THE COMPARATIVE APOLOGETICS OF RACIALLY REGRESSIVE LAWS IN THE CONFEDERATE STATES OF AMERICA AND THE SOUTH AFRICAN REPUBLIC

OR

HOW DID THEY LIVE WITH THEMSELVES?

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I. PURPOSE

A. *Introduction*

Many ordinary[1] persons of Anglo-European stock participated, without qualm, in systems of slavery and apartheid.

James M. McPherson, on examining the letters and diaries of 374 Confederate soldiers, finds that only twenty percent expressed pro-slavery sentiment.[2] "They took slavery for granted as part of the southern way of life for which they fought, and did not feel compelled to discuss it."[3]

Likewise, white South Africans "were conditioned to regard apartheid society as normal, its critics as communists or communist-sympathizers."[4]

How did this ideological complacency endure the growing hostility of neighbor sovereigns? *Why* did the citizens of these particular regimes defy world opinion in defense of their "peculiar institutions"?

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[1] I am operating under the presumption that white southerners and white South Africans had no special moral defects aside from their repugnant racial politics. Admittedly, this is a rebuttable presumption.

[2] JAMES M. MCPHERSON, WHAT THEY FOUGHT FOR: 1861-1865, 53-54 (1995).

[3] *Id.* at 54.

[4] LEONARD THOMPSON, A HISTORY OF SOUTH AFRICA 201 (2000).

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That whites had a material interest in these minority-exploiting systems[5] is, at best, a partial answer.[6] First, the claim is factually questionable. Unfashionable racism is costly. Opportunities for profitable exchange are lost as potential trade partners turn elsewhere.[7] Resources in the subordinated community go underdeveloped.[8] Meanwhile, the ranks of border guards, bounty hunters, riot police, arms manufacturers, and state

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[5] *See, e.g.*, L. Scott Stafford, *Slavery and the Arkansas Supreme Court*, 19 U. ARK. LITTLE ROCK L. REV. 413, 417-420 (1997) (citations omitted) ("The average Arkansas slave was worth as much as an eighty acre farm or a substantial city residence.") And by 1970, "white [South African] manufacturing and construction workers were earning six times as much as Africans and white metalworkers were earning no less than twenty-one times as much as Africans." THOMPSON, *supra* note 4, at 195. Put another way, if we assume that (a) the white rate is the result of free market bartering, and (b) that gross disparities in formal education did not effect non-white workers' ability to do vocational work at parity with whites, then factory owners could get one dollar's worth of work by paying non-white workers between 5 and 13 cents.

[6] *See, e.g.*, MCPHERSON, *supra* note 2, at 15 (noting that only about one-third of Confederate soldiers came from slaveholding families).

[7] *See generally* DAVID RICARDO, ON THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION (1817) (proposing a theory of comparative advantage by which mutual gains are possible through specialization and trade). While both regimes were subject to trade embargoes, South Africa had at least two big advantages over the Confederacy in maintaining substantial access to world trade. First, South Africa was a free agent during the Cold War, which meant that it could extort the First World into trading by threatening to switch allegiance to the Soviet-led Second World. THOMPSON, *supra* note 4, at 215-216. Moreover, the Republic was an indispensable supplier of certain items. According to the U.S. Bureau of Mines, in 1979, the Republic:

> produced 60% of the world's annual supply of gold... and significant quantities of four minerals that were essential to Western industry and defense: 47 percent of the world's platinum group of medals... 33 percent of the world's chromium, 21 percent of the world's manganese, and 42 percent of the world's vanadium (some of which are indispensable in the production of steel). And South Africa was still the world's major producer of gem diamonds and a producer of significant quantities of asbestos, coal, copper, iron, nickel, phosphates, silver, uranium, and zinc. *Id.* at 217.

[8] *See, e.g,,* THOMPSON, *supra* note 4, at 221 (noting that state schools for non-white South Africans were "sharply inferior" to those provided to whites). As one not-too-surprising result, the Republic was plagued by a continuing, acute "shortage of the skilled labor needed to run private industry and the bureaucracy." *Id.* at 221.

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apologists swell.[9] And, in the case of the South, racially regressive policies became the incident that triggered an economically devastating war.[10]

Moreover, lawful peoples require legal reasons to limit the freedoms of others, regardless of the possibilities for material gain. For example, the elderly account for a large portion of America's healthcare costs, which are then passed on to younger consumers. A law denying medical coverage to the very old would lower premiums substantially for the young, thereby conferring a substantial material gain. But such a law would never pass because socialized people cannot defend it, whether to themselves, to each other, or to the world.

Likewise, slavery and apartheid could not have become so entrenched, so accepted by their practitioners, without the benefit of legal justifications and excuses. The citizens of the Confederate States of America had first been citizens of the United States, a constitutional system with deep roots in English common law.[11] White South Africans received a "mixed" tradition, wherein English common law modified a base of Roman civil law as it had

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[9] THOMPSON, *supra* note 4, at 199-200 (laying out the swelling of the security state under apartheid).

[10] After the war, former Confederacy President Jefferson Davis claimed that while "of course the diversity of [sectional economic] interests [in slavery] contributed, in some minor degree, to the conflict of interests," "the truth remains intact and incontrovertible that the existence of African servitude was in no wise the cause of the conflict, but only an incident." JEFFERSON DAVIS, 1 THE RISE AND FALL OF THE CONFEDERATE GOVERNMENT 67 (1990). But, Confederate Vice-President Alexander H. Stephens expressed a contrary view in 1861. Rejecting "the assumption of the equality of races," Stephens argued that, "Our new government is founded upon exactly the opposite idea; its foundations are laid, its cornerstone rests upon the great truth, that the Negro is not equal to the white man; that slavery – subordination to the superior race – is his natural and normal condition." THE CIVIL WAR CHRONICLE 44, J. Matthew Gallman, ed. (2000) [hereinafter "CHRONICLE"], reprinting Alexander Stephens, "The 'Cornerstone' of Slavery," an address given in Savannah, Georgia (Mar. 21, 1861).

[11] In fact, the deep connection between the United States and Confederate governments can be seen most strikingly by comparing the permanent constitutions of the two polities side-by-side, as Jefferson Davis does in Appendix K of his "The Rise and Fall of the Confederate Government," Volume 1. DAVIS, *supra* note 10, at 559-582.

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been received in the Netherlands (Roman-Dutch law).[12] Neither of these polities would recognize as effective a law which did not "uphold...its own logic and criteria for equity; indeed, on occasion by actually *being* just."[13]

This paper posits that the apologia[14] of these outcast systems may provide valuable insight into their systems of legal reasoning.

By analogy, suppose a child psychologist is trying to understand a patient's reasoning process. He has videotapes of arguments between the child and her parents. They deny her permission to engage in a popular activity. She says,

1) "All the other kids can do it!"
2) "When my older sibling was my age, you let her do it!"
3) "You're not being fair!"

The most fiercely debated issues prove most illuminating. So it is with legal systems. Legal scholars trying to understand the mentality of rogue states should listen to the reasons these states give for what they do. These statements, even if factually untrue or illogical, betray the speaker's ideas of process, law, and justice.

B. A Note on Defensive Statements

While many English-speakers use *justification* and *excuse* interchangeably, it is important for the purpose of our analysis that each word used herein retains its distinct meaning. A *justification* is "a showing or proving [that one's conduct is] just or conformable to law, justice, right, or duty."[15] An *excuse*, by

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[12] Although, at least under Nationalist Party rule, "it [was] scarcely an exaggeration to suggest that South African political and legal structures have come to include the worst of all the traditions on which they draw, while ignoring the safeguards against the abuse of power inherent in those traditions." Charles Villa-Vicencio, *Whither South Africa?: Constitutionalism and Law-Making*, 40 EMORY L.J. 141, 144 (1991).

[13] POLITICS BY OTHER MEANS: LAW IN THE STRUGGLE AGAINST APARTHEID, 1980-1984, at X (1995) [hereinafter "POLITICS BY OTHER MEANS"], Foreword by Geoffrey Budlender, quoting E.P. Thompson (no further attribution given).

[14] Webster defined apology as "something said or written in defense or justification of what appears to others wrong, or of what may be liable to disapprobation." WEBSTER'S REVISED UNABRIDGED DICTIONARY 69, Noah Porter, ed. (1913).

[15] *Id.* at 807.

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contrast, is "a plea that arguably censurable conduct be overlooked because of extenuating circumstances."[16]

A memorable pro-apartheid speech before the Rotary Club of London in 1953 furnishes examples of how we can apply this distinction in the context of racially regressive law.[17]

The speaker begins his defense of apartheid by noting the "*vast debt owed by Black Africa* to [the]...white men," a debt comprised of "every millimeter of progress" ever made in all of Black Africa.[18] The speaker is impliedly justifying white rule as being no more than the dividend paid by white investment in Africa. He sets the baseline for non-white Africans at less than zero. For centuries, they faced "interminable, savage inter-tribal wars, witchcraft, disease, famine, and even cannibalism."[19] So, any good that the black African now enjoys is attributable to the charity and industry of white men.

Geyer then offers a second justification, this time predicated on a *first-come, first-served notion of property-rights creation*: "South Africa is no more the original home of its black Africans, the Bantu, than it is of its white Africans. Both races went there as colonists and, what is more, as practically contemporary colonists. In some parts the Bantu arrived first, in other parts the Europeans were the first comers."[20]

Finally, for the benefit of listeners unsympathetic to Geyer's justifications, he offers an excuse:

> South Africa is the only independent country in the world in which white people are outnumbered by black people. Including all coloured races or peoples the proportion in Brazil is 20 to 1. In South Africa it is 1 to 4... Need I say more to show that this policy of Partnership could, in South Africa, only mean the eventual disappearance of the white South African nation? And will you be greatly surprised if I tell you that *this white nation is not*

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[16] *Id.* at 521 (using a paraphrase of the first two definitions offered, so as to avoid the ambiguity mentioned above).

[17] A.J. Geyer, "The Case for Apartheid," a speech before London's Rotary Club (1953), from Union of South Africa, *Information Pamphlet* (New York 1953).

[18] *Id.*

[19] *Id.* (emphasis added).

[20] *Id.*

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> *prepared to commit national suicide*, not even by slow poisoning?[21]

The Confederacy and the Republic both sought to excuse their actions by asserting that the black horde will debase culture and politics. This paper will focus exclusively on the justifications of racially regressive law, because therein lies the most compelling cleavage between the apologia of the common and mixed law systems.

II. THE CONFEDERATE STATES OF AMERICA

A. *The Composition of the Confederacy*

"By the eve of the American Revolution, slavery was not only legally established in all thirteen colonies but so firmly implanted in the Southern colonies that Negroes constituted about 40 percent of their population."[22]

Under the United States Constitution as amended by the Bill of Rights, the States retained residual sovereignty.[23] That is, the States only ceded that power necessary for the federal government to exercise its enumerated powers.[24] It was decidedly within the province of the State to regulate the treatment of blacks (Africans and those descended from Africans) within its own territorial limits.[25]

The Confederacy was composed of eleven States of the United States of America, which singly elected to secede from that union and jointly elected to form a new one. This process began with the secession of South Carolina, by unanimous act of the legislature, on December 20, 1860.[26] Six sister states from the

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[21] *Id.* (emphasis added).

[22] DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 15 (1978).

[23] *See* U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

[24] *See* U.S. CONST. art. I, § 8 (laying out the legislative powers of the federal government).

[25] FEHRENBACHER, *supra* note 22, at 29 ("Slavery under the federal Constitution of 1787 remained almost entirely a creature of local (state) law.").

[26] CHRONICLE, *supra* note 10, at 23.

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deep South joined South Carolina: Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas.[27] "After the attack on Fort Sumter in April 1861, Arkansas, North Carolina, Tennessee, and Virginia joined them."[28] The Confederate charter gave its weak central government no real power to impede State support for the regulation of slavery.

B. *Chattel Slavery*

As Part II.A indicates, each State had the power, from its inception until 1865, to regulate the treatment of blacks by whites. The States of the South chose to permit chattel slavery. That is, "at law, *a slave was reduced in considerable degree from a person to a thing*, having no legitimate will of its own and belonging bodily to its owner. As property, a slave could be bought and sold. As animate property, he could be compelled to work, and his offspring belonged absolutely to the master."[29]

For example, the Virginia Supreme Court decided in 1827 that state law provided no basis for punishing a master "for the immoderate, cruel, and excessive beating of his own slave."[30] Slaves had no right to defend themselves, or each other, against such beatings.[31] Slave families were routinely broken up, with young children sent to live and work many miles from their parents.[32] "Mississippi and Missouri... decided that the rape of a

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[27] Columbia Electronic Encyclopedia, *Confederacy*, *available at* http://education.yahoo.com/reference/encyclopedia/entry?id=11330 (last visited Jan. 23, 2004).

[28] *Id.*

[29] FEHRENBACHER, *supra* note 22, at 15.

[30] Commonwealth v. Turner, 26 Va. 678, 686 (1827) (characterization of issue by Brockenbrough, J., dissenting).

[31] State v. David, 49 N.C. 353 (1857) (condemning as guilty of murder a slave who announced his intention to stop the overseer from beating a fellow slave, and who did advance on the overseer, when that distraction allowed a third, unrelated slave to kill the overseer).

[32] *See, e.g.*, *Memoir of Old Elizabeth, A Coloured Woman* 3-4 (Philadelphia 1863), reprinted in SIX WOMEN'S SLAVE NARRATIVES, ed. Schomburg Library of Nineteenth-Century Black Women Writers ("In the *eleventh* year of my age, my master sent me to another farm, several miles from my parents, brothers, and sisters, which was a great trouble to me. At last I grew so lonely and sad I thought I should die, if I did not see my mother... I set off and walked twenty miles before I found her. I staid [sic]with her for several days, and we returned

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slave woman was simply not a crime, even when committed by a slave."[33] It is virtually impossible to construct a system more repressive than slavery in the American South at its legal limit. What could be said in defense of this system?

C. Justifications for Slavery

1. The Bible

One of the earliest and most common justifications of slavery held that it was the will of God that Africans be slaves to whites. Chattel slavery was "justified for a time in cultural terms and on biblical authority – that is, 'the Negro was a heathen and a barbarian, an outcast among the peoples of the earth, a descendant of Noah's son Ham, cursed by God himself and doomed to be a servant forever on account of Biblical sin.'"[34]

An examination of biblical authority shows that what appears to be a grouping of justifications is actually one coherent common law claim:[35]

Divine Rulings:[36] God Has Suspended the Rights of Blacks: This argument finds support in Saint Augustine's exegetical work, *City of God*. The Doctor writes that "the prime cause, then, of slavery is sin, which brings man under the dominion of his fellow – that which does not happen save by the judgment of

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together. Next day I was back at my new place, which renewed my sorrow. At parting, my mother told me I had 'nobody in the wide world to look to but God'... On reaching the farm, I found that my overseer was displeased with me for going without his liberty. He tied me with a rope, and gave me some stripes the marks of which I carried for weeks.") (emphasis added).

[33] A. Leon Higginbotham, Jr., *The Law Only as an Enemy: The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia*, 70 N.C. L. REV. 969, 1056 (1992) (citations omitted).

[34] FEHRENBACHER, *supra* note 22, at 12 (citations omitted).

[35] To give some idea of how important religious arguments were to the maintenance of slavery, 141 federal and state cases between 1790 and 1870 use the words (*Series One*: slave, slaves, or slavery) in the same sentence as (*Series Two*: Bible or Scripture or God or Genesis or Exodus). Over the same 80 year period, 311 cases have a Series One and Series Two word together in the same paragraph. LEXIS search, Dec. 12, 2001.

[36] The question of whether God does what is good, or it is good by virtue of being God's choice is beyond the scope of this paper.

God...who knows how to award fit punishments to every variety of offense."[37]

Precedent: Abraham had slaves.[38] The Israelites had a well-regulated slave population in the time of Moses.[39] The slavery of Hebrews to Hebrews was forbidden by divine decree.[40] But owning slaves from "the nations around you" was given divine sanction.[41] (Confederate apologists rarely noted that God forbade the surrender of fugitive slaves to their masters.)[42] Solomon, the paragon of wisdom, made slaves of captured foreigners "whom the people of Israel were unable to destroy utterly."[43]

Silence: Jesus *praises* the Roman centurion who understands miracles by analogy to slavery.[44] Neither Yahweh, nor Jesus, nor any of the prophets or apostles ever condemns slavery. In fact, the early Church fathers legitimize slavery by analogizing slave and free Christians to different parts of the same body, each with their own role to play in the incorporated church.[45]

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[37] AUGUSTINE OF HIPPO, CITY OF GOD, Book XIX, Part 15, at 693, transl. Marcus Dods (1993 Modern Library Edition).

[38] *Genesis* 3:15.

[39] *Exodus* 21:1-21 (laying out ordinances for the treatment of slaves). Note also that this code was not particularly progressive. *Id.* at 21:20-21 ("When a man strikes his slave, male or female, with a rod and the slave dies under his hand, he shall be punished. / But if the slave survives a day or two, he is not to be punished; for the slave is his money.").

[40] Lev. 25:39-41 ("For they are my [God's] servants, whom I brought forth out of the land of Egypt; they shall not be sold as slaves."). *See also* Deut. 24:7 (making the enslavement of Hebrews by Hebrews a capital offense).

[41] *Id.* at 25:44-46 (including permission to keep hereditary slaves).

[42] *Deuteronomy* 5:15-16 ("You shall not give up to his master a slave who has escaped from his master to you; he shall dwell with you, in your midst, in the place which he shall choose within one of your towns, where it pleases him best; you shall not oppress him.")

[43] 1 *Kings* 9:20-21 ("All the people who were left of the Amorites, the Hittites, the Perizzites, the Hivites, and the Jebusites, who were not of the people of Israel-- their descendants who were left after them in the land, whom the people of Israel were unable to destroy utterly--these Solomon made a forced levy of slaves, and so they are to this day.").

[44] *Matthew* 8:9-10 ("'For I am a man under authority, with soldiers under me; and I say to one, "Go," and he goes, and to another, "Come," and he comes, and to my slave, "Do this," and he does it.' When Jesus heard him, he marveled, and said to those who followed him, 'Truly, I say to you, not even in Israel have I found such faith.'").

[45] 1 *Corinthians* 12:13-22.

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The apostle Paul proclaims "there is neither slave nor free" because "you are all one in Christ."[46] But, in the same breath, he testifies that "there is neither Jew nor Greek" and "neither male nor female."[47] He may mean (1) that all Christians should be treated alike, i.e. advocating universal manumission, gender and racial equality, but more likely (2) was asserting that all Christians are alike in God's eyes.

In support of the second reading, in Ephesians 6:5-9, Paul instructs slaves and masters how to treat one another:

> Slaves, be obedient to those who are your earthly masters, with fear and trembling, in singleness of heart, as to Christ; not in the way of eyeservice, as men-pleasers, but as servants of Christ, doing the will of God from the heart, rendering service with a good will as to the Lord and not to men, knowing that whatever good any one does, he will receive the same again from the Lord, whether he is a slave or free. Masters, do the same to them, and forbear threatening, knowing that he who is both their Master and yours is in heaven, and that there is no partiality with him.

There is, to be sure, an element of subversion in this charge. Paul seems to indicate that a slave has the duty to refuse unchristian orders, which the master now has no right to give. But surely brutal manual labor, the primary use for slaves, does not fall under this liberty of conscience.

And he did not say, *masters, set free your slaves.*

The closest that Holy Scripture comes to combating slavery is Paul's request, on behalf of Onesimus, a recently converted slave, that his master "have him back for ever, no longer as a slave but more than a slave, as a beloved brother."[48] Southerners, who have a long tradition with manumission in cases of slaves

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[46] *Galatians* 3:28.
[47] *Id.*
[48] *Philemon* 1:15-16.

rendering exceptional service,[49] would not be one bit troubled by Paul *asking* Philemon to free an exceptional Christian.

Prophecy: In fact, Scripture envisions the endurance of slavery unto the very end of history. "[E]very one, *slave* and free, hid in the caves and among the rocks of the mountains, calling to the mountains and rocks, 'Fall on us and hide us from the face of him who is seated on the throne, and from the wrath of the Lamb; for the great day of their wrath has come, and who can stand before it?'"[50]

In summary, Southerners defended their institution of slavery on a variety of biblical grounds: (1) God has judged the black race guilty, and we are but their jailors; (2) the Chosen people have always had chattel slavery, at the express warrant of God; (3) nothing in the Bible, our handbook on serious ethical matters, expressly criticizes the institution of chattel slavery; and, in fact, (4) the Bible assures us that slavery as an institution will persevere until the Second Coming.

These could easily be restated as one common law justification: Our highest court is God. He has, by letting you be subject to capture, handed down the decision that your actions warrant your punishment through slavery. As this is in line with all of the precedents God has provided over the course of history, we are required to carry out this sentence. He will, when He deems your sins expiated, release you from captivity, either by seeing us defeated or by changing our hearts towards you. Until that time, mankind acts outside its authority to abolish black slavery.[51]

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[49] FEHRENBACHER, *supra* note 22, at 48-50.

[50] *Revelation* 6:15-17.

[51] Of course, the claim could also be recast as a civil law claim, with God possessing the *imperium*, and the States having the power in their *plebiscites*, i.e. legislatures, to block his decision by freeing the slaves. This reading of the Confederate apologist's logic is inferior because, while it maps onto the slavery and redemption process, the idea that a judgment of God would be trumped by one of man is repugnant to Christianity.

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2. Consent

One of the great justifications in Anglo-American law is consent. Consent turns rape into sex, trespassing into lawful entry, theft into donation. And, many apologists argued, slaves consented to their role in Southern life, both by word and deed. This, it was put forth, debunked the Yankee caricature of slavery, and helped prove the legality of the peculiar institution, and justify the well-ordered slaveholding family.

William Wyndham Malet, an Englishman, visited Horry, South Carolina in 1862. He observed a plantation peopled by hundreds of slaves, and "never did I see a happier set than these negroes."[52] "The negro servants watched for tidings from their master [a Confederate officer at war]... as anxiously as their mistress."[53] Despite the lure of abolitionists, the slaves swore "they said they would never leave him – they loved their 'massa and missis.'"[54] According to Malet, the slaves prayed regularly that God would protect their absent master.[55] While Malet was not himself a Southerner, his cheery account of life as a slave is a key example of apologetics for slavery.

Indeed, one Southern observer of the Union occupation of Vicksburg noted that, "the [emancipated] slaves brought in by planters, and servants of soldiers and officers, did not appear in the least gratified of their freedom. The majority of those connected with the [Confederate] army were very desirous of leaving with their masters."[56]

There is even a report of a slave so devoted to his master that he "dodged his way in and out of Federal lines, and brought his master all his important papers and ten thousand dollars in gold (two thousand pounds)."[57]

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[52] WILLIAM WYNDHAM MALET, AN ERRAND TO THE SOUTH IN THE SUMMER OF 1862, as reprinted in THE CONFEDERATE READER: HOW THE SOUTH SAW THE WAR, 109 Richard B. Harwell, ed. (1989) [hereinafter READER].
[53] *Id.*
[54] *Id.* at 110.
[55] *Id.* at 112.
[56] Alexander St. Clair Abrams, "Defeat at Vicksburg," *Whig* (Sept. 1862), *reprinted in* READER 201.
[57] Fitzgerald Ross, "Gaiety as Usual in Mobile," (1863-1864), *reprinted in* READER 258-59.

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These anecdotes could be added to *ad infinitum.* What compels is not the truth or falsity of any particular anecdote of happy slavery, or even the truth or falsity of this entire genre of apology (apology by consent). What compels is the fact that slavery is here justified by reference to the expressed preferences of the individual slaves.

3. Biological and Constitutional Justifications

A biological argument for slavery insists that blacks are not biologically "persons," and hence are not invested with natural rights. The Constitutional tact claims that because the Framers believed blacks were doomed to slavery, they cannot have meant for blacks to be counted amongst the "persons" whose liberty is secured by the Constitution.

The biological argument "did not appear until the second quarter of the nineteenth century."[58] But, in the eyes of Confederate Vice President Alexander Stephens, it was the central truth of Confederate government.[59] "The architect in the construction of buildings, lays the foundation with the proper material – the granite, then comes the brick or the marble. The substratum of our society [slaves] is made of the material fitted by nature for it... ."[60] The idea here is that blacks are no different from animals or even natural resources. We value these things and provide them a measure of protection. However, we will not go through the farce of recognizing enforceable rights in that which is not capable of moral agency.

The Supreme Court case of Dred Scott v. Sanford gives rise to the fullest explication of the argument that blacks are not Constitutional "persons." Don Fehrenbacher asserts that Chief Justice Taney, in writing the opinion of the court, "was determined to meet every threat to southern stability by separating the Negro race absolutely from the federal Constitution, and all the rights that it bestowed, thus leaving the states in complete control of the black man, whether slave or free."[61]

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[58] FEHRENBACHER, *supra* note 22, at 12.
[59] CHRONICLE, *supra* note 10, at 44.
[60] *Id.*
[61] FEHRENBACHER, *supra* note 22, at 341.

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Taney approached this task in a typical common law manner, by asking what the Framers actually meant by such relatively clear terms such as "men" and "persons" in the founding documents.[62] Fehrenbacher skewers Taney's analysis, both for faulty historical assumptions about the Founder's prejudices and for the scanty and skewed precedent that Taney presents.[63] What is important for our purposes is that Taney inquired into the intent of the drafting agents rather than sticking to the language of the text.

D. Conclusion

Standing against a storm of words, apologists for American slavery hewed closely to traditional common law arguments. Precedent (even Scriptural precedent), the binding authority of higher courts, the moral magic of consent,[64] natural law concerning the preconditions for moral agency, and an intentionalist reading of the Constitution combined to salve the conscience of the South.

III. SOUTH AFRICA

A. The Composition of the South African Republic

In the seventeenth century, the Dutch East India Company brought Europeans and the European brand of slavery to the tip of Africa.[65] First envisioned as a mere refilling station for ships passing around the Cape of Good Hope,[66] the colony there grew into a complex agricultural society.[67] "When the British captured the Cape from the Dutch later in 1795, they took over responsibility for a thinly-populated, loose-knit territory... With fifteen thousand inhabitants (including ten thousand slaves) [and] 1,145 private homes... Cape Town was the only real town in the

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[62] *Id.* at 340-64.

[63] *Id.*

[64] I borrow this term from Professor Heidi Hurd, who made use of it in teaching Torts at the University of Pennsylvania Law School in the fall of 1999.

[65] THOMPSON, *supra* note 4, at 31-36.

[66] *Id.* at 39.

[67] *Id.* at 42.

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colony."[68] Indeed, from a European perspective, "the colony's function was still little more that [a] stepping stone to Asia...it yielded nothing else of significance to the metropolitan economy."[69]

"In 1830, to escape British rule, Dutch settlers made the Great Trek northward and established the independent Boer republics of Orange Free State and the South African Republic (later the Transvaal region), which the British annexed as colonies by 1902. In 1910 the British colonies of Cape Colony, Transvaal, Natal, and Orange River were unified into the new Union of South Africa. It became independent and withdrew from the Commonwealth in 1961."[70]

Thus, South Africa's legal system draws from Roman-Dutch and British influences. But the influences of the civil law jurisdictions would predominate as white South Africans responded to passionate criticism of the Republic's treatment of non-whites.

B. *Apartheid*

A law school textbook from 1977 introduces its readers to apartheid:

> The policy of separate development is the cornerstone of present government policy, and...because of its very nature is part and parcel of South African constitutional and administrative law. The aim and practical effect of this policy is that each racial group must be allowed to preserve its own culture and language; and to achieve this not only must there be separate development but there must also be separation of the races in most spheres of life. Thus there are separate areas for residential

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[68] *Id.* at 51.

[69] *Id.*

[70] *South Africa, Republic of*, CONCISE BRITANNICA, *available at* http://education.yahoo.com (Dec. 10, 2001).

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> and business purposes, separate facilities for education, transport, entertainment, sport and so forth.[71]

As those familiar with the Jim Crow laws of the American South may well suspect, this separation of racial groups led to anything but equality. By (1) setting demanding voter registration standards, and (2) forcibly resettling non-whites, along ethnic lines, into the Homelands (eleven small, nominally self-governing "kingdoms"), the ruling white Nationalist Party, starting in 1948, was able to "eliminate every last vestige of black participation in the central political system." [72] Thus, three-quarters of the population were effectively disenfranchised, with no say in "their" Parliament.

Marriage across racial lines was banned.[73] Non-white presence outside the Homelands was limited to seventy-two hours, absent a special permit from a white employer.[74] The central government, which assumed responsibility for education even in the Homelands, "spent ten times as much per capita on white students as on African students, and African classes were more than twice as large as white ones."[75] In the Homelands, "electricity, running water, public telephones, sewage systems, parks, and playing fields were rare."[76]

"Laws and regulations confirmed or imposed segregation for taxis, ambulances, hearses, buses, trains, elevators, benches, lavatories, parks, church halls, town halls, cinemas, theaters, cafes, restaurants, and hotels, as well as schools and universities."[77] The gap between whites (1/4 of the population) and non-whites (3/4) in

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[71] W.J. HOSTEN ET AL., INTRODUCTION TO SOUTH AFRICAN LAW AND LEGAL THEORY, Chapter XIV, *Public Law: Legislation Relating to Race* 647-648 (1977).
[72] THOMPSON, *supra* note 4, at 187.
[73] *Id.* at 190.
[74] *Id.* at 193.
[75] *Id.* at 196.
[76] *Id.* at 201.
[77] *Id.* at 197.

https://scholarship.law.upenn.edu/jlasc/vol7/iss1/3

matters of income, wealth, and health was one of the widest amongst modern nations.[78]

The government exercised wide powers to censor and suppress racially progressive groups and African trade unions.[79] To control the black population, "the government resorted to bannings, arrests, detentions, and treason trials." [80] Political prisoners endured torture.[81] Racially progressive political leaders were assassinated.[82]

Apartheid endured, in this form, from 1961 until the constitutional reforms of 1984, which transformed the Parliament into one very large white-only chamber, a small blacks-only chamber, and a small Indians-only chamber.[83] However, this change and others did not satisfy the black majority. The Nationalist Party negotiated an end to apartheid, and transitioned government to the formerly banned African National Congress, which swept the 1994 elections.[84]

C. *Justifications for Apartheid*

1. Parliamentary Supremacy

Under the Nationalist regime, "The South African Parliament was supreme. No bill of rights restrained it, nor was there any tradition resembling the unwritten constitution that inhibits its Westminster antecedent."[85] When judicial review of acts of Parliament threatened some key apartheid legislation, Parliament simply restricted the jurisdiction of the courts to pass on that question.[86] The 1961 Constitution provided that "no court of law shall be competent to enquire into or pronounce upon the validity of any Act passed by Parliament, other than an Act which

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[78] *Id.* at 202-204.
[79] *Id.* at 210-212.
[80] *Id.* at 235.
[81] *Id.*
[82] *Id.*
[83] *Id.* at 225.
[84] *Id.* at 241, 263.
[85] POLITICS BY OTHER MEANS, *supra* note 13, at 3.
[86] *See* Villa-Vicencio, *supra* note 12, at 150-154.

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repeals or amends . . . the provisions of section 128 or 113 [referring to English and Afrikaans as official languages]."[87]

A strong belief in the validity of an institution can justify acceptance of the products of that institution. White South Africans, educated in state-run schools, learned to accept the supremacy of Parliamentary action, and were discouraged from considering the integrity and authority of the Parliament itself.[88]

2. Creation of the Homelands

White South Africans also defended apartheid as an opportunity for the Homelands to emerge as independent black nations. "Government propaganda likened this process to the contemporaneous decolonization of the European empires in tropical Africa."[89] While no nation on earth ever recognized the independence of these regimes, the supporters of apartheid pointed to them as the potential payoff of apartheid for blacks. Instead of

[87] *Id.* at 153.

[88] THOMPSON, *supra* note 4, at 198 ("In particular, [state-run schools for whites] imbued them with a political mythology derived from a historiography that distorted the past for nationalist purposes.").

[89] *Id.* at 191; *see also* A.L. Geyer, "The Case for Apartheid," a speech before the London Rotary Club (1953):

> We believe that, for a long time to come, political power will have to remain with the whites... But we believe also... that "no people in the world worth their salt, would be content indefinitely with no say or only indirect say in the affairs of the State or in the country's socio-economic organisation in which decisions are taken about their interests and their future"... The immediate aim is, therefore, to keep the races outside the Bantu areas apart as far as possible, to continue the process of improving the conditions and standards of living of the Bantu, and to give them greater responsibility for their own local affairs. At the same time the long-range aim is to develop the Bantu areas both agriculturally and industrially, with the object of making these areas in every sense the national home of the Bantu - areas in which their interests are paramount, in which to an ever greater degree all professional and other positions are to be occupied by them, and in which they are to receive progressively more and more autonomy.").

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one multiracial nation, up to eleven sovereign states could have coexisted with a wealthy white neighbor in the Republic of South Africa. For as long as this hope could be sustained, it was used to justify apartheid.

D. *Conclusion*

Apartheid was justified by (1) deference to the supremacy of the Parliament and (2) the hope of black empowerment through creation of separate territorial spheres in which they could excel. In sharp contrast to the discourse surrounding chattel slavery, the debate over apartheid did not dwell on the abstract question of whether blacks could properly receive political rights. Nor did anyone posit a guilt on the part of non-whites for which apartheid was the punishment. Nor did the apologists for apartheid long pretend that it was popular among non-whites.

A few factors help explain the difference between the rights-based apologia of slavery and the political process-based apologia of apartheid.

First, by stripping its judiciary of the power of judicial review, South Africa pre-empted any judicial discussion of innate human rights and the dictates of natural law. Also, because legal scholars knew that such rights-based arguments could not succeed in court, they did not waste time in crafting them.

Second, South Africa's legal traditions included Roman law as received by Holland in the 17th century. Roman law had a long tradition of distinguishing between classes of citizens, as exemplified by the split between the office of the urban praetor and that of the peregrine praetor. With the effective split between the Western and Eastern Empires, South Africa had a working model of political devolution to which it could turn.

Finally, South Africa had a different set of political values than the American South. From the justifications it chose, South Africa appears to have had a top-down view of legality, in which the State's actions are evaluated according to their tendency to promote the good of the governed. The Confederate States of

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America justified slavery from the bottom up, explaining why blacks alone lacked any rights. While this does not accurately characterize every apologist in each system, it is a working description of two legal systems that could retain self-respect while doing evil.

IV. A PREFACE TO FUTURE HISTORY

Without question, future legal historians will ask the same questions about the United States in the 21st century.

According to the 2000 Census, the median income for black households is $30,439, compared to $45,904 for non-Hispanic white households.[90] To quote an old saying, "It's no crime to be poor...but it might as well be."

In the United States today, 9% of the African-American population is under correctional supervision, compared to 2% of whites.[91] African-Americans make up 43% of death row inmates, but just 13% of the nation.[92] Blacks are victims of violent crimes—murders, rapes, robberies, and assaults—at nearly double the rate of their white peers.[93]

Finally, when our legal system metes out penalty for a murder, it openly and repeatedly cheapens black lives lost:

> T]he rate [at which the death penalty is imposed in Georgia] is .06 (15/246) for black victim cases versus .24 (85/348) for white victim cases. This disparity is particularly apparent when prosecutors are deciding

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[90] U.S. Census Bureau, *Nation's Household Income Stable in 2000, Poverty Rate Virtually Equals Record Low, Census Bureau Reports* (Oct. 10, 2001), *available at* http://www.census.gov/Press-Release/www/2001/cb01-158.html.

[91] U.S. Department of Justice, Bureau of Justice Statistics, *Demographic Trends in Correctional Populations*, (Jan. 16, 2002), *available at* http://www.ojp.usdoj.gov/bjs/glance/tables/cpracepttab.htm.

[92] U.S. Department of Justice, Bureau of Justice Statistics, *Prisoners on Death Row by Race* (Nov. 9, 2003), *available at* http://www.ojp.usdoj.gov/bjs/glance/tables/drracetab.htm.

[93] U.S. Department of Justice, Bureau of Justice Statistics, *Serious Violent Victimization Rates by Race, 1973-2002* (Aug. 24, 2003), *available at* http://www.ojp.usdoj.gov/bjs/glance/tables/racetab.htm.

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> whether to seek a death sentence, and its effect persists after one adjusts for the aggravation level of different cases. In other words, *our data strongly suggests that Georgia is operating a dual system, based upon the race of the victim, for processing homicide cases.* Georgia juries appear to tolerate greater levels of aggravation without imposing the death penalty in black victim cases; and, as compared to white victim cases, the level of aggravation in black victim cases must be substantially greater before the prosecutor will even seek a death sentence.[94]

In future legal histories, we may well stand as the *de facto* mirror image of *de jure* apartheid systems of the past. Legal historians will wonder what manner of legal reasoning led us to adopt a system of laws and policies that, in practice, perpetuated the racial divide. We would do well to anticipate the question, and to try to frame a response. But, as always, the rift between races helps hide from the privileged class the fact of their privilege. As one devil mused to another, "funny how mortals always picture us as putting things into their minds: in reality our best work is done by keeping things *out*."[95]

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[94] David C. Baldus, et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661, 709-710 (1983) (emphasis added).
[95] C.S. LEWIS, THE SCREWTAPE LETTERS 20 (MacMillan & Co. 1961) (1942).

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