"AS IF THE INJURY WAS EFFECTED BY THE NATURAL ELEMENTS OF AIR, OR FIRE": SLAVE WRONGS AND THE LIABILITY OF MASTERS

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Discussion about slavery and law has been raised recently to a high level of abstraction, but important aspects of the relationship remain unexamined. Under what circumstances were masters held liable for the damage that resulted from the wrongs of slaves? The question of distributing the burdens of accidents is a matter of policy, and involves important questions of power and responsibility. But, within an historical context, the range of choices open to a society is neither infinite nor static. This study suggests that legal traditions, styles of reasoning, and, above all, social relationships and perceptions (including those between slaveholders and nonslaveholders) help unravel the policy choices Southerners made in the years before the Civil War.

I. INTRODUCTION

Within the past few years there has been a renewed interest in the law of slavery. In 1974 a conference was held at the University of Chicago Law School devoted exclusively to the subject, and several fine studies have appeared since then (Kier Nash, 1979; Tushnet, 1975; Tushnet, 1981; Hindus, 1980; Howington, 1975). However, important omissions remain. Among recent scholars of the law of slavery few have noted that it involved more than questions about manumission, the treatment of slaves, or the criminal law of slavery. Exceptions are Tushnet (1975: 122), who argued that "a full-fledged law of slavery emerged, with subcategories dealing with contracts and torts," and Kier Nash (1979: 207), who divided the law of slavery into "real and personal property issues, contracts, negligence, and criminal law."[1] Neither author, however, attempted to deal with all of these categories, and it is not my intent to do so

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[1] More striking perhaps is the fact that leading nineteenth-century studies of the law of slavery overlooked such categories as tort law (Cobb, 1958; Hurd, 1858-62).

here. The purpose of this article is more modest: it is to deal with the single question of when, and upon what principles, masters were held liable in civil actions for the intentional or unintentional injuries inflicted upon others by their slaves.

A first glance at the case law can easily leave one confused. Justice Harry I. Thornton, for example, concluded for the Alabama Supreme Court in *Cawthorn* v. *Deas* (1835) that for many victims of slave wrongs "it is, as if the injury was effected by the natural elements of air, or fire." There would be no compensation. Six years later the Louisiana Supreme Court, in *Gaillardet* v. *Demaries* (1841), argued that a master's liability was "one of the burthens of this species of property; it is absolute and exists whether the slave is supposed to be acting under their authority or not." What lay beneath the apparent muddle, of course, was "choice" or "policy."

Calabresi, in a thoughtful analysis of the possible systems a society might adopt to allocate the costs of accidents, listed eight examples (such as "borne by particular victims" or "paid from the general coffers of the state or by particular industry groups in accordance with criteria [such as wealth] that may be totally unrelated to accident involvement.") The point—Calabresi's main point—is that the whole question of allocating the burdens of accidents is a matter of choice: and "what we choose, whether intentionally or by default, will reflect the economic and moral goals of our society" (1970: 22-23). Calabresi was concerned with a complex modern system involving industrial accidents, automobile accidents, and so on. But this theory alerts us to the open-textured nature of the approaches available in dealing with accidents, whether in a contemporary or historical context. Choices must be made, and they are sometimes difficult. Our task is to understand what purposes and values lay behind them.

Recent studies of the law of slavery (even though they have not dealt directly with the subject of this article) have focused a good deal of attention upon the "greater significance of legal decisions," to use Kier Nash's phrase. The debate has reached a very high level of abstraction in the work of Tushnet and Kier Nash. Tushnet's Marxism informs his analysis of the legal choices made in the American South. In his view, slave law had two primary characteristics: 1) "it attempted to allocate control over slaves to the sentiment of the master class," and 2) since a complete allocation would have completely removed the regulation of slavery from the sphere of law (which was impossible in a bourgeois world), slave law

had to have a substantive as well as jurisdictional content. It was marked by the "effort, repeated in various forms, to confine the content of slave law to the situation of slaves alone." Moreover, "slave law recognized regulation by law rather than sentiment more readily the closer the circumstances came to involve purely commercial dealings. In a sense slave law asserted jurisdiction only over market transactions, leaving other relationships to be regulated by sentiment. Thus the law/sentiment dichotomy was not coincidentally related to the market relations/slave relations dichotomy, but was rather structurally derived from it" (1981: 36-37).

Kier Nash, however, found little that was truly autonomous about the law of slavery, or even a development in that direction (one of Tushnet's points). In fact, he has even expressed serious doubt that it makes any sense to talk about "the law of slavery" at all. Moreover, any analysis that rests heavily upon the notion that the "law of slavery" somehow reflected the "ideology of the master class" is, for him, too amorphous to be of much use. Slave law, for Kier Nash, was "much less unified and autonomous, at least in its case law, than as disparate, and as displaying as much continuing dependence on the larger English and western legal and political traditions as it did autonomy. So much for the 'what' of the 'law of slavery,' or as I would prefer it, 'laws of slavery'—laws in which two unresolved dichotomies struggle on—the rule of law versus the supremacy of whites over blacks, and the black man as human versus the black man as property" (1979: 205-210).

A very crude parallel to this debate exists (although I do not wish to push this very far) in another current scholarly debate. Within the past few years, interpretation of the emergence of torts as a distinct legal category has been raised to its own high level by the work of Horwitz and White. Horwitz has argued that within the United States "tort" law underwent a revolutionary transformation at the hands of jurists during the first few decades of the nineteenth century. The most important development was the destruction of the notion of strict liability which had stood in the way of the development of the notion of carelessness as a central element in negligence actions. It was also necessary to break the concept of negligence away from its contractual foundations. Jurists then began to substitute a standard of due care with the express purpose of reducing the "crushing burden of damage judgment that a system of strict liability . . . entailed." This

development was pronounced in Pennsylvania, Massachusetts, and New York, and was associated with the rise of industrialization—in fact, it preceded it and was one of the conditions that aided its rise. The end result was that "after 1840 the principle that one could not be held liable for socially useful activity exercised with due care became a commonplace of American law." It also allowed the dynamic elements of American society to overwhelm "the weak and relatively powerless segments of the American economy" (1977: 85-99). It was, in short, an instrumentalist use of the law to promote the interests of an entrepreneurial class.

White, on the other side, admits that "changes associated with industrial enterprise did provide many more cases involving strangers, a phenomenon that played a part in the emergence of Torts as an independent branch of law." But this was not the only factor in the emergence of torts. The increase in cases associated with industrialization came at a time "when legal scholars were prepared to question and discard old bases of legal classification. The emergence of Torts as a distinct branch of law owed as much to changes in jurisprudential thought as to the spread of industrialization" (1980: 3). The change was toward conceptualism as much as instrumentalism.

White, moreover, places the emergence of torts as a distinct category somewhat later than does Horwitz. "The crucial inquiry in tort actions prior to the 1870s," in White's view, "was not whether a defendant was 'in fault' or had otherwise violated some comprehensive standard of tort liability, but whether something about the circumstances of the plaintiff's injury compelled the defendant to pay the plaintiff damages." Before the middle of the nineteenth century "individual 'tort' actions . . . tended to be decided with reference to their own features and to current perceptions of equity and justice" (1980: 14-15).

Where Horwitz sees something approaching a uniformity based upon a class foundation (this would be the crude parallel to Tushnet, although Tushnet has a more sophisticated notion of class), White (who inclines toward the Kier Nash approach) sees American law as "dissonant, diverse, and even chaotic." For White this resulted from the nature of American values: Americans lived in a world in which "the simultaneous espousal . . . of synthetic and atomistic visions of society was a defining characteristic of early nineteenth-century American culture, manifested, on the one hand, by the still binding force of religious dogma and, on the other, by the growing awareness

of the value of individual autonomy" (1980: 5). Horwitz, on the other side, tends to see the ground of legal change in these years in a somewhat ill-defined alliance between the mercantile and legal communities. The striking difference among these approaches (whether into the law of slavery or the emergence of torts) is the respective weight given to class relationships and to ideas and values apart from such relationships in the shaping of the law.

All of these studies contain important insights that can help unravel Southern legal history, but none standing alone is sufficient to disentangle adequately the ways in which the liability of masters for the wrongs of slaves was defined. Despite the value of the work of White and Horwitz, for example, a notable weakness—characteristic of most legal scholarship—was that neither paid much attention to the South. The fact that the wealthiest class in the region owned land and slaves rather than factories and railroads created unique legal questions. This is not intended to suggest that a simple class analysis or reference to the "ideology of the master class" will, by itself, bring us a great deal closer to a grasp of the reasons behind the choices made. Kier Nash's thoughtful warnings about the softness of such an approach, as well as White's work, should be enough to make us cautious. At the same time, they should not stop us from looking at the possible impact of social relationships upon the development of the law. Tushnet's first "primary characteristic" (allocation to the sentiment of the master class) is a sharp insight that has some force, especially for the early nineteenth-century efforts to define a master's liability, but it also can carry us only so far. Moreover, the market analysis is of little use in the area of slave torts, since most of the injuries inflicted by slaves fell outside market relationships (such as the death of one slave at the hands of another, or the spread of a fire from an owner's field). It is hardly much of an insight to point out that many of the conflicts which a legal system must attempt to resolve fall outside of market relationships. That is not to suggest that Tushnet's point is without force, but only that it is a mode of analysis of limited use in the area covered by this article.

Interpreting the efforts of Southern jurists to define a master's liability, to take a cue from Calabresi, involves an understanding of moral and economic choices. A choice by "default" was often made by jurists who answered the question, "Should a master pay?" by a reference to common-law categories and standards of liability. Although these

categories and standards were framed to meet the needs of a totally different socioeconomic system, they were what Southern jurists had learned as students of the law, and many continued to function within that familiar intellectual world. The weight of legal traditionalism then was quite heavy for many jurists. Kier Nash surely was correct that Southern jurisprudence owed a great deal to English legal tradition. Occasionally a jurist would cut through the technical rules to suggest that the real basis of the judgment was a sense of fairness grounded in the idea that someone should not pay for the wrongs of someone else unless that person was under their control. This, of course, raised the critical question about the nature of a master's power and responsibility over his or her slaves. Was a slave owner's power absolute, and, if so, was liability absolute? If power was limited, what theory of limitation could be used to mark the boundaries of responsibility for the misconduct of slaves? In a broader sense the question involved the perception of their society held by different slave state jurists.

One factor too often overlooked was the role of the nonslaveholding class in the formation of legal rules. Legal choices are made within the context of social relationships. But the relationship between master and slave was not the only one of importance. Social relationships within the South were highly complex. The story of the efforts of Southern jurists and legislators to define a master's liability, therefore, is not a simple one.

II. COMMON LAW PATTERNS OF DEALING WITH ACCIDENTS

Various disciplines have their own mode of discourse (Foucault, 1972: 215-239). Patterns of thought and analysis do condition the way people respond to given situations and problems. This was certainly true in the ways jurists in the South attempted to define the liability of a master for the wrongs committed by his or her slaves.

There have been two main streams of thought in the common-law world about the nature of civil liability for wrongs. One, the most congenial to nineteenth-century individualist thinking, emphasized the notion that without "fault" there could be no liability. Oliver Wendell Holmes, Jr. was one of the first to develop this idea in a full blown theory of torts. White starts, essentially, with Holmes. "At the bottom of liability," he wrote, "there is a notion of blameworthiness but yet that the

deft's blameworthiness is not material." What this meant was that "fault" or "blameworthiness" for Holmes was to be defined in external terms, in terms of "a certain average of conduct" (White, 1980: 180; Holmes, 1963: 86). The moral state of the defendant was not truly relevant. Not all American legal thinkers agreed with this (especially with the notion that the "deft's blameworthiness is not material"), but by the end of the century most did agree that "fault" was essential to liability (Reid, 1967: 133-151).

The other stream has broadened and deepened considerably in the twentieth century. It is one side stream into a larger current that Roscoe Pound described as the "socialization of law" (Stone, 1966: 152). It is the notion of liability without fault, or absolute liability. In the 1940s, Justice Roger Traynor of the California Supreme Court, in a landmark products liability opinion, argued that "it should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings" (*Escola* v. *Coca Cola Bottling Co. of Fresno* [1944]). This concurrence has been seen as the foundation of modern American legal thought about strict liability, but even Traynor was forced to admit as late as 1958 that "for the most part" the substantive rules of tort law "rest on the theory that liability is based on fault" (1958: 638; see also *Stanford Law Review*, 1980: 391; Jenkins, 1980: 50-51).[2]

Southern jurists did not have the advantage of the conceptualism of a Holmes, a Pound, or a Traynor. Their views were developed after a revolution had already occurred in the way people thought about noncontractual wrongs, after "negligence" emerged as a separate tort (it did not exist at the end of the eighteenth century), and after torts had begun to appear as a coherent legal category alongside contracts and crimes. In short, Southern jurists' earlier responses were channeled by the common law, the civil law, or statutes as these existed before the emergence of a clear concept of torts.

All American slave states except Louisiana were common-law jurisdictions, and common-law thought had long been marked by analogical reasoning. Since slavery did not exist under the common law, most slave state jurists had to fashion

[2] Traynor (1958: 638) added that "in our ultra-hazardous age, however, some scholars are reasoning that this should give way in many areas to strict liability . . . If we are moving toward an expansion of strict liability, we should do so openly, not by declarations of fictitious negligence or denials of actual negligence."

rules of liability from rules found elsewhere. Understanding fully the problem they faced (and the weight of traditional legal thought) requires a brief look at the system of which the rules were a part. It had not yet, as White has argued, been raised to a very high conceptual level.

At the end of the eighteenth century there was no substantive category of law called "torts." Rather, there was a cluster of individual wrongs for which the law provided a precise remedy through a particular writ (the forms of action), each of which had its own standard of liability and rules of pleading. "The law itself was seen as based," S. F. C. Milsom has written, "not upon elementary ideas, but upon the common law writs, as consisting in a range of remedies which has as it were come down from the skies." "If a case," he proceeded, "fell within the scope of no writ, then in general there was no law. If it fell within the scope of one writ, then in general no other writ could be proper" (1969: 266). Common law thought then flowed into the arcane crannies of the writ system.

The two forms of action relevant to an understanding of a master's liability for the acts of slaves are trespass and trespass on the case (usually abbreviated to "case"). The most important question is not which writ applied to which set of facts but rather the nature of the liability associated with the writs. Some have argued that trespass rested upon a notion of strict liability while case required proof of negligence or wrongful intent (Prosser, 1964: 506-510). This neat formulation, however, has been undercut. Horwitz noted, for example, that liability in fire cases had been strict because of the duty not to allow fire to spread (undoubtedly a rule of law that arose out of the destructive fires that swept through the medieval cities of England). The action, however, was in case. What *is* clear is that at the beginning of the nineteenth century there was no separate tort created solely by negligence: there was no legally imposed responsibility of care owed by all persons to all other persons independent of special relations. "The dominant understanding of negligence at the beginning of the nineteenth century," Horwitz has written, "meant neglect or failure fully to perform a preexisting duty, whether imposed by contract, statute, or common law status" (1977: 87).

Until this was broken down, and the notion of carelessness as a distinct ground of liability emerged, Southern jurists continued to work within the older confused common-law writ system and mode of thought. That meant that they faced the problem of finding an appropriate analogy within that system

to the position of slaves within Southern society. Among the possible analogies used were cattle, domestic animals with vicious habits, and servants. If cattle strayed upon the land of another and treaded down herbage, the owner of the cattle would be answerable in trespass. This was because the owner had a duty to keep the cattle fenced in, and if they strayed (as dumb beasts are apt to do) the plaintiff had his action. If slaves then were analogized to cattle, a strict liability could be imposed upon the master under the common law. Of course, one problem with this was that it might immunize slaves from punishment because the analogy denied moral agency.

The other property analogy contained the same problem. The liability of the owner of a domestic animal with bad habits was not strict, and therefore this analogy differed from that of cattle. The assumption was that domestic animals, as a category, were not dangerous. The rule then was that the owner, of a dog for example, must have knowledge of the bad character of the particular animal. The basic common-law rule in master-servant relationships was that a master was liable for the negligence of a servant in his employ. His knowledge of the conduct that led to the injury was not essential. Liability was grounded upon a contract theory: there was an implied contract between the master and strangers that the servant would perform with skill. A master, however, would not be liable for the intentional wrongs of the servant unless they were done with the authority of the master, either express or implied (Blackstone, 1771-1773: I, 431; III, 153, 211). None of these analogies was truly apposite to the condition of the slave in American society. But they were all that was available.

The Analogies to Cattle and Vicious Animals

Only one case, in fact, contained any discussion of the analogy to cattle—*Campbell* v. *Staiert* (1818). In that case Justice John Louis Taylor simply rejected it out of hand. A master was not bound to keep his slaves confined like cattle, and that was that. His opinion was less than one-half of a page; it would thus be feckless to attempt to decide whether Taylor was more concerned with treating slaves as persons or with removing what would otherwise have been an unfair burden on masters. Perhaps it was a little of both.

The second analogy crept into cases more often. In both *Wright* v. *Weatherly* (1835) and *Ewing* v. *Thompson* (1850), it was rejected, and upon precisely the same ground. In *Wright* it was because the slave was not an animal but rather "an

intelligent moral agent" liable for his own wrongs, and in *Ewing* because slaves were "responsible moral agents" answerable for their own misconduct. Alabama came as close as any to use of the vicious animal analogy, but it did so without any direct reference to the common-law rules (*Brandon* v. *Planter's & Mercant's Bank* [1828]).

The Master-Servant Analogy

What remained was the master-servant analogy. This was preferable to dealing with slaves as though they were cattle or dogs. However, the problems with this analogy were made clear in an early slave tort case in South Carolina, *Snee* v. *Trice* (1802). The facts in *Snee* were that the defendant Trice's slaves had built a fire in a field that was being cleared prior to planting, probably for cooking, "as is usual among Negroes." It was made in the morning when there was no wind, but by midday a breeze blew up "which is very common at that season of the year," and the fire spread while the slaves were elsewhere in the field. It burned down Snee's corn-house and destroyed 300 bushels of corn inside. Snee then sued Trice in a special action on the case for the value of the corn "upon the ground that this loss was occasioned by the negligence or misconduct of defendant's negroes."

In his charge to the jury Judge Elihu Bay observed that, "If the doctrine, laid down by Mr. *Blackstone* in the extent in which he has placed it was to prevail in this country, to make masters liable for the negligences of their slaves, it would place all the slave-owners in the state at the mercy of their numerous slaves, who might commit what trespasses, or be guilty of what neglects and omissions they thought proper, to the ruin of their masters." Blackstone had written that masters were liable for the negligence of their servants: that was the extent of his view (1771-1773: I, 431). The problem of course was that slaves and servants were *not* truly analogous. A servant in England normally was a skilled craftsman who had contracted with a master to perform a limited set of duties. The slave in South Carolina, on the other hand, was the property of his master for life—he was always under the power or jurisdiction of the owner, or the agent of the owner, or a hirer. The social and the legal position of the slave simply was not the social and legal position of the English servant.

Bay, of course, did not allow the master an absolute immunity, even though he sought to carve out an area of immunity from legal responsibility for the wrongs of slaves.

There were instances, he wrote, where an owner was liable "as in all cases where negroes are permitted to perform any public duty, or to carry on a handicraft trade or calling, or to perform or superintend any other kind of business where public confidence is to be reposed." In other words, to the extent that the status of a slave was nearly identical to that of a servant, the liability of the slave's master was exactly the same as under the common law. Under no circumstances, however, would a master be liable "where any unauthorized act is done by a slave in his private capacity, without the knowledge or approbation of his master" (*Snee* v. *Trice*, 2 Bay [1802]). The position of the slave then was treated by Bay as though it were nearly the same as the servant under English law. What he ignored was the fact that the slave might always be presumed to be under the authority of the owner.

Twenty-three years later, in *Wingis* v. *Smith* (1825), Justice Josiah Nott held that the rule in *Snee* was that masters were "not liable for the negligence of" servants. "Tradesmen, ferrymen, carriers and others acting in such like capacities are exceptions to the rule." He concluded with the observation that "the interest of the master affords a higher security against misconduct or negligence of his servants than any liability which the law could impose." This "allocation to sentiment" (to use Tushnet's phrase), however, had gone too far. *O'Connell* v. *Strong* (1838) overruled *Wingis*: ". . . the proposition may be laid down that in all cases a master would be held liable for the negligence or misfeasance of a slave whilst in the lawful and authorized employment of the master . . . in other words, the distinction between slaves and other servants, so far as it regards the liability of the master for non-feasance and negligence, does not obtain in South Carolina."

This was about as far as the analogical reasoning of the common law would carry Southern jurists. Within common law categories, they could impose a very wide liability by analogizing slaves to animals, or a narrower liability by attempting to squeeze the slave into the status of the English servant. This latter choice, however, tended to leave some victims of slave wrongs without any compensation: for them, it was as the Alabama court observed, "as if the injury was effected by the natural elements of air, or fire."

Standing alone, this choice would, of course, leave wrong-doers—in this case slaves—without any burden whatever. This would be intolerable in a slave-owning society, and the *Snee* court had an answer. "Other salutary checks have been found,

by experience," wrote Justice Bay, "more efficacious than that of recovering damages from masters." Although he did not say what these checks might be, there could be a hint in an earlier slave insolence case, *White* v. *Chambers* (1796). The court in that case, which included Bay, suggested that "the best rule would be, in all cases where a slave behaved amiss, or with rudeness or incivility to a free white man, to complain to the master, or other person having the charge of such offending slave, who, if he was actuated by curtesy and civility to his neighbor, would on such application, give him the necessary satisfaction for every insult or piece of improper conduct which a slave had offered." If this was not sufficient the offended party could resort to a public tribunal to have the slave punished. It is entirely possible that the "salutary checks" Bay had in mind then would be either a private remedy, or a criminal action against the slave. For jurists who believed in a society controlled by a responsible aristocracy, such a proposal made perfect sense. A decent master—and the law would presume all were actuated by a sense of civility and decency—would surely provide some remedy upon the request of an injured neighbor. To believe otherwise might even involve questioning some of the basic assumptions about one's society. Snee ought to have simply asked Trice to assume the burden of the accident without resorting to the courts. Tushnet's idea about allocation to the sentiment of the master class is, of course, fully supported by the approach of the *Snee* court, as well as the *Wingis* court.

Summary

The law then would not impose a liability upon a master beyond that defined by the analogous rules of English master-servant law. Further than this, there could be remedies for the victims of slave wrongs, but they would not always be imposed by law. They would flow from the sense of decency and responsibility of slave-owners. If a given master's standards of conduct fell below those of society at large, the only recourse a victim would have would be a criminal action, if the facts sustained it. Otherwise the victim was left where the Alabama court found him. This choice undoubtedly was reinforced by the view that it would be unjust to make someone liable in a court action when no fault could be imputed to him.

III. NEGLIGENCE AND "FAULT"

But the notion of "fault" was itself undergoing a significant transformation in the early nineteenth century with the emergence of a new idea of "negligence." As mentioned earlier the "dominant understanding of negligence at the beginning of the nineteenth century," in Horwitz's words, "meant neglect or failure fully to perform a preexisting duty, whether imposed by contract, statute, or common law status" (1977: 87). He also studied the breakdown of this notion and the emergence of the idea of due care, a legally imposed responsibility of care owed by all persons to all persons independent of special relations. There is little in White's work to directly dispute this. White, however, does place it later, and sees the early nineteenth century as more chaotic and confused than does Horwitz. The main line of development nevertheless is clear enough. To what extent did this transformation apply to defining a master's liability for the misconduct of slaves?

A logical starting point is precisely where we just left off—*Snee* v. *Trice* (1802), because Horwitz viewed it as the first case that contained some "creative impulses." He believed it was the "first unambiguous recognition in American law of a legally imposed standard of care not arising out of contract." To fully understand this side of the case it is necessary to know what "negligence" meant in the common-law in cases of fire. Most scholars, including Horwitz, believe that it had meant nothing more than "neglect" or "failure" to keep the fire from spreading. There was no standard of due care as that is understood today: if the fire spread it was because of a failure to contain it. Liability in such cases then would be strict. The only clear ground of exemption was in the case of "inevitable accident." An early eighteenth-century English statute exempted a master from any liability for fire-spreading damage caused by the "negligence" of his servants. The servant would have to pay a fine to be distributed among those injured, or else be committed to the workhouse. This was the status of English law when *Snee* was decided (Blackstone, 1771-1773: I, 431).

Did the *Snee* court develop new standards? Did it impose or recognize a standard of prudent conduct arising out of a general duty to all? To answer this it is necessary to return to the court's description of the event on Trice's plantation: "the morning was still, and the fire had burnt down, but towards the middle of the day, the wind arose, and blew up the sleeping embers which communicated the fire to the buildings; this, therefore, had more the appearance of accident than

negligence." Then came the following two sentences: "but be that as it may, the master, Mr. Trice, knew nothing of it; he was away from home and did not even hear of it until his return. To make him therefore chargeable, would be very rigorous and unjust" (*Snee* v. *Trice* [1802]). A reasonable interpretation would be that unless the fire spread because of inevitable accident, the master would be liable, but if and only if he had knowledge of the conduct. Did this change the English common-law rule (South Carolina had not adopted the statute)? Yes it did, but not with a new standard of "due care."[3] The English rule did not require a master to have specific knowledge of a servant's conduct, because the servant was presumably acting upon his authority. What *Snee* ruled was that the court would not rest liability upon the presumption that slaves were always under the authority of the master. Furthermore, since the master-slave relation was involved, the court did not break away from basing liability upon an implied contract between masters and strangers that the slave would perform with skill.

It is not, finally, to the decision in *Snee* that we ought to look for evidence of a modern standard of "negligence." It is, rather, to the decision in *O'Connell* over 30 years later. The facts in *O'Connell* were similar to those in *Snee*, except that the servant involved was a white man employed on a farm and not a slave. The worker here was using fire in clearing new ground. "Having done so by the consent of the defendant," Butler wrote, "if it had been shown that he used it with a reckless indifference to the plaintiff's rights and property, as by setting fire to the log heaps at an improper time, or that the fire escaped from his not having taken proper precautions to prevent its spreading, there is no reason why the defendant should not have been held answerable for the consequences. But if the fire escaped by inevitable accident, or in any way which common prudence could not have prevented or remedied, the liability could not have attached" (*O'Connell* v. *Strong* [1838]). We now find quite modern standards such as

[3] A second report of *Snee* appeared (*Snee* v. *Trice* [1802]). Joseph C. Brevard had the court define the problem as "whether the mischief was occasioned by a want of ordinary care in keeping the fire, or to an extraordinary gust of wind, or some other unexpected and uncommon circumstance." The problem concerns the meaning of the phrase "want of ordinary care." Should it be seen as a modern standard of "due care"? Probably not, since Brevard added a lengthy footnote on the subject of the English rules in firespreading cases. It was only a summary of the law as it stood in the seventeenth century, and—as already mentioned—liability at that time was strict.

"reckless indifference," failure to take "proper precautions," and "common prudence."

"Negligence" also appeared in a North Carolina case (*Garrett* v. *Freeman* [1857]), but probably the clearest commitment to a modern standard of due care or negligence came in a dissent in a Louisiana case on the very eve of the Civil War. The case, *Maille* v. *Blas* (1860), involved an action to recover the value of a slave who was killed in a fight with the slave of the defendant. Justices A. M. Buchanan and A. Voorhies simply ruled that the master was indeed liable: the Code provision was absolute. Chief Justice E. T. Merrick dissented. He attempted, by reference to railroad negligence cases, to introduce the concept of contributory negligence into the case. "It is then apparent, that a party's right to recovery for the loss of his slave depends in many cases upon the question whether the slave, for which he claims recompense has or has not acted lawfully and prudently, or whether he has not brought the injury upon himself by his negligence, his malice or felonious intent."

This is the total of the cases involving slave misconduct in which modern notions about "negligence" made their appearance. It is hardly an impressive record. The only South Carolina case in which the standard of liability was adopted actually involved a white servant rather than a slave. There was one case in North Carolina, one dissent in Louisiana. But that is all.[4] One possible reason for this meager record is that the need simply was not there. Slave-owners were hardly weighted down by what Horwitz described as "the crushing burden of damage judgment that a system of strict liability . . . entailed." The same was not true for those in the North—for example, those who were putting up mill-dams that flooded riparian owners' land (1977: 85-99). If Horwitz is correct, Northern courts set out to construct rules that would exempt entrepreneurs from civil liability "for socially useful activity

[4] Modern tort language appeared in a Mississippi case, *Leggett* v. *Simmons* (1846), but it failed to create a liability in the master. It was an action of trespass to recover damages from the owner of a slave who had killed the slave of another master. Justice J. S. B. Thacher ruled that the liability of the master "seems to depend upon the criminal knowledge or agency of that master." This was not shown. The facts were that the owner of the slave who killed the other not only allowed the slaves involved to have liquor, but also knew they had fought. When the fight ended he went to bed, leaving the slaves still together, and woke up to find one of them dead. Thacher observed that "the defendant was doubtless censurable and blamable, for want of care, prudence, and resolute and sufficient interference between the slaves at the outset of the fatal difficulty, but his conduct seems hardly to warrant the finding of the jury, as such cases are contemplated by the law."

exercised with due care," and by about 1840 they had succeeded. Such a notion, according to Horwitz, had become a "commonplace of American law." Perhaps it was, and that may account for its occasional appearance in slave misconduct cases, but it was hardly a major consideration in the law of slavery.

But the notion of "fault" need not be viewed solely within the context of modern standards of prudent conduct, e.g., of a standard of due care owed to all by all regardless of relationship. It was also seen in terms of one's responsibility for the misconduct of others, modern standards of "negligence" apart. The idea was that it was simply not fair to impose liability upon one person for the wrongs of another.

IV. LIABILITY AND CLASS RELATIONSHIPS: MASTERS AND SLAVES

Fairness required that masters should not pay for the wrongs of slaves not under their control. But inevitably this principle raised the vital question of the nature of a master's power and responsibility. Was a slave owner's power absolute? If so, was liability absolute? If power were limited, what theory of limitation marked the boundaries of responsibility for the misconduct of slaves? Answers depended, to some extent at least, upon whether the jurist worked within a system defined by statutes, civil-law traditions, or common-law traditions. Common-law jurisidictions differed from statutory or civil-law ones.

Formal rationality has long been regarded as an attractive feature of the civil law (Weber, 1967: 15).[5] Rules about the liability of slave owners are a good example. Under the civil law liability was complete and absolute; it flowed out of "ownership," as the Louisiana Supreme Court observed, and was one of its "burthens" (*Gaillardet* v. *Demaries* [1841]). There is some dispute about the theoretical ground for this liability, but in the view of W. W. Buckland, it may have been representational: since a slave could not be civilly liable, the master must represent or stand in the position of *defensor* (1908: 112-113). Such a notion certainly has the neatness of rationality. Still another possible foundation for liability might be found in a provision of *Las Sieta Partidas*, the fourteenth-century Spanish code. Slaves were not allowed to testify under

[5] Many early nineteenth-century American jurists, such as Chancellor James Kent and Associate Justice Joseph Story, had a great admiration for the civil law for this reason (Miller, 1962: 94).

oath, but they "should . . . be tortured . . . because slaves are, as it were, desperate men, on account of the condition of servitude in which they are, and every person should suspect that they will easily lie and conceal the truth when some force is not employed against them" (Tushnet, 1975: 182-183). Duplicity and rebelliousness were the natural results of the desperation of slavery. If slaves were viewed this way, it *could* reasonably follow that those who owned slaves had an affirmative duty to control them in the common interest. Wrongs committed by slaves resulted from the failure of the owner to control, and this failure or neglect became the foundation for civil liability. A principled ground for complete liability could be that slaves were always presumptively under the control of the master. Culpability rested upon the failure of the master to control the slave.

Whatever the theoretical foundation might be, absolute liability can be found in the Louisiana Civil Code, which was patterned after the Napoleonic *Code Noir*. Article 180 of the Code of 1838, for example, provided that "the master shall be answerable for all the damages occasioned by an offence or quasi-offence commited by his slave, independent of the punishment of the slave" (Upton, 1838: Chap. 3, Art. 180). A "quasi-offence" under Louisiana law corresponds to what we think of as a "tort" under the common law. A master, therefore, was civilly liable under the Code for all criminal or civil wrongs of a slave. However, as under the Roman law of slavery, a master was allowed to limit the impact of this responsibility through the *actio-noxalis*. Article 181 of the 1838 Code described this process.

> The master however may discharge himself from such responsibility by abandoning his slave to the person injured; in which case such person shall sell such slave at public auction in the usual form, to obtain payment of the damages and costs; and the balance, if any, shall be returned to the master of the slave, who shall be completely discharged, although the price of the slave should not be sufficient to pay the whole amount of the damages and costs; provided that the master shall make the abandonment within three days after the judgment awarding such damages shall have been rendered; provided also that it shall not be proved that the crime or offence was committed by his order; for in case of such proof the master shall be answerable for all damages resulting therefrom, whatever be the amount, without being admitted to the benefit of the abandonment.

While the liability was absolute, the consequences of that liability could be limited. The *actio-noxalis* retained the principle of complete responsibility at the same time that it allowed a distribution of the damages (Upton, 1838: Chap. 3, Art. 181).

A case that shows the extent of liability (and how strikingly different it was from the other slave communities) under the Code was *Gaillardet* v. *Demaries* (1841). In this case the plaintiff sued the hirer of a slave. The slave, while in the employ of the defendant, drove a dray against the gig of the plaintiff, "breaking it to pieces and injuring his servant." The damage was alleged to have resulted from "the negligent and unskillful conduct of a slave." The defendant contended that the owner of the slave was liable for the damages under the Code, but that he, as a mere hirer, was not. The court, however, ruled that the plaintiff had an action against both the owner and the employer of the slave. The master's liability, said the court, flowed out of the ownership and existed whether the slave was supposed to be acting under his authority or not. The liability of the hirer, however, was narrower. The hirer would not be liable for the willful wrongs of the slave, only for damage resulting from the neglect or unskillfulness of a slave in the course of employment. In other words, the common-law rules of master and servant liability applied in Louisiana to the case of the hirer of the slave, but not to the master whose responsibility was absolute.

The dilemma presented by the Code to a jurist who shared the view that a person should not be liable for someone else's wrongs cropped up in the 1858 case of *Boulard* v. *Calhoun* (1858). The plaintiff in the case, Antoinette Boulard, sought vindictive damages against the defendant Meredith Calhoun. Calhoun's slaves removed the plaintiff's property from her home, put it and her on a flatboat, and set it adrift on the Red River. They then burned her house to the ground. They were under the direction of Calhoun's overseers (he had four plantations) among others who had decided to run Boulard out because she was supposedly a notorious illegal trader with slaves. The facts developed at the trial showed that Calhoun had not only not supported the action, he had positively tried to dissuade the white leaders. Despite that fact, Justice Buchanan was compelled by the Code to find the defendant guilty, but it bothered him. To extend the accountability for vindictive damages "to other cases than those in which the owner of the slave was an active participant in the tort or crime committed by the latter, would constantly expose the master to ruin by the acts of a vicious slave, without any fault of his own; and would thereby operate as the greatest of discouragements, to the holding of that species of property; a consequence which we conceive to be at variance with the policy of the law of

Louisiana." The liability of a master was absolute and flowed from his ownership (*Gaillardet*), but it would not be extended beyond the command of the Code to allow vindictive damages in a case when the owner had not been at fault. Any other rule would expose him or her to ruin at the hands of slaves, and could even undermine the institution itself.

Under common law the problem of defining the precise boundaries of a master's power proved more difficult. This is perhaps nowhere better evident than in the work of Justice Thomas Ruffin of North Carolina, avowed by most scholars to be one of the finest judicial minds in the pre-Civil War South. Ruffin was the author of the most frequently quoted of all cases involving the law of slavery, *State* v. *Mann* (1829). In that case, a criminal action for abuse against the hirer of a slave, Ruffin argued for the total subordination of the slave: "the power of the master must be absolute to render the submission of the slave perfect." If a master's power were absolute, then absolute liability for wrongs committed by the slave followed logically. Twenty years after the *Mann* decision, however, Ruffin refused to carry the logic to this conclusion (*Parham* v. *Blackwelder* [1848]). The case did not deal with "negligence," but with a more traditional trespass—cutting timber on someone else's land. Despite *Mann*, Ruffin refused to make the master liable. His reasoning was as follows: "we believe the law does not hold one person answerable for the wrongs of another person. It would be most dangerous and unreasonable if it did, as it is impossible for society to subsist without some persons being in the service of others, and it would put employers entirely in the power of those who have, often, no good-will to them, to ruin them." Besides, he noted, the slave would be criminally liable for his trespasses. Ruffin, in other words, had hardly strayed an inch from the reasoning of the South Carolina Constitutional Court in the *Snee* case.

One dramatic effort to go beyond the approach of the South Carolina court came in a Tennessee case, *Wright* v. *Weatherly* (1835). The case involved the death of one slave at the hands of another, and to avoid the dilemma of a false analogy to the servant in English law, the Tennessee court suggested (unsuccessfully as it turned out) that the legislature adopt the *actio noxalis* of the civil law.

The response in two other states, Arkansas and Missouri, was somewhat different. Both made masters civilly liable for a specified series of trespasses, and many of these were indictable offenses as well. In Arkansas, a number of

trespasses, previously only torts, were made indictable offenses (such as killing, maiming, or administering poison to domestic animals). An Arkansas statute, however, also provided that in "all trespasses, and offences less than felony" committed by a slave, the master could "compound with the injured person and punish his own slave, without the intervention of any legal trial or proceeding; but if he refuse to compound, the slave may be tried and punished, and the damage recovered by suit against the master" (*McConnell* v. *Hardeman* [1854]).

In the *McConnell* case the statute was given a narrow interpretation: the law was restricted to trespasses which were indictable offenses or acts expressly listed in the statutes. Liability was broad but not unqualified. In this case, the tortious act of "taking the plaintiff's horse" was not listed in the statute, and therefore the master was not liable. But the court went on to invite the legislature to consider "whether the true interests of slave-holders would not be promoted by making them liable for all trespasses committed by their slaves, thus removing many causes of jealousy and ill-feeling against the owners of that species of property, and at the same time protect them by limiting their liability, as at the civil law, to the value of the offending slaves."

Missouri moved a little closer to the civil law than did Arkansas. It provided that masters would be civilly liable for injuries that resulted from certain stipulated offenses, but that the damages could not exceed the value of the slave. The Missouri Supreme Court, in interpreting the statute, was far less sympathetic to the victims of slave offenses than either the Arkansas or Tennessee courts. Justice William B. Napton,[6] for example, argued that "the power of the master being limited, his responsibility is proportioned accordingly. It does not extend to the willful and wanton aggressions of the slave except where the statute has expressly provided (*Ewing* v. *Thompson* [1850]).

Arguments favoring a wider statutory liability than existed under a common-law master-servant mode of analysis claimed that it flowed from the nature of the master-slave relationship. This was true, for example, in Louisiana and Tennessee. Such analysis focused on the responsibility of the master to control the slave. It implicitly recognized that slaves were not merely

[6] Justice Napton was one of the Missouri judges determined to use the Dred Scott case to overturn all judgments that accepted the force of the slavery prohibitions in the Ordinance of 1787. He was, in short, an avowedly pro-slavery judge (Ehrlich, 1979: 58-61).

docile extensions of a master's will but independent, responsible "moral agents."

But the same premise existed for those who attempted to *limit* the liability of a master. Justice Bay in *Snee* had described slaves as a "headstrong, stubborn race of people" who could ruin their owners if the latter were made absolutely liable (a point repeated in Ruffin's analysis in *Parham*, and in the Louisiana case of *Boulard* v. *Calhoun*). Only one jurist, as far as I am aware, clearly adopted the theoretical position that a master's liability was limited because his power was limited (*Ewing* v. *Thompson* [1850]).

It is difficult to explain with much confidence or certainty why a given jurist took one side or the other in this debate. Justices Bay, Ruffin, and Buchanan all fell back upon the notion that if owners were to bear the costs of accidents in all cases it could lead to their ruin. Such a position would place power in the hands of slaves. Buchanan, who worked within a civil law Code state, could only use this notion to reject vindictive damages, not to remove all liability for certain accidents. But the general idea remains the same. What is impossible to tell, of course, is whether or not these jurists were really that timid. Did they truly believe that placing the costs of accidents upon masters would lead to their ruin? Perhaps Ruffin, who in the *Mann* case noted that nothing but absolute power could keep slaves in submission, was indeed uncertain about the stability of his society. Perhaps Bay, with the recent bloody slave insurrection on Santo Domingo before his eyes, was equally sensitive to the dangers from a servile population. Whatever the answer might be, one thing is reasonably clear: these jurists tended to fashion rules of law and make policy choices with minds focused upon the master-slave relationship.

Was this relationship also the focus for those who attempted to justify a wider liability for slave-owners? The answer, in my judgment, is probably not. What complicated that focus is the one remaining area to be examined in this article: the impact of nonslaveholding whites upon the choices made by jurists and legislators.

V. COST DISTRIBUTION AND NON-SLAVEHOLDERS

It is plausible to argue that Southern judges, especially in view of the confused state of tort law development in mid-nineteenth-century America, were moved by a concern that injured plaintiffs be compensated under some circumstances.

Class relationships and perceptions often played an important role in the way Southern jurists and legislators grappled with the problem of civil liability for slave wrongs. Over 50 years ago Francis M. Burdick, writing about the fellow-servant rule in tort law, argued that Brooks Adams was simply wrong when he asserted that "the rules of the law are established by the self-interest of the dominant class, so far as it can impose its will upon those who are weaker" (1911-12: 349). One can accept Burdick's view that law is not purely an "expression of class selfishness" without also accepting his contention that law is a system of "principles under which justice can be fairly administered between litigants without respect to class, or rank, or condition" (1911-12: 349-371). The importance of class relationships in the shaping of legal rules cannot be ignored, but we simply must not fall into the reductionist trap. Surely Calabresi is correct that "fairness" played a role, and it was not always defined by class relationships.

We have already dealt at some length with the question of how perceptions of the master-slave relationship conditioned the imposition of civil liability on masters for the misconduct of their slaves. What remains is to discuss the role of white class relationships. Non-slaveholders also helped to shape the law by their attitudes toward slavery and slaveholders, and through the latter's perceptions of those attitudes. The role of this class has been overlooked by legal historians; little is known about it except for some pioneering studies (Shugg, 1939; Clark, 1942; Weaver, 1945). How widespread, for example, was the bitterness of Hinton Helper of North Carolina who wrote in the 1850s that "slavery benefits no one but its immediate, individual owners, and them only in a pecuniary point of view, and at the sacrifice of the dearest rights and interests of the whole mass of non-slaveholders, white and black . . . To all classes of society the institution is a curse; an especial curse is it to those who own it not" (1857: 279).

Surely there were deep-seated ambiguities in the minds of non-slaveholders. Some undoubtedly agreed with Helper, while others hoped eventually to own a slave or two at least. Some, like Andrew Johnson of Tennessee, the future President, absolutely despised the large slaveholders (Stampp, 1966: Ch. 3); and many supported slavery because without it they feared they would have to compete with black labor and be degraded in the process. In the final analysis perhaps Eugene Genovese's suggestion is correct: "How loyal, then, were the non-slaveholders? Loyal enough to guarantee order at home

through several tumultuous decades, loyal enough to allow the South to wage an improbable war in a hopeless cause for four heroic years. But by no means loyal enough to guarantee the future of the slaveholders' power without additional measures" (Genovese, 1975: 341). One of these "measures" may well have been an effort to impose a wider responsibility upon masters for the misconduct of their slaves. Because so little is known about the non-slaveholders (farmers, urban workers, "poor white trash," etc.) their *precise* role in shaping the law remains uncertain. There is enough evidence, however, to show that the influence was there.

There is little evidence to suggest that jurists like Thomas Ruffin, Elihu Bay, or Josiah Nott fashioned a theory of liability with an eye to non-slaveholders. Chief Justice Watkins in Arkansas and Justice Nathan Green in Tennessee, on the other hand, certainly did. Watkins, as discussed earlier, urged the legislature to widen a master's liability "thus removing many causes of jealousy and ill-feeling against the owners of that species of property" (*McConnell* v. *Hardeman* [1854]). And Green, who was no proslavery jurist (Howington, 1975: 249), faced a full-scale assault upon the institution of slavery from counsel representing the slave-owning plaintiff. "The people of this country," counsel contended, "deprecate slavery as an evil—to be rid of which would be a great public blessing." He further argued that "it is not the policy of the law to encourage slavery." (Such an argument, it need hardly be said, would have been unthinkable before a court in South Carolina or Georgia). Of equal interest was Green's response to the request for a rule imposing a wide liability. After urging the legislature to impose it he observed that "such a provision would be fair and equal among the slaveholders themselves; and, in relation to a large majority of the people of the state, who do not own slaves, it is imperiously required" (*Wright* v. *Weatherly* [1835]).

The nature of slavery and the class structure among whites in Tennessee provoked a different analysis of the problem than that pursued in the Carolinas. The *Wright* case was decided one year after a major debate between proslavery and antislavery forces in the state. Antislavery sentiment remained strong in Tennessee, even though it did not prevail (Mooney, 1957: Ch. 1). In Arkansas, hostility to slaveholders was also strong. At the time of the movement to acquire statehood, for example, a correspondent wrote the following to the Little Rock *Times*: "Of the whole white population, for one who has twenty

slaves, we will find you twenty who have no slaves. The one, then, will be the sufferer by the abolition of slavery in the Territory, and to enable him to loll in ease and affluence and to save his own delicate hands from the rude contact of the vulgar plow, the twenty who earn their honest living by the sweat of the brow are called upon with the voice of authority assumed by wealth to receive the yoke. They must consent to a tenfold increase of tax for the support of a state government, because my lord is threatened with danger of desertion from his cotton field if we remain as we are" (Taylor, 1958: 38). This, of course, was an unsuccessful plea against statehood, but the point lies in the writer's unconcealed hostility toward slaveholders.

Such sentiments were relatively strong in states like Arkansas, Missouri (Eaton, 1954: 47-48, 154-155, 201; Barney, 1972: 14-15, 101, 118, 124, 144), and Tennessee—states not dominated by a slave population. Arkansas and Missouri modified the rules on a master's liability by statute, but despite Judge Green's plea, this did not happen in Tennessee. Perhaps, and this must only be speculative, the reason is that though all three states were common-law jurisdictions, Tennessee was the oldest and most traditional. The newer states of the west often showed a greater willingness to depart from the common law. States like Alabama and Mississippi, of course, were also newer states that showed a willingness to move by statute to significantly modify common-law rules, as in the Married Women's Property Laws; but in regard to civil liability of slaveholders for the misconduct of slaves, they differed sharply from the other western slave states, because they had very large slave populations. Within those states the master-slave relationship was of far greater moment than the relationship between non-slaveholding whites and slaveholders. It was easier for an Alabama jurist to accept the fact that in many cases the victim of a slave wrong had to be content with the notion that the injury was as if "effected by the natural elements" than it was for a jurist in Arkansas or Tennessee. A comment is also in order about North Carolina. Why, since it had produced Hinton Helper and harbored opposition to slavery in the up-country, did an analysis like that of Green or Watkins fail to break the surface? Here the purely human element must be brought into the story (aside from the obvious fact that North Carolina had a very long common-law tradition). Tushnet and Kier Nash placed a great deal of weight upon the differences in ability and views of various judges and courts. Thomas Ruffin simply did not view

slavery the same way Nathan Green did. It is not altogether correct, however, to leave the impression that the class structure in North Carolina produced no one who inclined to the Green or Watkins approach. Richmond Pearson's charge to the jury in the *Parham* case in the 1830s suggests otherwise. He, at least, was prepared to create a much wider liability than Ruffin; and it is just as likely that he was reflecting the class pressures that existed in North Carolina as that he was expressing some personal preference (*Parham* v. *Blackwelder* [1848]). It also may be significant that Bay, for example, sat on the court of his state in the first years of the nineteenth century, while Watkins and Green were jurists during the emergence of Jacksonian Democracy and the rise of a strong abolitionist movement in the North. The early South Carolina court's decision may have reflected a society largely unbattered by politically important class divisions (non-slaveholding whites simply had little political clout at that time) or attacks upon the social fabric. As democracy spread, slave-owners became more and more concerned about the loyalty of non-slaveholders—especially since this came at the same time that the northern abolitionist movement was launching its full-scale attack upon slavery, and more and more moderate northern political leaders were embracing the notion of containment (Channing, 1970: 255-256).

It is this relationship between slaveholders and non-slaveholders that has not been perceived adequately. Tushnet acknowledges it in discussing the criminal law of slavery (1981: 124), while Kier Nash and White, who place little weight upon the importance of social relationships in legal choice, generally overlook it altogether. Horwitz is sensitive to the importance of class in legal change, but tends (largely because he does not define the relationships between the classes involved with any care or precision) to see only the action of a dominant class able to ride roughshod over the weaker elements of society. Social relationships, however, are far more complex than that. Even the "lower orders" are not always mere passive victims of decisions by those who wield power. Nonslaveholding whites, no less than slaves, were able by their demands to force slave owners and their allies to make some adjustments within their system.

VI. CONCLUSION

What ought to be obvious by now is the correctness of Calabresi's notion that distributing the burdens of accidents is

a matter of choice: "what we choose, whether intentionally or by default, will reflect the economic and moral goals of our society" (1970: 23). But the range of choices is not infinite. Legal traditions and styles of reasoning, as well as class needs, affected the policy choices made by Southern jurists. A theory of responsibility, like the theory of liability from which it springs, is determined by complex social relations, conditioned by legal traditions.

Such choices, however, are not static, and this brings up a question Tushnet and Kier Nash have debated. Was there development within the law of slavery? In my view the answer must be that there was, although it is not a simple task to describe it. After the 1830s, Southern states increasingly intervened in the master-slave relationship. Examples are plentiful: many states began to impose restraints upon the right of a master to alienate his property interest (emancipate), and some began to forbid it completely. Moreover, owners more and more often had to face the risk of legal actions against them for criminal abuse of their slaves (Stampp, 1956: 217-224; Genovese, 1974: 49-70). What may well account for this is the spread of democracy and the concurrent spread of abolitionist sentiments. Jacksonian Democracy and immediatist abolitionism emerged at about the same time. The first forced slave-owners to take into account the attitudes of non-slaveholders in their midst, and the latter pressed them to reform the system to remove some of the greatest abuses (some even urged the legalization of slave marriages) (Genovese, 1974: 69).

Jacksonian jurisprudence reflected the changing nature of social and political relationships by its emphasis of "community" over "vested rights." A classic example is Chief Justice Taney's ruling in *Charles River Bridge* v. *Warren Bridge*, 11 Peter 420 (1837). But this, by itself, did not mean that only one choice remained to those who had to define the limits of a master's liability. The newer jurisprudence, with its emphasis upon the "good of the community," could lead to the imposition of a larger liability in those states in which deep class divisions existed among whites (and in which non-slaveholders held a measure of political power). On the other side, it could buttress the earlier policy choices in favor of limited liability in those in which the community was politically dominated by slave owners and a large slave population. "Tended" is, however, the only word that can properly describe the development, along with such words as

"erratic" or "jagged." This is because the individual temperament and values (proslavery or antislavery, conservative or liberal, natural law or legal positivist in orientation) of jurists would temper the tendency, as the rulings of the Missouri court attest (Kier Nash, 1979: 185). Even though the state might be intervening more and more, it would not necessarily dictate one and only one policy choice over others.

As long as the dependence upon English legal traditions remained strong, the options might be somewhat constricted, but not necessarily uncongenial. The turn to statutory involvement might broaden the options but yet not dictate a particular result. For that we must examine the class structure within a given state—and the legal, social, and religious values of individual jurists. For most of the older slave states, whose choices were made early and whose social character was heavily defined by the master-slave relationship, the *tendency* was for a continued commitment to a limited liability. The theoretical foundation for this, in most cases, was the idea that someone should not be responsible for the wrongs of someone else. The fact that this might leave some victims of slave misconduct bearing the burdens of accidents "as if effected by the natural elements" was a price worth paying. In those states in which non-slaveholders were strong, or in which there was some uneasiness in the minds of a jurist because of them, the *tendency* (beginning in the 1830s and 1840s) was toward the imposition of a wider liability, to make the masters bear the burdens of accidents caused by their slaves. There the development seemed to be to embrace the notion in the Louisiana code: strict liability was one of the "burthens of ownership."

Where was the law of slavery going beyond this? Tushnet has argued that Louisiana represented the mature law of slavery (1975: 148). The South, he believed, was moving away from common-law analogies toward a categorical and autonomous law of slavery (largely, but not exclusively, through statutes). Increasingly caught up in a bourgeois world, slave owners became tied into a market system they could not easily escape, and this was reflected in legal change. In allocating the costs of accidents caused by slaves, however, the market analysis is of little value; the line of development in the Carolinas, moreover, does little to uphold Tushnet's characterization of development as tending to separate slaves from others. But, even assuming he is correct, it would only be

the beginning of the problem—as the judicial experience in a Code state like Louisiana shows.

How would the courts interpret the statutes? If the Louisiana experience is a fair index, it is likely that notions developed in other legal categories (such as railroad law) might well spill over and help condition the responses. But this could and did happen without statutes. The *O'Connell* decision in South Carolina, the *Garrett* decision in North Carolina 20 years later and Merrick's dissent in *Maille* tell us that much. Precisely how notions like "reckless indifference," "prudence," and "contributory negligence" would fit into the wide variety of factual situations that led to tort actions against masters is a difficult, if not impossible, question to answer. What is clear is that such notions would leave absolute liability in a total shambles.

Tugging in the opposite direction, however, was the pressure of class divisions among whites in what Genovese called the "slave owners' democracy." Within a democratic framework, such divisions required more concern and respect than might have been the case in earlier autocratic societies. The limited evidence from Arkansas and Tennessee suggests that regard for the criticisms of non-slaveholders was an important factor in the responses of some slave-state jurists. It tended to push toward an absolute liability in some cases, a liability without regard to the culpability of the master. What role this class division might have played after 1860 is, of course, impossible to tell. Class divisions are not static, and changes in them could well change the pressures to allocate the costs of accidents in different ways. One possibility would have been an increase in class animosity; the other, a decrease, or an increase in loyalty to the slave-owning regime. Roger Shugg argued that by the end of the 1850s it was nearly impossible (because of the high costs involved) for yeomen and non-slaveholders to acquire, or even to hire, slaves. Shugg then quoted the argument of a rural Louisiana newspaper that "the slave trade will have to be opened in time, to prevent the slaves from getting into the hands of a few, thereby forming a monopoly. The minute you put it out of the power of common farmers to purchase a negro man or woman to help him in his farm, or his wife in the house, you make him an abolitionist at once" (1939: 88). Perhaps the opening of the slave trade, or a significant demographic shift (bringing more slaves into states like Arkansas) might have turned aside the concentration of slaves in the hands of a few, and perhaps not. If it did not, the

animosity of non-slaveholders toward slave owners might have increased, leading to more pressure to substitute a concept of "fault" based upon social concerns, which in turn could lead to the notion of "absolute liability" as reflected much later in the work of a jurist like Roger Traynor in California. More and more Southern jurists might have joined Justice Watkins in Arkansas or Green in Tennessee. Another possible way to defuse the pressure from non-slaveholders was suggested in the New Orleans *Delta* in 1856 (Reprinted in the Chester (S. C.) *Standard* Nov., 1856). The argument was that the legislatures should create a "species of homestead in slave property," and exempt it from seizure for debts. This would lead to a wider distribution of slave property, because poorer whites would feel a greater security in their ownership, and this wider distribution would "enlarge and diffuse the interest of the whites in negro slavery." If such reforms had occurred, and with the desired result, they might have defused the pressure to move toward absolute liability; the notion of no liability without fault would then itself have been under relatively little strain.

In any event, the answers worked out by Southern jurists were but momentary solutions wrought within changing patterns of legal thought and legal doctrines, and evolving class relationships. The story of their effort, a sometimes bemused and sometimes troubled effort, was halted abruptly by the violence of war, when not only slavery, but also the legal systems built around it collapsed.

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