retained his commission. When he left Congress this time it was for good.

Cobb led his troops throughout 1862, and in November of that year he was promoted to brigadier general, now commanding "Cobb's Brigade," which included two regiments from Georgia, one from North Carolina, as well as the Legion he had organized a year earlier. Near the end of the month the North Carolinians were transferred to another command, and Cobb gained yet two more Georgia units. "This makes my entire command *Georgians*," he proudly wrote his wife.⁶⁹

Cobb had little time left to enjoy his new position commanding so many Georgians. On December 13, 1862, he was wounded at the Battle of Fredericksburg, and the thirty-nine-year-old lawyer-turned-soldier bled to death within a few hours. General Robert E. Lee eulogized that if the South became an independent nation, "we will need such a man as General Cobb was to give our country tone and character abroad."⁷⁰ Lee's point was well taken. He understood that the loss from Cobb's death was more cultural than military. The South, as Lee well knew, had no shortage of generals and would-be generals. However, it had precious few scholars and intellectuals of Cobb's caliber.

IV. WRITING THE LAW OF NEGRO SLAVERY

Although he never ran for public office until the secession crisis, Cobb was deeply connected to politics through his brother Howell. As already noted, in the late 1840s and early 1850s, both Cobb brothers were staunch Unionists, denouncing the Southern nationalist followers of John C. Calhoun. Their support for the Compromise of 1850 forced them to temporarily leave the Georgia Democratic Party. But, in 1851, Howell won the governorship running on the ticket of the Constitutional Union Party, which included Alexander Stephens and Robert Toombs in its leadership.

69. *Id.* at 315 (quoting Letter from Thomas Cobb to Marion Cobb (Nov. 29, 1862)).

70. Krick, *supra* note 55, at 365.

By 1852, the Cobbs were back in a unified Democratic Party, which helped Howell return to Congress in 1855.

Sometime around 1850, while Congress and the nation contemplated the Compromise measures designed to head off a collapse of the Union, Thomas Cobb began writing *An Inquiry into the Law of Negro Slavery*. The book reflects Cobb's hope that the Union could be maintained through strict adherence to legal and constitutional principles which, as he understood them, would protect slavery at the local level and in national controversies. The *Inquiry* is in part a lawyer's response to the crisis of the 1850s and a plea for the law to solve the problem of slavery by protecting this special form of Southern property. As the decade unfolded he found support for this position in the Supreme Court, especially in *Dred Scott v. Sandford*,⁷¹ which created important proslavery constitutional doctrine.

The treatise on the law of slavery was simultaneously a practical manual for lawyers and judges, a moral tome directed at proslavery legislators and a defense of Southern interests. The book was a singularly important contribution to the proslavery argument because it was the only major defense of slavery written with the legal community as its primary audience.

By the time the book appeared Cobb had become a more ardent Southern nationalist, but not yet a secessionist. His volume reflected these views. His history of slavery, which takes up about two-fifths of the book, was a proslavery, racist and Southern nationalist account of slavery from antiquity to the present. In this part of the book Cobb took every opportunity to defend the legitimacy of slavery in general and of racially based slavery in particular.

It took Cobb nearly eight years to write the book. Researching the history of slavery was particularly difficult. Without understatement, he described Athens as "an interior village" and noted that while living there he suffered from the lack "of access to extended libraries."⁷² Cobb traveled to libraries in Washington, Philadelphia and New York, but was unable to make it to the nation's best library, at Harvard. Instead, he corresponded with Simon Greenleaf, a retired Harvard Law School professor, who sent him

71. 60 U.S. (19 How.) 393 (1856).

72. Cobb, *Inquiry*, *supra* note 1, at ix.

material for his book. Cobb shared much with Greenleaf: both were evangelical Christians, temperance reformers and legal educators. On the issue of slavery and national politics both favored sectional compromise, support of slavery where it existed and enforcement of the fugitive slave laws.⁷³ Still, despite these common interests, there was no reason for Cobb to expect the kind help Greenleaf gave him. Thus, Cobb's acknowledgement to Greenleaf in the *Inquiry* is almost reverential.⁷⁴

Because Athens was so isolated and the library holdings so weak, Cobb had to travel to Northern cities and to seek the help of a New England law professor. Of course, many conservatives lived in New York and Philadelphia where Cobb did much of his work, and Simon Greenleaf was no abolitionist. Nor for that matter, was Harvard Law School a hot-bed of antislavery. On the contrary, the faculty supported the enforcement of the Fugitive Slave Law of 1850, as did many of the students.⁷⁵ Nevertheless, despite his kind words about Greenleaf, it is possible that the irony of conducting his research on free soil helped shape Cobb's growing pro-slavery nationalism. The experience alerted him to the necessity of creating Southern libraries to collect the books necessary to offer an intellectual defense of what much of the nation, and the world, saw as the "peculiar institution." Similarly, it may have convinced him of the need for a law school in Georgia to train Southern lawyers to defend slavery in the courtrooms of America. It was a year after the appearance of the *Inquiry* that Cobb helped found Geor-

73. See Act to Amend, and Supplementary to, the Act Entitled, "An Act Respecting Fugitives from Justice, and Persons Escaping from the Service of their Masters," Approved February Twelfth, One Thousand Seven Hundred and Ninety-three, ch. 60, 9 Stat. 462 (1850); Act Respecting Fugitives from Justice, and Persons Escaping from the Service of their Masters, ch. 7, 1 Stat. 302 (1793).

74. See Cobb, *Inquiry*, *supra* note 1, at x.

Never having visited the extensive University Library at Cambridge, I took the liberty to apply to the lamented Greenleaf, before his death, to examine and copy for me from several authors that I could not find elsewhere. With a courtesy and kindness, equaled only by his ability and accuracy as a lawyer and a scholar, he cheerfully complied with my request. The MSS. sent me are in his own handwriting, and I prize them as relics of a great and good man.

Id.

75. See Paul Finkelman, *Legal Ethics and Fugitive Slaves: The Anthony Burns Case, Judge Loring, and Abolitionist Attorneys*, 17 *Cardozo L. Rev.* 1793 (1996).

gia's first law school. The *Inquiry* was one of the assigned texts at that school.

V. A TREATISE IN DEFENSE OF EVIL

Cobb claimed his book had "no political, no sectional purpose."⁷⁶ He did admit, however, the work was likely "biassed [sic] by my birth and education in a slaveholding State."⁷⁷ His book certainly offered some neutral, dispassionate and detailed discussions of the law of slavery. For an attorney practicing law in the late antebellum South the *Inquiry* would have been a uniquely useful tool. Cobb cites many cases on various aspects of the law of slavery and offers reasoned analysis on many topics. The *Inquiry* was certainly the best single source for finding the law of slavery as it existed at the time.

But, the book was also self-consciously biased. Imbedded in Cobb's scholarly history of slavery and his impressive analysis of the law surrounding it, was an aggressive defense of the institution. The logic of his approach seems obvious. Cobb hoped his history and legal treatise could survive the scrutiny of both scholars and legal practitioners, especially those in the North. If open-minded Northern critics accepted Cobb's scholarship, then they might also find some truth in his analysis and proslavery theories. Cobb did not need to persuade Northerners of the righteousness of slavery, he only had to undermine their attacks on it.

In preparing the *Inquiry* Cobb followed in the tradition of two other great treatise writers, St. George Tucker and Joseph Story. Tucker prepared his famous edition of Blackstone in order to provide American students with an understanding of the common law based on American values and legal developments.⁷⁸ Similarly, Joseph Story wrote his most significant treatise, *Commentaries on the Constitution*,⁷⁹ in order to create a nationalist history and in-

76. Cobb, *Inquiry*, *supra* note 1, at x.

77. *Id.*

78. Tucker of course wrote his great work *before* he began teaching, rather than after. See 1 Paul Finkelman and David Cobin, *An Introduction to St. George Tucker's Blackstone's Commentaries*, in St. George Tucker, *Blackstone's Commentaries: With Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia* x-xi (The Lawbook Exchange, Ltd., 1996) (1803).

79. 1 Joseph Story, *Commentaries on the Constitution of the United States: With a Preliminary Review of the Constitutional History of the Colonies and*

terpretation of the Constitution that would influence and shape generations of future attorneys and through them politicians and jurists.⁸⁰

Cobb's goals were similar. He wanted his book to be a major tool for training lawyers, especially Southern lawyers. He assigned it to his law students and had the War not intervened, it is likely the book would have become a central text throughout the South. And, just as Story's nationalist and Northern centered treatise influenced the education and constitutional views of Southern attorneys, so too Cobb hoped his treatise would influence the views of some Northern attorneys. Slaves, after all, constituted a major form of property in half the nation, and so it was reasonable for him to expect that Northern lawyers would rely on his treatise and perhaps begin to accept some of his views on the proper way to adjudicate cases involving slavery.⁸¹

The book is carefully designed to support the law of slavery, while at the same time undermining opponents of slavery. Throughout his book Cobb carefully sets the groundwork for a scientific, moral and religious defense of the law of slavery as it existed. His few criticisms of the law—such as the suggestion that rape of a slave be punished—seem to be strategically placed to disarm Northern critics. Cobb himself cannot be seen as a full-fledged apologist for slavery, because after all, he points out its problems. Similarly, the legal system that supports slavery is not really all that bad, because, as Cobb demonstrates, the natural moral and intellectual inferiority of blacks undermines any complaints about the legal structure.

Had the War not changed *everything*, it is easy to imagine law students and lawyers in the North reading Cobb. In reading about

States Before the Adoption of the Constitution (Da Capo Press 1970) (1833); 2 Joseph Story, *Commentaries on the Constitution of the United States: With a Preliminary Review of the Constitutional History of the Colonies and States Before the Adoption of the Constitution* (Da Capo Press 1970) (1833); 3 Joseph Story, *Commentaries on the Constitution of the United States: With a Preliminary Review of the Constitutional History of the Colonies and States Before the Adoption of the Constitution* (Da Capo Press 1970) (1833).

80. See R. Kent Newmyer, *Supreme Court Justice Joseph Story: Statesman of the Old Republic 181-95* (1985).

81. Most cases involving slavery were not political. Many involved commercial transactions, suits for debt, or insurance claims. Northern lawyers were often involved in slavery related cases in the federal courts, especially in the Supreme Court.

the law of slavery they would have been introduced to Cobb's proslavery theories. The perceptive reader, the student or attorney with a strong antislavery background and sharp analytical skills, would doubtless have seen that even Cobb's apparently straightforward explication and analysis of the law contained a good deal of proslavery argument and philosophy. But less careful or intelligent readers—or those without strong or certain views on slavery—might have been easily drawn into Cobb's argument, bolstered as it was by his intelligent and useful analysis of slave law. With his prodigious footnotes, clear writing and willingness to criticize some aspects of the existing law of slavery,⁸² Cobb might have led many Northerners to see some merit in his defense of slavery.

Southern students, of course, would have come away from reading Cobb better prepared to defend their most important social institution from the growing challenge of Northern and British antislavery theory. They would also have learned a great deal about the day-to-day legal aspects of slavery.

Cobb's historical arguments and legal analysis stem from his belief that slavery was not "a peculiar institution," but on the contrary was normal, moral, and economically productive. His historical analysis correctly points out that almost all societies have had slavery. Anticipating the scholarship of our own age, Cobb argued that slavery was never a "peculiar institution," but on the contrary, was common everywhere.⁸³

Unlike modern scholars, but like many other proslavery authors, Cobb also argued that slavery was essential to the creation of any great society. Cobb's discussions of Rome and Greece both implicitly and explicitly compare the South with those great classical societies, while at the same time showing that Southern masters were kinder and gentler than the ancients. Quotations from

82. For example, Cobb believed that state legislatures ought to make rape of a female slave a crime. He even suggested that if a master raped a slave the master should be forced to sell the slave to another master. This should be done "for the honor of the statute-book." Cobb, *Inquiry*, *supra* note 1, § 107, at 100. However, even here his racism overcame his reformist notions, for he also asserted that rape of a slave was "almost unheard of" and that "the known lasciviousness of the negro, renders the possibility of its occurrence very remote." *Id.*

83. See generally Bush, *supra* note 24 (noting that "the peculiar institution is a misnomer for slavery"); Patterson, *supra* note 7, at viii (noting that "[t]here is nothing notably peculiar about the institution of slavery").

Plato, Euripides, Juvenal, and other classical writers were designed to teach the reader that slavery, especially Negro slavery, was accepted by the greatest minds of Western culture.⁸⁴ Along with his voluminous citations of legal sources and careful analysis of the state of the law, Cobb provided his readers with a proslavery argument designed to justify slavery to the reader and to simultaneously condemn those whose legal theories or doctrines threatened slavery.

VI. SLAVERY AND NATURAL LAW

Central to his defense of slavery are Cobb's arguments that slavery is not contrary to natural or divine law, but rather that enslavement, particularly of blacks, is consistent with nature and religion. Throughout the book Cobb equates slaves, even in antiquity, with Africans. Although this discussion is often factually inaccurate, it is excellent propaganda for readers who would be unlikely to know much about the history of slavery in other countries. Throughout these arguments Cobb weaves the theory that blacks are inferior beings who are naturally slaves and better off under the care and tutelage of Christian white masters.

Cobb begins with a frontal attack on the assumption that "slavery is contrary to the law of nature."⁸⁵ He traces this view to Lord Mansfield's decision in *Somerset v. Stewart*⁸⁶ and regrets that "even learned judges in slaveholding States . . . have announced gravely, that slavery being contrary to the law of nature, can exist only by force of positive law."⁸⁷ Cobb then begins an extraordinary assault on this proposition and a simultaneous defense of the enslavement of blacks.

Cobb views slavery as part of natural law. He notes that Hobbes believed "that war was the natural condition of mankind,"⁸⁸ and thus enslaving captured enemies was universally accepted and legitimate. He reminds his readers that "Aristotle declared that some men were slaves by nature, and that slavery was absolutely necessary to a perfect society."⁸⁹

84. See Cobb, Inquiry, *supra* note 1, at lxix-lxx, lxxxv.

85. *Id.* § 3, at 5.

86. See *supra* note 19.

87. Cobb, Inquiry, *supra* note 1, § 3, at 5 (footnote omitted).

88. *Id.* § 6, at 7 (footnote omitted).

89. *Id.* § 15, at 17.

Cobb is not, however, a proponent of the enslavement of just anyone. On the contrary, he argues that "the enslavement, by one man or one race, of another man or another race, physically, intellectually, and morally, their equals, is contrary to the law of nature, because it promotes not their happiness, and tends not to their perfection."⁹⁰ He defends the Greek enslavement of their European neighbors because they "were so far the superiors of their contemporaries, that it did no violence to the existing state of things for their philosophers to declare their preeminence, and draw thence the conclusions which legitimately followed."⁹¹

While he recognizes that Romans also enslaved other Europeans, Cobb insists that at the "early day . . . the negro was commonly used as a slave at Rome."⁹² Implicitly comparing the South to the Roman Republic, he notes that "[f]or her footmen and couriers, the [Roman] wife preferred always the negroes."⁹³ Underscoring the inherent enslaveability of Africans, he notes that "Negroes, being generally slaves of luxury, commanded a very high price."⁹⁴ There is, of course, virtually no historical support for these ideas, but again it is important to understand that most antebellum readers would have had no access to any serious works of history that could have refuted Cobb's presentation.

Cobb did not limit his notions of universal black enslavement to Rome. Again, with no serious evidence he asserts that in Ancient Israel "many of [the slaves] were Africans and of negro extraction,"⁹⁵ and that "[a]mong the Egyptians . . . there were numbers of negro slaves."⁹⁶ In Cobb's Egypt "the ruling castes . . . were of the Caucasian race," while the slaves and many of the "lower castes . . . were negroes."⁹⁷ Similarly, in Assyria, according to Cobb, "Infidels and negroes . . . taken captive in war, were reduced to slavery."⁹⁸ Discussing Alexander the Great's empire, he

90. *Id.*

91. *Id.*

92. *Id.* at lxxxix (footnote omitted).

93. *Id.* at lxxxiii (footnote omitted).

94. *Id.* at lxxxv (footnote omitted).

95. *Id.* at xl.

96. *Id.* at xli.

97. *Id.* § 37, at 41-42 (footnote omitted).

98. *Id.* at lvi (footnote omitted).

asserts "Here, too, we find the negro still a slave," although he admitted "[t]he numbers, in ancient times, we cannot estimate."⁹⁹

"[T]he negro," Cobb claimed, "was a favorite among slaves" in the ancient world,¹⁰⁰ although he seemed inconsistent as to why. He noted that when a Greek Army returned from Persia no one wanted to buy the captives as slaves because "their skins being soft and white, by reason of their having lived so much within doors" they were thought to be "of no service as slaves."¹⁰¹ In Athens and Sparta, the slave markets depended on foreign slaves, and he asserted, "Those from Egypt were accustomed to burdens, and were very enduring. From Egypt principally came the supply of negroes. These were prized for their color, were kept near the persons and were considered slaves of luxury."¹⁰²

Cobb seemed unaware of the contradiction here, between "slaves of luxury" and those "accustomed to burdens." But apparently, in Cobb's mind, the great virtue of black people was that they were so universally perfect as slaves—they could be "accustomed to burdens" and could work outside because of their dark skin, but they could just as well be "slaves of luxury."¹⁰³ This, of course, reaffirmed the practice of the South, where slaves were valuable house servants and equally useful field hands. In Cobb's mind it did not seem to matter where a black worked, as long as he or she worked as a slave under the control of a white.

Cobb also supports the enslavement of blacks by arguing that it has analogies in nature. He asserts that in the animal kingdom "servitude, in every respect the counterpart of negro slavery, is found to exist."¹⁰⁴ Here he offers theories of race that would be comical, if they had not in fact been taken seriously by some of his contemporaries. He writes that "[i]t is a fact, well known to entomologists, and too well established to admit of contradiction, that the red ant will issue in regular battle array, to conquer and subjugate the black or negro ant."¹⁰⁵ Once captured, Cobb asserts that "these negro [ant] slaves perform all the labor of the communities into which they are thus brought, with a patience and an aptitude

99. *Id.* at lviii.

100. *Id.* at lxvii.

101. *Id.*

102. *Id.* at lxvi (footnote omitted).

103. *Id.* (footnote omitted).

104. *Id.* § 7, at 8.

105. *Id.*

almost incredible."¹⁰⁶ This leads him to the remarkable conclusion that "negro slavery would seem to be perfectly consistent" with "the law of nature."¹⁰⁷

Later he argues "like the horse and the cow, the domestication and subjection to service" of blacks "did not impair, but on the contrary improved his physical condition" and thus the "subjection was consistent with his natural development, and therefore not contrary to his nature."¹⁰⁸

Such analogies were, of course, not wholly conclusive, because Cobb realized that the black man or woman was emphatically not "a mere animal."¹⁰⁹ A devoutly religious Christian, Cobb fully understood that blacks had immortal souls and were "endowed with reason, will, and accountability."¹¹⁰ Thus, he argued, enslavement was only legitimate "if the physical, intellectual, and moral development of the African race are promoted by a state of slavery, and their happiness secured to a greater extent than if left at liberty."¹¹¹ He concluded that if this was so, then the enslavement of blacks was "consistent with the law of nature, and violative of none of its provisions."¹¹²

His conclusion on this issue was, of course, foregone. Utterly ignorant of African history or culture, Cobb blithely asserted that despite "living for centuries in contact with civilization, . . . the negro tribes of Africa have never received or exhibited its influences."¹¹³

VII. RACIAL INFERIORITY AND SLAVERY

More than anything else, Cobb believed that slavery was tied to race. In the United States he asserted that "the black color of the race raises the presumption of slavery."¹¹⁴ This, was of course, true throughout the South.¹¹⁵ Moreover, through such federal

106. *Id.* at 9.

107. *Id.*

108. *Id.* § 18, at 21.

109. *Id.*

110. *Id.*

111. *Id.* at 21-22.

112. *Id.* at 22.

113. *Id.* § 37, at 41.

114. *Id.* § 69, at 67 (footnote omitted).

115. The only exception, apparently, was Delaware, where after 1840 the vast majority of blacks were free. Thus, in *State v. Dillahunt*, 3 Del. (3 Harr.) 551

cases as *Prigg v. Pennsylvania*,¹¹⁶ *Jones v. Van Zandt*,¹¹⁷ and most of all *Dred Scott v. Sandford*,¹¹⁸ the United States Supreme Court similarly accepted a notion that race implied slavery. Thus, from a normative perspective, Cobb explained, in great detail, that slavery was in fact a racial matter. For Cobb, however, the normative condition of blacks as slaves merely reflected their racial inferiority.

A. *Biological Inferiority*

Cobb argued that blacks were biologically and mentally inferior to whites. Blacks in Africa were “degraded” and “barbarous.”¹¹⁹ “So debased is their condition,” he argued “that their humanity has been even doubted.”¹²⁰ In both Africa and the United States, whether free or slaves, they were “habitually indolent and indisposed to exertion.”¹²¹ Cobb dismissed notions that these habits were caused by either the climate of Africa, the circumstances of enslavement or even color prejudice. Because “the Maker stamped indolence and sloth” on the people of Africa, they were best off as slaves under the guidance of whites.¹²²

Cobb’s view of the abilities of blacks was unambiguous: “the negro race is inferior mentally to the Caucasian.”¹²³ The “prominent defect in the mental organization of the negro,” he writes, “is a want of judgment. He forms no definite idea of effects from causes.”¹²⁴ Cobb admits that young blacks can learn at the same rate as whites, but when “education reaches the point where reason and judgment and reflection are brought into action, the Caucasian leaves the negro groping hopelessly in the rear.”¹²⁵

Cobb’s view of the biological and mental make-up of blacks led him to conclude that they were perfectly suited, divinely created in fact, for slavery. He noted that “[t]heir physical frame is capable of

(1840), the court ruled that blackness was not a presumption of slavery. See Morris, *supra* note 14, at 21-22.

116. 41 U.S. (16 Pet.) 539 (1842).

117. 46 U.S. (5 How.) 215 (1847).

118. 60 U.S. (19 How.) 393 (1856).

119. Cobb, *Inquiry*, *supra* note 1, § 32, at 36.

120. *Id.* at 36-37.

121. *Id.* at 37.

122. *Id.* at 38 (footnote omitted).

123. *Id.* § 30, at 34.

124. *Id.* § 31, at 35.

125. *Id.* at 36 (footnote omitted).

great and long-continued exertion."¹²⁶ Yet, at the same time, "[t]heir mental capacity renders them incapable of successful self-development."¹²⁷ However, their limited mental abilities "adapts them for the direction of a wiser race."¹²⁸

Significantly, Cobb did not offer these discussions of the racial abilities of blacks in his long introduction, the *Historical Sketch of Slavery*. Rather, they appeared for the most part in the first chapter of his legal treatise, a chapter entitled *What is Slavery*. Any lawyer turning to the treatise for a general overview of the law of slavery, or any student seeking to understand this important field of law, would naturally begin with this introductory chapter of Cobb's treatise. Thus, Cobb would introduce the reader to legal philosophy, some case law and racial theory all in one chapter.

B. *The Natural Immorality of Blacks and the Law*

As a devout Christian, Cobb was especially concerned with the moral nature of blacks. In Cobb's view the "moral character"¹²⁹ of the black is clearly deficient. These moral failings, which Cobb believed were inherent to the race, further justified slavery and the legal regime that supported slavery.

Cobb asserted that blacks are "naturally mendacious, and as a concomitant, thievish."¹³⁰ He discounted the notion that this was caused by slavery, because "the prisons and records of the non-slaveholding States show that enfranchisement has not taught the negro race honesty, nor caused them to cease from petty pilfering."¹³¹ Modern scholars might argue that conditions in the North for free blacks were hardly ideal,¹³² and that racism led to numerous prosecutions of blacks.¹³³ But, for Cobb the explanation was clearly race.

126. . *Id.* § 44, at 46.

127. *Id.*

128. *Id.*

129. *Id.* § 32, at 36.

130. *Id.* § 35, at 40 (footnote omitted).

131. *Id.*

132. See David A. Gerber, *Black Ohio and the Color Line, 1860-1915*, at 60-61, 93-139 (1976); Leon F. Litwack, *North of Slavery: The Negro in the Free States, 1790-1860*, at 154-55 (1961); Paul Finkelman, *Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North*, 17 Rutgers L.J. 415 (1986).

133. See Michael Stephen Hindus, *Prison and Plantation: Crime, Justice, and Authority in Massachusetts and South Carolina, 1767-1878*, at 61, 78-79 (1980).

Cobb's assertion that they lack "thrift and foresight" of course goes along with their natural indolence.¹³⁴ But, even with all these traits, Cobb happily informs his reader that the "negro is not malicious" and "[h]is disposition is to forgive injuries, and to forget the past."¹³⁵

In his desire to defend the enslavement of blacks Cobb ignores the internal contradictions of his own analysis. Thus, he argues the Negro's "gratitude is sometimes enduring, and his fidelity often remarkable" but that at the same time "[h]is passions and affections are seldom very strong, and are never very lasting."¹³⁶ Similarly, despite being "naturally mendacious," Cobb finds blacks are also "passive and obedient, and consequently easily governed."¹³⁷ Furthermore, although "lascivious" and unfaithful in marriage, he argues blacks can exhibit "a degree of faith unsurpassed, and a Christian deportment free from blemish."¹³⁸

The implications of this analysis for law are obvious. Blacks must be kept under close control, with a tough criminal law, but one that can be imposed humanely—on a case-by-case basis—to discipline, punish or restrain the child-like slaves. Because blacks are "mendacious" their testimony in court is suspect. Because they are "indolent," it is obvious that they must be whipped. But, because these are inherent traits, and blacks are also "passive and obedient," discretion is required in punishment. The "passive and obedient" slaves need not be punished harshly, although the truly dangerous ones must be so punished.

VIII. RAPE, MARRIAGE AND THE LAW OF SLAVERY

Historically, masters have considered their slave women as easily available sexual partners. In some cultures slave concubines were common. In other places, including the American South, slave women were sometimes used as prostitutes for the profits of their owners. In almost all slave cultures masters have freely had sex with their slaves. In the American South most members of the master class, including non-slaveholding whites, also saw slave women as easily accessible sexual beings.

134. See Cobb, *Inquiry*, *supra* note 1, § 33, at 38.

135. *Id.* § 34, at 39 (footnote omitted).

136. *Id.*

137. *Id.* at 40 (footnote omitted).

138. *Id.* at 39-40.

A. *Cobb and Slave Rape*

It is hard to know what Cobb actually thought about slave-master relations. Like any other Southerner, white or black, he had to be fully aware of the common occurrence of sex between white men and slave women. This most likely offended his sense of Christian morality. Given his strong religious and patriarchal views, it is doubtful he would have condoned white men forcing themselves on slave women. Indeed, Cobb believes that the legislatures of the South ought to consider "whether the offense of rape, committed upon a female slave, should not be indictable."¹³⁹ He even suggests that if a master rapes a slave, the owner/rapist should be required to sell the slave to a new master.¹⁴⁰ Such a law, he believes, might be passed for "the honor of the statute-book," since he doubted the actual offense was very widespread.¹⁴¹

But, to punish masters for the rape of a slave would imply that slaves had rights. This would have opened up a Pandora's Box of problems for the Southern legal system. The law could give the slave "no rights or privileges except such as are necessary to protect [his] existence."¹⁴² Obviously, rape did not threaten the existence—the lives—of slaves. Furthermore, the effective enforcement of laws punishing whites for raping slaves would have required that slaves testify against whites, even against their own masters. And this simply was not possible under the slave regime. Moreover, since blacks were naturally "mendacious," their testimony would have been deemed worthless when offered against whites.

Having considered the problem, Cobb, in the end concluded that the issues were more theoretical than real. He believed that few, if any, female slaves were ever raped by their masters, because the very nature of blacks made the rape of a slave rare. "The occurrence of such an offence," he asserted, "is almost unheard of; and the known lasciviousness of the negro, renders the possibility of its occurrence very remote."¹⁴³ Despite the likelihood that rape of a slave by a master could rarely take place—presumably because slave women would in fact always give consent—Cobb nevertheless would put such a law into place "for the honor of the

139. *Id.* § 107, at 100.

140. *See id.*

141. *Id.*

142. *Id.* § 89, at 86.

143. *Id.* § 107, at 100.

statute-book” rather than for any practical purpose.¹⁴⁴ Since there would be almost no prosecutions under the law, Cobb could afford to advocate that for the “honor” of their statute books the Southern states adopt such a law.

Cobb’s advocacy of a law punishing the rape of slaves was in three ways ultimately a tactic in the propaganda war between the South and the opponents of slavery in the North. First, it made Cobb seem reasonable and humane. If readers believed him to be so they might be more open to his proslavery theories. Second, this issue gave Cobb a forum for discussing his racial views, and in so doing, articulate why blacks were best suited to be slaves. Finally, if the Southern states did pass such a law, it would further enhance the claim, made throughout the slave states at this time, that slavery was a humanitarian, paternalistic system, in which the stronger and smarter master class protected the weaker, and less able, slave class.

Ironically, by claiming to protect the slaves from what was traditionally considered a violation of the honor of the victim, Cobb was in fact suggesting a method to proclaim the “honor” of the master class. Equally important, by arguing for such a law Cobb made himself seem “reasonable” in the debate over slavery. Here was a slave state lawyer, indeed a slaveowner himself, advocating the protection of the virtue of slave women. Such a position would undermine those who might attack Cobb for his proslavery and racist views.

B. *Slave Marriage*

The lack of legal protection for slave marriages troubled Cobb, because it offended his moral and religious sensibilities. He even admitted that the lack of marital fidelity among slaves was “to some extent . . . [a] fault of the law,”¹⁴⁵ because no Southern state gave any legal recognition to slave marriages. He thought the law might even be used to “[guard] against” the “unnecessary and wanton separation of persons standing in the relation of husband and wife.”¹⁴⁶ But, in the end, Cobb could not suggest anything more than a statute preventing the separation of families at “sales made

144. *Id.*

145. *Id.* § 36, at 40-41.

146. *Id.* § 276, at 245-46.

by authority of the Courts, such as sheriffs' and administrators' sales."¹⁴⁷ Any other protection of slave marriages had to be "guided and enlightened by Christian philanthropy."¹⁴⁸

Cobb had to back off from a recognition of slave marriage, or a protection of it, because to do so would undermine the most basic aspect of slavery: that the slave was the property of the master. Most Southerners—including Cobb—understood that any legal recognition of slave marriages would undermine the economic and social needs of the masters. Indeed, all slave marriages were subject to the whim of the master. At any moment a marriage could be destroyed by sale or the migration of an owner.¹⁴⁹ Cobb, as a master, knew perfectly well that the right to sell slaves was a matter of economic necessity. He would not let a "false tenderness for . . . negroes"¹⁵⁰ interfere with his profits. He also understood that selling slaves was a factor in slave discipline. When one of his female slaves misbehaved, Cobb sold off her four youngest children as a form of punishment.¹⁵¹ That Cobb thought separation from family was a punishment illustrates his ability to disconnect the practical realities of his life as a master from his racial theories. In the *Inquiry* Cobb asserts that slaves have few family ties and in effect, will not suffer from separation. He notes, for example, without much evidence, that former slaves in Liberia are unfaithful to their spouses, thus implying that the nature of blacks, and not the law or even the circumstances of slavery, is what undermines slave marriages.¹⁵² The real cause of marital infidelity among slaves, or former slaves, is the "lasciviousness" of blacks.¹⁵³ Blacks, in Cobb's mind, are not concerned with the destruction of their mar-

147. *Id.* at 246.

148. *Id.*

149. In some parts of the South, between a third and a half of all married slaves had been separated from an earlier spouse through sale or the migration of masters. See Herbert G. Gutman, *The Black Family in Slavery and Freedom, 1750-1925*, at 20-21 (1976). Other data indicate that in some areas at least one in ten slave marriages were forcibly destroyed by masters. See *id.* at 146.

150. McCash, *supra* note 55, at 94 (footnote omitted).

151. See *id.* Similarly, Thomas Jefferson once directed that as a form of punishment a slave be sold to "negro purchasers from Georgia" or some "other quarter so distant as never more to be heard of among us." Thomas Jefferson's *Farm Book: With Commentary and Relevant Extracts From other Writings* 19 (Edwin Morris Betts ed., 1953). Jefferson wanted this removal to appear to the other slaves "as if he were put out of the way by death." *Id.*

152. See Cobb, *Inquiry*, *supra* note 1, § 36, at 40-41.

153. *Id.* at 40 (footnote omitted).

riages because of their ability to “forget the past” and the fact that their “passions and affections are seldom very strong, and are never very lasting” and that a “few days blot out the memory of his most bitter bereavement.”¹⁵⁴ Here Cobb followed the lead of Thomas Jefferson, who had asserted in his *Notes on the State of Virginia* that “[t]hey are more ardent after their female” while “love seems with them to be more an eager desire, than a tender delicate mixture of sentiment and sensation. Their griefs are transient.”¹⁵⁵ Thus, the line from the Founders of the Republic to the Founders of the Confederacy was complete: the law could allow for the separation of black families and ignore the sanctity of black marriages, because black people were incapable of lasting love or marital fidelity.

Masters, of course, knew better. Slaves often absconded to seek wives and husbands after they were separated by sale. Masters understood this practical reality, as they advertised for runaways by suggesting the slave was headed to where a wife or husband lived.¹⁵⁶

Slaves also ran away to find their children or their parents. Masters also knew this as well.¹⁵⁷ But, ignoring this reality, Cobb asserts that the Negro is “cruel to his own offspring, and suffers little by separation from them.”¹⁵⁸ This analysis relieves the master of any moral concerns for beating slave children or separating slave families. The law, which allows both, naturally reflects this. Cobb provides the intellectual defense for these results.

IX. COBB’S INFLUENCE

If the Civil War and the subsequent destruction of slavery had not intervened, it is likely that Cobb’s book would have become a standard teaching tool throughout the South, as well as the North. It would have also become a basic source for practicing attorneys. Similarly, judges would have relied on Cobb when deciding novel issues involving slavery.

154. *Id.* at § 34, at 39.

155. Jefferson, *supra* note 38, at 139 (footnote omitted).

156. See John Hope Franklin & Loren Schweninger, *Runaway Slaves: Rebels on the Plantation* 49-74 (1999).

157. See *id.*

158. Cobb, *Inquiry*, *supra* note 1, § 34, at 39 (footnote omitted).

One measure of the importance of Cobb's work is found in the last treatise on American slavery ever published. In the same year that Cobb published his *Inquiry*, John Codman Hurd, a New Yorker, published the first volume of his ponderous treatise, *The Law of Freedom and Bondage in the United States*.¹⁵⁹ In Volume II, which appeared in January 1862, Hurd cited Cobb in a number of places. Hurd had an extensive discussion of the relation of the Full Faith and Credit Clause of the Constitution to slavery. He was "led to devote so much space to its consideration solely by the observations of Mr. Thomas R.R. Cobb."¹⁶⁰ Hurd understood the power of Cobb's arguments and took the time to confront and refute them. At another point he quoted Cobb on the important duality of slaves as persons and things in the South.¹⁶¹ Clearly Hurd respected the Georgian, even as he disagreed with him.

So too did the Alabama Court, which in 1861 went out of its way to challenge Cobb's criticism of an earlier Alabama decision involving the manumission of slaves.¹⁶² In an 1846 case, the Alabama Court had ruled that slaves could not "elect" to take freedom under a will, if that option was offered by a master.¹⁶³ Cobb had written, "[t]his suggestion has not been approved by other courts, and we cannot see the force of it."¹⁶⁴ The Alabama Court, in 1861, complained that "Mr. Cobb" had "overlooked" "the obvious distinction" between slaves as things and persons when he criticized the earlier case.¹⁶⁵ What is important here is not the outcome of the case, nor the reasoning, but that in January 1861 the Alabama Court felt the necessity of answering Cobb because his treatise was simply too important for the court to ignore.¹⁶⁶

Some Southern lawyers and jurists almost immediately recognized the importance of Cobb's work for arguing and deciding diffi-

159. See 1 John Codman Hurd, *The Law of Freedom and Bondage in the United States* (Boston: Little, Brown, & Co. 1858); 2 John Codman Hurd, *The Law of Freedom and Bondage in the United States* (Boston: Little, Brown, & Co. 1862).

160. 2 *Id.* at 262 n2.

161. 2 *See id.* at 408 n2.

162. See *Creswell's Ex'r v. Walker*, 37 Ala. 229, 236-37 (1861); see also Cobb, *supra* note 1, § 363, at 301-02 (criticizing *Carroll v. Bromby*, 13 Ala. 102 (1848)).

163. See *Bromby*, 13 Ala. at 106.

164. Cobb, *Inquiry*, *supra* note 1, § 363, at 302 (footnote omitted).

165. *Creswell's Ex'r*, 37 Ala. at 236-37.

166. It is also possible that Cobb's prominent role in the creation of the Confederate government made the Alabama court take special notice of his criticism of the earlier decision.

cult cases. It is quite likely that both attorneys and judges turned to Cobb to research the law of slavery, but evidence of such research is hard to find for run-of-the-mill cases. In such cases attorneys and courts might use Cobb to find the law; they did not need to cite Cobb because there were ample precedents and solid theoretical arguments to decide such slave cases. But, for new legal issues, or unsettled questions, some judges and lawyers turned to Cobb and cited him in their arguments and opinions.

The case of *United States v. Amy*¹⁶⁷ illustrates the way lawyers used Cobb. After a jury found her guilty of stealing from the United States mails, United States District Judge James Dandridge Halyburton sentenced the slave Amy to two to ten years in federal prison in Washington.¹⁶⁸ On behalf of her master, Richmond attorney John Howard, he argued that a slave could not be prosecuted for stealing mail, because the statute involved was only directed against "persons" and slaves were property.¹⁶⁹ Thus, Howard asked that the verdict be set aside. Judge Halyburton thought the argument of such "great novelty and importance" that he delayed ruling on it until Chief Justice Roger B. Taney could hear the case when he came to Virginia to attend his circuit duties.¹⁷⁰ Before Chief Justice Taney, Howard quoted Cobb to bolster his argument that "statutory enactments never extend to or include the slave, neither to protect nor to render him responsible, unless specifically named, or included by necessary implication."¹⁷¹ While Howard was unsuccessful in persuading Taney, his argument nevertheless illustrates the immediate impact of Cobb on legal arguments.

Mississippi's highest court began to support its rulings with references to Cobb within a year after the appearance of the treatise. In 1859, the High Court of Errors and Appeals cited Cobb in two cases involving slave criminals and two involving the rights of free blacks and the manumission of slaves.¹⁷² All four cases raised issues that were not simply legal, but instead, dealt with the public

167. 24 F. Cas. 792 (C.C.D. Va. 1859) (No. 14,445).

168. *See id.*

169. *Id.* at 793.

170. *Id.*

171. *Id.* at 800 (quoting Cobb, Inquiry, *supra* note 1, § 94, at 91).

172. *See* *Minor v. State*, 36 Miss. 630, 632-35 (1859); *Heirn v. Bridault*, 37 Miss. 209, 220, 231, 233 (1859); *Mitchell v. Wells*, 37 Miss. 235, 251-52 (1859); *George v. State*, 37 Miss. 316, 317-18, 320 (1859).

policy surrounding the law of slavery. For jurists breaking new ground, or at least treading on unfamiliar legal turf, Cobb offered support and guidance.

*George v. State*¹⁷³ illustrates this. George was convicted of raping a female slave, and his attorney appealed on the grounds that no such crime existed in Mississippi.¹⁷⁴ George's attorney relied on Cobb to argue that the law of rape could not be applied to blacks because "their intercourse is promiscuous" and, thus, the "violation of a female slave by a male slave" was at worst "a mere assault and battery."¹⁷⁵ He further cited Cobb for the proposition that the common law did not apply to slaves.¹⁷⁶ In reversing George's conviction, Justice William L. Harris relied on Cobb to support the notion that the rape of a slave was only an injury to the master's property and never to the slave.¹⁷⁷ He dismissed as "unmeaning twaddle" a few cases which found the common law did protect slaves, and instead cited to Cobb for the opposite proposition.¹⁷⁸ In the space of four pages in the Mississippi Reports there are four citations to Cobb by George's counsel and four more by Justice Harris.¹⁷⁹ The case of rape of course created morally difficult issues for the Court, and so the Court turned to Cobb for support of its ruling.¹⁸⁰

More significantly, perhaps, was the Mississippi Court's use of Cobb in *Mitchell v. Wells*,¹⁸¹ one of the most virulently racist opinions of the antebellum period. In this case, Mississippi refused to allow a free mulatto woman living in Ohio to inherit property from her deceased father, a white Mississippi planter.¹⁸² The woman, Nancy Wells, had been born a slave in Mississippi, the daughter of Edward Wells and his female slave. Edward Wells had later taken Nancy to Ohio, where he formally manumitted her.¹⁸³ When he

173. 37 Miss. 316.

174. *See id.* at 317.

175. *Id.*

176. *See id.* at 320.

177. *See id.* at 318.

178. *Id.* at 320.

179. *See id.* at 317-20.

180. *See id.* at 320. In a note following this case the Court reporter points out that in 1860 the Mississippi legislature made the rape of a slave by another slave a crime, punishable by death or whipping, "as the jury may decide." *Id.* at 320 n.1.

181. 37 Miss. 235 (1859).

182. *See id.* at 264.

183. *See id.* at 237.

died, Edward Wells tried to leave Nancy his bed, his watch and three thousand dollars.¹⁸⁴ In refusing to allow this bequest, the Court denied that it owed any comity to the free states on issues of black freedom.¹⁸⁵ In making this argument Justice William Harris relied heavily on Cobb. He also relied on Cobb for the proposition that blacks—even free blacks—were not entitled to any rights in Mississippi, unless the state chose to grant blacks such rights.¹⁸⁶

Other lawyers and courts also relied on Cobb, or felt it necessary to explain why they rejected him.¹⁸⁷ After the War, Cobb's work lived on as courts tried to figure out all of the legal issues of slavery that remained in play after emancipation ended slavery. In *Hall v. United States*, Cobb's work helped the United States Supreme Court to conclude that a black man who had produced cotton during the War was not entitled to any of the proceeds from that crop, because at the time he was still a slave.¹⁸⁸ Had he lived through the war Cobb would have seen judges appointed by Lincoln imposing the law of slavery on former slaves and using his treatise to enrich the widow of a Confederate slaveowner at the expense of the black man who did the work of actually growing the cotton.

X. A CODA: THE REALITY OF SLAVE MARRIAGE AND THE EVILS OF COBB'S THEORIES

Nearly four decades after Cobb's death, his treatise found its way into an opinion by Oliver Wendell Holmes, Jr., who was then Chief Justice of the Massachusetts Supreme Judicial Court. The case, *Irving v. Ford*,¹⁸⁹ involved two half-brothers and their father's estate. The case illustrates the complexity of slave law, and the fundamental tragedy of the refusal of the Southern states to acknowledge slave marriages. It also demonstrates the perversity—and essential wrongness—of Cobb's theories about slavery,

184. *See id.*

185. *See id.* at 264.

186. *See id.* at 259. For a detailed analysis of this case, see Finkelman, *supra* note 21, at 287-95.

187. *See, e.g.,* Stephenson v. Harrison, 40 Tenn. (3 Head) 728, 732 (1859) (upholding the right of slaves to sue for their freedom under a will, and explicitly rejecting Cobb).

188. 92 U.S. 27, 30 (1875).

189. 179 Mass. 216 (1901).

race, marriage and family life. Finally, it places on a human scale the fundamental evil of the system of law that Cobb defended and underscores Cobb's complicity with that system of evil.

In his treatise, Cobb argued that slaves—and indeed all blacks—were naturally promiscuous, unfaithful in marriage and cared little for their children. The complex, poignant and ultimately sad story in *Irving v. Ford* illustrates how wrong Cobb was.

In 1846, Robert Irving (later known as Sheridan W. Ford)¹⁹⁰ and Julia Ann Gregory, both slaves in Virginia, “went through a form of marriage” in the presence of Gregory's master.¹⁹¹ Although owned by different masters, Robert and Julia were allowed to live together in the basement of Julia's master, where they resided for eight years, and had three children.¹⁹²

In 1854, the twenty-seven year old Irving, fearing his master was about to sell him away from his family, escaped to Massachusetts and changed his name to Sheridan W. Ford.¹⁹³ It is somewhat ironic that his love of his wife made Irving leave his wife. But the logic of this act was clear: if Irving successfully escaped he might some day be able to come back for his wife, perhaps with money to purchase her freedom. Or, perhaps she could also escape and meet him in the North. Fearful she would do just that, Julia's master jailed her for five months before sending her to North Carolina, where she remained until after the Civil War.¹⁹⁴

The actions of Julia's master illustrate how savvy slaveowners ignored the theories about slave love and fidelity articulated by Cobb and other proslavery propagandists. Cobb, like Jefferson three quarters of a century earlier, postulated that slaves did not really mind separation from spouses because they lacked the ability to have a sophisticated sense of love and fidelity. As Jefferson wrote, “love seems with them to be more an eager desire, than a

190. In the 1860 census, he appears as Sherndon W. Ford. This may be an error of the census taker, or it may be that during the Civil War he changed the spelling of his name in honor of the military hero General Philip Sheridan. See Census Data Base of African-American Communities Project, National Museum of American History, Smithsonian Institution. I thank James O. Horton, Director of the Census Data Base Project, for sharing this information with me.

191. *Ford*, 179 Mass. at 220.

192. See *id.*

193. See *id.* at 217; Census Data Base of African-American Communities Project, *supra*, note 190.

194. See *Ford*, 179 Mass. at 217.

tender delicate mixture of sentiment and sensation."¹⁹⁵ But Julia's master knew better; with her husband gone, she too might flee bondage at the first opportunity, especially if she could be reunited with her husband. Thus, her master sent her to jail for no crime at all, except being married to a man who escaped from slavery to avoid being sold away from his family. Then Julia's master sold her south.

Julia ended up in North Carolina, where she eventually married a fellow slave named Killis Bunn.¹⁹⁶ This was not a betrayal of either the marriage bonds or her love for Robert Irving. Rather, it was a realistic understanding that the sale to North Carolina had preempted any chance of being reunited with her husband. Slaves sometimes took marriage vows that included the language, "[u]ntil death or distance do you part."¹⁹⁷ The sale of Julia was a de facto divorce from Robert. When the Civil War ended, Julia returned to Virginia to find her children. After Bunn's death she married another free black, Joseph Brown, in Portsmouth, Virginia, in 1870.¹⁹⁸

Meanwhile, in November, 1856, Irving (now calling himself Sheridan W. Ford), married another fugitive slave, twenty-six-year-old Mary D. Armstead.¹⁹⁹ Most likely, by this time Ford no longer believed it was possible to be reunited with his wife Julia. He probably knew she had been sold south but may not have known where. Sheridan Ford and Mary remained married until his death in December, 1898. During this marriage he fathered Leonard A. Ford, the defendant in *Irving v. Ford*.

Despite his new life, with a new wife and new children, Sheridan Ford did not forget his Virginia family. In 1865, Ford contacted his former wife, who had returned to Virginia to find her children. At Ford's request, Julia Ann sent their son, Robert, to live with him in Massachusetts. Sheridan twice went to Virginia where he visited his ex-wife and her second husband. While there

195. Jefferson, *supra* note 38, at 139 (footnote omitted).

196. See *Ford*, 179 Mass. at 217-18.

197. Eugene D. Genovese, Roll, Jordan, Roll: The World the Slaves Made 481 (1974).

198. See *Ford*, 179 Mass. at 218.

199. See *id.* While in slavery her name had been Clarissa Davis, but in Massachusetts she took on her new name of Mary D. Armstead. For her age, see Census Data Base of African-American Communities Project, *supra*, note 190.

he "recognized the petitioner Frank Irving as his son."²⁰⁰ Frank later visited his father in Massachusetts, "where he was recognized . . . as a son and brother."²⁰¹ During his last trip to Virginia, Ford gave Frank Irving a gold watch, and told him "Son, I am not coming here any more; it makes me sick in my stomach when I look at the place and see how I had to go away from my wife and children."²⁰² He further told his son, "when I die a part of my property will be yours. You will get your share of it."²⁰³

When Sheridan Ford did die, however, in 1898, he left no will and no provisions for his son Frank Irving to inherit any part of his estate. The probate court made Leonard A. Ford the administrator of the estate, as well as the co-heir, along with his sister, Annie E. Ford. Irving then sued to be made executor and sole heir, on the grounds that he was a "lawful son."²⁰⁴ Irving argued that his parents had been legally married, and thus as the oldest son of Ford, he was entitled to be the administrator. He further argued that the marriage between his father and Mary Armstead was void, thus making his half-brother illegitimate.

Chief Justice Holmes found against Irving on both points. The marriage to Julia Gregory was never a legal union, and Ford's subsequent recognition of Frank Irving had no legal force. This was a legally proper outcome, one that was supported by case law from before and after the Civil War. It was completely consistent with Cobb's treatise. On this point, Holmes accepted the law of slavery and applied it to the litigants in Massachusetts.

In his second contention, Irving argued that the marriage between Ford and Armstead was void, because, as fugitive slaves, they had no legal right to marry. In making this argument, Irving asked Holmes to be consistent in applying slave law. Relying on Cobb's treatise, Irving argued that Ford and Armstead were still legally slaves in Massachusetts, and thus their marriage in the state was also illegal.²⁰⁵ Irving asserted that a slave did not gain freedom by coming into a free state, and thus could not marry in that state. Here he was in line with Cobb, who asserted that "a

200. *Ford*, 179 Mass. at 218.

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.* at 219.

205. *See id.* at 220, 221, 222.

fugitive slave, though he may be in a State where slavery does not exist, is still incapable of contracting, his *status* remaining unchanged."²⁰⁶ Thus, the marriage between Ford and Armstead was doubly void, since both parties were fugitive slaves.

Holmes emphatically rejected this point. In Massachusetts, all men and women were free. There could be no slavery in the state. Holmes would not speculate on how a return to bondage might have affected such a marriage, but where the fugitives continued to enjoy their freedom, they also continued in their legal right to sue, be sued, own property and marry.²⁰⁷ Thus, Holmes rejected Cobb's theory on runaway slaves, even while implicitly accepting his assertion that slaves, while under the control of their masters, could not legally marry.

In 1861, both Holmes and Cobb had gone off to war: one to preserve the United States, the other to destroy it. Four decades later Holmes rejected the theories of the dead Confederate general to protect the property interest of heirs whose father had escaped to Massachusetts and freedom. Ironically, however, in order to do this, Holmes had to acquiesce to Cobb's basic proslavery theory and legal analysis—that slaves in the South had no rights, and that the law would never recognize them as parents or spouses. Thus, the fundamental unfairness of slavery remained to haunt the children of slaves, just as some of Cobb's theories and arguments lived on, long after the demise of the institution he had himself died to preserve.

206. Cobb, *Inquiry*, *supra* note 1, § 277, at 246 (emphasis in original) (footnote omitted).

207. See *Ford*, 179 Mass. at 222. Irving later asked the courts to consider him a legitimate heir, but not the sole heir, to his father's estate. He lost on this issue as well. See *Irving v. Ford*, 183 Mass. 448, 451 (1903).

