Roadblocks to Freedom

Slavery and Manumission in the United States South

Andrew Fede

ROADBLOCKS TO FREEDOM

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BY
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Preface

A Note on Methods and Acknowledgments

This book furthers the interpretation of the law of slavery in the United States South that I advanced in *People Without Rights: An Interpretation of the Fundamentals of the Law of Slavery in the U.S. South*.[1] That book was first published in 1992 after my initial ten years studying slavery law and my publication of one review essay and two longer articles on slavery law in the United States.[2]

In chapter 7 of *People Without Rights*, I discussed the statutes and cases that regulated and eventually prohibited the masters' power to free their slaves.[3] This book began as an article that I intended to write as an initial chapter in a second edition of *People Without Rights*. Instead, I found the need to write this book to further analyze these legal trends, to develop the fundamental procedural and practical aspects of the law of slavery as applied in real trials and appeals, and to incorporate and consider the books and articles that have more recently been published on the manumission and freedom suits in the United States and elsewhere.

After *People Without Rights* was written, scholars published important monographs and articles on slave law in the United States South, including surveys written by Robert B. Shaw[4] and Thomas D. Morris.[5] Judith Schafer wrote a thorough study of the Louisiana Supreme Court's slavery decisions.[6] Jenny Bourne Wahl contributed an economic history analysis of slave law.[7] William Wiethoff reviewed the judges' rhetoric in their antebellum slave law opinions.[8] A. Leon Higginbotham, Jr. wrote a monograph on the history of race in American law, and co-authored a series of law review articles that included discussions of what he called slave law's "Ten Precepts."[9] Glenn McNair, James M. Campbell, Ariela J. Gross, Walter Johnson, and Sally E. Haddon also published books discussing the law of slave criminal justice, slave sales, slaves' suits for freedom, and slave patrols.[10] Bernie D. Jones, Adrienne D. Davis, and Jason A. Gillmer, among others, have recently written about the law of manumission and miscegenation.[11]

Judith Schafer's 2003 monograph on the Louisiana manumission statutes and freedom suits is a most noteworthy contribution.[12] The present book can be read to complement her study because, as in my earlier work, I will focus on the way that the judges and legislators in the common law states integrated slavery law into the law that the English colonists brought to the New World.

These and other scholars whose works I will cite in this book have made valuable contributions toward an understanding of the cases in which people

held as slaves sought to be released from bondage. Still, I believe that the issues that I could further discuss, and contribute a different perspective, include those that were raised in the cases in which people held as slaves won their freedom while slavery was legal in the United States South.

To this end, I draw upon my three decades of experience as a practicing lawyer to consider these cases and statutes, not as abstract expressions of legal doctrines or principles, but as the products of the conscious decisions made by lawmakers and judges. These decisions had real world effects on ordinary lawyers like me and of course even more so on their clients—the enslaved, their owners, and other free people—and the perceived public interest. This practical experience enables me to apply a somewhat different perspective to the legal materials from the years that the United States was a slave nation.

In my earlier works, I examined the fundamental nature of the legal relationship between slaves, masters, and third parties, and addressed the question: Why did the law of slavery in the United States South treat people held as slaves as both people and property? I contended that this slavery law was true to slavery's logic as a social and cultural institution—and to avoid confusion and enhance our understanding of this law, we should not think of slave rights in the law.

As a general rule, the law in the United States defined slaves as human property with no legal rights. Of necessity, however, the lawmakers sometimes treated slaves as people because, after all, they were people. Consequently, the lawmakers included slaves among the people who could commit crimes and who also could be the victims of crime. But, as Randall Kennedy noted, the way that the lawmakers defined crimes that could be committed by and against slaves was one instance in which blacks and other people of color were the victims of both "racially invidious over-enforcement of the criminal law" and "under-enforcement" that "purposefully denies African-American victims of violence" the criminal law's equal protection.[13]

Accordingly, the lawmakers burdened slaves with extra legal duties while they also denied to slaves the most basic human rights. This was so even though the law regulated the masters' right to treat their slaves as cruelly and as leniently as they wished. These regulatory laws included those that at times provided that masters could not free their slaves and that defined who could legally be held as a slave. These regulations did not create slave rights. Instead, they legitimated while regulating the masters' powers, and furthered ends that the lawmakers perceived to be necessary to perpetuate and advance their slave society.[14]

In *People Without Rights*, I explained why it follows that the references in the law to the slaves' humanity constituted cruel ironies. The judges and legislators—often in the name of humanity—denied to slaves the rights that the common law afforded to free people, imposed additional legal duties upon slaves, legitimized the powers of others over slaves, and defined the relative property rights of free people to own and control slave property.[15]

The law allocating the slave's legal rights and duties in this way epitomized

in the law slavery's oppressive social relationships. Accordingly, upon further reflection, the phrase "people without rights," although useful in explaining slave law's fundamentals, is an understatement. It captures only one side of slave law's equation of oppression. The statutes and cases that imposed extra legal duties and liabilities on slaves illustrate this equation's other half.[16]

To test and advance this interpretation, I studied those instances in which it appeared that the law recognized slaves as persons. These examples I argued were revealed—one by one—to be rhetorical devices that legitimized slave law's inherent inhumanity. Indeed, slaves were people who according to the law were the property of others. Therefore, the law of people differed from the law of people who were slaves. This was slavery law's fundamental reality.[17]

Southern legislators and judges acknowledged that slavery differed fundamentally from other relationships that exhibited inequality. It does not necessarily follow that all masters treated slaves as property without recognizing the slaves' humanity, but the law permitted masters to think of and treat their slaves as property. Nor does this mean that the judges and legislators anticipated that masters would dehumanize their slaves; but the lawmakers allowed for this possibility, and it was a foreseeable consequence of the law.[18]

Slavery's abolitionist critics and twentieth-century historians including Kenneth Stampp advanced similar interpretations of the slave's legal status.[19] I have attempted to further this interpretation by noting that Southern judges also at times expressed in their judicial opinions similarly frank acknowledgments of slavery's essence. Occasionally, these judges looked into what Henry Wadsworth Longfellow called "the abyss" that was slavery and they saw and expressed the real meaning of slavery's legal suppression of the slave's humanity.[20] For one example, Louisiana Supreme Court Justice Alexander Buchanan wrote, in an 1856 opinion, that the slave

> is the object of contracts, not a legal party to contracts. He may be sold or mortgaged, but he cannot sell or mortgage. He can neither inherit, nor make a will, because he can possess nothing as owner. He is inadmissible as a witness in any civil suit whatever. And if accused of crime, he is tried by a special tribunal, to which the safeguards of the common law are unknown.[21]

Judges like Buchanan "were not 'abolitionist fanatics' bent on the destruction of a perceived moral evil, but were pro-slavery jurists."[22]

At other times, however, judges looked into the same abyss and deluded themselves into thinking that the law that they made and upheld was not so bad.[23] Thus, in an 1821 Mississippi Supreme Court opinion, Justice Joshua G. Clarke asked: "Has the slave no rights, because he is deprived of his freedom?" Clarke answered his own question by asserting that the slave "is still a human being, and possess all of those rights, of which he is not deprived by the positive provisions of law[.]"[24]

Clarke was "only half correct" because slavery law's first principles defined slaves as property. This definition cut slaves off from all claims to legal rights.

But slaves were unique property because they could commit crimes. "Thus, slaves were considered persons by the criminal law. This added insult to injury," because the lawmakers burdened slaves with additional duties and punishments. "Consequently, the slave had a dual legal status that was consistent with and epitomized the oppression of slavery. Slaves were denied the benefits of personhood and were saddled with burdens that exceeded the obligations of 'real' people."[25]

I also emphasized the notion that the law of slavery in the American colonies and states was constantly changing by tracing the origin and constant development of the legal relationships between masters, slaves, and third parties in the common law states of the United States South. This inquiry's goal was to show how slavery was accommodated into the common law that was evolving in the pre-Civil War South.[26]

This approach was to some extent an attempt to address what Paul Finkelman called a "neglected" area of slavery law: "the interaction between slave law and legal doctrine, and the theoretical underpinnings of the law of slavery."[27] This study centered on legal materials—cases, statutes, and constitutions. Nevertheless, I also argued that the social, political, economic, and intellectual background of the law of slavery provides the necessary context within which we can best analyze these legal materials.[28]

This book's analysis is informed by the approaches to legal history that I used in my earlier works, except that I will make a greater use of a comparative approach to evaluate the development in the Southern common law states of substantive legal standards and procedural rules with reference to the law in the civil law state of Louisiana and in other slave societies. Scholars have applied comparative approaches to better understand the possible legal rules that different slave societies adopted or rejected, and "to identify the circumstances in which law changes and hence to uncover the reasons for legal development."[29]

According to Peter Kolchin, historians interested in the United States South "have differed sharply in their definitions of 'comparative history[.]'" He nevertheless suggested "three different comparative approaches: (1) comparisons between the South and the North (the 'un-south'); (2) internal comparisons among various components of the South ('many souths'); and (3) comparisons between the South and other societies sharing some of the same attributes ('other souths')."[30] Although they often reach different conclusions, "a wide variety of scholars have recognized that Southern society is best understood in the context of slavery and other forms of unfree labour elsewhere in the modern world."[31] This book is not a comprehensive comparative study, but it will at times use all three of these comparisons.

Kolchin also stated that most of us think of the third approach when we refer to comparative history, and some historians consider this as "the only real form of comparison."[32] I will use the third approach by referring to the ancient Roman and more modern slave codes, including the Spanish law *Las Siete Partidas de Rey don Alfonso el Sabio*, which was compiled in the Middle Ages

under Alfonso X and contained slavery provisions that later influenced slave law in Spain's colonies, and the French *Code Noir*, which was adopted in 1685 under Louis XIV as "the first integrated slave code written specifically for the Americas."[33]

A growing body of literature compares South American slavery and law with that of the French, English, and Dutch colonies, but scholars have hotly debated the proper methods to use and conclusions to draw.[34] Indeed, as Eugene Genovese argued, while critiquing the work of Frank Tannenbaum and others, "the comparative method is a treacherous business, and we have yet to learn to recognize all of its pitfalls or understand its limits."[35] Scholars are still debating the merits of Tannenbaum's thesis concerning the provisions in the South American slave law that apparently were less oppressive than the analogous North American slave law.[36] One does not have to agree with all of the components of Tannenbaum's thesis to use "its rich potential in assessing whether the law enabled slaves to exercise agency or self-sufficiency."[37] Although the comparative approach must be applied with care so as not to "exaggerate or magnify differences[,]" legal historical issues involving race and slavery "are brought into sharper focus when viewed through a comparative lens."[38]

As to Kolchin's first comparison, I refer at times to the law of Great Britain and the free states and to New Jersey law from the years before that state abolished slavery. New Jersey was the last Northern state to adopt a gradual emancipation act, and this process was so gradual that slavery continued in New Jersey in modified form until the Thirteenth Amendment went into effect.[39] In addition, I examine the rules that the American courts applied to analogous proceedings that did not involve slaves. This analysis can at times provide a context for evaluating slave law.[40]

Applying Kolchin's second approach, I again will review the patterns of social and legal change over time within the different Southern colonies, states, and regions to emphasize both continuities and discontinuities. This approach permits us to discern larger patterns and trends within Southern slavery law and society.[41]

I again find it helpful to draw upon ideas and methodological approaches from traditional doctrinal legal history, instrumentalist legal history, and the Critical Legal Studies authors.[42] From the instrumentalists, I argue that the complex and shifting structure of slavery law in the South can best be understood as a process by which the judges and legislators accommodated slavery's essential social elements into the common law, for which slavery was a long-forgotten institution. They achieved this by balancing what they perceived to be the salient interests implicated in the issues presented. These interests included the slave master class's perceived need: (1) to foster slave control, obedience, and submissiveness; (2) to perpetuate the plantation economy and preserve slave property values; (3) to regulate the behavior of overseers and slave hirers; and (4) to control poor white violence and slave abuse, while co-opting poor whites into becoming supporters of the slave economy.[43]

The social, economic, political, and intellectual/religious developments appear to have over time caused the dominant slave owners' perceptions of the balance of these interests to shift. The judges and legislators who created the new legal standards also for the most part shared these new attitudes and concerns. Therefore, the courts and legislatures changed the civil and criminal law to protect slave property, but they also used the law as an instrument of social control asserted against poor whites, overseers, slave hirers, and even against slave owners who did not properly maintain and discipline their slaves.[44]

To evaluate the effect of these social and cultural conditions on slavery law, we should examine relevant non-legal materials in addition to the statutes, constitutions, and case law reports that Robert Gordon called law box data. According to Gordon, the law box contains "whatever appears autonomous about the legal order—courts, equitable maxims, motions for summary judgment; outside lies society, the wide realm of the nonlegal, the political, economic, religious, social...."[45] I have again grounded my interpretation upon an external approach to legal history, which reaches outside of the law box for nonlegal data to help evaluate the law box data. This approach is in contrast to an internal legal history, which confines its inquiry to the law box.[46]

Implicit in each approach, however, is an important answer to the key question concerning the relationship between law and social change: Whether legal change was caused only by autonomous forces at work inside the law box, or whether changes in law, at least to some degree, occurred in response to changes in the society at large.

The way one defines the concept of legal autonomy influences how one views the relationship between law and social change. Gordon suggested two ways to perceive of the contents of the law box. The first is a theory "asserting that law derives its shape almost wholly from sources within the box (i.e., that it is really autonomous as well as seeming so)[.]" According to the second, "the box is really empty, the apparent distinctiveness of its contents illusory, since they are all products of external social forces."[47]

I again assert that slavery law in the United States can best be described as a process by which the judges and legislators legitimized and accommodated slavery's social and cultural elements into the law. The legal and non-legal data support the interpretation that these legislators and judges formulated and reformulated legal standards and doctrine concerning slave law in response to the social, political, economic, and intellectual/religious changes that accompanied slavery's development. This legal evolutionary process was, in essence, more a reaction to non-legal changes and was less an expression of autonomous legal forces.

I thus used different terms to emphasize what Philip Schwarz, Ariela Gross, Laura Edwards, and others have called legal history from the bottom up. This is an approach by which the historians use trial court testimony and other primary sources to reveal the cultural and political interactions that masters and the people they enslaved experienced, as well as the inquiry into how those inter-

actions influenced changes in slavery law.[48] Like Schwarz, however, "I cannot confine myself to 'history from the bottom up,' like a cave explorer who looks down at the stalagmites and ignores the stalactites. I must investigate both 'history from the top down' and 'history from the bottom up.'"[49]

We need to look at how those at the bottom and at the top interacted to form and reform the legal rules both in the books and in action. Robert Olwell explained this interaction well when, in describing colonial South Carolina criminal slave law, he noted that "no system of law can exist apart from the ongoing process of its creation and legitimization." He added that when we speak of the law we "describe the consequence of myriad individual actions, not a single prescient actor." Thus, he concluded that the colonial criminal law of slavery "was constructed each day by the decisions and choices of the living men and women, white and black, who cooperated with or contested against one another in the legislature, at the slave court, or upon the gallows."[50]

Indeed, people held as slaves and their lawyers, from the bottom up, influenced those who wrote the slave laws and court decisions, and this process included cases in which slaves asserted freedom claims. The lawmakers at the top often responded to these claims coming from the bottom, however, by cutting off potential legal routes to freedom. For example, judges and legislators in different jurisdictions and at different times imposed greater or lesser legal constraints upon individual slave masters who wished to free their slaves, and thus confined or expanded the claims to freedom that slaves potentially could assert based upon proof of their masters' intentions to free their slaves. The lawmakers also responded to freedom claims by limiting the potential substantive theories on which slaves could claim their freedom independent of proof that the slaves' masters' intentions to free them. These lawmakers also adopted procedural rules that created burdens and barriers for freedom claimants.

The legislators and judges thus created a legal reality that confronted the freedom claimants, and their lawyers, whose cases are discussed in this book. This law also influenced potential claimants who, by definition, simply could not assert viable legal cases under the legal rules of substance and procedure that were imposed from above.[51]

This interaction between those at the top and at the bottom was not the same in all slave societies, however. In the British colonies that later became states in the United States, the lawmakers and judges at the top were not the kings, queens, or parliaments of the mother country or their colonial administrators. Instead, they were almost from the beginning locally elected or selected legislators and judges who were slave owners themselves, or who were at least not unsympathetic to the interests of the slaveholders.[52] Moreover, except in Louisiana and at the start in South Carolina, these lawmakers and judges did not base their slave law on a code of Roman, medieval, or non-local origin. They instead made up the law as they went along to advance the salient public and private interests in the slave societies that they established and developed.[53]

This interpretation of legal change is akin to the instrumentalist model

because it asserts that Southern judges and legislators viewed this law as an instrument of social policy that they used to encourage certain nonlegal changes and to alleviate the harmful effects of others.[54] I do not suggest, however, that the law box was always empty, that statutes and case law reports necessarily reflected dominant interests, or that they did so by means of a simple, unthinking reflex action. In fact, we must account for the important institutional differences between courts and legislatures, along with the different natures of case law and statute law materials. Moreover, we must interpret case law reports with a lawyer's expertise, which accounts for the way lawyers and judges argue from precedents, and which focuses on the specific issues that the litigants have asked the courts to decide.[55]

Therefore, from the traditional legal history approach, we need to carefully distinguish the holdings from the *dicta* in slave law cases, a basic but essential principle of legal research and analysis.[56] Karl Llewellyn said it best when he wrote that the only "law" in a judicial opinion is created when the court "speaks to the question before it[.]" As to any other question the court "says mere words, which no man needs to follow." These words are not "worthless." "We know them as judicial *dicta*; ... words dropped along the road, wayside remarks. Yet even wayside remarks shed light on the remarker. They may be very useful in the future to him, or to us. But he will not feel bound to them, as to his ex cathedra utterance."[57]

Consequently, I again argue that traditional legal doctrinal analysis can help us to reconcile the court opinions in which judges sometimes referred to slave rights with other decisions in which the judges did not feel bound by claims to slave humanity or rights when reaching the holdings in their decisions. These *dicta* and holdings, when read together, tell us that the judges' various references to slave humanity or right do not reconcile the cases. In some cases the courts explicitly discussed the relevant interests that the courts balanced in the slave law judicial opinions. In other opinions, however, the judges' concerns about social changes were implicit in the complex and changing structure of the legal rules and results that flowed from the case and statutory law.

We can reconcile the evolving legal standards only if we reflect on how the judges' and legislators' perceptions of the balance of the relevant interests changed over time. Thus, the judges' and legislators' changing perceptions about the balance of these relevant interests were the motivating force behind legal change. The law does not appear to change for its own strictly autonomous reasons.[58]

From the Critical Legal Studies authors,[59] I will again borrow the notion of reification.[60] Reification is a mode of thought and expression by which we substitute an abstract and positive word or idea in the place of the complex reality of oppressive personal relations.[61] Gordon again provided a helpful analysis: "'Law' is just one among many ... systems of meaning people construct in order to deal with one of the most threatening aspects of social existence: the danger posed by other people, whose cooperation is indispensable to us..., but

who may kill us or enslave us."[62]

Slave owners already had enslaved the people held as slaves. They sought to preserve their dominant position over their slaves as well as poor whites, whose cooperation was indispensable. These classes, of course, could combine and rebel. Because of these perceived threats, Gordon stated that the elites in society create legal "belief structures," along with economic and political ones, to rationalize "their dominant power positions[.]" These belief systems "define rights" in ways that reinforce "existing hierarchies of wealth and privilege."[63]

This the master class did with the pro-slavery ideology and the law of slavery. The followers of this ideology in the South, through racism, denied the slave's humanity—or at least placed the slave on a level between humanity and other animals. Similarly, the law defined slaves as chattels to cut them off from all claims to the ordinary rights enjoyed by humanity. These were the "belief structures" that the Southern elites constructed to rationalize their dominant position.[64]

Gordon stated, moreover, that these belief systems make "the social world as it is come to seem natural and inevitable." This occurs when people "externalize" beliefs by attributing "to them existence and control over and above human choice; and, moreover [people] believe that these structures must be the way they are."[65] Gordon thus concluded that reification "is a way people have of manufacturing necessity: they build structures, then act as if (and genuinely come to believe) that the structures they have built are determined by history, human nature, [and] economic law."[66]

Accordingly, slave owners and the legislators and judges in the slave states came to believe that the slavery law that they made was determined by history, human nature, and economic law. With this belief, they rationalized slavery's inhumanity. They thought they were merely acting out the perceived dictates of the reality that they created. The epitome of this process was the rise of the positive good theory of slavery, which did indeed influence the law of slavery, as illustrated by many of the statutes and cases cited in this book.[67] "[O]ne [does not] have to be a Marxist to accept that one of the reasons why people believe in certain shared ideals ('ideology') is to enable them to come to terms with and tolerate practices which would be intolerable when looked at from some alternative point of view."[68]

The definition of slaves as property was the key to the belief system that included slavery law. It rendered all references to slave rights and humanity into rationalizations that masked slavery's total oppression. For example, in *James v. Carper*,[69] the Tennessee Supreme Court in 1857 rejected the contention that the law could deprive a master of her right to recover damages from a hirer of one of her slaves who perpetrated a battery against the slave. Justice Robert J. McKinney's opinion stated that a rule denying the owner her right to sue and recover her damages would "ignore the plainest principles of reason and of right," and "would be justly esteemed a reproach to humanity in any condition of civil society above the level of barbarism."[70]

According to Daniel Flanigan, this decision "demonstrated how slavery

could warp the values of the slaveholders. Civil suits to recompense masters for the value of the labor or lives of their slaves did not reduce but instead encouraged 'barbarism.'"[71] Indeed, the court applied the general rule of the common law by which a hirer or bailee of a chattel, such as a horse, can be held liable to the owner for damages caused by the intentional misuse of the chattel.[72] This opinion provides just one example of how slavery's "barbarism" was reified; the court's references to humanity and right helped to obscure the oppression of the fundamentals of the master and slave relation.[73]

Indeed, phrases such as slave "humanity" and slave "rights" expressed—in legal terms—the slave's economic value, and defined the relative property rights and duties of individuals and the state in the slave. Slave law thus expressed the conflicting interests of free people that were embodied in slaves. The notions of slave rights and humanity became reifications.[74]

In this book, I will build on the interpretation that I advanced in *People Without Rights* by again using all of these approaches to legal history, as well as my experience as a practicing lawyer, to further reveal slavery law's essential nature through an analysis of the manumission and freedom suits and the related statutes.[75]

* * * * *

This book is the latest chapter in my 31-year effort to understand and write about slavery law in the United States. I began this inquiry as a second-year law student at Rutgers Law School, in Newark, New Jersey, during a Fall 1980 seminar on law and social change taught by Professor James C. N. Paul. I again wish to note my thanks to Professor Paul and my Rutgers professors John Anthony Scott and Arthur Kinoy, who encouraged me to continue my research and writing in this important field of study while I completed my traditional law school course of study.

In addition to my law practice and continuing research into historical sources and interpretation, since 1986 I have worked as an adjunct professor teaching law classes at Montclair State College, now University, in Upper Montclair, New Jersey. I wish to thank the Sprague Library personnel at Montclair for assisting me in obtaining books that were not available in the Library's collection.

This book, like my earlier works, is the product of my independent efforts. Nevertheless, I thank all of those who have commented on my publications, both in print and in communications that I have received over these many years.

I also wish to acknowledge the many online sources of information, especially Google Books, which have made it easier for independent scholars to obtain access to materials that previously were readily available only to those who were associated with elite institutions. The following data sources also were especially helpful to me in completing this project: Archives of Maryland Online, http://aomol.net/html/, which is the source of most of the Maryland

materials I have cited, and Paul Axel-Lute, ed., "The Law of Slavery in New Jersey: An Annotated Bibliography" (January 2005, revised October 9, 2009), http://njlegallib.rutgers.edu/slavery/bibliog.html/, which is the source of many of the New Jersey materials.

Of course, I thank Alan Childress for agreeing to publish the book and for assisting me in my efforts to get the manuscript into publishable form. But my most important thanks go to my wife, Daniele Fede. Also a lawyer, she has had to endure for three years the storage boxes in our dining room filled with copies of the fruits of my research efforts, compounded by my occupation of our dining room table with books, notes, and drafts of the chapters that have finally found their way into this book. For these reasons, and countless others, this book is dedicated to her.

ANDREW T. FEDE

Bogota, New Jersey
October, 2011

Notes to the Preface

[1] Andrew Fede, *People Without Rights: An Interpretation of the Fundamentals of the Law of Slavery in the U.S. South* (1992), and the reprint edition published in 2011 by Routledge [hereinafter Fede, *People Without Rights*].

[2] In *People Without Rights*, I advanced an interpretation of the criminal law, manumission law, and commercial law of Southern slavery, which I had outlined in a 1984 review essay, Andrew Fede, "Toward a Solution of the Slave Law Dilemma: A Critique of Tushnet's 'The American Law of Slavery,'" 2 *Law & Hist. Rev.* 301 (1984) [hereinafter Fede, "Toward a Solution"]. I applied that approach to the criminal law of slavery in Andrew Fede, "Legitimized Violent Slave Abuse in the American South, 1619-1865: A Case Study of Law and Social Change in Six Southern States," 29 *Am. J. Legal Hist.* 93 (1985) [hereinafter Fede, "Legitimized Violence"], reprinted in *Articles on American Slavery: Law, the Constitution, and Slavery* (Paul Finkelman, ed.) (1989); and to the law of slave sales in Andrew Fede, "Legal Protection for Slave Buyers in the U.S. South: A Caveat Concerning *Caveat Emptor*," 31 *Am. J. of Legal Hist.* 322 (1987) [hereinafter Fede, "Slave Buyers"]. *See also* Andrew T. Fede, "Slave Codes," in 2 *Macmillan Encyclopedia of World Slavery* 801 (Paul Finkelman and Joseph C. Miller, eds.) (1998); Andrew T. Fede, "Gender in the Law of Slavery in the Antebellum United States," 18 *Cardozo L. Rev.* 411 (1996) [hereinafter Fede, "Gender"].

[3] Fede, *People Without Rights*, *supra* at 41, 131-58.

[4] Robert B. Shaw, *A Legal History of Slavery in the United States* (1991).

[5] Thomas D. Morris, *Southern Slavery and the Law, 1619-1860* (1996) [hereinafter

Morris, *Slavery*]; *see* Andrew T. Fede, "Book Review," 41 *Am. J. of Legal Hist.* 406 (1997) [hereinafter Fede, "Morris Book Review"] (for a review by this author).

[6] Judith Kelleher Schafer, *Slavery, the Civil Law, and the Supreme Court of Louisiana* (1994) [hereinafter Schafer, *Supreme Court*].

[7] Jenny Bourne Wahl, *The Bondsman's Burden: An Economic Analysis of the Common Law of Southern Slavery* (1998) [hereinafter Wahl, *Burden*]; Jenny Bourne Wahl, "Legal Constraints on Slave Masters: The Problem of Social Cost," 41 *Am. J of Legal Hist.* 1 (1997) [hereinafter Wahl, "Constraints"]; *see* Andrew T. Fede, "Book Review," 42 *Am. J. of Legal Hist.* 433 (1998) (for a review by this author).

[8] William E. Wiethoff, *A Peculiar Humanism: The Judicial Advocacy of Slavery in High Courts of the Old South, 1820-1850* (1996).

[9] A. Leon Higginbotham, Jr., *Shades of Freedom: Racial Politics and Presumptions of the American Legal Process* (1996); A. Leon Higginbotham, Jr., "The Ten Precepts of American Slavery Jurisprudence: Chief Justice Roger Taney's Defense and Justice Thurgood Marshall's Condemnation of the Precept of Black Inferiority," 17 *Cardozo L. Rev.* 1695 (1996); *see* Anita F. Hill, "The Scholarly Legacy of A. Leon Higginbotham, Jr.: Voice, Storytelling, and Narrative," 53 *Rutgers L. Rev.* 641 (2001) (for a bibliography and evaluation of Judge Higginbotham's legal history writings).

[10] Glenn McNair, *Criminal Injustice: Slaves and Free Blacks in Georgia's Criminal Justice System* (2009); James M. Campbell, *Slavery on Trial: Race, Class, and Criminal Justice in Antebellum Richmond Virginia* (2007); Ariela J. Gross, *What Blood Won't Tell: A History of Race on Trial in America* 1-110 (2007) [hereinafter Gross, *Blood*]; Ariela J. Gross, *Double Character: Slavery and Mastery in the Antebellum Southern Courtroom* (2000) [hereinafter Gross, *Double Character*]; Sally E. Hadden, *Slave Patrols: Law and Violence in Virginia and the Carolinas* (2001); Walter Johnson, *Soul by Soul: Life Inside the Antebellum Slave Market* (1999) [hereinafter Johnson, *Soul*].

[11] Bernie D. Jones, *Fathers of Conscience: Mixed-Race Inheritance in the Antebellum South* (2009) [hereinafter Jones, *Fathers*]; Jason A. Gillmer, "Suing for Freedom: Interracial Sex, Slave Law, and Racial Identity in the Post-Revolutionary and Antebellum South," 82 *N.C. L. Rev.* 535 (2004) [hereinafter Gillmer, "Suing for Freedom"]; Adrienne D. Davis, "The Private Law of Race and Sex: An Antebellum Perspective," 51 *Stanford L. Rev.* 221 (1999) [hereinafter Davis, "Race and Sex"]; *see* chapter 1, *infra* at notes 19 and 20 for other sources.

[12] Judith Kelleher Schafer, *Becoming Free, Remaining Free: Manumission and Enslavement in New Orleans, 1846-1862* (2003) [hereinafter Schafer, *Becoming Free*].

[13] *See* Randall Kennedy, "The State, Criminal Law, and Racial Discrimination: A Comment," 107 *Harv. L. Rev.* 1255, 1267 (1994); *see also* Randall Kennedy, *Race, Crime, and the Law* 29-36, 76-80 (1997) [hereinafter Kennedy, *Race*].

[14] *See* Fede, *People Without Rights*, *supra* at 9-12.

[15] *Id.* at ix.

[16] Many writers have used the phrase "people without rights." For example, some have used it in connection with slavery. *See, e.g.*, Philip D. Morgan, *Slave Counterpoint: Black Culture in the Eighteenth-Century Chesapeake and Lowcountry* 259 (1998) [hereinafter Morgan, *Slave Counterpoint*]; Laura F. Edwards, "Enslaved Women and the Law:

Paradoxes of Subordination in the Post Revolutionary Carolinas," in *Women and Slavery: The Modern Atlantic* 129 (Gwyn Campbell, *et al.*, eds.) (2008); Paul Marshall, "Rights Talk and Welfare Policy," in *Welfare in America: Christian Perspectives on a Policy Crisis* 281 (Stanley W. Carlson-Thies and James W. Skillen, eds.) (1996); *see also* Laura F. Edwards, "Status Without Rights: African Americans and the Tangled History of Law and Governance in the Nineteenth-Century U.S. South," 112 *Am. Hist. Rev.* 365 (2007). Plato used it to describe people who, like slaves, were subject to violence and the confiscation of their property. *See Plato on Rhetoric and Language: Four Key Dialogues* 145 (Jean Nienkamp, ed.) (1999). Hannah Arendt and others used it when writing about the status of European Jews. *See* Peg Birmingham, *Hannah Arendt and Human Rights: The Predicament of Common Responsibility* 98 (2006); Leon I. Yudkin, *Jewish Writing and Identity in the Twentieth Century* 103 (1982) (quoting French poet André Spire). Writers also have used the phrase to describe the disenfranchised people in the Soviet Union before 1936, Golfo Alexopoulos, *Stalin's Outcasts: Aliens, Citizens, and the Soviet State, 1926-1936* 3, 23, 28-31 (2003); the people in the nations captured by the Germans during World War II, Konrad H. Jarausch and Michael Geyer, *Shattered Past: Reconstructing German Histories* 139 (2003); Australia's Aboriginal people, John Chesterman and Brian Galligan, *Citizens Without Rights: Aborigines and Australian Citizenship* 1-10 (1997), and Hannah McGlade, "Aboriginal Women and the Commonwealth Government's Response to Mabo—An International Human Rights Perspective," in *Words and Silences: Aboriginal Women, Politics and Land* 139 (Peggy Brock, ed.) (2001); and those in Kosovo and East Timor, Noam Chomsky, *People Without Rights: Kosovo, Ost-timor und der Westen [Kosovo, East Timor and the West]* (2002).

[17] Fede, *People Without Rights*, *supra* at x.

[18] *Id.* at ix-x.

[19] Kenneth M. Stampp, *The Peculiar Institution: Slavery in the Ante-Bellum South* 193-236 (1956); *see, e.g.*, Fede, *People Without Rights*, *supra* at 6-12; and Thomas D. Russell, "A New Image of the Slave Auction: An Empirical Look at the Role of Law in Slave Sales and a Conceptual Reevaluation of Slave Property," 18 *Cardozo L. Rev.* 473, 488-502 (1996) [hereinafter Russell, "New Image"] for reviews of the literature. The anti-slavery treatises include George M. Stroud, *A Sketch of the Laws Relating to Slavery in the Several States of the United States of America* (photo. reprint 1968) (2d ed. 1856); Richard Hildreth, *Despotism in America: An Inquiry Into the Slave-Holding System in the United States* 169-303 (photo. reprint ed. 1970) (1854); William Goodell, *The American Slave Code in Theory and Practice* (photo. reprint 1968) (1853); Harriet Beecher Stowe, *The Key to Uncle Tom's Cabin* (reprint ed. 1968) (1853). Other essential antebellum studies include: Thomas R.R. Cobb, *An Inquiry Into the Law of Negro Slavery in the United States of America* (photo. reprint 1968) (1858); John B. O'Neall, *Negro Law of South Carolina* (1848), in 2 *Statutes on Slavery: The Pamphlet Literature* 117-72 (Paul Finkelman, ed.) (1988) [hereinafter *Statutes on Slavery*]; Jacob D. Wheeler, *A Practical Treatise on the Law of Slavery* (photo. reprint 1968) (1837). For cases, statutes, and commentary, *see, e.g.*, Helen T. Catterall, ed., *Judicial Cases Concerning American Slavery and the Negro* (5 volumes) (reprint ed. 1968) (1926-1937); John C. Hurd, *The Law of Freedom and Bondage in the United States* (2 volumes) (reprint ed. 1968) (1858, 1862); Alexander Karst, "Slaves," in 36 *Cyclopedia of Law and Procedure* 465-95 (William Mack, ed.) (1910).