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Public & Private Order: Law, Race, Morality, and the Antebellum Courts of Louisiana, 1830-1860

By Gwendoline Alphonso *

In the summer of 1852, Mildred Ann Jackson, a "good-looking quadroon" who worked as a "seamstress" and "hairdresser" in New Orleans, "broke through three doors" to escape out of a "negro yard." Jackson then disguised herself in male attire and successfully fled to France.[1] In another instance, Charlotte Levy, a white woman, signed a lease in November 1858 agreeing to rent an eleven-room house at the corner of Carondelet and Canal Streets in New Orleans for $50 a month to Mary Wise, a mulatto slave fraudulently denominated in the lease as free woman of color (f.w.c.) with P.L. McRae and Thomas Foster, both white, signing on as sureties to guarantee that agreement.[2] Mary Wise and her daughter Ella, comfortably lived in the house with their own vast furnishings until Wise's arrest for arson sometime later. In a third case, John Trumbull, a white man, died in June 1856, while "being notorious" for living in "open concubinage" with his "mullatress" slave, Rachael, for many years, and having five children by her. In his hand written will, he emancipated Rachael and their five children, attempting to bequeath one-third of his estate to them.[3]

In antebellum Louisiana, whites, blacks, and mulattoes lived complex, intertwined lives that often defied the racialized social order of a slave society,[4] their private practices often transgress-

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ing the rigid statutory order of a slave state.[5] By leasing a fine house in the French Quarter section, Mary Wise, a slave, along with her white sureties contravened local ordinances that prohibited enslaved blacks from entering into contracts.[6] By breaking out and escaping, Mildred Ann Jackson and many hundreds like her directly flouted laws against runaway slaves along with legal rules that compelled bondsmen to always submit to the slaveholder.[7] Attempting to manumit and bequeath part of his estate to his slave mistress, John Trumbull, like many others, violated crucial legal bars against concubinage and miscegenation and challenged the legal order in which only white heirs had legitimate claims to the property of a decedent.[8]

Scholars of southern legal history have long noted the competing, often contradictory, features of antebellum southern society, reflected in its laws and judicial pronouncements. Personal honor and private means of conflict resolution (such as duels) existed in tandem with an attachment to the larger community and deference for written laws.[9] Long-standing commitments to personal autonomy and moral discretion, or often indiscretions, of white men coexisted alongside a preoccupation with rigid public morality and social order.[10] Existing scholarship also points to the discrepancies between formal law and lived practices in the South in terms of slavery and race.[11] Laura Edwards, in her path-breaking book *The People and their Peace,* highlights the coexistence of disparate outcomes within the antebellum legal system of the south, wherein formal rights-based state law coexisted with, often contradictory, localized conceptions of "peace." In Edwards' account, the centrality of localized law within southern legal systems enabled "subordinates to exercise influence in law" despite being "[un]able to change or challenge their legal subordination."[12]

In New Orleans, free blacks actively engaged with civil and political institutions in the antebellum period despite increasing statutory constraints on them.[13] Also, "at the level of day-to-day interactions," many "slaves took advantage of the gap between rules and enforcement."[14]

Several works collectively identify the dissonance between the public (statutory) order and lived, private practices accommodated within southern law, some suggesting how they nonetheless cohere,[15] others suggesting otherwise,[16] few identify the *mecha-*

nisms by which both could coexist. This Article suggests one such mechanism found in play in antebellum Louisiana: institutional variance between the local courts on the one hand, and the Louisiana Supreme Court on the other. It argues that the courts at each level, reflecting different institutional legacies, demonstrate marked differences in how they viewed social relations, their own institutional roles, and their approaches to social order. Thus, although both courts upheld social order by guaranteeing white male privileges, local courts were more apt to do so, with the supreme court additionally emphasizing public policy and the statutory public order. By so doing, local courts were, in fact, more accommodating of social permeation and discrepant private practices that served the interests of individual white men than the supreme court which also operated as the guardian of legislative will and statutory laws. The existence of both levels, as well as their fluctuating interdynamic, enabled public and private concerns to coexist, intersect, and dually define the parameters of accepted behavior within its law.

This Article thus follows in Edwards' analytical revisionist framework that stresses the importance of bottom-up localized law, local legal norms, culture, and inconsistencies alongside more formal, top-down state law.[17] However, it modifies Edwards' framework in three ways. First, the focus is on Louisiana, a state steeped in the civil law system, rather than on the Carolinas (the object of Edwards' inquiry) that followed the common law system. Thus the overarching institutional framework, rules, and legacy of the courts of this study differ from that in Edwards' examination. Second, whereas in Edwards' account the local and state courts of the Carolinas operate more or less separately, as a result of their own differing institutional logics, this Article highlights a greater institutional inter-connection *between* the two judicial levels, wherein inter-level dynamics such as borrowing and competition *between* state and local courts also inform how they operate. Third, unlike Edwards' much larger cross-issue post-Revolutionary study my inquiry is limited to cases of race and racial indeterminacy in Louisiana in the three decades just preceding the Civil War, and from that more narrow scope, the Article develops heuristics of "public" and "private" order that are not found elsewhere.

In its focus on public and private approaches to social (and legal) order, this Article also contributes to wider conservations regarding nineteenth-century legal development. Legal historians have long debated the competing centrality of private and public orientations on nineteenth-century legal development. On the one hand, many have emphasized the prominence of (*laissez faire*) liberal individualist principles in guiding nineteenth-century law, characterized by a weak state and courts that "released the creative energy" of individuals through extensive protection of private rights such as property and contract.[18] On the other hand, others have demonstrated nineteenth-century jurisdictions as being more concerned with community and collective (or public) order, legal development revolving instead on a commitment to a well-ordered or well-regulated society, in which morals were policed extensively and private rights were often subordinated to the welfare of the society.[19] Most do not look at inter-level dynamics within a single (state) jurisdiction as enshrining these multiple judicial outlooks and so constructing social order in diverse, inter-related, ways as I do here. Institutional complexity suggests that neither one — public order or private rights — was exclusive but that both had important roles to play in how courts navigated, and constructed, social behavior.

Following a section on case selection and methodology, this Article is divided into three main parts. The first section examines legislative developments accompanying the incorporation of common law into antebellum Louisiana and identifies patterns in the responses of the Louisiana Supreme Court and local courts *vis-à-vis* race and the construction of racialized social order. The second section discusses the varied responses by the supreme court and local courts to jury trials, demonstrating their inter-level dynamic in this regard and how that served to instantiate their differing approaches to social order. The third section explores the deep-seated differences in conceptions of morality contained in supreme court and local court decisions, also further engendering institutional variance in their construction of racialized social order. The conclusion sums up the main findings and discusses implications for existing and future research.

I. Case Selection & Methodology

This study is based on the trial manuscript records of the Louisiana Supreme Court, which are housed in Account No. 106 in the Earl K. Long Library at the University of New Orleans. Although some of the records are now digitized, this was not the case at the time of research such that the physical record of each trial manuscript file was read in its entirety. All case transcript files examined were handwritten and contained copies of the trial court case, including attorney's arguments, depositions, written interrogatories, bills of exceptions, the clerk's summary of the testimony and the copies of the original hand-written opinions, appellate briefs, and the judgments of the trial and supreme court (often with errors crossed out and writing in the margins). These transcripts were preserved because the decisions were appealed to the Louisiana Supreme Court and ultimately deposited in the University of New Orleans. The transcript file is the only existing record of the case at the trial level and allows a researcher to "follow" a case from the local court to the supreme court (sometimes twice over) comparing judicial attitudes at each level. This rich archive also provides details of the social contexts in which the people lived and in which the courts functioned, much more than the bare judicial decision alone.

The case records examined are those that were tried in parish and district courts in Louisiana between 1820 and 1860 and ultimately reached the supreme court. I searched the indexes and texts of JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO,[20] Louisiana Digest: 1809 to Date,[21] LITIGATING WHITENESS: TRIALS OF RACIAL DETERMINATION IN THE NINETEENTH-CENTURY SOUTH [22] and SLAVERY, THE CIVIL LAW, AND THE SUPREME COURT OF LOUISIANA[23] for cases associated with race and skin color, using the keywords: "color," "white," "black," or "mulatto" [often within a main heading, such as "slaves."].

The cases selected are those in which the person's color was a legal issue because of the indeterminacy of a person's color, or because their color affected their value or appraisal as a slave, or because it resulted in contestable presumptions and behavior (example: mistaking a jailed, free woman of color as a slave

because of her "black" skin color, leading to her whipping as a runaway). The rationale for the focus on color is based on the assumption that race was the most significant status distinction in the social order of a slave state and often enveloped other intertwined statuses such as gender, age etc. By selecting cases in which color or race was at issue, I hope to assemble a sample of meaningful judicial decisions from which to access the attitudes of Louisiana judges regarding how a central status (race) and associated statuses related, if at all, to social order, and how its boundaries should be policed, if at all.

Of these color-based cases, I further selected only those involving either persons of "mixed" color (called "mulattoes," "griffes," or "quadroons") or else of "indeterminate" color whose very racial identity was to be determined. The decision to focus on mixed and indeterminate people of color follows from the acknowledged position that light-skinned people of color in Louisiana, enslaved or free, had a unique, intermediate position, with greater capacity and incentive to "permeate" (and obscure) the social order of a slave society than most others.[24] Thus, the adjudication of their claims or their color, or both, is illustrative of effective "moments" in which judges would or would not reproduce the racialized social order, rationalizing and enforcing (or not) the boundaries between white and black along the way.

This two-step process of selection yielded twenty-one case transcript files, each consisting of approximately fifty to several hundred pages of documents. Some cases were tried multiple times in local courts, resulting in a total of forty-four decisions, across trial courts and supreme court decisions. Each was coded separately. Because I am interested in race distinctions and how the courts viewed those distinctions, I constructed a second data set where each judicial decision was separated for every mulatto or indeterminate person — man, woman, or child — who was a party to the case. In most cases there was only one such party but some contained "families," so I coded each judicial decision, at the trial court and supreme court levels, separately for each party (sometimes judges would rule differently in the cases of women versus children for example). This resulted in a second N of 51 and not 44 (the number of judicial decisions/units of analysis in the first dataset). Charts and figures present the findings for each dataset, some with an N of 44 and one with the

N of 51. For both data sets I coded each analytical case for the kinds of social order they evidenced, the legal sources used, racial order effected (or not), the case type, social order ideology, and — in the second dataset — the race and gender of each individ ual. The race and gender of the party of the case was not found to yield statistical differences for the judicial outcome, so charts or discussions of these variables were excluded. However, the second data set is used to display variations in "interventionism" as per each "colored" party to the cases. The purpose of statistical analysis is to determine whether there were systematic differences in the judicial ideologies of racialized social order across individuals and court levels. I use the forty-four judicial decisions more as a sample of judicial ideologies, not intending them to be exhaustive. The descriptive statistical analysis is used to supplement the in-depth content analysis of each case transcript file.

Judicial decisions in this Article represent the exercise of state discretion, the ways by which the courts, as state institutions, implemented and constructed racialized social order. These decisions are as much cultural artifacts, the judicial response to prevailing social practices, as acts of state power: judges interpreting and applying the "legislative will." The cases represent contingent moments in development of slave states in which courts had occasion to interpret and implement legislative mechanisms to fashion "social order" in their own way.

II. Hardening of Racial Boundaries, Incorporation of Common Law & The Louisiana Courts in the Antebellum Era

In the antebellum era, Louisiana underwent extensive change. Amidst the rising criticism from northern anti-slavery forces, political elites tinkered with legislation, tightening their control over the lives of their slaves, free blacks, and other subordinate groups. Louisiana had been, consecutively, a French and Spanish colony prior to its purchase by the United States in 1803 and Creoles jostled with Americans in the exercise of social and political power.[25] Louisiana also experienced extensive agricultural expansion and economic prosperity, as legal historian Judith Schafer notes, "Lousianians increasingly believed that slavery was an essential element not only for economic success but for social order."[26] With the coming of American rule, all

whites in Louisiana (Americans, French and Spanish-speaking Creoles, and West Indians alike) began to seek harsher restrictions on people of color, legally differentiating them more clearly than before from whites.[27]

When Louisiana became an American territory in 1806, it adopted a "Black Code." The Black Code, stricter than the preceding Spanish slave law, upheld a three-tiered racial caste system, which distinguished between whites, *gens de couleur libre* ("free people of color"), and slaves, in regard to a multitude of actions such as: punishment for rape or attempted rape "upon the body of any white female," arson, the destruction of crops, causing "insult or assault and beating of any white person," "carrying arms," traveling to and from the state, residency limits, employment upon steamboats and other vessels, testifying before court, service on juries, participation in elections, holding public office, serving in the militi, and in capacity for inheritance and exercise of paternal authority.[28]

The Black Code also added a provision that "free people of colour ought never to insult or strike white people, nor presume to conceive themselves equal to the white; but on the contrary that they ought to yield to them in every occasion and never speak or answer to them but with respect, under the penalty of imprisonment."[29] When Louisiana compiled its existing laws into the Digest of 1808, it stipulated that free people of color must be clearly identified in all legal documents as "f.m.c." or "f.w.c." ("free man/woman of color").[30] An ordinance in the City of New Orleans began to require that all women of color, free and black, distinguish themselves by wearing headscarves.

Other laws tightened the binds of slavery by prohibiting slaves from purchasing their own freedom (a practice called "coartacion," inherited from Spanish reign and previously long practiced in Louisiana), limiting manumission, and curtailing the emigration or settlement of "free negroes or malattos."[31] In the years following its entry into the Union, Louisiana law thus more keenly began to emphasize racial distinctions between people, characterized in the 1825 Civil Code as "distinctions of persons which are established by law," to differentiate between slaves, free people, and whites.[32]

As a consequence of the statutory hardening of race-based distinctions, the number of cases before the courts in which color

or race appeared as a legal issue also progressively increased. Racial distinctions in Louisiana were invoked mainly in four kinds of cases, broadly definable as: (a) cases of "white slavery" — when light-skinned women claimed to be wrongfully enslaved on the basis of their (white) race or skin color; (b) cases of inter-racial sex — when the race and inter-racial sexual connection of mulatto mistresses (slave or free) and white men were at issue in claims to his property; (c) cases of "passing" — when light-skinned "white" men brought suits of slander against other individuals for calling them "coloured" and (d) cases of "passing as free" — when the skin color of mulatto individuals was used to presume them free or enslaved. Cumulatively, across all four categories there is an overall, marked, increase in the number of cases decided by the courts. In other words, the courts were increasingly called upon to decide cases whose outcome pivoted on race. By the 1850s, many more cases involving inter-racial sex, "whites" claiming race-based slander, and mulattoes passing as free and claiming wrongful imprisonment reached the courts.

Table 1: Race-Based Cases before Louisiana Local & Supreme Courts, 1830-1860

In the antebellum period, as the statutes progressively hardened boundaries around a more rigid, stratified, social order, the courts were confronted with more real life instances

of possible social permeation and racialized "disorder," presenting them with greater opportunity to themselves construct and order society.

Within statutory social ordering, the law upheld the superiority, liberty, and authority of white men over all others. In Louisiana, as in other slave states, the totality of the power of the white master over his slaves is an extreme example of the patriarchal quality of its legal order.[33] A slave was by definition subjugated to the authority of his master, defined in the Civil Code as, "…one who is in the power of the master to whom he belongs…he can do nothing, possess nothing or acquire anything but what must belong to his master."[34] However, slaves were only a part of the sphere of the patriarchal authority guaranteed to white men by law (including planters and yeomen, slaveholders and non-slaveholders), instead the law upheld the legal dominion of men over all others: women, free persons, and children.[35] As the Louisiana Civil Code of 1825 stated,

> Laws on account of the difference of sexes have established between men and women essential differences with respect to their civil, social and political rights. Men are capable of all kinds of engagements and functions, unless disqualified by reasons and causes applying to particular individuals. Women cannot be appointed to any public office, not perform any civil functions, except those which the law specifically declares them capable of exercising.[36]

Louisiana law subjugated the wife to the authority of her husband, requiring that she be "bound to follow her husband and to live with him wherever he chooses to reside," that she "cannot appear in court without the authority of her husband," "possess her property separate from her husband," or even when she is separate in estate from her husband "cannot alienate, grant, mortgage or acquire either by gratuitous or incumbered title" without her husband's consent or concurrence.[37] Children were also firmly under their father's authority, and paternal rights extended to their education and administration of their estates.[38] Unlike white men, free men of color in Louisiana were limited in their civil and political rights — they could not vote, nor hold political office or serve on juries, the laws also progressively restricted the movement and economic activities of all free people of color.[39] In antebellum Louisiana, the law constructed

a deeply stratified, hierarchical (public) social order that upheld white men's privileges and authority over all others.

In deciding cases of race-based claims, the courts too evidence a pattern of upholding white male prerogatives. As seen in the figure below, the courts upheld a patriarch's rights more often than they decided against them (twenty-three cases upholding and twenty-one against) however they were more apt to do so in the earlier decades of the antebellum period. By the 1850s, the courts were deciding more against the rights of the patriarch than in favor of them, holding them more firmly to statutory order than before.

Figure 2: Upholding Patriarchal Rights in Louisiana, Local & Supreme Courts, 1830-1960

The acquisition of Louisiana by the United States also unsettled its abiding civil law legacy. Civil law had been an integral part of Louisiana's French and Spanish colonial past, and its people were accustomed to civil law principles. Upon its entry into the Union, native Louisianians feared the imposition of the American common law system, which was based on judge-made law rather than upon a written code.[40] Whereas the American common law system focused on protection of individual rights

through various legal mechanisms such as: trial by jury, presumption of innocence, habeas corpus, and stare decisis; the civil law system was more concerned with public order and majoritarian good in which individual legal protections were mostly absent.[41]

Table 2: Characteristics of District & Supreme Courts' Decisions, Louisiana 1830-1860

Following the Purchase of 1803, the considerable efforts to Americanize Louisiana's laws thus came up against its civil law legacy. In its first constitution in 1812 (and later constitutions thereafter) the overwhelming preference for civil law resulted in provisions forbidding the legislature from imposing any general and unspecific form of law, such as the common law, upon the state, and requiring the supreme court to justify each and every decision by citing specific acts of legislature or articles in the Civil Code.[42] As the Civil Code in 1825 asserted in its very first article, "law is a solemn expression of Legislative will," the written code was elevated above judicial discretion.

However, the majority of judges and justices appointed to the Louisiana Supreme Court in the antebellum period were American attorneys, trained in common law and not native Louisianians, and were apt to meld common law principles onto their adopted civilian legacy. [43] Moreover, as the nineteenth century wore on, statutes began to increasingly incorporate principles of individualized, American common law, also intermixing judicial discretion and individual rights with the more long-standing civilian emphasis on public order and the written law.[44]

In the race-based cases, judges on the Louisiana Supreme Court followed their mandate to uphold legislative will, dutifully citing relevant statutory provisions in most decisions. At other times, they constructed elaborate attempts to insert their own interpretation of legislative intent or to ignore legislative dicta altogether.[45] In keeping with its elevated stature, supreme court decisions were longer in page length than trial court opinions and relied more on complex statutory status distinctions rather than on jury opinion in deciding a case (see Table 2 opposite page). The supreme court frequently reversed rather than affirmed trial court rulings — reversing fourteen cases and affirming only six.

Perhaps due to its institutional mandate and preeminence, the supreme court more frequently cited public policy and public order concerns as opposed to local courts that almost exclusively decided cases narrowly, as an adjudication of private interests. Although the Louisiana Supreme Court too was far more likely to adjudicate on the basis of private interests, it was also four times more likely to refer to "public order" or "public policy" in

the cases examined than the local courts, this difference is statistically significant.

Table 3: Private Interests & Public Order, as Decision Focus in Louisiana Local & Supreme Courts, 1830-1860

As seen in Table 3, in a little over one- third of the cases examined, the supreme court referred to public order, especially in cases involving inter-racial sex. The high court invoked public order in five out of eight cases in comparison to local courts, which did not invoke public order at all. The supreme court, for example, repeatedly upheld the absolute nullity of contracts such as marriage between free persons of color and whites, described as "tainted with motives (contrary to) public order."[46]

In cases involving mulatto concubines of white men, the Louisiana Supreme Court reiterated the importance of the article of the Civil Code that prohibited most bequests to concubines, as "an explicit provision of law of great importance to the order, decency and well-being of society."[47] The court asserted, "the letter of this law is positive, its last disposition is prohibitive in its

application; it destroys the right which the testator might have had of disposing of any other part of his succession indiscriminately."[48] Thus, despite its overarching deference to white men's privileges, the supreme court was also cognizant of statutory, public order objectives, sometimes in the face of the private wishes and prerogatives of a white master especially when it involved inter-racial sexual liaisons.[49]

Statutory public order and attendant legislative preeminence were also invoked by supreme court decisions in suits of freedom brought by mulatto slaves claiming to have been freed by deceased masters. Here too, the supreme court differentiated an "action for freedom" from "an ordinary case of private right" insofar "as it concerns the public that none but worthy persons should be admitted to the status of freemen."[50] The supreme court strictly upheld the 1857 legislative ban against emancipation, extending its application retroactively to acts of manumission that preceded its enactment but were not executed before the passage of the act, writing "the subject of enfranchisement of slaves is one over which the State was always exercised a controlling power . . . the policy of the State has annexed conditions to the enfranchisement of slaves, which the court cannot permit to be disregarded."[51]

In other instances, the supreme court made attempts to establish the boundaries of existing legislation by inserting its interpretation of legislative intent, preserving in these instances its own view of social order over statutory pronouncements. In the case of *Foster v. Mish*,[52] the court loosely relied on article 10 of the Civil Code (which provided that a deed of manumission made in another state was governed by the laws of the state where it was made) to import the common law of Kentucky to the case of Andy Foster, previously a free resident of color there who had been captured and sold into slavery in Louisiana. In so doing, the court disregarded the strict 1857 ban on emancipation and allowed Foster to recover his freedom. The court firmly stated its interpretation of social order (where free people cannot be wrongfully re-enslaved) and the applicatory limits of the 1857 law thereto, protecting its own institutional legitimacy along the way.

> It is a grave error to suppose, that free persons of color, who have been wrongfully and illegally deprived of their freedom, and sold into slavery in this State, have no right of action in our courts for the recovery of their liberty. If no right of action in such cases existed, then free negroes might be kidnapped in part of the Union, and sold into slavery in this State, with impunity — a species of slave-trade, which our Legislature never intended to legalize by the Act of 1857, prohibiting emancipation.[53]

With less institutional heft than the supreme court and similarly bound to the written code as per the civilian system, local courts applied statutes more mechanically — without attempting to interpret legislative intent or to examine underlying public policy objectives. In the case of Andy Foster, Judge Price of the New Orleans Fourth District Court, admitted that the evidence conclusively showed that Andy Foster was born free in the State of Kentucky but in the light of prior supreme court decisions and "considering the act of the Legislature prohibiting emancipation of slaves in this State," he dismissed Foster's petition for freedom.[54] The majority of trial judges' opinions were brief statements of the decision rendered, less than a page in length with little or no elaboration of the nature or scope of the law applied.

The local courts evidence a strong pattern of preserving the private property interests of slaveholders, affirming the rights of the master or patriarch over his dominion. In *Turner, Curator v. Smith*,[55] Justice Ratcliff of West Feliciana Parish wrote, "it is very difficult to circumscribe the authority of the master."[56] In an unusually lengthy thirteen-page opinion, Justice Ratcliff went so far as to refuse to follow the supreme court Justice Preston's decision in *Vail v. Bird*[57] to limit a master's capacity to bequeath his slave concubine her freedom. Asserting that a slave did not "have a will of her own," and so could not consent or refuse the advances of an unscrupulous master, Justice Ratcliff maintained that a slave woman could not be considered a concubine. In this unusually lengthy opinion, he cautioned against the implications of the supreme court's decision to view a slave as a consenting concubine, stating: "Grant the slave the right to determine for himself — what is and what is not a lawful exercise of power by the master over him, and you destroy at once and forever the relation of master and slave."[58] Concerned with not disturbing

the private rights of the master/patriarch over his slave, the trial court found in favor of the slave concubine, granting her the freedom bequeathed to her by her master.

For two-thirds of the parties of color in the cases examined, local courts preserved the private interests and prerogatives of the related patriarch. In contrast, the supreme court handed down many more decisions limiting a master/patriarch often in the name of public order, doing as much for over half of the parties examined. The more preservationist character of the trial courts (*vis-à-vis* the supreme court) can also be seen from the finding that the outcome of local courts' decisions was mostly non-interventionist, not disturbing social practices (such as miscegenation or passing) but maintaining the existing status quo.

The outcome of supreme court decisions for these same parties of color, on the other hand, was somewhat different. Evidencing a greater concern with public order and adopting a more formalistic approach, the supreme court was, in effect, more interventionist and decided the dispute more often against, rather than for the master/patriarch. These differences across the courts are also statistically significant using both chi-square and column proportions (z) tests.

Although the trial courts and the supreme court were closely bound to the written law as per Louisiana's civilian system and guaranteed white men's rights as enshrined within that statutory order, the supreme court — due to the composition of its judges and its own institutional stature — more often independently interpreted legislative intent and assessed the implications of a case for overall public order. Trial courts, in contrast, with much less acknowledgment of a case's public order implications, were more mechanical in their use of statutes and more focused on its individual adjudication. The courts also differed in how they regarded jury trials and in the relative weight they attributed to juries' opinions, further inscribing the supreme court's additional role as preserver of public order alongside the trial courts' sole role as guarantors of private (patriarchal) interests.

Table 4: Interventionism in Local & Supreme Courts' Race-Based Decisions, by Parties of Color, Louisiana 1830-1860

III. Reliance on Juries

In the Judiciary Act of 1813, the newly-created Louisiana state legislature gave the supreme court supervisory jurisdiction over inferior courts and authority to make rules regulating their procedure not inconsistent with law.[59] Judgment was to be given as justice required, and the court interpreted this provision as giving it power to independently review the facts in most cases. Although the federal government allowed Louisiana to retain its civil law heritage, it required that trial by jury, a common law practice, be afforded in all causes.[60] Trial by jury was incorporated into Louisiana's civilian legal system through the 1825 Code of Practice (articles 493-532). Whereas rehearings by a jury had been permitted by the previous territorial superior court, the Louisiana Supreme Court ruled in *Brooks v. Weyman*,[61] that an

appeal brought before the court could not be heard by a jury, stating, "[m]uch as every man must be convinced of the necessity of the appellate power, as contemplated by the constitution and the laws, the introduction of juries into the tribunals of the last resort, can have no other tendency than to render everything unsettled . . . . "[62] By so precluding juries from its deliberations, the supreme court strengthened its own institutional hand over local court decisions and its institutional stature as the "court of last resort."[63]

Jury reliance also highlights trial courts overriding character as essentially conservative *local* arenas embodying the prevailing attitudes and sentiments of the local community. Through juries, local court judges embedded their decisions in the existing private social practices of the local community. This was especially prominent in cases involving slander and "passing." By allowing juries to determine who was and who was not white, local court decisions displayed their ongoing preoccupation with maintaining the status quo, intervening as little as possible into the organic private social relations of the community.

In the case of *Boullemet v. Phillips,*[64] Stephen Boullemet brought a suit of slander against Alexander Phillips for allegedly spreading false and malicious rumors that he and his family were "colored persons." Judge Charles Marrian of the New Orleans Parish Court felt bound by the legislature to uphold the jury's decisions to award $4000 (an astronomical amount) to the plaintiff, although he pointedly inserted his discomfort with the jury's findings by also pointing out his own dissatisfaction with jury trials in civil suits, stating:

> Does the law not effectually declare that the jury are the sole judges of evidence in which must of course be included the degree of credibility which they may allow to the witnesses heard in the cause and I certainly think it does and whilst I am on this subject I will avail myself of the opportunity of declaring that I am very far from sharing in the great admiration which many people entertain for the trial by jury. I mean in civil matters. I hear daily very eloquent declamations as to the trial by jury being the bulwark of liberty, the shield against despotism, etc. etc. This is all very true in criminal matters . . . but in civil matters I am clearly of opinion, that in a country of written law, like Louisiana, the trial by jury is generally a poor way of obtaining justice. There are indeed a few species of cases, and that of vindictive damages for torts (like the present) is one, in which probably a trial by a jury is the fairest way of assessing the

> damages, because such cases are mostly dependent upon facts and feelings. Be that as it may, however, as long as our Legislature preserve the trial by jury in civil cases, I think it the duty of the Court to treat verdicts with respect . . . whatever therefore my views might be of the facts in the present case, I will not presume to consider that correct, when in opposition to those of twelve honest and intelligent citizens.[65]

Louisiana Supreme Court's Chief Justice, Francois Xavier Martin however, exercising the court's powers to interpret facts and independently access the evidence regarding Boullemet's color, felt much less constrained by the jury's verdict and particularly by their finding of malice on the part of the defendant:

> Our learned brother of the Parish Court . . . appears to have concluded that, as the jury were the judges of malice and they found a verdict against the defendant, he was bound to infer that they had found malice; and when moved for a new trial, he doubted his right to touch their verdict, although he informs us that he did not in any way agree with the jury in their finding, for his views of the evidence totally differed from theirs. Sharing with him his dissatisfaction with the finding of the jury, and our view of the evidence, like his, totally differing from theirs, we are bound to remember that the verdict of a jury must be set aside when contrary to the evidence, as we held in the case of *Rosseau v. Chase,* 2 La. 497.[66]

In all three lengthy cases of slander of a "white" man found in the case transcript archives, the local court judges based their decisions on juries, all finding for the plaintiff who sued the defendant for stating he was not white. In contrast, in two of the three cases the supreme court substituted its own interpretation of the evidence, to reverse the verdict in favor of the defendant or else to reduce the damages awarded by the lower court.[67]

In awarding damages in these cases, judges at the trial and appellate levels display differing conceptions of the injury suffered by the plaintiff, and the severity of injury suffered from impugning the color of an ostensibly-white person. For trial judges, such as Judge Octave Rousseau of St. Bernard Parish who were embedded deeply in the community, even when defendants were purportedly merely repeating rumors without originating them, the court was very firm to underscore the gravity of such offense, holding, "the defendant should not escape without being made at least to feel the impropriety of his course, on charging

the plaintiffs to be persons of color, and in attempting to disturb the civil status they enjoy as white persons."[68] Trial judges consistently upheld steep damages awarded to injured plaintiffs.

On the contrary, the supreme court judges, removed from the community, were less inclined to "imagine" the extent of injury to the individual caused by such utterances, finding for example "nothing in the record to show that the plaintiffs were in any manner injured by what the defendant said."[69] Even though the supreme court acknowledged that "the evidence is conflicting," the court declared, "[w]e think, however, that the damages allowed are excessive and that little more than nominal damages should have been given," reducing the damages from five hundred to fifty dollars, a fraction of the original award.[70]

Juries also played a central role in trials of "white slavery" cases, in the determination of the race of a slave (always a woman) who claimed to be wrongfully enslaved on grounds that she was white. Jurors and trial courts were far more likely to intervene in these cases than in the case of slander of "white" men, almost always finding in favor of the slave and against the title of the master. Alexina Morrison, for example, repeatedly won over the majority of white jurors in three different trials.[71] Madame Aimee Busle was not allowed to claim the price of Polly and her child, Mary, described as "whiter than quadroons," until their race was determined in a separate trial.[72] The supreme court released Sally Miller from her bonds of slavery on the "record of the complexion" and the presumption of freedom on the basis of her light color.[73]

In *Morrison v. White*,[74] the embeddedness of juries within local communities loathe to enslave light-skinned women became a central issue in the defendant/owner's petition for change in venue. The judge noted that having received a writ of sequestration, plaintiff Alexina Morrison "was taken in the society of white persons and was even seen dancing at a ball at Carrolton, where the most respectable white persons of the town had assembled" whereas the "defendant was threatened with personal violence, on account of this suit." Judge Victor Burthe of Jefferson Parish Court although wary of transferring the case, "to throw the burden of the duty upon a brother judge," thus admitted that "the evidence leaves no doubt that it would be extremely difficult if not altogether impossible to obtain a fair trial by a jury in this

Parish."[75]

The subsequent trial judge, H.D. Ogden of New Orleans Parish, upheld the jury's unanimous verdict to grant Morrison her freedom. The supreme court reversed the judgment of the district court on grounds that it had improperly excluded evidence presented by the defendant. Writing for the court, Justice Buchanan, offered his own appraisal of the evidence and upheld instead the paramountcy of the legislature in deciding the case.

> The said [excluded] evidence has come up in the transcript, as attached to the bills of exception. We have examined it, and find full proof therein that the plaintiff was born a slave, the offspring of a mulatto woman slave, and that she passed by a regular chain of conveyances, from the possession of her original owner, the owner of her mother, to the defendant.… [T]he presumption of freedom, arising from her color, is not a presumption *juris et de jure*. It must yield to proof of a servile origin. The Legislature has not seen fit to declare, that any number of crosses between the negro and the white shall emancipate the offspring of the slave; and it does not fall within the province of the judiciary to establish any such rule of property.[76]

In the third and final trial, the trial judge on instruction from the supreme court reluctantly accepted the evidence, repeatedly recording his dissatisfaction with the supreme court's decree. This is recorded in the plaintiff's numerous bill of exceptions as thus, " . . . said Testimony allowed to be admitted and read as evidence on the ground that said Court was compelled to admit said testimony under the decree of the Supreme court though the Court stated that it had it not felt bound by said decree it would have excluded said testimony . . . . "[77]

Despite inclusion of the testimony, the jury again found in favor of Alexina Morrison (ten to two) and the trial judge granted her freedom refusing yet another trial on grounds that "this case is one peculiarly suited to a Jury, and especially believing that it is for the interest of both of the parties that the litigation should terminate."[78] The heirs of the original defendant, James White, now long deceased, filed an appeal on grounds that "the Court erred in charging the jury, that being the judges of the law and the evidence they could totally disregard the judgment of the Supreme Court."[79] The case never made it to the supreme court again as the court disbanded

in 1862 and there are no records of what became of Morrison thereafter.

Cases of "white slavery" thus contrasted with those of "slander" in revealing the institutional proclivities and dynamics of the supreme court *vis-à-vis* the trial courts. As the cases of slander show, the trial courts and their juries were more concerned with maintaining existing social relations and the private interests of the white male plaintiffs than they were intent on ensuring public order, by warranting that only those beyond reproach be allowed to claim white male status.[80] The supreme court, on the other hand, was more interventionist in these cases, eschewing jury sentiments to more strictly police who could and who could not legitimately claim the status of a white man. Yet in the case of the enslavement of a "white" woman, juries and trial courts were far more likely to intervene, finding for her freedom and strongly condemning a master's right to own a "white" woman. The supreme court, on the other hand, was far more dispassionate, upholding the masters' title of ownership rather than freeing the "white slave." Here too the high court invoked its role and stature as interpreter and upholder of legislative intent and public policy to do this.

As the contrast between slander and white slavery cases shows, gendered morality underpinned many of these decisions, playing an important role in how the courts differentially and complementally constructed racialized social order.

IV. Public & Private Morality

For abolitionists and southerners alike, private life and the domestic sphere were inextricably, if uneasily, linked to a patriarch's public authority. The very public morality of slavery as an economic system hinged on the private morality of the slaveholder's household.[81] For abolitionists and critics, slavery was not just an economic system but it was also an immoral one. It reduced white men to sexual depravity and undermined social order. As the noted English visitor, Harriet Martineau, remarked, "[L]et any one look at the positive licentiousness of the south, and declare if, in such a state of society, there can be any security for domestic purity and peace."[82] South Carolinian, Mary Boykin Chesnut, also wrote in scathing terms of the hypocrisy of white men's moral superiority, from a white woman's perspective:

> What do you say to this? A magnate who runs a hideous black harem and its consequences under the same roof with his lovely white wife and his beautiful and accomplished daughters? He holds his head as high and poses as the model of all human virtues to these poor women whom God and the laws have given him.[83]

Southerners in defense of slavery instead pointed to the innate moral superiority of the white race and, hence, of white supremacy as a social and political system. For them, inter-racial sexual relations were the result of either a few depraved white individuals (rather than a systemic response) or else the consequence of the sexual wantonness of people of color. Thomas R. Cobb, a southern lawyer writing on slavery, illustrates the prevailing perception that the rape of a female slave by her owner "[was] almost unheard of [as] the known lasciviousness of the negro, rendered the possibility of its occurrence very remote."[84] In the sphere of the household, particularly on plantations, white men's private liaisons with female slaves — however extensive or exploitative — thus occurred without disapprobation or public scrutiny.

Yet quadroon balls and the system of placage were well-established within New Orleans society, normalizing sexual relations between upper-class women of color and wealthy white men who publicly established households together.[85] Brothels and widespread prostitution by white, mulatto, and black women, freed and slaved, also flourished in New Orleans, serving the economic interests of the wealthiest white men and were condoned and accommodated by city laws and enforcement.[86] Race and gender intersected to create a three-tiered moral order, affording disparate legal protection to women on the basis of their ascribed morality. On the top were white women whose ascribed moral virtue entitled them to their more privileged protected status, followed by mulatto women who were entitled to some protection but whose suspect morality made them far more vulnerable. Black slaves were at the bottom, whose assumed overt sexuality and sexual exploitation by white men remained largely outside of the legal order.

Social order was inextricably tied, in many ways, to a racially-stratified, gendered moral order. The private interests of white men, slaveholders and non-slaveholders alike, as well the public

legitimacy of slavery and the system of white supremacy rested on maintaining this uneven, stratified, system. In constructing racialized social order Louisiana courts could not deny the underlying morality or moral claims of the social system. However, here too we find some variation in the supreme court and the local courts' conception of morals, either as an essentially private or also a public morality, implicating either the larger social structure or else merely the individual litigants before them.

Marriage, for instance, was defined in the 1825 Civil Code in strictly private contractual terms. The Code specified that "the law considers marriage in no other view than as a civil contract"[87] and miscegenation was prohibited as a nullity arising from the "incapacity" of certain individuals to enter into such marriage contracts.[88] Slaves and free blacks were deemed "incapable of contracting marriage together" and the "same incapacity" attached "to marriages contracted by free white persons and free people of color."[89] Despite statutory insistence on marriage as a private contract, its implications for public morality and order were frequently pleaded in briefs and sometimes entertained by the courts, often in reference to the statutory provision that "individuals cannot by their conventions, derogate from the force of laws made for the preservation of public order or good morals."[90]

In the case of *Succession of Minvielle*, [91] Raymond Domec attempted to recover a sum of money from L. Barjac, executor of the estate of Jean Michel Minvielle, on the grounds that its adjudged recipient, Cora LaLande of New Orleans, was his wife and he was thus the head of their matrimonial community to which the money belonged. Cora LaLande, being made party to the suit denied that she was his wife since "Domec [was] a white man and she [was] a colored woman."[92] The case illustrates the common experience of racial ambiguity in the lives of many light-skinned people, whose accommodation within the prevailing social order itself was often fluid and fluctuating.

For example, Reverend Father Morrisset testified to the marriage having occurred, saying that that he had seen Cora LaLande "at the foot of the altar . . . having blessed her marriage with Domec." Father Morrisset also testified that Raymond Domec "is a white man and is a Frenchman" who "has

a face of Jewish Cast, black hair and dark complexion," but that he "did not know whether [LaLande] was a woman of color or not."[93] On the other hand, another witness, Auguste Girault, testified to having known the couple "for nine years" and swore that LaLande "is a woman of color or what is generally called a mulatress" and that Domec "is a Frenchman — a Gascon" whom he had "seen . . . several times with friends from France." None of the witnesses made reference to the exceptional character of this (possibly inter-racial) union. The district court accepted the evidence regarding the color of both parties, over the objections of Domec that the nullity of the marriage on these grounds required a separate suit. It did not comment on the implications of the case for public morals and instead instantly dismissed Domec's claim over LaLande's property.[94]

In her appellate brief, Cora LaLande reiterated the nullity of the "pretended marriage," offering as evidence an original statement signed by Domec and published in the *New Orleans Bee*, in which "he makes known to the public that Cora LaLande is a colored woman — that he did not know the mystery of her birth" despite having cohabited with her several years and proclaimed that "Cora LaLande has no right whatsoever to assume the name of Madame Domec."[95] LaLande thus argued that the private marriage contract was "tainted with a nullity resting on motives of public order . . . having its origin in the respect due to good morals, it [was] an absolute nullity," hence she was not required to bring a separate action "to annul a thing — which by itself was null and void ipso facto."[96]

The supreme court agreed. Chief Justice Edwin T. Merrick was quick to point to the implications of private inter-racial unions for public morality, "[t]he prohibition [against miscegenation] is one eminently affecting the public order . . . . The law is of that rigorous nature that it will not permit a marriage to exist between persons of the two different races for a moment . . . no suit is needed to declare the nullity of such a union." [97] The court's strict regulation of the color line in the interest of public morals extended to preserving the private property interests of a free woman of color over that of her white "husband." The court stated, "either party may disregard [such a marriage], and neither can pretend to derive from it any of the consequences of a lawful marriage."[98]

In *MacArty v. Mandeville*,[99] the supreme court similarly upheld the property claims of Eulalie Mandeville, a wealthy free woman of color, against the claims of the white heirs of her deceased white companion, Eugene MacArty. MacArty's heirs claimed that Mandeville's vast estate (valued at $155,000) was an illegal donation by MacArty, contrary to Article 1468 of the Civil Code, "which provide[d] that those who live together in open concubinage are respectively incapable of making to each other . . . any donation of immovables, and if they make a donation of movables it [could not] exceed one-tenth part of the whole . . . estate."[100] Mandeville's defense was that the property in her possession belonged exclusively to her, "honestly acquired . . . the result of her industry and economy during half a century."[101] Chief Justice Eustis refused to view Mandeville and MacArty's lifestyle as disreputable, pointing to the pervasive (moral) acceptance of their union and their embeddedness within the community, stating,

> It is obvious that this attempt involves the histories of both their lives, their habits, their pursuits, as well as their pecuniary means . . . . It appears that [Mandeville] had, in all respects, rendered her condition as reputable and as useful as it could be made. Five children have been the fruits of her connection with the deceased. They were all well educated. Two of the sons are in business in this city, and one is living on his income. The daughters were married and established in Cuba . . . . The state in which she lived was the nearest approach to marriage which the law recognized, and in the days in which their union commenced [during Spanish rule] it imposed serious moral obligations. It received the consent of her family, which was one of the most distinguished in Louisiana, and nothing appears to have occurred to forfeit or to diminish their approbation and good will."[102]

The implications of the case for public morality was not allowed to trump the private (property) interests of Mandeville, a free woman of color, whose own private moral legitimacy was determined from her industry, wealth, and family connections. In his opinion, Eustis C.J. thus concluded:

> We are not insensible to the appeal made to us in this case, in the interest of morals, religion and social order . . . . At the same time that we are bound to give effect to our laws made in the interest of families, it would be an abuse to bring them in conflict with the right of property, under which the defendant claims the subject of the present suit. She bases her

> defence on that right, and we find no warrant in the law or evidence for disturbing her in the enjoyment of the fruits of the labor and thrift of a long life.[103]

The court agreed with the district judge's appraisal of the evidence, affirming the local judge's wariness to classify MacArty's financial services (to Mandeville) as fraudulent or illegitimate in any way, stating: "[w]e must let matters stand as the deceased has thought best to leave them. From what is before us, we do not feel ourselves at liberty to declare that the last twenty years of his long life has been a continued cheat, and that he closed it with a falsehood on his lips."[104]

The supreme court was less sanguine in the cases of manumission of slave mistresses, instead their inter-racial liaisons with their masters were routinely viewed as contrary to public morals. By so doing, the supreme court upheld the rights of white heirs to ownership despite the wishes of the (deceased) masters.[105] Local courts however continued to uphold the master's wishes, rationalizing his private immorality in such a way as to not disturb the system of public morals: one explanation was that, as a leading legal historian has observed, "they were only legalizing what was in some instances already established practice — some owners no doubt treated their slave mistresses and children as though they were free."[106] A close reading of the opinions of trial judges reveals a greater attention to the private morality of the master's conduct and a silence regarding the implications of such conduct for "public morals."

In their opinions, local court judges often used religious language, referring to master-slave sexual relations as "sin," the slave mistress as "being sinned against rather than sinning,"[107] and characterizing the master's posthumous emancipation of his slave mistress as an act of final "atonement." "Sin" is of course a private act and the judges struggled to rationalize such sinful acts so as to uphold the manumission deeds that they engendered. Judge J.J. Burk of the Second District Court of East Baton Rouge, for example, did so in this way in *Vail v. Bird*:[108]

> The Testator's life may have been bad — but not the end of it — the Emancipation of Jane by his will is thought moral . . . such a vice in the Master . . . required atonement; and the best earthly reparation to the injured — and the most appropriate that as her personal condition of slave had been abused by him — he gave her liberty to save her from the

like abuse by another master.[109]

In *Turner, Curator v. Smith*,[110] Judge Cyrus Ratliff, the trial judge from the Parish of West Feliciana, similarly details his reasoning for upholding the emancipation of the slave mistress Rachael and her five children, in terms of the master's atonement and reparations:

> . . . that the slave Rachael was his concubine; that is true, but this [emancipation through will] was long after the deed was done, and at a time when the master wished to atone to some extent for his hitherto immoral and illicit conduct . . . . The master having absolute power and control over his slave, and she having no will of her own when opposed to that of her master should not be held responsible for the vices and sins of her master . . . to deprive a slave of the bounty or liberality of her master on account of the immoral or licentious acts of the master, on account of her yielding obedience to his wicked desires would be punishing the weak and the helpless for the sins of the strong and powerful.[111]

As Ratliff concluded, "such a construction would be in the teeth of eternal justice and against every rule of right."[112] By construing sexual intercourse between masters and slaves as acts of "sin" by individual white masters and attempts at manumission of slave mistresses as "atonement," trial judges contained such transgressions to the realm of private immorality, incidental or unconnected to the public moral or social order.

The Louisiana Supreme Court was less accommodating, often viewing instead the emancipation of slave mistresses and inheritance of slave children by white masters as directly arising out of "open concubinage," upending statutory order and public decency.[113] In contrast to the lower courts, the supreme court averred that slave mistresses were legally (and morally) "concubines" as they were active participants in sexual transgressions, and so incapable of receiving their liberty as "donations" (of themselves) from the master, as Justice Preston opined:

> It is true, the female slave is peculiarly exposed, from her condition, to the seductions of an unprincipled master. That is a misfortune; but it is so rare in the case of concubinage that the seduction and temptation are not mutual that exceptions to a general rule cannot be founded upon it.[114]

Similarly Judge Buchanan of the supreme court in *Turner, Curator*

v. Smith also reversed the decision of the lower court by pointing to public interest, stating that the provision in the decedent's will acknowledging certain slaves as his natural children was "offensive to morality" and so "without operation in law."[115] In five of the eight cases involving inter-racial sex that reached the supreme court, it acknowledged the implications of the case for "public order" and "decency."

In sum, whereas trial courts viewed sexual relations between masters and slaves exclusively as acts of *private* immorality and sin, the supreme court also approached them as contrary to *public* morals, collective order and decency. Trial courts also rationalized the manumission wishes of a deceased master as a final moral act of "atonement." By so doing, they were able to give effect to a master's private wishes while also restoring the overall morality of the patriarchal slave social order. However, by emphasizing public order and decency, the supreme court emphasized the written law and its legalistic construction of social order, often subjugating the rights of the white master to the rights of white heirs to "cast the opprobrium of concubinage upon those he is entitled to inherit," and to the collective right of the State, to exercise the controlling interest in matters of enfranchisement.[116]

V. Conclusion

This Article has argued for the recognition of institutional complexity among the southern judiciary in guaranteeing racialized social order in the antebellum period. This has at least two central implications: the first with respect to southern law and society, the second regarding the political development of slave states.

First, the institutional judicial variation and inter-level complexity holds clues as to the multiple, diverse ways by which southern courts "made" social order—combining strict adherence to the legal public order with a more flexible (privatized) order. The institutional differentiation between Louisiana's trial and appellate courts enabled law to serve as the very "ligament which binds society together," to hold a vast gamut of hierarchical social relations in place and establish workable boundaries of permissible behavior, whose slightest "disturbance" could cause the "whole machine [to] (sic) tumble into pieces."[117] In this sense,

this Article contributes to understanding *how* southern law was able to meld the private interests of the governing slaveholding class with its wider public purposes of preserving the integrity of the law and of the system of white supremacy for all southerners at large. In this account, the public and private functions of southern law are found to be layered on top of the state's judicial structure, imbricating public and private order. As Peter Bardaglio writes, "Southern law did not simply reflect the narrow economic interests of the planters and merchants . . . but mediated social relations in such a way as to place certain constraints on the actions of those in power while legitimizing the position of these governing elements and contributing to their dominance."[118] Through investigation of both trial courts and supreme court decisions, we are able to see just how the courts were able to do this.

Second, like prevailing work, this investigation finds that the courts upheld white men's privileges, demonstrating what has been termed an "agrarian conception of republicanism" that utilized government to preserve the individual autonomy of those at the top rung of the social order: adult, white males.[119] However, the cases also reveal this picture to be a partial one, particularly in a civilian state such as Louisiana. As the laws around race hardened, accompanying several internal and external political developments in the antebellum period (acquisition of Louisiana by the United States, the increased commitment of all whites to the system of slavery, the gaining abolitionist movement, and the state's own increasing agricultural prosperity), white men's individual wishes and privileges, such as manumission of their slaves, were increasingly held to a broader public order.

This Article finds that the Louisiana Supreme Court (reflecting its institutional stature as the state's "court of last resort") served as the gatekeeper of this formalistic "public order," a more reliable guarantor of legislative social order, often chiding local judges and juries for their apparent laxity. In contrast, the local courts — through their reliance on juries and their ideas of personalized morality — mostly upheld prevailing status quos including possibly "disordered" ones, finding in favor of white masters' wishes to emancipate their "coloured" or slave mistresses and children despite strict laws against concubinage

and inter-racial sexual intercourse, or upholding the "honor" and "reputation" of a "white" man (slander cases) despite a suspect genealogy. Very rarely did local courts attempt to interpret the intention of the legislature or positively implement legislative public order.

In terms of political development, the supreme court's gate-keeping function in the antebellum period points to its emerging institutional role as a key actor in the preservation of southern racial (and social) hierarchies; a role that would be augmented greatly during Reconstruction, when, in the absence of a slave state, southern (superior) courts would come to actively preserve southern racialized social order from Federal constitutional incursions.[120]

ENDNOTES

1. Fisk v. Bergerot, #6814 (1859), Sup. Ct. La. Hist. Archives (Mss 106), Earl K. Long Library, Univ. of New Orleans, 21 La. Ann. 111.

2. Levy v. Wise, #5962 (1860), Sup. Ct. La. Hist. Archives 25, 15 La. Ann. 38.

3. Turner, Curator v. Smith, #5076 (1857), Sup. Ct. La. Hist. Archives, 12 La. Ann. 417.

4. Louisiana, in particular, stands apart from the rest of the South in its more open-ended, less rigid, social practices of race. Even within the law, as Ariela Gross has observed, "Louisiana . . . sanctioned much 'intermingling,'" particularly through its recognition of "gradations of caste and color" beyond rigid black-white distinctions, in which "free people of color" had more rights than in any other southern state. Ariela Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109, 176.

5. On racial hegemony as the foundation of a slave-based political economy see MARTHA HODES, WHITE WOMEN, BLACK MEN: ILLICIT SEX IN THE NINETEENTH CENTURY SOUTH 38 (1997); THOMAS MORRIS, SOUTHERN SLAVERY AND THE LAW, 1619-1860 (1999); MARK TUSHNET, THE AMERICAN LAW OF SLAVERY: CONSIDERATIONS OF HUMANITY AND INTEREST: 1810-1860 (1981).

6. Thomas Gibbes Morgan, Civil Code of the State of Louisiana with the Statutory Amendments From 1825 to 1853, Inclusive and the References to the Decisions of the Supreme Court of Louisiana To the Sixth Volume of Annual Reports (New Orleans: Bloomfield & Steel, 1861) Title I, art. 37 [hereinafter 1825 Civil Code].

7. *Id*; *see also* An Act Prescribing the Rules and Conduct to be Observed with Respect to Negroes and Other Slaves of this Territory, Act of June 7, 1806, Orleans Territory Acts, 1806, § 18 [hereinafter Black Code].

8. For the Law against Miscegenation see Civil Code, 1825, Title IV, ch. II, art. 95. For the ways in which white masters challenged the dominant social order of a slave state through mixed-race inheritance see BERNIE D. JONES, FATHERS OF CONSCIENCE: MIXED-RACE INHERITANCE IN THE ANTEBELLUM SOUTH 2-6 (2009).

9. For discussion of the clash between personal and impersonal justice, the ethic of honor versus deference to the law see PETER BARDAGLIO, RECONSTRUCTING THE HOUSEHOLD: FAMILIES, SEX & THE LAW IN THE NINETEENTH-CENTURY SOUTH 5-7, 20 (1995); BERTRAM

WYATT-BROWN, SOUTHERN HONOR: ETHICS AND BEHAVIOR IN THE OLD SOUTH 360-61 (1982); DICKSON D. BRUCE, JR., VIOLENCE AND CULTURE IN THE ANTEBELLUM SOUTH ch. 1 (1979); Charles S. Sydnor, *The Southerner and the Laws*, 6 J. SOUTH. HIST. 3-23 (1940); W.J. CASH, THE MIND OF THE SOUTH 32-35 (1941).

10. Lawrence M. Friedman, *The Law Between the States: Some Thoughts on Southern Legal History*, *in* AMBIVALENT LEGACY: A LEGAL HISTORY OF THE SOUTH 30-46, 38-39 (David J. Bodenhammer & James W. Ely, Jr., eds. 1984); JUDITH KELLEHER SCHAFER, BROTHELS, DEPRAVITY, AND ABANDONED WOMEN: ILLEGAL SEX IN ANTEBELLUM NEW ORLEANS (2009); ARIELA J. GROSS, WHAT BLOOD WON'T TELL: A HISTORY OF RACE ON TRIAL IN AMERICA 58-60 (2008).

11. For a good summary of the literature revealing the culture and experience of slavery versus formal laws, see Alejandro de la Fuente, *The Tannenbaum Debate Revisited*, L. & HIST. REV. (2004). For discrepancies between fluid lived practice of race and the rigidness of legal racial categories see GROSS, WHAT BLOOD WON'T TELL, *supra* note 10; Richard Bensel & Gwendoline Alphonso, *The Juridical Construction and Social Practice of Race in Antebellum New Orleans* (article under review) (2014); JUDITH KELLEHER SCHAFER, SLAVERY, THE CIVIL LAW, AND THE SUPREME COURT OF LOUISIANA 20-21 (1997).

12. LAURA F. EDWARDS, THE PEOPLE AND THEIR PEACE: LEGAL CULTURE AND THE TRANSFORMATION OF INEQUALITY IN THE POST-REVOLUTIONARY SOUTH 8-9 (2009).

13. KIMBERLY S. HANGER, BOUNDED LIVES, BOUNDED PLACES: FREE BLACK SOCIETY IN COLONIAL NEW ORLEANS, 1769–1803 (1997); Kenneth R. Aslakson, Making Race: The Role of New Orleans' Three-Caste Society, 1791-1812 (unpublished Ph.D. dissertation, University of Texas at Austin, 2007). This literature argues that unusually powerful positions of free blacks in antebellum Louisiana was the result of their social and legal maneuverings during Spanish and early American rule. On the distinctive position of free people of color in Louisiana see HANGER, BOUNDED LIVES, *supra*; Aslakson, Making Race, *supra*; THOMAS INGERSOLL, MAMMON AND MANON IN EARLY NEW ORLEANS THE FIRST SLAVE SOCIETY IN THE DEEP SOUTH, 1718-1819 (1999); Laura Foner, The Free People of Color in Louisiana and St. Domingue: A Comparative Portrait of Two Three-Caste Societies, 3 J. SOC. HIST. 406 (June 1970); Donald Everett, *Emigres and Militiamen: Free Persons of Color in New Orleans, 1803-1815*, J. NEGRO HIST. (1972); Thomas Ingersoll, *Free Blacks in a Slave Society: New Orleans, 1718-1812,* WM. & MARY Q. 3d Ser. 48 (Apr. 1991); Kimberly Hanger, *The Fortunes of Women in America: Spanish New Orleans's Free Women of African Descent and Their Relations with Slave*

Women, in DISCOVERING THE WOMEN IN SLAVERY (1996).

14. Ariela J. Gross, Legal Transplants: Slavery and the Civil Law in Louisiana, USC Legal Studies Research Paper No. 09-16, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1403422.

15. BARDAGLIO, RECONSTRUCTING THE HOUSEHOLD, *supra* note 9, at 11-12; Friedman, *The Law Between States, supra* note 10, at 41.

16. MICHAEL S. HINDUS, PRISON AND PLANTATION: CRIME, JUSTICE AND AUTHORITY IN MASSACHUSETTS AND SOUTH CAROLINA, 1767-1878, at 49 (1980); Drew Gilpin Faust, *Culture, Conflict, and Community: The Meaning of Power on an Antebellum Plantation*, 14 J. SOC. HIST. 83-97 (1980).

17. EDWARDS, THE PEOPLE AND THEIR PEACE, *supra* note 12.

18. JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES (1964). In his seminal essay, Hurst argues that an organizing principle of the nineteenth-century legal and social order in the United States was that the "legal order should protect and promote the release of individual creative energy . . . . " *Id.* at 6; *see also* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 107, 111, 112, 114, 115 (2d ed. 1985).

19. WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA (1996). In terms of the active national government intervention in the nineteenth century see BRIAN BALOGH, A GOVERNMENT OUT OF SIGHT: THE MYSTERY OF NATIONAL AUTHORITY IN NINETEENTH-CENTURY AMERICA (2009); Jerry L. Mashaw. *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362-1472 (2010).

20. HELEN T. CATTERALL, JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO (1926: rp., 1968).

21. Louisiana Digest: 1809 to Date (1959).

22. Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth Century South*, 108 YALE L.J. 109-88 (1998).

23. JUDITH KELLEHER SCHAFER, SLAVERY, THE CIVIL LAW, AND THE SUPREME COURT OF LOUISIANA (1994).

24. For a good summary of this literature, see Aslakson, Making Race, *supra* note 13, at 7-11.

25. MARK F. FERNANDEZ, FROM CHAOS TO CONTINUITY: THE EVOLUTION OF LOUISIANA'S JUDICIAL SYSTEM, 1712-1862 (2001); A.N. Yiannopoulos, *The Civil Codes of Louisiana*, 1 CIV. L. COMMENT. 1-7 (2008).

26. SCHAFER, SLAVERY, THE CIVIL LAW AND THE SUPREME COURT, *supra* note 23, at 9.

27. Paul Lachance, *The Formation of a Three-Caste Society: Evidence from Wills in Antebellum New Orleans*, 18 SOC. SCI. HIST. 211-42 (1994).

28. For a comparative analysis of the Black Code of 1808 versus Spanish law relating to Spanish, arguing for the ameliorative nature of Spanish, not Anglo-American slave law, see SCHAFER, SLAVERY, THE CIVIL LAW, AND THE SUPREME COURT, *supra* note 23, at 3; Aslakson, Making Race, *supra* note 13, at 27-28, 97-98.

29. Black Code § 4:0, 188-90.

30. Digest of the Civil Law Now In Force in The Territory of Orleans (1808), ch. III, at 38-40 [hereinafter 1808 Louisiana Digest of Laws]; Act of Mar. 31, 1808, Orleans Territory Acts, 1808, 138-40.

31. Acts Passed at the First Session of the Second Legislature of the Territory of Orleans (1807), ch. X, at 82; *see also* Louisiana Civil Code of 1825, Book I, Title I, art. 35.

32. *See* 1808 Louisiana Digest of Laws, Book I, Title I, ch. II ("Of the Distinctions of Persons which are established by Law") in contrast to ch. I ("Of the Distinction of Persons established by Nature.")

33. BARDAGLIO, RECONSTRUCTING THE HOUSEHOLD, *supra* note 9.

34. Louisiana Civil Code of 1825, Book I, Title I, art. 35.

35. *See, e.g.*, Eugene Genovese, *Our Family, White and Black: Family and Household in the Southern Slaveholders World View*, *in* IN JOY AND SORROW: WOMEN, FAMILY, AND MARRIAGE IN THE VICTORIAN SOUTH, 1830-1900, 69-87 (Carol Bleser ed., 1991); *see also* BARDAGLIO, RECONSTRUCTING THE HOUSEHOLD, *supra* note 9, at 23-36.

36. Louisiana Civil Code of 1825, Book I, Title I, art. 24-25.

37. *Id.* at Book I, Title IV, art. 122-125.

38. *Id.* at Book I, Title I, art. 39 & Title III, ch. V, art. 82.

39. IRA BERLIN, SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH (1974). Although studies on free blacks in Louisiana demonstrate the distinctiveness of race relations in Louisiana wherein free people of color enjoyed greater privileges than elsewhere, this was the result of limited enforcement and does not take away from the fact that there were increasing legal restrictions on them. *See* Aslakson, Making Race, *supra* note 13, at 7.

Yet by the antebellum period, ideas of individualism and also affection within the family led judges to adopt a more domesticated form of patriarchy, emphasizing qualities of paternalism rather than the "absolute power of a prince on his throne." BARDAGLIO, RECONSTRUCTING THE HOUSEHOLD, *supra* note 9, at 26-27. On the role of affection and "paternalism" in family relations among southern whites, see

DANIEL BLAKE SMITH, INSIDE THE GREAT HOUSE: PLANTER LIFE IN EIGHTEENTH-CENTURY CHESAPEAKE SOCIETY (1980); JAN LEWIS, THE PURSUIT OF HAPPINESS: FAMILY AND VALUES IN JEFFERSON'S VIRGINIA (1983). Antebellum southern judges also often viewed slavery in benevolent, paternalist terms, in which the "kindness of the owner to the slave" was the "first law" that if "property inculcated, enforced by law and judiciously applied" rendered slavery a "family relation, next to its attachments to that of a parent and child." JONES, FATHERS OF CONSCIENCE, *supra* note 8, at 145.

40. SCHAFER, SLAVERY, THE CIVIL LAW, AND THE SUPREME COURT, *supra* note 23, at 16.

41. FERNANDEZ, FROM CHAOS TO CONTINUITY, *supra* note 25.

42. Sybil Ann Boudreaux, The First Minute Book of the Supreme Court of the State of Louisiana 1813 to May, 1818: An Annotated Edition (1983). University of New Orleans Theses and Dissertations. Paper 1683, pp. 3-4.

43. FERNANDEZ, FROM CHAOS TO CONTINUITY, *supra* note 25, at 17; SCHAFER, SLAVERY, THE CIVIL LAW, AND THE SUPREME COURT, *supra* note 23, at 13. Fernandez suggests that the appointment of non-native judges to the state's highest court and the influx of a great number of American lawyers caused a widespread incorporation of common law principles into Louisiana's legal system, but for a contrary position, that American lawyers and judges were not significantly concerned with substituting common law principles in place of civilian rules, see Ronald Fonseca, Blackstone's Commentaries: Foothold or Footnote in Louisiana's Antebellum Legal History (2007) University of New Orleans Theses and Dissertations, Paper 514, pp. 7-9.

44. Most accounts of Louisiana's legal history point to the ambivalence in its legal system during the early period of its statehood. While there is difference in opinion regarding the *extent* of Americanization and influence of the common law system on its native civilian one, none dispute the incorporation of American common-law principles into Louisiana's legislation and judicial decisions. For good examples and summaries, see FERNANDEZ, FROM CHAOS TO CONTINUITY, *supra* note 25; Fonseca, Blackstone's Commentaries, *supra* note 43; Shael Herman, *The Louisiana Code of Practice (1825): A Civilian Essay Among Anglo-American Sources*, 12 ELECTRONIC J. COMPARATIVE L. 1 (May 2008).

45. FERNANDEZ, FROM CHAOS TO CONTINUITY, *supra* note 23; Herman, *The Louisiana Code of Practice*, *supra* note 44.

46. Succession of Minvielle, Sup. Ct. La. Hist. Archives, #6447, 15 La. Ann. 342 (supreme court judgment, transcript file).

47. Vail v. Bird, Sup. Ct. La. Hist. Archives, #2129, 6 La. Ann. 223 (1851) (supreme court decision, transcript file).

48. Compton, Heirs v. Executors, Sup. Ct. La. Hist. Archives, #1059 12 Rob. 56 (1845) (supreme court decision, transcript file).

49. Perhaps this was so because of the court's strong guardianship of the sanctity and integrity of the white family. Inter-racial sexual contact insofar as they were seen to threaten the white family were strictly regulated, however in many cases—as we shall see—these transgressions were seen as incidental, and hence not fatal, to the overall integrity and reproduction of the white family. *See* JULIE NOVKOV, RACIAL UNION: LAW, INTIMACY, AND THE WHITE STATE IN ALABAMA, 1865-1954, at 10-11 (2008). My point is that the supreme court sometimes viewed these liaisons as a threat to public order, and so to the white family structure, much more than the local courts.

50. Delphine, f.w.c. v. Mad. Widow Guillet, 11 La. Ann. 424, 1856 WIL 4753 (La.) (cited in Foster v. Mish, Sup. Ct. La. Hist. Archives, #6344, 15 La. Ann. 199 (1860) (reasons for Judgment Price J., Fourth District Court, New Orleans, transcript file, 39).

51. Turner, Curator v. Smith, Sup. Ct. La. Hist. Archives, #5076, 12 La. Ann. 417 (1857) (supreme court decision, transcript file).

52. Foster v. Mish, Sup. Ct. La. Hist. Archives, #6344, 15 La. Ann. 199 (1860).

53. *Id.* (supreme court decision).

54. *Id.* (Judgment, Price, J., Fourth District Court, New Orleans transcript file, 39).

55. Turner, Curator v. Smith, Sup. Ct. La. Hist. Archives, #5076, 12 La. Ann. 417 (1857).

56. *Id.* (opinion of the court, Ratcliff J., District Court, West Feliciana, transcript file, 26).

57. Vail v. Bird, Sup. Ct. La. Hist. Archives, #2129, 6 La. Ann. (1851).

58. Turner, Curator v. Smith, Sup. Ct. La. Hist. Archives, #5076, 12 La. Ann. 417 (1857) (opinion of the Court, Ratcliff J., District Court, West Feliciana, transcript file, 24).

59. When Louisiana became a state and adopted its first constitution in 1812, it created a supreme court whose jurisdiction was appellate only, limited to civil cases involving more than $300. Reflecting the rivalries of Creoles and Americans, delegates to the constitutional convention were unable to reach a consensus regarding the structure of inferior courts, which they instead left to the newly-

created state legislature to determine. The Judiciary Act of 1813 divided Louisiana into seven judicial districts, each with a district (trial) court empowered to try crimes and misdemeanors as well as hear civil litigation. This structure remained in place until 1855, although the number of district courts grew as the state expanded. *See* Warren M. Billings, *Origins of Criminal Law in Louisiana*, 32 J. LA. HIST. ASS'N 63-76 (1991).

60. An Act Erecting Louisiana into Two Territories, and Providing for the Temporary Government thereof, Act of Congress Mar. 26, 1804, c. 38, 2 U.S. Stat. 283, §§ 5 & 11 (known as the Breckinridge Act). When Congress passed an enabling Act in 1811 to allow the Territory of Orleans (as Louisiana territory was first known) to form a constitution and state government, it only mandated that the proposed Louisiana constitution provide jury trials only in criminal cases. None of the antebellum Louisiana Constitutions of 1812, 1845 and 1852 preserves the right to a jury in civil cases and yet the right to jury trials in civil cases was preserved by legislation. *See* Fonseca, Blackstone's Commentaries, *supra* note 43, at 5.

61. 3 Mart. (o.s.) 9 (La. 1813).

62. *Id.* at 13.

63. Initially, until the enactment of the 1845 Constitution, the supreme court construed its powers narrowly, holding early on in *Labatut v. Puche*, 3 Mart. (o.s.) 325 (La. 1814), that it could not interfere in matters that were specifically assigned to the jurisdiction of inferior courts. It was only after some hesitation that the court held it could order a lower court to hear a case over which the latter court had jurisdiction. *See* Sybill Ann Boudreaux, The First Minute Book of the Supreme Court of Louisiana, at 6. However, by the time most of the cases in this study came before the courts (1840s and 1850s) in tandem with the increasing Americanization of Louisiana's laws, the supreme court had come into its own, exerting much greater supervision over the decisions of lower courts.

64. 2 Rob. 365 (1842).

65. Boullemet v. Philips, Sup. Ct. La. Hist. Archives, #4219, 2 Rob. 365 (1842) (Opinion of the Court Delivered, Parish Court, New Orleans, transcript file, 109-11).

66. *Id.* at 2-3 (Appeal from the parish Court, transcript file, unnumbered pages).

67. Reversed or reduced damages in Dobard v. Nunez, Sup. Ct. La. Hist. Archives, #1944, 6 La. Ann. 294 (1851), *aff'g*, Cauchoix v. Dupuy, Sup. Ct. La. Hist. Archives, #425, 3 La. Ann 206 (1831); Boullemet v.

Phillips, Sup. Ct. La. Hist. Archives, #4219, 2 Rob. La. 365 (1842) .

68. Dobard v. Nunez, Sup. Ct. La. Hist. Archives, #1944, 6 La. Ann. 294 (1851) (Opinion of Judge Octave Rousseau, Second Judicial District Court, Parish of Saint Bernard, transcript file, 356).

69. *Id.* (supreme court opinion, transcript file, 358).

70. *Id.*

71. *Id.*

72. *Id.*

73. Morrison v. White, Sup. Ct. La. Hist. Archives, #442, 16 La. Ann. 100 (1861); Gottshalk v. De La Rosa, Sup. Ct. La. Hist. Archives, #2550, 6 La. Ann. 219 (1834); Miller v. Belmonti, Sup. Ct. La. Hist. Archives, #5623, 11 Rob. 339 (1845).

74. Sup. Ct. La. Hist. Archives, #442, 16 La. Ann. 100 (1861).

75. Morrison v. White, Sup. Ct. La. Hist. Archives, #442, 16 La. Ann. 100 (1861) (Judgment on Prayer of Change of Venue, transcript file, 66-67).

76. *Id.*

77. *Id.* (Plaintiff Bill of Exceptions, filed Jan. 30, 1862, transcript file, 164; Bill of Exceptions of Plaintiff to the Testimony of B.F. Danby, J.Giles & B.F. Giles, transcript file, 166, 168; Plaintiff's Bill of Exceptions to the Testimony of Morrison, transcript file, 169).

78. *Id.* (Judgment, transcript file, 172).

79. *Id.* (Motion for New Trial and Grounds, transcript file, 174).

80. Additionally, as Ariela Gross has argued, southern juries' propensity to uphold the whiteness of a person who appeared that way, was also out of their overriding concern to preserve white supremacy as a social system. From this perspective, had juries found a hitherto "white" man, colored, or allowed an ostensibly "white" woman to be enslaved, this would disrupt the operation of white supremacy by blurring racial boundaries, allowing people who appeared "white" to be enslaved or rendering uncertain their "actual" racial identity. The certainty of race distinctions, based on strict lines demarcated by outward racial appearance, served to uphold white supremacy and the social system built around it. GROSS, WHAT BLOOD WON'T TELL, *supra* note 10, at 3, 78.

81. There is a vast amount of literature on the study of family in southern history. Some important examples from the Antebellum Period include: VICTORIA BYNUM, UNRULY WOMEN: THE POLITICS OF SOCIAL AND SEXUAL CONTROL IN THE OLD SOUTH (1992); ANNE FIROR SCOTT, THE SOUTHERN LADY: FROM PEDESTAL TO POLITICS, 1830-1930

(1970); WYATT-BROWN, SOUTHERN HONOR, *supra* note 9; JEAN E. FRIEDMAN, THE ENCLOSED GARDEN: WOMEN AND COMMUNITY IN THE EVANGELICAL SOUTH, 1830-1900 (1985); STEVEN M. STOWE, INTIMACY AND POWER IN THE OLD SOUTH: RITUAL IN THE LIVES OF THE PLANTERS (1987); Steven M. Stowe, *The Rhetoric of Authority: The Making of Social Values in Planter Family Correspondence*, 93 J. SOUTH. HIST. 916-33 (1987); Joan E. Cashin, *The Structure of Antebellum Planter Families: The Ties that Bound us was Strong*, 56 J. SOUTH. HIST. 55-70 (1990); THE WEB OF SOUTHERN SOCIAL RELATIONS: WOMEN, FAMILY AND EDUCATION (Walter J. Fraser Jr., et al, eds., 1985).

However, the literature on the study of antebellum family within southern law is far less extensive. Seminal work includes PETER BARDAGLIO, RECONSTRUCTING THE HOUSEHOLD, *supra* note 9; Peter Bardaglio, *"An Outrage upon Nature": Incest and the Law in the Nineteenth-Century South in* IN JOY AND SORROW: WOMEN, FAMILY, AND MARRIAGE IN THE VICTORIAN SOUTH, 1830-1900, at 32-51 (Carol Bleser ed., 1991); MARYLYNN SALMON, WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA (1986). For the groundbreaking investigation into family law in Victorian America albeit northern in focus and scope, see MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND FAMILY IN NINETEENTH-CENTURY AMERICA (1985). For law and the family in the Reconstruction period, see JULIE NOVKOV, RACIAL UNION: LAW, INTIMACY, AND THE WHITE STATE IN ALABAMA, 1865-1954 (2008).

82. HARRIET MARTINEAU, SOCIETY IN AMERICA 225 (Seymour Martin Lipset ed., 1962).

83. BARDAGLIO, RECONSTRUCTING THE HOUSEHOLD, *supra* note 9, at 56.

84. THOMAS R. COBB, INQUIRY INTO THE LAW OF SLAVERY 83 (Philadelphia: T. & J.W. Johnson, 1858) .

85. Kenneth S. Aslakson, *The Quadroon-Plaçage Myth of Antebellum New Orleans: Anglo-American (Mis)interpretations of a French-Caribbean Phenomenon,* 3 J. SOC. HIST. vol. 45 no. 3, 709-34 (2012).

86. SCHAFER, BROTHELS, DEPRAVITY, AND ABANDONED WOMEN, *supra* note 10, at 12.

87. Louisiana Civil Code of 1825, Title IV, Ch. I, Art. 87.

88. *Id.* at Title IV, Ch. II, Art. 95.

89. *Id.*

90. *Id.* at Preliminary Title, ch. III, art. 11.

91. Succession of Minvielle, Sup. Ct. La. Hist. Archives, #6447, 15 La. Ann. 342 (1860) (Supreme Court Judgment, transcript file).

92. *Id.*

93. *Id.*

94. *Id.* (transcript file 4, 5, 6-7).

95. *Id.* (Brief for Defendants & Appellees 2 (emphasis in original)).

96. *Id.* (Transcript file 3).

97. *Id.* at 342, 342-43.

98. *Id.* at 343.

99. Sup. Ct. La. Hist. Archives, #646, 3 La. Ann. 239 (1848).

100. *Id.* at 240.

101. *Id.*

102. *Id.*

103. *Id.* at 245.

104. *Id.* at 244.

105. Several manumission cases involved attempts by white men to free their slave mistresses and/or their offspring. These cases came before the courts in two forms: (1) during the execution of a master's will in which the emancipation of a slave mistress (and/or her children) was disputed by putative heirs as illegitimate disposals of their inheritance; (2) in disputes over slave titles in which two or more slaveholders had entered into sale contracts with the understanding that a slave mistress be allowed to "buy herself out." The right of master to emancipate his slave or to dispose of his property/estate in any way he willed was thus challenged on the basis that it either impinged on the private rights of other white individuals, such as the legitimate heirs of the master, or that the very fact of the inter-racial sexual relation threatened public morals by being a case of "open and notorious concubinage." *See* SCHAFER, SLAVERY, THE CIVIL LAW, AND THE SUPREME COURT, *supra* note 23, at 184-85.

106. SCHAFER, SLAVERY, THE CIVIL LAW, AND THE SUPREME COURT, *supra* note 23, at 184.

107. Vail v. Bird, Sup. Ct. La. Hist. Archives, #2129, 6 La. Ann. 223 (1851) (supreme court decision, Judgment, J.J. Burk J., Second Judicial District Court, Baton Rouge, transcript file, 25).

108. *Id.*

109. *Id.*

110. Sup. Ct. La. Hist. Archives, #5076, 12 La. Ann. 417 (1857)

111. Vail v. Bird, Sup. Ct. La. Hist. Archives, #2129, 6 La. Ann. 223 (1851) (supreme court decision, transcript file, 26-27 (case reported as 12 La. Ann. 417)).

112. *Id.* at 27.

113. *See supra* notes 45-47 and accompanying text.

114. Turner, Curator v. Smith, Sup. Ct. La. Hist. Archives, #5076, 12 La. Ann. 417 (1857) (supreme court decision, transcript file).

115. *Id.* at 418. The significance of "societal order" or "common/collective good" as an obstacle to courts permissiveness regarding racial transgressions is further illustrated by the fact that the supreme court during this time would be permissive, finding in favor of liberty of slaves, when the question was presented instead as one of individual contract. For example, in the unreported case of *Dunbar v. Connor*, the supreme court preserved the liberty of a mulatress, Sarah Connor, against attachment by the creditors of white, Theophilus Freeman. In that case, the court accepted Connor's contention that the contract between Freeman and her previous owner was "with an intention to free" her, since she had "bought her (own) freedom" legitimately by her industriousness; and that this contract was without an intention to defraud Freeman's creditors from their interest in Connor, as property. Here, individual contract rights (of Freeman and Connor's previous owner) along with their perceived individual or private morality were upheld despite evidence that Freeman and Connor were cohabiting in the same home. Dunbar v. Connor, Sup. Ct. La. Hist. Archives (1850, 1851).

116. Turner, Curator v. Smith, 12 La. Ann. 417.

117. J.D.B. De Bow, *Law and Lawyers*, 6 SOUTH. Q. REV. 374 (1844); *see also* James W. Ely & David J. Bodenhamer, *Regionalism and the Legal History of the South*, *in* AMBIVALENT LEGACY, at 4-14 (Bodenhamer & Ely, eds.).

118. BARDAGLIO, RECONSTRUCTING THE HOUSEHOLD, *supra* note 9, at xvi.

119. GROSSBERG, GOVERNING THE HEARTH, *supra* note 81. Peter Bardaglio argues that the southern legal system reflected the influence of a distinctive kind of "republicanism" in the slave south. In contrast to the more active-state version of republicanism among New England political elites, and its egalitarian counterpart among northern artisans and farmers, white southerners held a more "agrarian conception of republicanism," that "underscored the necessity of maintaining freedom from the control of others," from centralized authority, and from "any exercise of actual authority beyond the barest minimum." However, the southern variant of republicanism did not equate freedom with the complete absence of government but maintained that the primary function of government was to preserve the individual autonomy of white males. Among the judiciary, southern republicanism led courts to deploy the power of the state with circumspection, cautiously

maintaining social and policy stability rather than instigating social change. BARDAGLIO, RECONSTRUCTING THE HOUSEHOLD, *supra* note 9, at 20-21. My argument here is that this picture is an accurate but partial one and that in some cases courts, particularly appellate courts more "removed" from local communities, were also likely to give effect to changing legislative orders more fully than merely preserving the autonomy and private wishes of individual patriarchs.

120. See, for instance, the southern courts active role in upholding proscriptions against miscegenation in the light of the new national constitutional guarantees of the Reconstruction era, Julie Novkov, *Pace v. Alabama: Interracial Love, the Marriage Contract, and Postbellum Foundations of the Family*, *in* THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT 329-65, 335 (Ronald Kahn & Ken I. Kersch eds., 2006).