

Property in People

William Fisher

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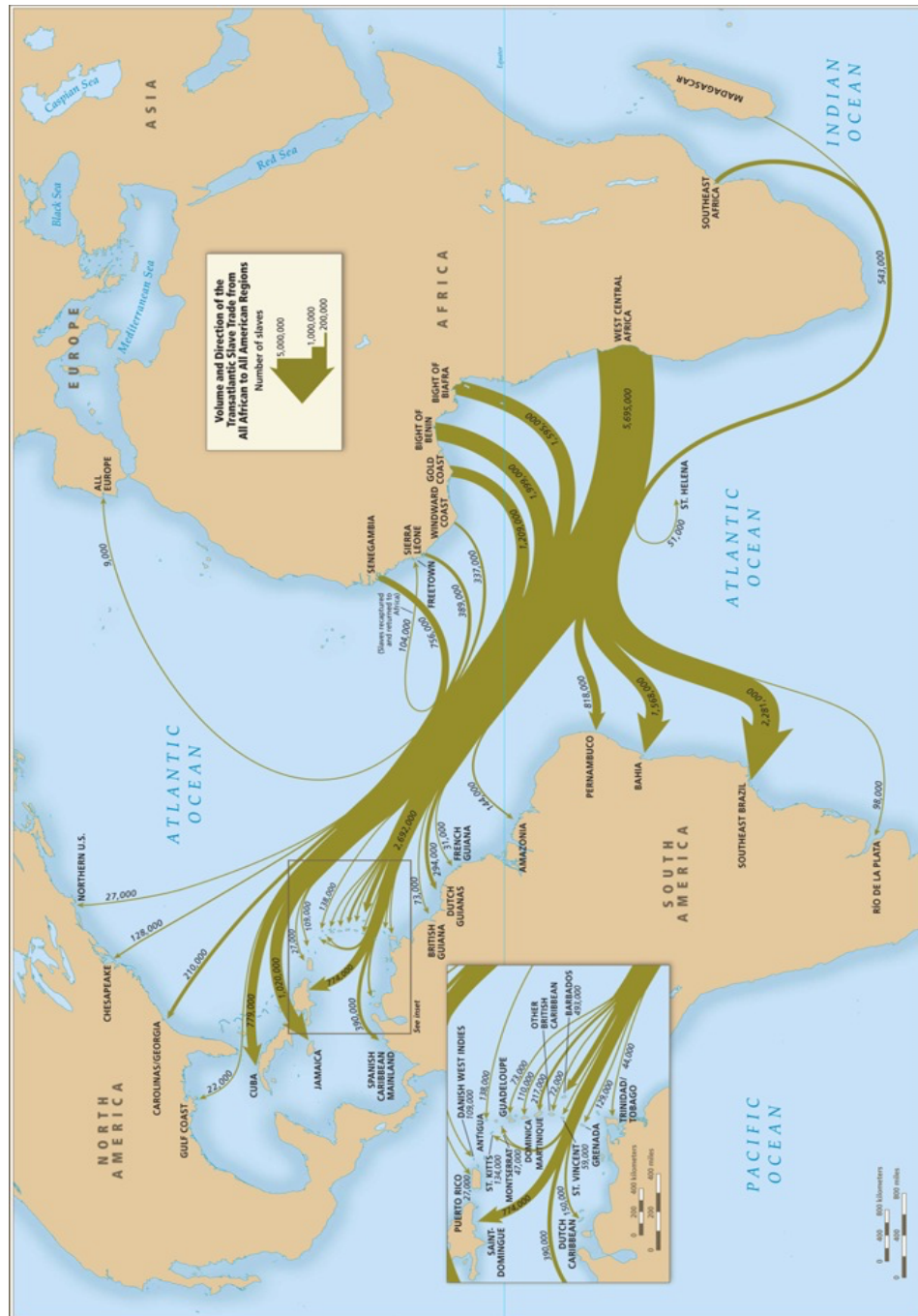
Introduction

In retrospect, one can identify five reasonably distinct phases of the history of slavery:

- (1) Slavery was common in the Ancient Near East, Greece, and Rome. During this era, most slaves were of the same ethnicity as the slave-owners. Partly as a result, slavery was not associated with racism.
- (2) Beginning in the seventh century, Arabs began enslaving black Africans in North Africa and the Persian Gulf. Initially, most of the slaves came from technologically sophisticated cultures in North Africa. By the ninth century, however, Arabs began to import slaves from less technologically sophisticated cultures in East Africa. Partly as a result, slavery begins to be associated with race and racism.
- (3) Slavery flourished in medieval southern Europe, especially the Iberian peninsula. Typically, religion separated slave-owners and slaves; Christians captured or purchased Islamic slaves, and Muslims captured or purchased Christian slaves. Genoese slave traders began to import, into southern Europe, Eurasian slaves from the area around the Black Sea.
- (4) Large-scale enslavement of black Africans by Europeans in Europe began around 1300. In the fourteenth century, the Genoese apparently began to use black slaves in sugar plantations in Cyprus (although the scale of this activity is disputed). In the fifteenth century, the Portuguese began to use black slaves in sugar plantations in southern Portugal, Medeira, and the Canary Islands.
- (5) The use of slavery in the European colonies in the western hemisphere began in the fifteenth century and continued through the first two thirds of the nineteenth century. Within this zone, there were three distinct regional systems.
 - a. The first to develop was in the Spanish and Portuguese colonies in Central and South America. Most of the slaves in this sector were drawn from indigenous groups, but some were imported from Africa.
 - b. Next came the regimes established in the “sugar islands” in the Caribbean: first Barbados, then Guadeloupe, Jamaica, San Domingo, and St. Croix. Almost all of these slaves were Africans, most of them imported – initially by Portuguese slave traders, then by Dutch slave traders.
 - c. Last but not least, in the middle of the seventeenth century, the British began using significant numbers of imported African slaves in their mainland North American colonies. This system was first employed in the Carolinas and in colonies abutting Chesapeake Bay, then spread to many of the other colonies.

During this fifth phase, a total of roughly 12.5 million African slaves were forcibly taken from Africa to the western hemisphere. Roughly 11 million survived the trip across the Atlantic. Roughly 500,000 arrived in British North America.

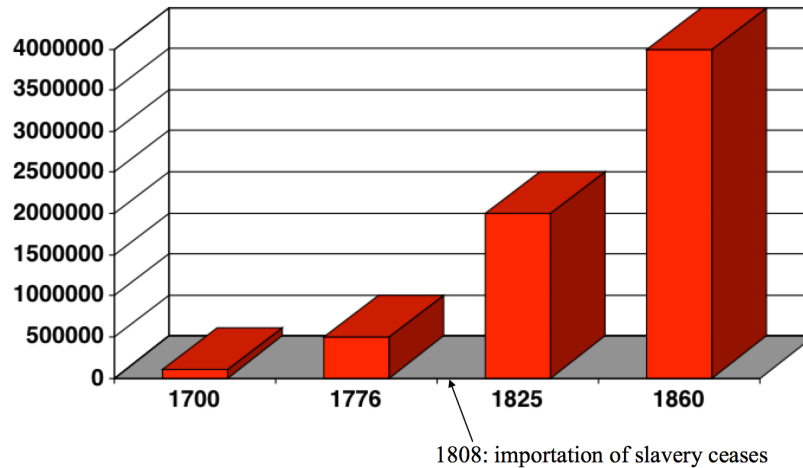
The places from which the African slaves were taken – and to which they were delivered – are shown in the following map.¹



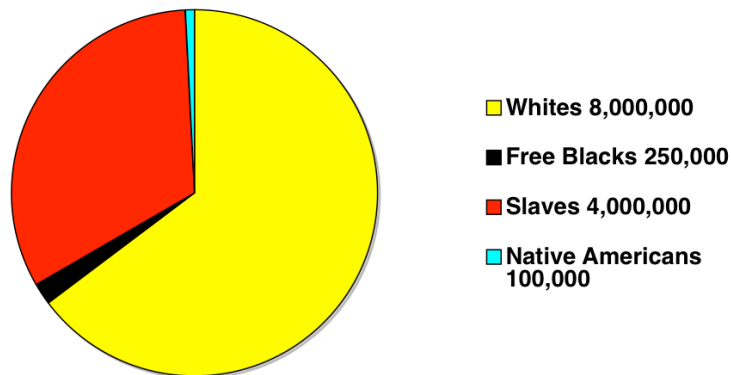
¹ Source: Philip Misevich et al., “A Digital Archive of Slave Voyages,” Smithsonian Magazine (2017), <https://www.smithsonianmag.com/history/digital-archive-slave-voyages-details-largest-forced-migration-history-180963093/>.

Slavery in British North America was physically more healthy than slavery in the Caribbean. As a result, after 1760, most of the growth of the slave population in what became the United States was “natural,” rather than the fruit of importation. The resultant numbers are indicated in the charts set forth below.

**Population of Black Slaves in
British North America / United States**



**Population Distribution
of the American South: 1860**



The Law of Slavery

The variant of slavery that took root in British North America and continued to expand during the first 80 years of the history of the United States was a legal as well as economic and social institution. A complex web of statutory and common law shaped and sustained the system. Set forth below is a summary of the principal components of the web.²

In important respects, the rules used by the southern colonies and states to administer the system of chattel slavery were consistent and coherent. For example, by the early eighteenth century, all jurisdictions had adopted the principles that a person's status as free or slave is determined by the status of his or her mother³ and that only persons with at least some nonwhite blood can be slaves.⁴ The law governing homicide of slaves by whites was approximately the same throughout the region: during the colonial period, killers of slaves received only modest sanctions (typically a fine or short prison term, combined with an obligation to compensate the owner of the victim); between 1790 and 1820, the penalties were increased substantially (although executions remained rare, and many substantive and procedural rules were available to killers of slaves that were not available to killers of whites or free blacks); and during the remainder of the antebellum period, the law was relatively stable in all states.⁵ During the colonial period, slaves everywhere were subject to severe criminal penalties for a wide variety of offenses; by the Civil War, the relevant rules had been softened a good deal, but remained harsher than those applicable to whites.⁶ When dealing with sales of slaves, courts throughout the South eschewed the doctrine of caveat emptor that was coming to dominate commercial law in the North⁷ -- although the rules varied significantly across the region concerning the circumstances in which a purchaser of a slave later found to be in some sense defective (e.g., ill, insane, or prone to running away) could secure rescission of the transaction.⁸ Finally, in all jurisdictions

² The following four paragraphs are derived from William Fisher, *Ideology and Imagery in the Law of Slavery*, in PAUL FINKELMAN, ED., *SLAVERY AND THE LAW* (Madison House 1997), 43-85.

³ See Wilbert Moore, *Slave Law and the Social Structure*, J. NEGRO HIST. 171, 185-87 (1941). This rule represented a repudiation of the doctrine that governed the English law of villeinage.

⁴ For discussions of the modest differences between the colonies and states concerning how racial status is to be determined and how much "black blood" is essential to expose a person to enslavement (and other legal disabilities), see William W. Wiecek, *The Statutory Law of Slavery and Race in the Thirteen Mainland Colonies of British America*, 34 WM. & MARY Q. (3d ser.) 258 (1977); Paul Finkelman, *The Crime of Color*, TULANE L. REV. (forthcoming 1993).

⁵ See ANDREW FEDE, *PEOPLE WITHOUT RIGHTS: AN INTERPRETATION OF THE FUNDAMENTALS OF THE LAW OF SLAVERY IN THE U.S. SOUTH* 62ff (1992); ALAN WATSON, *SLAVE LAW IN THE AMERICAS* 74-75 (1989).

⁶ See, e.g., A. LEON HIGGINBOTHAM, *IN THE MATTER OF COLOR* (1978); PHILIP J. SCHWARZ, *TWICE CONDEMNED: SLAVES AND THE CRIMINAL LAWS OF VIRGINIA, 1705-1865* (1988); KENNETH STAMPP, *THE PECULIAR INSTITUTION* 206-16 (1956).

⁷ See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1760-1860* 180 (1977).

⁸ For descriptions of the spectrum of positions taken by the various states, see Andrew Fedé, *Legal Protection for Slave Buyers in the U.S. South: A Caveat Concerning Caveat Emptor*, 31 AM. J. LEG. HIST. 322 (1987); Judith Schafer, *"Guaranteed Against the Vices and Maladies Prescribed by Law": Consumer Protection, the Law of Slave Sales, and the Supreme Court in Antebellum Louisiana*, 31 AM. J. LEG. HIST. 306 (1987); Ariella

slaves were deprived of many civil rights and liberties: they could not make contracts or other legally binding choices,⁹ sue or be sued,¹⁰ acquire property,¹¹ legally marry,¹² or (with rare exceptions) testify against whites.¹³

In several other respects, however, the law of slavery was inconsistent or incoherent. Many issues were handled differently in the various states. For example, in Virginia and South Carolina, slaves prosecuted for serious crimes received few of the procedural protections available to white defendants;¹⁴ in Louisiana, Georgia, Delaware, and Maryland, slave defendants were given more protections but not as many as whites;¹⁵ and in Alabama, Florida, Mississippi, North Carolina, and Tennessee, the courts could claim with some plausibility that, "whenever life is involved, the slave stands upon as safe ground as the

Gross, "'Pandora's Box': Breach of 'Moral Qualities' Warranty in Slave Law in the Deep South, 1793-1866" 6-10 (unpublished paper 1993).

⁹ See, e.g., *Creswell's Exec. v. Walker*, 37 Ala. 229, 234-35 (1861); A. Leon Higginbotham and Barbara Kopytoff, *Property First, Humanity Second: The Recognition of the Slave's Human Nature in Virginia Civil Law*, 50 OHIO ST. L.J. 511, 525-28 (1989).

¹⁰ The one significant exception to this principle was that, in every state, slaves were permitted (usually through "next friends") to petition for freedom on the ground that they had been wrongfully enslaved. See, e.g., Act of 1740, Statutes at Large of South Carolina, vol. 7, pp. 397-417, sec. I; Act of June 18, 1822, sec. 76, Laws of Mississippi.

¹¹ See, e.g., Higginbotham & Kopytoff, *supra* note 9, 528-33; William E. Wiethoff, *The Logic and Rhetoric of Slavery in Early Louisiana Civil Law Reports* 12 LEGAL STUDIES FORUM 441, 448 (1988); *Love v. Brindle*, 7 Jones 560 (N.C. 1860). The only official exception to this rule was the willingness of some courts to defer, when administering decedents' estates, to the widespread custom of permitting slaves to keep the proceeds of crops grown on small garden plots. See *Waddill v. Martin*, 3 Ire. Eq. 562, 564-65 (N.C. 1845). Slaves in ancient Rome, by contrast, had much more extensive rights. Although technically they could not own property, they frequently were permitted to earn money and thereby accumulate a fund, called *peculium*--and even to use the fund to purchase their freedom. See ALAN WATSON, *ROMAN SLAVE LAW* 90ff (1987).

¹² See Margaret A. Burnham, *An Impossible Marriage: Slave Law and Family Law*, 5 LAW AND INEQUALITY 187 (1987); *Smith v. State*, 9 Ala. 990, 996 (1846) ("[T]he municipal law . . . does not recognize, for any purpose whatever, the marriages of slaves, and therefore there is no prohibition against the husband and wife being witnesses for, or against each other.").

¹³ See EUGENE GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* 33 (1972). The rare exceptions (seemingly inadvertent) are described in WATSON, *supra* note 5, at 73-74. This disability was explicitly based on race. Thus, free blacks and mulattoes typically were also forbidden to testify against whites, while slaves, free blacks and mulattoes were able to testify against each other.

¹⁴ See Flanigan, *Criminal Procedure in Slave Trials in the Antebellum South*, 40 J. SO. HIST. 537, 540-45 (1974); Higginbotham and Jacobs, *The "Law Only as an Enemy": the Legitimation of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia*, 70 N.C. L. REV. 969, 984-1016 (1992).

¹⁵ See Flanigan, *supra* note 14, at 545-46. Judith Schafer contends that, in Louisiana, slave defendants were treated very badly. *The Long Arm of the Law: Slave Criminals and the Supreme Court in Antebellum Louisiana*, 60 TULANE L. REV. 1247 (1986). However, many of her examples involve aspects of the criminal justice system that Louisiana inherited from the French and that were unfavorable to all defendants (not merely slaves), and she acknowledges that convictions of slaves were overturned with approximately the same frequency as convictions of whites. See *id.* at 1258-59. On balance, Flanigan's original assessment of the Louisiana system still seems accurate.

master."¹⁶ The rules governing manumission of slaves were equally diverse. In Georgia, for example, the legislature severely restricted private emancipations early in the nineteenth century, and, in almost all ambiguous situations, the courts ruled against slaves whose masters had sought to free them.¹⁷ In Tennessee, by contrast, slaveowners until the mid-1850s continued to enjoy several ways of freeing their slaves.¹⁸ The legal problems associated with the increasingly important system of slave leases provoked similarly divergent responses. In some states, if a leased slave ran away, became ill, or was injured or killed during the lease term, the lessee (in the absence of a relevant contractual provision) bore the resultant financial burden; in other states the lessor sustained the loss.¹⁹ On the issue of a master's financial responsibility for injuries his slaves caused to third parties, the positions adopted by the various states ranged from absolute liability (Louisiana) to liability only for specified sorts of misconduct by slaves (Arkansas and Missouri) to liability only if the slaves were acting pursuant to the master's specific directions or had been put in positions of public trust (South Carolina).²⁰ The states divided along different lines on the question of the applicability of the fellow-servant rule to slavery: most courts refused to exempt from liability the lessees of slaves who were injured through the negligence of other workers, but those in North Carolina and Alabama took the opposite stance.²¹

Doctrinal dissonance was not limited to inter-jurisdictional disputes; lawmakers within a given state frequently disagreed on how major issues involving slavery should be resolved. For example, the Tennessee courts often upheld slave manumissions that plainly violated restrictions the state legislature had sought to impose.²² In South Carolina, Mississippi,

¹⁶ The quotation is from *Cato v. State*, 9 Fla. 163, 173-74 (1860). For documentation of the extensive protections provided slaves (especially at the appellate level) in these states, see Reuel E. Schiller, *Conflicting Obligations: Slave Law and the Late Antebellum North Carolina Supreme Court*, 78 VIRGINIA L. REV. 1207, 1222 (1992); Flanigan, *supra* note 14; A.E. Keir Nash, *The Texas Supreme Court and the Trial Rights of Blacks, 1845-1860*, 58 J. AM. HIST. 622, 628-29 (1971); A.E. Keir Nash, *Negro Rights, Unionism, and Greatness on the South Carolina Court of Appeals: The Extraordinary Chief Justice John Belton O'Neill*, 21 S.C. L. REV. 141 (1969); A.E. Keir Nash, *Fairness and Formalism in the Trials of Blacks in the State Supreme Courts of the Old South*, 56 VA. L. REV. 64 (1970).

¹⁷ See A.E. Keir Nash, *Reason of Slavery: Understanding the Judicial Role in the Peculiar Institution*, 32 VAND. L. REV. 7 (1979); Schiller, *supra* note 16, at 1235. But cf. David J. Grindle, *Manumission: The Weak Link in Georgia's Law of Slavery*, 41 MERCER L. REV. 701 (1990) (identifying various contexts in which the Georgia rules on manumission were not unusually harsh).

¹⁸ See Howington, *"Not in the Condition of a Horse or an Ox,"* 34 TENN. HIST. Q. 249 (1975); Nash, *supra* note 17.

¹⁹ See David J. Langum, *The Role of Intellect and Fortuity in Legal Change: An Incident from the Law of Slavery*, 28 AM. J. LEG. HIST. 1, 3-4, 13-14 (1984).

²⁰ See Terrence F. Kiely, *The Hollow Words: An Experiment in Legal-Historical Method as Applied to the Law of Slavery*, 25 DEPAUL L. REV. 842 (1976); Thomas D. Morris, *"As if the Injury Was Effected by the Natural Elements of Air, or Fire": Slave Wrongs and the Liability of Masters*, 16 LAW & SOCIETY REVIEW 569 (1982); Schafer, *supra* note 15, 1257-61.

²¹ See Kiely, *supra* note 20, at 871-76; Frederick Wertheim, *Slavery and the Fellow Servant Rule: An Antebellum Dilemma*, 61 N.Y.U. L. REV. 1112, 1129-36 (1986); Paul Finkelman, *Slaves as Fellow Servants: Ideology, Law, and Industrialization*, 31 AM. J. LEG. HIST. 269 (1987).

²² See Howington, *supra* note 18; Schiller, *supra* note 16, at 1235.

and Virginia, the judges were divided among themselves; some upheld highly questionable manumissions, while others denounced all efforts to free slaves.²³

Finally, the entire body of slave law was riven by three fundamental tensions. The first concerned the legal status of slaves. In most contexts, they were treated as things – objects or assets to be bought and sold, mortgaged and wagered, devised and condemned.²⁴ Sometimes, however, they were treated as persons – volitional, feeling, and responsible for their actions.²⁵ In the words of the Supreme Court of Mississippi, "[i]n some respects slaves may be considered as chattels, but in others, they are regarded as men."²⁶ The second tension concerned the relationship between slavery and the rule of law. In many connections, courts and legislatures took the position that the control and discipline of slaves was primarily the responsibility of their masters and that the law ought neither reinforce nor interfere with masters' exercise of their power.²⁷ In other settings, however,

²³ Until the mid-1840s, South Carolina law pertaining to manumission resembled that of Tennessee; the legislature adopted a series of statutes hostile to emancipation, which the judiciary resisted or narrowly construed. See Linda O. Smiddy, *Judicial Nullification of State Statutes Restricting the Emancipation of Slaves: A Southern Court's Call for Reform*, 42 S.C. L. REV. 589, 598-630 (1991). After, the mid-1840s, however, the consensus among the judges broke down. Compare, e.g., *McLeisch v. Burch*, 3 Stro. Eq. 225 (1849) (upholding a bequest of a slave accompanied by instructions that he should be held in nominal service only--in defiance of an 1841 statute declaring such trusts invalid), with, e.g., *Gordon v. Blackman*, 1 Rich. Eq. 61, 61 (1844) (Johnston, Ch.) (bemoaning the proliferation of cases in which "the superstitious weakness of dying men, proceeding from an astonishing ignorance of the solid moral and scriptural foundations upon which the institution of slavery rests, and from a total inattention to the shock which their conduct is calculated to give to the whole frame of our social polity, induces them, in their last moments, to emancipate their slaves, in fraud of the indubitable and declared policy of the State"); see also WATSON, *supra* note 5, at 75-82. For an analysis of the handling of the same problems in Mississippi, see MEREDITH LANG, *DEFENDER OF THE FAITH: THE HIGH COURT OF MISSISSIPPI, 1817-1875* 69-93 (1977) (concluding that "schizophrenia within the high court . . . resulted in two conflicting lines of cases on the issue of manumission: one holding the policy of the state to be merely against the increase of free Negroes in Mississippi, but not against their manumission elsewhere; and the other, opposed to emancipation in any form, anywhere"). The judges in Virginia were not quite so sharply divided, but still differed on substantial issues. See Nash, *supra* note 17, at 127-56.

²⁴ See, e.g., STAMPP, *supra* note 6, at 201; WINTHROP JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812* 71-82 (1968); HIGGINBOTHAM, *supra* note 6, at 56-58. Initially, slaves were classified in some colonies as real property. By the middle of the eighteenth century, however, they were treated in most jurisdictions as chattels personal. But see *Cooke v. Cooke*, 3 Littell 238 (Ky. 1823) (treating a slave as real property for the purposes of inheritance).

²⁵ See, e.g., *State v. Simmons* (S.C. 1794) ("Negroes . . . have wills of their own, capacities to commit crimes; and are responsible for their offenses against society."); *United States v. Amy*, 24 F.Cas. 792 (C.C. D. Va. 1859) (No. 14,445); *Commonwealth v. Chapple* (Va. 1811) (upholding the conviction of a white defendant under a statute proscribing homicide of a "person" on the ground that "a slave in this country has been frequently decided to be legally and technically a person on whom a wrong can be inflicted."). For secondary studies emphasizing this tension, see Moore, *supra* note 3; Kiely, *supra* note 20, at 853-58.

²⁶ *State v. Jones*, 1 Walker 83, 84 (Miss. 1820). For other judicial acknowledgments of this tension, see, e.g., *State v. Williams*, 9 Iredell 140, 145-47 (N.C. 1848); *State v. Jim*, 3 Jones 348, 352 (N.C. 1856); *State v. Maner*, 2 Hill 453, 454-55 (S.C. 1854); *Elijah v. State*, 1 Humphreys 102, 103-04 (Tenn. 1839).

²⁷ See *Miller v. Porter*, 8 B. Mon. 282, 283 (Ky. 1848) ("The running away of a slave is not a public but a private offence, the prevention and punishment of which the law leaves to the owner, without making any provision in aid of his rights, except that when a runaway slave is taken up by a stranger, he may be placed in a county jail where he may be reclaimed by the owner; or if not reclaimed within a certain period, may be

lawmakers insisted that slaves enjoyed the protection of – or were subject to punishment by – the state; private resolution of disputes with slaves was consequently discouraged.²⁸ The last tension pertained to interracial sexual relations. Lawmakers ostensibly sought to maintain a rigid separation of blacks and whites. So, for example, they banned racial intermarriage, established severe penalties for interracial fornication and adultery, and frequently in related contexts expressed repugnance for "commingling" of the races. In practice, however, while sexual relations between black men and white women typically were strongly condemned and harshly punished,²⁹ both consensual and forcible sex between white men and black women was commonly tolerated.³⁰

sold for his benefit. . . . The law presumes that the owner is competent to control and manage his own slave, and leaves the expense and responsibility of so doing to be borne or provided for by him."); *State v. Boozer*, 5 Strohart 21 (S.C. 1850) ("[A] judicious freedom of administration in our police law for the lower order, must always have respect to the confidence which the law reposes in the discretion of the master, the presence of the proprietor, his loyalty to the sympathies and the policy that involve our common interests, peace and safety."); *Ann v. State*, 11 Humph. 159, 164-65 (Tenn. 1850) ("[T]he charge puts the disobedience to the master's order, on the same footing with a violation of a command or prohibition of the law. This is a great mistake. Such violation of the master's order, is not an 'unlawful act' in the sense of the rule above stated. It is no offence against the law of the land: nor is it cognizable by any tribunal created by law. It is an offence simply against the private authority of the master, and is cognizable and punishable alone in the domestic forum."); ROBERT FOGEL AND STANLEY ENGERMAN, *TIME ON THE CROSS: THE ECONOMICS OF AMERICAN NEGRO SLAVERY* 144-47 (1974); EDWARD AYERS, *VENGEANCE AND JUSTICE: CRIME AND PUNISHMENT IN THE NINETEENTH-CENTURY AMERICAN SOUTH* 133 (1984).

²⁸ See, e.g., *Witsell v. Earnest*, 1 N. & McC. 182, 183-84 (S.C. 1818); *State v. Hale*, 2 Hawks 454 (N.C. 1823); *State v. Jarrott*, 1 Iredell 76 (N.C. 1840); *Doughty v. Owen*, 24 Miss. 404, 407-09 (1852); *Jordan v. State*, 32 Miss. 382, 387 (1856); *Polk, Wilson & Co. v. Fancher*, 1 Head 336, 338-39 (Tenn. 1858). Cf. Act for the better Ordering and Governing of Negroes and Slaves (S.C. 1712), sec. 19 (penalizing masters for failing to impose on runaway slaves statutorily prescribed penalties).

²⁹ See, e.g., *Armstrong v. Hodges*, 2 B. Mon. 69, 70 (Ky. 1841); *State v. Fore*, 1 Iredell 378 (N.C. 1841); *Midgett v. McBryde*, 3 Jones 21 (N.C. 1855). There were, however, some exceptions to this pattern -- cases in which the judges were remarkably tolerant of sexual relations between white women and black men. *Walters v. Jordan*, 12 Iredell 170 (N.C. 1851); *Smith v. State*, 39 Ala. 554 (1865).

³⁰ See Applebaum, *Miscegenation Statutes: A Constitutional and Social Problem*, 53 GEORGETOWN L.J. 49 (1964); Karen Getman, *Sexual Control in the Slaveholding South: The Implementation and Maintenance of a Racial Caste System*, 7 HARV. WOMEN'S L.J. 115 (1984); A. Leon Higginbotham and Barbara K. Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 GEO. L.J. 1967 (1989). The most apparent manifestation of the ubiquity of miscegenation was the growing population of mulattoes. By the Civil War, approximately ten per cent of the "black" population in the South had some white blood. See SALLY G. McMILLEN, *SOUTHERN WOMEN: BLACK AND WHITE IN THE OLD SOUTH* 22 (1992). Cf. *Richmond v. Richmond*, 10 Yerg. 343 (Tenn. 1837) (granting a divorce to a wife whose husband had committed adultery with a slave, but showing little distaste for the husband's behavior); *Hubbard's Will*, 6 J.J. Marsh 58 (Ky. 1831) (upholding--and commending--a bequest by a white man to his illegitimate slave daughter); *Patton v. Patton*, 5 J.J. Marsh 389 (Ky. 1831); *Carrie v. Cumming*, 26 Ga. 690 (1859); *Jeter v. Jeter*, 36 Ala. 391 (1860) (strongly condemning a husband's adultery but showing little concern for the fact that it was interracial).

The Facts of Mann

The events that gave rise to the famous case of *State v. Mann* occurred against this complex historical backdrop.³¹ Lydia, whose last name is not known, was a slave owned by Thomas Jones, a white man who lived in North Carolina's coastal and agrarian Chowan County. Jones was a farmer, and most of his 21 slaves worked his 640 acres. Together, these slaves, all black, had a market value of \$4,525.

When Thomas Jones died in November 1822, he left no will. Like all his possessions, Lydia passed to his heirs. For two years, Lydia worked for Thomas' wife, Temperance Jones, as a domestic slave. When Temperance died in 1824, fifteen-year-old Elizabeth Jones inherited eighteen-year-old Lydia.

Because Elizabeth was a minor, she was assigned a guardian: her older sister's husband and prominent local citizen, Josiah Small. Like Elizabeth's father, Small was a Chowan County farmer who owned significant acreage and several slaves — seventeen by 1830. As guardian, Small was responsible for Elizabeth and her estate.

In antebellum North Carolina, leases of slaves were reasonably common. Typically, a lessee agreed to provide the slave basic provisions, to pay rent to the owner, and to return the slave to the owner at the end of the leasehold in a condition no worse than at the outset. Beginning in 1825, Small, acting on Elizabeth's behalf, hired out Lydia annually, recording each transaction as income in Elizabeth's estate papers. From this arrangement, Elizabeth earned \$38.25 in 1827. In 1828, Small hired Lydia out to John Mann, for whom she continued to work into 1829.

Mann was white, a widowed sailor over fifty, who owned no land and little property. In 1812, he had spent twenty days in debtor's prison. He lived in the poorer section of Edenton, a century-old town on Albemarle Sound, with a population of roughly 1500 people. Lydia worked as Mann's domestic slave.

Around March 1, 1829, Mann shot Lydia. He later explained: Lydia had erred in some way, so Mann had punished her. He did not say whether this punishment was verbal or physical, frequent or rare, sexual or not, but he said Lydia resisted the punishment and fled, a response that "frustrated" him. So Mann called for his gun, which was brought to him, and with it he shot after Lydia. She was hit but lived and returned to Small's home, where she told of what happened.

No medical records describe the nature of Lydia's injury. Whatever their extent, they were sufficient for Small, on behalf of Elizabeth, to urge the solicitor of Chowan County's Superior Court to bring a criminal case against Mann.

In the spring of 1829, a Grand Jury advanced the case to trial. A jury of twelve white men, some of whom owned hundreds of acres and slaves, was empanelled. During the trial,

³¹ The following account has been distilled by Elyssa Spitzer from Sally Greene, *State v. Mann Exhumed*, 87 N.C. L. Rev. 701 (2009).

Mann acknowledged that he had shot Lydia but argued that the shooting was not criminal because, as Lydia was a slave and he was a master, she was property and he could punish her as he saw fit. The judge instructed the jury that Mann, as a hirer, had “special property” in Lydia. These special rights were distinguishable from full property rights held by a slave’s owner. The jury found Mann guilty of assault and battery.

Mann appealed to the North Carolina Supreme Court. The Court’s opinion, written by Judge Thomas Ruffin, follows.

The State v. John Mann
13 N.C. 263 (1829)

- 1 The Defendant was indicted for an assault and battery upon Lydia, the slave of one Elizabeth Jones.
- 2 On the trial it appeared that the Defendant had hired the slave for a year – that during the term, the slave had committed some small offence, for which the Defendant undertook to chastise her – that while in the act of so doing, the slave ran off, whereupon the Defendant called upon her to stop, which being refused, he shot at and wounded her.
- 3 His honor Judge DANIEL charged the Jury, that if they believed the punishment inflicted by the Defendant was cruel and unwarrantable, and disproportionate to the offence committed by the slave, that in law the Defendant was guilty, as he had only a special property in the slave.
- 4 A verdict was returned for the State, and the Defendant appealed.
- 5 RUFFIN, Judge.-- A Judge cannot but lament, when such cases as the present are brought into judgment. It is impossible that the reasons on which they go can be appreciated, but where institutions similar to our own, exist and are thoroughly understood. The struggle, too, in the Judge's own breast between the feelings of the man, and the duty of the magistrate is a severe one, presenting strong temptation to put aside such questions, if it be possible. It is useless however, to complain of things inherent in our political state. And it is criminal in a Court to avoid any responsibility which the laws impose. With whatever reluctance therefore it is done, the Court is compelled to express an opinion upon the extent of the dominion of the master over the slave in North-Carolina.
- 6 The indictment charges a battery on Lydia, a slave of Elizabeth Jones. Upon the face of the indictment, the case is the same as the State v. Hall. (9 N.C. 582, 2 Hawks 582.) No fault is found with the rule then adopted; nor would be, if it were now open. But it is not open; for the question, as it relates to a battery on a slave by a stranger, is considered as settled by that case. But the evidence makes this a different case. Here the slave had been hired by the Defendant, and was in his possession; and the battery

was committed during the period of hiring. With the liabilities of the hirer to the general owner, for an injury permanently impairing the value of the slave, no rule now laid down is intended to interfere. That is left upon the general doctrine of bailment. The enquiry here is, whether a cruel and unreasonable battery on a slave, by the hirer, is indictable. The Judge below instructed the Jury, that it is. He seems to have put it on the ground, that the Defendant had but a special property. Our laws uniformly treat the master or other person having the possession and command of the slave, as entitled to the same extent of authority. The object is the same – the services of the slave; and the same powers must be confided. In a criminal proceeding, and indeed in reference to all other persons but the general owner, the hirer and possessor of a slave, in relation to both rights and duties, is, for the time being, the owner. This opinion would, perhaps dispose of this particular case; because the indictment, which charges a battery upon the slave of Elizabeth Jones, is not supported by proof of a battery upon Defendant's own slave; since different justifications may be applicable to the two cases. But upon the general question, whether the owner is answerable *criminaliter*, for a battery upon his own slave, or other exercise of authority or force, not forbidden by statute, the Court entertains but little doubt. – That he is so liable, has never yet been decided; nor, as far as is known, been hitherto contended. There have been no prosecutions of the sort. The established habits and uniform practice of the country in this respect, is the best evidence of the portion of power, deemed by the whole community, requisite to the preservation of the master's dominion. If we thought differently, we could not set our notions in array against the judgment of every body else, and say that this, or that authority, may be safely lopped off. This has indeed been assimilated at the bar to the other domestic relations; and arguments drawn from the well established principles, which confer and restrain the authority of the parent over the child, the tutor over the pupil, the master over the apprentice, have been pressed on us. The Court does not recognize their application. There is no likeness between the cases. They are in opposition to each other, and there is an impassable gulf between them. – The difference is that which exists between freedom and slavery – and a greater cannot be imagined. In the one, the end in view is the happiness of the youth, born to equal rights with that governor, on whom the duty devolves of training the young to usefulness, in a station which he is afterwards to assume among freemen. To such an end, and with such a subject, moral and intellectual instruction seem the natural means; and for the most part, they are found to suffice. Moderate force is superadded, only to make the others effectual. If that fail, it is better to leave the party to his own headstrong passions, and the ultimate correction of the law, than to allow it to be immoderately inflicted by a private person. With slavery it is far otherwise. The end is the profit of the master, his security and the public safety; the subject, one doomed in his own person, and his posterity, to live without knowledge, and without the capacity to make any thing his own, and to toil that another may reap the fruits. What moral considerations shall be addressed to such a being, to convince him what, it is impossible but that the most stupid must feel and know can never be true--that he is thus to labour upon a principle of natural duty, or for the sake of his own personal happiness, such services can only be expected from one who has no will of his own; who surrenders his will in implicit obedience to that of another. Such obedience is the consequence only of uncontrolled authority over the body. There is nothing else which

can operate to produce the effect. The power of the master must be absolute, to render the submission of the slave perfect. I most freely confess my sense of the harshness of this proposition, I feel it as deeply as any man can. And as a principle of moral right, every person in his retirement must repudiate it. But in the actual condition of things, it must be so. There is no remedy. This discipline belongs to the state of slavery. They cannot be disunited, without abrogating at once the rights of the master, and absolving the slave from his subjection. It constitutes the curse of slavery to both the bond and free portions of our population. But it is inherent in the relation of master and slave.

- 7 That there may be particular instances of cruelty and deliberate barbarity, where, in conscience the law might properly interfere, is most probable. The difficulty is to determine, where a Court may properly begin. Merely in the abstract it may well be asked, which power of the master accords with right. The answer will probably sweep away all of them. But we cannot look at the matter in that light. The truth is, that we are forbidden to enter upon a train of general reasoning on the subject. We cannot allow the right of the master to be brought into discussion in the Courts of Justice. The slave, to remain a slave, must be made sensible, that there is no appeal from his master; that his power is in no instance, usurped; but is conferred by the laws of man at least, if not by the law of God. The danger would be great indeed, if the tribunals of justice should be called on to graduate the punishment appropriate to every temper, and every dereliction of menial duty. No man can anticipate the many and aggravated provocations of the master, which the slave would be constantly stimulated by his own passions, or the instigation of others to give; or the consequent wrath of the master, prompting him to bloody vengeance, upon the turbulent traitor – a vengeance generally practised with impunity, by reason of its privacy. The Court therefore disclaims the power of changing the relation, in which these parts of our people stand to each other.
- 8 We are happy to see, that there is daily less and less occasion for the interposition of the Courts. The protection already afforded by several statutes, that all-powerful motive, the private interest of the owner, the benevolences towards each other, seated in the hearts of those who have been born and bred together, the frowns and deep execrations of the community upon the barbarian, who is guilty of excessive and brutal cruelty to his unprotected slave, all combined, have produced a mildness of treatment, and attention to the comforts of the unfortunate class of slaves, greatly mitigating the rigors of servitude, and ameliorating the condition of the slaves. The same causes are operating, and will continue to operate with increased action, until the disparity in numbers between the whites and blacks, shall have rendered the latter in no degree dangerous to the former, when the police now existing may be further relaxed. This result, greatly to be desired, may be much more rationally expected from the events above alluded to, and now in progress, than from any rash expositions of abstract truths, by a Judiciary tainted with a false and fanatical philanthropy, seeking to redress an acknowledged evil, by means still more wicked and appalling than even that evil.
- 9 I repeat, that I would gladly have avoided this ungrateful question. But being brought to it, the Court is compelled to declare, that while slavery exists amongst us in its present state, or until it shall seem fit to the Legislature to interpose express enactments

to the contrary, it will be the imperative duty of the Judges to recognize the full dominion of the owner over the slave, except where the exercise of it is forbidden by statute. And this we do upon the ground, that this dominion is essential to the value of slaves as property, to the security of the master, and the public tranquillity, greatly dependent upon their subordination; and in fine, as most effectually securing the general protection and comfort of the slaves themselves.

- 10 PER CURIAM. – Let the judgment below be reversed, and judgment entered for the Defendant.

Interpretation

When trying to make sense of the opinion in *Mann*, you might find it helpful to know a bit more about its author. Thomas Mann was born in 1787 in Virginia. He graduated from Princeton, then studied law as an apprentice to Archibald Murphey in North Carolina. During the early part of his career, he earned his living partly by practicing law in Hillsborough, North Carolina, and partly by farming. He was elected several times to the North Carolina legislature. Between 1816 and 1818, and again between 1825 and 1828, he served as a trial judge on the Superior Court. In 1829 (one month before his decision in *Mann*), he was appointed to the North Carolina Supreme Court. In 1833, the members of the Court elected him Chief Judge. He retired to his farm in 1852, but was reappointed to the Court in 1858. He again retired in 1859.

Like many farmers in North Carolina, Ruffin owned slaves. The scale and economic importance of his holdings is suggested by the petition he submitted in 1865 to President Johnson, requesting a pardon for his actions in support of the Confederacy during the Civil War. The relevant portions of the petition (in which he refers to himself in the third person) follow.³²

He further represents, that he was during and up to the close of the war the owner of more than one hundred Slaves, nearly all of whom were born his and raised by him; and furthermore had investments in Corporate and publick Stocks to a considerable amount which are now of little or no value in the market; so that his losses from the war will, directly or indirectly, amount probably to the sum of Two hundred and fifty Thousand dollars or more and the residue of property still held by him has been so reduced in value as to render it at least doubtful, whether it could be fairly assessed for taxation to \$20,000...

In conclusion then, he submits, that, considering the course of his life as herein set forth, his age, the motives for his actions, the condition of his family, his pecuniary losses already incurred, the state of the Country and the propriety of healing our political troubles by acts of Pardon and Oblivion, his be not a proper case for Executive interposition under the powers vested in the President by the Act of Congress: and therefore if any of his acts herein mentioned can be construed to amount to Treason, he asks for a full and free pardon therefor, or one on such other terms as may seem right and proper....

The published opinion, set forth above, was Ruffin's third draft. Clues concerning the thinking that underlay the decision may be obtained by comparing the final version to Ruffin's first two drafts, which appear below.³³

³² Source: The petition was located by Judge Leon Higginbotham in *THE PAPERS OF THOMAS RUFFIN, PUBLICATIONS OF THE NORTH CAROLINA HISTORICAL COMMISSION*, Volume 8, Part 4, 16-21.

³³ Source: J.G. DE ROULHE HAMILTON, ED., *THE PAPERS OF THOMAS RUFFIN*, Vol. IV. (Raleigh: Edwards & Broughton Printing Co., 1918) pp. 249-254.

First Draft

- 1 This is one of those cases which a Court will always regret being brought into judgment – One in which principles of policy urge the Judge to a decision in discord with the feelings of the man. But until the condition of our population be much changed or it shall seem fit to the Legislature to alter the rule, Courts are obliged, however reluctantly, to recognize the rights of the owner to full dominion over the Slave, as essential to their value as property, to the public peace as dependent upon their subordination and, indeed, while slavery in its present form shall continue to exist, as most effectually securing the general protection and comfort of the slave himself.
- 2 The indictment charges the defendant with an assault and battery on Lydia, a slave, the property of Elizabeth Jones. This brings the ease with in the rule established in the State v. Hall, 2 Hawks, 582. It is not intended to question what is there decided even if it were an open question and had not been decided. But it is not considered open. It is settled by that case. The question, here, is altogether different, upon the evidence. The slave had been hired by the defendant for the year 1825 from E. Jones; and the battery complained of was committed during that year. The liability of the defendant to the general owner for a permanent injury, impairing the value of the slave, caused by the excessive and wanton battery on her or other fault of the hirer is a distinct matter of consideration. There can be no doubt, that the common doctrine of bailments apply are applicable to such a study of facts. But in a criminal proceeding and in references to all other persons but the owner, the hirer and possessor of a slave, in relation to his rights and duties, is, for the time being, the owner. The case therefore presents the general question, whether the owner of a slave is responsible *criminaliter* for a battery upon his own slave or other exercise of authority or force over him, not expressly forbidden by status. Such a rule has not yet been established. This Court disclaims the power to lay down such a rule, or to enforce it, without it be first prescribed by the Legislature. The province of interposing between Master and Slave is too delicate, in our State of Society, to be assumed by Courts without the positive injunction of the lawmaker. This has been assimilated to the other domestic relations; and arguments drawn from the well established principles, which confer and restrain the authority of the Parent over the child, the Master over the apprentice and the tutor of the pupil, have pressed on us with zeal and ability. The Court cannot recognize their application. There is no likeness between the Cases. They are separated from each other by an impossible gulf. Without enlarging on the subject, it is enough to say that the differences between them is that, which exists between Freedom and Slavery. A contrast greater than that cannot be imagined. In the one case the subject of government is one born to equal rights with the governor, his offspring or his ward, young, helpless or inexperienced, the object of affection or benevolence, confided by providence or the law to the charge of another to be trained for usefulness in a station among freemen – the end in view, the happiness of the youth, the means, morals and intellectual instruction which, for the most part, are found to suffice. Force is superadded, only to make the former effectual in cases of intractability. In the other, the end is the profit of the master and the security of his person, and the public safety. And who is the subject of this authority? One who has only intelligence and moral feeling enough to make his service reluctant to enable him to understand that the laws,

which condemn him to toil for another is unjust, to condemn that injustice and abhor the master who avails himself of it. Can he who has these consciousnesses be prevailed on by moral considerations to perform the functions of servitude? What moral consideration can be presented to him? Is it that there is to be no end to the degradation of himself and his descendants – that, thro' time, his offspring as well as himself are to have no will of their won and that their exertions are never to yield fruit but for a master? Surely every passion, good or bad, of the human heart combine to rebuke the folly of him, who advises or expects the Slave to serve his master upon a principle of natural duty. A submissive and entire obedience to the will of the Master can alone be expected to produce that subordination and those efforts of labor exacted from the slave. That submission of will can only follow from the power of the Master over the Body – a power which the Slave must be made sensible is not usurped, but conferred at least by the law of man, if not of God. Restraint, therefore, constant, vigilant, not unfrequently severe and exemplary and painful punishments of the slave is the unwelcome, and the necessary task of the Master. This discipline belongs to the state of slavery. They cannot be disunited without abrogating all the rights of the master and annulling the duties of the slave. It makes the curse of slavery both to the bond and the free portion of our population. But in the actual condition of things, there is no remedy. The power of the mater must be as strong and as absolute as the submission of the Slave must be unconditional and implicit. It is inherent in the relation of Master and Slave.

- 3 It is with pride as Citizens and sincere joy as men that we observe every day improvements in the condition of slaves. The Legislature compels the owner to provide a comfortable subsistence for them, and gives him the same security of life which belongs to a free man: The Courts protect him from the cruelty and abuse of a stranger. Public opinion, in accordance with the humanity of the laws, demands a mitigation of the rigors of slavery, which has not been without the happiest effects upon the feelings of Masters, who now, generally, practice towards the black more mildness than formerly and as much indulgence as is consistent with the true interests of both classes and the common safety.

Second Draft

- 1 It is to be lamented when such cases as the present are brought into judgment. It is impossible that the reason on which they go can be appreciated, but when institutions similar to our own exist and are thoroughly understood. Besides, the struggle in the Judge's own breast between the feelings of the man and the convictions of the Magistrate is a severe one – presenting a strong temptation to put aside such questions if it be possible. It is useless however to complain of things inherent in our political State. And it is criminal in a Court to avoid any duty which the laws impose. While therefore Slavery exists among us or until it shall seem fit to the Legislature to interpose express enactments to the contrary, it will be the imperative duty of the Judges to refrain from laying down any rule, which can diminish that dominion of the Master, which is necessary to enforce the obedience and exact the services of the Slave accorded by our law to the owner.

- 2 The indictment charges a battery by the defendant on Lydia, the slave of E. Jones. Upon the face of the indictment, the case is the same as *the State v. Hall*, 2 Hawks, 582. – That case is considered as settling this question, as it relates to a stranger. The Court finds no fault with the rule then adopted, even if it were now open. But it is then put to rest. The evidence makes this a different case. Here the slave had been *hired* by the defendant and was in his possession, and the battery was committed during the period of hiring. With the liabilities of the hirer and the general owner for an injury to the slave permanently impairing the value, no rule now to be adopted can interfere. The common doctrine of bailment would, no doubt, apply to that state of facts, modified to the emergency. The enquiry is, whether a cruel and unreasonable battery on a slave, by the hirer, is indictable. The Judge below instructed the Jury, that it is. It seems in the charge, to be put upon the ground, that the defendant had been a special property.
- 3 Our laws uniformly treat the Master, overseer or other person having the possession and command of the slave, as entitled to the same authority. The object is the same – the services of the slave: And the same powers must be confided. In a criminal proceeding and in reference to all other persons but the general owner, the hirer and possessor of a slave in relation to both rights and duties, is, for the time being, the owner. This opinion would dispose of the particular case before us; because this indictment, which charges a battery upon the slave of E. Jones, is not supported by proof of a battery upon the defendant's own slave, since, certainly, different kinds of justification are applicable to answerable *criminaliter* for a battery upon his own slave or other exercise of authority or force on him, not forbidden by Statute, the Court decided: nor even, as far is known, has been before contended. There have been no prosecutions of the sort. The established habits and uniform practices of the Country, in this respect, is the best evidence of the portion of Power deemed by the whole Community, requisite to the preservation of the Master's dominion. We can not set out notions in array against the judgment of everybody else and say that this or that authority may be safely lopped off. This has, indeed, been assimilated at the Bar to the other domestic relations; and arguments drawn from the well established principles which confer and restrain and authority of the Parent over the child, the Tutor over the Pupil, and the Master over the Apprentice have been pressed on us. The Court does not recognize their application. There is no likeness between the cases. They are opposition to each other and there is an impassable gulf between them. The difference is that, which exists between Freedom and Slavery – and a greater cannot be imagined. In the one, the end in view is the happiness of the youth, born to equal rights with that governor, on whom the duty devolves of training the young to usefulness in that Station which he is afterwards to assume among free men. To such, an end and with such a subject moral and intellectual instruction seem the natural means; and for the most part, they are found to suffice. Fore is superadded, only to make the others effectual. With slavery it is far otherwise. The end is, the profit of the Master, his security, and the public safety: The subject, one doomed in his own person and his posterity to live without knowledge and without capacity to make anything his own and to toil, that another may reap the fruits. What moral consideration shall be addressed to such a being, to convince him what it is impossible but that the most stupid must know can never be true, -- that he is thus to labor upon a principle of

natural duty or for the sake of his personal happiness? Surely such services can be expected only from one, who has no will of his own; who surrenders his will, in implicit obedience to that of another. Such obedience is the consequence only of uncontrolled authority over the Body. The power of the master must be absolute to render the submission of the slave perfect. I most freely and fully confess my sense of the harshness of this position. I feel it as deeply as any man can and as a principle of moral right every one in his retirement must repudiate and condemn it. But in the actual conditions of things, there is no remedy. This discipline belongs to the State of Slavery. They cannot be disunited without abrogating at once the rights of the Master and destroying the subjugation of the slave. It constitutes the curse of slavery to both the bond and free portions of our population. But it is inherent in the relation of Master and Slave.

- 4 That there may be particular cases of cruelty and deliberate barbarity where, is conscience, the law might properly interfere is most probable. The difficulty is to determine which is the proper case. Merely in the abstract, it may be asked, what power of the master accords with right? The answer will probably be found to sweep away all. The truth is, that every consideration forbid their being brought into discussion before Courts of justice. The Slave, to remain a slave, must be made sensible that there is no appeal from his master and that his power is, in no instance usurped but is conferred by the laws of man at least, if not the law of God. The danger would be great indeed, if the tribunals of justice should be called on to graduate the punishment appropriate to every temper and dereliction of menial duty. We are happy to see, that there is daily less and less occasion for their interposition. The protection already afforded by sundry statutes, the private interest of the owner, the benevolences towards each other seated in the hearts of those who have been born and bred together, the frowns and deep execrations of the Community upon the barbarian who is guilty of excessive and brutal cruelty to his unprotected slave, all combined, have produced a mildness of treatment and an attention of the comforts of that unfortunate class, greatly mitigating the rigors of slavery and ameliorating the condition of the slaves. The same causes will continue to produce and enlarge the same effects, until the disparity between the numbers of the whites and blacks shall leave the latter without power dangerous to the others, when the police now existing may be further relaxed. This result, much to be desired, may be much more rationally expected from the events above alluded to and now in progress than from any rash expositions of abstract truths by a Judiciary tainted with a fanatical philosophy and philanthropy.
- 5 I repeat therefore, that we would gladly have avoided this ungrateful question. But Courts are often compelled to set on principles, which outrage individual feeling. This is one instance of it. We are obliged therefore to declare, that, until the Legislature shall otherwise order the Courts must recognize the rights of the owner to full dominion over the person of the Slave, unless restrained in particular instances by Statute. And this we do upon the ground, that such dominion is essential to their value as property and to the public peace, greatly dependent upon their subordination: and while slavery shall continue to exist in its present form as most effectually securing the general protection and comfort of the Slave – Let there be a new trial.

The Fate of Lydia

Like the overwhelming majority of slaves in the United States, Lydia left no trace in the written record. As a result, we know nothing about her life other than the bare facts recited above. In particular, we have no information concerning either the impact on her of Mann's attack or how she fared after the final resolution of the case.

However, a few clues concerning what might have been her experiences can be gleaned from the ways in which analogous episodes were described in surviving slave narratives. Perhaps the best of those narratives was written by Harriet A. Jacobs. Her remarkable book, *Incidents in the Life of a Slave Girl*, written in 1857 and first published in 1861, contains many accounts of punishments imposed on slaves. The following passage is representative:

Dr. Flint was an epicure. The cook never sent a dinner to his table without fear and trembling: for if there happened to be a dish not to his liking, he would either order her to be whipped, or compel her to eat every mouthful of it in his presence. The poor, hungry creature might not have objected to eating it; but she did object to having her master cram it down her throat till she choked.

They had a pet dog, that was a nuisance in the house. The cook was ordered to make some Indian mush for him. He refused to eat, and when his head was held over it, the froth flowed from his mouth into the basin. He died a few minutes after. When Dr. Flint came in, he said the mush had not been well cooked, and that was the reason the animal would not eat it. He sent for the cook, and compelled her to eat it. He thought that the woman's stomach was stronger than the dog's; but her sufferings afterwards proved that he was mistaken. This poor woman endured many cruelties from her mater and mistress; sometimes she was locked up, away from her nursing baby, for a whole day and night.

When I had been in the family for a few weeks, one of the plantation slaves was brought to town, by order of his master. It was near night when he arrived, and Dr. Flint ordered him to be taken to the work house, and tied up to the joist, so that his feet would just escape the ground. In that situation he was to wait till the doctor had taken his tea. I shall never forget that night. Never before, in my life, had I heard hundreds of blows fall, in succession, on a human being. His piteous groans, and his "O, pray don't massa," rang in my ear for months afterwards. There were many conjectures as to the cause of this terrible punishment. Some said master accused him of stealing corn; others said the slave had quarreled with his wife, in presence of the overseer, and had accused his master of being the father of her child. They were both black, and the child was very fair.

I went into the work house next morning, and saw the cowhide still wet with blood, and the boards all covered with gore. The poor man lived, and continued to quarrel with his wife. A few months afterwards Dr. Flint handed them both over to a slavetrader. The guilty man put their value into his pocket, and had the satisfaction of knowing that they were out of sight and hearing. When the mother was delivered into the trader's hands, she said, "You promised to treat me well." To which he

replied, “You have let your tongue run too far; damn you!” She had forgotten that it was a crime for a slave to tell who was the father of her child.³⁴

Perspectives on Legal History

There are myriad ways in which one might study and try to make sense of the development of legal doctrines and institutions. Summarized below are four families of approaches that have proven especially influential in the study of the legal history of the United States.

The most venerable of the four is sometimes known as “Progressive Evolutionary Functionalism.” Its foundation is a teleology, in which all societies (or at least American society) are seen as evolving slowly but inexorably toward increasingly productive and equitable versions of welfare capitalism and representative democracy. Generally speaking, the legal system is depicted as a facilitator of this evolution. More specifically, legal doctrines are adopted and discarded as they become more or less effective in meeting the needs of the changing economy, society, and polity. Legal historians who write in this vein (such as Arthur Corbin, the great contracts scholar; Roscoe Pound, a key figure in the development of Harvard Law School; and Patrick Atiyah, a prominent British legal historian) often explicitly analogize the development of the legal system to Darwinian conceptions of biological evolution.

The second family, sometimes known as instrumentalism, sees laws as tools or weapons used by groups to advance their interests. Historians who adopt this stance do not posit that either the legal system or society at large is evolving along a foreordained path. Rather, the directions in which they move are determined by the sum of the vectors brought to bear upon them by interest groups. There are many variants of this approach, with sharply different political valences. Histories in the vein of what might be called “pluralist instrumentalism” show how multiple competing interest groups sought to control particular sectors of the legal system. Histories in the vein of “ironic instrumentalism” emphasize the ways in which the efforts of interest groups to use the law to their advantage have gone awry, producing outcomes that disadvantage them. Other histories emphasize the disproportionate roles played in legal history by elites; in these, law is depicted as a vehicle of class wars, which are usually won by dominant or rising classes. Still other histories emphasize the ways in which legal doctrines and arguments are employed (consciously or subconsciously) by dominant groups to legitimate their continued dominance.

The third family of approaches is sometimes known as Descriptive Economic Analysis of Law (not to be confused with the better-known Normative Economic Analysis of Law). Historians who take this tack seek to show how and why the legal system (or at least the sector of the legal system shaped primarily by judges, instead of legislatures) has developed so as to promote ever more effectively economic efficiency – defined most often as aggregate consumer welfare, measured by peoples’ ability and willingness to pay for

³⁴ HARRIET A. JACOBS, INCIDENTS IN THE LIFE OF A SLAVE GIRL, WRITTEN BY HERSELF (Cambridge: Harvard University Press, 1987), 12-13.

goods, services, and states of affairs. A crisp statement of this perspective was provided by Judge Richard Posner in his pioneering book, *Economic Analysis of Law*:

[W]e have seen that the law of property, of contracts and commercial law, of restitution and unjust enrichment, of criminal and family law, and of admiralty law all can be cast in an economic form that explains the principal doctrines, both substantive and remedial, in these fields of (largely) judge-made law.... Those doctrines form a system for inducing people to behave efficiently, not only in explicit markets but across the whole range of social interactions.

Historians' explanations for how the legal system comes to function in this benign fashion vary. Some (like Posner) contend that most economic principles are common sensical, and that judges (especially those who in the nineteenth century were especially influential in crafting the common law) have been guided largely by common sense. Others argue that the common law is deeply rooted in custom, which in turn has evolved to promote efficient behavior. Still others suggest that efficient legal doctrines emerge (and inefficient doctrines die out) through a process of natural selection, which depends not on the wisdom of judges but on the incentives of litigants.

The fourth family draws its inspiration from methodologies developed in intellectual history, rather than from those developed in social, political, or economic history.³⁵ The most popular variants of this perspective have been structuralist legal history and contextualist legal history. The premises of the former are that all human thought is structured by language and thus that the job of an historian is to map the deep structure of the linguistic system that provided the vocabulary and thus organized the thinking of the members of a culture (or a discipline within a culture) in the past. Legal histories founded (in part) on this assumption include Duncan Kennedy's monumental study, *The Rise and Fall of Classical Legal Thought*, and Gregory Alexander's history of the law of trusts in the United States.³⁶ The premise of the second variant is that the meaning of any document is radically dependent upon the linguistic and conceptual systems in which the author moved when writing it. Legal histories founded on this assumption typically seek to locate legal documents and developments in the discursive and ideological contexts of their times – the vocabularies and belief systems that constrained the thoughts and actions of lawyers, lawmakers, and members of the public. So, for example, Herbert Hovenkamp traces the major developments in American constitutional law, labor law, and antitrust law during the late nineteenth and early twentieth centuries to the belief-system of classical political economy, while Reva Siegel locates the antebellum debate concerning legal recognition of

³⁵ For additional detail concerning this family of approaches, see William Fisher, *Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History*, 49 STAN. L. REV. 1065 (1997).

³⁶ Gregory Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189 (1985).

wives' domestic labor in three ideological contexts – utopian communitarianism; abolitionism; and the “separate spheres” ideology.³⁷

Discussion Questions

- (1) What could Ruffin (and his colleagues) have done?
- (2) What should Ruffin (and his colleagues) have done?
- (3) What motivated Ruffin to rule as he did?
- (4) Is the decision in *State v. Mann* consistent with the overall pattern of the law of slavery, described on pages 4-5, above?
- (5) Of the approaches to American legal history summarized on pages 16-17, which, if any, illuminates (a) the outcome of the case or (b) the reasoning in Ruffin's opinion?

³⁷ See HERBERT HOVENCAMP, ENTERPRISE AND AMERICAN LAW, 1836-1937 (1991); Reva B. Siegel, *Home as Work*, 103 YALE L.J. 1073 (1994).