ESSAYS

HUMANITY, UTILITY, AND LOGIC IN SOUTHERN LEGAL THOUGHT: HARRIET BEECHER STOWE'S VISION IN DRED: A TALE OF THE GREAT DISMAL SWAMP

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INTRODUCTION

In 1856 Harriet Beecher Stowe published her second antislavery novel, *Dred: A Tale of the Great Dismal Swamp.*" Appearing four years after her stunningly successful *Uncle Tom’s Cabin,* the novel provides a "sympathizing heart" for "those who now are called to struggle for all that is noble in our laws and institutions." Like *Uncle Tom’s Cabin* and *A Key to Uncle Tom’s Cabin,* *Dred* dwelt on the harshness of slavery, focusing on the ways that Southern laws released the passions of slave owners from control and thus licensed the horrors of slavery. An important part of the novel involves a young abolitionist lawyer, who files suit against a man for abusing a slave, and the legal decision—issued by the lawyer’s father, a judge on the North Carolina Supreme Court—that freed the abuser from liability. Stowe explores important issues at the intersection of humanity and law, including the role of a judge in mediating between law and justice, the role of antislavery lawyers in the Southern legal system, and the role of utilitarian thinking in supporting the law of slavery.

This essay mines Stowe’s novel for three purposes. First, it seeks to recover the sophisticated jurisprudential ideas that circulated in popular culture at the time. Second, it seeks to illuminate how Stowe believed Southern lawyers and judges reasoned. As a contemporary observer, Stowe has the power to illustrate proslavery legal thought in ways that we cannot now replicate. Her perceptions and critique can point us toward an understanding of proslavery thought that twentieth-century scholars, who are not steeped in the same conflict, may not see. Along with depicting Stowe’s interpretation of Southern legal thought, this essay categorizes other important ideas that Stowe’s characters articulate—legal logic, utility, and humanity. It attempts to discern Stowe’s understanding of why legal reform had not occurred and the prospects for the end of slavery. Finally, the essay compares Stowe’s depiction of the reasoning processes of Southern legal thinkers to the process that they actually undertook.

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3 *DRED*, supra note 1, at xiv.
4 Harriet Beecher Stowe, *A Key to Uncle Tom’s Cabin* (Boston, John P. Jewett & Co. 1853) [hereinafter KEY]. *A Key to Uncle Tom’s Cabin* is a collection of laws, judicial cases, and vignettes Stowe published in 1853 to provide factual support for her novel.
There is a rich literature regarding the roles and interplay of morality,\textsuperscript{5} formalism,\textsuperscript{6} instrumentalism,\textsuperscript{7} and utilitarianism\textsuperscript{8} in American jurisprudence. Beginning with the earliest American legal writings,\textsuperscript{9} those concerned with law have addressed such fundamental issues as the proper response for judges faced with cases in which the law conflicts with their moral vision of a just outcome. In his 1975 book,\textit{ Justice Accused}, Professor Robert Cover reconstructed the legal and intellectual worlds that antislavery judges inhabited in the forty years leading up to the Civil War. Cover found that those judges faced an excruciating conflict, which he labeled the “moral-formal dilemma.” They were forced to choose between following Congress’ positive command to support slavery and their own, often religiously inspired, moral position that slavery violated natural law and the dictates of humanity.\textsuperscript{10} Their responses took several forms. Some judges resigned from the

\textsuperscript{5} See generally H.L.A. Hart, \textit{Positivism and the Separation of Law and Morals}, 71 \textsc{Harv. L. Rev.} 593 (1958) (explaining and defending the separation of law and morals); Lon L. Fuller, \textit{Positivism and Fidelity to Law—A Reply to Professor Hart}, 71 \textsc{Harv. L. Rev.} 630 (1958) (attacking separation of law and morals).


\textsuperscript{7} See generally Horwitz, \textit{supra} note 6, ch. 1 (discussing the emergence of instrumentalism in American law).


\textsuperscript{9} See, e.g., 1 Henry St. George Tucker, \textit{Blackstone’s Commentaries: With Notes of Reference to the Constitution and Laws, of the Federal Government of the United States; and the Commonwealth of Virginia} iii-vi (Philadelphia, William Young Birch & Abraham Small 1803) (questioning role of opposition to slavery in light of legislation supporting slavery).

\textsuperscript{10} See generally Cover, \textit{supra} note 6, at 197-256. It is common to phrase the debate as one between law and morality. Stowe, however, phrased the debate as one between “humane feelings” and law. \textit{See Key, supra} note 4, at 77. To preserve Stowe’s language, with its connotations of sentimentality and of the role of emotions in evoking reform, this essay usually uses the word “humanity” where Professor Cover and others write in terms of morality. \textit{See generally Cathy N. Davidson, Revolution and the Word: The Rise of the Novel in America} 125-36 (1986) (focusing on sentimentality and social commentary); Elizabeth B. Clark, \textit{“The Sacred Rights of the Weak”}: Pain, Sympathy, and the Culture of Individual Rights in Antebellum America, 82 \textsc{J. Am. Hist.} 463
bench; others "elevate[d] the formal stakes"—advancing justifications based on the threat that an antislavery decision posed to society;\(^{11}\) still others retreated to formalism in their opinions, arguing that their duty to law required that they return fugitive slaves whatever the dictates of humanity,\(^{12}\) or ascribing moral responsibility for their decisions elsewhere.\(^{13}\)

Scholars have also questioned whether a judge should issue an opinion dictated by a formalist approach to law, or conversely, reject legal doctrine and instead issue a decision based on a utilitarian calculus of maximizing happiness or social harmony. Both positions have adherents in contemporary debate and have analogs in American history.\(^{14}\)

These questions have also captured the American literary imagination. Several of the great literary works of the nineteenth century, such as Herman Melville’s *Billy Budd* and James Fenimore Cooper’s *The Pioneers*, addressed

\(^{11}\) See *Cover*, *supra* note 6, at 199, 229-32 ("By 'elevation of formal stakes,' I mean the tendency to choose the highest of possible justifications for the principle of the formalism relied upon.").

\(^{12}\) See *id.* at 232-36 (describing the judicial tendency to take the easy way out by resorting to a "mechanistic" application of "the law and the law alone" when confronted with the "moral-formal" dilemma).

\(^{13}\) See *id.* at 236-38 (describing the practice of attributing moral responsibility on others, particularly by pointing to the doctrine of "separation of powers").


For examples of contemporary analogs, see *Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 102nd Cong. 237-43 (1991) (notes for appearance of Erwin N. Griswold) (questioning the role of natural law in constitutional interpretation); *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 100th Cong. 319-22 (1987) (exchange between Senator Joseph Biden and Judge Robert Bork over role of precedent and "substantive due process," particularly as it relates to slavery).
the dichotomy between law and justice. Both authors addressed the complicated moral issue of whether judges should render decisions at odds with their understanding of a “just” outcome.\footnote{See, e.g., G. Edward White, The Marshall Court and Cultural Change, 1815-1835, at 40-49 (1988) (demonstrating that one of the major themes of Cooper’s The Pioneers was the distinction between justice and law); Perry Miller, The Life of the Mind in America: From the Revolution to the Civil War 104 (1965) (employing Cooper’s The Pathfinder to illuminate “the concept of a man who knows justice not by law but by instinct”). Cooper’s later works, such as The Redskins (New York, 1853), represent a shift in his thinking. They concern the way that law is subverted by democratic passion. Melville, however, who wrote Billy Budd near the end of his life, had been developing the themes he explores there throughout his work. See, e.g., Herman Melville, Pierre: Or, The Ambiguities 93 (Grove Press 1957) (1852) (contrasting the “cold balls of justice” with the “warm balls of the heart”).}

Beneath the nineteenth century’s renaissance of major literary figures flowed a host of now obscure writers who addressed similar issues. William Dunlop’s play, André, broached the almost sacrosanct question of whether it was proper for General Washington to order the execution of British Major André for bribing Benedict Arnold.\footnote{See generally William Dunlap, André (New York, 1798), reprinted in Representative American Plays 83 (Arthur Hobson Quinn ed., 6th ed. 1938).} One of Major André’s friends, Colonel Bland, pleaded with General Washington, to spare André from the “iron law of war” because André possessed “every virtue of humanity” and was acting only according to duty.\footnote{See id. at 96. James Waddell saw the analogy to Major André in Uncle Tom’s Cabin Reviewed. See James Waddell, Uncle Tom’s Cabin Reviewed 42 (Raleigh, NC 1853). See also James N. Barker, Superstition (Philadelphia, 1826), reprinted in Representative American Plays, supra note 16, at 113 (play about the Salem Witchcraft trials and problems in reducing the standard of proof).} Royall Tyler, a justice on the Vermont Supreme Court and sometime professor of law at the University of Vermont, examined the moral choices made by King Solomon as a judge in his play The Judgment of Solomon. Southern lawyer John Pendleton Kennedy’s 1832 book, Swallow Barn, likewise examined the abstruse science of the law and how its vagaries led to uncertain results.\footnote{See generally Royall Tyler, The Judgement of Solomon, reprinted in Four Plays (Arthur Wallace Peach & George Floyd Newbrough eds., 1941).} In many cases, especially in
the period from 1820 through the Civil War when abolitionists debated with proslavery legal thinkers the role that law should play in the institution of slavery, the literary discussions echoed public debate over the boundaries between law and justice, and formalism and utilitarianism.\textsuperscript{20}

Stowe subtly treated important aspects of these issues in \textit{Dred}. However, despite the extensive writings on slave law and Stowe in the last three decades, \textit{Dred} remains largely unstudied.\textsuperscript{21} \textit{Dred} uncovers the conflict between humane treatment of slaves and the law that enveloped Southern judges and lawyers. Stowe recognized just how constrained judges felt by the judicial role, and how unlikely it was that they would be able to remove their judicial masks while on the bench. At the same time, other actors in the slave system, such as legislators and lawyers, had little interest—because of their own utilitarian calculations—in restricting slavery. \textit{Dred} thus represents an abolitionist’s answer to the question how did judges and lawyers act within the slave system?

Part I of this essay sketches the story of \textit{Dred}. Part II addresses the tension antebellum judges felt between humanity toward the slave and the dictates of law and the Constitution. It begins by discussing the abolitionists' critique of the duties imposed by law, then shifts to Justice Thomas Ruffin of the North Carolina Supreme Court, whom Stowe used as a model for the judge in \textit{Dred}. Stowe asked why Ruffin, who recognized the conflict between humanity and law, failed to reform the law. She attributed Ruffin's failure to his adherence to cold, legal logic. Part II then shifts to the views of other judges and of abolitionists regarding the duties imposed by law. Part III examines the problems of the abolitionist lawyer faced with a proslavery law. To further examine those problems, Part IV discusses three proslavery foils Stowe set up in the novel: a legislator, a jurist, and a lawyer. The utilitarian focus of these characters demonstrates that neither utilitarianism nor formalism offered an adequate answer to problem of the unjust slave law. The final Part of this essay examines Stowe’s lessons for our understanding of the role of law in antebellum culture.

\textsuperscript{20} See generally COVER, supra note 6; LOUIS S. GERTEL, MORALITY AND UTILITY IN AMERICAN ANTI-SLAVERY REFORM (1987); Aviam Soifer, Status, Contract, and Promises Unkept, 96 YALE L.J. 1916, 1921-27 (1987) (providing a description of Betty's Case, which represents the level of public involvement in the legal debate over slavery).

I. DRED: THE STORY

While Stowe's first antislavery novel, *Uncle Tom's Cabin*, focuses on the "horrors suffered by the slave," *Dred* focuses on "the moral degradation, the bad feeling, the state of calm and of civil conflict, the poverty and misery of the master." Dred centers on inhabitants of two North Carolina plantations, Canema and Magnolia Grove. The major characters are Nina Gordon, a beautiful, whimsical young woman, heiress of Canema; her brother, Tom Gordon, the harsh, demagogic proslavery politician; their half-brother, Harry, who is the son of their father, Colonel Gordon, and one of the slaves on Canema; Nina's lover, the young lawyer Edward Clayton, owner of Magnolia Grove; and Edward's father, the Chief Justice of North Carolina, Judge Clayton. Surprisingly, the figure for which the novel is named, Dred, a fugitive slave who lives in the Dismal Swamp and aids runaway slaves, occupies only a peripheral role during much of the novel.

Two cases serve as vehicles for exploration of the conflict between law and humanity. The first arises when Nina hires out Milly, a slave, to a neighbor, Mr. Baker, for desperately needed cash. Milly intervenes when Baker, in a drunken rage, tries to punish a slave boy for a small offense. Baker hits Milly, then shoots her when she tries to escape the punishment. When Nina hears of the atrocity, she asks Edward to sue Baker. Edward gladly takes the case and succeeds at trial, winning a jury verdict. He loses on appeal, in an opinion delivered by his father, Judge Clayton. Stowe modeled this opinion on North Carolina Supreme Court Justice Thomas Ruffin's 1829 opinion in *State v. Mann.* Edward then resigns from the practice of law; Nina dies of cholera.

Harry's sister, Cora, also falls victim to the law. Cora is taken to Louisiana by Colonel Gordon's sister, Mrs. Stewart. There Cora marries Mrs. Stewart's son, George, who emancipates her. When George dies, Cora inherits his plantation. But Mr. Jekyll, a lawyer from New Orleans, sues to oust Cora from her inheritance and return her to slavery.

Edward and his sister, Anne, try to establish a school on Magnolia Grove to educate their slaves. Their neighbors attempt to dissuade them, however, by attacking and partially burning the plantation. Only the intervention of Edward's friend, the pragmatic lawyer-politician Frank Russell, who opposes slavery in private but supports it in public, stops the destruction. Frustrated, Edward and Anne Clayton soon leave North Carolina for Canada.

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22 *Book Review*, 101 Q. Rev. 324, 324 (1857) (reviewing *Dred*).
23 13 N.C. (2 Dev.) 263, 268 (1829).
24 These facts resemble closely *Hinds v. Brazealle*, 3 Miss. (2 Howard) 837 (1838), where the court invalidated a deed of emancipation and thus eliminated a slave's right to inherit.
II. THE CONFLICTS OF THE ANTEBELLUM JUDGE

A. Justice Thomas Ruffin and State v. Mann: The Conflict Identified

Stowe first addressed the conflict between humanity and law that motivated her examination of Judge Clayton in *A Key to Uncle Tom’s Cabin.* She used Justice Thomas Ruffin’s opinion in *State v. Mann* as a central part of her discussion of the law of slavery in the *Key.* The case arose from the prosecution of John Mann for assaulting Lydia, a slave whose services he had hired for one year. Mann hit Lydia when she committed a small offense, and she ran away. Mann “called upon her to stop;” when she did not, he shot and wounded her. A jury convicted him of battery, but Ruffin overturned the conviction.

1. Justice Ruffin’s Opinion in *State v. Mann*

Justice Ruffin captured the attention of abolitionists with his extraordinary

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25 One can see the genesis of *Dred* in *A Key to Uncle Tom’s Cabin.* From Stowe’s focus on Judge Thomas Ruffin to setting the action in the Dismal Swamp, the characters, setting, and ideas that emerged in *Dred* were explored in non-fiction format in the *Key.* In the *Key* Stowe quoted Henry Wadsworth Longfellow’s poem, *The Dismal Swamp,* about a slave hunted in the swamp, which provides a setting strikingly similar to the death of Dred. *See Key,* supra note 4, at 86. She also collected notices declaring fugitive slaves outlaws and authorizing their killing, which she quoted in *Dred.* *See id.* at 85 (reprinting a notice that offered $125 for the return of a fugitive slave and $150 for his head). Stowe’s ideas about law in the *Key* are collected, in turn, from abolitionist writers, who had devoted substantial energy to examining the legal duties of lawyers and judges. *See Hedrick,* supra note 21, at 230-31 (discussing sources of the *Key*); *see also Theodore Weld, American Slavery As It Is: Testimony of a Thousand Witnesses* 143 (New York, American Anti-Slavery Society 1839) (criticizing the major role public opinion has played in perpetuating slavery).

26 *See Key,* supra note 4, at 77-79 (discussing *State v. Mann*). Ruffin caught the attention of abolitionists with his decision in *Mann.* For other references to *Mann,* see *Weld,* supra note 25, at 143 (discussing the harshness of slavery, to show how slaves were vulnerable to their masters’ total control); *William Goodell, The American Slave Code in Theory and Practice* 174-75 (New York, American & Foreign Anti-Slavery Society 1853) (“The struggle between the man and the magistrate, implying that slavery requires of its magistrates to trample upon their own manhood; the cool and deliberate decision to do this, and to elevate the law of slavery above the law of nature and of nature’s God, are painful but instructive features of the exhibition.”). Ruffin was recognized by his contemporaries as having conflicting obligations. *See Theodore Parker, A Letter to the People of the United States Touching the Matter of Slavery* 85 (Boston, James Munroe & Co. 1848) (quoting one of Ruffin’s sorrowful declarations).

27 *See Mann,* 13 N.C. at 263.

28 *See id.*

29 *See id.*

30 *See id.* at 268.
opinion in *Mann*, because he released the possessor of a slave from all liability for abusing her,\textsuperscript{31} despite his recognition of the inhumanity of his decision. Ruffin began by lamenting "the struggle... in the Judge's own breast between the feelings of the man; and the duty of the magistrate."\textsuperscript{32} The opinion presents a mixture of rationales that together release Mann from liability for abusing a slave who was under his control. The issue, just as in Milly's case, was whether the hired and possessor of a slave could be liable for abuse.\textsuperscript{33}

The opinion employed utilitarian and instrumentalist rationales, as well as rationales based on community standards. Ruffin observed that no owner had ever been held liable for abuse of a slave.\textsuperscript{34} Immediately, Ruffin placed responsibility for the decision on others. Ruffin rationalized that he was required to follow the community's rule of non-liability, for even if he thought differently, "we could not set our notions in array against the judgment of every body else, and say that this, or that authority, may safely be lopped off."\textsuperscript{35}

He then distinguished the restrictions placed upon parents in correcting children and on masters correcting apprentices.\textsuperscript{36} In those cases, the children and apprentices were being taught how to act, but there needed to be limits on the corrections.\textsuperscript{37} In cases involving slaves, however, "[t]he end is the profit of the master, his security and public safety; the subject, one doomed in his own person, and his posterity, to live without knowledge, and without the capacity to make any thing his own, and to toil that another may reap the fruits."\textsuperscript{38}

Such language demonstrated a keen awareness of the harshness of slavery. Ruffin, however, followed a guide other than his own feelings of morality. Slaves, he knew, would almost certainly perceive their situation as unjust. "What moral considerations," Ruffin asked rhetorically, "shall be addressed to such a being, to convince him what, it is impossible but that the most stupid must feel and know can never be true?"\textsuperscript{39} To expect a slave "thus to la-

\textsuperscript{31} See id. at 264-68.
\textsuperscript{32} Mann, 13 N.C. at 264.
\textsuperscript{33} See id.
\textsuperscript{34} See id. at 265.
\textsuperscript{35} Id.
\textsuperscript{36} See id. ("The difference is that which exists between freedom and slavery and a greater cannot be imagined.").
\textsuperscript{37} See Mann, 13 N.C. at 266 ("Moderate force is superadded... if they fail, it is better to leave the party to his own headstrong passions, and the ultimate correction of the law, than to allow it to be immoderately inflicted by a private person.").
\textsuperscript{38} Id.
\textsuperscript{39} Id. In 1849 Ruffin dissented from the reduction of a slave's murder conviction to manslaughter on the grounds that the slave was provoked. He thought that the "great mass of slaves"—born with deference to the white man, take the most contumelious language
bour upon a principle of natural duty, or for the sake of his own personal happiness," was unrealistic. Ruffin's ruling in *Mann* reflected his belief that slaves would not accept their position in Southern society unless they were compelled to by force. "[S]uch services can only be expected from one who has no will of his own; who surrenders his will in implicit obedience to that of another." This obedience only arises when the master has "uncontrolled authority over the body." Ruffin's candid statement was extraordinary for its honesty and for its understanding that slaves would not abide by the Southerners' moral philosophy, which taught that slaves should be content with their low place in Southern society. While Southerners might tell themselves that liberty is denied only when people have less freedom than they are entitled to, Ruffin understood that slaves would disagree.

without answering again, and generally submit tamely to his buffets, though unlawful and unmerited." State v. Caesar, 31 N.C. (9 Ired.) 391, 421 (1849).

40 *Mann*, 13 N.C. at 266.

41 Id.

42 Id.

43 See, e.g., Albert Taylor Bledsoe, *Liberty and Slavery: Or, Slavery in the Light of Moral and Political Philosophy*, in COTTON IS KING AND PROSLAVERY ARGUMENTS 271, 278 (E.N. Elliott ed., Augusta, GA, Pritchard, Abbott & Loomis 1860) ("The law which forbids mischief is a restraint not upon the natural liberty, but upon the natural tyranny of man."); John C. Calhoun, *A Disquisition on Government*, in 1 WORKS OF JOHN C. CALHOUN 55 (R. Crallé ed., 1851) ("It is a great and dangerous error to suppose that all people are equally entitled to liberty. It is a reward to be earned, not a blessing to be gratuitously lavished on all alike; ... not a boon to be bestowed on a people too ignorant, degraded and vicious, to be capable either of appreciating or of enjoying it."); id. at 52 ("For to extend liberty beyond the limits assigned, would be to weaken government and to render it incompetent to fulfill its primary end—the protection of society against dangers, internal and external."); Louisa McCord, *Diversity of the Races; Its Bearing upon Negro Slavery*, 3 S.Q. REV. 392, *reprinted in Louisa McCord: Political and Social Essays* 159, 173 (Richard C. Lounsbery ed., 1995) ("The white man, made for liberty ... rebels at what the submissive, obsequious, imitative negro finds, perhaps, his happiest existence."); William A. Smith, *The Necessity for the Institution of Domestic Slavery Exemplified by Facts*, in LECTURES ON THE PHILOSOPHY AND PRACTICE OF SLAVERY 192 (Thomas O. Summers ed., Nashville, Stevenson and Evans 1856) (supporting propositions that "Africans are not, in point of intellectual and moral development, fitted for that measure of self-government which is necessary to political sovereignty; that political equality cannot be justly claimed for them—they have no right to it: that to them it could not be an essential good, but an essential evil, a curse"). Not all judges shared Ruffin's honesty, but as Ariela Gross and William Fisher have shown, many Southern judges explained their decisions using references to their understanding of slave character. See generally William W. Fisher III, *Ideology and Imagery in the Law of Slavery*, 68 CH.-KENT L. REV. 1051, 1057-64 (1993) (describing the use of stereotypical images of Black characters by Southern judges); Ariela Gross, *Pandora's Box: Slave Character on Trial in the Antebellum Deep South*, 7 YALE J.L. & HUMAN. 267, 271 (1994) (examining "the legal construction of black character").
His understanding led him to articulate rules that subjected slaves to extraordinary control, for what he believed was the good of Southern society.44

44 Ruffin expressed the common argument of proslavery writers that the good of society was an important goal when establishing the rules governing slavery. See, e.g., Chancellor William Harper, Slavery in the Light of Social Ethics, in COTTON IS KING, supra note 43, at 549, 550 ("[I]f the maintenance of our institutions be essential to our prosperity, our character, our safety, and the safety of all that is dear to us, let us enlighten our minds and fortify our hearts to defend them."); Bledsoe, Liberty and Slavery, in id. at 271, 380 ("[T]he great practical problem of slavery is to be determined, if determined at all, not by an appeal to abstractions, but simply by a consideration of the public good."). Cf. Thomas R. Dew, Professor Dew on Slavery, in THE PROSLAVERY ARGUMENT; AS MAINTAINED BY THE MOST DISTINGUISHED WRITERS OF THE SOUTHERN STATES, CONTAINING THE SEVERAL ESSAYS, ON THE SUBJECT OF CHANCELLOR HARPER, GOVERNOR HAMMOND, DR. SIMMS, AND PROFESSOR DREW 287, 293 (Joseph Walker ed., Charleston, Walker, Richards & Co. 1852) ("We fear not the result" of discussion of abolition of slavery, "so far as truth, justice, and expediency alone are considered.").

Legal historians debate vigorously the nature of judicial decisions in the antebellum era, centering around the question whether judges self-consciously used opinions to foster economic growth. In short, whether there was an "instrumental" conception of law. See generally Horwitz, supra note 6, at 3 (characterizing legal thought after 1820 as increasingly preoccupied "with using law as an instrument of policy"); William E. Nelson, The Roots of American Bureaucracy, 1830-1900, at 58 (1982) (characterizing proslavery legal forces as resting upon arguments that are "politically wise and economically expedient"). There seems to be a consensus emerging that the common law was used to advance judges' philosophy and hence, used self-consciously as an instrument of change. The common law, however, may have fostered changes beyond those depicted by Professor Horwitz. See generally William Weston Fisher III, The Law of the Land: An Intellectual History of Property Law Doctrine, 1776-1880 (Ph.D. Dissertation, Harvard University, 1991) (detailing ways that legal discourse regarding property drew upon—and contributed to—political ideology); Peter Karsten, Heart Versus Head: JUDGE-MADE LAW IN THE NINETEENTH CENTURY 3 (1997) (viewing judges as motivated by sentiment of heart, rather than economics, and portraying changes in law as anti-corporate). Judges appear to consciously craft the law to comport with their social, economic, and historical views as treatise writers encourage the idea that the common law adapts to meet changing societal needs, which is a version of what Horwitz labeled instrumentalism. Chancellor Kent wrote about the changing nature of American law:

Considering the influence of manners upon law, and the force of opinion, which is silently and almost insensibly controlling the course of business and the practice of the courts, it is impossible that the fabric of our jurisprudence should not exhibit deep traces of the progress of society, as well as of the footsteps of time.

1 JAMES KENT, COMMENTS ON AMERICAN LAW 445-46 (New York, O. Halstead 1826). Ruffin's opinion in State v. Mann fits within the picture of an antebellum judiciary that took the best interests of society into account in framing judicial decisions, as do many other slave cases from North Carolina. For example, State v. Hale, 9 N.C. (2 Hawks) 582, 583 (1823), the only case cited in Mann, imposed liability on a stranger who assaulted a slave in part because Justice Taylor wanted to "keep [ ] pace with the march of benignant policy and provident humanity . . . ." Id.
Ruffin's question also indicates that he recognized the artificial nature of slavery. However necessary slavery might be to society, it needed the support of elaborate human institutions, such as law. Even as Southerners increasingly defended slavery as a natural outgrowth of human society, they also emphasized the need for humans to construct their intellectual and social environment. Thomas Roderick Dew, President of William and Mary College, explained in his Digest of the Laws, Customs, Manners, and Institutions of Ancient and Modern Nations the necessity of cultivating a respect for institutions and precedent. He contrasted the English and French Revolutions in discussing the dangers posed by failure to respect the institutions and ideas of the previous generation. Regarding the English Revolution, he wrote:

The statutes, jurisprudence, traditions, customs, &c., of the realm, were constantly invoked by both parties as the only legitimate judges of the strife. Coke and Selden would have been wholly out of place in the French revolution; they were indispensable to the English. From the dusty records of the Tower, their indefatigable labors drew forth those precedents and authorities that gave the popular party the ascendancy in the argument. . . . Even at the moment when they were clearly transcending all the limits of the ancient constitution, you find them still indulging in the belief that they are justified by the past. Instead of appealing to the fundamental principles of government, they clung still to the laws, customs, and traditions of Old England.46

Dew first came to national attention with his Review of Debates in the Legislature, a pamphlet evaluating the Virginia legislature's debate over a gradual abolition plan, which became one of the leading proslavery tracts. Gone from the debate were appeals to inferences based on Locke's state of nature so common in the Revolutionary generation. Such appeals were replaced by proslavery writers like Dew, who encouraged careful attention to "practical consequences"—the "utter destruction" that often follows "the too ardent and confident pursuit of imaginary good."47 Dew, like Southerners

45 See, e.g., Harper, supra note 44, at 551 ("President Dew has shown that the institution of slavery is a principal cause of civilization. Perhaps nothing can be more evident than that it is the sole cause."). Other sources detailing the process include: Eugene D. Genovese, The Slaveholders' Dilemma: Freedom and Progress in Southern Conservative Thought, 1820-1860, at 10-40 (1992) (explaining Southern proslavery thought across disciplines such as literature, law, and religion); Larry E. Tise, Proslavery: A History of the Defense of Slavery in America, 1701-1840 (1987) (tracing strengthening proslavery religious thought after 1830).


47 Dew, supra note 44, at 287, 362, 292. See also Drew Gilpin Faust, The
generally, rejected arguments based on Enlightenment ideas of nature in favor of a cultivated, human-created environment, which emphasized the role that institutions played in advancing beyond nature. From literature to fine


48 Some of the best evidence of the change comes from the Virginia Constitutional Convention of 1829-30, where the participants debated elimination of the property qualification for suffrage. Many delegates emphasized the importance of practical experience over Enlightenment ideas. See, e.g., PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829-30, at 138 (Richmond, Samuel Shepard & Co. 1830) (statement of J.S. Barbour, Nov. 2, 1829) ("Notwithstanding the lights of our own revolution, and those reflected by the lamp of history, we are now to disregard all, and to pursue a path as yet untried, either by prudence or success. . . . [Gentlemen] will be guided by experience, rather than follow the lights of the French Revolution. Lights that shone for a time upon the path of despotism. . . ."); id. at 367 (statement of Nicholas, Nov. 18, 1829) ("Those who set the revolution in motion, were many of them . . . virtuous and enlightened men. But they were more of philosophers and theorists, than practical statesmen. . . . They did not know how free Government would work . . ."); id. at 206 (statement of Joyner, Nov. 5, 1829) ("The only question that a wise Statesman should ask is, whether the measure proposed, is best calculated to operate as they really are; and not, whether the measure conforms to certain rules of theoretical perfection, and would be best adapted to a people such as he would have them to be."). Law often was depicted as bringing order to societies.

Man was created for society; and social intercourse is as much a law of his nature, as that he should support his existence by food, promote his comfort by raiment, procure supplies by labor, protect himself from aggression by force. In every state of society—whether savage or civilized—whether patriarchal or political—laws arising from the nature of man, from his weakness, his dependance, his wants, his desires, his appetites, his passions, and his intelligence, must necessarily govern his social relations—regulate his rights and duties.

Id. at 264 (statement of Johnson, Nov. 11, 1829). In contrast to those who argued that the Declaration of Independence embodied a commitment to universal emancipation, Southerners responded that "he, only, is the slave, who is forced into a position in society which is below the claim of his intellect and moral." William Gilmore Simms, The Morals of Slavery, in THE PROSLAVERY ARGUMENT, supra note 44, at 175, 258.

Some members of the Convention recognized the extent to which political theory had drifted from the time of Jefferson. Phillip Doddridge was the boldest defender of Revolutionary era principles:

In the whole progress of this debate, the name of Thomas Jefferson, the great Apostle of liberty, has never once been invoked, nor has one appeal been made to the author of the Rights of Man, whose immortal work, in the darkest days of our revolution, served as a political decalogue and operated as a talisman to lead our armies to victory. . . . Then, the authority of the sage of Monticello would have stood against the world; now, there are "none so poor as to do him reverence." Then, was Burke regarded as the enemy of human rights and the firmest defender of aristocracy and monarchy—but now Burke, Filmer, and Hobbes, judging from their arguments, have become the textbooks of our statesmen.

PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION, supra, at 411 (statement
art to political philosophy, antebellum Southerners showed their admiration for the way that human progress in America had improved upon nature. Moral philosophers in particular celebrated what one might call the constructed conscience—the use of reason, moral instruction, and revelation to arrive at a correct, moral decision. Moreover, they understood that national characteristics were shaped by religion, government, and education—

of Dodderidge, Nov. 21, 1829). See also id. at 193 (statement of Mercer, Nov. 5, 1829) ("The gentleman from Chesterfield [Benjamin Watkins Leigh] . . . has cast away Cocker, as well as Locke, and taken up with Robinson Crusoe and De Foe as his authorities. . . . I never before heard this doctrine [of the origin of slavery] deducted from the rights of humanity and the obligation of gratitude."). While there were occasional concessions that "Nature, or Nature's God rather, has conferred certain original rights upon man," they were circumscribed by the argument that "individual coveniency must yield to the good of the whole. We must give up a portion of our natural liberty, in order to enjoy the advantages of social union. . . ." Id. at 351 (statement of Massie, Nov. 18, 1829).

49 For illustrative examples of the importance of construction in literature, see Edgar Allen Poe, The Domain of Arnheim, or the Landscape Garden, in COMPLETE TALES AND POEMS OF EDGAR ALLAN POE 604-15 (Vintage ed., 1975) (celebrating human improvement over nature in Arnheim). For illustrative examples of the threats posed by nature in fine art, see Washington Allston's Ship in a Squall, depicting a white ship threatened by the dark surroundings, which may very well represent white Southern society threatened by Africans, discussed in WILLIAM W. FREEHLING, 1 THE ROAD TO DISUNION: SECESSIONISTS AT BAY, 1776-1854, at 232-36 (1990). Southern political philosophers often wrote of the progress of society and the fragility of advanced society. See, e.g., HARPER, supra note 43, at 565-67. Northern thought celebrated the advancement over nature as well. See, e.g., SAMUEL R. KNAPP, AN ORATION PRONOUNCED BEFORE THE SOCIETY OF PHI BETA KAPPA AT DARTMOUTH COLLEGE 26 (Boston, Commercial Gazette Press 1824) ("The revolution of wisdom which now pours its rays upon us, has changed the laws of Eden by the consent of its Creator."). Legal writers emphasized the dependence of institutions and laws upon human construction. For example, Hugh S. Legaré wrote that:

It is quite a matter of course that "the influence of America upon the mind" . . . should become first and chiefly, if not exclusively perceptible, in the department of politics and law. . . . [T]he civil and juridical institutions of a country . . . are, in a great degree, the work of man, and may be moulded, and have been moulded into endless varieties of form, to suit his occasions or his caprices. [Hugh S. Legaré], Commentaries on American Law, 2 S. REV. 72, 73-74 (1828). There are many other examples, such as Joseph LeConte, who analogized societies to biological organisms; as organisms grew, they developed sophisticated functions. See JAMES OSCAR FARMER, JR., THE METAPHYSICAL CONFEDERACY: JAMES HENLEY THORNWELL AND THE SYNTHESIS OF SOUTHERN VALUES 104-08 (1986) (discussing LeConte).

50 JASPER ADAMS, ELEMENTS OF MORAL PHILOSOPHY 28 (Cambridge MA, Folsom, Wells, and Thurston 1837) ("[T]o insure safe decisions, the mind must be kept free from prejudice and passion, and, above all, the conscience must be guided, regulated, and enlightened."). Donald Meyer has termed the movement the "instructed conscience." See D.H. MEYER, THE INSTRUCTED CONSCIENCE: THE SHAPING OF THE AMERICAN NATIONAL ETHIC (1972).
the "whole system" of culture.\textsuperscript{51} One needed only to study human history to uncover the evils lurking within Enlightenment ideas of universal equality.\textsuperscript{52} Ruffin's position, that he must construct a law to teach slaves their proper position in Southern society, which they otherwise would reject, appears as part of a dominant Southern philosophy that emphasized the control of nature through law.

Ruffin followed a rule laid down by the community, which gained further strength because it was dictated by the needs of the community. That led to Ruffin's confession of his "sense of harshness of the proposition."\textsuperscript{53} Even though he felt the harshness "as deeply as any man can," and even though he believed "as a principle of moral right, every person in his retirement must repudiate it," Ruffin upheld the master's "uncontrolled authority over the body."\textsuperscript{54} For no other rule could cause submission of slaves to masters.\textsuperscript{55} Ruffin's decision was part of the separation between moral and legal duties, which moral philosophers frequently discussed at the time. He echoed an important strain of thought, which sought to divide requirements imposed by law from those imposed by morality.\textsuperscript{56} Moreover, the opinion was part of the belief that antebellum judges were constrained by their duty to uphold the society that surrounded them. It also constituted the fruit of the utilitarian calculus that governed some American judges.\textsuperscript{57}

\textsuperscript{51} Dew, supra note 19, at 103.
\textsuperscript{52} See generally id.
\textsuperscript{53} Mann, 13 N.C. at 266.
\textsuperscript{54} Id.
\textsuperscript{55} Id.
\textsuperscript{56} Proslavery essayist Louisa McCord thought that law might force one to be just, "but vainly would it force him to be generous." Louisa McCord, Justice and Fraternity, in Political and Social Essays, supra note 43, at 57, 61. McCord distinguished between duties imposed by morals and those imposed by law, and concluded that law could not make men moral, nor should it attempt to do so. She asked, "Can a people enjoy either moral rest, or physical prosperity, who, at the say of a legislator, may, at any hour, be called to assume such a stamp of benevolence as his whim of the moment dictates?" Id. at 63. Edward Pringle, attacking Harriet Beecher Stowe's Uncle Tom's Cabin, in 1852 pamphlet Slavery in the Southern States, also argued for the distinction between law and morality, stating that no legislation "provid[e] altogether against those abuses which grow out of the evil passions of men." A Carolinian [Edward Pringle], Slavery in the Southern States 12 (Cambridge, John Bardett, 1852). The distinction between morality and law drew substantial attention in antebellum discourse. See generally The Anti-Slavery Debate: Capitalism and Abolitionism as a Problem in Historical Interpretation 107-60 (Thomas Bender ed., 1992).
\textsuperscript{57} The debate about the extent to which judges were "instrumental"—that is, that they shaped legal rules to promote their economic and social views—is closely related to the question whether judges employed utilitarian balancing to determine legal rules. Antebellum moral philosophy had a precarious relationship with utilitarianism. William Paley's Moral and Political Philosophy, one of the leading college texts in moral philosophy in the

A strong counter-current, however, opposed Paley. See id. at 61; DANIEL WALKER HOVE, THE UNITARIAN CONSCIENCE: HARVARD MORAL PHILOSOPHY, 1805-1861, at 65-67 (1970) (discussing Paley's "theological utilitarianism" and its critiquers); MARY KURPIS CAYTON, EMERSON'S EMERGENCE: SELF AND SOCIETY IN THE TRANSFORMATION OF NEW ENGLAND, 1800-1845, at 60-62 (1989) (discussing Emerson's belief that people possessed innate sense of right and wrong). However, even those who criticized Paley for allowing morality to be governed by expediency often conceded that "the rule of expediency" had some value. See ADAMS, supra note 50, at 35. In response to the maxim "We must do our duty without shrinking, and leave the consequences to God," Adams urged that "one test, by which we are to judge of our duty, is the consequences which may probably result from our conduct." Id. at 37. Transcendentalists, who strongly rejected utilitarianism, recognized some value in such calculations. See George Ripley, James Mackintosh, in THE TRANSCENDENTALISTS: AN ANTHOLOGY 65, 65 (Perry Miller ed., 1950) ("It is evident, that there are many instances in which the utility of an action convinces us that the action is right, and that we are under a moral obligation to perform it."). The opposition to Paley proved particularly strong among Southern moral philosophers. President R.H. Rivers of Wesleyan University in Alabama, for example, criticized Paley in the "Theoretical Ethics" portion of his Moral Philosophy treatise. R.H. RIVERS, MORAL PHILOSOPHY 128-32 (1859) (Thomas O. Summers ed., 2d ed. 1861). In his discussion of "Practical Ethics," however, Rivers justified slavery in part because "slavery has been, and still is, a blessing to the negro." Id. at 351. Rivers drew upon lectures delivered by Randolph Macon College President William Smith and invited readers to refer to Smith's Lectures. Id. at 349-51. Smith used utilitarian rationales in his justification of slavery. See, e.g., SMITH, supra note 43, at 192-209 (exploring "Necessity for the Institution of Domestic Slavery"); id. at 185 ("Political equality cannot be justly claimed for them. . . . To them it would not be an essential good, but an essential evil—a curse."). The Encyclopedia Americana acknowledged the reach of the concept of utility: "The idea of utility has even encroached upon the province of morality as if our age could not love and do good for its own sake." Utilitarians, 12 Encyclopedia Americana 490 (Francis Lieber ed., 1832). It reconciled utilitarian thought and conventional morality by observing that: "The noblest course may be the most truly useful." Id. at 491. For further discussion of utilitarianism in political thought, see infra note 107.

Contrary to judges who explicitly made decisions based on instrumental or utilitarian calculations, some judges employed what we have come to call formalism—they answered legal questions by reciting legal doctrine and by inductive reasoning. See infra note 67.

Yet others (most often members of the public, but occasionally judges) advocated a reliance upon humanity for guidance in determining legal rules. Such humanity might be expressed in formalist terms, as happened in In re Booth, 3 Wis. 1, 91 (1854), where the court applied its own moral sense despite contrary United States Supreme Court precedent. See also UNCLE TOM'S CABIN, supra note 2, at 101, 108 (describing how Mrs. Byrd argued in favor of helping fugitive Eliza because she just knew it was right). Or, it might be
Ruffin shifted responsibility for his opinion to political necessity, arguing that the discipline of slaves "belongs to the state of slavery." Discipline and slavery cannot "be disunited, without abrogating at one the rights of the master, and absolving the slave from his subjection," said Ruffin. "It constitutes the curse of slavery to both the bond and free portions of our population. But it is inherent in the relation of master and slave." Such a justification was a useful strategy for judges who rested authority for their decisions in the sentiment of the larger community.\footnote{Mann, 13 N.C. at 266-67.}

an argument articulated by a judge as part of a search for the right rule to apply. For example, the court in \textit{State v. Hale} made the following statement:

It would be a subject of regret to every thinking person if Courts of Justice were restrained, by any rule of austere judicature, from keeping pace with the march of benignant policy and provident humanity, which for many years has characterized every Legislative act relative to the protection of slaves, and which Christianity, by the mild diffusion of its light and influence, has contributed to promote. \textit{State v. Hale}, 9 N.C. (2 Hawks) 582 (1823). Ruffin himself allowed considerations of humanity to influence his decision in \textit{State v. Hoover}, which affirmed a slaveowner's conviction for killing his slave. He stated "the acts imputed to this unhappy man do not belong to a state of civilization." \textit{State v. Hoover}, 24 N.C. (4 Dev. & Bat.) 365 (1839). The slave had died as a result of a beating so savage that it could not have served a corrective purpose. \textit{See id.} "They are barbarities which could only be prompted by a heart in which every humane feeling had long been stifled; and indeed there can scarcely be a savage of the wilderness so ferocious as not to shudder at the recital of them." \textit{Id.} Considerations of humanity appeared in both formal and instrumental (utilitarian) arguments.

\textit{Id.} Considerations of humanity appeared in both formal and instrumental (utilitarian) arguments.\footnote{See, \textit{e.g.}, Mitchell v. Wells, 37 Miss. 235 (1859) (interpreting Mississippi emancipation law in light of state policy).} Chancellor Kent celebrated the origins of common law rules in the community:

A great proportion of the rules and maxims which constitute the immense code of the common law, grew into use by gradual adoption, and received, from time to time, the sanction of the courts of justice, without any legislative act or interference. It was the application of the dictates of natural justice, and of cultivated reason, to particular cases.

\textit{I Kent}, supra note 44, at 441-42. Presbyterian minister John Yeomans urged support for law over individual conscience in an 1850 Thanksgiving Day sermon. \textit{See Rev. John W. Yeoman, Signs of Our Country's Future} 25-26 (Danville, Pa., E.W. Conkling 1851). Law should be followed, for the "influence of . . . intelligent and conscientious neighbors" tended to produce the correct decision. \textit{Id.} Such was the principle motivating the "professional deference which we observe in all wise judges of the law for legal decisions of the past." \textit{Id.}

It might be improper, however, to allow the community's sentiment to dictate the immediate response to an offensive law, such as the Fugitive Slave Act, 9 Stat. 462 (1850); instead, the sentiment should be channeled into political campaigns. William Greene explained in an 1851 lecture at Brown that:

[If lawmakers] enact a law in opposition to the public sentiment, there are two ways of meeting the difficulty: first, by direct resistance to the law; and, second, by patiently awaiting its repeal, by the election to power of a new and more faithful set of men. The first is rebellion, which in resisting one law, violates all. The second, in
Ruffin then further contrasted the instrumental approach, which justified legal rules based on their necessity to the community, with reasoning based on conscience. "That there may be particular instances of cruelty and brutality where the laws might properly interfere, is most probable." But Ruffin would not even begin such reasoning. In an abstract sense, one could ask about the master's right to discipline the slave, but Ruffin rejected such reasoning. He cast himself as a realist, who looked to the situation as it was, rather than in abstract terms. Grand notions of justice could not be permitted to interfere with deciding cases. Ruffin reached conclusions based on what was possible; his reasoning was driven by a consequentialist understanding of the implications of his decision. The strength of the rule that Ruffin announced came from the need to preserve slave society. That need—the imperative duty that the law imposed on Justice Ruffin—forced due time, breaks up the law and maintains the government.


60 See Mann, 13 N.C. at 267.

61 Ruffin looked to the consequences of his decision to gauge the appropriateness of the rule he was announcing in other cases as well. In State v. Caesar, 31 N.C. (9 Ird.) 391, 427-28 (1849), he dissented from the reduction of a slave's conviction for murder of a white to manslaughter on the grounds that the slave was provoked. Ruffin wrote:

'It seems to me to be dangerous to the last degree to hold the doctrine, that negro slaves may assume to themselves the judgment as to the right or propriety of resistance... It may be apprehended that they will end in denouncing the injustice of slavery itself, and, upon that pretext, band together to throw off their common bondage entirely.'

Id. In State v. Samuel, 19 N.C. (2 Dev. & Bat.) 177 (1836), Ruffin addressed the question whether a couple, who were slaves, were married. See id. The issue arose because the wife sought immunity from testifying against her husband. See id. He analyzed the consequences of construing the couple as married and decided that although it would be beneficial to the wife in this case, it might subject others to prosecution for bigamy. See id. at 179. He was not prepared "without a mandate from a higher authority than our own, to apply... a rule, which would in innumerable instances, either subject them to legal criminality of a high grade, or deprive them almost entirely of their greatest solace—having families of their own." Id. at 183.

62 The word "imperative" is frequently used in antebellum law to describe the sense of compulsion that judges felt in making decisions. See, e.g., Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 624-25 (1842) (Story, J.) ("Consequences like these show that the nature and object of the provision imperiously require, that, to make it effectual, it should be construed to be exclusive of state authority."); Cherokee Nation v. Georgia, 30 U.S. 1, 48 (1831) (Marshall, J.) ("I have no duty to act and imperious duty compels me to stop at the portal."); Shorter v. Smith, 9 Ga. 517, 532 (1851) (Lumpkin, J.) ("Were there any imperative rule of law... I would bow to it; for... I feel already the responsibility sufficiently great, of expounding laws, without increasing it by making them."); Wright v. Weatherly, 15 Tenn. (7 Yer.) 367, 380 (1835) ("Such a provision would be fair and equal among the slaveholders themselves; and in relation to a large majority of the people of the
him to release an abuser from liability. The reliance upon a utilitarian calculus—what rule will best promote Southern society—appears explicitly in the first sentence of the first extant draft of Mann, where Ruffin acknowledged that “principles of policy urge the Judge to a decision in discord with the feelings of the man.”

Near the end of the opinion, Ruffin enumerated four trends that were combining to improve the situation of the slave. First, some statutes were passed protecting slaves; second, slave owners’ private interests encouraged them to treat slaves well; third, the humane sentiments of masters became “seated in the hearts of those who have been born and bred together,” and, finally, the community began to frown “upon the barbarian who is guilty of excessive and brutal cruelty to his unprotected slave.” None of those trends occurred within the courtroom; all the hope that Ruffin found came from outside. The improvement of the slaves’ condition would result, he thought, more from the changes in the community than from “any rash expositions of abstract truths by a judiciary tainted with a false and fanatical philanthropy, seeking to redress an acknowledged evil by means still more wicked and appalling than even that evil.”

The centrality of the utilitarian and instrumentalist impulses appeared again in Ruffin’s conclusion. Ruffin felt that as long as slavery existed it was the “imperative duty of the judges to recognize the full dominion of the owner over the slave,” unless abosved of that duty by statute. “This we do upon the ground that this dominion is essential to the value of slaves as property, to the security of the master, and the public tranquility.” In short, the rule was commanded because it “most effectually secur[ed] the general protection and comfort of the slaves themselves.”

In stark contrast to instrumentalism is formalism. Judicial formalism is frequently defined as the following of precedent, accompanied by statements regarding the importance of logic, to the exclusion of utilitarian or instrumental goals. Some other Ruffin opinions explicitly follow the legal rules

state, who do not own slaves, it is imperiously required.”). A variant of imperious often appeared in popular literature and legislative debate as well. See, e.g., KENNEDY, supra note 19, at 333 (“[C]ustom, in these innovating times, almost imperatively exacts” a response); PROCEEDINGS, supra note 48, at 76 (“[O]ur property imperiously demands that kind of protection which flows from the possession of power.”); id. at 255 (“The county never could be tranquillized so long as the people see that we have no confidence in our own measures—measures of so high a character imperiously to demand both our own confidence and theirs.”).


54 Mann, 13 N.C. at 267.

55 Id.

56 Id. at 268.

57 Formalism emerged, according to Professor Horwitz, as part of the search for “certainty and logical inexorability.” MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW: THE CRISIS OF ORTHODOXY, 1870-1960, at 16 (1992). “In a world of
laid down by previous generations without looking to "policy." Indeed, as was characteristic of many judges of his generation, Ruffin venerated precedent. In Mann, however, Ruffin felt unconstrained by precedent—there were no North Carolina cases that had decided the issue Mann presented. There was, however, a close adherence to "logical" inferences from established facts. The opinion thus represents the triumph of a proslavery instrumentalism, a cold calculation of the benefits from the rule Ruffin adopted and the costs involved in choosing another path along with adherence to legal logic.

2. Harriet Beecher Stowe's Opinion of State v. Mann

Stowe took Ruffin up on his invitation to see the "struggle, too, in the judge's own breast, between the feelings of the man and the duty of the magistrate." She detected "the conflict between the feelings of the humane judge and the legal necessity of a strict interpreter of slave-law." Such separation between the judge's sentiment and his legal opinion puzzled Stowe, for she had written Uncle Tom's Cabin with the optimistic belief that she could harness sentiment to make her readers feel passion and, therefore, undertake radical reform of the law. She explained in the final chapter of

conflicting ends, it aspired to create a system of processes and principles that could be shared even in the absence of agreed-upon ends." Id. Its characteristics, as defined by Professor Horwitz, included deduction from general principles and confident analogies to cases and doctrines. See id.

Thomas Grey has created a detailed taxonomy of legal thinking after the Civil War, which he calls orthodox legal thought, in which formalism occupies an important place. See Thomas Grey, Langdell's Orthodoxy, 45 U. Pitt. L. Rev. 1 (1983). Orthodox thought began with the idea that law is a science, and thereby sought to construct a complete response to all legal questions. See id. at 8. It did this through "formalism," which for Grey meant that "outcomes are dictated by demonstrative (rationally compelling) reasoning." Id. For Grey, "'Formalism' describes legal theories that stress the importance of rationally uncontrollable reasoning in legal decisions, whether from highly particular rules or quite abstract principles." Id. at 9.

68 Ruffin commented on his limited authority to change the common law in State v. Ephraim, 19 N.C. (2 Dev. & Bat.) 162, 166-67 (1836):

It is . . . a bold and hazardous assumption in judges, to change and upset settled law, under the pretext that it was adopted in a state of society to which it was suitable, but that circumstances have now so varied, and the opinions of mankind so changed, that the rule has become inconvenient and unsuitable, and ought therefore to be altered. Id. at 166. Ephraim represents a version of legal formalism—a stark application of precedent and a refusal by a judge to alter the law, even in the face of arguments that society surrounding the law has changed.

69 Mann, 13 N.C. at 263.

70 Key, supra note 4, at 77. See also Mann, 13 N.C. at 263.

71 See Philip Fisher, Hard Facts: Setting and Form in the American Novel 92 (1985) (characterizing sentimentality as "the primary radical methodology within culture"); Stowe, Uncle Tom's Cabin, supra note 2, at 513-15 (appealing to the "public sentiment" of Southern readers, and urging readers to "see to [their] sympathies in this
Uncle Tom's Cabin that her desire to awaken heated passions led to the novel:

[W]hen [the author] heard ... Christian and humane people actually recommending the remanding escaped fugitives into slavery, as a duty binding on good citizens—when she heard, on all hands, from kind, compassionate and estimable people, in the free states of the North, deliberations and discussions as to what Christian duty could be on this head, she could only think, These men and Christians cannot know what slavery is.\(^72\)

There was substantial reason for Stowe to believe that she might effectively play on her readers' sympathies. Scottish common sense philosophy, the dominant moral philosophy in Stowe's America, posited that humans had an innate moral sense.\(^73\) Stowe, like many other sentimental novelists of her period, hoped to harness public sympathies to effect radical change.\(^74\) But in 1852, when Stowe was writing A Key to Uncle Tom's Cabin, it seemed to her that the changes she sought were not to be and that puzzled her. She asked the question, why?

It was an inhumane coolness, represented by the legal mentality, that led Americans to accept slavery. Stowe contrasted the cold, logical, and strictly

\(^{72}\) See Howe, supra note 57, at 43-53.

\(^{73}\) See, e.g., Stowe, Uncle Tom's Cabin, supra note 2, at 513 (attributing her motivation for writing the novel to the belief that “Christians cannot know what slavery is; if they did, such a question could never be open for discussion”). Elizabeth Clark has shown how the turn to sympathy in American thought was harnessed by religious reformers to change peoples' attitudes. See Clark, supra note 10. Stowe’s contemporaries recognized the radical potential of fiction. See, e.g., Catherine Beecher, Preface to Harriet Beecher Stowe, The Mayflower xii (Boston, Harper & Bros. 1844) (“Works of imagination might be made the most powerful of all human agencies in promoting virtue and religion.”); George Frederick Holmes, Review of Uncle Tom’s Cabin, 18 S. Literary Messenger 721, 724 (1852) (“The potency of literature, in this age of the world, when it embraces all manifestations of public or individual thought and feeling, and permeates, in streams, more or less diluted, all classes of society, can scarcely be misapprehended.”).

In an address at Bowdoin College, Joseph R. Ingersoll stated that:

The literature of a nation is calculated especially to affect its moral tone and habits... Let literature and science... exhibit systems of elevated morality and sound practical knowledge... and they will purify the streams of public sentiment at their very source, give aim and direction to the employments of mankind, and restrain the first inclinations and efforts towards evil.

Joseph R. Ingersoll, An Address Delivered Before the Phi Beta Kappa Society, Alpha of Maine in Bowdoin College 23-24 (Brunswick, ME, 1837). The magical power of literature, however, might be used to support as well as attack slavery. See, e.g., William Gilmore Simms, Woodcraft; or, Hawks about the Dovocat, A Story of the South at the Close of the Revolution (New York, Redfield 1854) (portraying Southern plantations in sentimental terms).
legal approach of Anglo-Saxon judges and lawyers with the "white heat of enthusiasm" that ministers, such as her father, Lyman Beecher, generated.\textsuperscript{75} George Sand recognized the conflict between religious beliefs and law in \textit{Uncle Tom's Cabin}. A master would protest "against slavery during the innocent part of life when his soul belongs to God alone." But later, "when society takes him, the law chases away God, and interest deposes conscience."\textsuperscript{76} The battle between cold law and hot evangelical religion continued in \textit{Dred}. Stowe wrote "Even in the soil of the cool Saxon heart the Bible has thrown out its roots with an all-pervading energy, so that the whole framework of society may be said to rest on soil held together by its fibers."\textsuperscript{77} To maintain slavery, harshness was necessary. Stowe depicted the need for harsh control of slaves through law with vivid imagery:

In the perpetual reaction of that awful force of human passion and human will, which necessarily meets the compressive power of slavery,—in that seething, boiling tide, never wholly repressed, which rolls its volcanic stream underneath the whole frame-work of society so constituted, ready to find vent at the least rent or fissure or unguarded aperture,—there is a constant necessity which urges to severity of law and inflexibility of execution.\textsuperscript{78}

Unfortunately, cold law was winning, and not just with Ruffin. In the abolitionists' minds, Ruffin's opinion was representative of Southern judges. Stowe accepted Ruffin's assessment that his decision was required by the law. "Men of honor, men of humanity, men of kindest and gentlest feelings, are obliged to interpret these severe laws with inflexible severity."\textsuperscript{79} Stowe

\textsuperscript{75} See \textit{Life and Letters of Harriet Beecher Stowe} 58 (Annie Fields ed., New York, Houghton, Mifflin and Co. 1897). See also \textit{id}. at 135 (praising Stowe's father for sermons that conveyed the slaves' anguish); \textit{id}. at 137 (stating that following publication of \textit{Uncle Tom's Cabin}, Stowe believed that "the hearts of good men were hot with desire to achieve" the end of slavery). See generally \textit{Miller}, \textit{supra} note 15, at 105 (contrasting the evangelical mind and the legal mind and characterizing the contrast as a dispute between the "heart and head").

\textsuperscript{76} Letter of George Sand, Nov. 15, 1852, in \textit{Life and Letters}, \textit{supra} note 75, at 154. See also \textit{id}. at 152 (stating that the efforts of Senator Byrd, who voted for a Fugitive Slave Act, to aid fugitive Eliza "paints well the situation of most men placed between their prejudices and established modes of thought and the spontaneous and generous intuitions of their hearts").

\textsuperscript{77} 1 \textit{Dred}, \textit{supra} note 1, at 264. The imagery of cool and hot pervaded antebellum writings. In response to Senator Charles Sumner's Speech on Kansas, which led to his caning by Preston Brooks, the \textit{South Side Democrat} observed that "no punishment is adequate to a proper restraint of his insolence, but a deliberate, cool, dignified, and classical caning." \textit{Book Review}, 101 Q. Rev. 324, 325 (1857) (reviewing \textit{Nassau William American Slavery} (1856)).

\textsuperscript{78} \textit{Key}, \textit{supra} note 4, at 71.

\textsuperscript{79} \textit{Id}.
examined the dilemma between humanity and law in several chapters of *A Key to Uncle Tom's Cabin*, using examples from other cases. Her examinations led her to criticize the cold, logical reasoning of the Southern judges generally: “It is often and evidently not because judges are inhuman or partial but because they are logical and truthful that they announce from the bench in the calmest manner, decisions which one would think might make the earth shudder and the sun turn pale.” In discussing a South Carolina trial for murder of a slave, Stowe quoted extensively from the *Charleston Courier*, for example. The paper applauded the jurors for putting aside the public feelings, which favored the slave; the threshold of the “court of justice” provided the accused master “refuge and safety.” “No profane clamors entered there; but legal investigation was had of facts.”

In her chapter entitled, “The Good Old Times,” Stowe looked to a South Carolina case from the early nineteenth century to demonstrate that there had once been a lesser contrast “between the judge’s high and indignant sense of justice, and the shameful impotence and imbecility of the laws under which he acted.” In that case, Judge Wilds sentenced a slave owner, John Slater, to a fine of 700 pounds for beheading his slave. In sentencing Slater, Wilds confessed “I never felt more forcibly the want of power to make respected the laws of my country... You have held the law in one hand, and brandished your bloody axe in the other, impiously contending that the one gave a license to the unrestrained use of the other.” Stowe concluded the chapter by reasoning that American judges were, for the most part, “honorable and humane men, who have wrested from their natural course, the most humane feelings, to fulfil the mandates of a cruel law... In the case of the American decisions, every form has been maintained. Revolting to humanity as these decisions appear, they are strictly logical and legal.”

Stowe may have gained an enhanced understanding of Judge Ruffin when she read his letter of resignation from the North Carolina Supreme Court, written in November 1852. He wrote, “I have administered the law as I understand it, and to the ends of suppressing crime and wrong, and upholding virtue, truth and right; aiming to give confidence to honest men, and to confirm in all good citizens love for our country, and a pure trust in her law and magistrates.” Such statements seem to have heightened Stowe’s belief that Ruffin inappropriately separated his sentiments from his legal decisions.

Stowe considered men like Ruffin, who were aware of the inhumanity of slave law, but believed that “if they are going to preserve the THING, they have no recourse but to make the laws, and to execute them faithfully after

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80 Id. at 82.
81 Id. at 98.
82 Id. at 99.
83 Key, supra note 4, at 99.
84 Id. at 106.
85 Id. at 79.
they are made.""\(^{86}\) Such men recognized that if slavery were to survive, the laws must be severely enforced: "[L]ike Judge Ruffin, men of honor, men of humanity, men of kindest and gentlest feelings, are **obliged** to interpret these severe laws with inflexible severity.""\(^{87}\)

Stowe came to admire Ruffin's legal reasoning; she thought that "one cannot but admire the unflinching calmness with which a man, evidently possessed of honorable feelings, walks through the most extreme and terrible results and conclusions, in obedience to the laws of legal truth."\(^{88}\) Stowe believed that:

[None could] read this decision, so firm and so clear in expression, so dignified and solemn in its earnestness, and so dreadful in its results, without feeling at once respect for the man and horror for the system. The man, judging him from the short specimen . . . has one of that high order of mind which looks straight through all verbosity and sophistry to the heart of every subject which it encounters.\(^{89}\)

Stowe hoped that Ruffin, once he recognized the humanity of the slaves, might modify the law. "So abhorrent is the slave-code to every feeling of humanity that just as soon as there is any hesitancy in the community about perpetuating the institution of slavery, judges begin to listen to the voice of their honorable nature, and by favorable interpretations to soften its necessary severities."\(^{90}\) But Ruffin, according to Stowe, did not listen to the voice in drafting his opinion; instead, he applied cold logic to the issue. It was this cold logic that led to so many perverse conclusions:

Every act of humanity of every individual owner is an illogical result from the legal definition; and the reason why the slave-code of America is more atrocious than any ever before exhibited under the sun, is that the Anglo-Saxon race are a more coldly and strictly logical race, and have an unflinching courage to meet the consequences of every premise which they lay down, and to work out an accursed principle, with mathematical accuracy, to its most accursed result. The decisions of American law-books show nothing so much as this severe, unflinching

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\(^{86}\) *Id.* at 71.

\(^{87}\) *Id.*

\(^{88}\) *Key, supra* note 4, at 77. Ruffin accepted his role as a judge as that role was widely perceived in the antebellum era—that judges should not interpose their conscience, but must decide according to an abstract concept of the law. That reasoning process, a mixture of utilitarian logic and reasoning by analogy from precedent, is what Stowe identified as the cold, scientific logic of the law. For example, in the *Key* Stowe identified proslavery law as "a crystallization of every teardrop of blood which can be collected from humanity, so accurately, elegantly, scientifically arranged." *Id.* at 82. Decisions like Ruffin's "show nothing so much as this severe, unflinching accuracy of logic." *Id.* They are the product of "the logical necessity of a strict interpreter of slave law." *Id.* at 77.

\(^{89}\) *Key, supra* note 4, at 78-79.

\(^{90}\) *Id.* at 71.
accuracy of logic. 91

It was Ruffin's cold, logical approach, strict reliance on precedent, and simple, direct language, that won him praise from his contemporaries. In a eulogy delivered before the North Carolina Agricultural Society in 1870, Judge William Graham reported that:

[Ruffin was] accustomed tenaciously to adhere to precedents upon the theory, that the wisdom of a succession of learned Judges, concurred in or tolerated by the Legislature from age to age, is superior to that of any one man, and that certainty in the rules of law is of more importance than their abstract justice. 92

Stowe concluded her discussion of the law of slavery with a statement that illuminates her fascination with Ruffin's ability to separate his legal mind from his feelings: "There is but one sole regret; and that is that such a man, with such a mind, should have been merely an expositor and not a reformer of the law." 93

91 Id. at 82.

92 WILLIAM A. GRAHAM, LIFE AND CHARACTER OF THE HON. THOMAS RUFFIN (1871), reprinted in 1 THE PAPERS OF THOMAS RUFFIN, supra note 63, at 17, 28. Ruffin explained during controversy over the appointment of William Gaston to the North Carolina Supreme Court the qualities a judge should possess. They included, "the calmness of dispassionate deliberation and unbiased decision upon the great questions which involve the liberties and rights of our fellowmen." 2 Id. at 92 n.1. See also id. at 29 (praising sparse, vigorous prose and Ruffin's powers of abstraction); id. at 388 (urging son to study algebra because "it teaches the art of pure reasoning and induction, with the least possible connection with sensible objects"). On the multifaceted connections between mathematics and law, see Hoeftlich, supra note 14, at 95-121. But see Howard B. Scherber, The "Science" in Legal Science: Nineteenth Century American Legal Education and the Natural Sciences (paper delivered at American Society for Legal History Conference, October, 1997) (interpreting references to legal science as referring to a prevalent antebellum idea of scientific method rather than principles of deductive logic).

93 Key, supra note 4, at 79. Stowe reported that on a trip to England, Lord Chief Baron Jonathan Frederick Pollack of the Court of Exchequer, "remarked especially on the opinion of Judge Ruffin, in the case of State v. Mann, as having made a deep impression on his mind. . . . The talent and force displayed in it, as well as the high spirit and scorn of dissimulation, appear to have created a strong interest in the author." HARRIET BEECHER STOWE, 1 SUNNY MEMORIES OF FOREIGN LANDS 260-61 (Boston, Phillips, Sampson, and Co. 1896) (1854). Historians also have focused upon Mann. Both Eugene Genoveze and Stanley Elkins used it to demonstrate the control that masters had over their slaves. See STANLEY ELKINS, SLAVERY: A PROBLEM IN AMERICAN INSTITUTIONAL AND INTELLECTUAL LIFE 37-52 (1959); EUGENE GENOVEZE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE 35-36 (1974). Mark Tushnet has viewed Mann as relegating the control over slaves to the sphere of sentiment. See MARK TUSHNET, THE AMERICAN LAW OF SLAVERY, 1800-1860, at 54-65 (1981). Tushnet's interpretation of the role of sentiment in slave law parallels the one advanced by antebellum Southerners who emphasized the importance of slaveholders' humanity as a restraint on masters. See generally PRINGLE, su-
B. Judge Clayton: The Judicial Mask Removed

Judge Clayton, constructed "according to artistic fit," reveals why Ruffin was merely an expositor and not a reformer of the law. Through Clayton, Ruffin appears in a light not cast while he was communicating solely through judicial opinions. He appears through the light cast by an abolitionist explaining to her readers her understanding of the judge. In Judge Clayton, Stowe created a character who shows abolitionists' beliefs about how jurists in slave states behaved and how the jurists wrestled with the tensions between the feelings of humanity and the commands of law.

1. Judge Clayton: Portrait of the Mind and Spirit

Judge Clayton, in appearance as well as action, represented the abolitionists' image of a cold, calculating judge. The first hint of his character came when Stowe introduced the Clayton family. The judge's appearance bespoke "a logical severity of thought." There was much to fear in him; there was "little to hope from any outburst of his emotional nature." His stern, rigidly logical attitudes were apparent in his strictly impartial approach towards domestic life. He never hesitated "to speak the truth nor to acknowledge an error." In Stowe's view, emotion drove one to do justice; coldness suggested a dangerous level of abstraction that did not allow for individual justice. Yet, Stowe allowed room for hope; deep beneath Judge Clayton's external coldness he possessed "a severely repressed nature, of the most fiery and passionate vehemence."

Stowe peered behind Judge Clayton's mask and listened to a conversation he had with his wife. He observed that it was "extremely painful" to have to deliver the decision to overturn the jury verdict in favor of his son's client. It was the doctrine he felt forced to announce that disturbed him. In response to questioning by his wife whether he had to make that decision, the judge responded: "Yes, . . . A Judge can only perceive and declare. What I see, I must speak, though it go against all my feelings and all my sense of right." Judge Clayton agreed with his wife's statement that the decision

pra note 56, at 12, 24 (focusing on human nature rather than legislation to ensure that slaves are treated well). Stowe, however, directed attention to the conflict between the inhumanity of the rule and the issuer of the rule, a different aspect of the opinion.


96 Id. at 12, 24.

97 Id.

98 Id.

99 Id.

100 See 1 DRED, supra note 1, at 439.

101 Id. at 438.
would cause "the most monstrous injustice." But he told her that:

I sit in my seat, not to make laws, nor to alter them, but simply to declare what they are. However bad the principle declared, it is not so bad as the proclamation of a falsehood would be. I have sworn truly to declare the laws, and I must keep my oath.

Then Harry, Nina Gordon, and Edward Clayton assembled in the courtroom to hear the Chief Justice stand and announce in "a clear, deliberate voice" the opinion of the court. He delivered the opinion, which he privately acknowledged caused him considerable pain, with his usual coolness. The opinion was taken directly from State v. Mann; Stowe omitted only the statement of facts and the paragraph that announced that treatment of slaves was improving. That omission further suggests the hopelessness of abolitionists for termination of slavery. Shortly afterward, Edward resigned from the practice of law.

2. The Culture of the Antebellum Judge: Jurisprudence of the Majority and Formalism

Judge Clayton represented what Stowe and other abolitionists had come to despise: an unflinching support for law over humanity. The ideology that judges must uphold an abstract conception of the "law" and the Constitution had taken strong hold in antebellum culture and jurisprudence. Justice Joseph Story, who had delivered a proslavery opinion in Prigg v. Pennsylvania, striking down a Pennsylvania statute conferring due process protections on alleged fugitive slaves before they were returned to Southern owners, explained his decision to a friend: "I shall never hesitate to do my duty as a Judge, under the Constitution and laws of the United States, be the consequences what they may... You know full well that I have ever been opposed to slavery. But I take my standard of duty as a Judge from the Constitution." Some modern observers question Story's commitment to the antislavery cause, and, therefore, doubt the sincerity of his claims to be acting under compulsion. But despite this skepticism, Story and many other

102 Id.

103 Id. at 440.


106 See R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 376-77 (1985) (suggesting that Story's decision was not as strongly anti-slavery as many have portrayed it); Paul Finkelman, Story Telling on the Supreme Court: Prigg v. Pennsylvania and Justice Joseph Story's Judicial Nationalism, 1994 SUP.
judges acted, and articulated their understanding of their role, as if the scope of their decisions were constrained by consensus interpretations of the law and Constitution.

Some judges presented practical, what we might call instrumentalist, reasons for upholding proslavery law. In October 1851, in the Northern District of New York, Judge Nelson cautioned a grand jury about the dangers caused by the rescue of a fugitive slave from a federal officer who was returning the slaves to their masters. Nelson warned that the actions were not simply aimed at defeating a federal law, but involved the very continuation of the Union.

New York may thus redeem herself from the odium of suffering the Constitution and laws of the Union to be trampled under foot, and from a just responsibility to the other members of the confederacy. If [the people of the Northern states] abide by the Constitution—the whole and every part of it—all will be well. If they expect the Union to be saved, and to enjoy the blessings flowing from it, short of this, they will find themselves mistaken when it is too late.\textsuperscript{107}

In 1858, Judge Conkling, also in the Northern District of New York, bound over for trial several defendants accused of aiding the escape of a fugitive slave from a Syracuse, New York magistrate. Conkling thought that the defendants suffered from either "gross delusion or . . . wanton contempt of law and social order," and that such means were unlikely to end slavery. "If we have nothing better than lawless violence to rely upon for" ending slavery, it "will never cease." It is to advancing civilization alone that we can look for slavery's gradual extinction. "Wise men understand this, and shape their course accordingly. Bigots and fanatics are too blind to see it, or too impatient to heed it; and in their headlong zeal to redress particular wrongs, real or fancied, regardless of all other consequences, they commit other wrongs more aggravated and intolerable."\textsuperscript{108}

\textsuperscript{107} Charge to the Grand Jury, 30 F. Cas. 1013, 1014 (N.D.N.Y. 1851) (No. 18,262).

\textsuperscript{108} United States v. Cobb, 25 F. Cas. 481, 482 (N.D.N.Y. 1858) (No. 14,820). Justice Benjamin Curtis also employed an instrumentalist rationale sitting on circuit in Boston in 1854 when he charged a grand jury investigating an attempt to free a fugitive slave from a federal magistrate. He reminded the jury that "our duty is limited to administering the laws of the United States." Charge to the Grand Jury, 30 F. Cas. 983, 984 (D. Mass. 1854) (No. 18,250). It is "the imperative duty of all of us concerned in the administration of the laws, to see to it that they are firmly, impartially, and certainly applied to every offence, whether a particular law be by us individually approved or disapproved." \textit{Id}. at 985. The reason that duty must be meticulously enforced is that "forcible and concerted
In *Prigg v. Pennsylvania*, Story further elaborated the duties of the judge. To interpret the scope of the Constitution’s fugitive slave clause, Story examined the clause in light of Northern states’ enactments. To arrive at the conclusion that the act was self-executing, he asked whether a Northern state could “dole out its own remedial justice, or withhold it at its pleasure and according to its own views of policy and expediency.”109 Based on the structure of the Constitution and the likely effects of various interpretations given to the Constitution, Story reasoned, “consequences like these show that the nature and objects of the provision imperiously require, that, to make it effectual, it should be construed to be exclusive of state authority.”110

Proslavery commentators also argued for the preservation of law over humanity towards individual slaves. Nehemiah Adams’ 1854 *A South-Side View of Slavery* criticized antislavery lawyers for their failure to follow law:

[A] lawyer is supposed to discriminate between what is specially benevolent and the obligations which we owe to the social compact: from him we expect to learn that an unlawful way of seeking a supposed good is fraught with a destructive principle, before which every thing may be laid waste. That compassion for a fugitive slave which leads one to abrogate the constitution of society is not benevolent, nor does it secure respect for any but radicals—a class of men, in all ages of the world, who have uniformly failed to secure the confidence of mankind.111

University of Virginia law professor Henry St. George Tucker, delivering a speech to the entering class of law students in September 1841, elaborated on the idea of lawyers as a bulwark against radicalism. Lawyers are “bred to a love of order; a devotion to settled forms and the supremacy of the law is one of their distinguishing characteristics. The ascertainment of fixed and definite rules of property and principles of Jurisprudence is their hourly occupation.”112 Through their training, lawyers learned to oppose radicalism. Young lawyers “grope among the rubbish of the year books of four centuries ago, for the precious treasure of the law.” From that experience, “we cannot fail to trace the antagonizing principle, to the eternal love of change.”113

University of Virginia professor Albert Bledsoe’s 1856 treatise, *Liberty* resistance to any law is civil war, which can make no progress but through bloodshed, and can have no termination but the destruction of the government of our country, or the ruin of those engaged in resistance.” *Id.*

110 *Id.* at 624-25.
113 *Id.* at 8.
and Slavery, criticized abolitionists like Senator William Seward of New York and Senator Charles Sumner of Massachusetts for allowing individual conscience to trump the duty to follow the Constitution. The morals of abolitionists, thought Bledsoe, paid too much attention to slaves and insufficient attention to "the obligation of an oath" to uphold the Constitution. Bledsoe believed that abolitionists had to abide by the interpretation of the Constitution made by the Supreme Court. He wrote:

[Otherwise,] law and order would be at an end; a chaos of conflicting elements would prevail, and every man would do that which seemed right in his own eyes. The only escape from such anarchy is a just and loyal confidence in the judicial tribunals of the land, is a subjection of the intense egotism of the individual to the will of the nation, as expressed in the Constitution and expounded by the constitutional authorities.

And ministers often preached of the duty of following law over sentiment. Presbyterian minister Boardman told his congregation that "[t]he obligation of contracts is not made contingent upon men's feelings." In Northern colleges as well, lecturers explained the importance of following law. In 1851, for example, William Greene told Brown's Phi Beta Kappa chapter that if conscience were the judge of whether one should follow the law, government would end. "For in dispensing with the principle of obedience, no matter with what apology, when the power of government has given the rule, it must take away the only means by which government can be preserved."

114 Bledsoe, supra note 43, at 440. B.F. Moore, one of Judge Ruffin's correspondents, published a tribute to Ruffin, which began, "the judge in the administration of the law, should have but one influence to direct his course, and that should be the influence of duty." 2 The Papers of Thomas Ruffin, supra note 63, at 358.

115 Bledsoe, supra note 43, at 456. Occasionally, proslavery judges issued antislavery decisions—decisions in conflict with their moral sense—because the law dictated that result. A Tennessee judge upheld a will emancipating the donor's slaves. He concluded:

I feel satisfied that I have no sympathies which would have misled me in this matter; for when permitted to indulge my feelings and opinions as an individual, I find them in strong and direct hostility to all schemes for emancipating slaves under existing circumstances, in the bosom of our country.

Fisher's Negroes v. Dabbs, 14 Tenn. (6 Yer.) 119, 139 (1834).

116 Henry A. Boardman, The American Union: A Discourse 38 (Philadelphia, Lippincott, Grambo and Co. 1851). See also John C. Lord, "The Higher Law" in Its Application to the Fugitive Slave Bill (Buffalo, George H. Delby and Co. 1851). Abolitionist ministers also wielded legal terms. "Blackstone," wrote Nathaniel Hall, "who will not be suspected of theological bias or weak sentimentalism, has said in his Commentaries . . . 'the law of nature, being coeval with mankind, and dictated by God himself, is, of course, superior in obligation to any other.'" Nathaniel Hall, The Limits of Civil Obedience 14 (Boston, Wm. Crosby and H.P. Nichols 1851).

117 Greene, supra note 59, at 36. Lecturers to college literary societies frequently em-
The writers of legal treatises further elaborated the duties that judges owed to established law. George Sharswood, author of the first treatise devoted exclusively to professional ethics and a law professor at the University of Pennsylvania, wrote in 1853 that "the great fundamental principle for judge and counsellor ought to be, THAT AUTHORITY IS SACRED."\(^{118}\) Sharswood went on to quote Horace Binney's funeral oration for Chief Justice Tilghman of Pennsylvania to show the respect with which a great jurist held precedent and how Tilghman separated his own moral view from the law:

\[^{118}\text{George Sharswood, } \text{Professional Ethics 40-41 (Philadelphia, T. & J.W. Johnson & Co. 1896) (1853).}\]
There is not a line from his pen that trifles with the sacred deposit in his hands by claiming to fashion it according to a private opinion of what it ought to be. Judicial legislation he abhorred, I should rather say, dreaded, as an implication of his conscience. His first inquiry in every case was of the oracles of the law for their response; and when he obtained it, notwithstanding his clear perception of the justice of the cause, and his intense desire to reach it, if it was not the justice of the law, he dared not to administer it. . . . [He] left it to our annual legislature to correct such defects in the system as time either created or exposed; and better foundation in the law can no man lay.\textsuperscript{119}

Justice Joseph Story explained in \textit{Commentaries on the Constitution} the basis for construing the Constitution according to the fair scope of its terms. He stated that one should not enlarge the government's powers simply because a constitutional restriction is "inconvenient, impolitic, or even mischievous."\textsuperscript{120} Such an interpretation would be "a departure from the true import" and would establish a "new constitution." Judges who undertook to decide based on policy rather than law, would be "usurping the functions of a legislator, and deserting those of an expounder of the law." Story explained that the Constitution should be "the same yesterday, to-day, and for ever."\textsuperscript{121} He quoted Chief Justice Marshall's opinion in \textit{Osborne v. Bank of the United States} to show that judges are narrowly constrained in the scope of their duties:

Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal

\textsuperscript{119} \textit{Id.} (quoting Horace Binney, \textit{Eulogy for Chief Justice Tildman}, 16 Sarg, & Rawles 444 (1827)). The developing professional standards of judging and practicing law in the nineteenth century, which is represented by Sharswood's treatise, promises to help in the recovery of the intellectual world of nineteenth-century judges and lawyers. We need to know more about what types of arguments they thought were persuasive—and what the limits on the judges were—so that we can understand how ideas popular in the public influenced—and were influenced by—the law found in the case reporters. \textit{See generally} MAXWELL BLOOMFIELD, \textit{AMERICAN LAWYERS IN A CHANGING SOCIETY}, 1776-1876 (1976); HORWITZ, supra note 6, chs. 1, 6. Benjamin Butler, proposing to start a law school at the University of the City of New York (now New York University), for example, justified the teaching of professional ethics because it would add to the "honor and usefulness of the profession, to secure . . . on the part of all its members, such a line of conduct, as shall furnish no occasion for judicial rebuke or popular reproach." BENJAMIN F. BUTLER, A PLAN FOR THE ORGANIZATION OF THE LAW SCHOOL IN THE UNIVERSITY FOR THE CITY OF NEW YORK (1833), reprinted in \textit{The Gladsome Light of Jurisprudence} 165, 175 (Michael Hoeflich ed., 1988).

\textsuperscript{120} \textit{Joseph Story, Commentaries on the Constitution of the United States with a Preliminary Review of the Constitutional History of the Colonies and States, Before the Adoption of the Constitution} 410 (Boston, Hilliard, Gray, and Co. 1833).

\textsuperscript{121} \textit{Id.}
discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the courts to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge.122

The belief that judges, and other political actors, such as legislators, must conform to the common understanding of the Constitution pervaded public debate over slavery. The ethical standards of judges, discussed frequently in writings on judging, correlated closely with attitudes expressed in more public fora, such as the United States Senate. In his March 7, 1850, speech supporting the Compromise of 1850, which included the Fugitive Slave Bill, Daniel Webster urged his fellow senators to support the Compromise because of their Constitutional duty.

Every member of every Northern legislature is bound by oath, like every other officer in the country, to support the Constitution of the United States; and the article of the Constitution which says to these States that they shall deliver up fugitives from service is as binding in honor and conscience as any other article. . . . [T]he North has been too careless of what I think the Constitution peremptorily and emphatically enjoins upon her as a duty.123

3. Antislavery Legal Minds: The Variety of Responses to Slave Law

While judges and lawyers who supported slavery emphasized duty and law, antislavery lawyers developed several responses. Some, such as Lysander Spooner, believed that the Constitution ought to be interpreted as an antislavery document and criticized judges who did not make such an interpretation. Spooner’s 1845 book, The Unconstitutionality of Slavery, argued that judges were under no obligation to enforce positive laws that were inconsistent with natural law. Spooner advised judges to decide according to their own moral vision, even if that vision was inconsistent with the Constitution.124


123 CONG. GLOBE, 31st Cong., 1st Sess. 274 (1850).

124 See generally LYSANDER SPOONER, THE UNCONSTITUTIONALITY OF SLAVERY (Boston, Bela Marsh 1845). See also COVER, supra note 6, at 154-58; WILLIAM GODDELL, VIEWS OF AMERICAN CONSTITUTIONAL LAW IN ITS BEARING UPON AMERICAN SLAVERY (Utica, NY, Lawson & Chaplin 1845); Randy E. Barnet, Was Slavery Unconstitutional Before the Thirteenth Amendment?: Lysander Spooner’s Theory of Interpreta-
At the same time that abolitionists like Spooner were criticizing Northern antislavery judges, they criticized Southern judges for adherence to law. William Goodell's *The American Slave Code in Theory and Practice*, published the year after *Uncle Tom's Cabin*, detailed in more than four hundred pages how the slave laws released masters from liability for injuries done to their slaves. Goodell, who resigned from the practice of law to devote himself to antislavery activism, argued that slavery was inconsistent with fundamental morality and was, therefore, not law. "Is there the wise legislator, civilian, or jurist," Goodell asked, "who does not see and condemn, the Slave Code, the opprobrium of legislation, the disgrace of jurisprudence, the subversion of equity, the promotion of lawlessness, the element of social insecurity, and the seeds of every crime which legislation and jurisprudence should suppress and restrain?" 125

Other abolitionists, such as Wendell Phillips, drew attention to the proslavery nature of the Constitution. From the premise that the Constitution was a proslavery compact, Phillips argued that abolitionists ought to remove themselves from the government. Phillips so effectively showed the proslavery nature of the Constitution in *The Constitution a Proslavery Compact* that Alabama politician John A. Campbell, soon to be a Justice on the United States Supreme Court and later Attorney General of the Confederacy, wrote to Senator John C. Calhoun of South Carolina, that "we might circulate [it] to great advantage . . . ." 126 In two later works, *Can Abolitionists Vote or Take Office Under the United States Constitution* 127 and *Review of Lysander Spooner's Essay on the Unconstitutionality of Slavery*, 128 Phillips articulated the imperative duty imposed by law on jurists. Jurists, he suggested, cannot decide cases according to their own moral visions, but must follow the law. 129 Because Phillips thought that justice could be achieved only "over the Constitution, trampling it under foot; not under it, trying to evade its meaning," he sought a radical solution: abolitionist judges should resign from the

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125 *Goodell, supra* note 26, at 407.


129 See, e.g., *Phillips, supra* note 128, at 25 ("Are we not, then, borne out in our assertion that neither any practical theory of Government, nor the recorded opinions of Statesmen or Jurists countenance the-doctrines . . . . that Judges are the proper persons to remedy, by overruling the bad laws of the State."). *See also id.* at 15, 18-25, 57; *Constitutionality of Slavery, 4 Mass. Q. Rev.* 463, 463 (1848).
bench and lawyers should resign from the bar rather than administer unjust laws under the proslavery Constitution. Phillips himself pursued that path. Phillips used appeals to humanity to recast the duty imposed by law into a prescription for disunion.

4. Behind the Mask of Judge Clayton: Judicial Ethics

Within Judge Clayton, judicial duty prevailed over the “feelings of the man.” Two days after the decision and Edward’s dramatic resignation from the practice of law, Judge Clayton spoke with his son. Judge Clayton accepted Edward’s explanation for resignation from the practice of law. “Every man must act up to his sense of duty,” the Judge acknowledged. Judge Clayton explained that he undertook the acts he believed were necessary to his station. He expressed his reason for supporting the law: it provides security to North Carolina society.

I have often myself pondered the question with reference to my own duties. My course is a sufficient evidence that I have not come to the same result. Human law is, at best, but an approximation, a reflection of many of the ills of our nature. Imperfect as it is, it is, on the whole, a blessing. The worst system is better than anarchy.

Stowe identified Judge Clayton with the antebellum moral philosophers who emphasized the need for order in society and the superiority of order over anarchy, as well as the legal thinkers who emphasized duty to the law.

Edward then asked Judge Clayton the same question that Stowe asked of Judge Ruffin in A Key to Uncle Tom’s Cabin: “[W]hy could you not have been a reformer of the system?” The answer makes Clayton appear as a

130 PHILLIPS, supra note 128, at 35.
131 See generally WIECEK, supra note 126, at 228-48. See also COVER, supra note 6, at 149-51.
133 1 DRED, supra note 1, at 442.
134 Id. at 450.
135 Id.
136 See, e.g., GENOVESE, supra note 45, at 10-40 (examining proslavery worldview of Southerners, particularly as it concerned order); WILLIAM A. SMITH, LECTURES ON PHILOSOPHY AND PRACTICE OF SLAVERY, AS EXHIBITED IN THE INSTITUTION OF DOMESTIC SLAVERY IN THE UNITED STATES: WITH THE DUTIES OF MASTERS TO SLAVES, 60-103 (Thomas O. Summers ed., Nashville, TN, Stevenson and Evans 1856).
137 1 DRED, supra note 1, at 450.
realist. He argued that until there is a conviction in society that slavery is a moral evil, there can be no reform. The lack of moral condemnation of slavery, Judge Clayton thought, was the fault of the church.

The decisions and testimonies of the great religious assemblies in the land, in my youth, were frequent. They have grown every year less and less decided; and now the morality of the thing is openly defended in our pulpits, to my great disgust. I see no way but that the institution will be left to work itself out to its final result, which will, in the end, be ruinous to our country. 138

Stowe maps in wonderful detail why the judges could not break out of their legal reasoning. Judge Clayton could not because of his abstract duty to the law, symbolized by his oath to protect the Constitution, and because of his belief that society was actually better off with the decision he rendered rather than by doing individual justice to individual slaves. As Judge Clayton explained later, no piecemeal reforms would work. 139 Moreover, Judge Clayton believed he was not “gifted with the talents of a reformer.” 140 He

138 Id. at 450-51. Stowe’s indictment of the church through Judge Clayton suggests that she believed in 1856 that reform of the law by itself was insufficient to root out the evils of slavery. For different reasons, proslavery writers likewise believed that slave law was a mere manifestation of the order inherent in nature, which could not be eliminated even with changes in law. The Mississippi lawyer George Sawyer, for example, wrote:

Law, for the government and regulation of this institution is the creature of slavery. The real cause and ultimate necessity of human bondage in some form or other, have had, in all ages and nations, an anterior existence to all human law; their foundation is laid broad and deep in the philosophy of human nature. . . . Laws may, it is true, change the form and modify, for better or for worse, the system under which any state of servitude may exist; but they can no more abolish the substantial relation of master and slave, than they can do away with . . . poverty.


139 2 DRED, supra note 1, at 16-17.

140 1 DRED, supra note 1, at 451. See COVER, supra note 6, at 119-23 (discussing constraints on judges). But Clayton was not merely retreating to a formalism that located responsibility for a morally suspect act elsewhere, as the Northern judges whom Cover studied did. See id. at 196-267. Instead, Clayton believed that he was furthering the greater goal of an ordered society by upholding the law. Cf. Soifer, supra note 20, a 1922-23 (discussing Massachusetts Justice Lemuel Shaw’s reasons for ordering return of fugitive slaves); James W. Ely, Book Review, 1975 WASH. U. L.Q. 265, 270-73 (1975 (reviewing ROBERT COVER, JUSTICE ACCUSED: ANTI-SLAVERY AND THE JUDICIAL PROCES
was not gifted with those talents because he thought in legal terms, which recognized only analytical reasoning, not humanity. 141

The fictional Clayton tracks closely the historical Ruffin in statements made from the bench, although one can never know how Ruffin felt in private. Stowe has rendered a relatively accurate portrait of how at least some Southern judges thought. Stowe demonstrates herself to be a perceptive commentator on legal thought in both Dred and A Key to Uncle Tom’s Cabin. 142

Stowe saw little hope for reform from within. The saga of Milly provided a means for Stowe to answer her own question as to why America had failed to extract itself from slavery. 143 Judge Clayton’s final statement emphasized

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141 See, e.g., Bledsoe, supra note 43 (contrasting philanthropy and judgment, criticizing “blind passion,” and emphasizing duty of citizens to the Constitution); R.H. RIVERS, ELEMENTS OF MENTAL PHILOSOPHY 258-78 (Thomas O. Summers ed., Nashville, TN, Southern Methodist Publishing House 1862) (contrasting “reasoning faculties” with feeling). See also Hoeftich, supra note 14 (portraying legal thought, particularly in South Carolina, as deductive and based on “mathematical models,” particularly geometry).

142 Stowe’s question, how should judges act when faced with humanitarian rationales, continues to be asked today by those exploring the duties of lawyers, judges, and citizens towards the law. See DANIEL COQUILLETTE, LAWYERS AND FUNDAMENTAL MORAL RESPONSIBILITY 155-60, 171 (1995) (discussing problem of harboring fugitive slaves). Stowe’s explanation is, of course, that of an abolitionist who had trouble believing that people would permit slavery if they knew “what slavery is.” UNCLE TOM’S CABIN, supra note 2, at 513. Therefore, Stowe’s depiction of Judge Clayton may have been biased by her search for an explanation why people who did understand what slavery was still failed to act against it. Stowe’s perspective on Clayton may, thus, tell us more about Stowe’s own incredulity about how people act than about the actual motives of Southern judges.

143 There is credible evidence that Stowe intended to offer an optimistic assessment of Southern society in Dred, but changed the direction of her novel following the caning of Senator Charles Sumner. See HEDRICK, supra note 21, at 258-59 (quoting Stowe as stating that “[t]he book is written under the impulse of our stormy times”). Stowe concludes with a picture suggesting that reform of slavery is impossible absent a complete change in American society. The message is very different from that in Uncle Tom’s Cabin, where individual readers were told to “feel right” and “pray.” UNCLE TOM’S CABIN, supra note 2, at 473. At the end of Dred, one is left with the thought that the only reform possible is complete removal from Southern society and that mere reform of the law is not enough. See also Thomas R. Hovet, THE MASTER NARRATIVE: HARRIET BEECHER STOWE’S SUBVERSIVE STORY OF MASTER AND SLAVE IN UNCLE TOM’S CABIN AND DRED 56-83 (1989) (discussing conflict between law and nature).

Presaging her later work, such as The Minister’s Wooing, which attacks the emptiness of mainstream religious doctrine, Stowe lays blame for the evils of slavery on the churches. Edward, for example, asks for help in lobbying the legislature for changes in the law from his uncle, Dr. Cushing, a Presbyterian minister. Dr. Cushing, like Judge Clayton, acknowledges his trying position, but believes that lobbying would be ineffective
the importance of following the dictates of morality, whether it was expedient or not. "We live here but a few years. It is of more consequence that we should do right than that we should enjoy ourselves." 144

III. EDWARD CLAYTON: THE DILEMMA OF THE ABOLITIONIST LAWYER

The position of the lawyer representing the oppressed client is usually less fraught with moral problems than the position of the judge charged with enforcing an odious law. 145 Nevertheless, some lawyers feel the need to remove themselves from participation in a legal system that treats their clients unjustly. The dilemma Edward Clayton faced when his father overturned the jury verdict in favor of his client presented an opportunity for Stowe to explore the relations between lawyers and humanity.

Stowe used Edward to explore the role that concern for humanity played in lawyers' advocacy. "Reading the theory is always magnificent and grand," Edward thought. "Law hath her seat in the bosom of God; her voice is the harmony of the world." 146 But in discussion with a friend, lawyer Frank Russell, Edward worried about legal practice. "Does not an advocate commit himself to one-sided views of his subject and habitually ignore all the truth on the other side?" 147 Russell recognized that Edward's conscience would prevent him from entering politics. "It's what I call a crotchety conscience—always in the way of your doing anything like anybody else," Russell said. 148 The influence of Edward's conscience on his legal training was particularly evident when Stowe contrasted him with his father. Edward "was ideal to an excess; ideality colored every faculty of his and therefore refuses to begin it. Judge Clayton, upon hearing his brother-in-law's response, tells Edward that there may be many individuals who seek reform, but that "they are mostly without faith or hope, like me. And from the communities—from the great institutions in society—no help whatever is to be expected." 2 DRED, supra note 1, at 76.

In the Key, Stowe argues that law reinforces—and is reinforced by—the churches. One could, thus, mine the Key for an understanding of the connection between law, religion, and public opinion, a topic of growing interest in Stowe's era. See Senator Charles Sumner, Freedom National, Slavery Sectional, CONG. GLOBE, 32nd Cong., 1st Sess. app. at 1111 (Aug. 25, 1852) (discussing impact of public disrespect for law on its enforcement); cf. BACON, supra note 117, at 4 ("The character of a people . . . is determined mostly by its origin, its history, its political organization, its religious doctrines and institutions."); DEW, supra note 10; see also William W. Fisher, Ideology, Religion and the Constitutional Protection of Private Property, 1760-1860, 39 EMORY L. J. 65, 68-128 (1989) (discussing the connection between religious ideas and constitutional thought).

144 1 DRED, supra note 1, at 451.
145 See COVER, supra note 6, at 159-61 (stating that the attorney's role within a system of law assumed to be immoral is much easier to justify than the role of the judge in the same situation).
146 1 DRED, supra note 1, at 16.
147 Id.
148 Id.
mind, and swayed all his reasonings, as an unseen magnet will swerve the needle. Ideality pervaded his consciousness, urging him always to rise above the commonly received and so-called practical in morals.”\(^{149}\) While Edward relished “the theory of the law,” he failed in the application of legal principles. Edward’s father was “obliged constantly to point out deficiencies in reasonings, founded more on a keen appreciation of what things ought to be, than on a practical regard to what they are.”\(^{150}\) Because of the differences in conscience, Edward and Judge Clayton “could never move harmoniously in the same orbit.”\(^{151}\)

Edward’s first case was the suit against Milly’s abuser, which he undertook with “great energy and enthusiasm.”\(^{152}\) Here was a case that corresponded with his conscience. He said, “It is a debt which we owe to the character of our state, and to the purity of our institutions, to prove the efficacy of the law in behalf of that class of our population whose helplessness places them more particularly under our protection.”\(^{153}\)

The case became a spectacle in the county seat where it was tried. Lawyers around the courthouse raised the question of whether law or humanity would prevail in the case. There were strong arguments on both sides. “Clayton has mounted his war-horse, and is coming upon us now, like leviathan from the rushes,” said Edward’s friend, Frank Russell.\(^ {154}\)

After explaining the problems that most cases presented to Edward’s conscience, Russell turned to the other side of the equation: “[H]e is sure to get the case, though I’m not clear that the law is on his side, by any means. . . . In fact, I’m pretty clear it isn’t.”\(^ {155}\) The law was not on Clayton’s side because Baker had not “really exceeded his legal limits.”\(^ {156}\) Nevertheless, Clayton still had a good chance of success. He would make a good speech that played on the jurors’ sentiments, Russell thought: “[B]ecause you see, it really was quite an outrage; and the woman is a presentable creature. And then, there’s the humane dodge; that can be taken, beside all the chivalry part of defending the helpless.”\(^ {157}\) Passion alone might propel the case with the jurors, who did not think in strictly legal terms. Clayton had the power to mystify—to contort the law to his moral vision. Russell said, “When a powerful fellow mystifies himself, so that he really gets himself thoroughly on to his own side, there’s nobody he can’t mystify. . . . I shall believe him

\(^ {149}\) Id. at 27.
\(^ {150}\) Id.
\(^ {151}\) 1 DRED, supra note 1, at 27.
\(^ {152}\) Id. at 371.
\(^ {153}\) Id. at 372.
\(^ {154}\) Id. at 373.
\(^ {155}\) Id. at 374.
\(^ {156}\) 1 DRED, supra note 1, at 374.
\(^ {157}\) Id. at 374-75.
while I hear him talk; so will you; so will all the rest of us."  

The case proceeded as predicted. Clayton established the limits that ought to be placed on absolute power in his speech to the jury:

The good of the subject is understood to be the foundation of the right; but when chastisement is inflicted without just cause, and in a manner so inconsiderate and brutal as to endanger the safety and well-being of the subject, the great foundation principle of the law is violated. The act becomes perfectly lawless, and as incapable of legal defense as it is abhorrent to every sentiment of humanity and justice.  

Clayton touched the sentiments of the jurors, and they returned a verdict in his favor. However, the spectators realized that when the case was appealed to the Supreme Court, where law rather than passions ruled, there might be a different result. They were right.

After his father finished reading his opinion, Edward stood and asked to address the court:

I hope it will not be considered a disrespect or impertinence for me to say that the law of slavery and the nature of that institution have for the first time been made known to me today in their true character. I had before flattered myself with the hope that it might be considered a guardian institution, by which a stronger race might assume the care and instruction of the weaker one; and I had hoped that its laws were capable of being so administered as to protect the defenseless. This illusion is destroyed. I see but too clearly now the purpose and object of the law. I cannot, therefore, as a Christian man, remain in the practice of law in a slave state. I therefore relinquish the profession into which I have just been inducted and retire forever from the bar of my native state.

Edward provided an answer to Stowe’s question about the proper role of abolitionist lawyers in Southern states. They must remove themselves from the practice of law.

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158 Id. at 375-76.

159 Id. at 378.

160 Id. at 380.

161 Juries were seen by some as a preserve of the moral sense of the community; others feared that they were used to help judges avoid responsibility for tough decisions. See Stell v. Glass, 1 Ga. 475, 488 (1846) ("Were their spirit more thoroughly infused into our system, we should no longer hear it cast upon it as a reproach, that the use of a jury is merely to screen the court from the responsibility and odium of a decision, which is, in fact, in most cases, the result of the judge’s own view of the testimony."); cf. LYSANDER SPOONER, AN ESSAY ON THE TRIAL BY JURY, 1, 142-56 (Boston, Bela Marsh 1852) (referring to the jury as a "palladium of liberty" and charging that the methods of selecting jurors was illegal).

162 1 DRED, supra note 1, at 446.
Salmon Chase, a prominent abolitionist lawyer in Ohio before his election as Governor and United States Senator, provides an instructive, real-life counterpoise to Edward, and his views on how abolitionist lawyers should respond to law. Chase argued the case of Peter Van Zandt, a former slaveholder, who was charged with violating the Fugitive Slave Act of 1793 by transporting several fugitives, just as Senator Byrd had transported Eliza and her child Harry in Uncle Tom’s Cabin. When Chase left the courtroom after arguing the case, the judge remarked, “[T]here goes a young man who has ruined himself to-day.”163 Chase appealed to the Supreme Court, which “utterly ignoring argument and justice,” as Stowe phrased it, decided the case against him.164 After the Civil War, Chase was appointed to the United States Supreme Court, which Stowe considered “one of those rare dramatic instances in which courage and justice sometimes bring a reward even in this life.”165 For Edward, however, there was no reward in the legal profession.

Judge Clayton’s discussion with Edward regarding his decision to leave the practice of law reveals the limited options available to a Southern abolitionist lawyer. When told by Edward that he resigned based on “the deepest and most deliberate convictions of my conscience,” the judge approved of the decision, because Edward “could not do otherwise.”166 The judge then asked whether Edward could continue to be a slaveholder and Edward told him that he was retaining ownership only “as a means of protecting my slaves from the cruelties of the law and of securing the opportunity to educate and elevate them.”167 Yet even this conflicted with the law. “If there is any reasonable prospect of having the law altered, I must endeavor to do that,” Edward responded.168 The judge probed further by asking what if there were no way to repeal the law without uprooting the institution.169 Here the judge may have been seeking an answer to his own doubts, as much as questioning his son. Edward’s answer was unsatisfactory to the judge, however. Edward sought individual justice for the slave, whatever the consequences to Southern society: “I say repeal the law if it do uproot the institution.”170 That approach, so characteristic of abolitionists, found disfavor among proslavery politicians, who often emphasized a utilitarian balancing of

163 Life and Letters, supra note 75, at 145.

164 Jones v. Van Zandt, 46 U.S. (5 How.) 216, 231 (1847) (Woodbury, J.) (“[T]his court has no alternative, while compromises on slavery exist, but to stand by the constitution and laws with fidelity to their duties and their oaths. Their path is a straight and narrow one, to go where the constitution and laws lead, and not to break both, by traveling without or beyond them.”).

165 Life and Letters, supra note 75, at 145.

166 Id. Dred, supra note 1, at 448.

167 Id. at 449.

168 Id.

169 Id.

170 Id.
benefits and harm in deciding political issues.  
Edward’s discussion with his friend Frank Russell further contrasts Edward’s abolitionist ideas with those of more moderate antislavery lawyers. Russell agreed with Edward that slavery was wrong, but thought there was little he could do to end it. “You see,” Frank explained, “our party can’t take up that kind of thing. It would be just setting up a fort from which our enemies could fire on us at their leisure.” Frank, nevertheless, hoped that someday he might do something to reform slavery.

IV. THE UTILITARIAN CALCULUS OF PROSLAVERY POLITICIANS, JUDGES AND LAWYERS

The antislavery Edward Clayton and Frank Russell have complements in Dred. Opposing them are the proslavery Judge Oliver, Representative Knapp, and lawyer Mr. Jekyll. Stowe uses those complements to show how proslavery politicians, judges, and lawyers reasoned.

\[171\] For example, Senator Charles Tillinghast James stated:
My own views of philanthropy and humanity lead me to the conclusion that, of two evils, we should choose the least; and I certainly form no just estimate of the enormous difference between the evils resulting from the return of a few fugitive slaves to their owners, and those to result to the entire people of the United States, from a course likely to annihilate the glorious fabric of the American Union.

Some sufferings, sir, belong to our condition; it is a part of the lot of humanity, and although you may point me to cases which I admit to be cases of hardship, cases which shock the feelings of every humane and benevolent man, cases which I would gladly relieve if I had the power, yet if it be shown to me that in relieving them I shall inflict an injury upon a larger class of the community—upon a whole caste—I must refuse to do it.

CONG. GLOBE, 31st Cong., 1st Sess. app. at 1632 (Sept. 3, 1850) (remarks of Rep. R.M.T. Hunter). See also PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION, supra note 48, at 264 (Johnson, Nov. 11, 1829) (“With these views of the rights of the majority, and the test of expediency to which every measure of reform must be subjected, let us proceed to the question before the Committee.”); SAWYER, supra note 138, at 14 (“Laws and regulations relate to [slaves] only upon the true principle of self-government—the greatest amount of good to the greatest number.”); JOHN W. ANDREWS, AN ORATION PRONOUNCED BEFORE THE CONNECTICUT ALPHA OF THE PHI BETA KAPPA SOCIETY OF YALE COLLEGE 18 (New Haven, B.L. Hamlen 1850) (“Utility is now made the best test of works of art. . . . So it is with the work of the poet, the sculptor, the orator, the statesman, and with every department of thought.”). Cf. Fisher, supra note 143, at 118 (Whig ideology held government “should limit itself to initiatives that do not cause any individual or group net injury.”). The balancing often appeared in public discourse as well. See supra note 57.

\[172\] 2 DRED, supra note 1, at 102.

\[173\] Id.
A. The Proslavery Lawyer: Mr. Jekyll

Stowe examines the utilitarian views of proslavery lawyers through Mr. Jekyll. Jekyll is a lawyer from New Orleans who comes to announce to Tom and Nina Gordon that they have inherited an estate from their aunt. Mr. Jekyll, who had performed legal work for Colonel Gordon, tells a complicated story to Tom and Nina. Colonel Gordon’s sister, Mrs. Stewart, inherited an estate from her husband. Their son, George, in turn, inherited from her. George married a “handsome Quadroon girl,” Cora, who was Harry’s sister, and took her to Ohio, where he executed a deed of emancipation. When George died, Cora inherited the plantation. Then an overseer who had been dismissed by Cora for his abusive treatment of the slaves told her story to Mr. Jekyll. He found that the emancipation deed was ineffective in Mississippi and, therefore, that Tom and Nina were the heirs to the estate. The havoc wreaked by Jekyll’s interference was great. Cora took the children and ran away to Cincinnati, but they were recaptured. She then murdered her children, so that they might escape slavery. Without Jekyll’s interference, it is likely that no one would ever have discovered that Cora and her children were slaves.

Jekyll’s callousness illustrates the proslavery legal mentality. Stowe allowed him to speak on more general issues of law and theology and to show the connection of law to theology and of the centrality of the utilitarian calculus to both. Jekyll spent his leisure time reading theology, particularly that focused on the nature of true virtue. “This, he had fixed in his mind, consisted in a love of the greatest good.” He believed that “right consisted in creating the greatest amount of happiness; and every creature has rights to be happy in proportion to his capacity of enjoyment or being.” Jekyll demonstrated that one who was immersed in formal law and theology long enough could no longer see humanity; the cold, rigid reasoning of law and Presbyterian doctrine overcame his feelings. His mind had been “petrified into such a steady stream of the consideration of the greatest general good, that he was wholly inaccessible to any emotion of particular humanity.”

174 1 DRED, supra note 1, at 72-73. Recall that Harry is Tom and Nina’s half brother—the son of their father, Colonel Gorden, and one of his slaves. See supra Part I, notes 22-24 and accompanying text.
175 2 DRED, supra note 1, at 67.
176 See 1 DRED, supra note 1, at 426-27; 2 DRED, supra note 1, at 67.
177 Cora’s story is based upon Hinds v. Brazealle, 3 Miss. (2 How.) 837 (1838).
178 1 DRED, supra note 1, at 209.
179 Id.
180 Id. at 210.
B. The Proslavery Judge and Politician: Judge Oliver and Representative Knapp

Edward tried to stay on at Magnolia Grove even after resigning from practice, but his decision to leave was hastened by two visits to his plantation. The first came from several distinguished proslavery neighbors, including Judge Oliver and Mr. Knapp, a North Carolina representative to Congress.

Judge Oliver explained that Edward was violating the law by teaching slaves how to read. When Edward protested that he thought the laws were “a relic of barbarous ages, which the practical Christianity of our times will treat as a dead letter,” both the politician and the judge provided a utilitarian rationale to support the slave law.\textsuperscript{181} Representative Knapp explained that Edward was mistaken to believe the laws would not be enforced. “Sir, they are founded in the very nature of our institutions. They are indispensable to the preservation of our property and the safety of our families.”\textsuperscript{182} Judge Oliver reminded Clayton that “there must be some individual rights which we resign for the public good.”\textsuperscript{183} Clayton acknowledged his duty under state law, but found “equally binding” his “responsibilities for the moral and religious improvement of those under my care.”\textsuperscript{184}

The visit to Edward’s plantation sets an instructive contrast between proslavery politicians and judges, and antislavery lawyers. The Claytons, father and son, were alike in one respect. Neither one cared about the consequences of his act; instead they followed another goal. Judge Clayton sought legal formalism; his son, religious formalism. The proslavery politicians and judges, however, cared only about consequences. They balanced their perception of the good of society against fairness to individual slaves. Representative Knapp, a man who had the power to change the law and who was not bound by the formalism that bound jurists, refused to change the law because that would destroy his society. Judge Oliver, who was acting in a private capacity when he visited Edward and who was not then bound by judicial formalism, likewise employed a balancing of the interests of Southern society against those of Edward’s slaves.

Dred posits a hierarchy of rationales. It is a hierarchy of how much one is bound by formalism. At the low end are three proslavery Southerners

\textsuperscript{181} 2 DRED, supra note 1, at 181.
\textsuperscript{182} Id. at 181-82.
\textsuperscript{183} Id. at 185.

\textsuperscript{184} Id. at 187. The proslavery lawyers, judges, and politicians in the novel never explain their affinity for slavery because it is a positive good, as many Southern lawyers and judges actually did in the period from 1830 through 1861. See, e.g., Harper, supra note 44. That disjunction between actual attitudes and Stowe’s portrayal may be the result of her belief that no one could believe that slavery in the abstract was desirable. Or it may be result of the way that she interpreted proslavery thought—as justifying slavery because it placed people in the right social position.
speaking in private: Jekyll the lawyer and Knapp the politician, neither of whom is bound by formalism, and Oliver the judge, who is bound by formalism only on the bench. All three advanced utilitarian reasons for supporting slavery. Next in the hierarchy is Judge Clayton, who was bound by formalism and uses it to support slavery from the bench, while secretly opposing slavery. Together they exposed the difficulty of reforming slavery through the legislature or the courts.

Stowe’s parade of legal thinkers, from Jekyll, through Knapp and Oliver, to Judge Clayton, details the unbreakable chords holding slavery to law. Neither formalism nor utilitarianism offers a solution. There are problems inherent in legal formalism: Judge Clayton’s harsh decision is the result. There are also problems with Representative Knapp’s utilitarian calculus: holding slaves in bondage for the preservation of Southern society is the result.

A second visit to Edward’s plantation came from a mob inspired by Knapp and Oliver. As Edward’s friend Frank Russell explained: “[T]he fact is that our republic in these States, is like that of Venice: it’s not a democracy, but an oligarchy, and the mob is its standing army. . . . The rabble are their hands.”185 The mob burned the school where Anne taught the slaves to read.186 Edward and his sister realized that removal from the state was the only practicable and legal course, so they moved to Canada. Not only could Edward not remain as a practicing lawyer in North Carolina; he could not, as a dedicated abolitionist, remain in North Carolina at all.

V. CONNECTIONS

With Dred, Stowe introduces to her readers important issues in jurisprudence, terrain usually written about as if it were reserved only for men at that time.187 Dred helps Stowe’s readers understand the legal and the moral

185 2 DRED, supra note 1, at 188.
186 Id.
187 There are wonderful, recent writings on women’s role in political movements, particularly abolitionism, temperance, and women’s rights. See, e.g., THE ABOLITIONIST SISTERHOOD: WOMEN’S POLITICAL CULTURE IN ANTEBELLUM AMERICA (Jean Fagin Yellin & John C. Van Horne eds., 1994); JEAN FAGIN YELLIN, WOMEN AND SISTERS: THE ANTI-SLAVERY FEMINISTS IN AMERICAN CULTURE (1989). Other studies examine women’s political ideology. See, e.g., NANCY COTT, BONDS OF TRUE WOMANHOOD (1977). Often, those are in the context of women’s opposition to traditionally male discourse, such as women’s emphasis on sentiment. See DAVIDSON, supra note 10. There are few works, however, that examine the specifically legal ideas of women, particularly the interaction of women’s ideas about law with other legal cultures. See, e.g., Clark, supra note 10; Sarah Barringer Gordon, “Our National Heartthrob”: Anti-Polygamy Fiction and the Sentimental Campaign Against Moral Diversity in Antebellum America, 8 YALE J.L. & HUMAN. 295 (1996); Jane Larson, “Women Understand So Little, They Call My Good Nature ‘Deceit’: A Feminist Rethinking of Seduction,” 93 COLUM. L. REV. 374 (1993); Lea Vander Velde & Sandhya Subramanian, Mrs. Dred Scott, 106 YALE L.J. 1033 (1997).
choices facing actors in the Southern legal system in the 1850s, as well as the constraints that law places on reform efforts. Stowe sought to understand why the brilliant Justice Thomas Ruffin, who sensed the inhumanity of slave law, nevertheless applied it like “elegant surgical instruments” to “dissec[t] a living human heart.”188 Her answer provides a window into a complex world of legal logic, humanity, and utilitarian thinking that encompassed ante-bellum lawyers, judges, politicians, and antislavery advocates.189 One could not expect judges to depart from law, even for the most compelling reasons. The power of the constellation of ideas about the sanctity of property, the importance of slavery to the Southern community, and the duty to law blocked the alternative jurisprudence of sentiment that Stowe sought. Or, as one might say today, the power of narrative was limited.

_Dred_ offers insights from the vantage of an abolitionist, not a Southern jurist. Therefore, its most direct testimony is about Stowe’s ideas regarding reform. Her three antislavery books, _Uncle Tom’s Cabin, A Key to Uncle Tom’s Cabin_, and _Dred: A Tale of the Great Dismal Swamp_, together constitute an abolitionist interpretation of Southern legal institutions. The trilogy presents Stowe’s vision of her jurisprudence of sentiment. But _Dred_ also has implications for understanding how Southern judges decided cases, particularly the interplay of formalism and utilitarianism as modes of judicial reasoning in the ante-bellum era. Robert Cover suggested in _Justice Accused_ that antislavery judges responded to cases conflicting with their sentiments in three ways: by elevating the formal stakes by discussing the implications of their decisions, by retreating to a formal upholding of the law, and by ascribing responsibility elsewhere.190 They did that as a way of

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188 Key, supra note 4, at 82.

189 As such, the window—or “site” as it might now be called—offers the chance to see how a contemporary engaged that thought. Peering through the window, one can catch a glimpse of a vibrant world. See William W. Fisher III, _Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History_, 49 Stan. L. Rev. 1065, 1084-86 (1997) (developing methodologies for recovering legal history); Hendrik Hartog, _Mrs. Packard on Dependency_, 1 Yale L.J. & Human. 79, 84 (1988) (using Packard’s writings describing her confinement to institution by her husband because she resisted his authority and describing Packard’s obscure life as a “site” to examine wide cultural patterns). _Dred_ also permits reconstruction of the context of both abolitionist and proslavery thought. For a reconstruction of Stowe’s ideas about law in _Uncle Tom’s Cabin_, see Alfred L. Brophy, "over and above . . . there broods a portentous shadow,—the shadow of law": Harriet Beecher Stowe’s Critique of Slave Law in _Uncle Tom’s Cabin_, 12 J. L. & Religion 457-506 (1995-96).

190 See Cover, supra note 6, at 229-38. Other commentators, such as Ronald Dworkin, have suggested that ante-bellum judges should not have felt themselves bound by the proslavery law. Dworkin believes that judges could have constructed a jurisprudence based on their understanding of the Constitution and “a conception of individual freedom antagonistic to slavery.” Dworkin, _The Law of the Slave Catchers_, Times Literary Supplement 1437 (Dec. 5, 1975) (reviewing Robert M. Cover, _Justice Accused:_
reducing their own moral anxiety over issuing proslavery decisions. Stowe, surely a perceptive interpreter of Southern thought, presented a similar interpretation of legal thought.

Stowe provides a similar but subtly different interpretation of the antislavery Judge Clayton. Where Cover distinguishes utilitarian and formalist responses to proslavery law, Stowe sees them as part of the same legal logic. Occasionally judges broke from their legal tradition. “Like a spring outgushing in the desert, some noble man... from the fulness of his own better nature, throws out a legal decision, generously inconsistent with every principle and precedent of slave jurisprudence, and we bless God for it.” But such judges were few. “All we wish is that there were more of them, for then should we hope that the day of redemption was drawing nigh.” Those decisions, the product of the judges’ “voice of their more honorable nature,” did “not commend themselves to the professional admiration of legal gentlemen.” Those humane judges were not, Stowe recognized, following legal tradition. They were taking what Cover called an ameliorist path, which did not have the respect of more traditional responses. With the abolitionist lawyer Edward, we see how the abolitionist legal mind might operate—how he focused on law as an instrument for justice and how that vision clashed with the cold judicial response. We also see Stowe’s despair with the legal system; it is the same despair that abolitionist lawyers felt.

Judges, according to Dred, were constrained by a trio of related principles: their own sense of duty to law, their need to support the society against anarchy, and their perceived inability to make piecemeal reform. The

ANTISLAVERY AND THE JUDICIAL PROCESS (1975)). Stowe shows why such a jurisprudence was unworkable.

Stowe’s categorization of Southern legal thought groups utilitarian thinking with formalism. Thus, Stowe identifies Ruffin’s calculations that slave law was necessary to uphold slavery as legal logic. Ruffin’s opinion presents a mixture of the rationales—formal defense of law with utilitarian balancing. See supra notes 31-68 and accompanying text. It was the law’s subordination of the slave’s humanity to the community—the strict separation of consideration of individual humanity—that Stowe complained of.

If this is not a scrupulous disclaimer of all human intention in the decision, as far as the slave is concerned, and an explicit declaration that he is protected only out of regard to the comfort of the community, and his property value to his master, it is difficult to see how such a declaration could be made.

KEY, supra note 4, at 73. Stowe, thus, groups together two concepts that Cover sees as distinct.

Id. at 72.

Id.

Id. at 71.

The law is treated as one part of a much larger system of proslavery thought and action, regulating and providing support for political and religious ideas, at the same time that it receives support from those areas. See Eugene D. Genovese, The Political Foundations of Justice, 85 YALE L. J. 582, 588 (1976) (reviewing ROBERT M. COVER, JUSTICE
judges' rhetorical response to the inhumanity of slave law was, according to abolitionists, part of a much larger legal ethos that impeded reform. A sense of duty, so common and powerful in the antebellum legal culture of which the judges were a part, exerted greater force on judges than did their anti-slavery feelings. 196 Clayton coldly followed out to their logical conclusions the consequences of the choices he had to make. He chose the one that was law, and thus he upheld that law, no matter what the consequences to individual slaves.

Judge Clayton's legal response to Milly's case specified the boundary between the domain of the heart and the domain of the cold legal mind. Antebellum Americans recognized that fiction held the power to sway minds. William and Mary professor Nathan Beverly Tucker stated that "[i]n this reading age . . . he who writes a people's books, need not care who makes their laws." 197 But Stowe held out no hope in Dred for reform through the courts, the legislature, or the churches; her pessimistic ending may be a result of her realization that the magical powers of sentimental literature were limited, as the cold Southern reaction to Uncle Tom's Cabin demonstrated.

Dred demonstrates that for a variety of reasons, ranging from the inability of judges to change the law, to the futility of individual action, to the outright opposition of legislators because of their desire to promote the interests of the "community," slavery was unlikely to end. Stowe's treatment suggests why reform was unlikely, as it details Southern legal thought. Stowe captures the principles motivating proslavery legal thought; in the process, she

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196 There is evidence that the judges recognized the "brooding omnipresence" of concern for humanity that Dworkin believes would be important in fashioning antislavery jurisprudence. Stowe employed the image of "brooding" in regard to the slave law—not humanity—and her detractors responded to her imagery. UNCLE TOM'S CABIN, supra note 2, at 37 ([O]ver and above there broods a portentous shadow—"the shadow of law."); A NORTHERN MAN [DAVID BROWN], THE PLANTER: OR, THIRTEEN YEARS IN THE SOUTH 37 (Philadelphia, H. Hooker 1853) (responding to Stowe's image of a brooding shadow). Nevertheless, those general principles of humanity were insufficient, given the judges' backgrounds and the political and religious constraints surrounding them, to allow the judges to break free of the gravitational pull of their perceived duty to law. See generally WENDELL A. PHILLIPS, THE CONSTITUTION A PROSLAVERY COMPACT: OR, EXTRACTS FROM THE MADISON PAPERS, ETC. 15-26 (New York, American Anti-Slavery Society 1856) (relating excerpts focusing on the law and slavery).

197 NATHAN BEVERLY TUCKER, A SERIES OF LECTURES ON THE SCIENCE OF GOVERNMENT INTENDED TO PREPARE THE學生 FOR THE STUDY OF THE CONSTITUTION OF THE UNITED STATES 416 (Philadelphia, Carey and Hart 1845). See also Holmes, supra note 74, at 722-24 (likening fiction to a magic wand that produces either bounty or blight depending on how it is used).
confirms the close connection between law and culture as she contributes to
the rich literature on morality, humanity, and utility in America.

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It is a credit to Stowe’s realization of the inability of Americans to resolve
their dilemma over law and slavery that on February 19, 1861, as the nation
lurches towards Civil War, a North Carolinian delivered a speech in the
House of Representatives threatening disunion. The congressman, in lan-
guage reminiscent of Mann in its call for order, reminded his audience that
“[t]he Southern people are conservative, not iconoclastic. They cherish the
Constitution, and they had no desire to break up the Government, or to
change our existing institutions.”198 He was disturbed by calls for Southern
states to follow the “laws of the country,” for Northerners had not abided by
the laws.199 “Sir,” he asked, “who can tolerate abolition lectures on obedience
to the laws?”200 The congressman explained the Southern states’ outrage
over Lincoln’s election. He read from Lysander Spooner’s The Uncon-
stitutionality of Slavery to show that “the fanaticism of antislavery zealots has
involved the country in the troubles now precipitating its destruction.”201

The namesake and distant cousin of the man whose judicial opinion calling
for a cold response to slavery was a rallying point for abolitionist sentiments
stood in Congress to remind Americans of the consequences of failure to
abide by the law, much as Judge Clayton had warned his son. “All that has
been done by the South has been a mere demand of our rights. We ask
nothing more. Duty to ourselves and to posterity imperatively demands of us
that we should accept of nothing less,” warned Thomas Ruffin.202

198 Thomas Ruffin, State Rights and State Equality, Cong. Globe, 36th Cong., 2d
Sess. 228 (Feb. 20, 1861).
199 See id. at 227 (indicating that the Republicans called for the South to follow the laws
of the United States but yet they “encouraged lawlessness in almost every conceivable
shape”).
200 Id. at 227. See also Thomas Ruffin, The Constitution and Union, Cong. Globe,
34th Cong., 1st Sess. 1031, 1032 (Aug. 2, 1856) (“As good citizens, they should conform
and submit to the laws of the country.”).
201 Ruffin, supra note 198, at 227.
202 See id. at 228. See 2 The Papers of Thomas Ruffin, supra note 63, at 517 n.1
(Identifying Representative Thomas Ruffin as distant cousin of Justice Thomas Ruffin).