Vanderbilt Law Review

Volume 32
Issue 1 *Issue 1 - Symposia: The Legal History of the South*

Article 3

1-1979

Reason of Slavery: Understanding the Judicial Role in the Peculiar Institution (Part One)

Robert B. Jones

Comment: Reason of Slavery: Understanding the Judicial Role in the Peculiar Institution (Part One)†

*Robert B. Jones**

The scholarly work of Professor A. E. Keir Nash, together with the works of Arthur Howington, Mark Tushnet, and others, represents a significant new attempt to probe the complexities of the institution of slavery in the South. Serious students of slavery usually begin their reading with the works of Ulrich B. Phillips. A Georgian and a tireless researcher, Phillips began at the turn of the century a life-long study of slavery that led to the publication of *American Negro Slavery*[1] and *Life and Labor in the Old South.*[2] Convinced that plantation records were a more reliable source of information on slavery than the accounts of slave runaways, travelers, and others, Professor Phillips characterized slavery in the antebellum South in favorable terms. To Phillips, it was a system that in practice was far gentler than its legal framework would suggest. Phillips' work eventually was challenged, however, by Richard Hofstadter, Kenneth Stampp, and others.

The most important challenge to the Phillips view came from Stampp in his book, *The Peculiar Institution,*[3] which depicted slavery as a far more brutal, dehumanizing institution. Stampp also emphasized slave resistance to bondage through rebellion, flight, and other more subtle forms of resistance. He devoted a chapter in his synthesis to the slave codes, but essentially it did not go beyond a description of the legal statutes affecting slaves and recognition that there were variations in the codes from state to state and from the Deep South to the Upper South. Neither Phillips nor Stampp dealt in great depth with the questions of how slave laws were applied, nor did they concern themselves with the development of judicial attitudes toward slave law and slavery that might have tended to heighten or lessen the severity of the slave system.

Since the appearance of *The Peculiar Institution,* a number of authors have contributed important new works to this field. In 1959,

---

† At the Legal History of the South symposium in April 1978 Professor Nash delivered, and Professor Jones commented upon, only Part One of the three-part Nash article that appears in this issue of the *Law Review*. Thus, Professor Jones' comment focuses solely upon Part One of the Nash article.

* Associate Professor of History, Middle Tennessee State University. B.A., University of Virginia, 1964; M.A., Vanderbilt University, 1968; Ph.D., Vanderbilt University, 1972.

1. U. PHILLIPS, AMERICAN NEGRO SLAVERY (1928).
2. U. PHILLIPS, LIFE AND LABOR IN THE OLD SOUTH (1929).
3. K. STAMPP, THE PECULIAR INSTITUTION (1956).

Stanley M. Elkins published *Slavery*.[4] Elkins, following a path first blazed by Frank Tannenbaum with his volume, *Slave and Citizen: The Negro in the Americas*,[5] urged scholars to address the question whether slavery in British North America evolved in different directions than those taken by the institution in other parts of the world. Undoubtedly, the most controversial section of his work is Elkins' comparison of the psychological effects of slavery with those produced in Nazi concentration camps. In the last dozen years, Eugene Genovese has published three especially significant works, *The Political Economy of Slavery*,[6] *The World the Slaveholders Made*,[7] and *Roll, Jordan, Roll: The World the Slaves Made*,[8] that address the nature of southern society, the relationship of slavery in the United States to slavery in Latin America, and the worlds created by slaveowners and slaves in their relationship to one another. Genovese's work has been somewhat eclipsed by the publication of the controversial volume, *Time on the Cross: The Economics of American Negro Slavery*,[9] by the cliometricians, Robert Fogel and Stanley Engerman. These two authors argue in revisionist style that too many scholars have exaggerated the severity of slavery. The interpretations of Fogel and Engerman, and those of Genovese, currently occupy the center of the stage in the continuing scholarly discourse on the nature of slavery.

This brief survey has superficially touched upon the most prominent works of the historiography of slavery and has ignored the large mass of work on subjects such as slavery in the various states, slave rebellions, slave reminiscences, and the anti-slavery crusade. With the exception of the Civil War, perhaps more has been written about slavery than any other aspect of southern history. Despite the great amount of scholarship devoted to the study of slavery, however, there has been, as Keir Nash points out, little scholarly work done on the legal history of slavery. One hopes this gap will be bridged in years to come through the efforts of Professor Nash and others who already are working in this area, and through the efforts of additional scholars who will turn to this subject. In the interim, however, the historiography of law and slavery will continue to exhibit traits that apparently generated Professor Nash's criticism of other works in the field; these traits, however, are char-

4. S. ELKINS, SLAVERY (1959).
5. F. TANNENBAUM, SLAVE AND CITIZEN: THE NEGRO IN THE AMERICAS (1946).
6. E. GENOVESE, THE POLITICAL ECONOMY OF SLAVERY (1965).
7. E. GENOVESE, THE WORLD THE SLAVEHOLDERS MADE (1969).
8. E. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE (1974).
9. R. FOGEL & S. ENGERMAN, TIME ON THE CROSS: THE ECONOMICS OF AMERICAN NEGRO SLAVERY (1974).

acteristic of any new field of inquiry. For example, because the field is large and the number of scholars are few, their works are not easily compared. Moreover, this area lacks both published syntheses that develop broad interpretative patterns for the legal history of slavery and studies at the grass roots level that analyze the workings of the lower courts in the slave states. If the experience of other fields provides any guidance, this synthesizing will be accomplished before all of the state-level work appears. For example, in 1951, C. Vann Woodward published his *Origins of the New South, 1877-1918*,[10] a magnificent interpretative study of the late nineteenth-century South, well before many historians published state-level monographs. Woodward's basic interpretations have stood the test of time remarkably well, as a wealth of works focusing on the local and state level have appeared.

Finally, the studies already published reflect the individual philosophical and methodological perspectives of the authors and dramatize their present lack of consensus. Fully formed schools of thought or interpretative camps have yet to appear. There is so much initial groundbreaking to be done that the stage in which a new generation reevaluates and reinterprets the scholarship of its predecessor, so typical of the historiography of the South in many aspects, is well into the future for the legal history of slavery. For example, although authors in the field agree that to understand the growth of slave law one must understand the autonomous aspects of legal change, there is less agreement as to what extent developments in legal history reveal a greater understanding of southern society. It would not be surprising if the latter point were to be a source of scholarly disagreement for years to come. A clear difference in the perspectives of scholars emerges when they reach their conclusions concerning the relationship of the legal system to the institution of slavery as a whole. The optimist and pessimist see this role in decidedly different lights, and this difference of view likely will remain a prevailing characteristic of this field as it has in the general historiography of slavery.

Professor Nash presents, in Part One of his multi-part work, an in-depth analysis of the historiography of slavery and the law. He mixes a critique of other authors' work with his own findings and convictions concerning the directions further inquiry should take. There is no point in attempting an extensive examination of Professor Nash's critique of the works of other scholars in the field. Nash's dissection of these works is skillful, but at times excessively bela-

10. C. WOODWARD, ORIGINS OF THE NEW SOUTH, 1877-1918 (1951).

bored. A few words are in order, however, about Nash's analysis of an article by Michael Hindus entitled "Black Justice Under White Law: Criminal Prosecutions of Blacks in Antebellum South Carolina."[11] Nash's critique of the Hindus article attempts to show that the evidence presented by a scholar of the "empty glass" Whiggery persuasion in evaluating the legal history of slavery can be seen in a different light by a proponent of the "ameliorative" Whiggery school. The latter is Professor Nash's interpretative preference. Although his opening remarks concerning the Hindus work are complimentary, his conclusions are less positive. While in the main Nash develops convincing arguments for an interpretative reversal of Hindus' conclusions, his zeal occasionally leads him onto thin ice.

For example, in presenting his paper last spring, Nash, an "ameliorist" Whig, reached rather far afield to find support for a positive outlook when he criticized Hindus for comparing South Carolina's punishment of slaves with the state of Massachusetts' practices in the punishment of criminals. Nash developed an alternative comparison between South Carolina slave whipping and the punishments administered by the British navy, an organization hardly known for its restraint in administering corporal punishment. Similarly, Nash strained to contrast execution rates for South Carolina slaves convicted of crimes with criminal execution rates for London and Middlesex County. This commentator contended that comparisons of the South Carolina data with similar information from another slave state or even other free states besides Massachusetts would be of much more value.

Professor Nash addresses this point by presenting data gathered recently by Arthur Howington involving slave and free Negro cases in the lower court systems of six Tennessee counties. This new information provides a valuable contrast to the data contained in the Michael Hindus article and strengthens Nash's argument for scholarly awareness of diversity among state and local systems in their handling of slave cases. Nash correctly calls for more research similar to that attempted by Hindus and Howington before broad generalizations about slave-state legal systems' relationships to slavery are made.

Nash concludes the first part of his Article by identifying six outstanding issues in the study of the legal history of slavery. They are all very important, and although Nash declares he wishes to withhold his conclusions on all but one issue for a later section in

11. Hindus, *Black Justice Under White Law: Criminal Prosecutions of Blacks in Antebellum South Carolina*, 63 J. AM. HIST. 575 (1976).

the article, readers of this Article and Keir Nash's other published work should have little difficulty in identifying his position on these issues. Nash makes a compelling call for the use of scholarly approaches that will recognize and assess in a balanced way the diversity in the ranks of the southern judiciary and among the different court systems in the South. This approach will yield the greatest understanding of the southern legal systems' treatment of slavery and the relationship of that treatment to the views of white southerners in general. In summary, Nash's critique, although excessively long and at times somewhat rambling, provides a thoughtful, perceptive, and potentially valuable analysis of an emerging feild of historical endeavor. To use Kier Nash's analogy, the glass of the legal history of slavery is half-full and destined, one hopes, to fill to the brim.