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The Racial Origins of U.S. Domestic Violence Law

By

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Committee in charge:

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**The Racial Origins of U.S. Domestic Violence Law**

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## ABSTRACT

### The Racial Origins of U.S. Domestic Violence Law

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Margo Myra Mahan

Doctor of Philosophy in Sociology

University of California, Berkeley

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This dissertation investigates the historical emergence of wife-beating laws in the United States. The key questions I investigate are: *What were the social conditions in which wife-beating laws emerged in the nineteenth-century South? What do these conditions reveal about the primary functions of these laws?* Based on analysis of 19th-century legal and government data, local and appellate case records, federal reports, Freedman's Bureau documents, periodical data, and family records, I argue that Southern wife-beating laws were a white supremacist post-Civil War response to the legalization of black family formation. They functioned to control black labor and degrade the status of blackness.

My research challenges conventional accounts about the historical origins of U.S. domestic violence legislation. Since the proliferation of early wife-beating laws (1870-1900) coincided with first wave feminism, scholarship assumes that they were the result of feminist agency and borne out of a desire to protect women. These assumptions have led to two important limitations in domestic violence scholarship. First, most scholarship focuses on the North, where first wave feminism flourished. Second, even when research considers the effects of other social factors, such as race and class, it foregrounds the effects of feminist agency. Both limitations are troubling because the first state to legally rescind a husband's right to chastise his wife was Alabama, whose 1871 *Fulgham v. State* ruling was also the country's first in which the litigants were black. In fact, anti-wife-beating laws proliferated throughout southern states where, like Alabama, there was neither a feminist movement, nor female collective action against wife-beating. By the early 1900s, the ideological association between wife-beating and black families was so pervasive that denying "wife-beaters" the vote was a device some southern states used to disenfranchise black men.

In contrast to the feminist narrative, I argue that southern anti-wife-beating laws were a postbellum response to the racialized and gendered convergence of the antebellum Master-slave and Husband-wife relationships. Antebellum socio-legal norms simultaneously advanced marital cruelty protections for wives on the one hand and encouraged the physical chastisement of slaves on the other. This ensured that the authority to beat slave women – to include de facto slave wives – was a specifically white male prerogative; and, it added physical chastisement to a long list of naturalized distinctions between blackness and whiteness. Emancipation exposed the fragility of 'domestic relations' – and thus the

southern way of life – by highlighting its dependence on racialized gender hierarchies. Wife-beating laws that threatened to punish black men, in the midst of socio-legal norms that kept black women vulnerable to white male violence, helped to restore a southern way of life that simultaneously controlled the labor and degraded the status of black families.

The dissertation has six chapters. The introductory chapter provides the theoretical framework for the project. Wife-beating cases, I argue, performed the crucial socio-legal function of reinforcing domestic gender norms – norms that were inextricably articulated through race and class, given the southern household’s distinctive Master-slave relationship. Chapter Two reveals that the antebellum progression of laws created a racialized double-standard for wife-beating, in which the prerogative to chastise white wives and slave men’s de facto wives, was a privilege exclusive to white men. Chapter Three begins after the Civil war, when the Reconstruction amendments led Southern states to legally recognize black marriages and families. But the antebellum racialized double-standard for wife-beating nevertheless endured, criminalizing black men as wife-beaters in a burgeoning law and order regime that enabled control over black labor. Chapter Four elucidates how, the racialization of wife-beating as a black crime functioned to symbolize and reify a hegemonic ideology of black family dysfunction. Chapter Five examines how wife-beating is eventually used to disenfranchise black men. Chapter Six concludes the dissertation. Situated at the intersection of sociology of family, political economy, criminalization, and 19th-century southern historical literatures, my dissertation reveals how racial projects to symbolically and materially privilege Whiteness motivated the emergence of “feminist” laws that scholarship and social policy largely conceptualize as apart from race, class, and market forces.

*For Ginger and Saleem*

## CHAPTER 1: INTRODUCTION

The purpose of this project is to examine the origins and functions of domestic violence law in the United States. Scholars who study early domestic violence law<sup>1</sup> typically assume that it was a feminist project, and that its function was therefore to protect women. This assumption makes sense since the first wave of domestic violence legislation occurred between 1870 and 1900, which coincided with First Wave Feminism. Prior to shifting its focus primarily to women's suffrage, one of first wave feminism's initial priorities was ending the husband's legal right of chastisement<sup>2</sup> – or what we now call, domestic violence. But there is a problem with the feminist activism line of argument. The strongholds of first wave feminist conventions, political protest, and mobilization were concentrated in Northern states – with New York and Massachusetts at the epicenter. More to the point, feminist activism was not present in the South until the 20th-century. Neither was there Southern female collective action against domestic violence. Yet, the first state to rescind the legal right of a husband to chastise his wife was Alabama in 1871.<sup>3</sup> A few months later, Massachusetts did the same.<sup>4</sup> But, with the exception of Massachusetts, the states that led the way in criminalizing wife-beating were in the South<sup>5</sup> – precisely the part of the country where first wave feminism was absent. Furthermore, the first court ruling that rescinded a husband's right to chastise his wife, concerned a black family. That case, and the Southern concentration of later cases, led me to question whether feminist activism actually led to the proliferation of domestic violence laws during this first wave of legal reform. This is important because if first wave feminism did not inspire the criminalization of wife-beating,

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<sup>1</sup> Aptly named the “canonical trio” by historian Elizabeth Katz (2015, pg. 383), the leading scholars on the history of domestic violence are Elizabeth Pleck, Reva Siegel, and Linda Gordon, whose body of work I discuss below. For a good summary of related works within this canon, see Elizabeth Katz, “Judicial Patriarchy and Domestic Violence: A Challenge to the Conventional Family Privacy Narrative,” *William & Mary Journal of Women and the Law* 21(2015): 383-4.

<sup>2</sup> At the 1848 Seneca Falls Convention, attendees spoke against domestic violence in their Declaration of Sentiments as follows: “In the covenant of marriage, she is compelled to promise obedience to her husband, he becoming, to all intents and purposes, her master—the law giving him power to deprive her of her liberty, and to administer chastisement” (in “Declaration of Sentiments and Resolutions: Woman's Rights Convention, Held at Seneca Falls, 19-20 July 1848,” in *In the School of Anti-Slavery, 1840 to 1866: Volume 1 of The Selected Papers of Elizabeth Cady Stanton and Susan B. Anthony*, ed. Ann D. Gordon (New Brunswick: Rutgers University Press, 1997), 23.

<sup>3</sup> *Fulgham v. State*, 46 Ala. 147 (1871): “the privilege, ancient though it be, to beat her with a stick, to pull her hair, choke her, spit in her face or kick her about the floor, or to inflict upon her like indignities, is not now acknowledged by our law.”

<sup>4</sup> *Commonwealth v. McAfee*, 108 Mass. 458 (1871): “Beating or striking a wife violently with the open hand is not one of the rights conferred on a husband by the marriage.”

<sup>5</sup> 1871, **Alabama**, *Fulgham v. State*; 1871, **Massachusetts**, *Comm v. McAfee*; 1882, **Maryland**, legislature approved the whipping post for wife-beaters; 1892, **Kentucky**, *Carpenter v. Commonwealth*; 1893, **Mississippi**, *Harris v. State*; 1896, **Delaware**, legislature approved the whipping post for wife-beaters; 1899, **Louisiana**, reversed right of chastisement through the legislature (not a common law state); 1902, **Georgia**, *Lawson v. State*; 1904, **North Carolina**, *Powell v. Benthall*. With the exception of Massachusetts, these were all former slave-holding states.

it calls into question whether the *function* of these laws was actually to protect women. In this dissertation, I therefore ask: *What were the social conditions in which anti-wife-beating<sup>6</sup> laws emerged in the 19th-century South? What do these conditions reveal about the primary functions of these laws?* My research reveals that the criminalization of wife-beating in Southern states was a white supremacist response to newly emancipated Southern black families' attempts to assert their legal legitimacy.

## FEMINIST AGITATION

This project investigates the origins and functions of 19th-century wife beatings law in the United States. There were two waves of legal reform around violence against women – one during the period from 1870 to 1900 and the other from 1970 to 2000. Since these time periods coincide with the emergence of first and second wave feminism, domestic violence scholarship generally credits feminist agitation with the proliferation of laws against wife beating. This assumption that feminism is responsible for U.S. anti-wife-beating laws is an important one because it shapes our understanding about the function of these laws. Specifically, if we assume that they originated as a response to women seeking protection from abusive husbands, than we may further assume that their function is to protect women.

The assumption that wife-beating laws originated from feminist agitation is evident in the work of the few scholars who have examined the first wave of wife beating laws (1870-1900). With added emphasis on the geographic specificity that is often understated in scholarly accounts, the conventional narrative on which wife-beating scholarship is based is as follows. In the first half of the 19th-century, anti-chastisement sentiments permeated public discourse from (Northern) abolitionist movements, which highlighted the cruelty of corporal punishment toward slaves.<sup>7</sup> This coincided with a change in (Northeastern) upper and middle-class family norms – the cult of domesticity – that regarded the home as a sacred woman's space, characterized by love, nurturing, and the protection of children from corporal punishment.<sup>8</sup> These women were also involved in abolitionist movements, and would later become what we now call First Wave Feminists. In the years leading up to the Civil War, women's rights emerged as a legitimate social issue (in the Northeast and Midwest hotbeds of feminist mobilization, conventions, publications, and protests). After the Civil War, feminist agitation (in the Northeast and Midwest) would reach a fever pitch, fracturing

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<sup>6</sup> A note on terminology: I use the term wife-beating because the term “domestic violence” did not emerge until the 1970s. “Wife-beating” or more formally, “chastisement,” were the terms used in this earlier period. That is the language I will therefore use moving forward. This language also underscores the heteronormative, marriage-centric thrust of these laws, which gets obscured in “domestic violence” and “intimate partner violence.”

<sup>7</sup> Reva B. Siegel, “‘The Rule of Love’: Wife Beating as Prerogative and Privacy,” *The Yale Law Journal* 105(1995-96): 2125-6.

<sup>8</sup> Elizabeth Pleck, *Domestic Tyranny: The Making of American Social Policy against Family Violence from Colonial Times to the Present* (Urbana: University of Illinois Press, 1987), 34-48; Siegel, “The Rule of Love,” 2125-6; Linda Gordon, *Heroes of Their Own Lives: The Politics and History of Family Violence, Boston 1880-1960* (Urbana: University of Illinois Press, 1988), 250-288.



into different strategies for suffrage most notably, but also into different movements aimed at feminist anti-chastisement reform, such as a revitalized Temperance movement.<sup>9</sup> In response to decades of feminist political pressure, lawmakers and jurists in the 1870s began to shift laws and sociolegal discourses about the domestic realm, implementing changes to married women's property rights, as well as laws ostensibly protecting wives and children from abusive husbands and fathers.<sup>10</sup> Inherent in this narrative is thus the assumption that feminist agitation brought about 19th-century anti-wife-beating laws.

From this narrative, scholars assume that feminist agitation was central to the origin of early wife-beating laws, and that the primary intention of these laws was to protect women. As such these scholars are interested in understanding why these laws fell short in fulfilling their protective function, either by design or in their implementation. Based on the contributions of Elizabeth Pleck, many scholars acknowledge the role of class dynamics in the failed implementation of wife-beat laws. Pleck argues that the socio-legal privileging of a "family ideal" – where a man is the head of his household consisting of his wife and their "legitimate" children – has been the biggest hindrance to family violence reform throughout U.S. history.<sup>11</sup> She highlights how assumptions about the pathology of men in the lower classes played into the creation and subsequent administration of early wife-beating laws. The evidence that Pleck draws from, however, is both Anglo and New England-centric, set in urban industrial contexts. Her New England data is further situated in the immigrant-heavy political economy of the Northeast. Consequently, Pleck's research minimizes the role of race in the shaping of anti-wife-beating legislation.<sup>12</sup>

Research that does consider the role of race in early anti-wife-beating laws is largely based on the contribution of legal scholar Reva Siegel. Like Pleck, Siegel is interested in explaining why these early laws, once implemented, failed to protect women.<sup>13</sup> She argues that jurists in this period shifted legal discourse toward marriage as an equal partnership, whose sanctity should nonetheless be respected via "privacy," thus negating any real enforcement of protecting women from their husbands.<sup>14</sup> Unlike Pleck, Siegel engages with

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<sup>9</sup> Kirsten S. Rambo, *Trivial Complaints: The Role of Domestic Violence Law and Activism in the U.S.* (New York: Columbia University Press, 2009), accessed Jan 2, 2013, <http://www.gutenberg-e.org/rambo/chapter2.html>, chap. 2, para 35-78; Elizabeth Pleck, "Feminist Responses to 'Crimes against Women,' 1868-1896," *Signs* 8(1983): 459.

<sup>10</sup> Siegel, "The Rule of Love," 2122, 2130, 2140; Rambo, *Trivial Complaints*, chap 2, para 21-31, 35-78; Pleck, *Domestic Tyranny*, 127-149; Carolyn Ramsey, "Intimate Homicide: Gender and Crime Control, 1880-1920," *University of Colorado Law Review* 77(2006): 173. Geographic specificity often gets lost in the latter part of this conventional narrative, a point to which I will return below.

<sup>11</sup> Pleck, *Domestic Tyranny*, xiii; Elizabeth Pleck, "The Whipping Post for Wife Beaters, 1876-1906," in *Essays on the Family and Historical Change*, ed. David Levine, et. al. (Arlington: Texas A&M University Press, 1983), 127-129.

<sup>12</sup> Based largely on Reva Siegel's work, Pleck has engaged with black women's experiences with wife-beating in her later work. See Catherine Adams and Elizabeth H. Pleck, *Love of Freedom: Black Women in Colonial and Revolutionary New England* (Oxford: Oxford University Press, 2010).

<sup>13</sup> Siegel, "The Rule of Love," 2117-2207. Siegel uses the case of postbellum wife-beating laws to illustrate the resiliency of law as a status regime.

<sup>14</sup> *Ibid.*

anti-wife-beating legislation in the North and South.<sup>15</sup> This allows her to expand Pleck's argument by arguing that the groups whose status suffered collateral damage from anti-wife-beating laws were black men in the South,<sup>16</sup> and men from the lower classes more broadly. Siegel begins with Alabama's 1871 *Fulgham v. State* ruling, which was the first in the country to rescind a husband's right of chastisement. The fact that the George Fulgham was black appeared to factor into the ruling, as evidenced by statements such as, "The wife is not to be considered as the husband's slave."<sup>17</sup> The *Fulgham* ruling, coupled with a similar passage in a later Mississippi ruling,<sup>18</sup> leads Siegel to suggest that Southern jurists may have had "racial preoccupations."<sup>19</sup> Echoing Pleck's argument about discrimination toward immigrant men in the North, Siegel's analysis of wife-beating laws in the Reconstruction era suggests a racial context in which jurists may have been "more interested in controlling African-American men than in protecting their wives."<sup>20</sup> Yet while she highlights the disparate impact of wife-beating laws on black men in the South, Siegel also understates the role of race in the *origins* of these laws.

The problem with assuming that early wife-beating laws originated from feminist agitation is that any inquiry at the intersection of race, class, and gender in the 19th-century necessitates close consideration of regional variation. To recapitulate the narrative from which the feminist agitation assumption derives: *Out of the political economies of the Northern (and to a lesser extent Midwestern) industrial centers emerged sociolegal ideologies about chastisement and the domestic sphere more broadly, that, over time, led middle- and upper-middle class white women in the North to seek legal reforms. We know that these Northern feminists' efforts worked because beginning in the 1870s, legislators and jurists responded with reforms to wife-beating, child protection, and married women's property laws.* In fact, Southern lawmakers granted Southern wives property rights and "free dealer" privileges immediately after the Civil War, *before* Northern legislatures.<sup>21</sup> Laws protecting children were a primarily Northern phenomenon because they were rooted in the cult of domesticity, which was a Northern ideology.<sup>22</sup> Most importantly, Southern states led the way in rescinding husbands' right of spousal chastisement.

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<sup>15</sup> *Ibid.*, 2122, 2130.

<sup>16</sup> *Ibid.*, 2120, 2130, 2135-6, 2138-41.

<sup>17</sup> *Fulgham v. State*, 46 Ala. 146-7 (1871).

<sup>18</sup> "The suggestion in the evidence of a belief amongst the humbler classes of our colored population of a fancied right in the husband to chastise the wife in moderation, makes it proper for us to say that this brutality found in the ancient common law, though strangely recognized in *Bradley v. State*, Walker (Miss.), 156, has never since received countenance, and it is superfluous to now say that the blind adherence shown in that case to revolting precedent has long been utterly repudiated in the administration of criminal law in our courts." *Harris v. State*, 71 Miss. 462 (1893).

<sup>19</sup> Siegel, "The Rule of Love," 2135.

<sup>20</sup> *Ibid.*, 2136. Kristen Rambo, *Trivial Complaints*, chap. 2, para. 15-21 builds on this possibility by highlighting the ways in which black newspapers attempted to push back against the notion that black men beat their wives.

<sup>21</sup> Suzanne Lebsock, "Radical Reconstruction and the Property Rights of Southern Women," in *Half Sisters of History: Southern Women and the American Past*, ed. Catherine Clinton (Durham: Duke University Press, 1994), 110-1.

<sup>22</sup> Gordon, *Heroes*, 27-45.

The notion that feminist agency is a necessary social condition for an anti-wife-beating legal outcome has strong ideological and empirical currency. First wave feminists argued that laws representing women's concerns would only be realized once women gained the right to vote. Second wave feminists made similar arguments regarding female representation in legislatures. Indeed access to political power has been an enduring goal for all marginalized groups, just as it has been an enduring threat to groups already in power. Nevertheless, in the postbellum South, the legal outcome was present, while the assumed necessary social conditions were absent.

We can largely trace the absence of first wave feminism in Southern states to two factors. First, in the agrarian South, the vast distances between plantations that characterized elite Southern women's daily life foreclosed opportunities for frequent interactions and thus alliances between women.<sup>23</sup> It also crafted a stronger relationship of dependence on their husbands.<sup>24</sup> Second, the South's loss of the Civil War, after which, Southern white women saw their homeland occupied by the same Northern enemy that killed their fathers, brothers, husbands, and sons in a war that threatened the foundations of Southern life, had a galvanizing effect on Southern identity, which left no room for disunity in Southern gender relations. In their quest for suffrage, property rights, and marital equality, Northern feminists were pushing back against the Cult of True Womanhood<sup>25</sup> at precisely the moment that it was revitalized in the South in the form of the Southern Belle. "The attributes of True Womanhood, by which a woman judged herself and was judged by her husband, her neighbors, and society, could be divided into four cardinal virtues - piety, purity, submissiveness, and domesticity."<sup>26</sup> It became the duty of the white women of the planter class to preserve Southern identity by embodying these four cardinal virtues, a role they took on with great pride and vigor.<sup>27</sup> Furthermore, Southern identity, especially in its postwar moment, was deeply rooted in an opposition to anything associated with the North - to include feminism.<sup>28</sup>

Entrée to an investigation of the origins and functions of Southern wife-beating laws therefore requires setting aside the role of feminist agitation, affording it equal scrutiny to any other social factor that may have contributed to the origin of early wife-beating laws.

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<sup>23</sup> Daphne V. Wyse, "To Better Serve and Sustain the South: How Nineteenth Century Domestic Novelists Supported Southern Patriarchy Using the 'Cult of True Womanhood' and the Written Word" (2012). *History Theses*. Paper 8.

<sup>24</sup> Ibid.

<sup>25</sup> Rambo, *Trivial Complaints*, chap. 2, para. 21.

<sup>26</sup> Barbara Welter, "The Cult of True Womanhood, 1820-1860," *American Quarterly* 18(1966): 152.

<sup>27</sup> C. Vann Woodward and Elisabeth Muhlenfeld, eds., *The Private Mary Chestnut: The Unpublished Civil War Diaries* (New York: Oxford University Press, 1984); Sarah Morgan Dawson, *A Confederate Girl's Diary* (Boston: Houghton Mifflin Company, 1913); Carol Blesser and Frederick M. Heath, "The Clays of Alabama: The Impact of the Civil War on a Southern Marriage," in *In Joy and Sorrow: Women, Family, and Marriage in the Victorian South, 1830-1900*, ed. Carol Blesser (New York: Oxford University Press, 1991); Jane Turner Censer, *The Reconstruction of White Southern Womanhood, 1865-1895* (Baton Rouge, LA: Louisiana State University Press, 2003); Catherine Clinton, *The Other Civil War: American Women in the Nineteenth Century* (New York: Hill and Wang, 1985).

<sup>28</sup> Clinton, *The Other Civil War*.

Despite her analysis of race in Southern wife-beating laws, Reva Siegel's fidelity toward the feminist agitation narrative leads her to conclude that, "As wife beating emerged as a "law and order" issue, class- and race-based discourses about marital violence became even more pronounced."<sup>29</sup> My research reveals the opposite: in the postbellum South, racial discourses about marital violence were the reason why wife-beating became a law and order issue to begin with.

## DATA

Alabama is my primary case study for two reasons. First, Alabama, was the first state to rescind a husband's right to beat his wife. Second, Alabama was also emblematic of the cultural, legal, economic, and political dynamics in which wife-beating laws emerged in the other 13 Southern states. For that reason, I spent a total of seven months in Alabama, moving there for a semester, in order to gain access to archival collections across the state, to include the State Archives, The University of Alabama, Tuskegee University, the Birmingham Public Library, the Equal Justice Institute, as well as various county and city collections.

The bulk of my data comes from: court rulings, periodical data, and Freedmen's Bureau records. The Supreme Court rulings are important because they create the law on the books and convey the rationale behind it. With the exception of Louisiana, Southern states were common law states. This meant that the system of law in Southern states was based on the precedents set in judicial rulings. But these rulings alone are not sufficient for my story because they do not give a window into how these laws were applied in practice. And part of my story is that, in practice, there was a legal double standard applied to black men which is only evident through an examination of the lower court rulings. Periodical data reveals popular discourse surrounding wife-beating, as well as slave beating. It also shows us what people thought about wife-beating and the extent to which it was seen as a social problem. Finally, Freedmen's Bureau records provide insight into the experiences of black people, from their perspective. But in its capacity as a postwar occupying force in Southern states, their records also help to illuminate what was at stake for Southern white planters' in their efforts to restore the social order of the Old South.

## THE RACIAL ORIGINS OF U.S. DOMESTIC VIOLENCE LAW

In contrast to the feminist narrative, I argue that Southern wife-beating laws were a postwar white-supremacist response to the legalization of black family formation. Alabama's landmark Fulgham ruling was handed down in 1871. However, to make my case, I need to start my story in the antebellum period, which is when Southern states began shaping family law<sup>30</sup> – at the center of which was race, gender, and violence.

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<sup>29</sup> Siegel, "The Rule of Love," 2138.

<sup>30</sup> Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America* (Chapel Hill:

In order to make sense of the emergence of *anti*-wife-beating laws, it is important to understand why antebellum American law held that wife-beating was legal to begin with. The chastisement prerogative was the linchpin of the Master of the House's authority. The rationale was that wife-beating was a fundamental tool for upholding the Master of the House's domestic authority. Anglo-American jurisprudence derived from the Roman Law logic of the "pater familias" – the man who held legal and property privileges over all members of his household. It held that the most important unit of civil society was the Household, the function of which was to raise future citizens, and to enable its leader, the Master of the House, to grow and pass down wealth, and participate in civic life. He was both symbolically and materially, the governing authority over the members of his household, and legally accountable for their conduct. As with any governance structure, authority is meaningless without the means to enforce it. The rationale for wife-beating (and spanking children) was to therefore allow the Master of the House a chastisement prerogative for enforcing his domestic authority. In this way, the chastisement prerogative symbolized the responsibilities of Manhood. Put differently it was a right of Men.

As Southern antebellum jurists began weighing the extent to which courts should erode the Master of the House's authority, the law on the books placed increasing limits on his spousal chastisement prerogative – limits that it simultaneously undermined with a language of domestic privacy. Furthermore, in the wife-beating cases that shaped the law on the books, courts' adjudication of husbands' alleged abuse was in fact based on the extent to which both husbands' and wives' behavior adhered to respectable gender norms. It was only to the wives found to embody True Womanhood that courts would grant the benefit of True Victimhood, which was a battered wife's sole pathway – though never guaranteed – toward a ruling in her favor. Due to privacy ideology and the high bar of True Victimhood, limits to the chastisement prerogative did very little to protect abused wives in action.

While this chastisement logic certainly pertained to Northern and Southern antebellum wife-beating laws, scholarship has yet to appreciate how *slavery* shaped the law of domestic relations in the antebellum South. Northern sociolegal ideology<sup>31</sup> recognized two dominant household relationships: Husband and Wife, Parent and Child. Equally salient in Southern sociolegal ideologies was an additional household relationship: Master and Slave. The Master and Slave relationship in the antebellum household played three crucial roles in shaping antebellum wife-beating law. First, it extended the Master's chastisement prerogative to his slaves. Unlike the relationship to his wife and children, the Master's relationship to his slave was characterized by the slave's diminished humanity. The law on the books therefore placed few limits on the Master's slave-beating prerogative, which in action meant that white men beat slave women and men with impunity – to include black men's *de facto* wives. Second, the Master and Slave relationship legally foreclosed access to the gendered privileges of marriage from slaves. Despite the widespread recognition of *de facto* slave marriages, the Master of a slave husband's 'home' was the white man who owned him and/or his slave

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The University of North Carolina Press, 1985), x.

<sup>31</sup> The split in Northern vs. Southern sociolegal ideologies was codified in law in 1804, when New Jersey was the last Northern state to abolish slavery.

wife. The law on the books and in action therefore never granted black men the right of chastisement over their de facto wives, to whom the possibility of True Victimhood was also never available. Finally, abused white wives often used their husband's adultery with slave women to successfully attain the court's sympathy, and thus a divorce, property rights therein, and a means of escaping their husband's violence. In other words, white men's frequent blurring of the lines between their -Wife and -(female)Slave relationship enabled abused white wives to attain True Victimhood through the erasure of slave women's sexual exploitation and physical abuse.

By the end of the antebellum period, Southern antebellum laws of chastisement had created a racialized double-standard for wife-beating. The law on the books: granted husbands the right to beat their wives, with limits; granted masters the right to beat their slaves, with significantly fewer limits; and it punished slaves for beating other slaves, unless ordered to by white men. In action, this meant that white men beat their wives with little fear of legal interference, and they beat black women with impunity, to include black men's de facto wives, while black men were punished when they chose to beat their de facto wives. On the books and in action, antebellum law therefore established that domestic chastisement was a solely white male prerogative.

The end of the Civil War marked a new era for emancipated slaves. The Reconstruction Amendments ended slavery, granted black people equal protection under the law, and armed black men with political power at the ballot box and in public office. In response, new Southern laws recognized black families as legitimate institutions. We might therefore reasonably expect that sociolegal mores afforded black men Master of the House privileges therein. This, however, did not occur.

In the postbellum South, the antebellum racialized double-standard for wife-beating endured. On the books, the law of domestic relations continued to uphold a husband's right of chastisement, and it no longer discriminated by race. In action, however, Southern whites entrenched a racialized double-standard where the postbellum law on the books applied to whites only. This meant that white men continued to physically abuse black women with impunity – to include black men's now legal wives. And it meant that through legal or extralegal means, white men continued to punish black men who beat their wives.

White Southerners refused to recognize black men's chastisement prerogative for two related reasons: emasculation and labor. Revisiting the "pater familias" logic helps to explain why. Scholars have suggested that because the Master of the House's authority, which the chastisement prerogative secured, was fundamentally a right of real Men, white Southerners' disregard for black men's chastisement prerogative was motivated by a desire to symbolically emasculate black men.<sup>32</sup> My data definitely supports this claim. However, my data also illuminates an attendant *material* motivation derived from the fact that the Master of the House owned and thus controlled the labor of all of the members of his household.

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<sup>32</sup> Siegel, "The Rule of Love," 2123, 2154-5; Rambo, *Trivial Complaints*, chap. 2, para 2; Catherine Clinton, "Bloody Terrain: Freedwomen, Sexuality and Violence During Reconstruction," *The Georgia Historical Quarterly* 76(1992): 319.

Reinvigorating the Southern economy meant sustaining the domestic relations of the Old South, in which chastisement was a prerogative exclusive to white men. There is a wealth of scholarship that reveals how the postbellum Southern political economy recovered by using vagrancy laws, black codes, and a convict lease system to retain control of black labor.<sup>33</sup> But this scholarship largely fails to appreciate how slavery inextricably linked the law of domestic relations to the Southern political economy. In the Old South, the political economy hinged on a law of domestic relations in which white men collectively owned and controlled black labor. After the Civil War, the South's infrastructure was destroyed, its coffers were empty, its debt was high, and its tax base diminished. The Reconstruction Amendments thus severed the Master-Slave relationship from the law of domestic relations at a historical moment when white Southerners most needed the ownership of black labor that the Master-Slave relationship guaranteed. The end of the Master-Slave relationship also meant that Southern black men were Masters of their own Homes. As such, the Reconstruction Amendments enabled what was arguably the biggest threat to the Southern white supremacy: the legal recognition of black families placed ownership and control of Southern (black) labor, first and foremost, in the hands of black men.

Foreclosing black men's right of chastisement served the critical function of undermining black men's Master of the House role as owners of their families' labor. White Southerners undermined black men's domestic authority through mutually reinforcing symbolic and material means. Symbolically, a hegemonic ideology of black family pathology took root immediately after the war. It held that black women were bad mothers, bad wives, promiscuous, and responsive to corporal punishment.<sup>34</sup> It characterized black men as bad fathers and husbands, who lacked affective family bonds, and depended on numerous black women for their livelihoods because they were too lazy to work to support themselves – much less their families. Black men, in other words, lacked the morality, capacity for family affection, and commitment to hard work that the Master of the House role required. This ideology inherently disintitiled black men to a chastisement prerogative, just as it stigmatized black men as wife-beaters. Freedman's Bureau records illuminate how planters leveraged this ideology to justify the many ways in which they regained control of black labor, to include: not paying black men for their labor due to their alleged misconduct, refusing to pay black men for their wives' and children's labor, and withholding from husbands their wives and children whom planters would retain in de facto slavery. This symbolic and material manipulation of black men's domestic authority ensured that, whereas white men were perceived to have the discernment to chastise their wives appropriately, the only way left to interpret black men's behavior was wife-beating.

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<sup>33</sup> C. Vann Woodward, *The Strange Career of Jim Crow* (Oxford: Oxford University Press, 2002 (1955)), 22-24; Alex Lichtenstein, *Twice the Work of Free Labor: The Political Economy of Convict Labor in the New South* (London: Verso, 1996); and, Christopher Muller, "Northward Migration and the Rise of Racial Disparity in American Incarceration, 1880–1950," *American Journal of Sociology* 118(2012): 281-326. While Vann Woodward remains central to this literature, Lichtenstein and Muller have since made important contributions vis-à-vis the relationship between crime and labor in the postwar South.

<sup>34</sup> Pathologizing black mothers also served a labor function, by allowing planters to retain de facto ownership of black children and young adults under new apprenticeship laws.

In this light, when Alabama's *Fulgham* ruling was handed down in 1871, I argue that all it did was affirm the racialized double-standard for wife-beating that had thus far been standard practice in the lower courts. George and Matilda Fulgham were husband and wife, parents of young children, and emancipated slaves living Greene County, Alabama. Matilda attempted to intervene one day when she felt that George was disciplining one of their children too severely. George retaliated by striking Matilda twice on her back with a board, leaving no permanent injury. George was subsequently arrested and charged with assault and battery on his wife. Unremarkably, the trial court found him guilty, like numerous black men at this time. This case would have remained just another unexceptional statistic if not for that fact that George was granted an appeal for his case, which would ultimately give Alabama the distinction of being the first state in the U.S. to repeal a husband's right of chastisement. In other words, Alabama was simply the first Southern state whose Supreme Court ruled on a wife-beating case involving a black family.

In his appeal, George's defense was very simple – his actions were completely and unquestionably within the bounds of the law on the books. Men could beat their wives, as long as it left no permanent injury – the law that had been in action been for white men only. Alabama's Supreme Court had the option to apply the existing law on the books, which held that a husband has the right of chastisement to the degree that it is necessary to accomplish the important ends of his wife's obedience. Doing so would have overturned George's conviction. Their other option was to uphold George's conviction by instead applying the racialized double-standard that did not recognize black men's chastisement prerogative. The Court chose the latter option, thereby upending centuries of Anglo-American jurisprudence that granted husbands the right to chastise their wives.

Alabama's post-*Fulgham* law on the books did not, however, change the racialized legal standard. Although the law on the books no longer recognized white men's right of chastisement, it is important to remember that even the limits to chastisement inscribed in the previous law on the books had always fallen short of protecting white wives from abusive husbands because of the courts' strict allegiance to the sanctity of domestic privacy and the idealized standard of True Victimhood. So even though the *Fulgham* ruling rescinded a husband's legal right of chastisement, in action, domestic privacy continued to shield white husband's violence from legal scrutiny just as it had always done. Where the privacy shield failed, the unattainability of True Victimhood continued to favor white husbands in court. Likewise, neither domestic privacy nor true victimhood ever became available to black men and women.

The racial origins and functions of Southern wife-beating laws had consequences beyond the courtroom and labor market. Once wife-beating was stigmatized as a black crime – “wife-beaters” (black and white) became the center of a moral panic, which had a few different effects. The most devastating of these was the eventual disenfranchisement of black men. At the heart of Southern white supremacy was the mission to strip black men of their political power. Toward the end of the century, having successfully “redeemed” itself from the horrors of reconstruction, Southern states established new state Constitutions for the primary purpose of disenfranchising black men without violating the 15th-Amendment. Some key tools considered for disenfranchisement were poll taxes, grandfather clauses, literacy tests, and “black crimes.” In the crime clause, disenfranchising wife-beaters was one



of the first tools many Southern states considered during their constitutional conventions, to include Alabama. Predicting that wife-beating alone would disenfranchise 60 to 80 percent of black men, Alabama's 1901 Constitution officially denied wife-beaters the vote. Subsequently, Alabama's suffrage provision, of which wife-beating was a key part, succeeded in all but eliminating the black male vote.

In contrast to the narrative of feminist agitation, my research demonstrates that Southern anti-wife-beating laws were a postbellum white supremacist response to racial legal cleavages in the law of domestic relations. Antebellum socio-legal norms simultaneously advanced marital cruelty protections for wives on the one hand and encouraged the physical chastisement of slaves on the other. This ensured that the authority to beat slave women – to include de facto slave wives – was a specifically white male prerogative; and, it added physical chastisement to a long list of naturalized distinctions between blackness and whiteness. Emancipation exposed the fragility of 'domestic relations' – and thus the southern way of life – by highlighting its symbolic and material dependence on racialized gender hierarchies. Wife-beating laws that threatened to punish black men, in the midst of socio-legal norms that kept black women vulnerable to white male violence, helped to restore a southern way of life that simultaneously controlled the labor and degraded the status of black families.

## DISSERTATION OUTLINE

I begin the story by discussing the development of southern wife beating laws during the antebellum era. Chapter Two argues that by the end of the Civil War, the law on the books allowed: men to beat their wives; men to beat their slaves; and it did not allow slaves to beat other slaves. In action, this meant that: *white* men could beat their wives; *white* men could beat black women, to include black men's de facto wives; while *black* men could *not* beat their de facto wives.

Chapter Three examines emancipation, when freed slaves were finally allowed to forge legally recognized families. This meant that the law on the books, now ostensibly applied to both white and black men, while slave laws were no more. But this did not mean that white Southern men were willing to so easily relinquish the domestic privileges they had just fought a war to preserve, especially if it meant relinquishing control of black labor to black men. I argue that despite the law on the books that recognized a husband's right of chastisement, in action: only white men were still allowed to beat their wives; white men could still beat black women, to include black men's wives; and black men were still denied the male prerogative of beating their wives. This entrenched a racialized legal double-standard where the husband's legal right to chastise his wife continued to be a solely white male prerogative.

After the war, a hegemonic ideology of black family dysfunction emerged, in which black men were unable to be Masters of the House and black women were seen as unworthy of protection. In Chapter Four, I show how, out of this black family pathology emerged the association of wife-beating with black families. Once racialized, wife-beating became seen as a black crime. By the time the Alabama Supreme Court presided over its first wife-beating

case involving a black family, it simply affirmed the racialized double-standard that did not grant black men the right to beat their wives. On the books: white and black husbands therefore no longer had the right to chastise their wives. In action, however, the racial double standard for wife-beating remained unchanged. In Chapter Five, I illustrate how this is not just a story about the role of race in wife-beating law. I will also show how wife-beating law became a mechanism to disenfranchise black men.

## CHAPTER 2: ANTEBELLUM WIFE-BEATING LAW

In this chapter, I will argue that antebellum laws of chastisement – wife- and slave-beating – established a racialized double-standard for wife-beating. My dissertation argument is the Southern anti-wife-beating laws, which began in 1871, were a postwar white-supremacist response to the legalization of black family formation. The origin story of those laws, however, begins in the antebellum period, when Southern states began creating family law – at the center of which was race, gender, and violence. On the books and in action, antebellum law had two crucial implications for the major shifts in wife-beating laws that came about in the postbellum era. First, it established that domestic chastisement – the corporal punishment of wives, children, and slaves – was a solely white male prerogative. By the end of the antebellum period, wife-beating laws had therefore established a key distinction between white and black masculinity. White men who beat their wives (and slave men’s de facto wives) were exercising their God-given<sup>1</sup> domestic authority. Having no such authority, black men who beat their wives did so from a pathological place. Socio-legal mores, in other words, granted abusive white husbands the strong benefit of honorable intention, while the only trope available to black men was wife-beater. Second, antebellum wife-beating law also established that the attainment of an idealized “true victimhood” would be compulsory for receiving divorces or legal protection from abusive husbands. The attainment of true victimhood however, was a (weak) possibility available to white women only. It was a classed construct that was entrenched through the erasure of slave women’s experiences of violence and sexual exploitation, which further normalized the conflation of sex, intimacy, and violence with black womanhood. By the end of the Civil War, the law on the books and in action: condoned white men’s abuse of black women; punished black men’s abuse of black women; normalized black women’s bodies as objects of physical abuse; all the while doing very little to protect abused white wives.

During the antebellum period, Southern courts adapted Anglo family laws, or laws of “Domestic Relations,” to the South’s unique racialized socio-economic order. Whereas family law in other states pertained to households centered on the husband-wife relationship, Southern family law was anchored on an additional household relationship, that of master-slave. In the early 1800s, Southern courts granted the Master of the House authority over his wife, children, and slaves, which he could enforce using corporal punishment, or “chastisement,” with few limits in degree, the idea being that the Master of the House would be able to discern the line between corrective chastisement and excessive cruelty.

The data for this chapter comes primarily from Southern state Supreme Court rulings and local case records, both of which are necessary data points for making sense of antebellum laws of domestic chastisement. In Southern courts, we see the law develop from both British<sup>2</sup> and *Southern* case law. Very rarely did Southern courts cite Northern state

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<sup>1</sup> The law of domestic relationships were rooted in “natural law” as well as “ecclesiastical law” which held that white men were, by nature or God respectively, imbued with the abilities to rule over the members of their household.

<sup>2</sup> After the Revolutionary War, states adopted British common law to the extent that it did not contradict

Supreme Court cases. None of Alabama's landmark wife-beating rulings were based on Northern cases. This is likely because slavery created a fundamental difference in the laws of domestic relations between Northern and Southern states.

Scholars who study wife-beating law from this period typically focus their attention only on state Supreme Court rulings, which reflect the law on the books.<sup>3</sup> Supreme Court rulings, however, give very little insight about how the law functions in practice, which is a crucial aspect of my argument. The law in action was instead the purview of local case records, which gave much more detail and specificity about how the law on the books was applied in circuit courts, chancery courts, and especially city and municipal courts.

Unlike Supreme Court rulings, which have been recorded in state law reports and American legal treatises, locating Southern antebellum local case records is a challenge. Many Southern circuit and chancery court records have been destroyed in courthouse fires,<sup>4</sup> or lost for other reasons. Antebellum wife-beating cases were either criminal cases of assault and battery or cases where wives filed for divorce on the grounds of cruelty. In Alabama, chancery courts dealt with divorce cases. Circuit courts dealt with criminal cases where the husband's violence was more than a misdemeanor. I have been able to locate a total of 67 complete wife-beating cases for 12 Alabama counties. This data provides details such as wives accounts of violence, their husbands' counter-narratives, witness statements, and the courts' decisions. As such, they give us broader insights about local ideologies regarding gender and family; and, they provide a picture of domestic life that rarely gets discussed in the idealized world presented in personal letters and diaries. Slave testimonies and written accounts of Southern life help to complete that picture.

Lower municipal courts (i.e. – Mayor's court, justice of peace, etc.) dealt with criminal cases, which would be elevated to circuit courts if the lower court held that the husband's violence was more severe than a misdemeanor offense. Case records in these cases are much less detailed or standardized, as they were kept based on the prerogatives of the clerk. The most detailed records consisted of no more than a paragraph summarizing the complaint and the court's decision. The least detailed would be a ledger that looked very similar to a court docket. I have located a total of only six such records for three Alabama counties.

In this chapter, I discuss both wife-beating and slave-beating law in the antebellum South. Analysis of both Supreme Court and local case records reveals the creation of a de facto racialized double-standard in the law of domestic chastisement. On the one hand Supreme Court rulings reveal a law on the books in which the Husband-Wife relationship was distinct from the Master-Slave relationship. In action, however, local case records reveal that the relationships between husbands, wives, and slaves were inextricably linked, especially

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America's new constitution. As new states entered the Union (Alabama entered in Dec 1819), they continued this practice, in addition to adopting common law from other states. Since British common law no longer recognized slavery, and all Northern states abolished slavery by 1804, Southern states relied on other Southern states in establishing laws pertaining or tangential to slavery.

<sup>3</sup> Statutes, which are created by state legislatures, had a lesser influence on the law on the books, and were often times altered to reflect changes in precedent made in Supreme Court rulings. Louisiana was the only Southern state whose laws privileged statutes over case law.

<sup>4</sup> Alabama has had 47 courthouse fires to date.

as it pertained to the Master of the House's domestic chastisement prerogative.

In the first half of the chapter, I examine wife-beating law and show how the law on the books granted white men the legal right to chastise their wives. This right, however, was not without limits. Over time, the Supreme Court extended increasing protections for abused wives. I will then show how, in action, class and gender combined to create an idealized "True Victimhood" that, in conjunction with "domestic privacy," offsets the legal protections granted to abused wives. In the second half of the chapter, I will bring the laws of slave-beating into the conversation. As the law on the books placed increased limits on husband's chastisement authority over their wives, I will show how the limits for Master's chastisement of their slaves grew increasingly subjective and vague. I will finally show how, in action, this established the de facto racialized legal double-standard that became entrenched in postbellum wife-beating laws (see Appendix, Figure 1).

## WIFE-BEATING LAW

The first U.S. ruling to uphold that wife-beating was legal (*Bradley v. Mississippi*, 1824) simply affirmed British common law in American common law, with very little tailoring or alteration. British and American courts upheld the husbands' chastisement prerogative because they believed it to be the linchpin of the Master of the House's authority. Legally and culturally, wife-beating was regarded as a fundamental tool for upholding the Master of the House's domestic authority. Wife-beating therefore symbolized the responsibilities of manhood.

Anglo-American jurisprudence derived from the Roman logic of the "pater familias" – the man who held legal and property privileges over all members of his household. It held that the most important unit of civil society was the Household, the function of which was to raise future citizens, and to enable its leader, the Master of the House, to grow and pass down wealth to his legitimate heirs, and participate in civic life. He was both symbolically and materially, the governing authority over the members of his household, and legally accountable for their conduct. As with any governance structure, authority is meaningless without the means to enforce it. The rationale for wife beating – as well as slave beating in the South – was to therefore allow the Master of the House a chastisement prerogative for enforcing his domestic authority.<sup>5</sup>

Coverture was the legal term used in antebellum law to describe the Husband-Wife relationship. The authority for coverture was British common law, which held that:

By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs every thing; and is therefore called in our law-french a feme-covert, fœmina viro co-operta; is said to be covert-baron, or under the protection and influence of her husband, her baron, or lord; and her condition during

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<sup>5</sup> Rambo, *Trivial Complaints*, chap. 2, para. 2 and 12 (see chap 1, n. 9).

her marriage is called her coverture.”<sup>6</sup>

From the perspective of the law, a married woman’s personhood was subsumed under her husband. From the perspective of the husband, he was legally accountable for his wife’s actions. From the wife’s perspective, her governing authority was her husband.

In the 19th-century, coverture was ostensibly based less on male domination of women than it was on a paternalistic motive of protecting women from themselves. In other words, it was seen as a response to natural law, as opposed to the laws of man. Sociolegal norms held that rationality, judgment, and leadership were qualities that were, by nature, intrinsic only to (white) men. By nature, women were seen as biologically incomplete men, which meant that they were ruled by emotions and susceptible to the irrationality and erratic behavior – or hysteria. This pervasive natural law ideology was mutually reinforced by the legal, social, religious, and scientific authorities of the time.<sup>7</sup> From that perspective, the relationship of husband and wife was not seen as a relationship of male dominance for the husband’s sake, but rather for the sake of the wife’s protection from her nature.

During the antebellum period, a husband’s chastisement prerogative had a dual-nature within the Husband-Wife relationship – legal and affective – that ultimately functioned to reinforce the husband’s domestic authority. According to William Blackstone, author of the primary legal treatise on British common law, the chastisement prerogative was necessary for the following reason: “As he is to answer for her misbehaviour, the law thought it reasonable to intrust him with this power of restraining her, by domestic chastisement.”<sup>8</sup> This statement is emblematic of the legal nature of the chastisement prerogative. The law therefore made husbands answerable for their wives’ behavior, which meant the law accordingly grant husbands the means for controlling their wives’ behavior.

As the antebellum American jurisprudence progressed, however, the affective nature of the chastisement prerogative emerged as equally salient. The leading American legal treatises encapsulated this thinking. For example, a leading jurist of American law, James Kent, wrote:

As the husband is the guardian of the wife, and bound to protect and maintain her, the law has given him a reasonable superiority and control over her person, and he may even put gentle restraints upon her liberty, if her conduct be such as to require.<sup>9</sup>

Similarly, William Bouvier, another leading jurist, wrote that, “He is bound to love his wife, and to bear with her faults, and, if possible, by mild means to correct them.”<sup>10</sup> This affective

<sup>6</sup> Sir William Blackstone, *Commentaries on the Laws of England in Four Books*, book 1 (Philadelphia: J.B. Lippincott Co., 1893), 441.

<sup>7</sup> Nancy Isenberg, *Sex and Citizenship in Antebellum America* (Chapel Hill: University of North Carolina Press, 2002), 28-32; Grossberg, *Governing the Hearth*, 9-29, 64-99; Bertram Wyatt-Brown, *Southern Honor: Ethics and Behavior in the Old South* (Oxford: Oxford University Press, 1982), 226-290.

<sup>8</sup> 4 Bl. Com. 444, 445.

<sup>9</sup> James Kent, *Commentaries on American Law*, 9th ed., vol 2. (Boston: Little, Brown and Company, 1858), 181.

<sup>10</sup> James Bouvier, *A Law Dictionary: Adapted To The Constitution And Laws Of The United States Of America, And Of The Several States Of The American Union: With References To The Civil And Other Systems Of Foreign Law: To Which Is Added Kelham's Dictionary Of The Norman And Old French Language*, 11th ed., vol 1. (Philadelphia: G.W. Childs, 1864), 675.

nature of chastisement emphasized the husband's responsibilities of care and guardianship toward his wife. It was a more paternalistic ideology that linked chastisement with love. In other words, a husband's disposition toward his wife was characterized by love and affection; chastisement was thus an act of love when his wife failed to obey his judgment.

Although antebellum courts upheld (white) men's right to chastise their wives, it would be a mistake to assume that wife-beating was widely condoned. In fact, antebellum wife-beating cases revealed a clear tension: jurists overwhelmingly and vehemently disapproved of wife-beaters and wife-beating; yet, time and again they fell short of revoking a husband's right to do so, finding that their allegiance to the Master of the House's authority was ultimately more important than protecting abused wives. For example, Supreme Court judges described wife-beating as "abhorrent,"<sup>11</sup> "unmanly,"<sup>12</sup> "barbarous,"<sup>13</sup> and "inhuman."<sup>14</sup> – which would seem to suggest that they would have taken great lengths to rescind a husband's right to do it. The problem is that these judges also found the prospect of eroding Men's domestic authority to be "deplorable,"<sup>15</sup> "pernicious,"<sup>16</sup> and indeed the end of civil society as we know it. Alabama's 1847 Moyler ruling, for example, cautioned against allowing abused wives to undermine Men's domestic governance by obtaining divorces thusly:

Marriage is the most important of all the social relations. Upon the strict observance of its duties, by the married pair, depends not only everything which ministers to comfort and happiness, but also to private virtue. A facility of obtaining divorces . . . saps the very foundation of domestic happiness, and public virtue. Historians trace the decline of public morals, in ancient Rome, to this cause, more than to any other.<sup>17</sup> Divorce brought down the mighty Roman Empire. This passage is emblematic of the 19th-century socio-legal ideology in which "domestic happiness" and "public virtue" were inextricably linked. When the household fails, society fails. The courts, therefore, opted to protect the chastisement prerogative, but limit it in extreme cases.

Antebellum law limited husbands' chastisement authority by offering increased specificity about which acts were lawful and which acts constituted cruelty. *Bradley v. Mississippi* (1824), the first U.S. ruling to uphold that wife-beating was legal, specified that such acts were lawful but only in moderation. Unfortunately, the *Bradley* ruling did not reveal any details regarding the nature of Calvin Bradley's assault on his wife, beyond stating that he "did beat, bruise, etc." her in a manner the court found to be excessive. In the trial court, a jury convicted him of an assault and battery on his wife, Lydia. Relying on Blackstone, his

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<sup>11</sup> *Bradley v. The State*, 1 Miss. 156 (1824).

<sup>12</sup> *Richardson v. Richardson*, 4 Port. 467 (1837); *Robbins v. State*, 20 Ala. 36 (1852); *David v. David*, 27 Ala. 222 (1855).

<sup>13</sup> *Moyler v. Moyler*, 11 Ala. 620 (1847); *Hughes v. Hughes*, 19 Ala. 307 (1851); *David v. David*, 27 Ala. 222 (1855); *Reese v. Reese*, 23 Ala. 785 (1853).

<sup>14</sup> *Moyler v. Moyler*, 11 Ala. 620 (1847); *Hughes v. Hughes*, 19 Ala. 307 (1851); *King v. King*, 28 Ala. 315 (1856); *Reese v. Reese*, 23 Ala. 785 (1853).

<sup>15</sup> *Bradley v. The State*, 1 Miss. 156 (1824).

<sup>16</sup> *State v. Jesse Black*, 60 N.C. 266 (1864).

<sup>17</sup> *Moyler v. Moyler*, 11 Ala. 623 (1847).

defense appealed on the grounds that the court should have instructed the jury that a husband cannot be found guilty of assaulting his wife, which the trial court refused. The Mississippi Supreme Court upheld the conviction, but only because it felt that Bradley's abuse was unreasonably excessive. In other words, though the court agreed that Bradley was guilty of wife-beating, it nevertheless established that a husband was permitted to chastise his wife, but only in moderation.

Unfortunately, *Bradley* left more questions than answers. Specifically, in precisely the landmark decision that *legalized* a husband's right to beat his wife, the defendant was nevertheless convicted for beating his wife. The reason was because the court felt that his abuse was excessive. But because the case record failed to provide any information regarding the nature of Mr. Bradley's abuse, the crucial question of which actions courts should consider excessive remained unanswered. The primary task that courts faced in future cases involving wife-beating was establishing, first and foremost, the extent to which a husband's actions exceeded the boundaries of moderate correction into the realm of cruelty. They ultimately determined that permanent injury and malicious intent would be the primary parameters.

As antebellum courts wrestled with the cruelty question, one of the most important precedents established that chastisement constituted cruelty when it resulted in permanent injury. However, this precedent was not established in a wife-beating case, but rather in a case of alleged cruelty to a child. Centered on the logic of the parent-child relationship, North Carolina's 1837 *State v. Pendergrass*, was subsequently applied beyond the parent-child relationship because it ultimately adjudicated not just the role of a father to a child, but of the Master of the house more broadly.

Rachel Pendergrass was a school teacher who was ultimately acquitted for the assault and battery of one of her young students. After administering "mild treatment toward"<sup>18</sup> one of her female students, Ms. Pendergrass determined harsher discipline was needed. She thus whipped the little girl--no older than 7--with a switch and possibly a larger instrument, which left marks on the little girl's body, arm, and neck that disappeared in a few days.

On the one hand, the trial judge cautioned the jury to take great consideration in concluding that Ms. Pendergrass was guilty, instructing them that she had a right to chastise the little girl, since a teacher's right to chastisement was "coextensive"<sup>19</sup> with a parent's right to chastisement. This correlation was significant because, although the schoolmarm-pupil relationship was in an arguably liminal space between the domestic and public realm, the judge eliminated that uncertainty for the jurors by anchoring the schoolmarm-pupil relationship firmly within the power hierarchy of the domestic realm. The judge therefore told the jury "that they should be cautious"<sup>20</sup> in concluding that the teacher's chastisement was excessive. On the other hand, he instructed that the jury take into consideration the little girl's "tender"<sup>21</sup> age, and find Ms. Pendergrass guilty if they believed that she did in fact whip

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<sup>18</sup> *State v. Pendergrass*, 19 N.C. 365 (1837).

<sup>19</sup> *Ibid.*, 368.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*



the little girl in a way that produced the marks described above. The jury found her guilty.

On appeal, her guilty verdict was reversed on the premise that the trial judge was wrong to instruct that Ms. Pendergrass was guilty if she left marks on the child since the marks were only temporary, and left no permanent injury. In his ruling, the appellate judge stated that the trial jury should have further been instructed that without permanent injury, they would have to infer whether or not Ms. Pendergrass nevertheless *intended* permanent injury. If they determined that neither actual permanent injury nor intended permanent injury occurred, than it was their duty to acquit the teacher.

On the subject of permanent injury, the appellate ruling states:

The welfare of a child is the main purpose for which pain is permitted to be inflicted. Any punishment, therefore, which may seriously endanger life, limbs or health, or shall disfigure the child, or cause any other permanent injury, may be pronounced in itself immoderate, as not only being unnecessary for, but inconsistent with, the purpose for which correction is authorized. But any correction, however severe, which produces temporary pain only, and no permanent ill, cannot be so pronounced, since it may have been necessary for the reformation of the child, and does not injuriously affect its future welfare. It may be laid down as a general rule, that teachers exceed the limits of their authority when they cause lasting mischief; but act within the limits of it, when they inflict temporary pain.<sup>22</sup>

It is important to unpack the appellate judge's statement that: "The welfare of the child is the main purpose for which pain is permitted to be inflicted,"<sup>23</sup> for this is precisely the point at which it is revealed that this ruling relies on a larger Master of the house logic that extends beyond the father-child relationship. The Master is the natural ruler of his wife for *her* benefit – to protect her from her own neurosis. Her chastisement is thus also for her own benefit. The Master is similarly the natural ruler of his child for the *child's* own benefit – to save him<sup>24</sup> from his immaturity. The purpose for the child's chastisement is thus also in the interest of his welfare.<sup>25</sup> Despite the difference in the Master's relationship to his child and his wife, chastisement is an area where his responsibility to both relationships is the same. Indeed, in the remainder of the *Pendergrass* ruling, the judge speaks less of the duties of the "parent" and more of the duties of the "Master."

On the issue of malicious intent, the Pendergrass ruling argued that pain or injury was not itself proof of cruelty. Permanent injury was determined to be an indicator that the teacher/parent's correction was excessive. But even then, the next step would be to determine whether or not the parent/teacher intended it to be so. Specifically, "Within the sphere of his authority, the master is the judge when correction is required, and of the degree of correction necessary; and like all others intrusted with a discretion, he cannot be made

<sup>22</sup> *Ibid.*, 365.

<sup>23</sup> *Ibid.*, 368.

<sup>24</sup> The doctrinal sources are clearly speaking of *male* children, and by exception, female children, which they indicate with female adjectives/pronouns.

<sup>25</sup> Granted, jurists frowned on wife-beating, while they saw beating children as an act of love and good parenting. Nevertheless, jurists were faithful acolytes of the Master of the house logic that justified chastisement in both relationships.

penally responsible for error of judgment, but only for wickedness of purpose.”<sup>26</sup> As wickedness of purpose, or intent, is clearly difficult to ascertain, the ruling advised that the master must be given the fullest benefit of doubt:

His judgment must be presumed correct, because he is the judge, and also because of the difficulty of proving the offence, or accumulation of offences, that called for correction; of showing the peculiar temperament, disposition, and habits, of the individual corrected; and of exhibiting the various milder means, that may have been ineffectually used, before correction was resorted to [*sic*].<sup>27</sup>

If, somehow - a somehow the ruling never offers - the master's intentions were found to be malicious, than his “mask of the judge shall be taken off, and he will stand amenable to justice, as an individual not invested with judicial power.”<sup>28</sup>

The Pendergrass ruling is important because it was subsequently applied in wife-beating cases (including the 1871 *Fulgham v. Alabama* ruling). During the antebellum period, the permanent injury parameter was applied as late as 1864 in the *State v. Jesse Black* ruling, where the husband seized his wife by her hair, pulling her to the floor, and held her there in the midst of an argument:

A husband cannot be convicted of a battery on his wife unless he inflicts a permanent injury or uses such excessive violence or cruelty as indicates malignity or vindictiveness; and it makes no difference that the husband and wife are living separate by agreement.<sup>29</sup>

In other words, the court acknowledged that the husband was violent, but held that it was lawful since it did not leave a permanent injury.

While the Antebellum law on the books limited chastisement against wives, in action, it did very little to protect wives from abusive husbands. One reason for this was that the courts clung to an ideology of “domestic privacy,” a euphemism for not interfering with the Master of the House’s domestic authority. For example, in the first Southern case to rule on – and uphold – the husband’s right of chastisement, the ruling warned that:

Every principle of public policy and expediency, in reference to the domestic relations, would seem to require, the establishment of the rule we have laid down, in order to prevent the deplorable spectacle of the exhibition of similar cases in our courts of justice.<sup>30</sup>

“Family broils,”<sup>31</sup> the ruling further asserted, needed to therefore be contained within the husband’s realm of authority. And it would be a mistake to establish a precedent where a husband’s authority was too easily “subjected to vexatious prosecutions.”<sup>32</sup> This landmark ruling was emblematic of antebellum legal ideology, which held that each time the doors of family privacy were thrown open to court and/or public scrutiny, it was an embarrassing

<sup>26</sup> *State v. Pendergrass*, 19 N.C. 366 (1837).

<sup>27</sup> *Ibid.*, 367.

<sup>28</sup> *Ibid.*

<sup>29</sup> *State v. Jesse Black*, 60 N.C. 266 (1864).

<sup>30</sup> *Bradley v. The State*, 1 Miss. 158 (1824).

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

“spectacle” that fundamentally undermined the Master of the House’s authority.

Similarly, in North Carolina’s landmark *State v. Jesse Black* (1864),<sup>33</sup> the court held that the law will not invade the domestic forum or go behind the curtain. Although the husband in this case pulled his wife by the hair, holding her down by the floor during the course of an argument, the court determined that he was not guilty of assault and battery. During the trial, she explained that her husband’s violence left her with a considerable headache, and that her throat was also sore for months. The court nevertheless ruled as follows:

“Certainly the exposure of a scene like that set out in this case can do no good. In respect to the parties, a public exhibition in the Court House of such quarrels and fights between man and wife, widens the breach, makes a reconciliation almost impossible, and encourages insubordination; and in respect to the public, it has a pernicious tendency.”<sup>34</sup>

Furthermore, the court blamed Mrs. Black for her husband’s violence because she allegedly instigated the argument with her husband in the first place.<sup>35</sup> The courts primary reason for not ruling in her favor, however, is clearly stated in the above passage. The court preferred to leave the parties to themselves, as the best mode of inducing them to make the matter up and live together as man and wife should.<sup>36</sup>

This allegiance to privacy also established a high legal threshold for cruelty when courts decided whether or not to grant abused wives divorces from their husbands. Alabama’s Moyer ruling is a perfect example. *Moyler v. Moyler* (1847) became a landmark ruling, in part, because it established that cruelty would be recognized as: physical violence committed with danger to life, limb, or health, or significantly, a reasonable apprehension of such violence. It further stipulated that verbal abuse, which was not in and of itself cruelty, could be regarded by the jury as an aggravation of an actual act of cruelty. It provided the kind of specificity for determining marital cruelty that Mississippi’s ruling lacked. And the ruling even went in favor of the wife, granting her a divorce on the grounds of cruelty. Nevertheless, the *Moyler* ruling made it very clear that courts’ protection of abused wives should be a lesser concern than respecting domestic privacy, lest the violence committed against her be extreme.

Within two weeks of their marriage, James Moyler began the “course of cruel, and inhuman conduct”<sup>37</sup> toward his wife that only ceased when she eventually fled from him for her own protection. In one unequivocal act of legal cruelty, he violently pulled her out of the bed at night, throwing water onto her and verbally demeaning her, all the while threatening that if she did not leave the house before morning, he would “take her heart’s blood.”<sup>38</sup> It is only because of a boarder who intervened that James did not leave his wife outdoors over night. The case does not detail how long the couple’s marriage lasted before Mrs. Moyler fled. But their marriage was characterized by routine severe verbal abuse. In addition, in one

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<sup>33</sup> *State v. Jesse Black*, 60 N.C. 266 (1864).

<sup>34</sup> *Ibid.*, 268.

<sup>35</sup> *Ibid.*, 266.

<sup>36</sup> *Ibid.*, 267.

<sup>37</sup> *Moyler v. Moyler*, 11 Ala. 626 (1847).

<sup>38</sup> *Ibid.*

instance, he threw a glass of milk in her face, and shook his fist in her face in yet another instance. Neither of those actions, however, amounted to cruelty. Though none of those acts, all corroborated by witnesses, in of themselves constituted cruelty, the court ruled that they were crucial to contextualizing the actual acts of legal cruelty that a husband could otherwise claim he committed in the heat of passion and felt deep remorse afterward. In other words, the court felt that verbal abuse, throwing milk, and shaking his fist in her face demonstrated a clear pattern of “brutal, unkind treatment”<sup>39</sup> in which to situate the physical acts of violence that were a danger to her life, limb, or health. It also validated that her decision to separate from him was based on a reasonable apprehension of violence, and not, as Mr. Moyler claimed, because she was displeased with his inability to provide her with a higher standard of living. For all of those reasons, the court granted Mrs. Moyler her divorce.

And yet, emblematic of divorce cases during this period, the ruling cautioned against applying its determinants of marital cruelty too broadly.

Marriage is the most important of all the social relations. Upon the strict observance of its duties, by the married pair, depends not only everything which ministers to comfort and happiness, but also to private virtue. A facility of obtaining divorces, not only tends to generate discord in families, by removing the restraints which necessity imposes, of a conformity to the habits, opinions, and even to the caprices of each other, from the conviction that the tie is indissoluble, but it also leads to licentiousness, and the disregard of the offspring of the marriage.<sup>40</sup>

Even in a landmark ruling in *favor* of the wife – finding that her husband’s violence did constitute legal cruelty, thus granting her a divorce – the court felt it was important to give the above cautionary note to prevent *Moyler* from becoming a slippery slope toward eroding “private virtue” in future cases. Their stated rationale for keeping the definition of legal cruelty “extremely strict,”<sup>41</sup> was the protection of the “private virtue”<sup>42</sup> of society’s most important institution: marriage. The ruling thus implemented increased legal protections for abused wives, just as it offered privacy ideology as the tool for undermining those protections.

Both *Moyler*, and *Black* are emblematic of how ‘privacy’ offset the increasing legal protections granted abused wives in the antebellum period. These cases demonstrate that, limits to the chastisement prerogative notwithstanding, the legal cloak of domestic privacy enabled husbands to abuse their wives without fear of court interference.

Limits to the chastisement prerogative were further undermined by deep-seated ideologies about gender roles in marriage, which added scrutiny to abused wives’ behavior. Ostensibly, wife-beating cases assessed the legality of a husband’s actions toward his wife. A closer look at the anatomy of appellate and local court wife-beating cases, however, reveals that jurists first and foremost assessed the extent to which both a husband’s and wife’s

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<sup>39</sup> Ibid.

<sup>40</sup> *Moyler v. Moyler*, 11 Ala. 623 (1847).

<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

behavior adhered to conventional norms for performing gender within families. A ruling in an abused wife's favor necessitated weighing her and her husband's gender role performance against each other, with the scales already primed against her.

In divorce cases especially (in lower and supreme courts), it was understood that courts would weigh spouses gender role performances as an important precursor to considering the facts of the case – though *always* with a higher bar for wives, largely because the wife's role was submission and obedience. This is significant because it established that a husband's violence would only be considered by the courts for women who demonstrated ideal womanhood, and thus legitimate victimhood. For example, in Alabama's *Moyler* ruling, weighing the evidence to adjudicate Mr. Moyler's alleged cruelty meant simultaneously weighing the evidence to adjudicate Mrs. Moyler's femininity. To this end, the court finally concluded that, "The proof shows that the wife was kind, dutiful and obedient."<sup>43</sup> This kind of statement affirming or critiquing a wife's gender performance was present throughout my local and appellate case data.

In cases where an abused wife's gender role performance was found wanting, she had no chance of a ruling in her favor. This stipulation was also infused into precisely the case law that ostensibly granted wives increased legal protection from abusive husbands. For example, shortly after its landmark 1847 *Moyler* ruling that had provided the broadest definition of legal cruelty, the Alabama Supreme Court received a case from which they determined that a wife's behavior should be considered in mitigation of her husband's violence against her. In *Robbins v. Alabama* (1852), Mr. Robbins wanted to appeal his conviction for wife-beating, on the grounds that his wife's behavior provoked him.<sup>44</sup> The Supreme Court agreed with him, and reversed his conviction. In the trial court, Mr. Robbins did not deny that he beat his wife. However, he wanted to introduce evidence to show that his actions were an immediate trigger response to his wife's "misconduct and bad behaviour,"<sup>45</sup> which the trial court did not allow. On appeal, his defense argued that from previous cases of assault and battery, it has been established that there should be a distinction between individuals who commit an assault in the heat of the moment, and those who commit an assault even after they have had the benefit of a cooling off period. The appellate judges agreed. They expressed no doubt that Mr. Robbins committed the "unmanly act"<sup>46</sup> of wife-beating on "one whom it was his duty to nourish and protect"<sup>47</sup> – reiterating the courts disdain for wife-beating and wife-beaters. They nevertheless agreed with Mr. Robbins that his actions were an immediate response to his wife's misconduct. Unfortunately, the case record does not offer insight regarding the nature of Mrs. Robbins' "bad behavior,"<sup>48</sup> which is perhaps why the *Robbins* case was subsequently not as widely cited as the *David v. David* case three years later (described below).

A third way in which limits to the chastisement prerogative were undermined in

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<sup>43</sup> *Ibid.*, 626.

<sup>44</sup> *Robbins v. State*, 20 Ala. 36 (1852).

<sup>45</sup> *Ibid.*, 39.

<sup>46</sup> *Ibid.*, 39.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

practice was that the courts saw marital relations within the lower orders as inherently pathological. This matters because it normalized violence in the “lower orders” in the following way: wives of the lower orders had a higher tolerance for violence, as they were matched with husbands who were more prone to violence. Accordingly, wives from the lower orders were seen as being less appropriately gendered as women from the higher classes. Indeed, gender is always articulated through classed assumptions. As a result, the bar for what constituted cruelty against wives in such families was higher.

In its capacity as the first U.S. ruling to uphold husbands’ right of spousal chastisement, *Bradley v. Mississippi*<sup>49</sup> established British common law as American common law, with very little tailoring or alteration. A key tenet of British common law on the subject of wife-beating was that despite British courts’ disapproval of the practice, it needed to be upheld for the benefit of “the lower rank of people.”<sup>50</sup> British common law had a decidedly status-based interpretation of wife-beating. Indeed, in the context of 18th-century Britain, the notion that people were, by nature (God), born into status groups – such as commoners, nobility, and monarchs<sup>51</sup> – was very much in line with natural law philosophy. As such, that a litigant’s position in the “lower orders” would be salient to his moral capacity made sense for British jurists. However, it is precisely this emphasis on status in the 1824 *Bradley* ruling that Mississippi jurists carried forward. Citing British common law almost verbatim, the *Bradley* ruling stated about a husband’s right of chastisement:

Sir William Blackstone says, during the reign of Charles the first, this power was much doubted.--Notwithstanding the lower orders of people still claimed and exercised it as an inherent privilege, which could not be abandoned, without entrenching upon their rightful authority, known and acknowledged from the earliest periods of the common law, down to the present day.<sup>52</sup>

The resonance of this “lower orders” logic for the antebellum South was perhaps not too incongruent since, at this point in history, the Southern economy allowed for a social structure that more closely resembled an aristocracy than the capitalist class structure that characterized the industrial North.<sup>53</sup> It is unclear whether or not Mr. Bradley was a man from the “lower orders” of Mississippi society. Nevertheless, in its capacity as the precedential U.S. case that declared wife-beating legal, the *Bradley* ruling infused class-based distinctions into the logic of adjudicating wife-beating cases.

Alabama’s landmark *Moyler* ruling further entrenched this classed logic into American common law. Also directly quoting a British ruling, *Evans v. Evans*,<sup>54</sup> it stated that:

Still less is it cruelty, where it wounds not the natural feelings, but the acquired feelings, arising from the particular rank and situation; for the court has no scale of sensibilities, by which it can gauge the quantum of injury done and felt; and therefore, though the court will not absolutely exclude considerations of that sort, where they

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<sup>49</sup> *Bradley v. The State*, 1 Miss. 157, (1824).

<sup>50</sup> 1 Bl. Com. 445.

<sup>51</sup> 1 Bl. Comm. 396.

<sup>52</sup> *Bradley v. The State*, 1 Miss. 157, (1824).

<sup>53</sup> Wyatt-Brown, *Southern Honor*, 62-87.

<sup>54</sup> *Evans v. Evans*, 1 Hagg. 39 (1790).

are stated merely as matters of aggravation, yet they cannot constitute cruelty, where it would not otherwise have existed; of course the denial of little indulgencies, and particular accommodations, which the delicacy of the world is apt to number among its necessaries is not cruelty. It may to be sure be a harsh thing to refuse the use of a carriage, or the use of a servant: it may in many cases be extremely unhandsome, extremely disgraceful in the character of the husband; but the ecclesiastical court does not look to such matters.<sup>55</sup>

The “natural feelings” speaks to the mental and emotional abuse discussed above. “Acquired feelings,” on the other hand, speak to material depravation and/or the mental and emotional trauma that may result from material depravation. Depravation is recognizable when a husband fails to symbolically and materially provide for his wife in a way that is congruent with their social status. As with the wounded “natural feelings,” the ruling went on to state that depravation was not considered legal cruelty, but was able to be considered as an *aggravation* of physical cruelty. In doing so, it instituted a logic that privileged higher status women in the pursuit of divorce. All women could subsequently assert verbal, mental, and emotional abuse in aggravation of an act of cruelty. But only privileged women could assert the “denial of little indulgences,” or accommodations such as, “a carriage of the use of a servant,” as aggravations of cruelty unto themselves, or more significantly, as forms of mental or emotional abuse as aggravations of cruelty. To even lend attention to such aggravations was a troubling flirtation with the notion that privileged women were more delicate than their lower-status counterparts.

Throughout the 19th-century, John Bouvier’s highly cited American Law Dictionary further entrenched this status distinction in its definition of marital “Cruelty.” It stated:

Between husband and wife, those acts which affect the life, the health, or even the comfort of the party aggrieved, and give a reasonable apprehension of bodily hurt, are called cruelty . . . It is to be remarked that exhibitions of passion and gusts of anger, which would be sufficient to create irreconcilable hatred between persons educated and trained to respect each other's feelings, would, with persons of coarse manners and habits, have but a momentary effect. An act which towards the latter would cause but a momentary difference, would with the former, be excessive cruelty.<sup>56</sup>

*Bradley, Moyler*, and Bouvier were instrumental in: normalizing violence in lower status families; normalizing the notion that lower status women had a higher capacity for cruelty; and infusing those normalizations into how courts adjudicated wife-beating cases. The Alabama Supreme Court would later use both rulings, as well as Bouvier, in their 1871 *Fulgham* ruling on their first wife-beating case involving a black family, or rather, “high tempered . . . emancipated slaves.”<sup>57</sup>

Not only did class-based stereotypes function to raise the threshold for a finding of cruelty in abuse cases involving such families, it also influenced the court’s interpretations of

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<sup>55</sup> *Moyler v. Moyler*, 11 Ala. 624 (1847).

<sup>56</sup> 1 Bouv. Law. Dict. 675.

<sup>57</sup> *Fulgham v. The State*, 46 Ala. 143.

wives' performance of gender. Alabama's *David v. David* (1855) case illustrates both. The violence that Henry David inflicted on his wife, Milly, was egregious and undeniable. He choked her. He often struck her with a stick – sometimes with a whip. He pulled her hair. At knife's point, he threatened to cut her throat. Many of these allegations were corroborated by witnesses. The trial court therefore granted Milly her divorce on the grounds of cruelty. Like the trial court, the appellate court condemned Henry's "harsh" and "unmanly violence."<sup>58</sup> They nevertheless reversed the lower court's ruling and denied Milly her divorce. Their reasons, once again, lived at the intersection of status and gender.

*David v. David* went further than any other case in indoctrinating the notion that marriages between low status people were inherently pathological. In his ruling, the appellate judge first established that "cruelty is frequently a term of relative meaning."<sup>59</sup> Under "ordinary circumstances,"<sup>60</sup> he admitted, this would have been an open and shut case of divorce on the grounds of marital cruelty. Resuscitating the class logic of *Moyler*, however, he cautioned that cruelty must be adjudicated on a case-by-case basis. To establish a universal criteria for what constitutes cruelty beyond affecting life, limb, or health would ignore that:

Between persons of education, refinement, and delicacy, the slightest blow in anger might be cruelty; while between persons of a different character and walk in life, blows might occasionally pass without marring to any great extent their conjugal relations, or materially interfering with their happiness.<sup>61</sup>

The *David* ruling therefore took for granted that those not privileged with education, refinement, and delicacy form marital unions in which physical violence is, at least to some extent, a way of life. For that reason, such unions exist outside of the boundaries of "ordinary"<sup>62</sup> and are instead intrinsically tainted with immorality, impropriety, and baseness. Among the delicate and refined members of society, the bar for what constitutes cruelty would therefore remain much lower. What did any of this have to do with Henry and Milly David? Unfortunately for Milly David, the court found her behavior to be anything but refined and delicate. And what it affirmed was that the difference between a low and high status woman was her performance of femininity.

The "evil,"<sup>63</sup> unmanliness, and potential barbarism of Henry's actions was already established. But again, wife-beating was not an individual infraction, so much as a couple's infraction in a socio-legal system where a married couple constituted one person in the eyes of the law.<sup>64</sup> Having weighed the evidence of Milly's accusations against Henry, the court therefore made clear that:

Before the court will lend an ear to her complaints, she must at least attempt to remedy the evil by a reformation of her own conduct. If, by a gross violation of her

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<sup>58</sup> *David v. David*, 27 Ala. 224 (1855).

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*, 225.

<sup>62</sup> *Ibid.*, 224.

<sup>63</sup> *Ibid.*, 225.

<sup>64</sup> The exceptions to coverture largely fell under property rights, and again, when a wife committed murder or treason.



duties as a wife, she has provoked the husband to go further even than he should have gone, the blame in a great measure rests with herself.<sup>65</sup>

As it turns out, Milly's gender role performance was found wanting. In one incidence, Henry was negotiating with a visitor to their home over the purchase of a slave. Milly had some opinions about this transaction, which was, in and of itself not an issue, as the court acknowledged that "females are sometimes apt to have views of their own as to the rights of their husbands over property."<sup>66</sup> However, Henry never asked Milly for her opinion. So instead of keeping it to herself, she made the grave mistake of forgetting and/or ignoring that "it is, to say the least of it, highly unbecoming in a female to abuse a visitor, who comes to the house on a matter of business with her husband."<sup>67</sup> Beyond that, the court found a lot evidence of her "unbecoming (not to say outrageous)"<sup>68</sup> – though they just said outrageous – temper without provocation. At one point, she even exhibited "abuse of the divine,"<sup>69</sup> when she inflicted a "verbal castigation"<sup>70</sup> on her husband in front of a visitor during their family worship. In fact, though she was allegedly "harsh and unkind"<sup>71</sup> to her husband in private, the fact that she would not even perform the proper respect for him in front of strangers and/or visitors was what the courts found most objectionable. Indeed, coverture logic rested on the notion that society was built on stable families, which, in reality meant the performance – the outward appearance – of stable families. In the presence of others, however, Milly would hurl insults at Henry, calling him a "tallow-faced devil,"<sup>72</sup> a "poor scamp,"<sup>73</sup> "worth nothing,"<sup>74</sup> and a "liar."<sup>75</sup> And sometimes, not only would she give him the silent treatment in front of others, but she would refuse to "help his plate"<sup>76</sup> at the table, as if he did not exist at all.

Henry was a preacher – a fact that mattered to the court only in consideration of Milly's behavior toward him, and not his behavior toward her. She was therefore already in the wrong for forsaking her wifely duties, but even more so for behaving that way for a husband who was also a man of God. What appalled the court most was Milly's actions on the day that Henry threatened to kill himself. The couple had been fighting one morning. It got so bad that Henry threatened to kill himself by drinking a vial of poison. A scuffle ensued when Milly attempted to prevent him from doing so, and the vial broke. Undeterred in his threat of suicide, Henry then stormed off threatening to hang himself. While he was gone, she cried to a witness to the whole event that Henry's death would be her fault and she lamented all of the agony she had caused him. She was essentially rapt in a deep state of

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<sup>65</sup> *David v. David*, 27 Ala. 225 (1855).

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*, 226.

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*

remorse and guilt. After a while, a man rode up to their front gate. Upon realizing that it was Henry, Milly's remorse was instantly transformed into rage, declaring that she knew he wouldn't follow through with his threat and that, "I wish to God he had!"<sup>77</sup> She then promised to give him "a blessing,"<sup>78</sup> which meant verbally berating him with "the most unmeasured and intemperate abuse, in language which, if not absolutely indecent, was at least low and profane – such as no female who had any respect for herself should have uttered."<sup>79</sup> Again, the court already regarded her behavior as egregious affront to femininity. But it found her use of "God" and "blessing" to inflict her verbal abuse to be a blasphemy that stripped her of her womanhood altogether.

The appellate court ultimately denied her divorce because, Henry's violence notwithstanding, Milly David was found guilty of "a gross violation of the wife's duties."<sup>80</sup> She would therefore not be relieved of a marital contract in which she refused to uphold her end. As with the *Robbins* case, the high court determined that it was necessary to weigh Henry's violence against Milly's behavior as a possible provocation. The result of this exercise was summarized thusly:

There may, as we have intimated, be cases where the offer of personal violence to a female might properly be regarded as an act of barbarous and unmanly cruelty; but we must discriminate--we must not be so unjust as to put all of the sex on the same level; and if a woman chooses to unsex herself, and forget that she is a female, she should not complain if others do not always remember it.<sup>81</sup>

Indeed, not all women are equipped with the breeding and propriety that high status teaches. Not all women, in other words, are real women. For, to act as Milly did, is to unsex one's self and thus lose the legal protections afforded real women. In keeping with the class logic of cruelty, the court concluded that Milly was, "entirely wanting in that refinement and delicacy of feeling which would cause her to measure the cruelty of a blow from her husband by any other standard than the bodily pain it occasioned."<sup>82</sup> In other words, the only claim to cruelty that an unsexed, and therefore low class woman could make was the literal act of violence, which the court found to be inconsequential.

## SLAVE-BEATING LAW

The racial separation that characterizes U.S. race relations took shape during the postbellum era, in the beginning of the Jim Crow era.<sup>83</sup> Wife-beating scholarship, however, has yet to appreciate the racial proximity and intimacy that characterized domestic relations

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<sup>77</sup> *Ibid.*, 227.

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*, 222.

<sup>81</sup> *Ibid.*, 227.

<sup>82</sup> *Ibid.*

<sup>83</sup> Vann Woodward, *The Strange Career of Jim Crow*, 15-17; Peter Bardaglio, *Reconstructing the Household: Families, Sex, and the Law in the Nineteenth-Century South* (Chapel Hill: University of North Carolina Press, 1995), 195-213.

in the antebellum South.<sup>84</sup> Specifically, Southern domestic relations were conceived in terms of three relationships that functioned together to comprise the household. As the Master of the house was understood to be the natural ruler of this domain, these three relationships got conceptualized in relation to him: husband and wife, father and child, master and servant. Where present, each of these relations had a specific function that contributed to the operation of the household. To focus on the husband and wife relationship is thus an incomplete picture of Southern domestic relations. This matters for wife-beating cases because jurists, in some instances, did not regard these relationships to the master of the house as legally distinct.<sup>85</sup>

### **(White) Men Can Beat Slaves**

Not only did (white) men have the right to beat their wives, they also had the right to beat slaves during the antebellum period. This was based on the same Master of the House logic in which the Master had social and legal responsibility for all members of his household – to include slaves. In 1829, North Carolina’s supreme court issued a ruling in a case of slave chastisement that would characterize the role of cruelty in the Master-Slave relationship throughout the antebellum South. Specifically, *N.C. v Mann* ruled that because slave owners had absolute dominion over their slaves, “cruel and unreasonable battery on a slave”<sup>86</sup> was not an indictable offense. In other words, the Mann ruling gave masters the right to chastise their slaves, just as antebellum wife-beating laws upheld the master’s right to chastise his wife. Unlike wife-beating laws, however, the Mann ruling declared that master’s had the right to beat their slaves with unreasonable and excess cruelty, and could therefore not be criminally indicted for doing so.

Elizabeth Jones hired out her slave, Lydia, to John Mann for a year. During that time, John chastised Lydia for something “small,”<sup>87</sup> and Lydia ran from him in the process. Mann called out to her to stop. When Lydia kept running, Mann shot and wounded her. The trial judge instructed the jury that if they felt John’s punishment to be “cruel and unwarrantable, and disproportionate”<sup>88</sup> to Lydia’s offence, they should find him guilty, as he only had “special property”<sup>89</sup> in Lydia. The jury found him guilty. Mann appealed, and the North Carolina supreme court reversed his conviction.

The ruling first upheld that when a slave is hired out, the law gives all powers of the master to a hirer. The primary question ahead of them was thus, did Mann, in his capacity as Lydia’s master during the time he beat and shot her, act cruel and unreasonably: “the Court

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<sup>84</sup> Steven Stowe, *Intimacy and Power in the Old South: Ritual in the Lives of Planters* (Baltimore: Johns Hopkins University Press, 1987), 161-191.

<sup>85</sup> See *State v. Pendergrass*, 19 N.C. 365 (1837) in previous section (pgs. 18-20), a case involving child abuse that was highly cited in wife-beating cases, due to its ruling about Master of the house duties, writ large.

<sup>86</sup> *NC v. Mann*, 13 N.C. 264 (1829).

<sup>87</sup> *Ibid.*, 263.

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.*

is compelled to express an opinion upon the extent of the dominion of the master over the slave in North-Carolina.”<sup>90</sup> In his appeal, Mann’s defense attempted to liken the master-slave relationship to the parent-child relation. The ruling vehemently disagreed with this linkage, stating that the parent-child relationship is fundamentally opposite to master-slave relationship because it boils down to the difference between “freedom and slavery.”<sup>91</sup> The end of parenting, it stated, is to raise a child to be useful in a station in which he will ultimately be a freeman. “Moderate force”<sup>92</sup> is helpful to that end. And even if that doesn’t work, then it’s best to leave harsher correction to the law than a “private person.”<sup>93</sup> The end of slavery, however, is:

“profit of the master, his security and the 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. What moral considerations 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--that he is thus to labour upon a principle of natural duty, or for the sake of his own personal happiness, such 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. Such obedience is the consequence only of uncontrolled authority over the body. There is nothing else which can operate to produce the effect. The power of the master must be absolute, to render the submission of the slave perfect.”<sup>94</sup>

The ruling is emblematic of the ‘natural law’ justifications for slavery, dating back to Ancient Greece. Thomas Aquinas, William Blackstone, James Kent, and other thinkers on which American jurisprudence relied, condemned chattel slavery.<sup>95</sup> Though widely cited in Southern courts, both Kent’s and Blackstone’s *Commentaries* offered elaborate condemnations of U.S. slavery specifically,<sup>96</sup> which left a hole in Anglo-American legal doctrine justifying Southern slavery. Aristotle, on the other hand, the ‘father’ of the natural law with which these same scholars and jurists largely aligned, found that *one* form of slavery is quite natural and thus necessary. The post-war practice of enslaving one’s vanquished enemies, for example, he argued was unnatural, and thus wrong, because it meant enslaving men who were naturally made to rule.<sup>97</sup> However, when a master and slave relationship is comprised of a man naturally fit to rule and a man naturally fit to be ruled, then slavery is natural, and thus right.<sup>98</sup> Given the deeply entrenched antebellum notion that slaves were incapable of decision-making, indeed survival, without the charitable paternalism of whites,

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<sup>90</sup> Ibid., 264.

<sup>91</sup> Ibid., 265.

<sup>92</sup> Ibid., 266.

<sup>93</sup> Ibid.

<sup>94</sup> Ibid.

<sup>95</sup> Thomas Aquinas, *Summa Theologica*, I of II. Question 105. Obj 1 (and Answer); 1 Bl. Comm. 423; 1 Kent Comm. 274-83.

<sup>96</sup> 1 Bl. Comm. 425; 1 Kent Comm. 279-83.

<sup>97</sup> Aristotle, *Politics, Books I* (London: Longmans, Green, and Company, 1877), Part 6.

<sup>98</sup> “It is clear, then, that some men are by nature free, and others slaves, and that for these latter slavery is both expedient and right” (*Politics*, Book 1, Part 5).

Southern antebellum slavery is precisely the form of slavery that natural law regarded as right.<sup>99</sup>

Similar to wife-beating, the Mann ruling was also emblematic of how jurists also expressed moral outrage at cruelty towards slaves. Also similar to wife-beating, jurists nevertheless upheld Master's right to do so. On the one hand, the issue of protecting domestic privacy was at stake. But more than that, courts felt that slave-beating was "inherent in the relation of master and slave."<sup>100</sup> Recognizing that some Masters may abuse their natural right of chastisement, the ruling determined:

"That there may be particular instances of cruelty and deliberate barbarity, where, in conscience the law might properly interfere, is most probable. The difficulty is to determine, where *a Court* may properly begin. Merely in the abstract it may well be asked, which power of the master accords with right. The answer will probably sweep away all of them. But we cannot look at the matter in that light. The truth is, that we are for-bidden to enter upon a train of general reasoning on the subject. We cannot allow the right of the master to be brought into discussion in the Courts of Justice. The slave, to remain a slave, must be made sensible, that there is no appeal from his master; that his power is in no instance, usurped; but is conferred by the laws of man at least, if not by the law of God.<sup>101</sup>

In other words, for the courts to interfere in the Master's discipline over his slaves, no matter how cruel and reprehensible, would allow slaves to disobey their masters – an act even more reprehensible as it would upset the laws of God and man.

The Mann ruling on slave-beating was precedent applied throughout the South, to include Alabama. Alabama's 1854 *Dave v. The State* ruling, for example, upheld that:

In the relation of master and slave, the master is entitled to the absolute dominion and control over the slave. The slave owes absolute and unconditional submission to the master. The master has the right to chastise and punish the slave in order to enforce his obedience, and to compel him to the performance of his duties.<sup>102</sup>

Even when slaves violated public laws in public spaces, courts were more than happy to allow a slave's Master to be judge and jury. We see this logic in an 1846 Alabama ruling, for example, which reasoned that, "So far as it concerns the public, it is quite as well, perhaps better, that his punishment should be admeasured by a domestic tribunal."<sup>103</sup> And so by the end of the antebellum era, for both domestic and public infractions, slaves were first and foremost at the mercy of their Master's "domestic tribunal."<sup>104</sup>

Though Masters had the right to beat their slaves, the laws were also clear that Masters should not be allowed to abuse this right. The Mann ruling determined that instead of using the law as a deterrent to excessive cruelty to slaves, it was best to trust in the

<sup>99</sup> Elizabeth Spelman, *Inessential Woman: Problems of Exclusion in Feminist Thought* (Boston: Beacon Press, 1988), 43.

<sup>100</sup> *NC v. Mann*, 13 N.C. 266-7 (1829).

<sup>101</sup> *Ibid.*, 267.

<sup>102</sup> *Dave v. The State*, 22 Ala. 33 (1853).

<sup>103</sup> *Gillian v. Senter*, 9 Ala. 397 (1846).

<sup>104</sup> *Ibid.*

goodwill of masters, whose compassion for the human nature of their slaves,<sup>105</sup> and whose material interest in the chattel nature of their slaves, would prevent them from inflicting excessive cruelty on their slaves.<sup>106</sup> Alabama, however, was more willing to allow for legal intervention in cases of excessive cruelty to slaves. Alabama even stated as much in its state Constitution. Alabama's 1819 Constitution empowered the general assembly power to:

Oblige the owners of slaves to treat them with humanity, to provide for them necessary food and clothing, to abstain from all injuries to them extending to life or limb, and, in case of their neglect, or refusal to comply with the directions of such laws, to have such slave or slaves sold for the benefit of the owner or owners.<sup>107</sup>

Unlike wife-beating laws, the legal line between chastisement and cruelty for slaves remained subjective and undefined, all the way through to the end of the antebellum era. Indeed, Alabama's 1861 Constitution replaced this same section to read: "The humane treatment of slaves shall be secured by law."<sup>108</sup> The move toward less definitive language in the latter Constitution was a response to 40 years of the state judiciary's increasing unwillingness to add any specificity about how and/or when courts should intervene in cases of excess cruelty to slaves.

The Alabama courts reticence to engage with the issue of how and when the law should protect slaves from excessive cruelty is evidence in an 1864 ruling that acquitted a white man for excessive whipping of a slave, for the following reason:

What is reasonable punishment, and when it can be affirmed that correction has gone beyond this boundary, and become unreasonable and cruel, is a question which admits of no certain and uniform solution.<sup>109</sup>

In this case, Mr. Tillman hired out his slave to Mr. Chadwick, during which time Chadwick whipped the slave to an extent that Tillman felt was grossly excessive. The court found Tillman's complaint to be unjustified, however, because during the hiring period, Chadwick was in the role of Master and was thus in a better position than anyone to determine whether or not the punishment he employed was necessary to secure the slave's obedience. The ruling reaffirmed that the Master alone was the best judge of the degree of his violence against slaves, which is why it ultimately determined that, "The law cannot enter into a strict scrutiny of the precise force employed, with the view of ascertaining that the chastisement had or had not been unreasonable."<sup>110</sup>

Since the law on the books placed no clear limits on chastising slaves, the violence that slaves experienced at the hands of abusive Masters was monumentally worse than the

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<sup>105</sup> "the private interest of the owner, the benevolences towards each other, seated in the hearts of those who have been born and bred together, the frowns and deep execrations of the community upon the barbarian, who is guilty of excessive and brutal cruelty to his unprotected slave, all combined, have produced a mildness of treatment, and attention to the comforts of the unfortunate class of slaves, greatly mitigating the rigors of servitude, and ameliorating the condition of the slaves" (*NC v. Mann*, 13 N.C. 267-8, 1829).

<sup>106</sup> "dominion is essential to the value of slaves as property, to the security of the master" (*NC v. Mann*, 13 N.C. 268, 1829).

<sup>107</sup> Ala. Const. art. VI, Slaves, §1 (1819)

<sup>108</sup> Ala. Const. art. VI, Slavery, §2 (1861)

<sup>109</sup> *Tillman v. Chadwick*, 37 Ala. 317 (1861).

<sup>110</sup> *Ibid.*

violence experienced by Masters' wives. This is because both household and statutory chastisement of slaves far exceeded the lowest legal criteria for cruelty to wives, which was permanent injury. Slave bodies, were a testament to *lawful* permanent injuries. Indeed, the 1829 Mann ruling specifically upheld that a Master is not responsible for "an injury permanently impairing the value of the slave."<sup>111</sup> The slave codes mandated the whipping and maiming of slaves for state punishments. Scarring from whippings were commonplace on slave bodies. When one looks at Sale, Auction, and especially Runaway ads where indentificatory markings on slave bodies are described, it becomes clear that even after the practice of branding waned in the 1830s, the cutting away of body parts, such as ears, fingers, and toes were also common forms of chastisement that Masters continued to use on their slaves.<sup>112</sup>

When it came to inflicting physical violence on slaves, there were no gender distinctions. In fact, where the story of antebellum gender roles becomes more interesting is the codified legal distinctions between wives and slaves.<sup>113</sup> The natural law on which Southern slave laws were based held that human beings are imbued with special functions that make them fit to fulfill certain roles within a healthy society. A woman's natural role is that of child-bearing and companionship to her husband. A slave's natural role is to minister to the lives and needs of others. A man's natural role is to act as ruler of his household, and to attain the highest possible humanity by participating in civic life – a realm for which women and slaves are naturally unsuited.<sup>114</sup> Nevertheless, the civic realm cannot thrive, and men can therefore not attain their highest humanity therein, without women and slaves performing their roles within the home. Women and slaves, however, are distinct. Though women are inherently inferior to men, slaves have no humanity outside of service to their masters.<sup>115</sup> Accordingly, a husband rules over his wife for *her* sake, while a master rules over a slave for the *master's* own sake.

Referring to Aristotle – the father of natural law – Philosopher Elizabeth Spelman<sup>116</sup> highlights how female and male slaves have no gender identity under natural law. She explains that for Aristotle, "men" are males who are naturally capable of ruling, and who therefore have civic personhood, or citizenship. "Women" are females who bear a "man's" legitimate children and serve as his companion. Slaves use their bodies to do menial tasks at "men's" rule. Indeed, a slave population is such precisely because it is naturally fit to be ruled and therefore has no natural rulers within its ranks.<sup>117</sup> Male slaves can therefore never be "men," which means male slaves can never be the natural ruler of female slaves. This is why

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<sup>111</sup> *NC v. Mann*, 13 N.C. 264 (1829).

<sup>112</sup> Theodore Weld, *American Slavery as it is: Testimony of a Thousand Witnesses* (New York: American Anti-Slavery Society, 1839), 62, 77, 153-5.

<sup>113</sup> Alabama statutes, for example, were categorized by "master and slave" relationship on the one hand, and the "husband and wife" relationship on the other.

<sup>114</sup> *Politics*. Book1. Part 5.

<sup>115</sup> *Politics*. Book1. Part 13.

<sup>116</sup> Spelman, *Inessential Woman*.

<sup>117</sup> "But among barbarians no distinction is made between women and slaves, because there is no natural ruler among them: they are a community of slaves, male and female" (*Politics*. Book1. Part 2).

there is no gender in slave populations. As Spelman poignantly states, “one of the marks of inferiority of a male slave is that he is not a better specimen of humanity than his wife.”<sup>118</sup> As in ancient Greece, what was clear in the antebellum South was that, despite one’s sex, to be gendered was a privilege articulated through whiteness.

Slave women, to include slave men’s de facto slave wives, were therefore subjected to the precisely the same brutality as slave men. In other words, the law on the books and in action, allowed white men to brutalize black women’s bodies with impunity. Newspapers and narrative accounts reveal the degree with which white men could brutalize even female slaves they did not own, with little to no accountability. The son of a Huntsville, Alabama slave owner, for example, emphasized precisely that point when he recalled that one of his uncles killed a slave woman – “broke her skull with ax”<sup>119</sup> – because the slave “insulted her mistress! No notice was taken of the affair.”<sup>120</sup> He then stated that slaves were “frequently murdered”<sup>121</sup> without any accountability.

More disturbing are the accounts revealing how pregnant black women working on the railroads, performing long and hard labor, and being beaten into miscarriages by *white* men were not noteworthy. Even the most vulnerable populations of slaves – children and pregnant women – were not exempt from equal punishment as slave men. In some instances, a hole was dug in the ground to accommodate a slave woman’s “enlarged form”<sup>122</sup> during her abuse. Recounting his five-year stay in the South, a Massachusetts minister wrote:

Whipping the women when in delicate circumstances, as they sometimes do, without any regard to their entreaties or the entreaties of their nearest friends, is truly barbarous. If negroes could testify, they would tell you of instances of women being whipped until they have miscarried at the whipping-post.<sup>123</sup>

Indeed, slave narratives affirm the normative brutality to pregnant women, and to children. Antebellum newspapers further revealed a pervasive disregard for slave women’s pregnancies. For example, an ad in the Huntsville Democrat suggested throwing an 18-year-old slave “very far advanced with child”<sup>124</sup> in prison. Her owner offered a reward not for her capture, but rather, for “any one who will commit this young girl, in this condition, to jail.”<sup>125</sup> Newspapers were also littered with ads describing pregnant and maimed runaway slaves, in which pregnancy was not special in and of itself, so much as another identifier.

By the end of the antebellum era, the beating of slave women was a solely white male prerogative, that white men regularly exercised with impunity.<sup>126</sup>

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<sup>118</sup> Spelman, *Inessential Woman*, 43.

<sup>119</sup> Weld, *American Slavery*, 46.

<sup>120</sup> *Ibid.*

<sup>121</sup> *Ibid.*

<sup>122</sup> *Ibid.*, 59.

<sup>123</sup> *Ibid.*, 20.

<sup>124</sup> *Ibid.*, 154.

<sup>125</sup> *Ibid.*

<sup>126</sup> *Ibid.*, 153-5; Deborah Gray White, *Ar’n’t I a Woman? Female Slaves in the Plantation South* (New York: W. W. Norton & Company, 1999(1985)),173-77, 184-89.



## Slave Men Had No Right Of Chastisement

Scholars understandably focus on antebellum wife-beating cases among whites because the law did not recognize marriage among slaves. However, the administration of the legal prohibition of slave marriages was much more nuanced. Slave laws could never account for jurists' and legislators' lived experience in a society that engendered an intimacy between slaves and whites that troubled the fluid application of a master-slave logic that was indeed legally and ideologically hegemonic. The reality in much of the antebellum South is that most slaves lived in nuclear family units (which were of course always under threat of separation).<sup>127</sup> Even on the largest plantations, whites and blacks co-existed as Family. As such, the white population in one household – planters, children, wives, extended kinship relations – along with the white hired help, was very familiar with the affective bonds and kinship ties that existed among slaves. Allowing those bonds and relations to exist posed no threat to the white population, especially in the Deep South where slave-owners were not plagued by the hyper-vigilance and insecurity that characterized border-states. No, the antebellum household was very much in tact in Alabama precisely because everyone understood their role. Those who did not were subject to a legal system that quickly and harshly reassured society that its domestic norms were secure. For precisely this reason, de facto slave marriages were absolutely recognized by jurists and law-makers, who therefore, quite unintentionally, revealed a lot about their views on wife-beating among slaves.

Slave marriages were a recognized and often encouraged social institution throughout the South. Newspapers, slave narratives, and legal documents regularly referred to slave couples as husbands and wives. In fact, Alabama's Code (1852) (written by slave owners) encouraged maintaining the integrity of slave families:

In all sales of slaves under any decree, or order of the chancery or probate court, or under any deed of trust or power of sale in a mortgage, the slaves must be offered, and, if practicable, sold in families; unless affidavit be made, as required in the preceding section, and delivered to the officer, or other person, having the charge or management of such sale.<sup>128</sup>

Although the “if practicable” clause offered planters considerable leeway in abiding the statute, they were motivated to allow for (or force) slave marriages for a few reasons. Planters found that entire families – husbands, wives, and children – could sell for a higher price than if the slaves were sold separately.<sup>129</sup> Marrying slaves also symbolically satisfied planters' religious mores around marriage, and their attendant paternalistic responsibilities of teaching their slaves Christian morality.<sup>130</sup> They felt that it also established an atmosphere

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<sup>127</sup> Eric Foner and Olivia Mahoney, *America's Reconstruction: People and Politics after the Civil War*, (Baton Rouge: Louisiana State University Press, 1995), 38.

<sup>128</sup> *The Code of Alabama*, prepared by John J. Ormond, Arthur P. Bagby, and George Goldthwaite (Montgomery: Brittan and de Wolf, State Printers, 1852), §2057.

<sup>129</sup> In his “Letters from the South,” for example, James K. Paulding, Secretary of the Navy, was surprised to discover that a planter he befriended “married all the men and women he bought, himself, because they would sell better for being man and wife! (Weld, pg. 89).”

<sup>130</sup> On the issue of slave marriage, for example, the Alabama Supreme Court acknowledged that despite it

that would lead to a happier slave-force, and therefore fewer runaways. Planters would thus also permit slaves to marry slaves who lived on neighboring plantations, giving one half of the pair a written pass to spend the night on the other plantation with his/her 'spouse'.

Although blacks in the antebellum South were not legally allowed to do family until 1865, courts had in fact been establishing legal precedents pertaining to black families decades before. The practice of allowing or forcing slaves into marriages was so ubiquitous, that courts at times wrestled with whether or not the legal parameters pertaining to white husbands and wives should also pertain to de facto slave marriages. Even court cases that reached state Supreme Courts, for example, wrestled with the extent to which de facto slave marriages should be taken into account. For example, in 1836, North Carolina's Supreme Court presided over a case where Samuel, a slave, was sentenced to death for murdering another slave, which he appealed, due to the incompetency of the primary witness to testify against him. The entire case revolved around Mima, a female slave, who was the only witness to the murder. What both the lower and appellate courts struggled to establish was whether or not Mima, a slave, was a competent witness against her husband Samuel, also a slave, because the law did not permit wives to testify against their husbands in such cases. One would think that since the law clearly did not recognize marriage among slaves, the courts would have easily established that Mima's de facto slave marriage to Samuel did not translate to a law pertaining to de jure marriages. Ultimately, after much consideration, the appellate court determined that the law could not recognize their marriage, thus allowing Mima's testimony, and affirming Samuel's conviction.

Ostensibly a simple murder case, the details of this case revealed so much more, to include the degree to which "privacy" was a never a privilege afforded slave marriages. At the heart of the legal question of Mima's competency as a witness against Samuel was a de facto slave divorce, involving property rights, remarriage, and jealousy. What we see is that the antebellum household structure – predicated on the distinct wife, child, and slave relationships to the Master – inherently foreclosed the performance of normative gender roles *within* slave "marriages." As pertains to wife-beating, it is necessary to make sense of how all of the relationships within the antebellum household structured the internal workings of slave marriages. More to the point, the Master of the house, and all other domestic relationships, mitigated the way in which slave husbands and wives related to each other.

Samuel and Mima were slaves who, according to Mima's owner, "had cohabitated as man and wife for about ten years successively, and had had five children."<sup>131</sup> One night, Mima and Samuel had an argument in which Samuel declared he intended to leave her – a de facto divorce from a de facto marriage. Samuel attempted to take a bundle of clothing with him, property rights that would have been his legal prerogative were he white. Mima, however, asserted that if he wished to take the clothes with him, he needed to first "bring an

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*legal* nonrecognition, "morality and decency require, and religion commands, that the moral relation shall exist, and be faithfully observed" (*Smith, a Slave v. State*, 9 Ala. 992, 1846).

<sup>131</sup> *N.C. v. Samuel, a Slave*, 19 N.C. 177 (1836).

order from his master”<sup>132</sup> allowing it. Though Samuel was her husband, she did not regard him as the Master of their domicile. Neither did Samuel. As slaves, they understood that Samuel did not have the master of the house prerogatives synonymous with the legally recognized white husband-wife relationship. Furthermore, Samuel’s master was *not* Mima’s master. And it is not as if Mima called on *her* own master to solve the matter. No, what both slaves recognized is that Samuel, a male, was not a ‘man,’ and that the only way his desire to take the clothes would be legitimate is by his master’s say so. Samuel therefore left the clothes with Mima and returned two weeks later with his master’s order to take the clothes. The matter of property in their ‘divorce’ settled, Samuel left and Mima made clear that he was not to return. But there are two key factors to be determined in a *de jure* divorce: property and child custody, where applicable. Samuel and Mima had five children. In white (*de jure*) divorces, the law at this time would have favored the father, which made sense given the patriarchal logic of coverture.<sup>133</sup> However antebellum slave laws structured a decidedly matrilineal rule for slaves. For slaves, it was understood that the “issue,” or children, to whom slave women gave birth were tied to their mothers, until the mother’s Master decided otherwise. Samuel’s children were therefore never his to begin with. Eventually, another slave asked Mima’s owner for permission to marry Mima – not unlike a suitor would also ask the Master of the house for his female child’s hand in marriage. Her owner consented and the couple was “married.” Soon after, Mima witnessed Samuel murder her new husband. Samuel was tried and convicted for murder. He appealed on the grounds that Mima’s testimony should not have been allowed, as she was his wife. As Mima was the only witness to this crime, throwing out her testimony would have reversed Samuel’s conviction.

The North Carolina Supreme Court upheld his Samuel’s conviction, which may not be surprising since slave marriage was *clearly* not recognized by law. The court nevertheless made clear that the issue of recognizing slave marriage was in fact more nuanced, in the following way. According the ruling, slave marriages do not really constitute the legal “relation of husband and wife,”<sup>134</sup> so Samuel and Mima could not really claim incompetency as witnesses for each other; but even if they were incompetent witnesses as husband and wife, in this case Mima was already married to another slave and thus not Samuel’s wife any longer. Uncomfortable with definitively disregarding the legality of their marriage, the ruling vacillated between what it regarded as “moral considerations” and “legal principles.”<sup>135</sup> Put differently, the court acknowledged the legal principles, but struggled with their morality. It rendered a lengthy explication of coverture logic and why wives cannot testify against husbands. It further detailed the rationale behind contracts and who has the human capacity to therefore enter into a marital contract to begin with. What followed from both logics was that slaves cannot enter into marital contracts without “curtailing the rights and powers of the masters.”<sup>136</sup> Morally, however, the court found this logic to which it agreed to be

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<sup>132</sup> Ibid.

<sup>133</sup> Grossberg, *Governing the Hearth*, 250-51.

<sup>134</sup> *N.C. v. Samuel, a Slave*, 19 N.C. 178 (1836).

<sup>135</sup> Ibid.

<sup>136</sup> Ibid., 182.

“unfortunate,” a “melancholy addition to the misfortunes and legal disabilities of this depressed race.”<sup>137</sup> It then offered a profound explication of what slave marriage really is:

In reference to the general law of marriage, and also to the known usages and modes of forming this connection between slaves, this proviso can mean only that concubinage, which is voluntary on the part of the slaves, and permissive on that of the master—which, in reality, is the relation, to which these people have ever been practically restricted, and with which alone, perhaps, their condition is compatible.<sup>138</sup>

Concubinage. The highest form of an intimate relationship to which slaves could aspire. To the extent that anything can be voluntary when one is enslaved, “voluntarily” entering into a relationship where, by definition, one will always be lower than a wife, is all that female slaves could hope for. And male slaves could certainly never be “husbands” since, as Spelman reminds us, a male slave is never “a better specimen of humanity than his wife.”<sup>139</sup> That was a gender privilege afforded only to white men.

The Alabama Supreme Court wrestled with this same “moral” vs. “legal” difficulty in an almost identical 1846 case. A slave wife witness her former husband murder her new husband. Her former husband appealed his conviction also on the grounds that his wife’s testimony should not have been permitted. The supreme court found the admissibility of the slave wife as a witness in that case to be of “great interest.”<sup>140</sup> But their ruling ultimately deferred to the North Carolina decision, adding that “whilst we admit the moral obligation, which natural law imposes, in the relation of husband and wife, among slaves, all its legal consequences must flow from the municipal law.”<sup>141</sup> To do otherwise would undermine the Master of the house’s authority.

In the midst of their moral ambiguity over the legal status of slave marriages, Southern whites were unequivocal – morally and legally – that slaves were slaves, never to be confused with whites or with having the gender privileges that whiteness affords. In other words, even though planters were in the habit of allowing slave marriages, that did not mean, for example, that they regarded slave women as being worthy of protection and slave men as being masters of their domiciles. Slave marriages were not simply marriages with a “slave” adjective. They were not unions in which slaves performed, or imitated, white marriages. In the eyes of slaves and whites alike, slave marriages were a fundamentally different thing altogether, intrinsically distinct from the white institution of marriage, legally, ideologically, affectively, and in every day practice.

The pervasive acknowledgement of slave marriages notwithstanding, black men had no rights of chastisement, to include with their de facto wives. Indeed, even when wife-beating was present in slave marriages, courts never understood it as such. Wife-beating was a construct that only made sense under coverture logic. Since male slaves had no master of the house authority, the courts could only interpret slave wife-beating as slave-beating. Slave wife-beating was therefore nothing more than slave-on-slave assault. For example, at

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<sup>137</sup> Ibid.

<sup>138</sup> Ibid.

<sup>139</sup> Spelman, *Inessential Woman*, 43.

<sup>140</sup> *Smith, a Slave v. the State*, 9. Ala. 990 (1846).

<sup>141</sup> Ibid., 992.

precisely the same time that Alabama courts were adjudicating the parameters of marital cruelty, the Supreme Court was presented with a case of slave murder. Balaam, a slave, was convicted for murdering his former wife, Ellen. Both the trial and appellate courts repeatedly acknowledged that the pair once lived together as “husband and wife”<sup>142</sup> and eventually “quarreled and separated.”<sup>143</sup> A year later, when Baalam and Ellen reconciled, and were seen walking together, Ellen was later found dead. In the midst of other evidence pointing to Baalam as the murderer, the court allowed evidence of the tumultuous nature of their previous relationship, as a possible indication of malice. Baalam appealed, arguing that the nature of their past relationship should not have been allowed since it was a year earlier and the couple subsequently reconciled. The appellate court disagreed, affirming Baalam’s conviction. The most salient issue in the appeal was the nature of Baalam and Ellen’s relationship when they were “husband and wife,”<sup>144</sup> which the court fell short of naming beyond the fact that the couple “quarreled.”<sup>145</sup> Yet, clearly the nature of their quarrels was such that witnesses felt they were evidence that Baalam murdered Ellen. The fact that this was the sentiment an entire year after the couple separated further points to a marriage in which witnesses felt Ellen was not safe. But of course, all of this is implied. A slave husband murdering his former slave wife did not warrant the kind of judicial conversations about marriage, marital roles, wifely protection, and husband’s authority that were being had in white wife-beating/murdering cases. After all, husband and wife notwithstanding, slaves were slaves, first and foremost. The case of *Balaam v. the State* was thus, a de-gendered case about one slave mistreating and ultimately murdering another.

Ultimately, slave husbands were not allowed to beat slave wives because *slaves* were not allowed to beat other *slaves*. In practice, Masters usually disciplined slaves who beat other slaves without their permission. For example, Dinah and Bob were slaves who lived together as husband and wife on the property of Dinah’s master. One day in 1855, upon discovering that Bob had beaten Dinah severely, Dinah’s master responded by whipping Bob severely, and effectively ended their marriage by sending Bob to live on a neighboring plantation.<sup>146</sup> This was a standard punishment used against slave husbands in such cases.<sup>147</sup> This example also highlights how the domestic privacy that was legally and culturally held as a sacred right for white families, was never applicable to slave families. Every aspect of slave family life was shaped by the prerogatives of their Masters.

The first Alabama case to formally establish that it was an offense for one slave to commit an assault and battery on another involved a separate incident involving both Dinah and Bob.<sup>148</sup> A year after Bob was sent to live on a neighboring property, Martha Lou, a white child who was very much attached to Dinah, followed her out to the field while she worked, which was not at all unusual. It was early morning. Bob was also working in the field a few

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<sup>142</sup> *Balaam, a Slave v. State*, 17 Ala. 451 (1850).

<sup>143</sup> *Ibid.*

<sup>144</sup> *Ibid.*, 453.

<sup>145</sup> *Ibid.*, 455.

<sup>146</sup> *Bob, a Slave v. State*, 29 Ala. 20 (1856).

<sup>147</sup> Clinton, “Bloody Terrain,” 319.

<sup>148</sup> *Bob, a Slave v. State*, 29 Ala. 20 (1856).

hundred yards away. Seeing Dinah, he rushed to her demanding that Dinah give him the axe with which she was working. She refused. A scuffle ensued. Martha Lou was standing very close by, likely attempting to reach Dinah whom she cared for deeply. But upon wresting the axe from Dinah, Bob turned and struck Martha Lou with it. He then stood between Dinah and the little girl as her dying body twitched on the ground. Dinah was able to wrestle the axe from Bob again. Bob then drew a knife and rushed Dinah attempting to stab her. Dinah somehow caught the knife, and after nearly bending it in half, got possession of it. She then pleaded with Bob not to kill her and begged him to let her get water from a nearby stream. She hoped she could save Martha Lou by washing her face and head with water. Bob consented, holding Dinah by one of her wrists. Dinah threw the axe behind her as they went. At the stream, Dinah once again begged for her life and for a chance to save Martha Lou. Bob replied, “No, I came here to kill you and Lou. I have killed her, and now I mean to kill you.”<sup>149</sup> Dinah begged once more. Bob reiterated his resolve. Since Bob had loosened his hold on her wrist, Dinah took the chance to run. Bob gave chase, struck her, and jumped on her, knocking her out. Dinah did not regain consciousness until mid-day. Bob was tried and convicted for murdering Martha. He appealed on the grounds that since it was actually his intent to kill Dinah, his accidental killing of Martha should have been a lesser conviction for manslaughter.

The courts did not doubt, question, or take issue with referring to Bob and Dinah as a husband and wife who were separated. That is precisely how jurists, as well as the white witnesses, interpreted the couple’s relationship. They all also believed the extent of Bob’s violence toward Dinah. Nevertheless, no one conceptualized his violence as wife-beating. One of the primary issues at stake in the appeal was whether or not it was illegal for a *slave* to assault another *slave*. Bob’s defense argued that since it was never his intention to murder Martha Lou, and since he did not even succeed in his intention to murder Dinah, he was, “at most, engaged in an attempt to commit an assault and battery on Dinah, a slave; and that the law knows no such offense.”<sup>150</sup> The appellate court disagreed, affirming that in fact, “One slave may commit an assault and battery on another slave.”<sup>151</sup> But the court did determine that since Bob meant to kill Dinah and not Martha Lou, he was guilty of the lesser charge of involuntary manslaughter.

*Bob, a Slave v. Alabama* became a highly cited case precisely because it established that it was an offense for one slave to commit an assault and battery on another. It was a case of horrific violence committed by a slave husband on a slave wife, but not a case of wife-beating. Inherent in the precedent for which it was most notable is thus the erasure of gendered experiences within slave marriages. And that is the crux of the problem. This example also highlights how the domestic privacy that was legally and culturally held as a

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<sup>149</sup> Ibid.

<sup>150</sup> Ibid., 25.

<sup>151</sup> This was the appellate court’s interpretation of the statute: “§3317. For the offence of petit larceny, or any other offence of the same or less grade, any slave may be tried by a justice of the peace on warrant, and may be sentenced to receive any number of stripes, not exceeding one hundred; but no justice is authorized to inflict more than thirty-nine stripes, unless he associates with him two respectable free holders, who concur in the propriety of the sentence (*Code of Alabama*, 1852, p. 595).

sacred right for white families, was never applicable to slave families. Every aspect of slave family life was shaped by the prerogatives of their Masters.

When slave men were not punished for beating slave women, it was because white men ordered them to. As such, they still had no chastisement prerogative, but functioned only as an extension of white men's chastisement prerogative. For example, Walter Calloway, a former slave, recalled:

His master had a big black boy named Mose, mean as the devil and strong as an ox, and the overseer let *him* do all of the whipping. And man, he could sure lay on that rawhide lash. He whipped a negro girl, about 13 years old, so hard, she nearly died. And always afterward, she had spells of fits or something.<sup>152</sup>

Upon discovering how damaged the little girl was from this beating, the Master fired the white overseer, but Mose, only following the overseer's orders, was not punished.

The violence that slave women experienced, whether at the hands of whites or at the hands of blacks acting on the orders of their Masters, was astounding. Indeed, a slave, named Henry Cheatam recalled that he grew up with a negro overseer who was so mean that he swore that when he grew up, he'd kill that negro overseer if it's the last thing he does. He often witnessed that overseer beating his mother and said:

One day I saw him beat my Auntie who was big with a child, and that man dug a round hole in the ground an put her stomach in it, and beat and beat her for a half hour straight till the baby came out right there in the hole.<sup>153</sup>

The fact that such violence against slave women was so common<sup>154</sup> – even normalized during the antebellum period – is important because it will help us to better make sense of the wife-beating that occurred within black families after emancipation.

## True Victimhood

Antebellum wife-beating cases made clear that gender role non-compliance – synonymous with low-status gender performance – threatened to un-gender individuals, thereby stripping them of their gender-based legal prerogatives. On the one hand, “unmanly” acts had the potential to strip a man from his legally protected domestic authority. On the other hand, unwomanly acts disentitled a woman to the legal protections afforded appropriately feminine women. But what of individuals who were never afforded the privilege of gender to lose in the first place? Biological sex notwithstanding, one's racial identity is a necessary precondition to whether or not a person is gendered – a concept exemplified during U.S. slavery.<sup>155</sup> As courts wrestled with the legality and nuances of chastisement within the husband and wife relationship, what was always legal and in some cases even mandatory, was the beating and sexual exploitation of slave women.

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<sup>152</sup> *Federal Writers' Project: Slave Narrative Project, Vol. 1, Alabama, Aarons-Young to 1937*, Manuscript/Mixed Material, Retrieved from the Library of Congress, <https://www.loc.gov/item/mesn010/>, 1936, 52.

<sup>153</sup> *Federal Writers' Project*, 66.

<sup>154</sup> Gray White, *Ar'n't I a Woman?*, 185.

<sup>155</sup> Spelman, *Inessential Woman*, 43.

The extent to which slave owners sexually exploited their slaves is something that scholars now acknowledge, though it still largely remains an unspoken taboo. In the antebellum South, however, case records reveal that it was spoken about and acknowledged quite freely. The ubiquitous “concubinage” or “amalgamation” – both terms used to signify white men’s rape of black women – within Southern antebellum households is evident in letters, personal accounts, and the science of the day. For example, a Connecticut minister who had lived in North and South Carolina for 14 years recalled:

As it relates to amalgamation, I can say, that I have been in respectable families, (so called,) where I could distinguish the family resemblance in the slaves who waited upon the table. I once hired a slave who belonged to his own uncle. It is so common for the female slaves to have white children, that little or nothing is ever said about it. Very few inquiries are made as to who the father is.”<sup>156</sup>

Indeed, Northerners were acutely aware of this Southern phenomenon, as visitors to the South would often return with the observation that, “There was scarce a family of slaves that had females of mature age where there were not some mulatto children.”<sup>157</sup>

Southerners were equally aware of the white men’s sexual exploitation of black women – especially Southern white women of the planter class. In an 1861 diary entry, proud Southern belle, Mary Chestnut highlighted this phenomenon, while nevertheless praising the honor and dignity of Southern men and women. She wrote:

Like the patriarchs of old our men live all in one house with their wives & their concubines, & the Mulattoes one sees in every family exactly resemble the white children - & every lady tells you who is the father of all the Mulatto children in every body’s household, but those in her own, she seems to think drop from the clouds or pretends so to think -- Good woman we have, but they talk of all nastiness -- tho they never do wrong, they talk day & night of (illegible). My disgust sometimes is boiling over -- but they are, I believe, in conduct the purest women. Thank God for my country women -- alas for the men! No worse than men every where, but the lower their mistresses, the more degraded they must be.<sup>158</sup>

Chestnut’s language of concubinage and “mistress” to describe the ubiquitous rape of slave women is emblematic of how Southerners made sense of Southern life through the erasure of black women’s exploitation and abuse. This was especially the case in wife-beating cases.

Concurrent with antebellum politics of masculinity and chastisement was a politics of femininity where abused white women were able to attain true victimhood through the erasure of black women’s experiences. In far too many wife-beating cases during this era, slaves were prominent, yet silent, actors. This was especially true at the local level – chancery courts – where divorce cases were heard. Of the 72 lower court wife-beating cases in my sample, 21 were centered on blurred lines between the Master-Slave and Husband-Wife relationship.<sup>159</sup> Though adultery and cruelty were separate grounds for divorce, and certainly

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<sup>156</sup> Weld, *American Slavery*, 97.

<sup>157</sup> *Ibid.*, 51.

<sup>158</sup> Vann Woodward and Muhlenfeld, *The Private Mary Chesnut*, 42.

<sup>159</sup> Alabama Supreme Court rulings give the impression that slavery had little effect on Southern marital relations. Only two (*Mosser v. Mosser*, 29 Ala. 313, 1856; *Jeter v. Jeter*, 36 Ala. 391, 1860) of the Alabama



sufficient alone as grounds divorce, they were often blurred in cases of adultery with slaves, as if a husband's adultery with one of his slaves constituted, in and of itself, marital cruelty.<sup>160</sup> In fact, adultery with slaves became so common as a grounds for divorce that in 1856, one man tried and failed to convince the Alabama Supreme Court, that adultery with slave females should not be regarded as adultery at all.<sup>161</sup>

Battered white wives who sought divorces on the grounds of cruelty, nevertheless gave (not functionally) gratuitous elaborations about their husband's infidelity with slave women. Statements about a husband "having illicit intercourse"<sup>162</sup> with one of his slaves or an "adulterous connexion" with a female slave he had purchased,<sup>163</sup> are emblematic of how slave women's humanity was consistently ignored in this process. Battered white wives were often able to gain the court's sympathy by appealing to the social mores about respectable Southern femininity in which jurists were equally invested. They typically did so by illustrating how the *public* shame of their husband's 'affairs' was in and of itself an affront to their refined Southern femininity. Jane Bizzell, for example, was allegedly less offended by her husband's infidelity than she was by the fact that he had become "so *infatuated*"<sup>164</sup> with a "negro woman of light complexion,"<sup>165</sup> and was "so *open in his intercourse*"<sup>166</sup> [emphasis added]. Similarly the court granted Isabella Kelly her divorce after she emphasized how her husband

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Supreme Court's wife-beating cases indicate the role of slave(s) in the marital relationship. Lower courts however painted a very different picture. Four of the 21 wife-beating cases involving slaves in my sample were appealed in the Supreme Court, at which point, the mention of cruelty and/or adultery with slaves was no longer referenced. These were cases where wives sought divorces from abusive husbands on the grounds of cruelty and adultery with slave women. However, because property and alimony – not adultery – were central to the Supreme Court appeals, the centrality of the husband's relationship with slaves was no longer relevant. This indicates that Supreme Court rulings are not always reliable indicators of how pervasive the role of slaves was in antebellum wife-beating cases.

<sup>160</sup> As of 1824, Alabama's divorce statute allowed for divorce where, among other things, "where he shall have abandoned her, and lived in adultery with another woman; or where his treatment to her is cruel, barbarous, and inhuman (*Digest of Laws of Alabama*, 1843, §3, pg. 170). In 1852, the divorce statute was updated to allow for divorce in cases of adultery (§1961, 2). And based on the *Moyler v. Moyler* ruling, the cruelty clause was updated to allow for divorce, "In favor of the wife, when the husband has committed actual violence on her person, attended with danger to life, or health, or when, from his conduct, there is reason able apprehension of such violence" (Code of Alabama, 1852, (§1963, pg. 383).

<sup>161</sup> *Mosser v. Mosser*, 29 Ala. 313 (1856).

<sup>162</sup> Norrell Divorce. Sep 25, 1848 - Nov 30, 1852. Race and Slavery Petitions Project at the University of North Carolina at Greensboro. Race, Slavery, and Free Blacks, Series II: Petitions to Southern County Courts, Part A: Georgia (1796-1867), Florida (1821-1867), Alabama (1821-1867), Mississippi (1822-1867)

<sup>163</sup> Underwood Divorce. May 25, 1843. Race and Slavery Petitions Project at the University of North Carolina at Greensboro. Race, Slavery, and Free Blacks, Series II: Petitions to Southern County Courts, Part A: Georgia (1796-1867), Florida (1821-1867), Alabama (1821-1867), Mississippi (1822-1867)

<sup>164</sup> Bizzell Divorce. Apr 01, 1852 - Jun 30, 1853. Race and Slavery Petitions Project at the University of North Carolina at Greensboro. Race, Slavery, and Free Blacks, Series II: Petitions to Southern County Courts, Part A: Georgia (1796-1867), Florida (1821-1867), Alabama (1821-1867), Mississippi (1822-1867)

<sup>165</sup> *Ibid.*

<sup>166</sup> *Ibid.*

was having “constant and undisguised”<sup>167</sup> sex with a slave with whom he sired two children. As indicated in Chestnut’s statement above, respectable Southerners knew that these ‘relationships’ occurred. But decorum dictated that they did so with the proper degree of secrecy.

To further illustrate how antebellum wife-beating divorce cases erased and thus normalized black women’s experiences of abuse and exploitation, consider the example of Tabitha and William Pope’s divorce. Tabitha Pope explained that her husband, William, was physically abusive, and that his verbal abuse was even worse because his vile words were “outrages upon her womanly delicacy and sensibility.”<sup>168</sup> But Tabitha’s primary issue was with William’s “acts of adultery with women of color.”<sup>169</sup> In the early years of their marriage, the couple would frequently visit Tabitha’s parents who lived near by – that is, until William and Tabitha’s father had a falling out. It seems that during these visits, William was in the habit of having “an illicit relationship with Violet, a black woman owned by his father-in-law.”<sup>170</sup> Banned from visiting Tabitha’s family every again, William then began having “‘carnal connections’ with his own slave, a ‘certain Mulatto woman named Mary Jane.’”<sup>171</sup> Specifically, late in the evening, William would enter Mary Jane’s “quarters,”<sup>172</sup> take “off his boots & stockings & breeches & completely undress himself,”<sup>173</sup> then put out the lamp and light a candle.

As with similar cases, it is noteworthy how much time the Pope case record dedicates to the details of William’s indiscretions with slave women, in a divorce case that was supposed to be assessing the excessiveness of William’s chastisement of Tabitha. This was because, despite the law on the books that defined cruelty as *physical* abuse, in action, battered wives were able to convey that their husband’s relations with slave women, in and of themselves, amounted to cruelty against their womanly delicacy and sensibility.”<sup>174</sup> It was one thing for a black woman to be used regularly as a man’s sexual slave. It was quite another thing for that black woman’s repeated rape to be coopted by another woman to claim victim status for herself. But it was the worst thing when, through it all, the repeatedly raped black woman would never be regarded as a victim at all.

Mary Jane’s sexual exploitation was simultaneously salient and invisible in Tabitha’s successful attempt to attain True Victimhood – to say nothing of Violet, whose sexuality was the rightful property of Tabitha’s father. As different sides of the same coin, William’s adultery figured prominently while Mary Jane’s sexual exploitation was erased. When we take

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<sup>167</sup> Kelley Divorce. Mar 26, 1859. Race and Slavery Petitions Project at the University of North Carolina at Greensboro. Race, Slavery, and Free Blacks, Series II: Petitions to Southern County Courts, Part A: Georgia (1796-1867), Florida (1821-1867), Alabama (1821-1867), Mississippi (1822-1867)

<sup>168</sup> Pope Divorce. Feb 25, 1851. Race and Slavery Petitions Project at the University of North Carolina at Greensboro. Race, Slavery, and Free Blacks, Series II: Petitions to Southern County Courts, Part A: Georgia (1796-1867), Florida (1821-1867), Alabama (1821-1867), Mississippi (1822-1867)

<sup>169</sup> Ibid.

<sup>170</sup> Ibid.

<sup>171</sup> Ibid.

<sup>172</sup> Ibid.

<sup>173</sup> Ibid.

<sup>174</sup> Ibid.

the mulatto woman Mary Jane's humanity seriously, these antebellum wife-beating cases open a door to many questions. For example, who was Mary Jane? How did she experience her relationship with William Pope? How did she experience her relationship with Tabitha Pope? How did she make sense of the children she gave birth to, either by William another man? Who were the other men in her life? Who were the other women in her life? Did she ever love? How did she manage that love? How did she structure her daily life in order to be sexually available to William? How did the men, women, and children in Mary Jane's life have to structure their daily lives around William's sexual exploitation of her? How did they experience it emotionally? How did Mary Jane experience it emotionally? And as a slave, who would never be a Wife, was she beaten by her master, a man who beat his own wife, and who lived in a society that condoned the beating of its slave population?

Using the erasure of black women's dehumanization to escape abusive husbands also had material benefits for battered white wives. Property is central to divorce proceedings. In the antebellum South, where white women of the planter class were never expected to financially support themselves, alimony, in addition to property distribution, was a necessary part of divorce proceedings. Highlighting their husbands' infidelity with slave women was an also important strategy that abused wives used to secure their desired amount of post-divorce wealth and security. After sharing details about her husband's 'affair' with "a certain negro woman,"<sup>175</sup> for example, Caroline Stevens told the court that her husband, Nathaniel, only spent his vast income on "himself and his colored concubine."<sup>176</sup> In doing so, she appealed to sociolegal sensibilities about respectable manhood. Sexual exploitation was one thing. But treating one's slave with the fiscal responsibilities reserved for one's wife was not something that respectable men did. Emphasizing this juxtaposition in her alimony plea, Caroline highlighted that Nathaniel continued to provide for the slave woman, and the child Nathaniel fathered with her, while Caroline and her children were "in danger of being subjected to shame degradation and absolute want."<sup>177</sup> Against Nathaniel's wishes, the court ordered him to provide Caroline the alimony amount she requested.

Finally, given that slaves had a dual nature as human and chattel, property negotiations in wife-beating divorce proceedings completed slave women's dehumanization by reducing them solely to chattel. The Stacy divorce provides a good example. After an uneventful marriage, William Stacy brutally whipped his wife, Elizabeth, without provocation. Six months later, he abandoned her. What occurred in the divorce was, as in many divorces, a property dispute over slaves. When William abandoned Elizabeth, it was to live with his younger (sexual) slave, Charlotte. But who owned Charlotte? Elizabeth argued that since she owned Charlotte and Charlotte's two children, along with another slave named Diana, before bringing them into the household via marriage, she had the right to own them after the divorce. The problem, Elizabeth stated, was that William had "seduced"<sup>178</sup> all of

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<sup>175</sup> Stevens Divorce. Oct 11, 1856. Race and Slavery Petitions Project at the University of North Carolina at Greensboro. Race, Slavery, and Free Blacks, Series II: Petitions to Southern County Courts, Part A: Georgia (1796-1867), Florida (1821-1867), Alabama (1821-1867), Mississippi (1822-1867)

<sup>176</sup> Ibid.

<sup>177</sup> Ibid.

<sup>178</sup> Stacy Divorce. Jan 01, 1845 - Dec 31, 1846. Race and Slavery Petitions Project at the University of

the slaves away when he abandoned her. He then purchased a home for all of them using Elizabeth's money. On the grounds of William's physical violence toward her and subsequent abandonment, Elizabeth therefore sued for divorce and asked "that the property which her husband acquired 'by virtue of his marriage' be returned."<sup>179</sup> In his answer, William did not dispute the claims of wife-beating. But he contended that he owned Charlotte and her children because he purchased them. He further argued that, though Diana came to him my marriage, it was actually via Elizabeth's father, from whom he also acquired another slave, Nancy, and her two children. Because one of Nancy's children later died, and William had since sold Nancy and her other child, the issue of property rights regarding Nancy and her children was moot. This was a wife-beating and abandonment divorce case between a white couple, at the heart of which was the simultaneous significance of a wife's property rights and liberation from an abusive husband, and the insignificant lives of at least seven slave women and children and the death of one slave child, all of whom were at the mercy of a physically abusive man and equally abusive legal system.

In the midst of antebellum wife-beating divorce cases that adjudicated the legal protection of white wives, courts naturalized the erasure of black women's exploitation, dehumanization, and brutalization. This is important because, when it comes to black women's experiences post emancipation, their dehumanization, and the fact that they were never seen as feminine to begin with,<sup>180</sup> matters.

## CONCLUSION

Antebellum laws of chastisement – wife- and slave-beating – established a racialized double-standard that condoned white men's abuse of black women, punished black men's abuse of black women, and normalized black women's bodies as objects of physical abuse. During the antebellum period, Southern courts adapted Anglo family laws, or laws of "Domestic Relations," to the South's unique racialized socio-economic order. Whereas family law in other states pertained to households centered on the husband-wife relationship, Southern family law was anchored on an additional household relationship, that of master-slave. In the early 1800s, Southern courts granted the Master of the House authority over his wife, children, and slaves, which he could enforce using corporal punishment, or "chastisement," with few limits in degree, the idea being that the Master of the House would be able to discern the line between corrective chastisement and excessive cruelty. Courts increasingly began to place limitations on this authority, albeit with great variation in the limits put in place for (white) wives and (black) slaves. By the Civil War, the right to chastise white wives and de facto slave wives in the antebellum South was a solely white male prerogative. Specifically: white men could legally chastise white women in limited ways; white men could legally chastise black women with significantly fewer limitations; black men

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North Carolina at Greensboro. Race, Slavery, and Free Blacks, Series II: Petitions to Southern County Courts, Part A: Georgia (1796-1867), Florida (1821-1867), Alabama (1821-1867), Mississippi (1822-1867)

<sup>179</sup> Ibid.

<sup>180</sup> Gray White, *Ar'n't I a Woman?*, 5, 6-7, 12, 161-3.

had no legal chastising rights whatsoever, even over their de facto wives. The implication of antebellum Southern law, in other words, was that wife-beating – the beating of one’s own wife and of black men’s de facto black wives – was a legal and cultural right exclusive to white men.

### CHAPTER 3: CONTROLLING BLACK LABOR

The end of the Civil War was the beginning of a new era for freed slaves. After the 13th Amendment ended slavery, the 14th Amendment granted blacks equal protection under the law. The 15th Amendment then granted black men the right to vote and to hold political office at the State and Federal level, from which 20 black Representatives and two black Senators represented Southern states in Congress.

These Reconstruction Amendments made Southern black families legitimate legal institutions, with equal protection under the law, and with heads of household who had the political power to uphold their family's interests. For the law on the books, they marked the end of slave laws, and established that the laws stipulating the gender privileges of men, now applied to all males, white and black. In theory, you might therefore reasonably expect that black men would have been granted the same "Master of the House" chastisement prerogative afforded white men. But this was not the case.

Lower court records and Freedman's Bureau records reveal that when it came to the law in action – nothing changed after the war. White men retained the right to chastise both white and black women, whereas black men never gained the right to do so. As such, the postbellum legal standards for wife-beating that ostensibly applied to both white and black families were in fact the same racialized double-standard of the antebellum era. Reconstruction therefore entrenched a racialized legal double standard where the law on the books applied to whites only. Black families were subjected to a different law in action, the purpose of which was to sustain the domestic relations of the antebellum period, which hinged on *only* white men having chastisement authority.

#### THE LEGAL RECOGNITION OF BLACK FAMILIES

Like all Southern states, one of Alabama's postwar priorities was to establish the legal recognition of black families. A September 1865 Ordinance ratified marriages between "freedmen and freedwomen who are now living together recognizing each other as man and wife, be it ordained that the same are hereby declared to be man and wife, and bound by the legal obligations of such relationship."<sup>1</sup> This fulfilled a symbolic need. In a society whose social norms were rooted in an interpretation of Christian morality in which marriage was salient, having a largely unmarried free population would have been seen as a moral stain on Southern society. Indeed, this is the same reason why so many planters encouraged marriage among their enslaved population before the war.<sup>2</sup>

Establishing the legal recognition of black families also had a material function for the state. Slavery ensured that slave children had loose ties with their parents, especially their (black or white) fathers. Even for 'respectable' white women, in a pre-DNA test world,

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<sup>1</sup> Negro Marriage Ordinance, No. 39, Sec. 1. *The Constitution And Ordinances, Adopted By The State Convention Of Alabama* (Montgomery: Gibson & Whitfield, 1865), pg. 63.

<sup>2</sup> Weld, *American Slavery*, 89.

*marriage* was the only construct that controlled women's reproductive capacity in a way that would satisfy social mores for paternity. Slave paternity was undermined not only by the inability to legally marry, but also by slave laws that recognized matrilineal descent.<sup>3</sup> Once subject to the laws of free people, all formerly enslaved children were therefore legally fatherless. Furthermore, legal paternity notwithstanding, white men's sexual exploitation of slave women and the ways in which white men structured slave family life ensured that a black child's actual paternity was often hard to know. The Reconstruction Amendments therefore gave an already financially insolvent Alabama the possible burden of approximately 200,000<sup>4</sup> black children as wards of state.<sup>5</sup> In the antebellum period, the law ensured that guardians were appointed for white orphans.<sup>6</sup> But the Civil War produced thousands of (poor) white orphans and fatherless children whose widowed mothers were unable to provide for them,<sup>7</sup> prompting Alabama to establish orphanages for white children.<sup>8</sup> Slavery had so severely disrupted the parentage of slave children that, in freedom, they were largely parentless.<sup>9</sup> The Fourteenth Amendment's requirement for equal treatment under the law meant the state would have to make provisions for black orphans that were similar to those it made for white orphans. In response to this potential crisis, Alabama's September 1865 Ordinance also imposed full legal responsibility onto cohabitating freedmen and women for their children. But also:

The fathers of children born without the father and mother having lived together as man and wife, or when they have heretofore lived together as man and wife and have ceased to do so, shall be required to take care of such children as in the case of bastards, under the laws of this State, and such laws on this subject as may be hereafter enacted by the General Assembly.<sup>10</sup>

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<sup>3</sup> According to Alabama law, "No execution can be levied on a child, or children, under the age of ten years, without including the mother; or upon the mother, without including the child, or children, as aforesaid, if living, and belonging to the defendant in execution: and the mother and child, or children, must be sold together, unless the parties in interest, or one of them, make affidavit and delivers the same to the officer, that he believes his interest will be materially prejudiced, by selling the slaves together, when they may be sold separately; but no levy or sale shall be made, by which a child under five years of age shall be separated from its mother" (*Code of Alabama*, 1852, §2056).

<sup>4</sup> Based on 1866 Census data in *The Alabama manual and statistical register for 1869*. Ed. Joseph Hodgson. Montgomery: Montgomery Daily Mail, pg. XXXVII.

<sup>5</sup> Laura Edwards, *Gendered Strife and Confusion: The Political Culture of Reconstruction* (Urbana: University of Illinois Press, 1997) pgs. 34-35.

<sup>6</sup> *Code of Alabama*, 1852, Part 2, Title V, Chap. 3, Art. 2, §2012-14.

<sup>7</sup> Walter Fleming, *Civil War and Reconstruction in Alabama* (New York: The Columbia University Press, 1905), 381.

<sup>8</sup> Alabama General Assembly, Called Session and 4th Annual Session, No. 130, Dec. 12, 1864; Alabama General Assembly, Called Session and 4th Annual Session, No. 131, Dec. 12, 1864; Alabama General Assembly, Called Session and 4th Annual Session, No. 132, Dec. 12, 1864; Alabama General Assembly, Called Session and 4th Annual Session, No. 133, Dec. 12, 1864; Alabama General Assembly, Called Session and 4th Annual Session, No. 134, Dec. 12, 1864.

<sup>9</sup> Herbert G. Gutman, *The Black Family in Slavery and Freedom: 1750-1925* (New York: Vintage Books, 1976), 226-8.

<sup>10</sup> Negro Marriage Ordinance, No. 39, Sec. 3. (1865).

In practice, this meant that black families were immediately forced into a mixed, real and fictive, kinship structure that would never model the respectable ‘nuclear’ family structure that characterized white families. The Southern legal system, economy, and labor practices were structured around marriage and family. Indeed, marriage – the most basic legal contract – was the baseline from which the logic of all other contracts – labor, financial, etc. – extended, not to mention property laws of descent. The September Ordinance recused the state from any financial responsibility for black children, forcing freedpeople into what we now call ‘blended families’, a family structure that was (then and now) assumed to be inherently flawed.

## THE RACIALIZED DOUBLE STANDARD FOR WIFE-BEATING

After the war, the wife-beating law on the books did not change, as the rationale of family government remained in tact. An 1868 North Carolina ruling,<sup>11</sup> for example, acquitted a husband for whipping his wife with a switch. The court affirmed that, “the violence complained of would without question have constituted a battery if the subject of it had not been the defendant’s wife,”<sup>12</sup> and emphasized the immorality of wife-beating. Nevertheless, the court upheld that, “the evil of publicity would be greater than the evil involved in the trifles complained of,”<sup>13</sup> reiterating that domestic trifles, “ought to be left to family government.”<sup>14</sup> In other words, wife-beating was a lesser evil than the evil of undermining a husband’s Master of the House authority through court intervention in the domestic realm.

In action, Southern white men continued to beat their wives with impunity, as well as black men, women, and children. Emancipation eliminated the Master-Slave relationship from Southern laws of Domestic Relations, ending white men’s chastisement authority over black people, in the law on the books. They nevertheless continue to treat black people with the same degree of unchecked violence.<sup>15</sup> In response to emancipation, planters used black bodies as the canvas on which to reinvigorate the racialized gender privileges they had just fought a war to preserve. After beating a freedwoman on his plantation, for example, a planter declared that he “could whip any damn free nigger.”<sup>16</sup> His declaration was emblematic of the ways in which planters used unchecked physical violence to signal their commitment to white supremacy.

As in the antebellum era, white men’s violence extended to black wives as well.

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<sup>11</sup> Remember, in the shaping of its law, Alabama used precedents established in other Southern states.

<sup>12</sup> *State v. Rhodes*, 61 N.C. 458 (1868).

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> Gray White, *Ar’n’t I a Woman?*, 173-77, 184-89; Michael W. Fitzgerald, “Extralegal Violence and the Planter Class: The Ku Klux Klan in the Alabama Black Belt During Reconstruction,” in *Local Matters: Race, Crime, and Justice in the Nineteenth-Century South*, ed. Christopher Waldrep and Donald G. Niemen (Athens: The University of Georgia Press, 2001), 155-168.

<sup>16</sup> Roll 31, Selma (Subassistant Commander): Complaints, June-Sept. 1866. United States. National Archives Records Administration, M1900. *Records of the Field Offices for the State of Alabama, Bureau of Refugees, Freedmen, and Abandoned Lands 1865-1872*.



Freedman's Bureau records are littered with accounts of white men physically abusing and murdering black women, to include black men's wives. Just as slavery subjected black women to unspeakable abuses at the hands of their masters and overseers, it largely buffered them from violence at the hands of other white men. Indeed, white men respected other white men's Master of the House role. After emancipation, whites largely refused to acknowledge black men's domestic authority, which exempted black wives from the kind of protection from outside forces that 'home' ostensibly offered to white women. It was therefore not at all uncommon for black women to be abused by their employers and other white men, even in their own homes. For example, two white men went into a freedman's home, dragged him and his wife outside, "stripped them naked, and whipped them with a large strap."<sup>17</sup> The primary target of their violence was the wife, whom the men discovered had cooked for Union soldiers during the war (when she was a slave and had little choice). The severity of the couple's injuries kept them from work for several days. The protections that marriage afforded white women from *public* violence also never applied to black women. One freedman, for example, discovered "that his wife was knocked dead"<sup>18</sup> by a white man while she was working on a plantation one county over. Incidents like these were common, and are reminiscent of the White Cap and Ku Klux Klan violence that would follow a few years later. In other words, from approximately 1865-1870, white men regularly inflicted Klan-esque violence on freed people, in the open, in the light of day, without masks or sheets, and without fear of punishment.<sup>19</sup>

In action, wife-beating law on the books continued to pertain to white men only. Black men, on the other hand, still had no rights of chastisement for their now legal wives. Freedman's Bureau records reveal that whenever a black man chose to beat his wife, the planter punished him by kicking him off of the plantation without wages, thus separating him from his family, and/or by having him "arrested and dealt with according to civil law."<sup>20</sup> It is true that white men could also be arrested and dealt according to the law. The significant distinction, however, is that either white women or their family members could have the woman's abusive husband arrested. In the case of freedmen, *planters* either acted as judge and jury against black wife-beaters, and/or *planters* had the black wife-beaters in their employ arrested. Planters largely made these decisions for their own ends, with little consideration of the abused wife's wishes.<sup>21</sup>

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<sup>17</sup> Roll 13, Greenville: Register of Complaints, Feb. 3, 1867-Dec. 1868. United States. National Archives Records Administration, M1900. *Records of the Field Offices for the State of Alabama, Bureau of Refugees, Freedmen, and Abandoned Lands 1865-1872*, pg. 74.

<sup>18</sup> Roll 13, Greenville: Register of Complaints, Feb. 3, 1867-Dec. 1868. United States. National Archives Records Administration, M1900. *Records of the Field Offices for the State of Alabama, Bureau of Refugees, Freedmen, and Abandoned Lands 1865-1872*, pg. 79.

<sup>19</sup> Fitzgerald, "Extralegal Violence," 156; Eric Foner, *Reconstruction: America's Unfinished Revolution 1863-1877*. (New York: Harper Collins, 1987), 119, 121.

<sup>20</sup> Roll 28, Selma (Subassistant Commissioner) Letters Sent, Volume 2, Jan.-Sept. 1867. United States. National Archives Records Administration, M1900. *Records of the Field Offices for the State of Alabama, Bureau of Refugees, Freedmen, and Abandoned Lands 1865-1872*.

<sup>21</sup> In this next chapter, I discuss this further by highlighting the ways in which battered freedwomen attempted to protect their husbands from punishment. This topic is also discussed in: Rambo, "Trivial

What makes planters' punishment of black wife-beaters even more troubling is that they still expected black men to beat their wives and children when white men ordered them to. For example, a freedman named Jeff sought help from the Freedmen's Bureau because the planter with whom he had a labor contract, ordered Jeff "to either whip his wife or else leave the place."<sup>22</sup> Jeff was thus faced with beating his wife or being separated from his wife. Indeed, planters often used contracts to justify kicking one spouse from the plantation, while holding the other to the contracts end, and/or booting the entire family from the plantation, cheating the husband of his family's wages. But in most cases, to include this one, it meant kicking only the husband off of the land while his wife and children remained under the direct control of the planter, just as they did during slavery.

## WHAT'S AT STAKE FOR WHITE SOUTHERNERS

Why did black men not gain the right to chastise their wives after the war? One word: labor. White supremacist attitudes, which held that "black man" and "Master of the House" were mutually exclusive identities, were foundational to the control of black labor. In order to understand the unwillingness of white Southerners to respect black men's new role as Masters of their own Households, it is useful to revisit the "pater familias" logic in which American jurisprudence was rooted. Master of the House had a symbolic function as the quintessential privilege of Men. But it also held important material privileges. Specifically, the Master of the House owned the labor of all of the members of his household. This meant that black men as Masters of their own Households would have placed the ownership of Southern black labor in the hands of black men. In the antebellum era, Southern civil society was built on the wealth it accumulated via white men's ownership of their slave's labor. At the Civil War's end, with empty coffers, valueless confederate bonds, no tax base, and destroyed infrastructure,<sup>23</sup> white men no longer owned slave labor at a moment when Southern society needed them to the most.

To better understand the implications of granting black men master of the house authority, it is useful to reconsider the role of coverture in both the ante- and post-bellum south. In the 19th-century South, the household was regarded as society's most basic institution, the place where individual and collective human needs are first met. As such, a people's survival depended on the health of its families. The primary beneficiaries of a society's prosperity therefore privileged and rewarded family structures that allowed for that society's continued prosperity. In the 19th-century South specifically, white land-owners

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*Complaints*," para 15.; and, Angela Davis, *Women, Race, and Class* (New York: Vintage Press, 1983), 91-3.

<sup>22</sup> Roll 28, Selma (Subassistant Commissioner) Letters Sent, Volume 1, Mar 1866 – Jan 1867. United States. National Archives Records Administration, M1900. *Records of the Field Offices for the State of Alabama, Bureau of Refugees, Freedmen, and Abandoned Lands 1865-1872*.

<sup>23</sup> 1866, Nov 12. "Governor's Address to Senate and House of Reps," Alabama Governor (1865-1868: Patton) administrative files, 1865-1868, Government Records Collections, Alabama Department of Archives and History, Montgomery, Ala, pgs. 6-11; Foner, *Reconstruction*, 124-25.

were the primary beneficiaries of Southern prosperity. They therefore legally codified a family structure that allowed for the subordination of all others under the governance of the Master of the house, a system known as coverture, which had been a long-standing legal and social norm in both the U.S. and Britain. Though it primarily benefited men from the upper classes, it applied to all men with families and/or property. Therefore, even for the poorest families, only the man of the house had legal personhood, always on behalf of the members of his household. This meant that he owned his wife and children's labor, and was allowed a large degree of latitude in correcting their behavior, to include corporeal discipline. Imagine, then, how U.S. slavery would have been transformed if slaves were legally able to participate in the basic human act of family life within a coverture-based society.

The legal proscription of slave family formation was vital to Southern economy. Because slaves were unable to form families beyond the whims of their plantation overlords, Masters had unequivocal ownership of black men's labor, as well as the women and children's labor that may have otherwise been under a black man's control. Accordingly, just as Masters had ownership of black men's bodies – in both the legal and embodied sense – they too possessed ownership of the black women and children's bodies that may have otherwise been under a black man's control or protection. All of this occurred within a sociolegal system that recognized men's humanity by imbuing them with Master of the House authority and the material and symbolic benefits therein. It recognized women and children's humanity by allowing for their 'protection' and 'guidance' within in a domestic realm insulated from the harshness of the world. Legalizing slave family formation would have therefore fundamentally turned U.S. slavery on its head, unleashing, at a minimum, a racialized politics of masculinity that could have been catastrophic to the Southern economy. Proscribing legal black family formation therefore obviated the complicated negotiations of male prerogative that would have otherwise been necessary. In doing so, it foreclosed the possibility of material control within black families and symbolically conjoined blackness with inhumanness.

The Civil War made the South's nightmare scenario of slave freedom and citizenship a reality. On September 12, 1865, Alabama's governor declared at the state constitutional convention:

There is no longer a slave in Alabama. It is thus made manifest to the world that the right of secession for the purpose of establishing a separate Confederacy, based on the idea of African slavery, has been fully and effectually tried and is a failure.<sup>24</sup>

A significant portion of the convention, and subsequent legislative sessions, was spent addressing the state's final distress – bonds, loans, public debt, state revenue law, debtors, and *labor*. White southerners were indeed concerned that freedmen and women would refuse to return to or remain on the plantations.

White southerners therefore looked for ways to retain their black labor force. Indeed, only four months after the war's end, the governor appealed to those assembled –

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<sup>24</sup> Constitutional Convention, *Journal of the proceedings of Convention of the State of Alabama: held in the City of Montgomery, on Tuesday, September 12, 1865* (Montgomery: Gibson & Whitfield, State Printers, 1865), 4.

those “lovers of law and order throughout the State”<sup>25</sup> – to not use the law as a tool of white supremacy, cautioning that, “The slave code is a dead letter. They who were once slaves are now free, and must be governed by the laws of Alabama as free men.”<sup>26</sup> There is a rich body of work that illuminates the ways in which white Southerners regained control of black labor during this period. Collectively, this work highlights how vagrancy laws, the “black codes,” and the institution of a carceral convict lease regime were some structural ways in which Southern whites attempted to regain control of black labor by keeping freedpeople tethered to the land.<sup>27</sup>

What much of the political economy literature on this time period overlooks, however, are the everyday, interactional ways in which Southern whites undermined black men’s domestic authority, denying them the master of the house privilege of control over their family’s labor. Undermining black family formation was less a state racial project than it was a collective white Southern response to emancipation. These everyday micro-social aggressions are therefore less recognizable in government records, political speeches, and case law, than they are in Freedmen’s Bureau records, for example, which offer a unique window to the everyday lived experiences of freedmen and planters. The Freedmen’s Bureau, you may recall, was a military occupying force – comprised primarily of Northerners – that the Federal government left in the South after the war to aid the integration of blacks into southern society. As such, Freedmen’s Bureau records also help to reveal what was at stake for Southern white planters’, and more importantly, the quotidian ways in which they sought to sustain the social order of the Old South. Collectively, Freedmen’s Bureau records, oral histories, and family letters, illuminate the salience of domestic relations – black and white – in controlling black labor and degrading the status of blackness. They reveal that federal policy, state laws and regulations, politics, and governance had very little effect on the everyday workings of plantation life, especially in the initial years following the Civil War, which, ironically, comprised Reconstruction.

Black family disruption was the lynchpin of postwar efforts to retain control over black labor. Planters consistently undermined black men’s master of the house authority by stealing or withholding black children from their fathers. John Fielding Burns, for example, was a prominent Alabama planter who would achieve political prominence after Reconstruction and who, as chapter X shows, played a key role in disenfranchising black men convicted of wife beating. Freedmen’s Bureau records reveal how he undermined black men’s ability to protect their children from abuse, as well as their authority over their children’s labor. In one instance, for example, Burns violated a labor contract with freedmen William Sampson by not providing clothes for Sampson and his family – a wife and two grown sons – as agreed. When Sampson brought this to Burns’ attention, Burns flogged Sampson’s two sons and threatened to flog Sampson as well.<sup>28</sup> During slavery, Sampson

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<sup>25</sup> *Ibid.*, 8.

<sup>26</sup> *Ibid.*, 40, 55, 79.

<sup>27</sup> Vann Woodward, *Strange Career of Jim Crow*, 22-24; Lichtenstein, *Work of Free Labor* (see chap 1, n. 33); Muller, “Racial Disparity in American Incarceration” (see chap 1, n. 33).

<sup>28</sup> Roll 28, Selma (Subassistant Commissioner) Letters Sent, Volume 2, Jan.-Sept. 1867. United States. National Archives Records Administration, M1900. *Records of the Field Offices for the State of Alabama, Bureau of*

would have no say in what happened to his sons, as their chastisement would have been the sole prerogative of John Burns. This is because they would have been recognized as Burns' property, whereas Sampson would have no legal claim to his sons at all. When Burns beat Sampson's children without Sampson's permission, he was therefore undermining Sampson's master of the house authority to chastise his children.

Burns was also committed to retaining ownership of freedmen's labor, and especially their children. Tom Randall, for example, was a freedman who worked in town, and regularly slept on the Burns plantation where his wife was employed. The couple had a five-year-old son, who was too young to do work around the house. Randall would therefore take his boy to work with him in town. Randall and his wife had recently lost their youngest child, and Randall wanted to spend time with his only living child. After two or three days of keeping his son at his brother's house in town, "John Burns ordered Tom to bring the boy back and leave him at the house." Randall, of course, refused. He was a free man, and had no contract with Burns. Later that week, when Randall visited his wife at the Burns plantation, Burns approached Randall and began beating him when Randall told him he did not bring his son. Randall's wife ran to the house to get help, at which time Burns cut Randall on the head and shot him through his arm. Thankfully, Randall was eventually able to run away. Although Burns in that moment lost control over Randall's son, it is very likely that he succeeded in keeping Randall and his wife apart.

White southerners also undermined black men's master of the house authority through the forced apprenticeship of black children. Alabama took advantage of the lack of clarity surrounding black children's paternity to maintain de facto ownership of the children planters wanted to keep as laborers. This practice of keeping children – as 'apprentices' – from their parents was made law through a major overhaul in apprenticeship laws enacted in February 1866.<sup>29</sup> It allowed planters to keep black boys until the age of 21, black girls until the age of 18, even stipulating that in the event of the planters' death, "it shall be the duty of the court to give the preference, in re-apprenticing said minor, to the widow or other member of said master's or mistress' family."<sup>30</sup> More importantly, it placed the burden of proof on the child's parents to not only establish parentage, but to "by proof, show his ability to support his or her child, or that the proposed master is an improper person to act as master of said apprentice."<sup>31</sup> In practice, then, the September 1865 Ordinance (which legalized black family formation to free the state of the responsibility for black children's fatherlessness) and the February 1866 Ordinance meant that control of black children's labor remained, first and foremost, with a white master/mistress, at his/her discretion. Secondly, black children were to be in the care of their parent(s).

Freedman's Bureau officials spent a considerable amount of time attempting to unite parents with children that planters refused to let go. Planters typically resorted to violence or threats of violence against black parents who tried to unite with their children. Indeed, with

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*Refugees, Freedmen, and Abandoned Lands 1865-1872*, pg. 11.

<sup>29</sup> Alabama General Assembly, Regular Session 1-2. (1865-55), No. 120.

<sup>30</sup> Acts 1865-66, No 120. §7.

<sup>31</sup> Acts 1865-66, No 120. §11.

complete disregard for the apprenticeship laws that worked in their favor, planters simply took or kept children at their whim, without any paper trail or attempt at establishing apprenticeship. They did it because they could. Even when freedmen attempted to use the law to regain custody of their children, they often did so in vain. Osborn Day, for example, was a freedman whose former Master, Leroy Day, did what many planters did post-emancipation – he kept Osborn’s children as de facto slaves without going through the trouble of making them apprentices. Osborn was able to retain a writ of habeas corpus for his children, which he presented to the county probate judge. The judge gave him “a paper of some kind,”<sup>32</sup> which he subsequently showed to Leroy Day, “the illegal possessor of his children.”<sup>33</sup> Leroy Day ignored the paper, however. He made it clear that the children were his property since he paid them, and the only way Osborn could have his children was if he paid Leroy Day for them. Osborn returned to the probate judge with this information, who informed him that, “unless Mr. Day was willing to give them up on his asking, he could do no more for him.”<sup>34</sup>

Even when planters allowed black men to take care of their children, they still interfered in the father child relationship, just as they had in slavery. As such, planters would punish freedmen for choosing to beat their children, and punish freedmen for *not* beating their children when white men ordered them to. Discretion over child chastisement (again, a master of the house prerogative) was so charged that some freedman tried to address the issue in their employment contracts. Charles, for example, made a complaint to the Freedman’s Bureau that his employer, Thomas Hardy, refused to recognize Charles’ paternal authority over his son. Hardy signed a labor contract in which he agreed that Charles “should correct his own children.”<sup>35</sup> Hardy subsequently “whipped”<sup>36</sup> Charles’ son three times. The day after the third whipping, Charles decided to take his son to the field with him while he worked. Taken aback by Charles’ decision, Hardy went to the field to ask Charles why he took his son with him, to which Charles replied that Hardy “whipped the boy so much he thought he would take him along with him when he could make him work without so much beating.”<sup>37</sup> Charles, in other words, used his lawful Master of the House authority over his son’s labor to make a decision that defied Hardy’s exercise of chastisement authority over the boy. In doing so, he committed the ultimate affront. Hardy retorted that, “he would whip the boy as much as he pleased.”<sup>38</sup> In response, Charles stood his ground. Utterly outraged at the Charles’ (lawful) audacity, Hardy struck Charles on his head so hard that

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<sup>32</sup> Roll 13, Greenville: Register of Complaints, Feb. 3, 1867-Dec. 1868. United States. National Archives Records Administration, M1900. *Records of the Field Offices for the State of Alabama, Bureau of Refugees, Freedmen, and Abandoned Lands 1865-1872*, pg. 87.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> Roll 28, Selma (Subassistant Commissioner) Letters Sent, Volume 1, Mar 1866 – Jan 1867. United States. National Archives Records Administration, M1900. *Records of the Field Offices for the State of Alabama, Bureau of Refugees, Freedmen, and Abandoned Lands 1865-1872*, pg. 91.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

Charles' skull was exposed, "rendering him insensible for some time."<sup>39</sup>

In the same way that planters undermined black men's Master of the House authority by detaining children from their fathers, planters repeatedly detained wives from their husbands. This almost always occurred whenever a husband made a decision about his wife's labor that contradicted her employer's wishes. For example, like many black couples, Virgil and Hannah Neal had different employers. Hannah did not have a contract with her employer because the couple was waiting for Virgil to secure a home where the couple could be contracted together, which he eventually did. Hannah's employer, however, refused to let Hannah go, despite having no contract with Hannah, and thus no legal claim for keeping her employed, much less imprisoned.<sup>40</sup>

When black couples were collocated under the same labor contract, employers regularly found ways to undermine husband's who attempted to control their wives' labor. This often occurred when a wife became ill and her husband insisted that she not work until she was better, only to find himself kicked off of the plantation, with his wife detained until the contracts end. Almost as often were husband's attempting to protect their wives from abusive employers. Sam's wife, for example, was beaten by Mr. Maddox, the employer with whom the couple had a contract. When Sam intervened to protect her, Maddox banished Sam from the plantation, while he kept Sam's wife in his "possession against her will"<sup>41</sup> and Sam's will. Maddox also threatened that unless Sam's wife remained on the plantation, he would have the couple thrown in jail.

Threats of violence and legal intervention, and actual violence, were common devices that planters used to keep husbands separated from their wives. Planter John Burns, for example, used the threat of death to separate black families. Ned Bastie and his wife, for example, had a contract with Burns. However, Burns one day threatened "to give Ned 1000 lashes, beat him to death with a stick, or stab him with a knife, or shoot him."<sup>42</sup> Bastie fled, telling the local Freedmen's Bureau official that, "he dares not go back for his wife, believing from past experience that Mr. Burns does not value human life."<sup>43</sup> Likewise, employers used violence to prevent wives from uniting with their husbands. Harriet Patterson, for example, was whipped "because she attempted to go to her husband."<sup>44</sup> A witness stated that Harriet was "most cruelly beaten, that she was tied hand and foot, and she was of no earthly use for

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<sup>39</sup> Ibid.

<sup>40</sup> Roll 30, Selma (Subassistant Commander): Register of complaints, Aug. 1865-Apr. 1868. United States. National Archives Records Administration, M1900. *Records of the Field Offices for the State of Alabama, Bureau of Refugees, Freedmen, and Abandoned Lands 1865-1872*, pg. 118.

<sup>41</sup> Roll 28, Selma (Subassistant Commissioner) Letters Sent, Volume 1, Mar 1866 – Jan 1867. United States. National Archives Records Administration, M1900. *Records of the Field Offices for the State of Alabama, Bureau of Refugees, Freedmen, and Abandoned Lands 1865-1872*, pg. 92.

<sup>42</sup> Roll 30, Selma (Subassistant Commissioner) Register of complaints, Aug. 1865-Apr. 1868. United States. National Archives Records Administration, M1900. *Records of the Field Offices for the State of Alabama, Bureau of Refugees, Freedmen, and Abandoned Lands 1865-1872*, pg. 150-151.

<sup>43</sup> Ibid.

<sup>44</sup> Roll 13, Greenville: Register of Complaints, Feb. 3, 1867-Dec. 1868. United States. National Archives Records Administration, M1900. *Records of the Field Offices for the State of Alabama, Bureau of Refugees, Freedmen, and Abandoned Lands 1865-1872*, pg. 82.

three months.”<sup>45</sup> Fortunately, black husbands and wives were some times able to escape from their abusive employers – as couples or as individuals.

Being driven from plantations was a double-edged sword for freedpeople. Leaving before a contract’s end, no matter the reason, always meant forsaking wages. Toward the end of their contract, Reuben Simpson and his wife fled from their plantation. The planter’s abuse escalated to the point of threatening the wife’s life. The couple fled to save her life, only to find that the planter subsequently refused to pay Reuben the wages from the entirety of their contract.<sup>46</sup> In another case, in response to a freedman who attempted to shield his sick wife from working, a planter ordered her away from the plantation, telling the freedman that he will “lose all wages if he chooses to go with his wife.”<sup>47</sup> In the absence of any alleged excuses for doing so, planters often simply outright refused to pay freedmen for their wife or children’s labor, a regular occurrence when the freedman’s wife or children were hired out to different planters than the freedman himself. If employers received a Freedmen’s Bureau letter about the issue, they would supply a reason for not paying, and that would be the end of it. Jesse Johnson, for example, complained to the Bureau that an employer to whom his wife was hired refused to pay Jesse for her labor. When the Bureau contacted the employer, he replied that one of his boarders hired Jesse’s wife to cook and clean. Her wages were deducted from the boarder’s bill. End of story.<sup>48</sup> This obviously made no sense, but it is emblematic of the lower bar for employers’ shenanigans.

Concurrent with their unwillingness to recognize freedmen’s Master of the House role, white Southerners had no regard for the sanctity of the domestic realm vis-à-vis black families. White men’s domestic authority was protected by socio-legal boundaries of “family government.”<sup>49</sup> As in slavery, however, whites consistently crossed this boundary for black families, physically and symbolically. For example, it was not at all uncommon for whites to physically enter black homes for nefarious reasons – physical and sexual assault. Symbolically, protecting the sanctity of black homes especially became an issue with regard to planters’ manipulations of contracts. In all of the above examples where freedmen and/or their families were ejected from plantations, they were simultaneously booted from their homes, and immediately subject to arrest for vagrancy. The Freedmen’s Bureau took great lengths to protect freedpeople’s right to a home, which, consistent with Northern and Southern mores, meant protecting black men’s right to be Masters of their Homes. The Bureau’s Alabama Subassistant Commander took pains to instruct the subordinate Bureau offices in the state on the matter in the following letter:

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<sup>45</sup> Ibid.

<sup>46</sup> Roll 13, Greenville: Register of Complaints, Feb. 3, 1867-Dec. 1868. United States. National Archives Records Administration, M1900. *Records of the Field Offices for the State of Alabama, Bureau of Refugees, Freedmen, and Abandoned Lands 1865-1872*, pg. 74.

<sup>47</sup> Roll 28, Selma (Subassistant Commissioner) Letters sent, v. 1-4, Mar. 1866-Dec. 1868. United States. National Archives Records Administration, M1900. *Records of the Field Offices for the State of Alabama, Bureau of Refugees, Freedmen, and Abandoned Lands 1865-1872*, pg. 146.

<sup>48</sup> Roll 28, Selma (Subassistant Commissioner) Letters sent, v. 1-4, Mar. 1866-Dec. 1868. United States. National Archives Records Administration, M1900. *Records of the Field Offices for the State of Alabama, Bureau of Refugees, Freedmen, and Abandoned Lands 1865-1872*, pg. 79.

<sup>49</sup> *State v. Rhodes*, 61 N.C. 458 (1868).



I would also call your attention to the fact that although laborers are discharged subject to their claim for damages for breach of contract, they cannot be turned out of their Houses without incurring severe penalties. Every man's place of residence is his castle. Though it is only a Negro hut; and when implied contract of lease for the cropping season a laborer working on shares is unlawfully turned off; this gives the planter no right to take advantage of his own wrong and turn him by force out of his 'Castle.' You will be careful to instruct each laborer complaining to you of his legal rights in this and all other causes of complaint.<sup>50</sup>

The postscript further advised, "You will give as much publicity to this as possible."<sup>51</sup> Upon receipt of the letter, a Bureau agent from the Livingston, AL office requested further clarification. Likely anticipating the push back he would receive from the planters in his district, he wanted to know if the letter was a "law or instruction,"<sup>52</sup> and requested a printed copy of the order if possible. In response, the Subassistant Commander conceded that although it is not written in any statute:

I believe it is a general principal of law not perhaps laid down in any code, that a man's house viz: the building in which he dwells is his Castle, and cannot be put out by any process of law whatever is the contract.<sup>53</sup>

He made clear that he wrote the above passage in red for emphasis, reiterating that it "is the law of the land,"<sup>54</sup> and ended his letter by stating, "I do not see how I can make the matter any clearer."<sup>55</sup> In other words, Bureau officials expressed a large degree of frustration over Southerners unwillingness to accept what appeared to be such a "general principal" – a man's home is his Castle. Even when it was "only a Negro hut," Bureau officials argued that the 'Castle doctrine' was a fundamental right of manhood. As the next chapter will show, Southerners took great lengths to propagate an ideology that black men were in fact not capable of manhood.

## **BLACK MEN'S EFFORTS TO PROTECT THE BLACK FAMILY**

As the previous sections demonstrate, black men tried to resist efforts to undermine their master of the house authority and to abuse their wives and children. They did so by standing up to white men and by appealing to the Freedmen's Bureau for assistance. During

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<sup>50</sup> Roll 20, Livingston: Register of Complaints, Aug.-Nov. 1868. United States. National Archives Records Administration, M1900. *Records of the Field Offices for the State of Alabama, Bureau of Refugees, Freedmen, and Abandoned Lands 1865-1872*, pg. 4.

<sup>51</sup> Ibid.

<sup>52</sup> Roll 20, Livingston: Register of Complaints, Aug.-Nov. 1868. United States. National Archives Records Administration, M1900. *Records of the Field Offices for the State of Alabama, Bureau of Refugees, Freedmen, and Abandoned Lands 1865-1872*, pg. 15.

<sup>53</sup> Roll 20, Livingston: Register of Complaints, Aug.-Nov. 1868. United States. National Archives Records Administration, M1900. *Records of the Field Offices for the State of Alabama, Bureau of Refugees, Freedmen, and Abandoned Lands 1865-1872*, pg. 18.

<sup>54</sup> Ibid.

<sup>55</sup> Ibid.

Reconstruction, however, black men also gained a considerable amount of political power. Alabama demonstrated its commitment to the 13th, 14th, and 15th Amendments – a requirement for Confederate state re-admittance to the Union – in its 1867 state Constitution, declaring that:

“That all persons resident in this state, born in the United States, or naturalized, or who shall have legally declared their intention to become citizens of the United States, are hereby declared citizens of the State of Alabama, possessing equal civil and political rights and public privileges.”<sup>56</sup>

The 1867-68 Constitutional Convention was the first time in Alabama’s history in which black men participated in shaping state laws. Indeed, 20 percent of the elected delegates present at the 1867 Constitutional Convention were black. Afterward, roughly 30 percent the state’s General Assembly was comprised of freedmen, for the first time in Alabama history. Reuniting family members who were forcibly separated during slavery, protecting black women and children from the abuses of white men, and establishing their Master of the House authority were core priorities for freedmen in the Alabama General Assembly. Although the 1865 and 1866 laws legitimizing black marriages and paternity fulfilled the needs of the white population, the black delegates at the 1867-8 Constitutional Convention as well as black legislators who joined the General Assembly beginning in 1868, displayed the deep desire that blacks had to forge families, and that black fathers had to reconnect with their children and former wives. Indeed, one of the primary problems Freedman’s Bureau officials dealt with on behalf of freedpeople at this time was appealing to planters to return children to their parents. They also spent a tremendous amount of resources writing letters to find former family members and arranging transportation for family reunification. The 1865 and 1866 laws, in other words, were very much compatible with the actual desires freedpeople had to do family.

Black leaders’ first priority was to give freedpeople more discretion in structuring their families. The September 1865 ordinance that legalized marriages between cohabitating freedmen and freedwomen failed to account for how slavery structured the ‘relationships’ that existed after emancipation. In other words, given the choice, many freedmen and women would have either preferred not to marry each other, and/or to marry someone from their past from who slavery had separated them. Accordingly, the 1865 ordinance brought with it a number of freed people who were subsequently charged with adultery and bigamy. At the 1867-8 Constitutional Convention, black delegates were able to pass an ordinance acknowledging that:

During the existence of slavery, the usage of the country permitted many thousands of its people to live together without the binding obligations of lawful marriage, and in many instances these connections were forced to suit the wishes and interest of the owner.<sup>57</sup>

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<sup>56</sup> Ala. Const. art. I, §2 (1867)

<sup>57</sup> Constitutional Convention, *Official Journal of the Constitutional Convention of the State of Alabama: held in the City of Montgomery, commencing on Tuesday, November 5th, A.D. 1867* (Montgomery: Barrett & Brown, 1868), 263.

This November 1867 ordinance successfully declared “null and void,”<sup>58</sup> all prosecutions against freedpeople for bigamy, adultery, and fornication.

Having cleared up the issue of marriage among freedpeople, black men also attempted, unsuccessfully to secure their Master of the House role in order to protect black women and children from white men. Black delegates attempted to shift responsibility “for the care and protection of the colored orphans”<sup>59</sup> to the state, consistent with the state’s protections for white orphans. They tried to establish a “Colored Orphan Asylum as well,”<sup>60</sup> also with no success. More importantly, they attempted various strategies for shifting apprenticeship laws in a way that would make it easier for black parents to retain custody of their children.<sup>61</sup>

Throughout the convention, black delegates also signaled their intentions to protect black women. Shielding family members from the violence and stressors of the ‘outside world’ was, after all, one the Master of the House’s primary responsibilities. In a discussion about desegregating trains, for example, Mr. Carraway a “mulatto” delegate from Mobile argued that blacks should be allowed to ride trains with respectable whites as opposed to always being relegated to the smoking cars. To make his point, he said, “at present the colored man could not send his wife from one part of the State to another because she would placed in a smoking car, and exposed to the insults of *low and obscene white men* [sic].”<sup>62</sup> Black delegates also unsuccessfully attempted to pass an ordinance stating that: “any white man intermarrying or cohabiting with colored women, shall be imprisoned for life.”<sup>63</sup> Considering that there was already an antimiscegenation law on the books pertaining to, “any white person and any negro,”<sup>64</sup> black legislators made clear that in action, the existing law only punished black men and white women, while leaving black women vulnerable to white men’s abuse and exploitation.

## HOW DO WHITE SOUTHERNERS GET AWAY WITH THIS?

Black men retained some measure of political influence until the 1874 election, when Southern Democrats ‘redeemed’ control of Southern power, bringing an end to Reconstruction in Alabama. Nevertheless, as this chapter makes clear, white Southerners were nonetheless able to inflict irreparable damage to black families during Reconstruction, when black men were exercising their right to vote, and black political representation was at its height. How did white Southerners get away with the quotidian abuses they inflicted on freed people? How were they able to undermine black men’s master of the house authority?

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<sup>58</sup> Ibid.

<sup>59</sup> Ibid., 15.

<sup>60</sup> Ibid., 230.

<sup>61</sup> Ibid., 24, 135.

<sup>62</sup> 1867, November 30. *The Louisville Daily Courier* 36(129): 2

<sup>63</sup> *Journal of the Constitutional Convention*, 1868, 189.

<sup>64</sup> *Penal Code of Alabama*, prepared by G.W. Stone and J.W. Shepherd (Montgomery: Reid & Screws, State Printers, 1866), Title I, Chap. V, §61.

The short answer is that political power during Reconstruction was decentralized. Though ostensibly relegated to lesser positions of authority during Reconstruction, planters were able to wield a considerable degree of power in the every day lived experiences of freed people. Freedmen's participation in state legislatures is often the focus – the “good news” – that characterizes current accounts of Reconstruction. That political power was significantly offset, however, by the stark absence of local black officials. Southern states in the 19th-century were “common law” states. In other words, the law was created by the precedents established in Supreme Court rulings. This gave state judiciaries, as opposed to state legislatures where black men were present, tremendous influence in shaping the law. Members of the Alabama Supreme Court, as well as all levels of the state judiciary were white men – freedmen did not have the legal credentials for filling those roles. Those responsible for applying the law in action also came from the elite planter class, overwhelmingly comprised of Democrats. Whereas circuit court judges had once been appointed by the General Assembly, an 1850 ordinance established that they would be elected by popular vote. The 1868 constitution made the same change for Justices of the Peace, Chancery Judges, and Supreme Court justices. Laws enacted in 1850 and 1868 further significantly decentralized state power to local officials, which allowed local officials – justices of peace, sheriffs, city courts, mayor's courts, and county courts – to exact a much larger degree of control over every day life than officials at higher levels of power.

Despite the fact that Republicans controlled the state legislature,<sup>65</sup> local appointees were old-line Democrats. Freedmen's Bureau officials were constantly confronted with precisely the frustration of having to appeal to local authorities when the complaints they received were against those same local authorities. In one of the many records involving John Burns, for example, an official wrote: “John F. Burns, a Justice of the Peace, (so called) has beaten her two or three times himself.”<sup>66</sup> Burns was very intentional in abusing his

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<sup>65</sup> Many political appointees after the war were Republicans, or Scalawags. Scalawags were Southerners who were Northern loyalists / antisectionists. Their numbers dominated the Republican Party initially. Their primary motivation was political power, which they held in Alabama's legislature, judiciary, and with the exception of the 1807-72 term, the governors were scalawags as well. They were eventually motivated to take measures to secure Negro votes, much of which meant, first and foremost, ratifying the 15th Amendment (Feb 1870), in addition to other tactics that gave the appearance of the same motivation for racial equality held by freedmen. Scalawags were primarily from the northern Alabama counties (which held the lowest negro populations), as well as the hill counties where many poor whites were forced into fighting the war wanted to maintain local political control from the Democrats. By 1874, however, many Scalawags switched loyalty to the Democrats in response to backlash from oppressive federal policies. Despite their antisection proclivities, Republicans' investment in white supremacy was no less strong than Democrats. For example, Republican Governor Patton told Alabama's General Assembly in November 1866 that while whites had a responsibility to teach freedpeople morality and industry, they should also “advise them to let politics alone; and they should be especially taught the utter absurdity of expecting or aspiring to a condition of social equality with the white race.” 1866, Nov 12. “Governor's Address to Senate and House of Reps,” *Alabama Governor (1865-1868: Patton) Administrative Files, 1865-1868*, Government Records Collections, Alabama Department of Archives and History, Montgomery: 25.

<sup>66</sup> Roll 28, Selma (Subassistant Commissioner) Letters Sent, Volume 1, Mar. 1866-Jan. 1867. United States. National Archives Records Administration, M1900. *Records of the Field Offices for the State of Alabama, Bureau of Refugees, Freedmen, and Abandoned Lands 1865-1872*, pg. 215.

power in this capacity. After stealing food and clothing from a freedman who refused to work for him, Burns declared that, “The yankees made him Justice of the Peace and he did just as he please with niggers.”<sup>67</sup> Burns then tied the freedman to a tree that Friday, where he told him he’d remain until Burns took him to the jail on Monday. Before leaving Burns told the freedman that if he chose not to work for Burns, Burns would kill him. Indeed, complaints lodged against Burns by freedmen to the Freedmen’s Bureau reveal that he routinely subjected women and children to vicious physical abuse. On one occasion, for example, Burns beat one worker – a *free* woman – with a “hoop pole, giving her some 200 lashes after having knocked her down the put of his pistol so that she was not able to work for three days.”<sup>68</sup> On the third day, he whipped her again.

Since Burns was a Justice of the Peace, black men and women had effectively no legal recourse against him. One particular ordeal that is scattered throughout Bureau records, entails the story of freedwoman Fanny Burns, and her child Leah. Fanny was a Burns family house slave, who was mentally slow. The Burns family, “kept her their ever since the freedom,”<sup>69</sup> or emancipation, “without wages, or any promise of them.”<sup>70</sup> During Reconstruction, Fanny was therefore still a slave of the Burns family, who would have accordingly attempted to enslave Fanny’s offspring. This is why the Bureau records stated that, “John F. Burns has the mother in his possession, and claims the child.”<sup>71</sup> Burns’ wife, Mrs. Eugenia Clay Burns, of Alabama’s powerful political Clay family, was in the habit of constantly beating Fanny, as well as other abuses like forcing her to remain outside in the rainy night when she was sick.<sup>72</sup>

John Burns severely beat Fanny from time to time as well. It seems that the cause of *his* abuse was Fanny’s attempts to get her daughter away from the Burns plantation. According to the record:

On one occasion her little child went away. Mrs. Burns sent her after it. She did not succeed in finding it. A man was sent after the child, who found it and brought it back. John Burns gave a severe beating because she did not find the child.”<sup>73</sup>

Again, Burns was determined to maintain ownership of his laborers’ children, just as he did during slavery. Fanny nevertheless endured brutal beatings without ever revealing Leah’s location. Twice Fanny attempted to get Leah to safety, and each time, “Burns has kidnapped

<sup>67</sup> Roll 30, Selma (Subassistant Commissioner) Register of complaints, Aug. 1865-Apr. 1868. United States. National Archives Records Administration, M1900. *Records of the Field Offices for the State of Alabama, Bureau of Refugees, Freedmen, and Abandoned Lands 1865-1872*, pg. 122-3.

<sup>68</sup> *Ibid.*, 150-151.

<sup>69</sup> *Ibid.*, 79.

<sup>70</sup> *Ibid.*

<sup>71</sup> Roll 28, Selma (Subassistant Commissioner) Register of complaints, June 1867-Jan. 1868. United States. National Archives Records Administration, M1900. *Records of the Field Offices for the State of Alabama, Bureau of Refugees, Freedmen, and Abandoned Lands 1865-1872*, pg. 219-220.

<sup>72</sup> Roll 30, Selma (Subassistant Commissioner) Register of complaints, Aug. 1865-Apr. 1868. United States. National Archives Records Administration, M1900. *Records of the Field Offices for the State of Alabama, Bureau of Refugees, Freedmen, and Abandoned Lands 1865-1872*, pg. 79.

<sup>73</sup> *Ibid.*

the child,”<sup>74</sup> only for Leah to “run away as soon as possible each time,”<sup>75</sup> and for both Fanny and Leah to endure another course of brutal beatings once Leah was found and brought back to the plantation. On her next escape, Leah made it to the local Bureau office. “She was shockingly bruised, so that Maj. Ogilby, at that time Superintendent, interfered in her behalf, and declared Burns’ claim to be null if he ever had any, on account of his abuse.”<sup>76</sup> Back at the Burns plantation, Fanny was once again beaten for not finding her daughter. When Fanny threatened to escape to the local Freedman’s Bureau office to report the Burns’ abuses, Mrs. Burns locked up all of Fanny’s possessions. Fanny nevertheless made her escape barefooted.<sup>77</sup> After Leah was discharged from a two-week hospital stay, the Bureau allowed Fanny to grant maternal rights to Malvina Schackleford, who then became Leah’s adopted mother.<sup>78</sup> Fanny returned to the Burns plantation. Soon after, Burns sent the sheriff to take Leah away from Malvina and bring her back to the Burns plantation. The Bureau once again pleaded with Count Court Judge John F. Conoly to return Leah to Malvina Schackleford. In his fourth letter to Judge Conoly regarding this ordeal, the Bureau official declared, “It is a great outrage for him to be allowed possession of the child again and if there is any way in which you can prevent it, I beg that you will do so.”<sup>79</sup>

The problem was that no matter the degree of outrage or wrongdoing expressed, Bureau officials had to ultimately defer to local criminal justice policies and procedures. In other words, they had to rely on the goodwill of the Democratic planter class to properly enforce the law against other members of the Democratic planter class. Judge John Conoley, for example, was the man responsible for adjudicating the numerous complaints against John Burns. But Conoley was a faithful servant of the confederate cause before and during the war, and in his capacity as the Dallas County Judge, he maintained his loyalty to the Democratic party long after the war.<sup>80</sup> Furthermore, John F. Burns was himself Justice of the Peace, precisely the official who would have otherwise adjudicated the charges against him.

John Burns’ abuse of power was by no means exceptional. His long history of abusive behavior is especially important, however, due to the role he played in efforts to disenfranchise black men convicted of wife beating at the turn of the century. Another key player in the wife-beating story was Benjamin Saffold, who would eventually serve on the Alabama Supreme Court during the *Fughlam v. Alabama* ruling. He came from a prominent

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<sup>74</sup> Roll 28, Selma (Subassistant Commissioner) Register of complaints, June 1867-Jan. 1868. United States. National Archives Records Administration, M1900. *Records of the Field Offices for the State of Alabama, Bureau of Refugees, Freedmen, and Abandoned Lands 1865-1872*, pg. 219-220.

<sup>75</sup> Ibid.

<sup>76</sup> Ibid.

<sup>77</sup> Roll 30, Selma (Subassistant Commissioner) Register of complaints, Aug. 1865-Apr. 1868. United States. National Archives Records Administration, M1900. *Records of the Field Offices for the State of Alabama, Bureau of Refugees, Freedmen, and Abandoned Lands 1865-1872*, pg. 79.

<sup>78</sup> Roll 28, Selma (Subassistant Commissioner) Register of complaints, June 1867-Jan. 1868. United States. National Archives Records Administration, M1900. *Records of the Field Offices for the State of Alabama, Bureau of Refugees, Freedmen, and Abandoned Lands 1865-1872*, pg. 219-220.

<sup>79</sup> Ibid. 219-220.

<sup>80</sup> Thomas M. Owen, *History of Alabama and Dictionary of Alabama Biography*, vol. III (Chicago: The S. J. Clarke Publishing Company, 1921), 391.

Black Belt Democrat planter family in the antebellum period. However, he switched loyalties to the Republican party after the war, due to his strong antisecessionist views. Indeed, he warned Democrats against secession before the war arguing that it would result in the abolition of slavery. Saffold, in other words, was antisecession because he wanted to protect the institution of slavery.<sup>81</sup> After the war, he was appointed to various positions by the Republican government, to include Mayor of Selma, and Circuit Judge of Dallas County. In both of these positions, he made decisions which allowed planters to secure black labor by undermining black family cohesiveness. While he was Circuit judge, he had one of his former slaves, Ned McCall, arrested because he could. McCall left Saffold's plantation after emancipation. Nine months later, he returned to his old quarters to "see his old acquaintances and was remaining there quietly."<sup>82</sup> When Saffold discovered he was present, he had McCall arrested for trespassing, and, in his capacity as Judge, sentenced McCall to the chain gang.

Local officials—most of whom were white Democrats—were especially complicit in the constant disregard of black men's master of the house authority. Freedmen's Bureau officials had very limited power, as they were required to defer to local laws and authorities. The most they could do was therefore appeal to the judgment and integrity of local authorities to intercede on freed people's behalf. Like Burns and Saffold, many of the local authorities would rise to prominence after Redemption, which positioned them to utilize the deep-seated ideologies about black family pathology that were hegemonic after the war.

Entrenching a racialized double-standard for wife-beating foreclosed black men's control over Southern labor. While the postbellum law on the books granted all husbands the right of spousal chastisement, in action, it continued to apply to white men only. Allowing black men to beat their wives would have been tantamount to giving them Master of the House authority – something white Southerners dared not do.

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<sup>81</sup> Walter M. Jackson, *The Story of Selma* (Birmingham: Birmingham Printing Company, 1954), 235-7; Alston Fitts, *Selma: A Bicentennial History* (Tuscaloosa: The University of Alabama Press, 2017), 46, 104-6.

<sup>82</sup> Roll 30, Selma (Subassistant Commander): Register of complaints, Aug. 1865-Apr. 1868. United States. National Archives Records Administration, M1900. *Records of the Field Offices for the State of Alabama, Bureau of Refugees, Freedmen, and Abandoned Lands 1865-1872*, pg. 114.

## CHAPTER 4: BLACK FAMILY PATHOLOGY

Immediately after the Civil War, an ideology that black families were pathological becomes hegemonic. This ideology undermined black men's master of the house authority by highlighting the alleged ways in which black men were incapable of manhood. In the same way, it ensured that black women would never be able to attain True Victimhood. The ideology of black family pathology therefore had a mutually reinforcing relationship with the racialized legal double-stand for wife-beating. As demonstrated in the previous chapter, black families in the post-war South were confronted with structures that were a continuation – a postwar upgrade – of the centuries old structures that functioned to control black labor and disrupt black family life. Those structures were simultaneously enabled by and gave the appearance of legitimacy to the deep-seated ideology that black families were inherently pathological. By 1871, Alabama's *Fulgham v. State* ruling was less a commentary about sociolegal changes in American marital ideologies than it was a legal affirmation of postbellum white supremacist ideologies about black families.

In its evolution as a racial category, blackness came to be associated with the absence of gender. Slaves, whose sexuality and reproductive capacity were indeed exploited in countless ways, were never in fact gendered when it came to physical violence. Male slaves were seen as naturally fit to be ruled, and therefore incapable of citizenship, legal marriage, and providing for their families – all prerogatives of “men,” or white males. With no “men” in their population, female slaves, seen as indelicate by nature, did not require a man's protection and guidance within the sanctity of a home and/or marriage – the prerogatives of “women,” or white females. Just as free was synonymous with whiteness, slave was synonymous with blackness. As white and black became hegemonic racial categories, the slave and free associations remained. Blackness therefore emerged as a racial category inherently devoid of the gendered prerogatives that inherently comprised Whiteness – characterizations that endured longer after emancipation.

### SLAVES WERE PATHOLOGICAL

“The black family” did not become a legitimate legal institution until 1865. However, antebellum jurisprudence had a decades-long head start in establishing legal precedents for how to make sense of black families. The tidiness of domestic relations in antebellum law on the books, with its distinct husband-wife, father-child, master-slave relationships, had significant ideological currency. In action, it created a *de jure* black family structure that struggled for existence in a socio-legal space where black marriage could never be anything more than concubinage,<sup>1</sup> parenthood was solely a matriarchal construct,<sup>2</sup> and the male

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<sup>1</sup> *N.C. v. Samuel, a Slave*, 19 N.C. 182 (1836).

<sup>2</sup> According to Alabama law, “No execution can be levied on a child, or children, under the age of ten years, without including the mother; or upon the mother, without including the child, or children, as aforesaid, if living, and belonging to the defendant in execution: and the mother and child, or children, must



prerogative of “master” was an impossibility. As antebellum courts dealt with de jure legal questions regarding slaves, they were therefore establishing de facto precedents for how to do black family law. By the time slave families became free families, a long-standing socio-legal norm had been established that disintegrated black families to the same logic of family and household that was used for white families.

In the antebellum period, slaves were instead unable to participate in the kinds of affective bonds and basic human connections that, then and now, we have taken for granted as essential to our individual as well as collective humanity. Slaves were husbands and wives only in the emotional and/or religious sense. Their unions were not legally recognized because, due to coverture, the law allowed for the Master of the house to be the governing authority for *all* members of his household. The ways in which slaves experienced the bonds of family between spouses as well as between parents and children was thus significantly shaped by the whims of their Masters. How slave husbands and wives related to each other in the most quotidian sense – whether they could sleep together; the conditions under which they had intercourse; how they resolved conflicts; how they disciplined their offspring; the extent to which they had decision making authority over their offspring – was never under their control. Fundamental to all of their everyday lived family experiences was the fact that the next day was not guaranteed. What constituted their ability to do family, in other words, was the ever-present possibility – or likelihood – that the end of family was inevitable. Doing family as slaves meant confronting the imminent undoing of family. Tragically, Americans perverted this reality into an ideology which held that black families were pathological.

Throughout the 19th-century South, the ideology that black families were inherently pathological was hegemonic – shared by all members of society, to include whites unsympathetic toward the South’s brand of white supremacy. Northerners who traveled through the South for example, many with abolitionists proclivities, nevertheless made sense of slave families through problematic tropes of promiscuity and concubinage. Of slave quarters, for example, a Northern minister visiting Alabama observed that, “Their huts are sometimes comfortable, but generally they are miserable hovels, where male and female are herded promiscuously together.”<sup>3</sup> Another Northerner visiting Virginia similarly observed that slaves: “slept on the floor of the room which they were permitted to occupy, lying in every form imaginable, males and females, promiscuously.”<sup>4</sup> While another found that, “Not one of the slaves attended church on the Sabbath. The social relations were scarcely recognised among them, and they lived in a state of promiscuous concubinage.”<sup>5</sup> This trope of promiscuity and concubinage was available to whites both supportive and critical of slavery, and they extended to interpretations of slave marriage as well. A Northern abolitionist visitor to Huntsville, Alabama found that:

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be sold together, unless the parties in interest, or one of them, make affidavit and delivers the same to the officer, that he believes his interest will be materially prejudiced, by selling the slaves together, when they may be sold separately; but no levy or sale shall be made, by which a child under five years of age shall be separated from its mother” (*Code of Alabama*, 1852, §2056).

<sup>3</sup> Weld, *American Slavery*, 47.

<sup>4</sup> *Ibid.*, 69.

<sup>5</sup> *Ibid.*, 85.

Legal marriage is unknown among the slaves, they sometimes have a marriage form — generally, however, none at all. The pastor of the Presbyterian church in Huntsville, had two families of slaves when I left there. One couple were married by a negro preacher — the man was robbed of his wife a number of months afterwards, by her “owner.” The other couple just “took up together,” without any form of marriage. They are both members of churches — the man a Baptist deacon, sober and correct in his deportment. They have a large family of children — all children of concubinage — living in a minister’s family.<sup>6</sup>

He offered this example as evidence to support his larger critique about the hypocrisy of slave-owning Christians. In doing so, he highlighted hegemonic assumptions about slave families. While they disagreed with the institution of slavery, Northern abolitionists and Southern white supremacists believed in black inferiority. Left to their own natures, slaves would promiscuously “take up” with each other and produce numerous children. It was thus the duty of whites to teach slaves the moralizing influences of Christianity, to include marriage, which this Presbyterian pastor in Huntsville had apparently failed to do.

## **FREEDPEOPLE ARE ALSO PATHOLOGICAL**

An often overlooked facet of Reconstruction is the almost immediate pervasive attribution of pathology to “the black family” once the institution of slavery was abolished. Indeed, liberal and conservative narratives about black family pathology that are often attributed to Senator Patrick Moynihan’s 1965 report on “The Negro Family,”<sup>7</sup> took root a century earlier.

The Southern press was instrumental in propagating the ideology of black family pathology during Reconstruction. New Orleans’ *The Daily Southern Star*, for example, shared with its readers correspondence between Montgomery, AL and Memphis, TN papers regarding “the future of the freedmen”<sup>8</sup> in the South. Highlighting the consequences of black people’s inherent promiscuity and concubinage, the article spoke to high rates of “aggravated disease”<sup>9</sup> among freepeople. Indeed, in addition to small pox, black women had a reputation for carrying venereal diseases. The article then shared how “even children were smitten with the worse than leprosy from contact with their parents,”<sup>10</sup> consistent with stereotypes about black people’s incapacity for parenthood and tendency toward infanticide. The article then described how:

Apathy and abandon are results flowing out of a state of war to a people at no time noted for intelligence or industry, and left to themselves they are fast relapsing to that semi-barbarous condition in which the little enlightenment they have copied from the

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<sup>6</sup> Ibid., 47.

<sup>7</sup> Department of Labor, Office of Policy Planning and Research, *The Negro Family: The Case For National Action*, 1965, <https://www.dol.gov/oasam/programs/history/webid-meyniha.n.htm>.

<sup>8</sup> 1866, Mar 44. *The Daily Southern Star* 1(162): 2.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

white race only serves to enhance their bestial propensities, and encourage them to the indulgence of self, even to the very gates of death through unmentionable diseases.<sup>11</sup>

Newspapers across the South were flooded with this kind of ‘reporting’, often to conclude, as this particular article did, that, “to the negro, ‘liberty is death.’”<sup>12</sup> Significantly, so too were Northern papers. The *Mobile Register*, for example, was all too happy to share with its readers how the *New York Tribune* reported on freed people’s “barbarous neglect of each other in sickness”<sup>13</sup> and “infanticide,”<sup>14</sup> which were “sweeping these victims of Radical philanthropy rapidly from the face of the earth.”<sup>15</sup>

These assertions about black pathology as the ultimate demise of black people were a prelude to Frederick Hoffman’s (1896) extinction hypothesis, which predicted that, among other things, the biological effects of amalgamation<sup>16</sup> (or rather, from generations of children produced from white men’s rape of black women), and black people’s preference for promiscuity over marriage,<sup>17</sup> would lead to the extinction of the black ‘race.’ In fact, by the end of the century, many notable scholars advanced theses about black family pathology, based on data and/or observations from Reconstruction. Notably, Cornell statistician Francis Willcox published his findings on divorce in America (1897), the increase in which he attributed to black families in the South.<sup>18</sup> Two years later, he followed this up with a book in which he attributed the source of Negro crime to the Negro family.<sup>19</sup> Instead of attributing the apparent surge in Negro crime to the mechanisms of the convict lease system, Willcox found its cause in Black men’s incapacity for family leadership. He argued:

Under the slavery regime the negro had a feeble family life, much of the responsibility for the proper rearing of the family falling upon the master. The emancipated slaves have not been able in a single generation of freedom to develop or to imitate that family life which it has cost the whites many centuries to acquire.<sup>20</sup>

Historian Walter Fleming came to similar conclusions in his books. Fleming was born and educated in Alabama, the son of a prominent planter and slaveowner.<sup>21</sup> He rose to academic prominence by the end of the 19th-century as a historian of Reconstruction. Pathology was central to his characterizations of black families during Reconstruction.<sup>22</sup> He reiterated the

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> 1869, Mar 24. *Mobile Register* 2(46): 2

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> Frederick L. Hoffman, *Race Traits and Tendencies of the American Negro* (New York: Publisher for the American Economic Association by the Macmillan Company, 1896), 177-208.

<sup>17</sup> Ibid., 63-8, 188.

<sup>18</sup> W. Francis Willcox, *The Divorce Problem: a Study in Statistics*, 2nd ed. (New York: Columbia University, 1897), 20-1, 23, 29-30.

<sup>19</sup> W. Francis Willcox, *Negro Criminality* (Boston: G. H. Ellis, 1899).

<sup>20</sup> Ibid., 8.

<sup>21</sup> Owen, *History of Alabama*, 587.

<sup>22</sup> Fleming, *Civil War and Reconstruction*, 270-2, 763-5.

trope of “promiscuous marriages.”<sup>23</sup> He asserted that, “The average negro divorced himself or herself without formality; some of them were divorced by their churches, as in slavery.”<sup>24</sup> And he took the further step of tarnishing the masculinity of black men who were leaders during Reconstruction, asserting for example that, “Divorces became common among the negroes who were in politics.”<sup>25</sup>

Edward King’s travel memoir, *The Great South* (1875), was another example of the hegemony of black family pathology. King, a Northern author and journalist, originally published his travel memoir in 1874 in *Scribner’s Magazine*, which was especially popular in the North. His memoir has since become an important primary document for understanding black Southern life during Reconstruction. In it, King chronicles his travels through Louisiana, Texas, Missouri, Arkansas, Mississippi, Alabama, Georgia, Florida, South Carolina, North Carolina, Kentucky, Tennessee, Virginia, West Virginia, and Maryland. The connective tissue in his observations in all of these spaces was his interpretation of black family life. He often wrote “husbands” and “wives” in quotations to emphasize the uncertainty and discomfort he had with using those terms to describe what he felt were “careless unions.”<sup>26</sup> For example, while visiting a South Carolina rice plantation, he decided to speak to four black men about their families, in order to “throw light on their morality.”<sup>27</sup> During this inquiry, he discovered that, “each of the four had had two ‘wives,’ as they termed it; one of the oldest had had four.”<sup>28</sup> Likewise, after speaking with two black women in a field in Tennessee, he wrote about, “their ‘husbands,’ or the men of the house,—for marriage is not always considered necessary among the negroes.”<sup>29</sup> As a general observation about Southern black family life, King also asserted that the insecurity of black marriages led to multiple partners and separations. “The causes of separation were various—infidelity, abuse, a hasty word, or laziness.”<sup>30</sup>

Even those charged with assisting freedmen against the Southern structures and attitudes that were against them were nevertheless invested in black marital pathology ideology. For example, based on reports from his officers throughout the Southern states, Freedman’s Bureau Commissioner, Major General Oliver Howard, wrote to Congress that:

Without the constant labors of these officers to instruct the freedman and secure the proper execution of all laws with reference to marriage, I believe, as a general rule, marriage would be little regarded. The feeling that negroes are not bound to solemnize the rite of marriage still exists in many places, and all the debasing influences of concubinage would still disgrace the nation. Most of the States have legislated on the this subject, yet the freedman are to a great extent ignorant of the law, and need assistance in the way of instruction. The white citizens do not seem to

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<sup>23</sup> Ibid., 763.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

<sup>26</sup> Edward King, *The Great South* (Hartford: American Publishing Co., 1875), 430.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid., 542.

<sup>30</sup> Ibid., 430.

take an interest in instructing the freedmen in the proper execution of this statute. Bureau officers attend to this matter.<sup>31</sup>

Amused by Howard's letter, Southern newspapers offered sarcastic commentaries about the futility of the Bureau's efforts in this regard. In an article titled "Marriage Among the Freedmen," for example, the *Mobile Register* shared with its readers a response to Howard's letter from New Orleans' *Natchez Democrat*, which read:

In order to show how lightly the bond of matrimony is esteemed among most of the freedmen of the South, we publish below a *verbatim et literatim* copy of a write of divorce (if such it may be called) issued from one of the Natchez colored churches. This copy was picked up, but is undoubtedly authentic. We publish it because we learn that Gen. Howard, of the Freedmen's Bureau, who was here a few days since, seemed extremely anxious to know how his colored pets esteemed the vows of matrimony. The following will perhaps aid him in arriving at a solution of the question. Here is the divorce:

This will Certify that This day April 12th 1866, that from a Request by Sister Jane Brooks Bringing Brother Grandson as her Witness to Frank Brooks Giving her a full Write to call on me for a divorce as a Separatxx xxxx xxx this will Certify that Frank & Jane Brooks this day forward is no more man and Wife he is Frank Brooks and she is Jane Xxxg.

Jackson S. Habersham, Church Clerk.<sup>32</sup>

Readers would have read the divorce example provided as a joke in and of itself,<sup>33</sup> as it hardly conformed to the lengthy and protracted legal standards for divorce among white couples.<sup>34</sup> Since the article did not attempt to explain or expand upon the divorce, it was clear that its apparent ridiculousness to its white audience spoke for itself. Indeed, it was yet another example that affirmed the ideology of black family pathology in which whites were deeply invested.

Attendant to the hegemonic ideology that freedpeople did not know how to do family was the stigmatization of black gender. It held that freedmen were not 'proper' men, but rather savage and licentious. Freedwomen were likewise not 'proper' ladies, but rather masculine and/or also licentious. Freedmen were bad fathers and husbands. Freedwomen were bad mothers and wives. These gender ideologies were crucial at a moment when the Southern way of life that depended on Victorian notions of true womanhood and true manhood – ideals that only worked in the presence of their constitutive outside, the degradation of gender among Negroes.

The significance of black family pathology ideology for black masculinity was that black men were incapable of being true husbands, fathers – Masters of the Houses. From his

<sup>31</sup> 1866, Aug 15. "The Freedmen's Bureau. General Howard's Letter" *Boston Daily Advertiser* 108(38):1.

<sup>32</sup> 1868, Sep 11. *Mobile Register* 1(193): 1

<sup>33</sup> Gutman illustrates the ways in which freedpeople's multiple marriages were objects of white ridicule during Reconstruction. Gutman, Herbert G. 1976. *The Black Family in Slavery and Freedom: 1750-1925*. New York: Vintage books, pgs. 226-8.

<sup>34</sup> In addition to property and alimony allegations, divorces between white couples required, at a minimum, legal documentation.

travels throughout the South, for example, King concluded that the freedman was incapable of possessing the morality necessary for the Master of House role, which is why “It is hard for him to bear the yoke of the family relation.”<sup>35</sup> Fleming’s deprecation of black men’s capacity for morality was less direct. In his interpretation, “Many negro men seized the opportunity to desert their wives and children and get new wives. It was considered a relic of slavery to remain tied to an ugly old wife, married in slavery.”<sup>36</sup> Indeed, having little sense of (manly) responsibility to one’s wife and children, much less a capacity for affective bonds, black men left their wives and children in order to find prettier new wives. Fleming further degraded black men’s capacity for fatherhood, stating that, “Much suffering resulted from the desertion, though, as a rule, the negro mother alone supported the children much better than did the father who stayed.”<sup>37</sup>

Again, those who were more sympathetic to the plight of freed people shared the same problematic ideologies about black masculinity as those who were the least sympathetic. While staunch white supremacists held that black men were incapable of Master of the House responsibilities, Freedmen’s Bureau officials and Radical Republicans held that black men were not *yet* capable of Master of the House responsibilities due to their ignorance. For his annual governor’s pardons for example, Radical Republican Governor Lindsay pardoned two freedmen imprisoned for bigamy in 1871. Of the first freedman, Lindsay stated that the “pardon is prayed for on the grounds of ignorance.”<sup>38</sup> Of the second, he likewise stated that the freedman married his wife “through ignorance.”<sup>39</sup>

These ideologies about black masculinity begged an important question: If black men were incapable of heading their families, to whom were black women and men to turn for guidance, support, and to the extent it was necessary, protection? The answer was the same as it has always been – white men. For white Southerners especially, revisionist accounts of slaves’ deep appreciation for white men’s kindness toward and fierce protection of their slaves began to propagate before the Civil War, when rumors of Confederate secession reached a fever pitch.<sup>40</sup> During Reconstruction, these narratives were especially meaningful for degrading black masculinity. Consider this 1868 blurb in the *Mobile Register* for example:

Yesterday evening a negro named Henderson Johnson . . . Administered a severe beating to a negro woman employed in the same establishment . . . The woman,

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<sup>35</sup> *Ibid.*, 277.

<sup>36</sup> Fleming, *Civil War and Reconstruction*, 271.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Pardons Granted by the Governor of Alabama, and His Reasons Therefor, submitted to the General Assembly, Nov. 21, 1871* (Montgomery: W.W. Screws, State Printer, 1871), 14.

<sup>39</sup> *Ibid.*, 16.

<sup>40</sup> A great example of this is in a letter published in the *Mobile Register* in 1859, written by Northern Republican William Hemstreet, who explained that after visiting the south, his abolitionist views on slavery were completely transformed toward the belief that, “I have seen enough to come to this declaration: *that the Southern States of America are the natural paradise of the negro* [sic].” Finding that, “There are three things for which a Southerner will quickly draw his knife: call him a liar, insult a female, and abuse his nigger,” Hemstreet applauded the loving relationship and protective dispositions that Masters had toward their slaves, adding that, “The negroes are aware of this regard for their persons, and they enjoy it.” 1859, July 21. *Mobile Register* V (1498): 1.

whose name is Fanny Rucker informed the Mayor that Johnson acted like the balance of the negroes, who generally treated her badly, while the white folks always showed her kindness.<sup>41</sup>

This blurb is emblematic of postwar narratives about race and masculinity. It appeals to beliefs about black men's misogyny and capacity for gender violence, as it indicts not just Henderson Johnson, but the balance of black men. And it makes clear that even black women knew that white men like the Mayor, were their true protectors – especially from black men's cruelty.

That said, white Southerners continued to regard black womanhood as the constitutive outside to true victimhood. As silences and erasures persisted vis-à-vis white men's physical and sexual violence toward black women, to the extent black women were ever seen as victims of violence, it was when black men were the perpetrators. In other words, black women's victimhood was largely a means to an end of diminishing black manhood. In circumstances where whites had little interest in achieving such an end, black women's abuse was not conceptualized as abuse at all.

Indeed, whites had very low opinions of black women, especially when they attempted to perform white femininity.<sup>42</sup> This was especially a challenge when freedwomen initially aspired to live with the degree of leisure enjoyed by their former mistresses – the only model for womanhood they had known. That, coupled with freedpeople's attempts to do family in the traditional fashion of men working while women stay at home and rearing children, led Freedman's Bureau officials to take measures ensuring that black women would continue to work just as they had in slavery. The Southern economy simply could not afford to recognize gendered distinctions in black people even after they were free.<sup>43</sup> A critic of the Bureau's handling of black marriage and labor made an apt observation in the Washington, D.C. based *National Republican*. Regarding a Bureau officer's decision to side with a planter who separated a wife from her husband, he wrote that "It is evident that this officer considers a labor contract more sacred than a marriage contract."<sup>44</sup>

Because femininity always had a higher bar for obedience and docility, black women's reluctance to continue living as they had as slaves led many Southern whites to see them as more belligerent than black men. Fleming conveyed precisely this interpretation as truth, when he wrote that:

Negro women never were as well-mannered, nor, on the whole, as good-tempered and cheerful, as the negro men. Both sexes during Reconstruction lost much of their cheerfulness; the men gradually ceased to go "holloing" to the fields; some of the blacks, especially the women, became impudent and insulting toward the whites.<sup>45</sup>

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<sup>41</sup> 1868, Jul 3. *Mobile Register* 1(133): 3.

<sup>42</sup> Fleming, *Civil War and Reconstruction*, 763.

<sup>43</sup> Annual Report of the Assistant Commissioner, Montgomery, AL, October 31, 1866, Records of the Assistant Commissioner for the State of Alabama, Bureau of Refugees, Freedmen, and Abandoned Lands, 1865-1870 (National Archives Microfilm Publication M809, roll 2), Records of the Bureau of Refugees, Freedmen, and Abandoned Lands, Record Group (RG) 105, National Archives Building, Washington, DC.

<sup>44</sup> 1866, Aug 10. *National Republican*, VI(217): 1.

<sup>45</sup> Fleming, *Civil War and Reconstruction*, 763.

Stripped of the feminine traits of weakness and frailty during slavery, black women were never able to take advantage of those justifications for not working – justifications that were assumed to be true about white women’s biology. To not be feminine, meant to be masculine. Common assertions such as: “it is a well-known fact that in many cases it is almost impossible to distinguish the sex of negroes except by their dress,”<sup>46</sup> therefore further degraded black womanhood. In this regard, black women would never be able to attain true victimhood. Just as they lacked gendered distinctions from black men in slavery, after the war Southerners often mused at black women’s capacity for abuse and self-protection. Mobile’s Mayor, for example, said the following about a wife-beating case before him, “A boy (as we used to say) who looked as if he might be Sarah Johnson’s brother, was complained of by his wife for slapping her rather pretty face, and she says she had paid a gang of women to whip him.”<sup>47</sup> According to the newspaper, the couple “declared in open court that they had no further use for each other, and the Mayor considering the study of the interior life of the colored element an ample compensation for the time spent in the case, dismissed the parties.”<sup>48</sup> Indeed, no matter how serious the incident, the “interior life of the colored element”<sup>49</sup> was a reliable topic for derision and amusement to white Southerners in the postwar South.<sup>50</sup>

## RACIALIZATION OF WIFE BEATING

Alongside bigamy, promiscuity, and insecure affective bonds, another pathology of the black family, according to whites, was wife beating. Indeed, after the war, Southerners began to regard wife beating as a “black crime.” While wife beating was legal during Reconstruction, Southern whites took umbrage with the notion that black men – who were not *real* men – nevertheless participated in the ultimate right of Men – the prerogative to enforce their domestic authority by beating their wives. Wife-beating laws thus became a location for fighting out the battle of racialized performances of gender. Just as in the antebellum period, they functioned to reinforce the gender norms of a particular time and place – gender norms that were always inextricably linked to race and class.

And so, almost immediately after the War’s end, wife-beating, though legal on the books, became racialized in action as a black “crime.” It was an object of mockery and derision for southern whites – an amused “I told you so” that was a further testament to the inevitable decline of a race of people whose survival depended on the civilizing effects of slavery. Did black husbands beat their wives? Yes.<sup>51</sup> Did white husbands also beat their

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<sup>46</sup> 1868, Oct. 22. *Mobile Register* 1(228): 3.

<sup>47</sup> 1870, Apr 27. *Mobile Register* 3(45): 3.

<sup>48</sup> 1870, Apr 27. *Mobile Register* 3(45): 3.

<sup>49</sup> 1870, Apr 27. *Mobile Register* 3(45): 3.

<sup>50</sup> Gutman, for example, illustrates the ways in which freedpeople’s multiple marriages were objects of white ridicule during Reconstruction. Gutman, *The Black Family in Slavery and Freedom*, 226-8.

<sup>51</sup> Alabama Freedman’s Bureau records reveal that black wives did, on occasion, seek protection from abusive husbands. Given that freedpeople overwhelmingly used the Bureau as a resource against abusive *planters*, it is likely that black women underreported their husbands’ abuse. As I illustrate below, the data



wives? Also, yes. Court records reveal that wife-beating in white families continued unabated.<sup>52</sup> The difference is how these acts were treated legally, as well as within popular discourse.

It is impossible to know for sure whether black men were more likely than white men to engage in wife beating.<sup>53</sup> Ideally we would want data on the frequency of wife beating among white and black men. And while local officials did collect data on wife beating: There was no standardization of what constituted wife beating across or within jurisdictions. It could be categorized as “assault and battery” “assault and battery on the wife,” “wife-beating,” “simple battery,” “disturbing the piece,” and so on. Furthermore, to the extent that local officials did keep records, those records were not systematically preserved. But more importantly, even if we *did* have this data, what would it tell us? It wouldn’t tell us the actual prevalence of wife beating. But rather the targets of enforcement – during a historical moment in which Southern states were building a carceral regime precisely for the purpose of criminalizing black people’s behavior.

What we can (and should) measure are the representations of black wife beating in the popular press. One of the most widely read newspapers in the South was Alabama’s *Mobile Register*. According to *Rowell’s American Newspaper Directory*, the preeminent authority on American newspapers at the time, the *Mobile Register* was the “oldest and most quoted paper in the South.”<sup>54</sup> Under the leadership of Confederate General John Forsyth, the *Register* was widely respected in the North and South. For example, in his Southern travel memoir, New York’s Edward King stated:

General John Forsyth, ex-diplomat, and one of the ablest journalists in the country. The *Register*, which General Forsyth edits, is sometimes a little bitter in partisan

indicates that black wives were invested in maintaining their families’ integrity by protecting their abusive husbands from legal and extralegal punishment.

<sup>52</sup> Between 1866-1871, records from Madison County Chancery Court (Northern Alabama region), Jefferson County Circuit Court (Industrial and planter region), and Sumter County Circuit Court (Black Belt) presided over 18, 36, and 14 (respectively) wife-beating cases involving white couples. The Circuit Court cases in Jefferson and Sumter Counties occurred because the husband was indicted for felony level violence. See: “Alabama, Madison County Chancery and Circuit Court Records, 1829-1968.” Images. *FamilySearch*. <https://FamilySearch.org>. Chancery Court Records; Madison County Record Center, Huntsville; “Alabama, Sumter County Circuit Court Files, 1840-1950.” Images. *FamilySearch*. <http://FamilySearch.org>. Circuit Court, Livingston; “Alabama, Jefferson County Circuit Court Papers, 1870-1916.” Images. *FamilySearch*. <http://FamilySearch.org>. Jefferson County Circuit Court, Birmingham.

<sup>53</sup> Scholars have belabored this point, due to the lack of available data. See Siegel, “The Rule of Love,” 2140; Rambo, *Trivial Complaints*, para 18. Critics of Siegel’s argument about the racialized administration of wife-beating laws have also pointed to the absence of crime statistics and police data that illustrates bias against blacks and immigrants. According to Ramsey (2015), for example, “several other legal histories have found evidence regarding the role of racial bias in domestic violence cases too sparse and contradictory to draw firm conclusions” (“The Stereotyped Offender: Domestic Violence and the Failure of Intervention,” in *Penn State Law Review* 120(337): 353). See also Ramsey, Carolyn. 2006. “Intimate Homicide: Gender and Crime Control, 1880-1920,” in *University of Colorado Law Review* 77(101): 172; and, Katz, Elizabeth. 2015. “Judicial Patriarchy and Domestic Violence: A Challenge to the Conventional Family Privacy Narrative,” in *William & Mary Journal of Women and the Law* 21(379): 404.

<sup>54</sup> *American Newspaper Directory* (New York: George P. Rowell & Co., 1872), 552.

politics, but altogether highly creditable to Mobile.<sup>55</sup>

Like most of the men who owned and controlled the Southern press after the war, Forsyth was a staunch defender of slavery who fought for the Confederacy during the war. He purchased the *Register* in 1854 and organized some of the top reporters in the South to cover the war.<sup>56</sup> After the War, Forsyth fiercely opposed Reconstruction. Emblematic of Southern newspaper editors after the war, he used the *Mobile Register* as to advance white supremacist platforms until his death in 1877.<sup>57</sup>

Its wide-readership notwithstanding, the *Register* carried out the normative local newspaper function of reporting on local court cases. In this capacity, its antebellum editions were littered with wife-beating cases – as pertained to *white* men because they were the only men with actual wives. After the war one would therefore expect to see both black and white wife beating cases reported. But instead all the *Register* reported was *black* wife-beating cases as though wife-beating within white families ceased altogether. In other words, upon comparing *Register* issues from before and after the war, what is instantly clear is that after the war wife-beating took an immediate ideological turn toward becoming a black crime.

In its reporting, the *Register* took the further liberty of propagating a racialized wife-beating ideology far beyond the facts presented in the local courts. At times, this occurred via (not so) subtle interpretations inserted into what were typically straightforward blurbs about court proceedings, devoid of interpretations. For example, where court reporting would typically state: “A negro named Jonas Shaw was arrested yesterday for beating his wife,” the *Register* instead reported, “A negro named Jonas Shaw was arrested yesterday for indulging in the pastime so common among negroes, of beating his wife. To use his own phrase, he made her ‘sweat, you bet.’”<sup>58</sup> In other words, instead of reporting about one black man’s wife-beating, the paper used his case to assert as truth that Jonas Shaw’s wife-beating is not exceptional, leaving its readers with an amused morsel of Jonas’ flippancy about the affair. Unlike this example, the *Register’s* editorializing in its court reporting was at other times much less subtle. For example, in an effort to normalize not only freedmen’s pathology for beating their wives, but also freedwomen’s pathology for accepting such beatings, the paper stated before reporting on one case, “Wife beating among the negroes has of late become so common that the negro women seem to labor under the impression that their husbands have a perfect right to beat them on all and every occasion.”<sup>59</sup>

But Southern newspapers often went much further than mere court reporting in advancing this ideology, choosing also to publish editorials and opinion pieces about wife-beating in black families. Consider the following “science” piece the *Register* shared with its readers. This was a lecture delivered by Dr. Samuel Cartwright to the New Orleans Academy of Sciences, in which he addressed the inherent inability of black men to perform Master of the House morality:

The Nigrithians, or Africans proper, not only enslave their wives, but pave their

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<sup>55</sup> King, *The Great South*, 327.

<sup>56</sup> Owen, *History of Alabama*, vol. III, 598.

<sup>57</sup> *Ibid.*

<sup>58</sup> 1869, Apr 6. *Mobile Register* 2(57): 3.

<sup>59</sup> 1868, Jul 2. *Mobile Register* 1(133): 3.

courtyards with the skulls of the refractory or disobedient. Wealth and power acquired by the husband, so far from elevating the wives, add to their degradation by being used to increase their number. Nor does, what is called negro freedom, elevate the colored woman, but sinks them lower. The husbands hold them in abject slavery. They dare not murder them, as in Africa, but they beat and maltreat them on the slightest provocation. The freedom of the husband is a loss to the women and children. They are in slavery still, and have lost their white protectors. While they and their husbands were in subordination to the white man, equal rights and equality among all the colored population, male and female, young and old, were sedulously maintained, as indispensable on every Southern plantation, all of which is lost to three-fourths of the black population, the women and children, by what is called negro freedom. Nor are the negro men free in anything by name. De Gobineau adduces Hayti as a glaring instance of the futility of the attempt to give a people institutions not suggested by their own genius and instincts.<sup>60</sup>

Cartwright's message of black people's inability to do family under black men's leadership was clear. As was his positioning of white men as black women and children's natural protector. Perhaps what is most noteworthy, however, is that the *Register* published this piece in August 1868; Cartwright gave this lecture in 1857 and died in 1863. He was one of many eugenicists whose 'research' supported the Confederacy leading up to the war. His speech is one of many examples of the kind of pre- and post-war 'science' that Southern newspapers shared with their readers during Reconstruction, often using "Africa" or the Caribbean islands where slaves' freedom predated the Civil War, to highlight free black people's base incapacity for doing family. Indeed, the *Register* resuscitated Cartwright's speech (after which other Southern newspapers followed suit) into popular Reconstruction discourse for no other reason than advancing the ideology of black family pathology, apart of which was black men's propensity for abusing their wives.

What is also apparent in newspapers' treatment of wife-beating after the war is the racialized double-standard created during the antebellum era. According to newspapers, local courts – Mayor's courts, city courts, and municipal courts – regularly punished and/or derided black men for beating their wives, despite the fact that the law on the books protected husbands' right of chastisement, *in moderation*. The depiction of black wife-beating consistently blurred this line. In other words, it would have been one thing for papers to say that the problem with black wife-beaters was that, *although the law protected their right of chastisement*, they consistently did so without moderation. But public discourse never achieved this degree of clarity in its depiction of black wife-beating, instead preferring indictments like this one advanced in the *Register*, that deny black men the right of chastisement to begin with. On its reporting of why yet another freedman was punished for wife-beating, the paper reported:

The majority of the negroes of this city, as a general thing, seem to labor under the belief that according to law they are at perfect liberty to whip and beat their wives

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<sup>60</sup> 1868, Aug 24. Mobile Register 1(177): 2

whenever they think proper.<sup>61</sup>

In contrast to what this statement conveys, the law on the books absolutely granted husbands the discretion to beat and whip their wives whenever they thought proper. In action, however, the law on the books continued to protect only the prerogatives of *white* husbands.

Abused black wives often tried in vain to have courts treat their families with the same legal standards afforded white families by evoking the language of privacy, only to be derided in court and in the press for doing so. For example, in its reporting of a freedman's wife-beating case in Mayor's court, the *Register* mocked the wife, stating: "His wife begged hard for him, and informed the Mayor that it was only a family affair, she having disobeyed her husband, for which he had a right to punish her."<sup>62</sup> The mayor ignored her pleas, punishing her husband with a \$10 fine anyway. The wife's logic exemplified the logic for protecting wife-beaters on which Southern law was based, as upheld in January 1868 when the North Carolina Supreme Court acquitted a white husband for whipping his wife with a switch in order to protect a husband's role as the head of "family government."<sup>63</sup> Yet the black wife's June 1868 assertion that her husband's abuse was a "family affair,"<sup>64</sup> fell on deaf ears. Later that year, the *Register* editorialized that, "Numerous cases have been brought before the Mayor, where negroes have treated their wives in a most brutal manner, yet, in almost every instance, the women have begged the Mayor to let their husbands off,"<sup>65</sup> once again depicting black wife-beating as a thing fundamentally different than white wife-beating – a thing for which domestic privacy therefore did not apply. After all, the goal of domestic privacy was to respect the Master of the House's authority, which is precisely the thing that courts and white Southerners were determined to undermine in black families.

The racialized double-standard also extended to abused wives. Remember that the adjudication of white wife-beating cases meant weighing the gender performance of the husband and wife. This meant that whenever a white husband was convicted for beating his wife, it was because his wife had proven herself to be appropriately gendered – meek, docile, obedient, and loving – a true victim. Since the goal of convicting black wife-beaters achieved the desired end of undermining black men's Master of the House authority and of itself, black wife-beating cases rarely functioned to protect black women, who ideologically embodied the opposite of "true victimhood" to begin with. Consistent with antebellum characterizations of black women, the ideological conflation of black womanhood with violence endured. In a case where a black wife-beater was not charged, for example, the *Register* reported:

The blows fell with such force and rapidity as to attract the attention of a policeman, and still the wife informed the Mayor that Charley was only playing with her, and that she was not in the least hurt, and had no complaint to make. As she appeared perfectly satisfied with the treatment she had received, the Mayor dismissed the case,

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<sup>61</sup> 1869, Jan 7. *Mobile Register* 1(291): 3.

<sup>62</sup> 1868, Jun 26. *Mobile Register* 1(128): 3.

<sup>63</sup> *State v. Rhodes*, 61 N.C. 458 (1868).

<sup>64</sup> 1868, Jun 26. *Mobile Register* 1(128): 3.

<sup>65</sup> 1868, Jul 2. *Mobile Register* 1(133): 3.

and the pair left the Court in a happy frame of mind.”<sup>66</sup>

The validity of the both the policeman and the *Register's* account notwithstanding, this passage illustrates that, unlike white wife-beating cases, discourse regarding wife-beating in black families was adept at attacking an abused wife's character while simultaneously attacking her husband's character. Accordingly, The *Register* regularly justified freedman's reasons for beating their wives, just as they condemned the freedmen for doing so. Consider the following passage from a Jan 1869 article about the Mayor's court inundation with black wife-beating cases:

Numerous cases in point are constantly brought before the Mayor, and though a heavy fine is imposed in every case, the practice – no doubt highly beneficial in many cases – still flourishes like a green bay tree. Yesterday evening a negro man, having good reasons to believe his dusky partner was not pursuing a straightforward and proper cause, seized her by her woolly locks and administered to her a sever beating with a rope's end, having previously divested her of a portion of her clothing. After beating her to his heart's content, he knocked her down and kicked her until she was insensible. On the same principle that the more you beat a hound the more he loves you, the woman upon coming to, used every endeavor to prevent the arrest of her husband, vehemently insisting that she deserved the flagellation, and that it was only a family affair with which the police had nothing to do and no right to interfere.”<sup>67</sup>

After reiterating the prevalence of black wife-beating, the article affirms stereotypes about black women's promiscuity and inability to be good wives, confirming the suspicions that led to the freedman's abuse. Despite that confirmation, the article cannot grant the freedman any manly prerogative for acting on his suspicions, as his wife attempted to do. This further highlights that when white men beat their wives, shielding their violence with an ideology of domestic privacy mattered, because that was the linchpin of wife-beating law. When black men beat their wives, however, the assertion of domestic privacy was a joke, a sort of false consciousness that black women evoked because they enjoyed being beaten – as the article states about the wife in this incident – the more you beat a hound, the more he loves you. Southern newspapers like the *Register* were thus instrumental in advancing the belief that wife-beating was a black crime.

The notion that wife-beating was intrinsic to black families was so hegemonic that even the Freedmen's Bureau took a punitive approach against it. Unlike southern planters, who were law and order stalwarts who created and were deeply invested in entrenching a convict lease system that would keep freedmen tied to the land, the Freedmen's Bureau stood in stark opposition to this law and order approach. In that capacity, they spent a great deal of time acting as intermediaries between freedpeople and local courts, pleading for fair treatment in the numerous instances where freedpeople were accused of a crime. The Freedmen's Bureau, in other words, was fundamentally *anti* – “law and order” approaches.

Nevertheless, wife-beating was one of the few areas where even the Freedmen's Bureau took a punitive stance, albeit for different reasons than Southern white supremacists.

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<sup>66</sup> 1868, Jul 2. *Mobile Register* 1(133): 3.

<sup>67</sup> 1869, Jan 7. *Mobile Register* 1(291): 3.

Much of the work undertaken by the Freedman's Bureau was to teach freedpeople the 'proper' family norms, inherent in which was the proper performance of gender roles. As such, the Freedmen's Bureau, from a paternalistic motivation, often encouraged the punishment of negro men charged with beating their wives as an educative device. As one Bureau official wrote to a planter about a black wife-beater in his employ, "If the man beats and abuses his wife you will be justified in having him arrested and dealt with according to civil law.<sup>68</sup> Just as they fought against or pushed back on so many other white supremacist carceral maneuvers, the punishment of wife-beaters was an act they supported.

The Freedman's Bureau's punitive stance on wife-beating further enabled the racialized double-standard. Consider this September 1866 letter from a Freedmen's Bureau official, about Jacob, a freedman, whose employer reported him for wife-beating:

Jacob, whom you report is certainly guilty of gross misdemeanor, and is amenable to the laws for his conduct. I would not only advise but earnestly hope that you will prosecute him and have him severely punished for his cruelty. It is a notion, I find, far too prevalent, that the relation of husband and wife gives the man privilege to whip and abuse the woman at pleasure. But they must be made to understand that abuse or violence offered a wife or a woman occupying that position of wife is punishable before the law to the same as against any other person. It may involve them in an acquaintance with the penitentiary. It will be well to make an example of Jacob.<sup>69</sup>

Again, whereas planters were motivated by a white supremacist project to regain control of black labor, the Freedmen's Bureau was motivated by a project to cultivate a particular ideal of healthy families among freedpeople – one that had no room for wife-beating. But this passage is also emblematic of the racialized double-standard for wife-beating. The official's assertion that "abuse or violence offered a wife or a woman occupying that position of wife is punishable before the law to the same as against any other person," is *patently false*. Not only did Southern law absolutely allow husbands to beat their wives, but all state laws in the U.S. at this time upheld a husband's right to chastise his wife. And they most certainly did not equate wife-beating with assault and battery on "any other person." Nevertheless this Bureau official's assertion is representative of the pervasive thinking among Southerners and Freedmen's Bureau officials. Just like the antebellum law that stated slaves could not beat slaves, ignoring any gender privileges within slave marriages, whites in the postwar era continued to ignore gender privileges within black marriages. As such, Jacob, like so many black men at this time, faced time in the penitentiary for being held to a legal standard that did not apply to white men.

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<sup>68</sup> Roll 28, Selma (Subassistant Commissioner) Letters Sent, Volume 2, Jan.-Sept. 1867. United States. National Archives Records Administration, M1900. *Records of the Field Offices for the State of Alabama, Bureau of Refugees, Freedmen, and Abandoned Lands 1865-1872*.

<sup>69</sup> Roll 28, Selma (Subassistant Commissioner) Letters Sent, Volume 1, Mar 1866 – Jan 1867. United States. National Archives Records Administration, M1900. *Records of the Field Offices for the State of Alabama, Bureau of Refugees, Freedmen, and Abandoned Lands 1865-1872*.

## FULGHAM V. ALABAMA

When the *Fulgham v. Alabama* ruling was handed down in 1871, all it did was replace the long standing law on the books that were used for white men, with the law in action double-standard that had been applied to black men. Legally, wife-beating among whites was adjudicated based on coverture logic, where respecting a man's role as head of his household was of upmost importance. In 1871, however, when the Alabama Supreme Court presided over its first case of black wife-beating, centuries of coverture logic come to a screeching halt, and marriage made a drastic turn toward equal partnership, where "the wife is not to be considered as the husband's slave."<sup>70</sup> In the midst of a pervasive black family pathology ideology that regarded wife-beating as a black crime, it is no surprise that Alabama became the first state to rescind a husband's legal right to beat his wife. Alabama was the first state to rescind a husband's legal right of chastisement because it was the first Southern state whose Supreme Court ruled on a wife-beating case involving a black family.<sup>71</sup>

### The Alabama Supreme Court, 1870-1871

Given the heightened racial tension and dis-ease that characterized Reconstruction, one could assume that George Fulgham was relatively fortunate to have a team of justices whose political leanings suggested a degree of fairness in their rulings vis-à-vis freedmen. Alabama's Supreme Court consisted of three justices during this period. All were Republicans who opposed secession. Chief Justice Benjamin F. Saffold was a Democrat before the war, moved North during the war, and changed his loyalties to the Republican party after the war. Justice Elisha Wolsey Peck was a former Whig who staunchly and actively opposed secession, supported Union goals, and was a prominent Republican during Reconstruction. Justice Thomas Minot Peters, who ultimately wrote the Fulgham opinion, was also a former Whig. He was pro-Union during the war and became a Republican during Reconstruction. However, attempts to make causal claims about their rulings and their personal and public affiliations may yield unreliable conclusions.<sup>72</sup> After all, they ultimately upheld George Fulgham's conviction.

In fact, the justices who ruled in the *Fulgham* case were instrumental in creating<sup>73</sup> and sustaining the racial sociolegal ideologies that drove the postwar South. Put differently, they

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<sup>70</sup> *Fulgham v. State*, 46 Ala. 146 (1871).

<sup>71</sup> The next state Supreme Court to rule on a wife-beating case involving a black family was Mississippi in 1893, which prompted Mississippi to also rescind a husband's right of chastisement and order to change the "belief amongst the humbler classes of our colored population of a fancied right in the husband to chastise the wife" (*Harris v. Mississippi*, 71 Miss. 464). Well before 1893, however, other Southern states had already rescinded a husband's right of chastisement and/or began to criminalize wife-beating in various ways, precisely because wife-beating became racialized as a *black crime*.

<sup>72</sup> Malcolm Cook McMillan, *Constitutional Development in Alabama, 1798-1901: A Study in Politics, the Negro, and Sectionalism* (Spartanburg: The Reprint Company, Publishers, 1955), 117-125; Siegel, "The Rule of Love," 2136.

<sup>73</sup> Grossberg, *Governing the Hearth*, x, xii.

were by no means unaffected or untouched by white supremacist ideologies. As discussed in the previous chapter, Chief Justice Benjamin Saffold was the son of a prominent Southern Democrat Black Belt planter family. He opposed secession because he wanted to *protect* the institution of slavery.<sup>74</sup> He firmly (and correctly) believed that secession would trigger a federal abolition of slavery. His nonparticipation in the Confederacy afforded him favor after the war, which is when he switched loyalties to the Republican Party. Unlike Saffold, Associate Justices Elisha Peck and Thomas Peters were Republicans (Whigs) before and after the war. Yet, they too owned slaves, and therefore depended on black labor for their livelihood.

I have thus far argued that in the postbellum South, black family pathology, the racialized double standard for wife-beating, and thus the racialization of wife-beating as a black crime, were *hegemonic*. In other words, these ideologies and stereotypes transcended political party, political ideology, and regional (North vs. South) ideologies about race. Alabama's Republican Supreme Court rulings, and indeed Saffold's *actions* when he was Mayor of Selma,<sup>75</sup> suggest that the Alabama's Supreme Court justices were apart of and made meaning through the hegemonic race and gender sociolegal ideologies that pertained to wife-beating.

In 1870, one year before the *Fulgham* ruling, the Alabama Supreme Court ruled on two landmark wife-beating cases. In both cases, the husband's violence far exceeded that of George Fulgham's. For example, the *Goodrich v. Goodrich* ruling stated that:

Besides the general bad conduct of the defendant by unmerited abuse and insult to the wife, which seems to have prevailed during almost the whole term of their married life, the bill alleges that the defendant had, upon several occasions, stricken complainant on the face, and in the mouth, and had once kicked her in the side, with his booted foot, with such violence as to produce a serious bruise, which remained visible for two months after the kick was inflicted, and which so affected the health of the wife that she was forced to take frequent potions of laudanum, in order to obviate the effects of a premature birth.<sup>76</sup>

The court ruled in the wife's favor, granting her a divorce. In the *Turner v. Turner* case, the husband's decision to whip his wife was only a fraction of his physical abuse.<sup>77</sup> But as in antebellum era divorces, Mr. Turner's violence was inextricably linked to the relationship he had with Sally, a black woman that Mrs. Turner referred to – in 1870 – as Mr. Turner's "slave."<sup>78</sup> Indeed, he once owned Sally. Before emancipation, he abandoned Mrs. Turner, taking Sally with him. Sally was still living with him by the 1870 trial. Here is an excerpt from the ruling that conveys this continued messiness of race and gender in postbellum domestic relations. It starts by stating how Mrs. Turner was:

Beaten by this defendant in her face with his fist, until "one third part of her face"

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<sup>74</sup> Jackson, *The Story of Selma*, 235-7; Fitts, *Selma*, 46, 104-6.

<sup>75</sup> In the previous chapter, I use Freedmen's Bureau data to illustrate how local officials, to include Saffold, undermined black men's chastisement authority.

<sup>76</sup> *Goodrich v. Goodrich*, 44 Ala. 672 (1870).

<sup>77</sup> *Turner v. Turner*, 44 Ala. 448 (1870).

<sup>78</sup> *Ibid.*, 444.



was “black and blue:” the same person at whom he had thrown a mug, at the breakfast table, with such force, that it had been shattered into atoms against the wall, by the force of the blow; the same woman whom he had choked at night in their private bed-room, until she was so nearly suffocated, as to need the support of his arm, until she was so far recovered as to be able to sit up in bed, and which had made “the blood gush from her nose and mouth,” (Mrs. Turner’s deposition,) and the same dear wife whom he had compelled to stand in the floor, before him and his paramour, the colored woman, Sally, and cower under the switches which the latter had brought for the chastisement of her, then, mistress! These are but a portion of the proofs upon which the chancellor’s decree is founded. There can be no possible doubt of its accuracy.<sup>79</sup>

In light of these details, the Court granted Mrs. Turner her divorce with a significant alimony amount and property rights. Finding her to be “a chaste, industrious, economical, faithful, useful and obedient wife,”<sup>80</sup> the justices had indeed found her to be worthy of True Victimhood.

Combined, Alabama’s 1870 *Turner* and *Goodrich* rulings convey that the same justices who presided over the *Fulgham* case recognized the husband’s chastisement moderation in cases where the white husband’s abuse was much more egregious. As in the antebellum era, the Court did *not* approve of the husbands’ violence in either case. Indeed it granted both wives divorces due, in part, to their husbands’ abuse. Nevertheless, Justice Peters, who wrote the ruling for both cases, as well as the *Fulgham* case, wrote in the *Goodrich* ruling that:

The law requires that the wife shall obey all the just and reasonable marital commands of the husband, and it requires that the husband shall protect and maintain the wife, according to his station in life . . . It also refuses to sanction any ‘conduct,’ on the part of the husband, beyond what may be necessary to accomplish these important ends.<sup>81</sup>

In other words, the court reiterated the law on the book’s right of chastisement *in moderation* as well as the law’s commitment to domestic privacy. What’s more, the ruling’s reaffirmation of the chastisement prerogative was unwarranted in the context of a lengthy tort ruling that otherwise made it very clear that husband’s violence constituted legal cruelty. The reaffirmation ends up being a surprising non sequitur that served no other purpose than to signal the Court’s continued belief that while excess chastisement is bad, chastisement is in and of itself a necessary prerogative for securing a wife’s submission to her husband’s authority.

Furthermore, the *Turner* ruling conveys that that the same justices who presided over the *Fulgham* case were also invested in the hegemonic racial ideology that recognized white women’s capacity for respectable femininity through the erasure of black women’s womanhood.<sup>82</sup> This case silenced Sally’s experiences in an arguably more problematic way

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<sup>79</sup> *Ibid.*, 448.

<sup>80</sup> *Ibid.*, 453.

<sup>81</sup> *Goodrich v. Goodrich*, 44 Ala. 673.

<sup>82</sup> Gray White, *Ar’n’t I a Woman?*, 175-77, 185, 188.

than the postbellum wife-beating cases illustrated. Instead of merely silencing Sally's voice, Mrs. Turner and the Court gave Sally an imagined voice – their own – by projecting their assumptions about Sally's motivations as Truth. Mrs. Turner shared with the Court that during slavery, when she discovered her husband's adultery with (or, sexual exploitation of) Sally, she asked her husband to have Sally "removed."<sup>83</sup> He ignored her request. Mrs. Turner then illustrated her further victimization when she "suppose(d)"<sup>84</sup> to the Court that Sally, "finding herself supported by the authority of her master, became insolent to"<sup>85</sup> Mrs. Turner. In response, Mrs. Turner "chastised"<sup>86</sup> Sally. This upset her husband who "forbade her to do so"<sup>87</sup> in the future. After all, as Master of the House, chastising Sally was *his* prerogative. Mrs. Turner nevertheless retorted to her husband that, "as long as he retained [Sally] about the house and under her management, she would punish her for any insolence that she might offer her."<sup>88</sup> He responded by threatening to "whip"<sup>89</sup> Mrs. Turner, and worse still, he "made the woman, Sally, go out and get switches for that purpose."<sup>90</sup>

To this incident and others, the Court was unequivocal in its affirmation of Mrs. Turner's victimization, which it conveyed through repeated characterizations of Mrs. Turner's respectable femininity, such as "timid and fearful,"<sup>91</sup> and "patient martyr."<sup>92</sup> The Court therefore affirmed that Mr. Turner's sexual exploitation of Sally made Mrs. Turner a victim. Mr. Turner withholding from Mrs. Turner the prerogative to chastise Sally made Mrs. Turner a victim. And, the nefarious motivation of insolence that Mrs. Turner projected on to Sally also made Mrs. Turner a victim. In other words, the Court granted Mrs. Turner true victimhood through the erasure and normalization of Sally's exploitation and abuse.

The *Turner* and *Goodrich* rulings, and the racialized sociolegal ideologies that pervaded the postbellum South, perhaps reveal more about the *Fulgham* case than the ruling itself. The postbellum South had entrenched a racialized legal standard that only recognized white men's right of chastisement. The hegemonic pathology of black family pathology further ensured that only white men could be offered the benefit of discernment and honorable intention when they chose to chastise their wives. Put differently, black men's stigma of immorality, laziness, and atavistic masculinity severed their entitlement to the chastisement prerogative. As such, black men were not husbands exercising their right of chastisement. They were wife-beaters. And because black family pathology ideology provided no framework through which one could interpret black womanhood as respectable, criminalizing black men as wife-beaters in no way functioned to protect black women – precisely the class of women on whose backs the path to True Victimhood was paved. All of

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<sup>83</sup> *Turner v. Turner*, 44 Ala. 446.

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.*, 449.

<sup>92</sup> *Ibid.*, 450.

these dynamics combine to help make sense of what happened in George Fulgham's initial trial and his appeal to the Alabama Supreme Court.

## The Fulgham Trial

While the Alabama Supreme Court ruled in the *Turner* and *Goodrich* rulings in 1870, George Fulgham was convicted in the Greene County Circuit Court for assault and battery on his wife. Located in the Black Belt, Greene County was one of the counties where crime was thought to be highest due to its predominantly black population.<sup>93</sup> The specifics of the case are that George Fulgham was chastising one of his children when his wife, Matilda, protested because she felt his punishment was too harsh. In that space of distraction, the child seized the opportunity to run. George immediately took chase after the child. Matilda immediately took chase after George. When she caught up to him, he struck her twice on her back with a board. She retaliated with a switch. The record concluded its summary of the incident by stating that, "both were high tempered, and were emancipated slaves, and were husband and wife,"<sup>94</sup> establishing up front that the violence was to be understood through a racialized lens.

The racialized double-standard for wife-beating that led to George's conviction was rooted in the court's instructions to the jury. Judge Charles Pelham presided over the case. He was a post-war Republican, from a large planter slave owning family. He and all six of his brothers served with distinction in the Confederate Army.<sup>95</sup> Pelham's instruction to the jury in George Fulgham's trial is emblematic of Elizabeth Spelman's statement that, "One of the marks of inferiority of a male slave is that he is not a better specimen of humanity than his wife."<sup>96</sup> In the Fulgham case, it was true that one of the marks of inferiority of "emancipated slaves," was that he was not a better specimen of humanity than his wife. And according to sociolegal norms, his wife's was not so great a specimen of humanity. Pelham instructed the jury that if they believed George struck Matilda out of anger and not "self-defense,"<sup>97</sup> he was guilty. However, if they found that Matilda verbally or otherwise provoked George's violence at the time of the "fight"<sup>98</sup> the jury could use that as a justification for his violence as they see fit. "Fight" and "self-defense" conveys a conflict between equal participants. In other words, in contrast to the sociolegal logic used in white wife-beating cases, Pulham's instructions advanced a logic in which George and Matilda were equals, with no gender privileges. He therefore stripped Matilda of any claims of True Victimhood and stripped George of any chastisement prerogative.

In response, George's defense attempted to reorient the case toward the law on the

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<sup>93</sup> Greene County, which was 80% black, had the second highest population of blacks in Alabama (calculated using 1870 Census data for all Alabama counties).

<sup>94</sup> *Fulgham v. The State*, 46 Ala. 143 (1871).

<sup>95</sup> Owen, *History of Alabama* v4, 1339.

<sup>96</sup> Spelman, *Inessential Woman*, 43.

<sup>97</sup> *Fulgham v. The State*, 46 Ala. 143 (1871).

<sup>98</sup> *Ibid.*

books. He emphasized that George's blows "made no permanent impression"<sup>99</sup> on Matilda's body, which had been the law since North Carolina's 1837 *Pendergrass* ruling,<sup>100</sup> and was later upheld in North Carolina's 1864 *Jesse Black* ruling.<sup>101</sup> He then objected to Pelham's charge to the jury, and asked the court to give an instruction to the jury, that was rooted in the law in the books. Quoting *Jesse Black*, the defense asked the court to instruct the jury that, "a husband can not be convicted of a battery on his wife unless he inflicts a permanent injury, or uses such excessive violence or cruelty as indicates malignity or vindictiveness."<sup>102</sup>

Pelham refused to give the jury the defense's charges. Recognizing that the law on the books for wife-beating were rooted in the North Carolina rulings, and foundationally in Mississippi's 1824 *Bradley* ruling,<sup>103</sup> Pelham stated that, "the proposition that a husband could moderately chastise his wife, was a relic of barbarism, and no part of the law of Alabama, although it might be of North Carolina or Mississippi."<sup>104</sup> In other words, he justified his refusal to apply the law on the books in George Fulgham's case by rationalizing that Alabama was not subject to the precedents laid down in other states. Upon deliberation, the jury found George guilty of assault and battery on his wife. And it was through Pelham's specious break with legal precedent in his instruction to the jury that Fulgham was ultimately granted an appeal.

### **The Appeal: Race and the New Wife-Beating Precedent**

In his appeal, George Fulgham's defense once again asserted, correctly, that based on the law on the books, George's violence was clearly within the parameters of moderate chastisement. His attorney, R. Crawford, argued that the trial court erred in two essential ways. First, it should have instructed the jury on the precedent laid down in the *Jesse Black* ruling.<sup>105</sup> Second, he argued that the specious instruction Pelham instead gave to the jury was wrong, incomplete, and misleading, and thus prejudicial to Fulgham.

In support of the first claim, Crawford cited additional cases that would have bolstered George's chastisement authority on the one hand, and appealed to dominant

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<sup>99</sup> Ibid.

<sup>100</sup> *State v. Pendergrass*, 19 N.C. 365 (1837). See Chapter 2, pgs. 18-20. In a case of child abuse, the court determined that "permanent injury" or chastisement "inflicted merely to gratify their own evil passions" was the parameter for excess cruelty.

<sup>101</sup> *State v. Jesse Black*, 60 N.C. 266 (1864). See Chapter 2, pgs. 20-21. Based on *Pendergrass*, the *Black* ruling was a wife-beating case which determined that, "A husband cannot be convicted of a battery on his wife unless he inflicts a permanent injury or uses such excessive violence or cruelty as indicates malignity or vindictiveness."

<sup>102</sup> *Fulgham v. The State*, 46 Ala. 143 (1871).

<sup>103</sup> *Bradley v. The State*, 1 Miss. 156 (1824). See Chapter 1, pg. 17. First U.S. case to uphold a husband's right of chastisement went used in moderation.

<sup>104</sup> *Fulgham v. The State*, 46 Ala. 143 (1871).

<sup>105</sup> *State v. Jesse Black*, 60 N.C. 266 (1864). "A husband cannot be convicted of a battery on his wife unless he inflicts a permanent injury or uses such excessive violence or cruelty as indicates malignity or vindictiveness."

assumptions about negro womanhood on the other. He cited the *Bradley, Pendergrass*, rulings to emphasize that the law on the books grants husbands a right of chastisement in moderation.<sup>106</sup> He also cited *Johnson & Wife v. TN*.<sup>107</sup> Like *Pendergrass*, *Johnson* was a child-beating case whose ruling on excessive cruelty had since been applied to the domestic chastisement authority more broadly. The *Johnson* ruling supported Crawford's assertion of the trial court's error because it held that cruelty was not something to be defined by law, but rather by the judgment of a jury familiar with the facts of the case. Most importantly, in defense of George's right of chastisement, Crawford cited Alabama's 1855 *David v. David* ruling, which established that a wife's behavior should always be considered is a provocation to her husband's violence.<sup>108</sup> Out of Alabama's numerous wife-beating tort rulings, the *David* ruling would have been most resonant with the pervasive stereotypes about black womanhood during Reconstruction. This is because the *David* ruling's depiction of the (white) wife's behavior was by far the worst. While the ruling reprimanded Henry David for his violence, it nevertheless found Milly David's lack of femininity to be so revolting that it stated, "If a woman chooses to unsex herself, and forget that she is a female, she should not complain if others do not always remember it."<sup>109</sup> All told, Crawford's defense of George Fulgham was rooted, unequivocally, in the law on the books.

The State's response, however, followed Judge Pelham's decision to instead rely on the law in action, which only recognized white men's chastisement prerogative. On behalf of the State, Attorney General John Sanford was unambiguous in his rejection of George Fulgham's right of chastisement. Before and after the war, Sanford had been a "States Rights Democrat of the strictest sect."<sup>110</sup> He was elected Attorney General in 1865, but was displaced by the Freedman's Bureau in 1868, who gave the position to a Republican. In 1870, Sanford wrote a widely published letter about the "iniquity of Reconstruction,"<sup>111</sup> which led to his landslide reelection to Attorney General in 1870. His letter and re-election signaled the beginning of the end for Republican power in Alabama. It is within the early throes of this pivotal political victory that he argued to uphold Fulgham's conviction.

Undercutting centuries of Anglo-American law and legal ideology, Sanford argued that, "A married woman is as much under the protection of the law as any other member of the community."<sup>112</sup> This logic fundamentally undermined the Master of the House logic, on which coverture, and thus the laws of marriage and property were based. And although he incorrectly stated that the right of chastisement had never been in force in Alabama, his argument ignored the allegiance to domestic privacy that permeated Alabama law, and that had thus far enabled (white) husbands to beat their wives with little interference. His argument further ignored how the law in action enabled white men to abuse married black women, also with little interference. In other words, what Sanford actually meant is, "a

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<sup>106</sup> *Bradley v. The State*, 1 Miss. 156 (1824); *State v. Pendergrass*, 19 N.C. 365 (1837).

<sup>107</sup> *Johnson & Wife v. State*, 2 Humphries, 283 (1840).

<sup>108</sup> *David v. David*, 27 Ala. 222 (1855). See Chapter 1, pgs. 26-28.

<sup>109</sup> *Ibid.*, 227. See Chapter 1, pg. 28.

<sup>110</sup> Owen, *History of Alabama*, v4, 1500-1.

<sup>111</sup> *Ibid.*, 1500.

<sup>112</sup> *Fulgham v. The State*, 46 Ala. 144 (1871).

married *black* woman is as much under the protection of the law *from black men* as any other member of the community.” That rephrase gets closer to the truth.

Alabama’s Supreme Court was thus faced with two vastly opposing arguments – an argument definitively rooted in the law on the books, and an argument that was categorically *not*. Put differently, the Court could have ruled based on the law on the books, which upheld a husband’s right of chastisement, in moderation, as determined by whether he left a permanent mark on his wife’s body. Or, the court could have ruled based on the law in action, which disregarded black men’s right of chastisement, and stigmatized them as wife-beaters.

The Court chose the latter option, repealing the chastisement prerogative, and upholding George Fulgham’s conviction. The ruling revealed ideologies about black men’s pathological inability for discernment as Masters of the House. Referring to black people in the Reconstruction South, the ruling affirmed Blackstone’s assertion that men from the “lower ranks of people” used wife-beating to “secure subordination in the family.”<sup>113</sup> To unambiguously entrench the racialization of wife-beating into law, the ruling further highlighted that, “The most zealous advocates of “wife-whipping” have never gone beyond this unhappy rank.”<sup>114</sup> In other words, only black men felt that husbands were entitled to a chastisement prerogative because wife-beating was the only mechanism black men had for gaining control over their wives. To be clear, this logic not only spoke ill of black men, but it affirmed the attendant ideology that the way to a black woman’s heart was through her abuse.

The ruling then applied a gross perversion of the Fourteenth Amendment, asserting that the law on the books could not turn a blind eye to black people’s belief in wife-beating since “The law for one rank is the law for all ranks of the people, without regard to station.”<sup>115</sup> In this way, the ruling exhibited the same form of paternalistic ‘concern’ exhibited by the Freedmen’s Bureau. The law’s purpose, in other words, was to instill the proper values in the Alabama’s black families.

The biggest takeaway from the Fulgham ruling is that it was not written as a commentary about the institution of marriage. It was written as a commentary about *black* marriage. As such it absolutely said a lot about the respectability of the (white) normative institution of marriage, which was everything that pathological black marriages were not.

Finally, although *Fulgham’s* rescinded the chastisement prerogative in the law on the books, in practice, domestic privacy continued to shield white men’s abuse just as it always had. The violence that George did to Matilda paled in comparison to the most *minor* cases of white wife-beating in both the Supreme Court and local court cases in my sample. This is precisely because of the gap in the law’s regard for black and white men’s domestic authority. Giving wide men’s domestic authority a wide girth meant that the violence battered white wives endured had to be egregious and usually occur over a period of time before either she would seek protection from the court and/or the court would consider her

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<sup>113</sup> *Ibid.*, 146.

<sup>114</sup> *Ibid.*, 145-6.

<sup>115</sup> *Ibid.*, 146.

request. Inversely, black families had never been given the benefit of domestic privacy – yet another way Southern whites undermined black men’s domestic authority. As such, police or planter intervention in black household affairs – to include wife-beating – was constant. In action, the *Fulgham* ruling did nothing to close this fundamental gap in white vs. black domestic privacy. Despite Alabama’s landmark *Fulgham v. State* ruling, the racialized double-standard for wife-beating that was established during slavery endured.

## CONCLUSION

What haunted freed slaves in their post-emancipation family endeavors was a shadow of emotional prostration, impotence, and incapacitation – bred, nurtured, refined, and propagated by centuries-old structures that should have guaranteed pathological black families. If one considered the genealogical inheritance of a freed person in 1865, he would therefore see in her the ancestral accumulation of psycho-emotional dissociation, affective paralysis, and unconscionable trauma vis-a-vis the most basic human connections – parent and child, spouse and spouse. Worse still, she would be seeped in a world where the antebellum white supremacist regime that had seemingly structured no other outcome for black families than pathology was now more entrenched and committed to its own survival than it had ever been. The post-bellum South needed to replace those old structures with new ones because if white supremacy was to survive, the black family could not. Upon its conception, the black family was thus structurally aborted at all levels of Southern society before it even had a chance to take its first breath.

Entrenching the notion that wife-beating was rampant within black families was a crucial part of this project. Like now, practically every social ill that blacks suffered post emancipation was attributed to their fundamental inability to do family. When black family formation in the South was in its nascent phase, we see a few dominant ideologies emerge: freedmen and women had loose marital commitments to each other; freed people were bad parents; and freedmen were in the habit of beating their wives. These ideologies about black families had both material and symbolic functions. Materially, they functioned as ‘divide and conquer’ strategies that kept freed people in a state of bondage. Symbolically, they kept blackness in a degraded social status, associated with licentiousness, dishonesty, and criminality. It is within this context that Alabama now enjoys the distinction of being the first state to rescind a husband’s legal right to beat his wife.

## CHAPTER 5: WIFE-BEATING USED TO DISENFRANCHISE BLACK MEN

The 15th Amendment to the Constitution, ratified in 1870, granted African American men the right to vote by declaring that the “right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.”<sup>1</sup> During Redemption, Southerners looked for ways to strip black men of the vote without running afoul of the 15th Amendment. They used a variety of means – the poll tax, grandfather clause, and literacy test among them. In addition, southerners used so-called “black crimes.” Chief among these was the crime of wife beating. Indeed, Alabama’s constitutional convention in 1901 added “assault and battery on the wife,”<sup>2</sup> as a class of individuals who would “not be permitted to register, vote, or hold office.”<sup>3</sup>

### NORTHERN WHITE FEMINISTS

Southerners were not the only ones to connect questions of wife-beating, race and the franchise; some northern white suffragists did as well. Northern feminist suffragists wanted the vote in part to gain protection of abusive men. In the 1848 Seneca Falls Declaration of Sentiments, ending the chastisement prerogative was one of the women’s rights movements initial goals. It stated that:

In the covenant of marriage, she is compelled to promise obedience to her husband, he becoming, to all intents and purposes, her master—the law giving him power to deprive her of her liberty, and to administer chastisement.<sup>4</sup>

However, they very quickly realized that in order to see their Sentiments realized, women would need to gain access to the ballot.

Confronted with the reality that the federal government would not give the franchise to both (male) Negroes and (white) women, some feminists suffragists, led by Elizabeth Cady Stanton, adopted racist and nationalist rationale for giving (white) women the vote first. In 1866, Stanton began a campaign in which she advocated for giving *educated* people the right to vote. Soon after, she unapologetically acknowledged that her intention was to privilege white women over black men and male immigrants, when she wrote in *The Revolution* that, “We prefer Bridget and Dinah at the ballot box to Patrick and Sambo.”<sup>5</sup> This created an

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<sup>1</sup> U.S. Const. amend. 15.

<sup>2</sup> Ala. Const. art. VIII, §182 (1901).

<sup>3</sup> Ibid.

<sup>4</sup> Gordon, “Declaration of Sentiments,” 23. (see chap 1, n. 2).

<sup>5</sup> Paula Giddens, *When and Where I Enter* (New York: Amistad, 1984), 67. In the face of criticism, from Frederick Douglas especially, Stanton doubled down on this stance, repeating her “Sambo” remark throughout this period. In a letter she wrote just before the 1869 Women’s Conference, she signed, “I remain as ever your friend (who desires to be enfranchised before Hans Yung, Tung, Patrick and Sambo) Elizabeth Cady Stanton.” “Letter from Elizabeth Cady Stanton to Edward M. Davis, 10 April [1869],” Massachusetts Historical Society, Collections Online: [http://www.mass hist.org/database/viewer.php?item\\_id=3314&pid=](http://www.mass hist.org/database/viewer.php?item_id=3314&pid=)



irreversible fracture to the abolitionist alliance that had thus far been characterized by racial solidarity. Despite their collective rhetoric of “universal suffrage,” Stanton and her allies advocated for (white) women’s suffrage first, while Lucy Stone and her allies (which included Frederick Douglass) advocated for (male) Negro suffrage first.

Congress passed the 15th-Amendment in February 1869, months before the May 1869 American Equal Rights Association (AERA) conference.<sup>6</sup> Despite acrimonious debates over supporting the 15th Amendment, one thing on which many of the attendees – white and black – largely agreed was black men’s cruelty as husbands and fathers. Those who supported the 15th Amendment did so for a few different reasons. Lucy Snow, for example, was a white woman who felt women’s suffrage was more important than black men’s suffrage, but supported the 15th Amendment as a victory in the battle for universal suffrage.<sup>7</sup> Frances Ellen Harper, a black woman, explicated her concerns about black men’s cruelty in their performance of patriarchal authority, based largely on her observations from Alabama, specifically the *Mobile Register’s* portrayal of black men as wife-beaters.<sup>8</sup> However, she supported the 15th Amendment because she was more distrustful of white women’s racism.

Those who opposed the 15th Amendment, Stanton, Susan B. Anthony, and Sojourner Truth, for example, argued that black men learned marital cruelty from white men, which made women’s rights a more urgent issue than racism.<sup>9</sup> Concurrent with their feminist solidarity agenda was a white supremacist stance that regarded white women as more capable and educated than all black people. Sojourner Truth, for example, felt that black men’s suffrage would further oppress black women, and explained that white women were smarter and more informed than black women.<sup>10</sup>

An ally sympathetic to this white supremacist feminism was Paulina Kellogg Wright Davis, a New England suffragist and abolitionist who was once an active member of the Central New York Anti-Slavery Society. During the convention she derided black men’s cruelty and tendency toward wife-beating during a discussion about why black women preferred not to marry. Her comments, paraphrased here, illustrate that by 1869, Northern feminists were leveraging black men’s stigmatization as wife-beaters as a justification for Negro disenfranchisement:

Mrs. Paulina W. Davis said she would not be altogether satisfied to have the XVth Amendment passed without the XVIth, for woman would have a race of tyrants raised above her in the South, and the black women of that country would also receive worse treatment than if the Amendment was not passed. Take any class that have been slaves, and you will find that they are the worst when free, and become the

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<sup>6</sup> Unable to find common ground on how to move forward in their quest for universal suffrage, the AERA split into two opposing national suffrage organizations shortly after the 1869 conference.

<sup>7</sup> Elizabeth Cady Stanton, Susan B. Anthony, Matilda Joslyn Gage, and Ida Husted Harper (Editors), *History of Woman Suffrage*, vol. 2 (Rochester: Charles Mann Printing Co., 1881), 345-52.

<sup>8</sup> Giddens, *When and Where I Enter*, 64-7.

<sup>9</sup> Giddens, *When and Where I Enter*, 64-7; Stanton, et. al., *History of Woman Suffrage*, 248-50.

<sup>10</sup> Giddens, *When and Where I Enter*, 67.

hardest masters. The colored women of the South say they do not want to get married to the negro, as their husbands can take their children away from them, and also appropriate their earnings. The black women are more intelligent than the men, because they have learned something from- their mistresses. She then related incidents showing how black men whip and abuse their wives in the South. One of her sister's servants whipped his wife every Sunday regularly. [Laughter.] She thought that sort of men should not have the making of the laws for the government of the women throughout the land. [Applause]<sup>11</sup>

For Davis and her white supremacist feminist allies, wife-beating was one of the few issues that would facilitate the kind of racialized and gendered discursive gymnastics that would uplift (black) women on the backs of black men. Wife-beating was an easy proxy for black men's pathological inability to be Masters of their homes, a shortcoming that exempted them from the Master's attendant participation in civic life – especially the privilege of the franchise. Recognizing that giving (white) women the franchise also meant giving *black* women the franchise, feminists suffragists advanced a rationale of black women's superior intelligence to black men, which mirrored their long-standing arguments for white women's superior intelligence to black men.

Southerners, who otherwise viewed feminism with scorn and paternalistic amusement, were all too happy to call attention to this brand feminism that criticized black masculinity in its arguments against (male) Negro suffrage. For example, the May 1869 *Mobile Register* article reported Paulina Davis's comments to its readers accordingly:

THE NEGRO MEN OF THE SOUTH TYRANNICAL. -- Mrs. Pauline Davis, (white woman), in the Women's Rights Convention at new York on Thursday last, said, in the course of "a few remarks" on the everlasting nigger, that she had been living down South, and that from her observations she had to say that down there "the negro men were exceedingly tyrannical and abusive – much more since they obtained their freedom," that "they thought that marriage had given them complete control over their families," and that "they not only whipped their wives, but often robbed them of their young children." Mrs. Davis, therefore, was opposed to giving the ballot to these negro men until it was given to the negro women, especially as those much-abused women were more intelligent than those tyrannical negro men.

We are not certain about this "more intelligent" class, though it cannot be denied that they have, under guidance probably, of shyster lawyers, made some demonstrations of intelligence, not altogether to their credit, but still less to that of their white victims.<sup>12</sup>

For its Southern audience, the *Mobile Register* of course dispelled the distraction of the gendered distinction in black people's intelligence, reducing Mrs. Davis's argument to its pure white supremacist form: wife-beating is why "the everlasting nigger" should not have the franchise.

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<sup>11</sup> Stanton, et. al., *History of Woman Suffrage*, 391.

<sup>12</sup> 1869, May 22. *Mobile Register* 2(97): 2.

## DISENFRANCHISING BLACK MEN

When Alabama Redeemers regained control of the state in the 1874 elections, their first priority was to overturn the 1868 Reconstruction constitution. The 1875 constitution, therefore, reduced state funding, lowered taxes, and laid a foundation for the educational segregation that would later characterize the Jim Crow era. But it was too soon to tamper with Negro suffrage without inviting federal intervention. As for the franchise, the 1875 constitution said simply that:

The following classes shall not be permitted to register, vote, or hold office:

Those who shall have been convicted of treason, embezzlement of public funds, malfeasance in office, larceny, bribery, or other crime punishable by imprisonment in the penitentiary.<sup>13</sup>

By 1900, however, Alabama no longer feared federal intervention, and officials set about to therefore alter the above franchise clause in the 1875 Constitution. The stated purpose of Alabama's 1901 Constitutional Convention to ensure "the negro is not discriminated against on account of his race, but on account of his intellectual and moral condition,"<sup>14</sup> in other words, to disenfranchise Negroes without violating the 15th Amendment. Alabaman's considered a variety of means to that end, one of which was so called "black crimes." Toward that end, the Constitutional Convention appointed white men with special knowledge of "black crimes" to the Elections & Suffrage Committee. Black Belt Democrats, it was thought, would be best suited for knowing which behaviors and traits the Constitution could target as "black crimes" in its anti-suffrage clause.

### John Fielding Burns

One of the chief architects of the Alabama wife-beating clause that eliminated the black vote was John Fielding Burns. Burns was a son of a prominent Alabama Black Belt family, who served in the Confederacy during the Civil War. After the war, he was therefore one of the Democratic power elite, the planter class, who was briefly disenfranchised after the war, relinquishing their vice grip on Southern power to freedmen, the Republican party, and the Freedman's Bureau. During Reconstruction, Burns was Justice of Peace for Burnsville and a newspaper man who helped shape popular discourse in the heart of the black belt, so named for its rich and fruitful soil. He was also a newspaper man, who established the "Independent Thinker" Telegram, as well as other newspapers that were instrumental in shaping the popular discourse in the heart of the Black Belt.<sup>15</sup> Once the "redeemers" reestablished Alabama as a Democratic stronghold, Burns was elected as: a delegate for Alabama's 1875 and 1901 Constitutional Conventions; a member of the state legislature during the 1896-97 session; and, a delegate to five Democratic national

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<sup>13</sup> Ala. Const. art. VIII, §3, para. 1 (1875).

<sup>14</sup> Constitutional Convention, *Official proceedings of the Constitutional Convention of the State of Alabama: May 21st, 1901, to September 3rd, 1901* (Wetumpka: Wetumpka Printing Co., 1940(1901)), 12.

<sup>15</sup> Owen, *History of Alabama*, 264.

conventions. He also served on various committees in every postwar local and state political convention as a “Black Belt Democrat.”

It was precisely his role as a Black Belt Democrat and a Justice of the Peace that led Alabama’s 1901 Constitutional Convention to appoint Burns to the Elections & Suffrage Committee. Black Belt counties contained the largest, most productive plantations in the state. For that reason, it is where the state’s black population was most concentrated, to the point that it outweighed the white population. Black Belt white people lived in closer proximity to and interacted more frequently with black people. Southerners therefore distinguished *Black Belt* Democrats, on whom the Southern agrarian economy depended, as experts on all matters concerning black people. Moreover, as a Justice of the Peace, Burns had gained alleged expertise on Negro criminality that won him a central role in Negro disenfranchisement at the constitutional convention. Indeed, an Alabama newspaper reported that, “Mr. Burns of Dallas, who has served many years as a Justice of the Peace in a precinct of his county, and is well acquainted with the criminal class of negroes, introduced an ordinance which proposes to regulate suffrage in Alabama.”<sup>16</sup>

In one respect, it is ironic that Burns would play such a significant role in suggesting that men be disenfranchised for wife-beating. As illustrated in Chapter 2, complaints lodged against Burns by freedmen to the Freedmen’s Bureau reveal that he routinely subjected women and children to vicious physical abuse. Burns abused his penal authority to keep undermine black men’s domestic authority, and to separate families. As Justice of the Peace, John F. Burns was the judicial authority over the freedmen in his beat, as well as for the thousands of complaints that freedmen brought to Bureau officials regarding planters in his beat – which had one of the highest populations of freedmen in Alabama. Here is one example that exemplifies how he performed this role. Haims Cowlan and a freedwoman (unnamed) informed their employer, a planter named Mr. Densby, of their intention to marry once their marriage license was approved. Densby informed the pair that there was no need to wait for the license, after which they got married “by a colored Preacher.”<sup>17</sup> Soon after, the freedwoman, now *Mrs.* Cowlan got sick. Densby nevertheless expected her to work. Cowlan, feeling that his wife was too sick to work, told her not to work until she was better. As Master of the house, Haims Cowlan had every right to do so – which was precisely the problem, which Densby easily solved by engaging the Justice of the Peace, John Burns. Sizing up the situation, Burns decided that he would place Cowlan in jail because Densby fired him – an unemployed freedman was a vagrant according to the law. Burns then held Cowlan in jail with a \$100 bond against him for “getting married without a license,”<sup>18</sup> which essentially placed Cowlan under the indentured servitude of any planter who chose to pay his bond. Soon after, Cowlan went to work on the plantation of a Confederate captain, away from his intended wife, whose labor remained under the control of Mr. Densby.

In his capacity as Justice of the Peace, Burns was instrumental in enabling planters’

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<sup>16</sup> 1901, Jun 12. *Montgomery Advertiser* LXXII(122): 1.

<sup>17</sup> Roll 30, Selma (Subassistant Commissioner) Register of complaints, Aug. 1865-Apr. 1868. United States. National Archives Records Administration, M1900. *Records of the Field Offices for the State of Alabama, Bureau of Refugees, Freedmen, and Abandoned Lands 1865-1872.*

<sup>18</sup> *Ibid.*

antebellum Master of the House prerogatives, which meant undermining freed people's ability to do family. It is thus no wonder that as Republican power began to wane in the early 1870s, John Fielding Burns emerged as a beloved figure among the Democratic establishment.

### Alabama's 1901 Constitutional Convention

While many other parameters were also ultimately added to target black men, disenfranchising wife-beaters was the *first* strategy considered. This proposal came from William Knight, a Black Belt Democrat who had previously served as sheriff of Hale County, commissioner of Russell County, and represented Hale County in the state legislature. On day 11 of the 82-day convention, he introduced an ordinance to amend the 1875 suffrage clause with only one change: adding "assault and battery on the wife"<sup>19</sup> to the list of classes not permitted to vote. In affirmation of his amendment, one newspaper reported that Knight was "a typical Black Belt Democrat and knows as much about the negro as any man in the convention,"<sup>20</sup> while another reported that:

Mr. Knight of Hale, offered a suffrage scheme which disqualified all persons convicted of felony or wife beating. He says this would settle the vexed question of negro suffrage in his part of the country, especially the latter clause.<sup>21</sup>

It was only after Knight's wife-beating amendment that members of the convention began to brainstorm similar crimes that highlighted black family pathology, as well as 'black crimes' such as vagrancy and larceny more broadly. Later that same day, a delegate suggested a slight alteration, adding "assault and battery upon the person of his wife."<sup>22</sup> The following day, another delegate suggested yet another obvious attempt at targeting (what they believed to be) black male pathology, thusly: "All persons who have abandoned their wives without legal separation or who have abandoned their minor children without having made provision for their physical support and their moral training."<sup>23</sup>

On the 18th day of the convention, John Burns introduced the most comprehensive strategy for disenfranchising black men, which ultimately led to his distinction in newspapers across the country and history books ever since,<sup>24</sup> as the architect of Alabama's suffrage clause. A significant portion of his suggestion was dedicated to disenfranchising:

Those who are descendants of parents, who are of or descendants of two or more different races, those who shall have married any woman having a living husband, from whom she has not been legally divorced, those who shall have married another

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<sup>19</sup> Constitutional Convention, 1901, *Official Proceedings*, 313.

<sup>20</sup> 1901, May 29. *Montgomery Advertiser* LXXII(122): 5

<sup>21</sup> 1901, June 5. *Times-Picayune* LXV(132): 5

<sup>22</sup> Constitutional Convention, 1901, *Official Proceedings*, 338.

<sup>23</sup> *Ibid.*, 384.

<sup>24</sup> For analysis of Burns' suffrage clause vis-à-vis wife-beating specifically: 1969. Jimmie Gross, *Alabama Politics and the Negro, 1874-1901*, Dissertation (UGA, 1969), 243; McMillan, *Constitutional Development in Alabama*, 275; Andrew L. Shaprio, "Challenging Criminal Disenfranchisement under the Voting Rights Act: A New Strategy," in *The Yale Law Journal* 103(1993): 541; and, Siegel, "The Rule of Love," 2140.

woman before they have obtained a legal divorce. Those against whom a decree of divorce has been rendered by some court. Those who shall have lived in open, continuous adultery or fornication. Those who have committed an assault and battery upon his wife, or step-daughter, or paramour.”<sup>25</sup>

He targeted stereotypical black male behaviors, as well as (largely biracial) educated Negroes in response to Booker T. Washington’s speech to the convention a few days earlier. Like Burns’ suffrage clause, no matter the specific agendas for disenfranchisement proposed during the convention – poll taxes, literacy tests, grandfather clauses, military service, black crimes, etc. – wife-beating retained its staying power throughout all of the debates. It was the one assumed specifically-black behavior that convention members took for granted as a necessary way to disenfranchise black men, without significantly disenfranchising the poor white population. The *Montgomery Advertiser*, for example, assured its readers that while “wife beating and vagrancy”<sup>26</sup> were crimes in the suffrage clause in which “the negro vote will suffer most,”<sup>27</sup> the clause also disqualified gamblers, “nearly all of whom in Alabama are whites.”<sup>28</sup> The suffrage clause would thus satisfy the convention’s goal of establishing a “suffrage system . . . free from the objection of discrimination against the colored race.”<sup>29</sup> By discriminating not by race, but rather morality and intellect, it would also enable “the cultivation of habits of virtue, family affection, industry, thrift”<sup>30</sup> in the Negro.

On the inclusion of wife-beating to the suffrage clause, John Fielding Burns,<sup>31</sup> who “had taken cognizance of for years in his justice of the peace court in the Burnsville district, where nearly all of his cases involved Negroes,”<sup>32</sup> estimated that “the crime of wife-beating alone would disqualify sixty percent of the Negroes.”<sup>33</sup> In other words, the same Justice of the Peace who brutalized black families, undermined black men’s domestic authority, robbed parents of their children, beat black women and children mercilessly, and enabled other planters to do the same with impunity, was responsible for using the racialized double-standard for wife-beating to disenfranchise black men in Alabama until after the 1960s.

Burns, however, was not an exception but rather an exemplar of southerners perpetuated this double-standard. The convention overwhelmingly supported his suffrage clause, as evidenced by its passage, but also in convention debates around race and violence. In one of Burns’ convention speeches about the suffrage clause, for example, he elegiacally slips into nostalgia about his violence toward black people, throughout which is littered laughter and applause from convention delegates. The context for this speech was disenfranchising educated Negroes by adding “illegitimates,”<sup>34</sup> or those of “mixed blood,”<sup>35</sup>

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<sup>25</sup> Constitutional Convention, 1901, *Official Proceedings*, 511.

<sup>26</sup> 1901, Jul 20. *Montgomery Advertiser* LXXII(165): 4.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

<sup>31</sup> Shaprio, “Criminal Disenfranchisement, 541; Siegel, “The Rule of Love,” 2140.

<sup>32</sup> McMillan, *Constitutional Development in Alabama*, 275.

<sup>33</sup> Gross, *Alabama Politics and the Negro*, 243.

<sup>34</sup> Constitutional Convention, 1901, *Official Proceedings*, 4788.

<sup>35</sup> *Ibid.*

to the suffrage clause. After reiterating the convention's purpose, "to kill snakes,"<sup>36</sup> a metaphor for disenfranchising Negroes, Burns continued:

We have come down to the edge of the water, waded in waist deep, now up to the neck. There are some still on the banks, sticking their toes in to see if the water is too cold. We have not come like the brave boys of my day came to the creek or river, and throw off your shirt and breeches and jump in. We were sent here to kill snakes. When I was a boy I was a snake hunter as well as a bird hunter (Laughter), and I have killed a good many innocent black snakes, and coach whips, and chicken snakes, and house snakes that will sleep with you and not harm you; but I always hated to bruise the head of one of these, but it was always my delight to find a rattler with his mouth open and his fangs; ready, a rattler who has control of nearly all of the other snakes, especially of his color and of his pedigree, a rattler educated and warmed at home by the fires, by smiles, by the approbation of the best white citizens, Democrats, and supported at the North by white Republicans who have never had any use for Alabama, or the Democrats in Alabama. That rattler with his mouth open, but his tail not giving you warning.<sup>37</sup>

The goal of his metaphor was to re-invigorate southern men's commitment to white supremacy. He dared delegates to be brave their commitment, reminding them of the unmitigated racial privilege they enjoyed before the oppressive effects of Reconstruction. He ended his speech with the hope that their sons would be able to inherit an Alabama where, like the days of old, "white men could go untrammelled and unmolested and without fear and trepidation,"<sup>38</sup> from the snakes' attempts to exert their power. The convention responded to his speech with applause throughout. One could argue that the violence he referenced was not literal, given its metaphorical context. However, the fact of the everyday normalized brutality to black bodies revealed in Freedmen's Bureau records, and antebellum records, cast a sinister light on Burns' speech as well as delegates' response to it, metaphoric context notwithstanding.

## Wife-beating and Southern Disenfranchisement

As Southern states revised their constitutions to disenfranchise black men, wife-beating played a role in a few conventions.<sup>39</sup> South Carolina, for example, vacillated between "habitual wife-beaters,"<sup>40</sup> "willfully neglecting his wife and children or maltreating either of them,"<sup>41</sup> and "wife-beating, desertion of wife and children,"<sup>42</sup> before deciding to simply use,

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<sup>36</sup> Ibid., 4787-8.

<sup>37</sup> Ibid., 4788.

<sup>38</sup> Ibid., 4789.

<sup>39</sup> "To the colored men of voting age in the southern states," From Slavery to Freedom: The African-American Pamphlet Collection, 1824-1909, Library of Congress: [http://memory.loc.gov/cgi-bin/query/r?ammem/rbaapc:@field\(DOCID+@lit\(rbaapc33200\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/rbaapc:@field(DOCID+@lit(rbaapc33200)))

<sup>40</sup> Constitutional Convention, *Journal of the Constitutional Convention of the State of South Carolina* (Columbia: C. A. Calvo, Jr., 1895), 151.

<sup>41</sup> Ibid., 101.

“wife-beating”<sup>43</sup> in its Constitution.

To be sure, not all southern states followed suit. Mississippi, heavily considered disenfranchising any man “convicted of beating his wife,”<sup>44</sup> during their constitutional convention. But they eventually chose not to include wife-beating because they felt that for *black* families, “a little beating occasionally did good. There are many families that we could not employ unless the husband could control his wife.”<sup>45</sup> In other words, delegates felt that allowing black men to beat their wives was an expedient way for planters to extract black labor. One delegate closed the door on wife-beating thusly:

If the Convention were Legislating alone for white people, no such provisions would be thought of; and the colored man should be let alone in his household, and manage his home without attempting to apply to him the restraints that govern the white man. We should not open the door to the investigation of a class of cases that it were better for this convention to overlook.<sup>46</sup>

Significantly, at the time of their convention (1890), Mississippi had not yet overturned a husband’s right of legal chastisement. Yet the racialization of wife-beating as black crime was deeply entrenched. Unlike Alabama, Mississippi’s Supreme Court had not yet ruled on a wife-beating case involving a black family, as Alabama had in its 1871 Fulgham ruling. Like Alabama, however, when Mississippi’s Supreme Court ruled on its first black wife-beating case in 1893, they also overturned a husband’s right of chastisement, declaring that it was time eradicate the, “belief amongst the humbler classes of our colored population of a fancied right in the husband to chastise the wife in moderation.”<sup>47</sup>

## Consequences

When states rewrote their constitutions, they had to ensure that their new suffrage clauses had their desired effect. Crime records, especially vis-à-vis wife-beating, were so inefficient and often nonexistent that many states based their so-called “black crimes” on deep seated *assumptions* about black male behavior. Alabama, for example, based its suffrage clause on estimates and observations of wife-beating among Negroes.

Black men, of course, were not the only ones to beat their wives. White men did too. Two months after Alabama ratified its new constitution an Alabama newspaper warned its white readers that wife beating could strip them of the right to vote:

Wife Beater, Beware. The new Constitution contains a provision disfranchising any man convicted of wife-beating and Madison county has furnished the first white man to be disfranchised for this crime. A white man was arrested at Huntsville last week

<sup>42</sup> *Ibid.*, 435.

<sup>43</sup> So. Car. Const. art. II, §6 (1895)

<sup>44</sup> Constitutional Convention, *Journal of the Proceedings of the Constitutional Convention, of the State of Mississippi* (Jackson: E. L. Martin, 1890), 66.

<sup>45</sup> 1890, Sep 24. *Clarion Ledger*, pg. 5.

<sup>46</sup> *Ibid.*

<sup>47</sup> *Harris v. State*, 71 Miss. 464 (1893).



charged with this grave offence and upon being arraigned plead guilty to the offence. He is forever disfranchised in Alabama and rightly so.<sup>48</sup>

In other words, newspapers continued to play a crucial role in perpetuating the racialization of wife-beating. After passage of the new constitution, newspapers were a key tool in efforts to shift white men's abusive behavior – not to protect white wives – but to make reality congruent with the racialized double-standard encoded in the new constitution.<sup>49</sup>

Once wife-beating, a proxy for black men's inherent immorality and unmanliness, was used to disenfranchise black men, not-voting eventually was characterized as an immoral and unmanly act unto itself. For example, in a 1904 editorial about “Men Who Fail to Vote,”<sup>50</sup> the *Huntsville Democrat* (owned by Mrs. John Burns' relatives), wrote:

Besides neglecting a duty, the man who willfully fails to vote, puts himself on a level with the criminal, thief and murderer, the weak-minded, insane, wife-beater, and irresponsible youth under age . . . are unworthy as voters!<sup>51</sup>

Before passage of 15th Amendment, Southerners regarded voting as a prerogative of the privileged. There was no stigma about not voting, especially vis-à-vis one's manhood. In other words, to the extent voting revealed anything about a man, it was his class status, not his masculinity or morality. Once the 15th Amendment made race salient, masculinity became salient to suffrage as well. Voting, after all, was the quintessential way in which the Master of the House participated in civic life. Black men's alleged tendency for wife-beating was proof that they were too immoral for the privileges of men. Wife-beating was thus an ideal tool for stripping black men of the suffrage privilege. Once the 1901 constitution conflated not-voting with black masculinity, not-voting itself became an act of immorality, weak-mindedness, irresponsibility, and ignorance. Being black, wife-beating, and not-voting – all attributes that could never be ascribed to worthy men.

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<sup>48</sup> 1902, Jan 2. *The Standard Gauge* XV(27): 3.

<sup>49</sup> Blacks Americans used pamphlets, black newspapers, and the pulpit to educate black Southerners about state constitutional changes and the kinds of behaviors they should avoid. Unlike white Americans, blacks did not regard the targeted stereotypes as truths about black men's behavior. For example, after informing its readers about wife-beating and the other suffrage crimes targeted from state to state, one pamphlet advised: “It is especially urged that as voters you should seek to be on friendly terms with your white neighbors in the communities in which you live, so that you may consult with them about your common interests; and that you should ally yourselves with the best people in your community for the general good. It is of the utmost importance to the race, and it cannot be urged too strongly upon your attention that nothing should influence your vote except a desire to serve the best interests of the country, and of your State” (“To the colored men of voting age in the southern states,” From Slavery to Freedom: The African-American Pamphlet Collection, 1824-1909, Library of Congress: [http://memory.loc.gov/cgi-bin/query/r?ammem/rbaapc:@field\(DOCID+@lit\(rbaapc33200\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/rbaapc:@field(DOCID+@lit(rbaapc33200)))). Black Americans understood that “black crimes” were less about black men's actual immorality than they were about racial profiling. While the mainstream media told its white audience to stop beating their wives if they wanted to vote, Black media offered strategies to its audience about circumventing white supremacy if they wanted to vote, such as the ‘be friendly to white people’ advice in the example above.

<sup>50</sup> 1904, Apr 24. *Montgomery Advertiser* LXXV(109): 14.

<sup>51</sup> *Ibid.*

## CHAPTER 6: CONCLUSION

In contrast to the narrative of feminist agitation, I have argued that Southern anti-wife-beating laws were a postbellum response to the legalization of black family formation. In comparison to other regions, the institution of slavery marked a fundamental difference in the Southern law of domestic relations, the Southern political economy, and Southern sociolegal gender and family norms. The connective tissue in these ostensibly different facets of Southern life was white supremacy – specifically, white control of black labor, and the symbolic degradation of blackness.

In the antebellum era, the household was the nexus of Southern white supremacy. By law, the Master of the House role enabled Southern white men to collectively control and profit from slave labor. It also enabled Southern women's subordination in the household. Indeed, the law established that both slaves and white wives were subject to the Master of the House's chastisement authority, albeit with different degrees. The law on the books granted increased protections to white wives against abusive husband, and granted increasingly vague protections to slaves against abusive masters. It accordingly failed to recognize gender privileges within the slave population, which meant that slave men had no rights of chastisement over their de facto wives. Furthermore, in honor of the Master of the House authority that the chastisement prerogative secured, the law cautioned interfering in cases of wife-beating and/or slave-beating altogether.

In action, the antebellum law on the books established a racialized double-standard which ensured that wife-beating was an exclusively white male prerogative. It did little to protect white wives from abusive husbands, and normalized the white men's cruelty toward black women – to include black men's wives. It also ensured that black men were punished when they chose to beat their 'wives' and punished for *not* beating their 'wives' when white men ordered them to. The Southern household was thus the space from which Southern white men could use black labor to secure and grow wealth, participate in civic life, and raise 'legitimate' children to pass their wealth on to. The chastisement prerogative allowed them to correct any impediments in achieving those ends.

Emancipation exposed the South's material and symbolic dependence on household racialized gender hierarchies. Sustaining a white supremacist social order meant undermining black men's new role as masters of their own houses, which would allow white men to wrest control of the Southern labor force from black men. A ubiquitous black family pathology ideology, a part of which was the racialization of wife-beating as a black crime, helped to achieve those ends. What emerged in the white supremacist project to re-establish control of the Southern way of life was a legal double-standard for wife-beating that functioned to control the labor of black families; degrade black womanhood and manhood; eliminate black political power; and keep black women vulnerable to white men's violence and exploitation.

## Implications for Northern Wife-Beating Laws

If feminism was not a necessary precondition for anti-wife-beating laws in the South, to what extent was it sufficient for explaining the emergence of anti-wife-beating laws in the North? Massachusetts was, after all, the second state to rescind a husband's right of chastisement, in December 1871. Despite their differences both regions held a number of important similarities. Specifically, Southern anti-wife-beating laws emerged within a confluence of ruptures in demography, government authority, and economic stability. Northern states were in the throes of a similar confluence of ruptures when they too experienced a moral panic about wife-beaters. While there was an undeniable women's rights movement in the North, to what extent can we be sure that Northern responses to wife-beating were a response to feminist demands?

As I have demonstrated, Southern anti-wife-beating laws were a response to the naturalization of the South's entire labor force and the legal rights to which they were entitled therein. The sociolegal Master of the House logic threatened to diminish planters' control over labor, indeed all freedwomen either were or had the potential to be a black man's wife. Furthermore, Southern state's vastly diminished political power, and the surge of extralegal vigilante violence further added to the uncertainty of the South's future. A white supremacist ideology that undermined black men's domestic authority, and stereotyped them as wife-beaters was instrumental in maintaining control of black men and women's labor, while keeping black women vulnerable to white men's violence and exploitation. In the North, there were similar tensions at the intersection of labor and demography. The second wave of European immigrants inundated Northeastern cities at precisely the moment workers began to organize, and threatened to diminish capitalists' control over their labor. Some of these immigrants were forced to fight in the Civil War due to Northern manipulation of their citizenship status, which led to immigrant's distrust of and violence toward state authority. While immigrant men led the fight in labor organizing and urban riots – also due to Northern states' loss of social control – a wave of young single women emigrated to the U.S. – primarily from Ireland – who, lacking husbands and fathers, were easily subject to labor and sexual exploitation by their employers. It is within that context that Northern states propagated a nationalist ideology that immigrant men were wife-beaters, in the midst of a larger immigrant gender and family pathology that closely mirrored black gender and family ideologies in the South.

Comparisons between the North and South in the latter decades of the 19th-century are not exact. But the similarities are compelling enough to ask: was the role of feminist agitation in bringing about Northern anti-wife-beating laws less significant than scholars have assumed? It is an empirical question. My research makes clear that feminist agitation is not a precondition for laws ostensibly put in place to protect women. Since early anti-wife-beating laws had racist origins in the South, the *nationalist* origins of Northern anti-wife-beating laws and sentiments is worth investigating.

## Implications for the Present

I will end by briefly highlighting how my research has important implications for how we think about domestic violence policy today. There have been two waves of domestic violence legal reform in the United States. My research has investigated the first period. The second was between 1970-2000. Between these two periods, there is a stark absence of new domestic violence legislation throughout the states. This is significant because it means that when Southern feminists began pushing for the legal changes that took root in the 1980s and 1990s, they were quite literally building from the laws created in the period I have just discussed – white supremacist laws that functioned to negatively impact black families. Unfortunately, feminist activists throughout the U.S. in this later period have misrecognized these laws as having feminist origins intended to protect abused wives. Since domestic violence had continued to be a problem in spite of these laws, feminist activists assumed that the laws were not functioning to protect women because they were not being properly enforced. The obvious solution to that problem would be to push for more enforcement, which they successfully did. By the end of the 1990s, most states were implementing some version of: mandatory arrest policies; enhanced prosecutorial discretion against batterers; specialized domestic violence courts, and enhanced judicial monitoring. Probation departments have adopted specialized practices for intensive supervision of offenders as well.

In the early 2000s, domestic violence advocates began assessing the consequences of those policies, only to find that white women were still victimized at alarming rates. And scholars such as Mimi Kim and Beth Richie have contributed important work on the devastating effects of these policies on black families and communities. In other words, feminists have come to realize what they consider to be the unintended consequences of these penal approaches to domestic violence. My research shows, however, that these consequences were not unintended. These laws have done precisely what they were intended to do – something that only becomes evident once their true origins are revealed. Put differently, punitive domestic violence policies disproportionately affect communities of color, with questionable success at curbing violence against women, because that is what they were created to do. Restorative justice, community-based approaches centered on maintaining family integrity within cohesive communities may therefore allow for congruence between an origin and function that both seek to eliminate violence within families.

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## APPENDIX

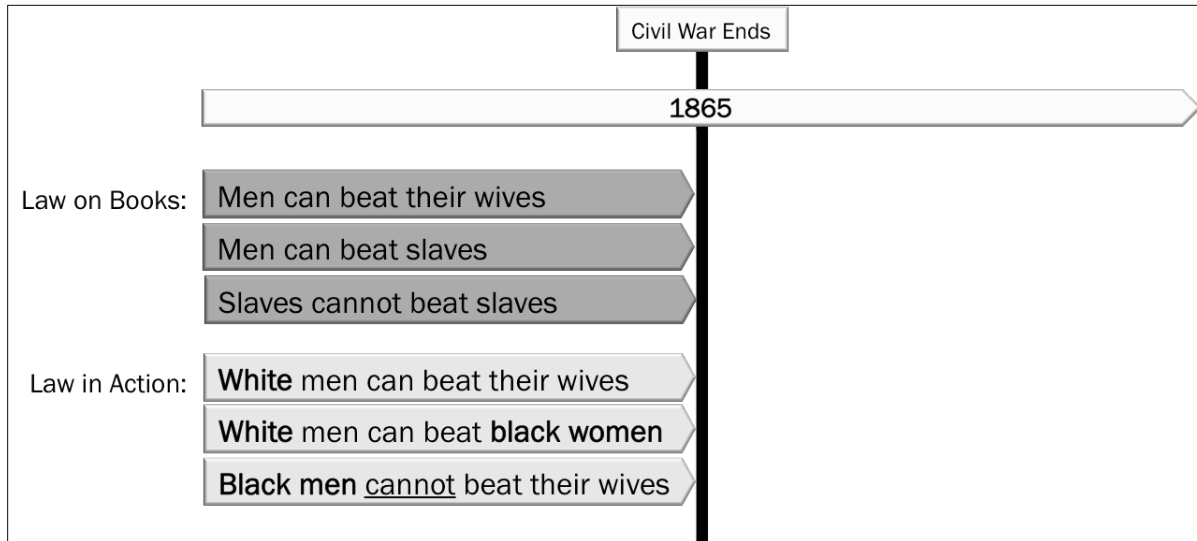


Figure 1. Antebellum wife-beating law and the books and in action.