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SLAVERY, PROPERTY, AND MARSHALL IN THE POSITIVIST LEGAL TRADITION

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In 1819, a ship called the *Columbia* departed from Baltimore Harbor with a crew from the United States and flying under Venezuelan colors.¹ Shortly after leaving Baltimore, the crew changed the ship's colors to the Republic of Artega (later known as the Oriental Republic) and changed the ship's name to the *Arraganta*.² The crew then took into its possession enslaved humans from

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¹ JOHN T. NOONAN JR., *THE ANTELOPE: THE ORDEAL OF THE RECAPTURED AFRICANS IN THE ADMINISTRATIONS OF JAMES MONROE AND JOHN QUINCY ADAMS* 26-27 (1990). The ship, captained by Admiral Louis Brion, a Venezuelan revolutionary, arrived in Baltimore Harbor carrying only two other sailors. *Id.* at 27. Jose Artigas, the leader of Uruguay's Oriental Revolution, sent blank sailor commissions to Admiral Brion with which he recruited Baltimore's entrepreneurs wishing to engage in the slave trade. *Id.* Shortly thereafter, approximately thirty sailors swore before a Justice of the Peace that they were not American citizens, after which the *Columbia* set sail. *Id.*

² The *Antelope*, 23 U.S. (10 Wheat.) 66 (1825). (Chief Justice John Marshall described the ship as flying under the colors of the "Oriental Republic"). Noonan explains that the purpose of the voyage was to "make war on the Ships of Spain and Portugal" under signed commissions of "José Artitagas, Chief of the Easterners and Protector of the Free Peoples the Eastern Republic." NOONAN, *supra* note 1, at 26.

several ships flying under different countries' colors.³ They took possession of slaves from a U.S. vessel called the *Exchange*; they attacked two unnamed Portuguese ships along the African Coast and took enslaved humans as their bounty;⁴ and, finally, they captured a Spanish ship, the *Antelope*, also carrying slaves.⁵ The two ships, the *Arraganta* and the *Antelope*, then set sail for Brazil.⁶ Along the way, the *Arraganta* wrecked, and the crew and remaining slaves were moved to the *Antelope* to continue their journey to a new destination—Florida.⁷ On June 29, 1820, the USS *Dallas*, a revenue cutter, seized the *Antelope* under suspicion of engaging in the transatlantic slave trade and escorted her to the port at St. Mary's Island off the east coast of Florida.⁸ She was later removed to the District of Savannah, Georgia, where the crew and human cargo awaited disposition—a process that would take nearly seven years before some of the Africans on board were returned to the African Continent.

Chief Justice John Marshall, in a series of United States Supreme Court opinions, considered whether the United States should respect the property claims by unknown masters (both foreign and domestic).⁹ While the United States was notoriously entwined in a society and economy that depended heavily on human chattel slavery, the Slave Trade Prohibition Act of March 2, 1807, prohibited actions that brought these particular Africans to the Western

³ See NOONAN, *supra* note 1, at 26. Amongst other exploits, the ship's crew boarded an American ship, chased an English brig, attacked a Spanish ship, fired on Portuguese forts, and boarded another empty American vessel. *Id.* at 27.

⁴ Again, Noonan reports that the crew was recruited "on the basis of shares in prizes to be taken," and, for some, the prospect of an "inexpensive entry into the slave market was appealing." *Id.* at 27.

⁵ During the course of its voyage, the ship's crew took possession of 280 Africans onboard American, Spanish, and Portuguese vessels. *Id.* at 28-30. Notably, Noonan suggests that only twenty-five of these Africans were apprehended aboard an American vessel. *Id.* at 28.

⁶ While en route, the crew unsuccessfully attempted to sell the slave cargo to Dutch traders for \$80,000. The Dutch counter-offered \$50,000, which was rejected, and the two ships continued on to St. Bartholomew. *Id.* at 30.

⁷ *Id.* Florida, having been ceded by Spain to the United States but remaining in Spanish hands, seemed to present a reasonable passage into the United States market for slave cargo. As she made her way through a passage in the Caribbean known as the "Hole-in-the-Wall," the *Antelope* set her sights on the Eastern Seaboard of Florida. Once off the shore of St. Augustine, Florida, she raised an American flag and waited for a signal from shore. *Id.*

⁸ *Id.* at 31-32; see also *The Antelope*, 23 U.S. (10 Wheat.) at 68 (summarizing the facts on appeal surrounding the seizure and disposition of the African "cargo").

⁹ Three cases were decided relating to the disposition of the Africans aboard the ship *Antelope*. All three cases are titled *The Antelope*. The first case, 23 U.S. (10 Wheat.) 66 (1825), was the longest opinion of the three and dealt most directly with questions of property and comity. The second case, 24 U.S. (11 Wheat.) 413 (1825), was an order mandating that the Spanish claimant provide proof before the Africans could be delivered. The third case, 25 U.S. (12 Wheat.) 546 (1826), considered whether the Africans could be detained by the Marshal of the District of Savannah, Georgia, for failure of payment for their upkeep by the U.S. Government.

Hemisphere.¹⁰ Marshall's opinion confronts the legal tension present when one sovereign entity endorses an action deemed morally prohibitive by another. In this case, the Court, as decisionmaker in the dispute, found itself validating the existence of an institution that could find no validation under U.S. law. This occurred despite the moral objections of Marshall or the rhetorical conflict that U.S. narratives of liberty, equality, and justice presented towards the problem.

I want to elaborate on this difficulty of defining moral problems by reference to their tangible impacts on people. Property is an apt subject for doing so, and slavery even more so. In property, we lay claims to things that supposedly are endorsed by our society and its laws.¹¹ Yet, moral claims arise despite the legal validation of the property claim. Should a company be entitled to move its operations elsewhere in order to reduce its costs even though this act imposes a great cost on its employees?¹² Can companies engage in pollution because its product is needed by society, or should there be greater constraints on production?¹³ These questions are often framed in the context of property through the lens of the owner, rather than considered from a broader perspective. As Joseph Singer has suggested in other contexts, starting from the question of ownership is often the wrong question because it frames the conversation as one solely pitting individual rights against social interests.¹⁴

Elaborating further on this question of morality in property, one must start from some place different. Chief Justice John Marshall approached the basic problem of how a property regime (slavery) responds to a moral shift.¹⁵ The United States, it has been said, was founded on slavery.¹⁶ The slavery institution

¹⁰ Act Prohibiting Importation of Slaves, ch. 22, 2 Stat. 426 (1807) (current version at 18 U.S.C. § 1590 (2008)) (“An Act to prohibit the importation of Slaves into any port or place within the jurisdiction of the United States . . .”). Notably, the Act has been examined in a number of contexts, including: (1) as a stage of the overall abolition movement, see Lorenzo Dow Turner, *Conclusion*, 14 J. NEGRO HIST. 489 (1929); (2) as a movement toward securing a more palatable and morally acceptable form of slavery, see PETER KOLCHIN, *AMERICAN SLAVERY: 1619-1877* (Eric Foner ed., 2003); and (3) as a moment of international moral cooperation, see J.R. Kerr-Ritchie, *Reflections on the Bicentennial of the Abolition of the British Slave Trade*, 93 J. AFR. AM. HIST. 532 (2008).

¹¹ See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

¹² See Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988) (noting that the imbalance of power in these situations is not easily remedied without requiring companies to consider the externalities involved in these scenarios, and that such arrangements “are indifferent to the rights and needs of third parties” and negatively affect society as a whole).

¹³ Doug Rendleman, *Rejecting Property Rules—Liability Rules for Boomer's Nuisance Remedy: The Last Tour You Need of Calabresi and Melamed's Cathedral*, in REMEDIES AND PROPERTY 43 (Russell Weaver & François Lichère eds., 2013) (Rendleman uses the example of particulate pollution cases to illustrate and analyze human decisionmaking and the law), available at http://works.bepress.com/doug_rendleman/67.

¹⁴ See Singer, *supra* note 12.

¹⁵ See, e.g., *The Antelope*, 23 U.S. (10 Wheat) 66 (1825).

¹⁶ See, e.g., EDWARD E. BAPTIST, *THE HALF HAS NEVER BEEN TOLD: SLAVERY AND THE MAKING OF AMERICAN CAPITALISM* (2014) (arguing that American commerce derived from the human chattel, slave trade economy).

was supported by the transatlantic slave trade, a harrowing and difficult journey in which many Africans died in transit on their way to become slaves in the New World. In 1807, the United States and Great Britain collaboratively attempted to end the international slave trade by passing respective laws banning further importation of slaves to their territories.¹⁷ Much, though not all, of the rhetoric supporting the end to the trade was based on morality. Some classic social ordering theory and some economic theory were also cast in support of ending the international slave trade in the United States.¹⁸ But primarily, taking Marshall's opinion at face value, this was a moralist's question. To this end, Marshall's opinion in *The Antelope* demonstrates the classic way in which property fails to account for the moral question by reverting to traditional tropes of ownership, authority, and entitlement. In Marshall's view, by defining property and non-property, the law is excused from engaging in the harder, more rhetorical ground of morality. Thus, Marshall portrays the moral question as binaries of legitimacy versus non-legitimacy or authority versus non-authority.

Marshall began his opinion by relating the property interests held by the disputants.¹⁹ While the United States claimed no interest, the consuls of Spain and Portugal appeared as representatives of property owners from those respective countries. In laying out these positions, Marshall contrasted the moral sources for the claims by both parties. The United States appearing as "guardians, or next of friends, of these Africans, who are brought, without any act of their own, into the bosom of our country,"²⁰ depicted the United States as "insist[ing] on their right to freedom"²¹ in the rhetorical tradition of a sanctuary from oppression. "Bosom of liberty" was a popular phrase used to describe the United States as the physical location where liberty opposed tyranny through vestiges of liberty-ensuring protection.²² Ironically, the phrase was used regularly to contrast the claims of liberty with the contradictions of slavery.²³ Opposing

¹⁷ See Act Prohibiting Importation of Slaves, ch. 22, 2 Stat. 426 (1807) (current version at 18 U.S.C. § 1590 (2008)) (prohibiting the slave trade in the United States); Abolition of the Slave Trade Act, 1807, 47 Geo. 3, c. 36 (1807) (U.K.) (prohibiting the slave trade in Great Britain); see also KOLCHIN, *supra* note 10, at 70-80.

¹⁸ KOLCHIN, *supra* note 10, at 70-80.

¹⁹ *The Antelope*, 23 U.S. (10 Wheat.) at 70-77.

²⁰ *Id.* at 114.

²¹ *Id.*

²² See Neil Miller Brody, "Proper Subjects for Public Inquiry": *The First Unitarian Controversy and the Transformation of Federalist Print Culture*, 43 EARLY AM. LIT. 101, 101-35 (2008) (describing the use of the phrase "bosom of liberty" to describe the role of press and freedom of discourse in the New Republic); see also Thomas Tredwell, New York Ratifying Convention (July 2, 1788), in 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 398, 398-400 (Jonathan Elliot ed., 2d ed. 1888), available at <http://press-pubs.uchicago.edu/founders/documents/v1ch14s44.html> (last visited July 24, 2015); Joyce Zonana, *The Sultan and the Slave: Feminist Orientalism and the Structure of "Jane Eyre"*, 18 SIGNS 592, 599 (1993).

²³ See, e.g., David W. Robson, *Anticipating the Brethren: The Reverend Charles Nisbet Critiques the French Revolution*, 121 PA. MAG. HIST. & BIOGRAPHY 303, 319 (1997)

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the United States were claims (to Africans) that arose in the “regular course of legitimate commerce,” “acquired as property by the subjects of their respective sovereigns, and claim[ing] their restitution under the laws of the United States.”²⁴ Framing this question, Marshall noted that the claims of the sacred rights of liberty found themselves in direct conflict with the rights of property, leading to John Quincy Adams’s observation that slavery was a conflict between the “principle of liberty and the fact of slavery.”²⁵

Marshall’s resolution of the conflict began by noting the unsettled nature of the moral question: “[t]hat the course of opinion on the slave trade should be unsettled, ought to excite no surprise.”²⁶ In doing so, however, Marshall began with apologetics for why the matter remains unsettled.²⁷ For some, it remained a steady course of commerce, or business as usual as we might say today. For others, the legal status of the trade was aided by the fact that it primarily benefited far off properties—distant worlds where the legal effects of offsetting the trade rarely intertwined with the realities of day-to-day life. And when they did interact, the familiarity of the practice may have “blunted” the moral sensibilities of the populace, leading to general acquiescence, if not specific acceptance, as a common commercial practice.²⁸ In summarizing this general acceptance, Marshall wrote that “the trade could not be considered contrary to the law of nations, which was authorized and protected by the laws of all commercial nations; the right to carry on which was claimed by each, and allowed by each.”²⁹

Marshall’s framing of the law of nations as not contradicting the slave trade, in fact, framed the law of nations as a substantively impotent source of law. Three years earlier, Joseph Story rejected the law of nations as a source of moral authority for supporting the slave trade, declaring that an institution responsible for significant violations of human rights could only be supportable on the basis of positive law, for which international law did not provide.³⁰ This view of international law, as one of respect without substance, meant that any moral authority of the law had to arise locally and not from a distance. Ironically, we see abolitionists and pro-secessionists before the Civil War engage in a similar dialogue surrounding the question of whether the federal government endorsed the bare institution of slavery.³¹

(quoting Nisbet’s assertion that “it does not appear that our Republican Government renders the People happy, either in Reality, or in their own Imaginations, as they are perpetually dreaming of Slavery & Chains, in the very Bosom of Liberty”).

²⁴ *The Antelope*, 23 U.S. (10 Wheat.) at 114.

²⁵ *Id.*; 10 MEMOIRS OF JOHN QUINCY ADAMS, COMPRISING PORTIONS OF HIS DIARY FROM 1795 TO 1848, 63 (Charles Francis Adams ed., Philadelphia, J. B. Lippincott & Co. 1876).

²⁶ *The Antelope*, 23 U.S. (10 Wheat.) at 115.

²⁷ *Id.* at 115-16.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *The Amistad*, 40 U.S. (15 Pet.) 518, 553 (1841).

³¹ Frederick Douglass wrote:

Marshall, having described the impotency of international law, set out to consider to what extent each domestic law should apply to the matter at hand.³² Starting with the American experience, Marshall depicted a country too eager to throw off the moral problem of the slave trade. Congratulating the United States and Great Britain for the works of several enlightened and humane individuals, Marshall described the institution as “denounced by both [the United States and Great Britain],” focusing on the legal status of the slave trade and describing public sentiment as joining government action in bringing a stop to the unnatural traffic.³³ From Marshall’s opinion, one might conclude that the international slave trade lacked any support from those in the United States.³⁴

Despite Marshall’s exuberant declaration that the slave trade lacked moral support in the United States, we know that the illicit slave trade continued to persevere. Marshall’s suggestion—that the enforcement of legal prohibitions against the trade inferred acceptance of the moral question—ignores the reality that despite whatever moral question the trade presupposed, the trade persisted, sometimes with the aid of government officials³⁵ and often with the endorsement of the public.³⁶ Various historical treatments have revealed that the illicit slave trade existed all the way up to the beginning of the Civil War³⁷ and have placed the number of Africans brought to the United States after 1808 as exceeding 270,000.³⁸ Following the passage of the 1808 law suppressing the trade,³⁹ President Madison petitioned Congress to pass further legislation to suppress the continued illegal importation of slaves, leading to one law passed in 1818 rewarding informants with half the fines and forfeitures collected from a successful apprehension;⁴⁰ and another law passed in 1820, declaring the slave

[T]he Federal Government was never in its essence anything but an anti-slavery government. . . . It was purposely so framed as to give no claim, no sanction to the claim of property in man. If in its origin slavery had any relation to the government, it was only as the scaffolding to the magnificent structure, to be removed as soon as the building was completed.

FREDERICK DOUGLASS ON SLAVERY AND THE CIVIL WAR: SELECTIONS FROM HIS WRITINGS 50 (Paul Negri & Joslyn T. Pine eds., Dover Publications 2003) (1945).

³² *The Antelope*, 23 U.S. (10 Wheat.) at 123-32.

³³ *Id.* at 116.

³⁴ *Id.*

³⁵ See Joe G. Taylor, *The Foreign Slave Trade in Louisiana After 1808*, 1 LA. HIST.: J. LA. HIST. ASS’N. 36, 36-43 (1960).

³⁶ See Dorothy Dodd, *The Schooner Emperor: An Incident of the Illegal Slave Trade in Florida*, 13 FLA. HIST. SOC. Q. 117, 117-128 (1935).

³⁷ See SYLVIANE A. DIOUF, *DREAMS OF AFRICA IN ALABAMA: THE SLAVE SHIP CLOTILDA AND THE STORY OF THE LAST AFRICANS BROUGHT TO AMERICA* 241-43 (2007).

³⁸ *Id.* at 241; accord Frances J. Stafford, *Illegal Importations: Enforcement of the Slave Trade Laws Along the Florida Coast, 1810-1828*, 46 FLA. HIST. Q. 124, 125 (1967).

³⁹ *Id.* at 124-25.

⁴⁰ *United States v. Haun*, 26 F. Cas. 227, 229 (C.C.S.D. Ala. 1860) (No. 15,329).

trade as an act of piracy and punishable by death.⁴¹ In an opinion prosecuting a trader of Africans allegedly procured through the illicit trade, a Federal Circuit Court of Alabama said:

Before the enactments under consideration had been made, philosophic and practical statesmen had discovered “that the true origin of the slave trade was not in the place it was begun at, but at the place of its final destination.” If there were not men who held, sold, or otherwise disposed of Africans, after the termination of the slave voyage, and the act of importation completed, there would be no building, equipping and manning of ships, no voyages to the African coast for slaves, no barracoons to supply American vessels, no piratical seizures, no confinements or detentions of Africans as slaves, no mortuary lists of the victims of such acts to startle and shock humanity, no need of African squadrons, or slave trade treaties, no illegal entries or importations. A complete preventive of the holding, selling or disposing of Africans within the limits of the United States, or by the citizens thereof, would remove the stain which has fallen upon our country by the abuse of its flag.⁴²

Whatever the moral agreement was towards the illicit trade, the translation of moral proclamations to actual changes in social relations posed a greater challenge.

For Marshall, the moral challenge was squaring the morally problematic institution with a legal system that condoned it. Marshall acknowledged that this problem created disagreement amongst the various courts that have considered the matter.⁴³ Some, he suggested, “may have carried the principle of suppression farther than a more deliberate consideration of the subject would justify.”⁴⁴ Other courts may have been too quick to sanction the institution despite the

Mr. Forsyth, of Georgia, in a report from the committee on foreign relations, informed congress: “The experience of ten years has evinced the necessity of some new regulations being adopted in order effectually to put a stop to the further introduction of slaves into the United States. In the act of congress prohibiting this importation, the policy of giving the whole forfeiture of vessel and goods to the United States, and no part thereof to the informer, may justly be doubted. This is an oversight which should be remedied. The act does, indeed, give a part of the personal penalties to the informer, but these penalties are generally only nominal, as the persons engaged in such traffic are usually poor. The omission of the states to pass acts to meet the act of congress, can only be remedied by congress legislating directly upon the subject themselves, as it is clearly within the scope of their constitutional power so to do.”

Id.

⁴¹ Stafford, *supra* note 38, at 125.

⁴² *Haun*, 26 F. Cas. at 232.

⁴³ See *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825).

⁴⁴ *Id.* at 116.

moral problems the slave trade presented. Marshall set the boundaries of the discussion with three cases: *The Amedie*, *The Diana*, and *Le Louis*.⁴⁵ As Donald Roper suggests, two other opinions actually frame Marshall's view.⁴⁶ The first case was Justice Joseph Story's 1822 opinion in *United States v. La Jeune Eugenie*,⁴⁷ in which Story described the immoral nature of the slave trade as repugnant to any system of law—domestic, international or otherwise:

[The slave trade] is repugnant to the great principles of Christian duty, the dictates of natural religion, the obligations of good faith and morality, and the external maxims of social justice. When any trade can be truly said to have these ingredients, it is impossible that it can be consistent with any system of law that purports to rest on the authority of reason or revelation. And it is sufficient to stamp any trade as interdicted by public law, when it can be justly affirmed, that it is repugnant to the general principles of justice and humanity.⁴⁸

In contrast, Justice William Johnson, sitting in circuit for the District of Georgia, described international law as having no qualms with the slave trade: "however revolting to humanity may be the reflection, the laws of any country on the subject of the slave trade are nothing more in the eyes of any other nation than the class of the trade laws of the nation that enacts them."⁴⁹ Notably, Marshall cited neither of these opinions, despite the presence of their two authors on the bench considering *The Antelope*. Instead, Marshall cited to three English cases in the opinion to frame the moral and legal claims.

The first case, *The Amedie*,⁵⁰ decided by William Grant, considered the claim for restitution by a U.S. ship captured by a British vessel and brought before the British court. While the United States had banned the slave trade three years prior, the British court's rationale was far more broad.⁵¹ Initially, the British court declared the trade prima facie illegal, placing the burden of demonstrating its legality in their country of origin on the ship's proprietors.⁵² But even if a person should demonstrate that the act was legal, the court denied that any right to restitution could flow from the British court in furtherance of the slave trade.⁵³ The same grounds sustained the condemnation of another vessel named the *Fortuna*.⁵⁴

However, *The Amedie* was contrasted by two other British cases, *The Diana*⁵⁵ and *Le Louis*,⁵⁶ both decided by Sir William Scott. In those cases, Scott rejected

⁴⁵ *Id.* at 77.

⁴⁶ See Donald M. Roper, *In Quest of Judicial Objectivity: The Marshall Court and the Legitimation of Slavery*, 21 STAN. L. REV. 532, 535-36 (1969).

⁴⁷ *United States v. La Jeune Eugenie*, 26 F. Cas. 832 (C.C. Mass. 1822) (No. 15,551).

⁴⁸ *Id.* at 846.

⁴⁹ Roper, *supra* note 46, at 536 (quoting Justice William Johnson).

⁵⁰ See *The Amedie*, (1810) 12 Eng. Rep. 92 (P.C.); 1 Act. 240.

⁵¹ *Id.* at 93-95; 1 Act. at 243-48.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ See *The Fortuna*, (1811) 165 Eng. Rep. 1240 (High Ct. of Adm.); 1 Dod. 81.

⁵⁵ *The Diana*, (1813) 165 Eng. Rep. 1245 (High Ct. of Adm.); 1 Dod. 95.

that the slave trade was universally abrogated by positive law, instead asserting in *The Diana* that

[t]he condemnation also took place on grounds that this court cannot in any manner recognise, inasmuch as the sentence affirms, “that the slave trade from motives of humanity hath been abolished by most civilized nations, *and is not, at present time, legally authorized by any.*” This appears to me to be an assertion by no means sustainable.⁵⁷

Similarly, in *Le Louis*, Scott contemplated the claims to a condemned French vessel, considering whether the British navy could apprehend a slave vessel when not in a state of war.⁵⁸ Scott, in narrowing the focus towards the slave trade, refused to identify slave traders with a class of pirates, stating that slave trading was “not the act of freebooters, enemies of the human race, renouncing every country, and ravaging every country in its coasts and vessels indiscriminately.”⁵⁹ In *The Antelope*, Marshall noted that even if domestic law defined slave traders as pirates, such as in the 1820 amendments to the 1807 prohibition by Congress, “[the slave trade] was not piracy” as an international matter.⁶⁰

Notably, Marshall used these three British cases to posture the arguments from his own bench. On the one hand, *The Amedie* captured the sentiments of Justice Story, whose view rejected the effect of the slave trade in total.⁶¹ On the other hand, *Le Louis* and *The Diana* align with the views of Justice Johnson, whose inclination towards slavery was not a moral question as much as one with practical implications—particularly in the realm of property.⁶² No doubt, within the chambers of the Court, “the question whether the slave trade is prohibited by the law of nations has been seriously propounded, and both the affirmative and negative of the proposition [were] maintained with equal earnestness.”⁶³

What Marshall did in the face of these arguments was to affirm the moral view that slavery conflicts with the laws of nature, while also refusing to impose that moral view on nations that as yet had not adopted that moral view. Marshall began by noting that the moral issue can hardly be denied: “[t]hat every man has a natural right to the fruits of his own labour, is generally admitted; and that no other person can rightfully deprive him of those fruits, and appropriate them against his will.”⁶⁴ But what a man may not do towards another person is ripe for a government to undertake despite its force arising from immoral ends. And

⁵⁶ *Le Louis*, (1817) 165 Eng. Rep. 1464 (High Ct. of Adm.); 2 Dod. 210.

⁵⁷ *The Diana*, 165 Eng. Rep. at 1246; 1 Dod. at 98.

⁵⁸ *Le Louis*, 165 Eng. Rep. at 1475-76; 2 Dod. at 243-47.

⁵⁹ *Id.* at 1476; 2 Dod. at 247.

⁶⁰ *The Antelope*, 23 U.S. (10 Wheat.) 66, 66 (1825).

⁶¹ *The Amedie*, (1810) 12 Eng. Rep. 92 (P.C.); 1 Act. 240.

⁶² *The Diana*, 165 Eng. Rep. at 1245; 1 Act. at 240; *Le Louis*, 165 Eng. Rep. at 1464; 2 Dod. at 210.

⁶³ *The Antelope*, 23 U.S. (10 Wheat.) at 120.

⁶⁴ *Id.*

thus, “that which has received the assent of all, must be the law of all,” and that which was “produced by general consent, cannot be pronounced unlawful.”⁶⁵

For Marshall, the choice to reject the immoral institution by a country prohibited its citizens from enjoying its effects.⁶⁶ However immoral the institution may have been for one, as to the other it was mere commerce. In fact, after spending a majority of the opinion describing the slave trade in moralistic terms, Marshall’s language shifted towards referring to the trade as a commercial outlet using the terms “commerce” and “trade” to contrast the words “piracy” and “traffic.”⁶⁷ Whatever the moralistic claims that would bind American traders, those claims held no power over traders whose laws would allow the trade to persist.⁶⁸

Marshall’s own moral compass might have given him plenty of room to find that the very nature of the prohibition in the United States tainted all of the Africans aboard the *Antelope*, thereby demanding that they be freed. Revolutionary era jurists in both England and the United States conveyed a message that the natural order of social relations was only altered by positive legal workings, suggesting that slavery required an equal positive response.⁶⁹ This view led Lord Chief Justice Mansfield to declare in *Somerset v. Stewart* that slavery was so “odious, that nothing can be suffered to support it, but positive law.”⁷⁰ That sentiment carried into Blackstone’s later declaration that the air of Britain was so freeing, just one whiff would produce freedom from slavery.⁷¹ Justice Joseph Story echoed similar views in *La Jeune Eugenie*.⁷²

However, this rhetorical question of universal, moral claims that slavery was unnatural soon became pitted against the pragmatic reality of property. Unsurprisingly, the law afforded support for both sets of rights. As John Quincy Adams would reflect, slavery was a conflict between the “principle of liberty and the fact of slavery.”⁷³ Justin Buckley Dyer has argued that this rhetorical conflict was one that shifted from universal application to a particular defined limitation:⁷⁴

If a system of chattel slavery was to subsist under a regime of liberty, then the questions properly arose: Are the rights to liberty merely conventional rights, inhering in the Englishmen *qua* Englishmen, (or

⁶⁵ *Id.* at 120-21.

⁶⁶ *Id.* at 86.

⁶⁷ *Id.* at 66.

⁶⁸ *Id.* at 121.

⁶⁹ Justin Buckley Dyer, *After the Revolution: Somerset and the Antislavery Tradition in Anglo-American Constitutional Development*, 71 J. POL. 1422, 1423-26 (2009).

⁷⁰ *Somerset v. Stewart*, (1772) 98 Eng. Rep. 499 (K.B.) 510; Lofft, 1, 19.

⁷¹ Dyer, *supra* note 69, at 1426 (discussing the tension between the acknowledgment of universal rights of all men and denying those same rights or refusing to apply those rights to Africans, as addressed by William Blackstone); see 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 410-20 (1765).

⁷² See *United States v. La Jeune Eugenie*, 26 F. Cas. 832 (C.C. Mass. 1822) (No. 15,551).

⁷³ ADAMS, *supra* note 25 at 63.

⁷⁴ See Dyer, *supra* note 69, at 1426.

Slavery, Property, and Marshall in the Positivist Legal Tradition

Americans *qua* Americans) or do some fundamental rights inhere in man *qua* man? Further if there are rights that inhere in man *qua* man, do these rights apply to Africans, and, if so, are these rights justiciable in courts of law? These questions uncover a tension between universal and particular elements at work in the English and American claim to liberty. In order to maintain a system of chattel slavery and simultaneously assert a constitutional right to be free from arbitrary exercises of force, one had to either deny the humanity of the slave or deny the relevance of human status to the claim of liberty under the Constitution. In this respect, one could deny the Africans' participation in the universal rights of man, altogether deny the existence of any such universal rights, or concede that universal rights do apply to the Africans while nevertheless asserting that such rights are not secured by the particular constitution in question.⁷⁵

What results in Marshall's opinion in *The Antelope* is a reluctance to disturb the existing state of property claims by Portuguese and Spanish claimants despite the moral and natural rights assertions that would demand otherwise.⁷⁶

This is a thematic occurrence in the realm of property law. Existing property claims enjoy the protection of the law, despite pervasive disagreement as to the value of the property institution. And even when judges understand that the property in question is a burden to society, there is a reluctance to disarm the property claims of those who have the force of law favoring their claim.⁷⁷ Marshall and other jurists in his era described this as a tension between natural law and positive law.⁷⁸ Natural law, the argument goes, so opposes an institution like slavery that its only support comes from positive law.⁷⁹ For Marshall, this in turn presented the conundrum in determining when legal institutions created through positive law may be overturned. The answer was that natural law was impotent to overturn positive law, meaning that the only means to undo positive law was through positive law. Thus, just as positive law was necessary to wrestle freedom from the natural state of man, so too was positive law necessary to undo the injustices of slavery.⁸⁰

But even after positive law catches up to the natural order of things, the impact that unjust institutions have on property and property law indelibly remains. Changing the legal structure of how the property in question related to the social environment did not necessarily change the social environment. This is because property, and its accompanying rules, reflects the social environment we believe most closely comports with the dominant corporate identity. Property then becomes the ultimate non-moral institution—capable of shaping itself to whatever the claims of the dominant social group desires. The result is that while

⁷⁵ See Dyer, *supra* note 69, at 1425-26.

⁷⁶ *The Antelope*, 23 U.S. (10 Wheat.) 66, 90-120 (1825).

⁷⁷ See *id.*

⁷⁸ *Id.*; see also Dyer, *supra* note 69, at 1423-25.

⁷⁹ Dyer, *supra* note 69, at 1427.

⁸⁰ *The Antelope*, 23 U.S. (10 Wheat.) at 103-23.

one aspect of property may be outside the realm of legal protection, other legal rules continue to prop up the social environment that gave rise to the unjust law in the first place.

For example, Marshall's decision in *The Antelope* decreed that some of the slaves were entitled to their freedom, while others may be returned to their purchasers upon proof of ownership.⁸¹ However, all of the Africans remained confined under the custody of the Marshal of the District of Savannah, Georgia, and its claim for compensation.⁸² The fact that two years passed while Africans existed in the liminal space between propertied and non-propertied persons suggests that property regimes often continue despite the creation of positive law that might suggest otherwise. Positive law unfortunately did not change the actual position of those Africans; only the relaxation of other claims associated with their status as property ultimately led to their freedom. This idea that property creates entanglements beyond the immediate moral question suggests that property law, if it is to have a moral impact, must do more than allocate space—it must allocate power.

Property law depicts the social environment by reflecting the power relationships that exist by ordaining geographic and wealth distributions. Slavery and its after effects depict this perfectly. For example, we continue to see U.S. slavery's concentrated impacts on African Americans 150 years after the legal institution ended, including poverty rates,⁸³ property ownership,⁸⁴ social mobility,⁸⁵ and beyond. Likewise, law and social relations have an impact on the physical environment. When viewed from that lens, *The Antelope* is best understood not as a question of Africans versus their captors,⁸⁶ but as the State of Georgia against their captors, with the Africans only incidentally involved.

So then what are we to do with property as a legal institution? Over the last few years, the Progressive Property Movement has attempted to redefine the way property shapes our social environment.⁸⁷ Our shared experience with property suggests that traditional property law is not very good, when left to its

⁸¹ *Id.*

⁸² *The Antelope*, 25 U.S. (12 Wheat.) 546 (1826).

⁸³ See Heather A. O'Connell, *The Impact of Slavery on Racial Inequality in Poverty in the Contemporary U.S. South*, 90 SOC. FORCES 713, 734 (2012).

⁸⁴ See DYLAN C. PENNINGROTH, *THE CLAIMS OF KINFOLK: AFRICAN AMERICAN PROPERTY AND COMMUNITY IN THE NINETEENTH-CENTURY SOUTH* (2003).

⁸⁵ See Dawinder S. Sidhu, *The Unconstitutionality of Urban Poverty*, 62 DEPAUL L. REV. 1, 44-61 (2012).

⁸⁶ The continuation of injustice in the landscapes that supported slavery affirms a thesis that Justin Dyer proposed: slavery positioned universal claims of slavery's anti-moral character with its particular impact on white landowners. See Dyer, *supra* note 71.

⁸⁷ See, e.g., Gregory S. Alexander, Eduardo M. Penalver, Joseph William Singer, & Laura S. Underkuffler, *A Statement of Progressive Property*, 94 CORNELL L. REV. 743 (2009); see also JEDEDIAH PURDY, *THE MEANING OF PROPERTY: FREEDOM, COMMUNITY, AND THE LEGAL IMAGINATION* 15-18 (2010); GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776-1970* (1997); Singer, *supra* note 12, at 611.

own devices, at reflecting progressive ideas of social egalitarianism. What property law is good at is preserving existing static relationships. The result is that property law may be a wonderful tool for preserving the social environment we desire to live in after we get there but will serve as a formidable obstacle along the way. The Progressive Property Movement reconceptualizes the institution of property by shaping law in a way that reflects our shared values. Positive law can have injurious consequences, as Marshall and his fellow jurists were plainly aware. As this Essay argues, property itself may be a substantial barrier even after the law reflects a progressive social value.

This is partially because property adds an additional static component to the existing legal framework. Thus, participants seeking to right injustice, where property is implicated, may face additional barriers of institutional, cultural, economic, and geographical infrastructure that has memorialized itself on the physical landscape. Correcting past wrongs might mean reimagining more than just how the law has shaped an environment—but, instead, how the environment would be shaped had an unjust legal regime not interceded in the first place.

This Colloquium, *[Re]Integrating Spaces*, confronted this question by asking how law, morality, and culture interact in shared spaces. The physical location in which those elements occur memorializes their conflicts over time. Racial boundaries that are created in one generation seem to persevere to the next, even when the verbalized norms of integration and reconciliation echo hollowly around. The law's power for maintaining entitlements in space seems to reaffirm the static place of social values from the past by bathing them in sanitized views of economic order and stability. Reshaping a space towards a moral view requires that the titleholder have both a desire to do so and the financial ability. Residents of low-income housing districts may have the animus to reinvigorate their neighborhoods towards a higher, more pluralized, economic zone; but absent the capital structure, the desire falls flat. Likewise, a visionary may have a desire to repurpose a place that once was one of injustice, but if the title cannot be shifted, the vision may be delayed or lost.

