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Response

The Savage Slave and the Humble Martyr in American Law and Culture

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Alfred Brophy's examination of pre-Civil War Southern legal thought sheds a whole new light on the framework *Gender and Race in Antebellum Popular Culture*[1] suggested for the development of antislavery and proslavery fiction in the same period. Brophy's Review explores the ways cultural thought and legal thought intersected in the decades leading up to the war. In particular, it raises important questions about why judicial decisions so closely mirrored trends in antislavery literature and why they seemed to diverge abruptly as secession and Civil War approached. To what extent, Brophy asks, were Southern jurists taking their cues from Northern female writers when those jurists chose the images and the language they used to craft their opinions relating to slavery and African-Americans during the antebellum period?[2]

Historical causation is not always an easy or a simple thing to establish. Culture, politics, and the legal system were intertwined with each other—as they still are today—in complex ways that reach beyond the establishment of a straightforward, direct line of causation. In this case, there are a number of explanations for the similarity between images of African-American slaves referenced in Southern judicial decisions and in antislavery literature. One

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1. SARAH N. ROTH, GENDER AND RACE IN ANTEBELLUM POPULAR CULTURE (2014).

2. Alfred L. Brophy, *Antislavery Women and the Origins of American Jurisprudence*, 94 TEXAS L. REV. 115, 118–19 (reviewing SARAH N. ROTH, GENDER AND RACE IN ANTEBELLUM POPULAR CULTURE (2014)).

possibility is that antislavery writers and proslavery jurists simply existed within the same society and thus both took their cues from the popular thought of their day, more or less independently of each other. It seems likely, though, that politicians and judges picked up on ideas put forward in popular culture and sometimes emulated or refuted those ideas in the official statements they made. That proslavery judges seem to have done so in response to sentimental fiction written by Northern antislavery authors—particularly female ones—demonstrates a blurring of the lines between public and private and between male and female spheres in an arena in antebellum America where historians have not previously identified this type of overlap or influence.

To fully understand this dynamic, it is critical to consider the specific purposes each group had for using the discourse that they did. It is also important to establish the intended audiences antislavery authors had in mind when crafting their stories and those which judges had in mind when fashioning their judicial decisions. By the 1850s, writers like Harriet Beecher Stowe sought to rouse popular support from a white Northern readership for the idea that the slave system should be ended.[3] To that end, these authors searched for images of African-Americans that Northern readers would find the most palatable and the most sympathetic. The image of the humble black martyr fulfilled this demand perfectly, as the record-breaking sales of *Uncle Tom's Cabin*[4] testify.[5]

At first, many proslavery authors and judges continued to use this image—one that, after all, Southerners themselves had incorporated into plantation novels as far back as the 1820s—to argue that slaves were members of the plantation family.[6] They stressed, however, that African-Americans' innate intellectual inferiority fitted them for their role as servants within the Southern household, not citizens within the American republic.[7] The argument was aimed at the same audience Stowe targeted—Northerners who were on the fence about the slavery issue or who had previously given it little thought. Using a benign and widely accepted portrayal of African Americans, proslavery jurists and writers strove to undermine Stowe's notion

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3. ROTH, *supra* note 1, at 105.

4. HARRIET BEECHER STOWE, UNCLE TOM'S CABIN (Longriver Press 1976) (1852).

5. An earlier best seller based on the same premise of highlighting black martyrdom as a way to turn white Northerners against slavery was *American Slavery As It Is: Testimony of a Thousand Witnesses*. THEODORE DWIGHT WELD, AMERICAN SLAVERY AS IT IS: A TESTIMONY OF A THOUSAND WITNESSES (Nabu Press 2010) (1839). Theodore Dwight Weld wrote the work in collaboration with his wife Angelina Grimké Weld and her sister Sarah Grimké. *American Slavery As It Is* reportedly sold 100,000 copies upon its release in 1839. JOHN DEWAR GLEISSNER, PRISON & SLAVERY: A SURPRISING COMPARISON 58 (2010). *Uncle Tom's Cabin* sold 350,000 within a year after its initial publication in book form in 1852. 1 ANNETTE T. RUBINSTEIN, AMERICAN LITERATURE ROOT AND FLOWER: SIGNIFICANT POETS, NOVELISTS & DRAMATISTS 1775–1955, at 140 (2009).

6. *See* ROTH, *supra* note 1, at 17.

7. *See id.* at 30.

that people of African descent were harmed by slavery and instead declared that they were sheltered by and, in fact, happy within the protective, familial arms of the institution.[8]

As abolitionist threats seemed to appear with more frequency and more intensity in the 1850s, the arguments jurists made about African Americans took a dramatic turn.[9] As Brophy points out, judges began to use increasingly shrill language to characterize slaves, especially black men.[10] One reason may have been that the audience these judges had in mind for their arguments shifted. Up through the early 1850s, some slavery supporters believed they could protect the slave system by convincing Northerners that the South was upholding a familial and thus a noble and benevolent institution.[11] Perhaps sensing by the mid-1850s that they were losing the battle for the hearts and minds of white Northerners, some magistrates concluded that the best way to strengthen the slave system was to solidify support for the institution within the South.

To do so, proslavery judges had to find a way to make nonslaveholding whites feel that they shared a common interest with slaveholders in preserving the slave system.[12] Turning a racist spotlight on white superiority and black inferiority was an obvious way to do so, as Roger Taney did in *Dred Scott v. Sandford*[13] when he argued that African Americans had "no rights which the white man was bound to respect."[14] As Brophy shows, Southern judges also appealed to nonslaveholding whites by stressing the dangers that the savage slave posed to all Southern whites.[15] In doing so, judges helped unify Southern whites from different socioeconomic backgrounds, most of whom had little personal economic stake in the slave system.[16] I wonder, then, if the judges Brophy discusses were responding as much to popular texts like Hinton Helper's *Impending Crisis of the South*[17] as they were to *Uncle Tom's Cabin*. In his book, Helper—a native white North Carolinian—put forward an economic argument against slavery, the crux of

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8. *See id.* at 141.

9. Brophy, *supra* note 2, at 118.

10. Brophy, *supra* note 2, at 119.

11. Brophy, *supra* note 2, at 123.

12. Historians have long advanced the notion of the South as a *herrenvolk* democracy. *See* GEORGE M. FREDERICKSON, WHITE SUPREMACY: A COMPARATIVE STUDY IN AMERICAN AND SOUTH AFRICAN HISTORY (1981); STEPHANIE MCCURRY, MASTERS OF SMALL WORLDS: YEOMAN HOUSEHOLDS, GENDER RELATIONS AND THE POLITICAL CULTURE OF THE ANTEBELLUM SOUTH CAROLINA LOW COUNTRY (1995).

13. 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

14. *Id.* at 407.

15. Brophy, *supra* note 2, at 125 & n.64.

16. *See id.* at 124–25.

17. HINTON ROWAN HELPER, THE IMPENDING CRISIS OF THE SOUTH: HOW TO MEET IT (New York, Burdick Brothers, 1857).

which was that the slave system had a detrimental impact on nonslaveholding white Southerners.[18]

As the Civil War drew near, a handful of authors of proslavery and anti-abolitionist fiction echoed Southern judges' insistence that African-American men were savages, unfit to live among "civilized" white Americans.[19] One particularly glaring example was Mrs. G. M. Flanders's novel *The Ebony Idol*.[20] The book was published in New York in 1860[21] by a woman who was likely white and from the North. *The Ebony Idol* portrayed its central black character as a duplicitous, lazy, and most importantly, a physically and morally repulsive creature.[22] Caesar was not, as he put it, a "genman" [gentleman].[23] Taken in by a gullible and fanatical white abolitionist, Caesar insisted on occupying the best bedroom in the house and on commandeering the dining room table to take a nap while the abolitionist's wife, Mrs. Cary, prepared dinner for the family.[24] Flanders made it clear that this "uncouth, swarthy figure" did not belong in company with respectable white people.[25] Mrs. Cary demanded that her husband "get Caesar out of the dining-room"—the center of domestic civilization in antebellum America—claiming that his "odor [was] perfectly intolerable."[26]

Most relevant to Brophy's findings about Southern judges is the fact that Flanders portrayed Caesar as a physical and sexual threat to the Carys' young, innocent daughter.[27] Caesar "smother[ed] her with kisses" when her parents were not looking and "drove her half frantic with persecutions" so that "[s]he came to fear him" and "shriek[ed] with terror when left alone for the night."[28] A more overt example of the physical dangers black characters posed can be found in *The Yankee Slave-Dealer*,[29] written "by a Texan."[30] Also published in 1860, this novel showed a male slave who "in a state of mental derangement" murdered his own child, "horribly mangling its throat with a knife."[31] Authors such as Flanders and the anonymous Texan presented enslaved black men—especially those striving for their freedom—as nightmarish, violent threats to the most vulnerable members of society. In

18. *Id.* at 154.
19. ROTH, *supra* note 1, at 150.
20. G. M. FLANDERS, THE EBONY IDOL (New York, D. Appleton & Co. 1860).
21. *Id.*
22. *Id.* at 132.
23. *Id.* at 140.
24. *Id.* at 136–37, 138.
25. *Id* at 139.
26. *Id.*
27. *See id.* at 141–42.
28. *Id.*
29. A TEXAN, THE YANKEE SLAVE-DEALER; OR, AN ABOLITIONIST DOWN SOUTH: A TALE (Forgotten Books 2012) (1860).
30. *Id.*
31. *Id.* at 366.

doing so, they joined Southern judges in suggesting to nonslaveholding whites that they had as much to fear from the end of the slave system as slaveholders did.

The trajectory of anti-*Uncle Tom* fiction thus followed that of jurists like Georgia's Joseph Henry Lumpkin. Lumpkin, Brophy establishes, shifted from voicing mild proslavery and anti-abolitionist sentiment in the late 1840s to spouting more hysterical claims by the mid-1850s about "large gangs of slaves" threatening whites' safety, and "thriftless, lazy semi-savages" jeopardizing civilized white society once they became free.[32] When they used such language, proslavery authors and judges were likely reacting to what they perceived as a revolutionary new image of African-Americans as worthy candidates for citizenship advanced by antislavery authors of the 1850s. Yet, as I seek to demonstrate in *Gender and Race*, popular antislavery texts of the 1850s—the ones Southern readers may have been exposed to—featured black male characters who actually fell far short of the worthy manhood required of full citizens in nineteenth-century America. These narratives may have precipitated what Brophy deems a "huge change in our nation's attitudes towards enslaved people (and men in particular)."[33] But in reality, that change did not include an acceptance by white Northerners of black men as true men or as equal citizens—at least not before the entry of black men into the Union army at the midpoint of the Civil War. Southern judges and writers interpreted these texts as threatening white supremacy only because of their hypersensitivity by the 1850s to any suggestion that people of African descent might not be entirely or solely fit for bondage.

Instead, antislavery authors like Harriet Beecher Stowe emphasized the humble nature of black men and, in particular, their inferiority to white women.[34] White female characters were more cultured, more intelligent, and more valued than the black male characters that appeared alongside them in texts like *Uncle Tom's Cabin*.[35] This contrast indicated, in fact, that black men did *not* actually qualify for full citizenship. The white women who wrote these fictional narratives were not, in fact, "heroes," as Brophy defines them, at least not by today's standards.[36] They did not advance a progressive vision of racial equality, even if proslavery Southerners believed they were doing so.

The image that antislavery authors found resonated most strongly with white Northerners in the 1850s was that of the suffering black martyr.[37] This

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32. Brophy, *supra* note 2, at 128, 129 (quoting Cleland v. Waters, 19 Ga. 35, 44 (1855); Am. Colonization Soc'y v. Gartrell, 23 Ga. 448, 464–65 (1857)).

33. Brophy, *supra* note 2, at 143.

34. *See* ROTH, *supra* note 1, at 110.

35. *See id.* at 109–10.

36. Brophy, *supra* note 2, at 143.

37. ROTH, *supra* note 1, at 11.

was a characterization of African-American slaves for which Southern jurists, of course, had little use. That depiction in itself represented a threat to the slave system that proslavery Southerners could not abide. If Northern white readers felt compassion for black slaves, they would easily turn on the system that victimized these slaves and on the people who perpetuated that system. Antislavery writers knew this and used it to their advantage in the battle for the hearts and minds of white Northerners over the slavery issue.

They were not the last activists for racial justice in American history to do so. The civil rights movement of the 1950s and 1960s would not have succeeded as it did if the notion of the suffering black victim had not continued to hold emotional power in the psyches of white Americans—and of white Northerners, in particular. Activists who espoused the nonviolent direct action approach to civil rights protest recognized this emotional calculus within the Northern white mind and deliberately appealed to it. The Northern white public, in general, responded with shock and outrage when they viewed the suffering of black men, women, and children on the nightly news in the early 1960s.[38] Seeing these protestors attacked by dogs (animals used in the previous century by slaveholders to subdue and torment black slaves), fists, and nightsticks had much the same effect as the beating to death of Uncle Tom had had on white Northerners over a hundred years earlier.[39] It is somewhat ironic that Malcolm X referred to Martin Luther King Jr. as an "Uncle Tom" when King's tactics actually make it more appropriate to compare him to Harriet Beecher Stowe than to her famous protagonist.[40] Both Stowe and King (and other civil rights leaders like Ella Baker, Dianne Nash, and James Forman) fought institutionalized racism by presenting white Northerners with carefully fashioned tableaux calculated to awaken their sympathy for suffering black victims of violence at the hands of Southern white racists.

But for white Americans in general, feeling sorry for black victims of racist white violence has not always translated into acceptance of African-Americans as equal citizens. Atticus Finch, mentioned in Brophy's review, provides an apropos example of a fictional attorney who championed the cause of a black victim of racism in court but did not support rights for African-Americans in the voting booth.[41] In *To Kill a Mockingbird*,[42] Finch urged compassion—or, more accurately, pity—for the wronged black man he defended in court.[43] But as Lee shows in *Go Set a Watchman*,[44] released in

38. Jack Nelson, *The Civil Rights Movement: A Press Perspective*, 28 HUM. RTS., Fall 2001, at 3, 4.

39. *See id.*

40. Louis Lomax, *A Summing Up: Louis Lomax Interviews Malcolm X*, *in* WHEN THE WORD IS GIVEN: A REPORT ON ELIJAH MUHAMMAD, MALCOLM X, AND THE BLACK MUSLIM WORLD 197, 203 (1963).

41. Brophy, *supra* note 2, at 143.

42. HARPER LEE, TO KILL A MOCKINGBIRD (Grand Cent. Publ'g 1982) (1960).

43. *Id.* at 204.

2015, any pity Finch himself had had for Tom Robinson did not mean Finch would support or even tolerate the extension of the franchise to African-Americans.[45] As literary scholars have suggested, having sympathy or pity for another person reinforces a feeling of separation between the sympathizer and the person being pitied.[46] The act of pitying helps to reify a hierarchical relationship between the subject and the object of sympathy.[47] Again, women like Harriet Beecher Stowe were not racially progressive "heroes" (or heroines), any more than Lee portrays Atticus Finch as a hero in *Go Set a Watchman*.

Purveyors of American popular culture continue to use the figure of the black martyr to advance racial justice in the United States. The film *Selma*[48]—released five months after protests against police brutality began in Ferguson, Missouri—repeatedly showed scenes of silent, frightened African-American victims succumbing to violence at the hands of white police officers.[49] The seemingly endless stream of videos emerging today in which police beat or shoot unarmed African-American suspects should likewise be seen as a continuation of the tradition Harriet Beecher Stowe popularized 150 years ago. These videos have in one sense gotten the attention of white Americans, changing their views about whether racism still exists in the United States.[50] But the impact continues, as it did in Stowe's day, to be limited. As Jamal Smith wrote recently in the *New Republic*, "[t]he legacy of our increased exposure to black death has merely been the deadening of our collective senses."[51] Sympathy and pity can only take us so far when popular culture does not promote in like measure images of African Americans as the equals of whites.

Alfred Brophy asks what role black activists played in shaping cultural images to promote an acceptance of African-Americans as citizens in the antebellum period.[52] As the chapter of *Gender and Race* on radical abolitionist writings of the 1850s indicates, African-American authors produced some of the most laudable black male characters in the history of

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44. HARPER LEE, GO SET A WATCHMAN (2015).

45. *See id.* at 246.

46. HOWARD SKLAR, THE ART OF SYMPATHY IN FICTION: FORMS OF ETHICAL AND EMOTIONAL PERSUASION 25 (2013); *see, e.g.*, KRISTIN BOUDREAU, SYMPATHY IN AMERICAN LITERATURE: AMERICAN SENTIMENTS FROM JEFFERSON TO THE JAMESES 12 (2002).

47. *See supra* note 46.

48. SELMA (Paramount Pictures 2014).

49. *Id.*

50. Kevin Sack & Megan Thee-Brenan, *Poll Finds Most in U.S. Hold Dim View of Race Relations*, N.Y. TIMES (July 23, 2015), http://www.nytimes.com/2015/07/24/us/poll-shows-most-americans-think-race-relations-are-bad.html?_r=0 [http://perma.cc/N7NR-U5B2].

51. Jamil Smith, *Videos of Police Killings Are Numbing Us to the Spectacle of Black Death*, NEW REPUBLIC (Apr. 13, 2015), http://www.newrepublic.com/article/121527/what-does-seeing-black-men-die-do-you [http://perma.cc/S4EF-LMF6].

52. Brophy, *supra* note 2, at 143.

American fiction in the decade before the Civil War.[53] Frederick Douglass's novella "The Heroic Slave"[54] and Martin Delany's serialized novel *Blake*,[55] for instance, both presented strong, noble black men who sought out freedom by means of violent slave rebellion.[56] These narratives, however, barely saw the light of day among mainstream, white American audiences.[57] As nonviolent activists of the 1960s recognized, black passivity resonated more favorably with white Americans than did black assertiveness.

The judicial opinions Brophy cites demonstrate why. When white Americans of the nineteenth century thought of black assertiveness, it was destructive black violence against whites of the Nat Turner variety that came to mind.[58] White Southerners, whether on the bench or not, lived for decades—perhaps even a century or more—with the specter of Nat Turner's deadly revolt and the awareness of other slave plots and rebellions constantly suggesting to them that black men with power of any kind posed a profound danger to all white people.[59] Thus, Southern judges had to guard against the threat of slave violence at all costs, or at least used such rhetoric to justify squelching the rights of the enslaved beneath the raw, state-sanctioned power of their masters. Antislavery activists, for their part, had to walk a fine line to promote black equality without triggering white fears of slave violence and of what became known in the Reconstruction period as "negro domination" of the political realm.[60]

The solution that advocates of racial justice have used most consistently—highlighting the suffering black victim as the chief casualty and consequence of racism—has had detrimental effects on African-Americans in personal as well as political ways. The film *Amistad*,[61] released in 1997, contains one of the most harrowing scenes on film depicting the experience of African-Americans (again, strictly as silent victims) on the Middle Passage.[62] An English professor, Chester Fontenot, Jr. observed a black couple coming out of the theater after having seen the movie.[63] When the couple reached a bench, the woman "sat down, placed her head in her hands, and began to weep."[64] Fontenot suggested that "[i]t

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53. ROTH, *supra* note 1, at 207–46.

54. FREDERICK DOUGLASS, THE HEROIC SLAVE (Start Publishing LLC 2012) (1852).

55. MARTIN R. DELANEY, BLAKE OR THE HUTS OF AMERICA (Floyd J. Miller ed., Beacon Press 1970) (1859–1862).

56. ROTH, *supra* note 1, at 219, 233.

57. *See id.* at 244.

58. Brophy, *supra* note 2, at 123.

59. *Id.*

60. *See* ERICKA M. MILLER, THE OTHER RECONSTRUCTION: WHERE VIOLENCE AND WOMANHOOD MEET IN THE WRITINGS OF WELLS-BARNETT, GRIMKÉ, AND LARSEN 4 (2000).

61. AMISTAD (HBO Films 1997).

62. *Id.*

63. Chester J. Fontenot, Jr., *Black Misery, White Guilt and* Amistad, 24 MELUS, Spring 1999, 235, 243.

64. *Id.*

was as if they were adrift on a sea of emotions deprived of the means to navigate their shared pain toward the shores of reconciliation and wholeness."[65] Recently, an article in *The Washington Post* warned black readers that they might be susceptible to "race-based trauma and stress" or "vicarious trauma" if they spent large amounts of time watching the videos of police brutality being released on a regular basis.[66] The *Post* offered African-Americans several "self-care tips."[67] Suggestions included "[c]reate something" (a wooden birdhouse was suggested), "take a stroll by the water," "[w]atch funny movies," "do yoga," and give someone a hug.[68] The pain not only of ongoing racism but of popular culture's attempts to drive racism away through repeated sacrificing of the black martyr continues to take its toll both emotionally and politically. It is significant that one of the most widely read newspapers in the United States acknowledges this phenomenon by offering mental-health advice to its black readers.

Antislavery writers of the antebellum era took ideas about black equality too far for the comfort of Southern jurists in the antebellum period. But they fell far short from the vantage point of modern-day racial progressives and of truly radical abolitionists of their own day. In another sense, Southern judges and Northern antislavery authors were speaking the same language. Though they saw themselves as being on opposite sides of the slavery issue, both camps drew on imagery of African-Americans that envisioned them as incapable and unworthy of full citizenship.

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65. *Id.*

66. Karen Attiah, *How Black People Can Emotionally Protect Themselves In The Age Of #BlackLivesmatter*, WASH. POST (July 24, 2015), http://www.washingtonpost.com/blogs/post-partisan/wp/2015/07/24/how-black-people-can-emotionally-protect-themselves-in-the-age-of-blacklivesmatter/ [http://perma.cc/78X9-55ML].

67. *Id.*

68. *Id.*