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Poor Whites, Benevolent Masters, and the Ideologies of Slavery: The Local Trial of a Slave Accused of Rape

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POOR WHITES, BENEVOLENT MASTERS, AND THE IDEOLOGIES OF SLAVERY: THE LOCAL TRIAL OF A SLAVE ACCUSED OF RAPE

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This Article analyzes in detail a case involving a slave accused of raping a white woman in the 1850s to offer a provocative challenge to our basic assumptions about sex and race in the slave South. Joining a new group of "cultural-legal historians," the author looks beyond the legal language of Southern legislatures and high courts, and focuses instead on the surviving local and trial records of one case: State v. Pleasant. *In doing so, the author uncovers the stories of ordinary men and women—the slave, his master, his accuser, his attorney, the jurors, and others—to see how the laws and official ideologies governing sex, race, and slavery affected everyday lives. This approach adds both specificity and complexity to the debate over how the socio-legal regime responded to interracial relationships. Ultimately, the author concludes that an accusation of black-on-white rape did not produce the hysteria that traditional thought presumes. Demands for retributive justice were tempered by the interests of the master, his slaveholding neighbors, and Southern notions about the honor and character of white men, white women, and black slaves.*

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INTRODUCTION

On a cold, rainy day in November 1851 in Union County, Arkansas, Sophia Fulmer, a white woman, accused Pleasant, a black man and a slave, of attempting to rape her.[1] According to Sophia, the events that unfolded that day were exceedingly brutal. Pleasant, after hitching his horse to a bush outside the house where Sophia and her husband lived, forced himself inside the modest home.[2] Once there, he looked about the house, helped himself to a drink of liquor, and then demanded that Sophia get him a chew of tobacco.[3] Sophia fearfully obliged his request, she later testified, hoping that was all Pleasant wanted and that he would soon leave.[4] But as she approached him, her worst fears were realized. Pleasant allegedly grabbed her and "threw her several times violently on the floor."[5] He then threw her on the bed, lifted her clothes above her head, and got on top of her, smothering her with her clothes.[6] But Sophia claimed to have resisted mightily. She testified that she drew her legs up such that Pleasant was unable to penetrate her, leaving Pleasant to "satisfy" himself on her clothes and body.[7] Afterwards, as he got up

1. Transcript of Trial at 1, State v. Pleasant (Ark. Cir. Ct. Union County Apr. 1852) (collection of Arkansas Supreme Court Records & Briefs) (on file with the North Carolina Law Review) [hereinafter Transcript of Trial, State v. Pleasant] (indictment), *rev'd*, 13 Ark. 360 (1853), *rev'd after remand*, 15 Ark. 624 (1855). For testimony that it was "cold & raining some," see *id.* at 9 (testimony of William Landers).

2. *Id.* at 8 (testimony of Sophia Fulmer).

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

to leave, Sophia claimed that she ran for a gun.[8] But Pleasant evidently moved quickly enough that he was out of range before she could take action.[9]

Five months later, Pleasant was hauled into court and put on trial for his life for the attempted rape of a white woman.[10] The mere fact that in 1852 he was given a trial, rather than lynched sometime earlier, may be surprising enough to some. But what stands out more as one delves into the record is not just that he had a trial, but that he had competent representation by a lawyer who—to borrow a phrase from Scout Finch in *To Kill a Mockingbird*—"aimed to defend him."[11] Indeed, through cross-examination and its own proffered witnesses, the defense challenged Sophia's story, raising a question of whether anything happened that morning or, if it did, whether Sophia had instigated if not consented to it.[12] Sophia, it seems, was a woman of lower class means who had disregarded the sexual codes so prevalent in the antebellum South.[13] In fact, she was rumored to have had (or be having) an affair with William Landers—the owner of the home where Sophia and her husband stayed—if not several others.[14] She also reportedly transgressed traditional boundaries between blacks and whites, having, on at least one occasion, invited a slave woman to dinner.[15] Her husband, too, said to be a "lazy man," was known about

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8. *Id.*

9. *Id.*

10. Arkansas, like most Southern states, mandated death for any "negro or mulatto" found guilty of rape or attempted rape of a white woman. *See* A DIGEST OF THE STATUTES OF ARKANSAS ch. 51, pt. IV, art. IV, § 9, at 331 (E.H. English ed., 1848) (on file with the North Carolina Law Review) [hereinafter STATUTES OF ARKANSAS]; *see also* THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW, 1619–1860, at 305 (1996) (noting that rape and attempted rape were capital offenses in every state in the antebellum South except Missouri, where castration was imposed).

11. HARPER LEE, TO KILL A MOCKINGBIRD 187 (Harper Collins 1999) (1960).

12. *See* Transcript of Trial, State v. Pleasant, *supra* note 1, at 9–20 (detailing evidence offered by defense).

13. For evidence that Sophia was poor, see *id.* at 11 (testimony of John C. Willingham). For testimony about her sexual conduct, see *id.* at 15–17 (affidavit of James Milton).

14. *Id.* at 15–17 (affidavit of James Milton). James Smith, for example, swore he had "had criminal connection with her himself often." *Id.* at 15. The transcript of the trial erroneously implies that Jacob Fulmer, and not William Landers, owned the home where they lived. *See id.* at 9 (detailing William Landers's testimony in which he supposedly said that Pleasant "came by Mr. Fulmers [sic], where he was living"). Other primary records, however, indicate that it was the other way around. *See infra* notes 424, 429 and accompanying text (discussing materials such as census records and tax records, which better show the relationship between Landers and the Fulmers); *see also* Pleasant v. State, 15 Ark. 624, 632 (1855) (noting Landers's testimony that it was the "witness' house, and Fulmer was living with him at that time").

15. *Pleasant*, 15 Ark. at 631.

the community as someone who regularly sold whiskey and other sundry items to slaves and people of color.[16] One witness also showed that after the alleged crime Sophia and her husband approached James Milton, Pleasant's master, and offered to settle the case for some $200.[17] This point undoubtedly was designed to raise the inference that Sophia and her husband had something to gain from her accusation. In fact, it appears that it was only after the deal fell through that Sophia notified local authorities.[18]

Pleasant's case ultimately wound its way through two trials, two convictions, two appeals, and two reversals; and whether he was tried a third time is not clear. But, regardless of the final outcome, the case provides an extraordinary look into a society deeply divided by conflicting interests, ideologies, loyalties, races, and classes. Traditional thought assumes that sex between black men and white women in the slave South was unthinkable, and that an accusation of rape by a white woman against a black man produced swift and definitive action. But the fact that Pleasant was given a trial, was ably represented, and obtained not one but two reversals in the Arkansas Supreme Court, suggests that the question is much more complicated than might be expected.

This Article, through the close examination of Pleasant's case, makes the argument for a nuanced approach to the slave South's attitudes towards accusations of black-on-white rape—one that emphasizes conflict and uncertainty rather than agreement and uniformity. To that end, this Article departs from a formidable body of scholarship that assumes Southern whites historically have reacted with one voice when a white woman accused a black man of raping her. Wilbur Cash was the first to call it a "rape complex," and Winthrop Jordan soon after posited that its roots could be traced to early English contacts with Africans.[19] Since then, a number of historians have built upon this basic thesis and have argued that white Southerners throughout this country's history have been obsessed with black male sexuality. Like Cash and Jordan before them, these scholars have assumed that what preoccupied the white mind after

16. Transcript of Trial, State v. Pleasant, *supra* note 1, at 18 (affidavit of James Milton). For the comment that Fulmer was lazy, see *id.* at 11 (testimony of John C. Willingham).

17. *Id.* at 10 (testimony of John C. Willingham).

18. *Id.*

19. *See* WILBUR J. CASH, MIND OF THE SOUTH 115–20 (1941); WINTHROP JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550–1812, at 136, 151–54 (1968).

the Civil War reverberated just as strongly in the decades and centuries before it. One scholar of the antebellum South, for example, has stated that an accusation that a slave raped a white woman provoked "profound rage" among white Southerners.[20] Another has written about how, under slavery, white men were "convinced that Black men wanted to rape white women," and that "this belief pervaded the South, emerging with particular virulence in the early nineteenth century."[21] Still another cites the extreme legal ramifications (death or castration) mandated for a guilty verdict as evidence of white anxiety over black male sexuality and presumes that mobs "broke into jails and courtrooms and lynched slaves alleged to have raped White women."[22]

To be sure, fears of black sexual aggression in the late nineteenth and first half of the twentieth centuries were real. Every student of race relations is familiar with the tragedy of the Scottsboro Boys and Emmett Till, in which Southern whites meted out a version of justice on black youths wrongly accused of sexually assaulting white women that has sickened generations to come. And these are not the only ones; there are literally thousands of other less famous cases from the same period in which black men and boys were lynched at the hands of vigilante whites, and the most common reason given was the rape of a white woman.[23] For those fortunate enough to reach a trial, as

20. Peter W. Bardaglio, *Rape and the Law in the Old South: "Calculated to Excite Indignation in Every Heart,"* 60 J. S. HIST. 749, 754 (1994).

21. Karen A. Getman, Note, *Sexual Control in the Slaveholding South: The Implementation and Maintenance of a Racial Caste System*, 7 HARV. WOMEN'S L.J. 115, 134 (1984); *see also* Bardaglio, *supra* note 20, at 752 ("White southerners, both inside and outside the legal system, widely shared the belief that black men were obsessed with the desire to rape white women.").

22. Jennifer Wriggins, Note, *Rape, Racism, and the Law*, 6 HARV. WOMEN'S L.J. 103, 105 (1983); *see also* Getman, *supra* note 21, at 134–35 (noting how black men convicted of rape or attempted rape were sentenced to death and how castration was "a punishment uniquely suited in colonial thought to curbing Blacks' sexual aggressiveness"). Other respected scholars, from historians to sociologists, have perpetuated this assumption of white fears of black-on-white rape. *See, e.g.*, CALVIN C. HERNTON, SEX AND RACISM IN AMERICA 7 (1965) (stating that the "sexualization of racism . . . spans the history of this country from the era of slavery to the present"); PETER H. WOOD, BLACK MAJORITY: NEGROES IN COLONIAL SOUTH CAROLINA FROM 1670 THROUGH THE STONO REBELLION 236–37 (1974) (discussing the "mounting preoccupation with ravishment" in colonial South Carolina); BERTRAM WYATT-BROWN, SOUTHERN HONOR: ETHICS AND BEHAVIOR IN THE OLD SOUTH 50 (1982) ("It goes almost without saying that the penalty for a slave who dared lust after white women's flesh was castration, first by the law of the slave code, later by community justice alone.").

23. *See* JOEL WILLIAMSON, THE CRUCIBLE OF RACE: BLACK-WHITE RELATIONS IN THE AMERICAN SOUTH SINCE EMANCIPATION 116–18 (1984) (discussing the rationale behind lynchings and noting how many took place). One of the most searing indictments

the Scottsboro case demonstrates, the outcome was rarely any better.[24]

Yet, notwithstanding this horrific proof of Southern atrocities, in recent years a few scholars have begun to question the notion that this same preoccupation with protecting white women against black male aggression existed during the time of slavery. Though the subjects they write about are somewhat varied, scholars such as Martha Hodes, Victoria Bynum, Joshua Rothman, and Diane Miller Sommerville all make the case that antebellum whites were not as intolerant of interracial sexual relationships—including between black men and white woman—as their postbellum counterparts.[25] Situated within an even broader range of recent scholarship, these works represent a shift in thinking about slavery, one which sees much more fluidity between the races than the rigid racial boundaries earlier accounts described. As a result, even accusations of rape, Sommerville in particular argues, did not carry the same significance under slavery as they would in later years.[26]

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of lynchings and all their horrors came from Ida B. Wells, an African-American newspaper reporter and editor. *See* Ida B. Wells, *A Red Record: Tabulated Statistics and Alleged Causes of Lynchings in the United States, 1892–1893–1894, reprinted in* SOUTHERN HORRORS AND OTHER WRITINGS: THE ANTI-LYNCHING CAMPAIGN OF IDA B. WELLS, 1892–1900, at 73 (Jacqueline Jones Royster ed., 1997).

24. *See generally* DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH (1979) (discussing the infamous Scottsboro rape trials of the 1930s). In one of the more recent studies of black-on-white rape, Lisa Dorr offers an intriguing analysis in which she questions whether, even in the twentieth century, white responses to accusations of rape were uniform. *See* LISA LINDQUIST DORR, WHITE WOMEN, RAPE, AND THE POWER OF RACE IN VIRGINIA 1900–1960, at 1–14 (2004).

25. *See* VICTORIA E. BYNUM, UNRULY WOMEN: THE POLITICS OF SOCIAL AND SEXUAL CONTROL IN THE OLD SOUTH 88–110 (1992) (describing relationships between socially marginalized women and black men in South Carolina); MARTHA HODES, WHITE WOMEN, BLACK MEN: ILLICIT SEX IN THE NINETEENTH-CENTURY SOUTH 1–6 (1997) (arguing that under slavery whites were much more tolerant of sexual unions between white women and black men than after slavery); JOSHUA D. ROTHMAN, NOTORIOUS IN THE NEIGHBORHOOD: SEX AND FAMILIES ACROSS THE COLOR LINE IN VIRGINIA, 1787–1861, at 1–11 (2003) (describing the intricacy and complexity of interracial relationships); DIANNE MILLER SOMMERVILLE, RAPE AND RACE IN THE NINETEENTH-CENTURY SOUTH 1–18 (2004) (arguing that whites were not especially anxious about blacks raping white women until the end of the nineteenth century).

26. *See* SOMMERVILLE, *supra* note 25, at 4 (noting that white Southerners "did not always line up on the side of the white female accuser"). A generation earlier, Eugene Genovese also noted that the "overwhelming majority" of rape accusations against slaves in the antebellum South did not result in lynching and that the "racist fantasy so familiar after emancipation did not grip the South in slavery times." EUGENE GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE 33 (1972). Rather, most slaves accused of rape "received trials as fair and careful as the fundamental injustice of the legal system made possible." *Id.*

This work follows in a similar vein; it too challenges the basic notion that antebellum whites were uniformly anxious or unduly concerned about black male sexual aggression. But the central purpose of this Article is not just to dismantle the various assumptions that define the traditional approach; instead, it is to build up a persuasive explanation for why a white woman's accusation that she was sexually assaulted by a slave did not, at least as a general matter, create the social anxiety and mass retaliation of later years. To that end, this Article focuses on one case—*State v. Pleasant*—to tell the rich and complex story that arose when Sophia Fulmer, a poor white woman, accused Pleasant, the slave of a wealthy master, of trying to rape her. This is a story of race, of sex, of class, of gender, of money, of honor, and, perhaps most of all, of slavery, because it was slavery, in the end, that ultimately formed the backdrop for the conflict. It was slavery that brought competing interests into the courtroom; it was slavery that pitted a wealthy master against his poorer neighbor; and it was slavery that forced the various parties into open and ugly argument about what race meant, about what proper white women did, about the character of slaves, and about what it meant to be a master and a man. Viewed this way, as class conflicts between whites expressed and experienced through different ideological constructs, the principal argument this Article makes is that a rape accusation under slavery did not necessarily create the type of mass hysteria and rush to judgment seen at the turn of the century. Under slavery, too much was at stake—personal, political, and economic—to assume that the South would speak with a uniform voice.

This work depends heavily on local records to support its thesis. Ariela Gross, in a recent article, has written about the importance of using these records, particularly trial records, because they allow us to view the law from different perspectives—"not only that of the judge but those of witnesses, litigants, jurors, and even slaves."[27] Doing so, moreover, helps in our understanding of how the law functioned in everyday life. The laws of slavery, including the laws governing black-on-white rape, were written by men concerned with the overall direction of their society. Thus, studying those laws along with the rules handed down by the high courts offers an important insight into the minds of those who pushed for them. But to view the law from the local level—from the bottom up—forces us to recognize that the

27. Ariela Gross, *Beyond Black and White: Cultural Approaches to Race and Slavery*, 101 COLUM. L. REV. 640, 643 (2001).

laws on the books were not always the laws in practice.[28] Indeed, the laws of slavery drew sharp lines between black and white, granting rights and privileges to one group while denying them to another. Yet, at the local level, things were never so clear. People who looked black were free and people who looked white were slaves;[29] people who were not entitled to own property did and people who were entitled never had any;[30] and people who were told not to associate with one another did so anyway, sometimes even on terms of mutual respect and adoration.[31] At the local level, in other words, formal legal doctrines and official ideologies ran head first into everyday life, and the local disputes that inevitably resulted provide us with a unique window into how ordinary citizens viewed both the law and the society in which they lived.

Hence, this Article pays close attention to the trial record of *State v. Pleasant*, along with the transcript that was made of the trial when the case was first appealed to the Arkansas Supreme Court.[32] This

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28. *Cf.* Arthur F. Howington, *"Not in the Condition of a Horse or an Ox":* Ford v. Ford, *the Law of Testamentary Manumission, and the Tennessee Court's Recognition of Slave Humanity*, 34 TENN. HIST. Q. 249, 250 (1975) (arguing that state supreme court decisions resemble "the tip of an iceberg," and that a more accurate appraisal of slave law comes from trial courts).

29. For one of the most comprehensive and important treatments of free blacks in the slave South, see IRA BERLIN, SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH (1974). For a discussion of the fissures created in the Southern socio-legal order by white or near-white slaves, see 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, 588–619 (2004).

30. One of the earliest and most comprehensive efforts investing whiteness with property and blackness with slavery was Virginia's 1705 slave code. *See* Act of Oct. 1705, ch. 49, *in* 3 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619, at 447–62 (William Waller Hening ed., 1823) [hereinafter HENING'S STATUTES AT LARGE] ("An act concerning Servants and Slaves."). In it, blacks were made slaves and deprived of all property. *See, e.g.*, *id.* at 447–50 (declaring who could be enslaved), 449–60 (prohibiting slaves from owning property). Meanwhile, whites—including indentured servants—were granted certain rights otherwise denied blacks, thereby investing whites with an interest in their own skin color. *See, e.g.*, *id.* at 448–49 (granting white servants legal rights), 449–50 (forbidding blacks from owning whites), 450 (declaring that white servants could not be deprived of their property), 451 (providing white servants with certain property at the end of the period of indenture). Yet, notwithstanding these and other laws, many slaves acquired property, and many whites did not.

31. *See infra* Part III.A (discussing the nature and content of interracial relationships in the antebellum South).

32. The actual trial record from Union County consists of brief entries—usually one paragraph—describing the legal proceedings: the name of the case, what was at issue, how the trial court ruled, or what the jury found. *See, e.g.*, State v. Pleasant, (Ark. Cir. Ct., Union County, Apr. 17, 1852), *microformed on* Union County Circuit Court Records, Roll 55 (collection of Ark. Hist. Comm'n) (on file with the North Carolina Law Review). If the

particular case was not chosen by accident. Part of its appeal lies in its sheer ordinariness. Indeed, if it is true that the law as most Southerners knew it was primarily a local affair,[33] then it seems like some of the best insights into what mattered most to ordinary citizens would come from everyday disputes like this one, and not necessarily from the canonical cases. But this story is also worth telling because of its location: Arkansas, a state that has received little attention in the scholarship on slavery.[34] Indeed, others have made good arguments for why a particular focus on, say, Virginia is merited, because it was one of the first colonies to implement slavery and many of its laws on the subject were imported elsewhere.[35] But as this country expanded westward—to unsettled places like Arkansas, Texas, and Oklahoma—the rules and ideologies of the old South had to be twisted and bent to address the circumstances of the new South. Who were the people who migrated westward? Where did they come from, how did they live, what did they think of slavery, and what did they do when confronted with a slave accused of raping a white woman?

The sources consulted for this Article were numerous. In addition to the court records from Pleasant's case, this work relies on materials such as census records, slave schedules, tax records, deed records, agricultural records, letters, and newspaper accounts. In addition, this Article takes into account the surviving trial records from the other cases in Arkansas that reached the state supreme

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case was appealed, the clerk of the court transcribed a detailed record of the case and included within that record a copy of the indictment, a description of what each witness said or would have said if allowed to testify, what motions were made, and how the court ruled. Along with the trial transcript, the record also includes the briefs filed to the Supreme Court of Arkansas. Unfortunately, the transcript of the record for the second appeal was destroyed by fire.

33. *See* Walter Johnson, *Inconsistency, Contradiction, and Complete Confusion: The Everyday Life of the Law of Slavery*, 22 LAW & SOC. INQUIRY 405, 425 (1997).

34. The only comprehensive work on slavery in Arkansas was published in 1958. *See* ORVILLE W. TAYLOR, NEGRO SLAVERY IN ARKANSAS (Univ. of Ark. Press 2000) (1958). In the last decade, there have been a handful of important shorter treatments. *See, e.g.*, S. CHARLES BOLTON, ARKANSAS, 1800–1860: REMOTE AND RESTLESS 125–44 (1998); Gary Battershell, *The Socioeconomic Role of Slavery in the Arkansas Upcountry*, 58 ARK. HIST. Q. 45 (1999); S. Charles Bolton, *Slavery and the Defining of Arkansas*, 58 ARK. HIST. Q. 1 (1999); Carl H. Moneyhon, *The Slave Family in Arkansas*, 58 ARK. HIST. Q. 24 (1999); L. Scott Stafford, *Slavery and the Arkansas Supreme Court*, 19 U. ARK. LITTLE ROCK L. REV. 413 (1997).

35. *See* A. Leon Higginbotham, Jr. & Barbara K. Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 GEO. L.J. 1967, 1967 (1989) (noting how Virginia was "the 'mother' of American slavery and a leader in the gradual debasement of Blacks through its institution of slavery").

court in which interracial issues were at the forefront.[36] Finally, best efforts have been made to find and read every Arkansas appellate case involving a slave, as well as every appellate decision from every jurisdiction in the South involving an accusation of rape or attempted rape against either a black or white man during the time of slavery. Additional appellate cases from other jurisdictions involving a variety of interracial issues also were consulted, from will contests, to divorce cases, to sexual slander cases, to miscegenation cases. All told, some two or three hundred cases were reviewed to help tell the story of just one: *State v. Pleasant.*

Part I of this Article introduces some of the major players in the case and gives a background on Arkansas and the people there. Part II turns to some preliminary questions about the role of the courts in the antebellum South and the role of law in the lives of slaves. From there, the Article moves into a discussion of why a slave master in general, and James Milton in particular, would be so interested in providing a good defense for his slave. Part III turns to the trial itself, first sketching a view of interracial sex that helps explain why Sophia's accusation of rape did not provoke the profound rage so often assumed. It then goes through the testimony in detail, setting up the point that a case like Pleasant's ultimately forced a confrontation over the very foundation of the Southern social order. Finally, this Article concludes by emphasizing the role of slavery in people's everyday lives.

I. THE SETTING

A. James Milton, the Master

By the time James Milton—Pleasant's master—arrived in Arkansas, the vast migration south and west from the older states in

36. For rape cases, see Transcript of Trial, State v. Charles (Ark. Cir. Ct. Hempstead County May 1850) (No. 104) (collection of Ark. Sup. Ct. Records & Briefs) (on file with the North Carolina Law Review), *rev'd*, 11 Ark. 389 (1850); Transcript of Trial, State v. Sullivant (Ark. Cir. Ct. Dallas County Sept. 1847) (No. 125) (collection of Ark. Sup. Ct. Records & Briefs) (on file with the North Carolina Law Review), *rev'd*, 8 Ark. 400 (1848). For will contests, see Transcript of Trial, Harriet v. Dixon (Ark. Ch. Ct. Pulaski County Aug. 1855) (No. 53) (collection of Ark. Sup. Ct. Records & Briefs) (on file with the North Carolina Law Review), *aff'd*, 18 Ark. 495 (1857); Transcript of Trial, Abraham v. Wilkins (Ark. Cir. Ct. Lafayette County June 1853) (No. 10) (collection of Ark. Sup. Ct. Records & Briefs) (on file with the North Carolina Law Review), *aff'd*, 17 Ark. 292 (1856); Transcript of Trial, Campbell v. Campbell (Ark. Ch. Ct. Chicot County May 1850) (No. 22) (collection of Ark. Sup. Ct. Records & Briefs) (on file with the North Carolina Law Review), *aff'd*, 13 Ark. 513 (1853).

the Upper South had long been underway.[37] Born in North Carolina in 1804, the precise reason Milton left his home state is not known.[38] But chances are that Milton, like thousands of other men and women, departed in search of prosperity and the better life he hoped prosperity would bring. Tobacco, the cash crop of the Upper South, had lost much of its profitability during the Revolutionary period, and as a result established planters as well as young upstarts began fleeing the crowded and overworked lands of Virginia, Maryland, and North Carolina in the hope of finding better fortunes elsewhere.[39] Many, including James Milton, headed to the newly created territories of the Southwest where cotton was king. Indeed, cotton—originally popular in the low country slave gardens of South Carolina—emerged as an immensely successful staple crop at the beginning of the nineteenth century after the invention of the cotton gin made the removal of the sticky seeds from the cotton fiber much easier and faster.[40] Production shot up, and so did the populations of the Southwest, where the climate and soil were ideally suited for growing the new cash crop.[41]

Milton's trek westward took him first to Mississippi. When he arrived is difficult to pinpoint, but we know that he had been living in that state since at least 1838, when he and his wife Nancy celebrated the birth of their first child, Emaline (or "Huldy," as she was called).[42]

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37. *See* IRA BERLIN, MANY THOUSANDS GONE: THE FIRST TWO CENTURIES OF SLAVERY IN NORTH AMERICA 262 (1998).

38. *See* Manuscript Census Returns, Schedule 1.—Free Inhabitants, Ouachita & Union Counties, Ark., *in* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, POPULATION SCHEDULES OF THE SEVENTH CENSUS OF THE UNITED STATES (1850), *microformed on* Seventh Census of the United States, 1850, M432, Roll 30 (Nat'l Archives & Records Admin.) (on file with the North Carolina Law Review) [hereinafter 1850 CENSUS: Free Inhabitants] (listing James Milton's birth place as North Carolina and his age as forty-six, meaning that he was born in 1804). James Milton is listed as "James Melton" in the 1860 census, but it is clear from the vital statistics, including age, birthplace, and family members, that this is the same person. *See* Manuscript Census Returns, Schedule 1.—Free Inhabitants, Ouachita & Union Counties, Ark., *in* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, POPULATION SCHEDULES OF THE EIGHTH CENSUS OF THE UNITED STATES (1860), *microformed on* Eighth Census of the United States, 1860, M653, Roll 51 (Nat'l Archives & Records Admin.) (on file with the North Carolina Law Review) [hereinafter 1860 CENSUS: Free Inhabitants] (listing, for example, James Melton's birthplace as North Carolina and his age as fifty-six).

39. *See* BERLIN, *supra* note 37, at 265 (describing wartime disruption on tobacco and the resulting migration to the West and Southwest).

40. *See id.* at 307 (describing the rise of cotton as a cash crop).

41. *See id.* at 343 (noting an increase in cotton production along the lower Mississippi valley at the turn of the century).

42. *See* 1850 CENSUS: Free Inhabitants, *supra* note 38 (listing Nancy, forty-three, and Huldy, twelve, under Milton's household). The closeness in the ages of James, forty-six,

But perhaps he was not as successful at farming as he had hoped, or perhaps he had simply gotten wind of better opportunities available further west for anyone with an industrious and adventurous spirit. Indeed, since the 1830s when Arkansas entered the Union, if not before, people had been extolling the virtues of the State, hoping to draw to the area as many settlers as possible with talk of alluvial soil and abundance of opportunity. "[T]he facilities offered a man for making a living and a fortune there, are nowhere equalled [sic]," raved the Boston-born Albert Pike as he traveled through the State in the 1830s.[43] Arkansas, he insisted, produced "the best cotton in North America," and he felt sure that the stranger who entered the rich bottomlands in the southern half of the State would be "astonished and delighted."[44] The editors of the *Arkansas Gazette* sounded a similar chord and did what they could to encourage people to come to the area. "We are having delightful weather just now, and our planters are again busily preparing for another crop," boasted one editorial.[45] "Cotton, niggers, and mules, the great staples of the South, are just now at tall prices. And as to Arkansas river bottom lands, there is no telling where they will reach—they are going up, up, and ere long can only be reached by a ladder."[46] A literate man,[47] perhaps Milton had seen accounts like these or read glowing letters from former acquaintances who had arrived before him. But whatever the reason, in 1842 Milton packed up his small family and their belongings and started west, toward what some were calling the "epitome of the world."[48]

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and Nancy, forty-three, suggests that they were husband and wife. Huldy, who was twelve years old at the time of 1850 census, is listed as being from Mississippi, meaning that she was born in that state in 1838. The 1860 census does not list a Huldy under the household of James Milton; however, it does list a twenty-three-year-old woman named Emaline Jones from Mississippi that is presumably her. *See* 1860 CENSUS: Free Inhabitants, *supra* note 38. "Emeline" Milton married Passhall Jones in 1858. Marriage Index, AR, MS, MO, TX, 1766–1981, *in* Family Archive CD-ROM No. 5 (Borderband Software, Inc., Banner Blue Division, 1996) (on file with the North Carolina Law Review) [hereinafter Marriage Index].

43. Albert Pike, *Letters from Arkansas*, 9 NEW ENG. MAG. 263, 265 (1835).

44. *Id.* at 264.

45. Editorial, ARK. GAZETTE, Feb. 21, 1857, at 2.

46. *Id.*; *see also Emigration*, ARK. GAZETTE, Jan. 26, 1842, at 2 (insisting that the soil in Arkansas was of the "first quality" and that the mineral wealth surpassed "the mines of Peru").

47. In the 1850 census there was a box for the census takers to check for "persons over 20 y'rs of age who cannot read & write." The box next to James Milton's name is blank, suggesting that he was literate. *See* 1850 CENSUS: Free Inhabitants, *supra* note 38.

48. 1 TIMOTHY FLINT, A CONDENSED GEOGRAPHY AND HISTORY OF THE WESTERN STATES, OR THE MISSISSIPPI VALLEY 571 (Cincinnati, Ohio, E.H. Flint 1828). Milton first appears in the Union County tax records in 1842. *See* TAX BOOK OF UNION

Milton and his family eventually settled in Union County, a fertile region just above the border of Louisiana known for its ability to sustain a number of crops, including cotton, corn, sweet potatoes, and peas.[49] To get to their new home, Milton, his wife Nancy, and their young daughter probably traveled by wagon, meandering across the rugged terrain of western Mississippi and eastern Arkansas. Steamboat travel was an option, though probably not an attractive one.[50] In addition to the expense and lack of a direct route, river navigation was notoriously problematic in the early years of Arkansas.[51] Though the Ouachita River formed a partial northern boundary of Union County, it, like the Arkansas River further north, "was subject to extreme fluctuations in flow," making river travel sketchy if not downright dangerous.[52] Safer and more reliable routes could be had along the primitive roads and horse paths.

Of course, travel by land had its own hardships. Crossing the swampland of eastern Arkansas, where the Mississippi River regularly overflowed, would have been difficult—to say nothing of the "excessive annoyance from its myriads of musquitos [sic]."[53] Littered about the roads, moreover, would have been "broken boughs and fallen trees," which never seemed to fall, according to one cynical account, "any other way than across a road, if [they] could only reach it."[54] At various points along the route, Milton probably found himself cutting his own way through the virgin forest. In fact, as late as 1857, residents were still complaining that there was no reliable road through the Mississippi river bottoms to the southern

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COUNTY FOR 1842, *microformed on* Union County Tax Records, Roll 61 (collection of Ark. Hist. Comm'n) (on file with the North Carolina Law Review) [hereinafter 1842 TAX RECORD].

49. *See Southern Arkansas*, OUACHITA HERALD, Dec. 10, 1857, at 2, *microformed on* Camden Misc. Newspapers, Roll 1 (collection of Ark. Hist. Comm'n) (on file with the North Carolina Law Review) (stating that southern Arkansas—which included Union County—"possessed . . . as good a climate and soil for the production of cotton, corn, wheat, potatoes, peas & c., as can be found in any similar range throughout the old or new States").

50. Steamboats made their first appearance on the Arkansas River in the 1820s. WILLIAM F. POPE, EARLY DAYS IN ARKANSAS: BEING FOR THE MOST PART THE PERSONAL RECOLLECTIONS OF AN OLD SETTLER 31–32 (Dunbar H. Pope ed., Little Rock, Ark., F.W. Allsopp 1895).

51. *See* BOLTON, *supra* note 34, at 20 ("Despite its excellent system of rivers, navigation was a problem in Arkansas."); *see also* Pike, *supra* note 43, at 264 (noting how the rivers—particularly the Arkansas River—often were not navigable by steamboats because of depth).

52. BOLTON, *supra* note 34, at 20.

53. FLINT, *supra* note 48, at 582.

54. FREDERICH GERSTÄCKER, WILD SPORTS IN THE FAR WEST 235 (Edna L. Steeves & Harrison R. Steeves eds., Duke Univ. Press 1968) (1876).

counties of Arkansas.[55] All told, the trip likely took weeks, if not months, and fatigue certainly would have set in. Indeed, one former slave recalled a similar move from Mississippi to Camden, a town in Ouachita County, not far from where James Milton and his family settled. "Lord only knows how long it tuck a-coming," she told an interviewer many years later.[56] "The biggest younguns had to walk till theys so tired theys couldn't hardly drag they feets; them what had been a-riding had to get out of the ox wagon and walk a far piece; so it like this we go on."[57]

By the time Milton arrived in Union County, he would have found a vast country with great potential. Others had come before him—the county was established in 1829[58]—but the land was largely untamed.[59] Broadax in hand, Milton would have had to clear the ground of unwanted trees and shrubs before planting his first crops.[60] The work would have been hard; Milton likely had to contend with wild animals and poisonous snakes as he dug up the stumps and hauled them away with one of the three horses he owned.[61] Having enough food on hand also would have been a concern, though other settlers from the same time recalled that with a good rifle and a keen eye, some venison or wild turkey was easily had.[62] In those first few weeks, Milton also had to focus his attention on constructing a home for his family. Huldy was now about four, and Nancy was either

55. *Southern Arkansas*, *supra* note 49, at 2; *see also* Letter from D.H. Bingham to Chester Ashley, U.S. Senator (Dec. 30, 1844) (asking for federal assistance in the construction of a road from Memphis to other parts of the South) (collection of Ark. Hist. Comm'n) (on file with the North Carolina Law Review).

56. Interview by Beulah Sherwood Hagg with Aunt Mittie Freeman in North Little Rock, Ark. (1937), *in* 8 THE AMERICAN SLAVE: A COMPOSITE AUTOBIOGRAPHY, pt. 2, at 346, 346 (George P. Rawick ed., photo. reprint 1972) (1941) [hereinafter THE AMERICAN SLAVE].

57. *Id.*

58. FAY HEMPSTEAD, A PICTORIAL HISTORY OF ARKANSAS: FROM THE EARLIEST TIMES TO THE YEAR 1890, at 949 (1890).

59. *See* SAMUEL H. CHESTER, PIONEER DAYS IN ARKANSAS 10 (1927) (stating that the counties of Union and Columbia, after the government removed the Choctaw Indians, stood in "undisturbed possession of the wolves and bears and panthers and other smaller animals of prey" in the 1830s).

60. *See* Pike, *supra* note 43, at 265 (describing how the newly arrived had to go "resolutely to work, chopping timber, grubbing up cane, and performing the various operations necessary to clearing up land").

61. *See* 1842 TAX RECORD, *supra* note 48 (taxing Milton on three horses).

62. *See* CHESTER, *supra* note 59, at 12 ("[I]t was possible by an accurate rifle shot to procure fresh venison or bear steak or a wild turkey within a half mile of the settlement at almost any hour of the day.").

pregnant or had just had the couple's second child, whom they named James after the father.[63]

In constructing their home, like most other Arkansans, Milton probably emphasized practicality over comfort, building a simple log cabin rather than a grand plantation home so often depicted in Southern lore. If the cabin was typical, it would have been made of hewn logs, perhaps with floors made of pine and with square holes cut in the walls to serve as windows.[64] A few of Milton's new neighbors may have journeyed over to help, no doubt advising him to build his cabin in the familiar "dogtrot" style, with two large rooms divided by a large open-air passageway to let the breeze circulate through.[65] The roof probably consisted of rough planks and split shingles, and there would have been a fireplace to warm the house in colder months.[66] At the back and at the side of his new home, Milton and his neighbors probably built separate detached cabins for his kitchen, pantry, and smoke houses.[67] The home, if it seemed small at first, was designed in such a way that it could easily be expanded with additional rooms as the family and its needs grew.[68]

Milton evidently spent the first few years squatting on his land in the fine tradition of Arkansas settlers, certain that he could buy it sometime in the future and refusing to pay taxes on it until forced to do so.[69] He built his home in Van Buren Township, in the

63. *See* 1850 CENSUS: Free Inhabitants, *supra* note 38 (listing a son named James who was eight years old in 1850, meaning that he was born in 1842). In the 1860 census, there is no James listed under the household of Milton, however, there is a son named Thomas who matches the age and birthplace of James. *See* 1860 CENSUS: Free Inhabitants, *supra* note 38 (listing a son named Thomas who was eighteen years old and from Arkansas). It is probable that Thomas and James were the same person.

64. *See* CHESTER, *supra* note 59, at 16–17, 20 (describing what homes from Union County looked like during the period).

65. *See id.* at 16 ("The building of a house was always a neighborhood affair.").

66. *See* GERSTÄCKER, *supra* note 54, at 136–37 (describing the home of a resident where Gerstäcker stayed); CHESTER, *supra* note 59, at 17 (noting the "big open fires" settlers used to have in their homes).

67. *See* CHESTER, *supra* note 59, at 16 (describing a typical home).

68. *See id.* at 17 (noting how settlers would build "dormitories for the children as the families increased, and for visitors when the number was greater than the main building would accommodate").

69. *See* BOLTON, *supra* note 34, at 53 (noting that in 1840 only about one-third of all the State's taxpayers "owned their own land, while the rest squatted on the abundant land owned by the government with the assurance that they could buy it at some time in the future"). In 1842, Milton paid taxes on one slave, three horses, and eight cattle, but no land. *See* 1842 TAX RECORD, *supra* note 48. The first time Milton was taxed on real estate was 1848. *See* TAX BOOK FOR UNION COUNTY FOR 1848, *microformed on* Union County Tax Records, Roll 61 (collection of Ark. Hist. Comm'n) (on file with the North

northwestern part of the county, not too far from the Methodist settlement and the county's first post office at Mount Holly.[70] At the time, the overall population of Union County was still relatively small. Over the next several years, however, Milton would have seen the population grow steadily; it stood at 2,889 in 1840 but grew to 10,298 in 1850.[71] During this time, Milton also likely watched with interest as El Dorado, the county seat, was founded and divided into town lots in 1844, and he perhaps even signed the petition for a postal route connecting El Dorado to Monroe in bordering Ouachita County.[72] At the very least, having the town close by would have helped assure Milton that he could readily obtain basic necessities—everything from sugar and coffee to Kentucky mustard[73]—for his growing family, for in the same year that El Dorado was founded, Milton's wife Nancy gave birth to their third child, Liddy.[74] But the town also provided a needed political center for the growing county, and among the notable settlers were John Quillin and Shelton Watson—a lawyer and a judge who would become involved in Pleasant's case.[75]

From the beginning, Milton, like most of the others who settled in the area, made his living from the land. Glimpses from the

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Carolina Law Review) [hereinafter 1848 TAX RECORD] (taxing Milton on forty acres of land and estimating its value at $200).

70. *See* 1850 CENSUS: Free Inhabitants, *supra* note 38 (noting township); *see also* CHESTER, *supra* note 59, at 11 (explaining how the government established a post office at Mount Holly, a name "suggested by the abundance of holly trees whose beautiful dark green leaves and red berries were the most conspicuous feature of the forest landscape").

71. U.S. DEP'T OF STATE, COMPENDIUM OF THE ENUMERATION OF THE INHABITANTS AND STATISTICS OF THE UNITED STATES 94 (Washington, D.C., Thomas Allen 1841) [hereinafter COMPENDIUM] (statistical summary of the 1840 census); J.D.B. DEBOW, STATISTICAL VIEW OF THE UNITED STATES 200 (Washington, D.C., A.O.P. Nicholson 1854) [hereinafter STATISTICAL VIEW] (statistical summary of the 1850 census).

72. *See* HEMPSTEAD, *supra* note 58, at 951 (noting the year in which El Dorado was founded); *see also* Letter from William R. Dunn to Chester Ashley, U.S. Senator (Jan. 26, 1846) (collection of Ark. Hist. Comm'n) (on file with the North Carolina Law Review) (referencing petition). The actual petition was not among the surviving papers of Chester Ashley.

73. *See* Advertisement, *Groceries*, EL DORADO UNION, Sept. 15, 1849, at 3 (advertising groceries and items for sale at Rust & Co. store in El Dorado), *microformed on* Arkansas Misc. Newspapers, Roll 6 (collection of Ark. Hist. Comm'n) (on file with the North Carolina Law Review).

74. *See* 1850 CENSUS: Free Inhabitants, *supra* note 38 (listing a daughter named Liddy who was six years old in 1850, meaning that she was born in 1844). In the 1860 census, "Lydia" is listed as fourteen years old and not sixteen as she should have been based on the 1850 census. *See* 1860 CENSUS: Free Inhabitants, *supra* note 38. But this is undoubtedly the same person; slight discrepancies in the ages and spellings of persons listed in the census records were very common.

75. *See* HEMPSTEAD, *supra* note 58, at 951 (discussing prominent early settlers).

agricultural records from 1850 and 1860 indicate that Milton and his neighbors grew and profited from a number of different crops, including cotton, wheat, oats, peas, sweet potatoes, and corn.[76] But it was cotton, in particular, where the largest profits were to be had. Union County, together with a handful of other counties along the eastern and southern borders of Arkansas, produced most of the State's cash crop.[77] Here, the rich bottom lands, flat terrain, and warm climate allowed cotton to be grown in significant amounts.[78] The county's location next to the Ouachita River also helped spur agricultural development, providing, as it did, a ready means for shipping the product to far away markets.[79] The story was different, however, in the northern and western part of the State—in the so-called highlands. There, due in large part to the terrain, Arkansans concerned themselves primarily with subsistence farming, tending a small cornfield and perhaps raising a few pigs.[80] But it became clear enough to many leading citizens of Arkansas that cotton was the key to economic success and the prosperity of the State. "Cotton is now the article of commerce which controls the markets of the world," the *Arkansas Gazette* grandly declared in 1857,[81] and judging by the increase in cotton production over Milton's tenure in Arkansas, many farmers took this information to heart. In 1840 Arkansas produced

76. Manuscript Census Returns, Schedule 4.—Production of Agriculture, Ouachita & Union Counties, Ark., *in* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, POPULATION SCHEDULES OF THE SEVENTH CENSUS OF THE UNITED STATES (1850), *microformed on* Seventh Census of the United States, 1850, M432, Roll 30 (Nat'l Archives & Records Admin.) (on file with the North Carolina Law Review) [hereinafter 1850 CENSUS: Production of Agriculture]; Manuscript Census Returns, Schedule 4.—Production of Agriculture, Ouachita & Union Counties, Ark., *in* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, POPULATION SCHEDULES OF THE EIGHTH CENSUS OF THE UNITED STATES (1860), *microformed on* Eighth Census of the United States, 1860, M653, Roll 51 (Nat'l Archives & Records Admin.) (on file with the North Carolina Law Review) [hereinafter 1860 CENSUS: Production of Agriculture].

77. *See* BOLTON, *supra* note 34, at 53 (summarizing cotton production rates by county).

78. *See* HEMPSTEAD, *supra* note 58, at 951 ("The general face of the county is level and with fertile lands."); *see also* BOLTON, *supra* note 34, at 13 (describing the climate of southern Arkansas).

79. *See Notice to Cotton Planters*, EL DORADO UNION, Sept. 23, 1848, at 3, *microformed on* Arkansas Misc. Newspapers, Roll 6 (collection of Ark. Hist. Comm'n) (on file with the North Carolina Law Review) (highlighting purchase of the "well-known" Beech Hill and Harvey's Landings and their location on the Ouachita River).

80. *See* BOLTON, *supra* note 34, at 50–52 (describing terrain and how it affected agriculture).

81. Editorial, ARK. GAZETTE, June 13, 1857, at 2.

over 6,000,000 pounds of cotton, in 1850 over 26,000,000, and in 1860 almost 147,000,000.[82]

As the decade of his arrival—the 1840s—neared a close, Milton assuredly was content with his decision to move his family to Arkansas. Huldy was now twelve, James eight, and Liddy six,[83] and nothing in the surviving records indicates that they were anything but healthy (none had succumbed, for example, to the "bilious and remittent fevers" known to hit the timbered bottoms in the latter part of the summer and early fall[84]). He and Nancy had also added a fourth member to their family—a daughter named Elizabeth, who was now three[85]—and they would have another son in the coming year.[86] In addition, Milton had become a successful and prosperous farmer, having earned enough to purchase forty acres of land at the end of 1847 for $275. In 1849 Milton was able to purchase an additional 126 acres, bringing his total to 160 acres for the 1849 taxable year.[87] In that same year, he was taxed on two horses, one mule, and nine cattle, and he owned some twenty-five pigs.[88]

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82. Though significant, these amounts paled in comparison to places like Louisiana, Alabama, and Mississippi. In Louisiana, planters produced 152,555,368 pounds of cotton in 1840, 71,494,800 pounds in 1850, and 311,095,200 pounds in 1860. In Alabama, farmers produced 117,138,823 pounds of cotton in 1840, 225,771,600 pounds in 1850, and 395,982,000 pounds in 1860. In Mississippi, the numbers were even higher. There, residents produced 193,401,577 pounds of cotton in 1840, 193,716,800 pounds in 1850, and 481,002,800 pounds in 1860. *See* COMPENDIUM, *supra* note 71, at 359 (summarizing agricultural production data from the 1840 census); U.S. DEP'T OF THE INTERIOR, MANUFACTURES OF THE UNITED STATES IN 1860, at 22 (Washington, D.C., U.S. Gov't Printing Office 1865) (summarizing agricultural production data from the 1860 census); STATISTICAL VIEW, *supra* note 71, at 173 (summarizing agricultural production data from the 1850 census). Thus, in hindsight, the 1852 pronouncement, "Before five years, Arkansas will be among the foremost of cotton growing states," so confidently made by the editor of the *Arkansas Gazette*, seems a bit overstated. Editorial, *Cotton in Arkansas*, ARK. GAZETTE, May 7, 1852, at 2.

83. *See* 1850 CENSUS: Free Inhabitants, *supra* note 38 (listing ages of James's and Nancy's children).

84. *See* FLINT, *supra* note 48, at 583.

85. *See* 1850 CENSUS: Free Inhabitants, *supra* note 38. Elizabeth also appears in the 1860 census. *See* 1860 CENSUS: Free Inhabitants, *supra* note 38.

86. *See* 1860 CENSUS: Free Inhabitants, *supra* note 38 (listing a ten-year-old son, Joseph, who would have been born in 1850).

87. *See* Deed from William & Elizabeth Hammock to James Milton (Dec. 20, 1847), *microformed on* Union County Deed Records, Roll 36 (collection of Ark. Hist. Comm'n) (on file with the North Carolina Law Review); TAX BOOK OF UNION COUNTY FOR 1849, *microformed on* Union County Tax Records, Roll 61 (collection of Ark. Hist. Comm'n) (on file with the North Carolina Law Review) [hereinafter 1849 TAX RECORD].

88. 1849 TAX RECORD, *supra* note 87; 1850 CENSUS: Production of Agriculture, *supra* note 76.

Over the course of the next decade, moreover, Milton's property holdings would continue to increase. Sometime between 1849 and 1853, he acquired another 320 acres of land, bringing his total to 480 acres.[89] By 1856 he had increased that amount to 640 acres,[90] and by 1859 it stood at 680.[91] The number of horses grazing his pastures remained relatively constant (over the course of the decade he owned between two and four).[92] But he added more mules (he owned three in 1856 and five in 1860)[93] and more cows (he had ten in 1853, twelve in 1856, fourteen in 1857, and fifteen in 1860).[94] He also owned twenty-six sheep and seventy-five pigs in 1860, which increased the total value of his livestock holdings to some $1,200.[95] In that same year, his real property was valued at $4,000.[96] At this level, although he was far from the county's richest resident, his combined holdings placed him among the area's elite—in fact, only 15% of all taxpayers in the entire cotton-producing region of Arkansas owned as much land as he did.[97] But perhaps the best indicator of Milton's status among Union County's prominent citizens was not his land or his livestock; instead, it was his growing inventory of black slaves.

89. TAX BOOK OF UNION COUNTY FOR 1853, *microformed on* Union County Tax Records, Roll 61 (collection of Ark. Hist. Comm'n) (on file with the North Carolina Law Review) [hereinafter 1853 TAX RECORD].

90. TAX BOOK OF UNION COUNTY FOR 1856, *microformed on* Union County Tax Records, Roll 61 (collection of Ark. Hist. Comm'n) (on file with the North Carolina Law Review) [hereinafter 1856 TAX RECORD].

91. TAX BOOK OF UNION COUNTY FOR 1859, *microformed on* Union County Tax Records, Roll 61 (collection of Ark. Hist. Comm'n) (on file with the North Carolina Law Review) [hereinafter 1859 TAX RECORD].

92. *See* 1853 TAX RECORD, *supra* note 89 (showing that Milton was taxed on two horses); TAX BOOK OF UNION COUNTY FOR 1854, *microformed on* Union County Tax Records, Roll 61 (collection of Ark. Hist. Comm'n) (on file with the North Carolina Law Review) [hereinafter 1854 TAX RECORD] (showing that Milton was taxed on four horses); 1856 TAX RECORD, *supra* note 90 (showing that Milton was taxed on two horses); UNION COUNTY TAXES 1857, *microformed on* Union County Tax Records, Roll 61 (collection of Ark. Hist. Comm'n) (on file with the North Carolina Law Review) [hereinafter 1857 TAX RECORD] (showing that Milton was taxed on three horses); TAX BOOK OF UNION COUNTY FOR 1860, *microformed on* Union County Tax Records, Roll 61 (collection of Ark. Hist. Comm'n) (on file with the North Carolina Law Review) [hereinafter 1860 TAX RECORD] (showing that Milton was taxed on two horses).

93. *See* 1856 TAX RECORD, *supra* note 90; 1860 TAX RECORD, *supra* note 92.

94. *See* 1853 TAX RECORD, *supra* note 89; 1856 TAX RECORD, *supra* note 90; 1857 TAX RECORD, *supra* note 92; 1860 TAX RECORD, *supra* note 92.

95. 1860 CENSUS: Production of Agriculture, *supra* note 76.

96. 1860 CENSUS: Free Inhabitants, *supra* note 38. There is a slight discrepancy between the census records and the agriculture records. The latter lists Milton's real property at $3,000. 1860 CENSUS: Production of Agriculture, *supra* note 76.

97. *See* BOLTON, *supra* note 34, at 62 (noting that only 15% of taxpayers in the lowlands owned at least 600 acres).

B. *Pleasant, a Slave*

When Milton first arrived in Arkansas, he possessed only one slave over the age of eight and under the age of sixty.[98] But even with just one, Milton could count himself a member of a privileged group. Indeed, contrary to popular legend, the vast majority of antebellum Southerners did not own any slaves. Moreover, of those that did, most could lay claim to only a few—half, in fact, owned five or less.[99] But like many men, Milton probably saw the acquisition of slaves as both a necessary component and a telling sign of success. "I should purchase negro fellows," advised A.C. Morehouse to his brother-in-law, Asa Morgan of Union County, when queried on how to invest money from the family estate.[100] Morehouse's advice was typical; in Arkansas, as elsewhere, slave property was seen as "a desirable object with every one who had a permanent investment of money," and prominent Arkansans did what they could to "encourage every citizen to not only become, but remain, a slaveholder."[101]

Thus, it hardly seems surprising that Milton began investing in human chattel from the outset, adding to his stock of slaves even before he paid for his land. In 1843, the year after he arrived in Union County, Milton purchased his second slave.[102] By 1846 he had added a third, and by 1848 he had added five more, all between the taxable ages of eight and sixty.[103] By 1849, Milton counted nine slaves—valued at $3,200—as part of his household.[104] And these were only the taxable slaves, the ones that were expected to and did turn a profit for their master. By the time of the 1850 census, Milton also owned three young children—a seven-year-old boy, a five-year-old girl, and a three-year-old boy—who were not old enough to work (and hence were not taxed) but whom Milton was no doubt counting

98. *See* 1842 TAX RECORD, *supra* note 48.

99. *See* PETER J. PARISH, SLAVERY: HISTORY AND HISTORIANS 26–29 (1989) (noting percentages of slaveholders and nonslaveholders in 1860); *see also* BOLTON, *supra* note 34, at 5 (noting that only one-fifth of Arkansas taxpayers owned slaves in 1840 and 1860).

100. Letter from A.C. Morehouse to Asa S. Morgan (Dec. 5, 1849) (collection of Ark. Hist. Comm'n) (on file with the North Carolina Law Review).

101. Editorial, *The Law of Self-Defense—It Must Be Exacted*, ARK. GAZETTE, Jan. 24, 1857, at 2.

102. *See* UNION COUNTY TAX BOOK FOR THE YEAR 1843, *microformed on* Union County Tax Records, Roll 61 (collection of Ark. Hist. Comm'n) (on file with the North Carolina Law Review) [hereinafter 1843 TAX RECORD].

103. *See* 1846 UNION COUNTY TAX BOOK, *microformed on* Union County Tax Records, Roll 61 (collection of Ark. Hist. Comm'n) (on file with the North Carolina Law Review) [hereinafter 1846 TAX RECORD]; 1848 TAX RECORD, *supra* note 69.

104. *See* 1849 TAX RECORD, *supra* note 87.

on to grow into productive hands in the near future.[105] Moreover, as with his land, Milton would continue to increase his stock of slaves over the ensuing decade. By the time the census takers arrived at his farm in 1860, he supervised a labor force of eighteen slaves and was taxed on twelve; six being under the age of eight.[106]

As with his other holdings, the number of slaves James Milton owned placed him among the county's elite. There were others who owned more. In 1850, Benjamin White and Hosea George, two of Union County's largest slaveholders, owned eighty-eight and eighty-four slaves, respectively.[107] But true to the statistics for the South as a whole, roughly 55% of all slaveholders in Arkansas owned fewer than five slaves in 1850, and 25% owned only one.[108] The size of the slaveholdings in Union County was slightly above the State's average during this year, due to the area's emphasis on large-scale agriculture rather than subsistence farming.[109] But still, at twelve slaves, James Milton owned more human chattel in 1850 than about 70% of his slaveholding neighbors.[110] By 1860, with eighteen slaves, he owned more than roughly 80%.[111] Milton may never have acquired the elusive status of "planter"—the name modern historians give to

105. *See* Manuscript Census Returns, Schedule 2.—Slave Inhabitants, Ouachita & Union Counties, Ark., *in* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, POPULATION SCHEDULES OF THE SEVENTH CENSUS OF THE UNITED STATES (1850), *microformed on* Eighth Census of the United States, 1850, M432, Roll 32 (Nat'l Archives & Records Admin.) (on file with the North Carolina Law Review) [hereinafter 1850 CENSUS: Slave Inhabitants].

106. *See* Manuscript Census Returns, Schedule 2.—Slave Inhabitants, Ouachita & Union Counties, Ark., *in* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, POPULATION SCHEDULES OF THE EIGHTH CENSUS OF THE UNITED STATES (1860), *microformed on* Eighth Census of the United States, 1860, M653, Roll 54 (Nat'l Archives & Records Admin.) (on file with the North Carolina Law Review) [hereinafter 1860 CENSUS: Slave Inhabitants]; *see also* 1860 TAX RECORD, *supra* note 92.

107. Robert B. Walz, *Arkansas Slaveholdings and Slaveholders in 1850*, 12 ARK. HIST. Q. 38, 59, 72 tbl.2 (1953).

108. *Id.* at 39–40.

109. For example, while the number of people owning fewer than five slaves in the State as a whole was 55.5%, in Union County it was 41.7%. Stated differently, 58.3% of slaveholders in Union County held five or more slaves, while only 44.5% of slaveholders in the state as a whole held this many. *See id.* at 39–40, 47 tbl.1.

110. Roughly 68% of Union County slaveholders owned fewer than ten slaves. *Id.* at 47 tbl.1.

111. There were 607 slaveholders in Union County in 1860. Of these, 89 (or 14.7%) owned one slave, 237 (or 39%) owned fewer than five, 374 (or 61.6%) owned fewer than ten, and 464 (or 76.4 %) owned fewer than fifteen. Stated differently, only 143 (or 23.6%) owned fifteen or more, and only 92 (or 15.2%) owned more than twenty slaves. *See* Geospatial & Statistical Data Center, University of Virginia Library, Historical Census Browser, http://fisher.lib.virginia.edu/collections/stats/histcensus/index.html (follow "1860" hyperlink; then follow "Slaveholders" hyperlink) (last visited Dec. 18, 2006).

slaveholders who owned twenty or more slaves—but he was very close.[112]

As for Pleasant, we know little about him; so little information is left in the records that we can only speculate. We do know, however, that by the time of the trial in 1852, Milton had owned Pleasant for at least five years and that he was considered an "old man" by his attorney.[113] This probably means that Pleasant was the forty-six-year-old man listed under James Milton's name in the 1850 slave schedules; the other male slaves were simply too young to be taken seriously as possibilities, at eight, seven, and three.[114]

Assuming Pleasant was this forty-six-year-old man, it is also entirely possible that he was the same slave recorded in the 1842 tax record. If so, he probably traveled with the Milton family as it moved from Mississippi to Arkansas, and was no doubt one of Milton's most valuable investments at the time. He would have worked alongside Milton that first year, grubbing up the land and building the cabins, as Milton, with only one slave, would have been unable to enforce much division of labor.[115] But even if Pleasant was not this first slave, Milton likely considered him an important part of his growing stock of human property. Like other slaveholders, Milton probably measured his success and his rank in society by counting his slaves, and a healthy male added an important source of both labor and reproduction. As Milton's slaveholdings increased, moreover, Pleasant, as the eldest male, may have been the one to take on more of the daily responsibilities of running the farm, allowing Milton to gradually withdraw from the fields to devote more time to managerial functions.[116]

Regardless of when Milton acquired him, of course, Pleasant would have found slave life difficult. As an adult male, he probably

112. *See, e.g.*, GENOVESE, *supra* note 26, at 7 (noting how modern historians have defined plantations to include units of twenty slaves or more); KENNETH STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH 30 (1956) (implying that membership in the planter class required twenty or more slaves).

113. *See* Transcript of Trial, State v. Pleasant, *supra* note 1, at 20 (affidavits of George W. Darden, John C. Willingham, and R.W. Durrebb) (stating that they had known Pleasant for five years); Letter from John Quillin to Judge Elbert H. English (Feb. 22, 1853) (collection of Ark. Hist. Comm'n) (on file with the North Carolina Law Review) (calling Pleasant an "old man").

114. *See* 1850 CENSUS: Slave Inhabitants, *supra* note 105.

115. *See* STAMPP, *supra* note 112, at 35 (noting how small slaveholders "could not afford merely to act as managers; and many of them were obliged to enter the fields with their bondsmen and drive a plow or wield a hoe").

116. *See id.* (stating that masters who owned six or more slaves tended to withdraw from the fields and concentrate on managerial functions).

spent most of his daylight hours in activities somehow related to farming, whether it was plowing, planting, hoeing, picking, or ginning.[117] It would have been backbreaking work with little or no respite. As one son told his father, "There is no lying by, no leisure, no long sleeping season" on a successful farm in the South.[118] Indeed, even on rainy days and during down time there were many tasks necessary to keep the farm running—fixing broken tools, splitting rails for fences, tending to the livestock, and repairing harnesses for the horses and mules—and Pleasant likely busied himself with all of them.[119]

At the end of each day, Pleasant would have retired to the slave quarters, a cluster of cabins just down the road from Milton's place. Pleasant's home, if typical, would have been built out of hewed logs, chinked up with grass and dirt to keep the wind and the rain out during the winter and left open to let the air circulate during the summer.[120] It likely had one room, perhaps a window or two, a mud chimney, and maybe a plank floor.[121] Pleasant may have tried to add to the comfort of the home by building a few pieces of furniture—a few chairs, a table, and a bed—all of which would have been simply constructed, done by "punching four holes in a board and putting sticks in there for legs."[122] And while we cannot say for certain, perhaps Pleasant was one of those from the county who was "especially adapted to leaning against the chimney wall" while the others rested from the day's work.[123]

Pleasant may also have been "married"; in the slave schedules there is a forty-year-old woman who could very well have been his mate.[124] If so, James Milton would have been following in step with

117. *See id.* at 44–46 (describing the workday of slaves in the cotton-producing regions of the South).

118. *Id.* at 45 (quoting Letter from Henry Watson, Jr. to his father (Feb. 24, 1843)).

119. *See* TAYLOR, *supra* note 34, at 100–01 (detailing work that slaves performed on Arkansas farms and plantations).

120. *See* Interview by Samuel S. Taylor with William Brown, in North Little Rock, Ark., *in* 8 THE AMERICAN SLAVE, *supra* note 56, pt. 1, at 317, 319 [hereinafter William Brown Interview] (describing home).

121. *See* Interview by Samuel S. Taylor with Campbell Armstrong, in Little Rock, Ark., *in* 8 THE AMERICAN SLAVE, *supra* note 56, pt. 1, at 68, 68 (describing home); Interview by Samuel S. Taylor with Ellen Brass, in Little Rock, Ark., *in* 8 THE AMERICAN SLAVE, *supra note* 56, pt. 1, at 246, 246 (describing home); Interview by Samuel S. Taylor with Sallie Crane, in Pulaski County, Ark., *in* 8 THE AMERICAN SLAVE, *supra* note 56, pt. 2, at 50, 50 [hereinafter Sallie Crane Interview] (describing home).

122. William Brown Interview, *supra* note 120, at 320.

123. *See* CHESTER, *supra* note 59, at 17 (remembering fondly how early members of Union County made do without some of the comforts of more established places).

124. *See* 1850 CENSUS: Slave Inhabitants, *supra* note 105.

many masters who encouraged their slaves to select a husband or wife, even if the relationship had no legal effect and could be violated or destroyed at any time.[125] Milton's reasons for encouraging a monogamous relationship, if he was like other masters, may have involved some combination of the admirable and the self-interested. On the one hand, he may have had strongly held religious beliefs about marriage and sexual morality; but on the other (and more likely) hand, he probably recognized that "married" slaves were less likely to be rebellious or to run away than "single" ones.[126] At the very least, Milton probably did not object to Pleasant getting married, as any children of the union—assuming Milton also owned the woman—would have only added to his growing stock of slaves.[127] But whatever Milton thought, Pleasant and his mate may have cared deeply for each other. Perhaps on their wedding day they even "jumped the broom," a light moment in which the couple hopped over a broomstick to determine who would take the place as the unofficial head of the family.[128]

Pleasant and his wife (if he had one) may also have had some children. From the slave schedules, we know that nine of the twelve slaves Milton owned in 1850 were under the age of twenty, and any one or combination of them could have been Pleasant's children.[129] But even if they were not his, their mere presence on the farm suggests a sense of community among James Milton's slaves, with young and old working together in the fields, cooking meals, and sharing stories after the whites had left them to their own. Indeed, others have written about how the slave quarters "provided more than a place to eat and sleep"; it was here that slaves in important, if limited, ways developed their strength, their independence, and their sense of worth.[130] In talking about slavery, Ira Berlin is assuredly right when he says that "slaveowners held most of the good cards in this meanest of contests"; but it is equally true, as Berlin notes, that

125. *See* JOHN W. BLASSINGAME, THE SLAVE COMMUNITY: PLANTATION LIFE IN THE ANTEBELLUM SOUTH 149–91 (1979) (describing a slave family).

126. *See id.* at 151–52 (discussing reasons why masters would want their slaves to marry).

127. *See* GENOVESE, *supra* note 26, at 472–73 (discussing the fact that masters preferred their slaves to marry within their own plantations).

128. *See id.* at 166–67 (describing ritual and significance of "jumping the broom").

129. The ages of the nine slaves, from youngest to oldest, were three, five, seven, eight, eleven, twelve, thirteen, and seventeen. *See* 1850 CENSUS: Slave Inhabitants, *supra* note 105. Also, in addition to the forty-six-year-old male and the forty-year-old female, there was also a twenty-eight-year-old female. *See id.*

130. *See* GENOVESE, *supra* note 26, at 528.

the slaves "held cards of their own."[131] And within the quarters, and within their routine, they made a life for themselves.

Yet, in whatever they did, Arkansas slaves were well aware of the brutal nature of the regime. Whippings would have provided the most telling sign. We have no way of knowing for certain what type of master James Milton was, but if he was typical, he would have viewed the lash as an effective means of slave control and resorted to it at least on occasion.[132] Indeed, Kenneth Stampp called the whip the "emblem of the master's authority,"[133] and virtually all masters used it at some point to discipline slaves thought unruly, and to demand more production out of even those who were not.[134] The former slave Tom Douglas, for example, recalled how those slaves perceived as acting "like [they] didn't want to work" were tied to a tree or bush and whipped unmercifully, "until [they] bled."[135] Though apologists often counseled against excessive use of the lash, urging slaveholders to reserve it for particularly rebellious or recalcitrant slaves, these words too often fell on deaf ears.[136] "I been whipped from sunup till sundown," remembered Sallie Crane from Hempstead County.[137] "They whip me till they got tired and then they go and res' and come out and start again."[138] One particularly brutal case comes from Washington County, in the far northwest corner of the State. There, a man named Spencer stripped his newly purchased slave, staked her to the ground, and—with "calm and deliberate" strokes—tore her back apart, "using a cowhide, with a plaited buckskin lash about fifteen inches long."[139] Every so often, witnesses later recalled,

131. BERLIN, *supra* note 37, at 2.

132. *See* GENOVESE, *supra* note 26, at 64 ("The typical master went to his whip often—much more often than he himself would usually have preferred."). Evidently, there were some slaveholders who did not use the whip at all, or used it rarely. William Baltimore of Pine Bluff, Arkansas, for example, recalled how his master refused to call them "slaves"—he called them "servants"—and "didn't want none of his niggers whipped ceptin when there wasn't no other way." Interview by R.S. Taylor with Uncle William Baltimore, in Pine Bluff, Ark., *in* 8 THE AMERICAN SLAVE, *supra* note 56, pt. 1, at 97, 97. Eugene Genovese credits accounts like Baltimore's, but points out that masters like this were "atypical by a good deal." GENOVESE, *supra* note 26, at 64.

133. STAMPP, *supra* note 112, at 174.

134. *See id.* at 174 ("Nearly every slaveholder used it and few grown slaves escaped it entirely.").

135. Interview by Pernella M. Anderson with Tom Douglas Baltimore, in El Dorado, Ark., *in* 8 THE AMERICAN SLAVE, *supra* note 56, pt. 2, at 193, 193.

136. *See* A.T. Goodloe, Editorial, *Management of the Negro—Again*, 18 S. CULTIVATOR, 239, 240 (1860) ("[M]y opinion is, the lash—not used murderously, as would be philanthropists assert, is most effectual.").

137. Sallie Crane Interview, *supra* note 121, at 53.

138. *Id.*

139. Pyeatt v. Spencer, 4 Ark. 563, 563–64 (1842).

Spencer "took salt and a cob, and salted her back," no doubt to add to the pain.[140] The reason for the brutal beating is not entirely clear, but Spencer may have been trying to break the woman of her known "obstinate and disagreeable" nature—she had tried repeatedly to run away to her children.[141]

Importantly, the law largely backed the masters' treatment of their slaves. As Judge Ruffin of the Supreme Court of North Carolina infamously declared, "The power of the master must be absolute to render the submission of the slave perfect."[142] In the predictable language of the slave codes, the Arkansas legislature gave to every master the right to "possession and control" of his human property[143] and expressly supported his efforts to maintain discipline with laws to protect the larger community. The codes made it illegal for slaves to be away from their masters' premises without a pass and gave to every white person the right to demand proof of their permission.[144] The legislature also prohibited slaves from possessing guns or other weapons without express written consent of their master and punished them for "unlawfully assembling" in groups, no doubt for fear that they might be plotting something.[145] If any slave wandered onto the plantation of another without permission, moreover, the law gave to the owner or occupier the right to punish him with "stripes not exceeding twenty-five."[146] And slaves selling liquor, or trading in any commodities with whites or other slaves without consent of the master, faced a series of lashes as well.[147] Further, for those acts considered criminal when engaged in by whites—murder, maiming, arson, rape, and so forth—the slaves often faced harsher penalties than whites, sometimes even death.[148]

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140. *Id.* at 564.

141. *See id.* at 564–65 (discussing witnesses' testimony).

142. State v. Mann, 13 N.C. (2 Dev.) 263, 266 (1829) (refusing to impose criminal liability on a slave hirer for shooting his runaway slave).

143. STATUTES OF ARKANSAS, *supra* note 10, ch. 153, art. V, § 64, at 953.

144. *Id.* ch. 153, art. V, § 50, at 950–51.

145. *Id.* ch. 153, art. V, §§ 52, 53, at 951.

146. *Id.* ch. 153, art. V, § 51, at 951.

147. *Id.* ch. 153, art. V, §§ 44, 62, at 950, 953.

148. Whites convicted of murder suffered either death or imprisonment, depending on whether the conviction was for first-degree murder or second-degree murder; slaves convicted of murder suffered death. *Compare id.* ch. 51, pt. IV, art. I, § 8, at 323 (penalties for whites), *with id.* ch. 51, pt. XII, § 8, at 380 (penalties for slaves). Whites convicted of maiming received a maximum sentence of seven years imprisonment; slaves convicted of maiming received a minimum of seven years. *Compare id.* ch. 51, pt. IV, art. III, § 5, at 329 (penalties for whites), *with id.* ch. 51, pt. XII, § 10, at 380 (penalties for slaves). Whites convicted of arson were imprisoned between two and ten years; slaves were to be punished with a minimum of one year, but there was no maximum. *Compare id.* ch. 51, pt.

For Pleasant, these laws of slavery, abstract in principle, likely manifested themselves daily in concrete examples. Pleasant may have never heard of Nathan, a slave from nearby Hempstead County, but he likely could recount similar tales of what happened to him.[149] Nathan's overseer, evidently after a day of drinking, approached Nathan as he was picking cotton and told him that he had "come for his shirt," an apparent reference to a whipping.[150] Nathan refused to submit to the overseer's demands, however, saying that "he had pulled off his shirt to the last overseer."[151] In a show of force, and perhaps encouraged by the alcohol, the undersized overseer pulled out a gun and repeated that he "had come for his shirt, and intended to have it or hurt him."[152] At that point, Nathan advanced with nothing in his hand other than a few bits of cotton.[153] Refusing to give ground, the overseer subsequently shot Nathan three times and killed him. Then, in a bizarre twist of events that makes sense only in the slave South, he sued the owner for lost wages when he was fired for doing so.[154] The jury found in his favor and the Arkansas Supreme Court affirmed, asserting that white people—masters, overseers, and even strangers—have the "absolute right" to "overcome by proper means" a slave's rebellion against "lawful authority."[155]

Tales of this sort undoubtedly figured prominently in the minds of Pleasant and most other slaves. They all understood the power of the master and most had felt the sting of the lash.[156] They all knew or had heard of someone whose back was "considerably scarred and marked from being whipped."[157] They all witnessed or had heard of slaves who had been mistreated, who were beaten, "knocked ...

V, art. I, § 6, at 334 (penalties for whites), *with id.* pt. XII, § 12, at 380 (penalties for slaves). Both whites and blacks could be put to death for rape, but only blacks could be executed for attempted rape. *Compare id.* ch. 51, pt. IV, art. IV, § 2, at 330 (penalties for whites), *with id.* ch. 51, pt. IV, § 9, at 331 (penalties for slaves).

149. Brunson v. Martin, 17 Ark. 270, 271 (1856).

150. *Id.* at 274.

151. *Id.* at 274–75.

152. *Id.* at 275. Nathan weighed about 200 pounds, "with bodily strength enough to crush the [overseer] down." *Id.*

153. *Id.*

154. *Id.* The overseer shot Nathan three times, once in the groin, once in the hip, and once in the abdomen. *Id.* The last proved fatal. *Id.*

155. *Id.* at 273; *see also* Austin v. State, 14 Ark. 555, 567 (1854) (holding that a slave owner may use "whatever force may be necessary" to secure the slave's "entire subordination to the lawful authority of his master").

156. *See* STAMPP, *supra* note 112, at 174 (noting that "few grown slaves escaped [the whip] entirely").

157. *Runaway Mulatto in Jail*, ARK. GAZETTE, Sept. 10, 1852, at 3 (describing a runaway).

about," and then put "on the block and sold."[158] Yet still they resisted, and still they fought back. They ran away, and talked back, and broke tools, and feigned illness, and even—like one slave from Arkansas County—threw their left shoulder out of place to save an hour's work.[159]

In doing so, moreover, slaves actively took part in shaping the laws that governed them. Whites may have insisted on the slave's "entire subordination to the lawful authority of his master,"[160] and passed laws to that effect, but everyday on the back roads and the country farms slaves were challenging these assertions of power and forcing whites to reevaluate and reassess their society. Oftentimes the slaves' conduct was admirable; other times it was not.[161] But in either case, slaves were daily bringing into conflict the laws that governed them and the society in which they lived. White Southerners may have believed that slavery was the best of all social conditions, but when Mr. Jefferson Walls of Pulaski County and his overseer were both "stabbed and killed by a negro," presumably Walls's own slave, antebellum Arkansans had to rethink both slavery and slaves, and the laws and ideologies that ruled them both.[162] Thus, it was here—in the daily interactions of ordinary people—that the laws of slavery came to life. And it is here that we must consider Pleasant's case.

II. BACKGROUND TO THE TRIAL

A. Courts and Court Week

By the time Pleasant came to trial in April 1852, local interest was undoubtedly high. Tried in the courthouse in El Dorado, Pleasant's case would have brought together men and women from the entire community—rich and poor, slaveholders and nonslaveholders, townsfolk and yeoman farmers—and forced them to

158. Interview by Samuel S. Taylor with Lucretia Alexander, in Little Rock, Ark., *in* 8 THE AMERICAN SLAVE, *supra* note 56, pt. 1, at 32, 33.

159. *$100 Reward*, ARK. GAZETTE, July 1, 1853, at 1 (advertising a reward for the return of a slave).

160. *Austin*, 14 Ark. at 567.

161. The starting point for any discussion on slave resistance—its meaning and its consequences—begins with HERBERT APTHECKER, AMERICAN NEGRO SLAVE REVOLTS (1943). This author does not take the position that any act of rebellion, including rape and murder, was admirable conduct, even under the dehumanizing regime of slavery. *Cf.* HERNTON, *supra* note 22, at 66–68 (1966) (discussing instances of black-on-white rape as acts of defiance or rebellion).

162. *Sad*, ARK. GAZETTE, Dec. 18, 1858, at 2.

confront some of the major issues of the day. Indeed, Ariela Gross calls the county courthouse the "central political, cultural, and economic institution" of the antebellum South.[163] It was here that friends and neighbors from all walks of life gathered on a regular basis to talk about the mundane as well as the serious, to hash out disagreements, and come to consensus. Stumbling into "an assemblage fit for a hanging," the German traveler Frederich Gerstäcker colorfully recounts how even the remote towns of Arkansas "bustle[d]" during court week.[164] " 'Well it's not quite a hanging, stranger,' " replied the farmer when asked by Gerstäcker's fictional character what all the fuss was about.[165] " 'But you're not far off. Court's in session.' "[166] Regularly covered in the local newspapers, even in dull weeks the editors reported on the news of the court—"No cases of particular public interest have been tried"[167]—perhaps to assure those not in attendance that they had not missed anything.

Pleasant was tried in circuit court. Held for one or two weeks in every Southern community, circuit courts more often than not handled the more interesting cases and provided the real excitement.[168] There were other courts in Arkansas—county courts, probate courts, and justices of the peace—but these generally dealt with routine county matters and petty disputes.[169] In the circuit courts, however, the bigger cases were resolved, and the more egregious crimes were tried. It was in the circuit court, for example, where one might go to see two merchants haggle over a large deal gone bad, or a slave purchaser complain that the seller duped him

163. ARIELA J. GROSS, DOUBLE CHARACTER: SLAVERY AND MASTERY IN THE ANTEBELLUM SOUTHERN COURTROOM 24 (2000); *see also* WYATT-BROWN, *supra* note 22, at 366 (1982) (recognizing that the "courthouse, more than the church, was the center for local ethical considerations").

164. FRIEDRICH GERSTÄCKER, IN THE ARKANSAS BACKWOODS: TALES AND SKETCHES 31 (James William Miller ed. & trans., 1991).

165. *Id.* In this story, Gerstäcker fictionalized his own experience with court week while he was traveling through Arkansas during the late 1830s and early 1840s. *Id.* at 30. The actual account is detailed in GERSTÄCKER, *supra* note 54, at 229–31.

166. GERSTÄCKER, *supra* note 164, at 31.

167. *The Circuit Court*, OUACHITA HERALD, Apr. 7, 1859, at 2, *microformed on* Camden Misc. Newspapers, Roll 1 (collection of Ark. Hist. Comm'n) (on file with the North Carolina Law Review).

168. *See* GROSS, *supra* note 163, at 24 (describing circuit courts).

169. STATUTES OF ARKANSAS, *supra* note 10, ch. 49, § 11, at 313 (county courts); *id.* ch. 48, § 1, at 307 (probate courts); *id.* ch. 95, pt. II, § 2, at 640 (justices of the peace).

into buying a sick or insolent slave.[170] It was here, too, where one might catch a glimpse of a criminal defendant, charged with something like murder, arson, or some other serious crime.[171] Circuit courts also had appellate jurisdiction over judgments and orders of the probate courts and justices of the peace, so in any given week one might be able to listen to disappointed relations complain about being left out of a will, or hear someone protest that he was unjustly assessed a small fine.[172] And it was in the circuit court, also, that slaves charged with felonies received their day in court.[173]

This was by no means the case in every Southern state. In Virginia, for example, slaves accused of crimes were tried in special slave courts, with justices of the peace quickly dispensing judgments with little attention to the niceties of courts of law.[174] The same was true in Louisiana and South Carolina throughout the antebellum period.[175] In Arkansas, however, the legislature saw fit to give slaves a number of procedural protections. The same rules of evidence that governed a white person accused of a crime, for example, governed the slave.[176] The one exception to this rule probably inured to his benefit: other slaves, while they could not testify for or against a white defendant, could testify when a slave was on trial.[177] Slaves accused of crimes were also guaranteed a jury trial, and, if they did not have one already, a lawyer would be appointed for their defense.[178] And in any case in which he was found guilty, a slave could appeal his conviction to the Supreme Court of Arkansas.[179]

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170. *See id.* ch. 47, § 10, at 306 (conferring original jurisdiction over matters not subject to jurisdiction of lesser courts). Civil disputes involving less than $100 were handled by justices of the peace. *See id.* ch. 95, pt. II, § 2, at 640.

171. *See id.* ch. 47, § 10, at 306 (conferring original jurisdiction over crimes not subject to the jurisdiction of other courts). Justices of the peace had jurisdiction over all actions for penalties under $100. *See id.* ch. 95, pt. II, § 2, at 640.

172. *See id* ch. 95, pt. II, § 2, at 640.

173. *See id.* ch. 51, pt. XII, § 6, at 379 (providing, in relevant part, that "[i]n all cases of felony, the slave committing the same shall be tried in the same court . . . as in cases of white persons committing the like offence").

174. STAMPP, *supra* note 112, at 226; *see also id.* at 224 (noting that slave courts were "usually less concerned about the formalities of traditional English justice than about speedy verdicts and certain punishments").

175. *Id.* at 224.

176. STATUTES OF ARKANSAS, *supra* note 10, ch. 51, pt. XII, § 6, at 379.

177. *Id.*

178. *Id.* ch. 51, pt. XII, § 1, at 379. The rights to a jury and to have counsel appointed for their defense were also guaranteed by the state constitution. ARK. CONST. of 1836, art. IV, § 25, *reprinted in* STATUTES OF ARKANSAS, *supra* note 10, at 48–49.

179. STATUTES OF ARKANSAS, *supra* note 10, ch. 46, § 2, at 301.

Union County fell within the Sixth Judicial Circuit, and court was held there for two weeks in April and two more in October.[180] The presiding judge at the time of Pleasant's trial was Shelton Watson.[181] Originally from Virginia, Judge Watson was one of the early settlers of El Dorado.[182] A position of immense honor, being a circuit judge was also a difficult job. Judge Watson would have had to "ride circuit," traveling to the various towns that fell within his jurisdiction with only a few law books in his hands and a change of clothes in his saddlebags.[183] At well near sixty years old, this no doubt took a toll on the judge, and perhaps for this reason he remained on the bench only two years.[184]

At the time of Pleasant's trial, Judge Watson was not married, and he made his home with his brother George and his family.[185] The family farm was a large one—some 2,600 acres—on the outskirts of town.[186] As with James Milton, it is impossible to say for certain how Judge Watson felt about slavery. But we do know that his brother was one of the larger slaveholders in the county, supervising a slave labor force of thirty-one slaves in 1850.[187] Thus, we can probably conclude that Judge Watson, together with his brother, was one of the many men who saw slavery as the best of all conditions. At the very

180. *See Terms of the Circuit Courts*, ARK. GAZETTE, Jan. 9, 1852, at 1 (indicating that the Sixth Circuit commenced in Union County in 1852 on the third Monday after the fourth Monday in March, and the third Monday after the fourth Monday in September).

181. *See* Transcript of Trial, State v. Pleasant, *supra* note 1, at 1 (identifying Shelton Watson as judge).

182. *See* 1850 CENSUS: Free Inhabitants, *supra* note 38 (identifying Watson's birthplace); *see also* HEMPSTEAD, *supra* note 58, at 951 (listing Shelton Watson as one of the original settlers of the town).

183. In addition to Union, the counties of Sevier, Pike, Polk, Montgomery, Clark, Ouachita, Lafayette, and Hempstead fell within the Sixth Circuit. *See Terms of the Circuit Courts*, ARK. GAZETTE, Jan. 9, 1852, at 1.

184. Judge Watson was fifty-eight at the time of the 1850 census, making him about sixty at the time of the trial. *See* 1850 CENSUS: Free Inhabitants, *supra* note 38. The names of the circuit court judges are listed at the beginning of each volume of the Arkansas Supreme Court Reports; Watson was the circuit court judge from 1852 until 1854. *See* 13 Ark. iii (1852–53); 14 Ark. iii (1853–54). Judge Watson died sometime in 1857. *See* Will of Shelton Watson, July 1857, Will Records, Book E, at 123, *microformed on* Union County Will Records, Roll 12 (collection of Ark. Hist. Comm'n) (on file with the North Carolina Law Review).

185. *See* 1850 CENSUS: Free Inhabitants, *supra* note 38 (listing Shelton under household of George Watson).

186. For the amount of land owned by Shelton and his brother, see UNION COUNTY TAX BOOK FOR THE YEAR 1851, *microformed on* Union County Tax Record, Roll 61 (collection of Ark. Hist. Comm'n) (on file with the North Carolina Law Review) [hereinafter 1851 TAX RECORD] (taxing Shelton on 160 acres and George on 2,491 acres). The farm was in El Dorado Township. *See* 1850 CENSUS: Free Inhabitants, *supra* note 38.

187. *See* 1850 CENSUS: Slave Inhabitants, *supra* note 105.

least, Judge Watson evidently had no qualms with the institution, as he appears to have kept a slave for his own personal use—probably a body servant—as he attended to his duties on the court.[188]

Circuit court commenced that year on Monday, April 12, 1852.[189] On Thursday, Pleasant made his first appearance in the court and, after listening to the charges against him, entered a plea of not guilty.[190] The next afternoon, twelve men from the community were sworn in as jurors.[191] Among the more prominent ones were John Beason and Hengust Norsworthy. Beason, at forty-one or forty-two, was one of the oldest members of the jury.[192] Married and a father, he was also the owner of twenty-four slaves and presided over an estate worth $3,000 in 1850.[193] Perhaps it was this combination—age and social standing—that earned him the respect of his fellow jurors, for he was elected foreman.[194] Hengust Norsworthy was another juror of substantial means. In his early thirties and married, Norsworthy owned thirty-three slaves at the time of the trial, and his land was worth $3,500.[195] And considering Hengust's three older brothers, Ehud, Woodrough, and Nestor, owned an additional sixty-four slaves between them,[196] the Norsworthys were probably among that select group of individuals who—"by their fine clothes, swift carriages, and sweeping gestures"—set the tone of the local culture.[197]

A third member of the jury, William Davis, presents a bit of a puzzle. There is a William Davis from El Dorado Township who seems to match the description offered by Fay Hempstead, an early

188. *See* 1851 TAX RECORD, *supra* note 186 (taxing Shelton Watson on one slave).

189. *See* Union County Circuit Court Records, Book E, at 87 (Apr. 12, 1852), *microformed on* Union County Circuit Court Records, Roll 55 (calling court to order) (collection of Ark. Hist. Comm'n) (on file with the North Carolina Law Review).

190. *Id.* at 96 (Apr. 15, 1852).

191. *See id.* at 105 (Apr. 16, 1852) (listing jurors as George S. Green, John R. Beason, Reason Wooley, William Reynolds, David T. Jones, James Tiffin, William Davis, Jeremiah S. Avera, Barton B. Scroggins, Hengust Norsworthy, Archibald C. Watts, and David S. Hagler); *see also* Transcript of Trial, State v. Pleasant, *supra* note 1, at 3–4 (same).

192. *See* 1850 CENSUS: Free Inhabitants, *supra* note 38 (listing Beason's age on Oct. 9, 1850, as forty, meaning that in April 1852 he was either forty-one or forty-two).

193. *See id*; 1850 CENSUS: Slave Inhabitants, *supra* note 105.

194. *See* Transcript of Trial, State v. Pleasant, *supra* note 1, at 4.

195. *See* 1850 CENSUS: Free Inhabitants, *supra* note 38; 1850 CENSUS: Slave Inhabitants, *supra* note 105.

196. Ehud owned twenty-four slaves; Woodrough owned sixteen; and Nestor owned twenty-four. *See* 1850 CENSUS: Slave Inhabitants, *supra* note 105.

197. BERLIN, *supra* note 37, at 97–98; *see also* JOEL WILLIAMSON, NEW PEOPLE: MISCEGENATION AND MULATTOES IN THE UNITED STATES xiii (1980) (recognizing the importance of the slaveholding elite in defining Southern culture).

biographer of Arkansas history, and it is possible that this was the William Davis empanelled to hear Pleasant's case. This William Davis, known as "Buck" Davis, was a lawyer, farmer, and "well-to-do gentleman," who, along with Judge Watson, was one of the original settlers of El Dorado.[198] A family man, Buck Davis was also a slaveholder, counting ten slaves as part of his household in 1850 and twenty-one in 1860.[199] But the William Davis who would decide Pleasant's fate may also have been another man, for there was a second William Davis residing in Harrison Township. If this second man was the William Davis that was summoned for jury duty on Friday, April 16, El Dorado must have been buzzing with excitement. This William Davis was one of the wealthiest men in the area, overseeing a plantation worth $7,000 in 1850 and tended to by seventy-seven slaves, making him the third largest slaveholder in the county.[200] This William Davis may also have been the man commissioned to build the courthouse square a few years before Pleasant's case, and its elegant yet sturdy design no doubt stood as a testament to his standing in the community.[201]

Of the remaining nine jurors, six more were slaveholders at the time of the trial, two were not (though both would become so), and one is not traceable in the records. Among the slaveholders in 1852 were David Jones, Archibald Watts, Jeremiah Avera, George Green, Reason Wooley, and David Hagler. With eleven slaves, Jones was the closest to James Milton in terms of property owned; the remaining five being far more typical of Southern slaveholders in

198. *See* HEMPSTEAD, *supra* note 58, at 951 (describing William "Buck" Davis in his history of Union County).

199. *See* 1850 CENSUS: Free Inhabitants, *supra* note 38 (listing William Davis as a resident of El Dorado Township and noting names and ages of members of his household); *see also* 1850 CENSUS: Slave Inhabitants, *supra* note 105 (listing William Davis of El Dorado as the owner of ten slaves). By 1860, William Davis had moved to Van Buren Township. *See* 1860 Census: Free Inhabitants, *supra* note 38 (listing a William Davis and a household in Van Buren Township that matches the William Davis from El Dorado); *see also* 1860 CENSUS: Slave Inhabitants, *supra* note 106 (listing William Davis of Van Buren Township as the owner of twenty-one slaves).

200. *See* 1850 CENSUS: Free Inhabitants, *supra* note 38 (listing vital statistics of William Davis from Harrison Township, including value of his estate); *see also* 1850 CENSUS: Slave Inhabitants, *supra* note 105 (listing the number of slaves owned by Davis). Of the slaveholders in Union County, only Benjamin White (eighty-eight) and Hosea George (eighty-four) owned more slaves than Davis. *See* Walz, *supra* note 107, at 56, 59, 72 tbl.2.

201. *See* Union County Court Records, Book D, at 31 (Feb. 2, 1852), *microformed on* Union County Court Records, (collection of Ark. Hist. Comm'n) (on file with the North Carolina Law Review) (mentioning William Davis as the building contractor for courthouse).

general, owning five or less.[202] Two members of the jury—James Tiffin and Barton Scroggins—did not own any slaves when summoned for duty.[203] Both, however, would later move into the slaveholding ranks. By 1860, Tiffin owned one slave and Scroggins headed a household that counted fifteen slaves as members.[204] Of this group, only Jones, Green, and Tiffin appear to have been married at the time of the trial, though Avera, Hagler, and Scroggins would become so by the end of the decade.[205] Hagler was also the youngest of the group, at twenty-four or twenty-five, while the rest ranged in ages from their late twenties to their mid-forties.[206] Only William

202. David Jones, Archibald Watts, Jeremiah Avera, and George Green all appear in the 1850 slave schedules as slave owners. *See* 1850 CENSUS: Slave Inhabitants, *supra* note 105 (indicating that Jones owned eleven, "A.C. Watts" owned five, Avera owned four, and Green owned three). All but Avera also show up in the 1851 tax record, and all were taxed on the appropriate number of slaves. *See* 1851 TAX RECORD, *supra* note 186 (taxing Jones on six slaves between the ages of eight and sixty, Watts on three, and Green on three). Reason Wooley does not appear in the 1850 census for Union County or the 1850 slave schedules, but he does appear in the 1851 tax records. *See id.* (taxing Wooley on five slaves). Hence, he evidently moved to Union County sometime in 1851 and brought his slaves with him. David Hagler shows up in the 1850 census but not in the slave schedules. Sometime in 1851, however, he evidently purchased a slave, because he was taxed on one slave in that year. *See id.*

203. Tiffin and Scroggins are not listed as owning slaves in the slave schedules of the 1850 census, nor are they taxed on any slaves in the 1851 tax records. *See* 1850 CENSUS: Slave Inhabitants, *supra* note 105 (not listing Tiffin or Scroggins as slave owners); 1851 TAX RECORDS, *supra* note 186.

204. *Compare* 1850 CENSUS: Slave Inhabitants, *supra* note 105 (not listing Tiffin or Scroggins as slave owners), *with* 1860 CENSUS: Slave Inhabitants, *supra* note 106 (listing James Tiffin as the owner of one slave and "E.A. Scroggins" as the owner of fifteen). Barton married Emaly A. Falkner on January 2, 1855. Marriage Index, *supra* note 42.

205. This conclusion is based on the ages, order, and sex of the members of each person's household. *See* 1850 CENSUS: Free Inhabitants, *supra* note 38 (suggesting that David Jones, thirty-five, was married to Nancy, twenty-five; George Green, thirty-four, was married to Mary, thirty-two; James Tiffin, twenty-nine, was married to Martha, twenty-four); *see also* 1860 Census: Free Inhabitants, *supra* note 38 (suggesting that, in the interim, Jeremiah Avera, forty, had married Mary, twenty-one). A secondary source, drafted by a member of the Hagler family, also indicates that David married Sallie Dennis on March 12, 1857. John M. Hagler, *Hagler Family*, *in* THE STORY OF MONTAGUE COUNTY, TEXAS: ITS PAST AND PRESENT 489, 489 (Melvin E. Fenoglio ed., 1989). Barton Scroggins also got married in 1855. *See supra* note 204 (referencing Scroggins's marriage).

206. In 1850, the known ages of the jurors were as follows: David Hagler was twenty-three; James Tiffin was twenty-nine; Jeremiah Avera was thirty; Barton Scroggins was thirty; Hengust Norsworthy was thirty-one; George Green was thirty-four; David Jones was thirty-five; John Beason was forty; Archibald Watts was forty-five. *See* 1850 CENSUS: Free Inhabitants, *supra* note 38. Reason Wooley is harder to track in the records, but it is likely—based on a listing for an "R.H. Wooley" in the 1860 census—that he was about thirty-two at the time of the trial. *See* 1860 CENSUS: Free Inhabitants, *supra* note 38 (listing R.H. Wooley's age as thirty-nine in 1860). Depending on which William Davis was on the jury, he was either forty-one or forty-five. *See* 1850 CENSUS: Free Inhabitants,

Reynolds, the twelfth juror, possessed too common a name to say with any certainty who he was.

Thus, the men empanelled on April 16, 1852, to hear the case against Pleasant represented a fair cross section of the white community. All but three made their living from the soil—in 1850 Archibald Watts was a steamboatsman, David Hagler was a grocer, and Barton Scroggins was a schoolteacher—and those who did ranged from wealthy planters to small farmers.[207] Nine of the identifiable jurors were slaveholders, though within the decade two more would count themselves members of this privileged group. Half of the jurors were married at the time of the trial, and all had emigrated to Arkansas from one of the older states in the South.[208] Though none currently lived in Van Buren Township, the home of James Milton, it is likely that at least some of the twelve jurors were either acquainted with him or had heard of Pleasant's case.

B. Slaves and the Law

It often strikes the modern observer as odd to learn that slaves accused of crimes received trials, let alone procedural protections, such as lawyers and juries. In this regard, at least on its face, the legal treatment of slaves stands in marked contrast to protections afforded blacks in the late nineteenth and early twentieth centuries, when it was not uncommon to have blacks summarily executed without a trial or, if a trial was had, without any pretense of fairness.[209] When Frank Moore of Arkansas was tried for the murder of a white man in 1919, for example, the courtroom was "thronged with an adverse crowd that threatened the most dangerous consequences to anyone

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supra note 38 (identifying William Davis from El Dorado as forty-one, and William Davis from Harrison Township as forty-five).

207. For the occupations of each member of the jury, see 1850 CENSUS: Free Inhabitants, *supra* note 38 (indicating that, aside from Watts, Hagler, and Scroggins, all were either farmers or planters). There does not appear to be any meaningful distinction between the designation "farmer" versus "planter" in the census. *See* Walz, *supra* note 107, at 49.

208. Four of the jurors were from the Upper South: James Tiffin was from Virginia; Hengust Norsworthy and David Jones were from North Carolina; and John Beason was from Delaware. *See* 1850 CENSUS: Free Inhabitants, *supra* note 38. Six were from the Lower South: George Green was from South Carolina; Jeremiah Avera, Barton Scroggins, Archibald Watts, and William Davis (both) were from Georgia; and David Hagler was from Alabama. *See id.* If Reason Wooley was the same "R.H. Wooley" from the 1860 census, then he was from Alabama. *See* 1860 Census: Free Inhabitants, *supra* note 38.

209. *See* WILLIAMSON, *supra* note 23, at 116–18 (discussing the rise of lynching in the decades following the Civil War).

interfering with the desired result."[210] The explosion in the number of lynchings—some 700 between 1889 and 1893 alone—provides an even more sobering reminder of the contempt that many Southern whites at all levels had for the rule of law in the decades following the Civil War.[211]

The South, of course, historically has been a violent society.[212] Long before the first shots were fired on Fort Sumter, Southerners had been resolving conflicts outside the courts. Indeed, Bertram Wyatt-Brown and Edward Ayers are two scholars who have emphasized the tendency of whites throughout the antebellum period to settle slights and assaults with a pistol rather than a court petition.[213] Yet, even within this violent society, antebellum Southerners showed a respect for the courts. "We live under a legal government, and are in favor of the supreme reign of the law," ran one editorial in the *Arkansas Gazette*.[214] Frederick Law Olmsted agreed; in his travels through the South he found it " 'really wonderful that Law has so much power, and its deliberate movements and provisions for justice to accused parties are so much respected.' "[215] Even Ayers admits, as this author can attest,

> Anyone who has ever looked into the huge dusty volumes of court records in rural Southern courthouses can only be struck at how much litigation Southerners waged against each other over rights to property. Three or four time-consuming and expensive civil cases are recorded there for every criminal case, which are plentiful enough in themselves.[216]

Notably, the courts also played an important role in governing the conduct of slaves. To be sure, many masters handled a number of petty disputes and internal matters involving their slaves with a whip or a brand or some other means of punishment.[217] And certainly,

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210. *See* Moore v. Dempsey, 261 U.S. 86, 87–89 (1923).

211. *See* EDWARD L. AYERS, VENGEANCE AND JUSTICE: CRIME AND PUNISHMENT IN THE 19TH-CENTURY AMERICAN SOUTH 238 (1984).

212. *See* WYATT-BROWN, *supra* note 22, at 366 ("Historians of Southern mores are agreed that violence as an aspect of Southern life clearly distinguished the region from the rest of the country."); *see also* AYERS, *supra* note 211, at 9 (noting the long history of violence in the South).

213. *See* AYERS, *supra* note 211, at 9–33; WYATT-BROWN, *supra* note 22, at 350–61.

214. *Mob and Murder in Saline County*, ARK. GAZETTE, Oct. 27, 1854, at 2.

215. AYERS, *supra* note 211, at 32 (quoting 2 THE PAPERS OF FREDERICK LAW OLMSTED 155–56 (Charles E. Beveridge & Charles Capen McLaughlin eds., 1981)).

216. *Id.*

217. *See* STAMPP, *supra* note 112, at 224 (acknowledging that "probably most minor offenses, such as petit larceny, were disposed of without resort to the courts").

some slaves (as well as some whites) were lynched.[218] But for many crimes, particularly those taking place off the plantation, slaves during the antebellum period were much more likely to be brought before a judge or a jury and tried according to established rules of law than punished by some extralegal means.[219] In fact, upstanding members of the community often spoke out against the latter practices. Some three years after Sophia Fulmer first leveled her accusation against Pleasant, for example, a mob broke into a jail in Saline County, Arkansas, and lynched a slave accused of the murder and attempted murder of two white men.[220] In a blistering editorial, the *Arkansas Gazette* lashed out at those who "hung the unfortunate negro," and demanded that the grand jury "indict the murderers, and let them be put on their trial for the same."[221] To the editors, mob violence threatened the very "laws on which we, at present rely, for the protection of our property, our reputation, and our lives," and they refused to admit, regardless of the slave's guilt or innocence, "that might is right."[222] Hence they closed, "The laws have been violated, and public morals outraged, and we have, as we think every good citizen ought to do, arrayed ourself [sic] on the side of the law."[223]

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218. *See* WILLIAMSON, *supra* note 23, at 183 ("During slavery, Negroes had been lynched, especially after about 1830. But, even then, it was not at all common, and lynching was by no means reserved for blacks.").

219. *See* AYERS, *supra* note 211, at 134 (discussing trials of slaves, and noting that the State, not the master, was the party prosecuting and punishing slaves who committed crimes off the plantation); STAMPP, *supra* note 112, at 224 (noting how, aside from such crimes as petit larceny, many slaves "who violated the law were given public trials"); Michael S. Hindus, *Black Justice Under White Law: Criminal Prosecutions of Blacks in Antebellum South Carolina*, 63 J. AM. HIST. 575, 582 (1976) (suggesting that "plantation justice" was limited to settling "thefts on the plantation, fights between slaves of the same owner, and even many (but not all) altercations between an owner and his slave," while other crimes were handled by courts).

220. *See Mob and Murder in Saline County*, *supra* note 214 (describing the events of the lynching).

221. *Id.*

222. *Id.*

223. *Id.* This evidently was a position of long standing. In an editorial written twenty years earlier after a slave was lynched, the editors expressed similar outrage. *See On Horror's Head, Let Horrors Accumulate*, ARK. GAZETTE, Nov. 29, 1836, at 2 (calling lynching a "disgraceful and barbarous outrage"). Interestingly, like in the incident in Saline County, the slave's apparent guilt only made the lynching more egregious. *See id.* ("The circumstances of this criminal outrage are aggravated by the fact, that the evidence against the negro was of such a character, that there was no chance of his escape from a just expiation of his crime by law—his condemnation was next to certain.").

Still, not all scholars are convinced that the legal system provided any real sense of justice for slaves accused of crimes.[224] Kenneth Stampp, for one, forcefully argues that "[w]hen tension was great and the passions of white men were running high, a slave found it ... difficult to get a fair trial before a jury in one of the superior courts."[225] But we need not belabor the point here; it seems clear enough that, while a slave accused of a crime probably never received the type of justice most whites could expect, the procedural protections and right to appeal afforded to slaves served to check at least some of the hasty judgments and extralegal violence blacks came to expect in the decades following the Civil War. Indeed, just looking at the six appeals by slaves accused of capital offenses in Arkansas, we find that five were reversed.[226] Moreover, of the three non-capital offenses that reached the high court, all were reversed.[227] And while

224. A.E. Keir Nash, in a series of articles in the early 1970s, argued that the procedural protections afforded slaves were real, and that antebellum judges attempted to ensure fair trials for slaves. *See* A.E. Keir Nash, *A More Equitable Past? Southern Supreme Courts and the Protection of the Antebellum Negro*, 48 N.C. L. REV. 197, 200 (1970) (arguing that "[b]etween the end of the eighteenth century and the Civil War, and particularly between 1830 and 1860, Southern state supreme courts sought almost without exception to expand protection of the Negro"); 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, 99 (1970) (explaining causes for "the relative fairness" of appellate court behavior during the antebellum era); A.E. Keir Nash, *The Texas Supreme Court and Trial Rights of Blacks, 1845–1860*, 58 J. AM. HIST. 622, 622 (1971) (arguing that slaves received "essentially decent treatment ... in the southern state supreme courts during an otherwise oppressive era of slavery"). Others agree, at least to some extent. *See, e.g.*, AYERS, *supra* note 211, at 134–37 (describing how "blacks accused of major offenses could expect procedural fairness"); GENOVESE, *supra* note 26, at 31–37 (noting that appellate courts in "every southern state" overturned slave rape convictions); MORRIS, *supra* note 10, at 209–48 (describing procedural protections in the trials of slaves); Daniel J. Flanigan, *Criminal Procedure in Slave Trials in the Antebellum South*, 40 J. S. HIST. 537, 538 (1974) (noting that despite their many flaws, "southern legislatures and courts were in many respects astonishingly considerate of slaves' procedural rights in major criminal cases"). Others do not. *See, e.g.*, PHILIP J. SCHWARZ, TWICE CONDEMNED: SLAVES AND THE CRIMINAL LAWS OF VIRGINIA, 1705–1865, at 23 (1988) (noting that legal "reform for slaves existed, but it lagged behind reform for whites"); Hindus, *supra* note 219, at 580 (describing the procedural deficiencies of Southern courts); Judith Kelleher Schafer, *The Long Arm of the Law: Slave Criminals and the Supreme Court in Antebellum Louisiana*, 60 TUL. L. REV. 1247, 1253 (1986) (citing the existence of separate slave tribunals as evidence of the injustice of the Southern courts).

225. STAMPP, *supra* note 112, at 226.

226. The five cases in which the slave's conviction was reversed were *Pleasant v. State*, 15 Ark. 624 (1855) (attempted rape); *Austin v. State*, 14 Ark. 555 (1854) (murder); *Pleasant v. State*, 13 Ark. 360 (1853) (attempted rape); *Charles v. State*, 11 Ark. 389 (1850) (attempted rape); and *Sullivant v. State*, 8 Ark. 400 (1848) (attempted rape). The one case in which the slave's conviction was affirmed was *Dennis v. State*, 5 Ark. 230 (1843) (rape).

227. *See* Mary v. State, 24 Ark. 44 (1862) (arson); Bone v. State, 18 Ark. 109 (1856) (assault and battery); Sarah v. State, 18 Ark. 114 (1856) (assault and battery).

we must be careful not to read too much into such a small number of appellate cases, the fact that the court threw out eight of the nine convictions does suggest that slaves received some protections rather than none at all.

It is, of course, tempting to dismiss these results, as some have done, as self-conscious efforts by the judiciary to protect the master's property interest in his slave.[228] To be sure, the master's financial interest was wrapped up in the trial of his slave, and judges—most of whom were slaveholders themselves—knew that an adverse judgment could be costly even in those jurisdictions that allowed for some compensation out of the public trust.[229] But to reduce the law of slavery to narrow economic terms seems inadequate in light of the complexities of the Southern mind and the distinctiveness of the Southern way of life. Indeed, as detailed in the next Section, the antebellum South was a society governed by more than just the marketplace. Instead, it was a society in which honor and character ruled paramount, and in which a man's reputation in the community provided his self-worth. Regardless of what motivated the judges who served on the state supreme courts, James Milton had more at stake in Pleasant's trial than just his property interest; at issue was his own reputation as a master and a man.

C. *Honor and Slavery*

1. In General

Historians have long recognized that the slave South was a culture governed by a code or ethic of honor.[230] Under this code, a

228. For arguments aligning the increased protections afforded slaves during the antebellum period with the property interests of the master, see especially ANDREW FEDE, PEOPLE WITHOUT RIGHTS: AN INTERPRETATION OF THE FUNDAMENTALS OF THE LAW OF SLAVERY IN THE U.S. SOUTH 159–77, 181–97 (1992); A. Leon Higginbotham, Jr. & Barbara K. Kopytoff, *Property First, Humanity Second: The Recognition of the Slave's Human Nature in Virginia Civil Law*, 50 OHIO ST. L.J. 511, 512 (1989).

229. In Arkansas, masters were not entitled to compensation. One citizen urged a change in the law. *See* Editorial, *For the State Gazette and Democrat*, ARK. GAZETTE, July 14, 1854, at 2 ("In order to punish negroes, who are guilty of great crimes, and prevent their masters from running them off before they are convicted, it is necessary to pass a law to pay the master one-half or two thirds of the value of such negroes as are condemned and executed. This is done in most of the States by a tax on slaves, which all slaveholders are ready and willing to pay.").

230. The starting point for any discussion on Southern honor is Bertram Wyatt-Brown's book of the same name. As he puts it, "Above all else, white Southerners adhered to a moral code that may be summarized as the rule of honor." WYATT-BROWN, *supra* note 22, at 3.

man had only as much worth as others conferred upon him.[231] Honor, in other words, was based upon reputation, and at its "heart" was "the evaluation of the public."[232] In this sense, honor stood in marked contrast to the introspective and restrained ideals of the Puritans, who, along with Southern outsiders and European travelers, often looked upon the Southern way of life with a mixture of contempt and puzzlement.[233] Southerners are "eternally wrangling," Hinton Rowan Helper grumbled in 1857, "[a]bout certain silly abstractions that no practical business man ever allows to occupy his time or attention."[234] Yet it was these "silly abstractions"—reputation, valor, hierarchy, and family—that mattered most to a Southern man and required his most vigorous response.

Bertram Wyatt-Brown, one of the premier scholars on Southern honor, explains that honor in the antebellum South consisted of more than just an "inner conviction of self-worth"; it required, in addition, the conscious placement of that self-assessment before the public and its confirmation.[235] A man of honor, in other words, valued appearances, and hence one of his "great[est] fears" was to be publicly shamed or dishonored.[236] This is why Taylor Polk of Arkansas responded with such defiant flourish when some locals accused him of being a thief and a criminal. They had insulted his character, and as an honorable man he could not let the charge go unanswered. Thus, in a response consistent with the code of honor, Polk "came out and told the company that he had lived in their county twenty-five years, and he defied any one of them to say that he

231. *See* AYERS, *supra* note 211, at 13 (describing "dictates of honor").

232. WYATT-BROWN, *supra* note 22, at 14.

233. Edward Ayers describes the differences between the North and South this way:

> Where honor celebrated display, the ideal Puritan called for restraint. Where honor demanded wealth as a means to command man's respect, the ideal Puritan valued wealth only as evidence of God's grace. Where honor needed the respect of others, the ideal Puritan spurned the opinions of men. Where honor existed in the constant assertion of self, the ideal Puritan gloried in the abnegation of self. Where honor looked outward, the Puritans looked inward.

AYERS, *supra* note 211, at 23.

234. HINTON ROWAN HELPER, THE IMPENDING CRISIS OF THE SOUTH: HOW TO MEET IT (1857), *reprinted in* ANTE-BELLUM: WRITINGS OF GEORGE FITZHUGH AND HINTON ROWAN HELPER ON SLAVERY 157, 210 (Harvey Wish ed., 1960).

235. WYATT-BROWN, *supra* note 22, at 14.

236. GROSS, *supra* note 163, at 47; *see also* AYERS, *supra* note 211, at 13 ("A coward tolerated insult, a liar attacked honor unfairly. To call a Southern man either one was to invite attack.").

had done anything wrong, and, baring his breast to them, he told them if they wished to take his life, to 'shoot away.' "[237]

Understanding the code of honor helps explain many of the unique characteristics of the South, from its excessive drinking and frequent carousing, to its love of gambling and its many tavern brawls.[238] But of all the symbols of the code of honor, the duel perhaps best represents its essential tenets. Highly ritualized and structured, the duel offered a man the opportunity to prove his honor in a manner that was dignified and dispassionate, to demonstrate that he did not fear death and would calmly face it.[239] With referees to ensure the fairness of the fight, "seconds" to stand in if called upon, and witnesses to report back on the solemnity of the occasion, duels were not about killing an enemy.[240] They were instead about proving worth; they allowed a man to demonstrate in dramatic fashion that he would rather be killed than lead a life without honor.[241] Judge Andrew Scott of Arkansas was one of many men who challenged his opponent to a duel after a personal slight. Preferring "death itself, to a life in disgrace," Scott traveled to the dueling grounds and shot his opponent dead.[242] In doing so, Scott avenged his honor in a method accepted by Southern society. A young admirer would later call him "the most chivalrous and purest-minded man I think I ever knew."[243]

It is of course true that the South was not the only society in which honor had meaning.[244] But the South, with its emphasis on hierarchy and deference, the productive nature of the household, and its highly localized politics, created an atmosphere in which the code of honor was allowed to flourish.[245] Importantly, some of these same factors contributed to the institution of slavery, and the two—honor and slavery—ultimately became inexorably linked and dependent

237. ARK. GAZETTE, Apr. 12, 1850, at 2.

238. On the role of nose-pulling, duels, gift-giving, politics, and many more aspects of Southern honor, see the aptly titled KENNETH S. GREENBERG, HONOR & SLAVERY: LIES, DUELS, NOSES, MASKS, DRESSING AS A WOMAN, GIFTS, STRANGERS, HUMANITARIANISM, DEATH, SLAVE REBELLIONS, THE PROSLAVERY ARGUMENT, BASEBALL, HUNTING, AND GAMBLING IN THE OLD SOUTH (1996).

239. *See* WYATT-BROWN, *supra* note 22, at 350–52 (describing rituals of the duel).

240. *See id.*

241. *See* GREENBERG, *supra* note 238, at 74 ("The central purpose of a duel was not to kill, but to be threatened with death.").

242. *See* BOLTON, *supra* note 34, at 34 (describing events surrounding the duel).

243. *See id.*

244. *See* AYERS, *supra* note 211, at 26 (noting the importance of honor in other cultures and at other times).

245. *See id.* (explaining that the code of honor "thrives only in certain kinds of societies"—including the antebellum South—"that are economically undiversified, localized, [and] explicitly hierarchical").

upon one another.[246] Slavery, like honor, requires the weak to submit to the powerful, the slave to submit to the master. It therefore goes without saying—at least in the white man's view—that a slave did not and could not have honor, and the master constantly reminded him of this fact.[247] Every time the master displayed his power—every time he unleashed the lash, threatened a sale, or raped an enslaved sister, mother, daughter, or wife—the master reaffirmed his superiority over his slave and, in the process, dishonored his property.[248]

But the master also exercised his honor in ways that did not victimize his slave, at least not in the traditional sense. Kenneth Greenberg, who has portrayed Southern honor with creativity and skill, has pointed to the giving of gifts as one of the distinguishing marks of an honorable man.[249] Central to Greenberg's argument is that gifts imply generosity; they flow, generally, in one direction, and are marked by the ability (or inability) to give them. And just as an honorable man gave others gifts, a master gave his slave "gifts": he gave him food, he gave him shelter, he gave him clothing, and occasionally he even gave him the gift of freedom.[250] Of course, under the law, slaves had no legal entitlement to any of these so-called gifts, beyond those designed to sustain the barest of subsistence.[251] Thus, masters who gave their slaves more than they could legally demand could congratulate themselves on their own generosity and bask in their honorable conduct.[252] Writing after the Civil War, Samuel Chester of Union County, Arkansas, insisted that he had "no apology for the institution of slavery," fondly remembering how the slaves in his father's household were "housed in the same kind of one room log cabin that the boys of the family . . . were housed in," were "clothed in the manner required for their

246. *See id.* at 26–27 (noting the link between honor and slavery).

247. *See id.* at 26 (stating that "slavery by its very nature dishonored all members of one class and bestowed honor on another").

248. *See* JAMES OAKES, SLAVERY AND FREEDOM: AN INTERPRETATION OF THE OLD SOUTH 14–24 (1990) (discussing rituals of honor and dishonor inherent in the master-slave relationship); *see also* GROSS, *supra* note 163, at 50 ("The rituals of slavery bolstered white men's honor while dishonoring the slave.").

249. *See* GREENBERG, *supra* note 238, at 51–86 (discussing the role of gift-giving and its relationship to honor).

250. *See id.* at 66–67 (noting the link between gift-giving and slavery).

251. In Arkansas, the legislature had the power to "oblige the owner of any slave or slaves to treat them with humanity," though the specifics were not spelled out. ARK. CONST. of 1836, art. IV, § 25, *reprinted in* STATUTES OF ARKANSAS, *supra* note 10, at 48–49.

252. *See* GREENBERG, *supra* note 238, at 66 ("Since all this giving resulted from no explicit demands or bargaining, most masters could think of themselves as men of great generosity.").

comfort and health," and were "fed abundantly from the same vegetable garden and the same smokehouse and storeroom that supplied the family table."[253] These excesses were gifts—neither bargained for nor given as a matter of right—and were a distinguishing mark of an honorable master and man.

2. Honor, Family, and Proslavery Thought

In light of the importance of honor in the antebellum South it is surprising how few legal historians have followed it into the courtroom.[254] But the argument here is that this same code of honor that governed men's daily interactions with each other would have played an important role in causing a man like James Milton to defend his slave against a criminal accusation. Honor, of course, figured prominently in a Southern man's view of his family.[255] As the quintessential patriarch, the Southern man lorded over his family as both protector and provider. Thus, if an outsider insulted a member of his household—disgraced his wife, mother, or sister, for example—his response was as swift and decisive as it would have been had the insult been directed at his own person.[256]

Moreover, by the time of Pleasant's trial, slaveholding Southerners viewed themselves as the head of a household that included more than just their wives and children; it included their slaves as well.[257] In fact, long before the Civil War, the expression, "our family, white and black," had become a ubiquitous part of the Southern lexicon.[258] "[T]ell all the servants howdie," a young Annie Smith from Dallas County, Arkansas, wrote to her parents in 1855, in

253. CHESTER, *supra* note 59, at 39.

254. There are, of course, important exceptions. *See, e.g.*, GROSS, *supra* note 163, at 47–71 (emphasizing the role of honor in local disputes); William W. Fisher III, *Ideology and Imagery in the Law of Slavery*, *in* SLAVERY AND THE LAW 43, 59–66 (Paul Finkelman ed., 1997) (examining how the code of honor influenced judicial decisionmaking); Johnson, *supra* note 33, at 428 (suggesting that honor and reputation played a role in slaveholders' decisions in the courtroom).

255. *See* WYATT-BROWN, *supra* note 22, at 55 ("[F]ealty to family was the first law of honor.").

256. *See id.* at 53 ("[N]othing could arouse such fury in traditional societies as an insult hurled against a woman of a man's household .... [To] attack his wife, mother, or sister was to assault the man himself.").

257. *See* Eugene Genovese, *"Our Family, White and Black": Family and Household in the Southern Slaveholders' World View*, *in* IN JOY AND IN SORROW: WOMEN, FAMILY, AND MARRIAGE IN THE VICTORIAN SOUTH 69, 72 (Carol Bleser ed., 1991) ("For the slaveholders, 'family' meant 'household,' and household implied slaves, or 'servants,' as they preferred to call them.").

258. *Id.* at 69.

typical language from the time.[259] A decade earlier, Annie's father, Maurice, likewise boasted to his wife, still in Tennessee, that upon his arrival at their new home in Arkansas he found "all the Negroes well . . . lively & cheerful."[260] Maurice scrawled on for another page about "his Negroes," carefully avoiding the word "slave" and happily recounting how "the children all have grown," how "Luck's baby is as fine a looking child as I ever saw," and how he planned to "fix them off in separate cabbins [sic] by family," and outlining the arrangements.[261] Samuel Chester of Union County also spoke affectionately about his family's "servants." Noting how his family, like many others, liked to bestow the familial title of "Uncle" and "Aunt" on some of their favorites, Chester seemed to have a special place in his heart for their old house servant.[262] Willis, he said, "never ceased to regard himself as a member of the family," even after the War ended.[263]

The view that the master's family extended to his slaves, and that as an honorable master he was obligated to support and protect them, received a strong ideological push beginning in the 1830s from the proslavery movement.[264] At that time, the abolitionists began in earnest their attack on the Southern way of life, denouncing the institution of slavery as inconsistent with Christianity and irreconcilable with the Declaration of Independence.[265] Refusing to back down, Southern ideologues shot back that blacks were better off in slavery, both because of their innate inferiority and because slavery was more humane than the free labor system of the North.[266] This new "positive good" outlook on slavery received the backing of some

259. Letter from Annie Maurice Smith to Maurice & Clarissa Smith (Sept. 13, 1855) (collection of the Butler Ctr. of Ark. Studies, Cent. Ark. Library Sys.) (on file with the North Carolina Law Review).

260. Letter from Maurice Smith to Clarissa H. Smith (Nov. 9, 1843) (collection of the Butler Ctr. of Ark. Studies, Cent. Ark. Library Sys.) (on file with the North Carolina Law Review).

261. *See id.*

262. *See* CHESTER, *supra* note 59, at 38, 45 (discussing how he and his family referred to some of the older slaves as "Uncle" and "Aunt").

263. *Id.* at 45–46.

264. *See* Genovese, *supra* note 257, at 70 (noting the link between the master's view of household and proslavery thought).

265. *See, e.g.*, William Lloyd Garrison, Editor, The Liberator, Address to the American Colonization Society (July 4, 1829), *in* WILLIAM LLOYD GARRISON AND THE FIGHT AGAINST SLAVERY 61 (William E. Cain ed., 1995) (articulating, in early form, the many objections to slavery that would come to form the foundation for the abolitionists' cause).

266. For an insightful discussion of proslavery thought, see GEORGE M. FREDRICKSON, THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY, 1817–1914, at 43–70 (1971).

of the South's most respected intellectuals, if not the most vocal. Henry Hughes, for example, insisted that slavery in the United States—or, as he preferred to call the system, "warranteeism"—consisted of mutual obligations between superiors and inferiors.[267] The master owed the slave support and protection, and the slave owed the master obedience and fidelity. Moreover, this "reciprocity" was "absolute," requiring a master to act as "an honest father of a family acts for the good of his household."[268] George Fitzhugh carried this argument to its logical extreme, maintaining that the patriarchal plantation was the ideal social arrangement.[269] He therefore refused to defend and justify "mere negro slavery," going so far as to suggest that some whites be enslaved as well.[270] "Domestic slavery," he insisted, was "a normal, natural, and, *in general*, necessitous element of civilized society, without regard to race or color."[271]

In this way, the code of honor intersected with the paternalist defense in significant ways. Both emphasized the master's role as protector and provider, and both emphasized the benevolence of the master-slave relationship. To be sure, Fitzhugh's ultimate position that some whites be enslaved probably received little support in Arkansas (or anywhere else for that matter). But the basic point undoubtedly did, convincing a man like James Milton that slavery was consistent with kindness and benevolence, and that it created an extended, biracial household with himself at the head. Indeed, the editors of the local newspapers made sure of this fact, regularly seizing on stories of slavery's positive good and eagerly reporting them to their consumer public, including Milton. One story involved

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267. Hughes wrote:

> Warranteeism in the United States South, is not an obligation to labor for the benefit of the master, without the contract or consent of the servant. That is slavery. Warranteeism is a public obligation of warrantor and warrantee to labor for the benefit of, (1), the State, (2), the Warrantee, and (3), the Warrantor. This obligation is not unilateral; it is bilateral: it is mutual.

HENRY HUGHES, TREATISE ON SOCIOLOGY (1854), *reprinted in* THE IDEOLOGY OF SLAVERY: PROSLAVERY THOUGHT IN THE ANTEBELLUM SOUTH, 1830–1860, at 241, 242 (Drew Gilpin Faust ed., 1981) [hereinafter THE IDEOLOGY OF SLAVERY].

268. *Id.* at 242, 246.

269. *See* GEORGE FITZHUGH, SOUTHERN THOUGHT (1857), *reprinted in* THE IDEOLOGY OF SLAVERY, *supra* note 267, at 274, 276 ("She [the South] is by far, very far, the most prosperous and happy country in the world.").

270. *Id.* at 285.

271. *Id.*

some escaped slaves who had grown "tired of freedom."[272] Showing up somewhere in the Northeast, this group of seven allegedly said that "they much preferred living with Mr. Calvert as his slaves than to lead the life they did . . . and desired to be sent home."[273] The mayor of the town obliged their request, "lodging" them in the local jail until their owner could come for them.[274] Another detailed how one slave, who was allowed by his master to remain in California to try his luck in the gold rush, "voluntarily" returned to Arkansas, indicating after he was picked up in New Orleans "his preference for his old home, with its many endearing associations."[275] To the same effect was the story of one of Colonel Riley's slaves. Humbly offered as a commentary on the "blubbering sympathy" of the Northern agitators, this article told of a slave "who was allowed to go to California some time ago, returned home to his master a few days since, gave a full detail of his operations, and presented a big item of gold dust as an aggregate of profits over expenses!"[276] But the pièce de résistance arguably involved the story of a free black named Hardy, who reportedly "came voluntarily into court, and prayed that he be permitted to choose a master and enslave himself to him for life."[277] After all, if slavery was the best of all conditions, then free blacks should *want* to return to slavery. It was this rationale, in fact, that led Arkansas to pass a statute in 1859, clearing the way for just such a decision.[278]

While it would be easy to dismiss these commentaries as simply self-serving cant to rebuff the critics of slavery, to do so would ignore the important role they played in maintaining the cultural identity of the white South. Like most individuals, slaveholders, including James Milton, viewed themselves as moral beings, and were stung by the accusations that they were immoral and un-Christian. They needed, for their own well-being, to convince themselves that their institution

272. *Slaves Running Home Again*, WASH. TELEGRAPH (Ark.), Oct. 2, 1850, at 2 (collection of Ark. Hist. Comm'n) (on file with the North Carolina Law Review).

273. *Id.*

274. *Id.*

275. *The Attachment and Fidelity of a Slave*, ARK. GAZETTE, Nov. 26, 1852, at 2.

276. *More "Uncle Tom" Material*, ARK. TRUE DEMOCRAT, Jan. 18, 1853, at 1.

277. *African Slave Labor*, OUACHITA HERALD, Aug. 19, 1858, at 2, *microformed on* Camden Misc. Newspapers, Roll 1 (collection of the Ark. Hist. Comm'n) (on file with the North Carolina Law Review).

278. Act of Nov. 1, 1858, No. 151, § 8, 1859 Ark. Acts 113 ("An Act to remove the Free Negroes and Mulattoes from this state.").

was just and right.[279] "As a believer in, and supporter of the Christian religion, if we sincerely believed slavery, as it exists among us, a moral evil—inconsistent with, or repugnant to revelation," one contributor to the *Arkansas Gazette* mused, "we would abandon it, and become an abolitionist."[280] "I go farther," added another; "we cannot at present discharge our christian duties without retaining them [blacks] in bondage."[281] The editors of the *Gazette* agreed. The "institution of African slavery is right," they thundered on more than one occasion.[282] "The institution of slavery has the sanction of the Bible from the days of the Patriarchs of the old Testament, to that of the Saviour and the Apostles in the new Testament."[283] Parroting the language of the proslavery theorists, these same editors insisted that slavery in the hands of "enlightened and humane masters" was "best for the negro and the white man," and chastised the "crack-brained fanatics" from the North who failed to see so.[284] Compared to the free labor system, "which crushes, and grinds, into the dust" the men and women of the North, they maintained that slavery actually "elevates and betters the condition of the negro."[285] Indeed, the editors queried, in light of the mild form of slavery practiced in all parts of the South, who could doubt but that "the condition of the slave, in the United States, is the best one in which the African has ever been placed."[286]

Thus, for a man like James Milton—a wealthy member of the slaveholding elite—talk of an extended, biracial household and of slavery's benevolence was not idle chatter. It defined him, and it defined his world view. In truth, of course, slavery was not kind and

279. *See* Genovese, *supra* note 257, at 69 (arguing that slaveholders "assimilated that special sense of family to their self-esteem, their sense of who they were as individuals and as a people, their sense of moral worth, their sense of honor").

280. Chicot Planter, *Who Are the Friends of Union?*, ARK. GAZETTE, Aug. 1, 1851, at 2.

281. *The Southern Pulpit on Slavery*, ARK. TRUE DEMOCRAT, Feb. 8, 1853, at 8.

282. *See* Editorial, ARK. GAZETTE, Sept. 19, 1857, at 2 ("But the institution of African slavery is right.") [hereinafter Sept. 19 Editorial]; Editorial, ARK. GAZETTE, Jan. 17, 1857, at 2 ("African slavery . . . is right in morals as well as in law."); *The Slave Trade*, ARK. GAZETTE, Oct. 2, 1858, at 2 ("We hold, as we have ever held . . . that slavery is right.").

283. Sept. 19 Editorial, *supra* note 282.

284. *The Slave Trade*, *supra* note 282.

285. Sept. 19 Editorial, *supra* note 282; *cf. Slavery Agitation*, ARK. GAZETTE, Oct. 9, 1858, at 2 ("We believe that the African amid the snowy cotton blooms of the plantations of Arkansas is less a slave than the wan representative of woman amid the looms and spindles of Massachusetts and New York.").

286. *African Slavery*, ARK. GAZETTE, Oct. 6, 1854, at 3. The irony of advertising for seven runaways in the same edition as the above claim was evidently lost on the editors. *See id.* at 3 (listing five advertisements, the last of which listed three runaways).

benevolent—it was, as Harriet Beecher Stowe said, an "absolute despotism, of the most unmitigated form"[287]—and the slaveholder who portrayed himself as the benevolent paternalist was the same one who whipped his slaves unmercifully and separated slave families through sale when money was tight. But the point is nevertheless a valid one: that James Milton, as honorable master and a man, had likely convinced himself that slavery was a benevolent institution. And as such, he would have been as much obligated to defend his slave against a criminal accusation as he would have been if his own son had been accused. Henry Hughes was adamant in this regard. "It is [the masters'] duty to represent in court," he proclaimed, "[slaves] prosecuted or prosecuting."[288] Judge Brockenbaugh of the Virginia Court of Appeals agreed; the master, he said, is charged with the defense of his slave "as much as a father is with the defense of his child."[289] Judge Starnes of the Supreme Court of Georgia felt the same way: the "duty of procuring counsel for his slave ... is as binding on the master, as the obligation to procure for that slave, medical attendance in his sickness, or food and clothing at all times."[290]

To be sure, money mattered as much to James Milton as it did to anyone else of his station. Like all slaveholders, he understood the importance of slaves to the overall production of his farm, and that the loss of Pleasant would have been an important loss of labor, to say nothing of his reproductive value. But to suggest that economics was the sole—or even the most significant—reason for defending a slave against criminal accusations ignores the importance of honor, family, and proslavery thought in the minds of these men. Consider how one observer described the scene after Samuel McMorrin of Saline County, Arkansas, found out his slave had been accused of murder:

> Mr. McMorrin ... instructed the counsel whom he felt it to be his duty to employ to defend his negro, to use no undue or improper means in his defense: but to see that his negro had a fair trial, and simple justice meted to him. If he was guilty, he did not desire him to escape, but receive the punishment, due his crime. If he was innocent, as a humane and a just man, he

287. HARRIET BEECHER STOWE, THE KEY TO UNCLE TOM'S CABIN 233 (Arno Press 1968) (1853).

288. HUGHES, *supra* note 267, at 246.

289. Genovese, *supra* note 257, at 81 (citing Letter from William Brockenbaugh to Thomas Ruffin (Feb. 7, 1831)).

290. Jim v. State, 15 Ga. 535, 540 (1854).

wanted his innocence to be established, by a fair trial, before twelve legal jurors of the country.[291]

Simply put, to a man like James Milton—a man of the local elite—honor and reputation likely weighed more heavily on his mind than dollars and cents.

3. John Quillin, Attorney

To that end, in hiring a lawyer to represent Pleasant, Milton settled on someone whom he undoubtedly thought shared his outlook on honor and slavery. His name was John Quillin, and he, like James Milton, was a man of considerable prestige.[292] Like so many others, Quillin arrived in Arkansas sometime in the early 1840s from one of the older states in the South.[293] Listed among "the most influential and substantial citizens" of the county,[294] Quillin became the circuit court judge for the Sixth Judicial Circuit in 1849, where he earned the reputation of being someone who "urged, in the most cogent, impressive, solemn and masterly manner, obedience to the laws of the country."[295] He remained on the bench until January 1852—four months before Pleasant's case—when he voluntarily stepped down to pursue private practice.[296] Why he stepped down is not clear, though

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291. *Mob and Murder in Saline County*, ARK. GAZETTE, Oct. 27, 1854, at 2.

292. *See* Transcript of Trial, State v. Pleasant, *supra* note 1, at 5 (listing Pleasant's attorneys as the firm of Quillin and Lyon). Additional records indicate that John Quillin, rather than Richard Lyon, was the one who actually represented Pleasant. An attorney named Richard Lyon appears in the 1850 census records for Union County, and this is undoubtedly John Quillin's law partner. *See* 1850 CENSUS: Free Inhabitants, *supra* note 38. John Quillin, however, appears to have been the one who actually represented Pleasant. *See, e.g.*, Pleasant v. State, 15 Ark. 624, 625 (1855) (listing John Quillin as attorney of record along with Samuel Hempstead). John Quillin also wrote two letters detailing his involvement in the case with no mention of Richard Lyon. *See* Letter from John Quillin to Elbert H. English (Feb. 3, 1853) (collection of Ark. Hist. Comm'n) (on file with the North Carolina Law Review) [hereinafter First Quillin Letter]; Letter from John Quillin to Elbert H. English (Feb. 22, 1853) (collection of Ark. Hist. Comm'n) (on file with the North Carolina Law Review).

293. *See* BIOGRAPHICAL AND HISTORICAL MEMOIRS OF SOUTHERN ARKANSAS 822 (Silas Emmett Lucas, Jr. ed., Southern Historical Press 1978) (1890) (identifying Quillin among a select group of settlers that arrived in the 1840s). Quillin was born in Virginia. *See* 1850 CENSUS: Free Inhabitants, *supra* note 38.

294. BIOGRAPHICAL AND HISTORICAL MEMOIRS OF SOUTHERN ARKANSAS, *supra* note 293, at 822.

295. *More of the Montgomery Affair*, ARK. GAZETTE, May 31, 1850, at 1; *see also* BIOGRAPHICAL AND HISTORICAL MEMOIRS OF SOUTHERN ARKANSAS, *supra* note 293, at 822 (stating that John Quillin became circuit court judge on March 2, 1849); 1850 CENSUS: Free Inhabitants, *supra* note 38 (listing Quillin's occupation as judge).

296. *See* ARK. GAZETTE, Jan. 16, 1852, at 2 (stating that, as of January 1852, Quillin had "resigned the office of Judge of the 6th Judicial Circuit of this State").

it could have been as simple as a desire for a more lucrative living (government servants being notoriously underpaid).[297] But it also may have been because the responsibilities of judging had interfered with the raising of his young son, for Quillin's wife had evidently died during childbirth three-and-a-half-years earlier, and he had been left to care for the baby on his own.[298] But whatever the reason, Quillin does not appear to have given up on his passion for judging; six years later, "Honest John Quillin" was running for circuit court judge again, though ultimately he was unsuccessful.[299]

It is not known how James Milton came to hire John Quillin. It certainly was possible that he was a family friend, or perhaps he had represented Milton or someone he knew in a previous case and had done well. But much more likely, it was Quillin's reputation that attracted an honorable man like James Milton, who needed someone devoted to the law and who would not be swayed by passion. Milton—or perhaps more accurately Pleasant—would also come to benefit from Quillin's connections with the Arkansas legal community. Among Quillin's friends and colleagues was Samuel Hempstead, a legal heavyweight from Little Rock who was active in state politics and later served as the United States District Attorney for Arkansas, official reporter of the Arkansas Supreme Court, and State Solicitor General.[300] Hempstead would bring his considerable prestige to Pleasant's case, appearing as an attorney of record on both appeals.[301] Quillin also was acquainted with Elbert H. English, also of Little Rock. Like Hempstead, English was a prominent member of

297. *See Election of Chief Justice of Supreme Court*, ARK. GAZETTE, Nov. 12, 1852, at 2 (noting how George Watkins, when he became chief justice of the Arkansas Supreme Court the same year in which Quillin resigned as circuit court judge, relinquished "a lucrative practice, worth, probably, double the salary attached to the office to which he has been elected").

298. Quillin married Susan Lock in 1847. *See* ARKANSAS MARRIAGES: EARLY TO 1850, at 180 (Jordan R. Dodd ed., 1990). Susan died the following year in 1848. *See* Margaret Smith Ross, *The Conway-Bradley Family Cemetery Near Bradley, Arkansas*, 1 ARK. FAM. HISTORIAN 1, 18–19 (1963). In 1850, two years after Susan's death, John Quillin is listed as the father of a two-year-old son, suggesting that Susan died in childbirth and the son survived. *See* 1850 CENSUS: Free Inhabitants, *supra* note 38.

299. *See* Editorial, ARK. GAZETTE, July 3, 1858, at 2 (noting that John T. Beardon, whom the editors liked best, had joined the race for judge of the Sixth Judicial Circuit with "Honest John Quillin" and Len B. Green). Len Green won. *See* BIOGRAPHICAL AND HISTORICAL MEMOIRS OF SOUTHERN ARKANSAS, *supra* note 293, at 71 (listing judges and the years in which they were elected).

300. *See* HEMPSTEAD, *supra* note 58, at 781–83 (providing a brief biographical sketch of Samuel Hempstead).

301. *See* Pleasant v. State, 15 Ark. 624, 625 (1855) (listing Hempstead and Quillin as Pleasant's attorneys); Pleasant v. State, 13 Ark. 360, 368 (1853) (listing Hempstead as Pleasant's attorney).

the Arkansas bar. In 1845, at the age of twenty-nine, he was appointed reporter of the Arkansas Supreme Court, a position he held until 1854 when Hempstead succeeded him;[302] in 1846, he was chosen to make a digest of the laws of the State, which he published in 1848;[303] and in 1854, he was elected chief justice of the Arkansas Supreme Court, where he was regarded as "one of the best judges [the court] ever had."[304] While English was still a practicing attorney, Quillin would write to him about Pleasant, asking him to bring his considerable influence to the case and help see that Pleasant's first appeal did not "go off on a quibble."[305] Not only did he apparently do so, but English wrote the opinion on the second appeal, granting yet another reversal.[306]

In light of the rigor with which Quillin would come to litigate Pleasant's case, it is tempting to cast him as a social reformer, an enlightened lawyer striving to improve the conditions of slaves and perhaps even sympathetic to the abolitionists' cause. In fact, the opposite is a more accurate description. Much like James Milton, John Quillin appears to have been a staunch defender of the South and all it stood for. Not only was he a slaveholder, but several years after Pleasant's trial he found himself on the losing end of a lawsuit in which he unabashedly sought to deny nineteen blacks their freedom.[307] Quillin, along with another man, evidently had purchased the slaves from William Averett after Averett's uncle had tried to free the slaves *in futuro* in his will.[308] With Hempstead arguing on his behalf, Quillin took the drastic position that, after the passage of an 1858 law, no slaves—including those who had been promised the gift

302. *See* Editorial, *For the Arkansas State Gazette*, ARK. GAZETTE, Jan. 20, 1845, at 2 (noting that English had been appointed reporter of the supreme court); *see also* James H. Rice & Kathryn Donham Rice, *Elbert Hartwell English: Lawyer, Chief Justice, Educator, Grand Master*, 36 PULASKI COUNTY HIST. REV. 26, 27 (1988) (noting the dates he held the position). English was born in March 1816. *Id.* at 26.

303. *See Elections by the General Assembly*, ARK. GAZETTE, Dec. 19, 1846, at 2 (stating that English had been elected digester).

304. *See* Rice & Rice, *supra* note 302, at 27; *see also Election of Supreme Judge*, ARK. GAZETTE, Dec. 22, 1854, at 2 (noting the election of English to the court).

305. First Quillin Letter, *supra* note 292.

306. *See Pleasant*, 15 Ark. at 626 (listing English as author).

307. *See* Phebe v. Quillin, 21 Ark. 490, 495 (1860) (noting that Quillin, along with Thomas Sledge, was "charged to be holding them [the nineteen slaves] in a state of slavery with intent to make that condition permanent"). The 1860 census lists John "Quillian" as the owner of one male slave and two female slaves. *See* 1860 CENSUS: Slave Inhabitants, *supra* note 106.

308. *See Phebe*, 21 Ark. at 495 (detailing terms of will and noting that Quillin and Sledge had bought the slaves from William Averett, nephew of deceased).

of freedom in a will—could be emancipated in the State.[309] Failing that, he argued that all *future* gifts of freedom were invalid and contrary to public policy.[310] The Arkansas Supreme Court rejected both arguments and held that the slaves were entitled to their freedom under the terms of the will.[311]

It thus seems safe to conclude that James Milton, when he hired John Quillin to represent Pleasant, settled on a man well versed in both the law and the Southern way of life. John Quillin was no antislavery advocate; he assuredly viewed blacks as genetically inferior and bound to obey white men in every respect. But, as a Southern man and a slaveholder, he also understood the importance of honor, family, and the rights and obligations of a master and man. Perhaps the members of the jury and the courtroom observers also understood the stakes at issue: a prominent member of the community had one of his slaves accused of a serious crime, and a respectable attorney was there to represent him.

III. THE TRIAL

A. Sex and Race

The men and women who had journeyed to court during the week of Pleasant's trial likely had plans to make the most of their experience. El Dorado itself was now a bustling commercial and political center, with doctors and lawyers, grocers and bakers, hoteliers and tavern keepers, and no doubt many of Union County's residents were looking forward to the opportunity to drink and gossip and argue with their friends and neighbors.[312] Flushed with alcohol and the spirit of the occasion, "shouts and cheers of wild merriment" may have even greeted some of the onlookers as they made their way to the courthouse square.[313] Built by William Davis, a potential juror in Pleasant's case, the square stood as a shining example of the years of hard work and steely resolve of the original settlers, who had carved a community out of the Arkansas backwoods in a decade or

309. *See id.* at 494–95.

310. *See id.* at 494.

311. *See id.* at 499 (dismissing the case as prematurely brought, but noting that the slaves would be entitled to their freedom after seven years in accordance with the wishes of the testator).

312. *See* 1850 CENSUS: Free Inhabitants, *supra* note 38 (listing occupations of residents of El Dorado: Robert Buron (doctor); L. Cronkwright (dentist); Richard Lyon (lawyer); A.J. Hagler (grocer); R. Cornish (baker); James Capers (hotelier and tavern keeper)).

313. *See* GERSTÄCKER, *supra* note 164, at 31 (describing the scene upon arriving at a frontier town in Arkansas during court week).

less.[314] It consisted of a fence with "good heart white oak posts," dressed "perfectly smooth," and four gates made of pine.[315] There was also a walkway made of "good well burned brick" passing in front of the courthouse.[316]

On the docket during the week of Pleasant's trial were a variety of cases. On Tuesday, April 13, Cyrius Sargent appeared before Judge Watson to plead guilty to the charge of Sabbath-breaking.[317] Later that afternoon, Stephen Smith was tried and found not guilty of illegal gambling, despite the prosecution's allegation that he had been playing cards with, among others, another of the jurors in Pleasant's case: Hengust Norsworthy.[318] But it was Pleasant's case that undoubtedly piqued the interests of the residents of Union County. After all, while Smith's card game and its attendees may have added grist to the rumor mill, and Sargent's crime of Sabbath-breaking may have irked some of the more religious types, they both paled in comparison to the real-life drama of a slave accused of raping a white woman. Perhaps for this reason it was no coincidence that Pleasant's trial was held on a Saturday—April 17, 1852—when most of the community could have attended.[319]

Of those who had come to see his trial, moreover, undoubtedly all would have been conscious of the social taboos involved with interracial sex. Indeed, sex and marriage between whites and blacks, whether slave or free, was against the law in most Southern states.[320] Typically, as it did with many of the laws governing slaves and slavery, Virginia led the way on this issue. In 1662, as slavery was just beginning to take hold in the colony, the legislature passed a law doubling the usual fine for fornication when one of the partners was black and the other white, sending a clear message to the early

314. *See* Union County Court Records, Book D, *supra* note 201, at 31 (Feb. 8, 1852) (setting forth a description of the courthouse and noting William Davis's role in its construction) (on file with the North Carolina Law Review).

315. *Id.*

316. *Id.*

317. Union County Circuit Court Records, Book E, *supra* note 189, at 96 (Apr. 13, 1852) (on file with the North Carolina Law Review).

318. *Id.* at 100. Evidently, the case against Smith fell apart when both of the State's witnesses, including Hengust Norsworthy, refused to testify for fear of incriminating themselves. *Id.* at 101.

319. *Id.* at 120.

320. *See* Emily Field Van Tassel, *"Only the Law Would Rule Between Us": Antimiscegenation, the Moral Economy of Dependency, and the Debate over Rights After the Civil War*, 70 CHI.-KENT L. REV. 873, 900 & n.116 (1995) (identifying Mississippi, Alabama, South Carolina, and Georgia as the four states that did not ban interracial marriages before the Civil War).

settlers that sex between the races was particularly distasteful.[321] By 1691, the legislature's disdain for men and women crossing the color line had become even more pronounced. In a law outlawing interracial marriages, the legislature spoke out against "that abominable mixture and spurious issue" as grounds for its prohibition.[322] Other states quickly followed suit, and Arkansas was no exception. In its statutory code, "[a]ll marriages of white persons with negroes or mulattoes" were declared "illegal and void."[323]

Yet, despite these legal prohibitions, no one living in the antebellum South, including Arkansas, could fail to notice that blacks and whites were sexually intimate. Even for those with no personal involvement, the sheer number of people with light brown skin and soft, wavy hair, would have provided the most obvious indicator. In fact, one could hardly open the pages of a newspaper, including the *Arkansas Gazette*, without finding some reference to a runaway with blond hair and blue eyes. Henry was just such a person. A "very bright *Mulatto*," his owner offered $100 for anyone who could find the "sandy"-haired fugitive, warning his would-be captors that Henry was probably "passing himself for a *White*" man.[324] The same was true of Sally, who had run off with her husband, a "bright mulatto."[325] Sally was described as "nearly white," with "straight hair and large eyes," who was "doubtless" passing herself "for a white woman and as the mistress of the man."[326]

By 1860, "mulattoes" (the indiscriminate term used for those possessing some mixture of white and black ancestry)[327] officially numbered just over a half million in the slave states, or, stated differently, they represented approximately one in eight persons of color.[328] But there are so many reasons to distrust this number that, at

321. *See* Act of Dec. 1662, Act XII, *in* 2 HENING'S STATUTES AT LARGE, *supra* note 30, at 170 (declaring, in relevant part, that "if any christian shall commit fornication with a negro man or woman, hee or shee soe offending shall pay double the [usual fine]").

322. Act of Apr. 1691, Act XVI, *in* 3 HENING'S STATUTES AT LARGE, *supra* note 30, at 86 ("An act for suppressing outlying Slaves.").

323. STATUTES OF ARKANSAS, *supra* note 10, ch. 102, § 4, at 706.

324. Sam M. Johnson, *$100 Reward*, ARK. GAZETTE, Dec. 13, 1850, at 3 (advertising a reward for the return of a runaway slave).

325. J.A. Neilson, *$100 Reward*, ARK. GAZETTE, Mar. 9, 1855, at 3 (advertising a reward for the return of a runaway slave).

326. *Id.*

327. *See* Gillmer, *supra* note 29, at 559–60 (discussing meanings and significance of terms used to describe people of mixed-race descent).

328. The total population of people of color in the slaveholding states and Washington, D.C., in 1860 was 4,215,614. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, NEGRO POPULATION IN THE UNITED STATES 1790–1915, at 220 (1918) [hereinafter

best, it can serve as only a rough—indeed vastly conservative—estimate. Simply put, the number was based entirely on appearance, and thus it does not take into account the untold many who were passing as white or the countless others who looked "black."[329] The percentage of mixed-race persons was higher in the Upper South than in the Lower South, with Arkansas falling about in the middle.[330] But, regardless of the actual number, it seems clear enough that the attempts of some of slavery's most ardent defenders to dismiss or downplay the amount of sexual contact between blacks and Southern whites need not be believed.[331] Their more honest contemporaries knew better. As one put it, "the practice was not occasional or general," but "universal."[332]

Unsurprisingly, white men were the primary instigators in many of these encounters. Indeed, travelers passing through the South were often struck with the frequency with which white men took advantage of their slave women. Frances Kemble, for example, found in her stay on a Georgia plantation in the late 1830s that "almost every Southern planter has a family ... of illegitimate colored children."[333] Frederick Olmsted, too, encountered one planter in

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NEGRO POPULATION]. Of those, 3,697,265 were listed as black, and 518,349 were listed as mulatto. *See id.*

329. *See* STAMPP, *supra* note 112, at 351 & n.9 (stating that the number of people classified as "mulattoes" was "certainly an underestimate" because it was based on appearance); *see also* Gillmer, *supra* note 29, at 595–619 (discussing freedom suits involving contested racial identity).

330. All told, of the 111,259 people of color in Arkansas in 1860, 97,123 were listed as black and 14,136 as mulatto, or 12.7%. *See* NEGRO POPULATION, *supra* note 328, at 220. This was slightly above the percentage for the slaveholding states as a whole, which stood at 12.3%. *See id.* (breaking down populations for slave states). At close to 38%, Washington, D.C., had the highest concentration of mulattoes, followed by Kentucky (20.1%), Missouri (19.9%), Virginia (17.0%), Tennessee (14.8%), and Maryland (14.6%). *Id.* South Carolina had the smallest concentration with 6.9%, followed in increasing order by Alabama (8.32%), Georgia (8.35%), Mississippi (8.5%), and Florida (9.4%). *Id.* The remaining slave states, like Arkansas, stood at or slightly above the average: Delaware (13.8%), Texas (13.8%), Louisiana (13.6%), and North Carolina (12.4%). *Id.*

331. James Henry Hammond, for example, dismissed the accusations of "licentiousness" as "grossly and atrociously exaggerated." James Henry Hammond, Letter to an English Abolitionist (1845), *in* THE IDEOLOGY OF SLAVERY, *supra* note 267, at 182. In doing so, Hammond evidently forgot that he had fathered several children with his slaves. *See* DREW GILPIN FAUST, JAMES HENRY HAMMOND AND THE OLD SOUTH 86–87 (William J. Cooper, Jr. ed., 1982) (describing Hammond's relationship with two of his female slaves).

332. FREDERICK LAW OLMSTED, THE COTTON KINGDOM: A TRAVELLER'S OBSERVATIONS ON COTTON AND SLAVERY IN THE AMERICAN SLAVE STATES 240 (Arthur M. Schlesinger ed., Alfred A. Knopf 1953) (1861).

333. FRANCES ANNE KEMBLE, JOURNAL OF A RESIDENCE ON A GEORGIAN PLANTATION IN 1838–1839, at 15 (Afro-Am. Press 1969) (1863).

Louisiana who insisted that there was not "a likely-looking black girl in this State that is not the concubine of a white man."[334] Men of every social and cultural level engaged in the practice, from the poorest overseer to the wealthiest grandee. From simple seduction in some cases, to force and violence in most, it appears that sexual relations with slave women were an accepted part of Southern life.[335] "I don't know nothin' bout my father," one former slave from Union County reported, doubtless expressing a fate that many other slaves shared.[336] "They said he was a white man."[337]

A number of white women at the time evidently saw themselves as the principal victims of these relationships. As one Virginia woman confided in a letter:

> "The white mothers and daughters of the South have suffered under it for years—have seen their dearest affections trampled upon—their hopes of domestic happiness destroyed, and their future lives embittered, even to agony, by those who should be all in all to them, as husbands, sons, and brothers."[338]

Yet no one would doubt now that it was anyone but black women who suffered the most. Whether it was a young man out on a lark, an overseer prowling about in the quarters, or an older master satisfying an immediate sexual urge, black women rarely had a choice in the matter, and they often could do little to resist.[339] As one former slave from Arkansas recalled, slave women had "no chance to run off or ever get off, you had to stay and take what come."[340] Alice Bratton of

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334. OLMSTED, *supra* note 332, at 240.

335. CATHERINE CLINTON, PLANTATION MISTRESS: WOMAN'S WORLD IN THE OLD SOUTH 211 (1982) (noting that white men were expected, not to refrain from, but to conceal their affairs with slave women); WYATT-BROWN, *supra* note 22, at 296–98 (discussing white Southern attitudes toward sex with black women).

336. Interview by Bernice Bowden with Bob Benford, in Pine Bluff, Ark., *in* 8 THE AMERICAN SLAVE, *supra* note 56, pt. 1, at 146, 147.

337. *Id.*

338. OLMSTED, *supra* note 332, at 239 (quoting "Mrs. Douglas, a Virginia woman").

339. It is commonly understood that rape of a slave woman, at least by a white person, was not a crime; indeed, there is not a single appellate case from the slave South involving an accusation of rape or attempted rape of a black woman, slave or free, by a white man. *But see* George v. State, 37 Miss. 316, 317 (1859) (involving the alleged rape of a slave by another slave). In his influential treatise on slavery, Thomas R.R. Cobb insisted, disingenuously, that "[t]he occurrence of such an offence [rape of a slave woman by a white man] is almost unheard of; and the known lasciviousness of the negro, renders the possibility of its occurrence very remote." THOMAS R.R. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA 100 (Paul Finkelman & Kermit L. Hall eds., Univ. of Ga. Press 1999) (1858).

340. Interview by Nancy Irene Robertson with Nancy Anderson, in West Memphis, Ark., *in* 8 THE AMERICAN SLAVE, *supra* note 56, pt. 1, at 49, 51.

Wheatley, Arkansas, echoed these words when she explained how her mother was "overcome" by her father, a white man.[341] "I don't remember the man," she said, "but mama told me how she got tripped up and nearly died and for me never to let nobody trip me up that way."[342] Harriet Jacobs, the escaped slave who had fought off the advances of her master for years, would come to offer one of the most poignant commentaries on the matter. "No matter whether the slave girl be as black as ebony or as fair as her mistress," she wrote, "there is no shadow of law to protect her from insult, from violence, or even from death."[343]

Yet, within this oppressive and brutal regime, relationships of a more substantial sort did emerge. Francis Hall lived for a number of years with Marcelette Marceau, a free woman of color, and she reportedly acted as the "mistress" of the house and had "a great deal of influence over him."[344] David Isaacs and Nancy West, a free mulatto woman, likewise developed a long-lasting relationship; they "occupied the same chamber, ate at the same board, and discharged towards each other the numerous common offices of husband and wife."[345] Former slaves also recalled similar instances of affectionate ties between the races. One ex-slave from Arkansas, for example, described how his white father was "a fool" about his mother.[346] Another recalled how a white overseer and a slave woman had five children together, and how the overseer "built dem a good house" and took care of them until "de chillum done grown an' de woman she dead."[347]

Nor would the men and women who journeyed to watch Pleasant's trial have been immune from such cases. Perhaps some had heard of the escalating dispute over the will of Allen Wilkins in nearby Lafayette County, in which he freed his "negroe [sic] woman Sarah Jane and her child John," and asked that they be "provided for in a proper and suitable manner."[348] Whether it was love or

341. Interview by Irene Robertson with Alice Bratton, in Wheatley, Ark., *in* 8 THE AMERICAN SLAVE, *supra* note 56, pt. 1, at 249, 250.

342. *Id.*

343. HARRIET A. JACOBS, INCIDENTS IN THE LIFE OF A SLAVE GIRL: WRITTEN BY HERSELF 27 (Jean Fagan Yellin ed., Harvard Univ. Press 1987) (1861).

344. Heirn v. Bridault, 37 Miss. 209, 215–16 (1859).

345. Commonwealth v. Isaacs, 26 Va. (5 Rand.) 634, 635 (1826).

346. Interview by Samuel S. Taylor with Thomas Ruffin, in Little Rock, Ark., *in* 10 THE AMERICAN SLAVE, *supra* note 56, pt. 6, at 97, 97.

347. Interview by Watt McKinney with Jeff Davis, in Marwell, Ark., *in* 8 THE AMERICAN SLAVE, *supra* note 56, pt. 2, at 117, 119.

348. *See* Transcript of Trial, Abraham v. Wilkins, *supra* note 36, at 4–5. The case was first brought in circuit court in April 1852, the same term as Pleasant's case, with Judge

something short of it, the "general report in the neighborhood" was that Wilkins kept Sarah Jane "as his concubine . . . and had a child by her."[349] Others may have known or heard of someone like Gilbert Barden of Pulaski County or James Dunn of Hempstead County. When Barden died, he attempted to free and provide for "Harriet, a woman of black complexion," and her two children, both of "yellow complexion."[350] While the appellate record is devoid of any direct references to Barden's relationship with Harriet, those familiar with the case no doubt understood full-well the situation. Dunn was not so discreet; he had hired the slave woman Mourning from a man named Moss, and in time she gave birth to a daughter named Eliza.[351] At "divers times, and to divers persons" Dunn publicly acknowledged Eliza as his child, and at one point, perhaps at the insistence of Mourning, tried to purchase Eliza from her owner.[352] And even the most obtuse person could read into John Thornton's ad for his runaway slave, Dilcey Ann, published in the *Arkansas Gazette* the week before Pleasant's trial. The twenty-two-year-old slave was "taken" by a twenty-five-year-old white man—undoubtedly her lover—named John Woods.[353] This couple proved particularly resourceful; before making good their escape, he commandeered one of Thornton's horses and she outfitted herself with "one checked silk, one red-flowered barege, and several gingham, calico, and blue-striped Northern homespun frocks."[354]

Of course, black-white relationships of the type described above never would win social approval in the slave South, as Charles Leadbetter from Ouachita County, Arkansas, would come to find out. Leadbetter, a teacher with apparent liberal leanings, was run out of town after he was caught writing "a piece of sentimental poetry for a negro woman."[355] Local authorities would also step in when they found a man named Jones "cohabiting with and keeping a female slave named Eveline," whom he did not own;[356] and they would do the same when they discovered Noah Smitherman and Tempe

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Watson presiding. *Id.* at 7. The case was postponed until the next term of the court because of a procedural error. *Id.* at 9.

349. *Id.* at 55.

350. Harriet v. Swan, 18 Ark. 495, 499 (1857).

351. Moss v. Sandefur, 15 Ark. 381, 382–83 (1854).

352. *Id.*

353. John Thornton, *Five Hundred Dollars Reward*, ARK. GAZETTE, Apr. 9, 1852, at 3 (advertising a reward for the return of a slave).

354. *Id.*

355. *Tampering with Slaves*, ARK. GAZETTE, Oct. 11, 1850, at 2.

356. Commonwealth v. Jones, 43 Va. (2 Gratt.) 555, 556 (1845) (emphasis omitted).

Manerd, a free mulatto woman, "living together" in an apparently stable relationship.[357] But the point is that relationships of a more substantial sort did happen, and they happened with enough frequency that one judge refused to declare insane a Kentucky man who "evinced an inclination to marry the slave, Grace, whom he liberated."[358] Such sentiments, the court reasoned, were simply "too common, as we all know."[359]

In light of the range of human emotions expressed by the white men and black women who engaged in interracial relationships, it should come as little surprise that white women and black men could and did desire each other as well. In fact, as early as 1681, the Maryland legislature was fretting over white women who, "to the Satisfaccõn of theire Lascivious & Lustfull desires," married black men.[360] But the laws that it passed and the others that followed would never stop the two groups from becoming intimate with each other. Judicial records left behind, for example, indicate that a number of white men tried to divorce their wives after learning that they had engaged in sexual relations with black men. In one such case, the distraught husband discovered the infidelity after his wife, five months into the marriage, gave birth to a "mulatto child."[361] In another, the wife "went away and lived in adultery with a certain negro slave," announcing that "she loved him better than anybody in the world."[362] In Virginia, where divorces were granted by the legislature and not the courts, one man sought to end his marriage after his wife gave birth to a mixed-race child with apparently no regrets; as he put it, she was "so bold as to say it was begotten by a negro man slave in the neighborhood."[363] Yet another sought a divorce after he returned home one night to find his wife "undressed,

357. Smitherman v. State, 27 Ala. 23, 23 (1855).

358. Patton's Heirs v. Patton's Ex'rs, 28 Ky. (5 J.J. Marsh.) 389, 389 (1831).

359. *Id.* (noting that white men sometimes cared for both mulatto children and their slave mothers).

360. *See* An Act of Aug./Sept. 1861, *in* 7 ARCHIVES OF MARYLAND: PROCEEDINGS AND ACTS OF THE GENERAL ASSEMBLY OF MARYLAND 203–04 (William Hand Browne ed., Baltimore, Md. Hist. Soc'y 1889) ("An Act concerning Negroes & Slaves").

361. Scroggins v. Scroggins, 14 N.C. (3 Dev.) 535, 535 (1832); *see also* Whittington v. Whittington, 19 N.C. (2 Dev. & Bat.) 64, 71 (1836) (regarding a husband who sought divorce after his wife gave birth to a mixed-race child); Barden v. Barden, 14 N.C. (3 Dev.) 548, 548–49 (1832) (same).

362. Walters v. Jordan, 35 N.C. (13 Ired.) 361, 362 (1852).

363. JAMES HUGO JOHNSTON, RACE RELATIONS IN VIRGINIA & MISCEGENATION IN THE SOUTH, 1776–1860, at 250–51 (1970) (citing Archives of Va., Legis. Papers, Petition 4472, Fluvanna County (Dec. 13, 1802)).

and in bed with a certain Aldrige Evans, a man of color."[364] Other interracial couples like Ms. Suttles and a free man of color named Alfred Hooper, bypassed social conventions altogether, and lived together for ten years "as man and wife."[365]

As with the more open and substantial relationships between white men and black women, intimate relations between white women and black men were never socially acceptable in the slave South.[366] But what seems remarkable in light of the violent reactions of their postbellum counterparts, is the measured response with which antebellum Southerners greeted these couplings. Many women were assuredly brushed to the fringes of acceptable society, and a few may have been prosecuted for violations of the antimiscegenation laws,[367] but an untold number probably continued on with their lives without much interruption from outside sources. Gary Mills has documented over forty "open and stable" interracial unions involving white women in Alabama from the early 1800s until the Civil War, and an even larger number of clandestine ones.[368] His research also revealed that the total number of mulatto births to white mothers in Alabama peaked between 1840 and 1850, doing much to refute the notion that these relationships would have tapered off as the country approached the Civil War.[369] Some, like Girard Hansford, a free man of color, even voluntarily brought their relationships with white women into the public eye during the period, with evidently no fear of reprisal. In a strange but perfectly consistent twist on the divorce cases, Hansford filed suit in a court of law in an attempt to end his marriage after his white wife gave birth to a white child, clearly not his own.[370]

To the extent that antebellum Southerners did comment on relationships between white women and black men, the dominant

364. *Id.* at 254 (citing Archives of Va., Legis. Papers, Petition 5370, Amherst (Dec. 6, 1809)).

365. *See* State v. Hooper, 27 N.C. (5 Ired.) 201, 201 (1844).

366. *Cf.* HODES, *supra* note 25, at 3 (using the word "toleration" to describe how Southerners greeted relationships between white women and black men).

367. For prosecutions under state antimiscegenation laws, see State v. Melton, 44 N.C. (Busb.) 49, 49 (1852); State v. Brady, 28 Tenn. (9 Hum.) 74, 74 (1848); State v. Hooper, 27 N.C. (5 Ired.) 201, 201 (1844); State v. Watters, 25 N.C. (3 Ired.) 455, 455 (1843); State v. Fore, 23 N.C. (1 Ired.) 378, 379 (1841).

368. *See* Gary B. Mills, *Miscegenation and the Free Negro in Antebellum "Anglo" Alabama: A Reexamination of Southern Race Relations*, 68 J. AM. HIST. 16, 22 (1981). Although Alabama's laws regarding mixed-race relationships were relatively permissive compared to those of other antebellum Southern states, Mills's research demonstrates that interracial relationships were not uncommon. *See id.* (noting Alabama's relatively permissive laws regarding interracial relationships).

369. *See id.* at 26.

370. Hansford v. Hansford, 10 Ala. 561, 561 (1846).

theme seems to be one of disgust rather than violence. "[T]here is something so revolting in the idea of this mixture of races," the editors of the *Arkansas True Democrat* opined, "that the contemplation of it would sicken any female of delicacy."[371] One male judge from Arkansas agreed; only those women who had "sunk to the lowest degree of prostitution," he was certain, would engage in the practice.[372] Yet the simple truth is that white women from all walks of life developed relationships with black men. In Tennessee, Louisa Scott and Jesse Brady, "a mulatto man," lived together as "man and wife."[373] In North Carolina, Susan Chesnut and Joel Fore, a free person of color, did the same.[374] And in Arkansas, a wealthy mistress took a "young and stalwart" slave for a lover.[375] After the two killed the woman's husband—some said in self-defense—she "averred that she had rather lose all else she possessed than the negro."[376]

Of course, white women who had children with black men did more to disrupt the Southern social order than white men who fathered children with black women. This was because in every Southern state the child's status as slave or free was determined by the mother.[377] Thus, while slave women could give birth only to slave children, white women gave birth to free children of African ancestry, disrupting the equation between color and slavery upon which the Southern order so much depended. Such was enough for one man to erupt, "As long as there are Negro slaves in Virginia, and bad white women, we shall have a mulatto population free."[378] But the outspoken critics of the practice were not enough to stop the local theater in the nearby town of Camden, Arkansas, from putting on a

371. *Uncle Tom's Cabin*, ARK. TRUE DEMOCRAT, May 24, 1853, at 2.

372. Pleasant v. State, 15 Ark. 624, 644 (1855).

373. State v. Brady, 28 Tenn. (9 Hum.) 74, 74 (1848).

374. State v. Fore, 23 N.C. (1 Ired.) 378, 378–79 (1841) (finding that defendants had "bedded and cohabited together as man and wife, and had one child without parting").

375. Letter to the Editor, ARK. GAZETTE, May 19, 1860, at 2 (stating that Mullins, the woman's husband, "had a considerable amount of money").

376. *Id.*

377. Virginia first enacted this rule, known as *partus sequitur ventrem*, in 1662. The law provided:

> Whereas some doubts have arrisen [sic] whether children got by any Englishman upon a negro woman should be slave or ffree, [sic] *Be it therefore enacted and declared by this present grand assembly*, that all children borne [sic] in this country shalbe [sic] held bond or free only according to the condition of the mother . . . .

Act of Dec. 1662, Act XII, *in* 2 HENING'S STATUTES AT LARGE, *supra* note 30, at 170.

378. JOHNSTON, *supra* note 363, at 264 n.61 (citing *A Friend to Humanity*, RICHMOND ENQUIRER, Feb. 24, 1859).

production in which an actor dressed in blackface crawled into bed just as a white woman was leaving it, and later embraced "very closely" another white woman.[379] While the editors of the *Ouachita Herald* may have thought the play indiscreet—especially considering that "Negroes were in attendance"[380]—the thunderous laughter that no doubt ensued indicates quite plainly that such alliances occurred much more frequently than the guardians of the social order would have liked to admit.

Even the accusation of rape did not provoke the extreme hysteria of later years. Here, it will not do simply to cite legislative enactments providing the death penalty for slaves accused of raping white women as proof of white attitudes.[381] Slaves suffered harsh penalties, including death, for too many crimes to rely on the "law as written" as an accurate reflection of contemporary white attitudes on the subject.[382] A better indicator comes from the courts, where community members, as judges, juries, and witnesses, were called upon to resolve the accusations when they did arise. Within this framework, two generalizations seem inescapable. First, compared to other crimes, prosecutions for rape and attempted rape of white women by black men did not occur often.[383] Second, compared to the

379. *The Theatre*, OUACHITA HERALD, Apr. 7, 1859, at 2, *microformed on* Camden Misc. Newspapers, Roll 1 (collection of Ark. Hist. Comm'n) (on file with the North Carolina Law Review).

380. *Id.*

381. *Cf.* Diane Miller Somerville, *Rape, Race, and Castration in Slave Law in the Colonial and Early South*, *in* THE DEVIL'S LANE: SEX AND RACE IN THE EARLY SOUTH 74, 75 (Catherine Clinton & Michele Gillespie eds., 1997) (pointing out the "fallibility and inadequacy of relying solely on statutory law to draw conclusions about the extent to which the white male population was animated by deep-seated fears of black male sexuality").

382. In Arkansas, slaves could be put to death for a number of offenses, from murder, to treason, to stealing for a second time horses, mares, mules, or other slaves. STATUTES OF ARKANSAS, *supra* note 10, ch. 51, pt. III, § 2, at 322; *id.* ch. 51, pt. XII, §§ 8, 16, at 380–81. There was also evidently nothing to prevent a court from imposing death (or at least severe punishment) on slaves convicted of a number of offenses which specified no maximum penalty. *See, e.g.*, *id.* ch. 51, pt. XII, §§ 10 (maiming), 11 (kidnapping), 12 (arson), 13 (burglary), 14 (robbery), 15 (larceny). In other states, slaves could be executed for such things as poisoning, robbery, arson, and battery. *See* STAMPP, *supra* note 112, at 210–11 (noting capital offenses for slaves).

383. *Cf.* GENOVESE, *supra* note 26, at 33 (concluding that "[r]ape and attempted rape of white women by black men did not occur frequently"); MORRIS, *supra* note 10, at 304 (recognizing that, while there is disagreement as to why, "the number of actual rapes or attempted rapes brought before the courts was small"). Michael Hindus's exhaustive study of the trial records of 1,076 cases involving slaves and free blacks for two upcountry South Carolina districts for the period 1818–1860 provides one example. *See* Hindus, *supra* note 219, at 582–83 & tbl.2. His study reveals that only eleven—or 1.1%—of the trials were for sexual offenses. *Id.* at 583 tbl.2. By far, the most commonly prosecuted

outrages of the late nineteenth and early twentieth centuries, antebellum Southerners appear to have approached these accusations with relative calm.[384] To be sure, some court records indicate that the defendant was convicted on flimsy evidence and uncertain testimony. There was the case from North Carolina, in which the court upheld the slave's conviction despite considerable evidence of a consensual relationship.[385] There was also the case from Alabama, where the court held that the defendant could be convicted of attempted rape even though he never got closer than "ten steps" to the alleged victim.[386]

But in other cases, the courts without hesitancy overturned convictions on grounds both substantive and technical. Courts threw out cases because of problems in the indictments,[387] faulty jury instructions,[388] impermissible delays in the trial,[389] evidentiary errors,[390] coerced confessions,[391] and insufficient evidence.[392] In fact,

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offenses were property crimes (43.3%). *Id.* These were followed by crimes against persons, including murder and assault (12.3%), crimes of "slave status," like harboring a runaway (11.7%), and crimes against morals, including gambling and drinking (10%). *Id.*

384. Other scholars, including Eugene Genovese, Martha Hodes, and Diane Miller Somerville, have reached similar conclusions. *See supra* notes 25–26 and accompanying text (noting these scholars' disagreement with some of the more traditional assumptions).

385. *See* State v. Jefferson, 28 N.C. (6 Ired.) 305, 305–06, 309 (1846) (noting how victim admitted that she had allowed defendant in the past "to put his hands on her in a free and familiar manner").

386. *See* Lewis v. State, 35 Ala. 380, 384, 389–90 (1860) (remanding for jury determination of whether the defendant "intended and attempted" to commit rape).

387. *See, e.g.*, State v. Sam, 60 N.C. (1 Win.) 300, 301 (1864); State v. Cherry, 31 Tenn. (1 Swan) 160, 164 (1851); Sydney v. State, 22 Tenn. (3 Hum.) 478, 478–80 (1842); Grandison v. State, 21 Tenn. (2 Hum.) 451, 452 (1841); State v. Jesse, 19 N.C. (2 Dev. & Bat.) 297, 300–01 (1837); State v. Martin, 14 N.C. (3 Dev.) 329, 329–30 (1832); State v. Jim, 12 N.C. (1 Dev.) 142, 142–44 (1826); Commonwealth v. Mann, 4 Va. (2 Va. Cas.) 210, 210 (1820); State v. Dick, 6 N.C. (2 Mur.) 388, 388–89 (1818).

388. *See, e.g.*, Cato v. State, 9 Fla. 163, 184–85 (1860); State v. Oscar, 52 N.C. (7 Jones) 305, 307–09 (1859); Lewis v. State, 30 Ala. 54, 56 (1857); State v. Henry, 50 N.C. (5 Jones) 66, 66–67 (1857); Dick v. State, 30 Miss. 631, 633–34 (1856); Wyatt v. State, 32 Tenn. (2 Swan) 394, 398–99 (1852); State v. Jim, 12 N.C. (1 Dev.) 508, 510–13 (1828).

389. *See* State v. Phil, 1 Stew. 31, 32–33 (Ala. 1827).

390. *See, e.g.*, Lewis v. State, 35 Ala. 380, 385 (1860); State v. Peter, 14 La. Ann. 521, 523 (1859); Dick v. State, 30 Miss. 631, 632–33 (1856); State v. Jim, 48 N.C. (3 Jones) 348, 349, 351–52 (1856).

391. *See* State v. Gilbert, 2 La. Ann. 244, 246 (1847).

392. *See, e.g.*, Major v. State, 36 Tenn. (4 Sneed) 597, 608–14 (1857) (reversing conviction where alleged victim's testimony contained a number of inconsistencies and half-truths); Major v. State, 34 Tenn. (2 Sneed) 11, 17 (1854) (previous appeal finding that the "identity of the prisoner with the person who committed the assault is a point on which, as it seems to us, more full and satisfactory proof may be adduced"); Green v. State, 23 Miss. 509, 513 (1852) (reversing conviction where prosecution failed to prove offense took place within county alleged in indictment); Peter v. State, 24 Tenn. (5 Hum.) 436, 440 (1844) (reversing conviction for "assault" on white woman where record did not

of the fifty published cases for rape or attempted rape of a white woman by a slave consulted for this Article, over half—thirty in total—either affirmed a judgment for the defendant or reversed his conviction.[393] In one representative case from Arkansas, the court held that, in addition to procuring a faulty indictment, the prosecution failed to prove that the slave Joe Sullivant was the one who had attempted to rape Emeranda Clemens.[394] Whether it was because Emeranda first identified another (white) man as the perpetrator,[395] whether it was because Joe's confession was obtained only after Emeranda's husband administered a severe whipping,[396] or whether it was because the only evidence linking Joe to the scene of the crime was a footprint in the dirt that supposedly matched his own,[397] the same court that would twice overturn Pleasant's convictions found that Emeranda's "loose and unsatisfactory" testimony was wholly insufficient to sustain a guilty verdict.[398] In another Arkansas case, the court overturned the conviction of the slave Charles on the grounds that he never intended to use force.[399] The court accepted as true that Charles entered a bedroom in which fourteen-year-old Almyra Combs slept alongside four other girls, and that Charles "took hold of her by the shoulders and tried to turn her over."[400] But it nevertheless concluded that the idea of force never entered into

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satisfy court "as to the character of the acts committed or intended by the prisoner"); Henry v. State, 23 Tenn. (4 Hum.) 270, 272 (1842) (finding no evidence that the alleged victim was white).

393. This number does not include three other appeals involving slaves accused of rape that involved solely jurisdictional issues. *See* State v. Lewis, 35 S.C.L. (4 Strob.) 47, 48 (S.C. Ct. App. 1849) (dismissing as untimely an appeal of an order granting a new trial); State v. Charles, 1 Fla. 298 (1847) (denying review because there was not a final decision entered in the trial court); State v. Washington, 6 N.C. (2 Mur.) 100, 100 (1812) (discussing jurisdictional questions, including original jurisdiction and right to appeal, in cases involving a slave accused of rape). This number also does not include an additional nine appeals, mostly from Virginia, involving free blacks. *See* State v. McDaniel, 60 N.C. 245, 1 Win. 249 (1864); Smith v. Commonwealth, 51 Va. (10 Gratt.) 734 (1853); Thurman v. State, 18 Ala. 276 (1850); Day v. Commonwealth, 44 Va. (3 Gratt.) 629 (1846); Day v. Commonwealth, 43 Va. (2 Gratt.) 562 (1845); Commonwealth v. Watts, 31 Va. (4 Leigh) 672 (1833); Commonwealth v. Fields, 31 Va. (4 Leigh) 648 (1832); Commonwealth v. Tyree, 4 Va. (2 Va. Cas.) 262 (1821); Commonwealth v. Bennet, 4 Va. (2 Va. Cas.) 235 (1820).

394. Sullivant v. State, 8 Ark. 400, 404–06 (1848).

395. *Id.* at 401 (testifying that she initially alleged that Trout, "a white man," had been the perpetrator).

396. *Id.* at 402 ("[Sullivant] was then whipped by my husband, and he confessed. . . .").

397. *Id.* (noting that Sullivant's foot "fitted the tracks exactly").

398. *Id.* at 408.

399. Charles v. State, 11 Ark. 389, 408–10 (1850).

400. *Id.* at 409.

Charles's "original design."[401] Indeed, as soon as Almyra raised the alarm, Charles alighted from the home.[402]

But what is perhaps most remarkable about these cases is that they even made it into the courts at all. Indeed, in 1892, on facts far less egregious, Lee Walker was mutilated, hanged, and burned in Memphis after he approached two white women and demanded something to eat.[403] In Paris, Texas, in 1893, Henry Smith, "a weak-minded fellow," was burned while yet alive by a surging mob of ten thousand persons based on the mere accusation of an assault on a police officer's daughter.[404] Yet, in 1850, when the evidence was undisputed that Charles, a black man and a slave, was in the bedroom of five teenage girls in the middle of the night, allegedly to have sex with one of them, community members remained calm enough to allow his guilt or innocence to be determined dispassionately in a court of law. No lynching or rush to judgment took place before or after his trial; and, in fact, following his conviction, the jury recommended him to the "mercy" of the court,[405] sending an implicit challenge to the contemporary argument that antebellum Southerners were obsessed with black men raping white women.

Other cases reached a similar result. In Tennessee, the court twice found that the evidence was insufficient to convict the slave Major of attempted rape.[406] This court dismissed the alleged victim's testimony as not credible, pointing to several inconsistencies and implausible occurrences in the young woman's description of the events.[407] But even if the attack did occur as she said, the court doubted whether this was the right man. By her own account, the court noted, the woman "had known the prisoner well from her earliest years," and he "had never, during her life before, attempted a

401. *Id.* at 410.

402. *Id.* at 409.

403. *See* Wells, *supra* note 23, at 112–17 (describing the lynching).

404. *See id.* at 91–98 (describing hysteria).

405. Brief for Prisoner at 24, Charles v. State, 11 Ark. 389 (1850).

406. *See* Major v. State, 36 Tenn. (4 Sneed) 597, 613–14 (1857) (reversing conviction because of insufficient proof); Major v. State, 34 Tenn. (2 Sneed) 11, 17 (1854) (same).

407. *See Major*, 36 Tenn. (4 Sneed) at 608–14. The court stated,

> In examining the proof in this record, there are many circumstances which will strike the candid, unprejudiced mind with some force as being somewhat incompatible with our views and impressions of human nature and human actions and well calculated to excite doubt and distrust of the accuracy of the statements made by the main witness for the prosecution.

Id. at 609.

rude approach toward her."[408] In Florida, the court tossed out the conviction of the slave Cato in part because the issue of force was not kept properly before the jury.[409] From the evidence, it looked to the court like the woman's attacker used "persuasion" rather than force to accomplish his purpose—notwithstanding his earlier threats—because he had "said something about coffee and flour" at some point during the confrontation.[410] If this was a mere ruse for overturning the conviction—the alleged victim, Susan Leonard, was a known prostitute—the court did not say so.[411] But the fact that the court saw fit to spare Cato's life says much about society's attitudes toward black men accused of sexual crimes and the women who accused them.

In short, without attempting to downplay the seriousness of a rape allegation, or even to deny that in some instances, depending on the facts or the victim, the accusation may have provoked outrage in the minds of some, the evidence simply does not support the traditional assumption that antebellum whites, as a general matter, were blinded by the same rape complex as their postbellum counterparts. To the contrary, when a woman like Sophia accused Pleasant of raping her, much like when Susan Leonard accused Cato of his offense, it probably generated more interest and excitement than violence and hysteria. After all, when the twelve jurors sat down to hear Pleasant's case and the members of the community packed the courtroom to listen, they could not have asked for a more exciting trial. It had scandal, intrigue, and all the sordid details of everyday life.

B. Fallen Women and Dishonorable Men

It is difficult to say for certain what the atmosphere inside the courtroom would have been like on the day of Pleasant's trial. But chances are, notwithstanding the intrigue surrounding the case, Judge Watson would have kept the courthouse dignified and subdued. Admittedly, there was a time when an outsider might come into a circuit court in Arkansas "and behold things going on in beautiful disorder," as the clerk pleaded with the "*drunken loafers*" to give him room to write, and the judge, "half sitting and half reclining, engaged

408. *Major*, 34 Tenn. (2 Sneed) at 12–13.

409. *See* Cato v. State, 9 Fla. 163, 184–85 (1860) (holding that juries must be plainly instructed on the distinction between "want of consent" and "force or violence").

410. *Id.* at 185.

411. *See id.* at 165 (noting that the alleged victim and her friend who testified on her behalf "were common prostitutes").

in stiff argument with some looker-on."[412] But such was the scene of "days gone by."[413] Now, men of distinction praised judges capable of "despatching [sic] business rapidly,"[414] who could recite a "clear and forcible" charge to the jury and command respect from the attendees and their court personnel.[415] Decorum was the watchword, and Judge Watson, with his years of experience at the bar, likely demanded much of it.

The attorney charged with prosecuting Pleasant was Edward A. Warren, the chief prosecutor for the Sixth Judicial Circuit.[416] In his mid-thirties, Warren had been practicing law on and off for close to ten years, though he had been prosecuting cases on behalf of the district for only one.[417] The residents of Union County may or may not have known him, for Warren lived in the city of Camden, in bordering Ouachita County.[418] But then again, the talk around town had probably alerted them to his reputation, for Warren, like many Southern men of means and desire, was a man of clear political aspirations. Warren, in fact, had served as a member of both the Mississippi and Arkansas House of Representatives in the 1840s, and he would later represent the citizens of Arkansas in the United States Congress.[419] Warren was also a family man and, like many men of his station, a slaveholder, owning one slave in 1850 and a few more in 1860.[420]

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412. Letter to the Editor, ARK. GAZETTE, Feb. 20, 1852, at 3.

413. *Id.*

414. *The Circuit Court*, OUACHITA HERALD, Apr. 7, 1859, at 2, *microformed on* Camden Misc. Newspapers, Roll 1 (collection of Ark. Hist. Comm'n) (on file with the North Carolina Law Review).

415. ARK. GAZETTE, Mar. 3, 1841, at 2; *see also* Letter to the Editor, *supra* note 412 (emphasizing the "stillness" of the courtroom and the judge's ability to demand respect from others); *Circuit Court*, OUACHITA HERALD, Oct. 2, 1856, at 2 (collection of Ark. Hist. Comm'n) (on file with the North Carolina Law Review) (praising "Judge S__" for his charge to the grand jury).

416. Transcript of Trial, State v. Pleasant, *supra* note 1, at 2 (indictment).

417. Warren was born in 1818 and was thirty-three at the time of the 1850 census. *See* BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 2010 (1989) [hereinafter BIOGRAPHICAL DIRECTORY] (listing Warren's birth date as May 2, 1818); *see also* 1850 CENSUS: Free Inhabitants, *supra* note 38 (listing Warren's age as thirty-three). Warren's official congressional biography erroneously lists him as a judge of the Sixth Judicial Circuit rather than chief prosecutor. *See* BIOGRAPHICAL DIRECTORY, *supra* at 2010. Warren became chief prosecutor in March 1851. *See* HEMPSTEAD, *supra* note 58, at 1194 (listing Edward A. Warner as prosecuting attorney).

418. *See* 1850 CENSUS: Free Inhabitants, *supra* note 38 (listing Warren's place of residence).

419. *See* BIOGRAPHICAL DIRECTORY, *supra* note 417, at 2010.

420. *See* 1850 CENSUS: Free Inhabitants, *supra* note 38 (indicating that Warren was married and had two children). It also appears that a sister and another couple lived with

The first witness called to the stand on that morning was Sophia Fulmer, Pleasant's accuser.[421] Sophia was a young woman—twenty-one years old at the time of the alleged rape—who had been married to her husband, Jacob Fulmer, for three years.[422] Jacob was not much older than Sophia—about twenty-five—but already had earned a reputation as a very poor and lazy man.[423] According to the 1850 census records and 1851 tax records, Jacob owned no land, no livestock, no home, and no slaves.[424] In fact, he evidently did not even make a respectable living, getting by as he did by selling liquor and other sundry items to "negroes in the neighborhood."[425] Born in Germany, it is not clear why Jacob came to Arkansas or how he met Sophia.[426] But it seems clear enough that he represented the undesirables in the community. He was the type of dishonorable man that contrasted so sharply with the likes of James Milton, and inevitably felt his disdain. "[I]n no single instance," Frederick Olmsted said of his discussions with landowners in the slave South, did an inquiry "about the poor whites of its vicinity fail to elicit an expression indicating habitual irritation with them."[427] In the minds of respectable classes, the dissolute constituted a plague on the social fabric of the South, and "no slave country, new or old," Olmsted learned, was "free from this exasperating pest of poor whites."[428]

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him. *Id.* The 1850 slave schedules indicate that Warren owned one slave. *See* 1850 CENSUS: Slave Inhabitants, *supra* note 105. The 1860 slave schedules list him as the owner of four slaves. *See* 1860 CENSUS: Slave Inhabitants, *supra* note 106.

421. Transcript of Trial, State v. Pleasant, *supra* note 1, at 8 (testimony of Sophia Fulmer).

422. Sophia was eighteen when she married Jacob on November 18, 1848, most likely making her twenty-one on November 29, 1851, the date of the alleged rape. Union County Marriage Records, Book A, at 66, *microformed on* Union County Marriage Records, Roll 1 (collection of Ark. Hist. Comm'n) (on file with the North Carolina Law Review). She is also listed as twenty years old in the 1850 census, recorded on October 6, 1850. 1850 CENSUS: Free Inhabitants, *supra* note 38.

423. For testimony about Jacob's character, see Transcript of Trial, State v. Pleasant, *supra* note 1, at 11 (testimony of John Willingham). Jacob was twenty-two when he married Sophia on November 18, 1848, and was twenty-four at the time of the 1850 census, thus making him about twenty-five at the time of the trial. *See* Union County Marriage Records, Book A, *supra* note 422, at 66; 1850 CENSUS: Free Inhabitants, *supra* note 38.

424. In the 1850 census record, Jacob and Sophia are listed as members of William Landers's household. 1850 CENSUS: Free Inhabitants, *supra* note 38. In the 1851 tax record, Jacob was not taxed on any property. 1851 TAX RECORD, *supra* note 186.

425. Transcript of Trial, State v. Pleasant, *supra* note 1, at 18 (affidavit of James Milton).

426. 1850 CENSUS: Free Inhabitants, *supra* note 38 (indicating where Jacob was born).

427. OLMSTED, *supra* note 332, at 578.

428. *Id.* at 290.

Without a home of their own, Sophia and Jacob lived with a man named William Landers in El Dorado Township, which bordered Van Buren Township—where Pleasant lived—to the south and east.[429] Landers himself was a man of modest means, especially compared to someone like James Milton, but he evidently did well enough to own a small farm worth $450 in 1850, one horse, several cattle, and sixty pigs.[430] At the time of the alleged rape, he also appears to have been working at a nearby mill, about a half mile from his house.[431] The exact arrangements between Landers and the Fulmers is not known, but it is likely that Landers allowed the Fulmers to stay with him in exchange for some help on the farm or a share of whatever profits Jacob could make selling his wares. Jacob evidently did not keep up his end of the bargain, however; at the time of the alleged rape, he was in debt to Landers for an undisclosed amount of money.[432]

On the stand, Sophia testified about how Pleasant came into her home and tried to rape her. Guided in her testimony by Warren, Sophia's narrative suggested a brutal attempt—one which, she said, left her "much bruised and injured"—and which easily met the requirements of nineteenth-century rape law.[433] To demonstrate force and nonconsent, Sophia detailed how Pleasant came into her house and demanded some whiskey and tobacco; how he "caught her by the bosom" when she approached him; how he threw her "violently" to the floor and on her bed; how he "pulled her clothes over head, and smothered her with them"; how she "drew up her legs, and offered such resistance as to prevent him from penetrating her body"; how she "made as much noise" as she could; how, after Pleasant finished, she "got hold of a gun," though never used it; and

429. *See* 1850 CENSUS: Free Inhabitants, *supra* note 38 (listing Landers as head of a household that included Jacob and Sophia Fulmer).

430. *See* 1850 CENSUS: Production of Agriculture, *supra* note 76 (listing Landers as owner of forty-five acres of improved land and 145 acres of unimproved land, for a total cash value of $450, as well as one horse and sixty pigs); *see also* 1849 TAX RECORD, *supra* note 87 (listing Landers as owner of 160 acres of land worth $480, one horse, and eight cattle); *cf.* 1851 TAX RECORD, *supra* note 186 (taxing Landers on one horse and eight cattle, but no land).

431. Transcript of Trial, State v. Pleasant, *supra* note 1, at 10 (testimony of William Landers stating that he "keeps the mill"); *see also id.* at 8 (testimony of Sophia Fulmer stating that the mill was half a mile from the house).

432. *See id.* at 10 (testimony of John C. Willingham indicating that part of the money the Fulmers received from James Milton to not prosecute the case "was to go to the said Landers in payment of a Debt due him by Mr. Fulmer").

433. *Id.* at 9 (testimony of Sophia Fulmer). In Arkansas, as elsewhere, rape was "defined to be the carnal knowledge of a female forcibly and against her will." Charles v. State, 11 Ark. 389, 409 (1850).

how, immediately afterwards, she ran to the mill and told William Landers and her brother what had happened.[434]

This was the type of testimony that, had it been alleged several decades later, likely would have meant certain death for a black man like Pleasant. But in this small, rural courtroom in antebellum Arkansas, where interracial sex was understood, if not tolerated, as an accepted part of everyday life, there is nothing to suggest that local whites responded with the "profound rage" some have assumed.[435] To the contrary, a number of residents disputed Sophia's version of the events and came to the defense of Pleasant. Three of Milton's neighbors, for example, signed an affidavit stating that they had known Pleasant for two years, and that he was a "humble and obedient servant" who had never been guilty "of any improper or disobedient conduct whatever."[436] Three others added that they had known Pleasant even longer and could testify to the same good character, clearly implying that Pleasant was not the type of person who would commit such an atrocious crime.[437] Still others sought to discredit Sophia by calling attention to some of the encounters she may have had with other men. One of them, Dr. Courtney, was certain that he "saw the said Sophia and the witness Landers in such position to each other that they must have been in criminal connection."[438] Another, Mrs. Burns, claimed to have seen "the said Landers and the said Sophia in the actual connection of adultery."[439]

John Quillin—Pleasant's lawyer—sought to exploit testimony like this, both during and after the trial. In fact, one of the first questions he asked Sophia was whether she had ever had "illicit intercourse with one William Landers or any other person."[440] She denied it, as did Landers.[441] But others came forward to suggest otherwise.[442] William Yarborough, for example, swore that when he went over to the house one day, he saw Landers "sliding" off of the

434. Transcript of Trial, State v. Pleasant, *supra* note 1, at 8–9 (testimony of Sophia Fulmer).

435. *See* Bardaglio, *supra* note 20, at 754 (discussing white response to accusations of black-on-white rape under slavery).

436. Transcript of Trial, State v. Pleasant, *supra* note 1, at 19 (affidavit of Thomas M. Wright, James Wordlaw, and Joseph Wordlaw).

437. *Id.* at 19–20 (affidavit of George W. Darden, John C. Willingham, and R.W. Durrebb).

438. *Id.* at 16 (affidavit of James Milton).

439. *Id.* at 17.

440. *Id.* at 9 (testimony of Sophia Fulmer).

441. *See id.*; *see also id.* at 10 (testimony of William Landers).

442. *See id.* at 15–18 (affidavit of James Milton) (detailing testimony).

bed where Sophia "was lying . . . all covered but her head."[443] Though he allowed that he did not see Landers on the bed, and "saw nothing about his clothes indicating that he had been in the bed or in connection with Mrs. Fulmer," Yarborough did add that no one else, including Jacob, was there.[444] Others, including Merrick Harrell and a man named Bailey, supported Pleasant's motion for a new trial with testimony of Sophia's general reputation for virtue and chastity: Harrell thought it "not good," and Bailey said he "would not believe her on her oath."[445] John Burns further added that he thought Sophia a "trollop," and James Smith was prepared to go on record with the unusually frank admission that he had "had criminal connection with her himself often."[446]

It is hard to say whether these witnesses meant simply to raise doubts about whether anything happened that day, or whether they meant to go further and suggest a consensual encounter, but the latter was certainly possible. After all, most of the white women who engaged in sexual relations with black men were not the delicate belles of Southern lore.[447] They were instead the "unruly women" Victoria Bynum writes about, the women whose social and economic position allowed for a free and familiar exchange with members of the slave community.[448] To that end, Sophia seems to have been the type of person whose social standing would have allowed her to interact with her black neighbors on terms that fell short of equality but that suggested a common lot in life.[449] If nothing else, her husband's business dealings lend support to this assumption, but proof that she had once invited a slave woman "to sit down at [her] table" for dinner makes it all but certain.[450] Perhaps for this reason Quillin was adamant in asking Sophia if she knew Pleasant. Her

443. *Id.* at 11 (testimony of William Yarborough).

444. *Id.* Landers was recalled by the State to rebut Yarborough's testimony and offered the plausible explanation that Sophia had been sick and he was "at her bed side for the purpose of giving her some medicine." *Id.* (testimony of William Landers).

445. *Id.* at 16 (affidavit of James Milton).

446. *Id.* at 15, 18.

447. *See* CLINTON, *supra* note 335, at 72–73 ("Planter wives were so carefully guarded in Southern society that infidelity was rare in plantation mistresses."); *see also* ELIZABETH FOX-GENOVESE, WITHIN THE PLANTATION HOUSEHOLD 208 (1988) (noting that liaisons between white "ladies" and black men occurred but rarely).

448. *See* BYNUM, *supra* note 25, at 1–14, 88–110.

449. *See* EDMUND S. MORGAN, AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA 327 (1975) (noting how, from the time of the first settlers, blacks and poor whites did much together).

450. Pleasant v. State, 15 Ark. 624, 631 (1855). The trial court excluded this testimony. *Id.*

answer—that she had seen Pleasant "several times, that he had come to the fence and asked for Peaches"—likely solidified in the minds of some that Sophia was exactly the type of "fallen woman" capable of developing a relationship with a black man.[451]

But perhaps the most damaging testimony against Sophia went not to her reputation or social standing but to her motive for the accusation. The evidence on this score, though sparse, was significant. According to John Willingham, a friend and neighbor of James Milton's, he "went down to the Fulmers to see what was the matter" soon after hearing about the alleged rape.[452] Upon his arrival, and evidently before Milton even had a chance to inquire, Jacob pulled Willingham aside and told him that he would take $200 to "not have had it ... happen[]."[453] Apparently intrigued, Willingham then sat down with the Fulmers—with William Landers suspiciously joining them—to discuss the offer further, and it was agreed that, if Milton would pay the sum, "part of the money was to go to the said Landers in payment of a Debt due him by Mr. Fulmer and the balance to be given to Mrs. Fulmer to be laid out in the store."[454]

To be sure, there may have been a plausible reason behind this settlement offer that had nothing to do with extortion. After all, throughout slavery times, persons injured by slaves regularly sought civil redress directly from the owner rather than resorting to the courts, and in Arkansas the legislature specifically authorized owners to lawfully "compound" all offenses "less than a felony" without court intervention.[455] But the offer nonetheless complicated the matter; not only was rape a serious offense not covered by the statute, but the offer quite simply *did* raise a legitimate question about whether Sophia's story "may have been in whole, or in part, a

451. Transcript of Trial, State v. Pleasant, *supra* note 1, at 9 (testimony of Sophia Fulmer).

452. *Id.* at 10 (testimony of John C. Willingham).

453. *Id.*

454. *Id.*

455. *See* STATUTES OF ARKANSAS, *supra* note 10, ch. 51, pt. XII, §§ 4–5, at 379. The Arkansas court explained the rationale for the law this way:

> [I]t is a reasonable provision of law, that the master should first be applied to, and have an opportunity of punishing his slave, and compensating the injured party for the trespass, before he is subjected to the inconvenience, loss of labor and costs of having the slave arrested, and taken off to Court to go through the forms of a legal prosecution.

Bone v. State, 18 Ark. 109, 112–13 (1856).

fabrication."[456] John Quillin certainly thought it did. "I think," he wrote to Justice English a year into the case, "it [is] a malicious prosecution to injure an old man from whom the prosecutor could not extort money."[457]

Ultimately, the proposed settlement never went through, though it is not clear why. Milton met with the Fulmers the next day and, after first explaining that he could not afford $200, agreed to pay them $125.[458] Whether Sophia could have explained why the sum was never paid is not known. But Judge Watson—in a ruling that the Arkansas Supreme Court would later determine was reversible error—refused to allow Quillin to ask her about it.[459]

C. *Slavery and the Limits of White Supremacy*

By the time the jury retired to deliberate, and the men and women attending the trial escaped the courtroom for a break in the April air, it seems clear enough that more was being debated in Pleasant's trial than the competing narratives over what happened that November day in 1851. Simply put, at issue were competing narratives about slavery and the foundation of the Southern social order. On the one hand, Sophia, along with her supporters, likely saw this case in black and white. Indeed, to Sophia, like so many whites, slavery was based upon a racist assumption that all blacks were genetically inferior to whites in every respect. Slavery of course is not dependent on a racist ideology; slavery has existed in other societies and in other periods in which race played little if any role.[460] But a racist ideology justified the uniquely American system that treated only persons of African descent as a thing, a possession, an extension of the master's will. Men like Dr. Josiah Nott left it squarely on the doorstep of science. "There is," he said in a lecture designed to shore up any doubts about Southern slavery, "a marked difference between the heads of the Caucasian and the Negro, and there is a corresponding difference no less marked in their intellectual and

456. *See* Pleasant v. State, 13 Ark. 360, 378 (1853) (explaining why it was prejudicial error to exclude this testimony).

457. First Quillin Letter, *supra* note 292.

458. Transcript of Trial, State v. Pleasant, *supra* note 1, at 10–11 (testimony of John C. Willingham).

459. *See id.* at 9 (sustaining an objection to this question during the testimony of Sophia Fulmer); *see also Pleasant*, 13 Ark. at 377–79 (reversing the trial court).

460. *See* STAMPP, *supra* note 112, at 6 (noting the centrality of race to slavery in the Americas).

moral qualities."[461] Others grounded their rationale on the Bible.[462] But from wherever the evidence came, many whites comforted themselves in denying blacks their basic humanity based on pure, unadulterated racism. The Arkansas court summed it up this way: "There is a striking difference between the *black* and *white* man, in intellect, feelings and principles. In the order of providence, the former was made inferior to the latter; and hence the bondage of the one to the other."[463]

Importantly, this view of slavery gave all whites, whether they owned slaves or not, a stake in the system. "It matters not that he is no slaveholder; he is not of the inferior race; he is a freeborn citizen," the proslavery theorist Thomas R.R. Cobb explained in sketching the social position of lower class whites.[464] Cobb's description of the South reflected what sociologists have dubbed a "*Herrenvolk* democracy": regimes "that are democratic for the master race but tyrannical for the subordinate groups."[465] Or, as an article printed in the *Arkansas Gazette* explained, "Democracy is not the 'equality of races' but the equality of the individuals of the superior race. Democracy is based on the assumption that all White men are equal and that every member of the Caucasian race is entitled to equality with any other member."[466] Blacks were not included within this egalitarian system of government because they were not part of the same human community. Thus, even as "free" persons they had no rights, Chief Justice Taney of the United States Supreme Court would declare in an opinion consistent with this ideology, "which the white man was bound to respect."[467]

The racism that developed from this view of slavery, moreover, helps explain many of the daily interactions between whites and blacks in the slave South. The overseer, who shot and killed a slave in Hempstead County when he refused to take off his shirt and be

461. JOSIAH C. NOTT, TWO LECTURES ON THE NATURAL HISTORY OF THE CAUCASIAN AND NEGRO RACES (1844), *reprinted in* THE IDEOLOGY OF SLAVERY, *supra* note 267, at 208, 232.

462. *See, e.g.*, THORTON STRINGFELLOW, A BRIEF EXAMINATION OF SCRIPTURE TESTIMONY ON THE INSTITUTION OF SLAVERY (1841), *reprinted in* THE IDEOLOGY OF SLAVERY, *supra* note 267, at 136 (appealing to the Bible to justify slavery).

463. Ewell v. Tidwell, 20 Ark. 136, 143 (1859).

464. COBB, *supra* note 339, at ccxiii.

465. FREDRICKSON, *supra* note 266, at 61 (quoting PIERRE L. VAN DEN BERGHE, RACE AND RACISM: A COMPARATIVE PERSPECTIVE 17–18 (1967)).

466. *The Philosophy of Negro Slavery—An Important Work—The Duty of the South*, ARK. GAZETTE, Nov. 10, 1854, at 3 [hereinafter *The Philosophy of Negro Slavery*].

467. Scott v. Sandford, 60 U.S. 393, 407 (1856).

whipped,[468] the slave trader, who raped an enslaved woman from Arkansas as he carried her down the Mississippi,[469] and the local ruffians, who formed a patrol in Ouachita County and beat several slaves whom they found "strolling about,"[470] were all giving voice to a view of slavery that said that all whites—even poor, nonslaveholding whites—were superior to all blacks, and could utterly disregard their most basic rights. This same white supremacist ideology, moreover, helps explain why Caroline Brown of Lafayette County rushed to court when the slave Bone was "rude and insolent" to her.[471] Bone had dared to challenge the strictures of white supremacy, and Mrs. Brown thought (as did the court) that "he no doubt deserved to be flogged for it."[472] Likewise, in charging Pleasant with rape and refusing to back it up with anything other than her word, Sophia Fulmer (and her supporters) asserted a view of slavery that assumed that all blacks were rapacious and fierce, that they belonged to a permanently inferior species, and that, as a member of the white race, the community would side with her and not him, despite her questionable background and her uncertain testimony. In her view, her white skin entitled her to certain privileges, the least of which was that others would join with her in reaffirming the supremacy of the white race.

But when Sophia came into court and demanded vindication for her view of slavery (white superiority), she found herself up against James Milton's version (honor and reputation).[473] To James Milton, this case was not about reaffirming dominance over an inferior race, but about character and the paternalist spirit. Like other honorable men, Milton probably took Sophia's accusation personally, for it affected not just his slave—a member of his extended household—but it also reflected poorly on his role as the head of that household.

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468. *See* Brunson v. Martin, 17 Ark. 270, 274–75 (1856); *see also supra* notes 149–55 and accompanying text (discussing this case).

469. *See* JOHN ROLES, SLAVERY ON SOUTHERN PLANTATIONS 30 (New York, Gray & Green 1864).

470. *See* Hervy v. Armstrong, 15 Ark. 162, 163 (1854).

471. *See* Bone v. State, 18 Ark. 109, 114 (1856).

472. *Id.*

473. Others have emphasized the ideological conflicts that took place in courtrooms in the slave South. Three scholars that have influenced this Article are William Fisher, Ariela Gross, and Walter Johnson. *See supra* note 254 (referencing their articles). But perhaps Barbara Fields said it best: "Of course in any society more complex than the primal horde, there cannot be a single ideology through which everyone apprehends the social world." Barbara J. Fields, *Ideology and Race in American History*, *in* REGION, RACE, AND RECONSTRUCTION: ESSAYS IN HONOR OF C. VANN WOODWARD 143, 155 (J. Morgan Kousser & James M. McPherson eds., 1982).

Indeed, by this time, most whites who owned or worked closely with slaves sincerely believed that slave character was malleable, and that an obedient slave—just like an obedient son—was the sign of a firm master.[474] Slaves that ran away, fought back, or got drunk were not always to blame; more often than not they belonged to a master who was unable to exercise the necessary control over a member of his household. Thus, when Sophia accused Pleasant of trying to rape her, James Milton's reputation as a master and a man was on the line. The testimony that his lawyer later secured—that Pleasant was a "humble and obedient servant," and that he had never been guilty of "any improper or disobedient conduct whatever"[475]—was thus offered as much to defend Milton as it was to clear Pleasant.

Nor should we be surprised that a case like Pleasant's brought these two world views into conflict. It is certainly true that the slaveholding elites had for centuries sought to forge a common bond between themselves and the lower and middling ranks; the more astute among them recognized the danger of allowing the natural sympathies to spring up between slaves and poor whites.[476] But the alliance that was established between these two groups was always an uneasy one and was daily undermined in practice. The reason for the elites' discontent is clear enough; it stemmed from the perception that poor whites interfered with their slaves and with slave discipline. "I wish the Governor, or the members [of the legislature] . . . would try and have an act passed making it a penal offence for white persons to be seen engaged in conversations with negroes in their cabins, or in the field without permission of the owner or overseers," one Arkansan mused in clear reference to people like Jacob and Sophia Fulmer.[477] "Low bred persons going into the farm, in the absence of any white person and engaging in conversation with negroes causes them to neglect their work, and has a tendency to put mischief in the negro's head."[478] The doctrine of white supremacy always had limits;

474. For an interesting discussion of how slave character reflected on the master, see Ariela Gross, *Pandora's Box: Slave Character on Trial in the Antebellum Deep South*, *in* SLAVERY & THE LAW 291, 298–301 (Paul Finkelman ed., 1997).

475. Transcript of Trial, State v. Pleasant, *supra* note 1, at 19 (affidavit of Thomas M. Wright, James Wordlaw, and Joseph Wordlaw); *see also id.* at 19–20 (affidavit of George W. Darden, John C. Willingham, and R.W. Durrebb).

476. *See* MORGAN, *supra* note 449, at 328 (emphasizing the decision to use racism to break up alliances between white indentured servants and black slaves in colonial Virginia).

477. Cato, Editorial, ARK. GAZETTE, Dec. 25, 1858, at 2.

478. *Id.* While few lawmakers seem to have gone this far, the legislature in Arkansas did make it illegal for whites to entertain slaves, to drink or gamble with them, or to "buy, sell, or receive of, to, or from a slave any commodity whatever, without the consent of the

if you interfered with a respectable man's slaves, you would have to pay for it.[479]

And, of course, John Quillin knew this; he knew—or at least he hoped—that the slaveholders on the jury and in the community were tired of that "low bred" class of persons often thought "worse sores on the body politic than the free negroes."[480] He therefore sought to turn a trial of rape into a trial of character, to somehow demonstrate that Sophia had lost her privileges of whiteness. Whether Sophia could or even wanted to emulate the myth of the ideal Southern woman is debatable, but by drawing out her alleged infidelities and questionable associations Quillin certainly tried to show that this was a woman who was not worth protecting. Dressed in the everyday language of sexual indiscretions and racial transgressions, in other words, Quillin was forcing a confrontation over how Southerners viewed themselves and how they viewed their society. The essential question being posed: how far would the doctrine of white supremacy go when it interfered with an honorable man's slave?

CONCLUSION

In the end, the jury returned a verdict finding Pleasant guilty of attempted rape.[481] It is hard to know what led the jury to reach this conclusion. Whether it considered Sophia's reputation or wondered about her motivations, whether it discussed Pleasant's character or brought up Milton's standing in the community, can never be known. But the guilty verdict in a way says less about what actually happened than about whose world view prevailed. The point was made before that the vast majority of antebellum Southerners—including those who lived in Arkansas and over half of the jurors in Pleasant's trial—either did not own slaves or held just a few. Certainly some of them, especially those farmers who had achieved some moderate success, aspired to become the aristocratic grandees that they had seen about town, with their emphasis on the patriarchal plantation and the extended, biracial household. But many more of them, small-time

master." *See* STATUTES OF ARKANSAS, *supra* note 10, ch. 153, art. V, §§ 56, 62, at 952–53. For prosecutions under these laws, see Omey v. State, 23 Ark. 281, 281 (1861) (selling ardent spirits to slaves); Edwards v. State, 21 Ark. 512, 513 (1860) (selling ardent spirits to slaves); State v. Cadle, 19 Ark. 613, 614–15 (1858) (harboring and entertaining slaves).

479. *See* Hervy v. Armstrong, 15 Ark. 162, 166 (1854) (holding that a master could recover monetary damages from a slave patrol if he could demonstrate actual harm; "[t]he unprovoked battery of a slave" the court reasoned, "is not only . . . an injury to the slave, but an insult to the master").

480. ARK. GAZETTE, Nov. 15, 1856, at 2.

481. Transcript of Trial, State v. Pleasant, *supra* note 1, at 4.

slaveholders included, were undoubtedly "fiercely democratic in their political and social thinking," and were much more likely to view white superiority and black inferiority—not a prebourgeoisie, aristocratic social philosophy—as the organizing principle upon which their society was based.[482] To the majority of these yeoman farmers and backwoodsmen, what mattered most were the local interactions between themselves and their black residents, in which racial ideologies were expressed and reinforced on a daily basis.

George Fredrickson makes a similar point when he notes how even the most ardent defenders of the paternalist worldview nonetheless conceded some justification for slavery based on innate racial differences.[483] Proslavery theorists like Henry Hughes and George Fitzhugh understood full well the appeal of *Herrenvolk* democracy for a large majority of whites, and no astute Southerner could ignore the emotional pull of its underlying theory of the supremacy of the white race.[484] Indeed, in the backwoods of Arkansas democracy came to depend on slavery, and it was often said that one could not exist without the other.[485] "Negro slavery places an inferior race in this its natural relation," an article printed in the *Arkansas Gazette* insisted. "By so doing, the negro is not only benefited by occupying the sphere assigned him by nature, but the white man is elevated and the white race saved from menial degradation."[486] Perhaps the role of this "egalitarian racism" is best captured in the decision to rename the *Arkansas Gazette* the *Arkansas State Gazette and Democrat* in 1850. As the editorial put it, the name reflected the paper's "original position as a democratic journal," not the Whig paper it had become.[487]

Despite a guilty verdict, the ultimate resolution of this case may never be known. Following Pleasant's conviction, James Milton—with John Quillin and his powerful colleague Samuel Hempstead arguing on Pleasant's behalf—appealed the decision to the Arkansas

482. *See* FREDRICKSON, *supra* note 266, at 67 (making similar arguments).

483. *See id.* at 64–70.

484. *See id.* at 68 ("No successful Southern politician, whatever his ties to the 'aristocracy,' was able to talk like Fitzhugh and give theoretical sanction to the enslavement or subordination of whites. When politicians justified slavery, they almost invariably did so largely in terms of race . . . .").

485. *See The Philosophy of Negro Slavery*, *supra* note 466, at 3 ("Negro slavery is the basis and foundation of Democracy, without which it cannot exist.").

486. *Id.*

487. *Union of the Gazette and Democrat*, ARK. GAZETTE, Feb. 8, 1850, at 2.

Supreme Court.[488] There, Milton found an audience much more receptive to his view of slavery. The men who made up the Arkansas court, it must be remembered, were all wealthy, educated, and slaveholders.[489] Like James Milton, they may have held deep convictions of white superiority over the black population. But this does not mean that they would have been sympathetic to Sophia's claim. To the contrary, as members of the ruling elite, they probably saw Sophia in the same way that James Milton did: as a poor woman who, through her sexual indiscretions and racial transgressions, was not worth sacrificing a valuable slave. In fact, with an irony that speaks volumes, the court eventually reversed Pleasant's conviction in part because the prosecution failed to put on evidence that Sophia—a woman who asserted a view of slavery that depended on white racial privilege—was in fact white.[490]

In the early fall of 1854, over two years after his first trial and almost three years since the alleged incident, Pleasant was retried, this time in bordering Ouachita County, after Judge Watson granted Quillin's motion for a change of venue on the grounds that the members of Union County had their minds made up.[491] Unfortunately, we will never know anything about the jurors in this second trial, or about the full extent of the evidence, because the local records were destroyed by fire sometime in the late nineteenth century. From the appellate record, however, we do know that John Quillin's strategy in the second trial was the same as the first, emphasizing Sophia's sexual indiscretions and her questionable

488. For a brief discussion of Samuel Hempstead and John Quillin's relationship to him, see *supra* note 300 and accompanying text.

489. Elbert English, who decided Pleasant's second appeal, valued his land at $20,000 in 1860 and his personal estate at $5,000. *See* 1860 CENSUS: Free Inhabitants, *supra* note 38. George Watkins, who decided Pleasant's first appeal, is not listed in the 1860 census. However, he, along with English, appears in the 1860 slave schedules as the owner of several slaves. *See* 1860 CENSUS: Slave Inhabitants, *supra* note 106 (identifying Watkins as the owner of eleven slaves, and English as the owner of three).

490. *See* Pleasant v. State, 13 Ark. 360, 376 (1853) ("Some testimony of her being a white woman was necessary."). The other ground for reversal, mentioned above, was based on the trial court's refusal to let John Quillin ask Sophia about the efforts to settle the case. *See id.* at 377–79.

491. The trial was held during the September term, 1854, of the circuit court. Pleasant v. State, 15 Ark. 624, 627 (1855). The motion for a change of venue, filed in the Union County Circuit Court in June 1854, asserted "that the minds of the inhabitants of the said County of Union[] are so prejudiced against him (the defendant) that he cannot have a fair and impartial trial." Union County Circuit Court Records, Book E, *supra* note 189, at 484 (June 6, 1854). No details are provided about the alleged prejudice. The motion was granted. *Id.*

motivations.[492] This time, however, even more witnesses paraded in front of the court to testify about Sophia's reputation for chastity, including James Tiffin, one of the jurors in Pleasant's first trial.[493] In what is surely an odd twist, Tiffin testified that he knew Sophia's "general character for chastity and virtue, and it was bad," and was asked about (but not allowed to answer) an encounter he had with Sophia one evening before the alleged rape in which Sophia "insist[ed]" that he spend the night with her so that she could "tangle legs with him o[n] a cold night."[494] Notwithstanding this testimony and more like it, however, Pleasant was found guilty; but again, the conviction was reversed on appeal. This time, in an opinion authored by Chief Justice English, it was because the trial court refused to allow James Milton to testify on Pleasant's behalf.[495]

Because of the fire, we also will never know whether Pleasant was tried a third time. If he was, the assumption here was that he was found not guilty. The reason is because of the rigor with which the first two convictions were appealed; presumably, if there had been a third conviction, Milton would have appealed that one as aggressively as he appealed the first two. Other primary sources provide little help. There are, for example, no newspaper accounts of the case, nor are there any records detailing Pleasant's death. The 1860 slave schedules hint that Pleasant may still have been alive; they list Milton as the owner of a fifty-year-old male slave.[496] And while this does not match the age Pleasant would have been if his age in the 1850 slave schedules was accurate—recall that in 1850 he was listed as forty-six, which would make him fifty-six in 1860—it is certainly possible that this was him, as neither the census takers nor slave owners were known for their preciseness or concern when it came to the exact age of slaves.[497] Adding further support to the possibility that this fifty-year-old slave was Pleasant is the unlikely (though certainly not impossible) scenario that James Milton would have purchased an

492. *See Pleasant*, 15 Ark. at 628–40 (detailing the evidence presented at trial).

493. *See id.* at 636–37 (detailing James Tiffin's testimony). For a discussion about James Tiffin, see *supra* notes 203–06 and accompanying text.

494. *Pleasant*, 15 Ark. at 636.

495. *Id.* at 654. Presumably, the trial court refused to allow Milton to testify based on Milton's alleged bias in the outcome.

496. *See* 1860 CENSUS: Slave Inhabitants, *supra* note 106.

497. Even within James Milton's white family the ages do not always correspond. In 1850, his daughter Lydia was listed as six; in 1860, she was listed as fourteen. *Compare* 1850 CENSUS: Free Inhabitants, *supra* note 38 (listing Lydia's age as six), *with* 1860 CENSUS: Free Inhabitants, *supra* note 38 (listing Lydia's age as fourteen).

elderly slave to replace Pleasant if indeed he had been executed for the crime.

As far as the other participants in the trial are concerned, they are easier to follow. By 1860, Jacob Fulmer had finally moved into the propertied class, tending a small farm worth a few hundred dollars.[498] Despite the past rumors of infidelity, Sophia and Jacob were still married, and they had added three more children to their family.[499] Interestingly, Sophia was now going by "Ann," and whether the name change had anything to do with the past events is possible, but pure speculation.[500] James Milton was still presiding over a large and prosperous farm with his wife and five children, together with his eighteen slaves, in Van Buren Township.[501] John Quillin, meanwhile, had remarried and moved to Camden in Ouachita County.[502] He was still practicing law.[503] A few years later, Quillin would go on to fight on behalf of his beloved South in the Civil War.[504]

In the final analysis, perhaps the lesson to be learned from a close study of a case like Pleasant's is the role of slavery in the everyday lives of antebellum Southerners. A major premise here is that slavery was never just a labor system; it was instead a way of life, affecting Southerners—black and white, slaveholders and nonslaveholders—in almost everything they did. Indeed, slavery affected the mundane as well as the grand; it influenced one's friends

498. *See* 1860 CENSUS: Free Inhabitants, *supra* note 38 (listing place of residence). Jacob may have been exaggerating his net worth to the census takers; he listed the value of his real estate at $744 and the value of his personal estate at $345. *Id.* The county, however, assessed the value of his land at $369 and his livestock holdings at $173 during the same year. *See* 1860 TAX RECORD, *supra* note 92.

499. *See* 1860 CENSUS: Free Inhabitants, *supra* note 38 (listing "Ann S." and four children under the household of Jacob Fulmer). "Ann S." is apparently Sophia: her age (thirty-one) and her place of birth (Georgia) in the 1860 census match up with her age (twenty) and her place of birth (Georgia) in the 1850 census. *Compare* 1850 CENSUS: Free Inhabitants, *supra* note 38 (listing her age as twenty), *with* 1860 CENSUS: Free Inhabitants, *supra* note 38 (listing her as thirty-one). In addition, another member of the household was Alfred Foil, an eighteen-year-old male, who was presumably Sophia's brother. *See* 1860 CENSUS: Free Inhabitants, *supra* note 38. Foil was Sophia's maiden name. *See* Union County Marriage Records, Book A, *supra* note 422, at 66 (recording the marriage of Jacob Fulmer and "Ms. Sofirah Foil").

500. *See supra* note 499 (demonstrating probable link between "Ann S." and Sophia).

501. *See* 1860 CENSUS: Free Inhabitants, *supra* note 38; 1860 CENSUS: Slave Inhabitants, *supra* note 106.

502. *See* 1860 CENSUS: Free Inhabitants, *supra* note 38.

503. *See id.*

504. *See* 3 INDEX TO ARKANSAS CONFEDERATE SOLDIERS 30 (Desmond Walls Allen comp., 1990) (listing John Quillin from Arkansas as a sergeant in the first infantry division).

as well as one's view of democracy; it dictated where one could go and with whom, as well as what one thought of the human condition. Slavery, in short, in a myriad of different and conflicting ways, affected how Southerners viewed themselves and the society in which they lived. It thus hardly seems surprising that slavery would have found its way into a courtroom when a poor white woman accused a slave of a wealthy landowner of raping her. If to Sophia and her nonslaveholding friends, this was a case about reaffirming the superiority of the white race, to Milton and his slaveholding neighbors, this was a case about honor and the paternalist spirit. And it was here, in a local courtroom in the backwoods of Arkansas, that these two worldviews collided, making for a long, drawn-out affair with the outcome far from certain. With honor, family, privilege, economics, gender, race, and racism on the line, the brutal lynching of later years seems out of the question.

And while it seems improvident here to draw any firm conclusions about the post-Civil War era, in which an accusation that a black man raped a white woman produced almost certain death, it assuredly has something to do with how the South reorganized itself following the end of slavery. With blacks enjoying their first taste of freedom, whites of all classes began to rally around race, assuring that even the poorest white would be aligned with the wealthiest.[505] Viewed that way, as a difference between slavery and race, it becomes apparent why Scout Finch's perceptive observation in *To Kill a Mockingbird*—"Tom was a dead man the minute Mayella Ewell opened her mouth and screamed"—applies to the decades following the Civil War, but not to those preceding it.[506]

505. *See* C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 67–109 (commemorative ed., Oxford Univ. Press 2002) (1955) (emphasizing the South's "capitulation to racism" at the end of the nineteenth century); *see also* Johnson, *supra* note 33, at 428 (emphasizing the race-slavery dichotomy).

506. LEE, *supra* note 11, at 276.