SOUTHERN SLAVERY AND ANTEBELLUM LAW: MODIFICATIONS SUITED TO THE STATE AND MASTER CLASS

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During the Antebellum period, the United States' slave law began changing in both the North and the South. On a state-by-state basis, laws were made, reformed, or removed to fit the time. Some states began amending laws in ways that appeared to benefit the slave. What the slaves and the slave-owners both knew though, and as historian Eugene Genovese claimed, was that "slave laws existed as a moral guide and an instrument for emergency use, although the legal profession and especially Southern judges struggled to enforce them as a matter of positive law; wherever possible, the authority of the master class, considered as a perfectly proper system of complementary plantation law, remained in effect."[1] However, as the North began moving on a more progressive path to reform, the South remained rooted in the sort of reactionary legal culture expected of the paternalistic, agricultural, slaveholder.

In the slave South, the legal system that emerged during the Antebellum period was built on several different foundations. These foundations of slavery were also the foundations of Southern culture, economy and overall way of life. The South was built on an agricultural system designed to produce high-demand products for export outside of the southern United States. To stay within the confines of an agricultural economy for the South, also meant in their view, staying within the system of slavery. Since English common law did not recognize hereditary unfree labor, the master class saw that it needed laws that would protect their interests. In fact, the complex Southern legal system was an extensive construct that balanced several interests. These included: the control, obedience and submissiveness of slaves; economic interests or the investment amount in the slave and the desire in long-run profits; the interest in continuing the plantation-style system of the South; and the master class' control over working class overseers, the poor, and other whites.[2] It was these components that slave law of the Antebellum period attempted to meet. With the lack of a unified government particular to the South as a whole, it was up to each individual state to establish and enforce this legal structure in the Southern slavery-state system.

The South experienced several noticeable changes before and throughout the Antebellum period that instilled a new sense of anxiety in the master class. Those who could afford large numbers of slaves found it more and more difficult to find slaves at prices they had paid in the past, due to the 1807 ban on the Atlantic Slave Trade. In Georgia for example, the average price of a "prime field hand" rose from $450 dollars in 1800 to $1,650 in 1859, even as the average New York price of upland cotton dropped by almost twenty cents.[3] As the cost of owning slaves increased, so did the importance of the slave himself.

Despite the rising price of owning a slave, slave sales continued to skyrocket in the years just after the War of 1812. Around that time, the master class began to worry about the increasing percentage of the enslaved population. In fact by 1860, four states had slaves accounting for more

than one-third of their total population. In South Carolina, the number was as high as sixty percent.[4] This essence of this type of economy contributed to a "social and economic class structure" that was based largely on wealth valued through the amount of slaves rather than amount of specie.[5] The master class feared the increasing number of slaves, believed it to be a precursor to rebellion, and on occasion passed laws to limit the number of African-Americans.[6] The master class began moving toward a new phase of plantation-style life with a more limited number of African-Americans, which historian Andrew Fede describes as the "mature plantation period."[7]

Doing so meant limiting a master's right to property, which was not something that the South was known for doing in order to maintain their socioeconomic system and the balance of interests in the Southern states. Pro-slavery advocates attempted to focus their property rights argument down to two basic forms of property, realty and personalty.[8] The South believed that slavery fell under the latter of these two categories, the criteria being that a slave was chattel, or moveable property.

However, it was also argued in the South that, due to the expensive nature of purchasing and owning a slave, it was a more valuable type of property than land or tools. In the well-known *A Treatise on Political Economy*, Jean-Baptiste Say argued that "a nation, awake to its true interest, is careful…to husband its pecuniary bounty, where it is prodigal of distinction and authority."[9] In this case, the idea of the paternalistic father-figure remained prominent in the South for reasons of both social and economic stability. The South wished to maintain its social order, while at the same time ensuring its economic success with the slaves responsible for its "pecuniary bounty."

According to Genovese, the Antebellum South was made up of a "complementary system of complementary plantation law."[10] This essentially meant that all authority on the plantation resided in the master, which complimented both public law and police laws. However, by the dawn of the Antebellum era, public law also implemented limits on slave abuse and violence on the part of the master. In essence, this system was accepted as common law, but only up to a point. The Southern analysis of their own system was that there was no contradiction between owning an unpaid worker while at the same time, participating in a greater capitalist, trans-Atlantic marketplace.[11] Political economists in the South combined the institution of slavery with their own analysis of the Southern master class to explain how they believed that planters in the Southern states were no different than capitalists in the North, on the grounds that they invested their resources into methods of production and attempted to maximize profits.[12] They then used this to argue for a new industrial future for slavery and at the same time the maintenance of their current legal and socioeconomic status. .

In states like South Carolina, for example, industrial interests made some headway but only secondary to the maintenance of control over the plantation system. However, if the South was able to maintain its economy with a low, stable amount of slaves, it might be possible to develop a system that functioned with fewer numbers of slaves to the point where the cost of rearing slaves was higher than the market price, in which case the opportunity costs associated with slavery would be too high and the system could collapse economically.[13]

This all falls under Genovese's theory of a complimentary legal system and the premise of free trade, which comes with economic consequences in and of itself. Georgia planter W.W. Hazard, for instance, told his newly acquired slaves how the state was legally required to take care of them at any age, and that he faced limits on what he could to in regards to harming them. Instead of using the law to assure his slaves of their own safety, he was really using it to try and convince them they were well-off. In reality, of course, ensuring the enforcement of state laws that actually countered the interests of the master class became an increasingly arduous task.[14]

Kentucky planter Henry Clay questioned even these weak laws imposed on masters and the internal slave trade. Clay, normally an advocate of federal power, insisted that regulation or abolition was not a legitimate method of control but rather a systematic "annihilation" of the institutions of free trade and slavery.[15] Clay believed that the federal courts did not have the constitutional right to regulate interstate trade regardless of what was being traded. The goal for the South was not just to make a profit but to maximize it. This is why the South argued so vehemently against the northern efforts at emancipation.

Opponents of Clay, like anti-slavery evangelicals in the North, argued that God's vision for the world could not possibly include a system like slavery. In response, Southern evangelicals like Baptist Richard Fuller disputed this and welcomed slave-imposed "reforms," saying that "religion allows no compromises with evil" (the evil in his view being the idea of straying from the institution of slavery which the North had done decades earlier).[16] For the Southern argument, slavery was an ingrained concept, cemented into the legal and socioeconomic makeup of the plantation-style system of the South. However, these legal and economic arguments were by no means the only types of justifications that the South used.

Religious idealism spread into the social aspect of the South as well, and ideas like the legal protection of human life existed within the social hierarchy. In *Fields v. State* (Tennessee, 1829), the clearly paternalistic attitude in a religious context had a bearing on the court's decision. The judge's decision read: "Christian nations do not consider themselves at liberty to sport away the lives of captives."[17] The judge ruled that the children of the nation were the slaves and the parents were the slaveholders. This paternalistic attitude was also rooted in Jeffersonian idealism. Jefferson viewed slavery as a necessary evil despite owning more than one hundred slaves himself. The idea of being the benevolent father-figure existed in the South long after Jefferson's death, despite the fact that no slaves saw it this way.

Religious paternalism was an Antebellum concept, but since 1618, the term "slave" had an understood rather than a defined meaning in any law books.[18] Historian Thomas Morris describes slavery using five elements that always existed in the Southern system of slavery: claim of ownership, claim of alienability, claim of heritability, claim to product of labor, and a general rightlessness.[19] The early lack of a legal definition, however, made the job of some of the earlier courts more difficult. In New Orleans, Louisiana, the old French colonial code, referred to as the Black Code, existed to establish procedural safeguards and constraints. However, it had nothing in it requiring jurors to seek the truth or justice in a case. Rather, it required the jury to be made

up of free white males who owned slaves of their own.[20] This Black Code was used in slave cases and even in some cases involving free blacks. Courts often tried to work together from state to state, but in the end, the law really depended on what an individual judge believed best for his state. Historian Christine Macdonald defines the right of jurisdiction as "the authority of a court to hear a dispute, to decide the outcome, and to articulate the reasons for its decision."[21]

In the 1802 case of *Gobu v. Gobu*, Judge John Lewis Tayler held that in North Carolina, being black was enough for the court to assume concurrent slave status.[22] Not only could the judge summon an African-American to Court, but the court could then rule them a slave, especially in the absence of any proof to the contrary. Race and status were at this point legally intertwined regardless of whether or not the individual held slave status by law. It simply became another way that the master class could legally assert its authority.

Many Southern states started their own laws by building upon the pre-existing legal traditions of earlier cultures. Specifically, they looked to laws of England, which had at one point controlled the original colonies and which took some of its own laws from the ancient Roman tradition. One example of English law that extended into the Southern system was what was known as Hue-and-Cry Law. Hue-and-Cry was an old English act requiring bystanders to yell out when they saw a runaway slave escaping and to in turn, pursue this slave until captured. The Southern Antebellum equivalent of this was the practice of slave patrols. In many cases, they were even more harsh or strict than the actual police force assigned to a specific town or city.[23]

Another of the South's laws came from the English document the Magna Carta. This was called the "law of the land clause," which limited the government's power to regulate state constitutions.[24] This way, the Federal Government had no authority to block the South's control over their slaves. Two other laws focused on the rights of a slave in regards to emancipation. That is, what would the status of a freed slave's family be in the eyes of the court? Unless the entire family was purchased or given freedom by manumission, they by law would remain slaves. However, there were exceptions. For instance, *partus sequitir ventrem* granted the unborn child of a freed pregnant slave its freedom as well. This was seen as *in futuro* manumission or, manumission by future event.[25] This, however, all changed if a slave that was due to be freed in the future was found guilty of a crime. The final example of law extending from the Old English tradition was the idea of *caveat emptor*. *Caveat emptor* means "let the buyer beware." In essence, it applied to slaves who had been sold: the buyer was getting whatever they appeared to be buying. There were even several newspapers that warned buyers of "stock" that looked good because of the legal condition *caveat emptor*.[26] *Caveat emptor* would be upheld a number of times and applied to *physical* problems with a slave but not *psychological* ones. If a buyer could prove that the slave was so mentally unfit that he or she could not work, and that this condition existed before the sale, then the original master could be held liable.[27]

A commonplace practice among slave owners was the hiring out of a slave to another master for a predetermined amount of time. Masters "hired out or sold slaves when work was slow at home; they sent their slaves to market or distant plantations…and…if one party failed to live up

to his part of the deal and the other party suffered a loss, judges typically awarded damages for breach of contract."[28] These contracts were a way to hold both parties liable. However, problems within these deals emerged on a regular basis, for quite obvious reasons. As Fede points out, "The slave owner's interest in preserving the value of a hired slave clashed with the hirer's interest in getting as much work out of the slave as possible during the period of hire."[29]

Finally, enforcement of these contracts was also difficult due to the fact that the South had weak central power at the state level across the board. This was done to protect against infraction of the *contra bonos mores* principle (literally, against the good way of life) but it also led to a difficulty in Southern contract enforcement.[30] The lack of a strong central authority usually meant the growth of smaller regional ones with less uniform laws that would vary from county to county and state to state.

In the judicial case of *Spencer v. Pilcher* (1837, Virginia), the judge declared that the "bailee" or hirer of a slave did not have the official rights of the master during the period of hire for that slave.[31] If the slave was killed or died by some other mistreatment from the hirer, then the hirer himself was responsible. However, if the slave ran away and could not complete the contract, it was grounds for the hirer to claim bad behavior on the part of the slave in which case it was the fault of the master.[32]

In almost any case across the South, it was an almost understood principle that the power of the master had to prevail. This was because of a landmark decision in *State v. Mann* (1829, North Carolina) by Judge Thomas Ruffin. Ruffin was a well-known supporter of slavery, so this decision was really no surprise. He declared that the slave must at all times remain submissive to ensure the power, authority, and rights of the master above all else.[33] This decision would carry across state lines of the South. Yet despite this decision, judges did not rule that all whites in the South were on equal class footing. The courts were usually more inclined to place economic burden of responsibility on the party more likely to be able to afford it. However, if through connections and support, an upper class member of society was involved, they could often change the opinion of the jury and in turn shift the burden onto the lower class party.[34]

In was common knowledge and even law in the nineteenth century South, that a master was allowed to harm and even kill his slave for various legally "qualified" reasons. However, there also were laws in place designed to protect a slave from abuse or mistreatment without due cause. These laws were, of course extremely hard to enforce, despite the fact that they were in place not for the slave's benefit but rather for the master's, so that they would not suffer an economic loss from an injured or dead worker.[35] This once again followed the legal principle in the South of *contra bonos mores*. Many such laws were in place because of the fears of the slave-owning class. There were documented cases in which slaves who experienced abuse retaliated by harming or even killing their master or another white involved in the abuse.

In a few cases, what was deemed as a "malicious" killing of a slave was not tolerated. In *Witsell v. Earnest* (1818, South Carolina[36]), the judge recognized the conflict between "the requirement that slaves be controlled and the need to protect slaves from whites who the court

called 'violent' and 'unthinking' people of the community."[37] Eventually in 1821, the death penalty was implemented for such maliciousness. If said maliciousness could be proved, it meant that in South Carolina at least, that simple monetary compensation for a killed slave by another white (not his or her master) was no longer considered proper or severe enough punishment. That does not however mean that it still did not occur or that the law was not often overlooked in such cases.

In contrast, the law recognized that a runaway slave was a matter of private not public offense.[38] According to *Bird v. Wilkinson* (1833, Virginia), if a master so chose, they could make the matter public. Many cases involving runaway slaves also involved the process of slave transport by someone other than the original master. If it could be proven that it was the fault of this other white or that they had allowed it intentionally for the purpose of emancipation, they could indeed be held liable.[39]

As historian John Hope Franklin wrote, "physical handicap did not dissuade slaves from attempting to escape."[40] For the slave, the consequences of running away and being captured were high. It often made no difference whether the runaway in question was male or female, because neither was spared the lash, and so the South would turn to the aforementioned slave patrols, or a reward offered to the general public to increase the number of ordinary citizens, slave-owning and otherwise, who would actively search out runaways with the expressed goal of returning them to the master.[41] Escape was one of the instances where a Southern court might find murdering a slave not only legally justified but warranted as well.

In cases where the slave was convicted of a crime, their testimony, or rather the validity of such a testimony, varied depending on state and time. Legally, the rights of a slave were all but nonexistent under the master, however it was recognized in later Antebellum years that a slave had human intelligence even if he or she was still classified as chattel.[42] Therefore in some less common cases toward the end of the Antebellum period, the courts were willing to look at the testimony of a slave. In 1856, a New Orleans court recognized the testimony of two slaves against the word of another slave.[43] It is important to note again here the later date of this case. It was also the testimony of a slave against another slave. In cases where a slave was involved in a crime against another slave, the courts were more willing to hear and consider the testimony of slaves.

Slaves' names and directions for what to do with those slaves were abundant in Southern property deeds and especially in final wills. In some cases, masters would grant manumission to a slave upon their death in a will. Walter Johnson notes that manumission was defined as "the right to grant slaves their freedom…posed between the privileges of property and the demands of public policy."[44] Manumission would be granted in almost every case to ensure the will was carried out properly. If the state went against the direction of the will, they would in turn be going against the will and authority of the master and usurping their own laws and the core principle of Southern slavery. In some cases, a master would promise their slave manumission in the will but could not put that into a contract due to the fact that slaves could not legally be allowed to enter into a contract. Rather, the master represented these obligations and actions in some sort of

agreement or transaction. This action was upheld in the case of *Stevenson v. Singleton* (1829, Virginia), continuing the barring of slaves from contracted arrangements.[45] There were cases, though, where slaves could be sold off despite manumission in a will, if the master owed anyone money from outstanding debts.

In the case of *Morris v Owen* (1801, Virginia), a number of slaves were left to a widow by their original master. She was granted the slaves for the remainder of her life and was then to do as she wished once she wrote her own will. Her children, however, sued the widow for possession after the original master died. The court denied the children ownership. This was because the state of Virginia intended to keep the will and authority of the master and his dominion over his slaves intact, despite the protests of the surviving heirs of the master.[46]

The case of *Kendall v. Kendall* (1816, Virginia) followed with a similar result of *Morris v. Owen*, but took a different route to get there. In this case, a will granted freedom for slaves upon the death of a master, but the master on his deathbed revoked this part of the will that granted manumission and instead wished not to free his slaves. In this case the courts still recognized the intent and wishes of the master, but revoked the manumission present in the will itself. The Virginia court saw the wishes of the master as more relevant than the will because he was altering the will before death.[47]

When looking at legal cases state by state, a general trend emerges. Nearly every state saw an increasing number of cases involving slaves during the Antebellum period. This increase was due in part to some of the social tensions evident between the North and South and part to the court decisions themselves that led to further tension between different members of society. Not only did the codes and laws of the South permeate the years of the Antebellum era of American history, but the legacy of those Southern judges critically involved in the formation, upkeep, and alterations of these laws did so as well. Wahl observes that besides upholding the doctrine of the dominion and authority of the master class, "by devoting considerable effort to preserving property rights in slaves, southern judges in fact left a legacy of legal doctrines that eventually served the interests" of the South as a whole in the era leading up to the Civil War.[48] During the late Antebellum period, the Fugitive Slave Act of 1850 was signed into law by President Millard Fillmore. This was followed ten years later by the election of Abraham Lincoln to the Presidency and the secession of South Carolina from the United States.[49] These acts were a result of the culmination of the tensions between North and South to date.

Ultimately, one of the greatest tensions between North and South existed in the Southern legal structure. "The changing law of white slave abusers represented the shifting accommodation of the interests of the white rulers," writes Historian Andrew Fede, "…nothing more." Regardless of what law was passed, no calculations were ever made in regards to slave rights or benefits by any such Southern lawmaker. Rather, any unintended effects that benefitted the slave usually had evident motives, and were simply a by-product of the South attempting to strengthen its hand in the ever-growing conflict with the North.[50] The legal structure of the Southern states leading up to the Civil War was designed to defend the social, economic, and political position of the South.

Because of this legal system, the socially ingrained ideals that one would consider to be an identifying factor of a Southern citizen remained intact throughout the Antebellum period. Indeed, nearly every Southern slaveowner in the years leading up to and during the Civil War would have advocated for slavery using a variety of justifications from paternalism and the Jeffersonian idealism associated with the early Antebellum period, all the way to slavery's potential impact to a possible future of industrialization, increased production, and on the Southern socioeconomic system.

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[1] Eugene D. Genovese, *Roll, Jordan, Roll: The World the Slaves Made* (New York: Pantheon Books, 1974), 47.
[2] Andrew Fede, "Legitimized Violent Slave Abuse in the American South, 1619-1865: A Case Study of Law and Social Change in Six Southern States," *The American Journal of Legal History* 29, no. 2 (1985): 96.
[3] Fede, "Legitimized Violent Slave Abuse," 108.
[4] Fede, "Legitimized Violent Slave Abuse," 103.
[5] Fede, "Legitimized Violent Slave Abuse," 101.
[6] This was especially the case in the state of South Carolina by the 1790s. For more information on the subject see Robert Olwell, *Masters, Slaves, and Subjects: The Culture of Power in the South Carolina Low Country, 1740–1790* (Ithaca: Cornell University Press, 1998).
[7] Fede, "Legitimized Violent Slave Abuse," 104.
[8] Thomas D. Morris, *Southern Slavery and the Law: 1619-1860* (Chapel Hill: The University of North Carolina Press, 1996), 62-63.
[9] Jean-Baptiste Say, *A Treatise on Political Economy or the Production, Distribution, and Consumption of Wealth* (Philadelphia: Lippincott, Grambo & Co., 1851).
[10] Morris, *Southern Slavery and the Law*, 3.
[11] Jay R. Carlander and W. Elliot Brownlee, "Antebellum Southern Political Economists and the Problem of Slavery," *American Nineteenth Century History* 7, no. 3 (2006): 391.
[12] Carlander and Brownlee, "Antebellum Southern Political Economists," 395.
[13] Carlander and Brownlee, "Antebellum Southern Political Economists," 400.
[14] Genovese, *Roll, Jordan, Roll*, 31-32.
[15] Maurice G. Baxter, *Henry Clay the Lawyer* (Kentucky: University Press of Kentucky, 2000), 96.
[16] John Patrick Daly, *When Slavery was Called Freedom* (Kentucky: University Press of Kentucky, 2002), 75.
[17] Jenny Bourne Wahl, *The Bondsman's Burden: An Economic Analysis of the Common Law of Southern Slavery* (Cambridge: Cambridge University Press, 1998), 148.
[18] Helen Tunnicliff Catterall, *Judicial Cases Concerning American Slavery and the Negro: Cases from the Courts of England, Virginia, West Virginia, West Virginia, and Kentucky* (Washington D.C.: The Carnegie Institution of Washington, 1926), 54.
[19] Morris, *Southern Slavery and the Law*, 426.
[20] Christopher Waldrep and Donald G. Nieman, *Local Matters: Race, Crime, and Justice in the Nineteenth-Century South* (Athens: The University of Georgia Press, 2011), 57.
[21] Christine Macdonald, "Judging Jurisdictions: Geography and Race in Slave Law and Literature of the 1830s," *American Literature* 71, no. 4 (1999): 628.
[22] Morris, *Southern Slavery and the Law,* 25.
[23] Hadden, *Slave Patrols*, 71-72.
[24] Baxter, "Henry Clay the Lawyer," 98.
[25] Morris, *Southern Slavery and the Law*, 48, 371.
[26] *Connecticut Mirror*, December 5, 1825.
[27] Morris, *Southern Slavery and the Law,* 108-109.
[28] Wahl, *Bondman's Burden*, 4.
[29] Fede, "Legitimized Violent Slave Abuse," 107.
[30] Fede, "Legitimized Violent Slave Abuse," 136.
[31] Catterall, *Judicial Cases*, 186-187.
[32] Catterall, *Judicial Cases*, 113.

[33] Mark Tushnet, "Review: Slave Law as Contrast and Hierarchy," *Reviews in American History* 24, no. 4 (1996): 590.
[34] Fede, "Legitimized Violent Slave Abuse," 112.
[35] Fede, "Legitimized Violent Slave Abuse," 124.
[36] *Tables of Cases of Alabama [-Wyoming] Reports* (St. Paul: West Publishing Company, 1901), 56.
[37] Fede, "Legitimized Violent Slave Abuse," 113.
[38] Catterall, *Judicial Cases*, 403.
[39] Catterall, *Judicial Cases*, 349.
[40] John Hope Franklin and Loren Schweninger, *Runaway Slaves: Rebels on the Plantation* (New York: Oxford University Press, 1999), 39.
[41] Franklin and Schweninger, *Runaway Slaves*, 209.
[42] Wahl, *Bondman's Burden,* 79.
[43] Waldrep and Nieman, *Local Matters*, 75.
[44] Walter Johnson, "Inconsistency, Contradiction, and Complete Confusion: The Everyday Life of the Law of Slavery," *Law & Social Inquiry* 22, no. 2 (1997): 417.
[45] Catterall, *Judicial Cases*, 158.
[46] Catterall, *Judicial Cases*, 107.
[47] Catterall, *Judicial Cases*, 127.
[48] Wahl, *Bondman's Burden*, 178.
[49] David Brion Davis, *Inhuman Bondage: The Rise and Fall of Slavery in the New World* (Oxford: Oxford University Press, 2006), xv.
[50] Fede, "Legitimized Violent Slave Abuse," 149-150.

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