An Impossible Marriage: Slave Law and Family Law

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> [T]he father of a slave is unknown to our law . . . .
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> *Frazier v. Spear*, 5 Ky. (2 Bibb) 385, 386 (1811).
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> [T]he young of slaves . . . stand on the same footing as other animals . . . .
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> *M'Vaughters v. Elder*, 4 S.C.L. (2 Brev.) 7, 12 (1809).
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> [Slaves could not legally marry, for] . . . to fasten upon a master of a female slave, a vicious, corrupting negro, sowing discord, and dissatisfaction among all his slaves; or else a thief, or a cut-throat, and to provide no relief against such a nuisance, would be to make the holding of slaves a curse to the master.
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> Thomas Cobb, An Inquiry Into The Law Of Negro Slavery In The United States of America 246 (1858).

I. Introduction

The perversions of the human soul wrought by American slavery have been well told. Fictive and historical modes, songs and sonnets, have carried over the centuries the bitter seeds of the awful deeds. In lengthy tracts, scholars have retraced the crimes of the trade and the plantation, while slaves themselves have borne witness in searing personal narratives. We all know something of the horrific legacy of the peculiar institution: a warped national personality and a twisted color consciousness which has invaded every facet of our lives.

Recent studies of slavery have begun to turn to the law which undergirded the institution in an effort to understand this legacy

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more fully.[1] The questions posed by those of us who study slave law are of two types: we seek to comprehend the manner in which legal principles were molded and manipulated to serve the institution's interests, and we employ the law to help fill out the historian's understanding of slavery's social reality. In this sense, the law becomes another tool of historical reconstruction.

From the beginning of the trade in 1619, slavery pressed the legal system. The law had to accommodate slavery's First Principle—humankind as property—even while it sought to set in legal stone bourgeois republican notions of equality and human rights. What was required was a system of laws flexible enough to hold the slave to the common code of conduct in certain circumstances while exempting him in others, a system which respected the slaveholders' right to rule their property without altogether yielding the state's right to govern aspects of Black-white, slave-master relations. To further complicate the picture, the ideological fine-tuning which slavery demanded took place in the context of a legal system in its infancy. The inherited common law jurisprudence of England provided some guidance, but precedents unique to the United States were yet to be firmly established. Thus, no formulaic recipe could be turned to; legislators and judges had to find their own way through a thicket of conflicting values and interests.

These intractable contradictions of legal principle were sharpened in the nineteenth century, for here was a historical moment of both deep political turmoil and legal consolidation.[2] This era of legal history is the territory of this article. The article explores the relationship between the development of family law in the nineteenth century and the southern law of the slave family.

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1. Historical studies which draw on legal sources include John Blassingame, The Slave Community: Plantation Life in the Antebellum South (1979); Winthrop Jordan, White Over Black: American Attitudes Toward the Negro, 1550-1812 (1968); and Juliet E.K. Walker, Free Frank: A Black Pioneer on the Antebellum Frontier (1983). General studies of the legal status of slaves include Daniel Flanigan, The Criminal Law of Slavery and Freedom, 1800-1868 (1973) (unpublished Ph.D. dissertation, Rice University); A. Leon Higginbotham, In the Matter of Color: Race & the American Legal Process: The Colonial Period (1978); Judicial Cases Concerning American Slavery and the Negro (Helen Tunnicliff Catterall ed. 1926); and Mark Tushnet, The American Law of Slavery, 1810-1860: Considerations of Humanity & Interest (1981). State studies include Florence Beatty-Brown, *Legal Status of Arkansas Negroes before Emancipation*, 28 Ark. Hist. Q. 6 (1969); James Currie, *From Slavery to Freedom in Mississippi's Legal System*, 65 J. Negro Hist. 112 (1980); and William Imes, *The Legal Status of Free Negroes and Slaves in Tennessee*, 4 J. Negro Hist. 254 (1919).

2. For a comprehensive history of the development of United States law in the nineteenth century, see Lawrence Friedman, A History of American Law (2d ed. 1985).

During the nineteenth century, the law sought to give new definition to family life—prescribing the roles of husband and wife, setting the parameters of marriage and divorce, and adjusting ancient rules and taboos about sex and procreation outside of marriage.[3] The body of law that emerged recognized the family as an organic, autonomous legal entity, and established the framework for the public governance of private life still remaining to this day.

The slave family, however, was constructed outside of legal developments governing family relationships. The notion of legal autonomy within the private sphere had no meaning for the slave family, whose members could lawfully be spread to the four corners of the slave south. Notwithstanding blood ties and romantic love, the slave family could not be an organic unit of permanently linked, interdependent persons. In the eyes of the law, each slave stood as an individual unit of property, and never as a submerged partner in a marriage or family. The most universal life events—marriage, procreation, childrearing—were manipulated to meet the demands of the commercial enterprise. Although slaves did marry, procreate, and form families, in some cases even under the compulsion of the master, they did so without the sanction of southern law.

In the nineteenth century, the denial of legal protection to slave family formation created an impossible tension in the law. The tenets of family law held that marriage and family were natural, sacred, and morally compelled. The family—husband, wife, and child—was an earthly representation of the holy trinity. Thus the law was deemed to be based both on God's plan and command, and on natural law which is but itself a reflection of divine law. That slaves, who were admittedly human creatures of God, were excluded from these sacred rules presented a profound challenge for a purportedly rationally based, consistent legal system.

This article argues that the courts wrote slaves out of family law by declaring them to be a different kind of human being—innately and immutably immoral (therefore not legally marriageable), too dumb and childish to themselves parent (therefore incapable of childrearing), and sexually licentious (therefore unsuited to marriage and family bonds). The legal gyrations required to accomplish this feat infected family law into the twentieth century. Further, this legal endorsement of the idea that the slave family was inherently "different" has been reflected in the reality

3. For a comprehensive treatment of the development of family law in the nineteenth century, see Michael Grossberg, Governing the Hearth (1985).

of Black family life for decades.[4]

In exploring these issues, this article briefly examines the actual family experience of the nineteenth century slave. This is followed by a discussion of the case law which evolved to govern slave family relationships.[5]

As is often the case, the divisions in this article must be somewhat artificial, for the two areas discussed are inextricably and inevitably connected. On the one hand, the case law illustrates how social relations were experienced by giving us factual detail and revealing standards of conduct. On the other hand, to give an account of the social relations is to lay out the fabric upon which the law stitched its ideological threads.

II. The Family Experience of the Slave

Recent studies of slavery[6] have established that slaves displayed considerable independence in how they organized their family lives. These studies point to kinship and family patterns which were shared by slaves in disparate geographical regions as evidence that the slaves built their own world.[7] In particular, naming practices have been noted to illuminate the significance slaves attributed to kinship relations.[8]

The conduct of newly freed slaves in renewing their marriage vows and seeking out family members separated during slavery,[9] also attests to an enduring commitment to family relations. Fur-

4. A sociological and historical comparison of Black and white family life is beyond the scope of this article. The rich literature on the subject includes Andrew Billingslea, Black Families in White America (1968); The Negro American Family (W.E.B. DuBois ed. 1970); E. Franklin Frazier, The Negro Family in the United States (1939); Jacqueline Jones, Labor of Love, Labor of Sorrow; Black Women, Work, and the Family from Slavery to the Present (1985); Joyce Ladner, Tomorrow's Tomorrow: The Black Woman (1971); Carol Stack, All Our Kin: Strategies for Survival in a Black Community (1975); and The Family Life of Black People (Charles Willie ed. 1970).

5. In the section on the legal governance of slave family relationships, this article is not comprehensive, but rather is a selective survey of illustrative cases. Moreover, this discussion focuses primarily on case law, rather than on legislation. It was ordinarily the southern courts which were called upon to explain why the slave could be denied in civil law what he or she was accorded by natural law.

6. *See, e.g.*, Blassingame, *supra* note 1; Eugene Genovese, Roll, Jordan, Roll: The World the Slaves Made (1976); and Herbert Gutman, The Black Family in Slavery and Freedom, 1750-1925 (1976).

7. Historian Eugene Genovese believed this concept to be so fundamental that he incorporated it into the title of his book. Genovese, *supra* note 6.

8. Gutman illustrates the efforts of slaves to communicate and institutionalize kinship relations by, for example, naming children after parents, grandparents, aunts and uncles. Gutman, *supra* note 6, at 93-95, 118-29.

9. Gutman draws a heart-rending picture of the ex-slave's heroic efforts to secure family bonds. *Id.* at 363.

thermore, strong familial ties are said to have inspired escapes from slavery and other forms of resistance.[10]

This new evidence of slave resilience and initiative in the face of degradation has resulted in an important reassessment of the character of the slave family. It establishes that the family served as shield and sword,[11] a critical institution in the well-documented culture of slave resistance.[12] In the slave quarters, there existed a distinct moral system which evolved from the slave's African cultural inheritance as well as from the influence of Christianity and the majority Western culture.[13] While slaves surely feared the master's power and adapted their behavior accordingly, their ethical beliefs, as reflected by their behavior in the quarters, were not wholly shaped by their inferior legal status. Put another way, while the law viewed the slave as immoral, slaves had their own moral vision and standards, which did not yield before the judgment of the master class or the courts.

The thrust of this fresh perspective, however, is not intended to dwarf the awesome impact of the master's manipulative hand on slave marriage and family life. True, out of physical and emotional deprivation and torment the slaves made a space for themselves and their kin, but it was a space on the master's terrain.

A. The Slave as Member of the Plantation Family

In the mid-nineteenth century, with increasing pride in their peculiar institution, southerners came to employ the description

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10. Advertisements for runaway slaves poignantly attest to the family connection as a motivation. *Id.* at 264-65. This advertisement appeared in the Raleigh Register on February 20, 1818:

> "FIFTY DOLLARS REWARD. Ran Away from the subscriber, living in Franklin County, North-Carolina on the 12th of January, 1817, a Negro Man named Randol about 26 or 27 years of age. . . . His wife belongs to a Mr. Henry Bridges, formerly of this county, who started with her about the 14th instant, to South-Carolina, Georgia or Tennessee. It is supposed he will attempt to follow her."

Bobby Jones, A Cultural Middle Passage: Slave Marriage and Family in the Ante-Bellum South 204 n.135 (unpublished Ph.D. dissertation, University of North Carolina)(quoting Raleigh Reg., Feb. 20, 1818). Genovese refers to studies showing that "thousands of slaves ran away to find children, parents, wives, or husbands . . . ." Genovese, *supra* note 6, at 451. *But cf. infra* text accompanying note 56.

11. As to the role of women in cultivating resistance in the slave community, see Angela Davis, *Reflections on the Black Woman's Role in the Community of Slaves*, 3 Black Scholar 3 (Dec. 1971).

12. For a recent assessment of the centrality of resistance to the American slave experience, see In Resistance: Studies in African, Caribbean, and Afro-American History 133-42, 143-65 (Gary Okihiro ed. 1986).

13. For a discussion of the influences shaping the slave's moral values, see Genovese, *supra* note 6, at 161-255.

"domestic slavery."[14] Initially, the term was coined to distinguish "political slavery" (the relationship between the colonists and England) and "civil slavery" (suffered by free Blacks denied civil rights) from the perpetual nature of African slavery in the South.[15]

The term signified more than merely the lowest level of political and civil deprivation. By "domestic," slaveholders and their apologists meant to imply two dimensions of slavery. First, in their estimation, the slavery of their day had been tamed, or domesticated. They boasted that conditions of life and work for the slave were far milder than had been the case in earlier generations. Second, by "domestic," these observers meant that slavery had placed master and slave within the same domestic sphere. Each lived more or less in close proximity. The nature of the domestic domain of the slave was determined by the master, and the slave's fate was buffeted by both the economic and the domestic fortunes of the master. It is this second point that is addressed here.

Often referring to all of the inhabitants of the plantation as "my people," the master considered it his reign and responsibility to govern the social and work lives of his slaves as well as that of his nuclear family. The image cultivated was that of the beneficent patriarch,[16] master of both his slaves and his own household. One North Carolina slaveholder expressed in his will this view of the extended plantation family: " 'I lend the whole of my property . . . to my beloved wife . . . for the purpose of raising, clothing and educating my children, and also raising the young negroes that are, or may hereafter, be born in my family.' "[17]

There were three social configurations over which the slaveholder exercised primary control.[18] The entire plantation com-

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14. Reference to the term is found in the case law. *See, e.g.*, State v. Mann, 13 N.C. (2 Dev.) 263 (1829), "[the master-slave relation has been compared] to the other domestic relations . . . [such as] the parent over the child . . . ." *Id.* at 265.

15. Willie Lee Rose, Slavery and Freedom 20-21 (1982) (citing a 1794 essay by the Virginia jurist, St. George Tucker).

16. William Byrd, a Virginia planter, wrote in 1726, in a letter to the Earl of Orrery:

> "I have a large Family of my own," he wrote. "Like one of the Patriarchs, I have my Flocks and my Herds, my Bonds-men [sic] and Bond-women." He had to "take care to keep all my people to their Duty, to set all the springs in motion, and to make everyone draw his equal share to carry the Machine forward."

Quoted in id. at 21.

17. Spruill v. Spruill, 6 N.C. (2 Mur.) 175, 176 (1812).

18. "As master, the slaveholder presided over not one, but three interlocking domesticities - his blood family, the slave families, and the larger family of the plantation community." Rose, *supra* note 15, at 28.

prised a social and economic unit. Within the "big house," both master and mistress maintained their spheres of operation, and each ruled the household slaves. Yet, it was the master who held the ultimate right to control his wife,[19] any property she brought into the marriage,[20] and the couple's children. In the quarters, slave husbands exercised circumscribed authority over their wives and children, but the right to control the shape and integrity of the slave family rested with the master.

This "one big happy family" image celebrated by slavery's adherents portrayed social and economic relationships on the plantation, among slaves and freemen alike, as organically interconnecting ones. This portrayal echoed the idealized nineteenth century view of the family as a refuge and safe haven, where flourished man's purest and most selfless instincts. The southern environment was much acclaimed as a natural setting for the family, and it became a tableau upon which images depicting pastoral simplicity and the wholesome virtues of rural life were painted. According to the ideal, the arms of the extended plantation family shielded the white mistress and her children as it did the Black slave and her children.[21]

This "plantation as extended family" rubric also provided

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19. One case, reflecting the onerous nature of mid-nineteenth century divorce law as well as the precarious positions of both the slaveholder's wife and his slaves, denied a divorce based on "indignities" to a woman. The woman charged, among other matters, that her husband had shot a valuable slave belonging to her children, and had whipped two other slaves near her sickroom window, thereby worsening her illness because of the slaves' shrieks and moans. The court denied her petition:

> So far as appears from the petition, he may have had good cause for inflicting punishment upon the slaves, and the only error he committed was in using an improper instrument [a gun] with which to punish the first, and to have selected an improper time and place for chastising the others.

Everton v. Everton, 50 N.C. (5 Jones) 202, 212 (1857).

20. The husband held the right to manage and control his wife's slaves, and to the profits from their labor. The first Married Women's Property Acts enacted in the southern states were in part designed to protect the wife's slave property from the husband's creditors. *See* Linda Speth, *The Married Women's Property Acts, 1839-1865: Reform, Reaction, or Revolution?*, in 2 Women and the Law 72-73 (D.K. Weisberg ed. 1982).

21. Thomas Cobb, a legal commentator of the period, placed the slave squarely within the "familia":

> As a social relation, negro slavery has its benefits and its evils. That the slave is incorporated into and becomes a part of the family, that a tie is thus formed between the master and slave, . . . that the old and infirm are thus cared for, and the young protected and reared, are indisputable facts. Interest joins with affection in promoting this unity of feeling. To the negro, it insures food, fuel, and clothing, medical attendance, and in most cases religious instruction. . . . [T]he institution prevents the separation of families, to an extent unknown among the

multiple layers of moral defenses for the slaveholder, defenses which were much needed as the anti-slavery forces increased in number and strength. The family was deemed to be the spiritual and moral hub of the society; it was a morally superior place.

Slavery's advocates argued that the plantation-extended family was the best suited institution to transmit moral imperatives to an otherwise heathen population of African slaves. The family constellation—man, woman, and children—and the superior position of the husband in the family was believed to be commanded by both nature[22] and God.[23] Similarly, the subjugation of slaves to the will of the master, head of the plantation-extended family, was deemed natural and divinely ordained.[24] Sanctified and sacred relations characterized the plantation-extended family, both within the planter's blood family and between him and his slaves. As one South Carolina court stated, "unless there be something very perverse in the disposition of the master or the slave, in every in-

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> laboring poor of the world. It provides him with a protector, whose interest and feeling combine in demanding such protection.
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> To the master, it gives a servant whose interests are identical with his own, who has indeed no other interest, except the gratification of a few animal passions . . . .
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> In short, the Southern slavery is a patriarchal, social system. The master is the head of his family. Next to wife and children, he cares for his slaves. He avenges their injuries, protects their persons, provides for their wants, and guides their labors. In return, he is revered and held as protector and master.

Thomas Cobb, An Inquiry Into The Law Of Negro Slavery In The United States of America at ccxvii-ccxviii (1858).

In one case where equitable relief was sought to prevent the sale of related slaves, the court intervened on the ground that "slaves constitute a part of the family, entitled to, and receiving, if they be worthy, the affections of the master . . . ." Loftin v. Espy, 12 Tenn. (4 Yer.) 84, 92 (1833).

22. The common law echoed Blackstone's description of nature as "guided by unerring rules laid down by the great Creator." 1 William Blackstone, Commentaries *39.

23. Justice Bradley's famous concurrence in Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872) is illustrative. The issue presented was whether the plaintiff, Myra Bradwell, could be denied admission to the Illinois bar on account of her sex.

> [T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.

Id. at 141.

24. *Cf.* State v. Mann, 13 N.C. (2 Dev.) 263 (1829), which maintained that "[t]he slave, to remain a slave, must be made sensible, that there is no appeal from his master; that his power is in no instance, usurped; but is conferred by the laws of man at least, if not by the law of God." *Id.* at 267.

stance where a slave has been reared in a family there exists a mutual attachment. . . . The tie of master and slave is one of the most intimate relations of society."[25]

Slaves were the moral inferiors of white men. White women were white men's moral superiors, but their physical and intellectual inferiors.[26] Therefore, both slaves and white women, whether morally weak or physically fragile, required the protection of the master, which was best provided in the context of the plantation-extended family.[27]

Moreover, slavocracy's claim that the plantation provided the slave with a family experience was the answer to those who charged that the trade was the very antithesis of family.[28] Slavocracy's proponents argued that while the law granted no family rights to slaves, the property relationship between slave and master incorporated a family relationship. The civil laws of marriage and child legitimation did not apply to the slave, but nature's laws grouping men, women, and children in family formation were nevertheless abided because the slave *had* a family—the owner's.

B. The Slave's Marital Experience

Typically, slaves chose their own marital partners,[29] perhaps

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25. Sarter v. Gordon, 11 S.C. Eq. (2 Hill Eq.) 121, 135 (1835).

26. The racial and sexual divisions of slavery's moral hierarchy are brilliantly described in a literary criticism of Harriet Beecher Stowe's *Uncle Tom's Cabin*. *See* Amy Schrager Lang, Prophetic Woman: Anne Hutchinson and The Problem of Dissent in The Literature of New England 193-214 (1987).

27. Gunnar Myrdal, in his classic text, *An American Dilemma: The Negro Problem and Modern Democracy*, cites a particularly revealing passage from a 19th century sociologist on the subject of wives and slaves:

> "A beautiful example and illustration . . . is found in the instance of the Patriarch Abraham. His wives and his children, his men servants and his maid servants, his camels and his cattle, were all equally his property . . . . Who would not desire to have been a slave of that old Patriarch, stern and despotic as he was? . . . Pride, affection, self-interest, moved Abraham to protect, love and take care of his slaves. The same motives operate on all masters, and secure comfort, competency and protection to the slave. A man's wife and children are his slaves, and do they not enjoy, in common with himself, his property?"

II Gunnar Myrdal, An American Dilemma: The Negro Problem and Modern Democracy 1073-74 (1944)(quoting George Fitzhugh, Sociology for the South 297 (1854)).

28. The deleterious and immoral effect of slavery on the family was a key plank in the abolitionists' political rhetoric. *See, e.g.*, George Bourne, Slavery Illustrated In Its Effects Upon Woman and Domestic Society (reprinted 1972) (Boston 1837).

29. Speaking more strictly, it was the male slave who chose the female. If he wished the union, and the master approved, little regard was paid to the desires of the woman. "De massa say, 'Jim and Nancy, you go live together,' and when dat order give, it better be done. Dey thinks nothin' on de plantation 'bout de feelin's of de women and dere ain't no 'spect for dem." Slave Narratives, XVI, Part 3, 191.

with their parents' approval.[30] Slave-owners, however, also forced unions.[31] Even when the partners self-selected, they could not be married until the master gave his consent.[32] When, as frequently happened, the partners lived on different plantations, each master had to grant consent.[33] In these cases, called "broad-marriages,"[34] the family was united only on weekends and holidays when the husband traveled to the wife's plantation.[35]

The marriage ceremony itself was performed by the master,

Slaveholders sometimes even asked their male slaves if there was someone at the auction block they might like for a wife, with no concern for other ties or interests the woman might have. Jones, *supra* note 10, at 83-84 (1965) (citing Slave Narratives, II, Part 4, 39; II, Part 5, 181).

30. See Genovese, *supra* note 6, at 464, on parental supervision of courtship and marriage.

31. In 1848, after a visit to his Alabama estate, a planter named John Hartwell Cocke, made this entry in his private diary:

> "A few days looking into the state of my plantation . . . disclosed a shocking state of moral depravity. . . . Two of my Foreman's Daughters had bastard white children. A state of almost indiscriminate sexual intercourse among them—not a marriage since I was last there—3 years ago. . . .
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> I now commanded, that which I had formerly requested and advised—'that they should be married forthwith or be punished and sold'—they chose the first alternative. I allowed one week for them to make matches among themselves—but what was not agreed upon, at the expiration of that time—I should finish by my own authority—until every single man and woman were disposed of and united in marriage."

Quoted in Rose, *supra* note 15, at 18-19.

32. One scholar cites the prosecution of a Virginia slave who murdered her mistress in 1827 because she had been denied the right to marry the man of her choice. Flanigan, *supra* note 1, at 54. In another case, a free Black man who failed to clearly establish that he had obtained his wife's master's consent, as required by statute, was prosecuted for marrying a slave woman. State v. Roland, 28 N.C. (6 Ired.) 241 (1846).

33. This required consent made it difficult for some slaves to marry. As noted one slave:

> "I . . . had a hell of a time gittin' a wife durin' slavery. If you didn't see one on de place to suit you and chances was you didn't suit them, why what could you do? Couldn't spring up, grab a mule and ride to de next plantation widout a written pass. S'pose you gits your marster's consent to go? Look here, de gal's marster got to consent, de gal got to consent. It was a hell of a way!"

Slave Narratives, XIV, Part 3, 167-68.

34. Many planters discouraged "broad-marriages" because the owner of the husband lost his claim to his male slave's progeny. Where the plantation population of men and women was disproportionate, however, the slave master had little choice in the matter. Writing in a planters' journal, one Georgia owner complained, " 'it is a source of deep regret to me, that I am not able to furnish a husband for every woman I have.' " Jones, *supra* note 10, at 82 (quoting "Foby," *Management of Servants*, in XI The Southern Cultivator 227 (Aug. 1853)).

35. Flanigan also describes an 1827 prosecution of a couple charged with conspiring to poison the wife's master because he would not permit them to visit one another. Flanigan, *supra* note 1, at 54.

or officiated by a Black preacher,[36] or, sometimes, a white one.[37] The Christian ceremony[38] mimicked that afforded whites,[39] except with respect to the promise of permanence.[40] It was also a practice for couples to set up housekeeping with the master's consent, but without a ceremony.[41]

C. *Procreative and Sexual Control of Slave Women*

The slaveholder had two principal interests in promoting slave unions, both of which were tied to the plantation economy. First, he was in the business of producing crops *and* of reproducing capital in the form of slaves.[42] Second, family ties were be-

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36. "In 1856 the plaintiff . . . a slave, . . . and Eliza Elder, a slave, were married; the marriage rites were solemnized by Fred. Martin, a colored preacher; it was by and with the consent of the owners of the slaves." McReynolds v. State, 45 Tenn. (5 Cold.) 18, 19 (1867).

37. In cases where an ordained minister performed the ceremony, the church would generally refuse to permit a second marriage if the former spouse was alive, even if the first marriage was disrupted by the parties' involuntary separation. Jones, *supra* note 10, at 95-96 (citing William Alexander Hoke Collection, XIX, Southern Historical Collection, University of North Carolina).

38. The role of the southern church in slave marriage reflected the contradictions of the day. Some congregations held that slaves who were involuntarily parted did not commit a sin when they remarried. Some even chastised and ruled out of order white members who separated their slaves. Jones, *supra* note 10, at 157-58. Equally as often, however, the church took the harsh position that the slave partners could not remarry even after the loss of a spouse through sale. For example, the Broad River Baptist Association of North Carolina, in 1820, advised its member churches as follows: " 'How shall a church proceed with a member in slavery whose companion was taken away out of the country and sold, and the member left has married another?' Answer, 'Agreeably to the Scriptures, the church could not hold such an one in fellowship.' " Blassingame, *supra* note 1, at 171.

39. Much has been made, however, of the "broomstick" ritual, wherein, as part of the ceremony, the couple sealed their vows by jumping over a broomstick. The origins and meaning of this custom are unclear. *See* Gutman, *supra* note 6, at 282-83; We Are Your Sisters: Black Women in the Nineteenth Century 35-36 (Dorothy Sterling ed. 1984).

40. Slaves knew that their nuptial rituals were different from those sanctioned by law. A Black man, testifying in a case where the issue concerned the legality of a 60 year marriage, said that the parties had been married " 'like other darkeys did in those days;' " and that, although they were slaves when they married, they were " 'regarded as man and wife all the time by their neighbors.' " Andrews v. Page, 50 Tenn. (3 Heisk.) 653, 657 (1871). Another ex-slave, called as a witness in a case raising a similar issue in Canada, testified: " 'I brought my wife from Virginia; she was a free woman, I was a slave; I married her again in New York, to make the former marriage valid; I was bound by Heaven by the first marriage, but not by the law of the land.' " Harris v. Cooper, 31 U.C.Q.B.R. 182, 184 (Can. 1871).

41. We Are Your Sisters: Black Women in the Nineteenth Century, *supra* note 39, at 35.

42. "[T]he scantiness of net profit from slave labour has become proverbial, and . . . nothing is more common than an actual loss, or a benefit merely in the slow increase of capital from propagation." Peter v. Hargrove, 46 Va. (5 Gratt.) 12, 19 (1848).

lieved to promote slave stability and docility.[43]

The economic value of the master's slave holdings depended in part on the proven reproductive capacities of his bondwomen. As her "increase" was his property,[44] the female slave was priced for both her labor-producing and reproducing ability.[45] Fertile women brought a higher price on the market,[46] but sterile women were often sold.[47] One master, in his will, proffered freedom as the incentive for a high yield: "If Jeany brings ten live children . . . she shall be at her . . . liberty . . . ."[48]

Since economic interest was found in both her productive and

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43. "Such marriages are permitted and encouraged by owners, as well in consideration of the happiness of the slaves and their children, as because, in many ways, their interests, as masters, is thereby promoted." Howard v. Howard, 51 N.C. (6 Jones) 235, 237 (1858).

44. "When a female slave is given [by devise] to one, and her future increase to another, such disposition is valid, because it is permitted to a man to exercise control over the increase . . . of his property . . . ." Fulton v. Shaw, 25 Va. (4 Rand.) 597, 599 (1827).

45. Sterility of a slave believed by the purchaser to be fertile could afford him grounds upon which to rescind the sale. In one case, the buyer of a female slave sought judicial relief because he discovered "that her legs were ulcerated . . . and owing to a malformation of the pelvis [she was] incapable of bearing children without endangering her life, in consequence of which she was of little or no value." Hooper v. Chism, 13 Ark. 496, 497 (1853). In fact, there is a preoccupation in cases seeking to rescind contracts for slaves on account of "unsoundness", with the gynecological disorders of females. *See, e.g.*, Hooper v. Chism, 13 Ark. 496 (1853); Williams v. Miller, 21 Ark. 469 (1860); Marr v. Hill, 10 Mo. 320 (1847); Cobb v. Fogalman, 23 N.C. (1 Ired.) 440 (1841); Gerkins v. Williams, 48 N.C. (3 Jones) 11 (1855); Crabtree v. Cheatham, 10 Tenn. (2 Yer.) 138 (1826); Shenault v. Eaton, 12 Tenn. (4 Yer.) 98 (1833); Walton v. Cottingham, 30 Tex. 772 (1868).

46. *See, e.g.*, White v. Martin, 1 Port. 215 (Ala. 1834): "[A] jury would place a higher value on a female slave promising issue, than on one of a contrary description; if she has proved the issue, between the conversion and the trial, she has furnished the best evidence of that quality." *Id.* at 221. In another case, the slaveholding parties—a widow and her female children—sought to exchange a boy slave for a young woman or a woman and child, but were unable to make an even exchange, because of the greater cost of females of childbearing age. Wynne v. Warren, 49 Tenn. (2 Heisk.) 118 (1870).

47. "Melinda was a runaway, in chains, when he bought her, and . . . he soon sold her; she was barren." Adams v. Jones, 39 Ga. 479, 488 (1869).

48. Fairclaim v. Guthrie, 5 Va. (1 Call) 5, 7 (1797). A latter-day Jeany sued and won her freedom in accordance with a promise made to her by her master: "B. Talbert, when he purchased the woman Jenny, made her a promise that when she should have a child for every one of his, (he then having five) he would set her free." Talbert v. Jenny, 27 Va. (6 Rand.) 159, 159 (1828). In an unusual case, freedom was promised to another woman only on the condition that she *did not* bear children: "Kerlin doth covenant . . . that if the said Grace shall serve him ten years without having children, then at the end of the said ten years to offer her her freedom . . . ." State v. Mount, 1 Coxe 292 (N.J. 1795), *noted in* IV Judicial Cases Concerning American Slavery and the Negro, *supra* note 1, at 325. In yet another case, an owner devised the unborn "progeny of [his female slave] Beck, whom he knew to be a *young breeding* woman . . . ." Ellison v. Woody, 20 Va. (6 Munf.) 368, 371 (1819). The court found this was his "means of providing for his . . . children." *Id.*

reproductive labor, the slaveholder asserted rights of ownership over his female slaves' sexuality. The slave woman was deemed sexual property not just as an instrument of reproduction, but along the full range of her sexuality. She was owned as both a procreative and a sexual object. Thus, she was available to be raped and sexually abused with impunity by the slaveholder, his sons, the overseer,[49] or any other white man.[50] And here, racist and sexist ideology combined to justify the wrong.

For its procreative potential, the bondwoman's union in marriage was promoted,[51] and sometimes demanded,[52] by the master. If she was separated from her husband, or widowed, the master could require her to take another husband.[53] On the slave block,

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49. *See, e.g.*, Alfred v. State, 37 Miss. 296 (1859), in which the court refused to permit the defendant-slave's wife to testify as to the overseer's rape of her, which led to the overseer's death at her husband's hand.

50. As noted one author:

> The slave girl is reared in an atmosphere of licentiousness and fear. . . . When she is fourteen or fifteen, her owner, or his sons, or the overseer, or perhaps all of them, begin to bribe her with presents. If these fail to accomplish their purpose, she is whipped or starved into submission to their will. . . . [R]esistance is hopeless.

Harriet Jacobs, Incidents in the Life of a Slave Girl 51 (Jean Fagan Yellin rev. ed. 1987)(L. Maria Child ed. 1861).

She was also fair game for Black men, but a code of slave morality which took a harsh view of adultery did protect the married woman to some extent from sexual abuse by male slaves.

But cf. Dozier v. Freeman, 47 Miss. 647 (1873). Sexual behavior was controlled in other ways as well. Although high birth rates were encouraged, in *Dozier* a slave was sold because, among other things, she was "bad after men." Independent female sexuality was penalized. *Id.* at 649.

51. Some masters arranged their slaves' marriages:

> "Marsa used to sometime pick our wive fo' us. If he didn't have on his place enough women for the men, he would wait on de side of de road till a big wagon loded with slaves come by. . . . Wasn't no use tryin to pick one, cause Marsa wasn't gonna pay but so much for her. All he wanted was a young healthy one who looked like she could have children, whether she was purty or ugly as sin."

Jones, *supra* note 10, at 84 n.70 (quoting Workers of the Writers' Program of the Work Projects Administration in the State of Virginia, The Negro in Virginia (1940); and Ulrich Bonnell Phillips, Life and Labor in the Old South 278 (1930)).

Others took a more *laissez-faire* approach: "Mr. Hayward does not interfere with his slaves in any way further than is necessary for the good of his own interest. They may have two or three wives apiece so long as they do not quarrel about them, but if they quarrel, he interferes." Basil Hall, The Aristocratic Journey: Being the Outspoken Letters of Mrs. Basil Hall Written during a Fourteen Months' Sojourn in America 1827-1828, at 223 (1931).

52. Girls were forced to marry at a young age, often before they knew anything about sexual relations. We Are Your Sisters: Black Women in the Nineteenth Century, *supra* note 39, at 33.

53. "Old massa go buy a cullud man name Uncle Charley Fenner. . . . Massa brung him to de quarters and say, 'Renne, here you husband,' and den he turn to Uncle and say, 'Charley, dis you woman.' Den dey consider marry . . . . Uncle Charley, he good step-pa to us." Slave Narratives, XVI, Part 1, 137-38.

she was sometimes randomly coupled with a male slave so as to "play on the sentiments of prospective buyers who would purchase a pair rather than separate them."[54] In some cases, she was explicitly worked as a breeder.[55]58

The master also employed socio-sexual control in the quarters in order to contain resistance and enhance his power. Due to the female slave's status as the master's lifetime captive, family ties placed her in a cruel double-bind: the slave's yearning for freedom was whetted by her love for her family, and in particular, for her children, whom, above all, she wished to see delivered from the tyranny she had known. But, it was that very love, the desperate desire to be *with* her family, that also tied her down. Family life at once emboldened and dampened the slave's quest for freedom.[56]

This dynamic was appreciated by the slavemaster, who saw the family as an important support for the slave system.[57] Marriage was considered to have a quieting effect on restive slaves.[58] Men were "given" wives in order to keep them sexually satisfied.

The interior family life of the slave was also subject to governance and interference by the master. He could foment dissent, encourage reconciliation, or simply specify the allocation of domes-

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54. Jones, *supra* note 10, at 85 (citing II Joseph Ingraham, The Southwest by a Yankee 195, 197 (1835); I James Paulding, Letters from the South, Written During an Excursion in the Summer of 1816, at 123 (1817)).

55. No study has definitively shown how widespread slave breeding was, but it is clear fertile women brought higher prices and were rewarded for childbirth:

> The majority of planters utilized the carrot rather than the stick to increase their stock. A "good breeder" was given a pig, a calico dress, or better rations. One planter ruled that "women with six children alive are allowed Saturday to themselves"; another promised his house servant her freedom after she bore five children . . . .

Quoted in We Are Your Sisters: Black Women in the Nineteenth Century, *supra* note 39, at 32.

In addition, "[o]ccasionally, slaveholders deliberately assigned slave men to live and work as studs." Genovese, *supra* note 6, at 462. One slave did report, "I been marry once 'fore freedom, with home weddin'. Massa, he bring some more women to see me. He wouldn't let me have jus' one woman. I have 'bout fifteen and I don't know how many chillen." Slave Narratives, IV, Part 1, 299.

56. For a discussion of the manner in which family ties limited the female slave's desire and opportunity to escape, see Deborah White, Ar'n't I a Woman?: Female Slaves in the Plantation South 70-75 (1985).

57. In the 1750s, a Dutch slaveholder wrote from Louisiana that: " 'It is necessary that the Negroes have wives, and you ought to know that nothing attaches them so much to a plantation as children.' " *Quoted in* Genovese, *supra* note 6, at 452.

58. "Slaves constituting a family would probably labor more cheerfully and harmoniously together, and, by consequence, would be more useful than those not so related." Bertrand v. Arcueil, 4 La. Ann. 430, 431 (1849).

tic responsibilities.[59] In regard to the master or his designees, slaves had no right to personal privacy in their quarters; and had only a derivative privacy right vis a vis other persons. The developing law of personal privacy held that "[t]he house of the slave is the house of his owner; and the fact that it is used by the former as his dwelling does not change its character . . . ."[60]

Even if the master paid no attention to home life in the quarters, slaves fully realized that he could intervene at any time. The master played a role in the termination,[61] as well as the initiation of marriage. As he saw fit, he would permit or deny mismatched couples to divorce and remarry. He, himself, sometimes brought about a separation which he determined to be in the best interest of the couple.[62] It was argued by one contemporary legal scholar that the slave owner had to have the power to separate couples, for

> to fasten upon a master of a female slave, a vicious, corrupting negro, sowing discord, and dissatisfaction among all his slaves; or else a thief, or a cut-throat, and to provide no relief against such a nuisance, would be to make the holding of slaves a curse to the master.[63]

Slave couples sometimes violently resisted the actions of a master who sought to keep them apart. A Tennessee court upheld a death sentence imposed upon a slave for a "cruel murder, inflicted on a feeble old man, who had always been kind to [him], and for no other reason than that [the old man] would not consent that [he] should gratify the unlawful desire, to abandon [his] wife and take another."[64]

The master's primary weapon of discipline and social control

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59. Some owners were quite specific in establishing rules for the slave family. For example, a Mississippi plantation owner prescribed the following:

> Each family to live in their own house. The husbands to provide fire wood and see that they are all provided for and wait on his wife. The wife to cook and wash for the husband and her children and attend to the mending of clothes. Failure on either part when proven shall and must be corrected by words first but if not reformed to be corrected by the whip.

Bell Hooks, Ain't I A Woman: Black Women and Feminism 44-45 (1981).

60. Thompson v. State, 25 Ala. 41, 46 (1854).

61. Divorce was often the inevitable result of compelled marriages, or those entered without the full consent of both parties. On slave marital separation and divorce, see generally Genovese, *supra* note 6, at 465; White, *supra* note 56, at 156-58.

62. In one such case, the master sold off a wife who had, in a fit of jealousy, attacked her husband with an axe. Even though she was thus physically removed by this sale, the woman continued to claim the man was her husband and threatened to bring harm to anyone who took up with him. He did not remarry. II Harriet Martineau, Society in America 333-34 (1966).

63. Cobb, *supra* note 21, at 246.

64. Gilbert v. State, 26 Tenn. (7 Hum.) 524, 531 (1847).

was, of course, the threat of separation, which hung like a dark cloud over every slave couple and family.[65] That a commitment to marriage and family life endured despite this emotional devastation is one of the small miracles of Afro-American culture. Although it was surely one of the worst features of slavery, the courts often turned a blind eye to the cruelty of family separation. In one such case, the sale of an entire family consisting of parents and ten children in "one lot" was challenged by the heirs of an Alabama estate, since family groups sold for less than individuals. The court noted that "although it would doubtless be proper to sell husband and wife, or parent and small children together, it could not be tolerated that twelve slaves, most of whom were grown, should be sold in one lot . . . ."[66]

The nature of the economic relationships was such that the slave marital bond was exposed even when the master himself eschewed family separation. As property, the slave could be seized at any moment and sold to pay off a living owner's debts, or be transferred following the owner's death during the settlement of his estate.[67] A kindly master was no assurance of family

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65. The number of slave marriages which were ended by force or sale has been approximated to be one in every six or seven. Gutman, *supra* note 6, at 318. Through the use of quantitative measurements, Robert Fogel and Stanley Engerman concluded that nine percent of marriages were destroyed through sales. Robert Fogel & Stanley Engerman, 2 Time on the Cross: The Economics of American Negro Slavery 116 (1974). Another scholar, a critic of Fogel and Engerman, more closely touched the heart of the matter in his analysis of the *risk* of sale. He and Gutman estimated that, on the average, a slave would experience the sale of 11.4 members of his family of origin and his own immediate family. Herbert Gutman & Richard Sutch, *The Slave Family: Protected Agent of Capitalist Masters or Victim of the Slave Trade?*, in Reckoning with Slavery: A Critical Study in the Quantitative History of American Negro Slavery 94, 111 (1976). As a calamity which could at any time disrupt the family, the threat of sale was in some ways as potent a weapon of social control as the actual event.

66. McLane v. Spence, 6 Ala. 894, 897 (1844). *But see* Lawrence v. Speed, 5 Ky. (1 Bibb) 401 (1811) where it was held that:

> [I]t is the duty of the sheriff [generally] to sell separately property which is divisible in its nature . . . . But [in] the present case . . . [t]he mother and child were indeed physically divisible, but morally they were not so; and the sheriff in selling them together certainly acted in conformity to the dictates of humanity . . . .

Id. at 404.

67. One North Carolina slaveholder charged with disposing of an estate consisting of a large slave family wrote another as to his intentions:

> "I shall advertise to sell them separately, and then all together; with right reserved in myself to choose which set of bidders shall be the purchaser. I shall so advertise because in the first place the law will require that they be sold separately, and in the next place because I wish to sell them all to one person so as not to separate Mother &

security.[68]

D. *The Slave Parenting Experience*

The threat of sale and separation that so pained romantic ties was an equally awful tool of terror for the slave mother and father.[69] The slave father was considered all but irrelevant. He was expected to procreate, but he had neither a moral nor a legal right to parent. As succinctly expressed by a Kentucky court, "the father of a slave is unknown to our law . . . ."[70] While the slave mother performed a critical reproductive function, as a parent, she too, was unknown to the law. The law treated the birth of a slave child not as a social, but as a commercial event.[71]

Typically, slave children lived their early years with one or both of their parents in the quarters.[72] About four weeks after birth, the mother was sent back to work in the fields or the big house. The mother was allowed to nurse her baby, who might be under the care of an elderly plantation nurse. As soon as the child

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children; hoping that some person . . . will give one dollar more for the whole than the aggregate amount of the separate sales.

The negroes are as follows-:

1 Hannah the mother aged about 36 to 40
2 Wilson a boy aged about 10 to 11
3 John a boy aged about 8 to 9
4 A girl aged 5 to 6
5 A girl aged 3 to 4
6 A girl aged 1 to 2

These negroes are healthy. Here are 5 of 11 children the woman has had; the other 6 having been sold; not one of whom . . . is dead. They are also on the side of father and mother of excellent temper and character. The woman has had but one husband; he but the one wife; they have always lived peaceably together, and were never separated until Decm. 1840."

Jones, *supra* note 10, at 191-92 (quoting letter from Thomas Turner to Ebenezer Pettigrew (Nov. 20, 1841), *reprinted in* Pettigrew Family Papers, Southern Historical Collection, University of North Carolina).

68. The will of one owner specifically provided for the break-up of his slave families in order to meet his debts. In Turner v. Timberlake, 53 Mo. 371 (1873), the owner wrote as follows: "[i]t is my will that . . . all my just debts be fully paid, and for that purpose I desire my wife to sell . . . forty-five acres . . . together with my black woman Hannah and her children, except her son Alexander and daughter Adeline . . . ." *Id.* at 375.

69. Louisiana passed legislation prohibiting the separation of mothers and their infant children. Louisiana law provided that no child under the age of 10 could be sold away from its mother nor the mother from her child. *See* Kellar v. Fink, 3 La. Ann. 17 (1848); and Childers v. Johnson, 6 La. Ann. 633 (1850), both referring to Territorial Legislation of 1806 and *cited in* Judicial Cases Concerning American Slavery and the Negro, *supra* note 1, at 587, 604.

70. Frazier v. Spear, 5 Ky. (2 Bibb) 385, 386 (1811).

71. *See* Cooper v. Purvis, 46 N.C. (1 Jones) 141 (1853).

72. On the subject of the lives of slave children, see Blassingame, *supra* note 1, at 183-85; Genovese, *supra* note 6, at 502-19.

was able, usually around five or six, the child would be put to work. On the larger plantations the initial tasks were with the "trash gang," composed of youngsters who tended the grounds, fetched water, and the like. As a young girl matured, she would be assigned tasks requiring ever greater strength and skill until she could take her place as a full hand in the fields or a servant in the main house. Anytime after age ten, the child was subject to being permanently separated from her family.[73] Eventually, sometimes as early as the mid-teen years, she would leave her parents' house, either to set up with a husband and children of her own, or to be hired out or sold. Motherhood sometimes came very early, as evidenced by one case concerning a dispute over the price paid for "a woman, aged 17 years, and her three female children—one of the age of six years; another, four; and the youngest, about one."[74]

After bringing her baby into the world, a slave mother had little control over her child's existence. Mother and father could and did exercise some discipline and provide guidance and all-important survival skills, but the child soon learned it was the master who really held the whip and the reins. He, or his overseer, prescribed the daily regimen. It was he, not the parent, who had the right to tell the child when to rise, how long to work, what to eat and wear, when and how to recreate, and when to go to bed. It was he who could as readily discipline the parent or the child. And, it was he who determined whether the child and parents would have any relationship beyond the biological one at all.[75]

In the eyes of the master and of the law, good childrearing was not essential; good slave-rearing was. As one traveler noted, slave children had "[n]o education—no God—their whole life—food and play, to strengthen their muscles and fit them for the work of a slave."[76] Although the system discouraged parents from forming strong bonds, the slave mother was nevertheless constantly accused of neglecting her children, and the father of brutality.[77] Indeed, slaves were cursed as both immoral and incompetent parents.

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73. Genovese reports that "[n]ot until the age of ten - usually twelve - did humane masters consider selling a child away from the mother, although a great many less humane masters sold children at any age." Genovese, *supra* note 6, at 502.

74. Ingram v. Smith, 41 N.C. (6 Ired. Eq.) 97, 97 (1849).

75. As to the significance the slaves themselves attached to motherhood, see White, *supra* note 56, at 108-10.

76. I William Russell, My Diary North and South 398 (1863).

77. One Virginia planter declared that he ran a nursery only because slave parents were incompetent. Jones, *supra* note 10, at 107 (quoting A Planter, *Notions on the Management of Negroes, &c.*, IV The Farmers' Register 495 (Dec. 1836)).

But, even though the institution squelched parental love, the literature is replete with material demonstrating deep parental devotion. One Louisiana case, in which the plaintiff sought return of the price paid for a slave, sets forth the story of a mother gone mad with grief at having been separated from her children:

> [After the sale and separation] she refused, from religious scruples, to eat or take medicines on Fridays . . . saying that God had appeared to her and forbidden it. This, and the fact of her having on one occasion burnt her clothes, . . . induced the belief . . . that the girl labored under an aberation [sic] of mind, which they ascribed to religious enthusiasm and grief at being separated from her children.[78]

Parents in name only, the slave mother and father could not shape their child's existence, nor could they exercise control over their child's fate—either immediate or long-term. Such control is the essential feature of the parenting relationship, marking the parent as different from other adults with whom the child might interact. But the slave child was the equal of the parent at birth. What slave parents did transmit was critical to the child's formative years, but the nature of the parenting relationship wholly depended upon the grace of another, in whose hands the child's future actually lay.

E. The Slave Family Experience: Conclusion

Plantation justice[79] placed the master in the position of priest, patroller, and arbiter of family relations in the quarters. He was the *ex officio* family law judge, however, he exercised even greater power than the courts, for unlike the civil judge, the slaveholder could grant or deny family rights at will. He matched, he married, and he divided, if he wished, at whim.

The law left the slaveholder to set the terms of all aspects of the slaves' social existence—how they were punished, clothed,[80] fed, cared for when sick,[81] and the like. But the cornerstone of the

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78. Buhler v. McHatton, 9 La. Ann. 192, 193 (1854).

79. For a general treatment of the exercise of quasi-legal authority by the slaveholder, see Michael Hindus, Prison and Plantation: Crime, Justice, and Authority in Massachusetts and South Carolina, 1767-1878 (1980).

80. In a ruling chastising a slaveholder who allowed his slaves to go around so "destitute of clothing, that their organs of generation . . . were publicly exposed," Britain v. State, 22 Tenn. (3 Hum.) 203, 203 (1842), one court revealed its presumption that slave sexual morality was the master's domain. "[I]f the defendant caused and permitted his slaves to go about the country in . . . a state of nakedness . . . he is guilty of lewdness, and ought to be punished . . . ." *Id.* at 204.

81. In reference to a requested jury instruction, an Alabama court in State v. Abram, 10 Ala. 928, 929 (1847) wrote that:

> The charge moved for, that if the prisoner was so sick as to be unable to work, he was not bound to obey the command, of the overseer to go

master's power was his reign over the slave family. This power was most effectively magnified by his right, sanctioned by law, to control conjugal and parenting rights, and to trample heedlessly over the vows of marital exclusivity and permanence and the parent-child bond. It was a power which rendered the source of the slave's greatest solace—his family—also his Achilles' heel.

The slave family created a tension for the master as well as the captive, since bonds of family loyalty simultaneously threatened and enhanced the master's power. The master wished for his slaves the passive contentment, but not the militant solidarity which family life could bring. In walking this thin line, the law was the slavemaster's guide, according him the power to coerce and control at the point of the slave's greatest vulnerability.

III. The Contradictions in Slave Law and Family Law

The southern courts had the difficult task of reconciling the contradictions between the slave family experience and the developing legal ideology as to the place of marriage and parenthood in human society.

The southern bench was only one of many contributing voices in a dialogue about the multifaceted moral contradictions slavery presented. It was a voice constrained by a legal tradition that sought to treat law and morality as reflections of each other. This was especially the case with respect to marriage and family, and therefore, the courts had to explain the seeming contradiction between slave law and family law.

Today, the law of the slave south is an essential source of the history of the ideas of that period about marriage, family and slavery. Nineteenth century case law and legislation serve as a mirror of prevailing opinion and practice of the time. Yet, the law often does not cast a literal reflection of experience. As one scholar of slave law put it: "[w]hile statutes usually speak falsely as to actual behavior, they afford probably the best single means of ascertaining what a society thinks behavior ought to be; they sweep up the felt necessities of the day and indirectly expound the social norms of the legislators."[82]

At best, the law of the period served as an aspirational instrument of the dominant class rather than an account of reality. The

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to work, is entirely untenable. As a necessary consequence of the condition of slavery, as it exists with us, the master, or the overseer representing him, and clothed with his authority, must be the judge of the capacity of the slave to labor.

Id. at 932-33.

82. Jordan, *supra* note 1, at 588.

case law can only provide evidence of how ruling class men viewed Black slaves. Slaves themselves had no access to the courts,[83] and therefore the law's rendering of slave family sentiment is necessarily incomplete. Further, it cannot lead us to reliable conclusions about the relative social status of women and men within the slave family itself.

Moreover, the common law method was not designed to faithfully document experience. In keeping with the praxis of the common law, slave law incrementally developed broad rules and categories, and strived for uniformity and judicial consensus. In this process, the multiplicity and complexity of the slave experience was washed over. The coarse legal conclusions necessarily masked the great variety of social conditions experienced by slaves. The plantation experience differed from the farm and town experience, as the early nineteenth century experience differed from that of the pre-civil war, and as conditions in Mississippi differed from those in Maryland. Finally, the cases themselves do not tell us much about whether, or how, legal rules actually affected the slave-master relationship.

These limitations set the contours within which to examine how nineteenth century southern jurists reconciled the ideal of marital sanctity and parental prerogatives with the law of slavery.

A. Conjugal Rights and Slave Law

There was one primary reason advanced to justify the denial of the right of civil marriage to slaves.[84] Marriage was described as a civil contract, and, since slaves could not contract, they therefore

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83. Slaves could not sue or be sued, except in suits for freedom, Cobb, *supra* note 21, at 247. A slave could only give testimony in a case involving another slave. *Id.* at 226.

84. There were no statutes forbidding slaves to marry in the slave-holding states; rather, the prohibition was judicially defined. This result was by no means a foregone conclusion, or a necessary consequence of slavery. Indeed, an early Massachusetts statute provided that "no master should unreasonably deny marriage to his negro with one of the same nation; any law, usage, or custom, to the contrary, notwithstanding." Prov. Stat. of Oct. 1705, ch. 19, § 2, *quoted in* Smith v. Rosenthal, *cited in* Validity of Slave Marriages: Opinion by Hon. James B. Bradwell 20 (1866). One nineteenth century legal authority reported:

> [E]ither in consequence of this provision, or of judicial adjudication upon the question as one of common law, slave marriages were deemed to be valid, and the rights of divorce were extended to slaves, the same as to freemen. Thus . . . "in 1745, a negro slave obtained from the governor and council" . . . "a divorce for his wife's adultery with a white man."

I Joel Bishop, Commentaries on the Law of Marriage and Divorce, of Separations Without Divorce, and of the Evidence of Marriage in All Issues § 155 (1864)(quoting Note to Oliver v. Sale, Quincy, 29).

could not marry. Further, the contract-like incidents of the marital relationship were deemed unenforceable with respect to slaves. Fathers could not be held financially responsible for the support of their wives and children because they had no legal right to be paid for their labor.[85] Slaves also could not be imprisoned for adultery or bigamy since they were the mere property of their masters.[86] As slaves were deemed morally inferior, it was considered to be unduly and unnecessarily harsh to hold them to the legal standards of monogamous marriage. But, the real reason to deny legal marriage to slaves was expediency: the sexual exclusivity and permanence implicit in marriage were inconsistent with the master's right to sexually control and to alienate his slave property.

Chief Justice Thomas Ruffin of the North Carolina Supreme Court, an exceptionally capable jurist who had provided leadership to the entire South in the development of the law of slavery,[87] explained why the law could deny slaves marital rights in the case of *State v. Samuel*.[88]

It was a lover's triangle that gave rise to the prosecution. Samuel, a slave, had killed his estranged wife's new lover. He appealed his murder conviction to the state high court, claiming as error the trial judge's evidentiary ruling permitting the State to call his wife as a witness against him. The defendant sought to establish that his wife's testimony was barred by the marital privilege.[89] The facts at trial showed he had been married to the witness for ten successive years; the couple had five children; they had separated; and, subsequent to the separation, the wife had then, with her master's permission,[90] taken the victim, now de-

85. Cobb, *supra* note 21, at 241.

86. *See generally* discussion on invalidity of slave marriages in Flanigan, *supra* note 1, at 121-22.

87. Robert Cover, Justice Accused: Antislavery and the Judicial Process 77-79 (1975).

88. 19 N.C. (2 Dev. & Bat.) 177 (1836).

89. With the exception of Georgia, every other slave jurisdiction which considered the matter concurred with the result in *State v. Samuel* as to the applicability of the privilege to the slave spouse witness. *See, e.g.*, Smith v. State, 9 Ala. 990 (1846); Coleman v. State, 14 Mo. 157 (1851). The Georgia superior court, in a case in which the prosecution had called the wife as a witness against her husband, ruled that " '[t]he contubernal relation among slaves shall be recognized . . . in criminal trials where it becomes important to the advancement of justice' " William v. State, 33 Ga. 85, 93 (1864)(quoting § 1666, *Code*).

90. The facts of the case characteristically illustrate the intervention in slave marital relations by the master. The owner of the defendant's wife, one A.M. Lea, testified in support of the State's successful effort to defeat the privilege. He related that the spouses had quarreled, which resulted in the husband's departure from the home. When Samuel, the defendant, did return to claim his clothes, Lea ordered Samuel to stay away from his wife. Ultimately, it was Lea who gave the victim permission to marry Samuel's wife.

ceased, as her new husband.

The Chief Justice did not pause to ponder the evidentiary wrinkle presented by the separation and purported remarriage. He went right to the core of the case: "The question of evidence made in this case, is not without difficulty; but, after the best reflection the court could bestow on it, that difficulty seems to arise rather from moral considerations than to be founded on legal principles."[91] After quickly identifying the moral dilemma, however, Judge Ruffin perceived that the law offered no option: he had to wiggle out of it. He first analyzed the reason for the common law evidentiary rule of marital privilege:

> No code could justly, by one of its edicts, pronounce that an union between two persons once formed, should by no means be severed, and yet, by another of its edicts, coerce them to acts necessarily productive of dissensions, that would deprive their union of all cordiality, separate them in feeling, and make their connexion intolerable.[92]

He then asserted that, as the privilege is grounded on the legal requirement of marital permanence, it ought not be held to apply where no contract exists to require such permanence:

> This privilege . . . owe[s] its origin to the duration of the legal obligation of the contract of marriage. It cannot be yielded to any persons but such as have entered into that contract, in that rightful and formal method which is recognized in law as binding the parties throughout life, absolutely, and independent of the continuing inclinations of one or both of them, or the continuing license of any third person. Hence a marriage *de facto* will not, but only a marriage *de jure*, will exclude one of the parties from giving evidence for or against the other.[93]

The "continuing license of any third person," namely the master's license to separate one spouse from the other, in part prevented the execution of a "contract" of permanent marriage. Here Judge Ruffin faced an intractable collision between three inviolable, sacred tenets he felt a legal duty to protect: marriage, the right to contract, and the right to hold slaves as private property.

In Judge Ruffin's jurisprudential time, each of these "rights" was deemed in some sense secured by natural law, the axiomatic law of first principles.[94] The problem had yet another dimension,

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91. *Samuel*, 19 N.C. (2 Dev. & Bat.) at 178.

92. *Id.* at 179.

93. *Id.*

94. Appeals to natural law were advanced on both sides of the slavery debate. For example, one Chicago anti-slavery probate jurist, in an opinion written after emancipation castigating the legal denial of slave marriage, argued:

> Slaves are made by captivity, or by virtue of local law enacted against the law of nature . . . in fraud and wrong, and during this captivity or slavery they are deprived of many of their civil rights, but upon their

giving it even greater density. Marriage was sacred both because it was the command of natural law,[95] and because it was considered to be a contract, which was sacrosanct in its own right.[96]

But, the very *sine qua non* of marriage—its intended permanence—made marriage unlike a commercial contractual relation which could easily be terminated at the will of both parties. Moreover, the terms of the marital relation were not the subject of bargaining by the spouses, but were prescribed by the law.[97] Marriage was only a contract in the sense that the parties agreed to become married to one another. In this sense, slave marriages were no different from any others. Slaves could agree, or contract, to "have and to hold," and they could promise to do so until parted by death,[98] but that promise was unenforceable.

> emancipation they are restored to their natural condition. Even in slavery they are subject to all the laws of nature like other men [including the natural law of marriage], for that force, or law, which deprived them of liberty, could not deny them the rights, nor absolve them from the obligations of their nature.

Validity of Slave Marriages: Opinion by Hon. James B. Bradwell, *supra* note 84, at 19.

95. This command was judicially observed by creating a presumption in favor of marriage: *semper proesumitur pro matrimonio*. In his treatise on marriage and divorce, Bishop explained the reason for the presumption:

> [B]ut for this institution [of marriage], all that is valuable, all that is virtuous, all that is desirable in human existence, would long since have faded away in the general retrograde of the race, and in the perilous darkness in which its joys and its hopes would have been wrecked together . . . .
>
> . . . Therefore, every court, in considering questions not clearly settled or defined in the law, should lean toward this institution of marriage; holding, consequently, all persons to be married who, living in the way of husband and wife, may accordingly be presumed to have intended entering into the relation, unless the rule of law which is set up to prevent this conclusion is distinct and absolute, or some impediment of nature intervenes.

Bishop, *supra* note 84, at §§ 12-13.

96. *See* Morton Horwitz, The Transformation of American Law, 1780-1860, at 161-63 (1977).

97. One Kentucky court defined marriage as follows:

> Marriage, though, in one sense, a contract, because, being both stipulatory and consentual [sic], it can not [sic] be valid without the spontaneous concurrence of two competent minds, is, nevertheless, *sui generis*; and, unlike ordinary or commercial contracts, is *publici juris*, because it establishes fundamental and most important domestic relations. And, therefore, as every well-organized society is essentially interested in the existence, and harmony, and decorum of all its social relations, marriage, the most elementary and useful of them all, is regulated and controlled by the sovereign power of the state, and can not [sic], like *mere contracts*, be dissolved by the mutual consent only of the contracting parties . . . .

Maguire v. Maguire, 37 Ky. (7 Dana) 181, 183-84 (1838).

98. In fact, the traditional marriage vows were altered to reflect the possibility of separation before death by sale or other cause attributable to the master. Genovese cites the offering of one white minister—"until death or distance do you

Properly viewed, the hard problem the court faced was not that slaves could not cross the marital threshold in a "contractual" sense; it rather was that, because they had no civil existence, they could not assume the civil benefits and burdens of husband and wife.[99]

Judge Ruffin acknowledged the weakness of the "inability to contract" argument. He noted that, because,

> slaves are human beings, with passions and senses impelling them to [marry], and with a natural capacity to contract it, which no municipal regulation can annul . . . . It has been urged that the essence of this, as of other contracts, consists in the consent of the parties; which . . . renders the contract obligatory by the law of nature and of reason; and it was thence inferred, that it is necessarily binding in our law, in the absence of positive provisions to the contrary.[100]

But, Judge Ruffin insisted on his vicious circle: only legal marriage is legal, and an individual who cannot legally marry cannot agree to *be* married:

> [I]t has been constantly required as an essential requisite of a legal marriage, that it should either be celebrated by some person in a sacred office, or be entered into before some one [sic] in a public station and judicial trust. . . .
>
> . . . How can that be deemed to any purpose a legal marriage, which does not, in any respect, conform to the only legal regulations upon the subject of marriage?[101]

Finally, recognizing that slave ownership was simply incompatible with slave marriage, Judge Ruffin conceded that the courts had no solution:

> [It] may unfortunately be the law [that slaves cannot legally marry]; and may have been intended by the legislature to be the law, upon the general ground of the incapacity of a slave to enter into this, as into other contracts, upon the presumption of the want of free consent, and upon the further ground of the difficulty of giving legal validity to the marriage, in respect to its most important legal incidents, without essentially curtailing the rights and powers of the masters. If it be so, it may be a fit subject for legislative interposition, to avert this melancholy addition to the misfortunes and legal disabilities of this depressed race.[102]

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part"—and of a slave Gullah preacher—"Till death or buckra part you." Genovese, *supra* note 6, at 481.

99. "[Slaves'] moral power to agree to such a contract or connection as that of marriage, cannot be doubted; but, whilst in a state of slavery it cannot produce any civil effect, because slaves are deprived of all civil rights." Girod v. Lewis, 6 Mart. 559, 559 (La. 1819).

100. State v. Samuel, 19 N.C. (2 Dev. & Bat.) 177, 180 (1836).

101. *Id.* at 181-82.

102. *Id.* at 182.

Having thrown the ball to the legislature, Judge Ruffin did not then make a graceful exit from what one of his contemporaries termed a "question of exceeding nicety and difficulty."[103] Rather, casting yet another eye on the "difficulty . . . aris[ing] . . . from moral considerations,"[104] he laid blame at the feet of the slaves themselves, for whom, he suggested, marriage would impose too great a moral burden. His argument was that, were the Court to recognize slave marriage for the purpose of the evidentiary rule in question, it would, in logic, effectively be grafting all of the incidents of civil marriage onto the slave relationship, including exposure to prosecution for bigamy:

> [T]he court is not prepared, without a mandate from a higher authority than our own, to apply to this class of our population a rule, which would in innumerable instances, either subject them to legal criminality of a high grade, or deprive them almost entirely of their greatest solace—that of having families of their own, frail as may be the right, and temporary the enjoyment, dependent, as they are, upon the caprice of the parties themselves, and yet more upon the necessities or caprice of their owners.[105]

Thus, "after the best reflection the court could bestow on it,"[106] the argument reduced to two simple, related, syllogisms: slave marriages are not legally valid because slaves cannot be legally married, and the moral commands of marriage are not held to apply to slaves because slaves are immoral.[107] This then, was the answer to Judge Ruffin's conundrum: the law of marriage required adherence to the moral norm, but slave morality was, by

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103. [A]s the fact of cohabiting, and living together as man and wife, is universal among slaves . . . these relations are recognized by the Courts, and the merciful extenuations of the law, to the conduct of the husband and father, are extended to the slave standing in the same situation . . . .

How far this contubernial [sic] relation between slaves may be recognized and protected by law, is a question of exceeding nicety and difficulty.

Cobb, *supra* note 21, at 245.

104. *Samuel*, 19 N.C. (2 Dev. & Bat.) at 178.

105. *Id.* at 183.

106. *Id.* at 178. Indeed, Judge Ruffin's analysis *was* more incisive than that of other jurists of the time. Most other courts considering the issue made no attempt to reconcile law and morality, for, as Mark Tushnet has persuasively suggested, most judges lacked Judge Ruffin's intellectual acumen or his grasp of the ideological implications of the cases which came before him. *See* Tushnet, *supra* note 1, at 7-8. The Alabama Supreme Court was more typical in its ruling that "whilst we admit the moral obligation, which natural law imposes, in the relation of husband and wife, among slaves, all its legal consequences must flow from the municipal law. This does not recognize, for any purpose whatever, the marriage of slaves . . . ." Smith v. State, 9 Ala. 990, 996 (1846).

107. As to whether the law had any duty to enforce public morality in the slave quarters, see Murray v. State, 9 Fla. 246 (1860), reversing a conviction for gaming:

nature, different from the norm. Therefore, the law did not violate the moral norm in excluding slaves from the rules governing marriage.

Employing the rationale that there was an innate difference in the races, an entirely different set of moral standards could therefore be applied to Blacks without offending natural law. This double moral standard provided the underpinning for the criminal law governing sexual interactions as well as the law of marriage.

In one particular aspect of the marital relation, however, at least one court acceded to the Black slave husband the same right as to the white husband.[108] The common law provided a defense to a murder provoked by the deceased victim's adultery with the defendant's wife.[109] The slave defendant in *State v. John*, convicted of murder, claimed on appeal that the trial court had erred in excluding the mitigating evidence of his wife's adulterous relationship with the victim. While the appellate court rejected the argument because there was no showing that the homicide was committed in the heat of passion, the court implicitly accorded to the slave husband the same legal right to vindicate his wounded male pride that was enjoyed by white husbands.[110] In effect, the court was declaring the slave wife to be, in this respect, as much the exclusive sexual property of her husband—at least vis a vis a *slave* competitor—as a white wife.

This holding excusing the male slave's use of violence to assert proprietary rights over his wife speaks to an internal dynamic of the slave marriage. The underlying rationale of the case is based on the "natural" personality—in contradistinction to the

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> [I]t is a difficult task to determine under statute offences against morals whether [slaves] can commit the offences or not.
>
> The only rule to govern us is the peculiar relation they bear in society and towards their superiors.
>
> Thus our general code provides and creates the offence of adultery and fornication . . . [y]et no one would think of indicting a slave for such an offence. . . .

Id. at 253. But even though the slave could not be charged as an adulterer, a white married man having sex with a slave could be divorced on the grounds of adultery. Mosser v. Mosser, 29 Ala. 313, 316-17 (1856).

108. State v. John, 30 N.C. (8 Ired.) 330 (1848).

109. In order to mitigate the charge, the discovery of the adultery in process was necessarily the proximate cause of the homicide:

> "A husband finding a man in the act of adultery with his wife, and in the first transport of passion killeth him; this is no more than manslaughter. But had he killed the adulterer deliberately and upon revenge, *after the fact and sufficient cooling time*, it had been undoubtedly murder."

Id. at 336 (quoting Foster in his Crown Law 296).

110. *John*, 30 N.C. (8 Ired.) at 336. *See*, to the same effect, Keith v. State, 45 Tenn. (5 Cold.) 35 (1867).

civil personality—of the slave husband. Although he can make no claims as a husband in a contractual or civil sense, his nature, as a man and a husband, excuses the slave's violent action taken upon "the sudden fury excited by finding a man in the very act of shame with his wife . . . ."[111] In this sense, he enjoys a form of male privilege, and, albeit for a limited purpose, holds the legal status of "husband."

The case of *State v. John* is also revealing in that, like other cases of domestic violence, it provides a window into the private life of a marriage. It particularizes the composite portrait we have of the slave wife. The defendant's wife, Flora, tells a poignant story about her break-up with John. As a chronicle of experience, the case sounds a theme of male domestic dominance which is hauntingly familiar to the contemporary ear. According to the court opinion, Flora's testimony was that:

> [S]he was the wife of the prisoner, and had been so for about six years; that the prisoner, although a slave, was permitted to keep house, and she was permitted to live with him; that she and the prisoner had frequent quarrels, and sometimes separated and came together again; that, some three or four days before the homicide, the prisoner, complaining that his dinner was not properly prepared, got angry, and gave her a whipping, and turned her out of his house, saying that she should not live with him any longer; that she then went to live with her mother . . . .[112]

She then told the story of the homicide itself:

> [T]hat about 10 o'clock of the night of the homicide . . . the prisoner came to her mother's house and told her . . . that he intended to kill [her new boyfriend] . . . that at the request of her mother, she, and her sister . . . went to the house of the [boyfriend] . . . that shortly afterwards the prisoner came to the door and . . . that he thereupon did break [the door] down, and came in and [killed the deceased]; that she became much alarmed and ran to call her brother from her mother's house, and that her brother came immediately and got the prisoner out of the house of the deceased.[113]

As social history, the case informs on two levels. Flora's dependence on her brother and mother suggests that slave family ties were the first line of defense in times of crisis. The violently possessive behavior of John, as shown by his treatment of both his wife and the "other man," suggests that, notwithstanding the emasculating effects of slave law, the prevailing culture of male domestic dominance held sway in the quarters as well.

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111. *John*, 30 N.C. (8 Ired.) at 336.
112. *Id.* at 331.
113. *Id.* at 331-32.

B. *Procreative and Parenting Rights and Slave Law*

Like the denial of marital rights, the denial of parental rights to slaves flew in the face of ideological trends and their legal echoes. This was the era of the cult of motherhood and domesticity. Indeed, the identification of womanhood with motherhood was near complete. Mother was now on her infamous pedestal, and ironically, her singular and unique importance as mother served as a threshold to greater legal rights for women. The judicially created "tender years" doctrine[114] enlarged women's guardianship and custodial rights while diminishing the legal hold of patriarchy.

At the same time, the state, employing the doctrine of *parens patriae*, was grasping a greater role for itself in childrearing.[115] The young child was increasingly being viewed as an individual and an incipient citizen, whose proper upbringing had become the state's interest. State intervention to protect the parenting relationship, or to sever it in cases of abuse or neglect, was regarded as appropriate to advance the "best interests of the child."[116]

In light of these developments, how could the law close its eyes to the erasure of the slave parent? How could it sanction the divorce of the birthing function from the mothering function, child-bearing from child-rearing? And how could it withhold its *parens patriae* oversight in the case of the slave child, who was subject to the greatest abuses and the harshest conditions?

In contradistinction to the common law, the slaveholding states all adopted the civil rule, *partus sequitur ventrem*—the issue and descendants of slaves follow the status of the mother.[117] The justification for the rule was the same as that offered by its Roman originators: " 'From the principles of justice, the offspring, the increase of the womb, belongs to the master of the womb.' "[118]

In providing that the fruits of the bondwoman's womb were the "property" of her master, slave law echoed early non-slave domestic law.[119] The master was deemed to "own" his wife and her

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114. The "tender years" rule, which developed midcentury, is a presumption favoring the mother in custody disputes involving an infant or child below the age of puberty. For a discussion of the rule and its place in the expansion of maternal rights, see Grossberg, *supra* note 3, at 248-49.

115. *See id.* at 236-37.

116. *See id.* at 234-42.

117. Cobb, *supra* note 21, at 68. For a discussion of the role of the principle of *partus sequitur ventrem* in the early development of slave law, see Wilbert Moore, *Slave Law and the Social Structure*, J. Negro Hist. 171, 185-87 (1941).

118. Cobb, *supra* note 21, at 69 (quoting Heineccius, Elem. Jur. Lib. I, tit. iii, § 81; Potgiesser, De Statu Servorum, Proleg. § xxix; Domat, § 99).

119. For a general treatment of the relative marital property rights of husband and wife in the colonial period, see Marylynn Salmon, *The Legal Status of Women*

children, just as he "owned" the slave woman and her children. Thus, the genesis of the rule involved two entangled proprietary relations: the master's marriage (a property relation) produced property for him (children), and his slave property also produced more property (slave children).[120]

The slave husband, however, had no marital ownership interest in his wife, and therefore he had no ownership interest in his children. This effected a double diminution of the slave father's legal and social status: he could not claim ownership of his children, as could free men, nor could he, through his progeny, enrich his master, as could slave women. He had only his own labor to "give" his master, not that of his wife or his children.

In the mid-nineteenth century, changing views of white women and children had begun to challenge the principle of male ownership of the "increase of the womb."[121] No longer were women seen as vessels whose exclusive vocation was to produce heirs. Property concepts were increasingly viewed as inappropriate in the law of family relations. But since property was the *sine qua non* of the slave-master relation, the rule persisted, reducing slave women to machines of reproduction and slave men to social irrelevancy.

This use of a commercial principle to vitiate a social relationship led to a confusing legal situation. The courts responded prodigiously to the many legal wrinkles produced without ever really questioning the underlying premise or its social meaning. Courts were, for example, perplexed by questions having to do with the legal status of the children of an enslaved but soon to be emancipated mother,[122] and the fate of children born to a fugitive[123] or momentarily free[124] mother.

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in Early America: A Reappraisal, 1 Law & Hist. Rev. 129 (1983). For a discussion of nineteenth century developments with respect to the legal status of wives and children, see Grossberg, *supra* note 3, at 24-27.

120. One result of the rule was that it permitted the slave master to hold the mulatto children whom he fathered by slave women as slave property, thus enlarging the slave population. Therefore, where the slave owner's extra-marital sex might carry a social and financial penalty if the child he fathered were white, he stood to gain in every way from the sexual abuse of slave women.

121. For a discussion of changes in popular views and in the legal construct of marriage, lineage, and motherhood in one southern locale, see Susanne Lebsock, The Free Women of Petersburg: Status and Culture in a Southern Town, 1784-1860, at 15-53 (1984).

122. *See, e.g.*, Caffey v. Davis, 54 N.C. (1 Jones Eq.) 1 (1853).

123. *See, e.g.*, Fields v. Walker, 23 Ala. 155 (1853), in which the owner of a fugitive slave sought to recover the slave's children, invoking the Fugitive Slave Act of 1793. The Alabama Supreme Court denied the claim, holding that the quality of "fugitive" was not inheritable.

124. *See, e.g.*, Bank v. Benham, 23 Ala. 143 (1853), where the child of an emanci-

In addition to the question whether a slave's child was born free or not, another highly litigated issue was who owned the child. The courts debated whether in determining ownership disputes, slave children could be treated like the offspring of farm animals. At common law, animal offspring were "natural fruits" which were deemed the property of the mother animal's owner.[125] Yet, since the judges were dealing with the relationship between mother and child, a relationship which the culture deemed sacred and fundamental, the commercial analogy to farm animals was not altogether satisfying. As one court put it, "the law . . . treats [slaves], as human beings, deprived, doubtless for wise purposes, of their freedom . . . and in our opinion the rule which applies to [the disposition of animals' issue] has no application to them."[126]

The legal controversy typically arose in the interpretation of a slave owner's bequest of a slave mother to one legatee for life with a remainder interest in another legatee. The question became which legatee owned the children she bore during the life estate. If, as was the case in Delaware[127] and Maryland,[128] the children born during the life estate became the property of the life tenant, then, upon the death of the life tenant, the slave mother would be, by operation of law, separated from her children, who became part of the life tenant's estate.

One Tennessee case presents an especially chilling example of how the slave mother and her children could get caught in the vise of the potentially conflicting interests of the life tenant and the remainderman.[129] The bequest was of the slave woman, Sally, to the testator's widow for life with the remainder interest in Sally to go to his children. The rule in Tennessee was that the offspring of the slave born during the life tenancy went to the remaindermen. The life tenant, the widow, petitioned the court to sell Sally because of "her bad temper, violent passions, immoral habits, and refusal to submit . . . ."[130] But Sally, having given birth to several

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pated bondwoman was deemed free, although the woman was re-enslaved to satisfy the claims of antecedent creditors. The court held that, as there were no liens against the slave when the child was born, the baby was born of a free woman.

125. *E.g.*, Herndon v. Herndon's Adm'rs, 27 Mo. 421 (1858); Wilks's Adm'r v. Greer, 14 Ala. 437 (1848); *see also* Patterson v. Bonner, 14 La. 214 (1839).

126. *Greer*, 14 Ala. at 445. *See also Herndon v. Herndon's Adm'rs*, where a Missouri court said: "A difference [as to the disposition of the issue] has thus been adopted between slaves and other property, founded upon motives of humanity and having regard to the moral as well as legal relations between master and slave." *Herndon*, 27 Mo. at 422.

127. *E.g.*, Smith v. Milman, 2 Del (2 Harr.) 497 (1839).

128. *E.g.*, Scott v. Dobson, 1 H. & McH. 160 (Md. 1749).

129. Arrington v. Grisson, 41 Tenn. (1 Cold.) 522 (1860).

130. *Id.* at 523.

children, had shown herself to be fecund, and it was therefore in the interest of the remaindermen to hold on to her. The Tennessee court refused to sanction the sale, noting that the "sale of the slave, so peculiarly valuable for her physical capacity of child-bearing, so far from being for the benefit of the owners of the remainder-interest, was an enormous sacrifice, though it may have been otherwise, as to the life-owner."[131]

Other questions as to the ownership of a slave mother's issue were equally fraught with difficulty. Where there was a lawsuit over ownership of a slave woman, there was a question as to who owned the children she bore during the pendency of the suit.[132] Another problem arose upon the master's divorce: were slave children to be deemed community property, or were they the separate property of the spouse who owned their mother at the commencement of the marriage?[133] The courts ended up on both sides of these questions, without ever a query as to the role of the slave father or the best interests of the slave child.

Indeed, just as the slave mother and father had no recognized legal relations with the child, the slave child could claim nothing from its parents. The lot of slave children was more damned and unfortunate than that of illegitimate children, although slave children were not strictly considered bastards.[134] The slave child inherited its mother's status but was not assured of its parentage, whereas the bastard was its mother's child in every sense.[135] A slave child could not claim membership in a household, or the right to maintenance, nurturing, or custody from its birth parents.[136]

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131. *Id.* at 523-24.

132. One Mississippi court held that the winning party had the right to any issue born during the pendency of the suit: "Having a right to recover the mother, the plaintiff could recover that which the mother produced pending the suit . . . ." Jordan v. Thomas, 31 Miss. 557, 563 (1856).

133. A Texas court held that "the increase" was the separate property of the party bringing it into the marriage and "constitute[d] no part of the community of gains . . . ." Cartwright v. Cartwright, 18 Tex. 626, 644 (1857).

134. With respect to the rules governing bastardy, the courts were unclear as to the exact legal status of the slave child. Illegitimacy implied wrongdoing, and the concept did not fit the slave family, which was denied the opportunity to be "legitimate." Slaves were compelled to live outside the law, and yet they were not outlaws. In attempting to describe a slave boy's status, one court termed the slave child "not legitimate." Andrews v. Page, 3 Tenn. (1 Heisk.) 653, 666 (1871).

135. In one case, the children of a free Black woman and a slave father *were* held to be bastards, because, as a slave, the father could not legally marry. The mother lost a *habeas corpus* action to release her children from apprenticeship. The court reasoned that, as bastards, the children were public charges who could properly be apprenticed against the mother's wishes. Brewer v. Harris, 5 Va. (1 Gratt.) 285, 303 (1848).

136. *Id.* at 305.

One case illustrating the perversity of this situation involved the claim of a Black, free father of a slave child to recover support payments of his child.[137] The father sued the estate of his son's owner, arguing that his support of the boy when he was too young to work inured to the benefit of the master, who by right should have borne the cost. The reviewing court reversed a jury verdict in the father's favor, holding that the father "had no just claim whatever on the administrator for taking care of his own child."[138]

C. *Family Law, Sexual Morality, and the Law/Morality Dichotomy*

As the cases discussed above demonstrate, the courts took varying avenues to resolve the vexatious law/morality split presented by the contradiction between the legal constructs of the family and slavery. Few of the judges had the perspicacity of North Carolina's Chief Justice Ruffin, but all of them confronted the dilemma which inhered in the very nature of the two institutions. The dimensions of the problem were hardly unique to issues of the family, but rather traversed the entire law of slavery.[139]

That slaves had to be, by virtue of their "nature," exempt from laws embodying moral commands was the underlying principle in a Mississippi case which considered whether a slave could be charged with intra-racial rape.[140] The defendant was indicted under a statute making it a crime to have sex with a child under the age of ten. The victim, in this case, was also a slave. The reviewing court reversed the conviction and dismissed the indictment for the reason that the statute did not explicitly include slaves,[141] and the common law did not cover slave crime.[142]

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137. Prince v. Cole, 28 Mo. 486 (1859).

138. *Id.* at 487.

139. *See generally* Higginbotham, *supra* note 1.

140. George v. State, 37 Miss. 316 (1859).

141. A year after *George v. State* was decided, the Mississippi legislature passed a statute making it a crime punishable by death or whipping for a Black slave or freeman to rape a Black female under 12 years old. *Id.* at 320 (citing 1859 Miss. Laws 102).

142. Since slaves, who were at the same time chattel and human, had obscure legal personalities, southern jurists repeatedly faced the problem of determining under what legal rubric they could be criminally punished by the state. Slaves were generally held not to be punishable under the state's criminal code or under the common law. The common law was said to be inapplicable because, as the court stated in *George v. State*, "slavery, as it exists in this country, was unknown to the common law of England, and hence its provisions are inapplicable to injuries inflicted on the slave here." *George*, 37 Miss. at 320. The slave codes were enacted to cover slave crime, but often they were not all-inclusive. The courts took different approaches when called to pass upon a criminal offense charged against a slave for which there was no specific slave statute.

The slave, George, was not just a lucky defendant who fell through a legal loophole. The lawyer for the accused argued that Black rape was different from white rape:

> The crime of rape does not exist in this State between African slaves. Our laws recognize no marital rights as between slaves; their sexual intercourse is left to be regulated by their owners. The regulations of law, as to the white race, on the subject of sexual intercourse, do not and cannot, for obvious reasons, apply to slaves; their intercourse is promiscuous, and the violation of a female slave by a male slave would be a mere assault and battery.[143]

The court, noting that "[m]asters and slaves cannot be governed by the same common system of laws: so different are their positions, rights, and duties,"[144] apparently concurred.

Indeed, because of the "difference" between Black and white rape, a similar statutory lapse produced a wholly different result in a case where the alleged rape victim was white. In the North Carolina case of *State v. Peter*,[145] the slave, Peter, appealed his rape conviction, pointing out that the slave code only prohibited attempted rape, and that since the code covering rape referred to "persons" committing the crime, it did not cover the slave. The court held, however, that the failure of the relevant rape statute to explicitly bring slaves within its ambit was not cause to reverse the conviction. It found a presumption that slaves were meant to be covered by the statute "unless from the nature of the subject matter and the punishment imposed, it appears not to have been the intention to embrace slaves."[146]

The existence of the loophole through which the defendant in *State v. Peter* sought to escape was unusual, for in contrast to the plight of the Black woman, who was much more likely to be victimized by rape, the rape of a white woman by a slave (or a Black freeman) was a capital offense in virtually every jurisdiction. One Georgia court reflected the pervasive hysteria about this most unspeakable offense: "The crime, from the very nature of it, is calculated to excite indignation in every heart; and when perpetrated on a free white female of immature mind and body, that indignation becomes greater, and is more difficult to repress."[147]

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143. *Id.* at 317.

144. *Id.* at 320.

145. 53 N.C. (8 Jones) 19 (1860).

146. *Id.* at 24.

147. Stephen v. State, 11 Ga. 225, 230 (1852). The *Stephen* court's opinion contains acknowledgement of what is now part of American history—that the criminal process, no matter what its features, was utterly perverted by the Black man/white woman rape charge:

> I would, were I in the Jury-Box, seize upon the slightest proof of

Moreover, even though a Mississippi court held, in *George v. State*, that a Black girl under ten could not be legally raped, in the slave rape case of *State v. Sam*,[148] a North Carolina court queried whether perhaps the common law age of incapacity ought to be reduced from fourteen so as to allow the prosecution of Black boys charged with rape:

> A large portion of our population is of races from more Southern latitudes than that from which our common law comes. We have indeed an element of great importance from the torrid zone of Africa. It is unquestionable that climate, food, clothing and the like, have a great influence in hastening physical development. Whether it may not be advisable to move down to an earlier age than 14, the period of puberty, for a portion, if not for all the elements in our population, may be a proper inquiry for the statesman.[149]

Since, in theory, the "nature" of the Black man was not affected by the race of his victim, taken together, *George v. State* and *State v. Sam* stand for the proposition that, while it was in the Black man's "nature" to rape, it was not within the Black woman's "nature" to *be* raped.

Indeed, for some time, the law did not recognize the rape of the Black woman by *any* man, either Black or white. In questioning the wisdom of this legal void, the Georgia legal scholar, Thomas Cobb, first inquired "whether the offence of rape, committed upon a female slave, should not be indictable; and whether, when committed by the master, there should not be superadded the sale of the slave to some other master."[150] He went on, however, to note that a change in the law would be only for the sake of appearance, for "[t]he occurrence of such an offence is almost unheard of; and the known lasciviousness of the negro, renders the possibility of its occurrence very remote."[151]

The "lasciviousness" of which he spoke was laid at the feet of Black women. For, to the nineteenth century mind, sexual morality properly resided in the souls of women; men could not, by nature, be expected to keep its commands. Thus, while the Black race as a whole was bereft of moral values, it was Black women

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> resistance—notwithstanding she may have been enticed to give her consent, in the first instance—even the usual struggles of a modest maiden, young and inexperienced in such mysteries, to find . . . that the act was against her will, and that the presumption of law was so strong, as to amount to proof of force.

Id. at 239.

148. 60 N.C. (1 Win.) 293 (1864).

149. *Id.* at 296.

150. Cobb, *supra* note 21, at 100.

151. *Id.*

who bore the brunt of the accusation of lasciviousness.[152]

Thus, the courts reasoned that, by nature, Black men and women were incapable of adhering to a code of sexual morality, and that they were therefore exempt from the natural moral strictures of marriage and family. But this double standard worked both for the system of slavery and against it. For while the system wished to exclude slaves from marriage laws, including adultery and bigamy, it also wanted to impose harsher penalties for Black man/white woman sex crimes than for all-white sex crimes.

The argument that race created different "natural" propensities which the law should account for was problematic, for in some instances, it was crucial to recognize the common humanity of all to whom the law spoke, slave and non-slave alike. In exempting slaves from certain moral edicts, these commands lost their universality. This challenged the idea that the laws were divinely derived, diminishing their binding force for whites.

These conflicting goals made it impossible for the courts to achieve doctrinal consistency. The core of the problem here, as in all of slave law, was the slave's dual status as person and chattel.[153] Moreover, southern jurists were operating within a legal framework whose moorings were embedded in bourgeois ideology. Slave law and bourgeois law were at odds—one idealized personal will; the other denied its relevance to the law. To define slavery itself was to define the legal contradiction: the master owned the slave, and yet could not own the person of the slave.

The courts traveled many avenues in search of a rational solution to this contradiction. In some respects, the courts sought to limit their own purview to the regulation of matters pertaining to the slave's commercial character, leaving to the slaveholder the regulation of his bondman's social character.[154] The jurists sought to circumvent their dilemma by taking slave law out of the reach of the common law, intervening only upon explicit statutory au-

152. This image of the Black woman as naturally licentious and as the seed of sexual evil justified and excused the exploitation of her reproductive function in the slave economy. *See generally* discussion in Jacobs, *supra* note 50.

153. Chief Justice Taney described the slave as "a person and also property. As property, the rights of the owner are entitled to the protection of the law. As a person, he is bound to obey the law, and may, like any other person, be punished if he offends against it . . . ." U.S. v. Amy, 24 F. Cas. 792, 810 (C.C.D. Va. 1859)(No. 14,445).

154. Mark Tushnet makes the persuasive argument that what he terms the law/sentiment dichotomy within slave law was related to the market relations/slave relations dichotomy within the developing law of the bourgeois state. "Slave law recognized regulation by law rather than by sentiment more readily the closer the circumstances came to involve purely commercial dealings." Tushnet, *supra* note 1, at 36.

thority, or where the analogy with areas of tort or contract law was clear, and keeping strictly within the bounds of precedent.

It was impossible, however, to keep this line between the social and commercial sides of the system sharp, because—as with the case of Black man/white woman rape—the slave's social interactions often fell outside plantation justice and brought the law "on the books" into play. Therefore, in order to maintain white supremacy, the courts were compelled to regulate relations between whites and Blacks. In order to hold slaves answerable for crimes they committed, they had to be recognized in law as morally and socially responsible persons. The reverse was also true, for, as exemplified by the rule, *partus sequitur ventrem*, commercial rules inevitably invaded the slave's social existence. Thus, the slave was, from a legal perspective, at once a person and a thing.[155]

The implications of the slave's dual status for the law of the family were difficult to untangle, for there was an analogous duality in family law itself. Marriage, for example, legally changed both social and property relations. Parenting created new social and property relations. The law favored and protected family relationships and sought to regulate these social relations using, among other legal tools, criminal sanctions. Therefore, if the criminal law was properly an instrument of social control for both slave and non-slave alike, how could its inapplicability to slave sexual morality be explained?

The hybrid nature of family relationships such as marriage was the source of the problem. As the slave was a moral and social being, the strictures of legal marriage logically should have been applied to him or her. But the slave was a chattel, and, therefore, as legal marriage altered property relations for the new husband and wife, the law of marriage had no meaning for the slave.

Similarly, parenting should have brought for the slave mother and father mutual social ties and financial responsibilities.

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155. As one scholar of slavery summarized it:

> [T]here was a deep-seated ambivalence between the conception of the slave as property, and as a person. The law seemed to give him recognition as a person with one hand, and take it away with the other. The slave could be guilty of a crime as a person, but if executed his master might be paid for the loss of his property. An assault upon a slave by an unauthorized person was judged to be a criminal offense, but this was in the interest of keeping the peace, and the master could maintain a suit for damage to his property. The crime of murder could be committed against a slave, but ordinarily not by his master, since the latter would scarcely plan to destroy his own property. The chief value of the slave as property lay in his being a person, but his chief value as a person lay in his being held as property.

Moore, *supra* note 117, at 201.

As the slave mother was merely an instrumentality of reproduction, however, the laws of bastardy, custody and the like—which served to legally define the parent-child relation—were dysfunctional as applied to her. As the slave father could not be paid for his labor, he also could assume no legal responsibility for his children.

IV. Conclusion

As Harriet Beecher Stowe set the scene at the beginning of *Uncle Tom's Cabin*,[156] she described the handsome and talented young slave, George, relating a tale of woe to his beautiful wife, Eliza. Eliza, who is owned by the Shelbys, and George live on neighboring plantations and George, who has recently been tormented to the breaking point by a mean and jealous master, is visiting to deliver to his wife the news that their marriage might be short-lived. This is their conversation:

> George: I wish I could be good; but my heart burns, and can't be reconciled, anyhow. You couldn't in my place—you can't now, if I tell you all I've got to say. You don't know the whole yet.
>
> Eliza: What can be coming now?
>
> George: Well, lately Mas'r has been saying that he was a fool to let me marry off the place; that he hates Mr. Shelby and all his tribe . . . and he says he won't let me come here any more, and that I shall take a wife and settle down on his place. At first he only scolded and grumbled these things; but yesterday he told me that I should take Mina for a wife; and settle down in a cabin with her, or he would sell me down river.
>
> Eliza: Why—but you were married to *me*, by the minister, as much as if you'd been a white man!
>
> George: Don't you know a slave can't be married? There is no law in this country for that; I can't hold you for my wife, if he chooses to part us.[157]

George spoke the bitter truth. The law had a lot to say about marriage, but for him and Eliza it boiled down to this: a slave could not be married if his or her master opposed.

This article has attempted to demonstrate how slave law perverted George and Eliza's marriage vow and how it tortuously twisted relations between slave parents and their children at a historical moment when marriage was a moral imperative and the family a divine institution. At a time when the church, the law, popular culture—indeed, all voices—placed the traditional family

156. I Harriet Beecher Stowe, Uncle Tom's Cabin (1852).
157. *Id.* at 35-36.

on a pedestal, where it was sacred and revered, the slave could only experience a cruelly mediated and debased version.

The needs of slavery have corroded both our legal legacy and our collective family experience. A careful analysis of the contribution of the slave experience to the current vicissitudes of the Afro-American family must take account of the failure of the courts to exercise moral and legal authority and the consequent quasi-law making role of the slave-master.

After emancipation, as Afro-Americans removed their chains to take a new place on the social and political landscape, the theme of Black immorality that had served the antebellum judges so well persisted. With the end of slavery, its functional place in the law was transformed. The idea that Blacks were immoral by nature became a foundational stone, *not* for slave property, but for social segregation and Jim Crow. The story of this link between racial ideology and sexual morality in our antebellum legal inheritance is one of tremendous contemporary significance, for it can provide the historical antecedents and assist in decoding the hidden messages in much of family and sexual law today.