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Righteous Fathers, Vulnerable Old Men, and Degraded Creatures: Southern Justices on Miscegenation in the Antebellum Will Contest

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"RIGHTEOUS FATHERS," "VULNERABLE OLD MEN," AND "DEGRADED CREATURES": SOUTHERN JUSTICES ON MISCEGENATION IN THE ANTEBELLUM WILL CONTEST

Bernie D. Jones*

Abstract

Although scholars have long addressed the role of legislators and local elites in policing the color line between black and white, antebellum jurists hearing will contests also played a special role, different from the roles they played in miscegenation prosecutions, but just as effective, nonetheless. State court justices, who heard cases involving bequests to the putative slave children of slaveholding elite men, exercised their power to police by deciding when the color line had been breached. In those cases, miscegenation between white men and slave women or free women of color was not the problem, however. Instead, the color line was breached in those cases when white men recognized and accorded slave women and their mixed-race children status through manumission and property. Official recognition by white relatives meant access to whiteness. Black personal freedom, combined with access to money and land, were threats to the social order of slavery and white supremacy. Free blacks were deemed uncontrollable and arrogant, particularly when they had money. They were perceived as a bad influence upon the bonded. In the eyes of many jurists, wealthy free black status was to be denied at all costs, for the benefit of the white social order, and the white relatives or creditors seeking to establish their claim to the decedent's estate.

In this article, I explore the attitudes of antebellum jurists towards slavery, miscegenation, and the transfer of property from elite white men to black slave women, free women of color, and their mixed-race children, as found in antebellum will contests. This article is a historical study, in which I do a case-by-case analysis and categorization of the language used by state high court justices of the South in describing the white men who

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left wills that gave property to black women and their children. Although these cases have been studied by historians and legal scholars in other contexts, reading these cases for the purpose of discovering judicial narratives on miscegenation has not been the focus on inquiry. As a result, scholarship on the full flavor of judicial responses to slavery is missing.

I. SLAVERY, MISCEGENATION, AND THE LAW OF WILLS

Gradual emancipation and the rise of abolitionism in the North led to the development of two different societies in antebellum America. Northerners, never as reliant upon slavery as Southerners were, began to emancipate their slaves early in the nineteenth century. With the rise of religious revivalism and a corresponding push for social reform, abolitionism's influence grew in the North, as indicated by the founding of the American Anti-Slavery Society.[1] Caught up in evangelicalism and rising free labor in the form of massive immigration from Europe, Northerners began to resent the existence of slavery, arguing that slavery was wrong and threatened free white labor.[2] Slavery led to immorality and laziness, as slave societies encouraged white indolence and abuse of the blacks in their midst.[3]

Thus, through the eve of the Civil War, conflicts over slavery grew more intense on the national political scene. What had once appeared to be minor differences in the early nineteenth century became irreconcilable as time went on.[4] At stake were competing moral visions of America's future. Would America be a land of the free, or a land of the bonded? Was slavery immoral or not? Faced with scriptural references that appeared to support slavery's existence, in conjunction with a growing secular culture that supported it, and "the growing conviction that all workable societies needed a permanent class of menial laborers in order to survive," those opposed to slavery in the South "lost the will to denounce" it.[5] By the mid-nineteenth century, slavery was dying

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1. Edwin Gaustad & Leigh Schmidt, *The Religious History of America: The Heart of the American Story from Colonial Times to Today* 184-88 (HarperCollins 2002).

2. Paul Finkelman, *Defending Slavery: Proslavery Thought in the Old South* 15-19 (Bedford/St. Martin's Press 2003).

3. *See e.g. More than Chattel: Black Women and Slavery in the Americas* (David Barry Gaspar & Darlene Clark Hine eds., Indiana U. Press 1996); Claire Robertson, *Africa into the Americas? Slavery and Women, the Family, and the Gender Division of Labor*, in *More than Chattel: Black Women and Slavery in the Americas*, *supra*, 3-40 (Indiana U. Press 1996); Christopher L. Tomlins, *Law, Labor, and Ideology in the Early American Republic* 259-60 (Cambridge U. Press 1993).

4. *See e.g.* Ronald G. Walters, *American Reformers: 1815-1860* (Eric Foner ed., Hill & Wang 1978). For general histories of the Civil War, see William W. Freehling, *The Reintegration of American History: Slavery and the Civil War* (Oxford U. Press 1994); Michael Perman, *The Coming of the American Civil War* (D. C. Heath & Co. 1993).

5. Jon Butler, Grant Wacker & Randall Balmer, *Religion in American Life: A Short History* 240 (Oxford U. Press 2003). Some of the biblical references included those in which "Old Testament patriarchs owned slaves and the New Testament did not condemn them for it. Indeed, the New Testament urged slaves to be obedient to their masters." *Id.* at 254. Moreover:

> [M]ost slaves would have remained ignorant of Christianity if they had been left in Africa, where their immortal souls would have perished in hell. Southern Christians also argued that the slavery system compared favorably with the inhuman working conditions in the mines and factories of the North. Above all, they believed that the slave system embodied a reasonable way to organize a society, especially if the slaves were Christianized and treated as fully human children rather than as less-than-human brutes.

out in the North while it persisted in the South, where a slave society, believing itself beleaguered by hordes of Northerners bent on expropriating slave property, was bent upon protecting white supremacy and property rights at all costs.

The divergence between North and South had its effects upon the legal system. Southern treatise writers like Thomas R. R. Cobb, who explained the law of slavery and justified its existence, were a key link between the rhetoric of the theologians and the lawyers and justices who upheld slave law in the courts. By the eve of the Civil War, Northern jurists tended to support the efforts of slaves to become free immediately upon arriving in free states, while their Southern brethren, oftentimes following the lead of legislators, became more hostile to slaves in freedom suits.[6] The suit for freedom oftentimes grew out of bequests in wills, where a master attempted to free a slave and grant the slave property in owning the self.[7] The right to own property, a hallmark of Anglo-American political theory and jurisprudence, did not apply to slaves.

The antebellum suit by slaves and free blacks for property left to them by former masters was thus primarily a Southern phenomenon. As slaves, they could not own themselves, and they could not own anything else. But as freed people, their status became precarious. White slave society looked upon them with a jaundiced eye, as uncontrollable, bad examples to the bonded. Freed men and women allegedly sowed the seeds of discontent in slaves, inciting them to insolence and rebellion. Because they were granted bequests of property by their slave masters, the slave women and their mixed-race slave children became caught up in the machinations of white creditors and relatives. These were the testators' heirs at law, people who might have been related to them, all of whom were seeking to deny their family ties in a regime where family inheritance represented the hallmark of whiteness.

Even though these slaves were members of the family through biological ties to slave-master testators, they were not recognized as such, because the matter of sexual relations between slave masters and slave women has long been a controversial one. Statutory law did not make white men liable to prosecution for sexual contact with female slaves, and

> [c]hildren begotten upon slave women by their owners or by other white men would grow up as slaves, adding to the property of the owners of the women and preserving the amazingly durable fiction that male slaveholders and the other white males in the vicinity were faithful to their wives.[8]

Id. at 255.

6. *See* Paul Finkelman, *An Imperfect Union: Slavery, Federalism, and Comity* (UNC Press 1981); Walters, *supra* n. 4.

7. *See e.g.* Finkleman, *supra* n. 6; Thomas D. Morris, *Southern Slavery and the Law, 1619-1860* (UNC Press 1996); Judith Kelleher Schafer, *Becoming Free, Remaining Free: Manumission and Enslavement in New Orleans, 1846-1862* (LSU Press 2003).

8. David A. Hollinger, *Amalgamation and Hypodescent: The Question of Ethnoracial Mixture in the History of the United States*, 109 Am. Historical Rev. 1363, 1369 (2003).

Much of the recent controversy over Thomas Jefferson and Sally Hemings comes to mind, and the willingness of historians to address the question of slavery and interracial sex, particularly when the reputation of elite white men of the antebellum South has been at stake. *Sally Hemings & Thomas Jefferson: History, Memory, and Civic Culture* (Jan Ellen Lewis & Peter S. Onuf eds., U. Press Va. 1999).

Thus, public scorn was the most white men needed to fear. But even if their activities were known, public scorn might not follow. In the brotherhood of white males, the sexual exploitation of black women was an open secret; men participated, and the law protected their white families from having to acknowledge these extramarital relations.[9] But the men discussed in this article chose to recognize the women and children through the official legal channels of trusts and estates law, indicating that they were anomalous to the general rule of denial and secrecy.

The Southern justices who presided over will contests involving white male testators—cases in which slaveholding men left legacies of freedom and property to their mixed-race children and the children's slave mothers—were faced with a paradox stemming from competing moral perspectives of master-slave relations. Slavery, as a cultural and social institution, was reinforced by religion and the secular law. Although the justices did not point to scriptural verses, they used biblical language to justify their decisions.[10] The Bible recognized slavery as a practice, providing justification for pro-

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But scholars have addressed this complexity in the lives of founders, these fighters for early American freedom, who realized the paradox of living in a slave society. Henry Wiencek, *An Imperfect God: George Washington, His Slaves, and the Creation of America* (Farrar, Straus & Giroux 2003); *see also* Joshua D. Rothman, *Notorious in the Neighborhood: Sex and Families across the Color Line in Virginia, 1787-1861* (UNC Press 2003); William Kaufman Scarborough, *Masters of The Big House: Elite Slaveholders of the Mid-Nineteenth-Century South* (LSU Press 2003).

9. Hollinger, *supra* n. 8. Hollinger discusses prohibitions against black-white marriage leading to exploitation of black women and the motivation for its prohibition: the children of black-white unions were illegitimate, unable to inherit from their fathers. *Id.* at 1379. *See also* Edward E. Baptist, *"Cuffy," "Fancy Maids," and "One-Eyed Men": Rape, Commodification, and the Domestic Slave Trade in the United States*, 106 Am. Historical Rev. 1619 (2001); Peter W. Bardaglio, *"Shamefull Matches": The Regulation of Interracial Sex and Marriage in the South before 1900*, in *Sex, Love, Race: Crossing Boundaries in North American History* (Martha Hodes ed., NYU Press 1999); Kathleen M. Brown, *Good Wives, Nasty Wenches and Anxious Patriarchs: Gender, Race, and Power in Colonial Virginia* (UNC Press 1996); Elizabeth Fox Genovese, *Within the Plantation Household: Black and White Women of the Old South* (UNC Press 1988) [hereinafter Genovese, *Within the Plantation Household*]; Eugene D. Genovese, *Roll, Jordan, Roll: The World the Slaves Made* (Random House 1974); *Interracialism: Black-White Intermarriage in American History, Literature, and Law* (Werner Sollors ed., Oxford U. Press 2000).

That the late South Carolina Senator Strom Thurmond, ardent twentieth-century segregationist, as a young man fathered a child by a black woman who once worked as a family maid, demonstrates the persistence of a phenomenon that dates back to the Old South, and explains why this study is necessary. *See e.g.* Jeffrey Gettleman, *Final Word: 'My Father's Name Was James Strom Thurmond,'* 153 N.Y. Times A1 (Dec. 18, 2003); Marilyn W. Thompson, *Woman Claims Thurmond as Father*, Wash. Post A1 (Dec. 14, 2003). What is interesting to note, however, is the public response to the allegations. Members of the black community, long familiar with the history of interracial sex, particularly those who had been eyewitnesses to Thurmond's interactions with his daughter Essie Mae Washington-Williams, were not surprised. *See e.g.* Brian Hicks, Schyler Kropf & Herb Frazier, *News Comes as No Surprise to Many in S.C.*, Charleston Post & Courier A14 (Dec. 14, 2003). Those who doubted the allegations, claiming that the story was so incredible that she must have been lying, seem to have forgotten the secrecy and denial that generally followed these kinds of relationships. Even though Thurmond denied the allegations all his life, he provided for his daughter's support, and Washington-Williams kept her secret, not feeling free to come forward before his death in 2003. Thurmond's family recognized her, however. *See* Michael Janofsky, *Thurmond Kin Acknowledge Black Daughter*, 153 N.Y. Times A28 (Dec. 16, 2003). During an August 2004 visit to Columbia, South Carolina, I saw a statue dedicated to him in 1999 that had the names of his four legitimate children listed. Washington-Williams's name was added afterwards. *But see* Martha Hodes, *White Women, Black Men: Illicit Sex in the Nineteenth-Century South* (Yale U. Press 1997) (discussing nineteenth-century miscegenation prosecutions against white women and black men in interracial relationships and the greater protections under the law granted to white women who accused black men of rape).

10. For example, "All who are under the yoke of slavery should consider their masters worthy of full respect, so that God's name and our teaching may not be slandered." 1 *Timothy* 6:1 (New Intl.).

slavery justices to promote its existence.[11] Moreover, the Bible could be used to justify the separation of the races and the subordination of the African. Yet, the Bible was also used to justify improving the condition of slaves or even to condemn slavery. Thus, in the eyes of other justices, slavery was an unfortunate aspect of living in Southern society; a distasteful, yet necessary practice, instrumental for white wealth and the proper ordering of the society their ancestors had developed since the Colonial period. But slavery also called upon these justices to exercise their greatest humanity, insofar as their treatment of slave women and mixed-race slave children indicated benevolence.

These two impulses came into conflict in the will contest. On the one hand, moralism, one's sense of proper moral behavior, could tend towards righteous indignation: criticism of testators for sinning, committing adultery, and crossing color lines. On the other hand, moralism could view care for slave children as examples of pious atonement for sin: a father's fulfillment of an obligation to his child, as was noted of Charles Bates.[12] Whether an individual judge was willing to let a testator do as he wished thus depended upon not only the law of slavery, but on where the justice stood on questions of personal and social responsibility. Were masters who had sex with their slaves sinful? If their behavior was sinful, should a slave master be able to provide for "the fruit of his sin," his slave child? If the Bible ordained slavery, what was the obligation of a justice to the legal and social orders of a slave society? Should a justice use the law of wills to punish a testator's moral failures, his fornication with slaves, or was punishment solely a matter to be addressed by religious institutions?

This judicial power was not to be taken lightly. As arbiters of the law, elite men of business and property would have looked to a justice like John Belton O'Neal, a former practicing lawyer and advisor to men seeking to manumit their slaves and will them property, for guidance in how to regulate their affairs.[13] But beyond that, justices set forth the community standards, insofar as they established the parameters of behavior, what other elite white men could do in their personal lives, and what sanctions might or might not follow if social mores were transgressed. If a state passed strict manumission laws, those laws determined whether an elite man could provide for slave women and their children during his lifetime, but justices hearing will contests decided whether he could provide for them upon his death. The appellate justices heard appeals from local trial courts and set the standard that lower court judges and lawyers would follow in making arguments and determinations. They guided jurors in explaining how they should view constructions of fact in light of the law. In the case of slave masters seeking to use the law of wills in providing for their slave children when the law of slavery barred legal remedies or made them difficult to pursue, the high court justices were called upon to arbitrate various interests, such as the testator's desire to do what he

11. *See e.g. Bryan v. Walton*, 14 Ga. 185, 202 (1853):

> Our ancestors settled this State when a province, as a community of white men, professing the [C]hristian religion, and possessing an equality of rights and privileges. The blacks were introduced into it, as a race of Pagan slaves. The prejudice, if it can be called so, of caste, is unconquerable.

12. *See Bates v. Holman*, 13 Va. 502 (1809).

13. Discussed *infra* nn. 237-239.

thought was proper, versus the community's interest in upholding slavery and punishing immoral behavior.[14]

Of significance was whether a justice was willing to see a slave as being more than mere property. As slavery died in the North and abolitionist fervor increased, Southerners were defending their institution of slavery, and will contests point to how the justices responded to one aspect of the growing debate: perhaps societal respect for the paternalism of individual testators should be encouraged, an example for abolitionists that slavery was not so terrible, and that slave owners were benevolent patriarchs. On the other hand, perhaps the justices themselves were facing a conflict over their own role: How would they be seen in the eyes of others as they tried to negotiate competing demands? Were they willing to protect fathers and their children, or were they overturning the religiously-ordained system of slavery by rewarding fornication across color lines? In the cases before them, were the slave women victims worthy of protection under the law?

These tensions in slave law point to a conflict inherent to slave societies of the American South of the nineteenth century. If slavery could be justified as an economic and social practice, and also on religious grounds, then what responsibilities did slaveholders have to themselves, their slaves, and the white community? The women in question were not white women granted greater rights under the social and legal orders. A white woman could claim rape or ravishment. Community pressure could be brought upon a white man to marry the white woman he took advantage of.[15] But what happened when the law left elite white men free to have sexual relations with slave women but did not hold them legally accountable for their behavior, nor set forth any obligation to care for their children by the women? Only the men's consciences could control them.

The language of shame framed the judicial response, but that language indicated a dualism. On one hand, atonement for sin could be found through a will and justified in decisions granting bequests of freedom and property, and on the other, the language of shame could be used as a post-mortem punishment for transgressions and denial of a testator's will. Those justices who sought a "humane" slavery were likely to view providing for slave children as atonement for sin and shame.[16] Those who were far more interested in punishing dead testators and denying rewards to slave beneficiaries focused more on defining testators who crossed the color line as immoral. Not only were these testators reprehensible for having engaged in extramarital sexual relations, but they were immoral for having contributed to the upheaval of what was perceived as the biblically-ordained social order of slavery.

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14. *See e.g. Carmille v. Carmille*, 2 McMul. 454 (S.C. 1842); *Farr v. Thompson*, Cheves 37 (S.C. 1839).

15. *See e.g.* Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America* 33-63 (UNC Press 1985) (discussing white women making allegations of seduction, and the civil lawsuits that followed).

16. I use the term "humane" to describe the rationale given by various justices for explaining why the testators' wishes should be fulfilled: recognition of slaves' humanity might deflect criticism that slavery was inhumane. As William E. Wiethoff explained, a "humane" slavery represented a balance: "Addresses to humanity and interest—the moral imperative to treat slaves humanely and the South's interest in maintaining slavery." William E. Wiethoff, *A Peculiar Humanism: The Judicial Advocacy of Slavery in High Courts of the Old South, 1820-1850*, at 12-13 (U. Ga. Press 1996).

Ultimately, the tensions between the justices lay in conflicts about how they saw their duty to decide cases where moral, but not legal, transgressions were at stake: extramarital sex with slave women and the granting of bequests of freedom and property to them and the children born of their unions. At issue was whether white heirs would inherit the estate over the testators' desire to provide for their slave children and the children's mothers. Those in favor of respecting testators' wishes and those opposing pointed to the same Bible but came up with different conclusions. Justices such as John Belton O'Neall of South Carolina, who looked to ordain a humane slavery, pointed to the moral obligations of fathers to their children.[17] On the other hand, those like Justice Joseph Lumpkin of Georgia, who focused more on the societal obligations they had to the white community, were fearful that permitting such a humane slavery would mean the unraveling of the social fabric and an evisceration of the natural order ordained by God for the proper foundation of a slave society.[18]

My purpose is not to romanticize and argue whether these relations were consensual and affectionate. Without knowing the day-to-day relations of participants, that is an impossible argument to make. But what matters is what the law set forth: black women were property, personal in nature, real people not treated as such, capable of being used and moved from one location to the next. Excluded from the presumption of chastity and protection of their sexuality, black women were vulnerable to sexual abuse and exploitation. Although the official record ignored interracial sex between master and slave, will contests over real and personal property can offer strong evidence of its presence.[19] In various cases, the appellate court found the evidence was presented at trial through the will itself, or through the statements of witnesses who knew the testator.[20] Slave owners could speak through their wills and end the secrecy, circumventing the informal rule of denial, with varying degrees of success: from acknowledgement of their unions and offspring to outright rejection.

But in cases where the court opinions do not explain the circumstances of a testator's benevolence, one can infer there was more at stake than simple kindness: the goodwill of a patriarch towards his slave "children"—slaves deemed childlike, yet loyal and obedient, thus earning his munificence. Particularly noteworthy are cases where a widowed or single white man made unusual bequests to a slave or free woman and her

17. Judge O'Neall drafted the will and trust arrangement at stake in *Farr* to ensure that W.B. Farr's partner and their son Henry would receive all his estate. *See infra* nn. 228-257.

18. *See Vance v. Crawford*, 4 Ga. 445, 459 (1848).

19. Note, however, African American biographies and family histories that have told the story of interracial sex. Edward Ball, *Slaves in the Family* (Farrar, Straus & Giroux 1998); Edward Ball, *The Sweet Hell Inside: The Rise of an Elite Black Family in the Segregated South* (HarperCollins 2001); Josephine Boyd Bradley & Kent Anderson Leslie, *White Pain Pollen: An Elite Biracial Daughter's Quandary*, in *Sex, Love, Race: Crossing Boundaries in North American History* (Martha Hodes ed., NYU Press 1999); Gail Lumet Buckley, *The Hornes: An American Family* (Alfred A. Knopf 1986); Sarah L. Delany, A. Elizabeth Delany & Amy Hill Hearth, *Having Our Say: The Delany Sisters' First 100 Years* (Dell Publg. 1993); Shirlee Taylor Haizlip, *The Sweeter the Juice* (Simon & Schuster 1994); Harriet A. Jacobs, *Incidents in the Life of a Slave Girl* (L. Maria Child ed., Oxford U. Press 1988); Carrie Allen McCray, *Freedom's Child: The Life of a Confederate General's Black Daughter* (Algonquin Bks. 1998); Mark Perry, *Lift Up Thy Voice: The Grimké Family's Journey from Slaveholders to Civil Rights Leaders* (Viking 2001); Henry Wiencek, *The Hairstons: An American Family in Black and White* (St. Martin's Press 1999).

20. *See e.g. Campbell v. Campbell*, 13 Ark. 514 (1853); *Ford v. Ford*, 26 Tenn. 92 (1846).

children, with no white wife or legitimate white child to take.[21] He might have singled out one slave child, described as the child of one of his female slaves, making it quite clear that the child was not to be considered part of his estate. Instead, the child was to be given special treatment: freedom, education, and money for the child's support. In jurisdictions where statutes and case law constrained their ability to manumit, testators sought other means: taking the woman and her children to Northern states where they could live freely, or directing others to do so, and setting up trust funds for their support.[22] The testators crafted wills that they hoped would stick, but doing so had its risks. Even when their relationships were well known, that did not mean that their relatives and the white community were in acceptance. Living with black women on levels of equality placed them beyond the pale, as transgressors of the social order who betrayed their race and class.

Perhaps criticism and ostracism were the only means of exerting social control upon men whose class and race privileges freed them to live their lives as they chose and distribute their property how they wanted. As unmarried men, they had no white wives and children to whom they had legal obligations. As the fathers of slave children, they were not going to be prosecuted for miscegenation. But even if they ignored what others had to say, the will contest might have been the means their relatives chose to get back at these men who had been wayward and disrespectful of white conventions. By that time, however, the men were dead and at the mercy of those same community members, white men who either served on juries, or as trial court judges and appellate justices, to uphold their wills when their collateral heirs—parents, siblings, aunts, uncles, nieces, nephews, and cousins—challenged the will.

More often than not, undue influence or incapacity founded the basis of a relative's claim. In trusts and estates practice, a person who makes a will, the testator, sets forth the disposition of the property owned at the time of death. He names an executor, someone trustworthy and responsible enough to see that his wishes are fulfilled. Under normal circumstances, the executor presents the will to the probate court and it is accepted. The executor then finds the assets, pays the estate's debts, and sees that the bequests are made, just as the testator wanted. But when a will is challenged, the process is disrupted and the will contest ensues. The challengers to the will might be people named, who are challenging particular bequests, or collateral heirs challenging the entire will as void—relatives who would take under the state's probate law if the will were declared invalid. They might claim the testator suffered from some incapacity: he was not of sound mind, and thus legally incapable of making a reasonable disposition of his property.[23] In the undue influence case, the claim might be that the testator was in a

21. *See e.g. In re Hubbard's Will*, 29 Ky. 58 (1831); *Greenlow v. Rawlings*, 22 Tenn. 90 (1842).

22. *See e.g. Shaw v. Brown*, 35 Miss. 246 (1858) (James Brown took his partner Harriet and their children to Indiana; in his will he directed his estate should be sold and the proceeds sent to a Louisiana bank.); *Jolliffe v. Fanning*, 10 Rich. 186 (S.C. 1856) (Elijah Willis took his partner Amy and her children to Ohio.); *Farr*, Cheves 37 (W.B. Farr sent his son Henry to school in Indiana and, provided for his support.).

23. *See e.g. Jolliffe*, 10 Rich. 186; *Ford*, 26 Tenn. 92.

vulnerable position, reliant upon someone in a confidential relationship with him who induced him to act.[24]

But in all cases discussed, the umpires were the justices who heard the will contests. The attitudes of these elite jurists of the antebellum South covered a broad range of responses, from tolerance of their slaveholding brethren in liaisons with black women, to viewing them as sorrowful sinners trying to do right by their slave children. To some, they were men caught in a terrible bind, who were only trying to fulfill their responsibilities as fathers. To others, they were degraded creatures who transcended the boundaries of illicit sex and undermined the whole social order of slavery. They were insane; they must have been crazy to deny the interests of their white relatives and elevate a slave with freedom and bequests of property. As benighted fools or helpless old men, they were the pawns of overly powerful black jezebels who controlled them and their households. These women were seeking to take advantage of the privileges their sexual liaisons offered them. They exerted their undue influence, aiming to steal the estate and thwart the legitimate interests of white family members.

But whether a justice was tolerant or intolerant of master-slave sexual relations, the law of slavery gave room to deny the transfer of property for the benefit of creditors and white heirs, notwithstanding the intent of the testator and any rights he might have had to resolve his estate as he pleased. In those instances, the social order of slavery was more important. This could even happen in Louisiana, the one Southern state known for its greater tolerance of black-white liaisons.[25] On the other hand, more liberal justices, such as O'Neall of South Carolina, could also use the formal law of slavery for their own ends, using their discretion to fulfill the intent of the testator, notwithstanding the jurisdiction's preference for bondage over freedom. In some instances, those justices acted as advisors and executors in fulfilling the wishes of their testator clients.

Scholars have long studied the question of just what accounted for the differences in judicial opinions in the old South on the slavery question, and formalism has long been the standpoint from which to ground inquiry.[26] In deciding cases where the rights of slaves were at stake, were justices following the formal rules of slavery, as developed

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24. *See e.g. Pool's Heirs v. Pool's Executor*, 33 Ala. 145 (1858); *Davis v. Calvert*, 5 G. & J. 269 (Md. 1833).

25. The claim of liberality has grown out of the status that free people of color enjoyed. They had a recognized place in antebellum Louisiana society, occupying a middle ground between whites and slaves. They were landowners, artisans, merchants, and slave owners. In addition, concubinage was openly practiced and tolerated, as a means of upward mobility for free black women in long-standing relationships with white male protectors who supported them and their children. *See e.g. Creole: The History and Legacy of Louisiana's Free People of Color* (Sybil Kein ed., LSU Press 2000); L. Virginia Gould, *Urban Slavery-Urban Freedom: The Manumission of Jacqueline LeMelle*, in *More Than Chattel: Black Women and Slavery in the Americas*, *supra* n. 3. This perception has also been expressed in popular histories and literature. Mary Gehman, *The Free People of Color of New Orleans: An Introduction* (Margaret Media 1994); Anne Rice, *The Feast of All Saints* (Ballantine Bks. 1979) (later made into a movie by Showtime Original Pictures in 2001); Lalita Tademy, *Cane River* (Warner Bks. 2001). But notwithstanding this apparent tolerance, the French, very early on, set forth in the Code Noir of 1724 the same prohibitions against interracial marriage enforced by the English colonists. Jennifer M. Spear, *Colonial Intimacies: Legislating Sex in French Louisiana*, 60 Wm. & Mary Q. 1 (2003) (noting that, once again, prohibitions against interracial sex did not necessarily mean enforcement).

26. A. E. Keir Nash, *Fairness and Formalism in the Trials of Blacks in the State Supreme Courts of the Old South*, 56 Va. L. Rev. 64 (1970).

by slavery's cultural and social orders to control blacks, or were they interested in setting limitations upon masters? Reuel E. Schiller considered the various perspectives developed by scholars to explain judicial motivation, A. E. Keir Nash suggested a judicial personality theory, and Mark Tushnet advocated a hegemonic theory.[27] In Tushnet's view, the hegemony of slavery demanded that all members of the white slaveholding elite maintain the legal and social orders of slavery: white supremacy in support of black subordination.[28] Those slave owners who rejected the precepts of the slave order were to be brought back in line.[29] But for the purposes of this article, Nash's judicial personality theory arguably is the most appropriate analytical tool, insofar as it explains conflicts among the justices hearing will contests. For even though the hegemony of slavery was the general rule, how else might one explain the different responses and opinions, and the conflicts on the bench?[30]

Several of these cases have been studied in other contexts by other scholars of slavery and the law, such as Paul Finkelman and William E. Wiethoff.[31] Although Adrienne D. Davis has built upon Tushnet's hegemonic theory in discussing the law's role in determining the status of black women in relation to the men who owned them and who bore children by them,[32] what is missing, however, but which will be presented here, is a comprehensive legal historical analysis of judicial attitudes towards testators in those identifiable cases from the antebellum period where miscegenation had been alleged. This approach will demonstrate the interplay of language and law, the cues of language that described how these men were seen, and the communal debates as found in testimony presented before the lower courts and reviewed in the appellate courts.

Finkelman focused on the development of slavery jurisprudence and its impact upon interstate relations: How did Northern and Southern state court justices handle the question of freedom and manumission in a nation with diverging positions on slavery?[33] Wiethoff, in his study of proslavery discourse, explains the role taken by antebellum justices of the state high courts of the old South who perceived themselves as public

27. Reuel E. Schiller, *Conflicting Obligations: Slave Law and the Late Antebellum North Carolina Supreme Court*, 78 Va. L. Rev. 1207, 1248 (1992).

28. *See e.g.* Mark V. Tushnet, *The American Law of Slavery, 1810-1860: Considerations of Humanity and Interest* (Princeton U. Press 1981).

29. Using a Marxist perspective, Tushnet focused upon slave law: its structure, its emergence, and how masters were controlled in their ability to inflict violence. Regarding cases like *Mitchell v. Wells*, 37 Miss. 235 (1859), discussed *infra*, he reflected on "the illegality of individual choice." Tushnet, *supra* n. 28, at 188.

30. For an earlier discussion of this rather contentious debate among scholars struggling to define the true role of law and to understand the significance of judicial actors in a slave regime, see A. E. Keir Nash, *Reason of Slavery: Understanding the Judicial Role in the Peculiar Institution*, 32 Vand. L. Rev. 7 (1979).

31. *See* Finkelman, *supra* n. 6; Wiethoff, *supra* n. 16.

32. Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 Stan. L. Rev. 221 (1999). Note that Davis discusses several cases from the antebellum period, and extends her study to a few subsequent to the war, as an exploration of how the private law of wills could be used for discriminatory purposes, and as a caution to contemporary scholars interested in law and family policy issues, such as gay marriage. *Id.* I use a legal history approach instead, focusing exclusively on the antebellum period and covering identifiable cases of miscegenation. I seek to contribute to the history of judicial attitudes towards slavery.

33. Finkelman, *supra* n. 6, at 1.

figures with a special responsibility the legal culture accorded them to support slavery.[34] But the miscegenation issue exposes a conflict neither scholar addresses.

It is true that justices like Joseph Lumpkin were quite adamant that slavery was the foundation of their Southern way of life. Justices who held this view exercised their authority to act as bulwarks against black upward mobility by denying manumission and the transfer of property from white to black. They established the legal framework within which testators operated. By frowning upon testators who left bequests of freedom and property to slave women and children, they guided the elite white community on proper mores: no elevation of blacks to a level of social and economic equality with whites.

Even so, testators, as other members of the elite, were free to follow or ignore the advice of these justices. They had their own opinions. They could use the law of wills for their own ends, and justices like O'Neall supported their decisions. As elite white men, these justices could not quarrel with another white man's right to live his life and dispose of his own property as he chose.[35] A justice could vote against his slavery bias and respect the wishes of a testator who took his fatherly duties seriously. These justices freed slaves and gave them the bequests their fathers left them, notwithstanding their disgust at racial mixing and their dislike of an increasing free black population. But that also meant that miscegenation that took place behind the veil of secrecy escaped judicial scrutiny, as did manumissions and grants of property that took place during a slave master's lifetime, under circumstances that did not require a will or the intervention of Southern legal institutions.

One might argue that the sale of slaves upon the dissolution of an estate or the denial of slaves owning property was not unusual for its time, for under trusts and estate law, all debts incurred by the decedent must be paid before anyone can inherit, and slaves were personal property that could be bought and sold.[36] The sale of slaves was complicated, however, by race and sex; the fact that black women were rendered powerless by the caste system of slavery. If slave women and children were both relatives of the testator and property he owned, what happened when they were freed by a will but the estate did not have enough money to pay the debts? The law did not accord them the rights of legitimate white family members—the wives and children who easily inherited money, status, and security from their husbands and fathers. Because these slave women and children were "illegitimate," they became subjects at the center of will contests in which disgruntled heirs accused them of engaging in the nefarious: forcing a white man to give them property, to the detriment of his legitimate family members.

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34. Wiethoff, *supra* n. 16. Among the justices he writes about are several whose opinions I discuss: Joseph H. Lumpkin of Georgia; Alexander M. Clayton and William L. Sharkey of Mississippi; William Gaston, Richmond M. Pearson, and John Louis Taylor of North Carolina; Baylis J. Earle, John B. O'Neall, David L. Wardlaw, and Thomas J. Withers of South Carolina; Nathan Green of Tennessee; and Henry St. George Tucker of Virginia. *Id.* Also included are Francis-Xavier Martin, Pierre A. Rost, and Thomas Slidell, all of Louisiana. *Id.*

35. *See also* Baylis J. Earle, *infra* n. 250 (discussing the behavior of W.B. Farr); Thomas J. Withers, *infra* n. 282 (discussing the behavior of Elijah Willis).

36. Morris, *supra* n. 7, at 96-99.

Evidence that tends to support this proposition comes from the status of the black women and children at the heart of the will contest. They had no legal identity. The women were invisible parties to the action, present only through the fruit of their sexual activity. They and their children were minor actors, mere property, pawns in a power play engaged by whites over the terms of a will. But in the end, these women's fates were decided by the judges who supervised the game. Slaves were not permitted to testify, and free blacks could not testify in matters involving whites.[37] Whites had definite opinions about them, but slaves could not speak in their own defense. When they were not maligning slave women as controlling jezebels, drunkards, and prostitutes, witnesses testified to the existence of partnerships: black women managing households who seemed to live on some level of social equality with white men.

Based upon the evidence presented in the decisions, one can get a sense of the children's relationship with their fathers, but it is impossible to sense the nature of their mothers' relationships with the powerful white men who controlled their lives. Were the women rape victims or life partners in a regime where marriage was illegal? It is unclear how much power they had in their relationships to negotiate for freedom and property for themselves and their children. The decisions show us, however, that when slave masters recognized black slave women and their mixed-race black children, intending that they become free, the law could force them to remain in bondage. They could be denied the property they were meant to have for their upkeep and support, something that would never be done to married white mothers and legitimate white children.

This article comprises a study of appellate decisions reported from various state supreme courts, where justices heard cases from the lower courts over questions of law. Such opinions are valuable, insofar as they include the factual matters at the heart of the dispute. But most important of all, they set forth the highest state court authority on interracial matters and demonstrate the interplay between the local trial courts and the high courts in establishing social norms and interpreting legislation. Although most of the decisions were will contests, some grew out of commercial lawsuits where the status of a black man or woman came into question: Was this person eligible to conduct business transactions as a free person? The questions turned on what had happened: how did that individual became a free person who owned property? There had been some act of manumission combined with a bequest of property from a will. Insofar as the opinions include statements of the factual matters as determined by the trial court, they generate an incredibly rich source of material on attitudes towards interracial sex and family relationships. Will contests often generate their own drama, reminiscent of soap operas, and those of the antebellum South were no exception. Justices heard cases that exposed family secrets and rivalries and greed among family.

White family members fought for all they could get, for the law of slavery tended to support their property interests. Huge sums of money—real property, cash, securities, and personal property, including the slaves at the heart of the case—could be at stake.[38]

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37. *See e.g. id.* at 229-30; *see also* Ariela J. Gross, *Double Character: Slavery and Mastery in the Antebellum Southern Courtroom* (Princeton U. Press 2000).

38. Where possible, I include information on the sums of money at stake, taken directly from the opinions. Note that it might be possible to find out the approximate value of the sums in contemporary dollars. EH.NET,

Moreover, the culture encouraged whites to criticize their men folk who had had sexual relationships with black women that led to grants of freedom and property for the women and their children, because the law did not obligate them to recognize familial ties to the blacks in their midst. The creditors sought to get their debts paid out of the estate, and were quite willing to make the slave women and their children pay for it, even if it had never been the testator's intent that they be considered part of the estate.

The executors often looked to their responsibilities to fulfill the testators' wishes and protect the women and children, but not always. They sometimes tried to take the proceeds for themselves. The black claimants, when they were parties to the lawsuits, asserted in turn their status as relatives and struggled for what they thought was legitimately theirs—the bequests left to them by the men. And when their white relatives denied their right to freedom, they were fighting for their very lives. At some times and in some places, the white family members won, in others, the black relatives did. Southern justices acted as referees in hearing those cases, and opponents of black freedom and wealth policed the color line. Southern justices disinherited in the name of maintaining slavery and white supremacy, particularly as Northern anti-slavery sentiment increased in the 1830s to 1850s, and Southern legislatures tightened their manumission laws.

In addressing how the justices saw the testators, I look at individual cases and focus on categories of responses; discovering the nuances of judicial behavior, instead of making broad generalizations within and across jurisdictions.[39] A testator could have been a virtuous father, a victim, a degenerate, or all at the same time: a "Righteous Father,"[40] a "Vulnerable Old Man,"[41] or a "Degraded Creature."[42] But most noteworthy was that the positions taken by the justices could be different from how those who challenged the will saw the testator, only demonstrating the tensions within the slaveholding elite as they grappled with interracial sex and the transfer of property. Where those challenging the will saw a vulnerable man, the judges might have seen a lucid and rational man of business who knew what he wanted to do with his property.

Narrative drove much of the judicial inquiry; in these will contests, the behavior and actions of the testator prior to his death were under scrutiny. His lifestyle was being called into question. Had he been the victim of an overreaching slave? Did he suffer from some sort of mental incapacity? Could his unorthodox last will and testament have been explained by his blatant transgression of social mores? Was he a father just trying to take care of his children? How would the slave order be affected if the will were to stand? All these questions had to be answered as the justices were negotiating the rights

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How Much is That?, http://www.eh.net/ehresources/howmuch/dollarq.php (accessed Oct. 1, 2005). *See also* EH.NET, *Commentary*, http://www.eh.net/ehresources/howmuch/sourcenote.php (accessed Oct. 1, 2005).

39. But in the case of Louisiana, I will do a more in-depth analysis of the state's jurisprudence, insofar as its apparent exceptionalism compels such an inquiry.

40. *See e.g. Le Grand v. Darnall*, 27 U.S. 664 (1829); *Campbell*, 13 Ark. 513; *Narcissa's Executors v. Wathan*, 41 Ky. 241 (1842); *In re Hubbard's Will*, 29 Ky. 58; *Greenlow*, 22 Tenn. 90; *Dunlop v. Harrison's Executors*, 55 Va. 251 (1858); *Foster's Adminstr. v. Fosters*, 51 Va. 485 (1853); *Bates*, 13 Va. 502.

41. *See e.g. Denton v. Franklin*, 48 Ky. 28 (1848); *Davis*, 5 G. & J. 269; *Ford*, 26 Tenn. 92.

42. *See e.g. Pool's Heirs*, 33 Ala. 145 (1858); *Bryan v. Walton*, 33 Ga. Supp. 11 (1864); *Vance*, 4 Ga. 445; *Shaw*, 35 Miss. 246; *Hinds v. Brazealle*, 3 Miss. 837 (1838); *Jolliffe*, 10 Rich. 186; *Farr*, Cheves 37.

of slave master fathers and the interests of a slave society. But in some instances, justices ignored paternal relationships, drawing upon the formal law of slavery in order to deny freedom.[43] The goal was to uphold the slave order, as the hegemony school would suggest. Hard-line justices were more likely to take this position. More liberal justices, however, could be just as formalist in focusing upon the law of slavery and ignoring the question of paternal relationships. But their formalism took different shapes, and resulted in decisions that appeared to benefit the slave beneficiaries, thus pointing to the significance of the judicial personality thesis.[44]

II. THE RIGHTEOUS FATHERS: DECENT MEN CAUGHT IN A BIND?

The term "righteous fathers" can be used to describe those testators whose care for their children and the children's mothers elicited judicial tolerance or neutrality, if not admiration and respect. The justices who upheld the men's wills appeared to have an unusual view of mixed-race sexual relations in a slave regime. White men providing for slave and free women in close relationships to them and caring for their slave children did not seem extraordinary in these justices' eyes. It appeared to be a matter-of-fact occurrence. Thus, the justices did not respond with rancor in determining whether the black and mixed-race beneficiaries should receive under the will or keep the property they had been given. Their tolerance led them to fulfill testators' wishes and affirm the transfer of property. But this tolerance did not necessarily entail an awareness of any power imbalances experienced by women that might have required greater legal protections for them and their children.

Nicholas Darnall, born sometime in 1803, grew up in Ann Arundel County, Maryland, the son of Bennett Darnall and an unnamed slave woman.[45] In his will, Bennett gave Nicholas several tracts of land, including Portland Manor, on 596 acres.[46] Apparently, there were two deeds of manumission executed by Bennett purporting to free Nicholas and various other slaves.[47] This case, which went all the way up to the United States Supreme Court, was not a suit for freedom. Nicholas, upon arriving at adulthood, took control of the property, but the question was whether he had legitimate title to property he was seeking to sell in 1826.[48] Under Maryland law, a master wishing to free a slave could do so by will, but not if the slave was under forty-five years old and unable to support himself.[49] Because the Maryland court of appeals had recently heard another case, in which a two-year-old infant was denied freedom based on this inability,[50] Nicholas and the buyer of some of the property, Claudius F. Le Grand,

43. *See e.g. Mitchell*, 37 Miss. 235; *Thomas v. Palmer*, 54 N.C. 249 (1854); *Green v. Lane*, 45 N.C. 102 (1852); *Bennehan's Executor v. Norwood*, 40 N.C. 106 (1847); *Cunningham's Heirs v. Cunningham's Executors*, 1 N.C. 519 (1801).

44. *See e.g. Cooper v. Blakey*, 10 Ga. 263 (1851); *Mallet v. Smith*, 6 Rich. Eq. 12 (S.C. 1853); *Broughton v. Telfer*, 3 Rich. Eq. 431 (S.C. 1851); *Carmille*, 2 McMul. 454; *Mutual Protection Ins. Co. v. Hamilton & Goram*, 37 Tenn. 269 (1857).

45. *Le Grand*, 27 U.S. at 667.

46. *Id.*

47. *Id.* at 665.

48. *Id.* at 667-68.

49. *Id.* at 668.

50. *Hamilton v. Cragg*, 6 Harris & Johns. 16 (Md. 1823).

decided to suspend the sale, particularly when Bennett's heir at law "made claim to the land, and threatened to commence suit for the recovery of it."[51] Le Grand and Nicholas brought their case to determine Nicholas's status and to clear up the cloud on title.[52] Nicholas was eleven years old when his father died.[53] Was he capable of taking care of himself at the time? Was he a slave at the time of his father's death?

The Supreme Court found that the evidence was in favor of Nicholas. The rule with respect to manumitting those incapable of taking care of themselves did not apply, according to Justice Gabriel Duvall, because four respectable witnesses from the community vouched for him: "Nicholas was well grown, healthy and intelligent, and of good bodily and mental capacity,"[54] fully capable of finding a job to support himself. Moreover, Bennett had devised to Nicholas and his brother a considerable estate. The young men then did what any responsible young men would have done: "had guardians appointed, [and] were well educated."[55] As a result, Nicholas was affluent.[56] Moreover, even if he were a slave at the time of his father's death, the fact that he was bequeathed property made him free by implication.[57] Thus, Justice Duvall had no doubt that Nicholas Darnall was fully capable of selling his property.[58]

Darnell's case, from Maryland, and others from Virginia, express a rather liberal, matter-of-fact attitude taken by justices toward master-slave sexual relations and grants of property to slave women and the slave children of testators. It was regrettable that white men had sex with black women who then gave birth to mixed-race children, but that was the nature of their society. One early case from 1809 grew out of a question regarding whether a will had been revoked.[59] When Charles Bates was a young man and single, he made up his first will.[60] The year was 1799, and he left his estate to his parents and siblings.[61] Judge Fleming noted that in 1803, Bates was still unmarried, but he had a slave daughter he mentioned in his second will:

> [H]aving formed an imprudent (though not uncommon) temporary connection . . . he recognized the *fruit* of his unhappy amour, called her his daughter Clemensa, declared her to be *free*, gave particular directions respecting her education, and made a handsome permanent provision for her, manifesting thereby a laudable instance of natural affection, and making the best atonement in his power, for his former indiscretion.[62]

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51. *Le Grand*, 27 U.S. at 668.
52. *Id.* at 668-69.
53. *Id.* at 667.
54. *Id.* at 669-70.
55. *Id.* at 670. For a discussion of Duvall's career, see David P. Currie, *The Most Insignificant Justice: A Preliminary Inquiry*, 50 U. Chi. L. Rev. 466 (1983); Frank H. Easterbrook, *The Most Insignificant Justice: Further Evidence*, 50 U. Chi. L. Rev. 481 (1983); *The Oxford Companion to the Supreme Court of the United States* 240-41 (Kermit L. Hall et al. eds., Oxford U. Press 1992). Duvall leaned toward antislavery.
56. *Le Grand*, 27 U.S. at 670.
57. *Hall v. Mullin*, 5 Harris. & Johns. 190, 194 (Md. 1821).
58. *Le Grand*, 27 U.S. at 670.
59. *Bates*, 13 Va. 502.
60. *See id.* at 502.
61. *See id.* at 502-03.
62. *Id.* at 540-41 (emphasis in original).

Three years later, Bates married.[63] Thereafter, he cut off his signature from the second will and revoked the first one in a note onto the cancelled second will.[64] He kept both copies, however.[65] By the time Bates died in 1808, his father was dead, and he was concerned about whether he had provided well for his mother.[66] He mentioned to others that he had a will, the first one he wrote years before, but he wanted to change things.[67] He did not make the changes before his death, and did not mention anything with respect to provisions for his wife. They had no children. The issue was whether by saying he had a will, the first one, he had republished it.[68]

The court decided the case after a second hearing and argument. The district court found in favor of the first will, but the justices of the supreme court were unwilling to support that position.[69] Bates died without a will. He cancelled the second one, and his statements that he had a will did not mean that the revoked first will had been republished.[70] Clemensa did not receive the benefits she would have gained under the second will. Notwithstanding Clemensa's loss, Fleming's admiration for Bates gives impression that had the second will not been revoked, the court might have been willing to let it stand.

About twenty years later, Francis Foster of Henrico County was the patriarch of a group of slaves, most of whom seemed to be connected to him by family ties.[71] William Foster was his son. In addition, he had several children by a slave woman named Betsey Johnson: Martha Ann, Ellen, Eliza, and William Johnson.[72] He also other children by other slave women. Wishing to free his children and their mothers, he brought them to New York City in 1831 for the express purpose of doing so.[73] Included were William Foster, Betsey, Francis, and Thomas Johnson.[74] He emancipated them by deed, having it witnessed and acknowledged by the mayor of New York.[75] But when he died, his executor seized them, claiming they belonged to the estate.[76]

Justice Green B. Samuels, writing for the Virginia Supreme Court on the appeal of a court order granting their freedom, noted that "before going to New York, and whilst there, and after his return, [Francis Foster] spoke of the trip to that place as intended for the sole purpose of giving freedom to the objects of his favor."[77] After Francis Foster manumitted them all, they returned to Virginia and "lived together as a family upon

63. *Id.* at 506.
64. *Bates*, 13 Va. at 505-06.
65. *Id.*
66. *See id.* at 502-11.
67. *Id.*
68. *See id.* at 502-10.
69. *Bates*, 13 Va. at 520-48.
70. *See id.* at 543-48.
71. *Foster's Adminstr.*, 51 Va. at 485-87.
72. *Id.* at 486.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Foster's Adminstr.*, 51 Va. at 485-87.
77. *Id.* at 486.

terms of equality."[78] Foster imagined that his manumission plan would circumvent the Virginia rule that required those emancipated in Virginia to leave the state within twelve months upon manumission.[79] Since they were emancipated elsewhere, he imagined the law might not apply.[80] He later manumitted others of his slaves by a will dated 1835 and probated in 1836.[81] None of those manumitted in 1831 were listed in his estate.[82] They lived as free people for about twenty years, even though they had not been registered as free, until 1850, when they were taken into custody and claimed as slaves.[83]

Neither Samuels, nor any of the other justices, commented upon whether Foster was acting improperly in acknowledging his slave children and their mothers and living with them as a family, thus indicating a matter-of-fact acceptance of the lifestyle he chose. They refused to view his removal to New York as an illegal attempt to circumvent Virginia law; instead, he shopped for a forum and used a method that fulfilled his wishes, a perfectly legal and above-board strategy.[84] He never intended that any of them live as slaves ever again, and he treated them accordingly: "Thus there was nothing in the law to prevent Foster from taking his slaves whithersoever he chose for any reason that to him seemed good: To hold otherwise would be an unjust interference with his rights [to relinquish] property."[85]

But a few years later, that right to dispose of property did not extend to free people of color inheriting slaves. Nathaniel Harrison of Amelia County died unmarried in the summer of 1852.[86] In his will, he left three women of color—Frankey Miles, Ann Maria Jackson, and Laurena Anderson—a tract of land each.[87] Another tract went to Edwin Harrison's four youngest children, and each child received one hundred dollars.[88] Frankey Miles was to receive six hundred dollars a year as an annuity for life; Laurena and Ann Maria were to receive two hundred and fifty dollars.[89] Additionally, he left the women all his household and kitchen furniture.[90]

It is quite telling that Harrison put contingencies in place for each of the beneficiaries, "in the event of their being required to leave the state."[91] The women were all free people of color, a primary population of people in the antebellum South who could be compelled to emigrate.[92] He left them his entire estate. But in Justice George Hay Lee's view, the most controversial clause had to do with the residue of what

78. *Id.*
79. *Id.*
80. *Id.*
81. *Foster's Adminstr.*, 51 Va. at 487.
82. *Id.*
83. *See id.* at 485-87.
84. *See id.* at 485.
85. *Id.* at 490.
86. *Dunlop*, 55 Va. at 251.
87. *Id.* at 252.
88. *Id.*
89. *Id.*
90. *Id.*
91. *Dunlop*, 55 Va. at 252-53.
92. *See e.g. Neither Slave nor Free: the Freedman of African Descent in the Slave Societies of the New World* (David W. Cohen & Jack P. Greene eds., Johns Hopkins U. Press 1972) [hereinafter *Neither Slave nor Free*]; Genovese, *Within the Plantation Household*, *supra* n. 9.

was a substantial estate: twenty-five hundred acres of land, eighty-four slaves, stock, crops and perishables, and about eighteen thousand dollars in money and bonds.[93] Harrison's executors were to become trustees of the estate for the support of Frankey, Laurena, and Ann Maria, and the children of the latter two, free from the debts and liabilities of their husbands.[94] If his slaves had to be sold in order to create the trust, he wanted them to be sold to good masters in good homes.[95]

This was the most controversial clause of the will, that by inheriting the entire estate, these free black women would gain ownership of slaves. Lee, in writing for the entire court, noted that under statutory law, "no free Negro shall be capable of acquiring (except by descent) any slave other than the husband, wife, parent or descendent of such free Negro."[96] Perhaps the purpose of the law was "to keep slaves as far as possible under the control of white men only, and prevent free negroes from holding persons of their own race and color in personal subjection to themselves. Perhaps also it intended to evince the distinctive superiority of the white race."[97] Arguably, it also aided free blacks attempting to help their relatives still in slavery. Notwithstanding the proscription against ownership, the women could inherit, nonetheless, because "[i]t was never intended to forbid the free negro to take the value of slaves in money or other property."[98] The slaves could be sold and the proceeds set aside for the benefit of the women of color.[99]

The legatees, Harrison's next of kin, were concerned that the women should inherit only what was necessary for their support, as per the residue of the estate.[100] They hoped to limit the statement "support and maintenance" to mean only the bare minimum of what might be required.[101] The justices did not agree, and gave them everything: "the expression of a particular purpose for which the gift is made will not operate as a condition or limitation of the bequest."[102] They were more interested in fulfilling Harrison's general intent to give the women the entire residue, because:

> [T]he most unbounded indulgence has been shown by the courts to the ignorance, unskillfulness and negligence of testators, and judges have even shown themselves astute in averting their effects.... [E]very allowance will be made for his want of better knowledge of the law as well as those of grammar and orthography. Where he may have obscured his meaning by conflicting expressions, his intention is to be sought rather in a rational and consistent than an irrational and inconsistent purpose. And if the will may admit of more than one construction that is to be preferred which will render it valid and effectual.[103]

93. *Dunlop*, 55 Va. at 252-53.
94. *Id.*
95. *Id.*
96. *Id.* at 258.
97. *Id.* at 260-61.
98. *Dunlop*, 55 Va. at 259.
99. *Id.*
100. *Id.* at 254.
101. *Id.* at 252.
102. *Id.* at 267.
103. *Dunlop*, 55 Va. at 263.

With the exception of the bequests of slaves, the matters in contention seem rather uncontroversial. Missing was the vitriolic language found in other cases of this nature where a white man left a substantial estate to people of color. Missing too was an explanation of the relationship Nathaniel Harrison had with Frankey Miles, Ann Maria Jackson, Laurena Anderson, and Edwin Harrison's children. But once again, a similarity to other decisions can offer an explanation. Harrison was unmarried and had no known legitimate children. But he did have close connections with a group of women of color such that he felt obliged to provide for them to the exclusion of his white relatives, the collateral heirs who sued.[104] It might have been known to all that these people of color may have been his family, but it was not stated openly.

In the case of *Greenlow v. Rawlings*,[105] there was no doubt about the nature of the relationship between the testator, Isaac Rawlings, and William Isaac Rawlings. In February 1837, Isaac petitioned the Shelby County Court to emancipate William, his son by a mulatto slave woman.[106] Isaac always recognized him as his son, insofar as William was "brought up in his family as a free boy—and so regarded by the said Isaac, who never intended he should be a slave."[107] The chairman of the county court examined the petition and authorized it as being in accordance with the law.[108] Isaac then gave bond, so that William would never become a charge of the state if he ever became unable to support himself.[109] In his will, Issac made William executor and gave him his entire estate: all his real and personal property.[110] The action before the court arose out of a note given by Thomas Rawlings to Isaac in July of 1837.[111] William signed it over to a creditor, J.O. Greenlow, in May of 1841, but Thomas Rawlings refused to pay, on the basis "that the endorser [William Isaac Rawlings], at the time of the endorsement and still, was a slave, and the endorsement void."[112]

The trial court judge instructed the jury that the record of evidence proved that William was free.[113] His status could not be questioned, and the jury held for Greenlow.[114] On Thomas Rawlings's appeal, Justice Nathan Green noted in his opinion for the court that, although under statutory law a newly manumitted slave must leave the state as "part of the judgment" of emancipation,[115] an exception could be made in those cases where the contract for manumission was made prior to 1831.[116] There was no direct evidence establishing that fact in William's case; however, the court presumed it was found in the decree of emancipation signed by the court officer.[117] The chairman of

104. *Id.* at 252-53.
105. 22 Tenn. 90.
106. *Id.* at 91-92.
107. *Id.* at 92.
108. *Id.* at 91.
109. *Id.*
110. *Greenlow*, 22 Tenn. at 91.
111. *Id.*
112. *Id.* at 91-92.
113. *Id.* at 92.
114. *Id.*
115. *Greenlow*, 22 Tenn. at 94.
116. *Id.*
117. *Id.*

the county court had the opportunity to read the petition and examine the parties.[118] Evidence of an agreement to free William could be found in what the court called "parol" evidence, the nature of the interactions between Isaac and William based upon the presumption of an oral contract between them.[119] It was obvious that a slave raised like a free-born son in his father's house was only nominally a slave, for he knew his father would free him.

William Isaac Rawlings was lucky, in that his route to manumission was a simple one. His father performed the manumission during his life, thus easing his ability to inherit as the only beneficiary of his father's property. But others were not as lucky. Perhaps the testator did not do as good a job of protecting the interest of his children and helping them gain their freedom. Perhaps white relatives of the decedent, collateral heirs, and executors colluded to destroy a will and undermine the testator's intent to free slave relatives and grant them property.[120] They might have threatened the testator. Finally, those trusted and charged with protecting a slave beneficiary could have violated their bonds of trust, and attempted to take the estate for themselves.

Narcissa, a slave and reputed daughter of Austin F. Hubbard of Nelson County, Kentucky, was one of the unlucky ones.[121] The county court admitted to probate a will in which Hubbard devised to her all his estate, provided her owner sell her freedom at a moderate and reasonable price.[122] Apparently, Narcissa and her mother had been owned by another, but were hired by Hubbard.[123] They lived in his house as servants.[124] If Narcissa did not become free, all went to Austin F. Hubbard, Jr., the testator's illegitimate son.[125] Hubbard's heirs claimed he was of unsound mind when he made the will.[126] He was an alcoholic, prone to drunken fits and delirium.[127] But that fact alone did not mean he was incompetent to make a will, according to Justice J.R. Underwood.[128] The court found that when Hubbard made the will, he was quite sane and lucid.[129] He knew what he wanted to do, and expressed his reasons for doing so: Narcissa was a faithful servant, she and her mother had been living in his house, and

118. *Id.*
119. *Id.* at 93-94.
120. *See e.g. Dickey v. Malechi*, 6 Mo. 177 (1839). Bazil Simmino, a brother of the deceased, Antoine Simmino, testified in a case of a lost will that his sister, the wife of one of the executors, colluded to destroy the will because it was "'ungrateful' towards the family of Antoine Simmino, as it gave the greater part of his property to a half negro." *Id.* at 184. The factual information is somewhat murky, but Francis Malechi sued to have the will probated; he brought his case by a guardian. *Id.* at 179. It is unclear whether he had a guardian because he was a minor, or because he was a person of color. The court did not state whether the allegations of his racial background were taken to be true.
121. *Hubbard's Will*, 29 Ky. at 58.
122. *Id.*
123. *Id.* at 60.
124. *Id.*
125. *Id.* at 58.
126. *Hubbard's Will*, 29 Ky. at 58-59.
127. *Id.*
128. *Id.* at 59.
129. *Id.*

there were no other whites present.[130] They were the ones he was closest to, because he was not married and had no legitimate children.[131]

Hubbard had the will drawn by a draftsman.[132] He then gave it to Narcissa for safe keeping, telling her that it was something important.[133] Underwood applauded Hubbard's intent to provide for his daughter: "The obligation, in the nature of things, to protect and provide for illegitimate children, should be held as sacred as that to provide for legitimates. Indeed, it is the best civil atonement for the guilt of fornication."[134] What is most surprising, however, was that Underwood thought it was proper for Hubbard to provide for her, his illegitimate mixed-race daughter, over "a son not tainted by African blood," because of "the faithful services of the one which he acknowledged, and the offensive conduct of the other, which had produced their separation."[135] It is unclear just what had happened between Hubbard and his son. Whatever it was, Narcissa was the better child in the long run.

But that alone did not mean Narcissa won in the end. She died eleven years later, never having received the property.[136] Her executors pursued the estate and litigation was pending.[137] Peter Sweets had bought her half-brother's contingent interest in the estate back in 1824 and might have been involved in the prosecution of the first case.[138] He tried to buy Narcissa, but Dr. Elliot, her owner, refused to sell her, unless it was for the purpose of freeing her.[139] Sweets and the curator of the estate, Thomas Wathan, then signed an agreement with Elliot that they would pay him three hundred and fifty dollars to emancipate her, if she would convey to them her entire interest in the testator's estate.[140] Thus, in October of 1831, seven months after the first case was decided, Narcissa became free.[141] She signed over the estate, having been told by Sweets and Wathan that the estate was "insolvent, or not worth more than" the money they paid to free her.[142] But she had been swindled. Sweets thereafter filed a bill for division of the estate, claiming the personal estate was worth more than ten thousand dollars, and the real estate, worth more than five thousand dollars.[143] By the date of the second lawsuit, about fourteen hundred dollars of the personal estate was remaining and the real estate was worth fifteen hundred dollars.[144]

Chief Justice George Robertson criticized Sweets and Wathan. He criticized Sweets for insinuating himself into the action for the purpose of stealing Narcissa's

130. *Id.* at 50.
131. *Hubbard's Will*, 29 Ky. at 50.
132. *Id.* at 59.
133. *Id.* at 59-60.
134. *Id.* at 60.
135. *Id.*
136. *Narcissa's Executors*, 41 Ky. at 241.
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*
141. *Narcissa's Executors*, 41 Ky. at 241.
142. *Id.* at 242.
143. *Id.*
144. *Id.*

property, and Waltham, who had a fiduciary duty entrusted by Hubbard "to disclose to Narcissa, frankly and explicitly, the situation of the estate and her potential interest in it."[145] There was no "rational doubt that they made a fraudulent use of their peculiar knowledge and position, and unconscientiously deceived and imposed on an isolated victim, who had not the ordinary means of rescue or resistance."[146] Equity demanded that the estate be audited and settled for the benefit of Narcissa's executors and trustees, to purchase and emancipate the children to whom she gave birth while she was a slave.[147]

One can certainly make the argument that if Hubbard cared about his daughter so much, he would have done all he could for her while he was alive, instead of leaving her at the mercy of untrustworthy men who only sought to take advantage of her ignorance. Perhaps he could have bought her freedom, rather than hoping that her freedom would be bought after his death. Nonetheless, Justice Robertson and the other members of the court of appeals did not hesitate to help her. The court in Arkansas was just as helpful to another slave, a child who was three years old when her father died.[148] Duncan G. Campbell made a will in 1845, giving his estate to his brother and sisters, after "deducting therefrom five thousand dollars, which I bequeath to Viney, a yellow girl."[149] One of his sisters was to take care of her until she turned fifteen, when she was to become free and receive her legacy.[150] He had no lawful issue, and Viney was his only child.[151]

Instead of being cared for by her father's relatives, her uncle, Samuel Campbell, executor of the estate, sold her in Missouri as a slave during the time of his appointment.[152] He served as executor from October 1845 until he was removed for breaches of trust in 1847.[153] Cornelius Campbell took over as executor that July.[154] In January 1848, Samuel Campbell brought the suit against Cornelius Campbell which founded the basis of the action before the court.[155] Other claimants included his sisters Mary and Flora Anne Campbell, and other siblings.[156] The purpose of the action was to declare "the bequest to Viney and so much of the will as purported to emancipate her were contrary to law and public policy, and void; and, notwithstanding the will, Viney continued to be a slave and the property of the estate."[157] During the course of the trial, everyone discovered what Samuel Campbell had done.[158] The court declared Viney to

145. *Id.* at 243.
146. *Narcissa's Executors*, 41 Ky. at 243.
147. *Id.*
148. *Campbell*, 13 Ark. at 517.
149. *Id.* at 516.
150. *Id.* at 516, 519.
151. *Id.* at 516.
152. *Id.* at 517.
153. *Campbell*, 13 Ark. at 516.
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.* at 516-17.
158. *Campbell*, 13 Ark. at 517.

be its ward, and "made a rule upon him to produce her by the next term."[159] Campbell, failing to do this, was imprisoned in contempt.[160] The guardian appointed to represent Viney in the action, "being directed by the court to ascertain where she was and reclaim her . . . recovered possession of her by habeas corpus."[161]

Through Cornelius Campbell's accounting, the court discovered that the estate was not worth more than five thousand dollars, due apparently, to Samuel Campbell's removal of assets and waste of the estate.[162] This was the amount of money Viney was supposed to receive, since it had always been Duncan Campbell's intent "as he had often expressed during his lifetime, to liberate Viney."[163] She answered in turn, claiming that she was entitled to freedom and as much of the estate as would be required to provide her legacy.[164] The lower court held in her favor, freeing her as per the will and finding that the legacy vested in her immediately upon Duncan Campbell's death.[165] Cornelius Campbell then became her guardian.[166] An appeal followed, and the Arkansas high court affirmed.[167] The court believed that her father wished to free her immediately upon his death, and that his behavior was reasonable:

> Considering that Viney was the child of the testator, that she was of tender years, that it was necessary, under our statute, for him to make some adequate provision for her support, to prevent her from becoming a charge on the public, at the same time confiding the care and custody of the child to one of his nearest relations . . . the will appears to be as sensible and judicious a one, albeit not technically framed, as any man in the unhappy condition of the testator, could well have made.[168]

Nothing under Arkansas law barred Duncan Campbell from freeing her, and he followed the state policy of preventing free people of color from becoming wards of the state, by placing her under care and giving her a legacy worth more than the five hundred dollar bond a free person immigrating to the state was required to provide, in addition to a certificate of freedom, "conditioned for his good behavior, and to pay for his support, in case he should, at any time thereafter, be unable to support himself."[169]

The evidence in these cases indicates the extent to which the mixed-race children of white slave owners could reach a certain level of privilege. Their mixed-race status gave them access, not only through their fathers, but through their access to whites in the community who protected their interests. Although they were slaves, they were able to obtain freedom and property when their fathers embraced paternalism and when other elite white men in the community—executors and justices hearing will contests—upheld

159. *Id.*
160. *Id.*
161. *Id.* (emphasis omitted).
162. *Id.*
163. *Campbell*, 13 Ark. at 517.
164. *Id.* at 517-518.
165. *Id.* at 518.
166. *Id.*
167. *Id.* at 522.
168. *Campbell*, 13 Ark. at 519.
169. *Id.* at 520.

those paternal inclinations. They became upwardly mobile, occupying a class status different from other blacks who remained in bondage.

III. THE VULNERABLE OLD MEN: ENTHRALLED AND BAMBOOZLED

The "vulnerable old men," were testators who drafted wills giving freedom and property to slave women and their children in cases where the undue influence allegations of the challengers to the wills stuck—where the justices hearing the cases found that the circumstances surrounding the legacy were suspicious. These were the vulnerable old men who lived in isolation from white relatives and friends, and were apparently in the thrall of women of color who controlled them. These women forced them to act contrary to propriety's demands. The men thus did not leave money and property to their white relatives; instead, they gave everything to the women and their children.

Davis v. Calvert,[170] a case heard by the Maryland Court of Appeals, is an example. Thomas Cramphin of Montgomery County died at the age of ninety-two in December of 1830.[171] A month later, Elizabeth Davis, his next of kin, filed an objection to the will filed for probate by the executor, George Calvert.[172] She alleged George Calvert had colluded with Caroline Calvert, his daughter and former slave, to defraud Cramphin of his estate.[173] The probate court directed the matter to the county court for trial, where Davis lost.[174] She then filed an appeal over various jury charges and objections to evidence sustained by the county court.[175]

Caroline Calvert became Cramphin's mistress when he was about seventy-five years old.[176] During that time, she remained George Calvert's slave and had eleven children, one of whom died.[177] She received her freedom two days before the will was made in 1824, when Cramphin was eighty-five or eighty-six.[178] Clauses in the will provided for her manumission and the gradual emancipation of seven of her children.[179] Those seven children received bequests under the will.[180] None of the others—the three born after her manumission—received anything.[181] She and the children were to receive what Justice John Buchanan of the appellate court described as a considerable estate.[182] George Calvert would receive the estate if any of the bequests to Caroline and her children failed.[183]

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170. 5 G. & J. 269.
171. *Id.* at 273.
172. *Id.*
173. *Id.*
174. *Id.* at 271-78.
175. *Davis*, 5 G. & J. at 278.
176. *Id.* at 273.
177. *Id.*
178. *Id.*
179. *Id.*
180. *Davis*, 5 G. & J. at 306.
181. *Id.*
182. *Id.* at 308.
183. *Id.* at 306-07.

Caroline Calvert claimed that she had been Cramphin's mistress and companion for all the years she had been with him.[184] She was a loyal and faithful servant.[185] She took care of him and supervised his household.[186] The children were his, and he recognized them as such.[187] Davis replied that Caroline Calvert had been a prostitute the entire time she lived with Cramphin, and that none of the children were his.[188] Davis had witnesses whose testimony she claimed would prove that Calvert bamboozled Cramphin and exercised undue influence upon a frail old man who was incapable of having children.[189] Other witnesses would testify that George Calvert, a few days after Cramphin's death, "had promised . . . to provide for the children, yet that he did not consider himself bound to do so, because they were not [Cramphin's] . . . ."[190] The trial court sustained the Calverts's objections to the evidence Davis proposed; Davis lost, but the appeals court reversed and remanded for a new trial.[191]

Justice Buchanan was quite suspicious, because of Cramphin's age and the drafting of a will that left everything to a newly-manumitted slave and some, but not all, of the children she allegedly had by the testator.[192] It seemed that George Calvert, apparently a trusted friend of the testator, had helped perpetrate a fraud, one that had the potential to benefit him, since he could also recover under the will.[193] The justices thus held that the evidence Davis proposed could be important for determining the circumstances of Cramphin's life and the making of the will.[194] Caroline Calvert's character evidence was important, therefore it was all admissible.[195]

At the remand, the nature of the evidence the court held could be admitted might very well have led to Elizabeth Davis winning the second time around. She could present all kinds of witnesses, presumably white men, who would testify that Caroline Davis was a prostitute, and in a regime where black women were deemed without virtue, it is certainly possible that they would have been seen as credible. Slaves in general could not testify, but Caroline Calvert was no longer a slave at the time the action began in 1831. As a party to the action, she was capable of testifying. One wonders, however, whether she would have been believed.

But the woman alleged to have wielded the undue influence need not have colluded with others. In another case, the relatives of Edmund Talbot, an elderly white man debilitated by old age, alleged that a free black woman in his house had made him leave everything in his will to her, to the exclusion of his own children "whose condition

184. *Id.* at 276.
185. *Davis*, 5 G. & J. at 276.
186. *Id.*
187. *Id.* at 274.
188. *Id.*
189. *Id.*
190. *Davis*, 5 G. & J. at 307.
191. *Id.* at 313.
192. *Id.* at 309, 312-13.
193. *Id.*
194. *Id.* at 313.
195. *Davis*, 5 G. & J. at 313.

and circumstances in life, required the exercise of his bounty in their favor . . . ."[196] Justice James Simpson explained:

> [He seemed] to have had no will of his own, but to have submitted implicitly to the dictation of a colored woman whom he had emancipated, and whose familiar intercourse with him, had brought him into complete and continued subjection to her influence. The very fact, that he undisguisedly yielded to an influence of such a character, and lost, under its exercise, apparently all independence of thought and action, leads irresistibly to the conclusion, that his mental faculties had given away . . . .[197]

Thus, the court held, Talbot did not have the mental capacity to make a valid will, and the will was rejected.[198]

Also worthy of protection were those testators threatened by their legitimate white children for recognizing their illegitimate mixed-race offspring. Loyd Ford of Washington County, Tennessee, made a will in 1840 directing that John Ford and other slaves be emancipated and given real property.[199] They were alleged to be his illegitimate slave children.[200] He named his legitimate sons, James and Grant Ford, as executors.[201] They refused to serve, and the slaves brought an action by their friend Phebe Stuart to have the will probated.[202] Some of the distributees and heirs at law then appeared and contested the will.[203] The lower court found that the will was valid, and an appeal followed.[204]

The opponents to the will alleged that Loyd Ford was of unsound mind, an elderly man with a failing memory.[205] But notwithstanding his advancing years, Justice Nathan Green, in writing for the court, found he was still capable of disposing of his property.[206] The jury was entitled to hear and weigh evidence of his reputation and the nature of the relationship he had with the slaves.[207] Ford had been heard to recognize them as his children, and the evidence corroborated it.[208] There was no reason to believe he was insane.[209] That he once told the keeper of the will to burn it, only to ask about it a few days later, did not necessarily mean insanity.[210] Witnesses claimed that Ford complained that one of his legitimate sons "threatened to beat him, if he did not come and get the will. . . . [Sarah Hale, R.G.'s wife,] brought a paper which, by the old man's direction, was thrown in the fire. . . . The paper thrown into the fire was not the

196. *Denton*, 48 Ky. at 30.
197. *Id.*
198. *Id.* at 31.
199. *Ford*, 26 Tenn. at 92.
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.*
204. *Ford*, 26 Tenn. at 93.
205. *Id.* at 97.
206. *Id.*
207. *Id.* at 98-99.
208. *Id.*
209. *Ford*, 26 Tenn. at 99.
210. *Id.* at 102-03.

will . . . ."[211] Instead of being insane, Ford could have been wily, dissembling to avoid conflict with his son: "Some days afterwards the testator was at Hale's house, and enquired of Sarah Hale . . . if she had his will yet; she told him she had. He then said she must keep it, and do what he had before told her to do with it."[212]

Justice Green thought that it was appropriate for evidence to be heard on the nature of the relationship between Ford and his mixed-race children.[213] Such evidence would establish whether Talbot was sane.[214] In noting that the slaves had the right to bring their action, Justice Green set forth a remarkably liberal disquisition on the personhood of slaves:

> A slave is not in the condition of a horse or an ox. His liberty is restrained, it is true, and his owner controls his actions and claims his services. But he is made after the image of the Creator. He has mental capacities, and an immortal principle in his nature, that constitute him equal to his owner but for the accidental position in which fortune has placed him. The owner has acquired conventional rights to him, but the laws under which he is held as a slave have not and cannot extinguish his high-born nature nor deprive him of many rights which are inherent in man.[215]

Wiethoff notes, however, that Justice Green's apparent liberalism was not consistent. Green also thought slaves were "unfortunate, degraded, and vicious."[216] Beyond that, free blacks were "an inferior caste in society, with whom public opinion has never permitted the white population to associate on terms of equality, and in relation to whom the laws have never allowed the enjoyment of equal rights."[217] This was the same Justice Green who held for William Isaac Rawlings.[218] Green's contradictions mean that he arguably was not a great supporter of black rights. Nonetheless, he did not seem troubled by the existence of Ford's mixed-race children. He might have been troubled, however, by adult children abusing their elderly father in an attempt to make him change his will. Finding Ford insane just on the bare facts of a will leaving property to slaves, without any further inquiry, would have left open the door for the unscrupulous to take advantage of old men and deny them their personal freedom and autonomy.

IV. THE DEGRADED CREATURES: LACKING MORAL FIBER AND LIVING BEYOND THE PALE

In some jurisdictions where justices frowned upon interracial liaisons, they felt constrained to fulfill the testator's interests, nonetheless. These men were the "degraded creatures" who recognized their slave women partners and their children. The will

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211. *Id.* at 102. Note, however, that one earlier commentator has read the language of "children" to mean the paternalistic language of a slave master for his figurative, but not literal, slave "children." Arthur F. Howington, *"Not in the Condition of a Horse or an Ox": Ford v. Ford, the Law of Testamentary Manumission, and the Tennessee Courts' Recognition of Slave Humanity*, 34 Tenn. Hist. Q. 249 (1975).

212. *Ford*, 26 Tenn. at 102-103.

213. *Id.* at 98-99.

214. *Id.* at 99.

215. *Id.* at 95-96.

216. Wiethoff, *supra* n. 16, at 46.

217. *Ford*, 26 Tenn. at 97.

218. *Greenlow*, 22 Tenn. 90; see *supra* nn. 105-119 and accompanying text.

contests in these cases illuminate the extent to which these were battles over social control. Elite white men who flouted society's mores by living openly with black women and recognizing their children could not be controlled. But their children and the children's mothers could be, insofar as they could be punished for the testator's illicit behavior. Thus, the will contest was to some extent motivated by those seeking to malign him and usurp his prerogatives.

This meant that claimants, for example, the brothers and sisters of Ephraim Pool of Alabama, played upon community prejudices and proposed legal presumptions that Pool was incapable of making a will.[219] The proponents of the will would then have had the difficult burden of disproving the presumption, and if the presumption stuck, the jury would be forced to see the facts through its light, and the will could be held invalid as a matter of law. Pool directed his executor, George L. Stewart, to take "Harriet, a mulatto woman, and several children of another woman, who were principally raised by [the first], and whose father the testator appears to have been," to Ohio.[220] They were to be emancipated, his estate liquidated in its entirety, and all of the money invested on their behalf.[221] Harriet was to control the money.[222]

So what did his siblings hope the jury would presume? The siblings hoped that the will would be seen as unnatural and that it was written due solely to Harriet's inducement and influence.[223] Ephraim and Harriet's relationship was an undue attachment, an adulterous connection, and his siblings righteously refused to associate with him as a result, but that should not bar them from receiving his property.[224] They argued that "Pool made his will out of spite," and "was acting under such an insane delusion as to his brothers and sisters."[225] Moreover, Harriet might have induced the prejudice that caused him to leave her and the children all his property.[226] But the presumption did not stick. The trial court did not permit it, and the high court reaffirmed.[227]

Men like Pool were privileged by race and class, living their lives how they pleased, and leaving their property as they saw fit, to the chagrin of not only their families, but also the justices who were critical of their behavior. Notwithstanding their disgust, the justices thought they could not do a thing about it. As elite white men, they could quarrel with the behavior, but the very hallmark of liberty meant that a man could do with his property as he wished. These battles sometimes amounted to fights within the courts themselves, between justices who were chagrined, and those who in various instances had been instrumental in helping these men draft their wills. In the view of the hardliners, these testators contributed to that ancient anathema: a population of free blacks privileged by their intimate ties to white men.

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219. *Pool's Heirs*, 33 Ala. at 145.
220. *Id.* at 146.
221. *Id.* at 145.
222. *Id.* at 146.
223. *Id.* at 147.
224. *Pool's Heirs v. Pool's Executor*, 35 Ala. 12, 14 (1859).
225. *Id.* at 14.
226. *Id.* at 15.
227. *Id.* at 19.

W.B. Farr of South Carolina was sixty-six years old when he died in 1837.[228] He made a will in 1836, and added a codicil in 1837.[229] In the will, he gave his entire estate, worth fifty to sixty thousand dollars, to W.P. Thompson, his executor.[230] Farr had never married, but according to the record "had lived for many years in a state of illicit intercourse with a mulatto woman, his own slave, who assumed the position of a wife, and controlled, at least, all the domestic arrangements of his family."[231] Her name was Fan, and she was described as "bright mulatto."[232] She and Farr had one child, Henry.[233] Henry, apparently, was "nearly white."[234] Years before Farr died, he tried to free Henry by applying to the legislature, the only method of manumission available under statutory law, but that effort failed.[235] Thus, when Henry came of age, his father sent him to Indiana, "where he had him settled, and provided him, from time to time, with considerable sums of money."[236]

The will in question was exactly like the one Judge John B. O'Neall had written for him back in 1828.[237] Judge O'Neall was not on the South Carolina Court of Appeals at the time.[238] In the 1836 will, Thompson, not O'Neall, was the executor.[239] In each case, Farr gave written instructions to the executor, declaring a trust relationship, explaining that the property should be "execute[d] for the benefit of Fan and Henry."[240] Those contesting the will were Farr's half-brothers, nephews, and nieces.[241] By claiming that the will was invalid due to the undue influence of Fan, they hoped to convince the court that Farr died intestate, in which case they would inherit.[242] In their view, Farr was under Fan's control, because she wielded the power of "a white woman and a wife."[243] Farr consulted with her, and did what she said.[244] Yet, they alleged, it was possible he was afraid of her, becoming so as he got older, because hard drinking and "a stroke of the palsy" had debilitated him.[245] They said she was also a drinker, and when she was under the influence, she used to become particularly insolent, which included acts of insulting and threatening him.[246] According to one witness, "he did not know why he took up with [her]; when he was well and could go about, he did not mind

228. *Farr*, Cheves 37 at 37.
229. *Id.*
230. *Id.* at 37-38.
231. *Id.* at 38.
232. *Id.*
233. *Farr*, Cheves 37 at 38.
234. *Id.*
235. *Id.*
236. *Id.*
237. *Id.* at 39-40.
238. *Farr*, Cheves 37 at 39-40.
239. *Id.* at 39.
240. *Id.* at 40.
241. *Id.* at 38.
242. *Id.* at 37-38.
243. *Farr*, Cheves 37 at 41.
244. *Id.*
245. *Id.* at 40.
246. *Id.* at 41-42.

her, but since he had been palsied, he had better be in hell."[247] The jury in the lower court found against the will.[248]

By the time of the appeal, Judge O'Neall was on the high court, but he recused himself.[249] Justice Baylis J. Earle delivered the opinion of the court, making an interesting comment on the undue influence allegation that was at the heart of so many of these types of will contests: "This phrase of *undue influence*, so frequently resorted to in this country, by disappointed relations, to avoid wills of persons on whom, while living, they had no claims, seems to me to be a modern innovation, and is not known in the English Courts."[250] The litigation instituted by these claimants had no basis. In his view, any reasonable and sane person could make a will, for the law permitted disposal of property at death, just as though the transfer took place while the person was alive.[251] Thus, he explained:

> The testator was an intelligent man, of strong mind . . . . He had no lawful wife, nor children, and had not lived in amity, at least not in continued amity, with his relations; and he has given his property to a stranger to his blood. This he surely had a right to do, and this is all that appears upon the face of the will.[252]

Notwithstanding Farr's long-term relationship with Fan, the social and legal culture did not accord her the status of a relation, and if Fan had been his lawful wife and wielded the same level of influence "it would not hold either with reason or law, to say that such an influence would avoid a will in behalf of the wife."[253] Fan was vulnerable only because she was a black woman and a slave. The undue influence alleged by the heirs at law did not hold, however, because the court took a very narrow view of what coercion meant.[254] The external threat or compulsion had to have existed at the exact moment when the will was written in 1836, and the court found none.[255] But beyond that, the will of 1828 was identical to the one at issue, and the evidence supporting the allegations of influence took place a few years afterwards, in 1835.[256] No matter how degrading the court found Farr's behavior, it was not unreasonable for Farr to provide for his son Henry, and to hold otherwise:

> [W]ould be, to let the jury run wild under the influence of prejudices and feelings which, however honorable and praiseworthy, must not be permitted to overthrow the rules of law, or divert the current of justice. The trial by jury would otherwise become an engine of capricious injustice, instead of the safe-guard of property.[257]

This safeguarding of property was what the testators in all instances were trying to do. They wanted to make provision for the women and their children, under a regime

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247. *Id.* at 42.
248. *Farr*, Cheves 37 at 42.
249. *Id.* at 49.
250. *Id.* at 46 (emphasis added).
251. *Id.* at 47.
252. *Id.*
253. *Farr*, Cheves 37 at 48.
254. *Id.* at 48-49.
255. *Id.*
256. *Id.*
257. *Id.* at 49.

hostile to such a purpose. The law and culture of public opinion denied them, but they could try through arrangements with trusted friends and relatives charged with seeing the task through. But nothing was more effective than making sure the manumissions took place before death. This was what Elijah Willis did.[258] In 1846, he made a will in South Carolina.[259] An unmarried man of about fifty-three years of age, he left his property to members of his extended family: his siblings and their children.[260] Eight years later, Willis went to Ohio and had another will made by lawyers there.[261] By this time, his circumstances changed; there were other people he wanted to make arrangements for, but he could not do what he wanted in South Carolina.[262] He directed his executors to take Amy (his slave mistress), her children and her mother, to Cincinnati and emancipate them there.[263] Everything in South Carolina—all his real and personal property—was to be liquidated.[264] All the proceeds were to go towards the purchase of land and the furnishing of a home for Amy and the children.[265] They were to get the remainder of the money.[266]

A year later, in May of 1855, Willis left his home in South Carolina and set off for Ohio.[267] Accompanying him were Amy, her seven children, and her mother.[268] But once they got off the steamboat, "[Willis] died between the landing and a hack [he hired to take him] to his lodgings."[269] The Ohio will was in his belongings; it was probated on May 23, 1855, and the South Carolina will was probated some time thereafter, once those back home learned of his death.[270] The heirs at law filed their bill opposing the Ohio will, claiming insanity, fraud, and undue influence, alleging facts similar to those alleged in the case of Farr.[271]

Judge O'Neall heard the case at the trial level, and the jury found against the will.[272] According to claimants' witnesses, "the deceased was often under gloomy depression of spirits—avoiding society on account of his connection with Amy, by whom he had several children; that he permitted her to act as the mistress of his house."[273] She was demanding and outspoken, and an alcoholic.[274] She might have been unfaithful, yet was always careful to look out for herself and her children, at his expense.[275] But another witness explained that:

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258. *Jolliffe*, 10 Rich. at 186.
259. *Id.*
260. *Id.*
261. *Id.*
262. *Id.* at 186-87.
263. *Jolliffe*, 10 Rich. at 188.
264. *Id.* at 188-89.
265. *Id.* at 189.
266. *Id.*
267. *Id.* at 186.
268. *Jolliffe*, 10 Rich. at 186.
269. *Id.* at 187.
270. *Id.*
271. *Id.*
272. *Id.* at 186, 193.
273. *Jolliffe*, 10 Rich. at 192.
274. *Id.*
275. *Id.*

> [H]e was always anxious to secure the freedom of, and make provision for, Amy, and her children by him. . . . [The witness] never thought any of the matters . . . affected his intellect. I thought there was not the slightest ground to say that the testator was not of sane mind, or that there was fraud or undue influence.[276]

The high court agreed and held that "the will was made in Cincinnati in the absence of Amy, more than a year before the testator's death, a copy retained by him during the whole time . . . ."[277]

That Willis made a new will in Ohio appeared to vitiate any allegations of illegality under an act of 1841 that barred manumission within the state.[278] The sole question for the court was whether the will was valid.[279] Willis freed Amy, her children, and her mother, and fulfilled the terms of the will.[280] He "carried said slaves to Ohio in his lifetime, there left them, and there they remain, so far as we know."[281] It was in his right to do so, said Justice Thomas J. Withers.[282] Contrary to being insane or under undue influence, Willis indicated that he had made a careful manumission plan for Amy and her family, and this was done of his own free will and reasonable mind.[283] Willis conferred with Ohio lawyers, because he would not have been able to find anyone in South Carolina to help him.[284] Notwithstanding the disgust most felt, men like Willis were to be pitied because "such motives and such provisions and such objects of bounty were perfectly consistent with the unconstrained pleasure and natural sentiments of such a man as Elijah Willis was."[285] His apparent moodiness and depression could be explained as such:

> [A] sigh when he beheld the living examples of his shame . . . it is most obvious that the more rational his reflections and forecast, when he contemplated the channel through which he must hand down his blood to posterity, and the probable fortune of those who had sprung from him, the deeper must have been his gloom, the more bitter his remorse.[286]

But none of that meant insanity. The court ordered a new trial, and the verdict was in favor of the Ohio will.[287]

V. FORMALISM: SLAVERY, FREEDOM, AND THE RULE OF LAW

Considering that legal thinkers of the antebellum South viewed slavery as fulfilling natural law and upholding the natural order of society,[288] it is only logical that they

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276. *Id.*
277. *Id.* at 199-200.
278. *Jolliffe*, 10 Rich. at 187-88.
279. *Id.* at 192.
280. *Id.* at 195.
281. *Id.*
282. *Id.*
283. *Jolliffe*, 10 Rich. at 200.
284. *Id.* at 200-01.
285. *Id.* at 200.
286. *Id.* at 201.
287. *Id.*
288. For examples, see various intellectual histories of nineteenth century American law, including Stephen M. Feldman, *American Legal Thought from Premodernism to Postmodernism: An Intellectual Voyage* (Oxford U. Press 2000).

upheld formalism, described by strict adherence to the law of slavery as established by local legislation and case law, in pursuit of the ultimate social policy goal: preventing an increase in the free black population. These justices were deeply suspicious of wills that appeared to manumit slaves within Southern states and grant them privileges, such as property and status as free people.[289] But formalism could be a two-edged sword. Justices like O'Neall, who appeared to be less suspicious of testators' actions, could find in the wills requirements that fulfilled the demands of the law of slavery: a master charged with control over a slave.

Decisions from North Carolina indicate that the courts were called upon to hear trusts set up for favored slaves, used when the law of the state prohibited manumission. The testators hoped to give the slaves the status of free people, even though they remained in bondage, a troubling concept to the appellate justices who heard the cases. Thomas Cunningham of Wilmington stated in his will that a negro woman named Rachel would be given land and the rental incomes on various properties he owned, all for her benefit and for "the maintenance and education of her three mulatto children, named Mary, Ritty and Chrissy, and the child of which she is now pregnant."[290] He desired that several other slaves—Virgil, Quash, and Tamer—should remain on the plantation where he resided "to work for the maintenance of Rachel's children during the natural life of the said negroes."[291] Finally, Rachel and her children were to become free immediately upon his death.[292]

Dr. Umstead of Orange County tried to do something similar in his will. He died in 1829, and in his will gave a negro slave, Dicey, and her two children, Emeline and Harriet, to his friends Catlett Campbell and Thomas D. Bennehan.[293] They were the executors charged with undertaking "the necessary legal steps, to have said slave Dicey and her two children manumitted and liberated."[294] Until they were manumitted, "the labour of such slaves, and the profits, and proceeds thereof, shall enure . . . to the benefit of no other person whatever."[295] In 1829, Campbell and Bennehan filed a petition for the slaves' emancipation; however, only Dicey became free.[296] When Catlett Campbell died in 1845, he asked that Bennehan remain true to the trust established by Dr. Umstead.[297] He then relinquished any rights he had to the slaves, giving them to Bennehan.[298] He did not want the children or their descendants to become part of his estate. Instead, he hoped they would gain their freedom, through some other trust arrangement, provided it were necessary "to enable [Bennehan] to accomplish this

289. For example, see Joseph Lumpkin's opinions in *Vance v. Crawford* and *Bryan v. Walton*, *infra* nn. 390-394 and accompanying text.

290. *Cunningham's Heirs*, 1 N.C. at 519.

291. *Id.*

292. *Id.*

293. *Bennehan's Executor*, 40 N.C. at 106.

294. *Id.*

295. *Id.*

296. *Id.* at 107.

297. *Id.*

298. *Bennehan's Executor*, 40 N.C. at 107.

purpose, if such release is necessary, or to sell, or to convey them to any other person or persons, for a nominal price."[299]

In each case, the North Carolina Supreme Court found the trust was illegal. Slaves were not competent to take property, as in the case of Cunningham's will. According to Justice John Louis Taylor, "a civil incapacity results from the nature and condition of slavery. And it would be a solecism, that the law should sanction or permit the acquisition of property by those, from whom it afterwards withholds that protection without which property is useless."[300] Beyond that, permitting a slave to live as a free person, as Dr. Umstead had planned for Dicey and the children, was illegal.[301] The executors, as residuary legatees, received the slaves outright.[302] Thus, the slaves Campbell owned that came from Dr. Umstead were considered part of his estate, subject to its debts.[303]

William S. Morris attempted to manumit a slave named Patsy and her three children: Harriet, Albert, and Freeman.[304] But the steps he took amounted to what the court found was an illegal attempt to free them and have them remain in the state.[305] In 1831, Morris made up his will in which he gave Patsy and the children to his executor for the purpose of freeing them within a year of his death, using all money remaining in the estate "to effect the removal and emancipation as aforesaid," and to provide for their education, improvement, and subsistence.[306] Seven years later, Morris added a codicil that devised them land, household effects, his cow and calf, and ten shares of stock in the Merchant's Bank at Newbern.[307] Patsy was to use and occupy the property.[308] After she died, the children were to get it.[309] Other pieces of land were to be sold for the benefit of William Henry Morris, Harriet's son and Patsy's grandson, who was to receive one thousand dollars out of the sale.[310] William S. Morris died in 1848, and his next of kin and various other legatees brought suit to declare the emancipations and legacies to Patsy, her children, and grandchild, void.[311]

Significant to the court's opinion was the fact that in 1828, Morris had brought Patsy and her three children to Pennsylvania for the purpose of emancipating them, only to bring them back to North Carolina on his return, where they lived as free people.[312] Interestingly enough, Justice William Gaston, who was sitting on the North Carolina Supreme Court at the time, had explained to him that the emancipation was irregular and

299. *Id.*
300. *Cunningham's Heirs*, 1 N.C. at 521.
301. *Bennehan's Executor*, 40 N.C. at 108-09.
302. *Id.* at 109.
303. *Id.* at 109-10.
304. *Green*, 45 N.C. at 102.
305. *Id.* at 107.
306. *Id.* at 103.
307. *Id.*
308. *Id.*
309. *Green*, 45 N.C. at 103.
310. *Id.*
311. *Id.*
312. *Id.* at 104.

might be declared void upon his death, thus advising Morris to make up the will.[313] Thereafter, the executors tried to effectuate the slaves' freedom by taking them back to Pennsylvania with the intent that they would live there permanently.[314] But the will held a contradiction. Judge Battle asked: How could Patsy and the others live in Pennsylvania, when according to Morris, they were to occupy and hold property in North Carolina? It was obvious that Morris intended North Carolina to be their place of residence, and the lower court thus held that the codicil of 1838 was contrary to state law and "the negroes Patsy, Harriet, Freeman and William Henry Morris, were still slaves, and belonged to the estate of said testator."[315] The Supreme Court agreed, and dismissed a petition for a rehearing, affirming the decree of the lower court.[316]

In another case, Lucy Thomas was more successful at gaining her freedom. But due to a contradiction between the terms of the will and a codicil, she was not able to gain the property Nathaniel P. Thomas left for her and her children, Mary Jane, James, and Newton.[317] Nathaniel intended that two plots of land in Caswell County, totaling 151 acres, be sold by his executors, and the proceeds be used to purchase a suitable home for Lucy and her children, with the remainder placed in an interest-bearing account.[318] The interest was to be used for their support, but before the sale took place, the estate would provide funds for them to live on.[319] In a codicil, Thomas included a clause he hoped would save the bequests to them in case North Carolina law:

> [S]hall present any obstacle to the fulfillment of the trust . . . in relation to my mulatto woman, Lucy, and her children, I do hereby authorize and direct my executor, to send them to such State, territory or country as she may select, and he may think best, and I do hereby charge my estate with a sum sufficient to provide for their removal . . . and for their comfortable settlement there; it being my will and desire that she shall not be continued in slavery.[320]

Once Lucy learned that she could not remain in North Carolina and receive the bequests under the will, she moved with the children to Ohio and became free.[321] Ohio became their domicile.[322] She then brought suit in North Carolina, explaining that through her own efforts and that of the executor, Nathaniel J. Palmer, they were able to get to Ohio, but she complained that "they [had] not been provided with a home or settlement as the will directs, and that they are in want and destitution, and that the children being small, the mother is unable to support herself and them, without the assistance of the fund provided in the will."[323] She wanted the fifteen hundred dollars of

313. For a discussion of Judge Gaston's career and opinions on slavery, indicating a humanistic perspective on slavery, stemming from religious conviction, see Wiethoff, *supra* n. 16, at 87. Gaston served on the court from 1834-1844, but was not on the court when *Green v. Lane* was decided in 1852.

314. *Green*, 45 N.C. at 104.

315. *Id.* at 112.

316. *Id.* at 116.

317. *Thomas*, 54 N.C. at 250.

318. *Id.* at 249-50.

319. *Id.* at 250.

320. *Id.*

321. *Id.* at 250-55.

322. *Thomas*, 54 N.C. at 251.

323. *Id.*

proceeds from the sale of the properties, the expenses for her move to Ohio, and the costs of their resettlement.[324]

Palmer replied that according to his advisors, nothing in the codicil validated what were "deficient and illegal devises in the body of the will, so that the plaintiffs [were] not entitled to anything but the expenses of their removal and a comfortable settlement"[325] in Ohio. He already gave them the money to assist in their move, and intended to provide for their comfortable settlement there, but he was waiting for what the court would say.[326] Justice Richmond M. Pearson, however, read the will and codicil in narrow terms, viewing the will void, insofar as it would have given Lucy and her children nominal slave status.[327] They would have had special housing and funding for their support.[328] To have permitted such a state of affairs would have fueled discontent among other slaves who knew them: "Free negroes constitute a distinct class; and the poor creatures seldom prosper so well as to become objects of envy."[329] Thus, all those becoming free were to leave the state, which was what Lucy did.[330] But the codicil did not make the terms written in the will valid and did not authorize Lucy and her children to receive the fund provided by the sale of the land.[331] Although Pearson intended the codicil to be a substitute for the will, in case the will was held invalid,[332] Lucy could receive from the estate only the costs to cover her move and settlement in Ohio, and not any income for the maintenance of her and her children.[333]

But in South Carolina, Justice John B. O'Neall was more open to such trust arrangements. Considering a case with a fact pattern almost identical to that in the case of Thomas Cunningham's will, he found that the assignment John Carmille made in 1830 of various slaves as part of a trust arrangement was proper.[334] The trustees, George Pringle and Philip Chartrand, paid nominal consideration, and received deeds for the slaves.[335] The contract permitted the slaves—a woman named Henrietta and her five children: Charlotte, Francis, Nancy, John, and Elizabeth to seek their own employment, work for their own maintenance, and exercise control over their earnings.[336] They were to pay the trustees the sum of one dollar per year.[337] Two other slaves, Tilly and Mary, were to apply their labor for the benefit of Henrietta and her children.[338]

It is quite telling that in 1832, Carmille made a will in which he left his entire estate to Henrietta and her children, directing that they be manumitted in the state, or

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324. *Id.*
325. *Id.*
326. *Id.*
327. *Thomas*, 54 N.C. at 252.
328. *Id.*
329. *Id.*
330. *Id.*
331. *Id.*
332. *Thomas*, 54 N.C. at 252-53.
333. *Id.*
334. *Carmille*, 2 McMul. at 454.
335. *Id.* at 455.
336. *Id.*
337. *Id.*
338. *Id.*

without, according to the law.[339] That will was rejected, however, because apparently Carmille had been married in 1830 to Margaret Arnott, with whom he lived for ten months, until she died.[340] Julia Carmille, claiming right as their daughter, was the complainant in the instant case.[341] John Carmille died in 1833, and his daughter claimed that Henrietta and her children should be considered part of his estate: "The object of this bill is to set aside those deeds, and subject the slaves, in the first place, to the payment of the debts of the intestate, and to have the surplus paid or delivered to the complainant, as next of kin."[342]

Significant to the case was whether the assignment to Pringle and Chartrand was designed to contravene the 1820 Act which declared "that no slave shall hereafter be emancipated but by the Act of the Legislature."[343] But O'Neall did not see this case as violating any law: the slaves were not emancipated at all, insofar as they still had masters, and it did not matter that Pringle and Chartrand were to give them the fruits of their own labor.[344] O'Neal stated that "[k]indness to slaves, according to my judgment, is the true policy of slave owners, and its spirit should go . . . into the making of the law, and ought to be a ruling principle of its construction. Nothing will more assuredly defeat our institution of slavery, than harsh legislation rigorously enforced."[345] The purpose of the contract was not to free Henrietta and her children, but to ensure that they would have kind masters upon Carmille's death.[346]

In these cases, it appears the trusts could stand because there was a deed that conveyed ownership to another, and the slaves in question could not sue to enforce the trust. The very ownership was transferred, with the effect of placing the actions of the trustees beyond the reach of the claimants alleging illegality and improper possession of their testator's property. The testator gave up all claim to the slaves. Yet, under the law, the trustees could do what they wanted, for they were owners in control of slaves. That meant in theory, they could violate the trust arrangement, and the slaves would lose as a result because "the beneficiaries being slaves could have no standing in Court to compel the execution of the trusts, which were thus of imperfect obligation, depending upon the benevolence of the trustee."[347]

But in 1841, the legislature put an end to the practice. According to Justice David L. Wardlaw, "the policy of the State announced in the Act of 1841 . . . inhibit[ed] the practical emancipation of slaves, and gifts and trusts for their benefit."[348] Thus, the trust William Hacket set up for the benefit of his slave Mary, their child Louisa, and her mother Alsey was found illegal.[349] Hacket died in 1850 after having drafted his will in

339. *Carmille*, 2 McMul. at 454.
340. *Id.* at 454-55.
341. *Id.* at 454.
342. *Id.* at 455.
343. *Id.* at 468.
344. *Carmille*, 2 McMul. at 470.
345. *Id.*
346. *Id.*
347. *Broughton*, 3 Rich. Eq. at 438.
348. *Mallet*, 6 Rich. Eq. at 20.
349. *Id.* at 12, 20.

1847.[350] In the fourth clause of the document, he gave the slaves to his brother, Hugh, and directed that he settle them on a designated piece of land and build them a house.[351] The slaves were to receive all the profits of the land, interest income on one thousand dollars, and the hire of one of the other slaves, Dick.[352] They were to live as free people, "without any person requiring or exacting any service or labor from [them]."[353] If any of the legatees to the will complained of the terms, the executors were directed to revoke the legacy of the complainant.[354]

William Hacket's sister Jane Mallet filed suit on the ground that the clauses for the benefit of Mary and her family were void under law.[355] Her brother Hugh responded that in keeping with the terms of William's will, she forfeited the two thousand dollars she was to receive, as well as her interest in the residue of the estate.[356] The court sided with her.[357] The purpose of the clause was to terrorize.[358] To permit it to stand would have meant that legitimate legal issues at stake would not be resolved.[359] According to Justice Wardlaw, the Act of 1841 established that the bequests William made were

> void as against public policy . . . . In the proper construction of the will, we must consider the fourth clause as struck out. . . . Besides, the legatees supposed to be disappointed here, are slaves, who have no civil rights or *status* in Courts, through which they might assert a claim for compensation.[360]

That the formal rule of slavery presumed every black person a slave, meant that a free person of color bringing suit could be accused of being a slave and incapable of receiving a legacy. Thomas Hamilton of Davidson County, Tennessee took out a five thousand dollar life insurance policy with the Mutual Protection Insurance Company on April 2, 1849.[361] In August, he wrote into the policy that he was making the policy over to Adelaide Eliza Goram, a free woman of color from New Orleans.[362] In February of 1850, he was in New Orleans and had the endorsement witnessed into the policy.[363] He died five years later on August 25, 1855.[364] Shortly thereafter, Goram went to the insurance company's office to cash it.[365] Andrew Hamilton, who became the executor of Thomas Hamilton's estate, also claimed the policy, arguing that the estate might be insolvent and the money would be needed to pay the debts.[366] The insurance company

350. *Id.* at 12.
351. *Id.* at 12-13.
352. *Id.* at 13.
353. *Mallet*, 6 Rich. Eq. at 13.
354. *Id.*
355. *Id.*
356. *Id.* at 14.
357. *Id.* at 25.
358. *Mallet*, 6 Rich. Eq. at 25.
359. *Id.*
360. *Id.* (emphasis added).
361. *Mutual Protection Ins. Co.*, 37 Tenn. at 270.
362. *Id.*
363. *Id.* at 270-71.
364. *Id.* at 271.
365. *Id.*
366. *Mutual Protection Ins. Co.*, 37 Tenn. at 271.

brought suit to determine who should receive the money.[367] The case was heard by the Tennessee Supreme Court in Nashville.[368]

Goram proved that Thomas Hamilton gave her the policy once he finalized the assignment and that it had been in her possession since then.[369] Andrew Hamilton responded that the assignment was not done in proper procedure, with notice given to the insurance company.[370] But more significantly, he did not believe that Goram was a free person "capable in law, of taking any interest under the assignment."[371] Justice Robert J. McKinney, writing on behalf of the court, held that there was nothing in the insurance contract that required Thomas to inform the insurance company of what he had done.[372] Moreover, once he made the assignment, it had the effect of "divesting the assured of all interest in, and power of disposition over the policy."[373] Goram thus gained absolute right to it. She had gone to the insurer's office, demanding payment, claiming her right as a free woman to do so, but the company's agent did not believe her.[374] The court refused to permit Goram's status as a free woman to become an issue for litigation:

> These incidental allusions to the status of the defendant, were scarcely sufficient perhaps, to have called for an answer, touching her social condition; much less to have put her upon proof in relation to it; yet she does not answer as to this matter, and denying the right to raise any such question against her, she avers that she is a free woman, capable in law of taking and holding property, and of suing and being sued. And there being no proof upon this point, the objection must of course fall.[375]

Adelaide Goram was a free person who was making a claim for an insurance policy, and her case was heard by a court that tended to be more liberal. But courts in Georgia and Mississippi tended to be more formalist in favor of slavery, particularly with respect to manumission taking place anywhere in the state. But when manumission took place elsewhere, the testators' intentions were more likely to be upheld. When Reuben B. Patterson set forth clearly that he entrusted George D. Blakely to become guardian to a three-year-old colored girl, Sophy, and remove her from the state of Georgia and free her, it was legal under Georgia law.[376] Sophy was the daughter of his woman, Margaret.[377] He did not want the little girl to be considered part of his estate.[378] Instead, she was to be educated and remain in Blakely's care until she reached the age of sixteen, or until she married with his consent.[379] She was to receive two thousand dollars, the interest to be used for her education and support.[380] If she were to marry,

367. *Id.*
368. *Id.* at 269.
369. *Id.* at 271.
370. *Id.* at 272.
371. *Mutual Protection Ins. Co.*, 37 Tenn. at 272.
372. *Id.* at 273.
373. *Id.* at 275.
374. *Id.* at 278.
375. *Id.* (emphasis omitted).
376. *Cooper*, 10 Ga. at 264.
377. *Id.*
378. *Id.*
379. *Id.*
380. *Id.*

Blakely was to buy her a homestead.[381] Blakely sued the executor, Alexander Cooper, in order to fulfill the terms of Patterson's will.[382] Cooper claimed the terms were invalid and void as contravening the laws against manumission of slaves.[383] The lower court held for Blakely, and Cooper appealed.[384] Justice Robert Iverson replied that the will did not violate the law.[385]

Although Georgia had in place prohibitions against manumission in the state as per statutes passed in 1801 and 1818, nothing prohibited manumission elsewhere, according to Justice Joseph Lumpkin. As a result, he upheld various manumission plans, even though he had "no partiality for foreign any more than domestic manumission,"[386] but he did not see it as within his purview to "dictate to more than a half a million of my fellow-citizens."[387] He just wanted all free blacks to stay away, with no slave ever experiencing a moment of freedom in Georgia before gaining manumission.[388] The acts against manumission "were intended to prevent the emancipation of people of color in this State, where their presence could not fail to be injurious to the slave population. . . . to the annoyance and injury of the owners of slaves."[389] They were the allies of Northern abolitionists, bent upon ending slavery through the South, and it only threatened to get worse as time went on and more and more slaves became free:

> Neither humanity, nor religion, nor common justice, requires of us to sanction or favor domestic emancipation; to give our slaves their liberty at the risk of losing our own. They are incapable of taking part with ourselves, in the exercise of self government. To set up a model empire for the world, God in His wisdom planted on this virgin soil, the best blood of the human family. To allow it to be contaminated, is to be recreant to the weighty and solemn trust committed to our hands.[390]

But as for mixed-race individuals, the danger was that they might pass for white and associate with whites on levels of social equality. As for the white men who had children by black and mixed-race women, they were contemptible. Commenting about Joseph Nunez, the mixed-race child of a Portuguese man, James Nunez said, "he never learned to write his own name, and took up with negroes as his associates,"[391] instead of maintaining some level of society that he should have aspired to, as a man of some property.[392] He married one of his slaves.[393] But Joseph was only following the

381. *Cooper*, 10 Ga. at 265.
382. *Id.* at 265.
383. *Id.*
384. *Id.*
385. *Id.*
386. *Sanders v. Ward*, 25 Ga. 109, 124 (1858).
387. *Id.*
388. *See e.g. Drane v. Beall*, 21 Ga. 21 (1857). The testator willed that various slaves could be as "free as the laws" permitted. *Id.* at 38. Others were to become free and then move to free states or Liberia, but they were to remain on the plantation for four years, working in order to raise funds for their upkeep upon their removal. *Id.* at 40-41. But the manumission plan failed, because its provisions would have had the slaves working for themselves, "enjoying the profits of their own skill and labor." *Id.* at 44.
389. *Cleland v. Waters*, 16 Ga. 496, 517 (1854).
390. *Vance*, 4 Ga. at 459.
391. *Bryan*, 33 Ga. Supp. at 23.
392. *Id.* at 23-24.
393. *Id.* at 23.

example of his father, who took a mulatto woman as his concubine, yet thought of himself as a gentleman. Men of this type were the ones who blurred the racial lines by trying to set their slave children free, and giving them monetary legacies. Lumpkin wanted nothing to do with such men or their children: "Which of us has not narrowly escaped petting one of the pretty little mulattoes belonging to our neighbors as one of the family?"[394] But they were family in the eyes of some white men, the testators whose wills were at stake, regardless of whether the law or their communities agreed.

In cases where legacies to children were at stake, the Mississippi Supreme Court, on the other hand, appeared least willing to recognize the biological ties between testators and their children, and the desires those men might have had in keeping the children nearby and living with them. The formalist language of slavery gave them something to hide behind, particularly due to "the statute of Mississippi prohibiting owners of slaves to set them free without an act of the legislature (upon proof of meritorious or distinguished services rendered by such slaves) approbating such act of emancipation."[395] These narrow prescriptions meant that the fathers of slaves could not free their children by deed or will. Fathers who sought to do so thus had to use their ingenuity.

Elisha Brazealle took his son, John Monroe, and the child's mother to Ohio in 1826, where he gave them deeds of manumission.[396] They then returned to Mississippi, where they lived until Elisha's death.[397] In his will, "he recited the fact that such a deed had been executed, and declared his intention to ratify it, and devised his property to the said John Munroe, acknowledging him to be his son."[398] Bringing suit were Elisha's heirs at law.[399] But Chief Justice William L. Sharkey, in writing for the court, refused to affirm the trial court's judgment in favor of John Monroe. The emancipation was void, because "[n]o state is bound to recognise or enforce a contract made elsewhere, which would injure the state or its citizens . . . ."[400] Brazealle, in freeing his son, recognizing him, and giving him property, contravened the social policy against increasing the local free negro population, and undoubtedly violated norms against racial mixing: "[T]he contract had its origin in an offense against morality, pernicious and detestable as an example. But above all . . . planned and executed with a fixed design to evade the rigor of the laws of this state."[401]

But Jonathan Carter wanted to go further, and send his mixed-race daughter into the white world, where she might pass for white. He conveyed to Joseph Barksdale "a yellow girl, nearly white, named Harriet, aged twelve years, born of the house-woman Fanny."[402] Barksdale was to raise her as a white girl.[403] Carter instructed that she was

394. *Id.* at 24.
395. *Hinds*, 3 Miss. at 837-38.
396. *Id.* at 837.
397. *Id.* at 841.
398. *Id.*
399. *Id.*
400. *Hinds*, 3 Miss. at 842.
401. *Id.* at 843.
402. *Barksdale v. Elam*, 30 Miss. 694, 694-95 (1856).
403. *Id.* at 695.

not to be treated like a slave, was to enjoy the fruits of her own labor and live in Barksdale's household.[404] She could complain to her guardians, B.B. Wilkes and his wife, Elizabeth, if she was being mistreated.[405] If she married a free white man, Barksdale and her guardians were authorized to set aside property for the benefit of her and her children.[406] Those terms, granting her nominal slave status, in the eyes of Justice Ephraim S. Fisher, did not mean the deed of sale was void. Instead, the illegal conditions were "contrary to the spirit and policy of our laws."[407] Barksdale owned her outright and was not obligated to fulfill the terms stated in the will, as a matter of law; that meant Harriet had no recourse if the terms of the will were not fulfilled.[408]

One means available to testators wishing to free their children and give them property entailed sending them out of the state, never to return. Thus, James Brown took Harriet, a mulatto woman who was his slave, and their two children, Francis and Jerome, to Ohio.[409] He gave them deeds of manumission and then took them to Indiana, where he owned property.[410] He sent the children to school.[411] They lived there with their mother and did not return to Mississippi; instead, Brown visited them.[412] Brown died there in 1856.[413] Described by Justice Alexander Handy as "[i]nfatuated or debased,"[414] he nonetheless made an effective devise of his property.[415] Everything was to be sold, including all his property and slaves in Mississippi, "and, after paying the debts of the testator . . . deposit the surplus in the Bank of Louisiana, subject to the order of Francis M. Brown; and, in the case of his death, subject to the order of Jerome B. Brown."[416]

Neither his sons nor their mother could hold property in their home state, because it was illegal for free blacks to remain or immigrate, insofar as "[t]he mischief intended to be prevented, was their improper interference with our slaves, or the force of their example, in producing discontent and insubordination among them . . . ."[417] The language used to define them, young men who had been born and raised in Mississippi, and who were the children and heirs of a white male resident, was significant. Freed by their father and living in the North, they were, in the eyes of the heirs at law, similar to "alien enemies, outlaws, or banished persons, and are excluded from all protection of our laws, and from the enjoyment of all rights here . . . ."[418] Justice Handy did not agree with that harsh assessment, however. All the evils stemming from their status as free blacks were eviscerated by the fact that they did not have to come into the state to

404. *Id.*
405. *Id.*
406. *Id.*
407. *Barksdale*, 30 Miss. at 697.
408. *Id.*
409. *Shaw*, 35 Miss. at 248.
410. *Id.* at 249-50.
411. *Id.* at 250.
412. *Id.*
413. *Id.*
414. *Shaw*, 35 Miss. at 308.
415. *Id.*
416. *Id.* at 249.
417. *Id.* at 318.
418. *Id.* at 314-15.

receive their legacies.[419] Richard D. Shaw, the executor, was charged with conducting the sale.[420] The money was to go directly to a bank in Louisiana.[421]

But that scheme for leaving property did not last long. One year later, the Mississippi Supreme Court decided *Mitchell v. Wells*,[422] a case with a fact pattern similar to that in *Shaw*. The court, unlike in *Shaw*, refused to uphold the bequest. Nancy Wells was the daughter of her slave owner, Edward Wells, who died in 1848.[423] She alleged that her father freed her by taking her to Ohio in 1846 and settling her there.[424] When he died, he gave her a legacy of a watch, a bed, and three thousand dollars.[425] Since she was still a minor, he charged the executor to manage it.[426] The estate was resolved and the property divided, but William Mitchell refused to turn over the money, though it was rightfully hers: "[T]he defendant retains the legacy on the pretext that complainant is a slave," but her father, and the laws of Ohio "recognized and treated her as a free woman."[427] William Mitchell replied that Nancy Wells was still a slave, because any manumission had been fraudulent: "[T]he testator took complainant to Ohio in fraud of the laws of Mississippi, and with the intention to return to this State . . . ."[428] In his view, she never really lived in Ohio, since she returned to Mississippi eighteen months after she left.[429]

Justice William Harris, in writing for the court, focused not on the reasons why Edward Wells would have given Nancy Wells the bequest, or on whether she truly was a resident of Ohio. Instead, his sole concern was on what her freedom and access to property might mean to Mississippi: "[O]n the subject of African slavery, we find this race in this inferior, subordinate, subjugated condition, at the time of the adoption of our Federal Constitution. . . . unfit by their nature and constitution to become citizens and equal associates with the white race in this family of States . . . ."[430] Slavery was essential to the social, political, and cultural well being of whites in the state. Thus, the state had "a right to full protection . . . both for the enjoyment of her property in slaves, and against the degradation of political companionship, association, and equality with them in the future."[431] The Mississippi justice, hiding behind the formalism of slavery to deny paternalism, did not talk about the father-child relationship.

The popular understanding of Louisiana slave society is that it was a more liberal society, where interracialism was more fluid. Mixed-race liaisons were more common and tolerated, leading to a population of free people of color who occupied a middle ground between white and black. Thus, the French Counsel at New Orleans explained to

419. *Shaw*, 35 Miss. at 319-20.
420. *Id.* at 319.
421. *Id.*
422. 37 Miss. 235.
423. *Id.* at 237.
424. *Id.*
425. *Id.*
426. *Id.*
427. *Mitchell*, 37 Miss. at 237.
428. *Id.*
429. *Id.* at 236-37.
430. *Id.* at 252.
431. *Id.*

Alexis de Tocqueville in 1832 that the nature of Louisiana's slave society contributed to "[g]reat immorality" among the colored population, for "[t]he law in some sort destines women of colour to wantonness."[432] Even though some were very light-skinned and appeared to be white, they were barred from full participation in white society.[433] Educated and cultured, the one drop rule applied, insofar as "tradition [made] it known that there [was] African blood in their veins."[434] In this caste society, darker skinned people of African descent, including slaves and light-skinned blacks, looked at each other across a divide. The lighter-skinned blacks were more like whites, but they were not really white. Neither were they fully black. Women of this group could not intermarry with whites, and marrying a man of color was not advantageous, "for men of colour do not even enjoy the shameful privileges that are accorded to their women."[435] Among these privileges was undoubtedly the access they had to wealth through their white male protectors.

The quadroon ball, long notorious in New Orleans society, was the "link produced by immorality between the two races,"[436] where one might see "[c]oloured women destined in a way by the law to concubinage."[437] The romanticized view explains that free black women, oftentimes of mixed race, went to the balls in search of a white man who would set her up as his mistress, providing her a house in which to live and money for her support.[438] Living in a society where their access to wealth was proscribed, concubinage could be a means of becoming upwardly mobile, as the men supported them, paid for their upkeep, and took care of any children they had. These women had status as free women who ran households and owned slaves. But how were they treated under the law? What was the effect of being barred from the status of wife?

Because these women had free status, did they have room to negotiate the bases of their relationships? It appears they did. Will contests before the courts raised the question whether white men and the black women with whom they were involved were lifetime partners or whether the women were in fact concubines. These were free women, able to sue. But what could they sue for? What could they expect to gain? If a woman alleged that she and the man lived together as lifetime partners, notwithstanding the lack of marriage, she could lay a claim for part of his estate: "In the universal partnership, all goods and effects, both present and future, [became] immediately the joint property of the contracting parties."[439] But the concubine, seen as nothing more than a servant "[whose] union was an immoral one,"[440] had no cause of action to sue for

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432. Alexis de Tocqueville, *Journey to America* 100 (J.P. Mayer ed., George Lawrence trans., Anchor Bks. 1971).

433. *See e.g. Neither Slave nor Free*, *supra* n. 92; Genovese, *Within the Plantation Household*, *supra* n. 9, at 261-63.

434. de Tocqueville, *supra* n. 432, at 100.

435. *Id.*

436. *Id.* at 165.

437. *Id.*

438. *See supra* n. 25 and accompanying text.

439. *Bore's Executor v. Quierry's Executor*, 4 Mart. (O.S.) 545, 551 (La. 1816).

440. *Id.* at 554. *See also Tonnelier v. Maurin's Executor*, 2 Mart. (O.S.) 206 (La. Super. 1st Dist. 1812) ("A [woman] of color, living with the deceased, [a white man, and] allowing him to receive her negroes' hire without calling him to account, is presumed to have allowed the hire as her part of their joint expense.").

his entire estate. She could only inherit "a donation of moveables [limited] to one-tenth part of the whole value of the testator's estate."[441]

Any executor or heir could thus sue for property alleged to have been given by a white testator to his concubine, including in one case a gift, made before death, of notes amounting to $123,451.50.[442] This was the amount in notes that Boni, a free woman of color living with Hart, had in her possession when Hart died.[443] Hart's executors, charged with "powers to take possession and inventory,"[444] were thus "authorised to bring an action to recover . . . any property which may have belonged to the testator at his death."[445] Because Boni had no legitimate status, she could be dispossessed.[446]

Some women, like Anna Sinnet, could be pushed out of the houses they lived in.[447] Sinnet had lived with Joseph Uzee in concubinage, but prior to his marriage.[448] She bought a slave for seven hundred dollars cash and, in 1841, Uzee sold her a house for thirty-five hundred dollars.[449] The court found the purchases to be made with Uzee's money, because "[t]he fact of concubinage and the absolute inability of Anna Sinnet to pay the price mentioned in the acts of sale . . . and the evidence in the record satisfactorily shows those sales to have been disguised donations."[450] On the other hand, in a case in which Gregorio Bergel conveyed all his property to Mary Bergel, a free woman of color who had once been his slave but who later became his mistress, the claimant creditors, alleging the sale fraudulent, were obliged to prove that the conveyance had been done in contemplation of his debt, for the sole purpose of evading payment.[451] In the eyes of the high court, they had not done so.[452] The court came to this conclusion because "the sale was in January, 1833, and the judgment was not rendered against Bergel, until January, 1834 ... [The notes,] due in August, 1826, . . . apparently, had been prescribed by [a] lapse of five years."[453] Nonetheless, at stake were not just the interests of the debtors, but also those of the heirs at law.[454] As a result, the court remanded.[455]

Lawsuits such as these could also be a means of claiming money belonging to free black women of independent means who, were involved with white men. Eugene Macarty began, in 1796, what was to become a long-term relationship with a free woman of color that lasted until his death in the 1840s.[456] It was "the nearest approach to

441. *Compton v. Prescott*, 12 Rob. (LA) 56, 69 (La. 1845). Moveables amounted to personal property, not land and houses.
442. *Executors of Hart v. Boni*, 6 La. 97, 97-98 (1833).
443. *Id.*
444. *Id.* at 98.
445. *Id.* at 99.
446. *Id.*
447. *Dupre v. Uzee*, 6 La. Ann. 280 (La. 1851).
448. *Id.* at 281.
449. *Id.*
450. *Id.*
451. *Lopez's Heirs v. Bergel*, 12 La. 197, 197-98 (1838).
452. *Id.* at 201-02.
453. *Id.* at 201.
454. *Id.* at 201-02.
455. *Id.* at 202.
456. *Macarty v. Mandeville*, 3 La. Ann. 239, 240 (La. 1848).

marriage which the law recognized, and in the days in which their union commenced it imposed serious moral obligations. It received the consent of her family, which was one of the most distinguished in Louisiana . . . ."[457] She belonged to the Mandeville family, and although she was the defendant in the lawsuit, she was identified only as "a person of color."[458] Her first name was not given. Was she part of a distinguished free family of color? Was she descended from a prominent white family? It is unclear. But what was clear, however, was that she was "*une femme extrèmement laborieuse*" and "*économe.*"[459] An excellent businesswoman, she had made a fortune selling dry goods and was worth more than $155,000, $111,200 of which was in the bank and in her name.[460] She had five children by Macarty and four survived.[461] All were well educated.[462] Two sons were in business, and one lived on his income.[463] A daughter was married and lived in Cuba.[464]

When Macarty died, his relatives claimed that the money was all his, that he had given it to his mistress in contravention of the law limiting the inheritance rights of concubines.[465] The action failed, however. Plenty of witnesses testified to her business acumen.[466] She bought goods and property, selling them and making a hefty profit over a lifetime of industry.[467] If anything, Macarty's money went toward a failing plantation in Cuba, "the expenses of his own household, and of the education and establishment of his own children."[468] Notwithstanding the evidence presented before the trial court that proved Mandeville's wealth, the plaintiffs made appeals to race and slave culture, such that Justice George Eustis felt compelled to answer:

> We are not insensible to the appeal made to us in this case, in the interest of morals, religion and social order . . . [W]e have . . . reversed the verdict of a jury, vindicating the rights of heirs and restored to them a large estate, which a party had attempted to deprive them of by an indirect donation to a concubine. . . . At the same time that we are bound to give effect to our laws made in the interest of families, it would be an abuse to bring them in conflict with the right of property.[469]

The social order demanded that the law protect the property interests of white relatives, elevating heirs over concubines not seen as life partners. That was what moral and religious sentiments demanded. But in the instant case, Mandeville's obvious property interests mattered more, even though in will contests such as this one, justices could feel obliged to protect white relatives and the pureness of the white race. Thus, according to Justice Isaac T. Preston: "[T]here exists in our State a public policy, perhaps

457. *Id.*
458. *Id.*
459. *Id.* (translated as: an extremely hardworking and economical woman).
460. *Id.*
461. *Macarty*, 3 La. Ann. at 240.
462. *Id.*
463. *Id.*
464. *Id.*
465. *Id.*
466. *Macarty*, 3 La. Ann. at 241-42.
467. *Id.* at 241.
468. *Id.* at 244.
469. *Id.* at 245.

an absolute necessity, to discourage the amalgamation of the white and colored race .... Here, marriage between the two races is forbidden by law; the honor of marriage shall not be debased by the connection."[470]

Although free women of color experienced disabilities under the law, slave women suffered more. Not only could a slave woman be owned by a more privileged free woman of color, but if she was freed by a will, the manumission could be denied if she was alleged to have been the testator's concubine. That is what happened in the case of *Vail v. Bird*.[471] The rule that applied to free women of color was thus extended to the slave woman, insofar as the bequest of freedom was deemed to be property—the ownership of the self. The slave woman's status provided no legal excuse for her concubinage, according to Justice Preston.[472] A female slave named Jane was owned by Henry C. Vail; he freed her in his will and gave her two promissory notes worth the sum of two hundred dollars.[473] His lawful heirs challenged the manumission, but the executor objected, "because the slave was entirely subject to the power of her master and without a will of her own."[474] The lower court agreed with Bird and dismissed the plaintiffs' suit.[475] They appealed and Preston, writing for the high court, disagreed and reversed.[476] He found that under the law, Jane was protected: "The slave is undoubtedly subject to the power of his master; but that means a lawful power, such as is consistent with good morals. The laws do not subject the female slave to an involuntary and illicit connexion with her master, but would protect her against that misfortune."[477]

It is unclear how the law protected Jane. Thomas R. R. Cobb, a Southerner and a lawyer, wrote on the slavery question, discussing just what the rights of slaves were in this period:

> Of the three great absolute rights guaranteed to every citizen by the common law, viz., the right of personal security, the right of personal liberty, and the right of private property, the slave, in a state of pure or absolute slavery, is totally deprived, being, as to life, liberty, and property, under the absolute and uncontrolled dominion of his master ....[478]

In Cobb's view, the rape of a female slave by her master was "almost unheard of; and the known lasviciousness of the negro, [rendered] the possibility of its occurrence very remote."[479]

Barred from testifying in her own offense and under the absolute dominion of the man who owned her, the female slave could not bring a lawsuit, except for her freedom. She could not file a complaint in the criminal courts that her master sexually assaulted her. If she had children by her master, he was under no obligation to free her or them. If

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470. *Badillo v. Tio*, 6 La. Ann. 129, 138 (La. 1851).
471. 6 La. Ann. 223 (La. 1851).
472. *Id.*
473. *Id.*
474. *Id.*
475. *Id.* at 224.
476. *Vail*, 6 La. Ann. at 224.
477. *Id.*
478. Thomas R. R. Cobb, *An Inquiry into the Law of Negro Slavery in the United States of America* 83 (U. Ga. Press 1999).
479. *Id.* at 100.

anything, the law enforced her subservience and made her vulnerable to exploitation. Nonetheless, Preston found that "the female slave is peculiarly exposed, from her condition, to the seductions of an unprincipled master. That is a misfortune; but it is so rare in the case of concubinage that the seduction and temptation are not mutual that exceptions to a general rule cannot be founded upon it."[480] A slave woman thus had, in his opinion, a certain level of agency to negotiate a consensual sexual relationship with her white male owner. But the contradiction was that such relationships, if they existed, could be used to deny her the freedom and property the testator meant for her to have.

Thus Sukey Wormley's lack of a sexual relationship with her master saved her.[481] The heirs of M.C. Hardesty "[sought] to reduce [her] to slavery, and to deprive her of all her property, upon the alleged grounds that she was the public concubine of Hardesty."[482] They lost at the trial court and appealed.[483] Justice Thomas Slidell, writing for the court, found that "[t]he evidence admitted at the trial [did] not prove it. . . ."[484] In 1834, Hardesty petitioned to free Sukey and her daughter Adeline.[485] When he had bought them from Wright, their former owner, Sukey had given money towards the purchase of their freedom.[486] The agreement between Hardesty and Wright was that "Hardesty [would] emancipate her and her child as soon as she should refund the money advanced."[487] And that is what she did:

> [B]y unusual industry, economy, and good character, she afterwards made a great deal of money, laboring day and night for the purpose of purchasing her offspring; that she has paid for herself and them, and that what she now has is the fruit of her honest and persevering exertions during a long course of years, in a community where she seems to have enjoyed general confidence and respect.[488]

Apparently, Justice Slidell was willing to free her, even if she had been in concubinage with Hardesty.[489] What mattered more was the agreement between the two white men: "the fulfillment of his promise of emancipation—a lawful promise, which his obligation to the vendor bound him to fulfill, and which legally enured to the benefit of the slave . . . ."[490]

Even if a slave had some level of agency and could persuade her master to free her, inheritance laws often limited the master's ability to do so. For example, under Louisiana law, heirs were entitled to a guaranteed portion of a testators' estate, as demonstrated by *Adams v. Routh & Dorsey*.[491] Thus, even though William Adams Jr. freed his slave Nancy in his will, "bequeathing her a sum of money," a watch and his

480. *Vail*, 6 La. Ann. at 223.
481. *Hardesty v. Wormley*, 10 La. Ann. 239 (1855).
482. *Id.*
483. *Id.*
484. *Id.*
485. *Id.*
486. *Hardesty*, 10 La. Ann. at 240.
487. *Id.*
488. *Id.*
489. *Id.* at 239-40.
490. *Id.* at 240.
491. 8 La. Ann. 121 (La. 1853).

furniture, his father successfully sued to have the bequest overruled, as "the forced heir of the one undivided fourth of his son's estate."[492] Giving Nancy freedom amounted to giving her a sum of money in the value of her own worth, but since her worth was greater than the amount available for the heirs, the bequest failed.[493] She was worth one thousand dollars, and the estate's value, excluding her, was worth $4,750.[494] As for "two bastard children of the testator," mixed-race children who received legacies of one thousand dollars each under the will, they were to get their share after their grandfather received his.[495]

It is unclear whether the children were Nancy's. If they were, they were elevated above her, to take their legacies while hers was denied. Because the court authorized partition—a division of the property between all those receiving bequests—she could be sold for the heirs' benefit because she was property considered part of the estate, not an heiress with rights of inheritance. She was made the sacrifice for the benefit of the testator's father and mixed-race children, who might have been hers. But in many respects, slave women were sacrificed under the law. Their bodily autonomy was not respected: they were valued only for their labor and the children they produced. Yet their children, born of liaisons with white men, could escape enslavement and receive property from their fathers.

Those freeborn children could be acknowledged, even though they were illegitimate, provided their fathers did so "in the registry of the birth or baptism, or by a declaration before a notary public, in [the] presence of two witnesses."[496] Proof of paternity was not enough; the formal steps had to be pursued.[497] If the father was married, the children sustained further disabilities, because "bastards, adulterous or incestuous, even duly acknowledged, [did] not enjoy the right of [inheritance] . . . ."[498] But white illegitimate children (not of adulterous or incestuous unions) could prove their paternal descent, even if they had "not been legally acknowledged . . ., provided they be free and white."[499] This proscription was necessary, because in the opinion of Justice Francois-Xavier Martin, "a native of France who had received his earliest education in a Jesuit academy,"[500] the new world of Louisiana called for new legal rules: "Cases of bastardy, of very rare occurrence in France, [were], unfortunately, much more frequent among us. . . . [T]hese [were] very important considerations which [imposed] on our

492. *Id.* at 121. Note that according to *Virginia & Celesie v. Himel*, 10 La. Ann. 185 (La. 1855), emancipation under those circumstances could be viewed as a fraud upon the heirs, if the testator did not leave enough money to pay the heirs their share of the estate. *Id.* at 187-88.

493. *Adams*, 8 La. Ann. at 121.

494. *Id.* If one calculates her value as a portion of the estate, she was worth about 21% of the estate. In the eyes of the court, the bequest of her freedom was thus excessive. *Id.*

495. *Id.*

496. *Pigeau v. Duvernay*, 4 Mart. (O.S.) 265, 266 (La. 1816); *see also Robinett v. Verdun's Vendees*, 14 La. 542, 545-46 (1840).

497. *Pigeau*, 4 Mart. (O.S.) at 266.

498. *Jung v. Doriocourt*, 4 La. 175, 178 (1832).

499. *Id.* *But see* Grossberg, *supra* n. 15 (stating that under the Anglo-American common law, white illegimates were also barred from inheriting from their fathers; however, in the case of white illegitimates, the law did not preclude marriage between the parents).

500. Wiethoff, *supra* n. 16, at 150.

courts a stricter observance of the laws relative to illegitimate children, especially those of colour."[501]

These laws had the effect of placing the mixed-race children of white fathers at a distinct disadvantage when it came to claiming inheritances from them. Even if their fathers intended they inherit, they could do so only if the men were unmarried at the time of their birth and had the foresight to perform the formal steps of acknowledgement. It did not matter whether a white father had formally acknowledged his white illegitimate child. The child could inherit anyway. In a society where black women were deemed concubines and barred from marrying their partners, their children lacked equal protections under the law. It was thus easier for their children to be disinherited, and more difficult for them to claim their status. Their fathers could easily disregard them, and they had no recourse.[502]

Such a policy operated to protect testators' estates, and Justice Pierre A. Rost, "master of Destrehan Manor and a leader in Louisiana's sugar industry,"[503] explained that,

> if colored children might make proof of their paternal descent from a white father, they might receive by testamentary dispositions, portions of the father's estate, and without a will, claim alimony from his legal heirs, thus giving direct encouragement to the degrading evils which the exclusion of the proof by law was intended to remedy.[504]

But "where the parent has been so lost to shame as to make an authentic act of his degradation,"[505] and the formal steps had thus been pursued, a mixed-race child could inherit. But that inheritance was limited to only a quarter of the estate: under Louisiana law, if a testator died without legitimate descendants, he was forced to give a portion of the estate to his collateral heirs.[506]

Important too was protection of marriage, the fundamental building block of white society. As Rost stated, "[h]ere, marriage between the two races is forbidden by law; the honor of marriage shall not be debased by the connection. Moreover, the inestimable advantages of marriage to society, shall not be disregarded by encouraging illicit and debasing concubinage with the colored race."[507] Recognizing the rights of mixed-race colored children to claim a share of their fathers' estates would fly in the face of the public policy and "diminish the father's estate to the prejudice of his white and lawful heirs."[508]

To permit marriage would mean the end of white society, the amalgamated race Lumpkin of Georgia was so afraid of, and the end of slavery itself as slave women achieved legal and social equality with white women through their relations with white

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501. *Jung*, 4 La. at 180.

502. *See e.g. Nouvet v. Vitry*, 15 La. Ann. 653 (1860). Achille B. Courcelle lived with Louise A. Vitry for nineteen years. *Id.* at 653. After he broke up with her, he successfully sued for property—real estate and slaves—that he claimed he bought with his own money, but put title in her name. *Id.*

503. Wiethoff, *supra* n. 16, at 73.

504. *Badillo*, 6 La. Ann. at 138.

505. *Id.*

506. *See e.g. Compton*, 12 Rob. 56; *Prevost v. Martel*, 10 Rob. (LA) 512 (La. 1845).

507. *Badillo*, 6 La. Ann. at 138.

508. *Id.*

husbands eligible to free their wives. It would also spell the destruction of the South's wealth in slave property as their mixed-race children gained status as the legitimate children of their fathers. This parade of horribles was to be avoided at all costs. In the case of elite white fathers of slave children, all legal channels to effectuate this social and legal equality were to be barred, and their prerogatives as white men usurped, to their shame, in the name of the greater social good: white supremacy.

Shaming testators who fathered mixed-race children was thus the ultimate goal of legislators and justices who opposed those elite white men who sought to fulfill their paternal obligations to children born of slave women and free women of color. Even though the testators were dead, their cases undoubtedly provided examples to other men who learned how other elite white men, the arbiters of society's rules, looked at them. They were certainly free to live their lives as they wanted, and mixed-race intimacy was so common in Louisiana as not to be unusual. But if they attempted to give to the women and their children valuable property, freedom, or any foundation of wealth, they would surely be slapped down. Their relatives would swoop down and destroy their work by suing to overturn the will. Their status as elite white men did not save them in this struggle over white supremacy and property.

VI. CONCLUSION

This article demonstrates the process by which justices of the high courts of the Southern states negotiated the interests of white wealth and white supremacy through will contests in cases where white men left bequests of freedom and property to black women and their mixed-race children. To put it simply, the will contest, presents the most significant aspect of this study: the clash of values. It was a conflict among elites, and at stake was whether a white man could exercise the prerogatives of his race and class. He certainly could exercise his prerogative and have sex with black women, notwithstanding societal taboos against interracial sex. As a single or widowed man, he was not constrained by conventional marriage to a white woman. But he was not necessarily able to exercise his prerogative as a white man to do with his property as he saw fit. He could not always fulfill what he saw as his moral responsibilities, to give the women and his mixed-race children freedom and property. The testator's relatives, entitled to their own prerogatives of legitimacy and whiteness, could sue to get his property: the women and children at the heart of the will contest, and the money and real property he hoped to give them. The courts that described the men as degraded or vulnerable explained why his will should not stand: he was incompetent or enthralled by a black woman who was permitted improper intimacies. The challengers were successful, or not, depending upon the state of the law in their jurisdiction, and upon the viewpoint of the high court justices who heard their cases.

Sympathetic justices respected testators' paternal instincts, while those who were unsympathetic obeyed the formalism of the law of slavery, reinforcing the white social order, retaining white wealth, and protecting the white heirs from having to recognize their slave relatives. These justices gave the heirs what they wanted: the money and property that would have gone to black people, who would only violate slavery's precepts as they became entitled. They would become arrogant, as though they were

white, when in fact, the testators' children were half-white and entitled by their whiteness. To legitimate their connections and uphold the will would mean the end of slave society. But insofar as some beneficiaries were successful, they became members of the black elite, people of freedom and property. They did not have all the benefits of freedom, but they occupied a middle ground between white and slave.

This study thus provides an important link for demonstrating the development of a pre-Civil War black and mixed-race elite. It had its roots in people who were fortunate enough to get their freedom long before most blacks did, and among them were black women and their mixed-race black children freed within their home states of the South, or brought to the North and freed. They were then able to live as free people with some money and property. The key link in these instances was a white male progenitor who freed them during life, or who gave them bequests of freedom upon his death. Questions that remain, however, include: what happened to them afterwards? Did these free people build upon their legacies? Did any of those privileged by wealth who looked "white" pass into the white world? How did those who were nearly freed manage after getting so close to freedom, only to lose it? These questions are beyond the scope of this article, but they are important, nonetheless.

One might consider the ramifications for other slave cultures and legal systems. How did miscegenation play out in the English colonies of the Caribbean? Slavery there ended in the 1830s, long before it ended in the United States. What was the nature of those slave societies? Was there as much social and legal control over slave masters' ability to leave property to slave women and their children? What influence, if any, did emancipation have upon the dynamic? On the other hand, justices hearing cases in Louisiana often cited to French or Spanish law, since the territory was briefly under Spain's control. Those laws could be used to deny freedom and the transfer of property. But what happened in territories that were under the control of France and Spain for longer periods of time, where the law of slavery might have had more time to develop, territories such as the former colonies of Puerto Rico, Cuba, Martinique, or Guadeloupe? The comparison might very well be worthwhile.