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No Right to Respect: Dred Scott and the Southern Honor Culture

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**No Right to Respect:
Dred Scott and the Southern Honor Culture**

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I. Introduction

Although it is possible for a nation to deny its history, it is not possible to escape responsibility for the consequences of that history. A significant part of America's history consists of the sordid practice of black chattel slavery. Integral to that peculiar institution was the Supreme Court's 1857 decision in Dred Scott v. Sanford¹ which Don Fehrenbacher declares "remains to this day the most famous of all American judicial decisions."² From the highest court in the land, in a vain attempt "to play the role of *deus ex machine* in a setting of national crisis,"³ that notorious decision judicially validated the constitutionality of America's unique form of slavery.⁴

The year 2007, marks the 150th anniversary of the American Supreme Court's decision in Dred Scott. Ever since it was decided, this case has been continuously and universally reviled by virtually every segment of the legal community, and variously characterized as absolutely the worst, most shameful, "infamous and notorious"⁵ decision in the American Supreme Court's history. Although this case was decided more than one hundred and fifty years ago, it is not merely a shameful part of America's long forgotten past. Regrettably, "the spirit of the opinion survived for a century in the racial sequel to emancipation... [and it] has a distinctly modern ring."⁶ Thus, careful reflection on the bitter legacy of Dred Scott continues to have significant contemporary "revelatory

¹ Dred Scott v. Sanford, 19 How. (60 U.S.) 393] [Dred Scott]

² DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS vii (1978) [THE DRED SCOTT CASE]

³ Id at 5

⁴ SLAVERY AND THE LAW, Finkelman ed, internal citations omitted, at 6, 7 (describing how American chattel slavery of blacks was a stark departure from slavery as practiced in ancient world. There slavery was an equal opportunity affair as a matter of social consequence, but in America, slavery was solely based on race, because in America "only blacks could be slaves; no one else...and ..by law every negro is presumed to be a slave.")

⁵ Keith Whittington, The Road Not Taken: Dred Scott, Judicial Authority, and Political Questions 63 JOURNAL OF POLITICS, 365, 367 (2001); Paul Kahn, Reason

⁶ THE DRED SCOTT CASE, supra note 2 at 5

value,”⁷ that when examined closely from a range of perspectives can become “a point of illumination, casting light upon more than a century of American history.”⁸ This value stems from the contemporary manifestations of the “most significant aspect of Chief Justice Taney’s opinion [which] was his insistence that no distinction in this respect was made between the free negro or mulatto and the slave, but the stigma of the deepest degradation, was fixed upon the whole race.”⁹ As the late Judge Higginbotham has characterized this part of Taney’s opinion, “this meant that the stigma of degradation and mark of inferiority were impressed on African Americans not because they were or had been slaves, but because they were African American. Thus slavery did not render African Americans inferior. Rather, African Americans, by their very nature were inferior. Slavery was merely the natural place for such an “unnatural“ race.”¹⁰

The central argument of this essay is that when Justice Taney notoriously characterized black people¹¹ as “a subordinate and inferior class of beings who...whether emancipated or not..had no rights which the white man was bound to respect,”¹² he was

⁷ Id

⁸ Id at 7

⁹ A. LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS 66 (1996) [SHADES OF FREEDOM]

¹⁰ Id

¹¹ Although the specific references in the paper are to black people, all of the observations, arguments, and effects described herein are equally applicable to all “people of color.” However, since *Dred Scott* only dealt specifically with black people, the arguments in this paper have deliberately limited its focus to the effects regarding this specific racial group. However, this focus is in no way meant to denigrate or marginalize the histories of discrimination that have historically been imposed on and endured by all those traditionally referred to as people of color. This approach is further justified by the fact that as I have noted elsewhere citing Robert Jensen, *The Heart of Whiteness: Confronting Race, Racism, and White Privilege* 2, (2005) “the only thing that realistically links together those traditionally associated with the term “people of color” is their common experience ...of being on the subordinated side of white supremacy...and of being targeted, abused, and victimized—albeit in different ways at different times—by a white supremacist society. In the absence of that common experience of victimhood at the hands of White supremacy, the coherence of the group labeled people of color vanishes.”

¹² *Dred Scott*, 406-407

also saying that blacks had *no right to be respected* by whites.¹³ In this way, beyond characterizing blacks as just members of “that unfortunate race,”¹⁴ Taney was also saying that blacks were not at all human but rather just ‘*things*’; and ‘*things*’ that were “so far below [whites] in the scale of created beings,” that they should be regarded as “ordinary article[s] of merchandise.”¹⁵ By characterizing black’s as degraded *things*, rather than people, Taney was arguing not only that blacks had no legal rights to be respected, but also that they had no human rights to be respected as members of the human family.

Taney bolstered his argument for this outrageous conclusion by harkening back to the framers of the Constitution. He argued that he was constrained to interpret that sacred document “according to its true intent and meaning when it was adopted.”¹⁶ The assertion that this ideology was the original intent of the framers legitimized white racialized dishonor and disrespect of all black people, and thus built into substantive national law a constitutional recognition of the denial of black humanity as the justification for slavery.

Although no longer controlling legal authority, this racial ideology of white disrespect of blacks as first articulated in *Dred Scott* has exerted a powerful influence on virtually every aspect of America’s racial discourse for the past 150 years. One of the principal legacies of *Dred Scott* is the way these racial ideologies have insidiously sabotaged and undermined many of the national efforts to shake off the racial shackles of the past and achieve meaningful racial equality in America.

¹³ See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY*, 272 (1978) (discussing the necessity of all governments treating everyone with “equal concern and respect...as human beings who are capable of suffering and frustration.”)

¹⁴ *Dred Scott* at 407

¹⁵ *Dred Scott* at 409, 407

¹⁶ *Id* at 405

This essay is part of the considerable national effort by all of the constituencies in the American legal community to reflect on this infamous case and consider the distance the nation has come since it was decided as well as its continuing legacy on the struggle for racial equality. Many legal scholars have already commented on the myriad of factors that contributed to the Dred Scott decision and the impact of its aftermath on today's racial reality. While all of these legal theorists make important contributions to understanding the significance of this case, to date none have analyzed the case in terms of the implications that may be drawn from its roots in the values and dynamics of the honor culture¹⁷ of the Old South¹⁸ where respect and honor were fundamental organizing principals.

In the Southern¹⁹ honor culture, where Justice Taney and many of his fellow justices were raised, the term "respect" had a particular meaning that reflected traditional regional beliefs and deep-rooted values that were directly challenged by the national implications of Dred Scott's claim of freedom from slavery. The meanings and implications that Taney associated with the term "respect" were drawn from his upbringing in the Southern honor culture and thus were not necessarily the same as

¹⁷ JAMES BOWMAN, HONOR: A HISTORY 6 (2006) [HONOR: A HISTORY] (describing an honor culture as a culture in which honor is "a dominant cultural paradigm.")

¹⁸ In this essay I use the term "Old South," to consist of the period from 1760 to 1880.

¹⁹ In the use of the term "southern" I am mindful that many when talking about the antebellum south "presume that the Confederacy was the crucible of southern identity and that white heritage and southern identity are synonymous. The adjective "southern" apparently does not apply to African Americans who live south of the Mason Dixon line." W. FITZHUGH BRUNDAGE, THE SOUTHERN PAST: A CLASH OF RACE AND MEMORY 2 (2005) This is an important distinction because, as Brundage notes "when southern identity is assumed to be interchangeable with white identity, much more than semantics is at stake. White claims to power, status and collective identity are advanced at the same time black claims are undercut." Id However, in this essay I am focusing only on the Southern honor culture which was and still is an artifact of the white southerner and not the black southerner. Thus the terms southerner and white are not intended to be interchangeable in this essay, but are used only to emphasize that white southern honor was a fundamental part of southern whites identity as whites, a quality not shared by southern blacks, and that the southern honor culture that produced Justice Taney was a white honor culture where duels, violence, and death, were values not shared by blacks either then or now.

interpreted in the North or in contemporary American legal scholarship. Therefore, by viewing Dred Scott through the analytical lens of honor and respect as expressed in the historical context of the Southern honor culture, it is possible to gain a deeper understanding of the case, its impact on contemporary racial reality, and going forward, the possibility of significant progress in achieving racial equality in America.

From a contemporary, sophisticated, and urban perspective the values of honor and respect may seem old fashioned and perhaps of little value in scholarly analysis.²⁰ However, contemporary scholars should take seriously the fact that in the Old South, these values were and continue to be a part of a “culture of honor ideology”²¹ where they are very real and critically important standards of public and private behavior. These values can have a significant effect on the “laws and institutional behaviors...and public representations”²² of those that share these ideologies because they help shape the world views and values of political and legal decision makers, like Justice Taney and his fellow southern justices. In fact, these values form a core ideology of political, social, and intellectual behaviors that are deeply grounded in both explicit and implicit notions of cultural honor and respect.²³

These values were powerful social and political determinants in the Southern mentality in 1857 and continue to have a strong resonance both in the geographic South and in the Southern perspective of her sons and daughters regardless of where they may

²⁰ See SHARON R. KRAUSE, LIBERALISM WITH HONOR 1 (2002) (where she noted that “...we rarely speak of honor today. The language of honor went out of fashion with the French Revolution, along with powdered wigs and silk hose with breeches. These days honor seems quaint and obsolete, even frivolous, and it makes us vaguely suspicious.”) [LIBERALISM WITH HONOR]

²¹ RICHARD E. NISBETT AND DOV COHEN, CULTURE OF HONOR: THE PSYCHOLOGY OF VIOLENCE IN THE SOUTH 78 (1996) [CULTURE OF HONOR] (explaining that the culture of honor values of the south are most pronounced in people who are either from the old slave holding states of the deep South or who have mothers who were born and reared there)

²² Id

²³ LIBERALISM WITH HONOR supra note __ at 1.

live today.²⁴ Therefore, in trying to gain a greater understanding of this case and its significance to contemporary racial reality it is important to view the context of the case and its principal actors from the same perspective as many of them saw themselves. However, one cannot understand the values of the white Southern honor culture that produced Taney, without first considering the multifaceted and complex meanings associated with the terms honor and respect.

II. Honor

In his seminal study on the topic James Bowman accurately defines honor “at its simplest... [as] the good opinion of the people who matter to us, and who matter because we regard them as a society of equals who have the power to judge our behavior.”²⁵ Bowman goes on to describe this society of equals as a particular person’s “honor group.”²⁶ Implicitly, the reason the good public opinion by one’s honor group is important and can determine a person’s public behavior is that this group consists of those individuals whose opinions matter most. Bowman defines an honor group as a natural result of any common enterprise, but as he notes “especially those like the armed services, police forces, fire brigades and sports teams.”²⁷ In addition, these honor groups tend to be highly “male dominated,” and place a great prize on loyalty, bravery, and strength—both physical and psychological.²⁸

Thus, members of the same honor group see and value themselves through the eyes of each other, at least as much as, and perhaps even more than, they see and value

²⁴ See generally CULTURE OF HONOR, *surpa note* __

²⁵ JAMES BOWMAN, HONOR: A HISTORY 4 (2006) [HONOR: A HISTORY]

²⁶ *Id*

²⁷ *id*

²⁸ *id*

themselves by their own internal lights. Since one's sense of honor was so dependant on how they were viewed by others, the primary underlying value relates to one's public appearance.²⁹ Implicit in this view is that "unlike morality...honor...by its very nature is relative to a particular social context,"³⁰ among those that one considers to be their social peers at any given time.

Honor cannot reasonably be bifurcated into types; one primitive and the other acculturated.³¹ Instead it is more precisely understood as a unitary concept whose variations are simply manifestations mediated by social context but informed by an instinctual "foundational social reflex."³² Bertram Wyatt-Brown has described honor as "an ancient ethic...the cement that held regional culture together."³³ Although a single thing, from this perspective honor consists of a "cluster of ethical rules, most readily found in societies of small communities, by which judgments of behavior are ratified by the community consensus."³⁴ However, as Wyatt-Brown is quick to point out, "honor is not confined to any rank of society; it is the moral property of all who belong within the community."³⁵ In fact honor is such a galvanizing and insular concept that it "determines the community's own membership."³⁶

Honor should thus be understood as a very powerful social, political, and economic force that both defines and binds. This power is clear and manifest both to

²⁹ See contra, BERTRAM WYATT-BROWN, *THE SHAPING OF THE SOUTHERN CULTURE* (where the author describes a type of personal honor that strives for a higher goal and is not limited to the esteem of others. As an illustration, the author cites the example of Judge Frank Johnson, who during the civil rights era, was a southern judge who frequently ruled in favor of black civil rights, and suffered a storm of criticism from his fellow whites in the community as a result.) [SOUTHERN CULTURE]

³⁰ JAMES BOWMAN, *HONOR: A HISTORY* 5 (2006)

³¹ See contra *HONOR A HISTORY*, supra at note ___ at 4 (where the author divides the concept into two distinct varieties; primitive honor, which is instinctual, and cultural honor, which is learned behavior.)

³² Id at 2

³³ BERTRAM WYATT-BROWN, *SOUTHERN HONOR* xv (1982) [SOUTHERN HONOR]

³⁴ Id

³⁵ Id

³⁶ Id

those who are within “the circle of honor” and those who are outside of it. The power of honor so understood can give meaning, strength, and comfort to those within the circle and thus “served all members of society in a world of chronic mistrust, particularly so at times of crises great or small.”³⁷

Beyond the choice of labels, the fundamental concepts of honor and respect are deeply bred in the human psyche and have had a greater or lesser degree of resonance in every culture; especially in honor cultures such as the Old South. It is important to note that as Nisbett and Cohen point out “almost all societies value honor defined as precedence or status. The culture of honor differs from other cultures in that violence will be used to attain and protect this kind of honor.”³⁸ At some level, the drive to achieve public honor and respect is not a social extravagance or personal indulgence, but rather can be accurately characterized as a fundamental human need and therefore a basic human right in every culture. However, it is most strongly expressed in honor cultures like the Old South. Thus, everything that is true about honor and respect generally is significantly amplified in the context of honor cultures.

As Sharon Krause has persuasively observed, far from being “an artifact of particular cultures and eras” honor is “a lens thorough which to view fundamental features of human nature and politics.”³⁹ A sense of personal honor and respect has historically been and continues to be a critical source of human and political agency and therefore exerts a powerful influence on the motives to enter into political life as well as both the form and substance of law and society.⁴⁰ Plato recognized the human need for

³⁷ Id

³⁸ CULTURE OF HONOR, supra note __ at 4

³⁹ LIBERALISM WITH HONOR, supra note __ at 21

⁴⁰ Id

honor and respect, or recognition, in his tripartite organization of the soul. As David Brooks accurately observed in a recent article in the *New York Times*:

Plato famously divided the soul into three parts; reason, eros (desire), and thymos (the hunger for recognition). Thymos is what motivates the best and the worst things men do. It drives them to seek glory and assert themselves aggressively for noble causes. It drives them to rage if others don't recognize their worth. Sometimes it even causes them to kill over a trifle if they feel disrespected...thymos is the psychological origin of political action.

In this way honor can be seen as a reflection of a natural instinct to bond and protect. As it is natural, it is also a universal yearning that speaks to every individual at a very deep level. Wyatt-Brown captures this sense of the universality of the longing for honor, by calling it a "prehistoric code"⁴¹ which was in effect, baked in the primal genes. He colorfully describes this primal code in the following terms, "ever since man first picked up a stone to fling at an enemy, he has justified his thirst for revenge and for popular approval on the grounds of honor."⁴²

The thymotic desire for recognition and acceptance by their peers was a primary motivating factor for both the founding fathers and the Justices that participated in the Dred Scott decision. The honor group for the founding fathers was the colonial aristocracy. The honor group for Taney and his fellow Southern Justices was the Southern slave holding aristocracy. In Plato's terms, Taney's audience was the South, not the northern abolitionists or even the nation as a whole. In short, he sought to distinguish himself within his honor group by saving slavery and legitimizing the values, lifestyle, and economic foundation of the Southern aristocratic slave holder.

When viewed from this perspective, Taney's decision in Dred Scott is perfectly understandable, not simply in terms of his historical evaluation of the racial views of the

⁴¹ SOUTHERN HONOR supra note ___ at xviii

⁴² Id

framers, but more importantly they were consistent with the values of his honor group. Thus, the only legitimate criticism of his views was not that he followed the dictates of his honor group, but that he defined his honor group too narrowly. Instead of seeing himself through the eyes of the nation as a whole, as a son of the Southern honor culture, he saw himself only through the eyes of the particular and parochial interests of the Southern aristocracy.

In general, this type of failing is at the heart of all constitutional decisionmaking; where the essential question is who do the justices see as their honor groups or whose perspectives have they adopted as their own controlling values. When Supreme Court justices define their honor group too narrowly, their decisions will always appear to be and to a large degree are, the product of bias rather than neutral jurisprudence. Thus, the essence of the great constitutional decisions have occurred when the Supreme Court Justices involved have looked beyond their own parochial honor group and been driven instead by the interests of the entire nation at large. In fact, this may well be the most reasonable metric by which to measure the greatness of any judicial decision making.⁴³

III. Respect

While some authorities consider “respect” to be a contemporary synonym for “honor,”⁴⁴ there is a subtle but important distinction between the two words. Further, there is even a more finely drawn distinction between both of these concepts and the value of personal “self respect.” Honor by definition is the esteem one actually enjoys in the eyes of those who comprise what Bowman described as their honor group. However,

⁴³ See discussion of personal honor and the description of the civil rights decisions of Judge Johnson. *Supra* section II

⁴⁴ HONOR: A HISTORY *supra* note ___ at 5

respect is the degree to which an individual and those within his honor group believe that he is truly deserving of the bestowal of honor.

Thus, respect is a sense of one's *deservedness* in one's own eyes and the eyes of others in their honor group of the public recognition of honor. Because this sense may or may not be shared by every member of one's honor group, there is the potential for a gap to exist between one's own sense of their deservedness of respect and the sense held by the members of their honor group for the actual bestowal and maintenance of this degree of esteem. This gap can be occasioned or exacerbated either by one's own actions or the actions of others. Therefore, the essence of this distinction is that while it is not possible to have honor without respect; it is possible to have respect without honor. Moreover, respect is the prerequisite by which honor is earned. It is the personal perception of the existence and significance of this gap that is the stuff of duels and other blood combats to redeem or restore an individual's honor after a perceived dishonor or disrespect either by one's own words or actions or by those of another. Both honor and respect are therefore based on public esteem and worthiness, or the value of a person in the eyes of others. In stark contrast, self respect is based on the internal evaluation and determination of one's own self. In short, honor is the esteem we get from others; respect is the esteem we think we deserve from others; and self respect is the esteem we give ourselves.

Although physical duels were common in the Old South, they were also common in the honor culture of the post-revolutionary North.⁴⁵ However, more common in the North during that period was what one scholar has characterized as the "grammar of

⁴⁵ Note the famous duel between Arron Burr and Alexander Hamilton over a perceived slight against Burr's honor by comments made by Hamilton at a party. See generally AFFAIRS OF HONOR, *supra* note __.

political combat.”⁴⁶ Using this grammar as verbal weapons of political combat in the place of physical blood duels, the founding fathers well understood, spoke, and conducted their personal affairs and the political business of the new and emerging American republic under strict, unwritten, but universally recognized “laws of honor.”⁴⁷ These laws of honor shaped the contours and values of the new nation and were well known, revered, and practiced by men from both the South and the North in post-revolutionary America.⁴⁸

These laws of honor connected the founding fathers to the Southern slave holding aristocracy, and by implication to the whole of the Confederacy, on both the home front and the battle field.⁴⁹ This insight goes a long way toward explaining why individual foot soldiers fight in all wars but especially in armies that hail from an honor culture like the Old South; not for a great cause, but for the sake of their reputations in the eyes of their comrades and families. As Bertram Wyatt-Brown so colorfully described, “[o]nce John Sharp Williams asked an old veteran of the Civil War why he and his fellow troopers had fought so desperately, so bravely, when they knew all along the cause had already been hopelessly crushed. “We were afraid to stop. Afraid of what asked the Mississippi Senator. Afraid of the women at home...they would have been ashamed of us.”⁵⁰

So powerful was the influence of these laws on the Confederate mentality, that above all the standard martial values expressed during the Civil War, such as “courage,

⁴⁶ Joanne Feeman, *Affairs of Honor*, at xxii

⁴⁷ *Affaires of Honor*, at 170 – 171 (describing the language and rules of honor)

⁴⁸ *Id.*

⁴⁹ JAMES M. McPHERSON, *FOR CAUSE AND COMRADES: WHY MEN FOUGHT IN THE CIVIL WAR* 77 (1997). [FOR CAUSE AND COMRADES]

⁵⁰ *SOUTHERN HONOR*, *supra* note __ at 172 (noting that “For this same reason the Germanic tribes of long ago had fought so fiercely, as Tacitus reported.”) See also, *FOR CAUSE AND COMRADES*, *supra* note __ at 69 (where the author noted that one officer declined to resign saying “you know me too well to ever mention that to me, to desert my country at this time would be awful. I had better die, by that I would not disgrace myself nor the woman I have sworn to love, cherish and honor.”)

bravery, and valor,”⁵¹ the one value that Confederate soldiers wrote most about, both in their diaries, and in letters to loved ones back home, was the value of “personal honor.”⁵² Although it may be foreign and baffling to contemporary sensibilities, in the minds of a majority of confederate soldiers “personal honor [was] the one thing that they valued more than life itself.”⁵³ As James McPherson so aptly noted, “[t]he belief in honor also remained alive and well for many soldiers to the end. To give up the Cause because of reverses, wrote a Tennessee cavalry officer in 1864 would mean ‘disgrace [and] dishonor... forever.’”⁵⁴

While it may overwhelm the contemporary American mind, there was a significant commonality between the Founding Fathers, the men of the Old South, and most especially the common soldiers of the Confederacy. To all of these disparate groups, whether physical or political, the honor-based concept of “death before dishonor,” was a value that they all intimately understood. This is due to the fact that since honor revolved around one’s public appearance in the eyes of their peers, its pursuit and defense controlled and animated virtually every aspect of their public lives and their private concerns.

On another level, respect can be seen as a type of judgment and a particular variety of emotion. However, these are not emotions in the sense that is embodied in a Stoic influenced view of the world. Instead, as Martha Nussbaum has persuasively argued, these emotions, like all emotions, are not “pushes,”⁵⁵ that simply propels a person

⁵¹ Id

⁵² Id

⁵³ id

⁵⁴ FOR CAUSE AND COMRADES, supra note__ at 69 (noting also, an officer writing home to his wife said “I would rather my children would mourn a Father’s death than his disgrace.”)

⁵⁵ MARTHA NUSSBAUM, UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS 25 (2001)

around like gusts of wind or the currents of the sea, without being connected to the ways in which one perceives the world.⁵⁶ Instead, unlike the wind that simply hits whatever is in its path, from this perspective these emotions are what Nussbaum insightfully argues are “a kind of judgment or thought...that are about something...they have an object. Therefore, because these types of emotions are about something they can be said to have an intentional object.”⁵⁷ In this sense Nussbaum correctly observes, emotions like respect and disrespect are not “about their objects merely in the sense of being pointed at them and let go, the way an arrow is released toward its target.”⁵⁸ Rather, this kind of “aboutness is more internal and embodies”⁵⁹ as Nussbaum concludes, a distinct and intelligent way of seeing the world. In *Dred Scott*, the distinct and intelligent way Taney saw the world was from the perspective of a Southern honor culture.

In this way the emotion of respect is about something that we have intellectually judged and thought about. These thoughts are about things in the external and internal worlds that we think we need, and whose presence or absence has the power to cause us to feel pleasure or pain; worthy or unworthy; significant or insignificant. Viewed from this perspective a sense of respect can be accurately characterized as more than just a human desire, or mere social preference. Rather, it seems more akin to a basic and essential need, like human companionship or communal society which is manifested in a perception of value in one’s self and in one’s peers. Self respect and respect for others is

⁵⁶ Id at 24

⁵⁷ Id at 27

⁵⁸ Id

⁵⁹ Id

thus a formal judgment that is essential for human “flourishing”⁶⁰ and fulfillment as a social animal.

It follows that it is this rational and essentialized judgmental sense of the human valuing of both one’s self and the lives of others’ moral scaffolding, upon which people decide whether to treat others as mere objects or means to seek their own private desires or as ends in themselves. Thus Nussbaum reflects upon and concludes in this same vein that:

“an adequate normative view... should make room for mutual respect and reciprocity; it should treat people as ends rather than means and as agents rather than simply passive recipients of benefits, that... should include an adequate measure of concern for the needs of others, including those that live at a distance... and should make room for attachments to particular people, and as seeing them as qualitatively distinct from one another”⁶¹

However, it would be a serious mistake of logic to conclude that this fundamental social sense of mutual and reciprocal respect dictates any particular normative theory of social or political organization. Rather as Nussbaum notes, “these characteristics although essential are deliberately vague and general, in order to show that they can be exemplified by a number of different normative theories ...and in different ways.”⁶²

Although this analysis of respect can be manifested in many different types of social orders, the essential point of agreement between Nussbaum’s theories and my own is that they both advocate a normative theory in which the absence of some form of mutual respect that regards people as ends rather than means, is an important standard by which to measure the moral legitimacy of any particular form of political organization. Applying these theories to the American form of democratic organization reveals that

⁶⁰ Id at 12

⁶¹ Id

⁶² Id at 12

from its inception to today, the American social and political order has been and continues to be morally illegitimate with respect to its treatment of the sons and daughters of Africa.

From its first breath as a nation, the American experiment in democracy has regarded and treated black people as means rather than ends, as devoid of a sense of personal agency' and most importantly as "qualitatively [in]distinct from one another."⁶³ This conclusion is morally fatal to both America's social and political organization. Moreover, it is a moral condemnation that can neither be redeemed nor atoned without a complete renunciation of white America's insistence on the selective denial and erasure of the true record of its national racial memory.

IV. The Southern Honor Culture and Dred Scott

The dictates of honor can so exhaust the social landscape that they have the power to go beyond mere elements of a culture, and instead dominate and constitute the essential building blocks of an entire culture. When this happens, the analysis shifts from a consideration of the behavior of individuals within a culture who seek simply honor, to what are generally described as entirely "honor based cultures."⁶⁴ In an honor culture, "there is no higher goal than honor and glory and its corollary of shame avoidance."⁶⁵ Because of the cultural norms that honor cultures develop, as it has been accurately observed, the natural dynamic of an "[h]onor culture erases any meaningful distinction

⁶³ Id

⁶⁴ WILLIAM IAN MILLER, *THE MYSTERY OF COURAGE* 179 (2000) [MYSTERY OF COURAGE]

⁶⁵ Id; see also SOUTHERN HONOR *supra* note ___ at xiv (describing honor and shame as opposite concepts); JEROME H. NEYREY, *HONOR AND SHAME IN THE GOSPEL OF MATTHEW* (1998) (where the author describes the values of honor and shame in Mediterranean communities of antiquity); ROLAND MULLER, *HONOR AND SHAME: UNLOCKING THE DOOR* (2000) (discussing honor and shame as opposite values in Arab cultures)

between service to some noble principle and the avoidance of shame and the acquisition of honor. The entire moral order is subsumed under the larger goal of honor.”⁶⁶ Although it may be foreign to many contemporary sensibilities, quite literally in an honor culture there is “no higher principle”⁶⁷ than personal and thus publicly acknowledged honor.

An important aspect in understanding the white Southern honor culture requires an appreciation for the uniqueness of America’s brand of chattel slavery in which “only blacks could be slaves’ [and] no one else, however great their misfortune, could end up enslaved.”⁶⁸ At the time of the decision in Dred Scott the “honorable gentleman who ruled the Old South”⁶⁹, lived in what can accurately be described as a traditional honor culture.⁷⁰ In fact, the Southern aristocracy who owned the large plantations and who were therefore most dependent on slavery saw themselves as “men of honor.”

As Orlando Patterson has correctly observed in his seminal study on slavery, the honor culture of the Old South “developed to its highest degree a slaveholder’s ideology...and the most elaborate and deliberately articulated timocracy of modern times.”⁷¹ Quite literally, in the white Southern honor culture it was impossible to have a public persona of any significance without owning property in slaves. Therefore, honor and the efforts made to achieve and maintain it was the “pivotal...and central articulating principle of southern life and culture.”⁷² John Hope Franklin captured the significance of honor in the timocratic Old South when he said, “the honor of the Southerner caused him

⁶⁶ Id

⁶⁷ Id

⁶⁸ SLAVERY AND THE LAW, supra note __ at 66

⁶⁹ KENNETH S. GREENBERG, HONOR SLAVERY xi (1998)

⁷⁰ RICHARD E. NISBETT AND DOV COHEN, CULTURE OF HONOR xvi (1996); See also JAMES BOWMAN, HONOR: A HISTORY 4 (2006) (where he points out that the terms honor and respect are synonymous terms)

⁷¹ ORLANDO PATTERSON, SLAVERY AND SOCIAL DEATH 94 (1982) [SLAVERY AND SOCIAL DEATH]

⁷² Id at 94-95

to defend with his life the slightest suggestion of irregularity in his honesty or integrity; ...to him nothing was more important than honor. Indeed he placed it above wealth, art, learning, and the other “delicacies” of an urban civilization and regarded its protection as a continuing preoccupation.”⁷³

In the white Southern honor culture, honor was so important both personally and culturally that one scholar has described it as “the keystone of the slaveholding South’s morality.”⁷⁴ Moreover, there is “a direct causal link between the southern ruling class’s...sense of honor and the institution of slavery.”⁷⁵ Although modern sensibilities may see a contradiction between morality and slavery and therefore regard the South’s morality as hypocritical, to the Southern mindset “there was nothing at all hypocritical or anomalous about the southerner’s highly developed sense of honor and freedom. Those who most dishonor and constrain others are in the best position to appreciate what joy it is to possess what they deny.”⁷⁶

Moreover notions of honor and slavery were sustained by southerner’s simultaneous devotion to religion and the dictates of honor. In fundamentalist religious terms of the Old South, “all mankind were marked by Adams original sin. It therefore followed that the curse of Ham imposed “original dishonor” upon the black race and consigned all of such color to perpetual bondage.”⁷⁷ Thus in the mind of the Old South, it was not southerners who had reduced black people to slavery; instead they believed

⁷³ JOHN HOPE FRANKLIN, *THE MILITANT SOUTH* 34-35 (1964)

⁷⁴ BERTRAM WYATT BROWN, *SOUTHERN HONOR: ETHICS AND BEHAVIOR IN THE OLD SOUTH* vii (1982)

⁷⁵ *SLAVERY AND SOCIAL DEATH*, supra note __ at 95

⁷⁶ *Id* at 94

⁷⁷ BERTRAM WYATT-BROWN, *THE SHAPING OF SOUTHERN CULTURE: HONOR, GRACE, AND WAR 1760-1880* xiii (2001)

that God made black people slaves through the curse of Ham.⁷⁸ In this way, “honor and grace—as opposed to shame and disgrace—were linked in advancing the religious proslavery argument and in the bedrock of Southern white folk tradition about race as well.”⁷⁹ Thus in the Southern mind, “slavery was wholly compatible with honor.”⁸⁰ This was so much a fact of Southern life, that one scholar has noted that “over the course of a parallel and mutually sustaining existence, white man’s honor and black man’s slavery became in the public mind of the South practically indistinguishable,”⁸¹ and mutually dependent.

The relationship between Southern masters and black slaves was complex and does not admit to easy descriptions. However as an important feature of this relationship it is important to note that a type of mutuality of dependence existed between them. Masters surely “owned” slaves, but they also were defined by that ownership because “beginning in childhood and continuing through life...the masters sense of honor was derived directly from the degradation of his slave.”⁸² Thus, because slaves were “universally treated as dishonored persons...the sense of honor held by the master, [and] its denial to the slave,” was in many ways enhanced “through the degradation of the slave and possibly the slave’s own feeling of being dishonored and degraded.”⁸³

This relationship of personal identity for the master through his degradation of the slave, was quite problematic. As Patterson noted, “the master’s existence is enhanced by the slave’s, for in addition to existing on his own account his consciousness is mediated

⁷⁸ Id at xiii (“Looking upon the nakedness of his father, the patriarch, Ham had violated God’s laws and shamed the old man, for which indiscretion punishment had to be extracted. The honor of God, the honor of the patriarchal order, which Noah represented, required stern vindication.”)

⁷⁹ Id

⁸⁰ SOUTHERN HONOR, supra note __ at 16

⁸¹ Id

⁸² SLAVERY AND SOCIAL DEATH, supra note __ at 95

⁸³ Id

through another consciousness, that of the slave.”⁸⁴ Hegel describes this complex interdependency as a function of the dialectics of slavery. Patterson incisively explains Hegel’s views on this relationship when he writes

At precisely the point where the master achieves lordship, he finds that he has become dependent on his slave. He cannot be sure even of his own existence, since the reality of his domination rests on the unreality of that which he masters; the slave, whom he has socially killed and rendered non-essential by making him merely an extension of himself. Further, the slave cannot confirm his honor, cannot offer recognition, because he is not worthy. This is what Alexandre Kojève, in his celebrated commentary calls the masters ‘existential impasse.’⁸⁵

In the honor culture of the Old South, honor “suffuse[d] all relations”⁸⁶ so much so that men of the Southern honor culture spoke a “language of honor . . . that was used by the Southern gentlemen [and] was embedded in a slave society.”⁸⁷ This language of honor also had its own values and was spoken not simply by the elite planter class, but also, so dominated the entire culture that it “was spoken almost universally by the white men of the South.”⁸⁸ Although there can be no question that the language was associated and connected to slavery it was so embedded in the Southern culture that “it was spoken by many men who did not actually own slaves.”⁸⁹

The essential connection between honor and respect in an honor culture and the peculiar institution of slavery, is that to the men of the Old South, being worthy of respect and honor was the basis of how they defined and distinguished themselves from slaves. Therefore since the “Southern gentleman defined a slave as a person without honor,” it

⁸⁴ Id at 97

⁸⁵ Id at 98 (note that Patterson himself totally disagrees with the notion of an existential impasse)

⁸⁶ SOUTHERN HONOR, supra note __ at 16

⁸⁷ KENNETH S. GREENBERG, supra note __ at (pointing out that Southern honor language “was alien to modern English.”)

⁸⁸ Id at xii

⁸⁹ Id

follows that “all issues of honor relate to slavery.”⁹⁰ Kenneth Greenberg has identified at least three ways “in which men of honor distinguished themselves from slaves: they would never allow anyone to call them liars; they gave gifts’ and they did not fear death.”⁹¹

The focus on not being called a liar is a critical characteristic of honor cultures generally and the honor culture in the Old South with particular force. In the language of honor cultures being called a liar was an insult of the highest order. Such an accusation was an attack on both a man’s masculinity and his honor. It was essentially an accusation that one’s public image as a man was a sham; a fraud that had been perpetrated on the entire community when in fact the target of the insult was unmanly and without honor. In the language of honor cultures, the assertion of a clear and apparent distance “between asserted appearance and reality,” was in essence tantamount to being exposed or “unmasked” in public and thereby “shamed.”⁹²

Since shame is the direct opposite of honor, this connection between lying and shame helps to explain why the South was so enraged by the harshness of Northern criticism of Taney’s white supremacist reasoning in supporting slavery. This criticism was tantamount to unmasking and thereby publicly shaming both Taney and by implication the entire South; by pointing out the gap between their claims of legitimacy in their asserted pro-slavery defenses and the stark reality of black humanity. As Kenneth Greenberg has correctly emphasized “[m]asters generally saw slaves as people

⁹⁰ Id at xiii

⁹¹ Id

⁹² HONOR AND SLAVERY, supra note __ at

who lacked the power to keep themselves from being unmasked.”⁹³ But in order to bolster their sense of identity as whites, masters frequently engaged in activities that were specifically designed to “unmask” their slaves by showing their inability to protect themselves. Such activities included “coercive sex” or more aptly “slave rape,” as well as whipping, slapping and other forms of physical and psychological abuse; none of which was subject to criminal sanction. Thus avoiding being “unmasked” or being accused of “the lie” was a vital part of the Southern honor culture.

From this perspective, it becomes clear that when Taney and the Dred Scott decision were so powerfully criticized and rejected by Lincoln and so many other significant public figures in the North, from the Southern perspective Taney was not accused of simply being wrong; instead, Taney was accused of actually lying about the historical record upon which his opinion rested, and therefore lying about the logic of his legal conclusions. In this way, what was deemed as mere political criticism in the North, was seen from the perspective of the Southern honor culture as exposing Taney, or unmasking, and shaming him by publicly accusing him of being a liar and thus without honor. It followed that if Taney was dishonored in his vindication of the Southern way of life; the South was dishonored too. Therefore, in the logic of the Southern honor culture, it followed that if Taney was lying about the natural inferiority of blacks in his defense of slavery, then Southerner’s pro-slavery arguments were lies slavery itself was a lie; and if slavery was a lie, then the entire Southern way of life was a lie, and if the entire Southern

⁹³ Id at 37 However there is one notable exception to this general rule. Greenberg noted that “Fredrick Douglas understood the deep connection between slavery and the inability to duel. Douglass was one of the few slaves ever to engage in a duel.” Thus duel has been overlooked by most historians because it did not involve dueling in the classic sense instead it consisted of Douglass asserting his manhood against what he regarded as the unjustified treatment of an overseer who had a reputation for “breaking negroes.” In essence Douglass defied the overseer and made it clear, in his words, that “the white man who expected to succeed in whipping me, must also kill me.” Id at 36. In this way, Douglass “asserted his power...[and] restored his manhood.” Id.

way of life was essentially a lie, then all Southern men who participated in, identified, and profited from slavery and this way of life were liars, too. In short, their entire way of life was dishonored and attacked as not deserving of respect.

Under the code of honor of the South, this was a profound insult, and the only way to vindicate such an insult to the entire Southern way of life and every Southern man of honor, was through violence—a duel. In this way, the entire civil war can be characterized as a duel of honor on a continental scale because such a profound dishonor demanded an equally profound satisfaction. Such a public expression of disrespect “struck at a man’s honor and reduced him as a man..[and therefore] his very identity was up for grabs.”⁹⁴ Since in an honor culture, men of honor “deserved respect” such public and powerful “signs of disrespect were dangerous”⁹⁵ because they either had to be retracted or punished and redeemed with a level of violence commensurate with the insult.

One of the most important aspects of an honor culture that is generally not sufficiently appreciated by those who do not share the ideology of honor, is “the importance placed on insult and the necessity to respond to it.”⁹⁶ As Nisbett and Cohen so accurately point out, in the ideology of an honor culture, “an insult implies that the target is weak enough to be bullied. Since a reputation for strength is of the essence in the culture of honor, the individual who insults someone must be forced to retract; if the instigator refuses, he must be punished—with violence or even death.”⁹⁷ In particular, in an honor culture certain types of insults were “off limits, tame as they are by modern

⁹⁴ JOANNE B. FREEMAN, *AFFAIRS OF HONOR: NATIONAL POLITICS IN THE NEW REPUBLIC* xvi (2001) [AFFAIRS OF HONOR]

⁹⁵ *id*

⁹⁶ *CULTURE OF HONOR*, *supra* note __ at 5

⁹⁷ *Id*

standards. Rascal, scoundrel, liar, coward and puppy; these were fighting words, and anyone who hurled them at an opponent was risking his life.”⁹⁸ In addition, in an honor culture there was one type of insult that was especially unacceptable; which is “one directed at female members of a man’s family.”⁹⁹ Bertram Wyatt-Brown insightfully summed up this critical aspect of male honor culture values when he said,

nothing could arouse such fury in traditional societies as an insult hurled against a woman of a man’s household, most especially his mother. In the Old South, as in the ancient world, “son of a bitch” or any similar epithet was a most damaging blow to male pride. The intensity of feeling arose from the social fact that a male’s moral bearing resided not in him alone, but also in his women’s standing. To attack his wife, mother, sister was to assault the man himself. . . .An impotence to deal with such wrongs carried all the weight of shame that archaic society could muster.¹⁰⁰

Add to this mix, the fact that “southerners were quicker to duel than northerners,”¹⁰¹ there was an inherent danger and risk in ignoring a public dishonor because it ran the risk of unmasking you as too weak to defend yourself and took a decided step toward public branding with a reputation for cowardice, which only invited more insults. As one scholar has correctly observed, “given the importance of reputation, an attack on a man’s honor was the ultimate trump card. The power of such an attack,” was such that “when honor was at stake, all else fell by the wayside, for a man’s sense of self and possibly his life were at risk.”¹⁰²

Once a man of honor was insulted or shamed by being metaphorically “unmasked” in public, his only recourse was to either actually or at least claim to be

⁹⁸ AFFAIRS OF HONOR supra note ___ at xvi

⁹⁹ CULTURE OF HONOR supra note ___ at 5

¹⁰⁰ SOUTHERN HONOR, supra note ___ at 53

¹⁰¹ AFFAIRS OF HONOR supra note ___ at xvi

¹⁰² Id at 28

willing to resort to violence to defend, vindicate and reclaim his honor.¹⁰³ Originally this violence was played out in the Old South in the form of duels between members of the aristocracy, and by hand to hand fighting in the lower socioeconomic classes. The common glue in both groups was the willingness to use violence and the willingness in the use of violence to risk being killed.¹⁰⁴ The willingness to put one's life at risk for the cause of honor was the ultimate expression of manliness and honor because it articulated, in the eyes of one's honor group, that death was preferable to dishonor. It also demonstrated the ultimate power and command by putting one's most precious possession, his own life, at risk in the name of honor.¹⁰⁵

Thus, a further demonstration of the distance between whites and slaves was that whites actually had the power and authority to use violence to protect their physical bodies and their public integrity and slaves did not.¹⁰⁶ This was true because, whether free or slave, almost universally, blacks had neither the power nor the authority to use violence to protect either their physical bodies, their personal honor, or the honor of their families from insults by whites. For example, some have accurately observed that "southern states forbade [even]...free blacks...from owning firearms."¹⁰⁷ This prohibition against all blacks free and slave from owning firearms struck at the very heart of black respect and honor, because by law they were denied the power to protect both themselves and their families. The inability or unwillingness to defend either themselves

¹⁰³ Id at 178 (in the context of a serious dishonoring, describing the importance of a display of a willingness to "die for their honor")

¹⁰⁴ Id at 8

¹⁰⁵ Id at 178

¹⁰⁶ This is why the "duel" between Fredrick Douglass and the 'negro breaker' overseer, supra note __, was so significant, and noteworthy. As Douglass described it himself, his act of defiance and his expressed willingness to die for it, "was a glorious resurrection from the tomb of slavery to the heaven of freedom." Honor and Slavery, supra note __ at 36.

¹⁰⁷ SLAVERY & THE LAW 6 (PAUL FINKLEMAN, ED) (1997)

or their families was the very height of dishonor and a profound insult that blacks could not redeem.

This importance of the ability to defend oneself, created an additional distance of honor between whites and blacks, at least with respect to black slaves, because a white man *could* risk his life for the sake of honor, because his life belonged to him; while a slave could not, because a slave's life did not belong to him, it was the property of his master. This relationship between honor and power is what allowed whites to feel a sense of distance from and superiority over all blacks. It was also the basis of what made many, but certainly not all, blacks feel inferior and weak. When Taney's words implied that blacks had no right to be respected by whites, this had the effect of shoring up this distance between whites and blacks. This is true because if one had no right to be respected then they could not be disrespected; therefore anything could be said of or done to such persons with little or no risk. It also further underscored the notion that by their very nature, all blacks whether free or slave, were naturally a distinct and inferior breed, because they had no honor. This fact was underscored and communicated in the language of honor in Taney's use of the word "respect" in Dred Scott. In this way, Taney's carefully worded opinion was an attempt to constitutionalize the distance between all whites and all blacks, and thereby permanently enshrine and protect white honor.

The honor culture of the South was focused primarily on the ability of a man to project a public image of strength, a sense of command, and the willingness to use violence, and risk death in order to preserve his public image and thus his honor, which thereby made him worthy of respect. Being a man of honor in the Southern honor culture

was a very public statement that was not to be messed with; he was the “master of events to one’s family and household.”¹⁰⁸ As Nisbett and Cohen point out, in order to protect his honor, a man who lives in an honor society “must be constantly on guard against affronts that could be construed by others as disrespect. When someone allows himself to be insulted, he risks giving the impression that he lacks the strength to protect what is his...thus [he] must respond with violence or the threat of violence to any affront.”¹⁰⁹

Thus, one of the principal features of an honor culture is the connection between honor and protection. In these societies an honorable man was expected to be willing and able to “protect one’s person, family, and property” including most especially “the beliefs embodied in them. A sense of honor is [thus] the source of the protectiveness so characteristic of manliness.”¹¹⁰ In this way honor cultures like the Old South, are by necessity patriarchal in structure. This is true because, “honor is an asserted claim to protect someone, and the claim to protect is a claim to rule. How can I protect you if I can’t tell you what to do.”¹¹¹ This perspective makes it clear that the Southern slave holder was a man who claimed a right to command and protect both his family and his slaves.¹¹² Any insult to his honor was therefore an assertion of his inability to protect himself, his family and his property. In this way Southerners took the insult occasioned by the negative Northern reaction to Dred Scott, as a profoundly personal insult, because it was a claim of them having no right to rule or command or protect their property; that is their slaves.

¹⁰⁸ CULTURE OF HONOR, *supra* at xv

¹⁰⁹ *Id*

¹¹⁰ *Id* at 65

¹¹¹ *Id* at 66

¹¹² Interestingly, this is also the basis of the fact that a physical or other public insult to a man’s slave by another white man was an insult to the master himself.

In the Southern honor culture, the very essence of the definition of slaves was based upon being a person without honor. It is not an overstatement to say that in the South “all issues of honor related to slavery.”¹¹³ But in the South, the homage to honor was not necessarily tied to slavery because it “existed before, during and after slavery.”¹¹⁴ However, “the determination of men to have power, prestige, and self-esteem and to immortalize these acquisitions through their progeny was the key to the South’s development.”¹¹⁵

Although the South did not invent slavery, it did raise the peculiar institution to a high art, in an effort to more finely define themselves. In this way, Southern honor depended on black dishonor. The criticality of this connection is evidenced by the founding principles of the Confederate States, which presaged the beginning of the Civil War. In his famous “cornerstone speech” the Vice President of the Confederate States of America, Alexander H. Stephens said that the new nation was dedicated to

the advancement of prosperity, happiness, safety, honor, and true glory of the confederacy...[because] our new government is founded upon...the idea, its foundations are laid, its corner-stone rests upon the great truth, that the negro is not equal to the white man; that slavery –subordination to the superior race—is his natural and normal condition. This, our new government, is the first, in the history of the world, to be based upon this great physical, philosophical, and moral truth.¹¹⁶

Stephens’ “cornerstone” speech made it clear that the honor the Confederate states was founded to protect white’s honor, had its foundation, its “cornerstone” on the presumption of inherent black inferiority.

¹¹³ CULTURE OF HONOR, supra at xiii

¹¹⁴ SOUTHERN HONOR supra note __ at 16

¹¹⁵ Id

¹¹⁶ Cornerstone Speech, Savannah Georgia, March 21, 1861, found at <http://members.aol.com/jfepperson/corner.html> (last visited March 14, 2007)

Taney understood that in the Southern mind, there was more at stake in Dred Scott than simply economic property rights in slaves. Thus, Taney's characterization of blacks, both free and slave, as being unworthy of white respect, both personally and in their legal rights, was no casual choice of words. By using the language of honor and respect he was signaling to the South that white honor, which was delicately balanced by black dishonor, was not only being protected and vindicated, but also enshrined into national constitutional law that the entire country would be bound to recognize and respect. Thus, Taney's decision was not simply a justification for the economic system of southern slavery, but a vindication for the entire southern way of life; where white honor and respect were measured by their distance from black dishonor and disrespect.

In the Southern language of honor, this was a critical protection, because if slaves could become free merely by traveling with their owners to free soil, and thereby become citizens – just like whites – then the distance between white honor and black dishonor would shrink to non-existence. In short, if blacks could be good citizens then the whole southern way of life was a lie, and the entire scaffolding of southern honor would collapse. Ironically, with the North's victory in the Civil War, and the passage of the 13th, 14th, and 15th constitutional amendments, this is precisely what happened, and the entire southern way of life was swept away. In the words of Margaret Mitchell, it was gone with the wind.

Viewed from this perspective it is easier to understand the vehemence of Southern reaction to Northern resistance to Dred Scott, and their willingness to go to war over it. It even helps to understand the massive white resistance and violent reaction to reconstruction. In the grammar of honor, black citizenship, land ownership, and full

political participation under Northern military protection, was the ultimate dishonor. Thus, when whites set about violently “redeeming” the south and ending reconstruction, whites were not simply taking back political and social control of the South, they were vindicating and taking back their honor in the only way they knew how – through violence.

The most important legacy of the Dred Scott decision is based on the extent to which the values of the Southern honor culture were injected into national policy and racial ideology that continues to haunt American race relations to this day.¹¹⁷ This is true because the heart of an honor culture lies in a belief in a “natural order of rank [among men]...in which their manliness makes sense and deserves respect.”¹¹⁸

However, since duels of honor are to the death, it is important to note that although the South was defeated in the Civil War, its lost cause of white supremacy as articulated by Vice President Stephens, was not killed, and lives on today as an undercurrent in American race relations.¹¹⁹

Thus, a vital part of the legacy of Dred Scott today is that in the minds of many Southerners, and those that follow their way of thinking, to this very day the ideological war to vindicate Taney’s portrayal of blacks and thus Southern honor, still goes on. This longing for another time when white supremacy was unquestioned and enshrined into law, constitutes a type of continuing cold war of resistance to black racial equality. This continuing cold war has manifested itself in a palpable sense of white disrespect and

¹¹⁷ See generally, WILLIAM C. DAVIS, *THE LOST CAUSE: MYTHS AND REALITIES OF THE CONFEDERACY* (1996) (describing the continuing myths indulged in by many in the geographical and ideological south, to justify the Civil War and promote its “lost cause” as having nothing to do with slavery) [LOST CAUSE]

¹¹⁸ HARVEY C. MANSFIELD, *MANLINESS* 110 (2006) [MANLINESS]

¹¹⁹ LOST CAUSE, *supra* note __.

dishonor that attempts to deny the equality of blacks and whites; in short, their equal humanity.

This racial cold war mentality on the part of so many whites laid coiled as a motivating force at the very heart of Jim Crow segregation; massive white resistance to educational integration in public schools in *Brown v. Board of Education*,¹²⁰ anti-miscegenation laws overturned by *Loving v. Virginia*,¹²¹ the zeal seen in opposition, originally to *Bakke v. California*¹²² and more contemporaneously to *Grutter v. University of Michigan*¹²³ upholding the limited constitutionality of affirmative action policies in higher education; and the Supreme Court's most recent action in striking down voluntary school integration policies in *Seattle and Kentucky*,¹²⁴ as well as residential mortgage discrimination that denies so many blacks the equal opportunity to own homes; the racially targeted subprime and predatory lending practices that strip the few black homeowners that exist, of their home equity thorough fraud and misrepresentation.¹²⁵

The list goes on and on. Viewed from this perspective, the disrespect and dishonor shown by whites to blacks on a racial basis, is not just a civil rights issue, it's a human rights issue.¹²⁶ In this way, the very essence of anti-black discrimination in all areas, from the most subtle to the most outrageous and egregious, constitutes a modern legacy of *Dred Scott* and Justice Taney's argument regarding the natural logic of white honor and supremacy and black dishonor and subordination.

¹²⁰ *Brown v. Board of Education of Topeka, Kansas*, 347 U.S. 483 (1954)

¹²¹ *Loving v. Virginia*, 388 U.S. 1 (1967)

¹²² *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978)

¹²³ *Grutter v. Bollinger*, 539 U.S. 306 (2003)

¹²⁴ *Meredith v. Jefferson County; Parents Involved v. Seattle Schools*, 127 S. Ct. 2738 (2007)

¹²⁵ See generally Cecil J. Hunt, II, *In the Racial Crosshairs: Reconsidering Racially Targeted Predatory Lending Under a New Theory of Economic Hate Crime*, 35 UNIV. TOLEDO LAW REV 211 (2003) (generally describing the weighty evidence documenting that much of predatory lending is racially targeted toward blacks on both a racial and economic basis)

¹²⁶ *Id*

Thus, as a result of social and legal processes as exemplified in Dred Scott, racialized and essentialized color was written onto otherwise non-colored human bodies in order to naturalize and justify the kind of racial hierarchy that supports an honor culture. Similarly, fueled and emboldened by Taney's infamous racial defamation, black people were not disrespected because they were black, instead, they were called black in order that they could be disrespected and thereby clearly demarcate and rationalize who was worthy of honor and respect and who was not; in short, who was fully human and who was not. The sad legacy of the Dred Scott decision is that it created an expressly racialized line separating those worthy of respect from those who are not. This line continues to this very day to use a racialized determination of who is white and who is black as a surrogate for one's worthiness of social, legal, and political respect...and disrespect.

As Derrick Bell has incisively observed, "to this day African Americans see their slave heritage...more as a symbol of dishonor than a source of pride. It burdened black people with an indelible mark of difference as we struggled to be like whites. In the end American slavery was peculiar because all slaves were defined by race."¹²⁷ As Bell's words suggest, the history of black people in America, almost from their first arrival in 1619, to today, has been characterized and negatively impacted by an association with the elusive quality of honor and respect and their binary opposites, dishonor and disrespect.

It is beyond dispute that there have been major, significant, important, and dramatic improvements over the last 150 years, in the recognition and enforcement of the rights of blacks in the political, economic, and social arenas. However, although black people have attained significant forms of legally recognized and government enforced

¹²⁷ SLAVERY AND THE LAW, Finkelman ed, internal citations omitted, at 6, 7

formal rights of equal treatment and legal equality, race relations between blacks and whites in America not only continue to be strained and uncomfortable, but also significant psychological and material racial disparities continue to exist and in some respects have intensified.

Moreover in light of and perhaps because of these racial difficulties, the goal of achieving any meaningful form of national racial equality continues to appear frustratingly elusive. One of the principal underlying reasons for these frustrating and continuing racial problems is because the struggle for the existing levels of formal racial equality that blacks have achieved, has caused many whites to feel resentful for what they perceive as a loss of their deserved racial honor, respect and supremacy.

One scholar has described the negative white reactions to black civil rights gains as consisting of some combination of “a nasty residue of...cold silent contempt...bitter resentment, cynicism...deep dismissal, disgust...and a denial of the prospect of reconciliation.”¹²⁸ Thus, despite formal legal equality, blacks remain the objects of white disrespect, but more importantly, from a white perspective blacks continue as Taney said, to have no right to ***be*** respected by many whites. The fact that many whites feel a fundamental disrespect for black people is deeply troubling and contributes either explicitly or implicitly to much of the continuing racial discord, strain, and psychological and material racial inequality in America.

Justice Taney’s implicit declaration that blacks have no right to ***be*** respected by whites, gave an official governmental imprimatur and a residual social tinge and license to all those who claim the mantle of being white, to feel entitled to impose on all blacks, whether free or slave, servile and degrading treatment on their whim, and as a means to

¹²⁸ THOMAS E. HILL, JR., RESPECT, PLURALISM, AND JUSTICE 60 (2003)

whatever end whites desired, with no value as human beings as ends in themselves. This actual and residual governmental license could not help but, at least to some degree, lead to a sense inferiority and loss of self respect by blacks who were subjected to such treatment. However, this dynamic also applied even to those who were lucky enough to escape direct harsh treatment by whites. Even blacks who had not yet been the subject of white disrespectful treatment knew that because such degrading impositions on their lives had been sanctioned by the law, the threat of helplessly being on the receiving end of such white disrespect was never far from their minds.

The disrespect against all blacks that Taney authorized and thus encouraged in *Dred Scott* has not only practical, social, political and psychological implications, but also important moral considerations as well. Kant argued that it was a “fundamental moral principle, a categorical imperative, that we should treat humanity, in every person, as an end in itself, never as a means only.”¹²⁹ In terms of the effect this treatment has on the sense of self-respect felt by those subjected to such disrespectful treatment, Kant also persuasively argued that “self respect requires that we avoid servility and other forms of self-degradation...[because] as a human being, everyone has an equal worth, independent of social standing and individual merits.”¹³⁰ This characterization of the kind of need that all humans have and are entitled to as a consequence of their humanity, is directly tied to America’s legacy of slavery generally, and particularly to the type of racialized chattel slavery practiced in the honor culture of the Old South, and endorsed by *Dred Scott*. From a moral standpoint to subject or authorize by law the treatment of human beings to

¹²⁹ Id at 64 (citing Kant’s *Metaphysics of Morals*)

¹³⁰ Id at 64

being forced to “grovel and humiliate [them]selves before others, in shame or even guilt” amounts to “deny[ing] one’s equal status as a human being.”¹³¹

V. Conclusion

The historical disrespect toward blacks in America, so epitomized by the racist rhetoric of Dred Scott, has been passed down from the past to the present. In the minds of many whites on both sides of the political spectrum, both liberal conservative, black people, as Taney suggested, still have no right to respect from whites...and frequently receive none. This basic and so far unaltered racial bias lies unspoken beneath all of the dramatic changes in race relations that have taken place in the last 30-40 years in America. In most whites it is not consciously thought nor actively expressed, but it is there, and quietly manifests itself in the nearly all white worlds that many whites construct for themselves outside of the workplace. Others wear this racial disrespect like a badge on their sleeves and express it in a myriad of ways, from revering and exhibiting the confederate battle flag in its many forms, to continued open hostility to racial integration in education, housing, and employment, to joining extreme right wing white supremacist groups.

Aristotle famously said that “we are what we repeatedly do.” To the extent that America has repeatedly shown disrespect and dishonor to black people, in its courts, legislatures, workplaces, schools and neighborhoods, racism has become one of the most traditional of American family values. Judge Higginbotham has written that this kind of disrespect is the fuel which drives the American “precept of black inferiority [and it] is the hate that raged in the American soul through over 240 years of slavery and nearly

¹³¹ Id

ninety years of segregation. Once slavery was abolished, and once the more oppressive forms of segregation were eliminated, many whites' hate still had not lost its immediate object."¹³² Whether this hate is expressed personally in snarling contempt or benignly in sterile institutional racism, the result is the same. Thus, Higginbotham concludes that "the ashes of that hate have, over the course of so many generations accumulated at the bottom of our memory. There they lie uneasily, like a heavy secret which whites can never quite confess, which blacks can never quite forgive."¹³³ The ultimate but deceptively simple answer to this distressing and persistent problem lies in the recognition of each person as possessing an equal humanity, deserving of equal respect and regard as human beings; nothing more, nothing less. This message was simply but eloquently summed up on the signs worn on the chests of silent black men marching during the civil rights movement, which was greeted by many whites with jeers and racial epithets, which read simply, "I am a man."

¹³² SHADES OF FREEDOM, supra note __ at 17

¹³³ Id