

BASE WRETCHES AND BLACK WENCHES:
A STORY OF SEX AND RACE, VIOLENCE AND COMPASSION,
DURING SLAVERY TIMES

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INTRODUCTION

In 1861, with the country in the midst of the Civil War, John C. Clark died at his home in Wharton County, Texas.¹ He left a large estate, consisting of lands, slaves, and personal assets, valued at almost a half a million dollars.² Ten years later, his three adult children filed suit to maintain what, they claimed, rightfully belonged to them.³ Their only problem: they were—under the law—black, and John Clark had been white.

What ensued was a lengthy trial, consisting of dozens of witnesses testifying about John Clark, his life, his holdings, and his relationship with a “dark mulatto” woman named Sobrina, Clark’s long-time slave and the mother of the three plaintiffs.⁴ For Clark died without a will, and since no heirs came forward in the immediate aftermath of his death, the local court ordered his property sold, and then had the proceeds deposited in the public

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¹ In the Estate of John C. Clark, dec’d, Probate Minutes Book “A”, at 325 (Tex. Cty. Ct. Wharton Cty. Aug. 1861) (collection of Wharton County Court Annex) [hereinafter Estate of Clark].

² Estate of Clark, *supra* note 1, Probate Minutes Book “B”, at 257, 264 (Tex. Cty. Ct. Wharton Cty. Feb. 1863) (listing items sold at estate sale and valuing them at \$450,147.55).

³ See Transcript of Trial to Supreme Court, Clark v. Honey, No. 789, at 1 (Tex. Dist. Ct. Wharton Cty. Dec. 1871) (collection of Texas State Library and Archives Commission) [hereinafter Transcript of Trial, Clark v. Honey] (plaintiff’s petition), *aff’d* 37 Tex. 686 (1872). The plaintiffs initially filed suit in March of 1871. *Id.* However, the district court postponed the trial after the attorneys for the State maintained that Sobrina’s children from a different father be added as plaintiffs. See *id.* at 30-31 (application for parties); see also *id.* at 32 (order of court). The case was retried in December of 1871. See *id.* at 111 (verdict and decree).

⁴ For the comment that Sobrina was a “dark mulatto” woman, see Transcript of Trial, Clark v. Honey, *supra* note 3, at 61 (testimony of Reason Byrne). The statement of facts ran fifty handwritten pages, and included a total of 29 witnesses. See *id.* at 50-99.

trust.⁵ But with that much money at stake, it did not take long for forgotten relatives from as far away as Virginia to descend on the small community, many claiming that they were entitled to the vast estate despite never having met the man whom they now so eagerly embraced.⁶ But for the jury listening to testimony in the case of *Clark v. Honey* these other filings were of little importance. For them, the question was deceptively simple: were the three plaintiffs John Clark's legitimate children, or, stated differently, were John and Sobrina husband and wife?

The ensuing trial and its aftermath, however, proved to be far more complicated than anyone on that mild December day likely could have anticipated. Indeed, the question of whether Clark's children were entitled to inherit his property took years to resolve—the case and its offshoots occupied the courts for the next several decades⁷—and the issues it raised remain problematic for scholars interested in questions of race and slavery even today. No one doubted then and no one doubts now that white men were involved sexually with their female slaves. But the question of whether terms like “caring,” “devotion,” and “love” can be used to describe these relations remains controversial. Twenty years ago, in her landmark study, Deborah Gray White turned contemporary analysis of the sexual aspects of slavery on its head when she looked at the subject from the perspective of black women, not white men.⁸ Since that time, there has

⁵ See Estate of Clark, *supra* note 1, Probate Minutes Book “A”, at 367-68 (Tex. Cty. Ct. Wharton Cty. Jan. 1863).

⁶ Mildred Ann Wygall and Richard J. Clark, evidently Clark's half-sister and half-brother and both residents of Virginia, filed the first suit in February of 1867. See *State v. Wygall*, 51 Tex. 621, 622 (1879) (describing procedural history to Wygall suit); see also Letter from Thomas H. Bayliss to A.H. Pearce, at 1 (Oct. 1, 1880) (collection of Wharton County Historical Museum) (suggesting that Clark was the son of his father and his father's sister-in-law, making all of his brothers and sisters half-siblings). Mildred Ann and Richard evidently died soon after they brought their case, but Mildred Ann's children, including Joseph B. Wygall, the named plaintiff in later cases, continued the suit. See *Wygall*, 51 Tex. at 622. At some point, Warren Clark, the child of another half-brother, also filed suit, together with a number of other distant relatives. See *id.* at 623 (mentioning suit brought by Warren Clark in Fort Bend County); see also *Clark v. Barden*, No. 1059, at 2 (Tex. Dist. Ct. Wharton Cty. Dec. 1877) (collection of Wharton County Historical Museum) [hereinafter *Clark v. Barden*] (noting Warren's relationship to John Clark).

⁷ The Texas Supreme Court considered the case four times from 1870 to 1879, one time involving John Clark's children with Sobrina and three times involving Clark's other heirs. See *Honey v. Clark*, 37 Tex. 686 (1872); see also *Wygall v. State*, 33 Tex. 328 (1870) (rejecting as untimely appeal of order changing venue back to Wharton from Fort Bend, where it had been transferred); *State v. Wygall*, 46 Tex. 447 (1877) (reversing judgment in favor of the Wygall heirs because district court in Fort Bend County erred in refusing to grant a legislative change of venue); *State v. Wygall*, 51 Tex. 621 (1879) (reversing judgment in favor of Wygall heirs because it conflicted with judgment in children's case). Various aspects of the case, however, occupied the local court into the 1890s. See *infra* notes 314-328 and accompanying text.

⁸ See DEBORAH GRAY WHITE, “AR’N’T I A WOMAN?” FEMALE SLAVES IN THE PLANTATION SOUTH 29-46 (rev. ed. 1999) (1985) (emphasizing black women's experiences with sexual abuse under slavery); see also ANGELA Y. DAVIS, *WOMEN, RACE, & CLASS* 25 (1981) (writing that, “Despite the

been an impressive outpouring of scholarship, reminding us that there was nothing romantic about planters taking advantage of their slave women. Sex in these circumstances was about power: it was brutal, it was ugly, and it was rape.⁹

But to hear John Clark's former slaves talk about the couple that occupied the small rustic cabin on the banks of the Colorado River, *their* relationship, at least, was anything but violent. "Clark and Sobrina lived together as man and wife until their deaths," said one witness.¹⁰ Another agreed: "Sobrina had no other husband and Clark no other wife."¹¹ Such testimony throws the master narrative of rape into flux, suggesting the need to reexamine the broad generalizations about the nature of these relationships and the people involved. It is unlikely, in this case or in most others, that the relationship ever evolved into an entirely consensual one—Sobrina, after all, remained Clark's slave until his death, inevitably tilting the relationship toward power and dominance.¹² But if we listen to Clark's former slaves—witnesses who arguably knew best—the relationship consisted of something more. How much more is the question, and it is the same question that a jury of twelve men were asked to answer in December of 1871, two years after Sobrina, now free, had passed away.¹³

This Article, through the close examination of John Clark's relationship with Sobrina, seeks to broaden our understanding of sex between the races by focusing on a case that seems both unusual yet strangely emblematic of the South in the years before the Civil War. This is a story of complexities and contradictions, and it is a story which illustrates the importance of taking into account not just the circumstances of brutal

testimony of slaves about the high incidence of rape and sexual coercion, the issue of sexual abuse has been all but glossed over in the traditional literature on slavery"). These authors were writing against a tradition of scholarship, illustrated by such works as Bertram Wyatt-Brown's book on Southern Honor, which treated sex with black women as simply "misconduct." BERTRAM WYATT-BROWN, *SOUTHERN HONOR: ETHICS & BEHAVIOR IN THE OLD SOUTH* 293 (1982).

⁹ See, e.g., Thelma Jennings, "Us Colored Women Had To Go Through a Plenty": *Sexual Exploitation of African-American Slave Women*, 1 J. OF WOMEN'S HIST. 45, 60-66 (1990); Norrece T. Jones, Jr., *Rape in Black and White: Sexual Violence in the Testimony of Enslaved and Free Americans*, in *SLAVERY AND THE AMERICAN SOUTH* 93, 93-108 (Winthrop D. Jordan ed. 2003); MELTON A. MCLAURIN, *CELIA, A SLAVE: A TRUE STORY OF VIOLENCE AND RETRIBUTION IN ANTEBELLUM MISSOURI* (1991). For one of the most extensive and detailed accounts of one woman's personal struggles with the issue, see HARRIET A. JACOBS, *INCIDENTS IN THE LIFE OF A SLAVE GIRL* (Jean Fagan Yellin ed. 2000).

¹⁰ Transcript of Trial, *Clark v. Honey*, *supra* note 3, at 52 (testimony of Aunt Clarisa Bird).

¹¹ *Id.* at 72 (testimony of Abraham Kincheloe).

¹² See *Estate of Clark*, *supra* note 1, Probate Minutes Book "B", at 224, 225 (Tex. Cty. Ct. Wharton Cty. Oct. 1861) (listing Sobrina among Clark's property at his death).

¹³ See Transcript of Trial, *Clark v. Honey*, *supra* note 3, at 3 (petition) (indicating that Sobrina died about the 25th of December, 1869).

exploitation so familiar to students of the subject, but also the rare case of genuine affection. Indeed, the central argument here is that sex between the races was far more complicated than traditional accounts suggest, as blacks and whites, men and women, intermingled with each other in ways that defied both the legal rules and the social conventions of the time.¹⁴ Reducing these cases to simple descriptions of power and powerlessness misses out on the rich details they have to offer, and risks minimizing the impact they had on both the people around them and on the larger community in which the participants lived.

To that end, this Article seeks to take advantage of a recent trend in slavery scholarship, one that draws on local records—and particularly trial records—to make its essential points.¹⁵ These records, as others have stressed, have been a surprisingly underused source among legal historians, a group who has traditionally spent time mining published appellate decisions and statutory provisions for hints of Southern ideologies.¹⁶ Yet trial records open up doors that these traditional sources can never do, by providing us with a window into the consciousness of ordinary people.¹⁷ Through their lawsuits and their testimony, litigants and witnesses argued about nothing of national significance yet about everything that mattered most to them. They fought over property rights and slave sales, over contested wills and slave hires—and in doing so they reveal a world that

¹⁴ In a number of recent studies, including by this author, scholars have begun to focus on the intricacies of interracial sex, arguing in different settings and on different topics for a more nuanced approach to the subject. See, e.g., VICTORIA E. BYNUM, *UNRULY WOMEN: THE POLITICS OF SOCIAL & SEXUAL CONTROL IN THE OLD SOUTH* 88-110 (1992); Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 *STAN. L. REV.* 221 (1999); Jason A. Gillmer, *Poor Whites, Benevolent Masters, and the Ideologies of Slavery: The Local Trial of a Slave Accused of Rape*, 85 *N.C. L. REV.* 489 (2007); MARTHA HODES, *WHITE WOMEN, BLACK MEN: ILLICIT SEX IN THE 19TH-CENTURY SOUTH* (1997); McLAURIN, *supra* note 9; JOSHUA D. ROTHMAN, *NOTORIOUS IN THE NEIGHBORHOOD: SEX AND FAMILIES ACROSS THE COLOR LINE IN VIRGINIA, 1787-1861* (2003); DIANNE MILLER SOMMERVILLE, *RAPE & RACE IN THE NINETEENTH-CENTURY SOUTH* (2004); PETER WALLENSTEIN, *TELL THE COURT I LOVE MY WIFE: RACE, MARRIAGE, AND LAW—AN AMERICAN HISTORY* (2002).

¹⁵ See, e.g., ARIELA J. GROSS, *DOUBLE CHARACTER: SLAVERY AND MASTERY IN THE ANTEBELLUM SOUTHERN COURTROOM* 3-9 (2000) (emphasizing importance of local records in studying disputes over slaves); HODES, *supra* note 14, at 1-15 (explaining her method of relying on local records to tell stories about white women and black men); Walter Johnson, *The Slave Trader, the White Slave, and the Politics of Racial Determination in the 1850s*, 87 *J. OF AM. HIST.* 13, 13-16 (2000) (focusing on testimony from lower court hearings in case involving a white slave suing for her freedom); McLAURIN, *supra* note 9, at ix-xi (noting importance of local case studies to help in our understanding of slavery); ROTHMAN, *supra* note 14, at 1-11 (recognizing “central importance” of local disputes in understanding interracial relationships).

¹⁶ See Ariela Gross, *Beyond Black and White: Cultural Approaches to Race and Slavery*, 101 *COLUM. L. REV.* 640, 640-42 (2001) (noting artificial divide between the work of legal historians and the work of social historians, and the sources used by each).

¹⁷ See *id.* at 643 (noting how trial records provide access into “the ways law was understood not only by judges but by litigants, the spectators in the courtroom, and the slaves themselves”).

involved far less adherence to the bright line rules of race and slavery than previous studies would have allowed. Indeed, when it came to such topics as interracial sex and its consequences, guardians of the Southern social order spoke with a uniform voice. “Hybridism is heinous,” Henry Hughes roared in 1854.¹⁸ “Impurity of races is against the law of nature. Mulattoes are monsters.”¹⁹ But at the local level, these seemingly rigid racial lines broke down with considerable frequency. Men left their entire estates to their former slaves; women divorced their husbands after losing their affections; and local prosecutors indicted interracial couples for living together as husband and wife²⁰—and the communities’ response—through testimony, through verdicts, through the filings of the cases themselves—tells us much about the substance of life of the ground, and about the complex interplay of slavery, race, sexuality, and power, in shaping people’s views of the world in which they lived.

In the end, then, this Article is about more than just John Clark and Sobrina; it is about a society struggling with its own identity. Far from the official ideologies of the South, men and women, blacks and whites, regularly met in the towns and on the streets—sometimes explosively and sometimes on more considerate terms. Yet, in either case, local communities had to reckon with a social order that never was how it was supposed to be. John Clark’s relationship with Sobrina, in other words, like so many others, forced a confrontation over the ideals white Southerners projected about themselves and the stuff of everyday life.

This Article, like some of my previous work, is written in the narrative style, to allow the story of John Clark and his eventual life with Sobrina to unfold naturally, and to provide the details so important for a case study of this type. It takes place in Texas, far from the political and cultural standards of a place like Virginia—indeed, far from some of the usual places that have occupied the attention of slavery scholars.²¹ Yet a

¹⁸ HENRY HUGHES, *TREATISE ON SOCIOLOGY* (1854), *reprinted in* THE IDEOLOGY OF SLAVERY: PROSLAVERY THOUGHT IN THE ANTEBELLUM SOUTH, 1830-1860, at 241, 259 (Drew Gilpin Faust ed. 1981).

¹⁹ *Id.* at 259-60.

²⁰ All of these types of cases, and more, happened in Texas. For property contests involving female slaves or mixed-race children, see *Oldham v. McIver*, 49 Tex. 556 (1878); *Clements v. Crawford*, 42 Tex. 601 (1874); *Wilson v. Catchings*, 41 Tex. 587 (1874); *Bonds v. Foster*, 36 Tex. 68 (1872); *Webster v. Heard*, 32 Tex. 685 (1870); *Hunt v. White*, 24 Tex. 643 (1860); *Hillard v. Fratz*, 21 Tex. 192 (1858); *Purvis v. Sherrod*, 12 Tex. 140 (1854); *Guess v. Lubbock*, 5 Tex. 535 (1851). For cases involving divorces, see *Cartwright v. Cartwright*, 18 Tex. 626 (1857); *Hagerty v. Harwell*, 16 Tex. 663 (1856). For antimiscegenation prosecutions, see *Smelser v. State*, 31 Tex. 95 (1868); *Ashworth v. State*, 9 Tex. 490 (1853).

²¹ For the most comprehensive treatment of slavery in Texas, see RANDOLPH B. CAMPBELL, *AN EMPIRE FOR SLAVERY: THE PECULIAR INSTITUTION IN TEXAS, 1821-1865* (1989). Legal historians, in

good argument can be made for focusing on a place like Texas, if only to expand our knowledge of the peculiar institution and its impact on the lives of ordinary people. Indeed, in the nineteenth century, as the country expanded westward, the ideas of the Old South had to be bent and shaped to address new circumstances and unique situations. The people who came to Texas did so because they wanted to start a new life, many hoping to prosper where they had been unable to before; yet they brought with them their cultural and social traditions, and as they struggled to clear their lands and build their homes, they debated the future of slavery and the relations between the races. In the end, their actions and their answers would affect not just John Clark and Sobrina, but the views of the witnesses who were later called on to describe the life these two had together.

Part I of this Article follows John Clark as he made his way to the Texas wilderness, and talks about how he and the other adventurous souls who came with him carved out a life for themselves. It describes some of the early hardships, as well as the many successes, and tries to position John Clark within the overall story of what was happening in Texas at this time. Part II delves into the slavery question, noting the early conflicts between the Mexican government and the vast majority of Anglo settlers. It then details John Clark's meteoric rise in the slaveholding ranks, and discusses both his role as a master and the life experienced by some of his slaves. With this context, Part III then turns to the life Clark and Sobrina had together, following the story from its ugly beginnings to its more substantive end. This Part, in particular, relies heavily on the testimony of Clark's former slaves and the slaves on neighboring plantations to illustrate the complexities and contradictions of the life Clark and Sobrina shared together. Finally, Part IV attempts to situate this story within the larger story of race and racial ideologies in the antebellum South. It suggests that, at the same time proslavery ideologues were trying to sharpen the lines of race and slavery, those lines were literally being erased before their very eyes. Indeed, through this case, or more specifically through the actions and words of those who tried to deny its more substantive components, this Part emphasizes that the South of John Clark and Sobrina was a society in complete disarray. Finally, this Article concludes with a brief discussion of the verdict and the aftermath of the case.

I. THE OLD THREE HUNDRED

particular, have given the State scant attention, with little being said on the laws of slavery since A.E. Keir's Nash's article in 1971. See A.E. Keir Nash, *The Texas Supreme Court and Trial Rights of Blacks, 1845-1860*, 58 J. OF AM. HIST. 622 (1971).

John Clark never found a white woman to marry. There was some talk about how in 1834 he once called on Stephen Heard's sister, a young woman who lived nearby.²² But whether the purpose was a romantic one or something else is not known, and certainly nothing ever came of it.²³ Indeed, by the time Clark was in his 50s, he had dismissed the idea of marrying a white woman entirely. According to Joseph Anderson, a resident of the county and the man in charge of taking the 1850 census, Clark told him in 1853 that he had no intention of proposing to anyone, as “no woman would marry him but for his property.”²⁴

To the casual observer this explanation may have sounded plausible. Clark was known among his neighbors in Wharton County to be a solitary man—someone who never visited others unless business was involved.²⁵ Yet, to those who dealt with him on a daily basis—namely, the slaves on his plantation—the explanation undoubtedly sounded disingenuous. Indeed, by the time he allegedly made his statement to Mr. Anderson, Clark had been involved in a twenty year relationship with Sobrina, the sometime cook who lived in his cabin and shared his bed.²⁶

It is not known precisely when John Clark purchased Sobrina—

²² See Transcript of Trial, *Clark v. Honey*, *supra* note 3, at 80 (testimony of Stephen R. Herd) (testifying that Clark “addressed his sister” in 1834). Stephen Herd—or “Heard,” as he is listed in the 1850 Census—was most likely the son of William J.E. Heard, a man who purchased land from Clark and settled just north of him. See Manuscript Census Returns, Schedule 1.—Free Inhabitants, Wharton County, Tex., in BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, POPULATION SCHEDULES OF THE SEVENTH CENSUS OF THE UNITED STATES (1850) [hereinafter 1850 CENSUS: Free Inhabitants] (listing S.R. Heard near the entries of both John Clark and W.J.E. Heard, indicating that all were neighbors); see also 2 THE NEW HANDBOOK OF TEXAS 135 (1996) (John C. Clark) (noting Clark sold his land to Heard).

²³ See Transcript of Trial, *Clark v. Honey*, *supra* note 3, at 56 (testimony of Aunt Clarisa Bird) (recalling that Clark “used to go and see Fannie Herd. But had no notion of marrying her for a wife”).

²⁴ *Id.* at 86 (testimony of Jos. Anderson); see also *id.* (stating that he—Anderson—took the census of the county in 1850). There is a J.S. Anderson in the 1850 Census, which is likely Joseph. See 1850 CENSUS: Free Inhabitants, Wharton County, *supra* note 22 (listing J.S. Anderson as being 32 years old, a farmer, and from Virginia). Joseph S. Anderson also appears in the 1860 Census. See Manuscript Census Returns, Schedule 1.—Free Inhabitants, Wharton County, Tex., in BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, POPULATION SCHEDULES OF THE EIGHTH CENSUS OF THE UNITED STATES (1860) [hereinafter 1860 CENSUS: Free Inhabitants] (listing Joseph S. Anderson as being 43, a planter, and from Virginia).

²⁵ See, e.g. Transcript of Trial, *Clark v. Honey*, *supra* note 3, at 86 (testimony of Jos. Anderson) (“Clark received very little company. When a man went there he had to attend to his business and leave instantly.”); *id.* at 92 (testimony of B.F. Sanford) (stating that Clark was “unsocial”); *id.* at 93 (testimony of Geo. W. Hooken) (talking about how Clark was a “miserly man” who “never visited except on business”); *id.* at 96 (testimony of Edward Collier) (testifying that Clark “was a solitary man”).

²⁶ See *id.* at 93 (testimony of Geo. W. Hooken) (“Sobrina was superintendent of milk and dairy and sometime cook”).

testimony indicates that it was probably sometime in the early 1830s.²⁷ But by that time, Clark had been living in Texas for about a decade. In fact, John Clark was one of Stephen F. Austin's Old Three Hundred, the name given to the original three hundred colonists who ventured into the Texas wilderness right around the time Mexico declared independence from Spain and acquired the vast and sparsely-settled lands west of the Sabine River.²⁸ The surviving records do not indicate why John Clark came to the country, or even why he left his native South Carolina.²⁹ But chances are he came for same reason so many others came: for opportunity and the promises of a better life. Indeed, the first few decades of the nineteenth century were a period of great migration south and west, as thousands fled the tired lands of places like Virginia and the Carolinas.³⁰ They came by covered wagon, across streams and rivers, often possessing little more than a love of adventure and a willingness to stake their futures on the untapped potential of lands further west. It may be that Clark was in New Orleans when he first heard about the Texas expedition, for it was here that Austin announced through the newspapers that Texas was open for settlement.³¹ But, even if not, talk of abundant lands and fertile soil—reported to be some of the best in the world³²—evidently reached him, and before long he, along with a man named Alexander Jackson, crossed over the border of the United States and into Mexico.³³

Those early years in Austin's colony were no doubt difficult and filled with hardships. Armed with little more than a good rifle and sturdy

²⁷ See *id.* at 81 (testimony of Stephen R. Herd) (stating that Clark bought Sobrina in 1833 or 1834). This date is probably the latest possible time in which Clark could have purchased Sobrina because several witnesses remembered that Sobrina had already given birth to Clark's two daughters by the Runaway Scrape of 1836. See, e.g. *id.* at 53 (testimony of Aunt Clarisa Bird) ("The two girls were born before the runaway scrape and Bishop afterwards."). For more on the Runaway Scrape, see *infra* notes 104-105 and accompanying text.

²⁸ See Lester G. Bugbee, *The Old Three Hundred: A List of Settlers in Austin's First Colony*, I TEX. HIST. ASSOC. Q. 108, 108-09, 111 (1898) (describing terms of Austin's original colony and listing John Clark's name among the Old Three Hundred).

²⁹ See 1850 CENSUS: Free Inhabitants, Wharton County, *supra* note 22 (listing John Clark's birthplace as South Carolina).

³⁰ See generally KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH* 237-39 (1956) (discussing migration Southwest).

³¹ See I LOUIS J. WORTHAM, *A HISTORY OF TEXAS: FROM WILDERNESS TO COMMONWEALTH* 94 (1924); see also Letter from Thomas H. Bayliss to A.H. Pearce, at 1 (Oct. 1, 1880) (suggesting in a letter written on behalf of John Clark's relatives that Clark may have been in New Orleans before going to Texas) (collection of Wharton County Historical Museum).

³² See *Texas—Character, of the Country, Emigrants, Etc.*, 20 DE BOW'S REVIEW 241, 242 (1856) (insisting that Texas had "as rich land as can be found in the world, the delta of the Nile not excepted").

³³ See Transcript of Trial, Clark v. Honey, *supra* note 3, at 69 (testimony of Sharp Jackson) (indicating that Clark and Jackson came to Texas together). Alexander Jackson is listed as one of the Old Three Hundred. See Bugbee, *supra* note 28, at 113.

plow, the men and women who first arrived were tasked with the heavy responsibilities of finding food, building homes, clearing lands, and planting the first crops.³⁴ Early tragedies, including the loss in 1822 of the schooner *Lively*, which left New Orleans carrying settlers and a supply of seed, were regular occurrences, as were lost crops and deaths from sickness and disease.³⁵ The settlers also found themselves embroiled in regular skirmishes with the Karankawa Indians, who had occupied the land long before Austin's colonists began arriving, and fought to maintain it.³⁶ Indeed, John Clark himself was severely wounded in one such battle, after a small band attacked Clark and two others as they floated down the river in a pirogue loaded with corn.³⁷ The other two men were killed and Clark only narrowly escaped—by jumping into the river—but not before being shot with seven arrows.³⁸

³⁴ For a number of interesting accounts of life in the first years of the colony, collected in a series of articles by J.H. Kuykendall, the son of Abner Kuykendall and a member of the Old Three Hundred, see J.H. Kuykendall, *Reminiscences of Early Texans: A Collection from the Austin Papers*, 6 TEX. HIST. ASSOC. Q. 236 (1903) [hereinafter I Kuykendall]; J.H. Kuykendall, *Reminiscences of Early Texans: A Collection from the Austin Papers*, 6 TEX. HIST. ASSOC. Q. 311 (1903) [hereinafter II Kuykendall]; J.H. Kuykendall, *Reminiscences of Early Texans: A Collection from the Austin Papers*, 7 TEX. HIST. ASSOC. Q. 29 (1903) [hereinafter III Kuykendall]; see also 3 THE NEW HANDBOOK OF TEXAS, *supra* note 22, at 1169 (Jonathon Hampton Kuykendall) (providing background on J.H. Kuykendall). For another interesting account of the early days of Texas, see W.B. DEWEES, LETTERS FROM AN EARLY SETTLER OF TEXAS 29-37 (Texian Press 1968) (1852).

³⁵ For discussions of the schooner *Lively*, see WORTHAM, *supra* note 31, at 96; I H. YOAKUM, HISTORY OF TEXAS: FROM ITS FIRST SETTLEMENT IN 1685 TO ITS ANNEXATION TO THE UNITED STATES IN 1846, 212-13 (1855). For discussion of some of the early tragedies, including drought, lost crops, lack of provisions, and difficulty with Indians, see, e.g. I Kuykendall, *supra* note 34, at 236-41 (recollections of Capt. Horatio Chriesman); III Kuykendall, *supra* note 34, at 29-39 (recollections of Capt. Gibson Kuykendall); see also T.R. FEHRENBACH, LONE STAR: A HISTORY OF TEXAS AND THE TEXANS 142 (2000) (noting drought ruined first crops).

³⁶ See YOAKUM, *supra* note 35, at 221-26 (providing overview of some early troubles with the Karankawa Indians). One settler, with a typical sense of awe and revulsion and perhaps a bit of poetic license, described the Karankawa Indians this way:

Fish and alligators were their principal food. They were also cannibals. In stature they were scarcely surpassed by the Patagonians, the average height of the men being fully six feet, and every warrior's bow when strung, was precisely as long as his person and as useless in the hands of a man of ordinary strength as was the bow of Ulysses in the hands of the suitors.

II Kuykendall, *supra* note 34, at 324 (extracts from a biographical sketch of Capt. John Ingram).

³⁷ The story of John Clark's battle with the Karankawas is retold in several early sources. See, e.g. DEWEES, *supra* note 34, at 37-38; I Kuykendall, *supra* note 34, at 247-48 (recollections of Judge Thomas M. Duke); III Kuykendall, *supra* note 34, at 47 (recollection of Abraham Alley); ANNIE LEE WILLIAMS, A HISTORY OF WHARTON COUNTY, 1846-1961, 15-16 (1964); WORTHAM, *supra* note 31, at 127; YOAKUM, *supra* note 35, at 223.

³⁸ DEWEES, *supra* note 34, at 38; YOAKUM, *supra* note 35, at 223. Clark was involved in another fight soon after this one. This time, Clark's traveling companion, Alexander Jackson, was shot through the elbow with an arrow. See II Kuykendall, *supra* note 34, at 324-25 (extracts from a biographical sketch of Capt. John Ingram) (providing details on fight, including description of Jackson being shot); see also DEWEES, *supra* note 34, at 41-42 (describing battle). Clark fired back and killed the Indian. See II Kuykendall, *supra* note 34, at 325 (extracts from a biographical sketch

Adding to the difficulties of the early settlers was the uncertainty of the land grants themselves. In fact, following the independence of Mexico, there was some doubt that the terms of the original colonizing grant between the Spanish government and Austin's father, Moses Austin, who had recently passed away, would be honored.³⁹ As such, Austin, as heir to the grant, found himself in the spring of 1822 making the rugged journey across twelve hundred miles to Mexico City to meet with the Mexican government.⁴⁰ Though he expected to be away only a short while—in one letter written soon after he arrived he said he hoped to leave “in the course of ten or twelve days”—he did not resolve the issue and return to the colony until over a year later, during the summer of 1823.⁴¹ By that time, Austin later recalled, a number of the colonists had become disillusioned “by the uncertainty in which they had been for such a length of time,” and many had long since abandoned their new-found homes for the comforts and securities of the United States.⁴² But for those who remained, they no doubt greeted Austin's assurances at the house of Sylvenus Castleman, who lived not far from John Clark, that the titles to their lands were “indisputable” with both satisfaction and relief.⁴³ Whether Clark was in attendance on that August day in 1823 is not known. But surely the renowned Indian fighter and stout young man—he was now about twenty-five—would have agreed with Austin's patriotic reminder at the close of his remarks: “that *American blood* flows in their veins, and that they must not dishonor that noble blood by yielding to trifling difficulties.”⁴⁴

of Capt. John Ingram); *see also* 2 THE NEW HANDBOOK OF TEXAS, *supra* note 22, at 135 (John C. Clark) (stating that Clark was a “noted Indian fighter,” who make parts of Wharton County “safe enough for others to move into”).

³⁹ *See* WORTHAM, *supra* note 31, at 97-98; YOAKUM, *supra* note 35, at 213-14.

⁴⁰ *See* Austin to Lucas Alaman, Jan. 20, 1824, in II THE STEPHEN F. AUSTIN PAPERS, pt.1, at 725-26 (Eugene C. Barker ed. 1924) [hereinafter AUSTIN PAPERS] (describing events around journey); WORTHAM, *supra* note 31, at 97-98 (same, including distance traveled).

⁴¹ *See* Austin to J.H. Hawkins, about May 1, 1822, in II AUSTIN PAPERS, pt.1, *supra* note 40, at 505. Austin remained in Mexico City until April 1823, when the terms of the colonizing grant were finally confirmed. *See* Austin to Lucas Alaman, Jan. 20, 1824, in II AUSTIN PAPERS, pt.1, *supra* note 40, at 726 (providing history of his stay in Mexico City); *see also* YOAKUM, *supra* note 35, at 217-20, 227 (detailing the complexities and confusion over the land grants, and when Austin returned).

⁴² Austin to Lucas Alaman, Jan. 20, 1824, in II AUSTIN PAPERS, pt.1, *supra* note 40, at 727; *see also* WORTHAM *supra* note 31, at 115-16 (noting how some of the original colonists left).

⁴³ Austin to the Colonists, August 6, 1823, in II AUSTIN PAPERS, pt.1, *supra* note 40, at 679. Austin's remarks were delivered at the “Colorado River House of Mr. Castleman's.” *Id.* Sylvenus Castleman was one of the Old Three Hundred and lived near Clark in Wharton County. *See* Bugbee, *supra* note 28, at 111 (identifying Castleman as one of the original colonists); *see also* Map of Wharton County (General Land Office 1880) (collection of The Center for American History, University of Texas) [hereinafter Map of Wharton County] (showing Castleman's league along Colorado River, south of Clark).

⁴⁴ Austin to the Colonists, Aug. 6, 1823, in II AUSTIN PAPERS, pt.1, *supra* note 40, at 681. Clark was born in 1798, making him about 25 in 1823. *See* 1850 CENSUS: Free Inhabitants, Wharton

During those early years, hardships notwithstanding, news of Austin's colony continued to garner significant interest throughout the South. "Mr. Elijah Noble," the famous Henry Clay expounded in an 1822 letter of introduction to Austin, "is attracted to Texas by the advantages which its fine soil, climate, and cheap hands [lands?] are supposed to offer."⁴⁵ The terms of the grant authorized Austin to settle three hundred families near the Colorado and Brazos Rivers—each family engaged in farming was to receive one labor of land (or 177 acres), and each family who planned to raise stock was entitled to one sitio (or 4428 acres).⁴⁶ These requirements, however, evidently served more as guidelines than settled law, with several single men joining up in twos and threes to act as a family, and several others receiving additional acres for planned improvements or for meritorious service or demonstrated wealth.⁴⁷ Men like Robert Kuykendall, William Kincheloe, and Josiah Bell were among the first to arrive—the first two becoming neighbors of John Clark⁴⁸—and not long after the Georgia planter Jared Groce crossed over into the territory with some fifty wagons and almost a hundred slaves.⁴⁹ Others soon followed, and by the summer of 1824, with no more luxuries than what were "afforded in beholding the loveliest natural scenery, and in taking part in the stirring adventures of the chase,"⁵⁰ all three hundred, including John Clark, had arrived.⁵¹

As part of his grant, Clark called himself a stock raiser and received one sitio of land in what would become Wharton County, about sixty miles southwest of present-day Houston.⁵² He built his home on the east bank of the Colorado near Peach Creek, an area rich in alluvial soil and marked by a timber belt of ash, pecan, live oak and other hardwood trees.⁵³ Like others

County, *supra* note 22.

⁴⁵ Henry Clay to Austin, June 7, 1822, in II AUSTIN PAPERS, pt.1, *supra* note 40, at 526.

⁴⁶ See Bugbee, *supra* note 28, at 108.

⁴⁷ See *id.* (explaining system for distributing land). Jared Groce, for example, received 10 sitios of land for the stated reason that he "has 'near one hundred slaves and may be useful ... on account of the property he has brought with him.'" *Id.* at 113 & n.2.

⁴⁸ See Map of Wharton County, *supra* note 43 (showing Clark's land to be just north of both Kuykendall and Kincheloe).

⁴⁹ See FEHRENBACH, *supra* note 35, at 138 (noting some of the first to arrive).

⁵⁰ YOAKUM, *supra* note 35, at 229.

⁵¹ See Bugbee, *supra* note 28, at 108 ("The three hundred families were all, or nearly all, in Texas before the close of the summer of 1824.").

⁵² *Id.* at 111. For a copy of John Clark's land grant, in its original Spanish, see <https://scandocs.glo.state.tx.us/webfiles/landgrants/pdfs/1/0/2/7/1027999.pdf> (last visited Aug. 28, 2007). Wharton became a county after Texas achieved statehood in 1846, and it was formed from parts of Matagorda, Jackson, and Colorado Counties. See 6 THE NEW HANDBOOK OF TEXAS, *supra* note 22, at 910 (Wharton County).

⁵³ See Map of Wharton County, *supra* note 43 (showing Clark's land on the Colorado); see also

who settled the area, Clark chose his land wisely. Not only was the soil first-rate, but being so close to the Colorado meant that Clark had a ready means to ship to faraway markets the products he planned to grow and raise. In the coming decades, in fact, many settlers, including John Clark, would grow and profit from a number of crops, including cotton, corn, sugar, sweet potatoes, peas, beans, and wheat.⁵⁴ Indeed, together with a handful of other counties in the southeastern part of the State, Wharton County produced most of the State's cash crops. In 1850, for example, Wharton County was the third largest producer of sugar, and the sixth largest producer of cotton.⁵⁵ By 1860, production of cotton had increased five-fold, and production of corn had almost doubled.⁵⁶ Settlers to the area also profited from large livestock herds. Cattle were the most abundant—in 1860, there were over 20,000—but records indicate that the county's residents also raised enough pigs that some of the meat was probably sold for profit, as was the wool from the few hundred sheep roaming the terrain.⁵⁷ All told, in 1860 the county's livestock herds, together with the horses and mules used on the farms, were valued at almost \$400,000.⁵⁸

Of his neighbors, moreover, John Clark grew to be one of the most successful. By the time he died, in fact, he had acquired over 8500 acres of land, buying up 1805 acres of the Huff league, 1107 acres of the Newman league, 1222 acres of the McFarland league, and 2214 acres of the Roberts league.⁵⁹ Clark put all of this land to good use, too, both raising stock and

Transcript of Trial, *Clark v. Honey*, *supra* note 3, at 81 (testimony of Stephen R. Herd) (stating that Clark's home was on Peach Creek). On the soil and types of trees in Wharton County, see WILLIAMS, *supra* note 37, at 87; *see also* 6 THE NEW HANDBOOK OF TEXAS, *supra* note 22, at 910 (Wharton County).

⁵⁴ *See, e.g.* AGRICULTURE OF THE UNITED STATES IN 1860; COMPILED FROM THE ORIGINAL RETURNS OF THE EIGHTH CENSUS 140-51 (1864) [hereinafter 1860 CENSUS: Agriculture] (charting amount of crops grown in Texas by county).

⁵⁵ The counties that produced more sugar were Brazoria and Matagorda. *See* Table XI Agriculture—Farms, and Implements, Stock Products, Home Manufacturers, &c., in THE SEVENTH CENSUS OF THE UNITED STATES: EMBRACING A STATISTICAL VIEW OF EACH OF THE STATES AND TERRITORIES, at 519-20 (1850). The counties that produced more cotton were Austin, Brazoria, Colorado, Harrison, and Washington. *Id.* at 517-18.

⁵⁶ In 1850, Wharton County produced 2,892 bales of cotton and 103,700 bushels of Indian corn. *See id.* at 518, 516. In 1860, Wharton County produced 11,495 bales of cotton and 194,100 bushels of Indian corn. *See* 1860 CENSUS: Agriculture, *supra* note 54, at 149.

⁵⁷ *See* 1860 CENSUS: Agriculture, *supra* note 54, at 148-49 (detailing number of live stock and pounds of wool produced).

⁵⁸ *Id.* at 149.

⁵⁹ *See* Estate of Clark, *supra* note 1, Probate Minutes Book "B", at 224 (Tex. Cty. Ct. Wharton Cty. Oct. 1861) (inventorying estate). John Clark also bought 142 acres from Robert Kuykendall in 1828, though the land is not listed separately in the inventory of the estate. *See* Robert Kuykendall to John C. Clark, English Translation to Deeds Book "A", at 28-29 (March 29, 1828) (collection of Wharton County Court Annex). It is possible that this land was included in the description of the Clark league in the estate's inventory. *See* Estate of Clark, *supra* note 1, Probate Minutes Book "B", at 224 (Tex. Cty. Ct. Wharton Cty. Oct. 1861) (listing 2391 acres in Clark league); *see also infra*

growing various crops. Roaming about his property in 1850, for example, was 2500 head of beef cattle, and there was 1500 in 1860.⁶⁰ Clark also owned milk cows, horses, mules, oxen, and hundreds of pigs.⁶¹ In 1850, moreover, he grew and sold 2000 bushels of corn, 1000 bushels of sweet potatoes, and 100 bales of cotton.⁶² By 1860, a year before his death, he had increased that amount to 2500 bushels of corn and 225 bales of cotton.⁶³ He truly was, as Justice Moses Walker of the Texas Supreme Court said, a man “engrossed by a desire to accumulate property.”⁶⁴ Indeed, only a handful of others in the county produced more cotton, and only one ever had more cattle.⁶⁵

Yet, despite his vast wealth, later testimony indicates that John Clark cared little for the fineries of the grand plantations he left behind in his native South Carolina. In fact, at his death, he was still living in a simple log cabin, measuring about eighteen by twenty feet.⁶⁶ The home was no doubt constructed in the manner common to Texas settlers, out of rough-hewn logs with a plank floor and a chimney made of sticks and mud.⁶⁷ A long-time acquaintance also remembered that there was an open shed or porch, probably in the front, and a separate detached kitchen about fifteen feet away.⁶⁸ If the cabin had a window there was no mention of it;

notes 108-109 and accompanying text (noting that Clark sold 2,222 acres to William Heard in 1830, leaving him with some 2364 acres with the Kuykendall purchase).

⁶⁰ See Manuscript Census Returns, Schedule 4.—Production of Agriculture, Wharton County, Tex., in BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, POPULATION SCHEDULES OF THE SEVENTH CENSUS OF THE UNITED STATES (1850) [hereinafter 1850 CENSUS: Production of Agriculture, Wharton County]; Manuscript Census Returns, Schedule 4.—Production of Agriculture, Wharton County, Tex., in BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, POPULATION SCHEDULES OF THE EIGHTH CENSUS OF THE UNITED STATES (1860) [hereinafter 1860 CENSUS: Production of Agriculture, Wharton County].

⁶¹ See 1850 CENSUS: Production of Agriculture, Wharton County, *supra* note 60 (noting that Clark had 20 horses, 10 mules, 20 oxen and 100 swine); 1860 CENSUS: Production of Agriculture, Wharton County, *supra* note 60 (listing 30 horses, 25 mules, 16 oxen, and 200 swine).

⁶² See 1850 CENSUS: Production of Agriculture, Wharton County, *supra* note 60.

⁶³ See 1860 CENSUS: Production of Agriculture, Wharton County, *supra* note 60.

⁶⁴ Honey v. Clark, 37 Tex. 686, 689 (1872).

⁶⁵ In 1850, with 2500 beef cattle, Clark was the largest stock raiser in Wharton County. See 1850 CENSUS: Production of Agriculture, Wharton County, *supra* note 60. In 1860, E. George owned the most cattle, with 3000, and John Clark, D.V. Myers, C.H. Kincheloe each counted 1500. See 1860 CENSUS: Production of Agriculture, Wharton County, *supra* note 60. In 1860, thirteen planters produced more cotton, with A.C. Horton and W.F. Alexander producing the most with 600 bales apiece. See *id.*

⁶⁶ See Transcript of Trial, Clark v. Honey, *supra* note 3, at 63 (testimony of Reason Byrne).

⁶⁷ See *id.* at 55 (testimony of Aunt Clarisa Bird) (noting that Clark’s cabin had a plank floor); see also FREDERICK LAW OLMSTED, A JOURNEY THROUGH TEXAS; OR, A SADDLE-TRIP ON THE SOUTHWESTERN FRONTIER 47 (1857) (discussing home of Texas settler).

⁶⁸ See Transcript of Trial, Clark v. Honey, *supra* note 3, at 63 (testimony of Reason Byrne); see also OLMSTED, *supra* note 67, at 47 (noting, in his description of a Texas home, that there was “a broad open shed or piazza in front” of the cabin, and also noting a detached kitchen). Byrne testified that he became acquainted with Clark in 1835. See Transcript of Trial, Clark v. Honey, *supra* note 3,

the only light may have come from a single door.⁶⁹ Inside the one-room home was a large bed and evidently a smaller one, a table, some chairs, an iron safe, some kitchen utensils, and perhaps also a dresser.⁷⁰ Near the fireplace and in various nooks may have been other things, such as a few books, some knick-knacks, and, of course, a gun.⁷¹

These humble furnishings, together with his general way of life, led some to dismiss Clark as a “miserly man.”⁷² Yet, in truth, Clark’s attitude was typical of many of the men and women who first settled in Texas. These were free-spirited folks, concerned less with the formalities of the Old South and its aristocratic foundations than with comfortable homes and the simple conveniences of life. They dressed in buckskin pants and built log cabins and ate corn-bread and bacon, much to the chagrin of northern visitors.⁷³ Yet, even in later years, there were constant calls for the “hardy and industrious *farmer*” (rather than the “professional man” or “politicians”)—those willing to work hard and reap the advantages the abundant lands and rich soil had to offer.⁷⁴ If to some this was cause for disparagement, for those who lived there it was something to be celebrated. “It is not a paradise,” said an article printed in *De Bow’s Review*, “but it is a country where the poor man can easily obtain land, and when he has it he can always turn it to good account in the support of his family.”⁷⁵

at 61 (testimony of Reason Byrne).

⁶⁹ See OLMSTED, *supra* note 67, at 47 (explaining how the house in which he stayed “had but one door and no window”).

⁷⁰ See Transcript of Trial, *Clark v. Honey*, *supra* note 3, at 84 (testimony of H.P. Cayce) (noting that the cabin had only one room); *id.* at 98 (testimony of J.P. Morton) (explaining that there were two beds in Clark’s house); see also Estate of Clark, *supra* note 1, Probate Minutes Book “B”, at 257, 262, 264 (Tex. Cty. Ct. Wharton Cty. Feb. 1863) (listing iron safe, bed, table and chairs, and kitchen utensils among the items sold).

⁷¹ See OLMSTED, *supra* note 67, at 48 (noting items around the fireplace); see also Estate of Clark, *supra* note 1, Probate Minutes Book “B”, at 257, 263 (listing guns as items sold at estate sale).

⁷² See Transcript of Trial, *Clark v. Honey*, *supra* note 3, at 93 (testimony of George W. Hooken).

⁷³ See YOAKUM, *supra* note 35, at 229 (describing common dress and attitude of early settlers); see also WORTHAM, *supra* note 31, at 82, 129 (same). Fredrick Olmsted, the famous northern architect, was not impressed with the food and lodgings of Texans. See, e.g. OLMSTED, *supra* note 67, at 49 (describing one of many meals as consisting of “a plate of cold, salt, fat pork; a cup of what to both eye and tongue seemed lard, but which [the host] termed butter; a plate of very stale, dry, flaky, micaceous corn-bread; a jug of molasses, and a pitcher of milk”). For more of his observations on the state of living in Texas, and a point-by-point rebuttal, see generally *Texas*, 23 DE BOW’S REVIEW 113 (1857). Amos Andrew Parker offered a similar unflattering opinion: “generally, the traveler only finds the log house, built in an open, rude manner, with only one room where he and the family lodge together; and perhaps only corn-bread, meat, and sweet potatoes to eat.” AMOS ANDREW PARKER, TRIP TO THE WEST AND TEXAS 148 (1835).

⁷⁴ *Texas—Character of the Country, Emigrants, Etc.*, 20 DE BOW’S REVIEW 241, 245, 246, 247 (1856).

⁷⁵ *Id.* at 241.

II. A SLAVE COUNTRY

When he arrived, John Clark did not own any slaves; in fact, he did not purchase his first human being until the late 1820s or perhaps the first year or so of the 1830s.⁷⁶ Yet, even during those first years in the colony, Clark no doubt hoped one day to count himself among this privileged group. Like all good (white) Southerners, Clark probably looked upon slavery as both natural and necessary. Indeed, by the time Clark arrived in Texas, many whites had long begun to see slavery as more than just a tolerated evil; instead, it had become an essential part of the way they viewed themselves and the rest of the world. These are not mere “Africans,” Austin explained to the institution’s detractors in 1824, “but are the family servants of the emigrants and raised by them as such from their infancy.”⁷⁷ Such language was typical; as the country became increasingly divided over the slavery question, Southerners became more adamant that theirs was a benevolent institution, consisting of mutual rights and obligations in which the master owed to the slave support and protection and the slave owed to the master obedience and fidelity.⁷⁸ Contrasted with the free labor system of the North, proslavery theorists argued, the patriarchal plantation of the South was the ideal social arrangement. “[T]he domestic Slavery of these States,” James Henry Hammond beamed, was “not only an inexorable necessity for the present, but a moral and humane institution, productive of the greatest political and social advantages.”⁷⁹ Hammond’s views were backed in Texas, where local leaders regularly reminded citizens that “the negro is indisputably adapted by nature, to the condition of servitude to the white man, yielding to him willing obedience and affection; enjoying a degree of health unequalled by any other servile

⁷⁶ See Transcript of Trial, *Clark v. Honey*, *supra* note 3, at 50 (testimony of Aunt Clarisa Bird (stating that she “was the first negro he ever owned”). It is difficult to pinpoint exactly when Clark purchased Clarisa, but she estimated that Clark bought her about four years before he bought Sobrina. *Id.* at 51. If Clark bought Sobrina in 1833 or 34, *see supra* note 27 (detailing evidence), then he purchased Clarisa around 1829 or 30. Regardless of the actual date, however, it is certain that he did not own her before 1826, because a census taken in that year indicates that 69 of the families in Austin’s colony owned slaves, and John Clark was not among them. See *Padron a la Colonia de Austin*, at 9-17 (1826) (collection of The Center for American History, University of Texas) [hereinafter 1826 CENSUS: Austin’s Colony].

⁷⁷ Petition Concerning Slavery, June 10, 1824, in II AUSTIN PAPERS, pt.1, *supra* note 40, at 827.

⁷⁸ See, e.g., HUGHES, *supra* note 18, at 242 (describing relationship between master and slave). Texans fully endorsed these views. See, e.g., *Boulware v. Hendricks*, 23 Tex. 667, 669 (1859) (“The relation of master and slave has its reciprocal duties and obligations.”).

⁷⁹ James Henry Hammond, *Letter to an English Abolitionist* (1845), reprinted in THE IDEOLOGY OF SLAVERY, *supra* note 18, at 170, 170; see also GEORGE FITZHUGH, SOUTHERN THOUGHT (1857), reprinted in THE IDEOLOGY OF SLAVERY, *supra* note 18, at 274, 276-77 (comparing Southern slavery to laboring poor and concluding that the South “is by far, very far, the most prosperous and happy country in the world”).

class in any portion of the world.”⁸⁰ “Take our slave population,” went a typical contribution to a local newspaper, “compare it with the free laborers at the North, and the most rigid investigation will only show so far as the ‘hog and hominy’ goes, and the ‘ease of mind and body,’ that the negro is best off. Work is his element, meat and bread and the banjo his happiness.”⁸¹ In fact, some even tied slavery to democracy, insisting that the latter could not exist without the former.⁸² To John Clark, then, a man who grew up around slavery and its incidents, owning slaves was something to be encouraged and celebrated, as a deserving reward and a telling sign of success.

From the start of Austin’s colony, slaves and slavery played a significant role. In fact, in his initial recruitment efforts, Austin promised settlers like William Kincheloe and the families that came with him eighty additional acres for every slave brought to the colony.⁸³ Others inquiring about land during these first years invariably mentioned that they owned slaves, no doubt as proof of prior successes and as a testament, in the upside down world of the slave South, to their strong moral character. James Muse, for example, thought himself a “choice settler;” among his attributes was a daughter beautiful enough to “make many a heart tremble,” a strong business acumen, and between ten and fifteen slaves.⁸⁴ Undoubtedly, Austin understood the importance of a slave labor force in a developing country. Notwithstanding the hard work and driving ambition of those who came, slaves provided the needed manpower to clear the fields and establish the colony.⁸⁵ Men like William Henderson evidently understood this as well; he closed out his letter of inquiry to Austin by noting that he and his

⁸⁰ A REPORT AND TREATISE ON SLAVERY AND THE SLAVERY AGITATION 4 (1857) [hereinafter SLAVERY AND THE SLAVERY AGITATION].

⁸¹ *Slave Labor*, TEXAS STATE GAZETTE, Feb. 23, 1856, at 3.

⁸² See *The Philosophy of Democracy*, TEXAS STATE GAZETTE, Nov. 13, 1858, at 2 (stating that white citizens “are entitled to equal civil and political rights, without regard to any difference of fortune or station,” and that “the progress of the tremendous northern movement against slavery must be arrested miraculously, as if by the hand of God, or it must subvert the constitution and the Union”); see also *Hon. T.J. Rusk on Slavery in the Territories*, TEXAS STATE GAZETTE, Feb. 28, 1857, at 3 (“You cry out for the freedom of the negro, and you abridge the freedom the white man.”); William H. Parsons, *Negro Slavery*, TEXAS STATE GAZETTE, Apr. 14, 1860, at 1 (“The very existence of slavery keeps alive in the breast of every white citizen a jealous passion for liberty.”).

⁸³ See Austin to William Kincheloe: Permit to Settle, Oct. 16, 1821, in II AUSTIN PAPERS, pt.1, *supra* note 40, at 421-22.

⁸⁴ James Fort Muse to William W. Little, Dec. 1, 1821, in II AUSTIN PAPERS, pt.1, *supra* note 40, at 439.

⁸⁵ See Petition Concerning Slavery, June 10, 1824, in II AUSTIN PAPERS, pt. 1, *supra* note 40, at 827 (recognizing that the colonists could not have cleared the land and established their farms without their slaves, as the land “is entirely uninhabited and great Labor [is] required in Opening farms”).

Louisianan friends had slaves, “who are good sawyers carpenters etc.”⁸⁶

Yet, notwithstanding the clear preferences of both Austin and the settlers, slavery in Texas was not without controversy. In fact, at the same time Austin was in Mexico City shoring up the terms of his grant, he was also fighting for the institution’s survival. Slavery had not been an issue when Austin’s father and the Spanish government agreed to terms, but, following Mexican independence, the institution immediately came under attack, with a number of Mexican officials voicing strong opposition to the practice and pointing out its inherent inconsistencies with their new-found freedom.⁸⁷ In Mexico, Austin did his best to negotiate a compromise, and the fact that slavery survived at all is a credit to his statesmanship. Indeed, considering the alternative, Austin considered it a success when he helped negotiate the passage of the Imperial Colonization Law of 1823, which prohibited the purchase and sale of slaves in the empire and mandated that all children born of slaves be free at age fourteen.⁸⁸ This law at least allowed the current slaveholders in his colony to keep the slaves they had, and allowed new emigrants to bring their slaves with them.

News of Austin’s success no doubt buoyed the hopes of the newly-arrived, as well as those who considering coming. Theirs was a dream of economic prosperity, and it was a dream dependent on slave labor. “We the Inhabitants of the lower part of the Brazos,” pronounced Josiah Bell and several others, “are unanously [sic] in favor of Slavery.”⁸⁹ Such strong support for the institution is hardly surprising. After all, while it is possible that a small number of settlers harbored some misgivings, most of Austin’s colonists were Southerners, and as such had come to see slavery as the best of all conditions.⁹⁰ It should therefore come as no surprise that further efforts by the Mexican government to limit the practice or abolish it altogether met stiff resistance from Austin and the colonists. “It is in my opinion a matter of the greatest importance,” Austin declared in 1825, soon after the Mexican legislature issued a decree prohibiting the slave trade, “to authorize the emigrants to bring in their Slaves and Servants; and that the right of property in these servants so introduced, as well as their

⁸⁶ William N. Henderson to Austin, Nov. 1, 1821, in II AUSTIN PAPERS, pt.1, *supra* note 40, at 424.

⁸⁷ See CAMPBELL, *supra* note 21, at 15-16 (noting some of the controversies over slavery).

⁸⁸ See LAWS, ORDERS AND CONTRACT ON COLONIZATION, 1821-1829, No. 5, art. 30 (1823), in I THE LAWS OF TEXAS, 1822-1897, 1, 30 (H.P.N. Gammel ed., 1898) [hereinafter THE LAWS OF TEXAS].

⁸⁹ Instructions to Deputy in State Congress, June 4, 1824, in II AUSTIN PAPERS, pt.1, *supra* note 40, at 809.

⁹⁰ See FEHRENBACH, *supra* note 35, at 142 (noting that most of the original colonists came from one of the Southern states).

descendants, be guaranteed to them by law.”⁹¹ Austin feared the worst. To restrict the rights of slaveholders meant that Texas would be populated by undesirables—“shepherds, or poor people”—rather than the wealthy planters he hoped to attract.⁹²

It is somewhat difficult, of course, to say how much this high-level wrangling over the institution affected everyday life along the banks of the Colorado and Brazos Rivers. But, judging by the evidence, it seems that Austin’s settlers carried on as they had always done, confident that things would work out in the end. As one early historian of Texas remarked, “Whatever puerilities may be found in the constitution, and in the laws enacted under it, the people of Texas were indifferent and heeded them not, so long as they were left to themselves, and did not feel the weight of strange systems and unmeaning ceremonies.”⁹³ Indeed, notwithstanding the increasing pressure from the Mexican government, Texans throughout this first decade bought, sold, and held slaves without interruption. When the census takers arrived in Austin’s colony in 1826, for example, they counted 443 slaves out of a total population of 1800, with sixty-nine of the families listing at least one slave as part of their household.⁹⁴ Mrs. Dilue Harris likewise remembered when her father helped the slave trader Ben Fort Smith when the latter came through in 1834, lost and nearly starved, with “a large gang of negroes.”⁹⁵ Austin himself regularly dealt in human chattel,⁹⁶ and in his will he left his “mulatto servant Simon” to his sister and a slave named Mary to an associate.⁹⁷ Even an 1827 constitutional provision prohibiting the further introduction of slaves into the country proved only a minor impediment, as slaveholders, with the blessing of the legislature, soon took to calling their slaves “indentured servants,” and then cleverly set

⁹¹ Austin to Governor Rafael Gonzales, Apr. 4, 1825, in II AUSTIN PAPERS, pt.2, *supra* note 40, at 1067. The decree prohibiting the slave trade, issued in July 1824, did not make clear whether it prohibited all importations of slaves, including by their owners, or just the importation of slaves for sale. *See generally* CAMPBELL, *supra* note 21, at 16-17 (discussing 1824 decree and its effect).

⁹² Austin to Governor Rafael Gonzales, Apr. 4, 1825, in II AUSTIN PAPERS, pt.2, *supra* note 40, at 1067.

⁹³ YOAKUM, *supra* note 35, at 254.

⁹⁴ 1826 CENSUS: Austin’s Colony, *supra* note 76, at 17.

⁹⁵ Mrs. Dilue Harris, *The Reminiscences of Mrs. Dilue Harris*, I, 4 Q. OF THE TEX. ST. HIST. ASSOC. 85, 97-99 (1900).

⁹⁶ *See, e.g.* Austin to Jared E. Groce, Oct. 19, 1823, in II AUSTIN PAPERS, pt.1, *supra* note 40, at 701 (setting forth agreement between Austin and Groce for hiring three blacks); Agreement for Hire of Slave, Apr. 12, 1824, in II AUSTIN PAPERS, pt. 1, *supra* note 40, at 763 (recording Sylvanus Castleman’s contract to hire “an African negro man named John” from Austin); Contract for Hire of Slaves, Aug. 1, 1824, in II AUSTIN PAPERS, pt. 1, *supra* note 40, at 869-70 (detailing terms of Austin’s contract to hire “four negroes”); James Gaines to Austin, Aug. 13, 1825, in AUSTIN PAPERS, pt.2, *supra* note 40, at 1165 (requesting Austin’s help in finding stolen slave).

⁹⁷ Will of Stephen F. Austin, Apr. 19, 1833 (Austin Papers) (collection of The Center for American History, University of Texas).

the terms of indenture so high that their “servants” in effect were bound for life.⁹⁸ The subterfuge, sufficient to satisfy the Mexican government several thousand miles away, fooled few others. “By the laws,” one traveler to the area observed in 1835, “slavery is not allowed in the province; but this law is evaded by binding the negroes by indenture for a term of years. You will, therefore, find negro servants, more or less all over the country.”⁹⁹ One of the witnesses in Clark’s suit testified to the same. “Slaves were held as slaves,” he said, even while under Mexican rule.¹⁰⁰

Still, the uncertain legal status of slavery gnawed at a growing number of settlers. Most simply could not fathom a system that deprived them of a form of property that was not just legal but strongly encouraged in every state in South, and the Mexican government’s antislavery stance—no matter how inconsistently pursued or enforced—pushed some to the edge. “*Texas must be a slave country,*” Austin resolved in the summer of 1835, after listening to his constituents.¹⁰¹ “*It is no longer a matter of doubt.*”¹⁰² The resulting conflict with the Mexican government was perhaps inevitable. Slavery was by no means the sole cause, but, combined with a growing list of grievances, it contributed to the general sense that Mexican rule had become intolerable.¹⁰³ The fighting started in 1835 and stretched into the first half of 1836, with John Clark playing a minor role. Following the defeat at the Alamo in March of 1836, settlers began fleeing parts of Texas west of the Colorado River, in what became known as the Runaway Scrape.¹⁰⁴ Evidently, a number of them gathered on or near a portion of Clark’s plantation before heading further east to the Trinity River.¹⁰⁵ John

⁹⁸ See CONST. OF THE STATE OF COAHUILA AND TEXAS of 1827, art. 13, in I THE LAWS OF TEXAS, *supra* note 88, at 423, 424. Ellis Bean, who proposed calling slaves “indentured servants” as early as 1826, described his plan this way: have the settlers “Gow in Presens of and Alcalde stating that this nigro cost you so much and when he Pays it by labor Don you have no charge against him he Discounts so much a month as any other hirid Persons a small sum so that he will be the same to you as Before.” Ellis H. Bean to Austin, July 5, 1826, in II AUSTIN PAPERS, pt.2, *supra* note 40, at 1369. Austin helped secure passage of this proposal in 1828. See generally CAMPBELL, *supra* note 21, at 21-23 (discussing the 1827 provision and the efforts to get around it).

⁹⁹ PARKER, *supra* note 73, at 162.

¹⁰⁰ Transcript of Trial, Clark v. Honey, *supra* note 3, at 77 (testimony of H.P. Cayce) (“Slaves were held as slaves before the runaway scrape.”)

¹⁰¹ Stephen F. Austin to Mrs. Mary Austin Holley, Aug. 21, 1835, in III AUSTIN PAPERS, *supra* note 40, at 101-02.

¹⁰² *Id.*

¹⁰³ For a discussion of the revolution of 1835-36 and the role slavery played in it, see CAMPBELL, *supra* note 21, at 35-49.

¹⁰⁴ For primary accounts of the Runaway Scrape, see DEWEES, *supra* note 34, at 203-06; Mrs. Dilue Harris, *The Reminiscences of Mrs. Dilue Harris, II*, 4 Q. OF THE TEX. ST. HIST. ASSOC. 155, 160-69 (1900). For secondary accounts, see CAMPBELL, *supra* note 21, at 42-43; FEHRENBACH, *supra* note 35, at 227-28.

¹⁰⁵ See 2 THE NEW HANDBOOK OF TEXAS, *supra* note 22, at 804 (Egypt, Texas) (stating that, “[d]uring the Runaway Scrape many of the people from west of the Colorado gathered in Egypt,”

Clark may even have joined a regiment of men fighting under the command of his neighbor, Captain William Heard, at the battle of San Jacinto.¹⁰⁶ If so, in addition to his renown as Indian fighter, he also may have aided in defeating General Santa Anna and the Mexican army in April of that year, securing once and for all the independence of Texas.¹⁰⁷

Thus, in light of the strong support for the system and the *de facto* status of people of color during the first decade of Austin's colony, it hardly seems surprising that John Clark, a man who undoubtedly looked upon slavery as just and right, chose to invest some of his early capital in slave property, even before the revolution. His first two purchases came right around the time he sold half of his land—some 2,222 acres—to William Heard, the same man who led the regiment of Texas volunteers, in 1830.¹⁰⁸ Whether he sold the land specifically to acquire the money to buy slaves is not known, but, at fifty cents an acre (or approximately \$1100), it seems likely that it played at least a role, as the average price for slaves around this time was about \$450.¹⁰⁹ The first person he bought was a woman named Clarisa, and either at the same time or soon after he purchased a young girl named Hannah.¹¹⁰ Little is known about Hannah—she disappears from the surviving records—but Clarisa remained Clark's property until his death, and she would become one of the star witnesses in the suit over his estate.¹¹¹

Clarisa's story seems typical of many of the slaves who were brought west by their masters in the endless pursuit of the American dream. She was born in South Carolina and spent some time in Alabama and the Red River region before coming to the Trinity River in Texas.¹¹² By that

which was where Clark's plantation was located); *see also* Transcript of Trial, Clark v. Honey, *supra* note 3, at 53 (testimony of Aunt Clarisa Bird) (noting that she fled with others to the Trinity River).

¹⁰⁶ *See* 3 THE NEW HANDBOOK OF TEXAS, *supra* note 22, at 534 (William Jones Elliott Heard) (describing Heard's military experience and his role at San Jacinto).

¹⁰⁷ *See generally* FEHRENBACH, *supra* note 35, at 219-33 (discussing battle of San Jacinto).

¹⁰⁸ *See* Transcript of Trial, Clark v. Honey, *supra* note 3, at 55 (testimony of Aunt Clarisa Bird) ("Capt. Herd bought his land from Master."); *see also* 2 THE NEW HANDBOOK OF TEXAS, *supra* note 22, at 135 (John C. Clark) (noting that Clark sold the west half of his league to Heard in 1830).

¹⁰⁹ *See* 2 THE NEW HANDBOOK OF TEXAS, *supra* note 22, at 135 (John C. Clark) (noting price per acre); *see also* CAMPBELL, *supra* note 21, at 69-70 (estimating value of Texas slaves between the mid-1820s and 1836 to be approximately \$450, regardless of sex, age, or condition).

¹¹⁰ Clarisa reported that she "was the first negro [Clark] ever owned," and that "he bought me first & little girl named Hannah." Transcript of Trial, Clark v. Honey, *supra* note 3, at 50, 55 (testimony of Aunt Clarisa Bird).

¹¹¹ Clarisa died between the time of the original suit, filed in March of 1871, and the retrial, held in December of 1871. *See supra* note 3 (detailing procedural history of case); *see also* Transcript of Trial, Clark v. Honey, *supra* note 3, at 50 (testimony of Pleasant Ballard) (confirming Clarisa's death since the last trial). Clarisa's testimony in the first suit was read into the record in the second. *See id.*

¹¹² *See* Transcript of Trial, Clark v. Honey, *supra* note 3, at 54-55 (testimony of Aunt Clarisa Bird) (detailing her history).

time, Clarisa had lived under at least two different owners, and was no doubt familiar with the pain and humiliation that comes from being uprooted from friends and family and placed on the auction block.¹¹³ As Sarah Ashley, one of the thousands of slaves brought to Texas in the ensuing decades, recounted: “Us family was sep’rated. My two sisters and my papa was sold to a man in Georgia. Den dey put me on a block and bid me off. Dat in New Orleans and I scairt and cry, but dey put me up dere anyway.”¹¹⁴ William Hamilton, who also was brought to Texas, offered an equally sobering account: “De only thing I ‘members ... am dere am lots of cryin’ when dey tooks me ‘way from my mammy. Dat something I never forgits.”¹¹⁵

Clarisa did not know how old she was when Clark bought her, other than to note that she had already started to turn gray.¹¹⁶ In 1861, however, she was listed in the probate records as being ninety years of age, which meant, working backwards, that she was probably in her fifties at the time of purchase.¹¹⁷ Her role was that of a house slave—which Clark presumably needed while he worked his land—and Hannah was probably there to help her.¹¹⁸ Of course, being in such close proximity to her owner was by no means an advantage. But Clarisa, like so many slaves similarly situated, evidently used her position to acquire an intimate knowledge of Clark and his goings-on. It was Clarisa who provided the court with many of the details about Clark’s relationships with his neighbors and his slaves, of who came to visit and how long they stayed, of the approximate dates of birth of Sobrina’s children, and of other aspects of Clark’s life and the life of some of his slaves. Indeed, even as Clark added dozens more to his growing stock of human chattel, “Aunt” Clarisa never seemed to lose her position in the house and the knowledge that came with it.¹¹⁹

¹¹³ See *id.* at 54-55 (testimony of Aunt Clarisa Bird) (noting that she belonged to Hans [?] Brimby when she was born, and that Clark bought her from Nicholas George).

¹¹⁴ Interview with Sarah Ashley, in 4 *THE AMERICAN SLAVE: A COMPOSITE AUTOBIOGRAPHY*, pt.1, at 34 (George P. Rawick ed. 1972) [hereinafter *THE AMERICAN SLAVE*].

¹¹⁵ Interview with William Hamilton, in 4 *THE AMERICAN SLAVE*, *supra* note 114, pt. 2, at 106.

¹¹⁶ Transcript of Trial, Clark v. Honey, *supra* note 3, at 55-56 (testimony of Aunt Clarisa Bird).

¹¹⁷ See Estate of Clark, *supra* note 1, Probate Minutes Book “B”, at 225 (Tex. Cty. Ct. Wharton Cty. Oct. 1861).

¹¹⁸ See Transcript of Trial, Clark v. Honey, *supra* note 3, at 51-52 (testimony of Aunt Clarisa Bird) (talking about waiting on Clark and bringing the lights); see also STAMPP, *supra* note 30, at 34-35 (noting that most small time slaveholders worked in the fields).

¹¹⁹ See Transcript of Trial, Clark v. Honey, *supra* note 3, at 50 (testimony of Aunt Clarisa Bird) (designating Clarisa as “Aunt”). For a discussion of slaveholders’ use of the moniker “uncle” and “aunt” and its implications for Southern thought, particularly the code of honor, see Gillmer, *supra* note 14, at 531-37; see also Eugene Genovese, “Our Family, White and Black”: Family and Household in the Southern Slaveholders’ World View, in *IN JOY AND IN SORROW: WOMEN, FAMILY, AND MARRIAGE IN THE VICTORIAN SOUTH* 72 (Carol Bleaser ed., 1991) (“For the slaveholders’ ‘family’ meant ‘household,’ and household implied slaves, or ‘servants,’ as they preferred to call them.”).

From Clarisa, and some of the other evidence, we learn that slavery in Texas was much like slavery in the rest of the South. It is true that Abraham Kincheloe, perhaps one of William Kincheloe's slaves and a neighbor to Clark, remembered a time before the revolution when people of color had more liberty than they later did.¹²⁰ But this undoubtedly was because the area was still sparsely settled, making the enforcement of rigid racial codes impractical rather than because of some wavering commitment to the institution.¹²¹ Indeed, there is no reason to take seriously the claims so often made by proponents of the region that slaveholders in Texas practiced a milder form of slavery than they did elsewhere.¹²² The testimony of former slaves is simply too overwhelming. "I can tell you the life of the average slave was not rosy," the Texas slave Martin Jackson recalled.¹²³ "They were dealt out plenty of cruel suffering."¹²⁴ William Moore added specifics to this assertion when he told his interviewer about how the marks from a handsaw were still on his mother's back when she died.¹²⁵ Moore's master evidently whipped the woman with the teeth of the saw because he did not like her cooking.¹²⁶ Other Texas slaves spoke of being tied to a post and whipped, of being branded, and of having salt rubbed into fresh wounds.¹²⁷ Still others remembered being chained by the neck and locked to trees, of being forced into unwanted marriages or sexual relations, and of being herded like cattle.¹²⁸ It may be true, as proslavery ideologues insisted, that not all masters engaged in such inhumane

¹²⁰ See Transcript of Trial, *Clark v. Honey*, *supra* note 3, at 73 (testimony of Abraham Kincheloe); see also Map of Wharton County, *supra* note 43 (showing Clark's land to be just north of William Kincheloe's league).

¹²¹ See Transcript of Trial, *Clark v. Honey*, *supra* note 3, at 73 (testimony of Abraham Kincheloe) (stating, at the same time he noted blacks had more "liberty then," that "there were few people in the country").

¹²² See, e.g. *Texas*, 10 DE BOW'S REVIEW 627, 637 (1851) ("There is a large black population in Texas, and though for ever the property of their masters, and under the restraints of the law, they are invested with more liberty, and are less liable to abuse, than the slaves of the southern states generally.").

¹²³ Interview with Martin Jackson, in 4 THE AMERICAN SLAVE, *supra* note 114, pt.2, 189.

¹²⁴ *Id.*

¹²⁵ Interview with William Moore, in 5 THE AMERICAN SLAVE, *supra* note 114, pt.3, at 134.

¹²⁶ *Id.*

¹²⁷ See, e.g., Interview with Monroe Brackins, in 4 THE AMERICAN SLAVE, *supra* note 114, pt.1, at 125 (whipped); Interview with Bill McRay, in 5 THE AMERICAN SLAVE, *supra* note 114, pt.3, at 38 (whipped); Interview with Ben Simpson, in 5 THE AMERICAN SLAVE, *supra* note 114, pt.4, at 28 (branded); Interview with William Moore, in 5 THE AMERICAN SLAVE, *supra* note 114, pt.3, at 133-34 (salt in wounds); Interview with Henry Lewis, in 5 THE AMERICAN SLAVE, *supra* note 114, pt.3, at 9 (salt in wounds);

¹²⁸ See, e.g., Interview with Ben Simpson, in 5 THE AMERICAN SLAVE, *supra* note 114, pt.4, at 28 (chained); Interview with Rose Williams, in 5 THE AMERICAN SLAVE, *supra* note 114, pt.4, at 176-78 (sexual relations); Interview with Ben Simpson, in 5 THE AMERICAN SLAVE, *supra* note 114, pt.4, at 28 (sexual relations); Interview with Henry Lewis, in 5 THE AMERICAN SLAVE, *supra* note 114, pt.3, at 11 (cattle).

treatment.¹²⁹ But the fact is that such atrocities happened, and they happened with enough frequency that life for most Texas slaves was barely tolerable. “Marse Tom been dead long time now,” William Moore reflected in his interview, offering a clear refutation to the institution’s defenders.¹³⁰ “I ‘lieve he’s in hell.”¹³¹

Importantly, the law in Texas, like elsewhere, supported and encouraged the master’s dominion and control over his slave property. Following the revolution, Texans were quick to solidify slavery’s future, declaring in their Constitution of 1836 that all persons of color who were previously held as slaves were now formally slaves for life, and that the legislature could not force any slaveholder to free his slaves nor pass any law prohibiting emigrants from bringing their slaves into the republic.¹³² Subsequent laws and court rulings built on these basic ideas, ensuring that blacks were deprived of their most basic rights.¹³³ The law permitted slaves to be bought and sold, devised by deed or will, and hired out on terms set by the owners.¹³⁴ The law also allowed masters, and by extension slave hirers, to use any form of punishment on their slaves, short of “maliciously” dismembering or depriving them of life.¹³⁵ Laws also forbade slaves from

¹²⁹ See, e.g. Hammond, *supra* note 79, at 188 (insisting that, of the alleged instances of barbarity, “many are false, all highly colored, some occurring half a century, most of them many years ago; and no doubt a large proportion of them perpetrated by foreigners”).

¹³⁰ Interview with William Moore, in 5 THE AMERICAN SLAVE, *supra* note 114, pt.3, at 133.

¹³¹ *Id.*

¹³² REPUB. OF TEX. CONST. of 1836, general provisions, § 9, in I THE LAWS OF TEXAS, *supra* note 88, at 1069, 1079.

¹³³ The Constitution of 1845, ratified when Texas became a state, retained critical portions of the Constitution of 1836, including the provisions prohibiting the legislature from forcing slaveholders to emancipate their slaves or from preventing emigrants from bringing their slaves with them. See TEX. CONST. of 1845, art. VIII, § 1, in II THE LAWS OF TEXAS, *supra* note 88, at 1275, 1296. In 1858, the Texas Supreme Court summed up the laws of slavery this way: “The master has an absolute property in the faculties and services of the slave. The intelligence and the strength of the slave belong to the master, and may be put by him to any use, not contrary to the law.” Callihan’s Ex’r v. Johnson, 22, Tex. 596, 601 (1858).

¹³⁴ Slaves’ role as property—in sales, in deeds, in wills, in hiring, etc.—gave rise to a number of cases. For breach of warranty cases, see, e.g., Doty v. Moore, 16 Tex. 591 (1856); Murphy’s Administrators v. Crain, 12 Tex. 297 (1854); McKinney v. Fort, 10 Tex. 220 (1853); Ables v. Donley, 8 Tex. 331 (1852). For disputes in deeds and wills, see, e.g., Hunt v. White, 24 Tex. 643 (1860); Hillard v. Fratz, 21 Tex. 192 (1858); Hagerty v. Harwell, 16 Tex. 663 (1856); Purvis v. Sherrod, Ex’r, 12 Tex. 140 (1854). For cases involving slave hirers, see, e.g., Callihan’s Ex’r v. Johnson, 22 Tex. 596 (1858); Echols, Adm’r, v. Dodd, 20 Tex. 190 (1857); Townsend v. Hill, 18 Tex. 422 (1857); Robinson v. Varnell, 16 Tex. 382 (1856); McGee v. Currie, 4 Tex. 217 (1849); Mims v. Mitchell, 1 Tex. 443 (1846).

¹³⁵ See TEX. CONST. of 1845, art. VIII, § 3, in II THE LAWS OF TEXAS, *supra* note 88, at 1275, 1296. An 1858 statute codified what was undoubtedly the rule in practice, that a master, except in extreme cases, had sole discretion to determine the type and extent of punishment. See Rules Applicable to Offences against the Person When Committed by Slaves or Free Persons of Color, GENERAL LAWS OF THE SEVENTH LEGISLATURE OF THE STATE OF TEXAS, Chap. 121, pt. 3, title 2, art. 802, § 9 (1858), in IV THE LAWS OF TEXAS, *supra* note 88, at 873, 1059 (“A master, in the exercise of

using “insulting or abusive language” to a white person, and mandated that they be executed for such crimes as insurrection, poisoning, rape or attempted rape of a white woman, assaulting a white person with intent to kill, arson, murder, and burglary.¹³⁶ Statutes also prohibited slaves from carrying guns or gathering suspiciously in groups of three or more, and they made it a crime to buy liquor or trade in any goods without written permission of their masters.¹³⁷ The legislature also set up rules and regulations for slave patrols, and gave to every white person the right to whip a slave found off the plantation or engaging in “turbulent conduct.”¹³⁸ The law, in short, left no room for doubt: “The right of the master to the obedience and submission of his slave, in all lawful things, is perfect.”¹³⁹

Hints from some of the witnesses in the case also indicate that there was nothing unusual about Clark as a master. Edward Collier, evidently a friend of Clark’s and a former slaveholder, considered Clark a “humane” man, but such endorsements are to be expected and hardly worth mentioning.¹⁴⁰ A more telling response comes from one of Clark’s own

his right to perfect obedience on the part of the slave, may correct in moderation, and is the exclusive judge of the necessity of such correction[.]”)

¹³⁶ See An Act to Provide for the Punishment of Crimes and Misdemeanors Committed by Slaves and Free Persons of Color, II LAWS OF THE REPUBLIC OF TEXAS, §§ 1, 6 (1837), in I THE LAWS OF TEXAS, *supra* note 88, at 1343, 1385-86. The list of capital offenses remained relatively unchanged throughout slavery. Cf. Of the Punishment of Slaves and Free Persons of Color, GENERAL LAWS OF THE SEVENTH LEGISLATURE OF THE STATE OF TEXAS, Chap. 121, pt. 3, title 3, chap. 1 (1858), in IV THE LAWS OF TEXAS, *supra* note 88, at 873, 1060 (listing murder, insurrection, arson, rape of a white woman, robbery or a white person, assault with intent to rape, rob, or kill a white person, attempted rape of a white woman, and assaulting a white person with a deadly weapon).

¹³⁷ On guns, see An Act to prevent slaves from carrying guns or other dangerous weapons, GENERAL LAWS OF THE SIXTH LEGISLATURE OF THE STATE OF TEXAS, Chap. CLII, §§ 1-2 (1856), in IV THE LAWS OF TEXAS, *supra* note 88, at 419, 499. On the number of slaves constituting an “insurrection,” see Exciting insurrection or insubordination, GENERAL LAWS OF THE SEVENTH LEGISLATURE OF THE STATE OF TEXAS, Chap. 121, pt. 1, title 19, chap. 1 (1858), in IV THE LAWS OF TEXAS, *supra* note 88, at 873, 1046. On trading with slaves, see An Act Concerning Slaves, LAWS OF THE REPUBLIC OF TEXAS (1840), in II THE LAWS OF TEXAS, *supra* note 88, at 175, 345; Trading with Slaves, GENERAL LAWS OF THE SEVENTH LEGISLATURE OF THE STATE OF TEXAS, Chap. 121, pt. 1, title 19, chap. 7 (1858), in IV THE LAWS OF TEXAS, *supra* note 88, at 873, 1048-49.

¹³⁸ On slave patrols, see An Act to provide for the appointment of Patrols and to prescribe their duties and powers, LAWS PASSED BY THE FIRST LEGISLATURE OF THE STATE OF TEXAS (1846), in II THE LAWS OF TEXAS, *supra* note 88, at 1307, 1497-1501. On offenses justifying chastisement, see Rules Applicable to Offences against the Person When Committed by Slaves or Free Persons of Color, GENERAL LAWS OF THE SEVENTH LEGISLATURE OF THE STATE OF TEXAS, Chap. 121, pt. 3, title 2, art. 802, § 9 (1858), in IV THE LAWS OF TEXAS, *supra* note 88, at 873, 1059.

¹³⁹ Rules Applicable to Offences against the Person When Committed by Slaves or Free Persons of Color, GENERAL LAWS OF THE SEVENTH LEGISLATURE OF THE STATE OF TEXAS, Title 2, § 1 (1858), in IV THE LAWS OF TEXAS, *supra* note 88, at 873, 1058.

¹⁴⁰ Transcript of Trial, *Clark v. Honey*, *supra* note 3, at 97 (testimony of Edward Collier). Collier was the attorney for the State and resided in Montgomery County, above Houston. In 1860, he owned six slaves. See Manuscript Census Returns, Schedule 1.—Slave Inhabitants, Montgomery County, Tex., in BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, POPULATION SCHEDULES OF THE EIGHTH CENSUS OF THE UNITED STATES (1860) [hereinafter 1860 CENSUS: Slave Inhabitants].

slaves, who simply said that Clark was “not a very indulgent master.”¹⁴¹ But even if Clark was neither excessively cruel nor unusually kind, it seems clear enough that Clark ran his plantation in a manner expected from a man of his standing: there are references to whippings, to sales, and to work, even if nothing remarkable stands out.¹⁴² But perhaps the best indicator of John Clark’s view towards people of color in general and the institution in particular was simply—and obviously—his decision to partake in the system.

It is not known how or where John Clark acquired most of his slaves. Some he probably purchased at one of the slave marts in New Orleans, Houston, or Galveston. Others he may have acquired at a sheriff’s sale in front of the Wharton County courthouse, perhaps after the owner failed to pay his taxes or died without surviving heirs. Still others he bought from neighbors who had more than they needed or could maintain, with human beings sold alongside farm animals and equipment, deftly described in terms of color and condition:

Know all men ... that we William Bonner and Elizabeth Bonner ... for and in consideration of the sum of Twelve Thousand five hundred dollars ... do bargain sell transfer and deliver unto J.C. Clark ... the following described negroes, slaves for life (to wit): Morris a black man aged about 27 years. Jim a black man aged 22 years. Joe a man of deep copper color aged about 22 years. Jerry a boy of deep copper or black aged 19 years. Wash a black boy aged 17 years. Lucinda a black woman aged about 18 years and a girl child of a same color aged 2 years. Susan a mulatto woman aged 21 years. Martha a black girl aged 13 years. Peter a black man aged 60 years. Eight mules and a wagon.¹⁴³

No matter how he acquired them, however, the records indicate that John Clark saw slaveholding as a means to achieve economic success, and that, with this in mind, he purchased slaves at an extraordinary rate. By 1850, in fact, about twenty years after he first bought Clarisa and Hannah, he counted thirty-six slaves as members of his household;¹⁴⁴ by 1860, he

¹⁴¹ Transcript of Trial, *Clark v. Honey*, *supra* note 3, at 76 (testimony of Pleasant Ballard).

¹⁴² On whippings, see, e.g., *id.* at 85 (testimony of Jos. Anderson) (describing incident in which witness was allowed to whip Clark’s slaves as punishment). On sales, see *id.* at 88 (testimony of Abraham Ross) (mentioning Clark’s effort to sell witness “a woman with scar on her face”). On work, see, e.g., *id.* at 92-93 (testimony of Geo. W. Hooken) (identifying himself as overseer and describing tasks performed by Sobrina and others).

¹⁴³ Bill of Sale from William Bonner & Wife to Jno. C. Clark, *in* Bill of Sales Power of Attorney Record Book “B”, at 61 (July 14, 1859) (collection of Wharton County Court Annex).

¹⁴⁴ Manuscript Census Returns, Schedule 1.—Slave Inhabitants, Wharton County, Tex., *in*

owned 116;¹⁴⁵ and by his death in 1861, he counted an astonishing 139 slaves.¹⁴⁶ With this many, Clark would have been among the true slaveholding elite. Indeed, here, it is worth remembering that slaveholders never constituted a majority in the South; in fact, in 1860, only about one of every four white families counted themselves as members of this privileged group.¹⁴⁷ The numbers were similar in Texas, where 28.5 percent of families in 1860 owned slaves.¹⁴⁸ Of this group, moreover, in both Texas and in the rest of the South, more than half were small scale, owning between one and four slaves.¹⁴⁹ Of those Texas slaveholders who owned more, roughly seventy-five percent owned less than ten and ninety percent owned less than twenty.¹⁵⁰ The number of slaveholders and the size of their holdings were higher in Wharton County, where the focus was on production agriculture rather than subsistence farming.¹⁵¹ But even here, where slaves outnumbered whites by more than four to one,¹⁵² a majority of the slaveholders owned fewer than twenty.¹⁵³ So, when the census taker arrived on John Clark's plantation in 1850 and counted thirty-six slaves, John Clark was already one of the wealthiest men in Texas. But by his death in 1861, after he had almost quadrupled that amount, to say that John Clark was well off is an understatement. With 139 slaves, he owned more human beings than 99.8 percent of all slaveholders in the State.¹⁵⁴

BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, POPULATION SCHEDULES OF THE SEVENTH CENSUS OF THE UNITED STATES (1850) [hereinafter 1850 CENSUS: Slave Inhabitants].

¹⁴⁵ 1860 CENSUS: Slave Inhabitants, Wharton County, *supra* note 140.

¹⁴⁶ Estate of Clark, *supra* note 1, Probate Minutes Book "B", at 257, 260 (Tex. Cty. Ct. Wharton Cty. Feb. 1863).

¹⁴⁷ See PETER J. PARISH, *SLAVERY: HISTORY AND HISTORIANS* 26 (1989).

¹⁴⁸ In 1860, there were 76,781 families in Texas. STATISTICS OF THE UNITED STATES (INCLUDING MORTALITY, PROPERTY, &C..) IN 1860; COMPILED FROM THE ORIGINAL RETURNS AND BEING THE FINAL EXHIBIT OF THE EIGHTH CENSUS 349 (1866) [hereinafter 1860 CENSUS: Statistics]. Of those, 21, 878 owned slaves, or 28.5%. 1860 CENSUS: Agriculture, *supra* note 54, at 242.

¹⁴⁹ In Texas, 11,342 of the 21,878 slaveholding families, or 51.8%, owned less than five slaves. 1860 CENSUS: Agriculture, *supra* note 54, at 242. For the South as a whole, see PARISH, *supra* note 147, at 27.

¹⁵⁰ Of the 21,878 slaveholding families in Texas, 16,292, or 74.4%, owned less than ten slaves, and 19,715, or 90.1%, owned less than twenty. 1860 CENSUS: Agriculture, *supra* note 54, at 242.

¹⁵¹ There were 159 families in Wharton County in 1860, and 128 of them, or 80%, owned slaves. 1860 CENSUS: Statistics, *supra* note 148, at 349; 1860 CENSUS: Agriculture, *supra* note 54, at 242. Of these, 20.3% owned less than five slaves, 42.2% owned less than ten, and 64.1% owned less than twenty. 1860 CENSUS: Agriculture, *supra* note 54, at 242.

¹⁵² The total white population in 1860 in Wharton County was 646; the total slave population was 2734. POPULATION OF THE UNITED STATES IN 1860; COMPILED FROM THE ORIGINAL RETURNS OF THE EIGHTH CENSUS 486 (1864) [hereinafter 1860 CENSUS: Population].

¹⁵³ Of the 128 slaveholders, 82 of them, or 64.1%, owned less than twenty slaves. 1860 CENSUS: Agriculture, *supra* note 54, at 242.

¹⁵⁴ Of the 21,878 slaveholding families in Texas, only 54, or 0.2%, owned 100 or more slaves. 1860 CENSUS: Agriculture, *supra* note 54, at 242. In Wharton County, in addition to John Clark, four others—A.C. Horton, R.D. Sorrel, M.G. Stith, and David G. Stevens—owned at least one hundred slaves. See 1860 CENSUS: Slave Inhabitants, Wharton County, *supra* note 140.

Of course, life for all of these slaves would have been difficult. Most would have spent their days in the fields, cultivating cotton and corn, though some of them would have had a special role, such as tending the livestock or driving the wagons. There also would have been a set of skilled slaves, including blacksmiths and artisans, while a few others may have assisted Clarisa with some of the household chores.¹⁵⁵ At the end of the day, each of the slaves would have retired to one of the twenty or so cabins that made up their quarters, probably just a short distance down the road from Clark's own cabin.¹⁵⁶ There, they would have cooked their meals and exchanged stories far from the listening ears of Clark or his overseers. Since the plantation was so large, it is safe to assume that a number of the slaves were married. In fact, there are a number of children in the slave schedules, which suggests that Clark understood the importance of a naturally reproducing labor force.¹⁵⁷ Of course, even the single ones would have shared in the sense of community that no doubt developed among Clark's slaves. On the banks of the Colorado, far from much else, the hundred or so slaves that made up Clark's estate would have found strength in friends and family—strength that would help them endure a life that gave them no rights which whites were bound to respect.

As for Clark, with as many slaves as he had, he would have spent most of his time attending to the details of running his plantation. Like others of his station, he had overseers to manage the day-to-day operations.¹⁵⁸ Still, Clark hardly fits the picture of the aristocratic planter that captures the popular imagination. Instead, from his rustic cabin to his unsocial temperament, he better represents one of the many upwardly mobile slaveholders James Oakes talks about, men who placed more emphasis on rugged individualism and equal opportunity than natural hierarchy and a stratified social order.¹⁵⁹ Frederick Olmsted encountered one such family in eastern Texas in his journey through the State. Talking

¹⁵⁵ See generally STAMPP, *supra* note 30, at 34-44 (discussing division of labor and types of work on different sized farms).

¹⁵⁶ The 1860 slave schedules indicate that John Clark had twenty slave cabins, which meant that each one housed roughly ten to twelve slaves, or perhaps two families. See 1860 CENSUS: Slave Inhabitants, Wharton County, *supra* note 140. This is more slaves per cabin than usual. See EUGENE D. GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* 524 (1972) (reporting that, by the 1850s, on average five or six slaves, or one family, occupied a cabin).

¹⁵⁷ See 1860 CENSUS: Slave Inhabitants, Wharton County, *supra* note 140 (listing 44 slaves 15 years of age or younger out of a total slave population of 116).

¹⁵⁸ See Transcript of Trial, *Clark v. Honey*, *supra* note 3, at 92 (testimony of Geo. W. Hooken) (stating that he was Clark's overseer); *id.* at 95 (testimony of J. T. Lawson) (same).

¹⁵⁹ See JAMES OAKES, *THE RULING RACE: A HISTORY OF AMERICAN SLAVEHOLDERS*, xvii-xix (Norton 1998) (1982) (outlining thesis about the role of capitalism and a free-market economy in shaping the slaveholder's worldview).

with one of their slaves, Olmsted determined that the family, living in a simple log cabin and subsisting on salt pork and stale corn-bread, cleared three thousand dollars in profits the year before.¹⁶⁰ “What do people do living in this style do with so much money,” Olmsted asked in summing up his visit, in words that could apply equally to John Clark.¹⁶¹ “They buy *more negroes* and enlarge their plantations.”¹⁶² Yet, if Clark looked upon the majority of his slaves as sound business investments, to be treated in such a way as to maximize profits, there appears to be at least one that he bought for other purposes. Her name was Sobrina.

III. THE INTIMATE LIFE OF MASTERS AND SLAVES

Clark purchased Sobrina a few years after he bought Clarisa and Hannah, sometime in the early 1830s.¹⁶³ She was his third slave, and, at the time of purchase, she belonged to a man named Gilbert.¹⁶⁴ How Clark came to know that Sobrina was for sale is not evident. Perhaps he heard about it through word of mouth, since Gilbert—probably Preston Gilbert, one of Austin’s Old Three Hundred—lived close enough that Clark would have considered him a neighbor.¹⁶⁵ Born around 1803, not much is known about Sobrina’s life before she came to Clark’s plantation.¹⁶⁶ Like Clarisa, though, it is safe to assume that Sobrina was one of the thousands of slaves brought to Texas from one of the older states in the Union. Perhaps she came walking behind her owner’s wagon, or perhaps she was part of a slave trader’s coffle, to be purchased by Gilbert or someone else upon her arrival in New Orleans. She already had four children at the time—Dan, Louis,

¹⁶⁰ See OLMSTED, *supra* note 67, at 46-51 (describing visit at home of planter)

¹⁶¹ *Id.* at 51.

¹⁶² *Id.*

¹⁶³ See Transcript of Trial, Clark v. Honey, *supra* note 3, at 81 (testimony of Stephen R. Herd) (stating that Clark bought Sobrina in 1833 or 1834).

¹⁶⁴ For testimony that Sobrina was Clark’s third slave, see *id.* at 58 (testimony of James Montgomery) (stating that Clark “had only two hands when he got Sobrina”); *id.* at 70 (testimony of David Prophet) (explaining that he knew Clark when he had only three slaves, and “Sobrina was one of them”); *id.* at 81 (testimony of Stephen R. Herd) (stating that “Clark had two negroes an old woman and a girl” when he bought Sobrina). For testimony that Clark bought Sobrina from a man named Gilbert, see *id.* at 60 (testimony of James Montgomery); *id.* at 81 (testimony of Stephen R. Herd).

¹⁶⁵ See *id.* at 81 (testimony of Stephen R. Herd) (stating that “Gilbert lived 6 or 8 miles from Clark’s”); see also Map of Wharton County, *supra* note 43 (showing Gilbert’s league north of Clark’s and on the west side of the Colorado). Preston Gilbert, along with his wife Sarah, is listed as one of Austin’s Old Three Hundred, each receiving one sitio of land in 1827. Bugbee, *supra* note 28, at 112; see also 3 THE NEW HANDBOOK OF TEXAS, *supra* note 22, at 158 (Preston Gilbert) (noting Preston was married to Sarah). Sarah’s land was south of Clark, and east of the Colorado. See Map of Wharton County, *supra* note 43.

¹⁶⁶ Sobrina is listed in the 1863 probate records as being 60 years old, meaning that she was born around 1803. See Estate of Clark, *supra* note 1, Probate Minutes Book “B”, at 257, 259 (Tex. Cty. Ct. Wharton Cty. Feb. 1863).

Sethe, and Jane—though the father’s name has long been lost in the records.¹⁶⁷ And while Clark evidently did not purchase any of the children at the time he bought Sobrina, at some point some or all came into his possession.¹⁶⁸ Three of them, moreover, were still living at the time of the dispute over Clark’s estate, and were eventually added as necessary parties to the suit.¹⁶⁹

Some of Clark’s neighbors may have been surprised with his decision to purchase Sobrina. From an economic standpoint it did not make much sense. He already owned two females to help with tasks around the home; the logical purchase, therefore, for a man hoping to make his plantation more profitable, would be a prime hand, a young male who could help Clark in the fields and with his stock. But Clark was not getting any younger—he was now in his thirties—and perhaps he sensed that his prospects for finding a white wife were diminishing. In fact, those living on the banks of the Colorado at this time remembered that the area was still sparsely settled, and Clarisa and another witness recalled that there were very few women nearby.¹⁷⁰ It is of course possible that he had other reasons for wanting her. He may have been intrigued by her reproductive capacity—her four children indicated that she was fertile and would likely produce more.¹⁷¹ Or he may have simply heard that she was a good cook, for that is what she would eventually do for him.¹⁷² But, even if these or other motives affected Clark’s decision, it seems clear enough that he purchased Sobrina at least in part for his own immediate sexual purposes. As Clarisa remembered it, as soon as Clark came home, “he put Sobrina in

¹⁶⁷ See Transcript of Trial, *Clark v. Honey*, *supra* note 3, at 56 (testimony of Albert Horton) (identifying Sobrina’s children before Clark). Albert Horton would eventually marry Sobrina’s daughter, Jane. *Id.*

¹⁶⁸ See Estate of Clark, *supra* note 1, Probate Minutes Book “B”, at 257, 258-60 (Tex. Cty. Ct. Wharton Cty. Feb. 1863) (listing Dan (40), Jane (26), and Lewis (30) as among Clark’s slaves at his death).

¹⁶⁹ See Transcript of Trial, *Clark v. Honey*, *supra* note 3, at 43-45 (petition of Dan and Louis Owens and Sethe Young). The petition also notes that Jane Horton, wife of Albert Horton, died in 1863. See *id.* at 44. Jane’s children, Melvina, Charles, Albert, and Dosh, were also added as necessary parties to the suit, claiming they were entitled to Jane’s share of the estate. *Id.* at 45-46 (petition of Melvina Young and Albert Horton).

¹⁷⁰ See *id.* at 52 (testimony of Aunt Clarisa Bird) (“At the time Clark bought Sobrina the country was sparsely settled.”); *id.* at 63-64 (testimony of Reason Byrne) (stating that, at the time in question, “Wharton County was very sparsely settled—women were very scarce”).

¹⁷¹ Southerners regularly discussed slaves’ capacity for bearing children, and good breeders commanded higher prices. See, e.g., FREDERICK LAW OLMSTED, A JOURNEY IN THE SEABOARD SLAVE STATES, WITH REMARKS ON THEIR ECONOMY 49-50 (1856) (recording conversation between two men considering price for “a woman thirty years old, with a young-one two years old”).

¹⁷² See, e.g., Transcript of Trial, *Clark v. Honey*, *supra* note 3, at 84 (testimony of H.P. Cayce) (stating that Sobrina was Clark’s “cook woman”); *id.* at 93 (testimony of Geo. W. Hooken) (“Sobrina was superintendent of milk and dairy and sometime cook”).

the house and stated he wanted her for his own woman.”¹⁷³

It is well known, of course, that white men from all over the South regularly turned to slave women to satisfy their sexual needs. How often this occurred is impossible to say. But enough white men found their way into the slave quarters that it is likely that most Southerners, white and black, were touched by it in one way or another. “Dey lots of places where de young massas has heirs by nigger gals,” the ex-slave Chris Franklin of Texas bluntly told his interviewer.¹⁷⁴ Elvira Boles, also of Texas, was one such person: “I’s e a child of the marster,” she said.¹⁷⁵ Men of respectable classes did what they could to dismiss or downplay the amount of sexual encounters between whites and blacks. The South Carolina grandee, James Henry Hammond, for example, maintained that the charges were “grossly and atrociously exaggerated,” laying blame on “natives of the North, or foreigners” for what little did occur.¹⁷⁶ But few then and none now give credit to these assertions. Harriet Martineau, in her travels through the region, was aghast at the “boundless licentiousness” of the South,¹⁷⁷ and one woman insisted that the practice “pervades the entire society,” reaching into “all ranks, occupations, and professions.”¹⁷⁸ In light of this, one large planter made the decision to send his boys to the North to be educated, confessing to Olmsted that “there was no possibility of their being brought up in decency at home.”¹⁷⁹ This is not to say that all men gave in to their passions and had sex with black women. But it seems clear enough that a good number explored the option. As one Texas slave remembered, “I can tell you that a white man laid a nigger gal whenever he wanted her.”¹⁸⁰

The havoc these sexual encounters had on black women and their families cannot be overstated. A number of former slaves, despite the reticence that they may have had in opening up on such a topic, nonetheless spoke in sobering tones of masters and others who forced themselves upon their victims. Harriet Jacobs has penned perhaps the most canonical of these accounts, but equally damning indictments come from ordinary women from across the South, including some from Texas. Betty Powers,

¹⁷³ *Id.* at 51 (testimony of Aunt Clarisa Bird); *see also id.* at 69 (testimony of Sharp Jackson) (stating that Clark told him “when he bought [Sobrina] he did so for his own use”).

¹⁷⁴ Interview with Chris Franklin, in 4 *THE AMERICAN SLAVE*, *supra* note 114, pt. 2, at 57.

¹⁷⁵ Interview with Elvira Boles, in 4 *THE AMERICAN SLAVE*, *supra* note 114, pt. 1, at 106.

¹⁷⁶ Hammond, *supra* note 79, at 182.

¹⁷⁷ HARRIET MARTINEAU, *SOCIETY IN AMERICA* 226 (Anchor Books 1962) (1837).

¹⁷⁸ FREDERICK LAW OL MSTED, *THE COTTON KINGDOM: A TRAVELLER’S OBSERVATIONS ON COTTON AND SLAVERY IN THE AMERICAN SLAVE STATES* 240 (1861).

¹⁷⁹ *Id.*

¹⁸⁰ Interview with Rosa and Jack Maddox, in 7 *THE AMERICAN SLAVE* (supp.), *supra* note 114, pt.6, at 2531.

for example, told her interviewer about how the “overseer and white mens took advantage of de women like dey wants to. De woman better not make no fuss ‘bout sich. If she do, it am de whippin’ for her.”¹⁸¹ Or, as Elvira Boles explained it, “Iffen dey had a pretty girl dey would take ‘em, and I’s e one of ‘em, and my oldest child, he boy by Boles, almost white.”¹⁸² Ben Simpson likewise described how his master was sadistically cruel to all of his slaves, but Ben noted that his sister, Emma, suffered a special type of degradation. “My sister, Emma, was the only woman he have till he marries... He sold her when she’s ‘bout fifteen, jus’ befo’ her baby was born. I never seen her since.”¹⁸³

Certainly, the law did little to discourage white men determined to have their way with black women. In virtually every state, including Texas, there were laws on the books prohibiting sex between the races, but these were rarely, if ever, enforced against white men.¹⁸⁴ It was also commonly understood then, as it is now, that white men were never prosecuted for raping black women.¹⁸⁵ Instead, the restraint, to the extent it existed, would have come about because of reasons outside of the law. Some men, for example, no doubt were stopped in their efforts by their own moral or religious code; others feared retribution at home.¹⁸⁶ But perhaps the most significant deterrent was simply community pressure, particularly if the

¹⁸¹ Interview with Betty Powers, in 5 THE AMERICAN SLAVE, *supra* note 114, pt.3, at 191-92.

¹⁸² Interview with Elvira Boles, in 4 THE AMERICAN SLAVE, *supra* note 114, pt. 1, at 107.

¹⁸³ Interview with Ben Simpson, in 5 THE AMERICAN SLAVE, *supra* note 114, pt.4, at 28.

¹⁸⁴ The Texas legislature banned interracial marriages in its first statutory code. See An Act to legalise certain Marriages; to provide for the celebration of Marriages and for other purposes, § 9, LAWS OF THE REPUBLIC OF TEXAS (1837), in I THE LAWS OF TEXAS, *supra* note 88, at 1087, 1294. Later codes similarly banned the practice. See Offences against Public Peace, LAWS OF THE FIFTH LEGISLATURE OF THE STATE OF TEXAS, Chap. XLIX, § 38 (1854), in III THE LAWS OF TEXAS, *supra* note 88, at 1445, 1510; Unlawful Marriage, GENERAL LAWS OF THE SEVENTH LEGISLATURE OF THE STATE OF TEXAS, Chap. 121, pt. 1, title 12, chap. 1 (1858), in IV THE LAWS OF TEXAS, *supra* note 88, at 873, 1036; Of Incest, Adultery and Fornication, *id.* at title 12, chap. 2, art. 392, in IV THE LAWS OF TEXAS, *supra* note 88, at 873, 1037. There are no appellate records from Texas involving a white man being prosecuted for cohabiting with a black woman during times of slavery. *But see* Smelser v. State, 31 Tex. 95, 96 (1868) (prosecuting man for living with his former slave *after* slavery).

¹⁸⁵ There is not a single published appellate decision in the South in the years before the Civil War involving a white man being prosecuted for raping a black woman. *But cf.* George v. State, 37 Miss. 316, 317 (1859) (discussing whether it was a crime for a black man to rape a black woman and holding that it was not).

¹⁸⁶ Though it was rare, white women occasionally tried to divorce their husbands for living with female slaves. See Cartwright v. Cartwright, 18 Tex. 626, 627 (1857) (filing for divorce after her husband “abandoned the bed and board of plaintiff, and lived in improper intimacy with the negress Jane”). With this in mind, the Texas Supreme Court refused to declare invalid one husband’s efforts to give a slave woman and the children he had with her to his sister after his wife filed for divorce. “It is natural,” said a sympathetic court, “that he should trust the mother and her children ... to the kindness of his own sister, rather than leave them to the injured and infuriated wife, who would possibly, yea probably, inflict severity, cruelty and hardship on them when the offender was beyond the reach of her angry passions.” Hagerty v. Harwell, 16 Tex. 663, 668 (1856).

man openly flaunted his mistress or the children he had by her. Witnesses in the suit over Clark's estate indicated as much. "It would not have done for any person to have introduced a black woman as his wife," reported I.M. Dennis.¹⁸⁷ "Public sentiment was against it."¹⁸⁸ Q.M. Heard agreed. "Men who kept black women were not held in high esteem."¹⁸⁹ In the end, though, with little to discourage it and enough to allow it, sex with black women was evidently an accepted part of Southern life. As one slave remembered in talking about her master, "Dr Kilpatrick took a black woman as quick as he did a white and he took any on his place he wanted and he took them often."¹⁹⁰

Thus, in light of the general practices of the South, it should come as no surprise that John Clark, a man rising in the ranks of the planter class with no wife and no family, decided to buy a woman to satisfy his sexual needs. Perhaps he searched out justifications for his conduct, telling himself that she was especially sensuous and wanted the attention—a "black wench" governed by her passions and sexual desires. Such views were common enough, as both white men and white women conveniently sought to blame her for the sexual contacts that regularly occurred.¹⁹¹ But, even if not, it seems certain that Clark's relationship with Sobrina started out as an abusive one. Soon after he returned home he evidently warned some of the neighboring slaves that Sobrina "was his wife—and we boys must keep out of the way."¹⁹² If Clark suffered from any pangs of guilt or any moral qualms about his decision, it is not disclosed in the record. More than likely, he considered his use of Sobrina for this or any other matter as nothing less than his right as a master and a man.

Sobrina, too, probably understood what was in store for her. She is described in the records as a "dark mulatto" and a "yellow" woman,

¹⁸⁷ Transcript of Trial, *Clark v. Honey*, *supra* note 3, at 91 (testimony of I.M. Dennis).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 83 (testimony of Q.M. Herd).

¹⁹⁰ Interview with Mary Reynolds, in 8 *THE AMERICAN SLAVE* (supp. series two), *supra* note 114, pt.7, at 3284, 3292.

¹⁹¹ See generally WINTHROP D. JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812*, 150-52 (1968) (discussing common assumptions about the sexuality of black women in the slave South); WHITE, *supra* note 8, at 29-46 (describing myth of the black jezebel and its influence on Southern society). It was this myth, in fact, that led prominent Southerners to deny that black women could even be raped. The crime "is almost unheard of," Thomas R.R. Cobb, the well known treatise writer on the laws of slavery, insisted, pointing to "the known lasciviousness of the negro" as the reason. THOMAS R.R. COBB, *AN INQUIRY INTO THE LAW OF NEGRO SLAVERY* § 107 (1858); see also William Harper, *Memoir on Slavery*, reprinted in *THE IDEOLOGY OF SLAVERY*, *supra* note 18, at 79, 104 (stating, in reference to the rape of slaves, that "there is little temptation to such violence, as there is so large a proportion of this class of females who set little value on chastity, and afford easy gratification to the hot passions of men").

¹⁹² Transcript of Trial, *Clark v. Honey*, *supra* note 3, at 70 (testimony of Sharp Jackson).

suggesting that perhaps her own mother was the victim of a slaveholder's abuse.¹⁹³ If so, Sobrina undoubtedly understood that resisting Clark's advances hardly would have been an option. Some spoke of it—John Finnely of Texas, for example, remembered when a slave woman named Clarinda went after her master with a hoe “‘cause he try to ‘fere with her and she try stop him”¹⁹⁴—but many more probably felt that it was better to give in than suffer even worse consequences. Indeed, Sobrina also had her children to worry about. If she ran or made too much trouble, she might never see any of them again. Further complicating matters, there is nothing to indicate that Sobrina had any knowledge of a safe haven—Mexico was about the only option, but, with several hundred miles between her and her freedom, it probably did not present a realistic possibility.¹⁹⁵ It is doubtful that even Clarisa could have helped. Despite the trust that likely came after being Clark's house servant for several years, there is nothing to indicate that she had any influence over Clark in such intimate affairs. In the end, though, whether Sobrina submitted without protest or whether she fought back, it is evident that Clark accomplished his purpose: within the first few months, Sobrina was pregnant with Lourinda, the first of her three children by Clark.¹⁹⁶

Still, if we are to believe Clarisa and the other ex-slaves who testified in the case, the relationship between Clark and Sobrina at some point developed into something more—when is impossible to say, but these witnesses were adamant that it did. A number of them spoke about how Clark and Sobrina lived together as husband and wife—some, like Albert Horton, whom Clark purchased in the late 1830s, insisting that this had been the case since as long as he could remember.¹⁹⁷ Others talked about

¹⁹³ See *id.* at 61 (testimony of Reason Byrne) (describing Sobrina as a “dark mulatto” woman); *id.* at 83 (testimony of H.P. Cayce) (stating that Sobrina was a “yellow” woman).

¹⁹⁴ Interview with John Finnely, in 4 *THE AMERICAN SLAVE*, *supra* note 114, pt.2, at 36-37.

¹⁹⁵ Slaves escaping to Mexico evidently posed enough of a problem that there were calls for legislative action. See *Fugitive Slaves*, *TEXAS STATE GAZETTE*, Dec. 12, 1857, at 2 (urging adoption “of a treaty with Mexico for the surrender of fugitive slaves”). Slaveholders advertising for runaways sometimes indicated that their slaves were heading towards Mexico. See, e.g., *Runaway Negroes*, *TEXAS STATE GAZETTE*, Jan. 8, 1859, at 3.

¹⁹⁶ See Transcript of Trial, *Clark v. Honey*, *supra* note 3, at 53 (testimony of Aunt Clarisa Bird) (stating that Lourinda “was born about one year after Clark and Sobrina lived together”).

¹⁹⁷ See *id.* at 56-57 (testimony of Albert Horton) (“J.C. Clark treated Sobrina as a wife and lived together as such all the time I knew them.”) Albert Horton testified that he was 40 years old when he was sold in 1863, meaning that he was born around 1823. See *id.* at 56. Albert also said he was about twelve years old when Clark bought him, meaning that he came into Clark's possession in 1835 or after. *Id.* at 56. For additional testimony about Clark and Sobrina living together as husband and wife, see *id.* at 52 (testimony of Aunt Clarisa Bird) (“Clark and Sobrina lived together as man and wife until their deaths.”); *id.* at 58 (testimony of James Montgomery) (stating that Clark treated Sobrina “exactly like a man does his wife”); *id.* at 71 (testimony of David Prophet) (testifying that Clark and Sobrina “continued to live together as husband and wife until Clark's death.”); *id.* at 72

how Sobrina grew to become “the mistress of the plantation,” and about how she “carried the keys and had management of everything.”¹⁹⁸ Still others remembered how Clark said he would “forsake all others for her,” and, in a telling sign of Sobrina’s position on the plantation, about how they had to wait on Sobrina “the same as if she was white.”¹⁹⁹ If to some this testimony sounds incredible, to Clarisa and the other slaves from the neighborhood, it was merely a reflection of what they saw everyday. Summing up the relationship, in words that resonate as strongly as any, Clark reportedly “cared for no other woman,” and she “no other man.”²⁰⁰

The story told by these witnesses, of course, adds a layer of complexity to the usual story of sex and race under slavery—the story of brutal exploitation so familiar to students of the subject. But it is a story worth telling, if only because it illustrates that things on the local level—in the vast spaces around the Colorado River, where a person’s closest white neighbor was several miles away and most of his daily contacts were with the folks who worked on his plantation—people did not always do what was expected of them. Perhaps it overstates the case to say it was love, but in this if not others it must have come close. Indeed, other cases from Texas indicate that relationships of the type between Clark and Sobrina defy simple descriptions, and illustrate that the slave South was never so black and white. In the city of Galveston, David Webster left a large estate, consisting of land and personal assets, to Betsy Webster, a woman of color and his slave, whom he also set free.²⁰¹ After David’s death, Betsy continued to reside in her “white cottage embowered amid flowers and orange trees...where she had lived with her former master, sustaining, perhaps, relations to him not sanctioned by law, but sanctified by all the sentiments of her nature.”²⁰² In Brazoria County, just south of Wharton,

(testimony of Abraham Kincheloe) (“Sobrina had no other husband and Clark no other wife.”); *id.* at 76 (testimony of Pleasant Ballard) (stating that Clark “regarded her as his wife and she was so considered”).

¹⁹⁸ *Id.* at 51 (testimony of Aunt Clarisa Bird); *see also id.* at 70 (testimony of David Prophet) (stating that Sobrina “carried the keys and attended to household affairs”); *id.* at 72 (testimony of Abraham Kincheloe) (“Sobrina had charge of his keys and money and everything pertaining to the place.”); *id.* at 75 (testimony of Pleasant Ballard) (stressing that Sobrina “took all charge of everything as far as I could see”).

¹⁹⁹ *Id.* at 51 (testimony of Aunt Clarisa Bird); *see also id.* at 59 (testimony of James Montgomery) (stating that Sobrina “always took authority just like a white woman”). Consistent with this testimony, several witnesses said that Sobrina had some of the slaves whipped. *See id.* at 54 (testimony of Aunt Clarisa Bird) (remarking how Sobrina used to say “what she was going to do with the hands if they did not do as she said”); *id.* at 57 (testimony of Albert Horton) (“Sobrina always had authority on the place and has had me whipped.”).

²⁰⁰ *Id.* at 52 (testimony of Aunt Clarisa Bird); *id.* at 60 (testimony of James Montgomery).

²⁰¹ *See Webster v. Heard*, 32 Tex. 685, 686 (1870) (setting forth will); *see also* at 702 (noting that there was “a large amount of property”).

²⁰² *Id.* at 707.

local authorities took action against John Smelser after they found out he was living with his former slave, a “nearly white” woman named Mary Ann Fraulis.²⁰³ The Texas Supreme Court waved the whole thing off—it dismissed the case on the specious ground that they “occupied different rooms”—but the fact that he was prosecuted at all suggests that there was something more to the relationship than the court let on.²⁰⁴ And in Kaufman County, Sally Catchings put a temporary stop to A.T. Wilson’s efforts to administer Augustus Catchings’ estate.²⁰⁵ Sally, a freed-woman and Augustus’ former slave, said “she was the lawful wife of the deceased,” and was entitled to the property.²⁰⁶ Notably, ex-slaves, whose testimony on the matter seems especially relevant, spoke of similar instances of strong ties between the races. Said one: “Why, there was one white man in Texas had a cullud woman ... [and] when old Mistress died he wouldn’t let this cullud woman leave, and he gave her a swell home right there on the place.”²⁰⁷

Undoubtedly, the shift in Clark’s relationship with Sobrina had at least something to do with the children that were born of the union. Sobrina’s second child by Clark was a girl named Nancy, born about a year after Lourinda, and her third was a boy named Bishop, born a few years later. Though none of the children’s exact birthdates are recorded, we know that both daughters were born before Texas declared independence from Mexico. As Clarisa and others remembered it, both were alive at the time of the Runaway Scrape—Nancy, the youngest, was “a suckling child, pretty large, running around a chair,” while Lourinda was about three feet high—and Bishop was born soon after.²⁰⁸ Later testimony indicates, moreover, that Clark always treated his children with the type of affection expected of a father. When the children were little, for example, Sharp Jackson said he used to see Clark “nursing and petting” them,²⁰⁹ and Albert Horton remembered that Clark often held Bishop in his lap.²¹⁰ Still others recalled that Bishop, Lourinda, and Nancy all called Clark “pappa,”²¹¹ and that he “fed them the same as any person does their children and treat[ed] them in

²⁰³ Smelser v. State, 31 Tex. 95, 96 (1868).

²⁰⁴ *Id.*

²⁰⁵ Wilson v. Catchings, 41 Tex. 587, 588-89 (1874).

²⁰⁶ *Id.* at 588.

²⁰⁷ Interview with Francis Bridges, in 7 THE AMERICAN SLAVE, *supra* note 114, at 20, 23.

²⁰⁸ Transcript of Trial, Clark v. Honey, *supra* note 3, at 60 (testimony of James Montgomery); *see also id.* at 51 (testimony of Aunt Clarisa Bird) (“Two girls were born before the runaway scrape, Nancy and Lourinda. Bishop was born afterwards.”).

²⁰⁹ *Id.* at 69 (testimony of Sharp Jackson).

²¹⁰ *Id.* at 57 (testimony of Albert Horton).

²¹¹ *Id.* at 57 (testimony of Albert Horton) (“pappa”); *id.* at 59 (testimony of James Montgomery) (“pappa”); *id.* at 71 (testimony of David Prophet) (“pappy”); *id.* at 74 (testimony of Pleasant Ballard) (“pappy”).

like manner.”²¹²

As they grew older, moreover, the children did not share the same fate as the other slaves. Bishop, for example, was never compelled to work; instead, he was generally left to his own devices, tending the stock when needed.²¹³ Others also recalled how Clark talked about leaving all of his property to his children, and, though a will was never found, Albert Horton heard that one had been made.²¹⁴ Bishop himself confirmed some of these facts. He testified that he and his sisters often ate with Clark and called him “father.”²¹⁵ He also said that he was not under the control of overseers, and that Clark “always told me I was working for myself.”²¹⁶ With this in mind, Dan Owens, one of Sobrina’s children before she came to Clark’s, remembered how Clark became infuriated when someone—who it is not known—struck Bishop. “He said G—d damn the man or boy that struck Bishop. When they strike him they strike my blood and if they set foot on my place I will blow a light hole through him.”²¹⁷

This testimony, on its own, says something remarkable both about Clark and about life on the banks of the Colorado, for most mixed-race children born to slave mothers, it must be remembered, received no special attention or considerations from their fathers. Most, according to Harriet Jacobs, were simply another entry on the ledger book, to be worked or sold as the master saw fit.²¹⁸ Auntie Thomas Johns of Texas confirmed this when she said that her master, who had several children with a slave, “treated their children jus’ like he treated the other niggers.”²¹⁹ Another said: “My mama had two white chillen by marster and they were sold as slaves.”²²⁰ In light of such testaments, the fact that Clark even recognized his children, let alone “made as much of them as if they had been from a

²¹² *Id.* at 52 (testimony of Aunt Clarisa Bird); *see also id.* at 59 (testimony of James Montgomery) (stating that Clark treated Bishop “just like a child”).

²¹³ *Id.* at 71-72 (testimony of David Prophet). Prophet was Clark’s foreman, and therefore would know Bishop’s status regarding work. *Id.* at 71. Pleasant Ballard also stated that Bishop “worked when he pleased and [was] let alone when he chose.” *Id.* at 76 (testimony of Pleasant Ballard).

²¹⁴ *See id.* at 57 (testimony of Albert Horton) (testifying that he “heard Mr. Clark tell Virgil Stewart that he had made his will and wanted his children to have their freedom and his property”); *see also id.* at 65 (testimony of Reason Byrne) (explaining that Clark told him that he wanted his children to “have all or a greater portion of his property”); *id.* at 69 (testimony of Sharp Jackson) (stating that he heard Clark “say that he was making property for his children”).

²¹⁵ *Id.* at 78 (testimony of Bishop Clark).

²¹⁶ *Id.*

²¹⁷ *Id.* at 78 (testimony of Dan Owens).

²¹⁸ *See JACOBS, supra* note 9, at 52 (remarking how the master’s children “are unblushingly reared for the market”).

²¹⁹ Interview with Auntie Thomas Johns, 4 *THE AMERICAN SLAVE, supra* note 114, pt.2, at 205.

²²⁰ Interview with Mother Ann Clark, 4 *THE AMERICAN SLAVE, supra* note 114, p.1, at 224.

white woman,”²²¹ suggests John Clark was not typical, and that he cared more for those close to him than about any unwritten rules regulating the practice.

Indeed, some light on the tortured circumstances in which they lived comes from Clark’s relationship with his eldest daughter, Lourinda. Like many fathers of the time, Clark evidently wanted what was best for his daughters, and hoped that they would marry well. For this reason, Clark became upset when Pleasant Ballard, one of the slaves on his plantation, started courting Lourinda.²²² This was not what he planned; he wanted Lourinda, his light-skinned daughter, to marry a “gentleman,” not a “negro.”²²³ After his verbal admonishments failed to end the relationship (at one point he evidently threatened to kill Pleasant), therefore, he took matters into his own hands and had Pleasant transferred to his lower plantation, several miles from the upper plantation where Clark and his family lived.²²⁴ Pleasant protested; he insisted that he was “as good as Lourinda was.”²²⁵ But Clark did not relent, at the same time or soon after instituting a general rule that no hands could visit Lourinda or Nancy.²²⁶ While the stern father’s rules were evidently followed—some said the girls “fared just like white girls”²²⁷—after he died, Lourinda and Pleasant were finally united, marrying sometime in the mid-1860s.²²⁸

But, undoubtedly, the most convincing evidence of the nature of Clark’s relationship with Sobrina came in the simple descriptions of the life they shared together—a life that was spent in the humid air of south Texas, battling mosquitoes, worrying about cotton prices, and growing old together. The old house servant Clarisa, for example, talked about how Clark and Sobrina ate together and drank together, and about how they slept together in the same bed.²²⁹ Clarisa insisted that she should know—she “carried the water and lights in to them and waited on him and Sobrina all the time.”²³⁰ David Prophet, who was in charge of making the early

²²¹ Transcript of Trial, Clark v. Honey, *supra* note 3, at 71 (testimony of David Prophet).

²²² See *id.* at 58 (testimony of Albert Horton) (talking about how Clark did not want Lourinda to marry Pleasant); *id.* at 71 (testimony of David Prophet) (same).

²²³ *Id.* at 58 (testimony of Albert Horton) (“Mr. Clark objected because [Pleasant] was a negro & he wanted her to marry a gentleman.”); *id.* at 71 (testimony of David Prophet) (“[Clark] objected to Lourinda marrying a negro man. He said he wanted to take her off and let her marry a gentleman.”).

²²⁴ *Id.* at 74, 75 (testimony of Pleasant Ballard).

²²⁵ *Id.* at 74.

²²⁶ See *id.* at 75.

²²⁷ *Id.* at 60 (testimony of James Montgomery).

²²⁸ *Id.* at 74 (testimony of Pleasant Ballard).

²²⁹ See *id.* at 51 (testimony of Aunt Clarisa Bird) (“Mr. Clark eat with her slept with her and drank with her.”).

²³⁰ *Id.* at 51-52.

morning fire, testified to the same.²³¹ He said that there was only one bed in the room and that Clark and Sobrina slept in it.²³² Others spoke about how Clark took his meals with Sobrina and slept with her,²³³ and about how he called her “dear” and his “old woman” and she called him her “old man.”²³⁴ Another remarked that Clark always treated her kindly,²³⁵ and it was said that he “dressed her better than he did himself.”²³⁶ At some point, too, he took Sobrina and the children to the town of Washington, a town of some political and commercial importance.²³⁷ Evidently, they went in part because Clark wanted to get Sobrina out of the oppressive air of the river bottoms, and Washington’s location on the bluffs above the Brazos River made it a desirable location.²³⁸ While there, he also enrolled his children in school.²³⁹ They stayed about a year, leaving after one of the girls “took sick.”²⁴⁰

Still, it would be a mistake to oversimplify this relationship, as one in which race and slavery somehow did not matter. In a world that subjected people of color to the most inhuman treatment, and looked upon them as “distinctively inferior intellectual being[s], incapable of self-elevation or moral improvement,”²⁴¹ it would be difficult, if not impossible, for either a white man or a black woman to love someone of a different race

²³¹ See *id.* at 70 (testimony of David Prophet) (“I was the fire maker and had frequent occasions to see how they lived.”).

²³² See *id.*

²³³ *Id.* at 57 (testimony of Albert Horton) (stating that he saw “Clark take his meals with Sobrina and the children many times”); *id.* at 59 (testimony of James Montgomery) (stating that Clark ate “at table with Sobrina and children”); *id.* at 72 (testimony of Abraham Kincheloe) (“There was only one bed in the room and they slept in it.”).

²³⁴ See *id.* at 57 (testimony of Albert Horton) (“dear”); *id.* at 59 (testimony of James Montgomery) (“my old man”); *id.* at 73 (testimony of Pleasant Ballard) (“his old woman” and “her old man”).

²³⁵ *Id.* at 72 (testimony of Abraham Kincheloe).

²³⁶ *Id.* at 52 (testimony of Aunt Clarisa Bird).

²³⁷ See *id.* at 70-71 (testimony of David Prophet) (describing trip to Washington); see also 6 THE NEW HANDBOOK OF TEXAS, *supra* note 22, at 832 (Washington-on-the-Brazos, Texas) (noting that Washington “was a major political and commercial center in early Texas”).

²³⁸ See Transcript of Trial, *Clark v. Honey*, *supra* note 3, at 71 (testimony of David Prophet) (explaining that Clark took “Sobrina for her health”); see also 6 THE NEW HANDBOOK OF TEXAS, *supra* note 22, at 833 (Washington-on-the-Brazos, Texas) (noting Washington’s desirable location on the bluffs above the river).

²³⁹ See Transcript of Trial, *Clark v. Honey*, *supra* note 3, at 71 (testimony of David Prophet) (noting that Clark brought the children so they could go to school); see also *id.* at 54 (testimony of Aunt Clarisa Bird) (stating that the “children, i.e., the girls went off to Washington to school”). There were no schools in Wharton in 1850. See Table 1 Population by Counties—Classifications of Ages and Color—Aggregates, in THE SEVENTH CENSUS OF THE UNITED STATES: EMBRACING A STATISTICAL VIEW OF EACH OF THE STATES AND TERRITORIES, at 508-11 (1850).

²⁴⁰ See Transcript of Trial, *Clark v. Honey*, *supra* note 3, at 71 (testimony of David Prophet) (“They stayed about a year.”); *id.* at 54 (testimony of Aunt Clarisa Bird) (stating that someone “took sick” while in Washington, and they returned).

²⁴¹ SLAVERY AND THE SLAVERY AGITATION, *supra* note 80, at 3.

without some confusion.²⁴² Some of this is reflected in Clark's reluctance to openly embrace Sobrina and the children in the presence of other whites. Said one white witness, whom we have no reason to doubt: "[I] don't remember that [I] ever saw them socially together."²⁴³ In fact, as far as this witness knew, Clark and Sobrina "were regarded in the community as master and slave."²⁴⁴ H.P. Cayce also failed to see any difference in Clark's treatment of Sobrina and the rest of his hands.²⁴⁵ He remembered seeing Sobrina when he stayed over for dinner and found nothing remarkable about her: "Clark seemed to recognize her as his cook woman."²⁴⁶ Bishop also testified that his father treated him differently when white people were around. According to Bishop, Clark "said that people would talk about him if we called or treated him as a father in their presence."²⁴⁷ Whether this was in Bishop's best interest or not, it illustrates quite plainly a man conflicted by the racist ideology of the South and the sentiments he had for those close to him.

Sobrina no doubt too suffered from the type of hurt and anger we would expect of a woman who was initially forced into sexual submission. The violation that occurred during those first weeks and months, and the corresponding damage to her psyche, must have been overwhelming. If, over the years, some of those scars healed, Sobrina probably continued to look upon her oppressor with at least some contempt. But there also seems no reason to doubt Clarisa, who said that Sobrina "did all that could be done for him with the affection of a wife."²⁴⁸ Indeed, Clarisa and others uniformly spoke about how Sobrina was "always with him," and a number of them mentioned how it was Sobrina who took care of Clark when he became ill.²⁴⁹ Notably, none of Clark's former slaves pretended that the relationship was idyllic—in fact, Clarisa admitted that Sobrina and Clark

²⁴² *Accord* GENOVESE, *supra* note 156, at 418-19 (arguing that, as a general matter, "blacks and whites were not free to love each other without considerable emotional confusion, marked in part by a self-contempt projected onto the other").

²⁴³ Transcript of Trial, Clark v. Honey, *supra* note 3, at 80 (testimony of Stephen R. Herd).

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 84 (testimony of H.P. Cayce). H.P. Cayce was probably Henry Petty Cayce, who came to Texas in December of 1829 and settled on the Colorado near the present Wharton-Matagorda county line. See 1 THE NEW HANDBOOK OF TEXAS, *supra* note 22, at 1050 (Henry Petty Cayce); see also Transcript of Trial, Clark v. Honey, *supra* note 3, at 76 (testimony of H.P. Cayce) (stating that he came to Texas in 1830).

²⁴⁶ Transcript of Trial, Clark v. Honey, *supra* note 3, at 84 (testimony of H.P. Cayce).

²⁴⁷ *Id.* at 78 (testimony of Bishop Clark).

²⁴⁸ *Id.* at 52 (testimony of Aunt Clarisa Bird).

²⁴⁹ See *id.* at 52 ("Sobrina took care of him until his death and did all that could be done for him with the affection of a wife."); *id.* at 71 (testimony of David Prophet) ("Sobrina and one of the children attended him when sick."); *id.* at 75 (testimony of Pleasant Ballard) ("Sobrina took care of Clark with Lourinda when he was sick.").

“fell out a little like all people.”²⁵⁰ But she also insisted that, over the thirty years they were together, Clark “always made much of her,” and that she had seen them “as loving as any other people together.”²⁵¹ Indeed, reflecting back on how things were, Clarisa thought that “Clark could have gotten any person he wanted as a wife,” but, in words that speak volumes, he “preferred Sobrina.”²⁵²

IV. THE POLITICS OF RACE AND LOVE

By the time John Clark died in 1861, Texas lawmakers and others of importance had been trying for years to limit or deny altogether the racial mixing that took place in the various nooks and crannies of everyday life. Entangled in the logic of slavery was the notion that blacks were innately inferior and “incapable of self-elevation or moral improvement;”²⁵³ that white skin invested persons who had it with certain inalienable rights and privileges;²⁵⁴ and that the “amalgamation of the white with the black race, inevitably leads to disease, decline and death.”²⁵⁵ Yet, everyday on the back roads and country farms those notions were being undermined and called into question. It was not necessary to be personally involved with the practice to know about it. The sheer number of mulatto slaves in Texas sent a glaring message that Southerners’ vitriolic rhetoric against interracial sex never matched their actual practices.²⁵⁶ Judicial records left behind also reveal that the drinking and gallivanting that inevitably takes place among those in close quarters happened among blacks and whites just as it did among members of the same race—perhaps not as often, but it did nonetheless. Just ask Leroy Waller of Smith County. He was dismissed from his job overseeing Hunley Fowler’s plantation in part because of an “unsuitable familiarity towards the negroes under his charge.”²⁵⁷ Or consider Lititia Stewart of Jefferson County, a “spinstress” of little means

²⁵⁰ *Id.* at 55 (testimony of Aunt Clarisa Bird).

²⁵¹ *Id.* at 51, 55.

²⁵² *Id.* at 52.

²⁵³ SLAVERY AND THE SLAVERY AGITATION, *supra* note 80, at 3 (1857).

²⁵⁴ See Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1713-14 (1993) (sketching relationship between concepts of race and property).

²⁵⁵ SLAVERY AND THE SLAVERY AGITATION, *supra* note 80, at 5.

²⁵⁶ In 1860, the census takers reported 24,987 mulatto slaves out of a total slave population of 182,566, which means that roughly 13.8% of the slave population was considered mulatto. 1860 CENSUS: Population, *supra* note 152, at 486. This is slightly above the average percentage for the slaveholding states as a whole, which stood at 12.3%. See BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, NEGRO POPULATION IN THE UNITED STATES 1790-1915, at 220 (1918) (breaking down populations for slave states). The percentage of mixed-race slaves was probably much higher, as the census takers categorized people based solely on appearance. See STAMPP, *supra* note 30, at 351 (discussing results of census).

²⁵⁷ *Fowler v. Waller*, 25 Tex. 695, 695 (1860).

who evidently found something in common with Henderson Ashworth, a free man of color, and tried to marry him.²⁵⁸

But Texans, or at least those concerned about the overall direction of their society, never were comfortable with the ambiguities of a social order in which the lines of race and slavery blurred into one another. They passed laws attempting to control the places where blacks and whites met and socialized—areas like gambling, card playing, trading, and making love.²⁵⁹ Free blacks also posed an especially unsettling problem. In a world that tied blackness to slavery and whiteness to freedom there was no room for people who fell in the middle. The solution, therefore, from the beginning was to ban them from the country, first in the constitution of 1836 and later in the constitution of 1845, when Texas became a state.²⁶⁰ Texas jurists, moreover, interpreted this ban to mean that owners were unable to emancipate their slaves in the State, and must instead send them to Ohio or Liberia or some other faraway place to effectuate their freedom.²⁶¹ A few free remained, by special permission of the legislature, but the numbers prove that like-minded Texans were remarkably successful in their efforts: in 1860, Texas had 355 free blacks out of a total population 604,215.²⁶² Wharton County had none.²⁶³

The rhetoric of race and slavery, moreover, only grew stronger as

²⁵⁸ See *Ashworth v. State*, 9 Tex. 490, 490 (1853) (noting, in prosecution for violating antimiscegenation law, that evidence was offered to prove that Ashworth and Stewart were married). Lilitia and Henderson appear together in the 1850 census, with no real estate to their name. See 1850 CENSUS: Free Inhabitants, Jefferson County, *supra* note 22.

²⁵⁹ On gambling and card playing, see *Of the crime against nature*, GENERAL LAWS OF THE EIGHTH LEGISLATURE OF THE STATE OF TEXAS, chap. 74, title 12, chap. 6, art. 409a (1860), in IV LAWS OF TEXAS, *supra* note 88, at 1363, 1459. On trading without the consent of the master, see *supra* note 137. On bans against interracial sex and marriage, see *supra* note 184.

²⁶⁰ See REPUB. OF TEX. CONST. of 1836, general provisions, § 9, in I THE LAWS OF TEXAS, *supra* note 88, at 1069, 1079. In its first statutory code of 1837, the legislature exempted free blacks already living in the republic from the general prohibition, allowing them to stay “as long as they choose.” Joint Resolution For the relief of Free Persons of Color, LAWS OF THE REPUBLIC OF TEXAS (1837), in I THE LAWS OF TEXAS, *supra* note 88, at 1087, 1292. In 1840, however, the legislature ordered all free persons of color, including presumably those exempted by the 1837 law, out of the republic. See *An Act Concerning Free Persons of Color*, LAWS OF THE REPUBLIC OF TEXAS PASSED AT THE SESSION OF THE FOURTH CONGRESS, § 1 (1840), in II THE LAWS OF TEXAS, *supra* note 88, at 175, 325. After this statute, free blacks were allowed to remain in Texas only with permission of the legislature. See, e.g. *An Act Concerning certain Free Persons of Color*, LAWS OF REPUBLIC OF TEXAS PASSED AT THE SESSION OF THE FIFTH CONGRESS (1840), in II THE LAWS OF TEXAS, *supra* note 88, at 465, 468. The constitution of 1845 maintained the general ban on free people of color. See TEX. CONST. of 1845, art. VIII, § 1, in II THE LAWS OF TEXAS, *supra* note 88, at 1275, 1296.

²⁶¹ See *Purvis v. Sherrod*, 12 Tex. 140, 167 (1854) (“[T]he prohibition of emancipation, unless the emancipated slaves shall be removed from the State, is implied, as their residence in the State is not permitted.”).

²⁶² 1860 CENSUS: Population, *supra* note 152, at 486.

²⁶³ *Id.*

the country approached the Civil War. Southerners, stung by the abolitionists' charges that they were immoral and unchristian, responded with increasingly refined arguments that slavery was the ideal social arrangement.²⁶⁴ Proslavery theorists adopted a paternalistic high ground, maintaining that blacks were better off in slavery—that they enjoyed “a degree of health unequalled by any other servile class in any portion of the world.”²⁶⁵ “Our negro is a stock, fatsided fellow,” ran an editorial in the *Texas Gazette*.²⁶⁶ “He loves to eat and to laugh, and give him his belly full, and he is as happy as a prince.”²⁶⁷ Texans were insistent that “slavery is the normal condition of the negro,” and any suggestion to the contrary was met with ridicule and disdain.²⁶⁸ “Hah! You might as well talk about building a railroad to the moon,” a confident contributor to the local paper maintained, “as the making of a free State out of any portion of Texas territory.”²⁶⁹ Indeed, the height of this twisted logic manifested itself in the so-called self-enslavement laws of the late 1850s, when states, including Texas, offered free blacks the opportunity to choose a master and enslave themselves for life.²⁷⁰

In this manner, Texas lawmakers and judges tried to shore up the boundaries of race and slavery. Through various provisions and court decisions, they made clear that people occupying that narrow space between slave and free were not wanted, and that, in the market and in the home, from selling goods to playing cards to making love, the races were to remain separate. It therefore should come as no surprise that the white witnesses who testified against Bishop and his sisters were adamant that no line had been crossed. They spoke with a uniform voice: Clark may have “kept” (their word) a black woman, but under no circumstances was she a wife. “It has been generally understood in the neighborhood since 1834 that Clark was cohabitating with Sobrina,” said Stephen Heard, a relative of William Heard, the man who bought half of Clark’s property in 1830.²⁷¹ But, as to the thirty-year relationship: “it was not understood that Sobrina was Clark’s wife.”²⁷² For his brother, Q.M. Heard, it was a series of

²⁶⁴ For a general discussion of proslavery thought, and its emergence along with the abolitionists' movement, see GEORGE M. FREDRICKSON, *THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY, 1817-1914*, 43-70 (1971).

²⁶⁵ *SLAVERY AND THE SLAVERY AGITATION*, *supra* note 80, at 4.

²⁶⁶ *Slave Labor*, *TEXAS STATE GAZETTE*, Feb. 23, 1856, at 3.

²⁶⁷ *Id.*

²⁶⁸ *A 'Slave Code' for the Territories*, *TEXAS STATE GAZETTE*, Jan. 8, 1859, at 1.

²⁶⁹ *A Free State out of Texas*, *TEXAS STATE GAZETTE*, Nov. 14, 1857, at 3.

²⁷⁰ *See An Act to permit Free persons of African descent, to select their own Master and become Slaves*, *GENERAL LAWS OF THE SEVENTH LEGISLATURE OF THE STATE OF TEXAS*, chap. 63, §§ 1-5 (1858), *in IV THE LAWS OF TEXAS*, *supra* note 88, at 873, 947-48.

²⁷¹ Transcript of Trial, *Clark v. Honey*, *supra* note 3, at 82 (testimony of Stephen R. Herd).

²⁷² *Id.*

negations: “Never heard of a marriage between Sobrina and John C. Clark. Never heard that he recognized them as his children.”²⁷³ But this same witness, like Stephen, never doubted “that Clark kept Sobrina and had children by her.”²⁷⁴ H.P. Cayce dismissed the whole idea as a palpable absurdity. He knew “that Clark had a woman that he kept.”²⁷⁵ But he was equally certain that he did not treat her as a wife, as the long-time resident of the area was sure he “would have known if such a report was afloat.”²⁷⁶

For these witnesses—many of whom were former slaveholders²⁷⁷—there was no room for ambiguity on the race-slavery nexus. Clarisa, after years of waiting on Clark and Sobrina, and after decades of seeing them eat together and sleep together, said that her former owner “placed himself on equality and footing with the blacks.”²⁷⁸ But Joseph Anderson, one of the white witnesses in the case, brushed all of this aside. “The colored people,” he pronounced flatly, “did not visit Clark and he would not have tolerated it.”²⁷⁹ To Anderson and others like him it was understood that men slept with slave women but they denied that anything like love could ever enter into it. “Clark kept a negro woman Sobrina as men frequently did in those days,” reported Edward Collier, but “no one ever thought or was it reported

²⁷³ *Id.* at 82 (testimony of Q.M. Herd). In the 1850 census, Q.M. Heard is listed under the household of William Heard, indicating that he was the latter’s son. See 1850 CENSUS: Free Inhabitants, Wharton County, *supra* note 22 (listing Q.M. under William Heard’s name, and listing his age as 17). Stephen Heard is listed a few entries later, and his age is 28. See *id.*

²⁷⁴ Transcript of Trial, Clark v. Honey, *supra* note 3, at 83 (testimony of Q.M. Herd).

²⁷⁵ *Id.* at 84 (testimony of H.P. Cayce).

²⁷⁶ *Id.* at 84-85; see also *supra* note 245 (noting that Cayce came to Texas and settled near Clark in 1829).

²⁷⁷ Sixteen witnesses testified for the defense, and fourteen were found in the census records. Of these, nine were slaveholders or came from slaveholding families, four were not, and one was evidently the former slave of the Heard family. The slaveholders were Stephen R. Heard, Q.M. Heard, H.P. Cayce, Joseph Anderson, D.V. Myers, George Hooken, J.T. Lawson, Edward Collier, and J.P. Morton. See 1850 CENSUS: Slave Inhabitants, Wharton County, *supra* note 144 (listing S.R. Heard and W.J.E. Heard (where Q.M. lived) as slaveholders); 1860 CENSUS: Slave Inhabitants, Wharton County, *supra* note 140 (listing S.R. Heard, W.J.E. Heard, H.P. Cayce, Joseph Anderson, D.V. Myers, Geo. W. Hooken, John T. Lawson, and J.P. Morton as slaveholders); see also 1850 CENSUS: Slave Inhabitants, Montgomery County, *supra* note 144 (listing E. Collier as a slaveholder). The other four white witnesses were R.W. Smith, Abraham Ross, B.J. Sanford, and A.L. Kern, and each can be found in one or more of the Wharton County census records but not the slave schedules. See 1850 CENSUS: Free Inhabitants, Wharton County, *supra* note 22 (listing B.J. Sanford and A.L. Kern); 1860 CENSUS: Free Inhabitants, Wharton County, *supra* note 24 (listing B.J. Sanford, A.L. Kern, R.W. Smith, and Abraham Ross); Manuscript Census Returns, Schedule 1.—Inhabitants, Wharton County, Tex., in BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, POPULATION SCHEDULES OF THE NINTH CENSUS OF THE UNITED STATES (1870) [hereinafter 1870 CENSUS: Inhabitants] (listing R.W. Smith and Abraham Ross). Finally, the one black witness was Nelson Heard, presumably one of the Heard’s former slaves. See 1870 CENSUS: Inhabitants, Wharton County, *supra* note 277 (listing Nelson Heard as 56-years-old, black, and a farm laborer).

²⁷⁸ Transcript of Trial, Clark v. Honey, *supra* note 3, at 54 (testimony of Aunt Clarisa Bird).

²⁷⁹ *Id.* at 86 (testimony of Jos. Anderson).

that they were married or husband and wife.”²⁸⁰ Indeed, he said, “a man would have been gotten rid of in the community that acknowledged to having a negro wife.”²⁸¹ Said another, in clear reference to his own biases: it “would have been dangerous to do so.”²⁸²

The vast division between what Clark’s former slaves saw and what Clark’s white neighbors saw is symbolic of a larger divide between the ideology of slavery and everyday life. In local courtrooms around the state the rough edges of slavery were revealed in cases about nothing of national significance yet about everything relating to the South and what it stood for. Henry Hedgepeth, an overseer on a Brazos plantation, might have thought his white skin empowered him with the authority to use any necessary means to correct a slave.²⁸³ But the slave, who had the audacity to pull down a portion of a fence to help extricate his wagon from a bog, thought differently.²⁸⁴ With a smart, “I spects you does sir,” the slave ran from Hedgepeth when the latter made clear that he intended to whip him.²⁸⁵ The slave disappeared, with all the whites assuming he drowned, oblivious to real possibility that the “expert swimmer” simply ran away.²⁸⁶ Arthur Moore likewise was miffed when the slave he hired from William Doty did not possess the “honest and good character” he imagined all slaves had.²⁸⁷ He sued Doty, complaining that the slave openly defied his authority, burning down his fence and shop before running away.²⁸⁸ And, in direct refutation of James Henry Hammond’s ebullient assertion that “our slaves are the happiest three millions of human beings on whom the sun shines,”²⁸⁹ the parents of Daniel Threatt had to struggle through the unfortunate fact that one if not more of their slaves killed their son.²⁹⁰ The reason for the murder was not disclosed, but the jury that handed down the murder convictions must have at least wondered why these happy and contented

²⁸⁰ *Id.* at 97 (testimony of Edward Collier).

²⁸¹ *Id.*

²⁸² *Id.* at 91 (testimony of I.M. Dennis).

²⁸³ See *Hedgepeth v. Robertson*, 18 Tex. 858, 858-59 (1857) (noting that Hedgepeth was Kirby’s overseer and that Kirby’s plantation was near the Brazos).

²⁸⁴ See *id.* (explaining how slave “got into a bog” and “pulled down a portion of the fence” to get out).

²⁸⁵ See *id.* at 861-62 (detailing reason for running away).

²⁸⁶ See *id.* at 859 (noting how “John was never heard of afterwards” and puzzling how he could have drowned because he “was an expert swimmer”). The court held that Hedgepeth was liable in an action for the value of the slave. *Id.* at 873-74.

²⁸⁷ See *Doty v. Moore*, 16 Tex. 591, 592 (1856) (suing for breach of warranty).

²⁸⁸ See *id.*

²⁸⁹ Hammond, *supra* note 79, at 192.

²⁹⁰ See *Elizabeth v. State*, 27 Tex. 329, 330 (1863) (noting that the indictment charged two slaves, Elizabeth and Ned, with the murder). The Texas Supreme Court reversed Elizabeth’s conviction based on lack of evidence. *Id.* at 332.

slaves inflicted such gruesome wounds on a three-year-old boy.²⁹¹

Some of the most glaring fissures in the slaveholder's ideology, however, came in the form of the near-white slaves that populated the countryside. Local newspapers were filled with their descriptions, with their hapless owners trying desperately to recover them long after they drifted across the color line. "George, a stout, fine-looking yellow fellow," was how L.G. Cleveland and P.W. Kittrell described one of their runaways, revealing more about George's appearance than they probably realized when they added that, like so many of the whites who would be looking for him, his hair had just the slightest "inclination to curl."²⁹² In the courtrooms, when they sued for their freedom, juries were faced with the unenviable task of trying to discern whether a person, who by all accounts *looked* white, was indeed "of the pure white race, or mixed with African blood and born of a slave mother."²⁹³ In one such case, the Texas Supreme Court puzzled over the implications of a woman with one-eighth African blood whose mother was a slave. "Her child, if by a white man, would be a competent witness against a white person," the court mused, "but following the status of its mother, it would be a slave, and it would so descend *ad infinitum*, so long as the descent from a slave mother could be traced, though the blood be of the smallest possible amount."²⁹⁴ Having raised the issue, the court nonetheless retreated behind the walls of its ideology (in two separate appeals), and said the woman was black and therefore a slave (or a slave and therefore black, it really did not matter), because her mother was a slave.²⁹⁵ Suits like these made clear that the slaveholders' world never was what they wanted it to be, that race and slavery never were coextensive, and that whites and blacks never kept just to themselves.

In the end, it hardly seems surprising that the whites who lived near John Clark refused to recognize what appeared obvious to others: that Clark and Sobrina lived together as husband and wife. But, indeed, for the local whites to concede that something more existed between the couple would

²⁹¹ See *id.* at 330 ("The child was greatly bruised, and had a hurt on the neck and side of the head, from which the witnesses present thought it might have been killed before having been thrown into the water; but its limbs were stretched out as though it had struggled after being thrown in.").

²⁹² *Runaways*, TEXAS STATE GAZETTE, Apr. 24, 1858, at 3.

²⁹³ See *Gaines v. Ann*, 17 Tex. 211, 214 (1856); see also Jason A. Gillmer, *Suing for Freedom: Interracial Sex, Slave Law, and Racial Identity in the Post-Revolutionary and Antebellum South*, 82 N.C. L. REV. 535, 588-619 (2004) (discussing implications of near-white slaves suing for freedom).

²⁹⁴ *Gaines*, 17 Tex. at 215-16.

²⁹⁵ *Id.* at 216 (reversing jury's finding that she was white). On remand, the jury found once again that the woman was white and entitled to her freedom. The decision was appealed, and the Texas Supreme Court held for a second time "that the verdict is not supported by the evidence, and that the judgment must be reversed because of the refusal of the court below to grant a new trial." *Gaines's Adm'r v. Ann*, 26 Tex. 340, 342 (1862).

be to admit that something was wrong with their system, for it did not fit with their beliefs, their language, or their very understanding of the world. In their minds, blacks and whites did not mingle as friends and acquaintances, they did not meet on terms of equality, and they certainly did not fall in love. Yet, if cases like John Clark's and Sobrina's tell us anything, it is that, regularly, in the towns and on the streets, the doctrines of white superiority and black inferiority ran headfirst into everyday life, revealing a social order built on rigid racial lines and dependent on racial subordination that was literally falling apart at the seams.²⁹⁶

VERDICT AND CONCLUSION

The jury who would decide if Bishop and his sisters were legitimate heirs came from a community that had grown up, presumably, with a basic understanding of what life was like on Clark's plantation. A few of the hundred or so slaves that had lived there undoubtedly had scattered, trying to find lost relatives or seeking out a better life somewhere else, but many more, if other communities can serve as a judge, remained. They, along with the other residents of Wharton County, were coming to terms with a new world order, one that saw former slaves competing for jobs, land, and social, economic, and political importance. Many white Texans resisted the change, or at least lamented the passing of their previous way of life. But, with the federal government setting terms for readmission to the Union, much of the antebellum political leadership lost its place.²⁹⁷ Under the stewardship of the republican governor Edmund J. Davis, Texas witnessed a fundamental shift in race relations, one in which blacks were entitled to vote, to own property, to make contracts, and to serve on juries.²⁹⁸

Of the twenty traceable jurors summoned to serve during the December term of 1871, the term in which the suit over Clark's estate would go to trial, moreover, all twenty were listed in the census records as

²⁹⁶ Cf. Walter Johnson, *Inconsistency, Contradiction, and Complete Confusion: The Everyday Life of the Law of Slavery*, 22 *LAW & SOC. INQUIRY* 405, 429-30 (1997) (stressing conflicts between everyday life of slavery and the ideologies of slavery, and arguing that the South was in a state of "complete confusion").

²⁹⁷ For a detailed discussion of Texas during Reconstruction, and particularly the struggle for political power, see generally CARL H. MONEYHON, *TEXAS AFTER THE CIVIL WAR: THE STRUGGLE FOR RECONSTRUCTION* 52-118 (2004); see also Randolph B. Campbell, *Grass Roots Reconstruction: The Personnel of County Government in Texas, 1865-1876*, 57 *J. OF S. HIST.* 99, 100-01 (1992) (providing brief sketch of the six phases of reconstruction in Texas).

²⁹⁸ See MONEYHON, *supra* note 297, at 119-54 (discussing Davis administration and its policies). Davis was elected governor in 1869. *Id.* at 115-16. During his term of office, the state legislature ratified the 14th and 15th amendments, and passed, among other important legislation, a homestead act and a law establishing public schools. See *id.* at 118-38.

either black or mulatto.²⁹⁹ Though it is not known how many of them actually served on Clark's case—the only name that is listed in the trial records is the foreman, Henry Fleming³⁰⁰—it is fairly certain that at least some of the twelve men, and perhaps more, were former slaves. It is of course possible that these witnesses were biased to begin with; perhaps they saw Clark's case as an opportunity to afford one of their own the land and money that had been deprived of all of them. This seems to have been the opinion of R.V. Cook, the attorney for Warren Clark, one of John Clark's distant relatives and a plaintiff in a related suit. "The cause was tried," he said, "before a jury of ignorant black people who were totally incompetent for so grave a task."³⁰¹ But just as likely, if not more so, the jurors who decided the ultimate question of whether John Clark and Sobrina had been husband and wife were attuned to a social order in which things were not so black and white. Unlike many of their former oppressors, in other words, the jurors—like the black witnesses—knew that blacks and whites had been meeting on their own terms for decades. The two groups were not supposed to, but they did, and far more often than the proslavery ideologues were ever willing to admit.

Thus, with the evidence in, Judge William Burkhart of the Twentieth Judicial District, sitting atop the bench in the Wharton County courthouse, asked the jurors to consider whether John Clark and Sobrina had been husband and wife, cautioning that if Clark simply lived with her "as a concubine or kept-woman and not as a wife" they must find for the State.³⁰² Recognizing, perhaps, as Pleasant Ballard did, that "it was not common when a man was keeping a woman to call her the man's wife,"³⁰³ the jury returned the only verdict that made sense: John Clark—one of Austin's Old Three Hundred, a successful planter, and one of the largest

²⁹⁹ Thirty-eight men were listed as petit jurors in the December term, but, because of the poor handwriting of the clerk, only twenty have been definitively identified and traced in the census records. See List of Jury Served, Minute Book "C", at 76 (Tex. Dist. Ct. Wharton Cty. Dec. 14, 1871) (collection of Wharton County District Court) [hereinafter List of Jury Served]. Those twenty, all of whom appear in the 1870 census, are: George Bryant, Spencer Daniels, Gilbert Gathers, Albert Horton, Gabriel Agustin, Abraham Hart, Nero Julius, Paul Evans, Manuel Louis, Billy Bryant, Giles Leafin, Warren Long, Joe Palmer, Alford Young, Issac Hodges, Bob Bilerny, John Ricks, Harry Boon, Alford Fisher, and Henry Fleming. Alford Young is listed as a mulatto and the rest are listed as black. See 1870 CENSUS: Inhabitants, Wharton County, *supra* note 277.

³⁰⁰ See Transcript of Trial, Clark v. Honey, *supra* note 3, at 112 (verdict and decree) (identifying Henry Fleming as foreman).

³⁰¹ Clark v. Barden, *supra* note 6, at 8.

³⁰² Transcript of Trial, Clark v. Honey, *supra* note 3, at 101 (charge of court). At the time of suit, the twentieth judicial district consisted of the counties of Wharton, Matagorda, Jackson, and Lavaca. An Act to provide for districting the State of Texas into judicial districts, GENERAL LAWS OF THE TWELFTH LEGISLATURE OF THE STATE OF TEXAS, Chap. XIV, § 20 (1870), *in* VI THE LAWS OF TEXAS, *supra* note 88, at 21, 22.

³⁰³ Transcript of Trial, Clark v. Honey, *supra* note 3, at 76 (testimony of Pleasant Ballard).

slaveholders in the State—had fallen for a black woman, and the two of them had lived together as man and wife until their deaths.³⁰⁴ In deciding on a starting point for the marriage, moreover, the jury settled on the years 1833 or 1834, around the time Sobrina’s first if not second child was born and a solid year or more before the Runaway Scrape.³⁰⁵ Such a finding was significant. The date meant that Clark and Sobrina had married while Texas was still under Mexican rule, at a time in which there was no law prohibiting blacks and whites from marrying. As such, the marriage was valid, which even an 1837 law banning the practice could not undo.³⁰⁶

Immediately following the jury’s verdict, the State appealed to the Texas Supreme Court. There it found a court that had been restructured in the years after the War, with all three judges being sympathetic to the Unionist’s cause.³⁰⁷ Judge Moses Walker—who hailed from Ohio and fought on behalf of the North in the Civil War³⁰⁸—wrote the opinion of the court, and he upheld the jury’s verdict in favor of the marriage.³⁰⁹ As such, Bishop, Lourinda, and Nancy, were declared, once and for all, legitimate heirs, entitled to the vast estate of 8500 acres and almost a half million dollars.³¹⁰ Joining with them in their victory celebration were Sobrina’s children from her prior relationship, though one of the children, Jane, had since passed away.³¹¹ Left, therefore, among these heirs, were Sobrina’s children Dan, Louis, and Sethe, and Jane’s children Charles, Albert, Dosh,

³⁰⁴ *Id.* at 111 (verdict and decree).

³⁰⁵ *Id.*

³⁰⁶ Counsel for the State apparently conceded this point. See *Honey v. Clark*, 37 Tex. 686, 691 (1872) (argument of counsel) (“Hence, if this marriage was ever contracted at all, it must have been done prior to June 5, 1837 [the date of enactment of antimiscegenation law] in order to be valid.”).

³⁰⁷ See James R. Norvell, *The Reconstruction Courts of Texas 1867-1873*, 62 Sw. HIST. Q. 141, 148, 158-62 (1958) (providing brief biographical sketches of the judges who made up the Texas Supreme Court starting in 1870).

³⁰⁸ See *id.* at 160-62 (noting Walker’s background, experience, and education).

³⁰⁹ See *Honey*, 37 Tex. at 709. The court’s decision was apparently based on two separate grounds. The first was that the parties were married before Texas outlawed interracial marriages. See *id.* at 708-09 (stating that “if the parties were married prior to 1837, no law subsequently passed could have divorced them or dissolved the marriage without the consent of at least one of the parties”). The second was that the twelfth provision of the Texas Constitution of 1869—legitimizing all marriages between people who, “by the law of bondage, were precluded from the rights of matrimony”—applied not just to slaves but to whites and blacks. See *id.* at 709 (stating that provision applied to all persons who lived “together as husband and wife, and who, by law, were precluded the rights of matrimony”).

³¹⁰ See Transcript of Trial, *Clark v. Honey*, *supra* note 3, at 112 (verdict and decree) (stating that Bishop, Lourinda, and Nancy “are the legitimate children of John C. Clark and Sobrina Clark”). For the order implementing the judgment after appeal, see *Clark v. Honey*, No. 789, Minutes District Court Book “C”, at 201 (Tex. Dist. Ct. Wharton Cty. Aug. 5, 1873) (collection of Wharton County District Court).

³¹¹ See Transcript of Trial, *Clark v. Honey*, *supra* note 3, at 112 (verdict and decree) (noting plaintiffs). Jane, or “Mary Jane,” reportedly died in 1864. See *id.* at 18 (plea in abatement).

and Melvina.³¹² The court below divided up the estate accordingly, giving equal shares of the separate property to Bishop, Lourinda, and Nancy, and appropriate shares of the community property to everyone.³¹³

Unfortunately, but perhaps not surprisingly, the story does not end here. For the next three decades, Bishop and his family were embroiled in countless legal skirmishes over the property. Some of these involved their attorneys. Indeed, within a year of the final disposition of the case, the lawyer who had assisted the family in the case had died, and their appointed new one, Tilson Barden, had convinced Bishop and his sisters to sell him all but a few hundred acres from Clark's original league, and all 1805 acres out of the Huff league.³¹⁴ Barden paid \$15,000 for the land, plus an additional \$11,600 for the family to give up any other rights and interests they might have in the estate, real or personal.³¹⁵ Whether Bishop and his sisters knew at the time what they were giving up is not known. But Barden certainly did—ten years earlier, at the estate sale, the same land had sold for over \$146,000, and the personal property, including slaves, was worth some \$275,000.³¹⁶ A few months later, perhaps after realizing their mistake, the family appointed Jackson Rust to be their attorney and attempted to revoke the deeds.³¹⁷ But later filings suggest that Barden got the best of them,

³¹² See *id.* at 112 (verdict and decree) (noting plaintiffs).

³¹³ See *id.* at 113 (verdict and decree) (dividing up property). The court allowed Sobrina's children prior to her relationship with Clark to take under the laws of intestacy because it evidently reasoned that Sobrina, as Clark's wife, would have been entitled to the entire estate upon Clark's death. All of her children, then, would share equally in the community property once she died.

³¹⁴ See Bishop Clark to T.C. Barden, Deed Record Book "C", at 54-55 (Aug. 7, 1874) (collection of Wharton County Court Annex) [hereinafter Deed of Clark to Barden] (conveying 1491 acres of land from 2391 acres in Clark league); *id.* at 56-57 (conveying all 1805 acres of land from Huff league). Bishop and his family had hired Franks to represent them in September of 1870. See Bishop Clark to Jackson Rust, Admr., Deed Record Book "C", at 51 (Dec. 1, 1874) (collection of Wharton County Court Annex) [hereinafter Deed of Clark to Rust] (referencing agreement).

³¹⁵ See Deed of Clark to Barden, *supra* note 314, at 54 (selling portion of Clark league for \$5000); *id.* at 56 (selling Huff league for \$10,000); see also Release and Satisfaction of Bishop Clark and others to T.C. Barden, Deed Record Book "C", at 59-60 (Aug. 10, 1874) (collection of Wharton County Court Annex) (giving up their "entire interest in said estate whether the same consists in realty or personalty and whether in possession or expectancy" for a total of \$11,600). In a related document, T.C. Barden conveyed 320 acres to Bishop out of the Clark league for \$3000 and the deed of relinquishment. See T.C. Barden to Bishop Clark, Deed Record Book "I", at 387-88 (Aug. 10, 1874) (collection of Wharton County Court Annex). But it is unclear whether this land was in addition to the land withheld under the August 7th agreement, or merely part of it.

³¹⁶ See Estate of Clark, *supra* note 1, Probate Minutes Book "B", at 257, 257, (Tex. Cty. Ct. Wharton Cty. Feb. 1863) (valuing Clark league at \$82,489.50 and Huff league at \$64,077.50); see also *id.* at 262 (listing slaves as worth \$207,361, and personal property on both the upper and lower plantations as worth \$67,777.80)

³¹⁷ See Bishop Clark to J. Rust, Bill of Sales Power of Attorney Record Book "B", at 190-91 (Nov. 14, 1874) (collection of Wharton County Court Annex) (stating, after appointing Rust as attorney, that "we hereby revoke, annul, and make void all other powers of attorneys given by us to any one and especially the power of attorney or agreement given to one T.C. Barden"). In this same document, Bishop and his family referred to their original attorney, F.G. Franks, as "the only party to

recording the deeds and taking possession of at least some of the land before Rust could put a stop to it.³¹⁸

Clark's distant white relatives, too, seemingly never did accept the rulings of the court. Two groups—one headed by Joseph Wygall and the other by Warren Clark, both apparently sons of Clark's half-brothers and half-sisters—had filed their own suits claiming their rights to the property.³¹⁹ The judgment in Bishop's suit, however, did little to dissuade their claims of entitlement. In 1877, Warren Clark instituted an action in Wharton County trying to overturn the judgment, naming the lawyers as defendants and arguing that the verdict was the result of collusion and fraud.³²⁰ The suit was not successful, but Bishop and his family evidently got the message. Right around this time, they affixed their marks to a deed conveying their rights to the property to Warren in consideration for his promise to give them 100 acres apiece if he was ultimately successful in any of his suits.³²¹ Meanwhile, the following year, Joseph Wygall successfully prosecuted his suit in Travis County and received a judgment declaring him the rightful heir to the property.³²² The Texas Supreme Court later reversed the judgment, but its mere existence illustrates quite plainly that no one seemed willing to accept a judgment placing a black family in charge of thousands of acres of some of the most productive land in Wharton County.³²³

In the end, with so many deeds and court filings, it is difficult if not

whom we looked for any protection in reference to our right in said Estate or who we recognized as having any interest in said Estate except ourselves." *Id.* at 191. Jackson Rust was the administrator of Franks' estate, and later entered into an agreement with the family in which it conveyed all the property to the estate to satisfy all outstanding legal debts, except 1590 acres of the Clark league. *See* Deed of Clark to Rust, *supra* note 314, at 51-53 (reserving 430 acres apiece for Bishop, Nancy, and Lourinda's husband Pleasant, and 150 acres apiece for Dan Owens and Albert Horton and his children with Sobrina's daughter Jane).

³¹⁸ *See* Clark v. Barden, *supra* note 6, at 16 (suggesting that Barden registered his deeds and went into possession before the family revoked the August 1874 deeds).

³¹⁹ *See supra* note 6 and accompanying text (detailing companion cases).

³²⁰ *See* Clark v. Barden, *supra* note 6, at 18-19 (setting forth prayer for relief).

³²¹ *See* Bishop Clark to T.B. McClure Agt for W.H. Clark Heirs of John C. Clark, Deed Record Book "C", at 322-33 (Dec. 20, 1876) (collection of Wharton County Court Annex). Two years later, McClure, as attorney for Warren, deeded the rights to the property to Warren's new attorney, George Dorman. *See* Warren H. Clark to Wilson, Wamock & Dorman, Deed Record Book "D", at 328 (Nov. 27, 1878) (collection of Wharton County Court Annex). Pursuant to this agreement, Dorman eventually deeded 100 acres to Bishop in February of 1886. *See* Deed Record Book "H", at 47-48 (Feb. 8, 1886) (collection of Wharton County Court Annex).

³²² *See* Wygall, 51 Tex. at 631 (noting that Wygall's suit was tried in Travis County in Nov. 1878, and that the jury returned a verdict declaring the plaintiffs the heirs of Clark).

³²³ *See* Wygall, 51 Tex. at 632-35 (reversing judgment in favor of the Wygall heirs and remanding for further proceedings where trial court took no action regarding former judgment in favor of Bishop, thereby subjecting the State to inconsistent judgments).

impossible to discern what happened to the family's claims. And though there does not appear to be any merit to the assertion, first reported by Annie Williams in her book on Wharton County, that a mob attacked members of Bishop's family after learning of the original verdict and burned alive two or three of them and shot at the others,³²⁴ the sad truth is that, more than likely, the family members died without ever having acquired what was legally their own.³²⁵ What wasn't taken from them through shifty deals and unscrupulous lawyers, was auctioned off at sheriff sales for nonpayment of taxes or for unpaid debts.³²⁶ One of the last

³²⁴ Williams, providing no sources to substantiate the claim, said this about the case:

A tragic aftermath is that the Negroes who inherited the property never got possession of it. Feeling against them was running high and the story is told that they were trapped in their home by armed men surrounding the house. They were ordered out of the county, and the house they were in was set on fire. Two burned to death inside and one man died later of burns. To make matters worse, they were shot as they tried to save themselves by jumping from the windows and running out of the doors. The few who escaped left the county.

WILLIAMS, *supra* note 37, at 115. This author has been unable to verify any of these facts. To the contrary, Bishop and Nancy are still mentioned in documents near the end of the century, and while Lourinda died sometime in the early 1870s, there is no indication that it was the result of foul play. For records of Bishop, see 1870 CENSUS: Inhabitants, Wharton County, *supra* note 277 (listing Bishop as 29 and mulatto); Manuscript Census Returns, Schedule 1.—Inhabitants, Wharton County, Tex., in BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, POPULATION SCHEDULES OF THE TENTH CENSUS OF THE UNITED STATES (1880) (listing Bishop as 41 and mulatto); Manuscript Census Returns, Schedule 1.—Population, Wharton County, Tex., in BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, POPULATION SCHEDULES OF THE TWELFTH CENSUS OF THE UNITED STATES (1900) (listing Bishop as 60 and mulatto). Nancy appears in the 1870 census records as a mulatto and the wife of Joseph Townsend. See 1870 CENSUS: Inhabitants, Fort Bend County, *supra* note 277. This author has not been able to find her in later census records; however, she does appear in later legal documents. See, e.g., Joseph Townsend to John C. Mitchell, Deed Record Book "K", at 177 (Apr. 30, 1888) (collection of Wharton County Court Annex) (listing Nancy as party). Lourinda appears in the 1870 census, but she is not listed among the parties in legal documents dating from August of 1874; in her place is her husband, Pleasant Ballard. See, e.g., Deed of Clark to Barden, *supra* note 314, at 54 (listing "Pleasant Ballard surviving husband of Lourinda Dow Ballard"); see also 1870 CENSUS: Inhabitants, Wharton County, *supra* note 277 (listing Lourinda as a 30-year-old mulatto woman married to Pleasant Ballard).

³²⁵ An 1885 survey of the Clark league, referenced in a legal document involving Joseph Wygall, shows Bishop and Nancy with 100 acres apiece, and Dan Owens, Albert Horton, and Pleasant Ballard each with 50 acres. See *Brown v. Wygal*, No. 3005, at 1 & Ex. A (Tex. Dist. Ct. Wharton Cty. May 1901) (collection of Wharton County Historical Museum).

³²⁶ Writing long before the family's legal troubles were over, an attorney in the Texas Supreme Court remarked how Bishop and his sisters never received much of the proceeds from the estate. "It is said that small pittance only ever reached the hands of the negro claimants." Wygall, 51 Tex. at 629. There are several sheriff sales for nonpayment of taxes in the records. See, e.g., John T. Cordray to Eva Barden, Deed Record Book "C", at 480-81 (Aug. 8, 1877) (collection of Wharton County Court Annex) (auctioning off 1600 acres of Huff League for nonpayment of \$66.00 in taxes); Jno. C. Clark Est. by Tax Col. to C.J. Battle, Deed Record Book "D", at 222-23 (Aug. 5, 1879) (collection of Wharton County Court Annex) (auctioning off 140 acres of Kuykendall League for nonpayment of \$1.26 in taxes); J.C. Clark Est. by Tax Collector to E.N. Brooks, Deed Record Book "D", at 578-79 (May 4, 1880) (collection of Wharton County Court Annex) (auctioning off 590 acres of Huff League for nonpayment of \$33.69 in taxes). In one instance, the State auctioned off 320

records, in fact, involved Bishop defaulting on a loan of \$2029 in 1905—a loan that was given to him by another lawyer. In the subsequent suit over the money, Bishop lost, and the court ordered several hundred acres of the Clark league sold to cover the amount.³²⁷ If Bishop had anything left after the sale it is not known. But chances are, at the age of sixty-something, he passed away without much to his name.³²⁸

As for the result in the Supreme Court's opinion in *Honey v. Clark*, in terms of establishing the rights and privileges of interracial families, it too met a similar fate. In 1874, the court considered another case involving a white man and a black woman. This time, Mary Clements claimed to be the wife of George Clements, and that efforts to foreclose on the family homestead therefore were invalid because the two of them had not jointly executed the deed securing a loan with the property.³²⁹ But the court that considered this case looked radically different from the one that considered Bishop's. By this time, the State as whole had been redeemed by the ex-Confederates,³³⁰ and the judges who now sat on the Texas Supreme Court were all loyal Southerners—including Oran Roberts, a former slaveholder, judge, and ardent secessionist.³³¹ Whether they looked fondly upon their old world, or whether they had begun to accept the new, it seems clear enough that they were once again determined to erase the ambiguities in a social order that allowed blacks and whites to mix on such an intimate level.³³² Addressing Mrs. Clements, with a decidedly dismissive tone, the

acres of the Clark League for nonpayment of taxes, only to have Bishop reclaim the property after he paid the \$45.84 owed. See Certificate of Redemption, Deed Record Book "X", at 84-85 (June 4, 1898) (collection of Wharton County Court Annex).

³²⁷ See *Martin v. Clark*, No. 3399, at 1-3 (Tex. Dist. Ct. Wharton Cty. May 1905) (collection of Wharton County Historical Museum) (detailing debt and directing sheriff's sale).

³²⁸ Illustrative of the entire case, as late as 1907 parties from as far away as Iowa were claiming that they were heirs to Clark's estate and entitled to the land in dispute. See Letter from H.E. Valentine to Judge G.G. Kelley (Dec. 13, 1907) (collection of Wharton County Historical Museum).

³²⁹ See *Clements v. Crawford*, 42 Tex. 601, 602 (1874) (detailing allegations and proof).

³³⁰ For a discussion of the change in political power, from a Republican government to a Democratic one, including the triumph of the Redeemers, see generally MONEYHON, *supra* note 297, at 188-205. The conservative successes began with the election of 1873, when the Democratic gubernatorial candidate Richard Coke defeated Davis. See *id.* at 197.

³³¹ See FEHRENBACH, *supra* note 35, at 344 (noting Roberts' role in secession, and noting also that he was a judge); see also 1860 CENSUS: Free Inhabitants, Smith County, *supra* note 24 (identifying O.M. Roberts as lawyer from South Carolina); 1860 CENSUS: Slave Inhabitants, Smith County, *supra* note 140 (listing O.M. Roberts as the owner of eight slaves). Following the Democrats' return to power in 1874, Roberts was appointed to the Texas Supreme Court, where he served as the chief justice. FEHRENBACH, *supra* note 35, at 434. He was elected governor in 1878. *Id.* at 439.

³³² Oran Roberts, first in his role as chief justice of the Supreme Court, then as governor, political historian, and law professor, was influential in discrediting and dismantling the Republican achievements and decisions of the court. Indeed, he derisively referred to the court that decided *Clark v. Honey* as the "Semicolon Court" because of the importance that court placed on a semicolon in its decision invalidating the gubernatorial election of 1873. See *Ex Parte Rodriguez*, 39 Tex. 706

court had only this to say: “It is not the letter of the Constitution, nor is it believed to be its intention, to confer on any parties, white or black, whose intercourse was illegal and immoral, the rights and benefits of lawful wedlock. In so far as the case of *Honey v. Clark* is at variance from this interpretation of the Constitution, it may be regarded as overruled.”³³³ Four years later, Phillis Oldham ran into an equally headstrong court. Like with *Sobrina*, Phillis had been involved in a thirty-year relationship with a white man, her former master and a man of considerable wealth and status.³³⁴ When he died, she struggled to maintain the family homestead, claiming that they had been husband and wife.³³⁵ But the court, revealing its prewar sensibilities, brushed all of this aside. “She being one-half African blood, and he being white,” Chief Justice Oran Roberts said for the court, “they could not have been man and wife at the time of his death under the laws of this State.”³³⁶ Indeed, not until 1969, two years after the United States Supreme Court declared efforts to ban interracial marriages unconstitutional,³³⁷ did Texas again accept what a jury had found over a

(1873) (voiding the election of Coke over Davis on the grounds that the constitution required “four day” voting and the legislature only allowed for one). Though the opinion was arguably based on accepted methods of statutory construction, because of its political implications, it served as a lightning rod for conservative criticism. Roberts said this:

This decision was in harmony with [the Davis] administration; but it deserves to be noticed as standing in disharmony with every other decision that was ever pronounced by our Supreme Court; in this, that no one except a few officers interested in it ever paid any respect to it as binding authority; no lawyer would ever cite it as authority in any court; no judge would ever refer to it as a judicial precedent; and therefore it stands solitary and alone upon the records of that court, to be remembered only with the regret that such a decision was made by a court that has so uniformly possessed the confidence of the people of Texas.

Oran M. Roberts, *The Political, Legislative, and Judicial History of Texas for Its Fifty Years of Statehood*, in II COMPREHENSIVE HISTORY OF TEXAS, 1685-1897, 209 (Dudley G. Wooten ed., 1898). Roberts went on to say that, because of the decision, “no Texas lawyer likes to cite any case from the volumes of the Supreme Court ... that delivered that opinion, and their cases are, as it were, tabooed by the common consent of the legal profession.” *Id.*

³³³ Clements, 42 Tex. at 604.

³³⁴ See Transcript of Trial to Supreme Court, *Oldham v. Oldham*, No. 1015, at 61 (Tex. Dist. Ct. Burleson Cty. Nov. 1874) [hereinafter Transcript of Trial, *Oldham v. Oldham*] (verdict) (finding that Phillis and William Oldham had lived together as man and wife from 1839 until his death), *aff’d sub nom.* *Oldham v. McIver*, 49 Tex. 556 (1878). By the time Oldham died in 1860, his estate was worth over \$127,000, and it included thirteen slaves. See 1860 CENSUS: Free Inhabitants, Burleson County, *supra* note 24 (estimating Oldham’s real property to be worth \$105,836 and his personal property \$21,600); 1860 CENSUS: Slave Inhabitants, Burleson County, *supra* note 140 (listing thirteen slaves). Among Oldham’s slaves in 1860 was a forty-two-year-old mulatto female who was likely Phillis. See *id.* Ten years later, Phillis appeared in the census records as a fifty-two-year-old mulatto female living in Burleson County. 1870 CENSUS: Inhabitants, Burleson County, *supra* note 277.

³³⁵ See Transcript of Trial, *Oldham v. Oldham*, *supra* note 334, at 3 (petition for certiorari) (noting that Phillis claimed to be the widow of William Oldham).

³³⁶ *Oldham v. McIver*, 49 Tex. at 564.

³³⁷ See Family Code, 61st Leg., R.S., ch. 888, § 6(3) 1969 Tex. Gen. Laws 2733. The Court

century before: that whites and blacks could, and did, enjoy each other's company, sometimes on terms of mutual respect and adoration.

In the final analysis, perhaps the point of telling the story of John Clark and Sobrina is to highlight the importance of local studies in understanding both race and slavery. No one should be surprised at the amount of sexual exploitation that took place during slavery times; but, neither should we be surprised to learn that blacks and whites sometimes did not do what was expected of them. Indeed, at the local level, the rigid lines of race and slavery so important to the South sometimes broke down, revealing a world with much more flexibility and fluidity than previously recognized. Everyday, the rituals of racial subordination and domination were acted out—but they were also challenged, shaped, and negotiated by men and women, blacks and whites, slaves and free persons. Their stories, in turn, found in the local disputes that inevitably arose, reveal a complex world that never was so black and white. The story of John Clark and Sobrina pauses at one of these moments, and asks if it is wrong to call relationships like this love, than what should we call it?