

BERNIE D. JONES

Fathers of
Mixed-Race Inheritance in the Antebellum South
Conscience

The University of Georgia Press *Athens & London*

CONTENTS

PREFACE	xv
INTRODUCTION. Inheritance Rights in the Antebellum South	i
CHAPTER ONE. Righteous Fathers, Vulnerable Old Men, and Degraded Creatures	21
CHAPTER TWO. Slavery, Freedom, and the Rule of Law	43
CHAPTER THREE. Justice and Mercy in the Kentucky Court of Appeals	68
CHAPTER FOUR. Circling the Wagons and Clamping Down: The Mississippi High Court of Errors and Appeals	98
CHAPTER FIVE. The People of Barnwell against the Supreme Court of South Carolina: The Case of Elijah Willis	125
CONCLUSION. The Law's Paradox of Property and Power: The Significance of Geography	151
APPENDIX ONE. Case Indexes	157
APPENDIX TWO. Opinions on the Emancipation of Slaves during George Robertson's Tenure as Chief Justice	159
APPENDIX THREE. Supplementary Information Regarding <i>Willis v. Jolliffe</i>	160
NOTES	165
BIBLIOGRAPHIC ESSAY	183
INDEX	189

When a white man freed an enslaved woman and her children in his will, for example, did that mean he found her lifelong service worth the reward of emancipation, or did the manumission conceal a more intimate relationship?

—JOSHUA D. ROTHMAN, *Notorious in the Neighborhood*

INTRODUCTION

Inheritance Rights in the Antebellum South

THIS BOOK CONSIDERS HOW WHITES of the antebellum South negotiated inheritance rights when slave beneficiaries were related by blood to their late owners. Were slave owners who partnered with enslaved black women and who fathered mixed-race children able to manumit in their wills and grant property to the women and children? How did the men's white relatives react to such bequests? When judges hearing cases of contested wills responded in the appellate courts, what type of language did they use in describing the men? How did that use of language determine whether the wills would stand? What was the influence of changing manumission requirements over time on judicial decision making?

The answers to all these questions lay in how state court judges of the antebellum South resolved competing demands: an owner's right to relinquish property balanced against the community's interest in the enslavement and subordination of blacks. The strategies the men pursued—manumission during life or upon death—were ultimately influenced, then, by more than the law of slavery as found in state constitutional provisions and legislative enactments. The men gambled on whether trial court judges, juries, and appellate courts would uphold their attempts to use trusts and estates law. The fates of women and children were at stake. Would they be able to obtain freedom and property through their ties of privilege and access to whiteness? Individual judges on the state high courts based their decisions on their own perceptions of white southern manhood, fatherhood, property rights, and the social good of the white community.

Slave owners in the antebellum South who sought to liberate and alienate property to enslaved women and the children the women bore acted as both insiders and outsiders when they used the law. These slaveholders were the ultimate insiders, white men empowered by the law to be owners of slaves and of land. But their alliances made them into outsiders by forcing them to use trusts and estates law in unique ways as legislatures modified the law of slavery during the course of the antebellum period, changing constitutional provisions and passing legislation that made manumission more difficult. They became outsiders because they affirmed allegiances to blacks in rejection of white interests to retain property within the white community and to deny blacks their freedom.

State court judges who heard cases of contested wills involving bequests to the putative enslaved partners and children of slaveholding white men exercised their power to decide when social boundaries had been breached. As we shall see, in the view of the greater society miscegenation between white men and enslaved women or free women of color was not a problem. Instead, the color line was breached when white men recognized and accorded enslaved women and their mixed-race children status in white society by bequeathing them property and manumitting them. Official recognition by white relatives meant access to whiteness; black personal freedom, combined with access to money and land, was a threat to the social order



Thomas Satterwhite Noble, *The Price of Blood*. 1868, oil on canvas, 39¼ × 49½ inches. Morris Museum of Art, Augusta, Georgia

of slavery and white supremacy. Free blacks, particularly when they had money, were deemed uncontrollable, arrogant, and a bad influence on the bonded. In the eyes of jurists who ascribed to this view, wealthy free black status was to be denied at all costs, for the benefit of the white social order and the white relatives or creditors seeking to establish their claims to the decedent's estate.

Contrary to this view of the law of slavery consistently being used to reinforce the demands of the slave order, other jurists supported the efforts of slave owners to atone for their transgressions; the men were fulfilling a moral obligation to the women and children.¹ Perhaps as Thomas Morris has noted, the "analytic model" proposed by Mark Tushnet does not consider "the messy and often complex attempts of Southern judges to deal with the problems created by 'thinking property.'"² The needs and demands of the greater social order were not as important in the view of some judges, compared to the pre-

rogatives of the individual owner to relinquish his slave property and divide his estate as he wished. It is important to note, though, that notwithstanding an interest among these judges to uphold the rights of individual white men and their black families, these judges who supported manumission and the granting of bequests should not be seen as abolitionists. They were men of their time and place who believed in the social order of slavery, and they might have been slave owners themselves.

It is important to note that all of the judges hearing such cases were faced with a paradox stemming from competing moral perspectives of owner-slave relations. Slavery, as a cultural and social institution, was reinforced by religion and the secular law. Although the judges did not cite scriptural verses, they used biblical language to justify their decisions. According to these southern Protestants, the Bible recognized slavery as a practice, providing justification for pro-slavery judges to promote its existence. Moreover, the Bible could be used to rationalize the separation of the races and the subordination of the African. Yet the Bible could also be used to justify improving the condition of slaves or even to condemn slavery, as the northern Protestant abolitionists did. Thus in the eyes of judges who upheld the rights of enslaved women and their children, slavery was an unfortunate aspect of southern society. It was a distasteful but necessary practice, instrumental for white wealth and the proper ordering of the society their ancestors had developed since the colonial period. But slavery also called upon these judges to exercise their greatest humanity, insofar as their treatment of enslaved women and mixed-race enslaved children indicated benevolence.

These two impulses came into conflict in the will contest. On the one hand, moralism—one's sense of proper moral behavior—could tend toward righteous indignation: criticism of testators for sinning, committing adultery and crossing color lines. On the other hand, moralism could view care for former enslaved partners and children as an example of pious atonement for sin and as fathers' fulfillment of obligations to mothers and children. Whether an individual judge was willing to let a testator do as he wished thus depended not only on the law of slavery but on the judge's position on personal and social responsibility. Were owners who had sex with their slaves sinful?

If their behavior was sinful, should a slave owner be able to provide for "the fruit of his sin," his enslaved child? What obligations did a judge have to the legal and social orders of a slave society? Should a judge use the law of wills to punish a testator's moral failures, his fornication with slaves, or was punishment solely a matter to be addressed by religious institutions? What responsibilities did slaveholders have to themselves, their slaves, and the white community?

Yet the morality question need not always be a driving factor, nor need opinions on slavery's role in society be a motivation. In the view of some judges on the appellate courts, those political questions did not always matter. Instead, the plain "black letter" law could have determined whether a will would stand. The precedents just might have favored the decedent, and the judges felt obligated to follow *stare decisis*. They were obligated to decide in light of the common law until the legislature passed a statute or a constitutional amendment that said otherwise. When all these were favorable and led to upholding the wills, the end result then was a decision favorable to the inheritance interests of the women and children.

The judicial power to determine the validity of wills was not to be taken lightly. As arbiters of the law, men of business and property would have looked to them for guidance on whether and how to manumit by will. This applied to both the large-plantation owner and the small farmer, the latter made elite by nature of his slave ownership, for men of both groups left wills that were contested. But, most significantly, the judges set forth the community standards, insofar as they established the parameters of behavior, what white men could do in their personal lives, setting forth which sanctions might or might not follow if social mores were transgressed. Manumission laws passed by legislators determined whether a white man could provide for enslaved women and their children during his lifetime, but judges hearing will contests decided whether he could provide for them upon his death.

State court judges heard appeals from local trial courts and set the standard lower court judges and lawyers would follow in making arguments and determinations. They guided jurors in explaining how they should view constructions of fact in light of the law. In the case of slave owners seeking to use the law of wills in providing for

partners and enslaved children when the law of slavery barred legal remedies or made them difficult to pursue, the high-court judges were called upon to arbitrate various interests: the testator's desire to do what he thought was proper versus the community's interest in upholding slavery and retaining white wealth, under the guise of punishing immoral behavior. Of significance was whether a judge was willing to respect testators' property rights.

Deciding to uphold a will and manumit was not merely about the legal issues limited to the case at hand. Each case presented the judge with political implications and tensions to be resolved. As slavery died and abolitionist fervor increased in the North, southerners felt forced to defend their institution of slavery, and will contests point to how the judges responded to one aspect of the growing debate. Perhaps societal respect for the paternalism of individual testators should be encouraged, providing an example to abolitionists that slavery was not so terrible because slave owners were benevolent patriarchs. Or, perhaps the judges should deny manumissions altogether, as a forceful response to the growing abolition movement. It could also be that the judges themselves were facing a conflict over their own role: how would they be seen in the eyes of others as they tried to negotiate competing demands? Were they willing to protect these fathers, the enslaved women and their children, or were they overturning the religiously ordained system of slavery by rewarding fornication across color lines? Were the persons named in the cases before them victims worthy of protection under the law?

The matter of sexual relations between slave owners and enslaved women had long been a controversial one. Statutory law did not make white men liable to prosecution for sexual contact with female slaves, and under the law, the children of enslaved women were slaves from birth, regardless of the fathers' status; the fathers were not bound by law to support such children. The women in question were not white women who had greater rights under the social and legal orders. A white woman could claim rape or ravishment. Community pressure could be brought upon a white man to marry the white woman he was alleged to have seduced. If a white married man died intestate, his white widow was automatically entitled under common law to dower, a third of her husband's estate. Enslaved women had no such

entitlements. When slave owners recognized in their wills enslaved women and their mixed-race children, intending that they become free, state law could force them to remain in bondage. They could be denied the property they were meant to have for their upkeep and support, something that would have never been done to married white mothers and legitimate white children.

Without the law to force their obligations to the enslaved women who bore them children, only the men's consciences and fear of public scorn held sway over the men's behavior. But even if their activities were known, public scorn might not even follow, in that they were not answerable to anyone, because the men were unmarried or widowed. But the community was in an uproar once the men died and their last wills were read. Granted bequests of freedom and property by their owners, the enslaved women and their mixed-race enslaved children then became caught up in the machinations of white creditors and relatives who were seeking to deny their access to property, in a society in which access to property and owning it was a hallmark of whiteness.

The claimants' greed was fueled by racism, as was their use of the language of morality, which had great social currency and which resonated among judges on the bench. The language of shame could frame the judicial response in the ways challengers might have hoped, but this was not always successful. The language thus indicated a dualism in the sense that atonement for sin could be found through a will and justified in decisions granting bequests of freedom and property, alongside the language of shame used as a postmortem punishment for transgressions and denial of a testator's will. Those judges who sought a "humane" slavery were likely to view providing for enslaved children as atonement for sin and shame. I use the term "humane" here to describe the rationale given by various judges for explaining why the testators' wishes should be fulfilled: recognition of slaves' humanity might deflect criticism that slavery was inhumane. As William E. Wiethoff explains, a "humane" slavery represented a balance: "Addresses to humanity and interest—the moral imperative to treat slaves humanely and the South's interest in maintaining slavery."³

Those who were far more interested in punishing dead testators

and denying rewards to slave beneficiaries focused more on defining testators who crossed the color line as immoral. Not only were these testators reprehensible for having engaged in extramarital sexual relations, but they were immoral for having contributed to social upheaval. Ultimately, the tensions among the judges lay in conflicts over how they saw their duty to decide upon cases where moral, but not legal, transgressions were at stake: out-of-wedlock sex with enslaved women combined with the granting of bequests of freedom and property to them and the children born of their unions. At issue was whether white heirs should inherit estates, notwithstanding testators' desire to provide for enslaved partners and children. Law and public policy could thus cut two ways: protect the rights of all testators not to have their wishes ignored, or support slavery first and foremost.

My purpose is not to romanticize by arguing that these relations were consensual and affectionate, or to romanticize the women's and children's struggles to gain inheritances. It is unclear how much power enslaved women had in their relationships to negotiate for freedom and property for themselves and their children. These were women living under conditions of extreme domination based on their race and gender. If they did not submit to their owners, their lives or the lives of others could be threatened. Moreover, the notion of autonomy is undercut by their lack of legal standing in the lawsuits. In many instances the enslaved women were minor actors, mere property, pawns in a power play among whites over the terms of a will, because the women had no inheritance rights. The enslaved women at the heart of these actions were not parties to the action although they might have been named in the will, they had no legal capacity, and therefore could not testify in their own defense: their fates would be decided by whites. When not maligning them as controlling jezebels, drunkards, and prostitutes, white witnesses testified to the existence of partnerships: enslaved women managing households who seemed to live on some level of social equality with their white male owners.

Even when the testators explained in their wills that their relationships were consensual, without knowing the day-to-day relations and perspectives of all participants, it is impossible to verify such

arguments. The men's relations with the women were tainted by slavery: his empowerment compared to her disenpowerment. Could a woman under those circumstances ever have the right to say no? The men had the power to coerce, and as Adrienne Davis noted in her study of slavery and sexual harassment law, enslaved women's work spaces and home spaces were intertwined: sexual labor and sexual abuse could be part of each.⁴ It is impossible today to divine the nature of the enslaved women's relationships with the powerful white men who controlled their lives and to know whether, in a system in which marriage between the races was illegal, the women were rape victims or life partners.

It also remains beyond our knowledge whether the women gained power through their sexual contacts with the men. In testimony in which the enslaved women beneficiaries were seen as powerful jezebels, whites presumed that the women had a certain level of agency to coerce the men without them having to acknowledge that sexual access was no guarantee of power. Instead of manipulating their owners, their owners could have manipulated them. Blandishments could be ignored and promises forgotten in the face of relationships grounded in dominance and hierarchy. So even if an enslaved woman hoped to benefit from a sexual relationship with her owner, without moral authority, social practice, or the law binding the men to any obligation to the women, there would have been no guarantee that she would get what she wanted. Thus what ultimately mattered most is what the law set forth: enslaved black women were personal property capable of being used and moved from one location to the next. Excluded from the presumption of chastity and due no protection of their sexuality because of their race, they were vulnerable to sexual abuse and exploitation.

Even though the women in the cases I examine were mothers, they might have been invisible parties to the action, present only through the fruit of their sexual activity. Their children were suing for their right to become free people of color, but it was as though their mothers did not exist. This happened because the legal system forced the enslaved women's children to minimize or deny their black mothers, for to claim rights through their fathers' wills they had to present themselves as though they had no other parent. Their

fathers' behavior might have even modeled that fiction. The men were their owners with sole control over their lives and the lives of their mothers. The women's status as property under the law enabled this, thus the women were known by a first name only, or were altogether nameless and faceless. The men decided who they wanted to favor, and this created tensions not only within their white families of origin but among their slaves. When property rights to land and cash were at stake, both the women and children were fighting in turn for the rights to claim wealth built by the community of slaves, thereby contributing to even more stratification even as they claimed kinship with their owners.

How then was evidence of miscegenation found? The parties presented the facts at trial or through the statements of witnesses who knew the testator. Slave owners could end the secrecy by speaking through their wills, perhaps circumventing informal rules of denial: acknowledgment of their unions and offspring. But in cases in which the court opinions do not explain the circumstances of a testator's benevolence, one can infer there was more at stake than simple kindness, the goodwill of a patriarch toward his slave "children," slaves deemed childlike yet loyal and obedient, thus earning his munificence.

Particularly noteworthy are cases such as those presented here, where a widowed or single white man made unusual bequests to an enslaved or free woman of color and her children, with no white wife or legitimate white child to take the inheritance. Although he could have manumitted during life and given them property to enjoy as people of color living in free states, he did not pursue that option. Instead, he aimed to have it done by others upon his death. He might have singled out one slave child, described as the child of one of his female slaves, making it clear that the child was not to be considered part of his estate. Instead, the child was to be given special treatment: freedom, education, and money. In jurisdictions in which statutes and case law constrained their ability to manumit, testators sought other means: asking the executors to take the woman and her children to northern states where they might live freely, and setting up trust funds for their support. Another option could include willing them to the American Colonization Society, in order that they might

be taken to Africa and become free blacks. The men crafted wills that they hoped would stand. But doing so had its risks. Even when their relationships were well known during their lifetimes, their relatives and the white community did not necessarily accept such relationships. Living with enslaved black women on levels of equality defined them as transgressors of the social order who betrayed their race and class.

Perhaps criticism and ostracism were the only means of exerting social control upon men whose class and race privileges freed them to live their lives as they chose and gave them the ability to use the law at their deaths for distributing their property how they wanted. They had no white wives and children to whom they had legal obligations. In death they were beyond the law's reach for prosecution for miscegenation. But the will contest might have been the means by which their relatives retaliated against these men who had been wayward and disrespectful of white conventions: they insisted on making enslaved women and children the beneficiaries of their bounty. Sex with an enslaved woman was one thing, but giving her property that whites had a legal right to inherit was quite another. The enslaved women relied nonetheless on community members—white men who served on juries, trial court and appellate judges—to uphold the late owners' wills when collateral heirs—parents, siblings, aunts, uncles, nieces, nephews, and cousins—challenged the will.

More often than not, undue influence or incapacity formed the basis of the heirs' claim. In trusts and estates practice the testator sets forth the disposition of the property owned at the time of death. He names an executor he trusts to be able to carry out his wishes. Under normal circumstances the executor presents the will to the probate court and it is accepted. The executor then finds the assets, pays the estate's debts, and sees that the bequests are made as the testator wanted. But when a will is challenged, that process is suspended while a will contest ensues. The challengers to the will could be people named in the will who are challenging particular bequests, or collateral heirs challenging the entire will as void. These collateral heirs are relatives who would inherit under the state's probate law if the will were declared invalid. In the cases discussed in this book, they might have claimed the testators suffered an incapacity that ren-

dered them legally incapable of making a reasonable disposition of the property. In the undue influence cases, claimants argued that testators were in a vulnerable position, reliant upon trusted associates who then induced them to act contrary to their best interests and those of their legitimate white relatives.

But in all the contested-will cases discussed here, appellate judges, not juries, were the arbiters. The attitudes and rulings of these elite jurists of the antebellum South ranged from tolerance of the liaisons their slaveholding brethren had with enslaved black women, to sympathy with these sorrowful sinners trying to do right by their enslaved children, to despising the degraded creatures who succumbed to illicit sex and undermined the whole social order of slavery. Some judges postulated that the testators were insane or arrogant to have denied the interests of their white relatives in order to elevate a slave with freedom and bequests of property. As benighted fools or helpless old men they were the pawns of overly powerful black jezebels who controlled them and their households.

In her book, legal historian Ariela Gross discusses deficient mastery in the context of owners' inadequate management.⁵ Owners didn't understand slaves' personalities, couldn't control them, and didn't know how to get them to work effectively. Mastery was also significant in the cases discussed here, though in a different way. In the patriarchal society of the day, these masters were deemed deficient because they did not assert and maintain appropriate boundaries with their female slaves. Other masters had sexual contact with their female slaves but did not become attached or sentimental, and they did not forget their obligations to race and class.

It is significant that many of these cases of contested wills had been decided in the chancery courts at the trial level. The chancellors heard not only cases involving trusts and estates law but cases in equity, when the law courts offered no recourse, and justice was at stake. As a result, when the judges heard appeals from the chancery courts they were called upon to consider what their roles were. The consequences of their decisions fell upon the social and legal orders: tensions within the slave order, empowerment of free blacks, and encouragement of white men to use trusts and estates law in ways the law of slavery never intended. The judges were considering

more than the matters of the litigation at hand—long-term policy mattered, too.

In the view of some judges the formal law of slavery, as legislated by the slave codes and developed through case law dating back to the colonial period, was built upon notions of natural law that defined blacks as inferior and not to be elevated to equality with whites; their enslavement fit into the proper ordering of U.S. society. All blacks were to be slaves for life, under the absolute control of an owner, with no right to freedom and no right to own property. As Tushnet described it, when testators violated those natural laws by seeking to manumit through their wills, appellate judges could overturn on policy grounds practices they deemed dangerous to the well-being of society, namely, slaves given freedom and economic equality with whites. Preservation of racial stratification was paramount.⁶ Judges who held this view exercised their authority, acting as bulwarks against black upward mobility by denying manumission and the transfer of property from white to black. They established the legal framework within which testators operated. By ruling against testators who left bequests of freedom and property to enslaved women and children, they guided the white community on proper mores: no elevation of blacks to economic equality with whites.

Such judges constrained themselves to narrow, formulaic interpretations of the law of slavery and inheritance rights that demanded denial of black rights as a matter of law and social policy.⁷ But judges who aimed to protect testators' prerogatives also had natural law on their side. The right to hold property included the right to relinquish, and as a matter of private law, one could do what one wished with one's property, particularly if there were significant moral obligations at stake, obligations that were also important as a matter of natural law. Patriarchs in a slave regime were called upon to exercise benevolence toward their dependents, their wives, children, and the slaves they owned. If they were unmarried but owned enslaved women who bore their children, masters exercising their moral obligations to care for them should also be able to, because natural law demanded it.

Whether a judge was tolerant or intolerant of owners' prerogatives to provide for the women and children, state slavery laws gave room

to deny emancipation and the transfer of property, for the benefit of creditors and white heirs, notwithstanding the intent of the testators and any rights they might have had to resolve their estate as they pleased. In those instances, the social order of slavery was more important. Other judges could also use the formal law of slavery for their own ends, using their discretion and deciding in ways such that fulfilled the testators' intent, notwithstanding the jurisdiction's preference for bondage over freedom. In some instances, those judges had acted as advisors and executors in fulfilling the wishes of their testator clients.

The men had options as a result: access to learned and competent lawyers who were willing to help them write a will that enabled them to fulfill their wishes. Moreover, there were judges on the appellate courts who supported slavery and were just as dedicated to upholding it in all forms, but who were willing to respect the testators' wishes in cases of contested wills where miscegenation had been alleged. Thus one can explain some of the contradictions found in judicial advocates of slavery who nonetheless upheld the rights of enslaved women and children to become free. As elite white men they could not quarrel with other white men's rights to live as they pleased and dispose of their own property as they wished at their death. Judges could vote against their slavery bias and respect the wishes of testators who took their fatherly duties seriously. Those judges freed slaves and gave them the bequests their fathers left them, notwithstanding their disgust at racial mixing and their dislike of an increasing free black population.

An owner could manumit by taking the women and children to a northern state, including those of the old Northwest Ordinance, such as Ohio, then return and draft a will in his home state. This strategy of physically removing them ensured that as free people of color they would be able to sue to protect their rights. These were the strongest legal cases, most likely to result in victory. Through the combination of geographic mobility and the stroke of a pen, the previously bonded could become free, in a paradox of property and power. One moment they were slaves living in the South; the next they were free black northerners with a greater legal potential to inherit.⁸

Not only were the men iconoclasts in refusing to follow the social rules that would deny recognition of enslaved partners and biological children, but when legislatures tightened manumission policies, they employed legal strategies that referred to the private law of wills, trusts and estates law. The judges, in responding to this instrumentalism, were then caught in a bind: should they use their own instrumentalism in support of inheritance law, though doing so would subvert the social order essential to white southerners' existence? Should they deny the men's ingenuity and thus provide precedent to subvert everyone's property rights? For if a white man's rights to property could be subverted based upon subjective evidence, was anyone's property rights safe? Couldn't other white men be labeled and criticized unjustly and their wills challenged, just because their relatives were displeased at the way they devolved their estates?

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

This book is organized into five chapters that develop the themes of race, gender, and inheritance rights as they affected enslaved women and their children as “illegitimate” heirs. Chapter 1 comprises a study of appellate decisions reported from various state supreme courts, where judges heard cases from the lower courts over questions of law. Such opinions are valuable insofar as they include the factual matters

at the heart of the dispute. But most important, they set forth the highest state court authority on interracial matters and demonstrate the interplay between the local trial courts and the high courts in establishing social norms and interpreting legislation. Although most of the decisions involved cases of contested wills, some grew out of commercial lawsuits where the status of free persons of color came into question: were they eligible to conduct business transactions? The questions then turned on how they had become free people of color who owned property. There had been some act of manumission combined with a bequest of property from a will. Insofar as the opinions include testimony from the trial courts, they are a rich source of material on attitudes toward interracial sex and family relationships. Will contests often generate their own drama, and those of the antebellum South were no exception, as judges heard cases that exposed family secrets, rivalries among members, and greed.

White family members fought for all they could get, for the law of slavery tended to support their interests in property, and huge sums of money—real property, cash, securities, and personal property, including the slaves at the heart of the litigation—could be at stake. Moreover, the culture encouraged them to criticize their male relatives who had had sexual relationships with enslaved women that led to grants of freedom and property for the women and their children, because the law did not obligate them to recognize familial ties to the blacks in their midst. The creditors sought to have their debts paid out of the estate, and were quite willing to use the enslaved women and their children to pay, even if the testator's intent was that they not be considered part of the estate.

The executors looked to their responsibilities to fulfill the testators' wishes and protect the women and children, but not always. They sometimes tried to take the proceeds for themselves. The black claimants, when they were parties to the lawsuits, asserted their status as relatives, struggling for what they thought was legitimately theirs: the bequests left to them by the men. And when their white relatives denied their right to freedom, they were fighting for their very lives. In some cases the white family members won, and in others the black relatives did. The judges who disinherited in essence championed slavery and white supremacy, particularly as northern antislavery sen-

timent increased in the 1830s to 1850s, and as southern legislatures, frightened of an increasing free black population, tightened their manumission laws. Tighter manumission laws meant that judges could defer to the legislature and ignore any sentiments in favor of testators' rights.

In addressing how the judges saw the testators, I examine individual cases and focus on categories of responses, discovering the nuances of judicial behavior, instead of making broad generalizations within and across jurisdictions. A testator could have been described as a virtuous father, a victim, a degenerate, or all at the same time. But most noteworthy was that a judge's interpretation could be different from those of the challengers to the will, which demonstrates the tensions within the slaveholding elite as they grappled with interracial sex and the transfer of property. Where challengers saw vulnerability, a judge might have seen a lucid and rational man of business sure of how he wanted to dispose of his property.

Narrative as found in these cases of contested wills thus drove much of the judicial inquiry because the behavior and actions of the testator prior to his death were under scrutiny. This narrative encompassed not only interpretations of the men as legal actors, but stories about the women and children as developed by the litigants. The men's lifestyles were being called into question. Had they been the victims of overreaching slaves? Did they suffer some from mental incapacity? Could their unorthodox wills have been explained by their blatant transgression of social mores? Were they just fathers trying to take care of their children and former partners? How might the slave order be affected if the will were to stand? All these questions had to be answered, as the judges were negotiating the rights of white men as the partners of enslaved women and the natural fathers of enslaved children, in opposition to the interests of the slave society. Regardless of the reasons the men did what they did, they used legal strategies that opened the legal consciousness of the women and children named as beneficiaries. The men enabled them to develop their own legal narratives and "engage, avoid, or resist the law and legal meanings" once they could sue as free people of color.¹¹

Chapter 2 considers cases in which judges focused solely on the formal law of slavery to deny manumission as a matter of internal

policy. Judges in these instances justified their opinions based not only upon constitutions and legislative practices, statutes that limited manumission within the jurisdiction, but were concerned about what slavery meant as an institution: a system of labor that arose within the country for the purpose of increasing white wealth and industry through the use of a perpetual laboring class. It was an ancient system used by Western civilizations throughout history. The statutes and legal opinions that reinforced servitude and subordination were significant for maintaining that system of labor. As such, slave owners seeking to manumit through their wills contravened the needs of the greater community, and for that reason the judges decided against manumission.

At the same time, however, there were judges in similar jurisdictions where constitutions and statutory law demanded subservience and control of slaves, but these were more willing to hold in favor of wills that met the formal requirements of ownership: identification of owners, even though the wills also permitted some modicum of freedom. In those cases, slaves had been the beneficiaries of a trust set up by their former owners. Their new owners were trustees pledged to fulfill the late owner's wishes. Although ownership was arguably a mere formality, the fact that an ownership relationship existed had its own ramifications and limitations upon the slaves' rights. In yet other cases, judges were more willing to recognize the rights of free blacks as not always being perilous to the interests of the local white community. As a result, these were less willing to write in favor of reinforcing slavery and denying freedom as a matter of greater social policy. Instead, they considered issues of justice on a case-by-case basis, in typical common-law fashion.

Chapter 2 also tests the popular perception of Louisiana as a multiracial community where mixed-race free blacks occupied the middle ground between whites and slaves. This view proposes that the French instituted a different system of slavery than existed in its English-speaking neighbors. This system of slavery was apparently fairer, granting greater recognition to free blacks, especially those who were of mixed race. These blacks worked as artisans: they owned farms, plantations, and slaves. But how did Louisiana law address

the rights of slaves and free blacks named as beneficiaries in wills? As historian Judith Schafer notes, with respect to manumission and inheritance, Louisiana was not much different from other southern states: limited protection of rights, in support of the formal laws of slavery.¹⁰

Chapters 3 through 5 build on several cases introduced in chapter 1, explaining the impact of judicial discretion, changing legislative policies on manumission, and the significance of geography upon the litigation. These cases also bring to the fore notions of agency and narrative as developed in specific cases in which former enslaved women—alleged to have been the partners and children of slave owners—sued for inheritance rights. In chapter 1 I explain the broad strokes of narrative used by challengers to the wills and the judges in describing the men, but in later chapters I widen the focus to include how the men described themselves and how the women and children defined themselves in relation to the men.

Chapter 3 explains how the contest over Austin F. Hubbard's will had significance years later, after his daughter Narcissa was able to gain her freedom, inherit, and then pass on a legacy of freedom to her own children. This happened because judges on the Kentucky Court of Appeals supported manumission over slavery. Not only did Kentucky from its earliest history have policies that made it relatively easy for owners to petition for manumission through local courts, but the court supported manumission over enslavement. By the eve of the Civil War, the court continued this trend, notwithstanding the Kentucky legislature's tightened manumission requirements.

Chapter 4 returns to Mississippi and explores Nancy Wells's attempt to gain an inheritance from the estate of her late father. It explores tensions on the bench over the decision, explains why her effort failed in the courtroom, and demonstrates the significance of the legislature rejecting an earlier approach to manumission. The legislature heard petitions to manumit, and the legislators were previously willing to grant relief. But by the 1840s the standards an owner had to meet were onerous and unattainable for the average person: not all owners could demonstrate that slaves to be manumitted had performed some meritorious service to the state of Mississippi. Thus,

Nancy Wells's father, Edward Wells, used the legal strategy of removal to Ohio combined with a return to the home state and a bequest under his last will and testament.

Chapter 5 offers a contrast and considers in turn, Elijah Willis's successful use of manumission outside of the state combined with the careful use of a will drafted in Ohio that enabled the Supreme Court of South Carolina to support his partner Amy Willis's right to inherit. The South Carolina State Legislature once had in place a policy similar to Kentucky's, but it was rejected in favor of petitions to the legislature, a requirement more in line with Mississippi's system. This change resulted in a trend toward rejecting manumissions altogether; it fueled Willis's manumission strategy. The chapter also analyzes a unique community response, indicating the extent to which cases of contested wills could place whites into conflict over community mores, social control, and the community's interest in preventing miscegenation. White men in partnerships with enslaved women threatened upheaval of the social order and diverted resources from the white community. In a struggle against the court, local men petitioned the legislature to punish white men living openly with enslaved black women, but to no avail. The legislators refused to do anything.

This refusal indicates the limitations of popular control over issues of private property rights, interracial sex, and morality in the context of slavery. The legislators were unwilling to regulate white men's private behavior, regardless of the extent to which the men's behavior troubled the local populace. They might gossip and criticize, but they could do nothing to stop men so privileged by their class from doing whatever they wanted in their private lives, and that included the right to live in social equality with the enslaved women they owned. Nonetheless, as I expand on in the conclusion to this book, limitations could be imposed upon the men's death. Once the men died the enslaved women were unprotected. If the men made wills recognizing the women and children, they could be denied nonetheless; the men themselves could not automatically bestow rights to freedom and inheritance on their black slaves. But if the men had the foresight to use geography as a strategy in planning eventual manumission, the women and children could win in the end.

We believe that sexual politics under patriarchy is as pervasive in black women's lives as are the politics of class and race. We also find it difficult to separate race from class from sex oppression because in our lives they are most often experienced simultaneously.

— COMBAHEE RIVER COLLECTIVE, "A Black Feminist Statement"

CONCLUSION

The Law's Paradox of Property and Power

The Significance of Geography

THIS BOOK IS UNIQUE insofar as it demonstrates the significance of what Ariela Gross has described as a cultural approach to legal history, an investigation into "trial records in order to view the law from other perspectives—not only that of the judge but those of witnesses, litigants, jurors, and even slaves."¹ It explores the "confrontation between ordinary people and the apparatus of the state, and thus provid[ing] an opportunity for historians to explore power relations at a level closer to people's actual lives."²

Fathers of Conscience demonstrates the process by which judges of

the state high courts of the antebellum South negotiated the interests of white wealth and white supremacy through will contests in which white men left bequests of freedom and property to enslaved and free black women and to the mixed-race children they bore the men. Put simply, the will contest, more than the mere transfer of property upon death, illuminates the most significant aspect of this book: the clash of values. It was a conflict among elites, and at stake was whether a white man could exercise the prerogatives of his race and class. He certainly could exercise his prerogative to have sex with black women, notwithstanding societal taboos against interracial sex. As a single or widowed man he was not constrained by conventional marriage to a white woman.

But he was not necessarily able to exercise his prerogative as a white man to do with his property as he saw fit. He could not always fulfill what he saw were his moral obligations, namely to give the women and his mixed-race children their freedom and his property. The testator's relatives, entitled by their own prerogatives of legitimacy and whiteness, could sue to secure his property for themselves: the women and children at the heart of the will contest, and the money and real property he hoped to give them. Attacking a man as degraded or vulnerable, they explained why his will should not stand: he was incompetent or enthralled by a black woman who was permitted improper intimacies. The challengers were successful or not depending on the specific laws in their jurisdiction and on whether the high court judges who heard their cases agreed.

Geography was important, not only because the cases examined here arose in different states that developed different approaches to manumission. From a state like Kentucky that had liberal manumission laws in place to states like South Carolina and Mississippi, whose legislatures made manumission more difficult over time, geography played a role. When manumission became difficult, geography affected which strategy testators pursued to convey their property as they wished. A last will and testament bequeathing freedom and property could be reinforced by effecting the manumission elsewhere. This strategy greatly improved the beneficiaries' ability to inherit; they could then use their status as free people of color with rights to sue for property, an avenue not available to them as slaves.

But their ability to sue as free people of color, or even to establish a right to freedom, was dependent on the decision of judges on the courts of appeal. Sympathetic judges respected testators' paternal instincts, while those who were unsympathetic obeyed the formal laws of slavery, reinforcing the white social order, retaining white wealth, and protecting the white heirs from having to recognize their enslaved relatives. Judges taking the latter view gave the white relatives what they wanted: the money and property that black people would otherwise have received. On the other hand, beneficiaries who were successful became members of the black elite, people of freedom and property.

This book thus provides an important link for demonstrating the development of a pre-Civil War black and mixed-race elite. It originated in people who got their freedom long before most blacks did, and among them were enslaved black women and their mixed-race black children freed within their home states of the South, or brought to the North and there freed. They were then able to live as free people with some money and property. Notwithstanding difficulties they experienced as free people of color without the same rights as whites, they were victorious. They escaped slavery to present themselves in written records as free people with rights. The key link in these instances was a white male progenitor who freed them during his lifetime or who gave them bequests of freedom after his death.

But there is no hagiography here in describing these men as benevolent patriarchs. Each act of heroism was infused with the villainy of slavery. Slave owners who fathered biological children by women they owned did so in a rigid system in which the inequality of status between them and the women raises the question of whether those relationships were consensual, particularly when the women were nameless and faceless but their children were identified as beneficiaries. Nonetheless, sympathetic judges hearing their cases could see the men as heroic in that their behavior in the end mitigated their past transgressions.

The beneficiaries named to receive bequests pursuant to the will of a deceased white man reinforced their own class privileges over other enslaved blacks. Their heroism in pursuing their rights was also

tainted by slavery. They did not create the system of slavery, its corresponding laws or conventions, but they hoped to gain from it. Their progenitors gave them the ability to pursue these goals. The wealth these beneficiaries sought was built through their own slave labor and that of others, and in absolute identification with the owner class they wanted to access the property that would give them financial independence. Where funds were insufficient to pay their legacies, slaves could be sold in order that they become enriched.

As for the judicial patriarchs, perhaps the sympathetic judges were heroic insofar as they respected the testators' bequests in the face of community pressure to reject them. When the common law or statutory law favored the wills, they upheld. But these were not saintly abolitionists and freedom fighters: often they were slave owners and, as judges for states that sanctioned slavery, they were part of the slave regime. Nonetheless, some, like O'Neill, could put aside political demands against manumission and fears of a financially empowered free black population because they adhered to a view of the rule of law that made them reluctant to permit passions and prejudices to influence judicial determinations. Testators' wishes were far more important in their view. Even when they were troubled by testators who crossed racial boundaries and knew that the community also objected, they could put aside those political concerns and focus on what was important: respect for the individual men's property rights.

As men occupying a conservative role in society, such judges believed their role was solely to protect property rights; the right to hold property also entailed the right to relinquish property. If that right to relinquish meant a slave became freed and inherited property, that was, after all, the hallmark of individual rights in Anglo-American jurisprudence. The testators wished to relinquish their property and perhaps atone for their past indiscretions. The law should not be used to deny them their last wishes. To do so would destroy property rights and imperil everyone's right of ownership.

This study of appellate cases from courts of the antebellum South explains the importance of legal institutions in identifying an anomalous population: white male partners of enslaved women who fathered their mixed-race enslaved children. As men living beyond

the pale, they could be written off by their white families, as in the case of Willis, or the fact of their mixed-race enslaved children ignored or forgotten. But their legacies lived on. Scholars of African American history have long been aware of oral histories demonstrating the existence of such a population, and it has not been a secret that many members of the nineteenth-century black bourgeoisie had their roots in miscegenation: mixed-race men and women who had access to privilege and whose white benefactors manumitted them, provided funds for their upkeep, and made it possible for them to learn trades.

Fathers of Conscience thus explains trusts and estates law as a unique avenue for black empowerment in the nineteenth century. Slavery was about property rights. Owners had the right to own slaves and profit from their labor. On the other hand, trusts and estates law determined who would receive property upon an owner's death. Trusts and estates law could thus be used to circumvent the law of slavery that would have denied manumission and access to wealth. But this also means that manumissions under circumstances that did not require a will or the intervention of southern legal institutions escaped scrutiny. The cases described here, then, are only a small part of a greater phenomenon.