Inconsistency, Contradiction, and Complete Confusion: The Everyday Life of the Law of Slavery

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THOMAS D. MORRIS. *Southern Slavery and the Law, 1619–1860.* Chapel Hill: University of North Carolina Press, 1996. Pp. x + 575. $49.95.

Forecasting earthquakes is a difficult business: locating fault lines that lie deep beneath the surface of the earth; estimating friction and force; predicting the effects of the cataclysm upon the world above. Though the job of historians is characterized by the same sorts of questions—isolating the grand threads of history that underlie their accounts; estimating the causal forces of evident tensions; relating deep structures to specific events—they seem at first to have a slightly easier task than do earthquake forecasters; after all, the events they describe have already happened. But look again, and the historian's job seems the harder one. For historians there is no simple chain of causation that can be used to explain every event, no certainty that an impulse comes from underground and that its effects will be evident on the surface, no agreed-upon account of *what* happened that points to a ready-made version of *why* it happened. The problem is human agency, and it makes the job of historians like predicting earthquakes at a time when people on the surface of the earth are dropping bombs on fault lines.

In the history of the law of slavery this problem has taken a particular form: that of relating the underlying circumstances—economic and ideolog-

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ical—of slavery to the specific events in the legislative chambers and courtrooms that gave the central institution of the antebellum South its peculiar legal shape. A generation of scholars has mapped the plate tectonics of the law of slavery. In the records of the criminal and civil courts of the antebellum South, they have found evidence of a society beset with practical and ideological tensions: evidence of a biracial social order in which not all nonwhites were slaves, of an archaic social order caught up in political and commercial revolution, of a property regime that treated human beings as possessions.

Watching these fault lines surface in the records of Southern courts, scholars who agree on little else have agreed that they are evidence of "contradictions," tensions too serious to be sustained indefinitely, tensions of the type that might cause a civil war. Or, put another way: tensions apparent in the daily life of slavery have acquired the status of contradictions when posed in light of the Civil War. For A. E. Kier Nash (1979, 93–184), for example, legal decisions made at a time when there was virtually no Southern discussion of abolishing slavery can nevertheless be described as "pro" or "anti" slavery on the basis of the presiding judge's subsequent support for secession or union. For Mark Tushnet (1981, 232), "latent" contradictions between capitalist and slave property regimes, incompletely resolved by efforts to codify a separate law of slavery, were made manifest in Southern slaveholders' eventual effort to "break free" from the bourgeois state onto which their social order was grafted (see also Fox-Genovese and Genovese 1983). For James Oakes (1990, 155–94), the Civil War came at the end of a history of day-to-day resistance to slavery that forced the Southern legal system into fitful recognition of slaves' legal personality. This "implicit threat" became a revolutionary reality as self-emancipating fugitives forced questions of comity and emancipation into Northern politics during the sectional crisis and Civil War.[1]

Never more so than in history books, stories are written around their endings, and by changing the ending, Thomas Morris has changed the argument. The issues taken up in *Southern Slavery and the Law* are the same as those treated by other scholars, but rather than casting the Civil War as the further expression of the underlying contradictions of slavery, Morris has posed it as a "constitutional crisis" (p. 432), an artificial end point to a set of ongoing changes occurring in the slave South. The progress of racism, liberal capitalism, Enlightenment humanitarianism, evangelical Christianity, and the self-protecting policy of the existing social order, Morris argues, were transforming the law of slavery—fitfully, inconsistently, and ultimately incompletely—but never in a way that indicated any underlying or unresolvable contradiction.

1. On the revolutionary implications of running away, see also Fields 1982, 164.

The general trends Morris describes are as follows. In laws regulating race and status, Southern lawmakers were moving from open recognition of hybridity and the existence of a significant free black population to legislated biracialism and the legally managed equivalence of "blackness" and slavery. In matters of commerce, the evolution was from equitable paternalism (looking behind a contract for the intentions of the parties) to capitalist formalism (strict adherence to the letter of the contract). In criminal law, from absolute subordination and slaveholder sovereignty in matters of slave discipline to humanitarian amelioration and (occasional) state intervention in the relations between masters and slaves, and fitful recognition of slaves' agency, legal personality, and attendant rights. And in manumission law, from notions of slaveholders' property rights comprehensive enough to include the right to manumit slaves to notions of public interest expansive enough to curtail that right.

Events that previous scholars have taken to be evidence of underlying contradictions—instances of state intervention in the affairs of supposedly sovereign slaveholders, for example, or courtroom recognitions of the humanity of people who were legally property, or the extension of rights to theoretically rightless slaves facing prosecution—stand here as evidence of interrupted transformations, frozen into jagged profile by the Civil War. At every turn Morris maps the rough edges that protruded from the smooth surface of change: inconstant doctrine between legal jurisdictions and ideological inconsistency between judges' decisions. For Morris, however, the law of slavery was the site not of violent collision but of grinding evolution—not contradiction but inconsistency. Indeed, Morris suggests in the conclusion to *Southern Slavery and the Law*, in the absence of the Civil War, slavery might have gradually (and presumably peacefully) evolved into "some other form of dependent labor" (p. 442). Inconsistency never made the law incoherent, Morris argues, because philosophical contradiction was often doing the work of practical transformation.

Inconsistency as an answer might seem like an anticlimax coming as it does on the heels of human cannibalism (A. Higginbotham 1978), judicial irresolution (Nash 1979), structural contradiction (Tushnet 1981; see also Fox-Genovese and Genovese 1983), fatal comity (Finkelman 1981), philosophical ambivalence (Oakes 1990), and outright hypocrisy (Fede 1992). But the achievement here is monumental. Morris has, far more than previous historians, told the story of the law of slavery in the terms of common law, treating "the law of slavery" as if both poles of the proposition mattered. For Morris the law was not simply a shadowy reflection of the logic of slavery but was itself an institution whose peculiar rules, categories, and precedents shaped the meaning and practice of slavery. By developing his analysis of slavery through the categories of common law—property, trusts and estates, contract law, criminal law—Morris has mapped the density of

the interchange between historiographical regions that are usually cast as mutually exclusive opposites: slavery and capitalism, slave law and common law, legal reasoning based on "humanity" and legal reasoning based on "interest."[2] Rather than focusing on how the law of slavery did not work, Morris has focused on how, in spite of (or perhaps because of) its broad inconsistencies and manifest absurdities, it did.

Morris's argument depends upon searching out how Southern judges made the categories of common law do the work of slavery, on case-by-case expositions and close consideration of various pieces of legal reasoning. Because of this technical detail, *Southern Slavery and the Law* is sometimes hard to follow; Morris's own argument occasionally disappears into a welter of technical terms, hard-won archival detail, and judicious consideration of existing scholarship. Whatever the difficulty of the reading, *Southern Slavery and the Law* is well worth the effort. The breadth of Morris's research, the detail of his state-by-state and judge-by-judge considerations of various legal problems, the acuity of his insistence on dismantling the philosophical "contradictions" that plagued Southern law in favor of the practical complexity of Southern lawmaking, combine to make this book the culmination of a generation of important scholarship on slavery, region, race, capitalism, law, and ideology in the courts.

While Morris has led the historiography of the law of slavery to a new destination, he has done so according to what is, basically, the same map used by his predecessors. As in accounts that emphasize "contradiction," the real action here occurs beneath the surface of the earth: racism, capitalism, humanitarianism, evangelicalism, and proslavery policy make their inevitable progress and are reflected in the law. The historical actors in this formulation are the judges upon whom Morris focuses, the men who (inconsistently) translated underlying transformation into positive law. In the final sections of this review—following sections on race law, commercial law, criminal law, and manumission law, which follow Morris's own division of the law of slavery and summarize his detailed findings—I offer an alternative viewpoint from which the law of slavery might be considered.

The problem with *Southern Slavery and the Law* is not so much its emphasis on the working out of practical transformations through evident philosophical contradictions or its focus on judge-made law, both of which are significant historiographical advances. The problem is, rather, a matter of perspective: Morris assumes that Southern judges were steadfastly and self-consciously making their way toward the culmination of the broad transformations that frame the argument of *Southern Slavery and the Law*. A map like that might be a useful tool for someone interested in forecasting earthquakes, but for someone interested in analyzing human behavior it might

2. See also Oakes 1990, which retains the language of ultimate contradiction between slavery and "liberal capitalism" while mapping constant interchange.

not be enough. A historian might do better to keep one eye on the road (see Bordieu 1977; de Certeau 1984; Kelley 1993; Holt 1995).

Viewing the law of slavery from the perspective of the immediate, contingent, and human manifestations of underlying economic and ideological structures, I argue, suggests that the "transformations" Morris maps continued to be experienced and contested locally long after they were "resolved" by the courts; that the law of slavery was as much the product of conjunctural pragmatism as it was of considered philosophy or concerted transformation; that the master languages of slavery were continually used by lawyers and litigants to contest its practice; that the social relations between and among slaveholders and nonslaveholders were embodied in and undermined by slaves; that slaves actively shaped the courtroom contests—contests that gave slavery its legal shape—which resulted from their agency and resistance; that slaves were able through everyday resistance to turn race against class—whiteness against slavery—in Southern courtrooms; and that rather than inconsistency or contradiction, the most prominent feature of the law of slavery was complete confusion.

RACE LAW

Southern Slavery and the Law begins where Morris believes slavery did: with race. Morris follows Winthrop Jordan (1968) in arguing that North American slavery was underwritten by the historical connotations of "blackness" and xenophobic reaction to "heathenism."[3] The bulk of Morris's work on race, however, suggests that if New World slavery was indeed founded upon an idea of blackness, it was a foundation that had continually to be rebuilt. Through the records of Southern courts from the early 17th to the mid-19th centuries, Morris traces the efforts of lawyers and legislators to codify into existence the evanescent racial idea upon which they had grounded their society.

In the first instance this meant dealing with "interracial" sexuality.[4] From the beginning in colonial Virginia, Morris argues, the sexual prerogatives of patriarchal slave ownership and the resultant offspring continually undermined the racial foundation of slavery.[5] Beginning with a 1662 Virginia law that was eventually imitated all over the South, those born to enslaved mothers followed the status of their mother: white men's transgressions were invisible before the law; their offspring were folded into the

3. For a contrasting view about the relation of slavery and race that underlies much of the following see Fields 1990.

4. This problem is posed strikingly in Tushnet 1981, 140–55, and taken up in greater detail in Hodes (forthcoming).

5. On sex, slaveholding, white patriarchy, and race see K. Brown 1996. For the antebellum period see Bardaglio 1995.

mother's slavery. But what about the children of white women and black men? The evidence, Morris argues, is unclear for the early colonial period, but after 1691 the mothers were fined—and, if they could not pay, their terms of service were extended—and the children bound to service until they reached the age of 31. That age was adjusted, first upward and then down, over the course of the colonial period, at the end of which the prescription of servitude was voided. What is interesting about these laws is the assumption of the mother's servitude: in the case of white women who were not bound to service, legislators and judges apparently preferred a silence mindful of the fictions of whiteness to a legal clarity that was not (see Hodes, forthcoming).

Over time, mixture and manumission produced tensions in the racial definition of slavery: not all slaves were black, and not all nonwhite people were slaves.[6] Meanwhile, through population increase and diffusion generally and the domestic slave trade specifically, it became more difficult to place the status of individuals by tracing that of their mothers. Throughout the 18th and 19th centuries many Southern states responded by enacting laws that attempted to establish presumptions of status (slave or free) based upon measurements of racial mixture. These laws stabilized elusive hybridity into degrees of the binary opposition between black and white by establishing legal standards based on the cultural fiction of "black blood": halves, fourths, eighths, sixteenths, and so on, down to one drop, which, Morris argues, was the standard only in Arkansas during the antebellum period.[7] Other states (South Carolina, Georgia, and Delaware) gave race a completely different imaginative existence by basing legal presumptions about status on the basis of observation and reputation.

State to state, Southern lawmakers' efforts to define race and regulate status were fitful and inconsistent. In any given instance, Morris shows, they were preposterous. But by 1860 most jurisdictions had bolstered racial presumptions by making manumission much more difficult and offering free people of color the chance to enslave themselves. The capstones of race-slavery ideology—of the effort to make race and status equivalent—the self-enslavement laws seem remarkable for their daring exploration of the point at which the proslavery edifice would collapse beneath the weight of its own absurdity. In the event, there were very few takers, old people and children apparently—vulnerable people—and Morris has dutifully tracked

6. For a previous formulation see Tushnet 1981, 140–55.

7. These presumptions did not always bear a relation to what happened in Southern courtrooms. Morris notes the decision of Virginia judge St. George Tucker in *Hudgins v. Wrights* (1806) in which racist physiognomy was substituted for reliance on Virginia's statutory one-fourth rule—belief in the objective visibility of race bypassed the legislature's blood-parsing presumptions (p. 26). Tucker's bloviation in the face of an existing presumption raises a problem to which we will return: the relation of the law as written in statute and decided on appeal to the local life of both law and ideology in the slaveholding South.

them down (pp. 31–36). The point, however, remains substantially the same: no one turned up for the opening of the tottering tower of a fully elaborated proslavery jurisprudence of race.

In spite of the occasional absurdity of the effort, Morris argues, Southern lawmakers were trying to rebuild in law what they had undermined in practice: "Having helped create a complex racial society by the end of the eighteenth century by their own sexual conduct, they worked to simplify it into black and white, as it had been in the early seventeenth century" (pp. 35–36). Through mixture and manumission, Southern slaveholders had continually revealed that their social order was built out of the cultural and legal elaboration of a racial fiction. And through law they ultimately tried to legislate elusive hybridity and arbitrary enslavement into the seeming constancy of race and nature. The more "race" disappeared into mixture, the more it had to be legislated into active existence. By the late antebellum period, Morris argues, it was working.

PROPERTY LAW

As they created a race-slavery social order in which race was the basis of enslavement, Southern lawmakers gave it the depth and authority of history by drawing on legal precedent. According to Morris, black people were clearly being valued and sold as slaves in the 1640s, decades before there was any legal precedent given for their status.[8] Morris locates the legal meaning of these transactions not in the existing slave laws of the various traditions of European civil law, which were likely unknown to the small group of settlers clustered on the coast in Virginia, but rather in the common law of property.[9] "It is simple common sense," Morris asserts, "to assume that colonial Englishmen would apply English notions and rules of property to slaves" (p. 42).

Because there was no common law of slavery, references to precedent were necessarily by analogy, and some historians have read these analogies as evidence of a deeper contradiction: the insertion of slavery into a law born of bourgeois property relations. Mark Tushnet (1981), for example, argues that this contradiction, which he frames in terms of social relations of "humanity" (the totality of the social relations of master and slave) and social relations of "interest" (social relations mediated through the cash nexus and commodified labor power), led Southern lawmakers to move to-

8. Morris's observation that the enslavement of individuals of African descent antedated the rigidification of a "color line" (p. 41) seems to me to argue against his own earlier assertion that slavery was the product rather than the producer of racialized "blackness" (p. 10). See Fields 1990.

9. Louisiana and Texas were civil law states. For a treatment of civil-law slavery that is equal in scope and depth to *Southern Slavery and the Law* see Schafer 1994.

ward a separate law of slavery during the 19th century.[10] Perhaps because of the temporal scope of his study, however, Morris discerns transition in that law where others have seen contradiction. The law of slavery, he argues, was following the path tracked by the rest of the common law of property and mapped by Morton Horwitz (1977): from paternalism to formalism, from conservative republicanism to liberal capitalism.[11]

The value of slaves and pressure to put property into the market, Morris argues, gradually eroded older protections of settled property. By the end of the 18th century in Virginia, enslaved people had gone from being real property to personal property—not subject to entail, more vulnerable to execution for debt, alienable by word of mouth rather than recorded signature. Similarly, sloppily drawn remainders, executory devises, and trusts that tried to effect entail by other means met increasing hostility at the Southern bar, and slaves were generally included in the first fund used to settle the estate's debts.

Morris outlines a similar trend in the commercial law of slavery: from legal paternalism to strict formalism—*caveat emptor* in slave sales, cash payment in damage cases, and strict contractualism in mortgages that had been formally framed as conditional sales. And here again, Morris finds exceptions and countercurrents: strict warranty laws in Louisiana and South Carolina; specific performance of contracts involving slaves in antebellum South Carolina and Virginia; and occasional equitable comparisons of legal savvy of debtor and creditor, or of real "value" to listed price when trying to sort intended mortgages from apparent sales.

As the pressure to put slaves into the market altered the terms of property law, Morris argues, it also diluted the promises of paternalism. Whatever relation there had been between the families of the enslaving and the enslaved was, by the 19th century, generally held at law to be secondary to the diffusion and alienation of human property. That is why Thomas Russell (1993a, b) has called the state itself the "largest slave auctioneering firm" in South Carolina. Still less were the courts concerned with holding together the enslaved families to which they gave no legal recognition. That is why Michael Tadman (1989, 171) has found that enslaved children in the upper South had a 30% percent chance of being separated from their families by the time they reached the age of 13. There were, Morris notes, exceptions, "favored slaves" shielded from legal executions by carefully drawn provisions or sympathetic judges. And these few exceptions to the general rule raise a question of extraordinary importance: how it is that the docket records of court cases about the disposition of enslaved property re-

10. The view of an essential contradiction is partially shared by Oakes (1990), though Oakes is primarily concerned with criminal law and the broader premises of "liberalism."

11. The usage of "republicanism" follows Morris's own, which focuses on the importance of preserving settled property from the market.

main one of our best sources for well-turned expression of slaveholders' feelings about enslaved humanity?

It bears saying, as Morris suggests, that recognitions of enslaved people's agency, statements about enslaved people's personal singularity, and expressions of concern for enslaved people's feelings are three vastly different forensic and philosophical moves which have, in the search for contradiction at any cost, been conflated under the rubric of "Humanity" (see Genovese 1974a; Tushnet 1981). All of these versions of "humanity," however, had promiscuous careers in the property law of slavery.[12] Historians who have tried to sort through the law of slavery to get at "the ideology" of the enslaving South have often encountered these strains of rhetoric and tried to tie them to the underlying social structure of Southern slavery. Thus Tushnet, following Eugene Genovese, takes the language of "humanity" to be evidence of the totality of the relation of master and slave—the substance of which made slavery different from capitalism and provided the impetus for the (incomplete) development of a separate law of slavery. Alternatively, historians who have taken a more instrumental view of language and a more formalist view of economy have credited expressions of economic interest with an authenticity they do not grant to those of paternalism and have simply dismissed expressions of slaveholders' concern for their slaves' feelings and well-being. Thus A. Leon Higginbotham (1978) and Andrew Fede (1992) take such expressions to be empty rhetorical cover under which judges promoted slaveholders' economic interest (see also A. Higginbotham and Kopytoff 1989).

These contrasting arguments, however, share a presumption that slavery was either one thing or the other all the way through: capitalist *or* paternalist. But it might just as well be argued that the languages of "humanity" that run through the law of property reflect an economy in which everything was for sale: productive and reproductive labor but also sex and sentiment. Neither structural contradiction nor hypocritical capitalism fully describes the obscene synthesis of humanity and interest, of person and thing, that underlay so much of Southern jurisprudence, the market in slaves, the daily discipline of slavery, and the proslavery argument.[13]

12. Morris attributes some of this seeming ideological promiscuity to eddies within the Southern economy: when judges recognized slaves' individual failings in a warranty case or slaveholders' stated affections in a damage case, he argues, they worked in a tradition of legal paternalism more appropriate to the eldest among the slave states than the "bumptious" commercial states of the expanding Southwest (pp. 104, 120). There is a Tushnet-like conjugation here: Old South vs. Emerging South; Paternalism vs. Liberalism; Humanity vs. Interest; and Warranty vs. Caveat Emptor. But in Morris's argument, these contrasts emerged from the incomplete commercial evolution of parts of the slave South—the evidence of Horwitz's transition rather than Tushnet's contradiction. Liberal capitalism, Morris concludes, "had made deep inroads" into the commercial law of slavery.

13. For the slave market see Johnson 1995. For the daily discipline of slavery see Oakes 1990, 139–52.

In the antebellum South, ideology had come unmoored from any simple relation to economy; "interest" and "humanity" in the law were living arguments rather than rhetorical diagnostics of underlying conditions.[14] As Morris ultimately suggests, philosophical coherence was less the question than practical effect. "Humanity" had no single position on slave law; nor, for that matter, did "interest." One might pose humanity as the fruit of interest, as did court decisions that argued that only an owner with an interest would care properly for a slave. Or one might, as did South Carolina's Chancellor Johnson in *Young v. Bruton* (1841), justify a legally "paternalist" decree of specific performance with a reference to the common experience of selecting one slave from the many offered for sale in the slave market.[15] Sometimes "humanity" was made to favor protection of slave families, sometimes to lead the way to their separation; sometimes to favor various efforts at entail, sometimes to favor enlargement and alienation.[16] And so on. In-

14. For a critique of overstrict relation of ideology to economy see Hall 1988.

15. "Can you go to the market, daily, and buy one like him, as you might a bale of goods, or a flock of sheep? No. They are not to be found daily in the market. Perhaps you might be able to buy one of the same sex, age, color, height and weight, but they much differ in Moral qualities of honesty, fidelity, obedience, and industry; in intellectual qualities of intelligence and ignorance; in physical qualities of strength and weakness, health and disease, in acquired qualities, derived from instruction, in dexterity performing labor you wish to assign to him. . . . When one goes into the market to purchase a slave, or a number of them, his selection is determined by the best evidence he can obtain in reference to these qualities. And why should he not have them in specie?" (quoted in Morris, p. 116). Chancellor Johnson's paean to legal paternalism takes the form of a slave buyer's guide, a tour of the slave pen where slaves are lined out by sex and size around the walls; the visible differences in age, size, and complexion; the questions to determine moral qualities and intelligence; the bodily inspections for health and tests of dexterity; the process of choosing the one, "him," from among the many. It is precisely the complexity of buying a slave (read: the slave market) that demands a decree of specific performance (read: a recognition of the human singularity of a slave), and precisely the arena of money value, of infinite comparability, that best illustrates the value of human singularity. (And it is precisely "him," an imagined male slave, who is best-suited to illustrate the paternalist attachment of slaveholder to slave without indelicately alluding to the other sorts of attachments available for sale in the slave market—imagine Chancellor Johnson writing "can you buy one like her . . .") Six years earlier in *Sarter v. Gordon* (1835) Chancellor Harper of South Carolina had reserved an exception to decrees of specific performance: if the "purchaser contracted for the slaves as merchandise to sell again" (quoted in Morris, p. 115). Taken together, the South Carolina decisions outlined the artificial separation of "slavery" from the "market" that has been taken up to one degree or another by most scholars who have worked on the topic. "The market" was represented by those who went there to sell, "Slavery" by those who went there to buy: on the one side was commerce, commodification, and deceit, on the other paternalism, humanity, and credulity. To see this as anything other than proslavery ideology, Michael Tadman has shown in *Speculators and Slaves* (1989), is to mistake the nature and complexity of the system that spawned it. On the antinomies and interrelations of "paternalism" and the slave market see Johnson 1995, esp. 122–28.

16. See, for instance, the decision of the Delaware Supreme Court in *Smith v. Milman* (1839), which involved the disposition of children born to a woman willed to a life tenant but destined ultimately to return to the estate's remainder. In that case the court argued that ensuring good treatment of the young slaves required that their permanent possession vested in those who held only life estates in their mother. That was, Morris notes, "humanity stood on its head," "humanity" that underwrote the life tenant's legal (if not necessarily eventual) separation of enslaved children from their mothers.

deed, as "humanity" and "interest" tangled through the law they often became inextricably tangled up with each other. Some decisions recurred to consideration of "income," "use," and "profit"; others referred to "the strongest and tenderest feelings of our nature" and the "revolting" character of family separation. Still other decisions did both at once: "No one would buy and humanity would cry out against it." Or: "The issue of a female slave would often be valueless but for her exertions and sufferings all of which are at the risk of her master. . . . Humanity obviously dictates that children should follow their mothers" (pp. 90–92). In the evolving commercial law of slavery, as in the logic of the slave market, Morris ultimately shows, "humanity" and "interest" worked as often as hendiadys as they did a contradiction.

CRIMINAL LAW

Alongside "liberal capitalism," Morris argues, Southern slavery was being transformed by the "humanitarian sensibility" and "evangelical Christianity" (pp. 170–72). Together these broad changes reshaped the criminal laws and procedural rules that governed the relations between Southern slaves, slaveholders, and nonslaveholding whites. In the years after the American Revolution, the trend was toward greater state intervention in the affairs of slaveholders, more humanitarian and legal recognition of slaves as rights-bearing individuals, and more or less concerted efforts to regulate the sometimes volatile relations between slaveholders, nonslaveholding whites, and slaves.

State intervention first. Over the course of the 19th century, crimes of wanton murder and indiscriminate violence against slaves by slaveholders were increasingly punished in Southern courts, though legal action remained rare and the emergent legal standard—"moderate force"—elastic. Similarly, some states introduced legal requirements limiting the number of hours slaves might be forced to work in a day (around 15) and providing minimal standards for the clothing and care of slaves. And some state courts decided that slaveholders were responsible for providing their accused slaves legal counsel (even when the slaveholders were themselves the victims of the crime in question). State involvement in the daily relations of master and slave, however, was infrequent and subject to local standards. In most cases when a slave was the victim, Morris notes, there had to be a dead body for the state to get involved.

The state was more likely to get involved when slaves were charged with crimes, and increasingly slaves were protected by the procedural standards of the common law. Never, however, were slaves subject to the same legal protections as white people. Indeed, never was there any comparison between white and black "justice." Except in the case of capital crimes,

slaves were generally tried in separate courts and were subject to different laws—the legal impossibility of a slaveholder raping a slave and the frequent presumption that a slave's liaison with a white woman was rape being only the most obvious example.[17] Where they were tried in the same courts and under the same laws, slaves received more severe punishments than did whites for the same offense: punishment more violent and more public. Slaves also faced the total exclusion of their testimony, except in the case of confession or insurrection or when it was necessary to convict other slaves.[18] Still, Morris notes, after the 1820s, slaves received some procedural protection in Southern courts, even in the case of accusations of insurrection, rape, and arson: trials by juries and grand juries instead of by magistrates (an equivocal "protection" at best and one not present in Virginia, where slaves continued to be tried before magistrates); changes of venue; challenges of prospective jurors; careful judicial instruction; and the right of appeal. Always, however, slaves faced the vagaries and violence of local justice.

Slave law, Morris points out, was only partially about slaves. When third-party whites were involved, slaves' crimes sometimes became matters of public interest. Beginning with 17th-century Virginia laws requiring slaves to carry passes when they traveled—evidence of the belief "that masters had duties to control slaves in the interests of society at large" (p. 338)—cases involving slaves were a significant part of the law that apportioned rights and responsibilities among white people. Rape decisions that considered the victim's race and social status, regulation of crimes against property which held "negligent" masters responsible for the crimes of their slaves, police regulations allowing patrols to discipline slaves and outlawing "insolence" to any white person, stipulations against trading with slaves or selling them liquor: all of these features of "the law of slavery," Morris argues, were regulations of the social and class relations between white people as well as of the behavior of enslaved ones.

The criminal law of slavery, then, was being reshaped by "humanitarianism": toward amelioration in punishment and procedure. And the criminal law of slavery was being reshaped by "capitalism": toward greater protection of human property from unjust punishment and of other property from the predations of arson and thievery. And the criminal law was being reshaped by "policy": toward the state-sponsored stabilization of the rela-

17. "The presumption that a white woman yielded . . . to the embraces of a [N]egro, without force . . . would not be great." *Pleasant v. Arkansas* (1855), quoted in Morris, p. 303. Morris points out that not all such liaisons, nor even all accusations of rape, ended in the quick and violent execution of the slave involved, a point also made by Hodes (forthcoming). Morris also notes that the social status of the white woman involved figured prominently in the disposition of these cases. For more on the social matrices that defined the boundary of consent see Block 1995, chap. 4.

18. The use of slave testimony against other slaves, Morris argues, emerged out of the use of such testimony in cases of insurrection (pp. 237–38).

tions between slaveholder, nonslaveholders, and slaves. That was the general motion, but the criminal law of slavery was also beset by philosophical contradictions—none greater than the bare fact of its existence.

In the criminal courts of the slaveholding South, Morris shows, the dialectics of person and thing were spun into countless contrarieties: perpetual outsiders were held to the law of civil society and the rightless were granted rights that they might be prosecuted; slaveholders bore absolute responsibility for the slaves' legal representation but not always for damage done by the people they owned; in the eyes of the law, slaves were self-willed enough that their confessions to white people were not considered coerced, but they did not have the independent capacity to decide to defend themselves necessary to reduce a charge of murder to one of manslaughter; the power of the master had to be absolute to render the submission of the slave perfect, but it was not.[19] If one was looking for a definition of slavery or an account of what slaves were like, the Supreme Courts of the South provided no simple answer.

Morris, however, makes clear that whatever its broader inconsistencies, the criminal law of slavery made local sense. Local outrage was usually behind the rare state interventions in the business of brutal slaveholders; legal procedures were often overwhelmed by local panic in the case of enslaved criminals; and some places just did things differently.[20] And, of course, for the majority of slaves, those who lived their lives in the broad band of resistance that fell short of murder, rape, and arson, "justice" was like slavery: as local and immediate as their owner's authority (Genovese 1974a, 25–49; Hindus 1980, xix–xxvii; Ayers 1984, 134). It is in the discussion of locally made criminal law that Morris comes closest to making good his promise to attend to legal "practice," closest to adding a sense of historical conjuncture to his account of evolving structure, closest to a sense of the local chaos amidst which law was made.

MANUMISSION LAW

Like criminal law, Morris argues, manumission law was posed between the privileges of property and the demands of "public policy." The right to grant slaves their freedom had long been included within slaveholders' property rights, but the consequent growth of free black populations posed both philosophical and practical problems in a society based on racial slav-

19. For the case for contradiction see, for example, Genovese 1974a or Oakes 1990.

20. Pointing out one peculiarity of local "justice," Morris notes that North Carolina had more slaves brought to trial for arson than most other Southern states, that a large number of those brought to trial were acquitted, and that the cases disproportionately originated in New Hanover County. An earlier state-level comparison of the frequency and tendency of slave law cases was made by Nash (1979).

ery: How could free blacks be surviving if all blacks were naturally suited to being slaves? How could slaves be distinguished from free people if not all free people were white?[21] With the heightening of sectional tensions, Morris argues, these problems took on the character of a threat to public order, and in manumission law the trend was toward greater restriction.

From the early 19th century, some Southern lawmakers discerned a public interest in limiting private manumissions, and throughout the antebellum period some states required newly freed people to move out of state or be reenslaved. Though most judges who decided manumission cases used the principles of property law, Morris argues, their decisions reflected the dictates of "public policy." With increasing frequency over the 19th century Southern judges narrowed the margins of legal manumission: in many jurisdictions slaves had no legal capacity to accept a legacy of their own freedom, contract to buy themselves, or to make a proffered choice between slavery and freedom; those manumitted by will remained liable for the debts of the estate, though Southern judges often allowed land in the estate or the freed person's subsequent income to be used for payment. As manumission was restricted, the laws were occasionally circumvented through "quasi emancipations," where the slaveholder retained legal title but allowed the slave to live as free. Everywhere but South Carolina, however, this option was gradually closed off with the argument that property had not only to be possessed but to be used. Additionally, Southern courts generally required that a will contain specific provision for the freedom of the children born to a woman between the date of an *in futuro* emancipation and that on which it took effect. In the absence of some evident intent to emancipate the children, they often remained enslaved. Finally, in the years after 1840, Morris shows, Mississippi, South Carolina, Arkansas, and Maryland made testamentary manumission entirely illegal. The general trend, then, was toward shutting down the possibility of freedom and simplifying the categories of Southern social life by making race and slavery coextensive. In the area of manumission law, a more legible connection of race and slavery had taken precedence over slaveholders' "right" to free their property if they pleased. "Public policy," Morris concludes, "had cut deeply into possessive individualism" by the time of the Civil War (p. 380).

As elsewhere in the law of slavery, Morris shows, philosophical coherence was sacrificed to practical effect. Human property was alienable except in the case of manumission; discipline and provision remained the province of the master up to the hazily defined moment of "quasi emancipation" when the state got involved; a child's condition followed the mother in

21. On the dialectics of manumission and slavery see Patterson 1982, where it is argued that the promise of eventual freedom is one of the most effective disciplinary features of slavery. On free black people see Berlin 1976; M. Johnson and Roark 1984; Fields 1985, 63–89.

slavery but not necessarily in the case of *in futuro* emancipation; slaves could not be allowed to choose between slavery and freedom because slavery was involuntary, but free people of color could volunteer to enslave themselves.

Indeed, manumission law would be a strange place to find a coherent version of the relations of master and slave. These were, after all, generally cases between white people, contests over estates and indemnity—over family relations and business obligations—property law argued in the philosophical conundrums of the person as thing. The law of slavery, it once again turns out, was often as much about governing the relations between white people as it was about governing their relations with slaves. And the extent to which the social relations between whites depended upon slaves made white people and their courts vulnerable to the agency and resistance of slaves. It is to this, to the specific forms dependency and agency took in the antebellum court system, to the everyday life of the law of slavery, that we now turn.

THE EVERYDAY LIFE OF THE LAW OF SLAVERY

Morris appears to have chosen his title carefully: *Southern Slavery and the Law*, not, say, *The Law of Southern Slavery*. For by the end of the book it is hard to imagine the idea of *a* law of slavery: between the jurisdictional inconsonance, the temporal variation, the portable ideology, and the outright philosophical nonsense, it is easy to see why Morris's conclusion emphasizes inconsistency. "Southerners," writes Morris in the conclusion to *Southern Slavery and the Law*, "failed to agree among themselves on a formal definition of slavery, the institution that defined their social order" (p. 424). And, at least in the case of Southerners who were white and male and judges or legislators, their confusion is amply demonstrated.

Morris, however, has made less of that confusion than he might have. The South was changing, he concludes, and it is hard to say what would have happened had there been no Civil War. Rather than using what he believes to be an artificial end point, Morris has drawn grand horizontal lines to contain the restless history he describes: temporal transformations driven by liberal capitalism, Enlightenment humanitarianism, evangelical Christianity, and public policy. Morris's achievement rests in defining these broad lines amidst the confusion of doctrine and argument evident in his detailed exposition of individual cases. As such, *Southern Slavery and the Law* is a testament to the importance of judge-made law: taken as a whole, it seems, Southern judges were able to resolve social chaos and ideological incoherence into constant practical progress. And perhaps they were.

Yet it is hard to imagine Southern judges, a body of people who have been thoroughly castigated for their moral idiocy and intellectual deficiency, sitting down and thinking: What does liberal capitalism need? How

does that square with the dictates of Enlightenment humanitarianism? And what of evangelical Christianity? Does public policy have an opinion about racial identity? These men had smaller minds than that, and we do well to consider that they may have been playing with smaller pieces. And, of course, Morris knows that. But he never really says so: gigantic abstractions—racism, capitalism, humanitarianism, Christianity, public policy—have a life of their own in *Southern Slavery and the Law*. They surface and contend with one another, they "spread" and are "absorbed" by judges, they make "inroads," "lead" to changes, "overthrow" old ways (pp. 87, 102, 113, 172, 263). You can almost see a stain spreading across the map.

The problem is that Morris has written a book about courts without courtrooms, about law without lawyers, and about slavery without slaves. In *Southern Slavery and the Law* the aggregate effects of legal change stand in as the specific causes of legal practice, cases present themselves as fully formed historical dilemmas rather than as conjunctural and human manifestations of history not yet made, and "the local" exists not as a terrain where law (and history) is made out of contention but rather as a site at which broad transformations either are or are not experienced, a site at which their progress can be diagnosed. For all of its superb nuance and careful attention to practical effect, judge-made law, and local variation, this book wants for what David Brion Davis (1992, 290) has called "mediating structures": the sites at which large historical transformations were experienced, and the places where the values we associate with them were expressed.[22]

Let me put it another way: The degree to which Southern legislators and Supreme Court judges were self-consciously and serially trying to get their bearings amidst these world-historical trends and to respond in a philosophically or practically coherent manner is exactly the degree to which they differed from all other Southerners, including those who had brought the cases into court in the first place. Whether they tried to think through the question "what is slavery" (and Morris says they could never think their way to a suitable answer) according to the demands of philosophy, progress, or precedent, they had to do their thinking through the specific cases with which they were confronted. As judges made their own maps (if that is indeed what they were doing, and the many instances of abrupt self-reversals and wavering commitments suggests to me that it may not have been), the ground beneath their feet was constantly changing.[23] Legal problems took their shape from the specific actions of those in whom

22. For a careful accounting of the structures that mediated the "humanitarian sensibility" in the 19th-century North see Clark 1995.

23. The anguished cries that punctuate some legal histories (not Morris's)—"how could Judge Ruffin say *x* when only six years earlier he had maintained *y*?!"—suggest to me a longing for philosophical coherence that is almost metaphysical in its willingness to ignore both space and time, strategy, and change. On inconsistency and change in intellectual history see Skinner 1969.

structural changes were conjuncturally embodied, and were framed in the predigested language of those who contested them—lawyers, slaveholders, nonslaveholders, and slaves. Change came to the Southern courts along local roads, embodied in familiar faces, and dressed in homespun rhetoric.[24]

We should, then, begin with the setting. Rhys Isaac (1982, 90) has pointed to court days as one of the rare moments when the "scattered community" of colonial Virginia came together to "attain full existence." Ariela Gross (1996, 191–264) has recently argued that things remained the same in the still-rural 19th-century South: the moments when antebellum Southerners confronted the changes that were overtaking their society remained decidedly local affairs. It was in the county courthouses of the antebellum South that the ideological grammar of slavery was tortured into meaning. Morris emphasizes humanity and interest; William Fisher III (1993) has highlighted Christianity, the "Code of Honor," and racist descriptions of slave personality; Ariela Gross (1995) has noted "scientific" and gendered theories of slave character; Gross and I have noted the extent to which slaveholders' own identities were invested in their slaves and implicated in the cases they brought to court (Johnson 1995, 81–135, 222–48). As Fisher (1993, 1072) suggests, the welter of arguments made in Southern courtrooms did not reflect any simple contest between different visions of social order, or a well-conjugated encounter between rival groups of structures, arguments, and exponents. Rather these arguments were used by lawyers who were trying to win cases; they were appropriated and bent into shape around the dispute at hand.

Which is to say that the master languages of slavery were being shaped and reshaped into meaning and argument around local events and everyday life. In the stories told in Southern courtrooms, a deal gone bad might indicate bad faith on the part of the seller in selling an unfit slave or on the part of the buyer in using that slave for a time and then suing for full price—both sides might recur to the language of paternalist equity to do the service of capitalist speculation. A slave's escape might suggest responsibility on the part of the seller who had sold a slave with a vice of character or on the part of the buyer who had mistreated a slave to the point of flight, both arguments might be based on a species of "paternalism" (legal or humanitarian), and both might be backed by explicit reference to the scars on a slave's back. Slaves might be capable of the finest sentiments of humanity or incapable of the simplest choice. "Black blood" might be objectively self-evident or subtly masked, evident in physiognomy or missing in performance—the

24. To understand the place of everyday life and local history in the writing of legal history, it is useful to think of world-historical processes as being like the beasts in Arnold Schwartzenegger's *Predator:* always there, shadowing the actors' every move, they are material only in the moment of confrontation. If you have not seen *Predator*, see Bourdieu 1977; de Certeau 1984; and Scott 1985, 1990.

woman standing in court might be black or white.[25] If a transformation was happening, it was one in which objectives and ideology were daily fractured by local practice and creative appropriation, one in which political process was diffused into local contention (see Hall 1988; Hartog 1985; Lazarus-Black and Hirsch 1994; Johnson 1996).

"Inconsistency" in the law, then, represents less an essential contradiction or incomplete transformation than the upwelling of argument from courts in which sacred principles daily served local necessity, courts in which the essence of slavery (if not its existence) was under continual interrogation. In courtrooms all across the South, questions of what separated sharp dealing from good business, brutality from mastery, slavery from freedom, black from white, and a host of other problems were continually and publicly reconsidered. Every case was an open contest over the pressing question that Morris says Southern judges could never answer: what is slavery? No matter about the higher courts: matters settled at law were daily revived in new cases, re-dressed in new arguments by lawyers using and reusing the master languages of slavery to contest its practice. Long after the higher courts made their transformation-tracking decisions, there were (at least) two sides to every case, for those left behind by History continued to turn up in the courtrooms of the antebellum South. And in those courtrooms, along with the stories of the lawyers and the mediocre legal reasoning of the judges, slavery was being shaped by the slaves.

If the court records of the antebellum South tell us any one thing, it is this: the relations between slaveholders depended upon slaves. As creditors, executors, and relatives contended with one another over slave property, relations of economy, community, and family were articulated through the movement of slaves. Slaveholders could not get married or die, they could not borrow money or settle their debts, they could not go about their business or their neighborhood without thinking about their slaves. The same was true in the slave market: buyers and sellers made a contract by dividing up rights and responsibilities, and out of that contract buyers, in particular, fashioned new identities. James Oakes (1990, 94) puts it this way: "The South was, at bottom, a slave society, and the significance of slavery extended well beyond the relation of master and slave. The ownership of even a single slave affected all the other relationships that made up the master's world." The master-slave relation was never just that: it was the foundation of family and business, of reputation and social identity. As husbands and wives, parents and children, planters and farmers, hostesses and neighbors, buyers and sellers, slaveholders' social identities were expressed in the cur-

25. For such stories see, for example, *Campbell v. Botts*, No. 1436, 5 La. Ann. 106 (1850); *Pilié v. Ferriere*, No. 1724, 7 Mart. (n.s.) 648 (La. 1829); *Morrison v. White*, No. 442, 16 La. Ann. 100 (1861) (Supreme Court of Louisiana Collection, Earl K. Long Library, University of New Orleans, hereafter UNO) and, generally, Johnson 1995; Gross 1995, 1996. For law made out of stories see Friedman 1989; Brooks and Gewirtz 1996.

rency of a slave society—through the motion and possession of slaves (Oakes 1990, 94–99; Johnson 1995, 81–135).

But the slaves did not go quietly: they expressed their betrayal and anguish at estate division or sale; they dissimulated in the market and resisted on the farm; they mouthed off, ran away, got sick, and died.[26] The currency in which slaveholders were figuring their social and legal relations had a restless mind and a susceptible body. Every time slaves disrupted slaveholders' business—the desires and expectations slaveholders had for their property—they also disrupted the social relations between slaveholders.[27] It is important to remember, then, that much of the business of lawyers and judges was to reconstruct social relations that were continually being disrupted by their unruly vessels, to repair slave law that was continually being undermined by the slaves (see Genovese 1974a, 25–49).[28]

And it is equally important to question whether or not the lawyers' usage of languages of "character" or "interest" or "humanity" or whatever evolved independently of concrete referent and local experience. To say that a slave ran away because of bad treatment rather than bad character, or that a slave unwilling to be sold would be of no value, or that separating families was a moral obscenity was to introduce the perspective of the enslaved into the making of slave law. These were not, however, *ex cathedra* "recognitions" of the humanity of slaves or immanent "contradictions" between contending philosophical systems. They were stories that drew a large measure of their authenticity from personal and local experience of the self-naming protests and self-willed resistance of enslaved people.[29] Indeed, these courtroom stories often insinuated the perspective of enslaved people into the law that governed enslaving ones. The process might be abstract, literally a matter of perspective: treating slaves' scars as they were treated in the slave quarters rather than in the slave market as evidence of the character of the one who had inflicted them rather than the one who bore them.[30]

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26. See, for example, W. Brown 1847; Bibb 1849; Northup 1968; Jacobs 1861. See also Blassingame 1977; Drew 1846.

27. For the importance of property and property-based expectations to personal identity see Radin 1982.

28. It should be noted that Genovese, who is often faulted for ignoring slaves' "agency," makes the point that the law of slavery was shaped around the actions of slaves. Genovese, however, reduces the effect of those actions to the encoding of a philosophically contradictory recognition of slaves' "humanity" in the law of slavery. Because this recognition occurred in confines suggesting to him that slaves had to appeal to their owners for justice, Genovese views it as fundamentally unthreatening—evidence of agency without autonomy. The rest of this essay is devoted to the very different conclusion about the stability of Southern slavery to which I have been led by the idea that the law governing the slaveholders was being shaped around the actions of the enslaved.

29. On the need for daily "verification" of ideologies in practice see Fields 1982, 153.

30. For the various ways of reading scars see Johnson 1995, 169–70, 261–63. For the type of story I am suggesting originated in Southern slave quarters and emerged in Southern courtrooms see *Lemos v. Daubert*, No. 4198, Rob. 224 (La. 1844); testimony of Dr. Allarsi, *Pilié v. Ferriere*, No. 1724, 7 Mart. (n.s.) 648 (La. 1829); testimony of Mary Ann Poyfarre and

But it might also be quite concrete: lawyers asking slaveholders explicit questions about acts of brutality to which no white person could testify: Did you strike him with the loaded end of a whip? Did you beat him so severely that he jumped in the bayou and drowned? Negative answers could only incompletely answer accusations that referred to an inaudible conversation with a slave.[31]

Upon any kind of reflection it becomes hard to imagine that such dialogues were not commonplace. The narrative of the events used to decide whether a roadside confrontation was legally an assault, the names of the previous owners of a slave involved in a disputed sale, the duration of an invisible ailment in a case of warranty or damage, the evidence of family connection or prior service that figured in the disposition of an estate: much of this information could come only from the slaves. Against the only settled principle of Southern jurisprudence, that slaves should not testify against whites, all of these stories were introduced as evidence in Southern courtrooms. Indeed, it was quite common for Southern lawyers to introduce explicitly, through their examinations of white witnesses, slaves' own accounts of their medical history as they contested warranty cases (Johnson 1995, 233–34; Gross 1995, 310–14).[32] Occasionally, these stories stretched beyond questions of condition to those of intention. When slaveholders testified that slaves were shamming or trying to undermine their own sale, that they would run away if put in the field but stay around if placed in the house, that their flight was a response to brutal treatment rather than a manifestation of "bad character," they were trying to shape law around the imagined intentions of their slaves (Johnson 1995, 214–19; Gross 1995, 308–9). The courts of Louisiana, alone among Southern courts in allowing testimony about slaves' intentions to run away, according to Ariela Gross (1995, 303), provided the most striking examples: "I had a conversation with the boy," remembered an auctioneer of an escaped slave named Henry; "he appeared sulky and said he had a wife in town and would not be sold in the country."[33] Henry's redefinition of his situation—from commercial transaction to personal violation—was used as evidence in a warranty case apportioning responsibility between slaveholders. The eventual terms of the contractual relation created by Henry's sale and undermined by his escape were to be shaped around the public telling of Henry's story of the sale. As

Celeste, *Walker v. Cucullu*, No. 326, 18 La. Ann. 246 (1866); testimony of Jean Landier and *State v. Walker*, a criminal case that emerged from the accusation of brutality made in the civil trial and included in the docket record of that case (UNO).

31. *Kock v. Slatter*, No. 1748, 5 La. Ann. 734 (1850), questions to F. W. Pike (UNO).

32. Gross shows that such testimony was often contested on the grounds of its origin but was generally allowed.

33. *Nixon v. Boazman and Bushy*, No. 3485, 11 La. Ann. 750 (1856), testimony of Joseph Beard (UNO).

such the case is one example of a broader phenomenon: law made out of the resistance and perspective of the enslaved.

Once it is recognized that law as most antebellum Southerners knew it was a mostly local affair, and that broad transformations—capitalist, humanitarian, evangelical, whatever—were experienced over and over again as specific conflicts, then it becomes clear that slaves played an active and important role in shaping the law of slavery—one that went well beyond forcing the law into fitful and inconsistent recognition of their humanity. First, because the slaves so often defined the work of the courts by undermining the social relations between slaveholders that were embodied in their possession and transfer. Second, because they helped provide the perspective and language from which Southern lawyers argued court cases. And third, because they often were silent partners in the legal speculations of the white parties to suits, providing information that was crucial to the outcome of these cases. Call it transformation, call it contradiction, but locally made law was law made vulnerable to the agency, perspective, and participation of the slaves it claimed to govern. Tallied and codified in law, the social relations between white people came into being through people who had a will of their own. And when the courts asked "What is slavery?" they were, among other things, re-sorting responsibilities and relations among white people in a process shaped by slaves. Indeed, it could be said, that even as the courts repeatedly tried to close that question, the slaves kept it open.

Nowhere was this more evident than in the criminal courts of the antebellum South. Criminal courts have always provided Southern historians with the strongest evidence of contradiction within the law of slavery. Alex Lichtenstein (1988, 415) has argued that much of slave theft represented an effort to contest the meager offerings of slaveholder paternalism by taking more: "incipient class-conflict over the forms the slave economy would take and the claims to its profits." Philip Schwarz, in his detailed study of slave crime in Virginia, has similarly argued that "each action by a slave that threatened the property or safety of other people also had the potential, and often the clear power, to weaken, even destroy" the institution of slavery (1988, 3). James Oakes has put it this way: "Any action that forced the legal system to recognize the slaves as in any way independent of the master represented an implicit threat to the principle of total subordination. . . . [T]he American political system . . . risked undermining slavery every time it recognized the legal personality of the slave" (1990, 155).

And yet these accounts of implications of the resistance of individual slaves have not been enough to convince those skeptical of unintended consequences and individual action, those for whom resistance must be glib and collective in order to be revolutionary.[34] As long as it is argued that

34. See, for example, Paul Finkelman's thoughtful review of Schwarz: "Schwarz's evidence suggests that much slave violence was motivated by personal responses to particular

slave resistance had to be systematic to be significant, it will be worth taking another look at what was happening in the Southern criminal courts. And in looking it will be worth setting aside a map of foreordained outcomes where the opposite of Slavery was Freedom and the only useful goal of resistance was political revolution and thinking instead from the perspective of the road where the opposite of slavery was antislavery—the point at which individuals met and contested the system. Seen from the perspective of the road, the history of enslaved people's resistance in North America may be one of tactical negations, conjunctural subversions, and unintended consequences. And, for all that, it may have been a great deal more destabilizing than the skeptics generally let on (see Scott 1985, 1990). The deeply subversive implications of slaves' crimes were particularly evident when the slaves' trouble was, as it seems so often to have been, with the nonslaveholding white people who lived all over the South.

It is by now a threadbare truth that the South's race-slavery social order was the result of a historic bargain: the world would be divided into black slavery and white freedom, and slaveholders henceforth protected from the potentially damaging alliance of their "black" slaves with their "white" neighbors (Morgan 1975).[35] That bargain, however, had continually to be renewed, and many historians have traced slaveholders' efforts to keep straight with nonslaveholding white people, whether they were playing at being neighbor, paternalist, or politician.[36] Historians, including Morris, have traced the legal elaboration of the race-slavery nexus—the restrictions on manumission and the extension of the franchise, the livery laws and the badges in urban areas, the restrictions on social contact and trade between free and slave, the allocation of the daily privileges of being brutal to slaves, of demanding their passes and punishing their "insolence." With increasing frequency after 1820, Morris shows, and a fervor that hints at desperation after 1850, legislative and judicial micromanagement mapped the widely scattered sites where racial "essence" was scripted into hierarchy and order (see also Wade 1964, 80–110; A. Higginbotham 1978, 170–78; Fields 1985, 40–62; Oakes 1990, 104–36).

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events or individuals, and not, as Schwarz argues, by a kind of unarticulated goal to destroy slavery" (1989, 401). See also Genovese 1974a, 597–98. Genovese's argument that slavery was characterized by the "hegemony" of master over slave, by the successful shifting of the terrain of conflict to regions that did not call into question the existence of slavery—the law, day-to-day resistance, personal conflict, and so on—remains the most influential statement of this position. My thinking on resistance and hegemony owes much to Scott 1985 and 1990 and to the arguments about the revolutionary significance of running away in the era of the Civil War made by Fields (1982, 164) and Oakes (1990, 155–94).

35. The issue is rethought with attention to differences among those who eventually became "black" in Berlin 1996 and in Brown 1996. For the antebellum period see Frederickson 1971 and Oakes 1982.

36. Genovese 1974b; Fields 1982; Hahn 1983, esp. 15–133; Watson 1985; Freehling 1990, 39–58; Oakes 1990, 80–136; McCurry 1995, 92–129.

But race could not simply be enacted, it had also to be acted out (Fields 1990, 95–181; Johnson 1996).[37] When Southern whites came into court to talk about race, they talked about biology but also about behavior; about runaways with bad character but also about those who had run away from bad treatment; about lineage and local history but also about who acted like a lady and who was treated as a free man; they talked about hair follicles and foot shapes but also about who was invited around to visit and who was allowed to dance at the ball; they justified their opinions with references to race science and biblical truth but also with the impervious confidence that they knew Negroes when they saw them and they could sense "black blood" the way an alligator could sense a storm (Hodes, forthcoming; Johnson 1996; Gross 1995).[38] Most importantly, they argued openly about what it was they were talking about. Racial identity, their testimony reveals, was as much a contested practice as a codified presumption.

And if race was as much practice as it was presumption, the racial edifice remained vulnerable to occasional subversion by those upon whom it depended to act it out. Recently, historians like Victoria Bynum (1992) and Martha Hodes (forthcoming) have searched out areas of the antebellum South where the social relations script stopped making sense, where interracial social life and sexual practice provided a continual counterpoint to official ideology. Many of the cases cited by Morris suggest a similar set of subversions of the race-slavery nexus: cases in which black slaves came into conflict with poor white people. What is interesting about these cases is not (only) that black slaves regularly gave the lie to race-slavery ideology by refusing to play the part they had been assigned but that slaveholding and nonslaveholding white people continually found themselves unable to agree on what that part was.

Murder, rape, arson, and assault: it has always puzzled historians that slaves accused of these crimes came to trial at all. Looking back through the decades of vigilante lynching and state-sponsored terror, historians have asked how it was that "justice" for black slaves sometimes included the trials and procedures so apparently absent from postbellum racial regulation. Southern lawmakers gave one answer: they defined slaveholders' unwillingness to see their slaves punished by the state as a matter of financial interest, and they tried to buy the slaveholders off by giving them a fair price for their convicted property. Historians (again including Morris) have followed

37. On gender and performance see Butler 1990, 79–149.

38. "Runaway" and "run away" is from Gross 1995, 288. *Miller v. Belmonti*, No. 5623, 11 Rob. 339 (1845); *Miller v. Miller*, Nos. 1024 and 114, 4 La. Ann. 354 (1849); *Eulalie v. Long and Mabry*, No. 3237, 9 La. Ann. 9 (1854); *Morrison v. White*, No. 442, 16 La. Ann. 100 (1861); *Euphémie, f.w.c. v. Maran and Jourdan*, unreported Louisiana Supreme Court case No. 6741 (1865) (UNO). The presence of so much testimony about behavior in the cases is doubly important because Louisiana was a state in which the legal standard for race was based upon blood quantum rather than appearance or reputation.

the courts, defining these cases as conflicts between the slaveholders' property interest in their slaves and the general interests of their class and communities (see also Genovese 1974a; Tushnet 1981).

But the question as I have posed it—the difference between "justice" in the antebellum South, a society based on slavery, and "justice" in the postbellum South, a society based on race—suggests that "private property versus public safety" may be an inadequate accounting of what was at stake in these cases—unless we rethink what we mean by "property." Cheryl Harris (1993) has recently noted the way in which "whiteness" is a form of property, a jealously guarded entitlement that allows its possessors to expect that events will break in their favor (see also Roediger 1991). It was surely this kind of property right—the legal privilege of acting out their whiteness—that nonslaveholding white people were asserting when they stopped slaves along the sides of Southern roads and asked them questions, and it was this type of property that made them believe they deserved honest and respectful answers, and made them angry if they received otherwise, and it was this type of property that made them believe that assaults on their persons or possessions were attacks on the social order, and that (white) slaveholders would join with them in punishing those responsible.

When they sought compensation for the damage to their whiteness, however, these nonslaveholders often found themselves facing the same enemy they had faced on the road: Slavery.[39] Asked to choose between their own slaves and their nonslaveholding neighbors, slaveholders could be counted on to side with the slaves: they valued their own property rights, those defined by slavery, more than they did the property claims their nonslaveholding neighbors rooted in whiteness. Slaveholders' stake in these conflicts was, arguably, more complicated than simple economic interest. After all, Kenneth Greenberg (1996, 16) has recently added his name to the long list of historians who think that slaveholders were less likely to calculate their interests in dollars and cents than in honor and reputation. And I have argued that slaveholders' own social identities as masters, men, and so on were embodied in the very slaves upon whom nonslaveholding whites attempted to exert their own peculiar brand of property right (Johnson 1995, 81–136; 1996). But even if we figure the slaveholders' interest in contesting these cases in narrow economic terms, the larger point remains the same: the Southern courts were full of cases in which nonslaveholders contended with slaveholders over who had what rights to slaves.

These, then, were class conflicts between whites which were themselves expressed and experienced in terms of race, over which rights followed from whiteness and which from slavery, over exactly how far nonslaveholding white people could hold property in their own race if that

39. For class-based differences over the law of slavery see Wyatt-Brown 1982; Gross 1996, 217–21.

meant interfering with other people's slaves. As Barbara Fields has put it: "Race became the ideological medium through which people posed and apprehended basic questions of power and dominance, sovereignty and citizenship, justice and right. Not only questions involving the status and condition of black people, but also those involving relations between whites who owned slaves and whites who did not were drawn into these terms of reference, as a ray of light is deflected when it passes through a gravitational field" (1982, 162; see also E. Higginbotham 1992).

That so many of these crimes—the encounters of patrollers and "insolent" slaves, the indecent propositions treated as rape, the silent theft of food—occurred on Southern roads should tell us something. For the road was the territory of the runaway and the thief, of the "insolent" slave and aggressive patroller, of contingent hierarchy, undefined identity, and unmade history. On Southern roads slaves embodied the conflicting property claims of slaveholders and nonslaveholders, property claims that defied reckoning or reconciling in dollar values. Daily, with the subtlety of deference withheld in passing or complaints about a drunken "patrol" upon arriving home, or with the violence bespoken by the ax handles and fence rails later brought into court as evidence, slaves all over the South were engaging race-slavery where they encountered it. Even more: slaves were daily bringing nonslaveholders and slaveholders into open and ugly argument about how their communities and their society should be organized. On Southern roads and in Southern courts, slaves were setting whiteness into conflict with slavery. Race-slavery, the historic bargain, the single sacred premise in the antebellum South, was being brought by the slaves into continual confrontation with itself.[40]

CONCLUSION

A Southern judge would never have put it that way. Southern judges did their job: they bound humanity and interest together in bewildering knots and bandaged the breach between whiteness and slavery; they dampened unruly appropriations of the master languages of slavery into doctrine and translated existing social conflict into legally enforced consensus; they solved slave-made problems with judge-made law. And their decisions may, indeed, mark the (incomplete) progress of a series of transformations rather than the immanence of a set of contradictions: of capitalism, humanitarianism, Christianity, and the elaboration of a race-slavery social order. We should not, however, mistake talk of transformation, even the talk of power-

40. In this formulation the vitriolic racism, sexualized political violence, and class-denying white supremacy of the postbellum South stand as the triumph of whiteness over slavery—of race over class—as the ordering principle of the Southern political economy.

ful people, for the thing itself. Laws and legal decisions are documents that erase the trace of ongoing contests with the languages of precedent, resolution, and progress: as guides to the reality they purport to represent, they are unreliable.

Read for traces of the legal process that are masked by its results, Morris's book is a story neither of grand but incompletely realized transformations nor of immanent contradictions that eventually led to the Civil War. It is instead a story of a society in which questions "settled at law" were continually reopened in practice; in which the structures of economy and ideology that underlay the history of slavery were embodied in slaves, staged through their agency, and daily disrupted by their resistance; in which the master languages of slavery were used by slaveholders and slaves alike to question its practice, and in which slaves' own answers to the question "What is slavery?" continually forced local and legal refiguring of the social relations between whites; in which slaves themselves played an active part in shaping the legal process that governed their owners. That is not to say that slaves were shaping the law of slavery to suit their own version of the relations between master and slave, although in any given case they might have been. It is rather to argue that the legal incoherence that Morris takes as evidence of transformation, and that others have taken as evidence of contradiction, was instead evidence of complete confusion, of the ideology and social order of the antebellum South being brought, at every turn in the road, into active and divisive question by the slaves.

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