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ARTICLE

Citing Slavery

Justin Simard*

Abstract. The law of slavery is still good law. In the twenty-first century, American judges and lawyers continue to cite case law developed in disputes involving enslaved people. These cases provide law for a wide variety of subject areas. Judges cite slavery to explicate the law of contracts, property, evidence, civil procedure, criminal procedure, statutory interpretation, torts, and many other fields. For the most part, judges cite these cases without acknowledging that the cases grew out of American slavery and without considering that a case's slave origins might lessen its persuasive authority. Nor do they examine the dignitary harms that the citation of slavery may impose. In citing slavery, lawyers thus demonstrate a myopic historical perspective that creates legal harms and reveals the ethical limitations of their profession. This Article illustrates the benefits a broader historical perspective can bring to bear on contemporary doctrinal issues. At a time when American groups and institutions from businesses to universities are coming to grips with the legacy of slavery, the legal profession has an obligation to do the same.

* Justin Simard is a Visiting Assistant Professor at Willamette University College of Law and will be an Assistant Professor at Michigan State University College of Law beginning in 2020. Thanks to generous research support from the Baldy Center for Law and Social Policy, the American Bar Foundation, and Northwestern University. I am grateful for the useful feedback I have received on many drafts of this paper. Thanks especially to Greg Ablavsky, Julia Bernier, Anya Bernstein, Chris Beauchamp, Guyora Binder, Todd Brown, Smita Ghosh, Andrew Fede, Joanna Grisinger, Joe Gerken, Cassandra Good, Sally Barringer Gordon, David Hausman, Amanda Kleintop, Sophia Lee, Jonathan Manes, Errol Meidinger, Jeffrey Omari, Stephanie Phillips, Kumar Ramanathan, Caitlin Rosenthal, Willa Sachs, Chris Schmidt, Mary Rumsey, Matt Steilen, Karen Tani, and Adam Wolkoff. Also, thanks to the students in my "Law of Slavery" class, who helped me think through these issues.

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Introduction

In 2015, Justice Thomas, writing in dissent, relied on an 1848 Kentucky case for the uncontroversial proposition that "the judiciary [is] 'the tribunal appointed by the Constitution and the law, for the ascertainment of private rights and the redress of private wrongs.'"[1] The private wrong which the Court addressed in that case was the legislature's deprivation of a widow's rights to her husband's estate, which included a number of enslaved people.[2] Thus, the Kentucky court appointed itself tribunal to enforce the right of a person to inherit other people. Justice Thomas, however, did not acknowledge the case's distinctive subsequent history. Because it concerned the inheritance of enslaved people, the Kentucky case had arguably been abrogated (on other grounds) by the Thirteenth Amendment.[3] The failure to consider the effect of the Thirteenth Amendment on slave cases is the rule rather than the exception: Neither Westlaw nor LexisNexis flag cases involving the enslaved as questionable precedent. Nor is it unusual for courts to rely on such cases without addressing their relation to the law of slavery.[4]

Slave cases, that is, cases involving human property, are still commonly cited in the twenty-first century. Other scholars have provided extensive analysis of the racial context and biases of American law, but this Article is the first to recognize and consider the implications of courts' continued reliance on slave cases. My research reveals that courts routinely treat these cases as good law in a wide variety of subject areas. The law of contracts, property, evidence, civil procedure, criminal procedure, statutory interpretation, torts, and many other fields still relies significantly on slave cases. I discovered this reliance by using standard electronic legal research tools. Proceeding on a state-by-state basis, I found hundreds of opinions over the last three decades in which judges

1. Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1966 n.4 (2015) (Thomas, J., dissenting) (quoting Gaines v. Gaines, 48 Ky. (9 B. Mon.) 295, 301 (1848)).

2. *See Gaines*, 48 Ky. (9 B. Mon.) at 295-98.

3. *See* U.S. CONST. amend. XIII ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."). Whether or not *Gaines* has been abrogated by the Thirteenth Amendment depends on how its holding is characterized. *Cf.* Joel Heller, *Subsequent History Omitted*, 5 CALIF. L. REV. CIR. 375, 375-78 (2014) (discussing controversy over Westlaw's classification of cases as abrogated). For additional discussion of Westlaw and LexisNexis classification of cases, see also Brian J. Broughman & Deborah A. Widiss, *After the Override: An Empirical Analysis of Shadow Precedent*, 46 J. LEGAL STUD. 51, 52 (2017) (noting that Westlaw and LexisNexis are faster at reflecting judicial than statutory overrides of decisions); Alan Wolf & Lynn Wishart, *A Tale of Legal Research—Shepard's® and KeyCite® Are Flawed (or Maybe It's You)*, N.Y. ST. B. ASS'N J., Sept. 2003, at 24, 25 ("For the citators, a case is bad law only if it is reversed or named in an overruling opinion.").

4. *See infra* Part II.A.

cited slave cases. Courts in Alabama, Alaska, Arizona, Arkansas, California, Colorado, the District of Columbia, Florida, Georgia, Hawaii, Illinois, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Missouri, New Hampshire, New Jersey, New York, North Carolina, Oklahoma, Oregon, South Carolina, Tennessee, Texas, Utah, Virginia, Wisconsin, and Wyoming have all cited slave-related cases in the last thirty-five years; I have also found citations to slave cases by the U.S. Supreme Court and nearly every federal court of appeals in the same period.[5]

Courts routinely cite these cases without acknowledging that they may no longer be, in a formal sense, good law. More important, courts rarely consider the ways in which a case's slave context makes it less persuasive authority. For example, although most courts would agree that the judiciary is "the tribunal appointed by the Constitution and the law, for the ascertainment of private rights and the redress of private wrongs," a case involving the judiciary's regulation of the buying and selling of human beings is a poor reason to justify such legal authority.[6]

Consider a few other examples. In 1994, the Supreme Court of Mississippi relied on a case involving the inheritance of enslaved people for the proposition that "[a] contract to devise or bequeath property by will is valid."[7] In other words, the court relied on an example of a contract that would now be invalid to explain why contracts are valid.[8] Similarly, in 2004, the Court of Appeals of Maryland relied on an 1862 case involving "certain specific advancements, in cash, notes and negroes"[9] as its chief authority for the "theory of mutuality" in collateral estoppel.[10] It did not note any irony in the citation of a case concerning the sale of humans to justify collateral estoppel on the grounds of what "[j]ustice requires" and what "the public tranquility demands."[11] It is axiomatic that where an opinion's holding is no longer valid, courts may look to the opinion to the extent that it remains persuasive. But

5. *See infra* notes 74-108 and accompanying text. For more on my methodology, see note 100 below.

6. *But see, e.g.*, *Wellness Int'l Network*, 135 S. Ct. at 1966 n.4 (quoting *Gaines*, 48 Ky. (9 B. Mon.) at 301).

7. Alvarez v. Coleman, 642 So. 2d 361, 372 (Miss. 1994) (citing Anding v. Davis, 38 Miss. 574 (1860)).

8. *See Anding*, 38 Miss. at 591-92, 594-95.

9. Cecil v. Cecil, 19 Md. 72, 81 (1862).

10. *See* Rourke v. Amchem Prods., Inc., 863 A.2d 926, 945 (Md. 2004) ("Justice requires that every cause be once fairly and impartially tried; but the public tranquility demands that having been once so tried, all litigation of that question, and between those parties, should be closed forever. It is also a most obvious principle of justice, that no man ought to be bound by proceedings to which he was a stranger." (quoting *Cecil*, 19 Md. at 79)).

11. *Id.*

when it comes to slave cases, courts not only routinely fail to note that many of the decisions on which they rely have been abrogated, but also—perhaps as a result—rarely discuss or consider whether the slave context of the cases limits their persuasiveness.[12]

This legal failure is also a historical and ethical one. Judges who cite slave cases demonstrate an interest in doctrinal history, while ignoring the broader context within which this doctrinal history developed. The Supreme Court of Arkansas, for example, cited a case about the inheritance of enslaved people for the proposition that a fee simple was "the greatest estate or interest owned by a person to convey."[13] It even referred to the earlier court, which enforced a bequest for the transfer of enslaved people, as "[w]e."[14] In cases such as these, courts draw connections between themselves and earlier jurists, but they rarely acknowledge the role of nineteenth-century judges who facilitated and maintained slavery, both in opinions directly upholding slavery and—equally important—in opinions applying standard private law doctrines to slave commerce. The judiciary's myopic approach to history not only obscures the complicity of lawyers in slave commerce but also presents a misleading portrait of the development of American law.[15] Failing to engage slavery leads

12. It can be argued that some slave cases, such as those related to the rules of pleading, have not been abrogated because the substance of these cases did not affect their procedural holdings. The distinction between substance and procedure, however, is not so simple. *See* Walter Wheeler Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 YALE L.J. 333, 335-41 (1933) (analyzing "confusion" in approaching the distinction between substance and procedure); Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U. L. REV. 801, 815 & n.78 (2010) (collecting literature on the difficulty of drawing neat lines between substance and procedure). Moreover, in nearly every one of these cases, an enslaved person should have been party to the case, which may have affected the case's outcome. Even if not strictly abrogated, these cases might still provide less persuasive precedent for the reasons I explain in more detail in Part II.C below.

13. Barton Land Servs., Inc. v. SEECO, Inc., 428 S.W.3d 430, 436 (Ark. 2013) (citing Moody v. Walker, 3 Ark. 147, 190-91 (1840)).

14. *Id.* Other courts have also used "we" when citing slave cases. *See, e.g.*, Whiteacre P'ship v. Biosignia, Inc., 591 S.E.2d 870, 879 (N.C. 2004) ("As we noted over 150 years ago, [estoppel] is a principle which 'lies at the foundation of all fair dealing between [persons], and without which, it would be impossible to administer law as a system.'" (second alteration in original) (quoting Armfield v. Moore, 44 N.C. (Busb.) 157, 161 (1852))); *see also Armfield*, 44 N.C. (Busb.) at 157 (deciding an action for replevin for the return of enslaved persons).

15. For more on the role of judges in enforcing slave commerce, see Justin Simard, *Slavery's Legalism: Lawyers and the Commercial Routine of Slavery*, 37 LAW & HIST. REV. 571, 574 (2019) ("[Commercial legal actors] supported slavery in subtle but important ways."). *See also* ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 6 (1975) (describing a "collaboration" of judges in a "system of oppression"). *See generally* Andrew Fede, *Legal Protection for Slave Buyers in the U.S. South: A Caveat Concerning Caveat Emptor*, 31 AM. J. LEGAL HIST. 322 (1987) (arguing for the importance of slave context in understanding the doctrinal development of commercial law).

judges to provide inadequate histories, even on their own doctrinal terms. Moreover, by refusing to recognize "slave cases" as a relevant category of legal and historical analysis, judges also impose dignitary harms. Slavery was a brutal system, and slave cases discuss that brutality, sometimes in excruciating detail. Citing such cases without commentary ignores the humanity of those subjected to legal subjugation and treats white supremacist judges as respected authorities.

The legal profession must take these harms seriously. When led to slave cases through research or citation, judges should reconsider their validity in light of contemporary constitutional and legal principles. Where courts determine that a slave case's holding remains persuasive, they should acknowledge and explain the case's slave context and explicitly justify their reliance on case law that has been abrogated by the Thirteenth Amendment. In a few cases, courts have recognized that a case's context in slavery ought to affect their treatment of the case, but these limited attempts are too brief and too scattered to seriously address a systemic problem.[16]

The reconsideration of citation to slave cases will not remove slave cases from reporters, overrule them, or remake a legal system that depends in part on such cases.[17] The impossibility of erasing the legacy of slavery, however, does not excuse judges from acknowledging that legacy. Only by confronting slavery's past can we learn from and attempt to address its costs. At a time when other groups and institutions, from universities to businesses, are confronting their links to slavery,[18] lawyers must do the same.

This Article proceeds in four parts. Part I provides an overview of the nineteenth-century law of American slavery. American judges and lawyers facilitated and maintained slavery through legal forms that outlived the

16. *See infra* Part III.A.

17. *See, e.g.*, Guyora Binder, Paper, *The Slavery of Emancipation*, 17 CARDOZO L. REV. 2063, 2101 (1996) (arguing that the legacy of slavery is so extensive that it still persists in the "institution of race"); *cf.* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 2, 193 (2010) ("We have not ended racial caste in America; we have merely redesigned it."); Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 369 (1992) (highlighting the limits of civil rights jurisprudence); Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 2 (1991) ("[C]olor-blind constitutionalism . . . fosters white racial domination."); Alex M. Johnson, Jr., *Bid Whist, Tonk, and* United States v. Fordice*: Why Integrationism Fails African-Americans Again*, 81 CALIF. L. REV. 1401, 1402 (1993) ("[T]he Supreme Court's decision in *Fordice* is wrong as a matter of social policy because it is built upon a premise of integrationism, first articulated in *Brown*, that has failed our society."); Patricia J. Williams, Comment, Metro Broadcasting, Inc. v. FCC*: Regrouping in Singular Times*, 104 HARV. L. REV. 525, 539 (1990) ("[C]ourts actually deal in and perpetuate not merely individual property interests, but also property interests that govern, silence, and empower significant groups of us as citizens.").

18. *See infra* Part III.B.

institution of slavery. Part II examines the widespread contemporary citation of slave cases by American judges. It argues that the opinions in slave cases are generally neither good law nor persuasive on their own terms, and that their citation is harmful to participants in the legal system. Part III analyzes other responses to the legacy of slavery in American life and provides a preliminary framework for judges considering the citation of slave cases. Finally, the Article concludes by calling for lawyers to expand and deepen their ethical perspective.

I. The Law of Slavery

Slavery has deep roots in American law. From commerce to criminal law to inheritance, slave-related disputes composed a significant portion of American dockets. Appellate case reporters for the fifteen slave states contain almost 11,000 cases concerning enslaved people prior to Emancipation.[19] Appellate reporters in states that abolished slavery earlier also contain hundreds of slave cases.[20] Involvement in slave commerce meant not only ruling on cases involving the enslaved, but actively participating in the sale of enslaved people. South Carolina's judicial system, for example, dealt with so many cases related to enslaved people that its courts "acted as the state's greatest slave auctioneering firm."[21] American courts also provided the apparatus to secure millions of dollars of loans backed by enslaved people.[22]

Lawyers made such support for slave commerce possible by using legal tools to fit slave cases into familiar categories. By integrating cases involving enslaved people into mainstream legal institutions, lawyers made slave cases part of the foundation of American jurisprudence. American institutions, even Northern ones,[23] accommodated themselves to slaveholding. Legal institutions continued to support slavery, even during the 1840s and 1850s, amid

19. Jenny B. Wahl, *American Slavery and the Path of the Law*, 20 SOC. SCI. HIST. 281, 281, 304 n.1 (1996).

20. For cases from states that abolished slavery prior to the Thirteenth Amendment, see 4 JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO (Helen Tunnicliff Catterall ed., 1936); and 5 JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO (Helen Tunnicliff Catterall ed., 1937).

21. Thomas D. Russell, *South Carolina's Largest Slave Auctioneering Firm*, 68 CHI.-KENT L. REV. 1241, 1241 (1993).

22. *See generally* Bonnie Martin, *Slavery's Invisible Engine: Mortgaging Human Property*, 76 J.S. HIST. 817 (2010) (illustrating through court records the importance of mortgages on enslaved people to the Southern economy).

23. Jeffrey M. Schmidt, *The Antislavery Judge Reconsidered*, 29 LAW & HIST. REV. 797, 829-33 (2011) ("Although [Massachusetts Supreme Court Justice Lemuel] Shaw was an avowed opponent of slavery, he consistently upheld the provisions of the fugitive slave acts and returned fugitives to bondage.").

heightening sectional tensions over slavery's future.[24] The law of slavery was so enmeshed in American law that neither the Reconstruction Amendments nor the Civil Rights movement could dismantle it. Understanding slave law as formative not only helps to explain its continued citation but also illustrates how the law developed to help keep people enslaved. This Part provides an overview of the nineteenth-century law of slavery, explaining how American lawyers allowed ordinary commercial law to support the brutal slave regime and brought slave precedent into the mainstream of American law.

Nineteenth-century lawyers distinguished commercial cases involving enslaved people, which they classified alongside other commercial cases, from the narrower category of the law of slavery, which included the basic ground rules of slavery. From this perspective, the law of slavery encompassed the law of maternal descent that governed the inheritance of slave status,[25] judicial decisions that allowed for brutal punishment,[26] statutes that hindered manumission,[27] fugitive slave laws,[28] and so on. This approach to understanding the law of slavery, which has been adopted by some modern scholars and lawyers, relegates the subject to an exception to broader American legal thought and practice, treating commercial cases involving enslaved people like other contracts and property cases. Such a perspective emphasizes the differences between law in the North—where the fundamental law of slavery did not apply—and law in the South, and helps to explain sectional differences in American jurisprudence.[29] Some Northern lawyers, scholars

24. Simard, *supra* note 15, at 573-74; *see also* ANDREW FEDE, PEOPLE WITHOUT RIGHTS: AN INTERPRETATION OF THE FUNDAMENTALS OF THE LAW OF SLAVERY IN THE U.S. SOUTH 17-19 (1992) (noting the accommodation of slavery in common law).

25. *See, e.g.*, Act XII, *reprinted in* 2 WILLIAM WALLER HENING, THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619, at 170 (1823); *see also* KATHLEEN M. BROWN, GOOD WIVES, NASTY WENCHES, AND ANXIOUS PATRIARCHS: GENDER, RACE, AND POWER IN COLONIAL VIRGINIA 133 (1996) (analyzing Virginia law of maternal descent).

26. *See, e.g.*, State v. Mann, 13 N.C. (2 Dev.) 264, 266 (1829) (per curiam) ("The power of the master must be absolute, to render the submission of the slave perfect.").

27. *See, e.g.*, Act Prescribing the Mode of Manumitting Slaves in this State (1801), *reprinted in* THOMAS R.R. COBB, A DIGEST OF THE STATUTE LAWS OF GEORGIA, IN FORCE PRIOR TO THE SESSION OF THE GENERAL ASSEMBLY OF 1851, at 983 (1851) (prohibiting any person from manumitting enslaved people); *see also* ANDREW FEDE, ROADBLOCKS TO FREEDOM: SLAVERY AND MANUMISSION IN THE UNITED STATES SOUTH 87-138 (2011) (describing limitations on emancipation in Southern states); THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW, 1619-1860, at 398-99 (1996) (same).

28. *See* Fugitive Slave Act of 1793, ch. 7, 1 Stat. 302 (providing for the seizure or arrest of "fugitive[s] from labour"); Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462 (expanding the power to return allegedly fugitive slaves).

29. *See* PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY 19 (1981) ("The decisions of the state judges and the statutes of the legislatures demonstrate

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have noted, helped oppose slavery by supporting free-labor ideology, bringing freedom suits, and publicizing the brutality of slavery.[30] Southern legal actors, by contrast, enforced fugitive slave laws and discouraged emancipation.[31] Disputes about these contentious issues were often couched in arguments based in "higher law" rather than standard legal rules.[32] They seem far removed from the common law cases that occupied most lawyers and judges. In this story, the Reconstruction Amendments were the official repudiation of the U.S. slave regime.[33] The aberration of slavery was abolished once the amendments outlawing human bondage were enacted.

This approach understates the important role of law and lawyers in supporting slavery. Although sectional conflicts appeared in cases and legislation, for the most part lawyers readily accommodated the American legal system to slavery. They did so with the cooperation of Northern lawyers who shared a legal vision that emphasized technical rules and customs and relied on learned citation.[34] This professional approach could be deployed for many different purposes, and lawyers spent a significant portion of their time

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how a nation of states was well on its way to dissolving its judicial and legal binds when secession completed that process.").

30. *See, e.g.*, PAUL FINKELMAN, SLAVERY IN THE COURTROOM: AN ANNOTATED BIBLIOGRAPHY OF AMERICAN CASES 11, 12-13 (1985) (describing the use of court cases as a publicity tool of the antislavery movement); ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 9 (2d ed. 1995) (describing free labor ideology that "led northern Republicans to an extensive critique of Southern society, which appeared both different from and inferior to their own").

31. *See* ALFRED L. BROPHY, UNIVERSITY, COURT, AND SLAVE: PRO-SLAVERY THOUGHT IN SOUTHERN COLLEGES AND COURTS AND THE COMING OF CIVIL WAR 217-26, 254-74 (2016) (discussing judicial opposition to emancipation); STEVEN LUBET, FUGITIVE JUSTICE: RUNAWAYS, RESCUERS, AND SLAVERY ON TRIAL 5-8 (2010) (describing tensions surrounding fugitive slave cases in the North); MORRIS, *supra* note 27, at 398-99 (discussing state-imposed limitations on emancipation); MARK V. TUSHNET, THE AMERICAN LAW OF SLAVERY, 1810-1860: CONSIDERATIONS OF HUMANITY AND INTEREST 228 (1981) (describing limitations on a "master's power to emancipate"); John Phillip Reid, *Lessons of Lumpkin: A Review of Recent Literature on Law, Comity, and the Impending Crisis*, 23 WM. & MARY L. REV. 571, 580-81 (1982) (discussing the refusal of a Georgia judge to recognize a Maryland law permitting manumission).

32. *See* LUBET, *supra* note 31, at 8 ("Eventually the claims of the 'higher law' found their way into courtrooms, as lawyers reflected the anger that was building in the North."); *see also id.* at 267-73, 294, 314, 325-26.

33. *Cf.* Kimberlé Crenshaw, *The Court's Denial of Racial Societal Debt*, HUM. RTS., Dec. 2013, at 12, 13-14 (arguing that a race-neutral approach to discrimination allows judges to "occupy[] the moral high ground of racial progress while relegating civil rights laws and advocates to the ugly past").

34. For more on the shared legal approach between Northern and Southern lawyers, see LAURA F. EDWARDS, THE PEOPLE AND THEIR PEACE: LEGAL CULTURE AND THE TRANSFORMATION OF INEQUALITY IN THE POST-REVOLUTIONARY SOUTH 251-55 (2009).

adapting and applying these technical rules to the commercial and financial matters of their clients.[35]

Nineteenth-century lawyers learned the law in apprenticeships, from treatises, and in law schools. A shared vision of law meant that Southern lawyers could acquire the tools they needed to support slavery from Northerners who opposed the institution. For example, even though teachers at the Litchfield Law School, the most successful law school in early America, opposed slavery, 30% of the school's students came from the South, and most returned to the South to work for slaveholders after they finished their training.[36] Litchfield's teachers devoted only a small fraction of their lectures to what they called the law of slavery. In more than a thousand pages of notes, a typical student notebook only contained a few pages under the heading of the law of slavery.[37] This number paled in comparison to the hundreds of pages on common law subjects from the rules of pleading to executors. Southern students, however, found that lectures on writs of error, bills of exceptions, evidence, chancery, apprentices, agents, sheriffs, and bailments could be readily adapted for legal practice in a slave society.[38]

Treatises, from which would-be lawyers who did not attend law school learned the law, exhibited a similar focus on technical rules, treating slave cases as part of venerable common law categories, rather than as part of the law of slavery. Justice Story's approach in his *Commentaries on the Law of Bailments,*[39] published in 1832, is typical. He analyzes bailment cases involving enslaved people alongside those involving boats and other private property.[40] For a

35. *See* Simard, *supra* note 15, at 593-601 (describing the commercial work of a Georgia lawyer); *see also* Justin Simard & Michael Halberstam, *Lawyers as Trusted Agents in Nineteenth-Century American Commerce: The Influence of Fiduciary Law and Norms on Economic Development*, 45 LAW & SOC. INQ. (forthcoming 2020) (describing commercial work of American lawyers).

36. *See* Simard, *supra* note 15, at 578-79. The school's graduates made up nearly 5% of the lawyers in the United States. *See id.* at 576 n.14.

37. Samuel Cheever's two volumes of notes from 1812, for example, contain less than four pages of notes related to the fundamental law of slavery. *See* 1 Samuel Cheever, Notes on Lectures of Reeve and Gould 117-20 (1812) (on file with Harvard Law School); 2 *id.* In contrast, he recorded extensive notes in other areas of the law. Other student notebooks provide similar broad coverage. *See, e.g.*, 1-4 William S. Andrews, Lectures upon the Various Branches of Law by Reeves and Gould at the Law School in Litchfield, Conn (1812-1813) (on file with Harvard Law School); 1-4 Caleb Stark, Lectures of James Gould, Litchfield Law School (1824-1825) (on file with Harvard Law School).

38. *See* Simard, *supra* note 15, at 578-82 (discussing Litchfield's popularity among Southern students).

39. JOSEPH STORY, COMMENTARIES ON THE LAW OF BAILMENTS WITH ILLUSTRATIONS FROM THE CIVIL AND THE FOREIGN LAW (Cambridge, Hilliard & Brown 1832).

40. *See id.* §§ 214, 216-217.

lawyer like Justice Story, these cases were about property, not slavery.[41] Because lawyers treated cases involving enslaved people as they did other cases, treatises focused solely on the law of slavery were rare. The two most prominent examples, George M. Stroud's *A Sketch of the Laws Relating to Slavery*[42] and Thomas R.R. Cobb's *An Inquiry into the Law of Negro Slavery in the United States of America*,[43] were designed not for use by lawyers but as political tools. Although Stroud was a lawyer himself, he wrote his book to expose the cruelties of slavery to a popular audience.[44] His treatise summarizes the law that allowed people to be held in bondage, defined them as chattel, limited their rights, defined acceptable punishments, and governed the social relations of slavery.[45] Cobb, on the other hand, intended his book to be a pro-slavery work.[46] It includes a lengthy discussion of the history of slavery as well as analysis of legal justifications for slavery, fugitive slave law, the legal disabilities of enslaved people, and the law of manumission.[47]

41. At least in part, a focus on broader categories of law was probably motivated by financial considerations. The nineteenth-century American bar was relatively small. Schools like Litchfield and treatise writers like Justice Story needed to discuss national rules if they wanted to attract enough students or sell enough books to make their enterprise worthwhile. As the preface to one treatise put it, a treatise writer aimed to "to render the book . . . equally valuable to all parts of our country." TAPPING REEVE, THE LAW OF BARON AND FEMME: OF PARENT AND CHILD, GUARDIAN AND WARD, MASTER AND SERVANT, AND OF THE POWERS OF COURTS OF CHANCERY, at i (Burlington, Chauncey Goodrich 2d ed. 1846). As Angela Fernandez has pointed out, Reeve was criticized for failing to accurately depict the state of the common law. *See* Angela Fernandez, *Tapping Reeve, Coverture and America's First Legal Treatise*, *in* LAW BOOKS IN ACTION: ESSAYS ON THE ANGLO-AMERICAN LEGAL TREATISE 63, 66-67, 71-72 (Angela Fernandez & Markus D. Dubber eds., 2012). Such criticisms demonstrate the practical expectations of the readers of American treatises. For more on the national focus of legal texts in America, see M. H. HOEFLICH, LEGAL PUBLISHING IN ANTEBELLUM AMERICA 34, 177-78 (2010); ERWIN C. SURRENCY, A HISTORY OF AMERICAN LAW PUBLISHING 30 (1990); and Daniel J. Hulsebosch, *An Empire of Law: Chancellor Kent and the Revolution in Books in the Early Republic*, 60 ALA. L. REV. 377, 387 (2009).

42. GEORGE M. STROUD, A SKETCH OF THE LAWS RELATING TO SLAVERY IN THE SEVERAL STATES OF THE UNITED STATES OF AMERICA (Philadelphia, Kimber & Sharpless 1827).

43. 1 THOMAS R.R. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA (Philadelphia, T. & J.W. Johnson & Co. 1858).

44. *See, e.g.*, STROUD, *supra* note 42, at vii ("The very existence of slavery is calculated to produce the worst effects on the tempers and morals of the master."); *see also* 1 COBB, *supra* note 39, at ix ("Stroud's 'Sketch of the Law of Slavery' is and was intended only as an Abolition pamphlet . . . .").

45. *See* STROUD, *supra* note 42, at 179-80.

46. *See* BROPHY, *supra* note 31, at 227-53 (analyzing Cobb's treatise as an example of pro-slavery legal thought); Paul Finkelman, *Thomas R.R. Cobb and the Law of Negro Slavery*, 5 ROGER WILLIAMS U. L. REV. 75, 84-86 (1999) (same).

47. 1 COBB, *supra* note 43, at xi-xxii.

Lawyers did not need treatises or law school to teach them the law of slavery because the general rules of private law could be easily adapted to support slave commerce.[48] In practice, Southern lawyers adapted common law forms and professional methods they learned as apprentices and law students to an economy built on slavery. This is not to say that Southern judges produced identical jurisprudence to their Northern counterparts. Historians have noted that many Southern judges attempted to shape law to protect slavery.[49] But more legal rules were the same, as lawyers turned slave cases into common law questions. The dispute of whether an agent had authority to sell and warrant an enslaved person became a matter of the law of principal and agent.[50] The proper procedure for a sheriff seizing enslaved people became a question of debt and commercial relations.[51] The "assertion of title" to enslaved people became a "conversion" of property.[52] Cases like these relied on the same kind of legal reasoning and legal categories—contracts, sheriff's sales,

48. A third antebellum treatise was aimed at practitioners, and it adopted a broad definition of slave law that reflected the way that slave-related questions seeped into many Southern legal disputes. *See generally* JACOB D. WHEELER, A PRACTICAL TREATISE ON THE LAW OF SLAVERY: BEING A COMPILATION OF ALL THE DECISIONS MADE ON THAT SUBJECT, IN THE SEVERAL COURTS OF THE UNITED STATES AND STATE COURTS iii-iv (Negro Univs. Press 1968) (1837) (covering cases related to the fundamental law of slavery as well as those governing private law topics such as title, warranty, hiring, mortgage, dower, division, remainder, and incapacity).

49. For example, Howard Schweber has charted Southern jurists' reluctance to embrace the movement toward modern negligence doctrine that eased the way for economic innovation in the North. *See* HOWARD SCHWEBER, THE CREATION OF AMERICAN COMMON LAW, 1850-1860: TECHNOLOGY, POLITICS, AND THE CONSTRUCTION OF CITIZENSHIP 2, 226-40, 260 (2004). Even the judges intent on promoting economic development did so as a means to strengthen the Southern slave economy. *See, e.g.*, TIMOTHY S. HUEBNER, THE SOUTHERN JUDICIAL TRADITION: STATE JUDGES AND SECTIONAL DISTINCTIVENESS, 1790-1890, at 81-87 (1999). Southern judges thus appear to have demonstrated a commitment to "[s]ectional politics" and slavery that deeply shaped their jurisprudence. *See id.* In short, Southern jurists "implemented the pro-slavery ideas circulating in southern culture." BROPHY, *supra* note 31, at xix.

50. *See, e.g.*, Mosely v. Gordon, 16 Ga. 384, 396 (1854) (holding that the plaintiff's agent had the right to "sell and warrant the slave Daniel").

51. *See, e.g.*, Hopkins v. Burch, 3 Ga. 222, 224-25 (1847) (explaining the procedure for the levy of "lands and negroes").

52. *See, e.g.*, Adams v. Mizell, 11 Ga. 106, 107-08 (1852) (holding a failure to return "negroes" "constitute[d] conversion"); *see also* Murphy v. Wilkinson County, 11 Ga. 331, 334 (1852) (upholding an action by justices of an inferior court in collecting proceeds from the sale of a runaway slave); Carter v. Buchannon, 3 Ga. 513, 520-21 (1847) (allowing evidence of possession to establish the gift of an enslaved person); Broughton v. Badgett, 1 Ga. 75, 76 (1846) (considering a warranty on an enslaved person who had already been sold).

conversions—that Northern lawyers used in cases about nonhuman property.[53]

Translating slave commerce into common law supported the slave system. Resolving basic questions of inheritance helped Southerners pass on the people they owned to their heirs.[54] Mortgaging enslaved people allowed slaveholders to capitalize on their human assets and created a market for collateralized slave securities.[55] Regulating the practices of those who borrowed enslaved people protected slaveowners who hired them out.[56] In addition to benefiting slaveowners, such laws tragically harmed people held as slaves. In enforcing the law of succession, courts forcibly subjected the enslaved to appraisal, sale, and permanent separation from their family and friends.[57] The purchasing power given to masters by slave mortgages increased their grip on political and economic power and heightened the risks for familial separation through a borrower's purchase or a lender's repossession.[58] Slave hiring forced enslaved people into dangerous occupations and subjected them to abuse at the hands of the people who hired them.[59] Northern cooperation with slave commerce heightened the potential for harm. The common language adopted by Southern lawyers allowed them to communicate with Northerners and to gain financial support for slave commerce from the North.[60] Training and practice prepared lawyers to collect debts for Northern clients who sold goods to the

53. *See, e.g.*, Rollins v. Phelps, 5 Minn. 463, 466-68 (1861) (determining the liability of an agent who sold logs); Lovejoy v. Jones, 30 N.H. 164, 169 (1855) (holding that the sale of borrowed ox constituted conversion); Hale's Appeal, 44 Pa. 438, 439 (1863) (outlining the procedure for the proper sale of personal property in Pennsylvania).

54. *See* MORRIS, *supra* note 27, at 81-101 (discussing Southern inheritance law as applied to slavery). *But see* BERNIE D. JONES, FATHERS OF CONSCIENCE: MIXED-RACE INHERITANCE IN THE ANTEBELLUM SOUTH 1-20 (2009) (discussing the use of inheritance law to benefit African Americans).

55. In a sampling of mortgages from 1812 through 1860, enslaved people accounted for 33% of equity mortgage dollars in Virginia and 88% of equity mortgage dollars in Louisiana. Martin, *supra* note 22, at 835, 838 graph set.2; *see also* RICHARD HOLCOMBE KILBOURNE, JR., DEBT, INVESTMENT, SLAVES: CREDIT RELATIONS IN EAST FELICIANA PARISH, LOUISIANA, 1825-1885, at 5 (1995) ("Slaves represented a huge store of highly liquid wealth that ensured the financial stability and viability of planting operations even after a succession of bad harvests, years of low prices, or both."); Edward E. Baptist, *Toxic Debt, Liar Loans, Collateralized and Securitized Human Beings, and the Panic of 1837*, *in* CAPITALISM TAKES COMMAND: THE SOCIAL TRANSFORMATION OF NINETEENTH-CENTURY AMERICA 69, 80-84 (Michael Zakim & Gary J. Kornblith eds., 2012) (discussing the use of enslaved people as a source of credit).

56. MORRIS, *supra* note 27, at 140-43.

57. *See id.* at 82-83; *see also* FEDE, *supra* note 24, at 221-40.

58. *See* Martin, *supra* note 22, at 859-66.

59. *See* MORRIS, *supra* note 27, at 143-46.

60. See also COVER, *supra* note 15, at 199-200, for Robert Cover's argument that a formal approach to law discouraged judges from supporting the anti-slavery movement.

South on credit. Collection in turn facilitated lending that gave Southerners access to desirable products from the North.[61] By selling these products, Northerners who did not own enslaved people benefited from slavery and linked themselves economically to its practice.[62] Even as sectional tensions heightened in the 1850s, Northern judges cited Southern opinions as persuasive authority.[63]

Sectional tensions, however, eventually won out. The Civil War wrought a revolutionary change, leading to the freedom of almost four million American enslaved people.[64] Nonetheless, the commercial and legal

61. *See* Simard, *supra* note 15, at 597; *see also, e.g.*, MAXWELL BLOOMFIELD, AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776-1876, at 276-79 (1976). For more on economic links between Northerners and slavery, see Kathryn Boodry, *August Belmont and the World the Slaves Made*, *in* SLAVERY'S CAPITALISM: A NEW HISTORY OF AMERICAN ECONOMIC DEVELOPMENT 163, 163-78 (Sven Beckert & Seth Rockman eds., 2016) (arguing that the institution of slavery facilitated the development of investment banking); and Seth Rockman, *Negro Cloth: Mastering the Market for Slave Clothing in Antebellum America*, *in* AMERICAN CAPITALISM: NEW HISTORIES 170, 170-94 (Sven Beckert & Christine Desan eds., 2018) (describing the manufacture and marketing of textiles in the North for sale to Southern planters).

62. *See* Rockman, *supra* note 61, at 170-94 (explaining the market for "negro cloth" manufactured in the North); Simard, *supra* note 15, at 595-99 (detailing the role of lawyers in debt collection on behalf of Northern creditors).

63. For example, *Flint River Steamboat Co. v. Foster*, 5 Ga. 194 (1848), a Georgia case about trial by jury, was cited in an 1858 concurring opinion by a justice of the Supreme Court of Michigan. Sears v. Cottrell, 5 Mich. 251, 259 (1858) (Christiancy, J., concurring) (citing *Flint River Steamboat*, 5 Ga. 194). Similarly, the District Court for the District of Wisconsin in 1850 cited *Hightower v. Thornton*, 8 Ga. 486 (1850), a Georgia case about the equitable power of creditors to a corporation. Cleveland v. La Crosse & M.R. Co., 5 F. Cas. 1030, 1031 (D. Wis. 1859) (No. 2887) (citing *Hightower*, 8 Ga. 493).

64. DAVID BRION DAVIS, INHUMAN BONDAGE: THE RISE AND FALL OF SLAVERY IN THE NEW WORLD 298 (2006). For more on the revolutionary changes wrought by the Civil War, the radical potential of Reconstruction, and its limitations, see *id.* at 297-322 (describing the Civil War as a shocking "apocalyptic success"); W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA: AN ESSAY TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860-1880, at 599-633 (Russell & Russell 1962) (1935) (analyzing white movement against Reconstruction); ERIC FONER, NOTHING BUT FREEDOM: EMANCIPATION AND ITS LEGACY 1, 39-40 (2007 prtg.) (defining Emancipation as "revolutionary"); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION; 1863-1877, at 35-76, 564-601 (1988) [hereinafter FONER, RECONSTRUCTION] (discussing the meaning and consequences of the Emancipation Proclamation and the failure of Reconstruction); STEVEN HAHN, A NATION UNDER OUR FEET: BLACK POLITICAL STRUGGLES IN THE RURAL SOUTH FROM SLAVERY TO THE GREAT MIGRATION, 62-264 (2003) (providing a history of black politics during slavery and Reconstruction) [hereinafter HAHN, A NATION]; STEVEN HAHN, THE POLITICAL WORLDS OF SLAVERY AND FREEDOM 55-97 (2009) (positing that the "greatest slave rebellion" in modern history occurred during the Civil War); and STEPHANIE MCCURRY, CONFEDERATE RECKONING: POWER AND POLITICS IN THE CIVIL WAR SOUTH 9-10, 176-77, 214-17, 262, 308-09 (2010) (highlighting the role of women and enslaved people in reshaping the Confederacy).

infrastructure that had supported slavery before its abolition continued to operate. After the war, the same lawyers whose legal work had been critical to maintaining slavery turned again to commercial work in a post-Emancipation society.[65] American lawyers also continued to treat cases involving slave commerce as if they had involved nonhuman property.[66] In 1871, in *Osborn v. Nicholson*, the U.S. Supreme Court held that outstanding contracts for payments for slave purchases were enforceable.[67] The Court reasoned that the Constitution's Contracts Clause prevented states from annulling agreements for slaves and since contracts for slaves had been legal when entered into and "enforced in the courts of every State of the Union," they remained valid.[68] The Court analogized the emancipation of a twenty-seven-year-old enslaved person named Albert to "railroad scrip" that had been repudiated by its issuer.[69] The Court did address natural law arguments against slavery, but it dismissed them: The "institution [of slavery] [had] existed largely under the authority of the most enlightened nations of ancient and modern times," and "the rights of the owner have been regarded . . . as surrounded by the same sanctions and covered by the same protection as other property."[70] In any case, the Court added, the rights of the plaintiff had vested before Emancipation.[71]

The Court's approach led it to categorize a case about a banned set of social relations as a simple contracts case. By classifying the case as involving a *contract* rather than a *contract for the sale of a person*, the Court avoided confronting difficult questions about the meaning of the Civil War and

65. *See* Simard, *supra* note 15, at 601-02.

66. *See* Andrew Kull, *The Enforceability After Emancipation of Debts Contracted for the Purchase of Slaves*, 70 CHI.-KENT L. REV. 493, 493-95 (1994) (noting that courts continued to enforce "debts for the purchase of slaves" after the Civil War).

67. 80 U.S. (13 Wall.) 654, 662-63 (1871). For extensive analysis of this case, see Diane J. Klein, *Paying Eliza: Comity, Contracts, and Critical Race Theory—19th Century Choice of Law Doctrine and the Validation of Antebellum Contracts for the Purchase and Sale of Human Beings*, 20 NAT'L BLACK L.J. 1, 30-41 (2006); and Kull, *supra* note 66, at 502-07. *See also* Amanda Laury Kleintop, *Life, Liberty, and Property in Slaves: White Mississippians Seek "Just Compensation" for Their Freed Slaves in 1865*, 39 SLAVERY & ABOLITION 383, 383-99 (2018) (detailing efforts by former slaveowners to obtain compensation for property lost in Emancipation).

68. *See Osborn*, 80 U.S. (13 Wall.) at 656.

69. *Id.* at 655, 658-59. The Court also cited a case involving the freeing of "apprentice laborers" by "the local governor and council" in British Guiana. *Id.* (citing Mittelholzer v. Fullarton (1842) 115 Eng. Rep. 373). In that case, the Queen's Bench had analogized the freeing of the laborers to "goods destroyed by fire." *Mittelholzer*, 115 Eng. Rep. at 385 (opinion of Williams, J.); *see also Osborn*, 80 U.S. (13 Wall.) at 660 (analogizing the freeing of slaves to "leasehold premises . . . destroyed by fire" (citing Holtzapffel v. Baker (1811) 34 Eng. Rep. 261)).

70. *Osborn*, 80 U.S. (13 Wall.) at 661.

71. *Id.* at 662.

Emancipation.[72] The Court did not seriously consider the possibility of voiding the contract or involving its subject, the former enslaved person Albert, in the disposition of a contract about him. Nor did the Court weigh the broader social implications of its decision. By the 1870s, lawyers had naturalized the law of slavery so completely that slavery's place as a normal part of the law was accepted even after more than 600,000 soldiers died in a war over its future, and even after the U.S. government had ordered the emancipation of enslaved people without compensation to their former owners.[73] The world of slave commerce had been uprooted, but its legal legacy remained part of U.S. law.

II. The Living Law of Slavery

Slavery's legal legacy lives on today. A legal approach handed down from their nineteenth-century predecessors has led most judges and litigants to continue to treat slave cases as good law and to categorize such cases in standard legal categories. Cases about hiring enslaved people remain bailments cases. Cases about mortgages on human property remain mortgage cases. And cases about inheriting enslaved people remain inheritance cases. In the past thirty-five years judges have cited slave cases when reaching decisions related to negligent damage to property,[74] adverse possession,[75] double jeopardy,[76] the

72. *Cf.* Klein, *supra* note 67, at 40 ("The judicial literary style often emphasizes the degree to which prior cases and relevant doctrines 'compel' a certain outcome, in the face of which the principled jurist cannot but comply.").

73. Some prior emancipations had resulted in various forms of compensation to former slaveowners. *See, e.g.*, KATHLEEN MARY BUTLER, THE ECONOMICS OF EMANCIPATION: JAMAICA & BARBADOS, 1823-1843, at xvi (1995) ("After prolonged negotiations the British government officially eliminated slavery in 1834 and agreed to compensate all owners of West Indian slaves."). For a discussion on attempts by American slaveowners to receive compensation after abolition, see generally Kleintop, *supra* note 67.

74. Tire Shredders, Inc. v. ERM-N. Cent., Inc., 15 S.W.3d 849, 853-54 (Tenn. Ct. App. 1999) (citing Johnson v. Perry, 21 Tenn. (2 Hum.) 569, 571 (1841)). In *Johnson*, a slaveowner sued for damages for injury to his personal property, an enslaved person. *See* 21 Tenn. (2 Hum.) at 571.

75. Sherrill v. Souder, 325 S.W.3d 584, 600 (Tenn. 2010) (citing Porter v. Porter, 22 Tenn. (3 Hum.) 586, 589 (1842)). *Porter* involved a challenge to a bequest of "a negro boy named Henry." *See* 22 Tenn. (3 Hum.) at 586.

76. Grady v. Corbin, 495 U.S. 508, 534-35 (1990) (Scalia, J., dissenting) (citing State v. Taylor, 18 S.C.L. (2 Bail.) 49, 50 (Ct. App. Law Eq. 1830)), *overruled by* United States v. Dixon, 509 U.S. 688 (1993). In *Taylor*, the defendants, previously convicted for unlawful trading with a slave, challenged their subsequent indictment for "receiving goods stolen by a slave." *See* 18 S.C.L. (2 Bail.) at 49-50.

conduct of executors,[77] contract interpretation,[78] jury discretion in forfeiture cases,[79] dram-shop liability,[80] marriage,[81] estoppel,[82] capacity,[83] examination of witnesses,[84] fraudulent conveyance,[85] statutory interpretation,[86] and many other doctrines.

Because lawyers still rely on many of these same legal categories, slave opinions easily supply case law for the twentieth and twenty-first centuries. Take, for example, the 1863 Florida case *Smith v. Hines*.[87] *Smith* involved a challenge by a widow to the actions of an administrator to a will. The

77. Madden v. Phelps, No. 1055-K, 1995 WL 606318, at *13 (Del. Ch. May 15 1995) (citing Chase v. Lockerman, 11 G. & J. 185, 207 (Md. 1840)). *Chase* resulted from a challenge to a will that devised enslaved persons. *See* 11 G. & J. at 190-91.

78. Bennett v. Inv'rs Title Ins. Co., 635 S.E.2d 660, 665 (S.C. Ct. App. 2006) (citing Alexander v. Burnet, 39 S.C.L. (5 Rich.) 189, 196 (Ct. App. Law 1851)). *Alexander* stemmed from a dispute about title to an enslaved person. *See* 39 S.C.L. (5 Rich) at 194-96.

79. Medlock v. 1985 Ford F-150 Pick Up VIN 1FTDF15YGFNA22049, 417 S.E.2d 85, 86 (S.C. 1992) (citing State v. Simons, 29 S.C.L. (2 Speers) 761, 767-68 (Ct. Err. 1844)). In *Simons*, the court held that forfeiture of enslaved people without a jury trial was a violation of the South Carolina Constitution's provision that "no free man . . . shall be in any manner deprived of his life, liberty or property, but by the judgment of his peers, or by the law of the land." 29 S.C.L. (2 Speers) at 767-68 (quoting S.C. CONST. art. IX, § 2).

80. Warr v. JMGM Grp., LLC, 70 A.3d 347, 391 (Md. 2013) (Adkins, J., dissenting) (citing Harrison v. Berkley, 32 S.C.L. (1 Strob.) 525, 550-51 (Ct. App. Law 1847)). *Harrison* involved the death of an enslaved person after he consumed alcohol. *See* 32 S.C.L. (1 Strob.) at 546, 551.

81. Garrett v. Burris, 735 S.E.2d 414, 416 (N.C. Ct. App. 2012) (citing State v. Samuel, 19 N.C. (2 Dev. & Bat.) 177 (1836)), *aff'd*, 742 S.E.2d 803 (N.C. 2013). In *Samuel*, the Supreme Court of North Carolina held that state law did not recognize marriages between enslaved people. 19 N.C. (2 Dev. & Bat.) at 183.

82. Whitacre P'ship v. Biosignia, Inc., 591 S.E.2d 870, 891 (N.C. 2004) (citing Jones v. Sasser, 18 N.C. (1 Dev. & Bat.) 452 (1836)). In *Jones*, the court held that the plaintiff was not estopped from bringing a challenge to the transfer of an enslaved person. *Jones*, 18 N.C. (1 Dev. & Bat.) at 462-66.

83. State v. Hunt, 722 S.E.2d 484, 491 (N.C. 2012) (citing Clary's Adm'rs v. Clary, 24 N.C. (2 Ired.) 78, 83-85 (1841)). *Clary's Administrators* involved a bequest of enslaved people. 24 N.C. (2 Ired.) at 78.

84. State v. Woods, 723 S.W.2d 488, 510-11 (Mo. Ct. App. 1986) (citing Brown v. Burrus, 8 Mo. 26, 29-30 (1843)). In *Brown*, the defendants were alleged to have committed an act of trespass "for seizing and taking away a negro girl slave, named Nancy." 8 Mo. at 27.

85. Macon Bank & Tr. Co. v. Holland, 715 S.W.2d 347, 349 (Tenn. Ct. App. 1986) (citing Floyd v. Goodwin, 16 Tenn. (8 Yer.) 484 (1835)). *Floyd* involved a dispute over "title . . . to slaves." 16 Tenn. (8 Yer.) at 485.

86. Harrison-Solomon v. State, 112 A.3d 408, 423-24 (Md. 2015) (citing Alexander v. Worthington, 5 Md. 471, 485 (1854)). *Alexander* involved a devise of land and enslaved people. 5 Md. at 494-96.

87. 10 Fla. 258 (1863).

administrator claimed to have purchased enslaved people from the decedent, but the widow alleged that the sale was a ruse to deprive her of her dower.[88] The Supreme Court of Florida sided with the widow, finding that the enslaved people had not been in the possession of the administrator until after her husband's death and that the sale was fraudulent.[89] A lawyer today would likely classify this case, as LexisNexis does, into subject areas such as "Family Law," "Estate, Gift & Trust Law," "Copyright Law," and "Contracts Law."[90] The persistence of formalism in legal reasoning removes *Smith* from its slave context, making it easier for lawyers to divorce its holding from slavery. The Thirteenth Amendment, for example, does not appear in its subsequent history on LexisNexis.[91] This approach helps to explain why the Florida District Court of Appeal cited *Smith v. Hines* in 1990 for the proposition that "a husband could dispose of his personal property during marriage."[92]

But this approach has cracks. Lexis's abstract portrait of *Smith* necessarily includes references to the slave context from which it arose. Two Lexis Headnotes refer to the statute that governed inheritance when the case was decided, which granted widows life estates in slaves.[93] And the first "Core Term[]" listed for the case is "slaves."[94] Moreover, the court's analysis also appears to have been influenced by the enslaved people on which the dispute turned. Acknowledging the "contradictory and unsatisfactory" evidence presented about two of the enslaved people, the *Smith* court attributed the confusion to the "varied names so often given to negroes."[95] Other cases, upon further scrutiny, reveal similar limitations to treating slave cases as regular precedent. The Court of Appeals of North Carolina, for example, cited an 1836 North Carolina case, *State v. Samuel*, for the proposition that "common law marriages cannot be created in North Carolina."[96] *Samuel*, however, involved the question whether enslaved people, who were ineligible for marriage under North Carolina law, could nonetheless avail themselves of the spousal testimonial privilege by virtue of common law marriage.[97] Such a case was

88. *See id.* at 259-61.

89. *Id.* at 298-99.

90. Smith v. Hines, 1863 Fla. LEXIS 3, at HN1, HN7, HN19, HN21 (1863) (headnotes listed by LexisNexis as of Jan. 4, 2020).

91. *Id.*

92. *See* Traub v. Zlatkiss, 559 So. 2d 443, 446 (Fla. Dist. Ct. App. 1990).

93. *See Smith*, 163 Fla. LEXIS at HN7, HN8.

94. *Id.* at Core Terms.

95. 10 Fla. 258, 298 (1863).

96. Garrett v. Burris, 735 S.E.2d 414, 416 (N.C. Ct. App. 2012) (citing State v. Samuel, 19 N.C. (2 Dev. & Bat.) 177 (1836)).

97. *See* 19 N.C. (2 Dev. & Bat.) at 180.

deeply enmeshed in the context of a slave society. As part of its decision, the *Samuel* court discussed the "incapacity of a slave to enter into . . . contracts" and highlighted "the difficulty of giving legal validity to . . . marriage . . . without curtailing the rights and powers of . . . masters."[98] "[C]oncubinage," the court concluded, was "the relation, to which these people have ever been practically restricted, and with which alone, perhaps, their condition is compatible."[99] Isolating such cases from their slave context is therefore more difficult than modern lawyers imagine.

When understood as a coherent category, the continued citation of slave cases reveals the flaws of the myopic perspective of American lawyers. This Part provides an overview of the modern citation of slave cases and examines the cost of citing such cases.

A. Finding Slave Cases

Slave cases are frequently cited and can be found with normal legal research tools.[100] My searches uncovered more than 300 examples of citations to slave cases in the last thirty-five years. Roughly 80% of the cases I found that cited slavery did not acknowledge a case's slave context.[101] Slave cases appear

98. *Id.* at 182.

99. *Id.* at 183.

100. To capture the citation of slave cases in the past thirty-five years, I conducted extensive electronic searches for judicial opinions that cited cases that involved chattel slavery. Proceeding on a state-by-state basis, I first searched for explicit discussions of slavery and slaves in opinions authored in the last thirty-five years. I excluded cases that used slavery as an analogy or that discussed slavery outside of the context of American chattel slavery. I therefore did not include cases dealing with "sex slavery," "white slavery," and the like in my search. I also excluded cases in which litigants compared their current status to that of a slave. Because extensive scholarship already exists on the Reconstruction Amendments, and because lawyers tend to recognize these cases as having a special relationship to civil rights, I also excluded cases interpreting or citing the Thirteenth, Fourteenth, and Fifteenth Amendments from my analysis. After finishing my search for modern cases that explicitly mentioned slavery, I searched for cases that cited slave-related cases but that did not acknowledge or discuss the slave-based context from which these cases grew. To find these cases, I searched first for opinions that discussed slavery before the ratification of the Thirteenth Amendment. I sorted these cases by the number of times they were cited and then found citations from courts in the last thirty-five years. I reviewed these modern cases to understand how and why judges decided to cite slave cases. Because my methodology relies on direct citation, it only begins to illustrate the significant influence of slavery on modern law. For every case that cites a slave-related case, there are many more that are once removed; that is, they cite cases that cite slave cases. Moreover, there may be many more unpublished opinions that cite slave cases and that are not accessible on Westlaw or LexisNexis.

101. *See Court Cases*, CITING SLAVERY PROJECT, https://perma.cc/2V36-Q6XW (archived Jan. 12, 2020).

as part of block quotations, string cites, footnotes, and every other form of citation. In approximately 20% of cases I found that cited slavery, judges did acknowledge the slave context of the holdings on which they relied, in forms ranging from brief mentions in footnotes to multiparagraph discussions.[102] Discussion of a slave case is sometimes simple as that in *In re Hockaday*, a 1994 case from the Bankruptcy Court for the Middle District of Tennessee.[103] In that case, which raised the question of whether a prepetition judgment lien had been properly filed, the court used a slave case as part of a "see, e.g.," string citation that included four other cases from the nineteenth century.[104] The description of the case was a simple parenthetical, "(levy of execution upon a slave)," and there was no other discussion of the case or the significance of its slave context.[105] A footnote in an Alabama Supreme Court case *McCollum v. Towns* provides another example of a brief acknowledgment of slave context.[106] In the footnote, the court described *Wilson's Heirs v. Wilson's Administrator*, decided by the Alabama Supreme Court in 1857, as a case "where the court refused to allow compensation to the fiduciary in the distribution of slaves."[107] More extensive engagement with slave cases is much less

102. *See id.*

103. 169 B.R. 640 (Bankr. M.D. Tenn. 1994).

104. *Id.* at 642.

105. *Id.* (citing Ethridge v. Edwards, 31 Tenn. (1 Swan) 426 (1852)). For other cases that cite cases in a parenthetical, see, for example, Grady v. Corbin, 495 U.S. 508, 534-35 (1990) (Scalia, J., dissenting) (citing State v. Taylor, 18 S.C.L. (2 Bail.) 49, 50 (Ct. App. Law Eq. 1830), and explaining in a parenthetical that "conviction of 'trading with a slave' does not bar prosecution for receiving goods stolen by enslaved person 'founded on the same act'; 'two distinct offences were committed' because neither offense was necessarily included within the other"), *overruled by* United States v. Dixon, 509 U.S. 688 (1993); McCall v. State, 501 So. 2d 496, 503 (Ala. Crim. App. 1986) (citing Spence v. State, 17 Ala. 192, 197-98 (1850), and explaining in a parenthetical that "evidence that master had always been in the habit of tying his slaves when they were charged with any matter, and whipping them till they confessed the truth, and that he had frequently treated the defendant the same way was admissible without the 'least doubt' to show that the defendant had reasonable ground to apprehend from his former treatment that he was to be whipped and have confessions extorted from him, as the master was in the habit of doing"); Hampton v. State, 455 So. 2d 149, 151 (Ala. Crim. App. 1984) (noting that Alabama courts "have traditionally and consistently held that a single act resulting in death or injury to multiple victims constitutes a single criminal offense" and citing Ben v. State, 22 Ala. 9 (1853), with a parenthetical explanation that "[i]ndictment charging defendant-slave with administering poison to white persons was not duplicitous and charged only one offense"), *abrogated by* McKinney v. State, 511 So. 2d 220 (Ala. 1987).

106. 435 So. 2d 17, 19 n.1 (Ala. 1983).

107. *Id.* at 19 (citing Wilson's Heirs v. Wilson's Adm'r, 30 Ala. 670 (1857)). For other examples of citation in footnotes, see, for example, Evanston Ins. Co. v. Premium Assignment Corp., 935 F. Supp. 2d 1300, 1307 n.2 (M.D. Fla. 2013) (citing McGriff v. Porter, 5 Fla. 373, 379 (1853), a case in which the Supreme Court of Florida held that the

footnote continued on next page

common.[108] For the most part, American judges treat slave cases like other precedent.

B. Normalizing Slave Law

Closer examination of citation to slave cases reveals the flaws of a legal perspective that discourages judges from deeper analysis of their use of slave precedent. *Smith v. Peoples Bank*, a 1992 case from Tennessee, provides a powerful example of the problems inherent in citing slavery.[109] *Smith* is a bailments case, brought by safety deposit holders against a bank that they alleged had taken property they had stored in their safety deposit boxes.[110] The bank argued that the plaintiffs' suit was barred by an exculpatory provision on the safe deposit cards they had signed.[111] The court ultimately sided in favor of the plaintiffs, citing a number of cases that provide exceptions to the "general rule . . . that exculpatory clauses are valid."[112] One of these cases was *Memphis & Charleston Railroad v. Jones*, which, as the *Smith* court characterized it, stood for the proposition that "a railroad's liability for willful or gross negligence in running over a slave asleep on the track cannot be contracted away."[113] Although the *Smith* court mentioned the slave context of the case it cited, its use of *Memphis* suggests that the court saw the case no differently from other precedent; from a legal perspective, *Memphis* appeared to provide ideal support for the *Smith* court's conclusion.[114]

In broader context, however, relying on a case based in human bondage proves more complicated than a narrow focus on the holding would suggest. *Memphis* grew out of a contract by a slaveowner to hire, as the *Memphis* court

decedent had authority "to dispose of an interest and property in the slaves specified"); Edwards v. Van De Rostyne, 245 S.W.3d 797, 802 n.6 (Ky. Ct. App. 2008) (citing Graham's Ex'r v. Sam, 46 Ky. (7 B. Mon.) 403, 405 (1847), as the "first appearance" of "*in forma pauperis*" in Kentucky law).

108. *See, e.g.*, Carr v. Int'l Ref. & Mfg. Co., 13 So. 3d 947, 962 n.8 (Ala. 2009) (Murdock, J., dissenting) (providing extensive analysis of *Bell's Administrator v. Troy*, 35 Ala. 184, 202 (1859), and recognizing that *Bell's Administrator* involved a "defendant's slave"); Tire Shredders, Inc. v. ERM-N. Cent., Inc., 15 S.W.3d 849, 853-54 (Tenn. Ct. App. 1999) (presenting the holding of *Johnson v. Perry*, 21 Tenn. (2 Hum.) 569 (1841), and discussing the recovery available for injury to the "plaintiff's slave").

109. Smith v. Peoples Bank of Elk Valley, No. 01A01-9111-CV-00421, 1992 WL 117061 (Tenn. Ct. App. June 3, 1992).

110. *See id.* at *1-2.

111. *See id.* at *3.

112. *See id.*

113. *Id.* (citing Memphis & Charleston R.R. v. Jones, 39 Tenn. (2 Head) 517 (1859)).

114. *See Memphis & Charleston R.R.*, 39 Tenn. (2 Head) at 519 (concluding that the exculpatory clause was invalid "against [the defendant's] own wilful [sic] wrong, or culpable negligence").

put it, "two negro boys" to the railroad for "twenty-three dollars per month, for each."[115] The contract signed by the slaveowner said that the railroad "assum[ed] no responsibility for damages from accident, or any cause whatever."[116] In the course of his work on the railroad, one of the hired men had been crushed to death when a fellow railroad worker failed to stop the train because he mistook his body for "a carpet-sack, or an old bag of clothes."[117] When the slaveowner attempted to sue the railroad for the value of the person he owned, the railroad argued that it could not be held accountable, even for willful misconduct or gross negligence, because the contract exempted it from liability.[118]

Memphis was grounded in white supremacy. Not only was the enslaved person treated like property, he was never named and was referred to as a "boy."[119] Moreover, despite its irrelevance to the case, the court also blamed him for his own death, accusing him of being "intoxicated."[120] The court's opinion reinforced racial stereotypes, even though they had no bearing on the case.[121] For the *Smith* court to cite *Memphis* without considering its racist language and reasoning is to suggest that such language and reasoning deserve no explanation. The offensiveness of this language is reinforced by its official origin in an opinion that apparently still has the force of law in some respects.

The *Memphis* court's white supremacist reasoning may have also influenced its legal holding. If the enslaved person who was killed by the train had been considered an employee rather than a hired slave, he would have likely been classified by the Tennessee court as a "fellow servant" and therefore have been ineligible to receive compensation for injury caused by a fellow worker's conduct.[122] In this context, the railroad's interpretation of the exculpatory clause is not as outlandish as the court suggests; if workers were regularly uncompensated for their injuries, it does not seem unreasonable for

115. *Id.* at 517-18.

116. *Id.* at 518.

117. *Id.*

118. *Id.* at 519.

119. *Id.* at 518-19.

120. *See id.* at 518.

121. *See* WALTER JOHNSON, SOUL BY SOUL: LIFE INSIDE THE ANTEBELLUM SLAVE MARKET 146 (1999) ("In southern courtrooms . . . slaves' misbehavior was often attributed to an inward disposition of character, which meant that there was something invariably, inevitably, perhaps biologically 'bad' about the slave."); *see also* IBRAM X. KENDI, STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA 458 (2016) (tracing the roots of modern stereotypes about African Americans to "[s]laveholders' racist theory of African Americans as more dependent").

122. *See, e.g.*, *Fox v. Sandford*, 36 Tenn. (4 Sneed) 36, 47 (1856) (applying the fellow servant rule).

slaveholders to be treated similarly for the injuries to their human property. Southern courts, however, refused to extend the fellow servant rule to enslaved people hired out by slaveowners.[123] As historian Thomas Morris has illustrated, treating enslaved people like property made it difficult for courts to view "the *thing* as a potential coworker."[124] Perhaps the court would have still reached a similar holding if the case had involved a horse or piece of machinery rather than a person, but its potentially motivated reasoning makes its conclusion suspect. *Memphis*, in other words, provides poorer support for the *Smith* court's holding than its citation lets on.

The Alabama Supreme Court's opinion in *Spain v. Brown & Williamson Tobacco Corp.* provides another example of the issues inherent in citing slave cases.[125] *Spain* relies on a quotation from *McArthur v. Carrie's Administrator* to explain the rationale behind Alabama's rule of repose.[126] According to the *McArthur* court, as quoted by the Alabama Supreme Court in 2003, "a *prima-facie* presumption is raised, whenever there is satisfactory proof of twenty years uninterrupted, adverse enjoyment and possession [of slaves]."[127] Although "use" and "enjoyment" are legal terms of art,[128] their application to people is nevertheless striking, especially in the context of slavery. Historians have detailed the manifold ways in which a slaveowner's enjoyment and possession manifested itself. Slaveholders bought, sold, overworked, beat, raped, and killed enslaved people, often without legal consequence.[129] That the

123. *See* MORRIS, *supra* note 27, at 147-158; *see also* Paul Finkelman, *Slaves as Fellow Servants: Ideology, Law, and Industrialization*, 31 AM. J. LEGAL HIST. 269, 269-305 (1987).

124. *See* MORRIS, *supra* note 27, at 150.

125. 872 So. 2d 101 (Ala. 2003).

126. *Id.* at 129 n.5 (Johnston, J., concurring in part, concurring specially in part, and dissenting in part) (quoting McArthur v. Carrie's Adm'r, 32 Ala. 75, 88-89, 94 (1858)).

127. *Id.* (alteration in original) (quoting *McArthur*, 32 Ala. at 88-89, 94).

128. *See Use*, BLACK'S LAW DICTIONARY (11th ed. 2019); *Enjoyment*, BLACK'S LAW DICTIONARY (11th ed. 2019).

129. For discussion of the treatment of enslaved people, see EDWARD E. BAPTIST, THE HALF HAS NEVER BEEN TOLD: SLAVERY AND THE MAKING OF AMERICAN CAPITALISM 111-44 (2014) (discussing cruel tactics used to improve the productivity of enslaved people); IRA BERLIN, MANY THOUSANDS GONE: THE FIRST TWO CENTURIES OF SLAVERY IN NORTH AMERICA 97-98 (1998) (explaining control exerted by masters); HAHN, A NATION, *supra* note 64, at 16 ("Slavery, quite simply, was a system of extreme personal domination in which a slave had no relationship that achieved legal sanction or recognition other than with the master, or with someone specifically designated by the master."); CAITLIN ROSENTHAL, ACCOUNTING FOR SLAVERY: MASTERS AND MANAGEMENT 2 (2018) ("The portrait that emerges from plantation records is that of a society where precise management and violence went hand in hand."); KENNETH M. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH 156-91 (1967) (describing violence in the institution of slavery).

For the lack of legal repercussions, see JOHNSON, *supra* note 121, at 118-61 (describing the conditions of slave markets); MORRIS, *supra* note 27, at 161-208 (observing that

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court relied on a case about human property for such a banal point emphasizes the court system's understanding of such cases as uncontroversial law.[130]

The dignitary harms deepen when read in the context of *McArthur*, which arose out of a dispute over an enslaved person named Fanny and her four children.[131] Because their ownership was disputed, a local sheriff had seized Fanny and her family and placed them in an Alabama county jail in 1853.[132] Fanny and her family had already faced difficulties. After Fanny's owner died, her owner's widow sold Fanny in 1829 or 1830 to settle the decedent's debts and purchase cattle.[133] Such a sale subjected Fanny to the whims and desires of another enslaver. He kept her in Hancock County, Mississippi, for twenty-three years where she worked for him and raised four children.[134] In 1853, just a few months before she and her family were put into jail, they were moved more than 300 miles away to Tallapoosa County, Alabama, by her owner's son,[135] likely tearing them from familial and friendship ties in Mississippi.[136] Fanny's part in this story was only tangentially relevant to the court's holding because she and her family were property, but citation to this case normalizes the treatment she and her family endured as legally defined property.[137] These

"[a]lmost all homicides of slaves, from the colonial period to the end of slavery, ended in acquittals" and concluding that "[l]ittle evidence exists that law . . . amounted to much protection for slaves against the nonfatal abuse inflicted on them by their masters"); Peter W. Bardaglio, *Rape and the Law in the Old South: "Calculated to Excite Indignation in Every Heart,"* 60 J.S. HIST. 749, 757 (1994) ("When a master raped one of his female slaves, the law did not hold him accountable for the attack.").

130. Courts, in contrast, are careful to explain when cases have been vacated, even for unrelated reasons. *See, e.g.*, Cochran v. Ward, 935 So. 2d 1169, 1176 (Ala. 2006) (citing Sperau v. Ford Motor Co., 674 So. 2d 24 (Ala. 1995), and noting in its citation that *Sperau* was "vacated on other grounds" by the U.S. Supreme Court and then remanded to the Supreme Court of Alabama).

131. *See McArthur*, 32 Ala. at 76.

132. *Id.* at 77-79.

133. *Id.* at 79-80.

134. *Id.* at 76, 79.

135. *Id.* at 79.

136. Being sold often involved a dehumanizing experience at a slave auction. *See* JOHNSON, *supra* note 121, at 163 ("[S]laves in the market became accustomed to presenting themselves as commodities."). It also sometimes meant being torn away from a network of friends and family who helped to ameliorate the harms of slavery. *See* HAHN, A NATION, *supra* note 64, at 17-19; DYLAN C. PENNINGROTH, THE CLAIMS OF KINFOLK: AFRICAN AMERICAN PROPERTY AND COMMUNITY IN THE NINETEENTH-CENTURY SOUTH 79-109 (2003) (describing the benefits of kinship networks).

137. The decision's language emphasized Fanny and her family's status as property, repeatedly referring to them in such terms, and only using Fanny's name when describing her as "the slave Fanny." *See McArthur*, 32 Ala. at 79-80, 86, 88. Fanny was also excluded from participating in the trial because of rules that barred her testimony, even though she was a witness to the sale. *See* 1833 Ala. Laws 391, § 4 ("No slave shall be

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brutal facts are deemed irrelevant to the court's decision to cite such precedent with approval.

Even if the dignitary harms of citing *McArthur* are discounted, the case offers weak precedential support for cases not related to slavery. The *McArthur* court carefully avoided making a broad statement of the law, limiting its holding to "cases like the present," and to "property situated substantially as this is."[138] It noted that "the property [i.e., Fanny and her children] remained in the neighborhood,"[139] giving her former owner the opportunity to have contested the transaction earlier. The opinion suggests that the possession of enslaved people might have been more noticeable than that of other types of property and therefore provides relatively weak precedential support for the *Spain* court. By failing to fully address the context in which *McArthur* was decided, the modern Alabama Supreme Court seems to have underestimated the case's legal limitations as precedent for non-slave cases.

Tire Shredders, Inc. v. ERM-North Central, Inc., a 1999 case decided by the Court of Appeals of Tennessee, further illustrates the harms of citing slave cases.[140] In discussing the damages allowed for the negligent destruction of a tire shredding machine owned by the plaintiff, the court cited the "first" Tennessee case "discussing the types of damages that are available when negligent conduct results in injury to personal property."[141] Unlike the tire shredding machinery at issue in the case before it, *Johnson v. Perry* involved human property.[142] In the 1999 recounting, the ruling on damages for personal property arose out of "an altercation" between the defendants and "the plaintiff's slave," in which "the slave fell and broke his leg" in attempt to "escape from the defendants."[143] For the *Tire Shredders* court, the underlying facts of the case were relatively unimportant. More important was the clear way that the opinion in *Johnson* had laid out the damages available for harm to "personal property."[144] After summarizing the *Johnson* court's holding, the opinion for the Court of Appeals moved on to other relevant precedent—a case involving damage to a car.[145]

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admitted a witness against any person, in any matter, cause, or thing whatsoever, civil or criminal, except in criminal cases, in which the evidence of one slave shall be admitted for or against another slave."); *see also* MORRIS, *supra* note 27, at 229-37.

138. 32 Ala. at 94-95.

139. *Id.* at 95-96.

140. 15 S.W.3d 849 (Tenn. Ct. App. 1999).

141. *Id.* at 851-52, 853 (citing Johnson v. Perry, 21 Tenn. (2 Hum.) 569, 571-72 (1841)).

142. *See* 21 Tenn. (2 Hum.) at 571.

143. *Tire Shredders*, 15 S.W.3d at 853-54 (citing *Johnson*, 21 Tenn. (2 Hum.) at 571-72).

144. *See id.* (discussing the *Johnson* court's holding at length).

145. *Id.* at 854 (citing Perkins v. Brown, 177 S.W. 1158 (Tenn. 1915)).

Such a formalist treatment ignores the harrowing experience of the "property" in slavery. The confrontation that led to the injury of David, the enslaved person who was the subject of the *Johnson* case, began with a "verbal altercation . . . between the slave and one of the defendants."[146] In a slave society dependent on black subordination, threats to white authority were taken seriously.[147] As reported by the court in *Johnson*, the defendants "seized the slave, and were attempting to tie him for the purpose of inflicting chastisement on him."[148] Such "chastisement" in the slave South could have involved a serious threat to well-being or even life.[149] It is likely that David recognized the danger. He "made his escape," risking a leap from "a precipice about four feet high" to get away from his pursuers and in the process severely injured his leg.[150] His ordeal did not end there. A doctor "of not much skill" was unable to heal his injuries.[151] After three or four months of little improvement (and likely serious pain), a second doctor diagnosed David with a broken knee.[152] The doctor subsequently removed "several pieces of broken bone" without the aid of modern anesthesia.[153] The injury, however, appeared to have persisted, and David was forced to rely on crutches to walk.[154] His condition was severe enough for the jury to award his owner $800, which was somewhere between 80% and 100% of what an enslaved person like him would have sold for on the market before the injury.[155] The Tennessee Supreme Court offered David no sympathy. They criticized him for not fleeing in a safer direction—comparing him to a mare who had been frightened by dogs—and spoke of him like they would have of an animal, writing "if a man's property has been injured, and after the commencement of the suit it dies, proof of the

146. *Johnson*, 21 Tenn. (2 Hum.) at 569.

147. *Cf.* Andrew Fede, *Legitimized Violent Slave Abuse in the American South, 1619-1865: A Case Study of Law and Social Change in Six Southern States*, 29 AM. J. LEGAL HIST. 93, 105-06 (1985) (referring to "the struggle to maintain slave discipline").

148. 21 Tenn. (2 Hum.) at 569.

149. *See* Fede, *supra* note 147, at 105-06.

150. *Johnson*, 21 Tenn. (2 Hum.) at 569.

151. *Id.*

152. *Id.*

153. *Id.* William T.G. Morton introduced anesthesia to surgical practice in 1846. *See* JULIE M. FENSTER, ETHER DAY: THE STRANGE TALE OF AMERICA'S GREATEST MEDICAL DISCOVERY AND THE HAUNTED MEN WHO MADE IT 5-6, 240-41 (2001).

154. *Johnson*, 21 Tenn. (2 Hum.) at 570.

155. *Id.* at 569-70, 574. The price of a "prime male field hand" in 1840 was between $750 and $1000. *See* Robert Evans, Jr., *The Economics of American Negro Slavery, 1830-1860*, *in* ASPECTS OF LABOR ECONOMICS: A CONFERENCE OF THE UNIVERSITIES-NATIONAL BUREAU COMMITTEE FOR ECONOMIC RESEARCH 185, 199 tbl.8 (Nat'l Bureau of Econ. Research ed., 1962); *see also Johnson*, 21 Tenn. (2 Hum.) at 569-70 (describing testimony from a physician that "the slave, previous to the injury, was worth from $800 to $1,000").

fact may be received to aggravate the damages."[156] Because David was personal property, he could be threatened, be chased, and suffer serious injury, but compensation for his suffering was only available to his owner.

Johnson provides poor precedent not only because it treats a person as property, but also because treating a person as property complicates the case's holding, especially for those unfamiliar with the context of slavery. The *Tire Shredders* court ultimately applied a rule different from that in *Johnson*, allowing for loss of use damages in *Tire Shredders* because the tire shredding machinery was "commercial property" and was therefore "unlike other types of personal property that can be replaced within a relatively short period of time."[157] At the time *Johnson* was decided, however, an enslaved person arguably fit into the same category as a difficult-to-replace piece of commercial property. The Tennessee Court of Appeals missed this similarity because it did not consider the broader slave context of the case it cited.

The dignitary and legal harms inherent in citing slave cases also present themselves in cases of indirect citation. *In re Deeb*, a 1985 case from the Bankruptcy Court for the Northern District of Alabama, provides a particularly egregious example.[158] In that case, the court faced the question of whether foals born of horses subject to a creditor's claim were also subject to that claim.[159] To answer that question, the court looked to *Meyer v. Cook*, in which the Alabama Supreme Court established the rule that "the offspring, or increase of female animals, when they come into visible existence and are endowed with independent life, rest under the same title or ownership their dam was subject to, at the time they were brought forth."[160] The lengthy block quote of *Meyer* in *In re Deeb* included citations to a number of cases, including the U.S. Supreme Court's 1851 decision in *Fowler v. Merrill*.[161] Unlike the other cases that involved cattle, *Fowler* involved a dispute over "certain negroes" who had served as the collateral for their owner's mortgage.[162] The U.S. Supreme Court's opinion treated the enslaved children in dispute in *Fowler* as it would have animals.[163] By citing *Fowler*, the *Meyer* court adopted the same reasoning,

156. *Johnson*, 21 Tenn. (2 Hum.) at 572.

157. Tire Shredders, Inc. v. ERM-N. Cent., Inc., 15 S.W.3d 849, 856-57 (Tenn. Ct. App. 1999).

158. 47 B.R. 848 (Bankr. N.D. Ala. 1985).

159. *Id.* at 850-51.

160. *Id.* at 851 (quoting Meyer v. Cook, 5 So. 147, 148 (Ala. 1888)).

161. *Id.*

162. *Fowler v. Merrill*, 52 U.S. (11 How.) 375, 392 (1850).

163. The Supreme Court relied on both slave and non-slave authorities to support its conclusion. *See id.* at 396 (citing 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 404; and Backhouse v. Jett, 2 F. Cas. 316 (C.C.D. Va. 1821) (No. 710)). Blackstone based his conclusion on "the growth of vegetables, the pregnancy of animals, the embroidering of cloth, [and] the conversion of wood or metal into vessels

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directly analogizing the children of an enslaved black woman to the offspring of cattle. Although the indirect citation slightly distances the Bankruptcy Court for the Northern District of Alabama from this slave case, the court still treated the case as good law and implicitly adopted the *Meyer* court's reasoning. Even in 1985, the court deemed the differences between the children of the enslaved and the offspring of animals inconsequential to Alabama law. Although the legal limitations of such citations are less clear than the dignitary harms, an analogy that relies on similarities between humans and animals offers significantly less persuasive power than one based solely on animals.

Smith, *Spain*, *Tire-Shredders*, and *In re Deeb* provide just four examples of how deeply slave cases are embedded in the brutal slave regime from which they arose. These modern cases suggest how typical citation practices ignore and obscure the brutality of that regime. This is a common consequence of the citation of slavery. Courts cite cases about mortgages on people for basic propositions about contemporary lending law.[164] They cite cases about the forcible transport of enslaved people for routine choice-of-law rules.[165] They rely on cases about the sale of the enslaved to explain the requirements of deeds.[166] They cite cases in which enslaved people served as collateral in debts to illustrate how property may be permissibly seized.[167] They cite the transfer of enslaved people from parent to child to illustrate basic rules for interpreting wills.[168] They cite cases where courts have sanctioned lawyers for not properly claiming human property to highlight a lawyer's duty to pursue his client's cause at all stages of litigation.[169] They cite cases where bank's assigned away

and utensils." BLACKSTONE, *supra* at 404. *Backhouse* involved a "number of slaves." 2 F. Cas. at 318.

164. *See, e.g.*, *In re* Beene, 354 B.R. 856, 860 (Bankr. W.D. Ark. 2006) (internal citation to Main v. Alexander, 9 Ark. 112, 117 (1848)). *Main* involved a mortgage on "a negro girl named Minerva." 9 Ark. at 113.

165. *See, e.g.*, Blount v. Boston, 718 A.2d 1111, 1117 (Md. 1998) (per curiam) (quoting Ringgold v. Barley, 5 Md. 186, 193 (1853)). In *Ringgold*, the court determined the domicile of an enslaved person for the purpose of a freedom suit. 5 Md. at 192-93.

166. *See, e.g.*, CK Regalia, LLC v. Thornton, 159 So. 3d 358, 360 (Fla. Dist. Ct. App. 2015) (citing Carter v. Bennett, 6 Fla. 214 (1855)). In *Carter*, the court discussed liens placed on enslaved persons. 6 Fla. at 246.

167. *See, e.g.*, France v. Am. Bank, 505 So. 2d 1175, 1178 (La. Ct. App. 1987) (citing Pepper v. Dunlap, 16 La. 163 (1840)). In *Pepper*, the court discussed a mortgage on land and eighteen enslaved persons. 16 La. at 164.

168. *See, e.g.*, *In re* Estate of McCreath, 240 P.3d 413, 420 (Colo. App. 2009) (internal citation to Wall v. Wall, 30 Miss. 91 (1855)). In *Wall*, the court considered whether an instrument facially labeled a deed and conveying enslaved persons and other property could be construed as a will. 30 Miss. at 91-92, 96.

169. *See, e.g.*, Johnson v. Coleman, 627 S.W.2d 564, 566 (Ark. App. 1982) (citing Pennington's Ex'rs v. Yell, 11 Ark. 212 (1850)). In *Yell*, the court discussed a sheriff's levy and sale of "a negro boy by the name of Dick, about seven years old." 11 Ark. at 216.

enslaved persons in their possession to avoid attachment by creditors.[170] They cite cases for legal propositions linked to the violence of the slave system (enslaved people whipped to death)[171] and the desperation of the enslaved (enslaved people drinking themselves to death).[172] They cite habeas cases, not for enslaved people seeking freedom, but for masters seeking the return of their property.[173] And they cite cases about the theft of enslaved people for basic evidentiary propositions.[174]

C. Harms of Citing Slavery

Analysis of these cases suggests that citing slavery creates both legal and dignitary harms. These harms are hidden by a judicial approach that does not see "slave case" as a relevant category of analysis. Slave cases, however, pose a unique set of legal and dignitary harms. Either set of harms provides sufficient reason to reconsider the treatment of slave cases as normal precedent.

1. Legal problems

Citing slavery creates three major potential legal problems. First, slave cases provide unclear precedent. By treating people as property, slave cases sometimes blur the lines between conventional legal categories.[175] As

170. *See, e.g.*, Johnson v. Kan. City S., 224 F.R.D. 382, 384-85 (S.D. Miss. 2004) (citing Arthur v. Commercial & R.R. Bank of Vicksburg, 17 Miss. (9 S. & M.) 394, 430-31, 432-34 (1848)), *aff'd sub nom.* Johnson v. Kan. City S. Rys. Co., 208 F. App'x 292 (5th Cir. 2006). *Arthur* involved a bank that owned enslaved people. 17 Miss. (9 S. & M.) at 397-400.

171. *See, e.g.*, United States v. Allen, 755 A.2d 402, 410 (D.C. 2000) (internal citation to Jordan v. State, 22 Ga. 545, 558-59 (1857)). *Jordan* was a criminal case brought against an overseer who murdered an enslaved person. 22 Ga. at 548-49.

172. *See, e.g.*, Godfrey v. Bos. Old Colony Ins. Co., 718 So. 2d 441, 444-45 (La. Ct. App. 1998) (citing Harrison v. Berkley, 32 S.C.L. (1 Strob.) 525 (Ct. App. 1847)). In *Harrison*, the court upheld a jury verdict against a dram shop for the death of an enslaved person who died of exposure after becoming intoxicated. 32 S.C.L. (1 Strob.) at 525-28, 551.

173. *See, e.g.*, Wlodarz v. State, 361 S.W.3d 490, 496-97 (Tenn. 2012) (citing *Ex parte* Toney, 11 Mo. 661 (1848) (per curiam)), *abrogated by* Frazier v. State, 495 S.W.3d 246 (Tenn. 2016). *Ex parte Toney* involved a habeas petition by a slaveholder for the return of an enslaved person. 11 Mo. at 662.

174. *See, e.g.*, State v. Woods, 723 S.W.2d 488, 510-11 (Mo. Ct. App. 1986) (citing Brown v. Burrus, 8 Mo. 26 (1843)). *Brown* involved the theft of an enslaved girl. 8 Mo. at 27.

175. *See* ARIELA J. GROSS, DOUBLE CHARACTER: SLAVERY AND MASTERY IN THE ANTEBELLUM SOUTHERN COURTROOM 3 (2000) (discussing "slaves double identity as human subjects and the objects of property relations *at one and the same time*"); TUSHNET, *supra* note 31, at 229 ("Southern slave law was constructed around the distinctions between regulation according to law and regulation according to sentiment, ultimately grounded in the contradictions between bourgeois and slave relationships."); Walter Johnson, Review Essay, *Inconsistency, Contradiction, and Complete Confusion: The Everyday Life of the Law of Slavery*, 22 LAW & SOC. INQUIRY 405, 429-30 (1997) (reviewing

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explained in Part II.B above, a case like *Memphis* requires the court to treat an enslaved person as both person and property. When applied outside the context of slavery, courts face the difficulty of understanding to which legal category the case belongs. Such blurring of categories can be found not only in cases deriving from the hiring out of enslaved people, but also in cases involving wrongful death and dram-shop liability, where precedent takes on a different meaning if enslaved people are understood as property or if they are understood as people.[176] Slave cases may therefore provide less clear statements of legal holdings than courts' initial readings of these cases suggest.

Second, judges risk relying on poorly reasoned cases by citing slavery. Nineteenth-century judges presided over a social, economic, and political system that was under attack.[177] These judges sometimes consciously made decisions to preserve the social relations that benefited them and other white Southerners.[178] By abstracting slave cases from their context, modern courts risk relying on cases grounded in specious, motivated reasoning. Southern courts, for example, often enforced public policies discouraging manumission.[179] By drawing legal conclusions from cases contesting manumissions or wills involving enslaved people, courts risk accepting the conclusions of Southern judges drafted in service of a Southern slave society.[180] By citing to slave cases, judges may rely on cases in which judges implicitly or explicitly were advancing a pro-slavery public policy.

MORRIS, *supra* note 27) (arguing that "complete confusion" characterized the Southern law of slavery); *see also* FEDE, *supra* note 24, at 9-12 (arguing that the law of slavery is coherent, but only when understood in the context of an oppressive system); MORRIS, *supra* note 27, at 13-14 (discussing tensions in Southern law in response to Tushnet's work).

176. *Compare, e.g.*, *Godfrey*, 718 So. 2d at 445-46 (referring to enslaved persons discussed in dram-shop liability cases as people), *with, e.g.*, Hughes v. PeaceHealth, 178 P.3d 225, 230-31 (Or. 2008) (referring to enslaved persons discussed in assorted wrongful death cases as property).

177. *See* MORRIS, *supra* note 27, at 14.

178. *See* HUEBNER, *supra* note 49, at 5-8 ("Sectional politics and the ideology of paternalism defined southern judicial thinking on slavery and racial issues."); *see also* BROPHY, *supra* note 31, at 254 ("The trajectory of judicial and social thought in the South from the beginning of the nineteenth century to the Civil War was from grand Enlightenment generalities about freedom to pro-slavery ideas."); FEDE, *supra* note 27, at 156 ("The courts . . . established and applied procedural rules in the Southern freedom and manumission suits that directly or indirectly exhibited . . . judges' intentions to make it difficult for people held as slaves to pursue and win their suits.").

179. *See* MORRIS, *supra* note 27, at 398-99 (describing judicial limitations on manumission).

180. *Cf.* Charles L. Barzun, *Impeaching Precedent*, 80 U. CHI. L. REV. 1625, 1631-32 (2013) (arguing for "impeaching precedent," a process where judges consider historical evidence to evaluate the precedential value of cases).

Third, citing to slave precedent requires grappling with a legal regime that has been officially repudiated by the Civil War, politics, and law. Citing to slave cases forces courts to distinguish the "good parts" of slave law from the "bad parts," which were officially rejected by the Reconstruction Amendments and subsequent statutes and case law. Citing to slave cases thus creates the need to justify the validity of a court's reasoning rooted in an oppressive (and now illegal) social order grounded in white supremacy. All other things being equal, a case about enslaved people serves as poorer legal support than a case about property that is still recognized as property.

2. Dignitary harms

Citing slavery also creates serious dignitary harms. Law has symbolic power. Even lawyers who have been trained to abstract law from fact recognize that cases have meaning that extends beyond their holdings. Consider the U.S. Supreme Court's recent decision to overrule *Korematsu v. United States* in *Trump v. Hawaii*.[181] In part to limit the force of the dissent's use of the case, Chief Justice Roberts used his opinion "to make express what is already obvious" and overrule a case that is now viewed as one of the Court's worst decisions.[182] In so doing, Chief Justice Roberts ratified *Korematsu*'s treatment by litigators who already hesitated to cite the case. As Jamal Greene has demonstrated, *Korematsu* had been "conspicuously absent" from government briefs even before it had been officially overruled.[183] Lawyers appear to have been wary of relying on the case because of its association with what is now recognized as the xenophobic and racist internment of Japanese-Americans.[184] Judges too seemed leery of its status, citing it in executive power cases only to "single it out as a case to be avoided."[185] Chief Justice Roberts's decision to overrule *Korematsu* suggests that he and other members of the Court were attuned to the negative consequences of having it on the books, even if they were not worried that it would be cited to justify similar abuses of presidential authority in the future. As the Chief Justice put it, *Korematsu* "has been overruled in the court of history."[186]

181. Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) (condemning *Korematsu v. United States*, 323 U.S. 214 (1944)).

182. *Id.*

183. *See* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 400 (2011).

184. For more on *Korematsu* and Japanese internment, see generally BRIAN MASARU HAYASHI, DEMOCRATIZING THE ENEMY: THE JAPANESE AMERICAN INTERNMENT (2004); PETER IRONS, JUSTICE AT WAR (1983); and ERIC K. YAMAMOTO ET AL., RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT (2013).

185. *See* Greene, *supra* note 183, at 402.

186. *Trump*, 138 S. Ct. at 2423. Chief Justice Roberts overruled *Korematsu* in dicta, so it technically remains good law.

Courts, however, do not seem to recognize that slave cases have also been "overruled in the court of history." Rather than avoiding them, some judges cite to slave cases *because* of their history. An Arkansas court, for example, cited to a slave case to show the origin of an evidentiary rule related to third-party testimony,[187] and a Supreme Court of Mississippi justice used a slave case to illustrate the origin of the jury's power to determine the sufficiency of circumstantial evidence.[188] Other courts use similar citations to denote the historical usefulness of slave cases and to emphasize the well-established nature of the rules they cite.[189] Using the citation of slave cases to teach a lesson in the history of legal doctrine illustrates the legal system's interest in one kind of history, namely that of the development of legal rules, while neglecting another, the experience of the people who served as the stuff out of which these legal rules were constructed. Rather than drawing attention to the plight of the enslaved, in these cases courts obscure it.

This lack of attention to slavery is emphasized by the attention courts draw to their quest to find the origins of legal rules. Slave cases in these citations become vehicles to demonstrate a court's rigor and learnedness. In *State v. Rinebold*, for example, a Missouri court drew attention to the "[i]ndependent research" it undertook to find authority for the seemingly "self-evident" rule of law it sought.[190] Lengthy string cites, including slave cases dating back to the nineteenth century, provide another way for courts to

187. *See* Bing v. State, 740 S.W.2d 156, 157 (Ark. Ct. App. 1987) ("As early as the decision in [*Pleasant v. State*] which involved a charge of rape, it was recognized under the first and third theories that: 'It was competent for [the third party] to state, on his examination in chief, the appearance of [the victim] . . . .'" (alteration in original) (quoting Pleasant v. State, 15 Ark. 624, 648-49 (1855))).

188. *See* Corbin v. State, 585 So. 2d 713, 718 (Miss. 1991) (en banc) (Hawkins, J., dissenting) (internal citation to Cicely v. State, 21 Miss. (13 S. & M.) 202 (1849)).

189. *See, e.g.*, Barton Land Servs., Inc. v. SEECO, Inc., 428 S.W.3d 430, 436 (Ark. 2013) ("We have long held that a 'fee simple,' as referenced in these statutes, is the greatest estate or interest owned by a person to convey." (citing Moody v. Walker, 3 Ark. 147 (1840))); Brock v. Wedincamp, 558 S.E.2d 836, 839 (Ga. Ct. App. 2002) (highlighting the court's citation to the "first opinion addressing Georgia's first wrongful death statute" (citing S.-W. R.R. Co. v. Paulk, 24 Ga. 356, 359 (1858))); Whitacre P'ship v. Biosignia, Inc., 591 S.E.2d 870, 879 (N.C. 2004) ("As we noted over 150 years ago, [estoppel] is a principle which 'lies at the foundation of all fair dealing between [persons], and without which, it would be impossible to administer law as a system.'" (second alteration in original) (quoting Armfield v. Moore, 44 N.C. (Busb.) 157, 161 (1852))); Tire Shredders, Inc. v. ERM-N. Cent., Inc., 15 S.W.3d 849, 853-54 (Tenn. Ct. App. 1999) (drawing attention to the "first" case "discussing the types of damages that are available when negligent conduct results in injury to personal property" (citing Johnson v. Perry, 21 Tenn. (2 Hum.) 569, 571-72 (1841))).

190. *See* 702 S.W.2d 921, 925 (Mo. Ct. App. 1985); *see also* Taylor v. Calvert, 437 So. 2d 508, 510-11 (Ala. 1983) (noting that the court's search for definitive authority on a point of law related to deed transfer "ended with the case of *Frisbie vs. McCarty*," 1 Stew. & P. 56 (Ala. 1831), an opinion based on the transfer of an enslaved person).

demonstrate their thoroughness.[191] Other courts use slave cases to provide simple definitions of legal terms such as privity,[192] private property,[193] and perpetuity.[194] By choosing a slave case to define basic legal terms or demonstrate learning, judges show how lightly they weigh a case's slave context when deciding to cite it.

By citing slavery without truly grappling with the slave society from which these cases arose, American lawyers follow in the footsteps of their predecessors. Like the U.S. Supreme Court's decision in *Osborn v. Nicholson*,[195] their approach cleaves the facts from the law. This approach fails to recognize that the division is not as neat as they imagine.[196] As Marianne Constable has convincingly illustrated, "legal claims or speech acts are simultaneously matters of fact and of law."[197] Judges shape the stories they tell to explain themselves and justify their holdings. In short, language and argument matter.[198] A recognition of the power of legal storytelling is not confined to scholars. Experts on lawyering demonstrate a recognition that facts, law, and language combine to give legal writing its power. They advise advocates to tell the "story" of their case in order to best represent their client.[199]

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191. *See, e.g.*, Alvarez v. Coleman, 642 So. 2d 361, 372 (Miss. 1994) ("Williams v. Mason, 556 So. 2d 1045, 1048 (Miss. 1990); Trotter v. Trotter, 490 So. 2d 827, 830 (Miss. 1986); Estate of McKellar v. Brown, 404 So. 2d 550, 552 (Miss. 1981); Monroe v. Holleman, 185 So. 2d [443 (Miss. 1966)]; and Anding v. Davis, 38 Miss. 574 (1860).").

192. *See, e.g.*, Winn-Dixie Stores, Inc. v. Dolgencorp, LLC, 746 F.3d 1008, 1031 (11th Cir. 2014) (quoting Lipscomb v. Postell, 38 Miss. 476, 489 (1860)).

193. *See, e.g.*, Bradley v. Tishomingo County, 810 So. 2d 600, 603 (Miss. 2002) (en banc) ("Private property is property of a specific, fixed, and tangible nature, capable of possession, and transmission." (citing Comm'rs of Homochitto River v. Withers, 29 Miss. 21, 32 (1855), *aff'd sub nom.* Withers v. Buckley, 61 U.S. (20 How.) 84 (1857))).

194. *See, e.g.*, Brown Bros. Harriman Tr. Co. v. Benson, 688 S.E.2d 752, 755 (N.C. Ct. App. 2010) (quoting Griffin v. Graham, 8 N.C. (1 Hawks) 96, 130-32 (1820)).

195. *See supra* text accompanying notes 67-72.

196. As Marianne Constable has illustrated, judges' opinions cannot be reduced to "a set of statements of ostensibly timeless rules applied to propositions of fact." *See* MARIANNE CONSTABLE, OUR WORD IS OUR BOND: HOW LEGAL SPEECH ACTS 23, 131 (2014).

197. *Id.* at 78. Constable provides a close reading of *Palsgraf v. Long Island Railroad*, 162 N.E. 99 (N.Y. 1928), to illustrate how Judge Cardozo for the majority and Judge Andrews for the dissent shaped their telling of the case to advocate for their positions. *See* CONSTABLE, *supra* note 196, at 47-65.

198. Richard Weisberg has similarly argued that language of court opinions matter. Because "form and substance are one" in a case, "judicial language is always more than the mere translation of a 'holding' into words." RICHARD WEISBERG, POETHICS, AND OTHER STRATEGIES OF LAW AND LITERATURE 4-6 (1992).

199. *See, e.g.*, RUGGERO J. ALDISERT, WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENT 163 (2d ed. 2003); RICHARD K. NEUMANN, JR. & SHEILA SIMON, LEGAL WRITING §§ 27.1-29.2 (2008); LAWRENCE D. ROSENBERG, WRITING TO WIN: THE ART AND SCIENCE OF COMPELLING WRITTEN ADVOCACY 21-24 (2012), https://perma.cc/X6AU-

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Judges who cite slave cases must pay more attention to the stories told by the judges on whom they rely. They must also recognize how their reliance on those stories affects the persuasiveness and legitimacy of the stories they tell in their own opinions. Slave cases provided crucial support for slave commerce. Every case that treated an enslaved person as property signaled legal approval of a slave society premised on white supremacy. Judges reinforced such approval through racist presumptions about the behavior of black people and demeaning descriptions of the enslaved. This language cannot be easily separated from a case's holding because it helped justify the treatment of black people as property and their exclusion from the courtroom.[200] White supremacy was a basic underlying presumption of every slave case. By citing such cases, contemporary judges treat the authors of slave cases as respected authorities, minimizing their support for white supremacy. They thus affirm and perpetuate the formalism that allowed lawyers to serve as such successful advocates for slavery in the first place. These stories obscure the legal system's complicity in slavery and erase the legacy of the law of slavery in the present.[201] Telling exclusionary stories is especially harmful because of the unrepresentativeness of the modern American legal system. The exclusion of the stories of enslaved people mirrors the continued exclusion of a representative number of black voices from the judiciary and upper echelons of the legal profession.[202] Perceived racial disparities throughout the justice system have led many black Americans to mistrust courts;[203] the stories judges

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WYTL; Robert H. Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations*, 37 A.B.A. J. 801, 803 (1951) ("[M]ost contentions of law are won or lost on the facts.").

200. The exclusion of black voices from the courtroom was further supported by evidentiary rules that barred their testimony. *See* MORRIS, *supra* note 27, at 229-30.

201. Judges thus shirk their responsibility "to stimulate a candid discussion of just what . . . shared norms are or should be." *See* MARK OSIEL, MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW 210, 229 (1997).

202. *See* TRACEY E. GEORGE & ALBERT H. YOON, AM. CONSTITUTION SOC'Y, THE GAVEL GAP: WHO SITS IN JUDGMENT ON STATE COURTS 7 (n.d.), https://perma.cc/677S-LL42; Robert W. Gordon, *The Legal Profession*, *in* LOOKING BACK AT LAW'S CENTURY 287, 293 (Austin Sarat et al. eds., 2002).

203. *See* DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 10-11 (1999) (describing African American wariness of the justice system); JAMES L. GIBSON & MICHAEL J. NELSON, BLACK AND BLUE: HOW AFRICAN AMERICANS JUDGE THE U.S. LEGAL SYSTEM 175 (2018) (finding a "dramatic chasm in the legal attitudes of blacks and whites"); MARK PEFFLEY & JON HURWITZ, JUSTICE IN AMERICA: THE SEPARATE REALITIES OF BLACKS AND WHITES 15-16 (2010) (noting that African Americans are "significantly more suspicious of the [justice] system" than whites); *see also* Derrick A. Bell, Jr., *Racism in American Courts: Cause for Black Disruption or Despair?*, 61 CALIF. L. REV. 165, 166 (1973) ("[W]ith few exceptions, black defendants in criminal cases have not engaged in disruptive behavior, not because they lack

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tell give black Americans further reason to believe that their experiences are not valued in American courtrooms.

III. Repealing Slave Law

Once judges recognize the legal and dignitary harms posed by their unconsidered citation of slave cases, they can begin to address them. This Part considers several possibilities for approaching the modern legacy of slavery and offers a preliminary framework for the judicial treatment of slave law.

A. Judges Address Slave Law

Although the vast majority of judges who cite slave cases treat them as regular precedent, a few judges have addressed the harms of citing slave cases. *Dougherty v. Rubenstein*, a 2007 case in the Maryland Court of Special Appeals, provides a helpful example of a court's treatment of the dignitary harms of citing a slave case.[204] In *Dougherty*, the court cited *Townshend v. Townshend* as part of its discussion of the development of the "insane delusion rule," which allowed a court to throw out a will if a person exhibited clearly delusional beliefs on a certain subject related to his or her will.[205] *Townshend* grew out of a challenge by a testator's family to a will that had freed the people the testator had held as slaves.[206] The family argued that the testator was operating under an "insane delusion" because he believed that "God wanted him to free his slaves and give them his property."[207] Although the *Dougherty* court cited *Townshend* as good law, it included a lengthy footnote in its opinion acknowledging the "startling" context of the case.[208] According to the court, the case provided an "example of the changes in American society and law in the past 200 years."[209]

The Seventh Circuit similarly attempted to address the dignitary harms of citing slave cases. In citing a case for the proposition that a federal court could not exercise concurrent jurisdiction over property with a state court, the court wrote that the "the nature of the 'property' involved in [the case]—human slaves—casts something of a pall over the rule's origins" but argued that its

provocation, but because nothing in their personal experience, and little in the history of the black man in America, provides them any hope for justice.").

204. 914 A.2d 184 (Md. Ct. Spec. App. 2007).

205. *Townshend*, the court noted, was the first use of the rule in Maryland. *Id.* at 187 (citing Townshend v. Townshend, 7 Gill 10 (Md. 1848)).

206. *See* 7 Gill at 11-14.

207. *Dougherty*, 914 A.2d at 187 n.2 (citing *Townshend*, 7 Gill at 15).

208. *Id.*

209. *Id.* at 187.

"subsequent invocation in cases involving" other forms of property was enough to confirm its "modern-day vitality."[210]

In other cases, courts have determined that a case's slave context makes it unreliable precedent. In *Payne v. Markeson*, for example, the Missouri Court of Appeals noted that it was difficult to tell whether cases in which masters were rewarded damages for enslaved people injured after consuming intoxicating beverages "sounded in property, rather than tort."[211] Similarly, in a bailments case over a collection of historical documents and manuscripts, the North Carolina Court of Appeals held that an 1856 North Carolina Supreme Court decision related to the "transfer of a slave from a parent to a child" was "inapplicable to bailments generally."[212] Such exceptions, both courts implied, should not be relied upon.[213] Another, more explicit, example of the treatment of slave law as dubious precedent came in *In re Security Lighting Co.*, a 1983 bankruptcy case from the Eastern District of Michigan.[214] That case arose from a negligence claim by a company in bankruptcy proceedings against a truck driver who had allegedly injured one of the company's employees.[215] Although the court recognized that Southern cases had held "non-slaves liable to a master for damages from injuring or killing his slave," the court refused to follow such precedent.[216] These cases, it argued, demonstrated "part of the perversity of rationalizing slavery."[217] The court concluded that "counsel for the plaintiff [would] not wish to rely upon the law of slavery to sustain his claim."[218] The Oregon Supreme Court reached a similar conclusion in *Hughes v. PeaceHealth*, holding that such cases were not relevant to modern wrongful death claims law.[219]

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210. United States v. $79,123.49 in U.S. Cash & Currency, 830 F.2d 94, 96-97 (7th Cir. 1987).

211. *See* No. WD77553, 2015 WL 2090268, at *7 n.13 (Mo. Ct. App. May 5, 2015).

212. *See* Johnson v. N.C. Dep't of Cultural Res., 735 S.E.2d 595, 598 (N.C. Ct. App. 2012) (citing *Largent v. Berry*, 48 N.C. (3 Jones) 531 (1856)).

213. *Payne*, 2015 WL 2090268, at *7 n.13; *Johnson*, 735 S.E.2d at 598.

214. 30 B.R. 10 (Bankr. E.D. Mich. 1983).

215. *See id.* at 10-11.

216. *Id.* at 11 n.1.

217. *Id.*

218. *Id.* The court also found that Michigan had "never recognized, either by statute or controlling case law, the ancient common law action permitting a master to recover the loss of the service of a servant." *Id.* at 11. It is possible that if the precedent in those slave cases had been followed earlier, the court would have felt comfortable citing slavery.

219. 178 P.3d 225, 230 (Or. 2008) ("Most of [the cases cited in support of common-law wrongful death claims] involve actions by slaveowners in Southern states seeking damages for the negligently caused death of a slave. Those cases did not involve actions for wrongful death in the present sense but, instead, were actions asserting tortious conversion of, or damage to, 'property.'").

These cases provide evidence that judges can recognize and attempt to address the harms inherent in citing slave cases if they so choose. But such cases are rare, and they do not provide a coherent framework for determining when slave citation provides bad law versus when it provides good law, whose "pall" or "startling" context must be addressed. Occasional remarks by judges are not sufficient to counteract the widespread citation of slave law.

B. Others Address the Legacy of Slavery

Other institutions also provide models for addressing slavery's legacy. Recent historical work has revealed the important role that slavery played in the development of many American institutions. Scholars have highlighted the importance of slavery to the development of the American economy, illustrating, for example, that slaveowners played significant roles in the growth of Northern industry, the development of investment banking, and the adoption of management practices.[220] Scholars have also highlighted the

220. Scholarship on the relationship between slavery and capitalism came in two waves, both of which highlighted the importance of slavery to American economic development. The first, which viewed "capitalism and slavery as antithetical social formations," nevertheless "highlighted the value of slavery and the slave trade in the violent development of capitalism." Amy Dru Stanley, *Histories of Capitalism and Sex Difference*, 36 J. EARLY REPUBLIC 343, 346-47 (2016); *see also* DOUGLASS C. NORTH, THE ECONOMIC GROWTH OF THE UNITED STATES: 1790-1860, at 101-134 (1961) (noting the importance of slavery to the economic growth of United States but distinguishing the Southern economy from other regions).

Other recent scholarship argues that slavery was both compatible with and critical to the development of American capitalism. *See, e.g.*, SVEN BECKERT, EMPIRE OF COTTON: A GLOBAL HISTORY, at xvi-xvii (2014) (arguing that slave-based cotton production played a critical role in development of capitalism); JOHN MAJEWSKI, MODERNIZING A SLAVE ECONOMY: THE ECONOMIC VISION OF THE CONFEDERATE NATION 3 (2009) ("Secessionists imagined that an independent Confederacy would create a modern economy that integrated slavery, commerce, and manufacturing."); AARON W. MARRS, RAILROADS IN THE OLD SOUTH: PURSUING PROGRESS IN A SLAVE SOCIETY 9 (2009) ("[W]hite antebellum southerners married conservative social ideals with forward-looking technological advancement."); SHARON ANN MURPHY, INVESTING IN LIFE: INSURANCE IN ANTEBELLUM AMERICA 184-206 (2010) (highlighting the use of life insurance by slaveowners to protect their investments in the enslaved); ROSENTHAL, *supra* note 129, at 3 ("At a minimum, slaveholders (and those who bought their products) built an innovative, global, profit-hungry labor regime that contributed to the emergence of the modern economy."); Boodry, *supra* note 61, at 163-67, 177-78 (linking slavery to the development of investment banking); Martin, *supra* note 22, at 817-66 (analyzing the use of mortgages backed by enslaved people in Louisiana, South Carolina, and Virginia); Seth Rockman, Forum, *The Future of Civil War Era Studies: Slavery and Capitalism*, 2 J. CIV. WAR ERA 5 (2012). Sven Beckert and Seth Rockman's edited volume provides a useful summary of recent literature on capitalism and slavery. *See generally* SLAVERY'S CAPITALISM, *supra* note 61. For a critical review of the book and the literature on slavery and capitalism more generally, see Stephanie McCurry, *Plunder of Black Life:*
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critical role that experimentation on enslaved people played in the development of the medical profession.[221] Churches too have been implicated in slavery, both by promulgating pro-slavery doctrine and by engaging directly in the buying and selling of enslaved people.[222] Universities involved themselves in slave commerce by benefiting from the ownership of enslaved people and by housing pro-slavery scholars.[223] State governments also participated in slave commerce, relying on enslaved people to accomplish public works projects.[224]

This work has also revealed the ongoing legacy of racial inequality that slavery helped create.[225] In part as a result of this scholarship, "[s]lavery has a greater presence in American life now than at any time since the Civil War ended."[226] Engagement with slavery's legacy has led to what historian Stephanie McCurry calls "a moment of reckoning . . . rare in [U.S.] history."[227] Thanks to the efforts of protestors, the Confederate flag no longer flies at the

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The Problem of Connecting the History of Slavery to the Economics of the Present, TIMES LITERARY SUPPLEMENT, May 19, 2017, at 23-26.

221. *See* DEIRDRE COOPER OWENS, MEDICAL BONDAGE: RACE, GENDER, AND THE ORIGINS OF AMERICAN GYNECOLOGY 46-47 (2017) (highlighting the use of black women in medical experimentation); HARRIET A. WASHINGTON, MEDICAL APARTHEID: THE DARK HISTORY OF MEDICAL EXPERIMENTATION ON BLACK AMERICANS FROM COLONIAL TIMES TO THE PRESENT 1-74 (2006) (discussing the use of enslaved people for medical experimentation); Todd L. Savitt, *The Use of Blacks for Medical Experimentation and Demonstration in the Old South*, 48 J.S. HIST. 331, 331 (1982) (noting that in the antebellum South "white medical educators and researchers relied greatly on the availability of Negro patients").

222. *See* JENNIFER OAST, INSTITUTIONAL SLAVERY: SLAVEHOLDING CHURCHES, SCHOOLS, COLLEGES, AND BUSINESSES IN VIRGINIA, 1680-1860, at 14-49, 87-125 (2016) (illustrating the ownership of enslaved people by Anglican, Episcopal, and Presbyterian churches). *But see* DOUGLAS M. STRONG, PERFECTIONIST POLITICS: ABOLITIONISM AND THE RELIGIOUS TENSIONS OF AMERICAN DEMOCRACY 1-5 (1999) (discussing religious abolitionism).

223. *See* BROPHY, *supra* note 31, at 48-130 (describing pro-slavery academic thought). *See generally* CRAIG STEVEN WILDER, EBONY & IVY: RACE, SLAVERY, AND THE TROUBLED HISTORY OF AMERICA'S UNIVERSITIES (2013) (identifying colleges as active participants in slave society).

224. *See* Aaron R. Hall, *Public Slaves and State Engineers: Modern Statecraft on Louisiana's Waterways, 1833-1861*, 85 J.S. HIST. 531, 532-35 (2019) ("Louisiana mobilized the expropriated human power of racial enslavement to govern nature for state growth."); Aaron R. Hall, *Slaves of the State: Infrastructure and Governance Through Slavery in the Antebellum South*, 106 J. AM. HIST. 19, 19-21 (2019) (describing the use of enslaved people for public infrastructure projects).

225. *See* Ira Berlin, Presidential Address, *American Slavery in History and Memory and the Search for Social Justice*, 90 J. AM. HIST. 1251, 1258 (2004).

226. *See id.* at 1251-55 (discussing new interest in slavery beginning in the late twentieth century that has generated movies, television programs, exhibitions, museums, books, and stories in the popular press).

227. McCurry, *supra* note 220, at 23.

South Carolina State Capitol.[228] And in New Orleans, statues of Confederate military leaders have been removed from public view.[229] Protestors in Chapel Hill, North Carolina refused to wait for official action, tearing down the Confederate statue known as "Silent Sam."[230] Many other monuments and memorials have been removed with less fanfare.[231]

Beyond removing memorials to heroes of the Confederacy, recent attention to the legacy of slavery has included efforts to grapple with those who benefited from and contributed to nineteenth-century slaveholding. The New York Parks Department removed a statue of J. Marion Sims, a pioneering gynecologist, from Central Park because he conducted surgical experiments on enslaved women.[232] Other cities have passed laws requiring businesses who contract with the cities to disclose whether they profited from slavery.[233] These ordinances have led private businesses to acknowledge the benefits their predecessors derived from supporting slavery.[234] Universities have also found themselves confronting the legacy of slavery. Georgetown University, for example, has attempted to atone for its sale of 272 enslaved people by issuing a formal apology, establishing a center for the study of slavery, and pledging to give preferential admissions treatment to the descendants of those whom it

228. Amanda Holpuch, *Confederate Flag Removed from South Carolina Capitol in Victory for Activists*, GUARDIAN (July 10, 2015, 10:36 AM EDT), https://perma.cc/76UT-6S7N; Stephanie McCrummen & Elahe Izadi, *Confederate Flag Comes Down on South Carolina's Statehouse Grounds*, WASH. POST (July 10, 2015, 1:20 PM PDT), https://perma.cc/XLF7-FWDR.

229. Janell Ross, *"They Were Not Patriots": New Orleans Removes Monument to Confederate Gen. Robert E. Lee*, WASH. POST (May 19, 2017), https://perma.cc/6L8Y-NYYD.

230. Jesse James Deconto & Alan Blinder, *"Silent Sam" Confederate Statue Is Toppled at University of North Carolina*, N.Y. TIMES (Aug. 21, 2018), https://perma.cc/M6GM-66RR.

231. *Confederate Monuments Are Coming Down Across the United States: Here's a List*, N.Y. TIMES (updated Aug. 28, 2017), https://perma.cc/83X2-U98W.

232. William Neuman, *City Orders Sims Statue Removed from Central Park*, N.Y. TIMES (Apr. 16, 2018), https://perma.cc/RU5T-6JVC.

233. *See, e.g.*, Slavery Disclosure Ordinance, L.A., CAL., ADMIN. CODE div. 10, ch. 1, art. 15 (2019); City of Oakland Slavery Era Disclosure Ordinance, OAKLAND, CAL., MUN. CODE § 9.60.010 (2019); San Francisco Slavery Disclosure Ordinance, S. F., CAL., ADMIN. CODE, § 12Y.4 (2019); Business, Corporate and Slavery Era Insurance Ordinance, CHI., ILL., CODE § 2-92-585 (2019); DETROIT, MICH., CODE § 17-5-252 (2019); Business, Corporate and Slavery Era Insurance Ordinance, PHILA., PA., CODE § 17-104(2) (2019).

234. *See, e.g.*, Darryl Fears, *Seeking More Than Apologies for Slavery*, WASH. POST (June 20, 2005), https://perma.cc/3FFY-4LDS (detailing disclosures by Wachovia and J.P. Morgan Chase); *see also* OAST, *supra* note 222, at 203-31 (analyzing industrial involvement in slaveholding); Berlin, *supra* note 225, at 1255-56 (discussing disclosure laws).

enslaved.[235] Other universities have renamed buildings and devoted resources to researching their ties to slavery.[236]

These moves demonstrate the strong public interest in addressing slavery's legacy and provide possible models for engaging with the citation of slave cases. Few, however, have established well-considered frameworks for when and how slavery's legacy should be acknowledged. Yale's Committee to Establish Principles on Renaming provides a welcome exception.[237] Its report offers a useful model for legal professionals reconsidering their citation practices.[238] Yale formed its committee in response to protests demanding that it change the name of one of its colleges so that it no longer honored John C. Calhoun, a prominent nineteenth-century defender of Southern slavery.[239] The committee adopted three principles.[240] First, it adopted a general presumption against renaming.[241] The committee justified this presumption by noting the value of tradition, the moral complexity of human activity, and the impossibility of ever achieving "perfect moral hindsight."[242] Second, the committee acknowledged that renaming was nevertheless sometimes justified.

235. *See* Rachel L. Swarns, *Georgetown University Plans Steps to Atone for Slave Past*, N.Y. TIMES (Sept. 1, 2016), https://perma.cc/3XXG-Z8AX; *see also* THE WORKING GROUP ON SLAVERY, MEMORY, AND RECONCILIATION, REPORT TO THE PRESIDENT OF GEORGETOWN UNIVERSITY 13, 28-29, 36, 38-39, 40 (2016), https://perma.cc/D9HX-82LY.

236. *See* Debra Goldschmidt, *Colleges Come to Terms with Slave-Owning Pasts*, CNN (May 23, 2011, 11:53 AM EDT), https://perma.cc/AW42-ME9F (discussing efforts by the College of William & Mary and Brown University to research their links to slavery); *see also* OAST, *supra* note 222, at 126-202 (describing slavery at the College of William & Mary, Hampden-Sydney College, the University of Virginia, and the Hollins Institute); President's Comm'n on Slavery & the Univ., *Universities Studying Slavery*, U. VA., https://perma.cc/TJD8-DVFA (archived Nov. 9, 2019) (listing member institutions of an initiative to study links between slavery and universities).

237. *See* Letter from Comm. to Establish Principles on Renaming, Yale Univ. to President Peter Salovey, Yale Univ. (Nov. 21, 2016), https://perma.cc/9XZ4-CFBE (describing the background and formation of the committee).

238. COMM. TO ESTABLISH PRINCIPLES ON RENAMING, YALE UNIV., REPORT OF THE COMMITTEE TO ESTABLISH PRINCIPLES ON RENAMING (2016), https://perma.cc/YE59-E699.

239. *See* Monica Wang and Susan Svrluga, *Yale Renames Calhoun College Because of Historical Ties to White Supremacy and Slavery*, WASH. POST: GRADE POINT (Feb. 11, 2017, 3:29 PM PST), https://perma.cc/99ZG-6X3N. John C. Calhoun trained as a lawyer at the Litchfield Law School discussed at notes 36-38 and accompanying text above.

240. COMM. TO ESTABLISH PRINCIPLES ON RENAMING, *supra* note 238, at 18-23. The principles are in part built on those suggested by Alfred Brophy. *See* Alfred L. Brophy, *The Law and Morality of Building Renaming*, 52 S. TEX. L. Rev. 37, 53-63 (2010). Brophy's principles are "Who Named It and What Did the Name Mean?"; "What Does the Name Mean Now?"; "Does the Building Name Speak Now?"; and "What Does Removal of a Name Say About Us?" *Id.*

241. COMM. TO ESTABLISH PRINCIPLES ON RENAMING, *supra* note 238, at 18-19.

242. *See id.* at 18.

It listed four factors to be considered: (1) whether the "principal legacy of the namesake was fundamentally at odds with the mission of the university"; (2) whether the principal legacy was "significantly contested" at the time of the naming, that is, whether the person being honored had an "unexceptional relationship[] to moral horrors" or was distinctively implicated in them; (3) whether the decision to honor the person was "at odds with the mission of the university" at the time they were honored; and (4) whether the specific building at issue played an important role in "forming community."[243] Third, the committee found that renaming created obligations.[244] Those who sought to rename buildings should be careful not to erase history, should consider contextualizing the name through exhibits or explanation if it is kept, and should go through a formal process before renaming.[245] In the case of John C. Calhoun, who left a legacy as a constitutional theorist and advocate of slavery, the Yale President and the Yale Board of Trustees concluded that renaming was in order.[246]

C. Addressing Slave Citation

Yale's principles provide a useful framework for the treatment of slave citation. First, like Yale's committee, the common law legal system recognizes the value of tradition. A simple rule like "stop citing cases with bad facts or written by judges who did bad things" would not work. Morality can be a moving target. Judging past actors purely by modern ethical standards undervalues tradition and gives too much credence to contemporary ethical norms.[247] But the legal profession also recognizes that changing standards may require us to reevaluate tradition. We cannot hold on to antiquated moral positions that have, in Chief Justice Roberts's words, been "overruled in the court of history."[248] Finally, Yale's principles suggest that ignoring history is not an appropriate response to past mistakes. Simply erasing a bad legal legacy

243. *Id.* at 19-22.

244. *Id.* at 22-23.

245. *Id.*

246. Andy Newman & Vivian Wang, *Calhoun Who? Yale Drops Name of Slavery Advocate for Computer Pioneer*, N.Y. TIMES (Sept. 3, 2017), https://perma.cc/ANE4-WJEU; *see also* Statement of Peter Salovey, President, Yale Univ., Decision on the Name of Calhoun College (Feb. 11, 2017), https://perma.cc/V9ZV-BT67.

247. Sanford Levinson refers to such judging of the past as a "cheap thrill." *See* Sanford Levinson, *Allocating Honor and Acting Honorably: Some Reflections Provoked by the Cardozo Conference on Slavery*, 17 CARDOZO L. REV. 1969, 1975 (1996) (responding to Richard Weisberg, *The Hermeneutic of Acceptance and Discourse of the Grotesque, with a Classroom Exercise on Vichy Law*, 17 CARDOZO L. REV. 1875 (1996)).

248. Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018).

would allow a legal profession that was complicit in slavery to avoid confronting its past.

Building on these values, I offer my own preliminary principles. First, judges should continue to treat most nineteenth-century precedent as good law. It would be possible to impeach nearly every nineteenth-century court decision by pointing to their authors' participation in (or contribution to) slave society. As white men, all judges benefited from the racial politics of slavery and every Southern judge contributed to the maintenance of slavery, even in non-slave cases. By setting the ground rules for commerce, they also set the ground rules for slave commerce. Most Northern judges were also complicit, either by benefiting from the products of the plantation South, by participating in trade, by maintaining legal ties with Southern lawyers, or by failing to participate in abolitionist activity. If we look carefully enough, we could find something objectionable about nearly every judge or opinion, if not in the treatment of the enslaved, then in the treatment of women, criminals, the poor, immigrants, or other marginalized members of nineteenth-century society. In a legal system built on precedent, disregarding the decisions of all these judges is impractical.

Second, slave cases should be an exception to the general rule that nineteenth-century precedent is presumptively good law. As I have detailed above, the citation of slave cases creates legal and dignitary harms. These cases, because they rely on the subjugation of black people, are clearly at odds with the mission of the post-Civil War legal system, especially as defined by the Reconstruction Amendments. Moreover, legal support for slavery cannot be excused by its general acceptance. Although most white Americans benefited from slavery, doubts about the morality of its practice predated the existence of the United States.[249] For these reasons, judges and litigants should exercise a presumption against citing slave cases as regular precedent.[250]

Third, judges who choose to rely on slave cases should justify the legal persuasiveness of their citations and work to ameliorate the dignitary harms inherent in citing slave cases. Because slavery treated people as property, it

249. *See generally* DAVID WALDSTREICHER, SLAVERY'S CONSTITUTION: FROM REVOLUTION TO RATIFICATION (2009) (describing the fight over slavery at the Constitutional Convention).

250. Although I have not researched the citation of other objectionable material, it is possible that these standards would require reevaluation of the use of precedent outside of the slave context. Slavery, however, is unique. Slave cases do not merely involve discriminatory holdings or rely on objectionable practices; they are also the product of legal reasoning that treated enslaved people as chattel. Not only was the original treatment of people as property dehumanizing, modern judges who cite these cases without commentary continue to dehumanize the enslaved people involved in these cases by treating them as property. They perpetuate the wrong, rather than just reminding us of an objectionable history.

created confusing and perverse legal rules. Judges who look to slave law should carefully analyze these cases to ensure that their basis in a slave regime, since repudiated by the law, does not affect their validity. Judges should therefore explicitly address and justify their legal validity in the body of their opinions. Moreover, judges must consider the dignitary harms of their citation. This means carefully reading the facts of the slave cases they cite and considering these facts in light of the propositions for which the cases are meant to stand. At minimum, judges who cite slave cases would have to both acknowledge a case's origin in slavery and its enslaved subjects. For many cases, however, deeper engagement would be required to acknowledge the humanity of human property and justify the use of the case despite its roots in white supremacy.

In order to encourage the adoption of these principles, I offer three suggestions:

First, legal research tools should implement a symbol analogous to the ones they use to denote a case's subsequent history to alert legal researchers when a case involves slavery. Such a symbol would draw attention to the pervasiveness of slave law and alert judges and litigators to slavery's presence in the cases they are reading. It would also prevent accidental citation and encourage legal researchers to read beyond a case's holding. It would be especially helpful to highlight cases that may have been abrogated by the Thirteenth Amendment.

Second, *The Bluebook* should require an additional signal, such as an "(enslaved party)" parenthetical, in citations to slave cases. The additional rule could be added as part (e) to section 10.7.1, which governs "Explanatory Phrases and Weight of Authority."[251] Such a requirement would prevent litigators from intentionally or accidentally obscuring a case's origin in slavery. Requiring such acknowledgement in citation would provide transparency to the public but not limit the power of judges and lawyers to cite these cases. Federal and state courts could promote a similar process by passing local rules that require the flagging of slave cases.

Third, the state and federal judiciaries should publicly acknowledge the legacy of slave law and make the history of slave citation accessible to those without access to legal research tools. They could make slave cases accessible on their websites, add informational plaques at courthouses below the portraits of judges who authored slave cases, acknowledge links to slavery when explaining their histories, or issue statements apologizing for their role in slave commerce. As other attempts to address slavery's legacy have demonstrated, members of the public, rather than historians or scholars, have often been the ones to force institutions to confront their ties to slavery. The

251. *See* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 10.7.1, at 109-10 (Columbia Law Review Ass'n et al. eds., 20th ed. 2015).

legal profession owes it to the public, upon whom it depends for legitimacy, to provide input on how the citation of slavery ought to be addressed.

Exposing the practice of the citation of slave cases will allow judges and court systems to acknowledge and begin to atone for their past acts. To encourage this process, I have made a database of the instances of slave citation I have found available online at www.citingslavery.org. I also plan to continue to update this database to reflect new instances of citation to slave cases.

D. Objections

Some may argue that the judicial system's general reliance on precedent ought to overcome my objections to the treatment of slave cases as good law. Justifications for precedent fall into four broad categories: First, precedent protects the rule of law by providing "legal certainty and formal equality."[252] By honoring prior decisions, judges make the law predictable, limit their discretion, and provide a stable legal environment.[253] Second, following precedent promotes integrity by treating people consistently, despite differences in time and place.[254] Third, reliance on precedent can be justified by a belief that the prior case was correctly decided, whether because the court had greater expertise, other decisionmaking advantages, or simply because the judicial system usually reaches the right outcome.[255] Finally, following precedent, as Anthony Kronman suggests, may be justified out of reverence for traditions.[256] Judges may choose to "honor the past for its own sake."[257]

The first justification for following precedent provides an unconvincing justification for the citation of slave law. Setting aside the obvious problem with describing cases involving human property as supporting formal equality, it is hard to imagine any litigants relying exclusively on slave cases from more than a hundred years ago to determine their rights.[258] Treating

252. Barzun, *supra* note 180, at 1646-47; *see also* Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 595-602 (1987) (describing justifications for precedent).

253. *See* Barzun, *supra* note 180, at 1646-47.

254. *See id.* at 1652-54.

255. *See id.* at 1648-52.

256. *See* Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1036-37 (1990). For a critique of Kronman's position, see David Luban, Essay, *Legal Traditionalism*, 43 STAN. L. REV. 1035, 1040-60 (1991).

257. Kronman, *supra* note 256, at 1036.

258. Judges themselves seem to rely on cases inconsistently for reasons that are difficult to pinpoint. For example, my research revealed that Mississippi courts have relied on *Nevitt v. Bacon*, 32 Miss. 212 (1856), a case involving a mortgage on a land and enslaved people, six times since 2003. *See* Knight v. Knight, 85 So. 3d 832, 836 (Miss. 2012) (citing *Nevitt*); Clark Sand Co. v. Kelly, 60 So. 3d 149, 161 (Miss. 2011) (en banc) (internal citation to *Nevitt*); Lincoln Elec. Co. v. McLemore, 54 So. 3d 833, 839 (Miss. 2010) (en

footnote continued on next page

slave cases with greater scrutiny seems highly unlikely to destabilize the rule of law or legal practice.

The second justification provides an equally implausible rationale. Slave cases treat some humans as property and often introduce categories unique to the law of slavery. They do not demonstrate the kind of consistency that justifies relying on them as precedent.

The third justification, based on deference to the prior court, provides a more convincing description of judicial behavior. Judges seem to cite slave cases as a way to honor the establishment of the legal rules on which those judges depend. Deference to the knowledge of earlier judges, however, should be drawn into question based on a case's origination in slavery. Even if we grant that a judge was a thorough jurist, his support for slavery gives us reason to scrutinize his judgment or at least consider the perspective that the enslaved person was likely barred from sharing in court.

The fourth explanation, understanding citation as respect for tradition, also provides a plausible explanation for how courts use slave cases when they cite them. Courts seem to value a connection with their history, as demonstrated when they use "we" to refer to decisions made more than 150 years earlier.[259] Reverence for a tradition that played a vital role in regulating a slave society, however, is suspect. Judges who cite slave cases to honor tradition should at minimum clarify which tradition they are honoring; they should also weigh the value of this tradition against the harms of citing slavery.

Another objection might be that discouraging slave citation will further obscure the roots of American law in slavery.[260] Judges will simply cite cases

banc); Koestler v. Miss. Baptist Health Sys., 45 So. 3d 280, 283 n.10 (Miss. 2010); Marshall v. Kan. City S. Rys. Co., 7 So. 3d 210, 213-14 (Miss. 2009) (en banc); Marshall v. Kan. City S. Rys. Co., 7 So. 3d 265, 270 (Miss. Ct. App. 2007), *rev'd*, 7 So. 3d 210 (Miss. 2009). Other cases, however, such as *Bullitt, Miller & Co. v. Taylor & Richardson*, 34 Miss. 708 (1858), a case involving the alleged fraudulent conveyance of enslaved people, have been cited only a few times in the last fifty years. *See* Barbee v. Pigott, 507 So. 2d 77, 84 (Miss. 1987) (most recent cite to *Bullitt*); Morgan v. Sauls, 413 So. 2d 370, 374-75 (Miss. 1982) (second most recent); Hinton's Ex'r v. Hinton's Comm., 76 S.W.2d 8, 11 (Ky. 1934) (third most recent).

It is unclear how such citation patterns emerge. Both *Nevitt* and *Bullitt*, for example, had not been cited for long periods of time before modern courts referenced them. Until 2003, the last citation to *Nevitt* came in 1958. *See* Lee v. Thompson, 859 So. 2d 981, 991 (Miss. 2003) (en banc); Smith v. Copiah County, 100 So. 2d 614, 616 (Miss. 1958). *Bullitt*, in contrast, was last cited in 1934 until it was exhumed by the Mississippi Supreme Court in 1982 as part of a string cite, only to return into obscurity after being cited (as a "see also") in another Mississippi Supreme Court case in 1987. *See Barbee*, 507 So. 2d at 84; *Morgan*, 413 So. 2d at 374-75; *Hinton's Ex'r*, 76 S.W.2d at 10.

259. *See, e.g.*, Barton Land Servs., Inc. v. SEECO, Inc., 428 S.W.3d 430, 436 (Ark. 2013); Whitacre P'ship v. Biosignia, Inc., 591 S.E.2d 870, 879 (N.C. 2004).

260. *Cf.* Brophy, *supra* note 240, at 66 (arguing that renaming buildings "threatens our memory of the past").

that cite slavery, avoiding the stigma of citation, while doing nothing to change the law or address the dignitary harms I have listed. I take this objection seriously, which is part of the reason that I have proposed the addition of a slavery flag in legal research tools and encouraged judicial officials to publicly acknowledge their involvement in slavery's legacy. Even if these proposals are not implemented, an end to the citation of slavery would still be an improvement. The roots of slavery have already been obscured by the practices of American lawyers. In this context, the erasure of slave cases from future citation would actually serve as an acknowledgment of past harms and a recognition that such cases should not be treated as regular precedent.

Conclusion

The contemporary citation of slave cases has deep roots in American law. Slave cases could not have become accepted as precedent if they had not first been integrated into the mainstream of American law, and second, been accepted as good law after the Civil War. The continued citation of slave cases can thus be seen as part of a failure of transitional justice. As historians have documented, the legal system neglected people formerly held as slaves in myriad ways in the wake of Emancipation. Federal legislators failed to redistribute Southern plantation land and law enforcement proved incapable of (and often unwilling to) address the politically effective violence of Southern Redeemers.[261] Following successful attacks on Reconstruction by white supremacists, the legal system again failed African Americans as it enforced Jim Crow policies.[262] The Civil Rights movement addressed some of these wrongs, but its rights-based, universalist approach to discrimination does not seem capable of addressing many of the problems faced by African Americans today.[263]

According to Ruti Teitel, transitional justice demands that law "[s]trik[e] a balance between discontinuity and continuity."[264] American lawyers, it appears, have consistently erred on the side of continuity. They produced a transitional narrative that defined the law of slavery narrowly, obscuring the profession's role in maintaining slavery's commercial viability. This narrow

261. *See* FONER, RECONSTRUCTION, *supra* note 64, at 434-36, 603.

262. *See generally* LEON F. LITWACK, TROUBLE IN MIND: BLACK SOUTHERNERS IN THE AGE OF JIM CROW (1998) (detailing the experience of African Americans during the Jim Crow era); C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (rev. ed. 1957) (documenting the rise of segregationist laws after Reconstruction).

263. *See* Gary Peller, *Legal Education and the Legitimation of Racial Power*, 65 J. LEGAL EDUC. 405, 405-06, 412-13 (2015) (discussing the legal profession's adoption of "universalist rule-of-law ideology" to address racial inequality); *see also* sources cited *supra* note 17.

264. RUTI G. TEITEL, TRANSITIONAL JUSTICE 71 (2000).

view demonstrates an approach to history that Robert Gordon has labeled "willed oblivion."[265] It leads lawyers to label slavery as "a historical accident, an outlying event in the general stream, so atypical as not to be worth mentioning, with no origins traceable to the prior period or implications for the present one."[266] From this narrow perspective, the law of slavery was abolished by the Reconstruction Amendments (at least once those Amendments were enforced). Slave cases transform from slave cases to property cases about people.

By adopting such a perspective, lawyers limit the potential for addressing slavery's legacy. They see slavery as a set of a few laws rather than as a "social system[]."[267] Acknowledging and addressing the continued role of slave precedent in the American legal system is one step toward recognizing the role lawyers played in supporting a society based on subjugation. Like the response to any atrocity, legal recognition of slave citation will be "inescapabl[y] inadequat[e]."[268] Lawyers nevertheless should take this opportunity to reconsider the myopic perspective that has led them to continue to cite slave cases more than a hundred years after the ratification of the Thirteenth Amendment.

265. *See* ROBERT W. GORDON, *Undoing Historical Injustice*, *in* TAMING THE PAST: ESSAYS ON LAW IN HISTORY AND HISTORY IN LAW 382, 386-87 (2017).

266. *Id.* at 387.

267. *Id.* at 409.

268. MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 5 (1998).