HE IS ALSO A SOUTHERNER AS WELL AS AN AMERICAN: JURISPRUDENCE, LEGAL HISTORY AND THE AFRICAN-AMERICAN RETURN TO THE SOUTH IN THE TWENTY-FIRST CENTURY

ANTHONY V. BAKER*

I. INTRODUCTION: AN ODD REPATRIATION

In its May 2001 edition, under the provocative headline “Blacks migrate to South in 90's by the millions,” the Raleigh (NC) News & Observer ran a story highlighting perhaps the most intriguing and unexpected of the demographic trends uncovered in the Year 2000 national census. “The South gained a record number of African Americans during the 1990s,” the story began, highlighting a burgeoning trend which had begun as a small but steady trickle in the two decades immediately preceding. The story rightly characterized the movement of the 1990’s as “a historic pattern that has come full circle,” referencing the well documented and equally well studied early-twentieth-century ‘black exodus’ from the rural South to the urbanized North as backdrop for the unprecedented and unanticipated return. Reprinted by the News & Observer under a Washington Post by-line, that story – or others very much like it – appeared in newspapers and other media vehicles across the nation, independently underscoring its significance and importance.

Not unexpectedly, demographers were the first of the social scientists to consider the scope and meaning of what all interested

*Associate Professor, Campbell University School of Law; LL.M., University of Wisconsin – Madison; J.D., University of North Carolina – Chapel Hill; B.A., Duke University. Thanks to my colleagues at Campbell for their encouragement in this project, and thanks, as always, to my family for their gracious indulgence in what I do. The title of this article is inspired by C. VANN WOODWARD, THE BURDEN OF SOUTHERN HISTORY 22 (1993); see also infra note 38.


2 Id.

3 Id.
persons agreed was a remarkable statistical trend. In an article appearing in the May/June 2001 edition of *Population Today* magazine\(^4\) and receiving broad national exposure, professional demographer William H. Frey began by highlighting the finding, arising from initial quantitative reviews of *Census 2000* data, that "Blacks ended the 20\(^{th}\) century by returning to the region that they spent most of the century leaving."\(^5\) Dr. Frey detailed the story in both raw numbers and statistical trends: a net gain of more than 3.5 million persons above corresponding 1990 figures, more than the rest of the United States combined.\(^6\) His more detailed *Research Report*,\(^7\) from which the popular article was derived, put the matter in even starker perspective: in registering its net population gains, the South took statistically significant numbers of African-Americans from every other region in the nation, all of which showed "a net out-migration of blacks" during the prior decade.\(^8\) Adding the gains from both the 1970’s and 1980’s to the *Census 2000* data – 1.9 million and 1.7 million persons respectively – the remarkable return of African-origin Americans to the South over the last third of the twentieth century might be seen as something very much like a definitive repatriation.

The rich, textured question immediately presented in consequence of the findings and reports is surely, "Why?", and Dr. Frey dutifully takes his turn at isolating possible underlying reasons: "Like whites, blacks were attracted by the South’s booming economy, low density living, and warmer climate."\(^9\) Frey describes historic roots, the growing black middle class population,

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\(^5\) Id.

\(^6\) Id.

\(^7\) *Census 2000 Shows Large Black Return to the South, Reinforcing the Region's "White-Black Demographic Profile*, PSC Research Report No. 01-473 (May 2001), [available at](http://www.frey-demographer.org/reports/rr01-473.pdf).

\(^8\) Id at 2.

\(^9\) FREY, supra note 4, at 4.
and an improved racial climate as "[o]ther pull factors." Of course, the problem with his quick observation lies in the very first two words of the explanatory statement: "Like whites." For while it is true enough that African-Americans hold much more in common with their majority culture compatriots than in difference, and are thus internally motivated by many of the same things, it is also equally true and plainly understood that, in the pristine American historical context of the region, the cognizable differences between the two groups are both real and profound. These differences themselves, it is suggested here - deep, complex and ineluctably intertwined with the very character of the South itself - render the raw fact of the return remarkable, while at the same time leaving Dr. Frey's explanatory observations under-convincing.

Various of the dedicated social sciences broadly considering modern cultural construction - sociology, social psychology, cultural anthropology and the like - have also considered this important "Why?" question, isolating the different motivations favoring the late African-American return to the South against the backdrop of the many virile, visceral reasons against it, with varying degrees of conviction and confidence. From the peculiar perspectives of their own specific disciplines, each has provided important pieces to the demographic and socio-cultural puzzle deriving from the most recent census work, adding to the richness of the picture being developed by the academy generally. This is to be expected, of course. However, as is equally to be expected, each is constrained by its own academic limits, none thereby having answered the important surviving question categorically or definitively. Thus, in the face of growing information from various sectors of the academy considering both the fact of the African-American return and the clarification of some of that trend's underlying reasons, a great deal remains yet to be discovered, considered and said.

That being the case, does law in its own peculiar social scientific forms have anything to add to this interesting and intriguing cultural mystery? For if African-origin America is conceptually and actually returning to the 'South,' it is in point of fact returning in two different ways to two discrete things:

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10 Id.
physically, to land, and metaphorically (for lack of a more precise term), to a distinctive and highly formalized and normative culture. The former – land – would seem to implicate law generally, the ‘social science’ by which that physical commodity is managed across Western societies, and jurisprudence particularly, that subset of law by which the commodity is both imagined historically and distributed practically, in the American context. The second – normative culture\(^{11}\) – clearly implicates the social science of history generally (that discipline chronicling, if not arguably catalyzing, the formation of ‘culture’), and legal history particularly, that subset of the broader academic discipline uniquely marking and delineating African-America’s complex interaction with and connection to Southern culture throughout. In this way, law may add its own not insubstantial voice to the rich and vital debate surrounding this important statistical trend, thus shedding distinctive and valuable light on the question at hand.

This, then, is the modest goal of this paper: to separately bring both late enlightenment-era jurisprudence\(^{12}\) and applicable principles of legal history to bear on the central question of African-American Southern repatriation, considering both their place in the debate and the answers they might suggest regarding the “why” of this significant trend. It will begin by considering the complex, slippery jurisprudence around the regularization and entitlement of land in the American experience, necessarily referencing the matter from the earliest days of American history, and seeking thereby to better appreciate the almost visceral connection between African-America and the land in question. It will follow by referencing legal history and legal-historical analysis in seeking more fully to explore African-America’s almost metaphysical connection with peculiar Southern culture. It is contended here that the application of both jurisprudential investigation and legal-historical analysis to the African-American/Southern connection, both singly and in unique combination, might offer some interesting insight into possible

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11 Of course by use of the term ‘normative’ here, I am including African America’s unique circumstantial connection to ‘the South,’ and its effects on the development of that culture.

12 The reasoning behind this particular starting concept and place in history should become quite apparent herein.

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motivations for the important current trend presently occupying American social science. Appropriate summary comments, applications and implications will be canvassed in conclusion.

II. OLD WORLD, NEW WORLD AND LAND: A TROUBLING JURISPRUDENCE

Given the sheer time that has passed and the multiple world-changing developments which that time has brought, it is simply impossible for the modern mind to recover any real appreciation for or understanding of the magnitude of the discovery of the 'New World' to fifteenth and sixteenth century Europe. Old, crowded and static as that continent was by that time, with its bounded fiefdoms and zero-sum, fully claimed commodity of real property, this terra nova presented an immediate and permanent change in the political power balance of 'Old World' Europe which can scarcely be described and cannot be overstated. Simply put, the 'New World' presented unparalleled and almost unimaginable opportunity for the Old World, conveniently offering a 'king's ransom' of the scarce commodity and practical currency of land and its accompanying natural resources, dwarfing anything previously discovered or even conceived of by the wealth-absorbed and deeply materialist sixteenth-century European mind.13 Seventeenth-century exploratory incursion ever deeper into this vast, promising western continent revealed that the 'discovered' land was fully occupied, presenting a very real problem for a people long favoring formalized systems of private land ownership, created and protected by law. How, then, might the 'discoverers' superimpose and legally regularize Old World notions of private control of real property on this 'New World' resource, in the face of a clear prior claim of occupancy by a people to whom the concept of private

13 Speaking generally in this regard, Alexis de Tocqueville canvassed the cruel and deceptive means employed by the European-origin American populations lusting after and eventually acquiring New World land, casually setting out the rather remarkable outcome: "In this way the Americans cheaply acquire whole provinces which the richest of sovereigns in Europe could not afford to buy." DEMOCRACY IN AMERICA 299-300 (J.P. Mayer & Max Lerner eds., George Lawrence trans., Harper & Row 1966) (1835)
land ownership could not have been more foreign.\textsuperscript{14}

To the European nations exploring North America throughout the seventeenth century and to the new nation of the United States inheriting both the land and the problem at the end of the eighteenth century, a virile jurisprudence was needed to facilitate this bit of metaphysical magic and, conveniently, just such a one was provided from England itself, by late seventeenth-century political thinker John Locke and his immense \textit{Second Treatise of Government}.\textsuperscript{15} Writing at the close of the seventeenth

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\textsuperscript{14} Here I am referring to Native America as a whole, of course. For example, the great Shawnee Chief Tecumseh set out a neat paradigm by which Native America understood law and value regarding land, antithetical to the European model reified by enlightenment philosophy and conveniently imported into the ‘New World’ by the English and their land-lusting heirs-apparent, the Americans: “The way, and the only way, to check and to stop this evil, is for all the red men to unite in claiming a common and equal right in the land, as it was at first, and should be yet; for it never was divided, but belongs to all for the use of each. For no part has a right to sell, even to each other, much less to strangers – those who want all, and will not do with less.” 8 \textit{THE WORLD’S FAMOUS ORATIONS} 15 (William Jennings Bryan ed., 1906), available at http://www.bartleby.com/268/8/4.html. The intellectual clash between this and a bedrock European notion of private land ownership and management must easily be understood to be both enormous and portentous.

\textsuperscript{15} \textit{JOHN LOCKE, TWO TREATISES OF GOVERNMENT} (Peter Laslett ed., Cambridge University Press 1988) (1690). In raising John Locke as directly as I have here, and in implying as I do the centrality of his jurisprudence in the foundational development of the American experiment, I am well aware of the intellectual controversy surrounding that implication on the part of interested American scholars. Numbering in its ranks such academic luminaries as Carl Becker (\textit{THE DECLARATION OF INDEPENDENCE} (1922)) and Thomas Pangle (\textit{THE SPIRIT OF MODERN REPUBLICANISM: THE MORAL VISION OF THE AMERICAN FOUNDERS AND THE PHILOSOPHY OF LOCKE} (1988)), favoring Locke’s influence in all things early American, and, on the other hand, Bernard Bailyn (\textit{THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION} (1967)), John Pocock (\textit{THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION} (1975)) and Garry Wills (\textit{INVENTING AMERICA: JEFFERSON’S DECLARATION OF INDEPENDENCE} (1978)), challenging that influence, the debate would appear somewhat beside the point for the present purpose. It seems that the matter before the contending scholars does not center on the pure question of \textit{whether} John Locke’s work – particularly that found in his objectively substantial \textit{SECOND TREATISE OF GOVERNMENT} – influenced American formulation, but rather on the more attenuated question of ‘how much’ influence ought reasonably to be assigned to his work in that regard. Given the particular reference to Locke’s work in the present context, it

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century and championing the cause of ‘popular sovereignty’ against the ‘divine right of kings’ toward the end of Britain’s absolute monarchy, Locke proposed a neat and easy means by which all property – realty as well as personalty – might regularly move from the common to the private, born in natural right and supported by the jurisprudence attending. This legal legerdemain was achieved through the alchemistical addition of personal human labor to the common property in question – ‘sweat equity,’ if we might – and the results, for Locke, were remarkably real: property regularly and irrevocably moved from the communal common to the personal private, thereby giving complete control rights to the individual providing the labor – rights defensible against all other competitive claims, both legal and extralegal. “God [having] given the World to Men in common, hath also given them reason to make use of it to the best advantage of Life, and convenience,” Locke wrote, noting the importance of labor – “being the unquestionable Property of the Labourer” – when annexed to property, as giving unique right to and, effectively, title over that property to the laborer, superior in claim to all others. In Locke’s mind, then, the simple, profound results were clear and naturally following: “As much Land as a Man Tills, Plants, Improves, Cultivates and can use the Product of, so much is his Property. He by his Labour does, as it were, inclose it from the Common.”

is neither necessary nor even appropriate to weigh in on that controversy here, either one way or the other.

16 Locke carried the intellectual freight of the popular movement of political sovereignty resting by natural right from God with individual persons, countering Sir Robert Filmer, who distilled the jurisprudential counterargument for ‘the divine right of Kings.’ Indeed, in its original printing, the first of Locke’s two treatises was subtitled (with the author’s confidence, if not his hubris), IN THE FORMER, THE FALSE PRINCIPLES AND FOUNDATIONS OF SIR ROBERT FILMER, AND HIS FOLLOWERS, ARE DETECTED AND OVERTHROWN. Locke’s place in political and philosophical history was forever secured by the outcome of this debate, the colorfully memorialized ‘Glorious Revolution’: Parliament (effectively, ‘the people’) recognized William of Orange’s overthrow of James II only after he agreed to a Bill of Rights acknowledging Parliament’s superior authority.

17 LOCKE, supra note 16, at 328.

18 Id. at 329

19 Id. at 332
Short-formed by subsequent generations of interested scholars with the pastoral aphorism ‘fence and improve,’ the contours of Locke’s arguments were straightforward, even if their implications were revolutionary. Grounding his particular application loosely on God’s primeval command to His creations Adam and Eve to “subdue the Earth,” Locke intellectualized this spare directive as essentially meaning to “improve it for the benefit of Life, and therein lay out something upon it that was his own, his labour.” It was this latter reality, the “something . . . that was his own” that provided the sublime and substantial spark working the magical transformation Locke posited. Thus, for Locke it all too naturally followed that “He that in Obedience to this Command of God, subdued, tilled and sowed any part of it, thereby annexed to it something that was his Property, which another had no Title to, nor could without injury take from him.” In this way, in laboring over land that otherwise lay in common, the laborer indelibly affixed something of himself to that land – his sweat, his spirit, his very nature – creating thereby a pristine bond between the two, establishing on behalf of that laborer unique, unadulterated and unparalleled right over that land to the marked exclusion of all others, in Locke’s fertile and imposing supposition.

Though Locke found it “very easie to conceive without any difficulty, how Labour could at first begin a title in Property in the common things of Nature,” it is simply beyond the scope of this modest work to consider the sheer enormity of his thesis or its centrality and importance in American history. However, neither

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20 Id., paraphrasing Genesis 1:28 (“Be fruitful and multiply, and fill the earth and subdue it; and have dominion over the fish of the sea and over the birds of the air and over everything that moves upon the earth.”)

21 Id. at 333

22 Id.

23 While there is nothing within the pure contours of Locke’s conceptual argument or practical presentation necessarily supporting the gender specificity of the pronoun repeated herein, a quick tour of applicable companion English common law would both justify and even necessitate the pronoun preference opted for here, and hereafter.

24 LOCKE, supra note 16, at 344

25 Historians who have ably undertaken this very task are legion, of course. In her Virgin Land and Savage People, Francis Jennings noted the clear if uneasy

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is it reasonable here to challenge the applicative veracity of this ‘fence and improve’ theory as a good part of the jurisprudential foundation by which land on this continent came uniquely to be held in private by post-colonial America against and above all other competitive claims, especially including those of the pre-occupying American Indians. For John Locke, all of this was firmly and regularly based in the natural law of God and the natural rights that straightforwardly followed. For if a person’s labor was the palpable extension of his will exerted toward a particular end for their own personal good, the raw ability to labor became nothing less than a gift from God Himself for that person’s measurable benefit and that of everyone put by that same God under his charge. Everything, then, to which he annexed his sweat and his spiritual essence became uniquely his own in some real way, giving him singular defensible rights to and over the property in question, rights to be acknowledged by God and honored and respected by all men.  

Implications of the above for African-origin America rooted and grounded in this region of the country ought to be plainly understood and just as plainly appreciated. For if the aboriginal relationship of that people group with the American experience is at its base a ‘slave’ relationship – and this fact is surely beyond dispute – then that relationship was consciously

union of Locke’s sparse words herein and American colonial land objectives, chronicling the inevitable effect of the one on the other. Francis Jennings, Virgin Land and Savage People, 23 AM. Q. 519 (1966), reprinted in EARLY AMERICAN HISTORY: INDIANS AND EUROPEANS: SELECTED ARTICLES ON INDIAN-WHITE RELATIONS IN COLONIAL NORTH AMERICA, at 103 (Peter Charles Hoffer ed., 1988). Wilbur Jacobs made those implications especially clear in his transparently and didactically titled DISPOSSESSING THE AMERICAN INDIANS: INDIANS AND WHITES ON THE COLONIAL FRONTIER (1972). Given the orthodox soundness of this latter connection, and America’s continual lusting after land at all costs following, it is not too strongly put to count these few remarkable words of John Locke, penned toward the end of the seventeenth century, as among the most weighty and cathartic in human history.

26 By way of reminder, this statement is not offered for its essential veracity, but rather instead for its inherent applicability to the American experience generally and to this project particularly. However God in fact views the matter is an issue separate from the fact that John Locke proposed it and, de facto, if not de jure, majority America believed it in some real capacity, and, most importantly, acted upon it.
concerned with both labor and land at its true core and simplest essence. For it was the unique commodity of labor that was at the center of the dark, difficult industry, specifically, the shameless purloining of that commodity by persons who had power to take it but no supporting natural right to it. At the same time, the plainly intended purpose behind the ubiquitous theft was the improvement of land on behalf of the very ones prosecuting this "execrable commerce," to borrow the potent Jeffersonian aphorism. And that is exactly what occurred, popular history plainly relates, first in all of the original thirteen colonies/states,27 and then, uniquely and powerfully, from sprawling Virginia through the Carolinas and Georgia and, in scythe-like fashion west, through the 'deep South' to Texas and beyond.

Following directly from the above, it is contended that at the very least the physical land of the South is rendered different for African-America - jurisprudentially different - spiritually different - than any other of the land of this country by straightforward application of Locke's unique vision. For it is a plain and incontrovertible fact that the labor of the African-American - their sweat, their effort, their work and their blood, figuratively and literally - is all over the particular American territory known popularly as 'the South', with intriguing and complex applications in tow, if John Locke's jurisprudence holds any sway. And neither can the fact of 'slavery' be metaphysically viewed as interrupting this jurisprudential relationship between African-America and this land on a pretext of the labor being owned by and thus ultimately benefiting its majority-culture

27 African slavery was a practical fixture in the earliest days of all but one of the thirteen colonies - Georgia, in its organizing Charter at least - carrying over directly into the initiating statehood of each. All of the states denominated 'northern' had abolished slavery de jure by 1830, though almost all in gradual fashion rather than immediately and categorically, leaving the related de facto position contrapuntal for some time thereafter. Indeed, so gradual was the abolition/emancipation process of some of the northern states that the institution effectively continued within their borders well into the nineteenth century. New Jersey registered 18 'apprentices for life' - rightly categorized as 'slaves' in the corresponding federal census, for 'slaves' in fact they were - at the commencement of the Civil War. See generally United States History in Encyclopedia Britannica at § 101 (1911); see also Joseph C.G. Kennedy, Bureau of the Census, Population of the United States in 1860, at 313 (listing 18 slaves in New Jersey).
owner/controller. For John Locke himself recognized the source of the gift of individual labor to be God and the theft of that commodity therefore to be nothing less than "the State of War continued, between a lawful Conqueror and a Captive" giving the captive an absolute right to freedom from the conqueror, even to "kill[ing] him if I can" as "one who has put himself into a State of War" with that captive. Application of this premise to our own unique history, then, yields an odd, even startling result: by application of even elementary rules of natural law based inheritance regimes and in jurisprudential consequence thereof, African-American has mightily labored over, and thus has come to 'own' in some conceptual way at least, almost all of South Carolina and Georgia and a good deal of northern Florida, Alabama, Mississippi, Virginia, North Carolina, Louisiana, and


29 John Locke's complete statement reads as follows:

[W]here he has no Right, to get me into his Power, let his pretence be what it will, I have no reason to suppose, that he, who would take away my Liberty, would not when he had me in his Power, take away every thing else. And therefore it is lawful for me to treat him, as one who has put himself into a State of War with me, i.e., kill him if I can; for to that hazard does he justly expose himself, whoever introduces a State of War, and is aggressor in it.

Id. at 320-21. He is by no means alone in these sentiments among the great cadre of his fellow enlightenment thinkers and jurisprudes. Montesquieu simply reflected on the institution as "in its own nature bad. It is neither useful to the master nor to the slave; not to the slave, because he can do nothing through a motive of virtue; nor to the master, because by having an unlimited authority over his slave he insensibly accustoms himself to the want of all moral virtues, and thence becomes fierce, hasty, severe, choleric, voluptuous and cruel." CHARLES DE MONTEESQUIEU, L'ESPRIT DES LOIS 235 (Thomas Nugent trans., Hafner Press 1949) (1748). Rousseau would not tolerate even Grotius' limited legitimation of slavery in the 'war conquest' scenario, noting boldly that "[t]he end of war being to subdue the hostile state, the army of one State has a right to kill the defenders of the other while they have arms in their hands; but, as soon as they lay them down and surrender themselves, they cease to be enemies or the instrument of enemies; they become simply men, and the victors have no longer any right over their lives." JEAN-JACQUES ROUSSEAU, LE CONTRAT SOCIAL 12 (Charles Frankel trans., Hafner Publishing Co. 9th ed. 1961) (1762). These represent orthodox denials of the legitimacy of human slavery in its particular American variant, there being no easy jurisprudential support of the institution anywhere in natural rights based Enlightenment philosophy.
Texas. While this point might reasonably be characterized as hyperbolic in some sense (though soberly so to be sure), it is by no means offered frivolously or facetiously. By any fundamental 'natural rights' based jurisprudence of a kind sympathetic with the work of John Locke, African-America has a rich, difficult, exquisite relationship with the terrain of the region, from the scrub pine plains of Virginia and the Carolinas through the deep-water nightmare of Charleston Bay and into the daunting red clay hills of Alabama and beyond, with interesting implications. Neither does it inevitably follow that that people's exodus from that region throughout the first three quarters of the twentieth century would end their mystical connection with it, as Locke would have the matter. To vacate a place as a political or economic refugee is by no means the same as voluntarily resigning that place; in the latter case one takes all of oneself away to a promising new destination, while in the former, one is all too likely to leave one's heart behind, at the least. It is worth remembering this unique connection to land, in its most spiritual sense, in seeking to fully explore and understand African-America's recently documented return to the traditional South, and jurisprudence of the kind foundational to American synthesis and historical development allows us to do just that.

30 Of course, the 'history' underlying this comment is more reflective of myth (particularly the virile myth of the monolithic, antebellum 'South') rather than the well-recovered actual history of the region. In reality, the labor history of the region defied the myth: while it is impossible to overstate the effect of slavery in the cultural landscape of the antebellum South, it is understood that it was by no means the only expression of agrarian development in that region at that time or even the most prevalent means when all is taken into account. Indeed, as historian John Hope Franklin noted in his epic history:

The impression should not be conveyed that the white population of the South, numbering around eight million in 1860, generally enjoyed the fruits of slave labor. There was a remarkable concentration of the slave population in the hands of a relative few. In 1860 there were only 384,884 owners of Negro slaves. Thus, fully three-fourths of the white people of the South had neither slaves nor an immediate economic interest in the maintenance of slavery or the plantation system.

JOHN HOPE FRANKLIN, FROM SLAVERY TO FREEDOM: A HISTORY OF AMERICAN NEGROES 185 (2d ed. 1963). Nevertheless, the point contended for here retains both its vitality and its value.
III. THE LAW AND SLAVERY: A TELLING LEGAL HISTORY

A second, related area of inquiry which law uniquely provides for the examination of the late African-American return to the 'sun belt' region lies in the area of legal history, that discipline offering particular insight into African-America’s special cultural connection to the South. By legal history, of course, I simply reference the particular ways in which law interacts with culture and circumstance to ‘create’ discernible historic truths – law in action, in effect – and, by this abecedarian definition of the discipline, 31 African-America’s deep resonance with the varying rhythms of the region become very clear. For while it is true that Africa counts its own presence in and interconnection with the whole of the American experiment from the experiment’s earliest inception, 32 that presence came in time almost exclusively to reflect Southern regionality and culture, and that by pure application of the law of the day. Thus, African-origin persons were brought by force of positive law into this nation in the legally bulwarked and debilitated social status of ‘slave’, and, by the early part of the nineteenth century, held by law in that status almost exclusively in the region of the South. 33 The implications of these particular truths ought to be reasonably clear:

31 As thus defined, the discipline continues to recognize the foundational work of University of Wisconsin Professor J. Willard Hurst, and to memorialize its continuing debt to him and his accomplishments in this regard.

32 History records the nascence of an African presence in the New World from the earliest decades of the seventeenth century, consonant with the earliest permanent English colonial presence on this continent. John Hope Franklin notes that, “from the very beginning of the Europeans’ exploits in the New World, Negroes came as explorers, servants, and slaves.” FRANKLIN, supra note 30, at 46. Eric Foner concurs, noting, “we shall use the 1619 date as the point of our beginning of the history of the Negro in the United States,” directly connected to the settling of Jamestown, Virginia. HISTORY OF BLACK AMERICANS: FROM AFRICA TO THE EMERGENCE OF THE COTTON KINGDOM 186 (1975). Indeed, that latter date has become orthodox among interested historians seeking to pinpoint the original African-American presence in this ‘New World.’

33 See supra note 27.
while American history synthesizes and chronicles the African-American ‘law-in-action’ experience generally, it is its legal history that best explains that experience, and bids the interested student of the period to look particularly to the South in seeking the breadth of that explanation.

The point to be made here is straightforward in its simplicity even if diabolical in its consequence: by any rudimentary consideration of the historical record, the African-American experience is reasonably and profoundly essentialized as a ‘Southern’ experience and a legal experience at one and the same time. By application of law, of course, African-origin persons were almost universally bound to this region of the American experience and the particular culture rooting and developing in that place. They were imported by customary law – or, after 1808, contra law, by theft, kidnapping and piracy – and that almost exclusively into the South, as Northern abolition and manumission came more and more to define the rule of the day in that region of the nation. They were held by state law in the status of ‘slave’ in the South, the status gaining all of its potency and practical existence from the passing of discrete popular legislation to that effect in state houses across the region,34 and they were forcibly returned by federal law to that tortured region, should their naturally expressed inclination toward personal freedom have ended tragically in ‘fugitive’ capture.35

34 The legal reality of this point was finally underscored for the nation by Justice Joseph Story in his controversial majority opinion in Prigg v. Pennsylvania, 41 U.S. 539, 611 (1842), when he noted, simply and importantly:

By the general law of nations, no nation is bound to recognize the state of slavery, as to foreign slaves found within its territorial dominions, when it is in opposition to its own policy and institutions.

. . . If it does it, it is as a matter of comity, and not as a matter of international right. The state of slavery is deemed to be a mere municipal regulation, founded upon and limited to the range of the territorial laws.

By way of simple fact, at the time of the writing of the above, the only municipalities reflecting ‘territorial laws’ creating the legal status of slavery existed exclusively below the Mason and Dixon demarcation.

35 This was accomplished by application of the infamous, notorious Fugitive Slave Acts, of course, first in its 1793 form (ch. 7, 1 Stat. 302) and finally in its more draconian and culturally incendiary 1850 form (ch. 60, 9 Stat. 462).
Thus, by application of law at each and every turn, the American experience of this remarkable people became more and more completely throughout its history to be a ‘Southern’ experience. In my opinion, far too little has been made of this vital legal historical fact, and the important implications following. For if African-Americans found their way to all regions of the antebellum United States, it remains a point of fact and law that they were found in culturally significant numbers in no other place than that region known by the difficult appellation ‘Dixie’.\(^{36}\) If they can be viewed as having ‘rooted’ anywhere in this culturally arid and hostile land, that ‘rooting’ was legally restricted to the South in every measurable way. The ‘Southern’ experience, then, came eventually and indelibly to be as deeply driven into the soul of African-America as that people’s own lifeblood came to be driven into the very depths of the awful land to which they were so completely and unconscionably bound.

The implications of this inescapable legal historical truth are by no means insignificant nor irrelevant to the present study. Simply stated, either by measurable personal experience or by aboriginal ancestral resonance, or something else or in-between, it does not put the matter too strongly to see the American part of the African-American tableau as foundationally ‘Southern’, and thus African-Americans as ‘Southerners’ in some broad and very fundamental way.\(^{37}\) No less keen a historical thinker and observer than C. Vann Woodward made note of this very fact, capturing

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\(^{36}\) The regional descriptive ‘Dixie’ stemmed from the popular song of the same name, which served as the unofficial anthem of the Confederacy. Written by Southern sympathists in affected, demeaning pseudo-black dialect and originally performed by blackface minstrels, the song told the story of a freed slave who pines for the plantation, itself depicted in a lighthearted and glorified manner. See, e.g., E. LAWRENCE ABEL, SINGING THE NEW NATION: HOW MUSIC SHAPED THE CONFEDERACY, 1861-1865 (2000); HANS NATHAN, DAN EMMETT AND THE RISE OF EARLY NEGRO MINSTRELSY 245 (1962).

\(^{37}\) This should be seen as no strange thing. If the experience of this people was peculiarly reified as a ‘southern’ experience by unique and ubiquitous application of law, this place comes to define that experience but also comes to be configured by it as well. If the ‘South’ has shaped the African-American experience – as it undoubtedly and inevitably has – it has been shaped by it as well, and in no less profound a way. This is important and, in my view, too little has been made of it.
even just a little of its inherent pathos and irony in the process. In his important essay entitled The Search for Southern Identity,38 Professor Woodward highlighted the then present-day failure of "the Negro" to achieve "articulate expression of [his] uniquely un-American experience"39 adding, almost presciently, that, in order to make peace with the experience, "[h]is first step will be an acknowledgment that he is also a Southerner as well as an American."40 In our self-reflective, 1980's era rejection of our color descriptor – 'black' – in favor of our preferred and adopted hyphenated descriptor – 'African-American' – we may well have been psycho-socially attempting to acknowledge Woodward's second identifier; our present day return to the South may well be a subconscious attempt to acknowledge, or even recover and embrace, Woodward's first.

This last possibility, deriving from the unique legal history of the region and thus involving the present day African-American repatriation in some fashion, is crammed full with significance, implicating as it does both Southern mythos and practical reality. For if all cultures in some capacity adopt as useful history a kind of reified myth, allowing them to 'smooth over the wrinkles' in their public story in an effective way, the South has naturally (and inevitably) engaged in this exercise with greater earnestness and intensity than most.41 Generally speaking, this is not wrong in and


39 Id. at 22, employing the parlance of his day.

40 Id.

41 To appreciate fully the point being advanced here, one need only look to the vigorous, configuring myth of the antebellum South itself: giant Georgian style homes, huge plantations, a mint julep here or there, timely and tantalizing, and, as necessary – but only 'as necessary' – happy, contented slaves – if slaves are in the picture at all. Slave ownership at its acme represented no more than 10 percent of the Southern agrarian mosaic, the remaining supermajority completing the difficult task of wrestling a living from their soil in the more conventional, Biblically-prescribed way: by the sweat of their own brows. The preferred Southern history/myth finds its roots not in the earthy truth of antebellum Southern life but rather much more in the pages of Margaret Mitchell or in the film rushes of David O. Selznick. See MARGARET MITCHELL,
of itself, and is more often than not constructive in fact, or neutral in application at the worst. However, when that myth becomes so absolutely sanitized that a significant subset of a culture’s natural constituency can no longer find themselves in it in any creditable fashion, as is undeniably the case when the present Southern myth is even cursorily referenced by its constituents of color, then that myth becomes itself a barrier to the positive culture-building which historical myth is designed to facilitate. In light of the most recent Census 2000 results, as touching the African-American trend considered herein, there is every reason and necessity for this possibility to be thoroughly canvassed and well considered.

Specifically, if African-Americans are returning in statistically significant numbers as de facto ‘Southerners’ to this region of historical angst and present-day opportunity, it is not an idle exercise self-consciously to consider “what ‘South’ they are ultimately returning to?” This involves introspective review of both the ‘practical’ South awaiting the re-involvement of this unique and regionally significant people-group, and the ‘symbolic’ South as well. Practically, the repatriation in question appears to be somewhat urbanized, involving as it statistically does significant middle class status, values and character among the majority of the returnees. This being the case, how valuable it would be for African-American repatriates to see themselves well-reflected professionally and infrastructurally in the land of their choice and voluntary return. In this way, African-American lawyers and doctors and teachers and police officers and judges and planners and politicians become not simply tolerated ‘affirmative’ outcomes but rather necessary and valuable ‘character lines’

GONE WITH THE WIND (1936); GONE WITH THE WIND (Selznick Int’l Pictures 1939).

42 Here I am simply referencing constructive benefits inuring to a culture by preferring reified myth as history, the reason why the ubiquitous practice is engaged in to begin with. A good (if easy) example of this may be found in the constant reference to our national ‘freedom loving’ nature as a motivating icon for the present ‘war’ with Iraq. In seeking the clearly intended result it would simply not do at all for us to reference the all too prevalent instances of destructive totalitarianism and the like littered across our ‘freedom loving’ past, given the needs of the day. Thus, myth naturally wins out over reality, and the cultural beat goes on.
in the ‘face’ of the ‘New South,’ if you will.

The matter of the symbolic South greeting these important returnees is at once more pristine, promising and problematic. For if cultures favor symbols generally in characterizing, defining and expressing themselves, the South has been more reliant on this process and these things than most. However, rather than developing new symbols to more fully express its new emergent self, majority-culture Southerners have far preferred and stubbornly clung to old symbols, symbols from its compromised past, contentious and divisive at their core, given the region’s easily referenced and well-appreciated politico-racial history. This, then, poses an important and imposing dilemma for the ‘New South’ in light of the present statistical trend at the heart of this study. In the face of the backflow of African-Americans to this region of both historical root and antipathy, and in the shadow of the cultural détente inevitably implied in that trend, what is the continuing and enduring place of such socially electrifying icons as ‘rebel flag’ depictions or publicly displayed memorials to ‘Confederate War dead,’ for example?

Of course, the first of the above-considered symbols is a treacherous and slippery icon indeed. Of attenuated political centrality during the region’s short, violent life as the Confederate States of America, the particular flag in question did not become centralized in broader American culture until long after the Civil War, and then through direct connection with the resurrection of the ‘ghosts of the Confederate war dead’ in the macabre specter of the Ku Klux Klan, and other similarly tendentious and incendiary

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43 Though clearly the most prominent of many visual symbols among Confederate troops on the various battlefields of the Civil War, “[t]he familiar red flag with a star-studded blue diagonal cross was never the national flag of the Confederate States of America.” JOHN M. COSKI, THE CONFEDERATE BATTLE FLAG: AMERICA’S MOST EMBATTLED EMBLEM 1 (2005).

44 That the origin of this bizarre group is superstitiously and inexorably connected to occult notions of the resurrected spirits of the dead confederacy is beyond question. Robert Selph Henry noted, in this regard:

The new order (of the Ku Klux Klan) began to hold its meetings in a ruined house on a lonely hill in the outskirts of Pulaski (Tennessee) – the sort of house in which the South is apt to become known as “haunted.” It became noised abroad among the Negroes that the ‘ha’nts’ of dead Confederate soldiers were meeting in the old house and marching about the country. That was enough. The Klan had

https://scholarship.law.upenn.edu/jlasc/vol9/iss1/4
groups. In this way the flag is much more properly associated with that sect and the vicious culture embracing it, than with that war itself. Thus, in the 'heritage, not hate' apologetic lately referenced in support of the dissembling icon, we are compelled to find a conundrum, and, ultimately, a falsity: more precisely associated with the post-Civil War South and the 'heritage of hate' ineluctably defining that period, the icon in question cannot reasonably be reified generally as a positive or constructive symbol and, as such, renders only disharmony at its true center. In this way, present-day Southern resolve to stubbornly cleave to a symbol of such dubious historicity and tendentious cultural orthodoxy which at the same time provides natural and understandable offense to a significant subset of fellow Southerners becomes problematic in the extreme.

I suspect the second of these symbols is driven even more deeply into the majority-culture Southern psyche than the first, given its more direct connection with the most visceral and

stumbled upon a power mightier than that of the law, superstitious terror, which was soon recognized, carefully cultivated and preserved.

"FIRST WITH THE MOST": FORREST 443 (1944). See also WILLIAM PEIRCE RANDEL, THE KU KLUX KLAN: A CENTURY OF INFAMY 8-9 (1965) ("One unexpected result [of the robbing and public display of the first 'klansman'] reported by various observers, was that the superstitious Negroes had . . . taken the riders for ghosts of the Confederate dead."); WYN CRAIG WADE, THE FIERY CROSS: THE KU KLUX KLAN IN AMERICA 35 (1987) ("According to the original Klansman, the 'impression sought to be made upon' the freedmen 'was that these white-robed might prowlers were the ghost of the Confederate dead, who had arisen from their graves in order to wreak vengeance on an undesir able class' of people.") That the particular symbol popularly recovered as the 'rebel flag' is inextirpably connected to that brigand cult is plainly attested to in its own photographic history, if nothing else: wherever flag symbols are referenced in Klan activity, the depiction of the American flag in tandem with the 'stars 'n bars' is all but ubiquitous. The adoption of that symbol by that group came late, to be sure - "[t]he earliest documented use of Confederate symbols by the Ku Klux Klan was in it third incarnation in the late 1930s and 1940s" (COSKI, supra note 43, at 87) - but the interconnection of the symbol with the group is indisputable, and virile. This fact alone ought to be troubling in the extreme for those continuing to revere the symbol in some measurable way.

animating icon in Southern cultural history: the Civil War. Yet here too we find an odd and disquieting symbol wherever it presents itself across the face of the hamlets and boroughs of the broader Southern experience. Heroism and bravery are admirable qualities wherever and in whatever circumstances they are found and ought rightly to be memorialized by the culture observing and benefiting from them. However, it is an absolute and irrevocable truism that they ought to be publicly celebrated beyond memorial only when naturally, easily and uncontestedly amalgamated to an objectively just and righteous cause. That simply cannot be the case in the broadest understanding of the matters in question, and African-origin America both resident in the region and presently returning stands in potent and important testimony to that straightforward reality.

By the above I do not mean to challenge Southern right to choose its own symbols nor to begin to enter into the labyrinthine consideration of why those particular symbols have come to occupy so central a place in Southern cultural expression. Instead, I hope to reference another Southern icon even more foundationally central to that culture than either of the ultimately peripheral symbols addressed above – good neighborliness – and ask what that might require in consequence of the dramatic changes presented and reflected in the Census 2000 data. For, in the face of present population changes, that superior icon might alert this culture to the opportunities presented by the demographic trend, opportunities which might best be understood in terms of present loss and future gain. Here the short-term cost of the loss of the confounding, conflicted symbols discussed above and presently occupying the majority culture South would be far surpassed by the ultimate gain to be experienced and enjoyed by all Southerners, those present and those presently returning, through creative and configurative replacements. The greatly enhanced harmonic and humanized cultural communion flowing from both the removal of the symbols and the gracious and spiritually significant act of removing might have its own dramatic and cathartic possibilities for both the region and even the nation.
IV. CONCLUSION: COMING ‘HOME’

By way of illustrative conclusion, let me reference my personal experience – my own ‘there and back again.’ Raised for my formative educational years in the backwaters of eastern North Carolina, my flight from my home state in 1981 – born as it was from an intensity of youth and an honest, deep ennui with all things ‘Southern’ at that point in my African-American life – might be understood as a deliberate expatriation. I could not then have articulated the source of my dissatisfaction with Southern life, but I certainly felt that dissatisfaction just as keenly as I felt the key to its alleviation lay in leaving the region. Tracing the footsteps of many a freedom-seeking African-American of earlier years, I ‘followed the drinking gourd’ north to Canada, confident in the cold-blooded understanding that, beyond the obligatory visits to family and the odd friend, I would never live in this region of my country again. Through each of the rather radical moves of my adult life, to Canada for 14 vital years, then to Wisconsin, Maine and California in rapid succession thereafter, I held true to my original parting commitment, steadfastly remaining deliberately apart from all things ‘Southern.’

Consequently, it was with some ironic surprise that a phone call from a North Carolina law school inviting me to consider a return to the South struck me as both odd and interesting, but not as wrong. For I had been away from my family home for almost 20 years by then, having married, undertaken the daunting task of helping to raise three children and commenced my teaching career. My post-Southern life had been full, interesting and challenging, to be sure, providing many valuable experiences while carrying myself and my family to different geographic regions and different cultural communities across North America, special benefits inuring all along the way. However, for all its richness, my life on the move had not produced for myself or my family a home in any reasonable understanding of that icon, and, what’s more, this reality had not escaped me. What was meant, then, by this phone call, at that critical point in my own professional life and my family’s personal journey, and what did the South have to do with all or any of this?

It was in this state of mind and spirit that I deliberately reconsidered my vow of 20 years earlier, turning my thoughts, if
not yet my heart, back south. And through the several cross-
country exploratory visits back to the land of my expatriation,
while carefully mulling over the wisdom of yet another colossally
disruptive family move – what was to be our fourth major one in
five years – I was genuinely surprised by the pleasant familiarity of
the land, even those many years removed. For, as it turned out, I
was not coming to a foreign place, but rather to a warmly familiar
one, a place of ‘visitin’ in public venues, obligatory
acknowledgments both of and by strangers, and six different ways
along pastoral country roads to get anywhere you desired to go.46
And so the decision was made, much more regularly and easily
than I ever would have expected through the time of my regional
exile, and I and my four fellow travelers entered the stream of the
almost 3.6 million African-American Southern returnees, in the
very year of the closing of the census profile. And, just as
surprisingly, though comfortably so, I knew that whatever I had
somewhat desperately and deliberately left behind those twenty
years earlier, I was returning to a place that very much felt like
‘home’.

This, then, in the end, is the operative word, the word
existing outside the vocabulary of demography and law pro forma,
but which is in some real way implicated in both jurisprudence
generally and the particular legal history strongly tying this people
with this region. Home. Along with the many other valid reasons
drawing people of all kinds to this region, could it be that African-
America is heeding a call to return ‘home’ in some visceral,
bedrock sense of the term? Could it be that the surface-level
amelioration of macro-racial tensions in the region has allowed this
people the exquisite, introspective opportunity of reconsidering its
own heart in this matter? Could it be that both jurisprudence and
legal history are chronicling and highlighting a trend far deeper
and more spiritually grounded than that with which either
discipline is usually occupied: African-origin America’s return
‘home’?

Let me suggest that the significance of this last possibility
cannot easily be overstated, and for this reason should not be

46 This latter remembrance was especially gratifying and attractive to me, having
by then spent far too many tense and dangerous moments on the Ventura
Highway and the L.A. Freeway.
quickly passed by. For if anything is clear from the dismal statistics describing and, increasingly, defining African-origin America’s American experience over the last third of our twentieth century and the beginning of our twenty-first at least, it is simply and undeniably this: the community as a whole remains deeply separated from and profoundly ambivalent to the ‘American Dream.’\textsuperscript{47} The negative legacy of this fact is splashed across the print and broadcast media of this nation daily, and its negative implications are experienced throughout the breadth of African-America and, in a very real way, across the face of the only nation in the world truly holding the promise of ‘home’ for this community. It is the promise that is key and perhaps it is the South where that promise will begin to be realized, or is beginning to be realized, if these present suggestions are correct and the present trends are at all prescriptive. African-America’s checkered historical connection to the region ought not to be seen intellectually as a barrier to this possibility, in and of itself, for it is useful to remember here that a place need not necessarily be positive to be home, but instead need only to be yours.

Should this be the case – and the tools of jurisprudence and legal history as recovered here at least somewhat suggest this possibility – majority culture America uniquely connected to the ethos and pathos of the South would do well to take heed. Little is clearer than the reality that, even almost four hundred years into our tortured, shared history, race still ‘matters’\textsuperscript{48} in an almost tragic sense for a nation where it ought profoundly not to. The present return of African-America to the South may signal that community’s desire to begin making its spiritual peace with the region and thereby to begin to reinvigorate fellowship with it.

\textsuperscript{47} Here the reader ought to receive this term in this context not simply in its ‘popular cultural’ form but also as it anchored the iconic presentation of one of America’s most configuring historical icons, Dr. Martin Luther King, Jr. See Martin Luther King, Jr., Address at the March on Washington for Jobs and Freedom (Aug. 22, 1963), available at http://www.stanford.edu/group/King/publications/speeches/address_at_march_on_washington.pdf (“I still have a dream. It is a dream deeply rooted in the American dream.”)

\textsuperscript{48} Here, of course, I am borrowing from the provocative title of Professor Cornel West’s important volume, \textit{Race Matters} (1993), and at least indirectly referencing its vital theme.
Should this even possibly be the case, it is not too much to ask
those present keepers of the Southern cultural experience to deeply
reflect on what it might do – what it might be required to do, what
it might be privileged to do – to hasten such a process along. For
if any settling of the 'race question' in the South in appreciable
measure is a settling of that question for the nation, what a gift that
would be, in the end, from a region so very aware of the source,
history and quality of the problem, and, perhaps in consequence, so
uniquely situated to do something pristinely eleemosynary – and
vitally necessary – about it.