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"for the murder of his own female slave, a woman named Mira..." : Law, Slavery and Incoherence in Antebellum North Carolina

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"The death of culture begins when its normative institutions fail to communicate ideals in ways that remain inwardly compelling..."

Phillip Rieff [2]

I. Prologue: "a settled and malignant insensibility to human suffering...." [3]

Some time early on March 28, 1839, a small group of sober-minded men led by County Coroner William B. Jones[4] made their way to the rural Iredell County farmhouse of Mr. John

[1]Introduction to the published opinion of the North Carolina Supreme Court: *State v. John Hoover*, 20 NC (4 Devereux & Battle) 500, 501 (1840).

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[2]TRIUMPH OF THE THERAPEUTIC: USES OF FAITH AFTER FREUD 18 (1966).

[3]*State v. John Hoover*, *supra*, note 1, at 503.

[4]Trial Record, *State of North Carolina v. John Hoover*, Superior Court, Iredell County, Fall Term, 1839, in North Carolina State Archives, Case No. 2637, at 17 of the hand-written transcript.

Hoover, in the western part of the state of North Carolina. A longtime resident of that County and community, the 57-year-old husband of 33 years and father of 10 children[5] was not long in learning the nature of the party before him and the singular purpose of their visit: Jones headed a criminal coroner's inquest dispatched to investigate the rumored death of "one Mira a female slave, the property of... the said John Hoover."[6] Mr. Hoover was cooperative at first, admitting to Mira's death the morning before "of the venerial [sic] disease..."[7], a matter he offered to prove by the testimony of "some of the neighbors..."[8] thus obviating the need of their expressed and intended task: to exhume Mira's day-old grave and establish to their own satisfaction the cause of her death. When his efforts to dissuade them met with "a determination to take up the body..."[9] his mood quickly turned, first to angry obstructionism – forbidding their touching the

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[5]Genealogical Society of Iredell County, THE HERITAGE OF IREDELL COUNTY, NC, VOL. II – 2000 296 (2000). Those records show Mr. Hoover, then 24 years old, marrying Miss Regina Lipe (a.k.a. Leib) on August 27, 1806 in Cabarrus County, N.C., one day after the latter's 19th birthday. During the course of their marriage she bore to the family Leah (1805, 9 months prior to their marriage), Catherine (1807), Margaret (1810), Sumpter (1813), Sarah (1816), Regina (1818), John Jr. (1820), Absalom and twin brother Archibald (1823) and Cowan (1826). His second daughter, Catherine, would predecease her father by 4 years, at age 29. He would lend 4 of his 5 sons to the Civil War; his 5th son, Absalom, was "crippled," possibly congenitally, and was thereby unable to serve. His 7th born, John Jr., would be killed in battle in March, 1863, very probably on the Union side; John Jr.'s brothers Sumpter, Cowan and Archibald would bear the opposing grey colors in battle, the latter dying in the Battle of Antietam, Maryland, in the late summer of 1862.

[6]Bill of Indictment, *State of North Carolina v. John Hoover*, Superior Court, Iredell County, Fall Term, 1839, in North Carolina State Archives, Case No. 2637, at 2 of the handwritten transcript.

[7]*Supra*, note 4, at 17.

[8]*Id.*

[9]*Id.* (quoting from the words of Coroner Jones.)

grave and refusing tools to assist – and then to hollow defensiveness – allowing that the deceased had "attempted to burn his kitchen and Still House..." having consequently been "locked up from fire since last December...".[10] While it does not clearly appear from the written record how long the tense confrontation played out, what is all too clear is that Coroner Jones' intentions prevailed over Mr. Hoover's objections: Mira's grave was in fact completely disinterred and her newly deceased body fully and thoroughly examined, for evidence of crime.

Though it was Mr. Hoover's stated intention to "prove by his family and neighbors that she did not die from ill usage..."[11] that self-serving goal was completely thwarted in the very first moments of the inquest examiners' grisly work. Examiner John McLaughlin would later testify to having found "five wounds on the head of the Deceased... one of the wounds... fresh... about one and a half inches long."[12] Examiner and medical doctor Moore fleshed out Mr. McLaughlin's observations more precisely, detailing the latter wound to have been "to the bone.... sufficient to have produced her death...."[13] in his opinion, as were any number of other wounds the examiners noted on Mira's body.[14] Indeed, as Examiner McLaughlin would soberly note in later testimony at Mr. Hoover's no doubt singular criminal trial,[15] "from the back of her

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[10]*Id.* at 18.

[11]*Id.*

[12]*Id.*

[13]*Id.* at 19.

[14]Specifically, Dr. Moore testified at trial "that the wounds on... [Mira's] body would have killed her in a short time independent of the fresh wound on her head....": *id.*, at 20.

[15]Speaking of the Hoover trial, one local historian noted: "The present researcher has never found a white man hanged for killing his slave except [Mr. Hoover] in Statesville.": W.N.

head to her heels was literally a continued wound..."[16], a stark fact rendered all the more vicious by Dr. Moore's added testimony, deriving from deliberate and careful examination, that he "did not discover the slightest Symptom of [venereal] disease…"[17]. The inquest brought its awful work to a definitive close in short, determined order: Mr. Hoover was summarily arrested and taken into penal custody on the spot, charged with the capital crime of murder.[18]

Under a Grand Jury Bill of Indictment describing him as "a person of a cruel and savage disposition, not having the fear of God before his eyes but being moved and seduced by the instigation of the Devil..."[19], John Hoover was brought to the Iredell Superior Court on

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WATT, STATESVILLE: MY HOME TOWN, 1789-1920 35 (1996). While more detailed historical analysis has provocatively shown this observation to have been not fully informed (see, particularly, A.E. Keir Nash, *A More Equitable Past? Southern Supreme Courts and the Protection of the Antebellum Negroe*, 48 N.C. L. REV. 197 (1970) in which the author noted almost 40 such cases involving prosecutions of whites for injuries – usually homicide related – of 'negroes' between 1830 and 1860, from Texas through North Carolina), the sheer pathos of such a public drama was no doubt uniquely compelling.

[16]*Supra*, note 4, at 18-19.

[17]*Id.* at 20.

[18]The arrest was not without some incidents of note. First, after arrest and during transportation to the County Seat of Statesville for formal processing, Mr. Hoover let it be known that "money should not be wanting...." should he find the inquest team willing to overlook the matter; Examiner McLaughlin testified at trial that "this advance... [was] repelled... with indignation....": *id.* at 19.

More interesting generally – and more pertinent to the themes of this article particularly – was Mr. Hoover's observation to the inquisitors, recalled by Mr. McLaughlin at trial, that "the negro was his own property and he had a right to do as he pleased with his property....": *id.* Given this article's deliberate focus on law, jurisprudence and foundational principles shaping and defining culture and society, Mr. Hoover's plaintive, aggressive observation, apparently unanswered by any to whom it was directed, will necessarily be the subject of further attention here.

[19]*Supra*, note 6, at 1-2.

September 12, 1839 before a jury of his peers – 12 male slaveholders, as then prescribed by North Carolina law[20] – under weight of the dramatic capital charge. Mr. Hoover was made to listen while a parade of witnesses proffered by Prosecutor James R. Dodge for the state – 13 in all, including in their rank one woman and many having worked as hirelings for the defendant[21] – gave eyewitness accounts of his veritable reign of terror over Mira, extending for 3 months at least before her ultimate death.[22] The few weak wisps of reasons justifying his physical chastisements of Mira coming obliquely before the trial court in the state's case-in-chief were thoroughly overwhelmed by graphic testimony, from one witness after another, of his clearly articulated intent not merely to 'correct' Mira through discipline,[23] but rather to kill her

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[20]Any criminal case involving a 'slave' or slavery, as victim or defendant, was required to be tried before a jury of slaveholders: Jury Act of 1793, ch. V N.C. Laws 4 (1793).

[21]Mr. Jacob Wooliver was included in that number. He had played plaintiff to Mr. Hoover's defendant in a civil action several years earlier. Judgment in that civil case was rendered on behalf of Mr. Wooliver, in the amount of $4.50; in what was no doubt an example of thorough criminal defense lawyering at Mr. Hoover's murder trial, Mr. Wooliver was there made to admit under oath, on cross-examination, that "he was not on friendly terms with the Defendant and had not been for the last three years...": *supra*, note 4, at 16.

[22]On appeal to the North Carolina Supreme Court, Mr. Chief Justice Thomas Ruffin commented on the abuses testified to against Mr. Hoover and recorded in the trial record, deeming them "barbarities which could only be prompted by a heart in which every humane feeling had long been stifled...": *supra*, note 1, at 503, and noting, in consequence, "[T]here can scarcely be a savage of the wilderness so ferocious as not to shudder at the recital of them...": *id*. Given the narrow thesis of this article, and in deference to the human dignity of the deceased Mira at least, no useful purpose would be served in detailing those abuses here, though, to my mind, having carefully reviewed the trial court record and testimony memorialized therein, Chief Justice Ruffin by no means overstated the matter.

[23]North Carolina common law had long before recognized the subjective intent of *correction* as an absolute defense to any assault/battery related criminal charges, where the erstwhile defendant was a slave owner and the erstwhile victim was a 'slave': *State v. Mann*, 13 NC (2 Devereux) 263 (1829), in an unanimous opinion of the North Carolina Supreme Court as

outright.[24] "[T]he Defendant offered no testimony..."[25] in his defense, and, after receiving the case from presiding Judge John M. Dick, along with his instructions on the matter of legal provocation arguably mitigating his alleged crime, the jury returned its taut verdict the same day the trial had commenced: "guilty of... murder."[26] Court was immediately adjourned until the following day – Friday, the 13th day of September, as it were – when Judge Dick pronounced the unremitting if shocking will of the people of the State of North Carolina through the voice of its jury, decidedly in Mr. Hoover's negative: he should be "kept until Friday the 25th day of October next and then be taken to the place of public Execution and thus hung by the neck until he be dead."[27]

As might be expected in a matter as vital and personally important as this, Mr. Hoover sought to exhaust all available remedies in attempting to ameliorate the unyielding verdict of his peers and society in the matter of the murderous dispatch of his human property. He began at the trial court itself immediately on the heels of the publishing of the verdict, praying through counsel that Judge Dick grant a motion for a new trial on the grounds that the jury had been

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per then Mr. Justice Thomas Ruffin himself. Given its importance to the themes being presently explored, more will be said about this useful and important case, and the 'law' it created, *infra*.

[24]For example, Jacob Hill testified to an incident occurring in the January immediately prior to Mira's March, 1839 death, when the defendant stated, while physically beating her, that "she was hard to kill, but he would kill her....": *supra*, note 4., at 14. Such testimony was repeated again and again, from witness after witness, throughout the short, spare trial.

[25]*Id.* at 20.

[26]Superior Court Minutes, *State of North Carolina v. John Hoover*, Thursday, September 12th, 1839, in North Carolina State Archives, at 518.

[27]*Id.*

"misdirected..."[28] on the issue of the precise legal difference between murder and manslaughter, as well as the notion of 'legally sufficient provocation' mitigating the one to the other. Not surprisingly, Judge Dick was indisposed to this argument, though not to Mr. Hoover's second, in which he "prayed for and obtained an appeal to the [North Carolina] Supreme Court..."[29] in order to press the 'misdirection' theory before that important final forum. On payment of the requisite $50.00 appeal bond, the *Affidavit of Plea and Verdict* was sealed in the case and the matter made ready for action before North Carolina's – and John Hoover's – court of terminal appeal. On November 2, 1839, Clerk of Court John S. Henderson certified the relevant trial record, receiving the documents at the Supreme Court offices in Raleigh;[30] after some administrative snags were successfully smoothed over by the Court,[31] it was then prepared to receive oral arguments in the significant matter of *The State of North Carolina v. John Hoover.*

Some time later in February, 1840, a three-member panel of the North Carolina Supreme Court convened in a Raleigh courtroom to hear arguments and render appropriate judgment in Mr. Hoover's case.[32] As was the custom of the day, the state was represented before the Court

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[28]*Supra*, note 4, at 22.

[29]*Id.*

[30]Record Certification, *State of North Carolina v. John Hoover*, Superior Court, Iredell County, in North Carolina State Archives, Case No. 2637, at 20.

[31]These snags involved the loss of the certified copies of the trial record, entailing Clerk Bell's personal appearance before the Court in Raleigh, on February 10, 1840, to provide a second copy of the record and to answer questions about the same: Record Order – North Carolina Supreme Court, *State of North Carolina v. John Hoover*, January 9, 1840, in North Carolina State Archives, Case No. 2637, at 20.

[32]Namely, Mr. Justice Joseph J. Daniel, Mr. Justice William Gaston and the aforementioned – and well famous – Mr. Chief Justice Thomas Ruffin.

by the Attorney General; curiously, given all that was effectively at risk for a man under the weight of a capital outcome, "...[n]o counsel appeared for the prisoner"[33] before his Court of last human resort. In a *per curiam* opinion released mere days after the completion of oral arguments, Mr. Chief Justice Ruffin agreed (in the very first paragraph) with Mr. Hoover's 'jury misdirection' argument, though disagreeing, ominously, with its ultimate effect: if anything, the Chief Justice opined, "the case was left hypothetically to the jury, much more favorably for the prisoner than the circumstances authorized."[34] That being neatly and definitively addressed at the outset, matters devolved from there for Mr. Hoover, and that at a rapid pace: the written record divulging no extenuations to be afforded to "the acts imputed to this unhappy man..."[35] the Court was quick to affirm Mr. Hoover's guilt in the matter at "the highest grade..."[36] and to re-certify his case thereby to the Iredell Superior Court for grimly referenced "further proceedings...."[37] On Friday, May 15, 1840, within weeks of having affixed his identifying mark on a codicil to his own formerly attested Last Will and Testament, and having fortified himself with religion at least, for the singular journey before him,[38] Mr. John Hoover was publicly

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[33]*Supra*, note 1, at 502.

[34]*Id.* at 503.

[35]*Id.*

[36]*Id.*

[37]*Id.* at 505.

[38]The October 6, 1839 church rolls of St. Martins Lutheran Church listed as one of its communicants "John Hoover" along with others of his family members (Lois M.P. Schneider, IREDELL COUNTY, N.C. CEMETERY RECORDS, VOL. 3: EARLY LUTHERAN CHURCHES 63 (1993)), this formal religious interest on the part of John and his family occurring after and possibly in

hanged in Statesville, North Carolina[39] and buried on his own homestead farm,[40] the same land witnessing his bloody actions and receiving Mira's worn out body the previous spring.

Apart from its gripping melodrama and epitragic conclusion, the case of *The State of North Carolina v. John Hoover* would not appear to commend any appreciable attention from legal historians seeking to trace the potent interface of law and society, on first, quick reading.

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consequence of the murder and capital outcome. This was the first note of any official religious involvement for any of the Hoover family among the extensive church roles and other religious historical records remaining from the area and period, and, for Mr. Hoover, his last: the next communicant role for the church, maintaining various of his family members' names but with his own conspicuously absent, was dated June 6, 1840, some three weeks after his capital execution. To their credits (it is presumed), the surviving records attest that the other members of his family remained active in churches throughout the Iredell County area for the remainder of their lives.

[39]Records of the actual hanging of John Hoover are curiously scarce. Statesville proper welcomed its first newspaper – the *Iredell Express* – in December, 1857, some 17+ years after Mr. Hoover's execution, thus leaving an understandable record gap in that way. However, other active and presumably interested publications in the surrounding counties and region apparently took no particular note of the event, leaving no reported news record of it. Indeed, the only journalistic reference to the event found by this researcher appeared in the *Statesville Landmark* some 40 years afterward, in an article entitled "Executions in Iredell". There, among the relatively obscure and comparatively famous executions in the county – the former including Nichols, identified in the article as a "negro," for the murder of his "master"; Fitzpatrick, "...very handsome", for horse stealing; Millsaps, for the murder of his wife; Gallimore, a "...white man of prepossessing appearance", for "negro stealing", and the latter including Thomas Dula, memorialized in folklore as "Tom Dooley," in 1868, for reasons well referenced in song – was noted that of "John Hoover, white... for the murder of a negro woman...." The account given to the newspaper by "some of the older heads..." in the community, provocatively noted that "Hoover was taken down after having been pronounced dead, and, but for official interference, would have been resuscitated.": STATESVILLE RECORD, February 13, 1880, at 3. Corroborating and/or clarifying information in this regard has proven wholly elusive.

[40]Specifically, in the Hoover Plantation Cemetery – Barringer Township, "along with wife Regina, surviving her husband by several decades at the least, and daughter Sarah Hoover Galliher, laid with her parents in November, 1898. The graves are listed in the 'abandoned cemeteries' category: RUSSELL C. BLACK, JR. & IRENE CLANTON BLACK, IREDELL COUNTY NORTH CAROLINA CEMETERIES, VOLUME FOUR: SOUTHEAST 197 (1999).

Mr. Chief Justice Ruffin's written opinion covers barely three (3) pages of printed text[41] and presents no particularly novel points of law surviving its terse, didactic prose. While of critical importance to the Hoover family, of course, and perhaps of some limited value in the further development of the North Carolina common law of slavery generally, and the legality of slave chastisement/correction specifically, it has in fact received only a few cursory legal literature citations in the years following,[42] and none of any especial legal force or precedential significance. It has enjoyed very little direct attention from law or other scholarship[43] and has been the subject of but a few spare, equivocal references at most,[44] in marked contradistinction to

[41]The entire opinion consists of exactly five (5) printed paragraphs, from start to finish.

[42]More precisely, three (3) case law citations and four (4) references in general law review articles – none beyond mere mention – in its over 160 year history.

[43]The most notable exception is found in James B. White's intellectually immense THE LEGAL IMAGINATION: STUDIES IN THE NATURE OF LEGAL THOUGHT AND EXPRESSION (1973). There, that author published the *Hoover* opinion *in toto*, among several others in his provocatively presented chapter E. THE LANGUAGE OF RACE (at pp. 451-54). While he gives the case only scant academic treatment (namely, one brief 'compare' style question preceding the case and a short series of analytical questions following), given the developing thesis of the present article, the fact alone of its inclusion in his book, with potent questions following, is, to my mind, prescient.

[44]For example, historian Samuel A'Court Ashe made brief mention of the *Hoover* case, noting, starkly, "In the case of *State v. Hoover* the [North Carolina Supreme] court sustained a verdict of murder against a master for killing a slave...." (HISTORY OF NORTH CAROLINA, VOL. II. 361 (1925)), referencing it as evidence of "the sense of justice that animated..." members of that court: *id.*, at 362.

This latter theme – justice for slaves as evidenced by *Hoover* and its ilk – surfaced with troubling regularity among the handful of scholars addressing the matter in their work. For example, historian Bryce Roswell Holt noted a decided liberality and 'humane attitude' of the North Carolina Supreme Court toward slaves and slavery, proof texting *Hoover* and other like opinions in support of the counterintuitive premise: *The Supreme Court of North Carolina and Slavery*, 17 TRINITY C. HIST. PAPERS 1, 72 (1927). Ernest Clark echoed the same theme in his graduate work when he noted "It is an incontrovertible fact that the Supreme Court of North

its far more famous cousin, the earlier opinion of then Mr. Justice Ruffin in *State v. Mann*.[45] Indeed, apart from the sad, lurid fascination the case inevitably invites, nothing on its face alone commends it to even the most inquiring of students: it rightly makes no appearances in casebooks and offers little enduring legal insights of any kind whatsoever.

However, as this paper straightforwardly propounds and will attempt adequately to establish, first appearances with regard to *State v. Hoover* are suggested to be decidedly deceiving. Even if the case draws no compelling academic attention to itself by text alone, should it instead be considered in *context* – particularly, the context of the jurisprudential foundations of slavery in North Carolina and the light the case may shed on those foundations

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Carolina displayed liberality toward slaves in all cases involving their personal security as human beings....", referencing *Hoover* among other cases in support: Slave Cases Before the North Carolina Supreme Court: 1818 – 1858 (1958) (unpublished M.A. thesis, UNC – Chapel Hill) (on file with the UNC – Chapel Hill Library). Most compelling in this regard – and thus most disturbing, given the pointedly contra-distinctive theme of the present article – is the work of A.E. Keir Nash in *A More Equitable Past? Southern Supreme Courts and the Protection of the Antebellum Negroe*, *supra*, note 15. There, following the thesis rhetorically raised in his article's title, Professor Nash referenced *Hoover* and other like cases in support of his 'rediscovered' Southern judicial humanity toward slaves. Taking on directly the prevailing negative historical orthodoxy of his day regarding the slave and antebellum southern slave culture, Professor Nash noted, hubristically, "If we wish to continue the 'concentration camp' analogy, we should modify it to suggest that, at the top, stood judicial guardians determined to do what they could to ameliorate the terrorism of the peculiar institution of slavery.": *id*., at 200. Indeed. Mark Tushnet rightly challenged Nash's under-considered thesis when he observed: "Unfortunately... [Professor Nash] went too far in speaking of the law's "essentially decent treatment of the black" and of its "libertarian policy...." [toward slaves and slavery]": *The American Law of Slavery 1810 – 1860: A Study in the Persistence of Legal Autonomy*, 10 L. &SOC'Y REV. 119, 176 (1975). If the present article develops its own thesis as fully as intended, the general thesis of the antebellum North Carolina Supreme Court's liberality or generosity to the 'peculiar institution' and/or its miserable 'beneficiaries' will come squarely within its cross hairs: Professor Nash's work will be seen as far too intellectually facile, and Professor Tushnet's critiques as far too professionally kind.

[45]*Supra*, note 23.

and the human systems resting upon them[46] – *Hoover* might rightly prove to deserve a great deal more attention than it has yet received. Put another way, when viewed as *fact* the case presents a fairly routine application of rudimentary principles of criminal law toward a legally unremarkable conclusion, albeit in rather novel and compelling circumstances and with the predictably tragic human consequences following. But if it is looked at differently than this, if it is considered not as fact *simpliciter*, but rather in the more nuanced and multifaceted guise of *artifact*, the *Hoover* case would seem to offer much more of promise to the interested historian, and thus to commend much more thorough attention to itself. Given the novelty of this contrapuntal distinction, coupled with its centrality to the entire intellectual framework of this paper, a word of further explanation is here in order.

Considered as *fact* alone – as a static code of rules and obligations by which a society governs itself and manages the behavior of its citizens – law is a perfectly reasonable and indeed intellectually challenging subject of study. This notion of law might be considered the *raison d'etre* of the modern American law school, of course, talented individuals queuing up in great numbers to both teach and study law in this way, to the ultimate benefit of the society defining and refining itself thereby. However, following on the groundbreaking work of Professor James Willard Hurst and others thereafter,[47] generations of legal historians and 'law and society' types have come to understand the unique qualities of law as a 'window' into societies and cultures in

[46]This would be 'law and society" in its most straightforward, elemental form, of course.

[47]Since much of the discrete academic discipline of 'legal history' generally owes a great debt to the immense early work of Professor Hurst, and as I owe an especial debt to that work and its intellectual progeny, it is worth tipping the hat to him here, simply, as the progenitor of much of value that has followed from his efforts.

time and place, shedding particular light on those dynamic communities by the very nature of its singular, catalytic interaction with them. For example, beyond its day-to-day workings, who would deny the almost anthropological significance of the changes in law in the German republic in the decade preceding and leading by short course to World War II.?[48] Or, alternatively, what clearer access might an interested student gain into the synthesizing values and practical preferences of a society in time and place than through a discrete and careful, almost archeological consideration of its legal taxing regime?[49]

In this 'other' way, then, law becomes not merely an end in itself, discrete and self-contained, but rather a useful and valuable means of achieving legitimate, functional intellectual ends serviced by any numbers of other important academic disciplines. Returning to the first example, sociologists and other social thinkers might learn a great deal about the dynamic of cultural change in post World War I. Germany throughout the relevant period – the eddies, currents and shifts presaging the precipitous cataracts of its national downfall following – through thoughtful review of the changes in its laws alone.[50] In the second example, cultural

[48]Indeed, had social chroniclers and prognosticators been so inclined, much of the horrors of the 1930's-40's German experience discovered after the close of World War II. might quite reasonably have been predicted through careful attention to the medium of its laws alone, and the particular kinds and trajectories of its changes over the period of time in question.

[49]Or lack thereof, to be sure. In both of the above examples, the reference to ancillary academic disciplines – *anthropology* and *archeology* – is of course deliberate, legal history gaining much of value from these and other cooperative branches of academic study in developing its own disciplinary language. This article will depend on the basic thrusts of both of these disciplines in developing its thesis.

[50]In this case, through the benefit of hindsight, of course, law might be expected to fulfill the role of a 'canary in the mine' of German cultural evolution/devolution throughout the period in question, it is reasonably expected. This arresting image should prove practically and intellectual significant to the thesis being developed in this article.

anthropologists and others concerned with the infra-structural values of a particular people in time and place are presented with transparent short-forms by which to discover and understand those values, through that culture's taxing scheme. In both cases law is studied not merely for its factual content, but also for its *artifactual significance*, for what it uniquely reveals about some other legitimate subject of intellectual inquiry. It is in this 'other' way, and with particular attention being paid to what it might reveal about the life – and death – of the culture producing it (in this case, antebellum slave culture in North Carolina and beyond, to be sure) that *State v. Hoover* will be commended for further consideration herein.[51]

This paper will proceed along the following path in developing its thesis and its final argument. First, three (3) foundational principles anticipating, underlying and necessarily supporting the paper's intellectual direction will be plainly laid out for the reader's consideration and understanding, in anticipation of the final points the article will attempt to make. Thereafter, by way of background and support, the reader will explore the broad jurisprudence of slavery as a cultural and institutional norm in antebellum North Carolina, considering thereby the relevant context in which *Hoover* came actually and inevitably to rest. The case itself will then be carefully considered, not as fact – as a static occurrence in history in which law was deliberately marshaled to effect a particular, intended outcome – but instead as *artifact* – as a lens, if you will, by which jurisprudential currents, cross currents and undercurrents effecting one antebellum society might be carefully observed and thoughtfully considered; it is here that the central thesis

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[51]This is a matter of no small significance as a project of interest for the growing 'law and society' movement, it is hoped. The reader is referred back to the aphorism of Professor Phillip Rieff opening this paper as the rallying point for its intended theme and, indeed, framing its entire intellectual landscape: *supra*, note 2.

of this paper – *coherence* and *incoherence* of law as a foundational principle organizing a society in question – will be fully developed and explored. The paper will conclude by briefly considering some possible consequences for antebellum North Carolina following from the 'jurisprudential incoherence' arguably highlighted by that state's Supreme Court in its *Hoover* opinion, with natural applications to our present day culture being considered.

*II. **Foundations: "in the nature of things..."*** [52]

Every academic argument depends for its consistency and effectiveness on discrete and discernible ideas – principles foundational in their nature, upon which the edifice of a persuasive postulate is more or less carefully laid. Whether explicitly stated or implicitly woven into the fabric of the work, these 'foundational principles' lend stability to arguments advanced, forming thereby the very *sine qua non* of the point insisted upon by the author and which she hopes to persuasively develop. Seeking to advance a particular thesis as it does, this paper is in fact no different. It depends for its own anticipated success on three distinct foundational 'theorems' nesting one inside another and together forming a sturdy platform upon which the paper's ultimate argument hopes to rest: a.) first, fairly straightforwardly, *nations, like persons, have spirits*; b.) second, following from, connected to and advancing the first, *the spirit of a nation is uniquely expressed in its law*, this latter term being here referenced in its broadest, most creative sense – discrete, tangible positive laws, along with less tangible[53] foundational jurisprudential principles and even local custom, to the extent it actually animates a society; and c.) simply put for the present, and following in consequence of the above two, *jurisprudence* – or, rather, more precisely – *jurisprudential coherence*[54] – *matters*, profoundly so, in both the experience of a people and the life of a nation. Given the significance of these principles to the ultimate

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[52]*State v. John Hoover*, *supra*, note 1., at 503.

[53]Less tangible, though by no means less important. In fact, these foundational principles, referenced as *jurisprudence* for the present purposes, will be presented as *more* important in critical ways than attending positive laws, if the argument suggested here develops as planned.

[54]Employed here as a term of art, of course, with clarifying explanations following in due course.

argument advanced in this article, and their unique interaction one with another, a word of explanation about each is in order here.

a.) *...nations, like persons, have spirits...*

This first principle – *nations, like persons, have spirits* – is the easiest to advance, being intuitive in its essence and readily marshaling as it does both anecdotal and intellectual evidence in its support. What is suggested by its lean, elegant contours is simply this: just as it is impossible to deny the essential spirituality of individual persons,[55] it is equally beyond reasonable question that the notion of 'spirit' can rightly be applied to a people collective, and that the spirit of the collective is not merely or simply an aggregation of the individual spirits of the persons comprising the collective. Such a notion is well supported by anecdotal, experiential evidence, easily accessible to and understood by each of us. Anyone who has done so would readily agree that a visit to Accra or Bangkok or Paris or Vladivostok involves not merely a change of geographical location but rather a world change of a very real sort, an entering into a cultural experience which is in each case singular, definable and different, in palpable ways, from the place the visitor owns as 'home.' In entering those individual places and the nations from which they derive, it is here suggested that visitors are effectively interfacing with a

[55]In a relatively obscure but important text from THE HOLY BIBLE, in which St. Paul of Tarsus traditionally closes his epistle to the Christian congregation at Thessalonika with a *brokhe* for his congregants, he makes the following significant trichotomous reference: "May the God of peace himself sanctify you wholly; and may your *spirit and soul and body* be kept sound and blameless at the coming of our Lord Jesus Christ.": *I Thessalonians* 5:23 (R.S.V., emphasis added). This small send-up, resting neatly in a whole text which followed Roman expansion and world dominance westward as a result, has influenced and indeed buttressed our western foundational notion of ourselves as uniquely *spiritual* individual beings, whatever else we agree that we are.

spiritual presence in each, which, though varying slightly from region to region of the nation in question, infuses the entire nation with an individuality and uniqueness as distinctive, place to place, as human spirits differentiating individual human beings.[56]

The point might be illustrated anecdotally by referencing an experience I had with my then small children many years ago in our home of Toronto, Ontario, Canada,[57] on one of our frequent visits to the Ontario Science Center. On this particular occasion we enjoyed an exhibit which sought to encapsulate the essence of an individual nation by surveying its citizenry broadly and asking them to collectively identify a popular 'proverb' best describing the character of their own nation; the results were amusing, provocative and, ultimately, illuminating. In Ghana, it was to be understood, "it takes many hands to pass around the calabash (feeding gourd)...", reflecting the gentle communitarian spirit stereo-typically gracing modern notions of the best of the African cultural cooperative. In Japan, simply, directly and matter-of-factly, "the nail that stands up gets pounded down..." (!), in marked, amusing and remarkably illustrative contradistinction to America, where, its own citizens agreed, "the squeaky wheel gets the grease."[58] Beyond simply illustrating their individual characters, these and many others of the

[56]Again, anyone experienced in world travel would have a hard time disputing the point contended here, nor reasonably challenging the use of the word *spirit* as the proper descriptive of the experience, nation to nation.

[57]Itself a wonderful place to be introduced to the notion of the distinctive, individual spirits of nations, given that city's profoundly multi-cultural make-up. In our years in that rich, interesting place we counted among our friends Egyptians, Koreans, Mexicans, Ghanaians, West Indians, Vietnamese, Israelis, South Africans, Japanese, Armenians, and Colombians, to give an incomplete list, leaving off mentioning various Canadians and Americans, and the usual assortment of Europeans, western and eastern.

[58]From this fascinating comparison, it is not difficult to posit real and distinctive positives of each nation hallmarked by the individual proverbs – humility and selfless uniformity in the

proverbs presented in the exhibit as representing each nation to its own mind and in its own words, clearly offers something valuable about the spirit of each, for the careful observer.

Beyond anecdotal and experiential evidences, the notion that *nations, like persons, have spirits* is not wholly without intellectual support. Chief among world noted jurists and legal philosophers considering the distinct spiritual nature of a national collective must be Friedrich Karl von Savigny,[59] an early 19th century jurisprude of immense intellectual weight in his native Germany and beyond, whose significant life's work might reasonably be said to have rested almost entirely on this pristine premise. Sparely yet gracefully denominating the thing in question as the *volksgeist*, he posited this 'spirit of the people' as an almost cosmic force,[60] running through a peoples' history as a unified, unifying theme, thus rendering their historical past of supreme relevance to any moment in their 'present' and clearly reflecting on and

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one, forthrightness and individuality in the other – nor the harsh undercurrents of each – a violence just below the civil surface of the one ("*gets pounded down*..."), and an almost childish self-indulgence clearly connected to the other ("*gets the grease*..."). One cannot help but wonder whether diplomacy takes self-conscious account of these not insignificant contra-distinctives.

[59]Born in Frankfort, Germany in early 1779 and dying in Berlin in 1861 at the age of 82, von Savigny is quite rightly included in GREAT JURISTS OF THE WORLD (Sir John MacDonell & Edward Manson eds., 1914, 1968), biographer J. E. G. Montmorency in that collection being "tempted to call him the Newton or the Darwin of the science of law...." (*id.*, at 586). A careful consideration of his expansive career as a student, scholar, writer, jurist and public servant suggests little hyperbole on the author's part in this regard. A central thinker in, if not co-founder of the "historical school" of legal jurisprudence prevalent in Germany and spreading throughout western Europe across the 19th century, the intellectual impetus of his work remains remarkably resonant with our 'new' 'law and society movement,' and thus lies ripe for rediscovery by today's legal historians to good effect, it is suggested.

[60]Indeed, Montmorency notes as one of von Savigny's most weighty intellectual achievements the understanding of the history of a people as "a cosmic process..." (*id.*), organic in its essence and force and by no means dry, dusty and static, effecting and perhaps even controlling much of their social structure and output, including the genesis and orderly development of their laws. As this tying of 'law' to the spirit of a people is very much at the

effecting their anticipated future. This *volksgeist* was for von Savigny real and powerful, distinctive in each people group and distinguishing as well, catalytic in its effect and thus something to be respected and understood by anyone seeking to study a people (academics), or move them (politics). And, being distinctly connected with people, it was thus intimately partnered to *law*, von Savigny viscerally understood and clearly appreciated, in significant and important ways, ways very much at the center of the thematic principles of this article.

b.) *...the spirit of a nation... uniquely expressed in its law...*

Assuming the orthodoxy and internal coherence of the first premise, the broad lines of the second premise should naturally and logically follow, building as it does from the first. Just as individuals express themselves uniquely and individually out of their own singular spirits, collectives do so as well, and through the same sorts of media available to and utilized by individuals. We intuitively understand this to be true when considering the popular culture-based media both publicly expressed and publicly (if personally) experienced, such as fine art (*e.g.*, the "Dutch Masters," not simply realizing individual artistic vision, but also surely evoking a precise time, place and unique cultural expression indelibly if quietly connected with more expansive Flemish nationalism) or literature (*e.g.*, the Russian giants, who, beyond their lyric individual genius, produced a body of work particularly and inextirpably identified with the stark, beautiful, foreboding culture from which they sprang). As well, it is no great intellectual stretch to view distinctive cultural markers such as language, dress, cuisine or particular social custom as expressing the unique spirit of the culture in question, if not at one and the same time

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thematic center of this article, more will be said of the ideas of von Savigny in this regard, *infra*.

defining, enhancing or even creating it. For reasons that ought to appear clear as the thesis of this article unfolds, it is not only reasonable but particularly helpful and valuable to include the discrete discipline of *law* among those cultural portals allowing ingress into and potent interface with the spirit of a cultural collective.

Simply put, there are few things more illustrative of the animus and vivacity of a culture – or the lack of those things – than the self-reflexive ways it deliberately chooses to encumber or advantage itself in its private or public spaces. This critical social and cultural story is singularly commended to interested students through the laws of that culture, both in point of time and across the life history of the culture, as recoverable through its always articulate preserving documentary records. In this way law as an historical artifact relentlessly recovers the story of a culture's growth and development, its vitality and morbidity, its life and its death, and it does so with a voice and recall that is at once powerful and profound, in the hands of the skilled and sympathetic observer.[61] Through the pristine tracks of its foundational principles and/or the development of its positive structure over time, one can see in a culture's documented law nothing less than a written record of the arc of development of that culture, from its onset and birth through its own self-conscious growth and maturation and even through to its death, if the

[61]Here one finds a deliberate contrast in the two legitimate schools of thought making up the discipline of legal history as recovered in most Anglo-based law teaching settings. The first considers the 'history of law' – the incremental development of the institution across time and place – as its own self-contained and self-reflexive story, included in the edifice of the discipline of history, though unique in that inclusion. The second considers 'law in history' – the ways in which in law might reflect history, preserve it and even create it, in the broadest and most academically rich sense of that term. While both are intellectually legitimate, the second is clearly being preferred over the first here and provides all of the legal/historical impetus of the present study.

record is particularly lucid and honest.[62] In all of these things law provides a profoundly accessible and transparent window into the life current of a culture – into its *spirit*, in reality – while at the same time chronicling, recording and perhaps even preserving that spirit for the generations of interested students who might follow.

Intellectual support for this intuitive second notion is by no means scarce in our western record. Clearly, premiere American jurist Oliver Wendell Holmes reflected something of the truth of this second postulate, either deliberately or incidentally, in the oft quoted framing words of his *magnum opus*, *The Common Law*:

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.[63]

Savigny also understood a visceral connection between the spirit of a culture and its law when he postulated:

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[62]Fortunately for historians, such lucidity inevitably characterizes western cultural recordation to an almost pathological degree.

[63] OLIVER WENDELL HOLMES, JR. THE COMMON LAW 1 (1944)

> In the earliest times to which authentic history extends, the law will be found to have already attained a fixed character, peculiar to the people, like their language, manners and constitution. Nay, these phenomena have no separate existence, they are but the particular faculties and tendencies of an individual people, inseparably united in nature, and only wearing the semblance of distinct attributes to our view. That which binds them into one whole is the common conviction of the people, the kindred consciousness of an inward necessity, excluding all notion of an accidental and arbitrary origin.[64]

Further, the very title of Baron de Montesquieu's masterpiece – *De l'esprit des lois*[65] – reflects something of the vitality of this second postulate as well, especially when the general content of that work is referenced; indeed, in consequence of such reference, it would seem not too forward to reconstitute the title more precisely as *De l'esprit d'un peuple réflechi dans ses lois*.[66] In each of these examples and many more, it is suggested, the simple truth of the presented principle – *the spirit of a nation is uniquely reflected in the laws of that nation* – rests on solid logical and intellectual foundations, valuable to the present study.

c.) *...jurisprudence – or jurisprudential coherence – matters...*

If the nuances of this third foundational principle are the most subtle of all, its importance to the projected direction and conclusion of the article is without doubt the most critical,

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[64] FRIEDRICH KARL VON SAVIGNY, OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE 17 (Abraham Hayward, trans., Littlewood & Co. Old Bailey 1831) (1999).

[65] CHARLES LOUIS SECONDAT BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS (David Wallace Carrithers trans., ed., University of California Press 1977)

[66] With apologies for the seeming arrogance of even considering a change of any aspects of the vital work of this important intellectual thinker, the point seems nevertheless to hold up here.

encapsulating *in toto* all of the original thinking, if any at all, which the article seeks to present and develop. Jurisprudence – or, more precisely and, thus, more importantly, *jurisprudential coherence* – matters. By reference to the first element of the principle – *jurisprudence* – nothing more or different is anticipated than its usual and orthodox meaning: a "system or body of law..."[67] by which a particular culture – in the present study, antebellum North Carolina – is constituted, supported and realized, or, alternatively, "the study of the general or fundamental elements of a particular legal system..."[68] in question.[69] By employment of the principle's third element – *matters* – I also do not intend to stray much beyond this term's commonly received meaning – to be of importance, intrinsic value or significance – though it's italicization is by no means accidental; as the thesis of this article develops, it should become clear that I reference it in its most emphatic form, *i.e.*, *really, really matters*, in a deep, far-reaching and consequentially profound way, to the very vitality and even the *viability* of the nation/collective conscripting the particular jurisprudence for its own infrastructural support. In the end, however, it is the middle

[67]WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1227 (1993).

[68]BLACK'S LAW DICTIONARY 871 (8th ed. 2004).

[69]Though it is only fair to warn the reader here that, given the limitations of the time period at issue in this study along with the limitations and predilections in my thinking, she will find me favoring an '18th century' recovery of the term, Black's Law Dictionary noting, by way of operative definition, "Originally (in the 18th century), the study of the first principles of the law of nature, the civil law and the law of nations...": *id.* As well, given the broad context in which the jurisprudence in question will be both cast and assayed, neither should the reader be surprised to find at play here elements of the more modern and precise notions of *analytical jurisprudence* ("[a] method of legal study that concentrate's on the logical structure of law, the meanings and uses of its concepts, and the formal terms and modes of its operation....": *id.*, at 872), and *sociological jurisprudence* ("[a] philosophical approach to law stressing the actual social effects of legal institutions, doctrines, and practices...." popularized by Dean Roscoe Pound at the turn of the 19th/20th centuries: *id.*).

element of the principle – *coherence* (modifying as it does the first and thereby giving the third the sum of its heft and force) – which bears all of the intellectual weight the entire principle is expected to carry here, thus making it deserving of special attention at this time.

Beginning with its root word – *cohere* – raising as that term naturally does notions of *inseparability*,[70] *harmony*,[71]and *inter-relational consistency*,[72] *coherence* references the positive state of all these things, including in their ambit "connectedness..." "interrelatedness..." "consistency..." and "congruity...".[73] However, in light of the element here which the term is intended to modify, a particular received definition of the concept sets itself above all the others in lending meaning to use of the term in the present context. If relevant (*i.e.*, 'sociological') jurisprudence naturally involves as it does notions of society, culture, values and ideology – and the seminal under-girding of those things for the people it serves – *coherence* becomes by association an "integration of social and cultural elements based on a consistent pattern of values and a congruous set of ideological principles...".[74] Simply put and contextually considered, harmony, consistency and logically grounded congruence of jurisprudence across the face of its

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[70]"…to hold together firmly, solidly, stickily, with resistance to separation...": *supra*, note 67., at 440.

[71]"…to become harmoniously united by common interests or sense of social membership or by emotional ties...": *id.*

[72]"…to have unambiguous connectedness and logical or aesthetic interrelation of parts: fit together naturally and consistently with suitable order, proportion, and similarity of tone without jar or wrench...": *id.*

[73]*Id.*

[74]*Id.*

disparate parts – foundational philosophical principles *(e.g.*, constitutions, written[75] or otherwise[76]*)*, focused positive preferences *(e.g.*, formal legislative enactments), substantive legal precedents (*e.g.*, 'common laws' as developed though principles of *stare decisis* and the like) and informal legal proscription (*e.g.*, local custom) – is deeply and integrally involved in the vibrancy and vitality of any community. A brief word of final example should illustrate the point being insisted upon here, and suggest at least the kinds of cultural consequences to be anticipated where coherence in its foundational jurisprudence is found to be lacking.

It is common knowledge that the construction of a residential building involves distinct if disparate parts – foundations, flooring, framing, walling and roofing, generally speaking – along with a host of separate but naturally inter-related functions. If the pure act of construction happens to be the end of the project in itself, it stands to reason that harmony, consistency and congruity of the parts of the building along with the processes of the related functions (*i.e.*, *coherence*) is of no especial value and, to the extent they slow down or otherwise burden the achievement of the end in question, form its measurable detriment. However, if the end instead is the safe and comfortable *habitation* of that building at the close of construction, then the coherence of the synthesis of those parts and the functions relying on and logically extending that construction are of nearly inestimable importance, for reasons all but obvious to the most inexperienced of builders. As with the construction of buildings, might matters be the same for the 'construction' of societies, the development of communities, and the enlightened vivacity of cultures? With this question as both a suitable backdrop for this study and at the same time its

[75]This is the overwhelming American preference, of course.

[76]The national preference of Canada until 1983 and the preference of Great Britain

central pivot point, we are now ready to enter the potent and powerful world of antebellum North Carolina, through the eyes and experiences of Mira, Mr. Hoover and others.

throughout its history, to the present day.

III. North Carolina Slavery: "exercise of an authority conferred by the law..." [77]

In seeking fully to explore the matter of *jurisprudential coherence* with regard to the *Hoover* decision and the antebellum culture receiving it, it is first necessary to recover a clear picture of the jurisprudence of slavery particular to that culture at the time the decision was rendered. However, immediately prior to and in consequence of this, it is useful to offer a brief word by way of reminder about the essential jurisprudence of the institution of human slavery generally in the distinctive American context. Specifically, it is necessary to highlight the important organizing fact that human slavery of all kinds, especially that related to the African experience in colonial and post-colonial America, drew all its jurisprudential life, vitality and substance from the relevant *positive law* of a jurisdiction,[78] and none from its *natural law*[79] to

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[77] *State v. John Hoover*, *supra*, note 1, at 504.

[78] More formally *jus positivum*, or "law established by human authority....": *supra*, note 68, at 1200. Here I am referencing the term in an entirely orthodox way, specifically considering the compendium of laws, legitimate and illegitimate, naturally speaking, deriving from recognized, coercive authority confined to the human experience.

[79] More formally *jus naturae*. In employing this contrasting term, both here and throughout the article, I am tending to recover it in its most Thomistic form and sense. Thus, being ultimately "appointed by [human] reason...", natural law becomes nothing more nor less than a "participation [by the rational creature] of the eternal law...", itself immutable, transcendent and universal (both in its knowledge and in its experience), originating outside of all persons yet holding sway over all, as having been given to each: THOMAS AQUINAS, SUMMA THEOLOGICA, PRIMA PARS 1008, 997 (Fathers of the English Dominican Province trans., Benzinger Brothers, Inc. 1947) (1273). Originating entirely outside the human cognitive will yet both discernible and discoverable by "the best [of] human reasoning...": (J.L. BRIERLY, THE LAW OF NATIONS 20 (1963)) and thus impressing itself by human reason on all of humanity, it cannot be amended by any human action, though it can easily be disobeyed.

In referencing a 13th century rendering of the term in question here, I am neither unaware of nor unsympathetic to the modern and post-modern debate regarding the intellectual veracity and ultimate utility of any medieval 'wisdom' in today's setting. However, I defend this preference on three simple grounds: 1.) although writing in the 13th century, Aquinas' work

whatever extent such was reflected in that jurisprudence. Thus, when the great Justice Joseph Story held American slavery where it existed to reflect nothing of natural law, but rather "deemed [it] to be a mere municipal regulation, founded upon and limited to the range of territorial laws...."[80] he was claiming nothing new, but merely repeating in short form what jurisprude[81] after jurisprude[82] after jurisprude[83] had confidently posited before him. This matter

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regarding 'natural law' rigorously retains a classical quality, and thus maintains intellectual vitality even centuries thereafter; 2.) the reference is used not for the sake of its own internal truth, but rather as the short-form of a deep metaphysical concept, using language still accessible to today's student; and 3.) most importantly, the term as defined in Thomist language maintained value to antebellum North Carolina, the cultural agar milieu through which we are testing the *coherence/incoherence* postulate, and is reflected in that culture in ways still accessible to today's student, using language retaining useful meaning in the present setting. Thus, if it was good enough for the culture we are studying...

[80]*Prigg v. Commonwealth of Pennsylvania*, 41 U.S. 539, 611(1842).

[81]Aquinas himself included "slavery..." among those things "not brought in by nature, but devised by human reason for the benefit of human life.": s*upra* note 79., at 1012.

[82]Important Dutch enlightenment philosopher Grotius (*neé* Hugo de Groot, 1583-1645) disavowed the natural law roots of slavery, intellectually condoning it in the strictly limited instance of conquest of war, and then only for the single life of the conquered. Jean Jacques Rousseau would not tolerate even Grotius' limited natural legitimacy of slavery in the 'war conquest' scenario, noting boldly:

> The 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.... These are not the principles of Grotius... but they are derived from the nature of things and founded on reason.

ROUSSEAU, LE CONTRAT SOCIAL 12 (Charles Frankel trans., Hafner Publishing Co. 9th ed. 1961 (1947)). 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

is not insignificant here, as it is suggested that our search for *coherence* in the manner raised herein will inevitably lead us to the 'pinch places' where these two otherwise incompatible jurisprudences are forced to meet,[84] and that the coercive out-workings of *incoherence* might best be understood in the consequences of their forced meeting.

At the time Chief Justice Thomas Ruffin's *per curiam* opinion in *State v. Hoover* itself entered into the common law of human slavery in North Carolina, and from there into slavery's legal ethos in others of the Southern states, almost assuredly,[85] it nested into a complex and

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natural rights based enlightenment philosophy.

[83]Writing at about the time of the explosion of his own nation's prosecution of the African slave trade in the North American colonies, John Locke was unequivocal in his disavowal of the 'naturalness' of the slave practice in America or his sense of a 'right remedy' for its amelioration:

> [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.

JOHN LOCKE, TWO TREATISES OF GOVERNMENT 320-21 (Peter Laslett ed., Cambridge University Press 1960) (Mentor Books 1965).

[84]Here, incompatibility is referenced only in relation to their combined effects regarding the institution of human slavery, of course, along with the culture intending to manage it thereby.

[85]Such a claim for any aspect of the work of "the Great Chief Justice" involves no real risk. Dean Roscoe Pound himself numbered Chief Justice Thomas Ruffin among "the ten judges who must be ranked first in American judicial history..." alongside such luminaries as John Marshall, James Kent, Joseph Story, Lemuel Shaw and Oliver Wendell Holmes: THE FORMATIVE ERA OF AMERICAN LAW 4 (1938). When questioned about this particular inclusion years thereafter, Dean Pound reiterate the Chief's "pervasive influence on the development of the common law in other southern states, revealed by great numbers of citations to North Carolina cases...": Martin H. Brinkley, *'The Great Chief Justice': Thomas Ruffin and the North Carolina*

layered jurisprudence developing around that institution for more than a century-and-a-half previous at least.[86] Necessarily involving state constitutional forms, public and private enactments by both the colonial legislative body and its state equivalent following, along with the wide ranging and ubiquitous state appellate court cases incrementally developing the subject area through practical application of *stare decisis*, the North Carolina common law of slavery essentially amounted to a series of discrete legal pronouncements around a unifying theme: positive law management of erstwhile natural rights flowing from fundamental natural law applications. While this 'unifying theme' is in no way unique to North Carolina as it developed its patchwork edifice of law managing the institution,[87] it is nevertheless important to the thesis at the center of this study. Essentially, the state reflected natural law consistent with the energetic foundational ideals of post-Revolutionary America through the late 18th and early 19th centuries, while creating a companion, competitive legal regime managing human slavery in its midst, generally dependent on positive law for its impetus and energy, and preferring this jurisprudence when conflicting natural law was in the offing. This 'dual jurisprudential approach' to slave-based culture building within the shadow of American philosophical/political

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Judicial Tradition. 14 (unpublished, 1991) (copy with myself).

[86]This figure is imprecise, of course, and selected for effect. Indeed, as African-origin slavery was a fixture in the British colonization of North America from its earliest days in the seventeenth century, it is not unreasonable to mark the commencement of the jurisprudential edifice supporting human slavery in North Carolina from Charles II.'s originating *Charter of Carolina*, sealed and witnessed on March 24, 1663.

[87]Indeed, recognizing the combining effects of close physical and politico-cultural affinity between all of the Southern states along with relatively narrow intellectual grounds available by which to manage the institution within the broader ideals of the American republic, there was little novelty in any one Southern state's approach to the difficult question, each borrowing broadly and conspicuously from the other throughout the period under consideration.

ideal was important, and its evidence can be seen across North Carolina's relevant legal landscape, through all of its received institutional law forms: constitutional, legislative and case/common law.

For example, in a document both recognizing and preserving such bedrock personal freedoms as 'double jeopardy' protection,[88] compulsory jury process[89] and freedom of religion,[90] THE FUNDAMENTAL CONSTITUTION OF CAROLINA (1669), that colony's original constituting charter, nevertheless noted, forthrightly and unequivocally, "110th. Every freeman of Carolina, shall have absolute power and authority over his negro slaves, of what opinion or religion soever."[91] It should be noted that this clause was not repeated in North Carolina's first statehood Constitution, ratified by appropriately convened constitutional congress on December 18, 1776. Indeed, in an 'action by omission,' that constitutional congress arguably moved in something of the opposite direction, creating individual suffrage rights in 'free negroes' otherwise qualified to vote as freeholders/freemen, by failure to exclude them from its relevant definitions.[92] However,

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[88]"64th. No cause shall be twice tried in any one court, upon any reason or pretence whatsoever.": THE FUNDAMENTAL CONSTITUTION OF CAROLINA (1669), in 25 THE STATE RECORDS OF NORTH CAROLINA 130 (Walter Clark, ed., 1994).

[89]"111th. No cause whether civil or criminal, of any freeman, shall be tried in any court of judicature, without a jury of his peers.": *id.* at 135.

[90]"109th. No person whatsoever shall disturb, molest, or persecute another, for his speculative opinions in religion, or his way of worship.": *id.*

[91]*Id.*

[92]One historian suggests that the positive use of the suffrage power was a virtual certainty among at least some African-Americans:

> [T]he 1776 Constitution had granted the franchise indiscriminately

that beneficent entitlement was deliberately and specifically closed by act of a constitutional amendment convention of 1835, in an "extensively discussed..." amendment, albeit "by only a small majority...".[93] Thus, by act of the amending convention ratified by popular vote,[94] the brief period of public liberality was over, the state reiterating in its constituting documents, *de facto*, the dual system of natural rights for citizens generally, trumped by coercive positive laws in the case of that state's members of African descent.

This same scheme can be seen even more clearly when considering legislative contributions to the North Carolina legal edifice of slavery, from colonial origins through the first third of the 19th century, the relevant terminus point in this study. While the legislature – both colonial and post-colonial – reflected an oblique deference to natural law and individual right typical of its sister jurisdictions in the post-Revolutionary American context, that tendency was abruptly and thoroughly betrayed with regard to institutional slavery. This can be seen at the outset in the singular and distinctive ways in which legislative enactments reified the very nature of the individuals held in institutional bondage, from the intuitive and natural human

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> to all "freemen"...including blacks. While it is now impossible to determine whether black voters were admitted to the poll in every North Carolina county, it is certain that they voted in some and that their numbers in a few places, were substantial....

JOHN V. ORTH, THE NORTH CAROLINA STATE CONSTITUTION: A REFERENCE GUIDE 9 (1993).

[93]*Id.*, Orth noting, specifically, "On the key [black disfranchisement] vote, delegates were divided sixty six to sixty one." (footnote omitted).

[94]The irony is plainly obvious, of course: by virtue of its previous, originating constitutional work, free black North Carolinians were enabled by law to vote on whether to bar voting for free black North Carolinians thereafter. History does not easily recover how many of those qualified voted, or what direction their votes generally took.

status, to something else, and quite a bit lesser.[95] In this way the law recovered these individual persons in the unnatural status of property in some fashion,[96] requiring of their 'owners' property taxes[97] and of their transporters import duties of a sort,[98] and opening up the ancient, property grounded common law writ of replevin as a streamlined means of recovery for tortious

[95]Now is as good a time as any to introduce the reader to my own personal predilection not to refer to the individuals themselves by the debilitated and immoral condition in which they were unnaturally held. Thus, for me, they are not *slaves* but rather, 'African-origin persons held in bondage to slavery'. Where considerations of brevity would require it, I will use the status word to describe the person, but I will do so using quotes, the reader understanding my intent and meaning in this.

[96]This status is referenced obliquely, of course. For example, the county sheriff was "strictly required and impowered [sic] to take into his care all such waggons [sic], horses, negroes and arms..." left stray by act of the British troops prosecuting the Revolutionary War in North Carolina, "the waggons [sic] and arms... [being] delivered to the most convenient quartermaster... the negroes... [being] hire[d] out for any term not exceeding twelve months...": Revolutionary War Contraband Act of 1781, ch. XVI N.C. Laws, in 24 THE STATE RECORDS OF NORTH CAROLINA 410 (Walter Clark, ed., 1994). As well, slave property is included among that general class of goods subject to "executory devise and bequest..." memorialized by "deed or writing..." akin to "a last will or testament...": Slave Limitations Act of 1823, ch. XXXIII N.C. Laws 35 (1824).

[97]For example, "[A]ll Lotts [sic] and Lands with their Improvements, Slaves under the age of Sixty Years, Horses, all Cattle from one year old and upward... [etc.] shall be held and deemed taxable property liable to be assessed and... collected...": Property Tax Act of 1778, ch. III. N.C. Laws, in 24 THE STATE RECORDS OF NORTH CAROLINA 200 (Walter Clark, ed., 1994). See also, in the same regard, Slave Restraint Act of 1785, ch. VI § VIII N.C. Laws, in 24 THE STATE RECORDS OF NORTH CAROLINA 727 (Walter Clark, ed., 1994), referencing "slaves... town taxables...".

[98]For example, "[A] duty of five pounds per head... [for slaves between 7-12 and 30-40 years old] and a duty of ten pounds per head... [for slaves between 12 and 30 years old] shall be collected by the collectors of the different ports in... [North Carolina]...": Import Duty Act of 1786, ch.V N.C. Laws, in 24 THE STATE RECORDS OF NORTH CAROLINA 793 (Walter Clark, ed., 1994). See also, in similar regard, Revenue Act of 1822, ch. I §VIII N.C. Laws of North Carolina 6 (1823), where "[A]ll persons who shall bring negro slaves from another state into this state, for sale, shall pay the sheriff of some one county, the sum of ten dollars upon each negro slave so brought...".

interference with the enjoyment of that 'property.'[99] As well, this 'lesser status' was reflected in the criminal outcomes regarding the death of 'slaves,' individuals "guilty of willfully and maliciously killing a slave..." in situations otherwise defining murder, being liable in penalty only to "twelve Months Imprisonment..." rather than the otherwise customary capital execution,[100] for example.

As well, this persistent, notorious duality was reflected in the individual lives of the persons managed by the relevant legislative enactments, both individual African-origin Americans and their majority culture counterparts, and in their interactions one with another. Thus, while the law created no similar impediments for the population at large, it visited extreme restrictions, through positive legislative actions, on African-American travel,[101] ranging and

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[99]For example, "[F]rom and after the passage of this act, writs of replevin for slaves, shall be held and deemed to be sustainable, against persons in possession of such slaves in all cases where actions of detinue or trover are now proper...": Replevin Act of 1828-29, ch. XXVIII N.C. Laws 15-16 (1829). See also, in the same regard, Replevin Act of 1838-39, ch. XXXV N.C. Laws 69 (1839), managing application of the writ when used in actions for the recovery of "such slave or slaves...".

[100]Slave Killing Prevention Act of 1774, ch. XXXI §I N.C. Laws, in 24 THE STATE RECORDS OF NORTH CAROLINA 975 (Walter Clark, ed., 1994). Note that the penalty did in fact mature to "Death, without benefit of Clergy...." upon conviction of a second such offense: *id.* See also, in the same general regard, Slave Act of 1715, ch. XLVI N.C. Laws, in 23 THE STATE RECORDS OF NORTH CAROLINA 64 (Walter Clark, ed., 1994), where any individual who "shall kill any Runaway Slave that hath lyen [sic] out two months... shall not be called to answer for the same..." on the strength of his oath alone of the necessity of the action, contrary evidence apparently notwithstanding. It should be noted here that the 1774 statute above quoted figures prominently in an important case addressing the very issue of appropriate penalty for the malicious killing of a slave, in which the greater common law of slavery was significantly affected by the North Carolina Supreme Court: *State v. Boon*, 1 N.C. 191 (1801). As such, it will be addressed in more detail, *infra*.

[101]These restrictions were obviously designed to manage the whereabouts of the slave *vis á vis* the master, with an eye toward the ever present and ever troubling runaway possibility. Thus, "no Slave shall go from off the Plantation or Seat of Land where such Slave shall be

hunting,[102] and, of course, notoriously, marriage.[103] As well, 'freemen' otherwise able to order their steps and actions as they would, to manage their financial resources to their own satisfaction and to dispose of their own personal property as they saw fit, endured marked restrictions in each of these areas, by positive pronouncement of the bicameral General Assembly, when the matter of slavery became at issue.[104] Also, the General Assembly sought through positive enactment to

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appointed to live, without a Certificate of leave, in Writing for so doing, from his or her Master or Overseer...": Slave Act of 1741, ch. XXIV N.C. Laws, in 23 THE STATE RECORDS OF NORTH CAROLINA 201 (Walter Clark, ed., 1994), which restrictions were regularly reiterated and augmented as deemed necessary by the Legislature, by further extensions, place limitations, process limitations, etc.

[102]These restrictions were regularly reiterated throughout the legislative record in question, involving both time of hunting/ranging, manner of such activity and place as well. While the restrictions usually applied to all persons, punishments where slaves were the transgressors almost always involved "thirty nine lashes on his or their bare back": Hunting Restrictions Acts of 1779, ch. III N.C. Laws, in 23 THE STATE RECORDS OF NORTH CAROLINA 269 (Walter Clark, ed., 1994), *e.g.*

[103]Short formed 'miscegenation' laws, these bans were specifically and carefully designed "for Prevention of that abominable Mixture and spurious issue... by white Men and women intermarrying with Indians, Negroes, Mustees, or Mulattoes....": Marriage Act of 1741, ch. I N.C. Laws, in 23 THE STATE RECORDS OF NORTH CAROLINA 160 (Walter Clark, ed., 1994), *e.g.*, setting out stiff monetary fines for both the principles and the clergy engaging in such prohibited action, and declaring the contracted status to be "null and void....": Prohibited Marriages Act of 1838-39, ch. XXIV N.C. Laws 33 (1839).

[104]By example of the first, note that individuals otherwise free to choose their involvement in public disturbance actions of any sort were required under that law to "use their utmost endeavours [sic] to apprehend all such Servants & Slaves as they conceive to be Runaways... or that shall be seen off his Master's grounds Arm'd [sic] with any Gun, Sword or any other Weapon of defence [sic] or offence...": Slave Act of 1715, *supra*, note 100., at 63.

By example of the second, individuals free to use after-tax disposable income in any legal endeavor they so favored were nevertheless required by law to reserve a portion of that income in the employment of "some white person to superintend and control... slaves, and remain on such plantation in the absence of the owner whenever such absence shall exceed forty days...." in certain legislatively created circumstances, with monetary penalties for failure following: Slave Overseers Act of 1830-31, ch. CXXXIV N.C. Laws 119 (1831). While the law does not itself

regulate social intercourse between the races/social castes, in such areas as economic trading,[105] and interpersonal gaming,[106] among others. Through these and many other means, and rigidly

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reflect this, of course, its chronological proximity to the conflagration notoriously remembered as the "Nat Turner Rebellion" (late summer/early fall, 1831) is to be noted.

By example of the third, one need look no further than the bank of ever more encroaching legislative enactments issued in consequence of the socio-culturally difficult matter of slave manumission. While an owner was absolutely free to dispose of all personal property as he/she saw fit, this was notoriously not the case when that personal property was sentient, animate and willful. From its earliest colonial existence forward, the North Carolina General Assembly exercised ever increasing positive control of this otherwise natural right, finally reserving to itself alone and entirely the choice regarding manumission of slaves. This latter was likely in direct consequence of and response to an organized movement among the not insignificant North Carolina Quaker population, in which adherents of that sect would purchase 'slaves' for the express purpose of manumitting them. Judging by the number of positive emancipation petitions granted by the General Assembly – less than 10 in the ten years immediately prior to Mr. Hoover's capital execution in 1840, by my count, the General Assembly predictably proved illiberal in this regard, and the practice was thereby not widespread.

[105]For example, see Trade Prohibition Act of 1826, ch. XIII N.C. Laws 7 (1826), a far-ranging act managing trade with slaves in minute detail (*e.g.*, detailing goods barred from trading, including "cotton, tobacco, wheat, rice, corn, rye, pork, bacon, beef... farming utensils, nails, meal, flour, spirituous liquor... flax, flaxseed, hogs, cattle, sheep... turpentine, fodder, shingles, hoops", *etc.*), defining breach as "...indictable" (*id.*), and providing imprisonment, criminal fine and corporal punishment in consequence of breaches. Note that the last punishment was reserved for free negro/mulatto and 'slave' transgressors, the former class receiving for breach no more than "thirty-nine lashes on his or her bare back..." (*id.* at 7), the latter class receiving the physical chastisement "on his, her or their bare backs, not exceeding thirty-nine lashes, to be well laid on...." (*id.*).

[106]These restrictions were enforced on slaves themselves (*e.g.*, "[I]t shall not be lawful for any slave... to play at any game of cards, dice, nine pins, or any game of hazard or chance, for any money, liquor or any kind of property...": Anti-Gaming Act of 1830-31, ch. X N.C. Laws 14 (1831), with predictable and ubiquitous physical chastisements following in breach) as well as between slaves and others (*e.g.*, "[I]t shall not be lawful for any white person to play with any Slave or Slaves at any game of Cards, or at any game of hazard or chance, for any money, liquor, or any kind of property...": Anti-Gaming Act of 1838-39, ch. XXII N.C. Laws 32 (1839). Penalties for the majority culture person were strictly limited to fine and/or imprisonment.).

consistent in its own arguable inconsistency,[107] the North Carolina legislative process relied on increasingly more extensive and coercive positive law pronouncements over time to manage the positive law status of slavery in its own ostensibly natural rights law midst.

As with North Carolina's constitutive laws and its legislative enablements, its judicially created appellate common law followed the same general pattern of duality in prosecuting its own distinctive part in maintaining human slavery in the midst of the 'republican democracy',[108] albeit with more arresting prose and more troubling twists and effects.[109] The first salvo in this

[107]I mean here only to re-highlight the dual jurisprudential system by which North Carolina sought at once to go about realizing Revolutionary values while at the same time maintaining the plainly anti-Revolutionary "execrable commerce" of positive human slavery, to borrow and employ Thomas Jefferson's colorful appellative. To be sure, the North Carolina legislature was "consistent in its inconsistency" in that it limited the worst of its positive law encroachments into natural right to the particular institutional management of slavery, and sought to keep these dual regimes hermetically separate, if necessarily uneasily so. While we in the twenty-first century might look with wise and knowing eyes at the inevitable dubiousness of such a tenuous and volatile venture, it is of no intellectual value to study that period through the microscope of our own 'enlightened values' and find it wanting. However, it is well worth our intellectual and spiritual energy to consider outcomes following if – or when – the sealing walls between the two dual regimes begin casually to come apart.

[108]This part of our study focuses on pronouncements from the North Carolina Supreme Court solely, to the exclusion of its trial courts (throughout the time in question there were no courts of intermediate appeal between the trial courts and the Supreme Court). This restriction recognizes the finality of the edicts of this level of court alone as having the kinds of effects which this study seeks to explore.

[109]In opting for this rather benign description of what is in fact an odd and variegated pastiche of case law around the institution of slavery over the period in question, I can reasonably be accused of 'pulling punches' here. Indeed, Professor Tushnet does not overstate the matter when he avers, "The first impression one has of the North Carolina cases on the criminal law of slavery is that they announce a confused collection of rules that defy arrangement into some rational scheme.": *supra*, note 44, at 137-38. While he is by no means incorrect, there is nevertheless 'method to my madness' in this. At the right time, I will recover this important case law voice not as 'confused' but rather as *incoherent*, something far more significant as my thesis is completed.

series came at the very turn of the 18th/19th centuries, in *State v. Boon*,[110] the Court there considering the legal propriety of the defendant's conviction of the murder of a 'slave.'[111] The Court found itself facing two relevant statutes in question, one enacted in 1774 which ameliorated punishment for the murder of a 'slave,'[112] while the second reversing the direction of the first, reinstating the death penalty as the appropriate societal response to such a plainly malicious

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Observationally, it is interesting to note that the closer the 'law generating' institution was situate to the object being managed by the law – here, human beings held in positivist bondage to slavery – the more 'hot blooded' and urgent was the means by which that management was necessarily achieved. Thus, from the constitution, the 'law generating' institution prosecuting principles directly, and not persons, and thereby most removed from the object being managed, the language of management was coolest, most reasoned and most detached. From the General Assembly, the 'law generating' institution prosecuting practical processes, the language of management warmed up, including within itself passes at motive and morality within its enabling prose. For the appellate judiciary, the 'law generating' institution prosecuting real cases and controversies, with real human beings at the heart of its deliberations, the matter became most urgent indeed. The 'language of management' in this case was hottest of all, involving passionate pleas, compelling prose and almost lyrical energy in managing its portion of the positive law edifice in question. This strikes me as important, and eminently appropriate: by analogy, I am told by those who have had related experience in the painfully human endeavor of war, that it is much easier to prosecute its counterintuitive and bloody end from a great distance, through means of bombs, then face-to-face.

[110]1 N.C. 191 (1801).

[111]It should be noted that the Court essentially limited its recitation of the relevant facts in that case to the simple description set out above; it is my experience that, where a court deliberately limits factual recitation in this fashion, it is too often in anticipation of a decision straining at a fundamental level even the most rudimentary notions of justice. See, for example in this regard, *U.S. v. Cruikshank* , 92 U.S. 542 (1875), where the U.S. Supreme Court's spare and convoluted factual recitation belied an abhorrent fact pattern actually attending the case, and an equally abhorrent outcome developed by the Court therein.

[112]In that legislative enactment the General Assembly criminalized the 'murder' of a 'slave,' though distinctly ameliorating the typical common law penalty response to that crime, to "suffer twelve Months Imprisonment..." for the first offense and back to the more traditional punishment, "suffer[ing] Death, without benefit of Clergy...." for the second: *supra*, note 100.

action.[113] Recognizing the legislative effect of the second statute as effectively working a repeal of the first, reflecting the General Assembly's clear intent to fully realize the applicability of the crime of murder in circumstances where the victim was a 'slave,' the four-member panel was nevertheless in agreement in its notice of an ambiguity in the enabling language of the second, fatal to the effect of that intention, in its unanimous, strained opinion.[114] The effect of that ambiguity was dramatic, in the Court's mind, requiring the arresting of the trial judgment and the discharge of an individual unquestionably guilty of "willfully and maliciously killing a slave...".[115]

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[113]And in remarkably strong and cathartic language, leaving little room for doubt as to the intent of the Legislature in the matter:

> [W]hereas, by another act of Assembly, passed in the year 1774, the killing of a slave, however wanton... is only punishable in the first instance by imprisonment... which distinction of criminality between the murder of a white person and one who is equally a human creature... is disgraceful to humanity... be it enacted... that if any person shall hereafter be guilty of willfully and maliciously killing a slave, such offender shall, upon the first conviction thereof, be adjudged guilty of murder, and shall suffer the same punishment as if he had killed a free man.

Supra, note 110, at 192.

[114]Specifically, the Court ruled everything prior to the "be it enacted..." clause to be preamblic and of no value in the interpretation of the statute body. Thereafter it found the last clause of the statute – "shall suffer the same punishment as if he had killed a free man...." – to work an equivocation in the meaning of the otherwise clear first part, the word "killed" there given to multiple meanings including those devoid of *malum in se* shadings (*e.g.*, 'justifiable' homicide). Thus, in deference to the time honored common law rule requiring "the construction of penal statutes in favor of life..." (*id.* at 199), the otherwise righteous "judgment must be stayed and the prisoner discharged." (*id.* at 201).

[115]*Id.* at 191.

Apart from the stark and disturbing outcome of the case,[116] *Boon* did touch on the matter of the duality of applicable jurisprudences considered herein, in the form of a central question raised by its facts troubling the Court's deliberations: apart from statutory construction, did the *common law* of murder apply in a case where the victim of the erstwhile crime was not a 'freeman' but rather, a 'slave?'[117] Hall J. in that case found it "doubtful whether the offense with which... [the defendant] is charged is a felony at common law or not....",[118] given that "slaves were considered as chattels...." and not persons liable to murder,[119] though Johnston J. pointedly disagreed, finding that "the definition of [common law] murder... applies as forcibly to the murder of a slave as to the murder of a freeman...".[120] In *State v. Tackett*[121] the Court readdressed the

[116]For example, Mr. Justice Johnston found himself necessarily in agreement with his brethren in both the effect of the law and the necessity of the outcome, inevitably throwing in his vote with theirs, "though not without a considerable degree of reluctance...": *id.* at 199.

[117]The 'pinch point' at the heart of this question, and its applicability to the present inquiry, should be plain. Quintessentially natural in its form and application, the common law of murder held an individual both guilty and liable for capital execution when they unlawfully killed a person (*i.e.*, a reasonable creature) willfully and maliciously, or, borrowing from the ancient language of the common law, "with malice aforethought." Of course, the key consideration here centered on the word 'person' a 'slave' being reified at positive law as something other than, and lesser than, a 'person' (alternatively, 'property' or the like). Thus, in considering the application of the common law in like situations, the Court was required to consider whether the natural common law of murder would govern all cases of unlawful human killing, or whether a companion positive regime would govern the case of 'slave' victimization.

[118]*Supra*, note 110, at 198.

[119]*Id.* at 196.

[120]*Id.*, at 198, though he makes no effort to reconcile this to the very real dilemma raised by Mr. Justice Hall's somewhat contrary reading of the matter. Mr. Justice Johnston was joined on this point by Mr. Justice Taylor ("For the killing of a slave, if accompanied with those circumstances which constitute [common law] murder, amounts to that crime, in my judgment, as much as the killing of a free man.": *id.*, at 199), though again without effort to harmonize Justice Hall's not insignificant counterpoint.

matter, making liberal reference to and application of the common law in the case of a white person charged with "the murder of Daniel, a slave..."[122], though failing to specifically settle the important question in favor of or against the 'slave' and slavery. The Court finally considered the matter definitively in *State v. Reed*,[123] Henderson J. there finding first that "a slave is a reasonable, or, more properly, a human being..."[124] and, logically following, "If... a slave is a reasonable creature within the protection of the law, the killing of a slave with malice prepense is murder by the common law...."[125] (Taylor C.J. concurring, Hall J. dissenting). Thus, the Court ultimately eschewed a dual construction of the relevant jurisprudence on this question, opting instead for one broad, *coherent*, natural law based application of the common law of murder, though without any effort to reconcile the arguable *incoherencies* of the 'slave's' dual legal status as naturally reasonable (human) and positively unreasonable (property).[126]

A second issue coming before the North Carolina Supreme Court in the years prior to *Hoover* implicating the 'dual jurisprudence' construct considered here had to do with *legally sufficient provocation* mitigating unlawful intentional homicide from murder to manslaughter.

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[121]8 N.C. 210 (1820).

[122]*Id.*

[123]9 N.C. 454 (1823), the issue before the Court there specifically considering the effect, if any, of the indictment of the defendant, a white person, for the common law murder of a 'slave.'

[124]*Id.* at 455.

[125]*Id.*

[126]This failure will prove of some significance in our deeper consideration of the *Hoover* case, *infra.*

Put succinctly, given the distinctive topography of human nature, the common law of culpable homicide recognized a difference between those killings deriving from a cold heart and premade will (murder) and those deriving from hot blood, under the direct influence of legally sufficient[127] provocation (manslaughter). Ought that time honored common law application to change in any way when the provocation precipitating the violent action comes from a 'slave' or, in the alternative, ought a 'slave' to have access to the same mitigating benefit in salient circumstances, their legal status as 'property' notwithstanding? As to the first matter, Taylor C.J. at least was of the opinion that "the homicide of a slave may be extenuated by acts which would not produce a legal provocation if done by a white person...." and, remarkably, "words of reproach... if offered by a slave..." in the right circumstances, might serve as sufficient provocation, the common law rule otherwise notwithstanding.[128] As to the second matter, in a case placing epitragic facts before the presiding court,[129] Gaston J., speaking for an unanimous three-member panel,

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[127]*I.e.*, specific categories of provocation predetermined by law (*e.g.*, extreme battery, unlawful arrest, or adultery *in flagrante delicto*), the law preferring actions in determining sufficiency, and eschewing entirely 'words alone' in any and all cases.

[128]*Supra*, note 121, at 217, 218. Mr. Chief Justice Taylor reiterated this tendency in his opinion in *State v. Hale*, 9 N.C. 582 (1823), where he noted, in considering legal provocation and common law battery, "[M]any circumstances which would not constitute a legal provocation for a battery committed by one white man on another would justify it if committed on a slave..." (*id.* at 586, concurred in by Mr. Justice Hall, who noted, "I think it would be highly improper that every... battery upon a slave should be considered an indictable offense, because the person making it might have... excuse or justification on his side which could not be used as a defense for committing an assault and battery upon a free person.: *id.*).

[129]*State v. Negro Will*, 18 N.C. 121 (1834), where, having fled moderate corporal discipline and receiving from the overseer/victim in consequence "the whole load..." of a shotgun blast in his back (*id.*, at 164), the defendant made a panicked escape from the murderous overseer, using a knife at one point and incidentally opening up a wound in the latter's arm from which the attacker/victim ultimately bled to death. On appeal from his murder conviction at trial, the defendant sought application of extenuating circumstances in his case, mitigating the act of

answered affirmatively the rhetorical question, "[W]ill the law permit human infirmity to extenuate a homicide from murder to manslaughter, in any case where the slayer is a slave, and the slain is the representative of his master?".[130]

Finally, a third important area where the 'dual jurisprudence' construct suggested here is most clearly and cogently implicated is in the area of the application of the common law of battery on the subject of the 'slave,' the issue at the very heart of the well famous *State v. Mann.*[131] There the defendant was indicted for aggravated battery in the shooting of one Lydia, a 'slave' he had hired from her 'owner' and who was fleeing moderate corporal correction at the time of the deliberate wounding. The issue before the reluctant Court[132] was straightforward, if

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homicide at least, if not justifying it altogether. Setting aside racist overtones necessarily attending all such cases, it is difficult on the fact of *Will* to appreciate why the defendant therein faced any charges at all.

[130]Mr. Justice Gaston placed a plethora of hedges around the application of this controversial extension of the common law, of course, again making no effort whatsoever to reconcile the arguable *incoherencies* of extending such mitigation to individuals placed under legal submission to 'masters,' in the counterintuitive guise of positive law defined unreasoning property.

[131]*Supra*, note 23.

[132]Then Mr. Justice Thomas Ruffin, speaking *per curiam*, began his notorious opinion with an inveterate – if colorful – jeremiad:

> A Judge cannot but lament when such cases as the present are brought into judgment.... The struggle, too, in the Judge's own breast between the feelings of the man and the duty of the magistrate is a severe one, presenting strong temptation to put aside such questions, if it be possible. It is useless, however, to complain of things inherent in our political state. And it is criminal in a Court to avoid any responsibility which the laws impose. With whatever reluctance, therefore, it is done...

Id. at 264.

dramatic in its form and the depth of its implications: "to express an opinion upon the extent of the dominion of the master over the slave, in North Carolina... [and] whether a cruel and unreasonable battery on a slave by the hirer is indictable."[133] Beginning with a keen picture of the ultimate out-workings of the institution of slavery, and therefore its demonic necessities,[134] Ruffin J.'s finding was all but inevitable, even if arresting in its brutality:

> The power of the master must be absolute to render the submission of the slave perfect…. We cannot allow the right of the master to be brought into discussion in the courts of justice. The slave, to remain a slave, must be made sensible that there is no appeal from his master; that his power is in no instance usurped; but is conferred by the laws of man at least, if not by the law of God.[135]

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[133] *Id.*

[134] Mr. Justice Ruffin's prose in this regard is nothing if not true, and stark as night:

> With slavery it is far otherwise. The end is the profit of the master, his security and the public safety; the subject, one doomed in his own person and his posterity, to live without knowledge and without the capacity to make anything his own, and to toil that another may reap the fruits. What moral considerations shall be addressed to such a being to convince him what it is impossible but that the most stupid must feel and know can never be true – that he is thus to labor upon a principle of natural duty, or for the sake of his own personal happiness, such services can only be expected from one who has no will of his own; who surrenders his will in implicit obedience that of another. Such obedience is the consequence only of uncontrolled authority over the body.

Id., at 266.

[135] *Id.* at 266, 267. Not by the law of God, most assuredly. It bears saying here that Mr. Justice Ruffin is elegantly clear in his own personal reluctance at the result he felt the law of the land (read: positive necessity) demanded:

> I most freely confess my sense of the harshness of this proposition; I feel it as deeply as any man can; and as a principle of moral right every person in his retirement must repudiate it. But in the actual

> condition of things it must be so. There is no remedy. This discipline belongs to the state of slavery. They cannot be disunited without abrogating at once the rights of the master absolving the slave from his subjection. It constitutes the curse of slavery to both the bond and the free portion of our population. But it is inherent in the relation of master and slave.

Id. Thoughtful and sympathetic as his words were in this case, we ought to stop short of fully crediting the Chief Justice in this regard for two reasons at least: 1.) the pains of his breast and the demands of his conscience notwithstanding, his words were nevertheless his words, however reluctantly he penned them, with the well predictive harsh consequences that would naturally attend them and, 2.) these words issued from a man who, in addition to his notorious and celebrated professional life, was in his private life and affairs, at one point at least, both a slave owner and, quite probably, a *slave trader*.

Beyond duality, then, *Mann* simply abrogated the common law of battery in its entirety where the victim is recreated 'slave' by municipal application, for reasons bearing complete homage to positive necessities, if not the positive law directly, with important results when our present theme of *incoherence* is fully explored.

By 1840, then, through its 'law making' institutions, North Carolina had addressed the preternatural matter of the proper place – if any – of positivist charged human slavery in its naturalist founded cultural midst in much the same fashion as its agrarian based Southern brethren. Faced with the clearly appreciated and plainly experienced tensions between the two incompatible jurisprudences,[136] it addressed the pressing and all important matter of choosing between the two of them by effectively choosing them both. While this allowed for the introduction of inconsistencies into the relevant governing law, to be sure, inconsistencies plainly appearing in our above review of the relevant appellate court record, for example, this fact alone would not ineluctably herald the kind of cultural morbidity with which we are here concerned.[137]

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[136]Tensions which, though having their beginnings in the ethereal realms of ideal, philosophy and reason, had their inexorable out-workings in the all-too-real worlds of human experiences, human potentials and human lives, as the relevant pages of the North Carolina Reports reported herein so clearly reflect.

[137]Indeed, it is even arguable that a close reading of the appellate case law in question would dispel the existence of any real conflicts between natural and positive law in the situation, the 'positively' held 'slave' receiving the benefit of 'natural law' in rare and extremely well defined discrete circumstances, as explicated in the concurrences in *Boon*, and in *Tackett*, *Reed*, *Will* and the like. In any event, notwithstanding the inherent incompatibilities between them, it was possible for both to govern the institution of slavery together, so long as a *coherent* self-evident separation existed between them both. As long as all members of society understood the separate realms in which natural right and positive law were to operate with regard to human bondage and slavery, it was at least conceptually possible that they might operate together in some form or fashion. However, of course, much depended on the maintaining of a credibly appreciated dividing wall between the two, for the closer they came to one another, the greater the risk of their fundamental *incoherencies* bleeding through what was in fact a coherent *veneer*

That point is reached only upon introduction of real and palpable *incoherencies* into the body of law playing a significant role in the management of a culture, it is suggested, places where the law so completely betrays its own necessary 'inner logic' that it utterly loses its ability to communicate culturally accepted *ideals* in ways that remain, for all its various segments, *inwardly compelling.*[138] That point is reached in those rare circumstances where the law both frighteningly enables and then fiercely reacts, situations like those typified by *The State of North Carolina v. John Hoover.*

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alone, with drastic consequences following.

[138]Back to the 'framing piece' opening this article, of course.

IV. Law, Slavery and Incoherence: "execution of the sentence of the law..." [139]

The historical record does not precisely recall how, when and in what circumstances the paths of Mira and Mr. John Hoover came to cross and become tightly intertwined one with the other. He was a modestly successful agrarian[140] and a not unambitious one, it would appear: review of the relevant deeds records of the period and place showed him to have been involved in at least nine (9) land transactions between 1812 and 1839, purchasing and selling, involving upwards of one thousand acres, all told.[141] While it is not clear whether he 'owned' other 'slaves' beside Mira at the time of her murder and his execution,[142] he was clearly no stranger to

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[139] *State v. John Hoover*, *supra*, note 1, at 505.

[140] Mr. Hoover was no doubt entirely given over to the farming vocation. Relevant estate records forming "A List of the Property belonging to the Estate of John Hoover Late May 16th 1840..." included in his estate 8 horses, 15 head of cattle, 25 head of sheep, 55 head of hogs along with wagons, plows, scythes, barrels, blacksmith tools, augurs, chisels, knives, etc., labeling his farm a small but going concern: Iredell County Estate Records, 1790-1970: Hoover, John (1840), in North Carolina State Archives, C.R.054.508.106.

[141] Relevant period records show John Hoover to have reported 1,377 ½ acres of land for tax purposes, in 1838, two years before his death: Iredell County List of Taxables, "Capt. Jones Company 1838" Registry, in North Carolina State Archives, C.R.54.701.1. A deed registered on December 4, 1847, some 7.5 years after his execution recorded the distribution of 1,914 ½ from the estate of John Hoover to his descendants, divided into nine (9) lots of varying sizes (from 153 to 283 acres): RUSSELL C. BLACK, JR., IREDELL COUNTY, N.C. DEEDS ABSTRACTS BOOKS W & X: 1843 – 1853 546 (1997), fixing the land size of his estate on his death at this larger number. His last registered land transaction occurred only weeks before his execution and involved not farmland but rather lots in the county seat of Statesville, North Carolina, where he had been jailed and tried, and where he was eventually executed. In a bit of macabre irony attending the case, one anecdotal account had him being hanged on land *that he owned* in the county seat, though efforts to establish this fact have thus far proven inconclusive, and its likelihood seeming intuitively to me to be remote.

[142] His Estate records do not list any 'human property' among the other articles listed there, and no other relevant records clarify this matter. This omission in the surviving record is quite likely conclusive in the matter, detailed estate records existing with no mention of other 'slaves' in his estate whatsoever.

the institution itself prior to her entering the picture,[143] nor apparently to its excesses.[144] The record regarding Mira is much less complete, as would be expected in the particular circumstances of her life and situation, recovering nothing of who she was, how she came under Mr. Hoover's vicious hand,[145] or even the merest clue as to why he would act as he did toward her.[146] And if she had no protector in the final days of her difficult life, it would necessarily be left to the North Carolina Supreme Court to be her last, ultimate vindicator in death, before God and man.

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[143]By virtue of a deed dated "28 May 183-" (the year is not clear in the hand written record, though the decade is legible and the deed itself is archived in a deed book covering the years 1830-1837) the record notes "Received of John Hoover $759 for a Negro girl named Raney and her three children, Sophia, August and George. Sold as the property of Jacob Lytaker deceased...": RUSSELL C. BLACK, JR., IREDELL COUNTY, N.C. DEEDS ABSTRACTS BOOKS P & Q: 1830-1837 360 (1996). The deed was recorded as registered on March 28, 1834, further fixing the general time of the transaction in question.

[144]Note in this regard testimony at Mr. Hoover's trial from Mr. James Wordy, a hireling of Mr. Hoover's at one time and a witness to his furious beatings of Mira. He testified to having confronted Mr. Hoover in consequence of the beatings and urging him to simply sell Mira if he was not satisfied with her, to which Mr. Hoover was alleged to have replied that "he would not sell her that he did not care if he did kill her & that he had nearly killed a negro once before.": *supra*, note 4, at 9. While the matter was not there elaborated upon, it is unlikely that such could have occurred outside the strict, debilitating confines of the "'master'/'slave'" disability, a disability protected by law, of course: *State v. Mann.*

[145]Only one particularly pathetic bit of testimony survives in this regard: "Mr. Allison stated that his father raised the Deceased – that Witness and his brother sold her to the Defendant that she was an obedient and humble negro when his father owned her –": *supra*, note 4, at 17. This is the only evidence in the public record touching on her life prior to her tragic time with the Hoover family.

[146]From a human standpoint, this gap in the record is the most puzzling of all. Added to it, sadly, was the fact adduced by the trial record that Mira was in the latter stages of pregnancy through the worst of her mistreatment at the hands of her tormentor, giving birth to the child about one month prior to her death; the record is silent as to paternity, and equally silent as to the fate of the child following the mother's demise.

And vindicate her they did – or, more precisely, he, now Mr. Chief Justice Ruffin, did, on their behalf – in language as harsh and unequivocal as his earlier opinion in *Mann* had been openly remitting, taking his words in *Hoover* on their face alone. Leaving no question as to his opinion about the character of the defendant based on acts undeniably affixed to him through copious trial testimony,[147] Ruffin C.J. was equally uncompromising in his view of the proper relationship of 'master' to 'slave' under law, in some capacity: "A master may lawfully punish his slave... *State v. Mann*... But the master's authority is not altogether unlimited. He must not kill. There is, at the least, this restriction upon his power: he must stop short of taking life."[148] As for the defendant's plea for mitigation in the case, intending thereby to reach an amelioration of both the final crime and the ultimate punishment, the Chief Justice was grandly and entirely unimpressed. "The Court is at a loss to comprehend how it could have been submitted to the jury that they might find an extenuation from provocation." he mused, adding, crisply and categorically, "There is no opening for such an hypothesis."[149] Concluding one last matter

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[147]The Chiefly Justice noted in this way, fiercely:

> [T]he acts imputed to this unhappy man do not belong to a state of civilization. They are barbarities which could only be prompted by a heart in which ever humane feeling had long been stifled; indeed there can scarcely be a savage of the wilderness so ferocious as not to shudder at the recital of them.

Supra, note 1, at 503. He continued in this vein without quarter, the actions of the defendant in his mind evincing "a settled and malignant pleasure in inflicting pain..." and a focused intent on "grievous tortures..." and "barbarous cruelties....": *id.*, at 504, 505. His prose in this light was unyielding throughout, terse, hard, and even apocalyptic.

[148]*Id.* at 503.

[149]*Id.* at 504. The Chief Justice simply would have nothing of Mr. Hoover's preferences

related to the proper *mens rea* element attending such a crime,[150] Mr. Chief Justice Ruffin was all too eager thereafter to rid the Court of the tawdry, tragic matter before it, bringing the case to an abrupt halt with all the humane gentility and subtlety of a hangman: "[T]he [trial] judgment ought not to be reversed, which will accordingly be certified to the Superior Court... for the execution of the sentence of law on the prisoner."[151]

If not for the muddled and dissonant body of relevant case law authored by the Court itself preceding the *Hoover* decision and in very real point of fact paving its way, we might *naturally* respond to it with positive approval, for its clarity of vision and liberal expression, through employment of almost heroic prose. Indeed, as mentioned before, the few academic treatments finding anything in the decision worth highlighting inevitably include it within the small, uneasy canon of cases from the period proof texting the Court's "liberality toward slaves..."[152] and its "pronounced willingness... to assert a humane attitude...." in this regard.[153]

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in this regard whatsoever. "There was no evidence of the supposed acts [of Mira]... which... might be provocations. But if they had been proved this Court could not have concurred in the instructions... In such a case, surely, we do not speak of provocation, for nothing could palliate such a course of conduct.": *Id.* at 504-505.

[150]There he recognized at law that 'actual intent' was not itself necessary to support the freight of a murder charge, where "great bodily harm be intended... and death ensue..." even in the face of a not incredible argument that "[the defendant] may not have intended death.": *id.* at 505.

[151]*Id*

[152]Ernest Clark, *supra*, note 44, at124.

[153]Patrick S. Brady, *Slavery, Race and the Criminal Law in Antebellum North Carolina: A Reconsideration of the Thomas Ruffin Court,* 10 N.C.CENT.L.J. 250, 254 (1979), citing from Holt, *supra*, note 44, at 72. Professor Nash carries the matter even further, noting, "Almost without exception the judges rendered decisions with exemplary fairness to the Negro.": *supra*, note 15, at 215. Surely he is employing the term 'fairness' in a relative fashion. For it is only if

But such a reading of this singular case far under-appreciates the immediacy of the appellate process and the potency of the judicial voice as a catalyst of both social development and legal culture-building, it is strongly suggested. For if a legislature effectively fulfills a culture's practical cognitive function, it does not overstate the matter to imagine the appellate judiciary as nothing less than its heart and its conscience (or lack of either), both reminding and teaching a culture of its own self-reflexive goals, and helping it to achieve them. And if "[t]he judicial opinion is a moment at which a civilization is expressed...."[154] – a means by which its very *volksgeist* is both explicated and realized – than related North Carolina appellate case law was a discordant symphony in the extreme, with *Hoover* as its crescendo and *coda* at one and the same time.

Even a cursory contextual review of the *Hoover* decision will categorically show it to have suggested many more problems, both practically and conceptually, beyond the one narrow issue that it did definitively solve.[155] One might naturally begin with the thunderous decalogic pronouncement founding, framing and limiting the opinion of the Chief Justice in the case, "He must not kill."[156] Taking all of the previous law together, with its rhythms and flows,

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one is prepared to set aside the basic irreligiousness of the institution, its fundamental incompatibility with the most plainly understood and foundationally basic tenets of the 'American experiment' along with the profound unevenness it all but demands in the treatment of various aspects of its citizenry, that it might be supposed that Professor Nash has a point.

[154]James White, *supra*, note 43, at 447.

[155]That one issue almost self-evidently being whether (or not) the law would countenance the beating to death of one human being by another, within the context of 'republican democracy' and under shadow of the 'rule of law', on the bald ground that the victim had been positively recreated a 'slave', earning that great disability by 'virtue' of law.

[156]*Supra*, note 1, at 503.

hopscotching between positive and natural law at whim and for convenience, the very intuitive question which ought to strike the student of the case, the era and the situation is, simply, "Why not?" For a Court which has made fiercely normative the savage beating of a 'slave' to within the proverbial 'inch of life', resuscitation and repetition, again and again, *ad infinitum*, within the long, deep shadow of a common law acutely and naturally antipathetic to human battery, does this prohibitive *cohere*? Having disencumbered an entire class of individual persons by constitution and use of the judicially created and legally enforced counterintuitive 'property', does the legal proscriptive in *Hoover* make sense in even the most basic of way?

This last is by no means offered rhetorically, standing as it does in its own independent strength and offering its own sound and damning challenge to the *coherence* of the work of the Supreme Court in *Hoover*. "[T]he negro was his own property and he had a right to do as he pleased with his own property....", did he not?[157] Spin it as we might, there was at that time and place for the broader antebellum North Carolina culture – 'slave', 'free' and 'master', legal fictions notwithstanding – no easy, clean, natural law based argument to effectively counter this powerful defensive contention of Mr. Hoover's. It was bolstered in all ways by relentless common sense, well within traditional imaginations of other kinds of property (horses, chests of drawers, etc.) and protected on all sides by the body of the Supreme Court's opaque legal reasoning, conceived in Raleigh and spread across the breadth of the culture receiving its words. Perhaps in latent testimony to its smooth lines and hard, clean, daunting face, the *Hoover* courts in question made no effort to address the issue in the least way, neither at trial nor on appeal,

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[157]*Supra*, note 4, at 18.

leaving it in place as a monument to the incoherence of that body's work at least, it is averred.

Beyond the self-created and unaddressed 'property' counterpoints, it is by no means easy to coherently discern the legal foundation or the jurisprudential base upon which the *Hoover* decision purported to rest. Returning for a moment to its ideological antecedent in *Mann*, itself positivist through and through, that decision cited absolutely no precedent in support of its fantastical propositions, lending it the feeling of having derived from the isolated actions of one enamored pontificate, apart from any rudimentary 'rule of law'.[158] Aside from its all-too-apparent implicit reliance on the natural law of human life and death, reliance which it simply had not earned in light of all the case law preceding, or at least which raised issues of incoherence addressed herein, Ruffin's work in *Hoover* must be recovered in exactly the same light. Devoid of statutory citation or relevant case law reference, it reads as the willful, angry fiat of a single arbiter, even if evincing the horrific reflexive of an entire culture,[159] without

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[158]Peter Teachout wrote, in this regard:

> In *Mann*, Judge Ruffin asserted he had no choice but to uphold the master's total authority over the life of the slave, even though it offended his personal morality to do so.... Significantly, Ruffin said the decision was forced upon him by the "actual condition of things,"... and by "things inherent in our political state,"... *i.e.*, by politics, *not law*. He cited no statutes or precedents to support his decision. It was not, therefore, adherence to the rule of law that forced this awful choice upon him. (emphasis his)

"Light in Ashes: The Problem of "Respect for the Rule of Law" in American Legal History", 53 N.Y.U.L.REV. 241, 2801-81, n.33 (1978).

[159]This last is a very important issue and is deserving of some attention here. While the vitriol with which both the trial court and the North Carolina Supreme Court eagerly dispatched Mr. Hoover to his eternity might strike the modern reader with surprise and bemusement, it is a simple point of fact that it almost always attended state court opinions– trial or appellate – where substantial issues of human rights violations by 'masters' of 'slaves' came before them for

adjudication. Rollin G. Osterweis considered prescient Southern social theorist W.J Cash in this regard, noting of him:

> To Cash, the antebellum South was suffering from a guilt complex over its 'peculiar institution' – and the inclination toward romantic fictions grew from this issue of shame. He represents the Southerners as haunted by the realization that they were defending slavery in a day when the rest of the civilized world was abandoning it. Since they were running counter to the prevailing moral motions of their age, he reasons, they must have had a powerful touch of uneasiness "in their secret hearts."

ROMANTICISM AND NATIONALISM IN THE OLD SOUTH 14 (1949). Cash himself notes, in this regard:

> This Old South, in short, was a society beset by the specters of defeat, of shame, of guilt – a society driven by the need to bolster its morale, to nerve its arm against waxing odds, to justify itself in its own eyes and in those of the world. Hence a large part – in a way, the very largest part – of its history from the day that Garrison began to thunder in Boston is the history of its effort to achieve that end, and characteristically by means of romantic fictions.

THE MIND OF THE SOUTH 61 (1941).

This strikes me as profoundly true, when considering even the 'romantic fiction' of the antebellum plantation: broad, pastoral and bucolic, with 'kind and generous masters' and 'contented and productive slaves', in need of the odd corrective, to be sure, as is the wont of children, but ultimately fulfilled in the only life for which they were truly suited. Indeed, with regard to corrective, Ruffin C.J. must surely have been indulging in a bit of that 'romantic fiction' himself, in his opinion in *Hoover*, when he noted, incredibly: "If death unhappily ensue from the master's chastisement of his slave, inflicted apparently with a good intent, for reformation or example, and with no purpose to take life, or to put it in jeopardy, the law would doubtless tenderly regard every circumstance which, judging from the conduct generally of masters towards slaves, might reasonably supposed to have hurried the party into excess.": *supra*, note 1, at 503. Say what? In truth only the most addled or romantic minded among Southerners might conceive of a situation where a 'master' could gently and unintentionally, though firmly to be sure, and with good intent for reformation, correct his 'slave' to death.

This may hold the key then, to the Court's – and society's – strong reactive response to what could not possibly have been an unexpected or unanticipated outcome from Mr. Hoover, or the other 'Mr. Hoovers' out there. It is a simple truth that a culture inevitably reserves its

energies in protection of any of its romances, in direct proportion to the extent of that romance's centrality to the *raison d'etre* of the culture itself. Thus, given the locus of the romantic fiction in question in the *Hoover* case at the very epicenter of Southern culture, it was one not to be troubled with in any way. And that may be the ultimate explanation of *Hoover* and its like, as well as its most illustrative lesson. Had Mr. Hoover taken due care to correct Mira up to but not beyond her last breath, the fiction in *Mann* would have been preserved and he would doubtless have drawn no attention to himself of any kind, legal or otherwise. But by correcting her that one simple breath beyond, itself a mercy for Mira, it might reasonably be argued, he had gone too far. Effectively stripping the wafer-thin romantic veneer away, and laying bare the repugnant and calamitous reality behind the fiction, he earned for himself that culture's most careful attention, its most enormous prohibitive. By means of its most conservative institutions, and with a force and dispatch as swift and uncompromising as it was violent and complete, the Court – and the culture it served – valued Mira's last breath with a frightening clarity, requiring from Mr. Hoover his own as due penalty for his excess. The 'Mr. Hoover's' following him would in consequence not be so unwise.

suitable support or necessary foundation. Taking all of the circumstances together, this lack of foundational support begs the question not of whether such was necessary to under-gird the decision, but rather whether in fact such was available at all, considering all of the Court's relevant work, itself raising coherency issues in the ways we have suggested.

And if it is reasonable to measure the coherence of a judicial decision in any American setting against the backdrop of the central icon around which the entire edifice of the American judiciary is organized – *justice* – coherence growing in direct proportion to its achievement of justice, then the incoherence of *Hoover* becomes clearer and even more pronounced. For Mira, 'justice' would necessarily have involved and even required 'vindication' in some real and measurable way. To view the *Hoover* decision as working a 'vindication' of Mira in the end is to so misunderstand and misappropriate that pristinely evocative and potent term as to render it almost entirely inert when used in the context of her life and death, devoid of any rational meaning and power whatsoever. For it was the *law itself* that surely placed her in her tragically vulnerable position, that bound her with jurisprudential cords beyond her poor ability to break and that delivered her with impunity and with a studied, reasoned insouciance into the care of her dark-hearted tormentor. That being the case, how could anything that same law might do in response to her vicious murder be coupled in any reasonable and coherent way with the deeper things of 'vindication', or 'justice'?[160]

[160]This point is not offered for rhetorical flourish, but addresses at its heart the fundamental problem with the "liberal 'slave'-state courts" revisionists of which Professor Nash is a prime example. Simply put, Mira was not benefited in any way by the *Hoover* decision, of course, and neither were a single one of the millions of human beings remaining in legally sanctioned, incoherent bondage after she was driven from this world. *Hoover* did not lighten the load of African-Americans held in bondage to slavery one iota, did not defend against a single bloody stripe across their many bare backs, did not ease the burden of their life in any

When the matter of 'justice' is considered with regard to the outcome of the North Carolina Supreme Court and John Hoover himself, the decision bearing his name and condemning his person descends ever further into incoherence. I do not mean to suggest by this that Mr. Hoover was not completely wrong in what he did and was not fully deserving of the fierce and shameful personal end his awful actions earned for himself. But having created the right and reinforced the remedy of 'purchasing' and 'owning' human beings and their progeny in perpetuity, against even the most rudimentary recoveries of natural law and natural right, was it the law's place then to police its logical outcome? Having singularly and notoriously protected Mr. Hoover's legal right to commit acts against the body of other human beings which its own common law defined by the dangerous proscriptive 'aggravated battery', where might that self-same body muster the moral authority to condemn its inevitable and highly predictive result? If Mr. Hoover indeed deserved to die a brigand's death, only the most incoherent admixture of hubris and sophistical hypocrisy would assign to the institution leading him to his violent excesses and paving with law each of his untoward steps, the power to take his life in consequence of his actions, and call it 'just'.[161]

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measurable way whatsoever. *Hoover* did not condemn the institution in any way, calling into question only its most severe excess, and the particular individuals prosecuting it to that excess, and thus did not lighten the institution a single bit. Indeed, in order to take advantage of the one benefit *Hoover* did provide the bondsman – the retrospective pronouncement that their death was ignominious and wrong – they would need first to *die*, and no doubt in a vicious way, Mira would add, moving themselves well beyond need of the benefit at exactly the time it became available.

[161]This is a strong statement, to be sure, but an important one. The appellate voice in a republican democracy is a singular one, standing between the people congregate and their self-named law makers, making sure that the latter are working in favor of the former. The appellate reviewer is required to search in many places to properly manage this remarkable responsibility, both within normal political processes and outside of them. When the appellate courts prosecute

But it is at the place of the intersection of the work of the Court in *Hoover* and the culture that Court was charged to serve that the incoherence addressed here becomes deepest, most profound and most disturbing. For in referencing natural law in such dexterous and extreme ways to hurry Mr. Hoover off into oblivion, the Court was implicitly admitting the availability of those tools to deconstruct the institution itself, at any point in its history, rendering its failure to do so conscious and deliberate rather than the less culpable short-sighted and ignorant.[162] And in setting the bright line of slavery illegitimacy only at the place of the death of the 'slave' – and not one bit before – *Hoover* effectively legitimated the institution *in toto*, and each individual

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the calling well, in an orderly and internally coherent manner, the quality of a culture's character – its *volksgeist* – is positively impacted. But where those courts fail in their clarifying, conserving function, the culture they are called to serve is measurably and discernibly damaged, both in its broader expressions and its individual manifestations. James White notes, in this light, "It is every judge's goal to create a system of wisdom, intelligence and humanity.": *supra*, note 43. This is true, of course, and the closer the judiciary comes to achieving this goal the more 'just' is their outcomes, and the society coming under their constructive care. That being said, with the related outcomes of the North Carolina Supreme Court being taken as a whole, the Court's actions with regard to Mr. Hoover can be characterized in many ways, but they simply cannot be considered 'just'. Mr. Hoover the victimizer was in a very real way Mr. Hoover the victim, all of the normal culture warnings generally hedging against crime before its commission having been eviscerated and replaced by facilitations, and that by the very body seeking to hold him accountable for his highly predictable resulting excesses. Thus, all things taken into consideration, the ending of this tragic tale might rightly be considered a coherent outcome, but by means of a very incoherent process.

[162]This is not a small matter, and represents a real detriment to the people of North Carolina flowing directly from the *Hoover* decision. Referencing natural law as adeptly as he did for the Court and on behalf of the culture he served, Mr. Ruffin effectively demonstrated a knowledge of the deeper principles in play in that jurisprudence, implicating their failure of application as a counterpoint to human slavery all along the way. Thus, *Hoover* proves and hallmarks, North Carolina's failure in this regard was in the end a matter of *will* rather than understanding, leaving them justly liable for any consequences naturally following from their willful choice. Referencing theological proscriptive to naturally condemn Mr. Hoover (*i.e.*, "Thou shalt not kill..."), it was effectively and inevitably condemning itself for all of the many ways it had abandoned the same theological right in favor of political and personal expedience in protecting and extending the anathema of human slavery in its midst.

part of it, short of that artificially drawn bright line, leaving human slavery *more* firmly and diabolically entrenched in the North Carolina cultural landscape than any of the Court's many slavery-related decisions had done before it.[163] And with the distinct advantage of hindsight, we must see this last effect flowing directly from the pen of Mr. Chief Justice Ruffin in *Hoover*, as the most disturbing of all. For as Mr. Hoover stood on his own gallows and looked out into his last North Carolina spring day, the greatest of American conflagrations, the one deriving directly from the untenable institution bolstered by the work of the Court in *Hoover*[164] and destined to decimate North Carolinians in almost holocaustic numbers over its interminable years, was but one short generation away.[165]

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[163]It is important that the reader fully understand this point, to grasp in a complete way the nuances of the 'coherence' thesis advanced here. Apart from its melodramatic outcome, the majority culture individual receiving that case would be more inclined toward involvement in the institution of human slavery than less, if the real, *human* lessens of *Hoover* were to be applied. For it is an inevitable and burdensome part of human nature that in seeking to understand both what we are free to do and what we are able to 'get away with' in any given situation, our natural tendency is to spend far more of our discerning talents and energy in establishing the latter rather than the former. Thus, far from condemning – or even calling into mild question – the institution by which Mira was destroyed, *Hoover* commends it, by showing it's would be prosecutors how far they might go in deriving its inhuman benefits. Thus, in condemning its excesses, the natural – and evil – effects of the decision would be bolster the institution itself, conceptually at least, to the deep detriment of the culture looking to the opinion's creators for guidance in this quintessentially human matter.

[164]In referencing African-origin slavery directly as a causative element in the American Civil War, I am ignoring neither the popular Southern thinking referencing 'state's rights' as its true cause, nor the intellectual support of that notion, but rather challenging them both. If we seek to credibly advance an argument that 'state's rights' was the true cause of Southern involvement in that War, than, for the sake of intellectual honesty alone, we are compelled at least to add the necessary descriptor to that concept – the state's right *to do wrong.* This tells the whole story, bringing the matter inevitably and honestly back to human slavery, where it in truth belongs.

[165]While statistics generally for that awful War are staggering, statistics for North

In the end, the work of the North Carolina Supreme Court in *State v. Hoover* ought reasonably to be recovered as a 'daguerreotype' of sorts, to reference an analogy appropriate to its period,[166] telling an alarming and important story. For if "nations, like people, have spirits...", and if "the spirit of a nation is reflected in its laws...", then a close reading of *Hoover* betrays a collective in visceral and very real crisis, a society whose *volksgeist* reflected an inner turmoil of no insignificant intensity or proportion. Having utterly and shamefully abandoned the rule of law in its earlier *Mann* decision in favor of nothing less perverse and mundane than a rule of immediacy and convenience, the Court's grasp after that abandoned rule again in the *Hoover* circumstances following was at best desperate and jurisprudentially unconvincing. And if as an inevitable outcome of the Court's work in that case Mr. Hoover climbed a very real scaffold to a very real rope of judgment awaiting, he could not have understood these destructive instruments to have been metaphysically incoherent; in an irony almost beyond understanding, the institution requiring his life had in practical fact abetted the actions for which it was then being required, and that by use of the law itself. Far from reflecting liberality on the part of the Court rendering the decision or producing a laudable and just result in all of the circumstances in which it found itself, then, the *Hoover* case in reality marked something of the final descent of a discrete culture through increasing inconsistencies to a pervasive incoherence by which it was not well served and from which it would not likely recover.

Carolinians are even more so, costing 1 in 4 of the Southern lives required by that war throughout its length. As mentioned before, Mr. Hoover himself would leave two of his five sons – fully 50% of his male progeny participating in the War – on its battlefields: *supra*, note 5.

[166]French chemist Louis J.M. Daguerre first publicly demonstrated his revolutionary process September 17, 1839, 4 days after Mr. Hoover's conviction at trial.

V. Conclusion: "justly answerable for all the harm..." [167]

July 1, 1940 was a banner day in the Pacific Northwest, marking as it did the unveiling of the famous and much anticipated Tacoma Narrows Bridge. Elegantly sleek and artistically compelling compared to its sturdier appearing and more stout predecessor bridges around the country and world, the Tacoma Narrows Bridge was a mere 39 feet wide and nearly 28,000 feet long, being hailed on its debut as a scientific and aesthetic marvel.[168] Amid all the fanfare of its opening to the public, the structure pointed uncompromisingly to the future of engineering in the field, being prognosticated as revolutionizing bridge-building forever. It would in fact more than meet that glossy prediction, though decidedly not in the ways its architects and engineers had so grandly anticipated on its opening. For in the mid-morning hours of November 7, 1940, just over three (3) months after its much-publicized opening, the Tacoma Narrows Bridge twisted, turned and waved itself entirely apart, falling with a spectacular crash into the very narrows it had been designed to span.[169]

Interested professionals poring over the details of the destructive miracle began by naming wind as the culprit in the dramatic event, the narrows being well known for its sustained

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[167] *State v. John Hoover*, *supra*, note 1, at 505.

[168] Its revolutionary design left it with the relatively flexibility of a metal tape measure, one inch in width and sixty (60) feet in length!: Johnny Chriscoe, The Collapse of the Tacoma Narrows Bridge 5 (July 24, 2002) (unpublished manuscript, on file with myself). It resembled nothing that had come before, and was hailed as the future of bridge building.

[169] The details of this dramatic and arresting event were captured by amateur camera work, recording in almost incomprehensible detail the truly remarkable demise of this engineering marvel. The short recordation of that event has lost nothing of its breathtaking excess and shocking destructiveness, to this very day.

boreal power in the locale of the bridge itself, though problems with that theory began arising almost as soon as it was broached. Referencing its engineering specifications and other relevant data, "studies indicated that the wind that morning, measured at approximately 42 miles per hour, could not have blown with a sufficiently constant velocity to attain resonance with the structure of the bridge..." and cause the disaster.[170] The deeper science and engineering delved into the problem, the more complex it became, involving individually issues of wave mechanics phenomena, vibration distortions, transverse and torsional forces and resonance/harmonics theory, and their complex interactions one with another, leading to the outcome that was both unexpected and even unanticipated. Designed and planned with the most modern physics concepts and engineering principles in mind then available, in the building of the structure its designers had in fact crossed lines and broken rules which they had not even known to exist, though nature was entirely unmoved by their honest ignorance. In the aftermath of the expensive and costly destruction, science was awakened to valuable new knowledge about the physical laws of nature, knowledge which has advantaged the building of every bridge following.

While it would not do to overwork this analogy, with the *Hoover* case and its aftermath in antebellum North Carolina, it is submitted here that it is not entirely devoid of instructive value. For as with the construction of a society's physical infrastructure, it does not strain things to suggest that its less tangible but no less real or important social/cultural infrastructure is the product of construction of sorts as well. And as with that physical infrastructure, this paper means self-consciously to suggest that a collective is all but required to show equally great care in the construction of its social/cultural infrastructure, and for exactly the same reasons: in both

[170] *Supra*, note 167, at 6.

cases, societies will be required to live in and live with the thing they self-consciously and inevitably create. As societies reference physical laws to solve physical problems – in the case example, bridges to span natural gaps and facilitate social movement and convenience – societies reference the metaphysical laws with which we in our profession should be very familiar, to do exactly the same thing with social problems. And as with the Tacoma Narrows event of 1940, and connected as *Hoover* inevitably and assuredly is with the social institution working a wedge in the structure of the nation and shaking it apart by the spring of 1861, it should be allowed to teach us equally important lessons as well.

A word of explanation is in order at this time. Clearly I do not mean here to suggest that *Hoover* is directly causally connected to the Civil War in even the smallest of measurable ways, as that would be claiming far too much for the little opinion from North Carolina, and would set up a linking challenge far too subtle and difficult for legal history to recover. But neither do I want to suggest that there is no association of any kind whatsoever between the two or that there are no lessons whatsoever to be derived from the interesting identification of the one with the other, commended by the relevant history of the time. Along with all of its Southern compatriots at the moment in question, North Carolina faced great problems with the fiercely anti-democratic institution of human bondage in its ostensibly democratic midst,[171] and as with other societies founded in some measurable way upon the rule of law, it turned to law for solutions. North

[171]The Jeffersonian 'wolf by the ears' descriptive comes quickly and easily to mind here. In a letter addressed to Mr. John Holmes written from his Monticello home and dated April 22, 1820, Thomas Jefferson remarked about the institution as early as 1820, "But as it is, we have the wolf by the ears, and we can neither hold him, nor safely let him go. Justice is in one scale, and self preservation in the other.": THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 637 (Adrienne Koch & William Peden eds., 1998). The images is arresting, very evocative and, as events finally showed, quite correct.

Carolina legal institutions – constitutional, legislative and judicial – offered up those solutions, willy nilly it would appear, selecting from positive and natural law at whim and according to prevailing circumstance, each choice leading inexorably to a cultural reckoning of sorts, as hindsight makes undeniably clear.

Further clarification of this point is useful here, and I would seek to achieve that by referencing an anachronistic analogy which should speak to our own modern sensibilities. Let us analogize the nation in the mid-nineteenth century to an airborne plane, with North Carolina as one of its passengers. If that plane was able to navigate the exceedingly choppy air of the 1830's and into the 1840's, and if it was able somehow to stay aloft through the fiercely turbulent 1850's – through the *Fugitive Slave Act (part II.)*, through 'popular sovereignty' and 'Bleeding Kansas', through James Buchanan and Dred Scott and Lincoln/Douglas and through the rise of the Radical Republicans and the calamitous collapse of the Democratic party at its disastrous 1860 Charleston Convention, and through even John Brown himself – it surely came crashing down in 1861, with casualties abounding. Slavery was the macro-cause of the crash to be sure, incontrovertible evidences of that fact abounding all around the massive wreck site. However, if one is interested in *the way* slavery came to act in the manner it did in bringing the nation to a halt, if one was able to recover the 'black box' of the 'plane' and sift through its telltale contents toward this end, one would surely find in the bits of data chronicling the *how* of that crash, among thousands of other discrete pieces of relevant information, *The State of North Carolina v. John Hoover.*

This is no small statement to make, of course, and comprises one of the important lessons which a facially benign case like this one would commend to a careful student. Simply put,

inevitably and very really, law changes things. With the public voting amendments coming out of its 1835 Constitutional Convention, with each of the legislative actions related to 'slaves' and slavery addressed above, and with each individual decision of its court-of-last-resort and the collective body of work resulting, North Carolina was practically changing and, history dispassionately but insistently reminds us, not for the better. Law did that then and, given its remarkable, singular character as both a preserver of society and a catalyst as well, it does that still today. This ought to be an empowering thought for all who are involved in law in a deep and formal way, both its teachers, its students and its professional traffickers, and a sobering one as well.

This leads us by a short way to another important related lesson deriving directly from our study of this little, significant case, echoing the third of our foundational points of reference: jurisprudence – or, most particularly, jurisprudential coherence – *really, really matters*, in at least two ways. First, it matters to the life, health and vitality of a culture building upon it, or alternatively to their lack in that culture. While North Carolina was referencing law to manage its own society with regard to the institution of slavery in its midst, it was just as assuredly 'renovating' the structure it would have to inhabit thereafter, in a manner of speaking. Having self-consciously laid its foundation in natural law as did all of its sister colonies, almost too well, throughout the turbulent and transforming Revolutionary years,[172] its preference for pure positive

[172]While I tend to recover Thomas Jefferson's iconic *Declaration of Independence* in its complete package as little more nor much less than a 'legal pleading' written to anti-British European powers sitting as 'trier of fact' in the dispute, and materiel suppliers in consequence of their verdict, I must confess to being as entranced as the next American with its visionary preamblic language of 'self-evident truths' and 'heavenly endowments.' Rightly bearing the entire philosophical weight of the remarkable Revolution it self-consciously sparked, and rightly taking its place as the very cornerstone upon which the surprising edifice resulting would be

law walls (if you will) to enclose and manage its human slavery option would be necessary, of course, though perilous in its counter-intuition.[173] Its choice of a natural law cap to 'roof' the edifice in question, in the form of the Supreme Court's work in *Hoover*, was then dangerous in the extreme; the walls on which it would rest could not have been expected to be 'load bearing' in the simple rules of building construction, and the dwelling resulting should not reasonably have been viewed as 'habitable' in the long-run.

Neither is this to court the mischievous historical counterfactual, "But what else could they have done?", nor simultaneously to claim for law a positive return to the 'legal realism' days of blind belief in its unabashed curative power and unrestrained social promise. History here does not allow us to direct the actions of the past nor to comment on the inevitability of the outcomes following, but rather seeks simply to isolate what was self-consciously done and consider in even a rudimentary way what may have been the result. Nor does it claim for law a power that it simply does not have – to cure each and every social ill of which law traffickers become aware, if only we take good and careful aim at the ill in question, and choose prudently the particular form and content of law to be used as ammunition.[174] We simply want to reference

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built, it has arguably proven far sturdier in reality than the nation-builders following would practically have desired. More often than not it has betrayed what we have built, and this in the most categorical of ways. One is left to consider how much easier the building task would have been without those remarkable words, and how much worse without them the edifice would be, even than it already is.

[173]Here I mean only to reference the simple but effectively inviolable builder's axiom that one maximize the utility and function of a building by constructing in strict adherence to and conformity with the foundation laid.

[174]In reality, and interestingly enough, law as a prescriptive for ills of the 'body politic' works very much like pharmaceuticals as curatives for ills of the body corporeal: undeniably and measurably effective when properly chosen and knowledgeably applied, it inevitably leaves

the story in question to understand more fully and remind ourselves more completely that law really does change things, and that jurisprudential choices really do matter, in ways as profound and important as the tasks to which they are inevitably referenced to address. That is all we can do here, with and through *Hoover*, and that is enough.

As well, 'jurisprudence matters' in a second important way, and for a second important reason: in referencing *law* to meet social challenges, the character of the referencer is indelibly effected – in small ways or large – by the laws being referenced, differently for each of the different options preferred. Here I do not mean to consider practical changes resulting from practical choices, but rather changes to the deep character of a collective deriving from the choices made, a matter about which we have paid far too little attention, it would seem, and of which we still have far too little understanding or appreciation. In selecting discrete and particular legal solutions for the problems it faced, in this case problems related to slavery, North Carolina was at the same time changing its own face, amending its own charter, altering its own course, perhaps only subtlety at a point in time, but enduringly, and thus importantly. Seeking only to meet its practical, tangible, day-to-day problems, would it have chosen differently if it could have appreciated that it was just as assuredly mapping out its own potential, measuring its own *volksgeist*, defining its own destiny by the choices it made? Would we?

This last lesson is ahistorical, of course: vital for the time in question and the challenges at issue in antebellum North Carolina, it is no less vital for the intense and intractable practical difficulties of today. For as we inevitably face a host of new and daunting social challenges going to the very heart of our character as a nation in the ominously denominated and

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in its wake its own untoward and unanticipated ancillary responses – side effects – which

notoriously understood ‘post-9/11’ world, and as we understandably reference law at every turn to meet these challenges, *Hoover* might speak gently and clearly to us at this very moment in time. If the human rights dilemmas with which we are presently occupied are different from those facing that state and that nation in 1840, they are not one wit less connected with law at a visceral level, and not one bit less involved in our own present day nation-building. As we debate and imagine and presently consider such things as secret prisons and extra-legal electronic surveillance of American citizens and unilateral breaching/violation of sovereign national borders and torture, and as we marshal and manipulate law itself toward those particular ends, we must remember that we are not only meeting a test in time but constructing a future as well: our own. *Hoover* should warn us that we will live with what we do long after it is done, and will become what we do as well, compelling us to consider prudently, choose carefully and build wisely.

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themselves must discretely be addressed, controlled, managed or lived with.