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Abstract:	Tribal Constitutions, Citing Slavery, and Petitioning for Freedom are digital legal history projects focused on expressions of sovereignty within tribal constitutions, the remnants of slavery in modern law, and the underexamined role of habeas petitioners in challenging coercion and confinement in the long-nineteenth-century United States. Each project deploys legal databases differently, but with the shared goal of contributing key insights to legal historical scholarship and offering interfaces that appeal to a broad, public audience.

The Journal for Digital Legal History

Citing Slavery Project

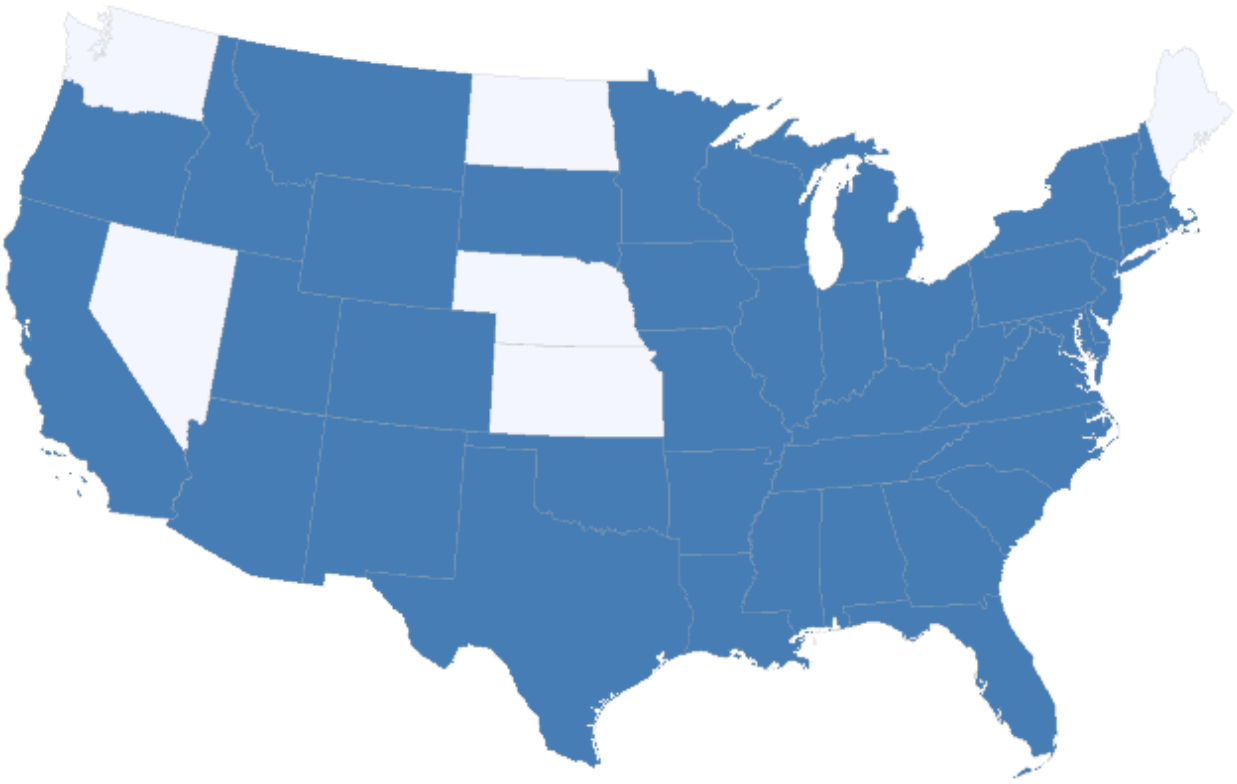
Audrea Dakho, Morgan Henry, Ilina Krishen, and Justin Simard

citingslavery.org

The Citing Slavery Project documents the past and continued influence of the law of American slavery. In the nineteenth century United States, slavery was a massive institution that generated thousands of legal opinions.[1] These opinions continue to be cited by modern judges and lawyers for routine propositions of law, and the doctrine established in these cases still exerts a major influence on American jurisprudence.[2] The influence of slavery appears in a variety of subject matter areas. Take, for example, *J&D Towing v. American Alternative Insurance*, a 2015 case from the Texas Supreme Court dealing with the question of the recovery of damages for injury to a dump truck.[3] In coming to its decision, the court cited *Pridgin v. Strickland,* an 1852 case in which an enslaver sued for the loss of use of an enslaved person who had been "unlawfully detained."[4] Although the modern court recognized *Pridgin's* roots in slavery, it nonetheless treated it as valid legal authority, citing the court's statement that "the owner of the slave 'would be allowed to recover not only his value but damages for the value of his services from the time of the demand up to the time of the trial[.]'"[5]

Use of slave cases as precedent is surprisingly common. More than 300 courts have cited a case involving an enslaved person as good law in the last thirty-five years.[6]

[1] JAMES HUSTON, CALCULATING THE VALUE OF THE UNION: SLAVERY, PROPERTY RIGHTS, AND THE ECONOMIC ORIGINS OF THE CIVIL WAR 25-27 (2016); Justin Simard, *The Precedential Weight of Slavery*, 47 N.Y.U. REV. L. & SOC. CHANGE (forthcoming 2023)
[2] Justin Simard, *Citing Slavery*, 72 Stan. L. Rev. 79 (2020).
[3] J & D Towing, LLC v. Am. Alternative Ins. Corp., 478 S.W.3d 649, 658 (Tex. 2016).
[4] Pridgin v. Strickland, 8 Tex. 427, 427 (1852) (enslaved party at issue)
[5] *J & D Towing*, 478 S.W. 3d at 658 (citing Pridgin v. Strickland, 8 Tex. 427, 435 (1852) (enslaved party at issue)).
[6] Simard, *Citing Slavery*, 97.



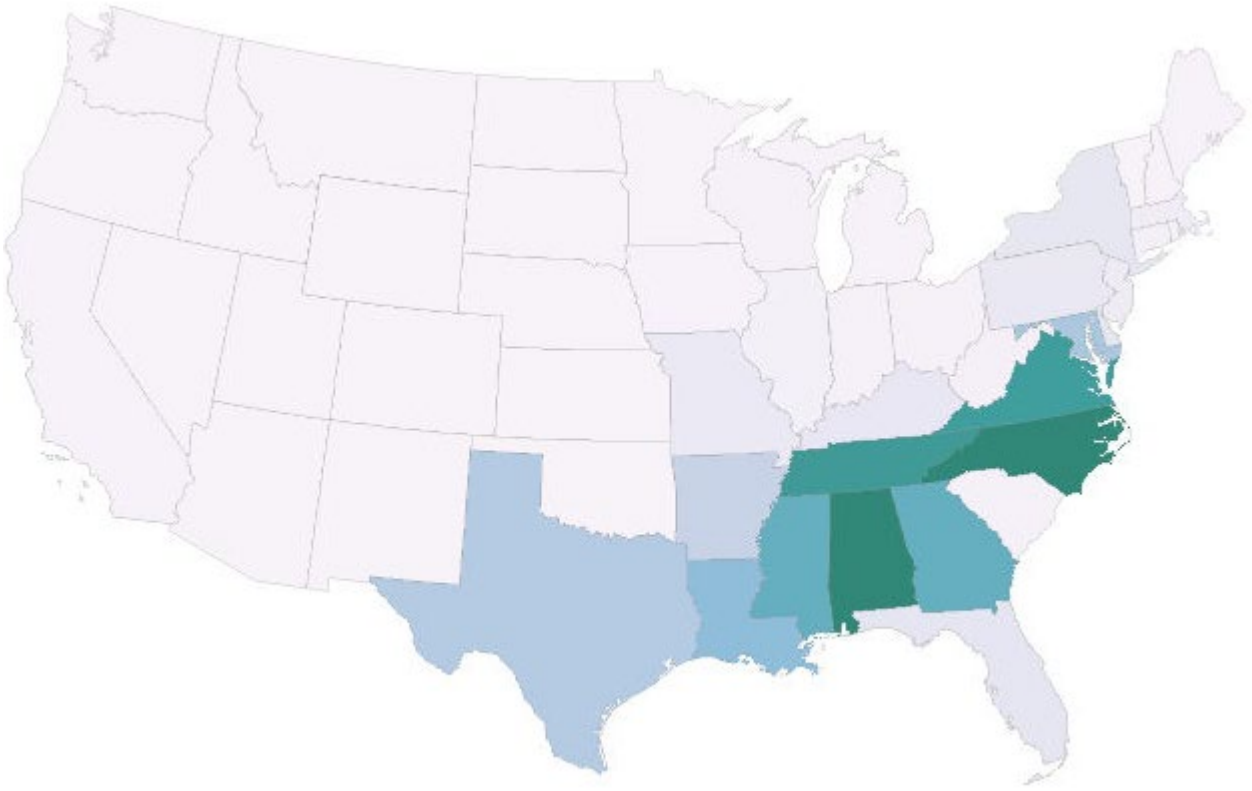
States with recent state court citations to slave cases

These citations have appeared in the courts of forty-four states, in every federal circuit, and in the United States Supreme Court. In eighty percent of those cases, judges do not acknowledge that the cases they are citing involved enslaved people. The influence of slave cases is even greater than the direct citation of such cases suggests. Nearly twenty percent of all published American cases cite a case that cites a slave case. These cases have helped to establish influential legal rules.[7] Basic doctrines of the law of property and trusts and estates first appear in slave cases, and these doctrines appear to have been shaped by the context in which they originated.[8]

Despite slavery's significant links to modern law, its systematic influence has been overlooked by most scholars and historians.[9] This neglect results, at least in part, in legal reasoning that is decontextualized from the violence of slavery.[10] Most legal databases and many judges and lawyers do not distinguish slave cases from other cases. Their influence has therefore remained hidden. The Citing Slavery Project aims to reveal this influence both to scholars and to the public. Our database, available at http://www.citingslavery.org, will provide open access to all published American cases readily identifiable as involving enslaved people as well as the cases that cite those cases. Our website will also give users tools to analyze the continued influence of these cases on law today. We have already made considerable progress collecting cases. Funding provided by Michigan State University and the Proteus Vital Projects

[7] Simard, *The Precedential Weight of Slavery*; David Alan Sklansky, *The Neglected Origins of the Hearsay Rule in American Slavery: Recovering* Queen v. Hepburn, SUP. CT. REV. (forthcoming 2023).
[8] See Simard, *Precedential Weight of Slavery*.
[9] Simard, *Precedential Weight of Slavery*.
[10] For more work on this, see K-Sue Park, *This Land is Not Our Land*, 87 U. Chi. L. Rev. 1977, 1992-2004 (2020) (reviewing Jedediah Purdy, This Land Is Our Land: The Struggle for a New Commonwealth (2019)); K-Sue Park, *The History Wars and Property Law: Conquest and Slavery as Foundational to the Field*, 131 Yale L.J. 1062; Dylan C. Penningroth, *Race in Contract Law*, 170 U. PA L. REV. 1199 (2022).

Fund has allowed a team of student editors from Michigan State University College of Law to collect more than 11,000 slave cases from Maine to Texas, of which 4,626 have been uploaded to our site. The vast majority of these cases are routine private law legal disputes, involving enslaved people as property.



Case Collection Progress

One of the Citing Slavery Project's main contributions is to supplement the commercial legal databases that currently serve as essential gatekeepers of legal information and obscure slavery's influence on the law. Two major commercial databases dominate the market: Westlaw and LexisNexis. When the online versions of LexisNexis and Westlaw first launched, they were meant to eliminate the need for expensive research software, streamline the examination of precedent, and create the appearance of 24-7 accessible computer assisted research.[11] Now legal research just requires a web address and a valid password.[12] The illusion of a more connected world masks how inaccessible legal resources are.[13] The cost is high, information-gathering is complex, and access is exclusive.[14] Barriers to access are even greater for those outside of legal practice.[15] Some public libraries offer free access to Westlaw, but the available material is limited.[16] Further, free legal resources are comparatively more

[11] Alvin Podboy, *The Shifting Sands of Legal Research*, 31 TEX. TECH L. REV. 1174 (2000).
[12] *Id*. 1170-71, 74.
[13] *Id.* at 1179.
[14] Year-long Westlaw Edge and LexisNexis subscriptions for a medium-sized firm average around $120,000. Ian Gallacher, *"Aux Armes, Citoyens!:" Time for Law Schools to Lead the Movement for Free and Open Access to the Law*, 40 U. Tol. L. Rev. 1, 39 (2008).
[15] Melissa Barr, *Democracy in the Dark: Public Access Restrictions from Westlaw and LexisNexis, Searcher*, Jan. 2003, at 66.
[16] Rachel Compton, *Researching Federal Legislative History*, Colo. Law., November 2010, at 67.

accessible in larger urban areas where universities and colleges are primarily located, as opposed to in rural locations.[17]

There is a cost and access chasm among lawyers and between lawyers and nonlawyers. To a lawyer, legal research databases, and the law itself, are professional tools. But to a non-lawyer, the law may represent more than that. Lawyers see *Gibbons v. Ogden* (1824) as a landmark case on the foundations of Congress's regulatory powers.[18] The case has been cited over 2,600 times and is often taught in first-year courses. But, to a non-lawyer, the commerce Congress was empowered to regulate might be more significant and troubling: black bodies.[19] Yet, legal research tools obscure this slave context. Westlaw includes thirty-six notes at the beginning of *Gibbons* designed to capture its legal importance, but none classify the case into Westlaw's Slavery and Human Trafficking category.[20]

Commercial legal databases therefore reinforce rather than challenge the tendency toward abstraction that has led judges to continue to cite slave cases as good law. By categorizing slave cases under headings like "contracts," "promissory notes," or "wills," rather than "slavery," they suggest to lawyers that these cases ought to be treated like ordinary law. Because of this lack of context, unless lawyers accessing these cases read them carefully and know what to look for, they may not even realize they are reading a case that involves human property. Legal scholars face the same barriers to understanding the context of the cases they cite. Legal databases encourage them to notice certain doctrinal connections while obscuring the way that slavery may have systematically shaped the law.

The underlying abstraction of the cases themselves also masks slavery's influence. Some appellate opinions never mention what the property in dispute is, and even thorough searching and close reading will not reveal this connection. Cases that do mention slavery often fail to provide even basic acknowledgement of an enslaved person's humanity. For example, they discuss "mortgages" or "contracts" at length, but never mention the names of the enslaved people included in the disputed mortgage or contract.

The abstraction of legal research tools and of the opinions themselves helps to explain why lawyers continue to cite these cases and the rules derived from them and why they rarely provide consideration of the humanity of the enslaved people appearing within the cited cases. Take, for example, the case of *Succession of Simon*, which Westlaw classifies only as a case concerning "Mortgages and Deeds of Trust."[21] Although the dispute concerned the issue of legally registering mortgages, the "mortgage" at dispute included a plantation and slaves. Here, the court held that because the mortgage that detailed a list of slaves was not registered properly within the register of mortgages, the mortgage was then invalid, dissolving the interest of a third-party creditor. The list of slaves discussed in the case included names and descriptions of the enslaved people but was not reproduced in the judge's opinion. *Succession of Simon* has been directly cited by subsequent cases six times. One of the citing cases, *McDuffie v. Walker*, another Louisiana Supreme Court case, included *Simon* as a reference for the discussion of unrecorded mortgages.[22] In *McDuffie*, the court listed the *Simon* decision, along with four other prior decisions, to describe rules of priority in mortgages. There was no mention at all of any of the underlying issues pertaining to slavery in *Simon*, but, instead, *Simon* was used alongside a string of cases to uphold what now is a fundamental legal theory in the law of secured transactions: compliance with the pertinent laws is what affords creditors and third parties their legal right to pursue their interests. From *McDuffie*, 263

[17] Gallacher, et al., *"Aux Armes, Citoyens!"* at 51.
[18] *Gibbons v. Ogden*, 22 U.S. 1 (1824)
[19] *Id.* at 103.
[20] These classifications are known on Westlaw's database as "headnotes" (For Lexis, they are listed as Shepard's). These headnotes describe what legal theory or framework the case details. Often, it is this headnote that attorneys and other legal professionals first look to understand if this case is of value to the issue at hand.
[21] 23 La. Ann. 533 (La. 1871).
[22] 51 So. 100 (La. 1909).

more citations commenced, with two of these cases decided as recently as 2021. Those two cases relied on *McDuffie's* unrecorded mortgage reasoning, the same reasoning that arose from *Simon*. In one of these 2021 cases, *TSS Properties, LLC v. Ray-Bayou, LLC, the* court provided a lengthy discussion of the principles laid forth in *McDuffie,* even noting that McDuffie" stands for the proposition that an act of sale is effective as to third parties from the date recorded, not the date of the sale," the very same principles drawn from *Succession of Simon*.[23]

Cases like *Simon* are not anomalous. Many slave cases are routinely cited, with little to no context.[24] Each citation to a slave case that does not address its roots in slavery not only risks applying law designed to protect slavery but also misses the opportunity to address the legal profession's complicity in slavery. If there is no context to provide the magnitude of these cases, then legal briefs and judicial decisions will still rely on their holdings. Hence, the law of continues to propagate.

To address these shortcomings, the Citing Slavery Project collects slave cases and highlights their connection to slavery. The Project aims to re-label these slave cases explicitly as such and to provide essential context that is discounted in legal databases, such as the names of enslaved people involved. By classifying the cases primarily as slave cases, rather than as cases involving other legal issues that happen to involve enslaved people, our project challenges the legal abstraction that has led to the continued citation of these slave cases.[25]

To construct our database, we search both Westlaw and LexisNexis for cases decided before 1875 that mention slavery or enslaved people.[26] In our initial collection, we have used a Boolean search that captures root expanded versions of the words "slave" and "negro." Our cutoff in 1875 is somewhat arbitrary but seems to capture most of the cases involving disputes about enslaved property that persisted after the Civil War. Although our searches are currently limited to relatively simple search terms, we plan to expand our search terminology after we complete initial collection.[27]

After performing keyword searches, student research editors review each case and determine if an enslaved person was involved, either as a party or as the property in dispute. Then, the editors collect identifying information about the enslaved person, the number of times the case has been cited, the location of the decision, information regarding the case reporter, and the legal subject matter of the case. The cases are briefly summarized and uploaded to the Citing Slavery Website, where they are catalogued according to the state in which the case was litigated. The Citing Slavery Project also articulates how slave law influenced diverse types of law in the case summaries, such as trusts and estates, business law, and secured transactions.

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[23] 329 So.3d 411 (La. App. 3d Cir. 2021).

[24] Simard, *Citing Slavery*.

[25] See Simard, *Precedential Weight*.

[26] When collecting slave cases, the Citing Slavery Project uses the commercial legal databases Westlaw and LexisNexis for several reasons. First, these two databases dominate the legal world as the primary search engines used for case, legal, and academic research. Second, they offer extensive case coverage, including a few cases that publicly accessible databases like CAP do not. Third, they provide powerful search and filtering options that allow us to ensure the consistency and coverage of our searches. CSP cross references with CAP to include public-accessible links to slave cases. In doing this, the Citing Slavery Project uses the tools accessible to both aisles of the law—legal professionals and the public, insiders and outsiders. For a further description of the search procedure see Armando Barcena, Audrea Dakho, Jessica Hollan, Clark Johnson, Samuel Jones, Ilina Krishen, Hannah Robinson, Justin Simard, and Dustin Reed Solt, CitingSlavery.org: An Introduction (November 12, 2021). Available at SSRN: http://dx.doi.org/10.2139/ssrn.3962495. We include post-emancipation cases in our searches because U.S courts continued to deal with the commercial and social fallout from slavery even after its abolition. *See* Simard, *Citing Slavery*, 93-94

[27] Because our collection up to this point has relied only on reading judicial opinions, if a court does not mention that a case involves an enslaved person, we do not collect it. In many cases, however, courts do not describe the property in dispute. Once we finish initial collection, of case using keyword searches, we plan to work through a random selection of volumes of eighteenth and nineteenth case reporters to identify cases in which property in dispute is not specified. This will help identify the number of cases that could potentially have involved enslaved people, but which cannot be verified from the appellate court opinion. Where available, further information about the property in these cases will be garnered using case and probate records available in online archives and commercial genealogical databases.

In addition to recognizing the legal influence of these cases, we collect the names of the enslaved people involved when they are available. During slavery, enslaved individuals were assigned their first names by slaveowners, so most cases involving them do not list their full names with most instances simply referring to them as property, often with no name listed. However, some cases do provide a first name of the enslaved people involved in the case, along with the name of slaveowners. Keeping track of the enslaved person's identity may allow historians or families to track the stories of the people involved in the cases we collect.[28]

This website is made to be available and accessible to non-lawyers. To give access to the full text of the opinions on our site, we rely on the work of Harvard Law School's Caselaw Access Project (CAP). CAP provides free access to full-text copies of more than six million American judicial opinion on their website. The integration with CAP allows the website to use its citation data to provide a list of cases that cite each case in the Citing Slavery database. Users can click on each individual case link to read the cases or any of the cases that reference the slave case on CAP's website. This layout and citation process using CAP demonstrates the far reach and indirect influence slave cases have on American legal jurisprudence.

Although CAP has provided monumental assistance in accessibility for general members of public, there are some notable limitations. CAP relies on optical character recognition ("OCR") to generate full-text searchable copies of the cases it scans. As CAP explains, even advanced OCR technology makes "countless errors," so some cases have transcription errors.[29] The citation tracking also contains errors in both under and over counting citations and even sometimes misses atypical report names. However, in other instances, CAP provides a more comprehensive citation count than its commercial competitors, like Westlaw.[30]

[28] See, e.g., Julia Bernier and Justin Simard, "In *Reference to the Death of Isham": Slavery, Law, and Their Afterlives*, 88 J. SOUTHERN HIST. 615 (2022).

[29] *About*, CASELAW ACCESS PROJECT, https://case.law/about/ (last visited Jul. 11, 2023). CAP sometimes misses atypical reporter names. Some Louisiana judges, for example, cite the *Louisiana Annual Reports* using "An." Or "A." rather than the standardized "La. Ann." CAP now undercounts the number of citations these cases receive. *See, e.g.*, Brownson v. Weeks, 47 La. Ann. 1042 (1895), *available at* https://cite.case.law/la-ann/47/1042/. In other cases, ambiguous citations lead CAP to conflate citations of *Virginia Reports, Washington* and *Washington Reports*, since both are cited as "Wash." *See, e.g.*, Schulte v. Schering, 2 Wash. 127 (1891), which is counted as a case that cites *Keene v. Lee*, when it actually cites to a page in a different Wash. Reporter. *See Cases Citing Keene v. Lee*, Caselaw Access Project, https://cite.case.law/citations/?q=6716265.

[30] For example, Westlaw does not include the citation to Moss v. Sandefur, 15 Ark. 381 (1854) from In re Estate of McTiernen, 4 Coffey 472 (Cal. Sup. Ct. 1895), but CAP does. *See Cases Citing Moss v. Sandefur*, CASELAW ACCESS PROJECT, https://cite.case.law/citations/?q=8728323.

http://www.citingslavery.org/court_cases/158

The Citing Slavery Project also plans to link to existing resources to encourage the use of our data. *Enslaved: Peoples of the Historical Slave Trade* provides coordinated access to a variety of datasets to provide information about the lives of individual enslaved people. Our collection of names will allow us to add information about the people discussed in our case to that database. We are also planning on collaborating with HeinOnline to use their database of law journals and treatises to allow our users to see when cases have been cited by secondary legal sources. These documents, beyond the official legal record, would assist our project and users in providing more context for the case law presented.

We are also working to build an interactive structure for the website. Users will be able to locate cases by state, use interactive maps, and be connected to other websites that document slave law. Users can also use the website to track down cases that cite slave cases, as each entry lists the cases, they were cited in. Because Citing Slavery's main goal is to make the history of the law of slavery more accessible to the public, not just the legal profession, our team is also creating lesson plans for high school students. High school history curriculums related to the legal history of slavery are often limited to a few major decisions. With our lesson plans, we hope to encourage a more critical history curriculum, where our database is used to broaden students perspectives on slave law to understand the full legal and personal reach slave law has.

The Project has also recently been working on additional features to encourage engagement and make the database more accessible for non-lawyers. "Spotlights" and blog posts provide short summaries of significant or interesting cases editors have come across during research. These features draw attention to individual cases and introduce users to the type of cases they might find on the site. Blogposts also allow research assistants to critically engage with the case material and provide a broader context to the case discussed. The forum containing these discussions will invite other scholars and students to critically analyze the cases they find.

All this work contributes to the Citing Slavery Project's mission to recast traditional legal material in ways that challenge the conventional thinking of lawyers and legal scholars. Such work is essential to fully understanding slavery's influence on the law and to confronting the legal system's complicity in slavery.