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Recommended Citation

Alfred L. Brophy, *Antislavery Women and the Origins of American Jurisprudence*, (2015).

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Antislavery Women and the Origins of American Jurisprudence

Alfred L. Brophy¹

Abstract

“Antislavery Women and the Origins of American Jurisprudence” is an essay review of Sarah Roth's *Gender and Race in Antebellum Popular Culture* (Cambridge University Press, 2014). It assesses Roth's account of the dialog between antislavery and proslavery writers. Roth finds that the antislavery and proslavery writers were joined in their depiction of enslaved people in the 1820s and early 1830s -- as savage people who threatened rebellion. But as antislavery writers shifted to portray enslaved people as humble citizens-in-waiting, the proslavery writers responded with an image of the plantation as a family. This critique turns to southern judges and treatise writers to provide a slightly different picture, which shows that while the public face of the proslavery movement may have been of happy enslaved people, the hard-nosed economic and legal side continued with the initial image of enslaved people. This became particularly salient as the south moved towards Civil War. Roth perceptively portrays the shift in the North that led to increasing calls for African American freedom and citizenship and the rise of empirical critiques of law, which became central to post-war jurisprudence. That is, the antislavery white women in Roth's study injected empirical as well as humanitarian considerations into jurisprudence. Meanwhile, in the southern courts the reaction to calls for citizenship resulted in increasingly dramatic efforts to deny citizenship -- and ultimately in a secession movement along the lines sketched by southern legal thinkers.

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Essay Review of Sarah N. Roth, *Gender and Race in Antebellum Popular Culture* (Cambridge University Press, 2014).

The truth is, the abolitionist can make the slave a brute or a saint, just as it may happen to suit the exigency of his argument. If slavery degrades its subjects into brutes, then one would suppose that slaves are brutes. But the moment you speak of selling a slave, he is no longer a brute,—he is a civilized man, with all the most tender affections, with all the most generous emotions. If the object be to excite indignation against slavery, then it always transforms its subjects into brutes; but if it be to excite indignation against the slaveholder, then he holds, not brutes, but a George Harris—or an Eliza — or an Uncle Tom — in bondage.

University of Virginia Professor Albert Taylor Bledsoe, *Liberty and Slavery* (1856)²

After the Civil War Harriet Beecher Stowe recalled that on meeting President Lincoln he said, “so you are the little woman who wrote the book that made this big war.”³ While Lincoln scholars think that may have been apocryphal, it suggests a theme that Sarah Nelson Roth explores in depth in *Gender and Race in Antebellum Popular Culture*: how antislavery writers, largely female novelists, remade the image of enslaved men and thus set the stage for rethinking about freedom and citizenship for enslaved people.⁴ Their influence went beyond ideas of citizenship, though – they provided a critique of the dominant considerations of utility and of historical jurisprudence. And they led the way for an expanded utilitarian calculations and for the post-Civil War critique of historical jurisprudence popularized by Oliver Wendell Holmes.

In the thirty years leading into Civil War anti-slavery writers – often affluent white women – changed dramatically their depiction of enslaved men. In the 1820s their case for abolition of slavery was based on the image of enslaved men as savage beasts. If such people were not freed, the United States risked a servile war and bloodshed that rivaled the revolution in Haiti.⁵ By the

² ALBERT TAYLOR BLEDSOE, *LIBERTY AND SLAVERY* 298-99 (Philadelphia, Lippincott 1856).

³ Daniel R. Vollaro, *Lincoln, Stowe, and the "Little Woman/Great War" Story: The Making, and Breaking, of a Great American Anecdote*, 30 J. ABRAHAM LINCOLN ASSOCIATION 18, 18 (2009).

⁴ SARAH N. ROTH, *GENDER AND RACE IN ANTEBELLUM POPULAR CULTURE* chapter 2 (2014)

⁵ *Id.* chapter (“More terrible than the uncage hyena”: The Savage Slave in 1830s Fiction”).

early 1850s antislavery writers had changed their depiction of enslaved men. Instead of savage beast, enslaved men were refined citizens who were being denied their rights as members of civil society.⁶ Proslavery southerners, especially politicians and judges, had to respond to that powerful imagery. Proslavery writers changed their depiction of enslaved men. Instead of depicting them as brutes, enslaved people were depicted as members of the family of slave owners, people who were not yet ready to be citizens.⁷ And then as the Civil War loomed, antislavery writers moved enslaved men up the next rung on the ladder of freedom, to citizens.⁸

Sarah Roth tells the story of this dialog between anti-slavery and proslavery forces, which had such momentous implications for constitutional law. And, significantly, it took place largely between antislavery women and proslavery men – often lawyers and judges. This is an important story for several reasons. First, it reveals the ways that elite white women changed the nature of political and legal debate on a central issue of our nation’s existence. It reveals the sophisticated ideas of antislavery legal thinkers on citizenship and freedom. Second, it reveals the ways that anti-slavery women and proslavery men responded to each other. It shows there was a dialog between antislavery and proslavery ideas and that the antislavery ideas, often embraced by women, exercised a gravitational pull on the proslavery ideas. This is a dialog in which fiction engaged proslavery judicial opinions and, more obliquely, those judicial opinions engaged the growing antislavery values. Thus, it relocates women to the center of constitutional thought and action in the pre-Civil War era. Finally, this reveals the power of ideas of citizenship and how difficult it was for proslavery ideas to effectively respond to the growing imagery that enslaved people should be treated as humans. That is, Roth reveals the power of anti-slavery imagery for political and

⁶ *Id.* at chapter 3 (“How a Slave was made a Man’: Manly Self-Defense in 1840s Slave Narratives”); chapter 4 (“Patient Sufferer, Gentle Martyr’: The Self-Sacrificial Uncle Tom”).

⁷ *Id.* at chapter 5 (“Impotent Rebels, Heroes, and Martyrs: Anti-Uncle Tom Novels of the 1850s”).

⁸ *Id.* at chapter 7 (“We have struck for our freedom”: The Black Revolutionary in Radical Abolitionist Fiction of the 1850s”).

legal thought leading into and during the Civil War.

Roth draws on a number of sources, such as the anti-slavery novel *Uncle Tom's Cabin*,⁹ as well as a novel written by a member of the Georgia Supreme Court,¹⁰ political theory published by southern university professors¹¹ and southern white women,¹² even science fiction written by proslavery southerners.¹³ Roth's framework of the growing desire for African American citizenship in North and the shifting images of enslaved people in the South is very useful for understanding the evolution of legal and political thought in the thirty years leading into Civil War.

Judicial opinions, however, are notable by their absence in this book. For judicial opinions are a particularly important source for gauging the proslavery attitudes in concrete settings. Roth's framework correlates with what was happening in state legislatures and also in the southern judiciary. Roth's framework helps us make sense of a series of cases in southern courts where judges discuss slaves' character. Those cases include attempts by testators to emancipate enslaved people, suits by owners and renters of slaves for the torts committed by slaves against strangers, suits by slaves claiming rights to freedom following travel in free states, and even criminal prosecutions of white people for abusing slaves and, conversely, against slaves for attacking owners, renters, and strangers. Southern judges' rhetoric about slave personality shifted along the

⁹ HARRIET BEECHER STOWE, *UNCLE TOM'S CABIN*, in HARRIET BEECHER STOWE, *THREE NOVELS* 10 (Library of Am. Ed. 1982) (Boston, John P. Jewett 1852).

¹⁰ JOSEPH JONES [EBENEZER STARNES], *THE SLAVEHOLDER ABROAD: OR, BILLY BUCK'S VISIT, WITH HIS MASTER, TO ENGLAND ...* (Philadelphia, J.B. Lippincott & Co., 1860).

¹¹ See, e.g., BLEDSOE, *supra* note 2; [George Frederick Holmes] *Observations on a Passage in the Politics of Aristotle Relevant to Slavery*, 16 S. LIT. MESSENGER 193 (April 1850); [George Frederick Holmes], *Uncle Tom's Cabin*, 18 S. LIT. MESS. 721, 727 (Dec. 1852); JAMES P. HOLCOMBE, *AN ADDRESS DELIVERED BEFORE THE SOCIETY OF ALUMNI, OF THE UNIVERSITY OF VIRGINIA, AT ITS ANNUAL MEETING, HELD IN THE PUBLIC HALL 40* (Richmond, Macfarlane and Ferguson 1853); WILLIAM A. SMITH, *LECTURES ON THE PHILOSOPHY AND PRACTICE OF SLAVERY: AS EXHIBITED IN THE INSTITUTION OF DOMESTIC SLAVERY IN THE UNITED STATES, WITH THE DUTIES OF MASTERS TO SLAVES* 14 (Nashville, Stevenson and Owen 1857).

¹² See, e.g., CAROLINE LEE HENTZ, *THE PLANTER'S NORTHERN BRIDE* (Philadelphia, T. B. Peterson 1853); CAROLINE LEE HENTZ, *HUMAN AND DIVINE PHILOSOPHY: A POEM, WRITTEN FOR THE EROSOPHIC SOCIETY OF THE UNIVERSITY OF ALABAMA ... DECEMBER 12TH, 1843* (Tuscaloosa, Journal and Flag Office 1844); Louisa S. McCord, *Uncle Tom's Cabin*, 7 S.Q. REV. 81 (1853).

¹³ See, e.g., [Edgar Allan Poe], *THE NARRATIVE OF SIR ARTHUR GORDON PYM...* (London, Wiley & Putnam 1838) OLIVER BOLOKITTEN, *A SOJOURN IN THE CITY OF AMALGAMATION, IN THE YEAR OF OUR LORD 18--* (New York, 1835).

lines that Roth describes from the 1820s to the mid-1850s.¹⁴ But as the Civil War approached, in the late 1850s, southern judges were writing again in dramatic terms about men of African descent as savages.¹⁵ That is, as they prepared for war their rhetoric turned to enslaved men as savages who had the power to wreck havoc and maybe even destroy the white slave-owning south. Thus, a comparison of Roth's framework against southern judicial opinions confirms that the judges were thinking and writing in terms very similar to the rest of the proslavery south. This confirms the close connections between judicial and cultural thought.

At points, however, judicial and popular thought diverged. Those are places where the economic imperative of slavery required a result that was at odds with the myth of paternalism that slave-owners told themselves. Those points of disjuncture between the judicial doctrine and southern popular culture reveal the places where the economic, demographic, and social reality of slavery were different from the idealized myths of the plantation. Roth provides an excellent framework for thinking about the sine curve of proslavery southern thought, from 1830 to 1860, especially in the judiciary.

In this essay review I have three goals: first, to assess the trajectory that Roth plots; second, to suggest the utility of that plot to understanding judicial behavior while also suggesting how judicial opinions modify somewhat Roth's story of the image of enslaved Africans held by proslavery southerners. Finally, I ask questions about causation in this story, such as the role of enslaved Africans and recently freed Africans in the changes described here as opposed to the white, female Northern writers. In that later line, I have two questions. First, while Roth describes well the changes in public images, I am unclear about the chain of causation. Moreover, in the south there is resistance by courts to the abolitionists' redefinition of slaves as citizens-in-waiting.

¹⁴ See *infra* sec. III.

¹⁵ See *infra* sec. IV.

The black image in the southern judicial mind, to paraphrase historians writing on this time,¹⁶ reveals that southern judges were deeply engaged in the creation of the public attitudes towards enslaved people and that those images drew upon popular culture. But those judges also departed from popular culture when necessary to develop a law based on hard-edged economic principles and to deny enslaved people citizenship rights. Those judges turned to the images of enslaved people as savages rather than as children and in that way departed from the popular culture that Roth details. Thus, I have two questions about whether Roth describes the causative factors North and South in translating public images of enslaved Africans into court opinions and legislative action. But whatever one's assessment of the causation, on which there should be more investigation, Roth's Northern, antislavery writers inject key issues into American jurisprudence, such as a deep reverence for empirical arguments (such as those based on an observation of the effect of slave law), as well as skepticism of historical thought and of natural law arguments based on hierarchy observed in nature.

I. The Trajectory of Anti-Slavery Imagery of Enslaved People

Roth plots a trajectory that begins in the 1820s as anti-slavery writers depicted enslaved men as savages. Their idea was to depict enslaved people as dangerous and to scare slave-owners into believing that if they did not free slave there would be rebellion. In fact, one of the most radical antislavery books ever published, David Walker's *Appeal to the Coloured Citizens of the World* threatened rebellion and urged slaves to take the lives of their owners.¹⁷ That imagery began to change around the time of an actual rebellion, the August 1831 Nat Turner rebellion, when one tract published shortly after the rebellion portrayed in sympathetic terms slaves in Turner's

¹⁶ GEORGE M. FREDERICKSON, *THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY, 1817–1914* (1987); MIA BAY, *THE WHITE IMAGE IN THE BLACK MIND: AFRICAN-AMERICAN IDEAS ABOUT WHITE PEOPLE, 1830-1925* (2000).

¹⁷ DAVID WALKER, *APPEAL TO THE COLOURED CITIZENS OF THE WORLD* (1829) (Boston, David Walker revised ed. 1830).

county. While the book was an account of the rebellion, readers could leave it thinking that the rebellion was in some ways understandable, perhaps even justified.¹⁸ The imagery shifts beginning in the late 1830s towards enslaved people as Christians and citizens. Harriet Beecher Stowe's *Uncle Tom's Cabin* is the most famous of this literature, but some of the anti-slavery legal literature engaged with this as well, such as William Goodell's *The American Slave Code in Theory and Practice*, which turned to an empirical study of the system of slavery – based largely on newspaper accounts of runaway slaves – as well as an intensive study of judicial opinions to map out the inhumanity of the slave code. It was, as its title says, both an empirical and theoretical analysis.¹⁹ It was, thus, part of the utilitarian calculations so ubiquitous in pre-Civil War political and legal thought.²⁰

In addition to the empirical attack on slavery, which argued that the harms of slavery outweighed the benefits, there was also a powerful attack from the vantage of humanitarian considerations for the enslaved. In an 1851 address at Concord, Massachusetts, Ralph Waldo Emerson advanced an alternative interpretation of law, which might admit of some antislavery sentiments. Emerson urged that the higher law, then so commonly invoked in antislavery circles, was part of the common law. Contrary to what many lawyers said, Emerson reported that his research showed support for the higher law. “A few months ago, in my dismay at hearing that the Higher Law was reckoned a good joke in the courts, I took pains to look into a few law books.”²¹

¹⁸ *Id.*

¹⁹ WILLIAM GOODELL, *THE AMERICAN SLAVE CODE IN THEORY AND PRACTICE* (New York, American Anti-Slavery Society 1853).

²⁰ See, e.g., Alfred L. Brophy, *Humanity, Utility, and Logic in Southern Legal Thought: Harriet Beecher Stowe's Vision in Dred: A Tale of the Great Dismal Swamp*, 78 B.U. L. REV. 1113, 1123 n.44, 1154-55 (1998) Alfred L. Brophy *Reason and Sentiment: The Moral Worlds and Modes of Reasoning of Antebellum Jurists*, 79 B.U. L. REV. 1161, 1171-72 (1999) (reviewing Peter Karsten, *Heart versus Head: Judge-Made Law in the Nineteenth Century America* (1997)).

²¹ *The Fugitive Slave Law*, in 11 *THE COMPLETE WORKS OF RALPH WALDO EMERSON* 178, 190 (Edward Waldo Emerson ed., 1903).

He looked for signs that “immoral laws are void” and found that “the great jurists, Cicero, Grotius, Coke, Blackstone, Burlamaqui, Montesquieu, Vattel, Burke, Mackintosh, Jefferson, do all affirm this.”²² Yet, Emerson did not cite passages from those authors in defense of his argument. For “no reasonable person needs a quotation from Blackstone to convince him that white cannot be legislated to be black.”²³ Soon there would be a novel affirming Emerson’s belief.

Harriet Beecher Stowe advanced a jurisprudence of sentiment in three works. She began with *Uncle Tom’s Cabin*, which portrayed the horrors of slavery and in particular the hazards of the law’s support for owners at the expense of slaves.²⁴ This was followed shortly by her non-fiction *A Key to Uncle Tom’s Cabin*.²⁵ A section of that book focused on southern judicial opinions. North Carolina Supreme Court Justice Thomas Ruffin’s *State v. Mann* decision received the largest attention.²⁶ Stowe turned to it as an example of cold legal logic.²⁷ Ruffin, according to Stowe, did not listen to the human voice in drafting his opinion; instead, he applied cold logic to the issue. It was this cold logic that led to so many perverse conclusions:

Every act of humanity of every individual owner is an illogical result from the legal definition; and the reason why the slave-code of America is more atrocious than any ever before exhibited under the sun, is that the Anglo-Saxon race are a more coldly and strictly logical race, and have an unflinching courage to meet the consequences of every premise which they lay down, and to work out an accursed principle, with mathematical accuracy, to its most accursed result. The decisions of American law-books show nothing so much as this severe, unflinching accuracy of logic.²⁸

The third book in the Stowe’s anti-slavery trilogy, *Dred: A Tale of the Great Dismal Swamp*, had a fictional character based on Justice Ruffin. That fictional jurist was anti-slavery in private, but felt compelled by law to issue a proslavery decision. Like *State v. Mann*, the opinion freed a man from

²² *Id.*

²³ *Id.*

²⁴ HARRIET BEECHER STOWE, *UNCLE TOM’S CABIN* (Boston, John P. Jewett 1852).

²⁵ HARRIET BEECHER STOWE, *A KEY TO UNCLE TOM’S CABIN* (Boston, John P. Jewett 1853).

²⁶ *State v. Mann*, 12 N.C. 263 (1830).

²⁷ Stowe, *supra* note 25, at 71.

²⁸ *Id.* at 82.

liability (this time it was civil liability) for abusing a slave in his custody. When asked by his wife whether he must issue the decision, the judge said “A Judge can only perceive and declare. What I see, I must speak, though it go against all my feelings and all my sense of right ... I sit in my seat, not to make laws, nor to alter them, but simply to declare what they are. ... I have sworn truly to declare the laws, and I must keep my oath.”²⁹ While that is a fictional account – in which a critiquer of the southern judicial system constructed a character – it gives a sense of how people at the time interpreted what judges were doing.³⁰

One of the most powerful critiques of the 1850 Fugitive Slave Act was that it deprived slaves of rights of citizenship and tended to take away those rights of citizenship from others. Henry David Thoreau, responding to the Act’s requirements that Massachusetts citizens assist with the return of fugitive slaves, said on July 4, 1854 that “there are perhaps a million slaves in Massachusetts.”³¹ As cases of fugitive slaves began to appear in courts the debates increasingly took on the question about whether individuals should actively stop rendition of fugitive slaves. The most famous case arose in Boston in 1854 when Anthony Burns was arrested as a fugitive slave and, after Judge Edward Loring ordered him returned, abolitionists set about plans to free him.³² President Franklin Pierce employed federal troops to make sure that Burns was put on a ship to return to Virginia.³³ Burns’ trial brought home to many the obligations that law imposed and many believed those obligations were odious. While some courts found creative ways to avoid the law,

²⁹ 1 HARRIET BEECHER STOWE, *DRED: A TALE OF THE GREAT DISMAL SWAMP* 440 (Boston 1856) (1896 edition).

³⁰ Stowe engaged in an explicit dialog with proslavery judges. See, e.g., STOWE, *A KEY TO UNCLE TOM’S CABIN*, *supra* note 25, at 79 (discussing Justice Thomas Ruffin’s opinion in *State v. Mann* and asking of him, why he was “merely an *expositor* and not a *reformer* of the law”); Justice John Belton O’Neill, *Letter*, N.Y. TRIBUNE (August 15, 1853) (discussing legal errors in Harriet Beecher Stowe’s *A Key to Uncle Tom’s Cabin*).

³¹ Henry David Thoreau, *Slavery in Massachusetts*, in 4 WRITINGS OF HENRY DAVID THOREAU 388, 388 (1906).

³² See, e.g., JAMES FREEMAN CLARKE, *THE RENDITION OF ANTHONY BURNS: ... A DISCOURSE ON CHRISTIAN POLITICS* (Boston, Crosby & Nichols 1854).

³³ See ALBERT J. VON FRANK, *THE TRIALS OF ANTHONY BURNS* 203-19 (1998) (describing Burns’ case from Loring’s decision to Burns’ departure from Boston).

most commonly and most importantly, they followed it.³⁴ Thoreau was led to ask in the wake of Anthony Burns' trial, "does anyone think that justice or God wait on Mr. Loring's decision?"³⁵ When enslaved people were seen as citizens, the distance that needed to be traveled to freedom was short.

II. The Image of the Enslaved Person in Southern Legal Thought

The proslavery literature in the 1820s and 1830s had the same imagery of enslaved men as the antislavery literature, but it drew different results from it. That proslavery literature, especially works like William and Mary Professor Thomas R. Dew's pamphlet responding to Nat Turner's rebellion, continued to view enslaved people (particularly men) as savages who needed to be controlled or rebellion would result.³⁶ But in the 1840s and especially 1850s the proslavery literature began to respond to the antislavery literature that saw enslaved people as humans deserving the rights of citizens. That proslavery literature then tried to emphasize the familial aspects of slavery. Works like Thomas R.R. Cobb's *An Inquiry into the Law of Negro Slavery* tried to balance the images of enslaved people as dangerous rebels (who needed to be controlled) against images of loyal enslaved people who were not yet ready for citizenship.³⁷

The political theory popular among white southerners in the 1850s hewed to that line. Instead of emphasizing Enlightenment principles of universal freedom and rights, the political theory of the 1850s emphasized inequality and taught that people were only entitled to rights

³⁴ See ROBERT S. COVER, *JUSTICE ACCUSED: ANTI-SLAVERY AND THE JUDICIAL PROCESS* (1975); MARK TUSHNET, *SLAVE LAW IN THE AMERICAN SOUTH: STATE V. MANN IN HISTORY AND LITERATURE* (2004).

³⁵ Henry David Thoreau, *Slavery in Massachusetts*, *supra* note 31, at 389.

³⁶ THOMAS R. DEW, *REVIEW OF THE DEBATE IN THE VIRGINIA LEGISLATURE OF 1831 AND 1832* (Richmond, T.W. White 1832).

³⁷ The conflicts of the two visions of enslaved people appear in Thomas R.R. Cobb's *An Inquiry into the Law of Negro Slavery* cccxii (Philadelphia, T. & J.W. Johnson 1858), which portrays enslaved people as improving morally and physically under the discipline of southern owners while on the same page discussing the "moral weakness of the native Ebo." See also Anon., *Observations on a Passage in the Politics of Aristotle Relevant to Slavery*, 16 S. LIT. MESSENGER 193 (April 1850).

according to where they were on the scale of civilization.³⁸ The novels published in response to Uncle Tom's Cabin routinely emphasize the point of African American inferiority and thus add further support to premise behind the proslavery political theory.³⁹ It was a political theory grounded in Aristotle, as University of Virginia law professor James P. Holcombe acknowledged in a speech to the state agricultural fair in Petersburg, Virginia.⁴⁰

Justice Ebenezer Starnes of the Georgia Supreme Court responded to Stowe and to empirical critiques of slavery, such as Goodell's *American Slave Code in Theory and Practice*, by conducting his own empirical studies of crimes committed by enslaved people and free people of African descent⁴¹ and also by writing a proslavery novel, *The Slaveholder Abroad*.⁴² While Starnes' work was a weak rebuttal of the antislavery critiques, it shows that just as the antislavery novelists and lawyers were responding to proslavery jurists, the proslavery jurists were responding to those critiques. Another response came from South Carolina Justice John Belton O'Neal, whose treatise listed the restrictions that South Carolina law imposed on owners in abusing their slaves.⁴³ More frequently judges relegated decisions regarding the treatment of slaves to the conscience of their owners, for whatever that was worth.⁴⁴

Beyond the common law, those writing on political theory emphasized hierarchy rather than equality. Slavery was part of the natural order, they argued, in which some labored for others. In this way proslavery southerners joined their belief that slavery was nearly ubiquitous in human history and that when slavery ended in the West Indies it led to demographic and economic disaster

³⁸ JOHN RANDOLPH TUCKER, ADDRESS . . . DELIVERED BEFORE THE PHOENIX AND PHILOMATHEAN SOCIETIES, OF WILLIAM AND MARY COLLEGE . . . , at 10–11 (Richmond, Chas. H. Wynne 1854).

³⁹ Roth, *supra* note 4, at 141-65.

⁴⁰ James P. Holcombe, *Is Slavery Consistent With Natural Law?*, 27 S. LIT. MESSENGER 401 (Dec. 1858) (reprinting address to Union Agricultural Society).

⁴¹ See STARNES, *supra* note 10, appendix, at 465-512.

⁴² See *id.*

⁴³ JOHN BELTON O'NEALL, THE NEGRO LAW OF SOUTH CAROLINA (Columbia, John P. Bowman 1848).

⁴⁴ See, e.g., DUTIES OF MASTERS TO SERVANTS: THREE PREMIUM ESSAYS (Charleston, Southern Baptist Publication Society 1851).

for the slave-owning class. It was a political theory of hierarchy and order that was in keeping with their understanding of history and contemporary society and their economic best interest.⁴⁵

Together they were debating law on the grounds of empiricism and sentiment both – and forming an American jurisprudence of empiricism, historicism,⁴⁶ and debate about the obligations that the rule of law imposed on government officials and private citizens.

Southerners understood the power of appeals to humanity that were increasingly made by the abolitionists. The Southern proslavery response changed the image of enslaved Africans. Where once the talk had been of the virtues of slavery for the slave-owning part of society, such as how it made democracy possible,⁴⁷ by the 1850s the proslavery side needed a response to the growing sense that enslaved people were citizens-in-waiting, who were being deprived of their rights and humanity. The proslavery response shifted course somewhat from the imagery of enslaved men as beasts to enslaved people as docile members of a plantation family.⁴⁸ Thus, the response focused on enslaved people as “family” members and at the same time made the point in increasing amplitude that enslaved people cannot be citizens. That was the response in the legal literature of the proslavery south.

III. The Salience of Judicial Imagery of Enslaved People

There was another response by southern judges. And that raises the question how much Roth’s framework can help us understand what judges were doing? Several central questions

⁴⁵ BLEDSOE, *supra* note 2; JOHN RANDOLPH TUCKER, ADDRESS ... DELIVERED BEFORE THE PHOENIX AND PHILOMATHEAN SOCIETIES, OF WILLIAM AND MARY COLLEGE, ON THE 3D OF JULY, 1854 (Richmond, Chas. H. Wynn 1854).

⁴⁶ See generally Alfred L. Brophy, *When History Mattered*, 91 TEX. L. REV. 601, 603-06 (2013) (reviewing David M. Rabban, *Law’s History: American Legal Thought and the Transatlantic Turn to History* (2013)) (discussing pre-Civil War origins of American jurisprudence in debate over slavery).

⁴⁷ See, e.g., [Abel Upshur], *Domestic Slavery*, 5 S. LIT. MESSENGER 677, 679 (Oct. 1839); Nathaniel Beverley Tucker, *A Note to Blackstone’s Commentaries*, 1 S. LIT. MESSENGER 227, 228 (January 1835).

⁴⁸ Cobb, *supra* note 37, at ccxvii-ccxix (discussing slaves as part of plantation family). To be sure, there were also elements of the earlier defense of slavery that it promoted a spirit of independence among white people, even non-slave owners. *Id.* at xxxix.

emerge from her narrative in regard to southern judiciary. First, how much does the imagery tell us about southern legal thought? Did judges reflect the changing images of enslaved people? And did judges contribute anything to the changing imagery. That is, what does Roth's discussion of the changing ideas about enslaved people tell us about the judiciary, legal doctrine, and the ways that antislavery advocates responded to proslavery legal thought? This is a question as we try to locate law at the center of American history.⁴⁹ By turning to a series of doctrines, this section illustrates that judges employed the imagery of enslaved people (particularly men) as savages at many points; at other points the imagery was of enslaved people as devious or manipulative. At other points they responded, most notably in the *Dred Scott* decision and the cases that cited it from 1857 to the beginning of Civil War in 1861, to the anti-slavery image of enslaved men citizens. Through four areas – cases where testators tried to free slaves via will, suits brought against owners or renters for the torts slaves committed, suits for freedom based on travel in a free state (or emancipation by an owner in a free state), and the criminal prosecutions of slaves, this section suggests the points of divergence between the imagery of slaves in popular culture in the proslavery south and the more economically oriented decisions of proslavery jurisprudence.

A. Emancipation Via Will

One way of gauging the shifting judicial ideas about enslaved Africans is to examine cases involving emancipation. For emancipation challenged the continuing strength of slavery. The cases reveal that judges increasingly feared the loosening of controls over slaves. Perhaps the best place to gauge the shifting ideas is Georgia, where Chief Justice Joseph Henry Lumpkin decided emancipation cases for nearly fifteen years before the Civil War.⁵⁰ In *Vance v. Crawford* in 1848

⁴⁹ See, e.g., G. EDWARD WHITE, *LAW IN AMERICAN HISTORY: FROM THE COLONIAL YEARS THROUGH THE CIVIL WAR* (2012) (using law's development as the center of a narrative about American history to the Civil War).

⁵⁰ *Vance v. Crawford*, 4 Ga. 445, *6 (1848) (listing will provision that seems to provide for quasi-freedom for slave, Ishmael).

Lumpkin first upheld a will that ordered slaves taken outside the state and emancipation. Lumpkin found such a provision consistent with Georgia's statutes, though he condemned emancipation – as injuring slaves, the Georgia state, and also families. Lumpkin concluded that though the family was the origin of all societies, emancipation injured families and thus wills providing for emancipation should not be given favor.⁵¹

Over the next dozen years, Lumpkin revisited other emancipation schemes via will and increasingly criticized them. Sometimes slaves were not freed despite a will ordering them taken outside of the state and freed – as happened in *Adams v. Bass*, where the testator ordered slaves taken to Indiana and freed. Indiana at that point no longer allowed this and thus the slaves descended to the residuary devisees, the testator's nephews and nieces.⁵² Lumpkin rejected a cy pres argument that might have allowed the slaves to be taken somewhere other than Indiana, for he thought such emancipations bad for the enslaved.

This policy of respecting a testator's wishes but not adding to them continued in *Cleland v. Waters*. In the first of the two *Cleland* cases, the court construed a will as providing for freeing even though there appeared to be some language missing. For apparently the will had been copied from another precedent, though imperfectly.⁵³ Here Lumpkin expressed support for slavery and opposition to emancipation:

Thanks to the blind zealots of the North, for their unwarrantable interference with this institution. It has roused the public mind to a thorough investigation of the subject. The result is, a settled conviction that it was wisely ordained by a forecast high as heaven above man's, for the good of both races, and a calm and fixed determination to preserve and defend

⁵¹ *Id.*

⁵² *Adams v. Bass*, 18 Ga. 130, *6 (1855). A dissent by Judge Benning argued that the entire will was invalid and that the testator's intestate heirs, not the residuary beneficiaries who were nephews and nieces, should inherit. *Id.* at *11.

⁵³ *Cleland v. Waters*, 16 Ga. 496 *7 (1854).

it, at any and all hazards.⁵⁴

In the second *Cleland* opinion, Lumpkin gave effect to the testator's will that allowed slaves to choose between slavery and freedom (as long as the emancipation took place outside the state) – while a dissenting judge interpreted Georgia statutes to prohibit emancipation in any way.

Lumpkin, though clearly proslavery, permitted a very mildly antislavery interpretation of the law.⁵⁵

For Lumpkin was upholding in some ways an anti-slavery law. Lumpkin referred repeatedly to resolutions in the Georgia Senate in 1827 about the hazards of the American Colonization Society.⁵⁶ Justice Joseph Henry Lumpkin thought that slaves should not be free for this led to insubordination by slaves in the state. This was a case where a judge's proslavery sentiments were trumped by a law that was not quite so proslavery:

I am fully persuaded that the best interests of the slave, as well as a stern public policy, resulting from the whole frame-work of our social system, imperatively demand that all post mortem manumission of slaves should be absolutely and entirely prohibited. Slavery is a cherished institution in Georgia-founded in the Constitution and laws of the United States; in her own Constitution and laws, and guarded, protected and defended by the whole spirit of her legislation; approved by her people; intimately interwoven with her present and permanent prosperity. Her interests, her feelings, her judgment and her conscience-not to say her very existence, alike conspire to sustain and perpetuate it.⁵⁷

Lumpkin wanted to restrict the owner's rights to dispose of property via will. He asked,

when the owner has kept them as long as he can enjoy them; shall he, from an ignorance of the scriptural basis upon which the institution of slavery rests, or from a total disregard to the peace and welfare of the community which survive him, invoke the aid of the Courts of this State to carry into execution his false and fatal views of humanity? Is not every agitation of these cases in our Courts attended with mischief? Is not every exode of slaves from the interior to the seaboard, thence to be transported to a land of freedom, productive of evil? Can any doubt its tendency? Are there not now in our midst large gangs of slaves who expected emancipation by the will of their owners, and who believe they have been unjustly deprived of the boon?

⁵⁴ 16 Ga. 496, *13.

⁵⁵ *Cleland v. Waters*, 19 Ga. 35 at *7 (1855).

⁵⁶ WILLIAM CROSBY DAWSON, A COMPILATION OF THE LAWS OF THE STATE OF GEORGIA, PASSED BY THE LEGISLATURE ... appendix Resolutions, at 84 (Milledgeville, 1831).

⁵⁷ *Cleland*, 19 Ga. 35, * 7.

Lumpkin was finding new bases for limiting emancipation⁵⁸ – and followed Mississippi’s similar decision the previous year.⁵⁹ Lumpkin then explained his own progression from advocate of gradual emancipation to opponent of emancipation. The trajectory of Lumpkin’s thought paralleled that of the south more generally – and of Roth’s subjects.

I was once, in common with the great body of my fellow citizens of the South, the friend and patron of this enterprise. I now regard it as a failure, if not something worse; as I do every effort that has been made, for the abolition of negro slavery, at home or abroad, Liberia was formed of emancipated slaves, many of them partially trained and prepared for the change, and sent thousands of miles from all contact with the superior race; and given a home in a country where their ancestors were natives, and supposed to be suited to their physical condition. Arrived there, they have been for a number of years in a state of pupilage to the Colonization Society, in order that they might learn “to walk alone and by themselves.” And at the end of a half a century what do we see? A few thousand thriftless, lazy semi-savages, dying of famine, because they will not work! To inculcate care and industry upon the descendants of Ham, is to preach to the idle winds. To be the “servant of servants” is the judicial curse pronounced upon their race. And this Divine decree is unreversible. . . . Under the superior race and no where else, do they attain to the highest degree of civilization; and any experiment, whether made in the British West India Islands, the coast of Africa, or elsewhere, will demonstrate that it is a vain thing for fanaticism, a false philanthropy, or anything else, to fight against the Almighty. . . . Let our women and old men, and persons of weak and infirm minds, be disabused of the false and unfounded notion that slavery is sinful, and that they will peril their souls if they do not disinherit their offspring by emancipating their slaves!⁶⁰

Lumpkin enforced a mildly antislavery law despite his obvious and growing proslavery sentiments.

In 1860 the Georgia court faced another permutation – that permitted slaves to choose to go to a free state and be emancipated or to select their owner in Georgia. Justice Lyon found this unacceptable, for it admitted of a shadow land that was part slave and part free.

No man can create a new species of property unknown to the Law. No man is allowed to introduce nomalies into the ranks under which the population of the State is ranged and classified by its constitution and laws. It is for the master to determine whether to continue

⁵⁸ For instance, in *American Colonization Society v. Gartrell* Lumpkin concluded that the American Colonization Society did not have the authority in its charter to take slaves and then free them. It was limited to helping colonize free people. Therefore Lumpkin invalidated a devise of slaves to the Society. *American Colonization Society v. Gartrell*, 23 Ga. 448, at *7 (1857) (“while the courts might decline to interfere, to prevent the execution of such a trust, they might consistently and without involving any absurdity, refuse to intervene, to compel its execution”).

⁵⁹ *Lusk v. Lewis*, 32 Miss. (3 Geo.) 297 *3 (1856).

⁶⁰ *American Colonization Society v. Gartrell*, 23 Ga. 448, at *7.

to treat his slaves as property, as chattels, or in the mode prescribed by Law, to manumit them, and thus place them in that class of persons to which the freed negroes of the State are assigned. But he cannot impart to his slaves, as such, for any period, the rights of freed men. He cannot endow, with powers of such import as are claimed for the slaves; here, persons whose status or condition in legal definition and intendment exists in the denial to them of any social or civil capacity whatever.”⁶¹

This was part of drawing yet further distinctions between freedom and slavery. The point here is that the images of enslaved people that Lumpkin used were in distinction to that advanced in southern popular culture of enslaved people as child-like family members. Lumpkin, in contrast, saw enslaved people as rebels in waiting.

B. Tort Suits Against Slave-Owners and Renters of Slaves

Justice Ruffin relied on his understanding of slave personality in civil cases as well. In *Heathcock v. Pennington*, Ruffin wrote of the ordinary duty of care required of people who rented slaves: “a slave, being a moral and intelligent being, is usually as capable of self preservation as other persons. Hence, the same constant oversight and control are not requisite for his preservation, as for that of a lifeless thing, or of an irrational animal.” Ruffin, then, absolved an operator of a mine shaft of liability to his owner for the death of a young slave who was employed there and had, late at night, fallen into the shaft and died. *Heathcock* was part of the emergence of a modern tort law, which left the owner of a slave with a limited remedy and facilitated the operation of the mine at a low cost. The mine had to keep operating twenty-four hours a day and “some one had necessarily to perform at those times”:

No one could suppose that the boy, knowing the place and its dangers, would incur the risk of stumbling into the shaft by not keeping wide awake. It was his misfortune to resemble the soldier sleeping at his post, who pays the penalty by being surprised and put to death. The event is to be attributed to one of those mischances, to which all are more or less exposed, and not, in particular, to want of care by the defendant.⁶²

⁶¹ Curry v. Curry, 30 Ga. 253, at *5 (quoting Bailey v. Poindexter, 55 Va. (14 Grat.) 132 (1858)).

⁶² 33 N.C. (11 Ired.) 640 (1850).

Similarly, in *Parham v. Blackwelder*, Ruffin further explored the nature of slaves' personality and the law's need to decouple an owners' liability from torts committed by her slaves. *Parham* arose when a slave owned by Amelia Parham cut wood and carried it away from Elizabeth Blackwelder's property. There was no precedent supporting an owner's liability for the intentional torts of their slaves. Ruffin found that there was no liability given the nature and extent of slavery:

We believe the law does not hold one person answerable for the wrongs of another person. It would be most dangerous and unreasonable, if it did, as if is impossible for society to subsist without some persons being in the service of others, and it would put employers entirely in the power of those who have often, no good will to them, to ruin them.⁶³

C. Criminal Prosecutions of Enslaved People and of Slave-Owners

Stowe first raised the conflict between humanity and law that motivated her examination of Judge Clayton in *A Key to Uncle Tom's Cabin* when she used Justice Thomas Ruffin's opinion in *State v. Mann* as a central part of her discussion of the law of slavery.⁶⁴ The case arose from the prosecution of John Mann for assaulting Lydia, a slave whose services he had hired for one year. Mann hit Lydia when she committed a small offense, and she ran away. Mann "called upon her to stop;" when she did not, he shot her. A jury convicted him of battery, but Ruffin overturned the conviction.⁶⁵

Justice Ruffin captured the attention of abolitionists with his extraordinary opinion in *Mann* because he released the possessor of a slave from all legal control for harm to her, despite his recognition of the inhumanity of his decision. Ruffin began by lamenting "the struggle . . . in the Judge's own breast between the feelings of the man, and the duty of the magistrate."⁶⁶ The opinion presents a mixture of rationales that together release Mann from liability for abusing a slave who

⁶³ 30 N.C. (8 Ired.) 446.

⁶⁴ *State v. Mann*, 13 N.C. (2 Dev.) 263 (1830).

⁶⁵ *Mann*, 13 N.C. at 266.

⁶⁶ *Id.* at 264.

was under his control. The issue, just as in Milly's case, was whether the hirer and possessor of a slave could be indicted for the abuse of her.

The opinion employed utilitarian and instrumentalist rationales, as well as ones based on community standards. Ruffin began by observing that no owner had ever been held liable for abuse of a slave. Ruffin had to follow the community's rule of non-liability, for even if he thought differently, "we could not set our notions in array against the judgment of everybody else, and say that this or that authority, may safely be lopped off."⁶⁷ In cases involving slaves "the end is the profit of the master, his security and 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."⁶⁸

Slaves, Ruffin knew, will almost certainly perceive their situation as unjust. "What moral considerations," Ruffin asked rhetorically, "would 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"?⁶⁹ Here Ruffin adopted a rule because he recognized that slaves would not accept their position in Southern society unless they were compelled to by force. Such obedience only arises when the master has "uncontrolled authority over the body."⁷⁰ Ruffin's candid statement was extraordinary for its honesty and for its understanding that slaves would not abide by the Southerners' moral philosophy, which taught that slaves should be content with their low place in Southern society.

Ruffin's question also indicates that he recognized the artificial nature of slavery: that however necessary it might be to society, slavery needed the support of elaborate human institutions, such as law. Even as Southerners increasingly defended slavery as a natural

⁶⁷ *Id.* at 265.

⁶⁸ *Id.* at 266.

⁶⁹ *Id.*

⁷⁰ *Id.* at 266.

outgrowth of—and necessary to—human society, they also emphasized the need for humans to construct their intellectual and social environment. Ruffin’s position that he must construct a law to teach slaves their proper position in Southern society, which they would otherwise reject, appears as part of the dominant Southern philosophy that emphasized the control of nature through law.

The centrality of the utilitarian and instrumentalist impulses appeared again in the conclusion. Ruffin felt that as long as slavery exists it is the “imperative duty of the judges to recognize the full dominion of the owner over the slave,” unless absolved of that duty by statute. “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 tranquility.” In short, the rule is commanded because it “most effectually secur[es] the general protection and comfort of the slaves themselves.”⁷¹

Four years after *State v. Mann*, the North Carolina Supreme Court revisited the amount of control that owners (or their agents, such as overseers) could exercise over slaves in *State v. Negro Will*.⁷² Then the court revealed a different conception of the docility that should be expected of slaves. *Will* raised the question of an overseer’s power over a slave through the prosecution of a slave who resisted – and ultimately mortally wounded – an overseer. The slave Will killed his overseer following a brief dispute with him. No one questioned that Will had argued with the overseer and in the process of running away, the overseer shot and wounded him. But the question was whether Will was guilty of murder or only a less serious charge of manslaughter. For the overseer had clearly been very aggressive in pursuing Will and had attacked him in a moment of irrational rage. Will responded by cutting the overseer on the thigh and then the arm, which led to his death. Whether Will was guilty of first degree murder or only manslaughter turned on whether the law recognized that Will was legitimately (or understandably is probably a better word)

⁷¹ *Id.* at 268.

⁷² *State v. Negro Will*, 18 N.C. (1 Dev. & Bat.) 121 (1834); *State v. Jarrott*, 23 N.C. (1 Ired.) 76, (1840).

resisting the overseer or whether – as some might suspect – the overseer could expect absolute and uncontrolled obedience from Will at all times, even in the midst of a dispute.

North Carolina Attorney General John R.J. Daniel, who argued the case for the state, turned to *State v. Mann* to show the slaves’ obligation of obedience.⁷³ Daniel maintained that Will had no legal right to resist the overseer. Moreover, if law recognized Will’s reaction to the attack by the overseer by reducing the severity of Will’s crime, such leniency, Daniel argued, “would beget desires for another, until nothing short of absolute emancipation would satisfy. It must then be had, or an alternative the most shocking to humanity would then be resorted to.”⁷⁴ There was a large threat to changing the law and protecting slaves more – or perhaps it is better phrased as subjecting overseers to more court oversight.⁷⁵ Daniel invoked a common argument about the ubiquity of slavery⁷⁶ and the dangers of a failure to vigilantly control the enslaved population.⁷⁷

Two important values mixed in Justice William Gaston’s *Will* opinion. First, the desire to limit violence, particularly violence over slaves. While he recognized that “unconditional submission” was the “general duty of the slave,” he thought that did not “authorize the master to kill his slave.” From that principle, he found some authority for Will’s fleeing from the overseer and he found no authority for the overseer’s shooting of Will. Second, was Gaston’s recognition of Will’s humanity and of the natural, human response he had to the attack by the overseer. Gaston concluded with rather remarkable terms that there were insufficient precedents to hold a slave guilty of homicide in all cases where he kills a person who has dominion over him.⁷⁸ *Will* reveals Gaston’s concern with the subordination of everyone – master as well as slave – to the restraints of

⁷³ 18 N.C. at 160-61.

⁷⁴ 18 N.C. at 163.

⁷⁵ *Id.* at 162-63.

⁷⁶ *Id.* at 153-54.

⁷⁷ *Id.* at 162-63.

⁷⁸ *Id.* at 172 (quoting Psalm 19 and William Shakespeare *Merchant of Venice*, Act III, scene 1).

law. It also reveals his particular attention to human emotions.

Will also reveals more nuance within the judiciary over the question of a slave's instinctive, *human* impulse for self-defense. As Jeannine DeLombard argued in *In the Shadow of the Gallows*, the slave who commits a crime is an important figure for establishing rational, responsible (because culpable) personhood and thus civic membership. This is different from the irrational, bestial figure of the savage -- which, as *Mitchell v. Wells* reveals -- re-emerges late in the antebellum period in conjunction with the asylum movement, the controversy over the Sixth Census, and abolitionist efforts to place sole responsibility for slavery's crimes on white slaveholders, leading to narratives of violent black incapacity.⁷⁹

D. The Shifting Law of Emancipation By Travel in a Free State

A third set of cases that deal with the southern judiciary's images of enslaved people are suits where enslaved people claim freedom based on travel in free states. There had been until the 1850s a fairly consistent constructional preference, in border state courts, in favor of freedom when enslaved people traveled with their owners in free states. That constructional preference seems to have been based on a belief, stretching back to the late eighteenth century, that by voluntarily taking slaves to free states their owners acquiesced in freedom.

The most famous case to endorse proslavery thought was the United States Supreme Court's 1857 decision in *Dred Scott v. Sandford*.⁸⁰ It dealt with the question whether enslaved human beings became free if their owners took them into free jurisdictions. Once that had been the law in Missouri.⁸¹ Thus, it came as something of a surprise when the Missouri Supreme Court ruled in

⁷⁹ JEANNINE DELOMBARD, *IN THE SHADOW OF THE GALLOWES: RACE, CRIME, AND AMERICAN CIVIC IDENTITY*, chap. 5 (2012).

⁸⁰ *Dred Scott v. Sandford*, 60 U.S. (15 How.) 393, 431 (1857).

⁸¹ See, e.g., *Winy v. Whitesides*, 1 Mo. 472 (1824); *Julia v. McKinney*, 3 Mo. 270 (1833). See also LEA VANDERVELDE, *REDEMPTION SONGS: SUING FOR FREEDOM BEFORE DRED SCOTT* 205-07 (2014) (discussing the phenomenon of freedom suits in St. Louis courts from 1820 to the Civil War, though noting that they were decreasingly

1852 that a slave, Dred Scott, who sued for his freedom with the claim that his owner had taken him into a free territory, was still a slave.⁸²

That set in motion an appeal to the United States Supreme Court, which gave the court the opportunity to make formal constitutional law what had for many years been only the constitutional theorizing of southern politicians like South Carolina Senator John C. Calhoun. Chief Justice Roger B. Taney's majority opinion in *Dred Scott* did at least two important things. First, it took away the right of citizenship, effectively silencing slaves in federal court. It did that by ruling that slaves were not entitled to citizenship.⁸³ Taney constitutionalizes the ideas that had been circulating in proslavery thought for decades when he rules that people of African descent were inferior and that they were not entitled to United States citizenship, which limited their ability to sue in federal court. Taney wrote that Africans had been seen for decades "as beings of an inferior order, and altogether unfit to associate with the white race either in social or political relations, and so far inferior that they had no rights which the white man was bound to respect." The result of such thinking was, according to Taney, "that the negro might justly and lawfully be reduced to slavery for his benefit."⁸⁴ Justice John Catron of Tennessee turned this doctrine into the broad statement that "Where ever a master may go within the United States, his slave is entitled to accompany him"⁸⁵ The reality of rights of free people was different, as scholars are beginning to show, especially in border regions like Maryland,⁸⁶ but the Supreme Court was trying to announce a new legal reality that shored up the southern rhetoric about African American

successful).

⁸² Scott v. Emerson, 15 Mo. 576 (1852); LEA VANDERVELDE, MRS. DRED SCOTT (2008); Dred Scott v. Sandford, 60 U.S. (15 How.) 393, 431 (1857) (discussing the Scott family's travels in Illinois and in federal territory with their owner, Major Taliaferro, a physician with the United States Army).

⁸³ *Dred Scott*, 60 U.S. at 427.

⁸⁴ *Id.* at 407.

⁸⁵ *Id.* at 493, 516 (Catron, concurring).

⁸⁶ See, e.g., Martha Jones, *Hughes v. Jackson: Race and Rights Beyond Dred Scott*, 91 N.C.L. REV. 1754 (2013).

inferiority.⁸⁷

Second, Taney's opinion also addressed the power of Congress to legislate for the territories. One part of the Missouri Compromise in 1820 prohibited slavery in the United States' territories north of Missouri's southern border.⁸⁸ If slavery was indeed illegal there, then presumably the Scott family's time in the territory of Upper Louisiana (what is now Minnesota) would make them free. But here Taney drew upon the idea popularized by Senator John C. Calhoun beginning in the 1830s that the Constitution protected slavery and that Congress could do nothing that discriminated against slavery. Thus, Congress could not exclude slavery from the territories.⁸⁹ In Taney's phrasing, the United States has "the duty of promoting the interests of the whole people of the Union." The Congress could not discriminate against slavery as form of property. "No word can be found in the Constitution which gives Congress a greater power over slavery property" than any other kind of property. Thus Congress could not prohibit slavery in the territories, and, this took away the argument that Dred Scott had resided in a free territory. In fact, slavery had been legal in all the United States' territories despite the Missouri Compromise. Both of Taney's key points – that people of African descent could not be citizens and that Congress could not take action against property in slavery – were key elements of southern constitutional thinking. Slaves were incapable of exercising political rights and so should not have them. And the denial of

⁸⁷ Taney's opinion fits, too, with Roth's thesis about how proslavery southerners responded to the new abolitionist emphasis on slave humanity, such as the print titled "Am I Not a Man and a Brother?" See Roth, *supra* note 4, at 117. And his opinion tried to equate lack of citizenship with lack of personhood and thus further instill a legal "reality" to match the rhetoric about African American inferiority. Jeannine Marie DeLombard, *Human Kinds: Slave, in THE ASHGATE RESEARCH COMPANION TO LAW AND HUMANITIES IN NINETEENTH-CENTURY AMERICA* (Nan Goodman & Simon Stern eds. forthcoming 2016). Similarly, some cases, especially in the 1850s denied slaves the right to choose freedom or slavery when their owners' wills provided that slaves would go free if they left the state. See, e.g. *Bailey v. Poindexter's Executor*, 55 Va. (14 Gratt.) 132, 1858 WL 3940 (1858). Where once courts allowed slaves to choose slavery or freedom, in keeping with their owners' wills, decisions like *Bailey* took away that right. This is a parallel Dred Scott's attempt to make notions of white supremacy and black non-personhood a legal reality.

⁸⁸ DON E. FEHRENBACHER, *THE DRED SCOTT CASE IN LAW AND POLITICS* 137-39 (1978).

⁸⁹ *Id.* at 46-49, 122-23, 134-39 (discussing Calhoun's ideas beginning in the 1830s about the federal government as agent of the states and the equality of the states and their implication for protection of slavery); 60 U.S. at 451-52.

citizenship silenced enslaved people. It wrote the southern belief that enslaved people were inferior and did not deserve rights into law. Moreover, it also wrote into formal constitutional law the southern belief that the Constitution recognized slavery and that the federal government could not act against it. These were the constitutional principles that went along with the understanding of history and moral philosophy that southerners had been building for decades. The opinion incorporated the substance of southern thinking about slavery and federalism. The process by which those ideas were made popular and introduced to the state courts and then brought to the Supreme Court is an important one, which has been told by many different people.⁹⁰

IV. The Proslavery Response to African American Citizenship

Proslavery southerners employed empiricism and historical arguments to make the case that slavery was a common condition and that enslaved people in the Americas, particularly the United States, were incapable of freedom. In the courts this position reached its high water mark in 1857 in *Dred Scott v. Sandford*, where the United States Supreme Court made a case that enslaved people were not entitled to citizenship. This rested on the historically suspect argument that enslaved people in the United States had never been entitled to citizenship. This interpretation helps us understand a part of the *Dred Scott* opinion that has been puzzling for generations of legal historians – why would Chief Justice Roger B. Taney spend so much time denying the right of enslaved people to sue in federal court if he was already concluding that they would lose on the merits. *Dred Scott* reflects the southern idea that slaves must be denied citizenship and it was an attempt to make a legal reality out of a response to the increasingly powerful abolitionist argument that humanized enslaved people. While the abolitionists – black and white – were turning voters minds

⁹⁰ See, e.g., FEHBRENBACHER, *supra* note 77; MARK A. GRABER, DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL (2006); CHRISTOPHER TOMLINS, FREEDOM BOUND: LAW, LABOR, AND CIVIC IDENTITY IN COLONIZING ENGLISH AMERICA, 1580-1865 509-69 (2010); AUSTIN ALLEN, ORIGINS OF THE DRED SCOTT CASE: JACKSONIAN JURISPRUDENCE AND THE SUPREME COURT, 1837-1857 (2006).

to the belief that people of African descent should be citizens, the southern proslavery response was that they had not been and they were not fit for citizenship. This was a key point of clash.

Dred Scott legitimized the belief that enslaved people were not citizens and had no citizenship rights. Indeed, *Dred Scott* should be read as an attempt to take away citizenship rights at precisely the moment that antislavery writers were advancing the citizenship rights of enslaved people. Under this reading, Taney's opinion becomes part of a dialog that included – and perhaps was started – by antislavery women writers. Other opinions picked up this theme and extended it between the decision of *Dred Scott* in March 1857 and the beginning of Civil War in 1861. *Dred Scott* cited numerous times before the Civil War, from treatises like Thomas Cobb's *Inquiry into the Law of Negro Slavery* and Thomas Sawyer's *Southern Institutes* to cases like the Mississippi Court of Errors and Appeals opinion in *Mitchell v. Wells* to justify the deprivation of rights to enslaved people and to shore up support for the idea that slavery is constitutionally protected.⁹¹ This is about taking away citizenship – that is, the southern judges are responding to the abolitionist rhetoric on African American citizenship – it was designed to take away citizenship and make a legal reality out of their belief of the inferiority of people of African ancestry. The holding that deprived citizenship to enslaved people suggests that the court is responding to popular culture and that judges responded to the abolitionist efforts to make slaves into citizens.

In *Mitchell v. Wells*⁹² the Mississippi Court of Errors and Appeals faced a question about a Mississippi resident who took a slave to Ohio and freed her (she was also his daughter) could leave her property in his will. The Mississippi courts and legislature had for decades struggled to reach

⁹¹ See, e.g., COBB, *supra* note 37, at 205-09; *Mitchell v. Wells*, 37 Miss. 235, 259 (1859) (citing *Dred Scott* in denying devise of property to formerly enslaved person); *Heim v. Bridault*, 37 Miss. (8 George) 209 (1859) (denying emancipation); *Forbes v. Scannell*, 13 Cal. 242 (1859) (tort committed by slave); *Apperson & Co. v. Ford*, 23 Ark. 746 (1859) (fraudulent conveyance); *Lemmon v. People*, 20 N.Y. 562 (1860) (emancipation through travel claim); *Gregory v. Taber*, 19 Cal. 397 (1861) (sale of property of estate); *Ex parte Hill*, 38 Ala. 429 (1863) (conscription).

⁹² 37 Miss. 235, 238 (1859).

an understanding of just how restrictive the state should be when owners tried to free their slaves.⁹³ But attitudes were changing in the proslavery direction in Mississippi and they came to a focal point in *Mitchell v. Wells*.

In October 1846 Edward Wells took a slave, Nancy (who also happened to be his daughter), to Cincinnati and liberated her according to Ohio law. Nancy Wells stayed for nearly two years in Ohio then returned to Mississippi in 1848, shortly before her father died. She stayed in Mississippi a few more years but in 1851 moved back to Ohio and subsequently she sought the money her father had left her in his will. Edward Wells' executor refused to recognize Nancy as a free person. This set up the question whether a person who was once a slave in Mississippi could ever inherit property from a Mississippi resident. There was no question of putting Nancy Wells back in slavery, for at the time of the lawsuit she lived in Ohio; the only question was whether she could inherit from her father's estate.

Mitchell's question of whether a former slave, who no longer lived in Mississippi, could inherit property in Mississippi might seem like an inconsequential matter. Few people would be taken outside the state and freed and even fewer would be devised property by the will of a Mississippi resident. However, for Justice William L. Harris this became a vehicle for a lengthy opinion that brought together policy arguments about "the security of our institutions and the safety of our people."⁹⁴ For Harris saw the case as promoting emancipation and as potentially recognizing the Ohio emancipation that he saw as inconsistent with Mississippi law. Harris framed the case as a test as one of comity, the respect that one state (or nation) gives to the laws (or judicial decisions) of another. This became a conflict between Ohio's act of emancipation and

⁹³ See, e.g., *Hinds v. Brazeale*, 3 Miss. (2 How.) 841 (1838) (denying emancipation and inheritance to a child of testator whose mother was a slave of the testator and returning child to slavery).

⁹⁴ 37 Miss. 235, 238 (1859).

Mississippi law. The issue was whether Mississippi should recognize Ohio's act and allow one of its former slaves to receive property. Harris believe Nancy Wells should not inherit.

Harris constructed the *Mitchell* around the idea that Mississippi would not allow slaves to be taken outside the state and freed. Once a slave in Mississippi, always a slave. Harris' lengthy and zealously proslavery opinion is remarkable for the breadth of proslavery judicial arguments just before secession. It is also revealing for how much Thomas Cobb's *An Inquiry into the Law of Negro Slavery*, which was published the year before *Mitchell v. Wells*, helped promote proslavery arguments.⁹⁵ Harris seems to have drawn upon Cobb in many ways. For instance, Harris asked rhetorically, how courts might determine what is in the public's interest. "[A]re we to be guided by the nature and character of our institutions; our Constitution and form of government; their nature, character, and whole history; the manners, customs, and habits of our people; our climate, soil, and productions; the resolutions and public acts of her conventions and general assemblies, as sources of evidence indicating public policy?"⁹⁶ The answer, as with Cobb,⁹⁷ was that history, manners, customs, and habits were all important.⁹⁸ They all pointed towards slavery and against recognizing Ohio's actions.

Harris reasoned based on his reading of history, and of Mississippi's constitutional history and its statutes that the policy of the state was to restrict emancipation of slaves. He looked back to the framing of the federal constitution to support his belief the African race was in an "inferior, subordinate, subjugated condition.... They were so regarded then by all the States united, and because thus incapable of freedom or of self-government, and unfit by their nature and constitution to become citizens and equal associates with the white race in this family of States, they were

⁹⁵ COBB, *supra* note 37.

⁹⁶ *Id.* at 251.

⁹⁷ *See, e.g.*, Cobb, *supra* note 37, at ccvix-ccxxi (discussing history of slavery in western civilization and using that history to justify continued slavery).

⁹⁸ 37 Miss. at 251-52.

rejected, and treated and acknowledged in the Constitution as slaves.”⁹⁹ Mississippi came into the United States on the principle of white supremacy. It was “to be associated on terms of political equality, comity, or courtesy with the white race, who alone by that compact had a right to be thus associated.” Slavery was recognized by Mississippi at the time it entered the United States. Mississippi “came into the Union with this institution, not only sanctioned, provided for, and protected by her own Constitution, by the direct act and recognition of the other States of the Union, and by the express provisions of that same Constitution which had originally excluded the African race from the privileges of citizenship, but with a right to full protection, under that instrument, both for the enjoyment of her property in slaves, and against the degradation of political companionship, association, and equality with them in the future.” Slavery was a matter of economics and society. It was, indeed, the foundation of the state. For Mississippi’s “climate, soil, and productions, and the pursuits of her people, their habits, manners, and opinions, all ... require slave labor.”¹⁰⁰ Many legislators in Mississippi in the 1830s had concerned with prohibiting importation of slaves into the state because they feared – so Harris wrote – that border states would sell their slaves to Mississippi and then, once they had lowered their slave population, would also turn against slavery.¹⁰¹

In addition to the federal Constitution and the Mississippi Constitution and statutes that together established the policy in favor of slavery in Mississippi, Harris turned to Thomas Cobb’s *An Inquiry into the Law of Negro Slavery* for the argument that slavery was consistent with natural law, so that wherever the slave went a law of slavery went with him.¹⁰² Despite some suggestions that slavery ended when a slave traveled to a jurisdiction where there was no positive law of slavery, the comity owed towards the slave’s home state, slavery continued. That is, while a slave

⁹⁹ *Id.* at 252.

¹⁰⁰ *Id.* at 252.

¹⁰¹ *Id.* at 253-54. See also *An Act in Relation to Free Negroes and Mullatoes*, REVISED CODE OF THE STATUTE LAWS OF THE STATE OF MISSISSIPPI Chap. 33, art. 9, at 234, 236 (Jackson, E. Barksdale 1857).

¹⁰² *Id.* at 258-59

visited a place where there was no law of slavery, the municipal law of the slave's home continued in force in the new state. This was one of Cobb's most creative and controversial arguments.

Harris also cited Cobb's *Inquiry* to show that comity did not require Mississippi to give effect to an attempted emancipation in Ohio.¹⁰³ For comity required mutual respect and mutual interest and there was little of either between Mississippi and Ohio at that point:

The State of Ohio, forgetful of her constitutional obligations to the whole race, and afflicted with a negro-mania, which inclines her to descend, rather than elevate herself in the scale of humanity, chooses to take to her embrace, as citizens, the neglected race, who by common consent of the States united, were regarded, at the formation of our government, as an inferior caste, incapable of the blessings of free government, and occupying, in the order of nature, an intermediate state between the irrational animal and the white man.¹⁰⁴

It was not a question that Mississippi failed to grant comity to Ohio's emancipation action, but that Ohio was trying to undermine Mississippi in Harris' mind. For Ohio's actions threatened the stability of slavery in Mississippi.

The most outlandish part of the opinion was a query at the end whether Mississippi would be expected to grant comity to Ohio if it granted citizenship rights to orang-outangs. "[A]re we to be told that 'comity' will require of the States not thus demented, to forget their own policy and self-respect, and lower their own citizens and institutions in the scale of being, to meet the necessities of the mongrel race thus attempted to be introduced into the family of sisters in this confederacy?"¹⁰⁵ Harris revealed a robust defense of slavery in Mississippi and such a disdain for the ideas of freedom in Ohio. Certainly Harris had those views independent of Cobb's *An Inquiry into the Law of Negro Slavery*, but Cobb helped to give shape and legitimacy to the resistance to Ohio's emancipation. The ideas developed by southern academics worked in conjunction with those of southern politicians and jurists. Harris' *Mitchell v. Wells* opinion reflects the anger and

¹⁰³ 37 Miss. 235 (1859).

¹⁰⁴ 37 Miss. at 264.

¹⁰⁵ *Id.* at 264. Perhaps Justice Harris took the example of an orang-outang from a discussion of similarities between Africans and orang-outangs. See Cobb, *supra* note 37, at 25.

the entitlement felt by southern jurists and the slave-owning class. Justice Harris' opinion illustrates well the centrality of constitutional rights to slavery and property and the ideas of white supremacy that helped steer the south towards secession.

V. Who were the Agents of Reform? Causation in *Gender and Race in Antebellum America*

So far I have suggested how the framework that Roth develops of images of enslaved people in popular culture correlates with and helps us understand the reaction of the southern judiciary. Southern judges reacted to the image of the enslaved person as a threat by allowing owners substantial control over them. Then, as the popular image shifted and began to recognize the humanity of enslaved men, judges again shifted their approach to deny them citizenship and to make emancipation more difficult. As southerners shifted from a sense that there should be gradual termination of slavery to expansion of it, the judiciary followed suit. And likely the judiciary contributed to that evolution as well as drawing from it.

And therein lies a complex question that must be asked of Roth's framework. There is no doubt that antebellum popular culture and judicial culture overlapped; indeed, the depictions of African Americans by Northern and Southern writers and Southern jurists are highly correlated. But how much of what she writes about provided an impulse to change? Did the popular culture that she so thoroughly reconstructs just correlate with the antislavery triumph on public ideas about African American citizenship and the south's move towards war? Or did it actually help change the attitudes and ideas of American voters in the Civil War era. Such ideas about preparation for citizenship continued to have salience for generations – and continued to be used to justify the deprivation of African American voting rights -- as Atticus Finch's character in the *Go Set a Watchman* reveals. Set in the 1950s, Finch denies that African Americans are ready for

citizenship. "What would happen if all the Negroes in the South were suddenly given full civil rights?" Atticus asked his daughter Jean Louise . "I'll tell you. There'd be another Reconstruction. Would you want your state governments run by people who don't know how to run 'em?"¹⁰⁶ It is easy to see how images of citizenship matter and how the people Roth writes about should be viewed as heroes.

Such questions of causation are important and controversial at the same time. A central question of *Gender and Race in Antebellum Popular Culture* is to what extent did the antislavery writers create a new culture that led to the emancipation of enslaved people? That is, how much did the antislavery culture bearers prepare the way for emancipation?¹⁰⁷ There is a parallel question for the south: to what extent did proslavery writers and jurists prepare the way for secession? A key question about Roth's thesis is how much the independent variable of antislavery fictional literature produced by white women contributed to the multiple regression equation that explains the huge change in our nation's attitudes towards enslaved people (and men in particular).

I have two questions about the paths of causation. First, how much did the Northern critique lead to a Southern reaction? Second, how much did Northern antislavery women clear the path for African American citizenship? As to the first question, the divergence between the judiciary and popular culture at certain points raises an additional question about causation. Where, for instance, the Southern sentimental literature depicted slaves as part of a plantation family, Southern legal opinions left slaves subject to the violent whims of their owners and even denied literal family members the right to inherit from their fathers.

By looking at the Southern judiciary and its points of divergence from popular culture it is

¹⁰⁶ HARPER LEE, *GO SET A WATCHMAN* chap. 17 (2015).

¹⁰⁷ There are other works, such as Jeannine Marie DeLombard's *Slavery on Trial: Law, Abolitionism, and Print Culture* (2006) that show how anti-slavery fiction critiqued proslavery law and that raise a similar question about causation, which is one of the most notoriously difficult questions for historians to answer.

possible to make some preliminary estimates of relative importance of judicial culture, with its emphasis on economic analysis and historical and demographic data, to southern proslavery thought. Focusing on southern legal thought and its appearance in the discussion of secession reveals that the images Roth finds in southern popular culture were extremely salient in southern politics and law. It also reveals that the secession movement departed in some significant ways from the paternalistic myth of the plantation south; hard-nosed southern politicians and jurists turned to economic analysis as they moved towards secession. The speeches supporting secession by leading jurists like Thomas R.R. Cobb,¹⁰⁸ William L. Harris, and William L. Benning,¹⁰⁹ as well as leading academics like and As the North was turning towards images of African Americans as citizens and embracing the image of a broader democracy, southerners were moving in a very different direction, towards a republic based on white supremacy. As each side moved in different directions Civil War was an understandable result.

I also want to suggest that there were other impulses to the evolution of support for African American citizenship than the white, female abolitionists at the center of this story and there were other opponents than the southern writers who opposed them. While I believe that Roth has done very important work in introducing women actors into the legal debate, and that those terms of debate traversed empiricism, historicism, questions about obedience to law, and the role of citizenship in constitutional culture, we should not forget that they were joined in important ways by African American writers and actors.¹¹⁰ And even beyond the formulators of popular culture

¹⁰⁸ THOMAS READ ROOTES COBB, SUBSTANCE OF REMARKS MADE BY THOMAS R.R. COBB, ESQ.: IN THE HALL OF THE HOUSE OF REPRESENTATIVES, MONDAY EVENING, NOVEMBER 12, 1860 (Atlanta, John H. Seals 1860), reprinted in SECESSION DEBATED: GEORGIA'S SHOWDOWN IN 1860 at 5 (William W. Freehling and Craig M. Simpson, eds., 1992).

¹⁰⁹ HENRY L. BENNING, SPEECH ON FEDERAL RELATIONS (n.p., n.d.), reprinted in SECESSION DEBATED, *supra* note 107, at 115.

¹¹⁰ See, e.g., LESLIE HARRIS, IN THE SHADOW OF SLAVERY: AFRICAN AMERICANS IN NEW YORK CITY, 1626-1863 (2003); ERICA ARMSTRONG DUNBAR, A FRAGILE FREEDOM: AFRICAN AMERICAN WOMEN AND EMANCIPATION IN THE ANTEBELLUM CITY (2008); BENJAMIN QUARLES, BLACK ABOLITIONISTS (1969). African American people were more

there were important economic and political motives to the rising opposition to slavery.¹¹¹ The multiple regression equation that explains changes in law and in legal theory has many variables.

Roth establishes a framework for the shifting ideas about slavery and anti-slavery from the 1820s through the Civil War that helps legal historians understand three things. First, that southern judges and lawyers were shifting their rhetoric (and in some minor ways doctrine) in conjunction with changing images of enslaved people; second, that many responded to the southern legal thought and southern legal thinkers responded to the abolitionist critique of them; third, southern legal thought had a strong correlation with secession rhetoric. All three points contribute a sophisticated picture of the multiple connections between legal thought and public thought fundamental issues of citizenship and slavery.

What is clear is that the arguments central to post-Civil War legal thought – historicism and empiricism, and for some a skepticism of rules based on long-term practices – all found expression in a deep and sophisticated jurisprudence before the Civil War. Often that work was written by antislavery women. We are still going to need to debate how – and whether – those ideas impelled our nation towards Civil War and then freedom. Clearly, Roth has opened important speculation on what caused legal and constitutional ideas to shift. She has opened up new intellectual terrain and populated it with people whom we did not previously realize had engaged in debate on legal and constitutional issues. Roth's book marks the emergence of a sophisticated model of how cultural and legal concepts interacted as our country moved towards Civil War and, ultimately, freedom.

than an image; they were living people. White abolitionists like William Lloyd Garrison, and Roth's subjects, were in conversation with black people, and moved towards immediatism because of African Americans demands for the same.

¹¹¹ John Ashworth, *Capitalism, Class, and Antislavery*, in *THE ANTISLAVERY DEBATE: CAPITALISM AND ABOLITIONISM AS A PROBLEM IN HISTORICAL INTERPRETATION* 290-309 (1992).