



January 1993

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## Recommended Citation

Jonathan A. Bush, *Free to Enslave: The Foundations of Colonial American Slave Law*, 5 *YALE J.L. & HUMAN.* (1993).  
Available at: <https://digitalcommons.law.yale.edu/yjlh/vol5/iss2/7>

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# Free to Enslave: The Foundations of Colonial American Slave Law

Jonathan A. Bush\*

Only a few decades ago, it was possible to write accounts of the culture or economy of the antebellum South which barely mentioned slavery or omitted “the peculiar institution” altogether. Today, slavery and race are rightly seen as central questions for the entirety of Southern—indeed American—history. Much of the scholarly attention to slavery has focused on the law. Historians have quarried legal records, including cases, statutes, probate inventories, and records of debtors’ sales, for a wide range of social and economic history research projects. But scholars also have examined late eighteenth- and nineteenth-century slave law, Northern as well as Southern, for the legal reasoning and intellectual underpinnings of slavery. How did the common law permit, explain, and classify this uniquely problematic form of property? And how did mandarin appellate judges, so often the heroes of legal scholarship, apply their professional skills and moral sensibilities to cases involving slaves? The interpretive efforts have yielded diverse and often brilliant views, but the scholarship shares the assumption that the law was an important social institution buttressing slavery and that the precise configurations of slave jurisprudence therefore matter.<sup>1</sup>

This article approaches slave law with the contrary premise that, in the critical first century of English colonial slavery, the common law had very little of importance to say about slaves, and it seeks to explore the

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\* This paper had its origin in a talk delivered to the Critical Legal Studies Conference, Cambridge, Mass., April 10-12, 1992. I thank my fellow panelists, Orlando Patterson and Mark Tushnet, and the members of the audience for their valuable criticisms. I also thank J.H. Baker, Guyora Binder, Peter Coffman, Paul Finkelman, Mark Floersheimer, Eric Foner, Susan Kent, Lisa Lang, Charles A. Miller, Robert C. Stacey, Robert J. Steinfeld, Alan Tonelson, and Alan Watson. Thanks also to the referees of the *Yale Journal of Law & the Humanities*.

1. Some leading interpretations are advanced and assessed in ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975); PAUL FINKELMAN, *AN IMPERFECT UNION: SLAVERY, FREEDOM, AND COMITY* (1981); ELIZABETH FOX-GENOVESE AND EUGENE D. GENOVESE, *FRUITS OF MERCHANT CAPITAL* 337-87 (1983); MARK TUSHNET, *THE AMERICAN LAW OF SLAVERY, 1810-1860* (1981); A.E. Keir Nash, *Reason of Slavery: Understanding the Judicial Role in the Peculiar Institution*, 32 *VAND. L. REV.* 7 (1979). The burgeoning monograph literature is illustrated by the essays in 31 *AM. J. L. HIST.* 269, 306, 322, 359 (1987) (articles by Paul Finkelman, Judith K. Schafer, Andrew Fede, and Robert J. Cottrol) and *LAW, THE CONSTITUTION, AND SLAVERY* (Paul Finkelman ed., 1989).

significance of that unexpected silence. Unlike many other slave societies, colonial America never developed a systematic law of slavery. Early American slave law was largely reactive and, in particular, played little role when the choice was made in the seventeenth century to turn to slavery. Rather than focusing on what substantive law of slavery existed, this paper instead explores how emigrants from the densely legalistic culture of the English common law erected slavery without direct legal authority. It asks how they and their descendants, unlike colonists elsewhere in the New World, maintained slavery without the sanction of a thorough slave law.

If accurate, this claim that common law was irrelevant describes a seemingly paradoxical state of affairs. "English society was intensely 'law-minded', obsessed with legal considerations, legal rights, and legal remedies."<sup>2</sup> Early seventeenth-century Englishmen regarded law and litigation as a principal means of dispute resolution, and the volume of litigation in royal courts continued to grow.<sup>3</sup> Litigants sought more than speedy resolution; they seem to have viewed the law as an important means of social interaction. In the words of one leading historian, litigation "had everything that war can offer save the delights of shedding blood. It gave shape and purpose to many otherwise empty lives . . . [and] remained the most popular of indoor sports . . ."<sup>4</sup> The swaggering, quarrelsome frontier entrepreneurs who clawed their way to the top of colonial Southern and Caribbean society shared these values, and they too were "law-minded," using local courts and law to consolidate property and position.<sup>5</sup> And of course slaves and indentured servants were valuable investments for planters, capable of yielding enormous profits though raising unusual legal issues. For these practical reasons, we might expect a slave law to develop not long after the inception of slavery as an institution.

Part I of this paper develops the paradox of a colonial slavery without

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2. E.W. IVES, *THE COMMON LAWYERS OF PRE-REFORMATION ENGLAND. THOMAS KEBELL: A CASE STUDY* 7 (1983).

3. The newest figures are contained in C.W. BROOKS, *PETTYFOGGERS AND VIPERS OF THE COMMONWEALTH: THE "LOWER BRANCH" OF THE LEGAL PROFESSION IN EARLY MODERN ENGLAND* 48-57, 75-79 (1986). The level of litigation is also assessed in J.H. BAKER, *THE REPORTS OF SIR JOHN SPELMAN* 51-62 (94 Selden Soc. 1978); MARJORIE BLATCHER, *THE COURT OF KING'S BENCH 1450-1550: A STUDY IN SELF-HELP* 17-20, 138-39, 170-71 (1978); IVES, *supra* note 2, at 7-9, 204-05, 207, 216; S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 65-67 (2d ed. 1981); LAWRENCE STONE, *THE CRISIS OF THE ARISTOCRACY, 1558-1641*, at 240 (1965); Thomas G. Barnes, *Star Chamber Litigants and their Counsel, 1596-1641*, in *LEGAL RECORDS AND THE HISTORIAN* 7 (J.H. Baker ed. 1978).

4. STONE, *supra* note 3, at 242.

5. EDMUND S. MORGAN, *AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA* 124-27, 148 (1975); Bernard Bailyn, *Politics and Social Structure in Virginia, in SEVENTEENTH-CENTURY AMERICA* 90, 96 (Joseph H. Smith ed., 1959), reprinted in *SHAPING SOUTHERN SOCIETY: THE COLONIAL EXPERIENCE* 193, 198 (T.H. Breen ed., 1976). The habit of litigiousness persisted into the eighteenth century, long after the first- and second-generation elites were succeeded by a new, self-confident gentry. See RHYS ISAAC, *THE TRANSFORMATION OF VIRGINIA, 1740-1790*, at 90, 93-94 (1982).

initial authority or systematic legal rules. Of course, colonial courts and legislatures addressed slavery frequently, in thousands of colonial statutes and cases relating to slaves, but the results were haphazard and inadequate for their tasks. Colonial slave law was incomplete, because the concern of local courts and legislatures was primarily with public law, the policing of slavery, while huge areas of daily concern to slave-owners, almost the entirety of private law, were not treated. Meanwhile, the inadequacies of local slave law were not remedied or otherwise addressed by Parliament and the common law courts in Westminster, which said little about the slave trade and almost nothing about slaves and slavery. Even the legal writers and learned lecturers at the Inns of Court, who lavished intellectual effort on exploring implausible and even impossible scenarios, failed to address the seventeenth century's enormously valuable "new property," the African slave. Neither colonial nor metropolitan lawmakers addressed slavery in the thorough way that the common law had long addressed other relationships and forms of property, or as the other European powers addressed their New World slave systems.

Parts II and III of this essay go behind the paucity and inadequacy of slave cases and doctrine to examine the contexts in which seventeenth-century English lawyers talked about the law, with a view to where they might have addressed the new social phenomenon of slavery. Far from being hidden from English eyes, slavery, both as an idea and in practice, was familiar and widely discussed by the laity. But the lawyers, even international and commercial lawyers whose fields implicated slavery and the slave trade, said little. This silence signified little in the early period, when the English were largely observers of the Spanish Empire, but by the mid-seventeenth century, the English had also turned to slavery. Caribbean and then American planters, and behind them English investors and creditors, built lucrative plantation economies on slave labor. Even then, with litigation frequent and the stakes high, the lawyers in Westminster offered little. Part III extends the analysis to the literary texts of the law, focusing on jurists writing within one of a number of formal traditions that aimed at legal depth, breadth, or virtuosity. These jurists had little to say about slavery, and almost none of it was relevant to early modern practice.

Part IV explains the deficiencies of English slave law by turning to the unexpected but familiar ground of constitutional law. The core issue is not why or even whether there was a paucity of systematic law on slavery, but rather how the colonists erected and sustained slavery using what they asserted were traditional legal doctrines and rationales. Ultimately, the basis for colonial slavery, and the explanation for the absence of substantive law directly on the matter, lies in the constitutional relationship between the English Crown and its colonies. The colonies began

as lands in the king's possession but not under Parliament or common law. Instead, they were dominions, governed by the royal prerogative and either annexed to the Crown or granted to lords proprietary. This prerogative framework permitted, under various theories, divergent local practices. Thus, despite the common law's traditions of anti-slavery rhetoric, doctrinal conservatism, and centralization, there were few obstacles to prevent the colonists from making their own local slave law, fashioned from bits and pieces of legal doctrine. Predictably, the legal results were incomplete and intellectually underdeveloped. The quality of slave doctrine, however, was less significant than the fact that the colonists would dare to fashion such radically new doctrine.

In this light, colonial constitutional law represents more than the familiar political backdrop to the American Revolution. It also provided the basis on which the novel practice of plantation slavery could develop with full legal protection, but only minimal legal discussion or intervention. The result was that, through these constitutional doctrines, slavery indirectly became an area in which it is possible to speak of the early "Americanization" of the common law. Under the evolving colonial law, slaveholders got to keep both their common law birthright and their slaves. The reliance on constitutional law, rather than unfree status per se, reflects notions of the colonists' right to adopt the precepts of the common law, which in turn had obvious and enormous importance for the development of a distinct American political identity. In the end, colonists awkwardly and often implicitly fitted the issues raised by their slaveholding into the traditional categories of the common law. Debt, contract, and tort actions, gifts and bequests, and trusts and entails became possible for slave property. But that result was only possible because the colonial constitution of the old British Empire provided a rationale for colonial divergence and thus a lawyerly way to reconcile American slavery with American freedom.

## I. THE LACK OF SYSTEMATIC SLAVE LAW AND ITS SIGNIFICANCE

### A. *The Inadequacies of Colonial Slave Law*

To nineteenth-century Southern judges as well as Northern abolitionists, it was a commonplace that slavery, in legal contemplation, had never been created. Historians today agree. Slavery had instead simply evolved in practice, as a custom, and then received statutory recognition.<sup>6</sup> Actually, the process of "recognition" was implicit, involving no

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6. For nineteenth-century opinion, see THOMAS R.R. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA § 83, at 82 (photo. reprint 1968) (1858); WILLIAM GOODSELL, THE AMERICAN SLAVE CODE IN THEORY AND PRACTICE 258-65 (photo. reprint 1968) (1853); *Miller v. McQuerry*, 17 F. Cas. 335, 336 (C.C.D. Ohio 1853) (No. 9583) (McLean, J.). For the views of historians, see WESLEY F. CRAVEN, THE SOUTHERN COLONIES IN THE SEVENTEENTH CENTURY 1607-1689, at 217 (1949) [hereinafter CRAVEN, THE SOUTHERN

(extant) legislative debates or articulation of first principles. For the first few decades of English colonization, there was likely no slavery in practice and no legal mention of slavery. Suddenly, legal documents began to refer to slaves. A Maryland act of 1638, for example, noted matter-of-factly that “all Christians—except slaves” shall have the full rights of Englishmen at home, and a Rhode Island statute of 1652 cited “the common course practised among English men to buy negars, to that end that they may have them for service or slaves forever.”<sup>7</sup> The famous Fundamental Constitutions, drawn up by John Locke in 1669 for the nascent South Carolina colony, guaranteed freedom of religion to black slaves provided that they remained slaves, and then added that “Every Freeman of Carolina, shall have absolute power and authority over Negro Slaves, of whatever upbringing or Religion soever.”<sup>8</sup> Almost from the outset, slavery was assumed in this way, *ex nihilo*, but it was nowhere justified, explained, or systematically described.

It is commonly thought that, however illegitimate its origins, colonial slavery soon acquired a legal framework sufficient for its purposes. But the reality is that even in the eighteenth century, slavery was principally acknowledged in law by an extensive set of police measures, as we shall discuss. There were few legal provisions for commercial and other private law aspects of slavery. Nor could the existing categories of property, tort, and contract suffice. Colonial lawmakers learned, as jurists had recognized in slaveowning Rome and as American lawyers contin-

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COLONIES] (citing Ulrich B. Phillips); WESLEY CRAVEN, *WHITE, RED, AND BLACK: THE SEVENTEENTH-CENTURY VIRGINIAN* 75 (1971) [hereinafter CRAVEN, WHITE, RED, AND BLACK]; DAVID B. DAVIS, *THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION 1770-1823*, at 473-74 (1975); ENGLISH HISTORICAL DOCUMENTS: VOL. IX, AMERICAN COLONIAL DOCUMENTS TO 1776, at 491 (Merrill Jensen ed., 1955) [hereinafter ENGLISH HISTORICAL DOCUMENTS]; PAUL FINKELMAN, *THE LAW OF FREEDOM AND BONDAGE: A CASEBOOK* 1, 10 (1986); WINTHROP D. JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812*, at 72, 81 (1968); MORGAN, *supra* note 5, at 330; KENNETH M. STAMPP, *THE PECULIAR INSTITUTION* 21-22 (1956); ALAN WATSON, *SLAVE LAW IN THE AMERICAS* 11-12, 64 (1989); Whittington B. Johnson, *The Origin and Nature of African Slavery in Seventeenth Century [sic] Maryland*, 73 MD. HIST. MAG. 236, 236-38 (1978), reprinted in *COLONIAL SLAVE SOCIETY* 82, 82-84 (Paul Finkelman ed., 1989); William M. Wiecek, *Somerset: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World*, 42 U. CHI. L. REV. 86, 127 (1974) (citing prescription, parliamentary act, custom, and local legislative fiat as bases for slavery); see WATSON, *supra*, at 85, 103 (noting practice of slavery also predated legislative authorization in French and Dutch Empires).

7. The Maryland act is cited in JAMES OAKES, *SLAVERY AND FREEDOM* 68 (1990) and Jonathan L. Alpert, *The Origin of Slavery in the United States—The Maryland Precedent*, 14 AM. J. L. HIST. 189-90 (1970) (dating act to 1639). Rhode Island's act is cited in JORDAN, *supra* note 6, at 70.

8. Section 110 is cited in STAMPP, *supra* note 6, at 18; WATSON, *supra* note 6, at 67-68; PETER H. WOOD, *BLACK MAJORITY: NEGROES IN COLONIAL SOUTH CAROLINA FROM 1670 THROUGH THE STONO REBELLION 18-19* (1974). On the question of Locke's authorship, see CRAVEN, *THE SOUTHERN COLONIES*, *supra* note 6, at 338 (tentatively attributing text to Locke's mentor Shaftesbury, with Locke only assisting); DAVID B. DAVIS, *THE PROBLEM OF SLAVERY IN WESTERN CULTURE* 118 (1966) (Locke transcribed text); FINKELMAN, *supra* note 6, at 20 n.6 (attributing work to Locke and Shaftesbury jointly).

ued to realize in the nineteenth century,<sup>9</sup> that the legal issues posed by chattelized humans and thinking property could often not be accommodated within ordinary legal categories. But the response was slow, and slave law failed to develop any analytic apparatus until the last few years of the colonial period, long after Africans had been brought as slaves to the English colonies. There are no thoughtful opinions of appellate judges on slave law until the second half of the eighteenth century. Daniel Boorstin has noted “how few books on the laws of slavery came out of the South.”<sup>10</sup> In fact, there were few treatises, Northern or Southern, on American slave law, and they all date from slavery’s last few decades in the mid-nineteenth century.<sup>11</sup> There were also no systematic slave codes in the English colonies, in contrast to such other New World texts as the French *Code Noir* or the *Codigo negro caroleno* of Santo Domingo.<sup>12</sup> In short, whatever the timing and extent of slavery in each English colony, at every step English colonial law seemed to take slavery more or less for granted.

The literary evidence adds almost nothing to this picture of colonial jurisprudential indifference. In all of the rich English polemical literature of the seventeenth century discussing oppression or slavery in domestic political contexts, there is no serious discussion of slave law and little defense of New World slavery. Similarly, seventeenth-century political economists rarely defended or examined the slave trade or Africa in their studies of mercantilism, though they clearly assumed that African slavery was crucial.<sup>13</sup> Travelers to the colonies and the planters themselves wrote about crops, taxes, political disputes and claims, slave purchases, and occasionally slave life, but did not defend or attack black slavery on political or legal grounds or describe its rules. The contrast is illustrated by the startling omission of blacks from the writings of Robert Beverley and Hugh Jones, two leading contemporary observers of colonial Virginia. Both devoted major passages to land, crops, governance,

9. DAVIS, *supra* note 8, at 58-59; Paul Finkelman, *Exploring Southern Legal History*, 64 N.C. L. REV. 77, 92-96 (1985).

10. See Finkelman, *supra* note 9, at 97 (citing and expanding on Boorstin).

11. Stroud’s famous treatise is from 1827, and both Hurd’s and Cobb’s are from as late as 1858. COBB, *supra* note 6; GOODSELL, *supra* note 6; JOHN C. HURD, *THE LAW OF FREEDOM AND BONDAGE IN THE UNITED STATES* (photo. reprint 1968) (2 vols. 1858-62); GEORGE M. STROUD, *A SKETCH OF THE LAWS RELATING TO SLAVERY IN THE SEVERAL STATES OF THE UNITED STATES OF AMERICA* (photo. reprint 1968) (2d ed. 1856). The treatises thus were contemporaneous with the shifting Southern rationales for slavery. The new Southern view was that slavery was not only necessary, but a positive good. It relied heavily on racial arguments in lieu of others (political economy, infidel status, captivity in war), and it may have relied as well on legal systematization by proslavery authors like Hurd and Cobb. I thank Mark Tushnet for suggesting this point. Letter from Mark Tushnet to Jonathan A. Bush (Sept. 28, 1992) (on file with author).

12. These codes are cited in WATSON, *supra* note 6, at 52, 59, 85. The *Code Noir* dates from 1685 and 1742, and the *Code negro caroleno* from 1785, but both incorporate much older edicts.

13. See, e.g., DAVIS, *supra* note 8, at 151 (citing the views of Josiah Child and Charles Davenant on the slave trade); 11 WILLIAM S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 40 (1938) (importance of slave-trading forts and slave trade).

peoples, and especially to the customs of the defeated American Indians, emphasizing the exotic bravery of the "Noble Savage." But both men had almost nothing to say about blacks (free or slave), other than to insist with evident irritation that slaves were treated better than reports in England alleged, better in fact than free English woodsmen at home.<sup>14</sup> That planters and traders were increasingly racist needs little proof here, but they rarely wrote about race or used it as an important rationale for slavery, unlike their nineteenth-century successors. In fact, there seems to have been a distinct lack of curiosity about plantation slavery and African slaves among all but a few European travelers, merchants, and other observers, as well as lawyers, which is remarkable in light of the consistent literary fascination of Europe with the customs of the American Indians.<sup>15</sup>

Yet, from the very inception of slavery, practical questions requiring legal answers arose every day: which heir should take how many slaves; what were the limits to a master's punishment of his slave; did a lessee have to pay when the slave died within the term of the lease. Whatever the substance of the answers, it was also clear that English colonial slave law had to be home-grown. Although English law had never abolished the category of "villeinage"—common law serfdom—it was in complete desuetude,<sup>16</sup> and common law did not have another category for slaves. While it is true that later Southern judges occasionally invoked medieval villeinage to support the general proposition that bondage and the common law were compatible, and abolitionists cited villeinage to argue that it was the only form of unfreedom permitted by the common law, both

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14. ROBERT BEVERLEY, *THE HISTORY AND PRESENT STATE OF VIRGINIA* 272 (Louis B. Wright ed., 1947) (1705); HUGH JONES, *THE PRESENT STATE OF VIRGINIA* \*37, \*114-15, at 75-76, 130 (Richard L. Morton ed., 1956) (1724).

15. DAVIS, *supra* note 8, at 10, 13; SEYMOUR DRESCHER, *CAPITALISM AND ANTISLAVERY: BRITISH MOBILIZATION IN COMPARATIVE PERSPECTIVE* 20 (1987); RICHARD S. DUNN, *SUGAR AND SLAVES: THE RISE OF THE PLANTER CLASS IN THE ENGLISH WEST INDIES, 1624-1713*, at 13 (1972); see Anthony Pagden, *The Savage Critic: Some European Images of the Primitive*, in 13 *Y.B. OF ENG. STUD.* 32 (G.K. Hunter & C.J. Rawson eds., 1983) (cultural uses of European image of New World and South Pacific indigenous peoples). David Brion Davis demonstrates that there was interest in the seventeenth century in discussing slavery as public policy, but the evidence in his own magisterial work is overwhelmingly drawn from the eighteenth century. As for other contemporary genres, Davis and Winthrop Jordan have described the important European discovery and scientific literatures about Africans and blackness prior to 1700, DAVIS, *supra* note 8, at 110, 201, 452-57; JORDAN, *supra* note 6, at ch. 1 and 90-91, but those early discussions do not seem to have been as sustained, or as interesting to a wide readership, as comparable writings about the indigenous Amerindians. The indifference and ambivalence of the English and other Europeans to the conversion of Africans, with the conversion of the American Indians being a leading tenet of colonialism, explains much about the silence regarding blacks. This, however, only moves the question from race to religion: why did the Christian missionaries so rarely direct their efforts toward Africans. See DAVIS, *supra*, at 204-19 (surveying missionary efforts); JORDAN, *supra*, at 21-22. That conversion might bring manumission in the seventeenth century, and in a few colonies even later, see Edward Fiddes, *Lord Mansfield and the Somersett [sic] Case*, 50 *LAW Q. REV.* 499, 501 (1934), is not sufficient explanation, for that view of conversion was widely repudiated, permitting masters to continue to enslave converted blacks.

16. R.H. HILTON, *THE DECLINE OF SERFDOM IN MEDIEVAL ENGLAND* 55-58 (2d ed. 1969).



sides saw that slavery was not in any historical sense a continuation of villeinage.<sup>17</sup> Nor could the substantive rules of villeinage support plantation slavery by way of analogy. Medieval common law almost from the outset had distinguished between villeinage land tenure and villein status, regardless of the fact that the early tenants of villeinage land typically were unfree villagers. Local custom protected the tenant in villeinage, and in time the common law did as well. As for unfree personal status, common law had always limited the lord's right to kill or maim his serf, and it assumed that the villein would have rights to religion as well as family integrity and formation (subject to certain payments). It permitted the villein to act in such legal capacities as executor to a will and so on. In short, under all formulations of villeinage—even Sir Edward Coke's ahistorical and slavish "villein in gross"<sup>18</sup>—the villein was protected in ways that went far beyond the essentially unlimited nature of colonial slavery.

In theory, proslavery forces could have invoked other bodies of common law to account for slavery. The law of personal property, for instance, contained doctrines applicable to ownership and transfer of things as well as damage to and by those objects. Certain of these doctrines were transferable to property in slaves. Similarly, the body of harsh Tudor law on vagrants, apprentices, and servants contained doctrines applicable to the governance of slaves.<sup>19</sup> But neither English personal property law nor labor law contained the *a priori* first step that would permit humans to be deemed property or slaves. On the contrary, at the heart of early modern labor law is the paradox that, despite its severity and assumption that (free) labor ought to be compelled to work, the law also regarded all non-villein labor as meaningfully free, and it celebrated that freedom. The practical unfreedom implied by Tudor-Stuart labor law may have resembled slavery, but by its own terms that law

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17. See, e.g., Opinion of Dulany (1767), reprinted in 1 H. & McH. 559, 560-61 (1809); Somersett v. Stewart, Lofft, 1, 3, 98 Eng. Rep. 499, 500 (K.B. 1772) (argument of counsel Hargrave); Chamberline v. Harvey, 5 Mod. 186, 189, 87 Eng. Rep. 598, 600-01 (K.B. 1697) (argument of counsel); R. v. Allan [The Slave, Grace], 2 Hagg. Adm. 94, 107-08, 115, 166 Eng. Rep. 179, 183-84, 186 (Adm. 1827); COBB, *supra* note 6, § 90, at 87; DAVIS, *supra* note 6, at 482-83, 487-88; Thomas D. Morris, "Villeinage . . . as it existed in England, reflects but little light on our subject." *The Problem of the "Sources" of Southern Slave Law*, 32 AM. J. L. HIST. 95, 125-27 (1988); A.E. Keir Nash, *Fairness and Formalism in the Trials of Blacks in the State Supreme Courts of the Old South*, 56 VA. L. REV. 64, 69 (1970) (proslavery judges reject continuity of villeinage and slavery, thus placing slaves outside of basic legal protections accorded villeins). *But see* Pearne v. Lisle, Ambl. 75, 27 Eng. Rep. 47 (Ch. 1749) (Hardwicke, L.C., sees continuity between villeinage and slavery); DAVIS, *supra* note 8, at 259 (citing views of Jamaica judge and historian Edward Long).

18. 1 EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND § 181, at \*120a-b. Coke's influential formulation is found earlier in Littleton and repeated in such texts as John Cowell and Sir Thomas Smith. JOHN COWELL, THE INSTITUTES OF THE LAWS 1.3 at 8-9 (photo. reprint 1978) (W. G. trans. 1651, 1605); THOMAS LITTLETON, LITTLETON, HIS TREATISE ON TENURES § 181, at 215 (photo. reprint 1978) (T.E. Tomlins ed., 1841) (c. 1481); THOMAS SMITH, DE REPUBLICA ANGLORUM 3.8 at 130-31 (photo. reprint 1979) (L. Alston ed., 1906) (1583).

19. The literature on how and which different bodies of doctrine were used in fashioning a law of slavery is surveyed *infra* at note 144.

addressed laborers of “free” status, and was part of a legal system that knew neither slavery nor slaves.<sup>20</sup> The result was that neither villeinage nor other substantive bodies of common law could have been transferred whole to the New World to justify and then sustain slavery.

The only other ready-made slave law in the seventeenth century would have been Roman law, upon which the various colonies belonging to Portugal, Spain, France, and the Netherlands had relied in order to support and implement their slave systems.<sup>21</sup> But such wholesale reception of Roman slave law was impossible in an English colony. Whatever the influence of Roman law on particular English doctrines or on common law generally, a full reception by a colonial legislature looking for analytic help would have faced serious constitutional, political, and ideological difficulties. A handful of Roman slave doctrines were used and retained into the nineteenth century, particularly *partus sequitur ventrem*, the rule by which the child of a mixed-status union follows the mother.<sup>22</sup> But even then it was clear to contemporaries that American slave law had very little in common with Roman law,<sup>23</sup> and aside from the rule of maternal descent, there is little evidence of Roman borrowings. In short, the colonists neither brought with them nor borrowed a systematic law of slavery. A new law had to be constructed.

Of course, the colonists did produce a legal response to these practical questions. It came not in the form of systematic codes or treatises, genres peripheral to the common law tradition, but in a large quantity of local case law and statutes. Beginning in the mid-seventeenth century, legislators in Barbados and the Chesapeake colonies addressed the public “problem” of black labor and defined slave status with increasingly harsh clarity.<sup>24</sup> Rarely did this emerging public slave law address pressing questions of private law relating to slavery. Typically, colonial slave stat-

20. Professor Steinfeld discusses the relationship between labor coercion and different notions of freedom in his important work, ROBERT J. STEINFELD, *THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATION IN ENGLISH AND AMERICAN LAW AND CULTURE, 1350-1870* (1991).

21. WATSON, *supra* note 6.

22. This rule is the opposite of the long-established common-law father rule, which applied both to personal freedom, *see, e.g.,* COKE, *supra* note 18, § 187, at \*123, and to analogous mixed-parentage issues, like nationality, *see, e.g.,* Bacon v. Bacon, Cro. Car. 601, 602, 79 Eng. Rep. 1117, 1118 (K.B. 1641). The rule of maternal descent for slavery was first enacted in Virginia in 1662, *see* 2 *The Statutes at Large* 170 (photo. reprint 1969) (William W. Hening ed., New York 1823), and was reiterated thereafter, *see, e.g.,* 5 *The Statutes at Large* 548 (citing 1748 Act). *See* DAVIS, *supra* note 8, at 277-78 (surveying adoption of mother-rule).

23. For the lack of reliance on Roman law in slave matters, *see* R.H. Helmholz, *Use of the Civil Law in Post-Revolutionary American Jurisprudence*, 66 TUL. L. REV. 1649, 1660-61 (1992); Morris, *supra* note 17, at 114-24. *But see* WATSON, *supra* note 6, at 64-65. *See, e.g.,* Somerville v. Johnson, 1 Md. 348, 351-53 (Md. Chanc. 1770) (life tenant's claim to issue of slave).

24. The celebrated debates on the status of the early black arrivals to Virginia, the relationship between slavery and race, and the origins of slave status generally are summarized in Alden T. Vaughan, *The Origins Debate: Slavery and Racism in Seventeenth-Century Virginia*, 97 VA. MAG. HIST. & BIO. 311 (1989). Notable recent data are contained in T.H. BREEN & STEPHEN INNES, “MYNE OWNE GROUND”: RACE AND FREEDOM ON VIRGINIA'S EASTERN SHORE, 1640-1676 (1980); CRAVEN, WHITE, RED, AND BLACK, *supra* note 6, at 73-109; MORGAN, *supra* note 5, at 154-57, 295-337; Warren M. Billings, *The Cases of Fernando and Elizabeth Key: A Note on the*

utes responded to some perceived threat to the stability of the slave regime, and were limited, reactive, and negative.<sup>25</sup> As for local private law, the cases are short and conclusory, almost entirely devoid of analysis or reasoning. They usually record transactions of value such as the sale or manumission of a slave, debts secured on slaves and other assets, and the probate of estates including slaves.<sup>26</sup> But nowhere in the statutes or caselaw is there anything remotely like a jurisprudence of slavery.

Contemporaries would not have seen this lack of systematic thinking about slavery in formal sources as a failure of the legal imagination. On the contrary, it reflected the colonists' view that the aim of applied law was dispute resolution and local order rather than the articulation of grand principles.<sup>27</sup> Similarly, we can read little significance into the failure to write treatises on slave law. Only late in the eighteenth century were treatises written, in the colonies or England, about almost anything other than the ancient common law forms of action and the duties of various officeholders and courts; even then there were few Southern jurists, law schools, or academic texts.<sup>28</sup> The brevity and practical orientation of pre-Revolutionary lower-court decisions does not mean that normative discourse concerning slavery and other legal issues was not transpiring, but that there was no incentive to transcribe or publish more thorough case reports.

Moreover, there were reasons outside of the law for the apparent lack of colonial slave law. Most important was that normative thinking about slavery occurred outside of legal forms. In addition to law, colonial Southerners found social legitimation in other normative systems such as honor and religion, which supported slavery. The master-slave relationship, which implied the complete removal of the slave from the public sphere, was particularly open to elaboration outside of formal law. And the developing political culture of plantation slavery, emphasizing values of personal autonomy and paternalism, made it likely that slaveowners would use law as but one means of implementing their mastery. Within the private world of the master, the formal underdevelopment of slave law was offset by private "rule-making," described in plantation manuals and rule-books, and enforced with whipping and other punishments, including death.<sup>29</sup> For all these reasons, the failure of colonial law to

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*Status of Blacks in Seventeenth-Century Virginia*, 30 WM. & MARY Q. 467 (3d ser. 1973), reprinted in COLONIAL SLAVE SOCIETY 1 (Paul Finkelman ed., 1989).

25. DUNN, *supra* note 15, at 228.

26. T.H. BREEN, TOBACCO CULTURE: THE MENTALITY OF THE GREAT TIDEWATER PLANTERS ON THE EVE OF THE REVOLUTION 96-97 (1985); MORGAN, *supra* note 5, at 178.

27. William H. Bryson, *Law Reporting and Legal Records in Virginia, 1607-1800*, in JUDICIAL RECORDS, LAW REPORTS, AND THE GROWTH OF CASE LAW 319, 328-29 (J.H. Baker ed., 1989).

28. A.W.B. Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L. REV. 632 (1981), reprinted in LEGAL THEORY AND LEGAL HISTORY 273 (1987); Finkelman, *supra* note 9, at 112-13.

29. BREEN, *supra* note 26, at 85-86; MORGAN, *supra* note 5, at 312 (centrality of statute holding

generate a formal slave jurisprudence cannot be taken as proof of a desire to avoid confronting slavery.

But if these considerations suggest there was no lack of rules for the governance of slaves, the failure to offer a systematized legal response to slavery often left masters and others without adequate answers. The familiar example is the uncertainty as to what kind of property a slave was. The common law provided essentially two choices—real property or personal (chattel) property. Once an item of property was classified as either real or personal, lawyers and owners everywhere would have known how to treat the item in any contingency. Categorization would have helped in implementing the routine transactions planters entered: purchasing slaves on credit from the Caribbean, pledging them to London creditors, transferring them to kin. Many colonies and states flip-flopped, but eventually almost all described slaves as chattels. The important point, however, is that neither category worked very well. Jurisdictions that classified slaves as real property typically came to add that, unlike other forms of real property, a slave was a chattel for certain purposes.<sup>30</sup> But where slaves were termed personal property, it was often added that they were still realty for purposes of inheritance or transfer by an underage heir.<sup>31</sup> Notwithstanding these analytic difficulties, the English colonies were slow to turn to new hybrid categories and more sys-

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masters harmless for death resulting from overzealous punishment); OAKES, *supra* note 29, at 24-25, 155-67; GARY A. PUCKREIN, *LITTLE ENGLAND: PLANTATION SOCIETY AND ANGLO-BARBADIAN POLITICS, 1627-1700*, at 86-87 (1984); Stanley Elkins & Eric McKittrick, *Slavery in Capitalist and Non-Capitalist Culture*, 9 AM. QTLY. 159, at 167, 175 (1957), reprinted in *COMPARISONS IN SLAVERY* 161, at 169, 177 (Paul Finkelman ed., 1989). See also PETER C. HOFFER, *LAW AND PEOPLE IN COLONIAL AMERICA* 91 (1992) (overlap between public and private lawmaking in governance of slaves). For the nineteenth century, see PHILIP J. SCHWARZ, *TWICE CONDEMNED: SLAVES AND THE CRIMINAL LAWS OF VIRGINIA, 1705-1865*, at 52 (1988); STAMPP, *supra* note 6, at 224.

30. These included bargain-and-sale, attachment for debt, recording transfer, disbursal by an executor, enfranchising the owner, transfer by gift, and suit in detainer, trover, and conversion. See DAVIS, *supra* note 8, at 248-51; Warren M. Billings, *The Law of Servants and Slaves in Seventeenth-Century Virginia*, 99 VA. MAG. HIST. & BIO. 45, 61 n.50 (1991); M. Eugene Sirmans, *The Legal Status of the Slave in South Carolina, 1670-1740*, 28 J. S. HIST. 462, 464 (1962), reprinted in *COLONIAL SLAVE SOCIETY* 388, 390 (Paul Finkelman ed., 1989); William M. Wiecek, *The Statutory Law of Slavery and Race in the Thirteen Mainland Colonies of British America*, 34 WM. & MARY Q. 258, 264 (3d ser. 1977), reprinted in *COLONIAL SLAVE SOCIETY*, *supra*, 452, 458; see also 4 *The Statutes at Large*, *supra* note 22, at 222 (Virginia Act of 1727), repealed by 5 *id.* 432 (Virginia Act of 1748). See also *Chamberline v. Harvey*, 5 Mod. 186, 87 Eng. Rep. 598 (K.B. 1697) (analogue in English law, allowing possibility of special trespass, a personal action, for recovery of a Barbadian slave working in England, though slave classified as real property in Barbados). The aim of classifying the slave as real property was to prevent dismemberment of the plantation by spendthrift owners, creditors, or multiple heirs. Sirmans suggested that one consequence of this classification was to protect the slave, by locking him and his family onto the plantation, along the lines of a serf. Sirmans, *supra*, at 465; see also A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR. RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 170* (1978). But see DUNN, *supra* note 15, at 241 (dissent); WOOD, *supra* note 8, at 51-52 n.63 (adopting a cautious approach to Sirmans' claim).

31. See DAVIS, *supra* note 8, at 248-51; STAMPP, *supra* note 6, at 197; Wiecek, *supra* note 30, at 258, 264; see also ELMER B. RUSSELL, *THE REVIEW OF AMERICAN COLONIAL LEGISLATION BY THE KING IN COUNCIL* 106-07, 135, 160 (1915) (Privy Council suspicion of Virginia law making slaves personal property).

tematic jurisprudence, preferring to reason by analogy and with ad hoc exceptions.<sup>32</sup> And so, of the few colonial statutes concerning private slave law, many were private acts confirming or breaking entails of real property to which slaves were annexed.<sup>33</sup> Only by fiat could the law accommodate the gordian knot of the competing interests of family, creditors, and doctrinal consistency.

Moreover, colonial slave law was characterized not only by inadequate categorization, but by a complete failure to address topics relevant to everyday life. With its focus on responding to threats of slave disorder and recording valuable transactions, colonial slave law never provided for most areas of private law. Such matters as work, family, religion, wages and private property (by analogy to the Roman *peculium*), bequests to slaves, most torts against and by slaves, adoption (of a master's illegitimate child), and so on were essentially absent from local jurisprudence, and left to private ordering.

### B. *English Law as a Source of Substantive Slave Law*

In theory, there was always the possibility that Westminster would come to the rescue. That is, the common law courts or Parliament in England, or some thoughtful legal author, could have offered legal answers for the new questions. The lesson of the French, Spanish, and Portuguese empires is suggestive, not because they each used different civil-law doctrines to maintain slavery in their colonies, but rather because each imperial power authorized or imposed, by legislative fiat from Paris, Madrid, or Lisbon, a body of slave law.<sup>34</sup> In the case of the English settlements, the colonists were, after all, still governed by the common law and statutes, though precisely what that governance meant was bitterly disputed.<sup>35</sup> Had Westminster lawmakers wished to fashion a law of slavery, their common law contained the raw materials: an extraordinarily refined law of property and a modest but serviceable law of persons, the latter providing for various kinds of dependent exploited labor. Lawmakers also knew of the long tradition of parliamentary regulation of those exploited laborers, of foreign trade, and of new territorial acquisitions, such as Wales. Neither jurisdictional limitation nor deference to local practices would have prevented English lawmakers from addressing colonial slavery, just as their late-nineteenth-century descend-

32. TUSHNET, *supra* note 1, at 40, 92-93, 157-58. For a description of how common law judges accounted for other difficult forms of property on the boundary of real and personal property, see BAKER, *supra* note 3, at 213-19.

33. See, e.g., THE LAWS OF VIRGINIA, BEING A SUPPLEMENT TO HENING'S STATUTES AT LARGE: 1700-1750, at 57, 60, 265, 341, 344, 352, 362, 376 (Waverly K. Winfree ed., 1971); Bailyn, *supra* note 5, at 90, 110-11.

34. See WATSON, *supra* note 6, at 46-47, 83, 91, 103-04.

35. See GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 294 (1969); *infra*, part IV.

ants did not ultimately shrink from prohibiting slavery in their African empire.<sup>36</sup>

But Westminster did not affirmatively address slavery in any substantive way in the seventeenth or eighteenth centuries, and the significance of this substantive omission is the focus of this paper. It is extraordinary that there are only one dozen published decisions in which common law courts addressed colonial slavery before the milestone *Somerset v. Stewart*, even though at least one and probably closer to two million Africans had already been brought as slaves to the English colonies in the Caribbean and America.<sup>37</sup> None of these few cases are very significant, though they have been studied with microscopic care from the time of *Somerset* to the present. Most are actions in trover or trespass, one is an *indebitatus assumpsit*; in another, plaintiff sought an order *ne exeat regno*; elsewhere, an administrator sought an account of decedent's personal estate.<sup>38</sup> The traditional view of these cases is that they represented the beginnings of the final, glorious ascent of the common law toward *Somerset*, abolition, and equal justice under law. Special praise is given to the celebrated trover cases in which Chief Justice Holt reasoned that "as soon as a negro comes into England, he becomes free; one may be a villein in England, but not a slave."<sup>39</sup> These cases, as one historian put it, are "an extraordinary change of judicial opinion . . . [and] one of the most revolutionary of all judicial pronouncements of the century."<sup>40</sup>

Scholars today are more skeptical of this whiggish interpretation and less likely to ascribe much importance to this trickle of slave cases. The reported cases contain dubious rhetoric, contradict each other, and in a few instances—including the cases in which Chief Justice Holt reasoned for freedom—were neither published nor widely known in their own

36. PATRICK MANNING, *SLAVERY AND AFRICAN LIFE* 157-66 (1990) (abolitionism overcomes initial reluctance to undermine cooperative slaveowning elites); Richard Roberts & Suzanne Miers, *Introduction to THE END OF SLAVERY IN AFRICA* 3, 17-24 (Suzanne Miers & Richard Roberts eds., 1988) (ambivalent abolition, spurred by humanitarian "lobby" at home); see also Howard Temperley, *Anti-slavery as a Form of Cultural Imperialism*, in *ANTI-SLAVERY, RELIGION, AND REFORM* 335 (Christine Bolt & Seymour Drescher eds., 1980) (cultural context of early nineteenth-century abolitionism).

37. *Somerset v. Stewart*, Lofft 1, 10, 15, 17, 98 Eng. Rep. 499, at 504, 507, 509 (K.B. 1772). The estimates are based on PHILIP D. CURTIN, *THE ATLANTIC SLAVE TRADE: A CENSUS* 9, 52-72, 118-53 (1969).

38. Most are abstracted in 1 *JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO* 2-14 (Helen T. Catterall ed., 1926) [hereinafter *JUDICIAL CASES*]; others are cited in DAVIS, *supra* note 8, at 205-06; JAMES OLDHAM, *THE MANSFIELD MANUSCRIPTS AND THE GROWTH OF ENGLISH LAW IN THE EIGHTEENTH CENTURY* 1225, 1236-37 (1992); see also Noel v. Robinson, 1 Vern. 453, 23 Eng. Rep. 580 (Ch. 1687) (citing Sgt. Maynard's case). There were also an undetermined number of slave-related cases in local courts. See, e.g., M. DOROTHY GEORGE, *LONDON LIFE IN THE EIGHTEENTH CENTURY* 141 (1965).

39. *Smith v. Brown and Cooper*, Holt 495, 90 Eng. Rep. 1172, 1173 (Q.B. 1702?), accord 2 Salk. 666, 91 Eng. Rep. 566. Similar reasoning by Holt is found in *Smith v. Gould*, 2 Ld. Raym. 1274, 1274-75, 92 Eng. Rep. 338 (Q.B. 1706) ("[F]or the common law takes no notice of negroes being different from other men. By the common law no man can have a property interest in another . . .").

40. DAVID OGG, *ENGLAND IN THE REIGNS OF JAMES II AND WILLIAM III*, at 73-74 (1969).

day.<sup>41</sup> The famous rhetoric of Holt was dicta, and the cases rejecting trover for slaves were decided on narrow pleading grounds and irregularly “reversed” soon after.<sup>42</sup> In an earlier ruling Holt had concluded to the contrary that Africans were indeed commodities.<sup>43</sup> And in no case—including *Somerset*—did the common law ever meddle with, ratify, reject, or otherwise address slavery in the colonies, as opposed to in England, other than to accept it as the apparent custom of the colonies.<sup>44</sup>

In fact, throughout the reports, there are many cases addressing the bankrupt English slave-trading monopoly, indebted tobacco or sugar planters, the duties applicable to the various plantation commodities, and trade to Africa and America, all matters whose circumstances frequently involved black slaves. Yet few of these cases even mention the institution, much less elaborate on the law applicable to slavery. The same pattern characterizes cases arising in specialized jurisdictions, such as the Admiralty Court. Here again the facts often concerned contested ownership of slave cargo, but only a few decisions even itemized slaves as part of the cargo, the convention being to refer to “cargo” without differentiation, and few described special legal rules applicable to slaves.<sup>45</sup> Of course, legal discussion often develops outside of reported cases, and there is some evidence that such exchanges on slave law may have occurred in the late seventeenth century.<sup>46</sup> But even assuming such a debate did occur, the paucity of cases, recorded discussions, and formal rules for slavery is revealing, as contemporaries saw.

Ironically, abolitionists later praised English law for this consistent silence. Nowhere, they said with Holt’s rhetoric in mind, did English law take account of slavery or race. Therefore the common law must be

41. DAVIS, *supra* note 6, at 480 n.19; DRESCHER, *supra* note 15, at 32; OLDHAM, *supra* note 38, at 1225, 1236-37; WILLIAM M. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848*, at 23-25 (1977); *see also* Fiddes, *supra* note 15, at 499, 501-02 (1934); James Oldham, *New Light on Mansfield and Slavery*, 27 J. BRIT. STUD. 45, 49, 54, 62-65 (1988) (citing other unpublished slave cases by Mansfield); Wiecek, *supra* note 6, at 90, 93-95.

42. J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 541 (3d ed. 1990). *See Somerset v. Stewart*, Lofft, 1, 3, 98 Eng. Rep. 499, 503 (K.B. 1772) (counsel for slaveowner calls Holt’s language mere dicta and seeks narrow, procedural ruling); *Pearne v. Lisle*, Ambl. 75, 25 Eng. Rep. 47, 48 (Ch. 1749) (Lord Hardwicke disregards Holt on trover, on basis of informal advisory opinion by himself and Lord Talbot in 1729).

43. Fiddes, *supra* note 15, at 501.

44. *Smith v. Brown and Cooper*, 2 Salk. 666, 91 Eng. Rep. 566; Holt 495, 90 Eng. Rep. 1172, 1173 (Q.B. 1702?) (Holt, C.J., acknowledges Virginia custom). Nevertheless, late seventeenth- and early eighteenth-century colonists sought by local statute to preclude the remote possibility that either conversion to Christianity or sojourn in England would imply freedom. *See, e.g.*, 5 *The Statutes at Large*, *supra* note 22, at 548 (Virginia Act of 1748).

45. *De Jonge v. Isaac* (Adm. 1763), reprinted in 23 *BRITISH MARITIME CASES 1648-1871*, at 216 (1978); *The Africa* (Adm. 1762), 23 *id.* at 228; *see also* LAW AND CUSTOM OF THE SEA, VOL. II, A. D. 1649-1767, at 95-101 (R. Marsden ed., 50 Naval Rec. Soc. 1916) (P.C. 1676, on appeal from Admiralty, with memorandum of views of Sir Leoline Jenkins; case concerning the British capture of the Dutch ship *Susanna*, bound from Africa with 544 slaves); *SELECT PLEAS IN THE COURT OF ADMIRALTY: VOL. II, THE HIGH COURT OF ADMIRALTY (A.D. 1547-1602)*, at xvi (Reginald G. Marsden ed., 11 Selden Soc. 1897) (citing cargo of blacks, 1600).

46. *See infra* text accompanying note 138.

a system of neutral rules and equality under the law. That may be so, but the silence of the seventeenth- and early eighteenth-century common law coexisted not only with licit slavery throughout the British Empire, but also with the retention of black slaves in England. The paucity of cases in the central courts, as well as the noncommittal stance of the common law until *Somerset*, did not imply that the air of England was too free for a slave to breathe, as the celebrated rhetoric put it. Rather, the status of colonial slaves brought to England was inconclusive, depending in any single case upon private, negotiable considerations. Slaves in England were neither clearly slave nor clearly free, but up for grabs. In favor of freedom in a given case was the slave's ability to find refuge if he fled; in favor of slavery was the master's ability to bind or induce his slave to stay, or to recover him if he fled. In short, the abolitionists misstated the history. Legal silence did not mean that the law did not know slavery, nor that the question of status never arose.<sup>47</sup>

Nor do other sources of English law supplement this slender body of case law. The Privy Council with its advisory boards played a critical role in imperial governance, and of course knew of the new form of labor in the colonies: "Blacks [are] the most useful appurtenances of a Plantation and perpetual servants," the Council for Foreign Plantations observed in 1664.<sup>48</sup> But neither the Privy Council nor its boards issued substantive slave law, and even its reactive role of evaluating colonial legislation became routine only toward the late seventeenth century.<sup>49</sup> By then, slavery was firmly in place, and far too valuable a form of property for the Privy Council to disallow.

Inevitably, the Council had to address slavery as part of its authority to oversee the affairs of the empire. Among the most significant conciliar rulings was the decision, first reached in 1677, that slaves were to be deemed goods or commodities within the Navigation Acts, with the consequence that the slave trade had to be carried by English ships and crews.<sup>50</sup> But despite their status as property under both colonial law and the Navigation Acts, blacks coming into England were not enumerated or dutiable like other commodities.<sup>51</sup> In other words, the Council's deci-

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47. See DAVIS, *supra* note 8, at 211 (citing 1764 complaint that blacks in England act as if free); DRESCHER, *supra* note 15, at 32-35; OLDHAM, *supra* note 38, at 1238 (citing Somerset's own understanding of the legal rule articulated in his case); Seymour Drescher, *Manumission in a Society without Slave Law: Eighteenth-Century England*, 10 SLAVERY AND ABOLITION 85, 87-97 (1989); Fiddes, *supra* note 15, at 509-10.

48. This observation is cited in JORDAN, *supra* note 6, at 85.

49. RUSSELL, *supra* note 31. For a conciliar case about slaves, see, e.g., OPINIONS OF EMINENT LAWYERS ON VARIOUS POINTS OF ENGLISH JURISPRUDENCE, CHIEFLY CONCERNING THE COLONIES, FISHERIES AND COMMERCE 144-45 (George Chalmers ed., Burlington, Vt. 1858) [hereinafter OPINIONS OF EMINENT LAWYERS] (Solicitor-General Montague, *On the Escheat of Negroes in Jamaica* (1708)).

50. CAL. ST. PAPS., COL. SER., AMERICA AND WEST INDIES, 1677-1680, at 118, 120 (1677 decision); see also Fiddes, *supra* note 15, at 501 n.12 (similar 1689 decision authored by Holt).

51. DRESCHER, *supra* note 15, at 27. Doubtless the reason is that it was relatively infrequent



sion was less a general claim about the legal status of blacks than a revenue ruling with almost no social implications. In fact, there were thousands of conciliar orders, advisory opinions, instructions and letters patent to proprietors and colonial governors, and dozens of royal charters, all of which constitutes English legal material addressing slavery. We shall return to these prerogative texts later, but for the moment it suffices that, like the 1677 ruling, these texts also are problematic sources of legal reasoning and slave law. They were more in the nature of executive communications, and even those texts which relayed decisions reached after judicial-type hearings usually did not include legal reasoning. Nor did these texts substantively address slavery. Rather, they were confined to weighing whether some colonial regulation was acceptable to London and protecting the economics of the slave trade. Nowhere did the Crown or Council explain the premise that the law, having seen classic villeinage fade away, could create or permit a new class of unfreedom. For that, we will have to look outside of slavery, to constitutional law.

Other legal genres form a picture consistent with this. There were many statutes on such mercantile and revenue matters as plantation commodities, rights to trade with Africa, and so forth, but neither statutes nor parliamentary floor debate addressed the new forms of labor in the New World.<sup>52</sup> The treatises and legal manuals of the period say almost nothing about slavery or about blacks, in the New World or in England, where there were approximately 14,000 by 1772.<sup>53</sup> Thomas Wood's *New Institute of Imperial or Civil Law*, for instance, does contain a rare reference to slaves by tracking Holt on the unavailability of trover, but the reference is not found in Wood's more important work, the *Institute of the Laws of England*, even in later, posthumous editions, published after *Somerset* and the first stirrings of abolitionism.<sup>54</sup>

### C. Colonial Slavery Statutes

With English law thus largely indifferent to slavery, only one body of significant slave law existed in the English colonies: the incomplete and

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that Africans, unlike tobacco, sugar, and other articles of tropical trade, were brought into England. See PETER MATHIAS, *THE FIRST INDUSTRIAL NATION: AN ECONOMIC HISTORY OF BRITAIN 1700-1914*, at 97, 100 (1969).

52. See WESLEY F. CRAVEN, *THE COLONIES IN TRANSITION 1660-1713*, at 295 (1968); 1 *PROCEEDINGS AND DEBATES OF THE BRITISH PARLIAMENTS RESPECTING NORTH AMERICA: VOL. I, 1542-1688* (Leo F. Stock ed., 1924) [hereinafter *PROCEEDINGS AND DEBATES*].

53. The figure of 14-15,000 is cited by counsel and Lord Mansfield in *Somerset*, and later historians have accepted this range. *Somerset v. Stewart*, Lofft 1, at 10, 15, 17, 98 Eng. Rep. 499, at 504, 507, 509 (K.B. 1772); BAKER, *supra* note 42, at 541 n.48; GEORGE, *supra* note 38, at 140; WIECEK, *supra* note 41, at 25. *But see* DRESCHER, *supra* note 15, at 27-29, 185-86 n.10 (suggesting lower estimates); Drescher, *supra* note 47, at 88.

54. See DRESCHER, *supra* note 15, at 187 n.19 (citing Wood's 10th and 1st eds.) with THOMAS WOOD, *AN INSTITUTE OF THE LAWS OF ENGLAND* 539-40 (photo. reprint 1979) (3d ed. 1724) [hereinafter *WOOD* (3d ed.)] and Wood's fourth edition, at 539-40 (4th ed. London 1728). Some assessments of Wood are collected in Daniel R. Coquillette, *Ideology and Incorporation III: Reason Regulated—The Post-Restoration English Civilians, 1653-1735*, 67 B.U. L. REV. 289, 344-45 (1987).

analytically inadequate colonial statutes. Consider the Virginia Slave Code of 1705, which formed the basis of all subsequent Virginia slave law and is widely considered the legislative consolidation of slavery in Virginia.<sup>55</sup> Substantively the Act is in no way a “code,” for it is not comprehensive or systematic. What the Act does is list, under four dozen more or less random titles, the activities that slaves and indentured servants cannot do, must do, or cannot do with whites, the things that whites cannot do for slaves, and that blacks cannot do even if free.<sup>56</sup> Among the topics are the correction of slaves, slave flight, weaponry in the possession of slaves, illegitimacy and intermarriage, and the baptism of slaves. Other leading common law slave “codes” are similar in the public law topics they address as well as their lack of structure.<sup>57</sup> The influential Barbados Act of 1661, which formed the basis of later slave statutes in Jamaica (1664), South Carolina (1696), and Antigua (1702), covered such matters as slave crime, non-criminal policing of slaves, flight, and rebellion. Supplemental Barbadian statutes later addressed black-white commercial dealings and the enforcement of black deference. The South Carolina Acts of 1690 and 1740, and the North Carolina Act of 1741 are to the same effect. The planters of the Leeward Islands managed without a full penal statute until 1702, relying until that time only upon ad hoc legislation. But even these elaborate statutes from other jurisdictions are not truly codes. They are more akin to lengthy police measures, listing crimes and consequences but little more. And like the colonial laws classifying slaves as real or personal property, the various “codes” often left practical legal problems unanswered and unclear.<sup>58</sup>

As an essentially reactive and penal jurisprudence, colonial slave law may have differed little from other contemporary bodies of new or reformed law. Like military law, domestic English criminal law, and the law governing Irish plantations, colonial slave law relied upon brutality and death as “the defining characteristics of this era of substantive British law.”<sup>59</sup> But the police problem common to each of these areas was surely most acute in the context of slavery, as the fearful legal responses of masters imply. Hence the predictable types of provisions contained in the statutes. These provisions have been classified and tracked from one “code” to the next, and many monographs have explained the real or

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55. See, e.g., BREEN & INNES, *supra* note 24, at 5; Billings, *supra* note 30, at 61-62. But see HIGGINBOTHAM, *supra* note 30, at 38-39 (emphasizing 1680 statute).

56. 3 *The Statutes at Large*, *supra* note 22, at 259, 269, 447; 4 *id.* at 126, 168; see CRAVEN, *supra* note 52, at 297 (reactive quality of Virginia slave law generally); see also ABBOT E. SMITH, *COLONISTS IN BONDAGE: WHITE SERVITUDE AND CONVICT LABOR IN AMERICA, 1607-1776*, at 227, 264, 275-76 (1947) (reactive quality of servant law as well).

57. The following discussion relies on statutes cited in DUNN, *supra* note 15, at 238-44; Wiecek, *supra* note 30, at 258.

58. See SCHWARZ, *supra* note 29, at 19 (uncertainty about applying benefit of clergy to slaves accused of felony).

59. PETER LINEBAUGH, *THE LONDON HANGED* 53 (1992).

perceived pressures which impelled legislators to respond how and when they did.<sup>60</sup> Taken together, these “codes” appear to recognize and legitimize the practice of slavery. But the general tenor of the codes is more important than any particular provision or penalty. They addressed such matters as slave criminality, flight and resistance, black-white daily interaction, and manumission. At their core, the codes determined who was a slave and how slaves could be kept unfree and unthreatening. Whether we consider such slave statutes individually or as additions to a notional slave “code,” they were police measures. Granted, they went well beyond criminal policing to address public law, broadly defined. That is, the codes were concerned with such seemingly private matters as a master’s right to forego punishing, educate, or manumit his slave, or a slave’s right to sell produce, precisely because the codes assumed these behaviors implicated the safety of whites and the political etiquette between whites and others (Indian, black, and mulatto).<sup>61</sup> The codes defined and patrolled the public boundaries between free and slave and between non-white and white.

#### *D. Freedom’s Boundaries: The Medieval Comparison*

Roman slave law, by contrast, aimed to be comprehensive, particularly on private law issues of manumission and succession, while colonial slave law merely defined a status and racial boundary. In this way, the colonial codes unexpectedly are comparable in structure not to Roman law, but rather to the early common law texts whose teachings on villeinage the colonists knew to be inapt. Most important of these medieval English treatises was the great systematic text attributed to Bracton, dating from the second quarter of the thirteenth century.<sup>62</sup> Antebellum judges and counsel occasionally cited Bracton—Southerners typically to adduce his discussions of villeinage, Northerners to note Bracton’s passages (themselves taken from Roman law) on the natural liberty of all men and the law’s “preference” for freedom.<sup>63</sup> But the similarity between Bracton

60. Wiecek, *supra* note 30, at 258; see also DUNN, *supra* note 15, at 238-45; WATSON, *supra* note 6, at 82.

61. JORDAN, *supra* note 6, at 108 (codes mold white as well as black attitudes); STAMPP, *supra* note 6, at 207, 212 (codes demarcate racial boundary); WATSON, *supra* note 6, at 66, 69-72 (codes address expanded public domain).

62. BRACON, *DE LEGIBUS ET CONSUEUDINIBUS ANGLIE* (George E. Woodbine ed. & Samuel E. Thorne trans. & intro., 4 vols. 1968-77).

63. For the preference for freedom doctrine, see *infra* note 75. For antebellum uses of Bracton, see, for example, *Fisher’s Negroes v. Dabbs*, 6 Yer. 119, 124, 14 Tenn. Rep. 78, 81 (1834); COBB, *supra* note 6, § 71, at 70. For the colonial period, see WILLIAM H. BRYSON, *CENSUS OF LAW BOOKS IN COLONIAL VIRGINIA* at xvi, 36 (1978) (availability of text); 1 PAMPHLETS OF THE AMERICAN REVOLUTION 1750-1776: VOL. I, 1750-1765, at 26 (Bernard Bailyn ed., 1965) [hereinafter PAMPHLETS] (use of Bracton in the polemics leading up to American Revolution), reprinted in *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 30 (1967). For slave cases, see, e.g., *Chamberline v. Harvey*, 5 Mod. 186, 189, 87 Eng. Rep. 598, 600 (K.B. 1697).

and colonial slave law is one of structure, not simply of familiarity or quotation.

Like colonial law, medieval common law texts such as Bracton's did not contain the efficient, concise statements of legal disabilities that the Roman model offered. On the contrary, medieval legal authors seemed to avoid discussing certain legally marginalized groups, including women, foreign merchants, Jews, the Irish, lepers, various kinds of serfs, and children born out of wedlock. There are a number of reasons for these omissions, though medieval moral discomfort is not prominent among them. For present purposes, it suffices that Bracton had almost nothing to say about most of these groups, even though they were important to the Crown on either fiscal or ideological grounds. In short, the text illustrates legal omission regarding outsiders.

Actually, the problem of medieval legal silence concerning the unfree is more complicated, in a way which speaks directly to the American slave law question. Bracton, for instance, was *not* silent concerning one legally marginal group, the unfree. In theory, he needed to say almost nothing. His treatise aimed at systematic description of the new common law, and, for that purpose, he needed only say that villeins were almost entirely ineligible for its protection. Instead, Bracton had a great deal to say about villeins. Almost all of it, however, concerned the boundary between serf and free: can a serf bring various actions, can a free litigant sue his serf vendor, and so on. Bracton had little to say about labor, how the lord-villein relationship should look, or the economic, religious, and family rights of serfs. Most of what he writes is not a substantive law of unfreedom, but "boundary law."<sup>64</sup> As for other outsiders such as Jews and Irishmen, whom medieval common law ousted from its protection and sometimes also called "unfree," however, Bracton said almost nothing at all.<sup>65</sup>

One reason that the common law texts treated medieval villeins so differently from Jews and Irishmen was doubtless the respective numbers of each group. Yet another consideration was the problem of demarcation. Unfree manorial peasants were in most respects very similar to free peasants. In village society, free and unfree mixed: they intermarried, leased land to each other, and stood surety for each other.<sup>66</sup> A legal system that wished to retain a status barrier between the free and unfree had to

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64. See PAUL R. HYAMS, *KING, LORDS AND PEASANTS IN MEDIEVAL ENGLAND: THE COMMON LAW OF VILLEINAGE IN THE TWELFTH AND THIRTEENTH CENTURIES* (1980).

65. For the medieval rhetoric of Jewish serfdom and the general problem of marginalized persons being excluded from legal texts, see Jonathan A. Bush, *The Invisible Man: The Jew in English Medieval Law* (unpublished manuscript, on file with author). For references to the Irish as legally unfree, see G.J. Hand, *Aspects of Alien Status in Medieval English Law, with Special Reference to Ireland*, in *LEGAL HISTORY STUDIES* 129, 132-34 (Dafydd Jenkins ed., 1975); G.J. Hand, *The Status of the Native Irish in the Lordship of Ireland, 1272-1331*, 1 *IR. JURIST* 93 (new ser. 1966) (examining both Irish unfree status and the legal disabilities assigned by English law).

66. See, e.g., Helen M. Cam, *Pedigrees of Villeins and Freemen*, 6 *GENEALOGISTS' MAG.* 299,

deploy elaborate legal tests to differentiate them. Precisely because unfree peasants in manorial villages were so much like free peasants, the legal topic of rightless villeins, which should have been amenable to brief, simple treatment, became a lengthy and elaborate set of doctrines.

Meanwhile, other rightless persons, such as the Jews and the Irish, required no legal elaboration to be defined and isolated. They were demonstrably different. In the case of Jews, most wished to stay that way. Some sought to purchase exemptions from the legal disabilities of Jewishness, but only a small handful of Jews sought the exemption that was always open—voluntary conversion.<sup>67</sup> As for the Irish, they could no more change their legal identity than they could their background. And so the jurists had very little work to do to define membership in these communities. English law simply took a seemingly common sense test of Irishness and appropriated the self-definition of the Jewish community, so little legal elaboration was necessary to distinguish the communities.

The silence of the medieval texts as to some unfree persons but not others brings us back to colonial slavery. The relative indifference of American law to slave questions is in part explained by the English majority's perception of groupness and difference. Winthrop D. Jordan has shown that English anti-black racism was very much in evidence by the late sixteenth century.<sup>68</sup> Thus, a social and intellectual category, the marginalized black, was in place perhaps a century before the encounter between English whites and African or Mediterranean blacks began on any meaningful scale. By the late seventeenth century, what had been chiefly a psychological category had become a major legal and economic category in the colonies, black slavery. And for most of the time from the seventeenth century through the American Civil War, the notion that African-Americans were different and inferior served as the cornerstone of American slavery and seemed to need no elaboration. Just as they once had seen the Irish and Jews, the English and their colonial kin now saw Africans as self-evidently different. The law thus could assume rather than assert or explain the premise of slavery.

But in the course of developing this simple legal definition of slavery,

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306-10 (1933), reprinted in *LIBERTIES AND COMMUNITIES IN MEDIEVAL ENGLAND* 124, 131-35 (1963).

67. For Jewish disabilities, see, for example, those recited in Henry III's edict of 1253, as cited in *CHURCH, STATE, AND JEW IN THE MIDDLE AGES* 188-89 (Robert Chazan ed., 1980). Regarding conversion, the paucity of references in the monastic chronicles, always eager to trumpet such successes, suggests that it was infrequent, as does the small population of the *Domus Conversorum*. See H.G. RICHARDSON, *THE ENGLISH JEWRY UNDER ANGEVIN KINGS* 28-32 (1960); Paul Hyams, *The Jewish Minority in Mediaeval England, 1066-1290*, 25 *J. JEWISH STUD.* 270, 276-77 (1974); Robert C. Stacey, *The Conversion of Jews to Christianity in Thirteenth-Century England*, 67 *SPECULUM* 263, 269-71 (1992) (suggesting conversion arose during 1240-1260, when the Crown's ferocious financial assault on Jewish resources brought strong pressures on Jewish families and communities).

68. JORDAN, *supra* note 6, at ch. 1.

rules were needed, mostly in the form of “boundary” statutes to address miscegenation, manumission, runaways, and black-white behavior. Often these lists were sealed with some form of harsh polemical claim, such as the 1696 South Carolina legislature’s declaration that slaves are “of barbarous, wild, savage natures, and such as renders them wholly unqualified to be governed by the laws, customs, and practices of this province.”<sup>69</sup> In part, rules were necessary to police slaves and slavery. But the additional implication of Bracton’s extensive treatment of villeinage may be that status markers and boundaries are hard to impose on complex social practice. The colonial boundaries of skin color and white racism did not always succeed in separating the races, particularly before the eighteenth century. There were instances of black slaves and white servants seeing their plights as common and running away together, or fighting together for the rebel Nathaniel Bacon, or drinking, trading, working together, or consensually making love.<sup>70</sup> For masters, the general answer to these boundary challenges was the same. Keep slaves as slaves and not free by keeping blacks separate. This explains the prominence of colonial penal statutes, miscegenation laws, restrictions on manumission, and a handful of other policing acts.

On one level, the significance of these boundary or policing rules is how little else there was to colonial American slave law. As one leading scholar has observed, “the striking thing about southern legal culture in the nineteenth century is how little of it there was,”<sup>71</sup> and this legal underdevelopment of rules, analysis, and institutions was even more characteristic of the colonial period. But equally remarkable is that colonial slave law existed at all, in its rude and incomplete form. First, by what authority had local lawmakers dared to create slavery and a body of slave law? Second, why was it that lawyers and lawmakers back in England failed to supplement the flawed colonial legal effort, as they had in other contexts? The two questions are related, and for their explanation we must focus on the common lawyers in Westminster.

## II. ENGLISH LEGAL THOUGHT AND SLAVERY: SOME PRACTICAL ISSUES

One of the great oddities of the adoption of slavery in the British colonies is how quietly it seems to have happened, through the “unthinking

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69. See Wiecek, *supra* note 30, at 270.

70. BREEN & INNES, *supra* note 24, at 27-30, 95-96, 98-100, 104-07; MORGAN, *supra* note 5, at 311, 327, 336; WOOD, *supra* note 8, at 54, 96, 218, 243-44; T.H. Breen, *A Changing Labor Force and Race Relations in Virginia, 1660-1710*, 7 J. SOC. HIST. 3, 7-8, 11-12 (1973), reprinted in SHAPING SOUTHERN SOCIETY: THE COLONIAL EXPERIENCE 116, at 121-22, 126-27 (T.H. Breen ed., 1976); Douglas Deal, *A Constricted World: Free Blacks on Virginia’s Eastern Shore, 1680-1750*, in COLONIAL CHESAPEAKE SOCIETY 275, 277 (Lois G. Carr et al. eds., 1988).

71. Finkelman, *supra* note 9, at 113.

decision," in Winthrop D. Jordan's apt phrase.<sup>72</sup> But if slavery as a social practice in the mainland colonies was a fifty-year process of unthinking decisions, it cannot be called a surprise. Surely it is no surprise that a profitable economic institution, long entrenched in the Spanish and Portuguese colonies, would be adopted by the English in their nearby Caribbean colonies. It is also no surprise that the mainland plantation colonies would also turn to slavery when, toward the end of the seventeenth century, the supply of "free" (i.e. indentured) servants fell and their price rose and when the supply of slaves increased. Indeed, there are few settings in which notions of race, market, and empire are more germane, and the switch to slave labor has been amply explained by social and economic historians.<sup>73</sup> But how did English law come to accept slavery, and how did it do so by stealth, by enshrining local custom in provincial statute and allowing it under common law?<sup>74</sup>

#### A. *Slavery and Early Modern Political Thought*

By way of background, recall that English public opinion was closely acquainted with the notion of slavery. Englishmen talked about slavery in the sense of political subjugation and rejoiced in their freedom. They fought wars and emigrated to ensure that freedom, and argued endlessly about liberty and rights. They insisted that the common law had an inherent preference for freedom, *favor libertatis*, even though the tag line was borrowed from Roman law.<sup>75</sup> They denounced the Spanish for hav-

72. JORDAN, *supra* note 6, at 44.

73. Some of the best recent scholarship is found in DUNN, *supra* note 15, at 67-73; DAVID W. GALENSON, TRADERS, PLANTERS, AND SLAVES: MARKET BEHAVIOR IN EARLY ENGLISH AMERICA (1986); ALLAN KULIKOFF, TOBACCO AND SLAVES: THE DEVELOPMENT OF SOUTHERN CULTURES IN THE CHESAPEAKE, 1680-1800 (1986); MORGAN, *supra* note 5, at 298-99; Russell R. Menard, *British Migration to the Chesapeake Colonies in the Seventeenth Century*, in COLONIAL CHESAPEAKE SOCIETY 99, 108-11 (Lois G. Carr et al. eds., 1988); Russell R. Menard, *From Servants to Slaves: The Transformation of the Chesapeake Labor System*, 16 S. STUD. 355, 373-80 (1977), reprinted in COLONIAL SOUTHERN SLAVERY 225, 243-50 (Paul Finkelman ed., 1989).

74. As I understand them, Professors Morgan and Finkelman, as well as many economic historians, see the initial legal acceptance of slavery as less problematic. In their view, given the practical exploitation of colonial labor in the early- and mid-seventeenth century, and the legal doctrines available to masters, it was no great leap to legal slavery. DAVID ELTIS, ECONOMIC GROWTH AND THE ENDING OF THE TRANSATLANTIC SLAVE TRADE 31 (1987); MORGAN, *supra* note 5, at 296-305; Stanley Elkins & Eric McKittrick, *Institutions and the Law of Slavery: The Dynamics of Unopposed Capitalism*, 9 AM. QTLY 3, at 14 (1957), reprinted in COMPARATIVE ISSUES IN SLAVERY 141, at 152 (Paul Finkelman ed., 1989) (adoption of slavery facilitated by absence of legal structures prohibiting slavery); Finkelman, *supra* note 9, at 91. This understates, in my view, the importance of traditional common law reasoning about freedom.

75. Coke and Fortescue were the best known of the many English writers who praised common law for this preference. See 1 COKE, *supra* note 18, § 193, at \*124b; JOHN FORTESCUE, DE LAUDIBUS LEGUM ANGLIE c. 42, at 103-04 (photo. reprint 1979) (S.B. Chrimes ed. & trans., 1942) (c. 1468-71). For reliance on *favor libertatis* in seventeenth-century litigation, see, for example, Chamberline v. Harvey, 5 Mod. 186, 87 Eng. Rep. 599, 600 (K.B. 1697) (argument of defendant employer against alleged master). The origins and medieval uses of the doctrine are set out in HYAMS, *supra* note 64, at 203-19; its later evolution is traced in J.H. Baker, *The Roots of Modern Freedom: Personal Liberty under the Common Law, 1200-1600*, at 11-12, 14, 17-18 (1992) (unpublished manuscript, on file with the author). The latter source was graciously made available by its author, whom I thank. Nor was favor-of-freedom reasoning confined to the common lawyers.

ing enslaved Indians in the New World. Whatever the perceived political, economic, or religious threats—"papists," Spain, Stuart kings (descended from Norman despots), London monopolists, protestants of a different hue—they typically were described as seeking to enslave the righteous English. Of course, there is irony in this vision of exceptionalism. Continental countries also viewed their laws as being too pure to permit slavery and otherwise favored freedom, and English society contained a variety of coercive work environments. But this hardly affected the English self-image of an embattled but free people.<sup>76</sup> A consistent theme of political discourse throughout the seventeenth century, along with patriarchy, the "ancient constitution," and, toward the end of the century, contract, was conquest; the English were freeborn, and England's enslavement was the aim of her enemies.<sup>77</sup>

This opposition to English slavery was not confined to articulate disputants and political metaphor. A 1547 statute, for instance, was highly unusual in mandating penal enslavement for habitual vagrants, and was repealed within two years.<sup>78</sup> In the absence of legislative history, the inclination has always been to accept at face value the preambular claim in the repeal that English public opinion found slavery too much even for the despised vagrants.<sup>79</sup> While direct evidence is scarce, there likely was

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See, e.g., SAMUEL PUFENDORF, *DE JURE NATURAE ET GENTIUM LIBRI OCTO* [THE LAW OF NATURE AND NATIONS], \*440, at 646, \*643 at 943 (C.H. & W.A. Oldfather trans., 1934) (1688).

Hyams concludes that, in the early common law, "favor libertatis" was consistent with a harsh status of unfreedom. Early jurists saw the doctrine not as freeing the unfree in close cases, but as protecting the free man from wrongful loss of freedom. HYAMS, *supra*, at 206-08. This limited interpretation of *favor libertatis* would have horrified Coke, but it does suggest how centuries later the slave South could incorporate such a loaded doctrine without jeopardizing the ideology of slave law. See, e.g., Marie Louise (f.w.c.) v. Marot, 8 La. 475, 478 (1835), cited in 3 JUDICIAL CASES, *supra* note 38, at 504, 505 (citing *favor libertatis*). The leading American case on the doctrine is Harry v. Decker and Hopkins, Walk. (Miss.) 36 (1818), discussed in FINKELMAN, *supra* note 1, at 228-30 and JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870, at 302 (1978). Compare PUFENDORF, *supra*, with DAVIS, *supra* note 8, at 110 (Pufendorf adopts rhetoric of the solicitude toward freedom, but also supports slavery, even advocating unorthodox step of slavery at home for paupers).

Hyams' revisionist view that the rhetoric of freedom was intended to protect (only) the free and thus could support slavery, also helps account for Southern use of other freedom texts such as Magna Carta that were attractive to jurists but double-edged. See, e.g., Fisher's Negroes v. Dabbs, 6 Yer. 119, 137, 14 Tenn. Rep. 78, 90 (Chanc. 1834); State v. Fraser, Dud. 42, 44-45, 1 Ga. Rep. Ann. 373, 374 (Richm. Super. Ct. 1831).

76. For Continental expressions of "free air" or "free soil" rhetoric, see DAVIS, *supra* note 8, at 46. A later irony is that many eighteenth-century American colonists thought in the same terms, seeing the home government as seeking to enslave them. See 1 PAMPHLETS, *supra* note 63, at 140-41. And some Britons agreed with them. Adam Smith termed British regulation of colonial industrial diversification the "impertinent badges of slavery." See MATHIAS, *supra* note 51, at 86 (citing Smith).

77. See, e.g., ROBIN BLACKBURN, THE OVERTHROW OF COLONIAL SLAVERY, 1776-1848, at 42 (1988); DRESCHER, *supra* note 15, at 17; JOHN LOCKE, TWO TREATISES OF GOVERNMENT passim (Peter Laslett ed., 1960) (3d ed. 1698); MORGAN, *supra* note 5, at 6-8; STEINFELD, *supra* note 20, at 95-97.

78. 1 Edw. VI, c. 3, repealed by 3 & 4 Edw. VI, c. 16; see C.S.L. Davies, *Slavery and Protector Somerset: The Vagrancy Act of 1547*, 19 ECON. HIST. REV. 533 (2d ser. 1966).

79. 3 & 4 Edw. VI, c. 16 (the "extremities of some [of such laws] have byn occasion that they have not ben putt in ure [use].") As Blackstone put it, "the spirit of the nation could not brook his [a



also a non-elite tradition which opposed slavery in principle, as well as the many lesser forms of coerced labor with which common people were also familiar, such as mandatory work in houses of correction and bridewells, mandatory apprenticeships, galley slavery, transportation to Ireland and the newer colonies, and impressment.<sup>80</sup>

English public opinion also was well acquainted with blacks, the colonies, and the growth of black slavery there. A handful of blacks were in England in the early seventeenth century and perhaps before that, though their precise status is unclear.<sup>81</sup> Nor was the turn to colonial slavery taken behind an oceanic screen, before which English lawmakers, merchants, and prospective emigrants sat in happy ignorance. Richard Hakluyt's widely circulated compilation of accounts of English travelers had proudly told of the three early African slaving ventures of Sir John Hawkins (1562-67), and also had mentioned the Spaniards' use of slaves.<sup>82</sup> Richard Ligon's *True and Exact History of Barbadoes* described the fabulously successful Barbadian sugar economy, whose

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slave's] condition, even in the most abandoned rogues . . . ." 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*424. Recent scholarship has shown that penal enslavement was not unique to the 1547 statute and that there were a handful of other instances in sixteenth-century England. Baker, *supra* note 75, at 20-21; Davies, *supra* note 78, at 548 n.3; see 39 Eliz. I, c. 4; A.F. POLLARD, ENGLAND UNDER PROTECTOR SOMERSET 224 n.1 (1900). But the examples are few, and it is a measure of the dislike for, or impracticability of, domestic slavery, that the common lawyers all but forgot that it was a possible response for crime or poverty. The proposals of such philosophers as Locke, Pufendorf, and Francis Hutcheson to reintroduce European slavery, MORGAN, *supra* note 5, at 324-25, were completely irrelevant as policy, and never came near adoption. See also ADAM J. HIRSCH, THE RISE OF THE PENITENTIARY: PRISONS AND PUNISHMENT IN EARLY AMERICA 75-80, 106 (1992).

80. BLACKBURN, *supra* note 77, at 36-37; SMITH, *supra* note 56, at 176-77; STEINFELD, *supra* note 20, at 97-98. The best evidence for this popular tradition may be not the literary evidence, but the behavior of juries in sixteenth-century villeinage cases, where they consistently found for freedom on even implausible facts or fictitious suits. See Baker, *supra* note 75, at 19-20.

81. See, e.g., MICHAEL CRATON, SINEWS OF EMPIRE: A SHORT HISTORY OF BRITISH SLAVERY 32, 35 (1974); FINKELMAN, *supra* note 6, at 10 (citing 1624 testimony of "John Phillips A negro Christened in England 12 yeers since . . ."); Davies, *supra* note 78, at 548 n.3; Fiddes, *supra* note 15, at 500 n.4; David B. Quinn, *Turks, Moors, Blacks, and Others in Drake's West Indian Voyage*, 14 TERRA INCOGNITAE 97, 100, 104 (1982), reprinted in EXPLORERS AND COLONIES: AMERICA, 1500-1625, at 197, 200, 204 (1990). I thank Martin Sheppard for his assistance with sources on this and other points.

82. RICHARD HAKLUYT, VOYAGES AND DISCOVERIES 106, 150 (Jack Beeching ed., 1972) (abridged ed. of RICHARD HAKLUYT, THE PRINCIPAL NAVIGATIONS, VOYAGES, TRAFFIQUES, AND DISCOVERIES OF THE ENGLISH NATION (2d ed. 1598-1600)). The network of powerful investors behind Hawkins' voyages is described in L.P. Jackson, *Elizabethan Seamen and the African Slave Trade*, 9 J. NEGRO HIST. 1 (1924), reprinted in SLAVE TRADE AND MIGRATION: DOMESTIC AND FOREIGN 211 (Paul Finkelman ed., 1989); R. Pollitt, *John Hawkins's Troublesome Voyages: Merchants, Bureaucrats, and the Origins of the Slave Trade*, 12 J. BRIT. STUD. 26 (1973); see, e.g., AN ELIZABETHAN IN 1582: THE DIARY OF RICHARD MADOX, FELLOW OF ALL SOULS 191, 307-08, 314-15 (Elizabeth S. Donno ed., 147 Hakluyt Soc. 2d ser. 1976) (early English encounter with Portuguese slaveowning in Africa, gift of young black to English captain); JORDAN, *supra* note 6, at 59 (involvement of other English captains with slaving). For the chronology of English slave-trading, compare KENNETH R. ANDREWS, TRADE, PLUNDER, AND SETTLEMENT: MARITIME ENTERPRISE AND THE GENESIS OF THE BRITISH EMPIRE, 1480-1630, at 111 (1984) (English largely excluded from slaving from approximately 1570 to 1650), with CRATON, *supra* note 81, at 39-40 (English interlopers enter slave trade before 1650, particularly after 1603). See generally, DAVID B. DAVIS, SLAVERY AND HUMAN PROGRESS 68, 70 (1984) (Black Legend of Spanish atrocities coexists

growth was dependent on black slaves, and Ligon described those slaves in a lengthy and conventionally racist way.<sup>83</sup> Puritan leaders also supplied their Providence Island colony with black slaves in the late 1630s, and the puritan colonists clamored for more.<sup>84</sup> Poor English and Irish men and women resisted private blandishments and public campaigns to remove them to the colonies because they expressly did not want to be worked like slaves, and those who were shipped to the colonies complained about or escaped from service on that same ground.<sup>85</sup> Mid-seventeenth-century merchants and investors were solicited to invest in the English slave trading ventures and companies. The founding documents for the South Carolina colony were revised in 1664 because of prospective settlers' fears that their right to slaves might not be guaranteed.<sup>86</sup> Not that there is need to rely on such literary and legal evidence. Englishmen of all ranks were surely familiar with the sugar colonies, their use of slave labor, and their fabulous wealth.<sup>87</sup>

### B. *Slavery and the Law Merchant*

The legal difficulty, however, is that any seventeenth-century institution grounded on custom and local legislation, as slavery was, would have been seen as very vulnerable by the lawyers in London. Thus, neither local "boundary" law, the candor of Hakluyt, Ligon, or Locke, nor a tradition of coercive labor practices is sufficient to explain how slavery interposed itself into common law. Without actual or tacit adoption by the common law, the claim of local planters to "legislate," in order to police slavery or for any other reason, would have been reducible to a problem of *ultra vires*. Chief Justice Holt acknowledged in the trover cases that slavery was the custom of the colonies, but, as he rea-

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with widespread English understanding of the "connections between slaves, plunder, and wealth" and desire to participate in same).

For the strange way in which nineteenth-century jurists relied in their argumentation on Hawkins' slave trading ventures, see, e.g., GOODELL, *supra* note 6, at 258, 272.

83. RICHARD LIGON, *A TRUE AND EXACT HISTORY OF THE ISLAND OF BARBADOES* 43-55, 62, 107 (photo. reprint 1970) (2d ed. 1673). The importance of Ligon's account is suggested in DAVIS, *supra* note 8, at 11.

84. Karen O. Kupperman, *Definitions of Liberty on the Eve of the Civil War: Lord Saye and Sele, Lord Brooke, and the American Puritan Colonies*, 32 *HIST. J.* 17, 29-30 (1989).

85. See, e.g., JORDAN, *supra* note 6, at 80-81; MORGAN, *supra* note 5, at 128; STEINFELD, *supra* note 20, at 101-02; Breen, *supra* note 70, at 3, 5; David T. Konig, "Dale's Laws" and the *Non-Common Law Origins of Criminal Justice in Virginia*, 26 *AM. J. L. HIST.* 354, 367 (1982). Even planters and entrepreneurs—the tiny colonial elite—complained of "slaveing it here . . ." DUNN, *supra* note 15, at 216. See also 1 *PROCEEDINGS AND DEBATES*, *supra* note 52, at 256-57 (members of Parliament "could hardly hold weeping" on learning of the sufferings of Englishmen banished to Caribbean in servitude); *THE INFORTUNATE: THE VOYAGE AND ADVENTURES OF WILLIAM MORALEY, AN INDENTURED SERVANT* 64 (Susan E. Klepp & Billy G. Smith eds., 1992) (1729 Philadelphia transportee describes fellow arrivals as "Voluntary Slaves").

86. WOOD, *supra* note 8, at 16, 19 n.16.

87. Hence the casual familiarity shown by a member of parliament complaining that the Commonwealth regime had imprisoned a political opponent without trial: "If you pass this, our lives will be as cheap as those negroes." 1 *PROCEEDINGS AND DEBATES*, *supra* note 52, at 256.

soned in a different setting, it is not open to private parties to dictate legal change to the courts in this backdoor way.<sup>88</sup> How could English courts recognize colonial practice?<sup>89</sup> Nowhere in common law was there direct ratification of slavery.

Generally, the common law and its royal master were exceedingly jealous of any rivals, including local jurisdictions. Centuries before, manorial lords and holders of other jurisdictional franchises, such as guilds, towns, and colleges, had found this out, and Crown lawyers had long challenged and nullified alleged franchise privileges. The historical fact that New World slavery originated as a local custom would not have strengthened the legal position of slaveholders, for a valid custom had to be "a law or right not written, which being established by long use and the consent of our ancestors; hath been and is daily practiced . . . [without] any commencement since the memory of man" and it had to be reasonable and consistent with the common law which, according to Sir Edward Coke and Sir John Davies, was itself the common custom of the realm.<sup>90</sup> The earliest major case about Renaissance colonial conquest, the *Case of Tanistry*, had made clear that local custom in conquered territory would yield to English law if it failed to meet these standards.<sup>91</sup> And, simply put, no common law authority ever stated that slavery was valid because it met the English test of a reasonable custom.

The alternative basis for slavery was to view it as a special kind of local custom, the practice of merchants, which was assimilated into English law through that body of international commercial law known as the Law Merchant. In fact, this is more or less how the common law came to accept slavery in the decades around 1700, though we have only shards of legal evidence. Many if not most Africans came to the English plantations in Dutch, and later English, shipping, and most had been brought to their ships by not capture but purchase, from local slave traders, victorious kings, privateers and interlopers, and European traders based in Africa. In other words, at the time they entered the hands of the shipper, Africans were already in commerce, as commodities. Hence the 1677 conciliar decision that slaves were commodities, and the ration-

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88. *Compare* Smith v. Brown and Cooper, 2 Salk. 666, 91 Eng. Rep. 566; Holt 495, 90 Eng. Rep. 1172, 1173 (Q.B. 1702) (customs of Virginia acknowledged) with Clerke v. Martin, 2 Ld. Raym. 757, 758, 92 Eng. Rep. 6 (Q.B. 1702) ("Lombard-Street . . . attempted in these matters of bills of exchange to give laws to Westminster-Hall"), cited in J.H. Baker, *The Law Merchant and the Common Law before 1700*, 38 CAMBRIDGE L. J. 295, 299 (1979), reprinted in THE LEGAL PROFESSION AND THE COMMON LAW 341, 345 (1986); see Daniel R. Coquillette, *Legal Ideology and Incorporation IV: The Nature of Civilian Influence on Modern Anglo-American Commercial Law*, 67 B.U. L. REV. 877, 937-38, 943 (1987) (discussing Holt and commercial custom).

89. BAKER, *supra* note 42, at 540.

90. Edward Coke, *The Compleat Copyholder; Being a Discourse of the Antiquity and Nature of Manors and Copyholds*, reprinted in THREE LAW TRACTS § 33, at 59 (photo. reprint 1982) (William Hawkins ed., 1764) (quotation); J.G.A. Pocock, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY 32-46 (1st ed. 1967).

91. Davies 28, 31-33, 80 Eng. Rep. 516, 519-21 (Irish K.B. 1606).

ale in *Butts v. Penny* “that negroes being usually bought and sold among merchants, as merchandise . . . [so] there might be a property in them . . . .”<sup>92</sup>

This mercantile-custom theory offered at least the first step toward a common law recognition of slavery. The common law did not have to repudiate *favor libertatis*, because the African was not a litigant whose claim to freedom was in legal equipoise. The enslaved African entered the English legal universe as a commodity, with no claim to freedom and no legal personality at all. Mercantile law governed, and it did not forbid this form of commodity any more than did international law, which held that slavery was against the law of nature but consistent with the law of nations.<sup>93</sup> This explains the unexpected argument in *Somerset* by the master’s counsel that English law ought to recognize the right of African nations to put their goods into commerce.<sup>94</sup> Better yet, the mercantile-custom rationale seemed to permit the common law to allow slavery without having to do anything at all. All that was required was that no judge or litigant go behind the alleged property interest, to ask what kind of merchandise it was and whether it presented any special difficulties. Hence, perhaps, the paucity of common law cases.<sup>95</sup>

That slavery was the custom of the plantations was a commonplace to jurists, but the mercantile-custom theory failed to prove the necessary second step that slavery was therefore absorbed into common law. In the first place, English authorities on the Law Merchant did not defend slavery on these grounds, as we shall discuss. Second, even if slavery was a local custom consistent with an international Law Merchant, the common law had by the mid-seventeenth century consolidated its position over all rivals including the Law Merchant. In fact, the current understanding is that there may not have been a separate body of substantive Law Merchant that declined or was assimilated by common law.<sup>96</sup> There was simply the practice of merchants, which the common law had always accommodated from medieval times onward. But even if the old view is right in seeing the Law Merchant as a distinct body, it was clear by the seventeenth century that a doctrine or practice (including slavery) had to be acceptable to common law to be part of the law of England, thus foreclosing any automatic back door into the common law.<sup>97</sup>

Regardless of whether the substantive law they applied was distinct,

92. 2 Lev. 201, 83 Eng. Rep. 518 (K.B. 1677).

93. The distinction was found in Justinian, and was widely followed. JUSTINIAN, INSTITUTES I.3, I.5; see, e.g., *The Antelope*, 23 U.S. (10 Wheat.) 66, 120 (1825).

94. *Somerset v. Stewart*, Lofft 1, 7, 98 Eng. Rep. 499, 503 (K.B. 1772).

95. Personal communication with Professor J.H. Baker, which the author acknowledges with gratitude.

96. Baker, *supra* note 88, at 295.

97. A modern analogy would be to a product or commodity illegal under American law but legal elsewhere; neither its foreign legality, nor the general encouragement given by international law to foreign trade, requires America to permit importation and possession of the product.

there certainly were courts outside the common law courts addressing foreign mercantile claims, notably the Court of Admiralty. But by the time slavery first took root in the colonies, the jurisdictional wars were ending, with the common law courts prevailing over local, ecclesiastical, civilian and prerogative court rivals. The powerful Tudor prerogative courts, Star Chamber and High Commission, were abolished. And the remaining non-common law jurisdictions, including the Admiralty, were firmly subordinated to common law.<sup>98</sup>

The process by which Admiralty jurisdiction had been diminished is a colorful story, like many legal stories of the time centering around the great Sir Edward Coke. In a series of cases brazenly seizing admiralty and mercantile jurisdiction, he and his colleagues secured for the common law concurrent and in some areas exclusive jurisdiction over foreign matters formerly in the exclusive jurisdiction of the Admiralty.<sup>99</sup> The best known step was to accept pleadings that described foreign contracts executed in Hamburg or Ragusa as from "Hamburg, in the county of Kent" and the like, by making the geographic part of the pleadings non-traversable, thereby capturing many foreign commercial cases for the common law tribunal. The consequence for slave law was that the Admiralty jurisdiction was reduced to such core areas as seamen's wages earned at sea, prize, and salvage. When slave cases arose under this diminished jurisdiction, the Admiralty resorted to the *jus gentium*, but even practices acceptable under the *jus gentium*, like slavery, had increasingly to meet a common law threshold.

Under the older theory of the Law Merchant, the sixteenth and seventeenth centuries saw the expansion of common law into such novel areas as commercial law and foreign transactions; under the newer explanation, what happened from the mid-sixteenth century was that common law pleadings in assumpsit became more candid and explicit in handling mercantile issues.<sup>100</sup> But whether the common law expanded its jurisdiction or simply showed more candor, the large mercantile docket of the seventeenth-century common law courts only adds to the expectation that there ought to be a great many cases discussing the slave trade and

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98. In the view of some observers, the Admiralty recovered a measure of its former jurisdiction in the nineteenth century. DAVIS, *supra* note 6, at 499 n.53. Certainly it continued to hear a modest flow of slave-related cases, including *The Slave, Grace*, the celebrated effort to limit the *Somerset* holding. See *R. v. Allan [The Slave, Grace]*, 2 Hagg. Adm. 94, 166 Eng. Rep. 179 (Adm. 1827). No less an authority than Justice Story viewed *The Slave, Grace* as the definitive interpretation of *Somerset*, but the broad emancipationist understanding of *Somerset* proved to be too persuasive for even Story to confine. See Wiecek, *supra* note 6, at 111.

99. Daniel R. Coquillette, *Legal Ideology and Incorporation II: Sir Thomas Ridley, Charles Molloy, and the Literary Battle for the Law Merchant*, 61 B.U. L. REV. 315, 326-36 (1981); D.E.C. Yale, *A View of the Admiral Jurisdiction: Sir Matthew Hale and the Civilians*, in LEGAL HISTORY STUDIES 1972, at 87 (Daffyd Jenkins ed., 1975); see also BAKER, *supra* note 42, at 141-42. Earlier examples of fictitious pleadings concerning foreign contracts are collected in Baker, *supra* note 88, at 303 n.32.

100. Baker, *supra* note 88, at 309-20.

slaves. Instead, there are only one dozen reported cases. Nowhere in English commercial law are there new legal concepts or categories for slaves or the slave trade.

Admittedly, old legal forms can always be made to handle new problems behind opaque formulae, and it might have been that slave trade issues were systematically handled by fictional pleadings. Commercial law is known to be an area where seemingly clumsy medieval legal forms, notably the conditional penal bond, were adopted to handle new levels of business activity through the seventeenth century.<sup>101</sup> But the slave trade was not handled through such pleading devices, because *assumpsit* litigation invited disclosure of the underlying facts and because the slave trade was seen to be different from other trade. As the English explorer Richard Jobson said in 1620 when offered a cargo of slaves near the Gambia River, "We were a people who did not deale in any such commodities, neither did wee buy or sell one another, or any that had our owne shapes."<sup>102</sup> The few common law cases from the end of the seventeenth century were among masters and merchants concerning rights over slaves, but the language of the late-seventeenth-century judges suggests it was still new to use common law forms to litigate over slaves and that the common law had neither open nor fictitious ways to account for slavery.

### III. ENGLISH LEGAL THOUGHT AND SLAVERY: THE GRAND TRADITION

#### A. *Silence in the Inns of Court*

Case law, however, was only one of a number of contexts in which early modern lawyers might have addressed the legal issues of slavery. There were also a number of important academic genres, both written and oral, that offered jurists the opportunity to address legal issues in a more speculative or systematic way. One such genre was the "readings" or lectures at the Inns of Court, in which senior lawyers glossed and commented on old statutes. Among the examples conventionally deployed in the readings were villeins and villeinage (frequently in the sixteenth century, somewhat less often in the seventeenth). Among the regular topics were such standard texts of common law freedom as Magna Carta chapter 29. There is no evidence, however, that the readers ever addressed slavery.<sup>103</sup> The essence of the readings was that they

101. A.W.B. Simpson, *The Penal Bond with Conditional Defeasance*, 82 *LAW Q. REV.* 392 (1966), reprinted in *LEGAL THEORY AND LEGAL HISTORY* 111 (1987); Samuel E. Thorne, *Tudor Social Transformation and Legal Change*, 26 *N.Y.U. L. REV.* 10, at 19-21 (1951), reprinted in *ESSAYS IN ENGLISH LEGAL HISTORY* 197, at 206-08 (1985).

102. Various details are cited in ANDREWS, *supra* note 82, at 114-15; CRATON, *supra* note 81, at 56; K.G. DAVIES, *THE ROYAL AFRICAN COMPANY* 15 (1970); DAVIS, *supra* note 8, at 452 (dating refusal to 1621); JORDAN, *supra* note 6, at 61.

103. Personal communication with Professor J.H. Baker, which the author acknowledges with

glossed the law by presenting complex, often impossible, hypotheticals. Often the scenarios employed complications from the law of persons, notably such figures as villeins and monks, both of whom were practically extinct by the seventeenth century. The examples grew quite ornate and fanciful: hence the villein who enters and then leaves holy orders, then acquires property, commits felony, or marries and dies.<sup>104</sup> But however speculative the scenarios, the stock figures always were drawn from within the already-ancient common law tradition, and so they never included slaves.

Nor was slavery or the slave trade addressed by readings on other statutes. The curriculum of readings frequently included the medieval Statute of Merchants and Statute of Westminster I, ch. 4 (on shipwrecks), both of which by the seventeenth century also had potential implications for the slave trade, but no slave references are extant.<sup>105</sup> The tradition of readings continued until approximately 1670, well after Barbados had completely adopted slave labor, and by which time Virginia, Maryland, the Leeward Islands, and Jamaica also were importing growing numbers of slaves. Yet no readings are known in which readers alluded to contemporaneous African slaves. Given the conventions of the genre, the omission is no surprise, but it is significant as part of a consistent pattern of legal neglect.

### B. *Unfreedom in the Texts of the Legal Systematizers*

Outside of the tight world of the Inns of Court and their academic oral exercises, the seventeenth century was a golden age of English legal scholarship, but the major writers also uniformly ignored the growing fact of plantation slavery. The omission of slavery is especially notable in the work of legal writers who sought to systematize English law. Like jurists all over Europe, these English systematizers sought to summarize English law by arranging it around major headings and distinctions, almost always drawn from Roman law. Free/slave is the opening substantive distinction of Justinian's *Institutes*, the text with which systematizers began.<sup>106</sup> Earlier English systematizers, notably Bracton, had

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gratitude. For the use of Magna Carta in common law courts as an argument against slavery, see *Chamberline v. Harvey*, 5 Mod. 186, 189, 87 Eng. Rep. 598, 600 (K.B. 1697); for its use to support slavery, see *Smith v. Gould*, 2 Ld. Raym. 1274, 1274-75, 92 Eng. Rep. 338 (Q.B. 1706)

104. READINGS AND MOOTS at THE INNS OF COURT IN THE FIFTEENTH CENTURY: VOL. II MOOTS AND READERS' CASES at lxxii (Samuel E. Thorne & J.H. Baker eds., 105 Selden Soc. 1990).

105. Indeed, readings on these topics from the period *prior* to the age of slavery sometimes *did* address the relevance of unfree personal status to shipping questions. See, e.g., Anon., "Reading on Westminster I, c. 4, Wreck of Sea," Linc. Inn Lib. Ms., Maynard 3, ff. 211-16v, at 211v, fiche in Eng. Leg. Ms. Proj., Readings Ms. 54 (J.H. Baker ed. 1975- ).

106. JUSTINIAN'S INSTITUTES 1.3. For the importance of the *Institutes* for Renaissance jurists, see *id.* at 18-26 (Paul Krueger ed., Peter Birks & Grant McLeod trans. & intro., 1987); ALAN WATSON, THE MAKING OF THE CIVIL LAW 64-82 (1981); Peter Stein, *The Fate of the Institutional System*, in HULDIGINGSBUNDEL PAUL VAN WARMELO 218 (J. van der Westhuizen et al. eds., 1984), reprinted in THE CHARACTER AND INFLUENCE OF THE ROMAN CIVIL LAW 73 (1988).

taken the *Institute's* passage and shaped it to describe more accurately the intermediate status of medieval serfdom.<sup>107</sup> Occasionally, the later jurists continued this tradition of locating common law villeinage along a Roman status spectrum (free/ascripticii/slave), even though villeinage itself was fast becoming irrelevant.<sup>108</sup> But more often these later jurists or their translators simply followed one or more of the following courses: they replaced free/slave with free/servant, king/subject, or king/lord/knight; they adapted free/slave to refer to master/servant; they claimed that it referred to lord/villein and then conceded that there were none of the latter; or they discussed freedom as freedom from arbitrary imprisonment rather than as personal status before going on to address the writ of habeas corpus.<sup>109</sup> Particularly suggestive are the ways that Matthew Hale and Thomas Wood addressed the institutional distinctions of persons. They were, along with William Blackstone, the great systematizers writing in the heyday of English slavery, and the works of both men were familiar in the slaveholding colonies.<sup>110</sup> Hale wrote of king/subject, master/servant, and lord/villein ("of little Use, and . . . altogether antiquated . . ."), while Wood wrote of liberty as non-imprisonment and elsewhere mentioned master/servant and master/apprentice.<sup>111</sup> Wood came closest to practical colonial issues by noting certain relevant doctrines of indentured apprenticeship, but not until the 1760s was plantation slavery addressed, and then by Blackstone, the last great systematizer, in language that nurtured the early abolitionists and prefigured Mansfield's speech in *Somerset*.<sup>112</sup>

107. 2 BRACTON, *supra* note 62, ff. 4b-5 and 6b-7b, at 29-30 and 36-38.

108. COWELL, *supra* note 18, 1.3 at 8; SMITH, *supra* note 18, 3.8 at 133-34; HENRY SWINBURNE, A BRIEF TREATISE OF TESTAMENTS AND LAST WILLS 44 (photo. reprint 1978) (1590). Perhaps it is significant that discussion of these irrelevant Roman categories tend to appear in institutional jurists like Cowell and Smith, writing before the rise of English slavery.

109. SMITH, *supra* note 18, bk. 1 at 1-48, 3.8 at 130-39; COWELL, *supra* note 18, 1.3 at 7-9, 1.6 at 14.

110. BRYSON, *supra* note 63, at xvi, 53, 81.

111. MATTHEW HALE, THE ANALYSIS OF THE LAW 2, 5-6, 42-43, 50-51, 56 (quotation) (photo. reprint 1978) (1713); WOOD, *supra* note 54, at 12-16, 48-57; see also the work of Blackstone's successor Sir Robert Chambers, whose friend Samuel Johnson is said to have assisted in the preparation of the lectures. 2 ROBERT CHAMBERS, A COURSE OF LECTURES ON THE ENGLISH LAW DELIVERED . . . 1767-1773, at 6-14, 26-28, 105-07 (Thomas M. Curley ed., 1986) (addressing habeas, the three conventional "private civil relations"—husband-wife, parent-child, and master-servant—and villeinage).

Earlier, the convention seems to have been to refer to apprenticeship as a temporary unfreedom. COWELL, *supra* note 18, 1.3 at 10; SMITH, *supra* note 18, 3.8 at 137-38. That convention softened, such that, by the late seventeenth century, authors included descriptions of various legal remedies available to the wronged apprentice. WOOD, *supra*, at 49-51. This suggests that, in the sixteenth century, it may not have been apparent that traditional forms of servitude, like apprenticeship, differed from the nonexistent "slavery," and that the rise of plantation slavery made it critical to delineate the outer bounds of traditional, domestic, and limited servitude. See STEINFELD, *supra* note 20, at 101.

112. WOOD, *supra* note 54, at 51 (citing salability of apprentices by custom of London; recent restrictions on transferring English apprentices to the colonies); 1 BLACKSTONE, *supra* note 79, at \*127, \*416-17 \*423-25. For the evolution in Blackstone's views on slavery, see DAVIS, *supra* note 6, at 485-86; WIECEK, *supra* note 41, at 27.



After its treatment of “persons”, the Justinianic scheme also provides extensive discussions of property and actions for that property. In the Middle Ages, Bracton had used these places to offer some brief, Romanized statements on the ownership of men and lengthy passages on the rights and disabilities of villeins.<sup>113</sup> But English institutionalists of the seventeenth and eighteenth centuries no more mentioned slaves under the headings of “property” or “actions” than they had under “persons.” Instead, there were only conventional discussions of copyhold tenure, the successor to medieval villeinage tenure.<sup>114</sup> The decision to delete villeins and villeinage tenure doubtless demonstrates the desire to give current law, but the impulse did not extend to the new property in Africans.

Unexpectedly, the fullest discussion concerning slaves is found not in the institutional texts but in Henry Swinburne’s *A Brief Treatise of Testaments and Last Wills*.<sup>115</sup> Swinburne carefully distinguished between slaves and villeins and gave an accurate, brief sketch of certain disabilities of each. Though he wrote before the English colonies were even established, Swinburne’s text enjoyed wide circulation in Virginia, and at least one historian has argued that it was of central importance in shaping early Virginian slave status, by describing the civil law’s rule of maternal descent.<sup>116</sup> It may be that the colonists used Swinburne in this way, but his text cannot have been an important part of the English legal recognition of colonial practices. In the first place, Swinburne firmly accepted the English paternal-descent rule for status of the child of a mixed marriage—the opposite of the mother-rule that the colonists needed and eventually adopted. Moreover, far weightier authorities than Swinburne—such as Coke and Fortescue—also discussed and rejected the mother-rule, and it is thus doubly hard to see what particular support Swinburne gave to planters or London lawmakers. In fact, Swinburne offered supporters of slaveowning less than any familiar continental civilian text, all of which accepted the mother-rule, or than knowledge of Spanish, French, Dutch, or Portuguese New World slave practices.

The real point of Swinburne’s discussion of unfreedom lies in how utterly irrelevant it was. In listing the various classes of persons ineligible to make a will (apostates, lepers, the blind, captives, “manifest usurers,” “sodomites,” the unfree), Swinburne looked backward to medieval canon law and the Roman *Code* rather than forward to plantation slav-

113. See, e.g., 2 BRACTON, *supra* note 62, ff. 8-8b, 11b, and 25-26b, at 40-41, 51, and 86-90.

114. See, e.g., WOOD, *supra* note 54, at 130-39. Chambers, for instance, did mention slaves, but only in the course of presenting an historical interpretation of the origin of Germanic serfdom and villeinage; there is nothing on contemporary New World slavery. 2 CHAMBERS, *supra* note 111, at 106.

115. SWINBURNE, *supra* note 108, at 43-44v.

116. Billings, *supra* note 30, at 57 (1991); Warren M. Billings, *English Legal Literature as a Source of Law and Legal Practice for Seventeenth-Century Virginia*, 87 VA. MAG. HIST. & BIO. 403, at 414 (1979) (Swinburne central to colonial slave law). See BRYSON, *supra* note 63, at xvii, 76-77. But see Morris, *supra* note 17, at 108-09.

ery. He cited classes no longer present in England. He quoted Bracton verbatim on the irrelevant medieval issue of leprosy. Everywhere on personal status, Swinburne presented already old and stylized formulae of persons and classes. Like other jurists of the day—Cowell, Smith, Coke—Swinburne repeated scholastic distinctions and implausible hypotheticals, and gave nothing that would be supportive of or helpful to colonial enslavement.<sup>117</sup>

### C. *Slavery in the Texts on Jus Gentium*

This habit of staying within inherited legal categories and rhetorical structures is characteristic of the few other jurists who wrote on slavery. Consider the early public international lawyers, that is, the jurists who wrote on *jus gentium* and the law of war and peace. It is a familiar story that the earliest figures in this tradition, the great sixteenth-century Spaniards, like Vitoria and Suarez, had among their chief concerns the conquest and enslavement of the Indians.<sup>118</sup> The seventeenth-century figures, including English jurists, also devoted attention to slavery, particularly the enslavement of prisoners in lawful wars. Consider, for example, Richard Zouche's *Juris et Judicii Feccialis*—an important local text of which the modern international lawyer Lassa Oppenheim observed that “[t]his little book has rightly been called the first manual of the positive law of nations.”<sup>119</sup> Zouche, Professor of Civil Law at Oxford and Admiralty judge, addressed the enslavement of prisoners, the conveyance of New World commodities to the enemy, and the thorny question of which non-Christians were “religious enemies” such that they could be displaced, killed, or enslaved.

Each of these issues implicated New World developments, but Zouche did not put the questions together to address English plantation slavery, which was already thriving on Barbados. His use of evidence is suggestive. Usually he invoked ancient Greek and Roman examples, sometimes medieval illustrations, and infrequently contemporary cases. When he gave recent examples, they usually were cases concerning the

117. See, e.g., COWELL, *supra* note 18, 1.3-4 at 9-12, 1.16 at 35, 2.1 at 55 (penal slavery, reenslavement of freedmen for ingratitude, public slaves). See also 2 BRACTON, *supra* note 62, at ff. 8-8b, at 40-41 (similar medieval borrowing of irrelevant Roman slave doctrines, not modified to describe English serfs). For an alternative, practical presentation of wills and testaments, compare Swinburne with WILLIAM NELSON, *LEX TESTAMENTARIA* (photo. reprint 1978) (1714).

118. See, e.g., ANTHONY PAGDEN, *THE FALL OF NATURAL MAN: THE AMERICAN INDIAN AND THE ORIGINS OF COMPARATIVE ETHNOLOGY* 29-118 (1982).

119. 2 RICHARD ZOUCHE, *JURIS ET JUDICII FECCIALIS SIVE JURIS INTER GENTES EXPLICATIO* 80, 101, 116-17, 125-26, 158 (Thomas E. Holland ed. & J.L. Brierly trans., 1911) (1650). Oppenheim is cited in W. HAROLD MAXWELL & LESLIE F. MAXWELL, *A LEGAL BIBLIOGRAPHY OF THE BRITISH COMMONWEALTH OF NATIONS: VOL. I, ENGLISH LAW TO 1800* at 603 (2d ed. 1955); see also J.L. BRIERLY, *THE LAW OF NATIONS* 35 (Humphrey Waldock ed., 6th ed. 1963) (Scelle and Brierly praising Zouche); 5 HOLDSWORTH, *supra* note 13, at 58-60 (3d ed. 1945) (terming Zouche's treatise the most influential and comprehensive English work until the nineteenth century).

Spaniards—the status quo power a century earlier whose lawyers had first staked out *jus gentium* claims. Nor were Zouche's examples only a matter of rhetorical fashion, with the author intending his stylized examples to extend by analogy to black slavery. That might be so where a continental jurist wrote in a nation or colony that "received" Roman law: in such a case, the civil law tradition made it possible that seemingly irrelevant discussions of Roman hypotheticals might later be revived en bloc to govern new practical matters.<sup>120</sup> Writing in a common law jurisdiction, Zouche had no serious expectation that his civilian speculations, backed by examples from outside the English tradition, could have the slightest domestic effect.

Moreover, insofar as Zouche and other writers on *jus gentium* advanced the theoretical position that the substance of the civil and natural law tradition was reasonable and applicable to slavery, it was almost irrelevant to the emerging reality of black slavery. Most of the victims of the slave trade and slavery were not captives in a "just war" or their descendants, though this view was comforting to slavers and adhered to long after it was palpably false.<sup>121</sup> In time, most slaves also were Christian, thus eliminating the justification that one was permitted to enslave infidels.<sup>122</sup> Again, the jurists consistently devoted attention to such doctrines as *postliminium*, but that issue did not arise, given that whites

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120. See WATSON, *supra* note 106, at 14-22, 82. Thus, even such basic works as Vinnius' *Institutes*, containing full formulaic treatment of *ascripticii*, enslaved captives, *postliminium*, and so forth, had influence in the civil-law colonies. Indeed, they were widely known in the common law colonies as well, but as teaching tools and ornaments, not as policy papers. ARNOLD VINNIUS, IN QUATUOR LIBROS INSTITUTIONUM IMPERIALIUM COMMENTARIUS 28-48, 80-83 (Johann G. Heineccius ed., Leiden 1726); BRYSON, *supra* note 63, at 28, 30; WATSON, *supra* note 6, at 95-97 (citing Heineccius); M.H. Hoeflich, *Roman Law in American Legal Culture*, 66 TUL. L. REV. 1723, 1738 (1992); Peter Stein, *The Attraction of the Civil Law in Post-Revolutionary America*, 52 VA. L. REV. 403, 404-06 (1966), reprinted in THE CHARACTER AND INFLUENCE OF THE ROMAN CIVIL LAW 411, 413-14 (1988). Professor Helmholz reaches a different conclusion about the American uses of Roman law in general, but not, as I understand it, with respect to slave law. See Helmholz, *supra* note 23, at 1660-61. I thank Albert Philipp for making Vinnius available to me.

121. For widespread acceptance of the capture doctrine, see, for example, HUGO GROTIUS, DE JURE BELLI AC PACIS 690 ff., 709-10 (Francis W. Kelsey ed. & trans., 1925) (1646 ed.); John Locke, *Instructions to Governor Nicholson of Virginia* (1698), cited in LOCKE, *supra* note 77, at 325-26 n.24; DRESCHER, *supra* note 15, at 184 n.69. Pufendorf also accepted the capture doctrine, 2 SAMUEL PUFENDORF, ELEMENTORUM JURISPRUDENTIAE UNIVERSALIS LIBRI DUO 283-84 (William A. Oldfather trans., 1931) (1672 ed.), but in one place gave a subtler version of the doctrine, DE JURE NATURAE ET GENTIUM LIBRI OCTO, *supra* note 75, at \*638-39, at 936-37 (emphasizing slavery by purchase and the relationship between economic development and slave labor). See also GWENDOLYN M. HALL, AFRICANS IN COLONIAL LOUISIANA: THE DEVELOPMENT OF AFRO-CREOLE CULTURE IN THE EIGHTEENTH CENTURY 32-33 (1992) (French slavers term Africans "captives" while awaiting shipment from Africa, "slaves" after arrival in New World). For the absurdities of the capture doctrine as practiced, see *infra* note 191 (priests accompany slavers to certify that each enslaved Amazonian Indian was captured in a just war or purchased from a legitimate owner). For repudiation of the capture doctrine in the eighteenth- and nineteenth-centuries, see 1 PAMPHLETS, *supra* note 63, at 142, 145; STAMPP, *supra* note 6, at 19; but see The Antelope, 23 U.S. (10 Wheat.) 66, 120-22 (1825) (Marshall, C.J., exhumes "capture" doctrine to explain slavery).

122. For the difficulties of a common-law slave theory that permitted conversion, see DAVIS, *supra* note 8, at 207-09; Drescher, *supra* note 47, at 101; Fiddes, *supra* note 15, at 501 (citing the weight given in various colonies to conversion on slave status).

rarely lost the “wars” (i.e. slave-raids against Indians and Africans) and that enslaved Africans did not return to their original political units.

Zouche’s choice of examples and topics demonstrates that his *Fecial Law* belongs squarely within the larger European tradition of writings on the *jus gentium*. There were other English participants in the discourse, and its most recent historian has surveyed their contributions in the most generous light.<sup>123</sup> But no English jurist made contributions comparable to those of the Continental theorists. Unlike Zouche, the best of these authors addressed not only isolated questions from the law of war, but the entirety of the law of nations. In some cases, the presentation was arranged in almost institutional style, others argued from first principles, and still other authors, notably Pufendorf in *De Jure Naturae et Gentium*, ambitiously combined both approaches. But whichever organizing plan they used, these texts almost invariably included systematic discussions of slavery. As a result, while theoretical discussions of slavery were absent from common law writings, they were readily accessible to elite eighteenth-century readers, for the *jus gentium* jurists were widely available in both England and the colonies.<sup>124</sup>

But despite their ambition and sophistication, what these texts provided on slavery differed little from Zouche, except in length. As with Zouche’s work, the discussions centered on Roman practice and doctrines, especially capture, supplemented primarily by biblical and medieval examples. Again the passages were updated to account for slave practices on the still-active Christian-Moslem frontier; instead of references to the Crusades, the texts alluded to Barbary pirates and the Turks.<sup>125</sup> But little else of current practice was mentioned, including the African slave trade. Occasionally there were statements that refer, or might be taken as roundabout references to, the burgeoning practice of enslaving Africans, but overwhelmingly these celebrated texts offered elaborate slave law that was wholly irrelevant to New World practice.<sup>126</sup>

123. Coquillette, *supra* note 54, at 289; Coquillette, *supra* note 99, at 315.

124. BRYSON, *supra* note 63, at xiii, 27-29; MAGNA CHARTA FOR AMERICA 24 (Jack P. Greene et al. eds., 1986) [hereinafter MAGNA CHARTA] (citing James Abercromby’s use of the treatises); 1 PAMPHLETS, *supra* note 63, at 24-25; Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L. J. 907, 914-15 nn.24-25 (1993); Stein, *supra* note 120, at 404-05.

125. Why European legal texts of all sorts were updated to include legal points (real and erroneous) relating to Turks, but not Africans, is unclear. See, e.g., SMITH, *supra* note 18, 1.10, 3.8, at 21, 123; JAMES DALRYMPLE, LD. STAIR, THE INSTITUTIONS OF THE LAW OF SCOTLAND 1.3.11 at 98 (David M. Walker ed., 1981) (1693); VINNIUS, *supra* note 120, at 30-31, 157. That the Turks were nearer, more numerous, or a greater threat to mainland Europe is almost certainly not the explanation, since the texts were also keenly interested in Indians. Perhaps it was that the medieval models on which the Renaissance texts drew already contained references to Moslems, a result of the medieval need to explain the Crusades; a second reason was the nature of the encounter between Europeans and Africans, with whites essentially seeking neither of the aims central to public law, conquest and conversion, but rather trade access and slaves for export; doubtless a third reason was racism.

126. For discussions that approached the delicate matter of slave trading, see, e.g., PUFENDORF, *supra* note 75, \*644, at 944 (reference, in course of rejecting Hobbes’ definition of liberty, to freedom

Slavery thus was hardly to be explained or restrained by the spinning out of the old “just war” tradition or by natural law syntheses.

#### D. *Slavery in the Treatises on Admiralty and the Law Merchant*

Meanwhile, there were other genres in which English jurists discussed certain aspects of the *jus gentium*. True to stereotype of the English, one genre concerned not grand theory, but the prosaic question of jurisdiction. In essence, this genre consisted of defenders of the Admiralty (Exton, Zouche in a second work, and others) and moderates (Hale) rebutting the narrow view of the Admiralty jurisdiction advanced most famously by Coke.<sup>127</sup> The conventions of this jurisdictional genre required that the medieval precedents be explained—this was after all a practical turf battle—and typically the texts thus never discussed new issues like colonial trade at all. That in itself is not without significance, given that the aim was to defend Admiralty jurisdiction over foreign and trade-related matters. But when the writers referred to slavery, it was in elliptical fashion, deriving more from Roman law and its stylized academic glosses than from current English and colonial needs.<sup>128</sup>

Even the practical volumes written for trade lawyers and merchants offered little on slave law. The leading example is the thorough and enormously popular treatise on the Law Merchant written by the common lawyer Charles Molloy, *A Treatise of Affairs Maritime and of Commerce*, which ultimately ran through ten editions and which circulated very widely in the colonies as well as the home country.<sup>129</sup> This was a simple, practical guide, to which planters, traders, and London creditors would turn for answers to a host of day-to-day legal questions. Molloy said little about the slave trade, even though it was both very lucrative and contested among Spanish, Dutch, English, French, and Portuguese traders and governments, as well as lesser players like the Danes and Germans.

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of man on ship to throw himself into the sea); 2 SAMUEL PUFENDORF, *LAW OF NATURE AND NATIONS* 37 (abr. ed., J. Spavan ed. & Basil Kennett trans.) (2d ed. London 1716) (reference to trading monopolies where European powers have territories in Africa or the Indies). For the irrelevance of the entire grand tradition to slavery as practiced, see DAVIS, *supra* note 8, at 108.

127. See, e.g., J. EXTON, *THE MARITIME DICAEOLOGIE, OR SEA-JURISDICTION OF ENGLAND* (London 1664); Matthew Hale, *A Treatise, in Three Parts . . . De Jure Maris . . . De Portibus Maris . . . [and] Concerning the Custom of Goods imported and exported, in A COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND* 1 (photo. reprint 1982) (Francis Hargrave ed., 1787); RICHARD ZOUCH [sic], *THE JURISDICTION OF THE ADMIRALTY OF ENGLAND ASSERTED, AGAINST SIR EDWARD COKE'S ARTICULI ADMIRALITATIS* (London 1663); see also Coquillette, *supra* note 54, at 320-22, 326-30 (discussing Exton and Zouche).

128. EXTON, *supra* note 127, at 109 (applicability of doctrine of average where “there be goods and merchandizes of several sorts, and many different passengers, bond-men and free; and whether goods of all sorts ought to be cast over. . .”); 8 HOLDSWORTH, *supra* note 13, at 264 n.9.

129. CHARLES MOLLOY, *DE JURE MARITIMO ET NAVALI, OR A TREATISE OF AFFAIRES MARITIME AND OF COMMERCE* (1st ed. London 1676). The background and publication history of Molloy’s hugely popular text is contained in Coquillette, *supra* note 99, at 315, 363-69; its popularity in the colonies, in BRYSON, *supra* note 63, at xvii, 65.

Consider why such a discussion of this particular branch of trade was relevant to a general mercantile handbook like Molloy's. First, even to a trade lawyer in a different moral universe, slaves were different from other forms of cargo. They rebelled and otherwise incurred criminal liability, committed suicide, fasted, and in other ways presented unique legal questions of risk, causation, and loss allocation—matters at the heart of Molloy's book II. Moreover, slaves are corporally indivisible, and so it was not obvious that litigants would be permitted to use the traditional law-merchant formulae of eighths and sixteenths of cargo.<sup>130</sup> Only on the question of liability for freight charges for carriage of live cargo that died in transit did Molloy give a legal rule for slaves.<sup>131</sup> On the scores of other questions where rules were needed—customs, average and contribution, insurance, wreck, liability of the cargo for wrongs by and to owners, mariners, and so forth—there was nothing. Further, in books I and III, Molloy discussed such areas as capture by enemies and pirates, joint trading ventures and monopolies, trade between aliens and British subjects, and the constitutional position of colonial settlers—all issues that in practice affected the slave trade. Molloy provided a practical guide, giving rules for particular places and trades where relevant, referring to Africa, Virginia, the East and West Indies, and the Mediterranean, and to such commodities as leather, wool, and salt.<sup>132</sup> Nowhere did he put commodity and place together to discuss the heart of the Africa trade.

Most important, however, is that Molloy did include a full title on slaves. It is, however, a derivative discussion, based again on the familiar academic, civilian tradition, and covering such topics as freedom in the state of nature, capture in just war, the etymology of "servus," ancient Roman statutory limits to manumission, sanctuary for fugitive slaves, and *postliminium*, updated to include such matters as Turkish capture.<sup>133</sup> His only comment relevant to plantation slavery is buried in marginalia, where he noted an exception to the general disuse of slavery. "Yet some of the English Merchants, and others, at the Canaries, do here support this unnatural Custom. So likewise at Virginia, and other Plantations."<sup>134</sup> As a throwaway line, it is extraordinary, but not because it termed slavery "unnatural"—that was conventional and Romanesque. Instead, there is only the backhanded reference to Virginia and the

130. Compare MOLLOY, *supra* note 129, at 195 n. (legal rule for shares of ship) with Noel v. Robinson, 1 Vern. 453, 23 Eng. Rep. 580 (Ch. 1687) (citing trover for one-fourth part of a slave); Butts v. Penny, 3 Keb. 785, 84 Eng. Rep. 1011 (1677) (trover allowed for 10 1/2 slaves). Note that another report of *Butts* gives the figure of 100 slaves. 2 Lev. 201, 83 Eng. Rep. 518.

131. MOLLOY, *supra* note 129, at 221.

132. See, e.g., *id.* at 240, 244-46, 422, 431-34, 451.

133. *Id.* at 388-89, 450; see *id.* at 424 (on colonists, where Molloy states that "[t]is very true that no man can pretend to share in the sweat of another mans browes, or that the pains, and wasting of another mans life should be for the maintenance of any, but his own . . .").

134. *Id.* at 387 n.

implied reference to the Caribbean, to which the overwhelming majority of slaves were brought, especially in the seventeenth century. And there is nothing about the merchants' vendees—Molloy's "others", perhaps—the planters, whose purchases from and debts to English traders were a fruitful source of litigation in all courts and whose land title Molloy elsewhere treated at length.<sup>135</sup> If two things were clear in 1676 to any English lawyer or merchant reading Molloy—as so many did—they were that slavery was practiced everywhere in the English Caribbean and increasingly in the Chesapeake, and that it bore no resemblance whatsoever to the legally elaborate slavery described in Roman law. But neither New World slavery nor the irrelevance of Old World models is suggested in Molloy.

Actually, Molloy's discussion of slavery took two further, stranger twists in subsequent editions. By the third edition (1682), the description of slavery was amended to include the legal rule that one could not bring an action in trover to recover slaves.<sup>136</sup> At first glance, this seems an unremarkable reference to Chief Justice Holt's trover cases. But the addition hardly signaled an intention to state the law applicable to slaves, for it *predated* the earliest of Holt's cases, *Chamberline v. Harvey*, by fifteen years. Before *Chamberline*, a case of which its reporter noted "[a] case like this never happened before," the prevailing law was that trover was available to recover slave "property," as stated in *Butts v. Penny* and *Gelly v. Cleve*.<sup>137</sup> In other words, Molloy or an editor took an otherwise practical text that gave almost no practical law of slavery but at least acknowledged that plantation slavery was practiced, and altered it to include a specific claim that would not be true for another generation, if then. It suggests not that Molloy was a closet abolitionist almost a century before that position had any support, but that the trover issue and perhaps slave law issues generally were discussed in legal London—exchanges of which we have only exiguous evidence because parties either avoided suit or settled before final court decision.<sup>138</sup> The second strange twist, in later, posthumous editions of Molloy, was the elimination of the marginal reference to plantation slavery in Virginia.<sup>139</sup> Thus updated, eighteenth-century versions of Molloy proceeded from the capture doctrine, to the now-vindicated trover statement, to indentured ser-

135. *Id.* at 421 *et seq.*

136. MOLLOY, *supra* note 129, at 335-36 (3d ed. London 1682).

137. *Chamberline v. Harvey*, 5 Mod. 186, 87 Eng. Rep. 598, at 599 (K.B. 1697), *also cited in* 3 Ld. Raym. 129, 92 Eng. Rep. 603, 1 Ld. Raym. 146, 91 Eng. Rep. 994, Carth. 396, 90 Eng. Rep. 830; *Gelly v. Cleve*, 1 Ld. Raym. 147, 91 Eng. Rep. 994 (K.B. 1694); *Butts v. Penny*, 2 Lev. 201, 83 Eng. Rep. 518, 3 Keb. 785, 84 Eng. Rep. 1011 (K.B. 1677). All three cases are cited in JUDICIAL CASES, *supra* note 38, at 9-10.

138. *See Chamberline v. Harvey*, 5 Mod. 186, 87 Eng. Rep. 598 (K.B. 1697) (published arguments of counsel who, like Molloy, advanced *jus gentium* and historical claims in absence of any common law of slavery).

139. MOLLOY, *supra* note 129, at 420 (8th ed. London 1744); 2 *id.* at 216 (9th ed. London 1769).

vants (whose rights were given in some detail), without any reference to real slavery.

Molloy wrote at a time when the common law had largely absorbed English mercantile law and jurisdiction. He embraced Coke's general view that *any* body of specialized law, maritime, mercantile, or local, was only valid insofar as it was incorporated into or tolerated by the common law.<sup>140</sup> Thus, to Molloy, whatever was applicable to England from the custom of merchants, clearly including slavery, was necessarily part of the common law. We have seen, though, that neither the common lawyers nor lawyers specializing in mercantile issues, like Molloy, addressed plantation slavery or the trade that fed it, and that their discussions of slavery in general were stylized and irrelevant.<sup>141</sup>

However inadequate these descriptions were, they were preferable to those typically found in the related genre of mercantile texts written by merchants instead of lawyers. Best known was Gerald Malynes' *Lex Mercatoria*, which like Molloy was widely available in the colonies and whose most recent student has praised it for substantive originality and practicality.<sup>142</sup> But concerning slavery in the colonies, Malynes was wholly irrelevant, albeit in a way different from the lawyers' texts. Malynes discussed the colonies and other centers of foreign trade, but he wrote in 1622, before English colonialization of the Caribbean and the sugar boom, and before English penetration of the slave trade, and his text reflects its early composition. What is remarkable, though, is that later editions did not update the treatment of slavery or colonies.<sup>143</sup> Here again eighteenth-century readers would find in a leading treatise nothing of the slightest relevance to the cornerstone of their economies. If compendia of practical mercantile matters barely mentioned slavery and the slave trade, where was the law to be found?

Because both the official and private contemporary sources of law say so little, historians have spent a great deal of effort attempting to identify where the common law found its understanding of slavery. Various substantive bodies of doctrine, such as villeinage, Roman slave law, the newer bodies of law on apprenticeship and indentured servants, and the law of chattel property have all been proposed.<sup>144</sup> In one sense, these

140. Coquillette, *supra* note 99, at 320, 346, 354.

141. See, e.g., MOLLOY, *supra* note 129, at 385-90, retained in subsequent editions, 417-21 (8th ed. 1744); 2 *id.* 212-18 (9th ed. 1769); ANON., A COLLECTION OF ALL SEA-LAWS 53 (n.d.), text bound with GERALD MALYNES, CONSUETUDO, VEL, LEX MERCANTORIA: OR THE ANCIENT LAW MERCHANT (3d ed. London 1686) (giving Romanesque example where a skipper "set his Ship to an Unfree-man, and not of substance, and other qualities . . .").

142. MALYNES, *supra* note 141; see BRYSON, *supra* note 63, at xvii, 64; Coquillette, *supra* note 99, at 356-59.

143. See MALYNES, *supra* note 141, at 4, 61-64, 133-35, 164-67.

144. For apprenticeship as an antecedent of slave status, see Billings, *supra* note 30, at 48-57 (citing Sir Thomas Smith); Davies, *supra* note 78, at 542-43, 547; RICHARD HULOET, ABECEDARIUM ANGLICO-LATINUM s.v. "apprentice" (R.C. Altson ed., photo. reprint 1970) (1552). For chattel law, see Morris, *supra* note 17, at 106, 112; HULOET, *supra*, s.v. "slave"



explanations are all true. It is clear, for instance, that many features of colonial slave law were taken intact from old law: the mother-rule, the policing system with its use of hue-and-cry and branding, and criminal procedure for slave trials. Colonial lawyers were analytically opportunistic, borrowing doctrines from all these bodies of law. But at the same time none of the candidates really explain the foundations of slave law. In the first place, the substantive rules of villeinage or chattel property were often insufficient for the needs of the planters, and, where they were adopted, it was only with modification. Second, substantive law did not address how colonists had the authority to use these doctrines to regulate even local economic and social practices. And, third, borrowed substantive doctrines do not explain why so little continued to be said about slaves in the common law.

#### IV. THE CONSTITUTION OF THE OLD BRITISH EMPIRE

There is, however, another legal explanation for both slave law—essentially, the policing measures applied in the colonies—and the paucity of sophisticated legal discussion, and it derives not from substantive law but from what later imperial lawyers knew as the constitutional law of the British Empire. Recall Chief Justice Holt’s decision in *Smith v. Brown and Cooper* on the availability of trover to recover a black slave. We have seen that the case was in fact decided on narrow pleading grounds, and contemporaries may not have even learned of it for a number of years. But the chief significance of the case lies elsewhere, in the advice that Chief Justice Holt gave the unsuccessful plaintiff: “[y]ou should have averred in the declaration, that the sale of the negro was in Virginia, and, by the laws of that country, negroes are saleable; for the laws of England do not extend to Virginia, being a conquered country their law is what the King pleases . . . .”<sup>145</sup> In other words, the critical doctrine was not slave law as such, but the common law’s more general response to legal issues arising in conquered lands, a response that predated the meager caselaw about slavery.

Among the clearest cases in the development of this doctrine of colonial conquest was *Blankard v. Galdy*, a debt action that arose in Jamaica and was decided in King’s Bench in 1694.<sup>146</sup> The defendant’s plea was

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(chattel). For servant status, see Alpert, *supra* note 7, at 198-209; CRAVEN, *supra* note 52, at 295-96; CRAVEN, THE SOUTHERN COLONIES, *supra* note 6, at 217; Bradley J. Nicholson, Legal Borrowing and the Origins of Slave Law in the British Colonies (1992) (unpublished manuscript, on file with author). For villeinage, see JORDAN, *supra* note 6, at 50-51. I thank Mr. Nicholson for graciously sharing his unpublished manuscript.

145. *Smith v. Brown and Cooper*, 2 Salk. 666, 91 Eng. Rep. 566-67 (Q.B. 1702?) (emphasis supplied). For another report using substantially similar language see Holt 495, 90 Eng. Rep. 1172, 1173.

146. 2 Salk. 411, 91 Eng. Rep. 356; Holt 341, 90 Eng. Rep. 1089; 4 Mod. 215 & 221, 87 Eng. Rep. 356 & 359; Comber. 228, 90 Eng. Rep. 445 (K.B. 1694). See JOSEPH H. SMITH, APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS 470-71 (1950).

that the debt stemmed from the purchase of the office of provost-marshal in Jamaica, and that purchase of such an office was in violation of an English statute. The court rejected the plea, holding that the English statute did not apply to the colony. In the case of conquered territory, such as Jamaica, English law could be imposed, but it did not apply until the conqueror had specifically imposed it. Meanwhile, local laws—perhaps the former law of the subjugated population, more typically the laws of the conquerors's local troops—continued in effect. The implication was that divergent local institutions like colonial slavery were valid, under this theory of tacit delegation.

Behind this legal framework for the Caribbean conquest were centuries of related doctrines. Medieval “just war” theory had distinguished between Christians and infidels, for purposes both of making war and of judging behavior in war, and that legal tradition had been revitalized in the sixteenth century.<sup>147</sup> Coke, in *Calvin's Case*, had distinguished between aliens in general and the “perpetual enemies” of a Christian kingdom.<sup>148</sup> Most important, there was the late Tudor conquest of Ireland. It is widely accepted by historians that the late Tudor efforts in Ireland were important precursors to subsequent New World colonization.<sup>149</sup> This is true of the colonial legal regime as well. It was already old law by around 1600 that, when Englishmen conquered new lands, the Crown could impose the common law on the new territories. But it need not do so, and the Crown at its discretion could impose common law doctrines selectively. It could annex the territories to the Crown and govern them as a feudal sovereign, directly or through a grantee, or permit even the old, pre-conquest rulers to remain.

The hard practical result of conquest doctrine was that, by imposing common law land tenure on the portions of Ireland held by the Tudors, the lawyers more or less wiped out indigenous Irish landholding rights.<sup>150</sup> Of equal importance, however, was the constitutional question of who had the power to make the substantive decisions. Who decided when common, martial, or local law applied, and under what basis? The answers to these questions were also clarified by the conquest of Ireland. Conquered land, the theory went, was under the king alone, and not

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147. Not that conquest was the only basis for colonial expansion. The sixteenth-century Spanish jurists in particular relied on discovery and the tutelage imposed on the neophyte Indian Christians, but both of these rationales worked more readily for the Spanish Crown, with its papal grants of authority.

148. 7 Co. Rep. 1a, 17a-b, 77 Eng. Rep. 377, 397-98 (K.B. 1608).

149. Nicholas P. Canny, *The Permissive Frontier: Social Control in English Settlements in Ireland and Virginia, 1550-1650*, in *THE WESTWARD ENTERPRISE: ENGLISH ACTIVITIES IN IRELAND, THE ATLANTIC, AND AMERICA 1480-1650*, at 17 (K.R. Andrews et al. eds., 1979).

150. *The Case of Tanistry*, Davies 28, 80 Eng. Rep. 516 (Irish K.B. 1606). The case is discussed in HANS S. PAWLISCH, *SIR JOHN DAVIES AND THE CONQUEST OF IRELAND* 9-13, 55-83 (1985). For the comparable application of conquest theory to native American land title, see FRANCIS JENNINGS, *THE INVASION OF AMERICA: INDIANS, COLONIALISM, AND THE CANT OF CONQUEST* (1975), especially chapters 8-9.

under the realm headed by that Tudor fiction the king-in-Parliament. Initially, there was reluctance to entrusting Ireland or the new American colonies solely to the Crown.<sup>151</sup> But opposition soon focused on other royal extravagances, and the Crown's claims to colonial rule gained acceptance, with only occasional flickers of resistance. Dominion or prerogative status did not mean that conquered lands were under the king as despotic monarch, jurists wrote. The theory was that *nowhere* was the English king a despotic monarch,<sup>152</sup> and events like the execution of Charles I and the ouster of his son James II underscored the limits to the king's power. But dominion status did mean that new lands were not under Parliament or the common law, until such time as the king extended those boons to a territory. Arguments were drawn from feudalism and the law of war to support this constitutional conclusion.

Of course the matter was more complex than this. Each of the Old World "dominions" had acceded to or been seized by the Crown under different legal circumstances. Lawyers distinguished between dominions of the king and of the Crown, between conquered and inherited lands, and among Ireland, the Isle of Man, the Channel Islands, Scotland, and so forth. The older medieval instances of Gascony, Normandy, Calais, Berwick, Wales, and the palatinates had themselves differed,<sup>153</sup> and seventeenth-century lawyers examined them anew. In fact, each case was *sui generis*. Scotland was variously called a subordinate or independent kingdom, retaining its own law; conquered Ireland was incorporated into the common law to the extent that writs of error lay from Dublin to the king's bench in England; elsewhere, appeals from colonial courts lay to the Privy Council. But the critical point for the development of colonial slavery is that, with the seventeenth-century version of conquest doctrine, English law allowed *all the colonies* a private space in which planters and merchants could deploy slave labor with little oversight from England. The leash was never so long that the colonists could take major or costly policy initiatives at will against the wishes of the Crown. Quite the contrary, the records of every colony and of the Privy Council and its

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151. The best known exchange dates from 1621, when backers of the Virginia Company lobbied Parliament for protection against importation of Spanish tobacco. Responding to claims of this sort, Secretary Calvert gave the Crown's position. "[I]f Regall Prerogative have power in any thinge it is in this, Newe Conquests are to be ordered by the Will of the Conqueror. Virginia is not anex't to the Crowne of England And therefore not subiect to the Lawes of this Howse." *4 Commons Debates 1621*, at 256 (Wallace Notestein et al. eds., 1935). That almost 80 members of the House were also members of the Virginia Company made it unlikely that this view would be favorably received. ROBERT ZALLER, *THE PARLIAMENT OF 1621* at 209 n.91 (1971) (citing T.K. Rabb's figure). See A. BERRIEDALE KEITH, *CONSTITUTIONAL HISTORY OF THE FIRST BRITISH EMPIRE* 11-13 (1930) (question of revocability of rights granted to colonies under the prerogative).

152. *The Case of Tanistry*, Davies 28, 40, 80 Eng. Rep. 516, 528 (Irish K.B. 1606); FORTESCUE, *supra* note 75, cc. 12-13 and 33-37, at 29-33 and 79-93.

153. KENT MCNEIL, *COMMON LAW ABORIGINAL TITLE* 113 n.20 (1989); Ralph A. Griffiths, *The English Realm and Dominions and the King's Subjects in the Later Middle Ages*, in *ASPECTS OF LATE MEDIEVAL GOVERNMENT AND SOCIETY* 83 (J.G. Rowe ed., 1986).

committees and advisory boards show that Westminster demanded the right to review local legislation and to reject unsuitable legislation. Often Westminster was able to make its claims and policies stick. But the momentum was with the colonists.<sup>154</sup> By using the decentralized private space allowed them by prerogative constitutionalism, the colonists were able to erect a regime of slave law.

Once the constitutional scheme was set in motion, little attention was required to sustain or clarify prerogative rule in the colonies notwithstanding the ongoing political battles between Westminster, governors, and local councils and elites. The parliamentarians of the Civil War, for instance, absorbed but did not curtail the prerogative power in colonial affairs, even though they abolished most prerogative justice at home.<sup>155</sup> Similarly, seventeenth- and eighteenth-century English jurists rarely discussed the rights of the Crown to govern foreign territories. Even royal supporters, such as William Noy and John Brydall, and the systematizers, like Matthew Hale and Thomas Wood, made little mention of the Crown's foreign claims and were content to enumerate other royal rights, ranging from the significant (customs) to the modest (deodand).<sup>156</sup> Of course, after the Glorious Revolution, it could hardly be maintained that the royal prerogative was independent of Parliament, but even the post-1689 prerogative, reduced to "only such part of the ancient discretionary right of the Crown as Parliament saw fit to leave untouched," permitted colonial autonomy in practice, outside those areas of trade regulation habitually addressed by Parliament.<sup>157</sup> The prerogative thus permitted

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154. See, e.g., DUNN, *supra* note 15, at 158 (colonial Caribbean leaders ignoring London); MAGNA CHARTA, *supra* note 124 (two major treatises offering recommendations how England could reclaim from its colonies income and rights long lost in practice). Examples could be multiplied from almost every colony. See generally RUSSELL, *supra* note 31.

155. See KEITH, *supra* note 151, at 10, 48-58; CHARLES H. MCILWAIN, *THE AMERICAN REVOLUTION: A CONSTITUTIONAL INTERPRETATION* 9, 21-31 (1923).

156. JOHN BRYDALL, *JURA CORONAE* 7-10 (photo. reprint 1979) (1680) (describing rights over Scotland and Ireland only); WILLIAM NOY, *A TREATISE OF THE RIGHTS OF THE CROWN* (photo. reprint 1979) (1715 ed.) (1634); WOOD, *supra* note 54, at 21 (3d ed. 1724, photo. reprint 1979). Particularly significant is Hale, who came near the question of colonial status in at least two of his major writings. Section V of *The Analysis of Law* is entitled "On the King's rights of Dominion or Power of Empire," but the chapter discusses war, peace, and domestic (but not colonial) lawmaking. HALE, *supra* note 111, at 12-13. In his *THE PREROGATIVES OF THE KING*, a lengthy chapter is given to the different bases for Crown claims to a range of dominions—Wales, Ireland, even long-lost Normandy and Gascony. The treatment of the American colonies, however, is extremely thin. As Hale notes, the New World, African, and East Indian colonies "are late and many, and therefore I shall not say much of them." MATTHEW HALE, *THE PREROGATIVES OF THE KING* 43 (D.E.C. Yale ed., 92 Selden Soc. 1976). The only major author who attempted to survey all prerogative claims was Blackstone—but by his day these rules were increasingly irrelevant in the politicized mainland colonies. 1 BLACKSTONE, *supra* note 79, at \*98-105. See also 1 CHAMBERS, *supra* note 111, at 268-92 (following Blackstone in surveying both old and new territories).

157. MCILWAIN, *supra* note 155, at 3; see *id.* at 9-11, 21-80 for the claim that Irish jurists Darcy and Molyneux, and a growing number of Irish and American writers later in the eighteenth century, rejected the notion that the colonies had acquiesced in or were bound by British acquiescence to parliamentary sovereignty. Long in disfavor, McIlwain's arguments have recently been adopted and extended by American legal historians. Cf. KEITH, *supra* note 151, at 380-83; JACK P. GREENE, *PERIPHERIES AND CENTER: CONSTITUTIONAL DEVELOPMENT AND THE EXTENDED POLITIES OF*

English planters to adopt the radically new institution of slavery and later to legitimize that slavery through law, without articulating a category of unfreedom that would clash with the strong rhetoric of the rights of Englishmen.

The prerogative thus allowed a second form of privatization, private ordering in the colony, in addition to the more obvious sense of privatization on each master's plantation. Legal autonomy of this sort was not new to the common law: the medieval franchisal rights of towns and ecclesiastical corporations allowed them to make their own rules, consistent with common law. More suggestive is the case of medieval villeinage, since, as in the colonial case, it also used privatization to permit unfreedom. Serfdom was a matter of manorial custom. It was a private matter, between the lord and serf. Thus, most common law texts did not describe serfdom at all, and Bracton, as we have seen, focused mostly on boundary law. Serfdom was what the local lord had always been able to get away with, softened in practice by whatever limits the peasants could get away with; in short, it was custom, permitted at the boundary of the law. If a person could not establish his freedom according to the common law tests, he was unfree. He was under his lord and not common law. To use an anachronism, what the common law did was develop a public-private distinction. Whoever could not prove his freedom was vulnerable because he was subject to private ordering only. The serf was "privatized" and excluded from common law.

Thus, the privatization of the medieval manorial serf is a model for colonial autonomy under the prerogative. Prerogative theory held that the early colonies were military or commercial enterprises, under the quasi-feudal lordship of their promoters and indirectly under the king, and that the royal as well as proprietary colonies were not necessarily under common law. Hence, early governors adopted martial-law rules at variance with the common law—the familiar example being Dale's *Lawes Divine, Morall and Martiall*<sup>158</sup>—and hence also many land seizures from the Indians were cast in odd feudal terminology of surrender, grant, and subinfeudation.<sup>159</sup> The irony of all this was that, long before the seventeenth century, private ordering had fallen into sharp

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THE BRITISH EMPIRE AND THE UNITED STATES, 1607-1788, at 144-48 (1986) (citing Barbara Black, John Reid, & Thomas Grey); HELEN T. MANNING, BRITISH COLONIAL GOVERNMENT AFTER THE AMERICAN REVOLUTION 1782-1820, at 66-67 (1933).

158. WILLIAM STRACHEY, FOR THE COLONY IN VIRGINEA BRITANNIA: LAWES DIVINE, MORALL AND MARTIAL (David H. Flaherty ed., 1969) (1612) (containing Dale's 1611 Laws). See Warren M. Billings, *The Transfer of English Law to Virginia, 1606-50*, in THE WESTWARD ENTERPRISE: ENGLISH ACTIVITIES IN IRELAND, THE ATLANTIC, AND AMERICA, 1480-1650, at 215 (K.R. Andrews et al. eds., 1979) (Dale's harsh laws aberrational); compare Konig, *supra* note 85, at 354 (Dale's laws within tradition of English and Virginia justice). For other martial law proposals, see Stephen S. Webb, *Army and Empire: English Garrison Government in Britain and America, 1569-1763*, 34 WM. & MARY Q. 1 (3d ser. 1977).

159. For Indian land grants and charters, see JENNINGS, *supra* note 150, at 108-11.

disfavor, and the centripetal rules of the common law had made that body of law essentially the only one that mattered. Everywhere in sixteenth- and seventeenth-century Europe, the trend was toward the breaking of old private and feudal social relations.<sup>160</sup> Thus, when seventeenth-century lawyers applied conquest law to the new colonies, they were taking a step that was highly unusual. Legal decentralization, where it was permitted, was a privilege aimed at creating and sustaining private preferences, typically in the hope of huge colonial profits. Viewed from “above,” from Westminster, common law judges saw private ordering, with which they would be reluctant to meddle.

But from “below,” from the perspective of Jamaica, for example, private space under the prerogative permitted not only local customs, but the legitimation of those customs. The planters not only made local arrangements to regulate their affairs, including their slaves, they did so in forms and with a vocabulary that echoed the common law. In other words, autonomy meant not only privatization, but self-governance. These local slave laws represent private ordering that came to acquire in its own right the legitimating force of a legal order. From “below”, a description of colonial slave law was not simply that “we follow the following practice” or “we govern our practice with local law,” but “our law permits it, and their law permits us to permit it.” The civil-law colonial slave societies deployed differing rationales for their slave laws, chiefly involving reception and legislative grant.<sup>161</sup> In the common law colonies, the basis was conquest and royal prerogative and the legal autonomy that they permitted.

Inevitably, the legal basis for common law colonial slavery was more complicated than this. Neither the conquest doctrine nor Coke’s dicta in *Calvin’s Case* about infidels can fully explain the legal steps taken to support slavery, despite the great weight often assigned to *Calvin* by historians.<sup>162</sup> The rhetoric about infidels tended to disappear after the great Case of Monopolies (1685).<sup>163</sup> More important, from the outset it was

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160. BLACKBURN, *supra* note 77, at 40. See, e.g., STONE, *supra* note 3, at 199-270 (Crown’s slow triumph over nobility’s military power). The king’s own power may have once been merely intensified private rights, see 1 FREDERICK POLLOCK & FREDERIC W. MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* at 512 (2d ed. 1968), but, by the sixteenth century, the claim that the king’s dominion was in a constitutional sense “private” would have rejected. See *The Case of Tanistry*, Davies 28, 40, 80 Eng. Rep. 516, 528 (Irish K.B. 1606). See also WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830*, at 36 (1975) (legal interpretation delegated from provincial to local level).

161. WATSON, *supra* note 6, at 46-47, 85, 93, 103-04.

162. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860*, at 5-6 (1977); KETTNER, *supra* note 75, at 28, 45.

163. *East India Co. v. Sandys*, 10 How. St. T. 371, 373-75, 390-93, 406-10, 440-51, 469-70, 483-89, 503-05 (1683-85) (“infidel” arguments of counsel Holt, Treby, Finch, Pollifxen, Sawyer, and Williams, dissolving into related but less germane discussions of medieval Jewish status). The doctrine was sharply criticized in *Campbell v. Hall*, Lofft 655, 716, 98 Eng. Rep. 848, 882 (K.B. 1774). Infidel status is discussed more fully in Jonathan A. Bush, “*You’re Gonna Miss Me When I’m*

apparent that new lands came to the Crown by a variety of ways. Barbados, for one, was not conquered but found and settled, and so a different rationale than conquest was used to explain its legal relationship to the Crown.<sup>164</sup> Whenever a new colony or conquest was added to the expanding empire, its particular constitutional status had to be determined—or relitigated, decades later.<sup>165</sup> Newfoundland was not deemed a legal settlement, but a mere fishing outpost; Tangier and Bombay were in the private hand of the Crown, having been a marriage gift to Charles II, but Bombay was soon granted, with full rights of governance and defense, to the East India Company; Gibraltar was reckoned neither a “conquered” nor a “settled” plantation, but “a mere fortress and garrison.”<sup>166</sup> South Carolina, Pennsylvania, and Maryland were granted to private proprietors under charters that, like their medieval models, gave the lords proprietary a wide ambit in organizing and governing the new colonies.<sup>167</sup> Over time, additional classifications were developed: protectorates, ceded territories, dependencies, appendages, imperial possessions, and so forth.<sup>168</sup> The full consequences of the various statuses took decades or longer to work out. Thus, cases addressing the constitutional status of long-subdued Ireland and Wales appeared as late as the end of the seventeenth century.<sup>169</sup>

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*Gone*”: *Early Modern Common Law Discourse and the Case of the Jews*, 1993 WISC. L. REV. (forthcoming).

164. Anon., 2 P. Wms. 75, 24 Eng. Rep. 646 (Ch. 1722); *Wytham v. Dutton*, 3 Mod. 159, 87 Eng. Rep. 103, 104 (K.B. 1687) (arguments of defense counsel); *Dawes v. Pindar*, 2 Mod. 45, 86 Eng. Rep. 931 (K.B. 1675). *But see* KEITH, *supra* note 151, at 10 (in challenge to earl of Carlisle’s charter, conquest doctrine extended to lands purchased and otherwise acquired).

165. A particularly rich discussion is found in *Campbell v. Hall*, Lofft 655, 98 Eng. Rep. 848; 1 Cowp. 204, 98 Eng. Rep. 1045 (K.B. 1774) (status of Grenada after 1762 conquest); *see* KEITH, *supra* note 151, at 15. The conquered status of Jamaica was reopened by Lord Mansfield in *R. v. Vaughan*, 4 Burr. 2494, 2500, 98 Eng. Rep. 308, 311 (K.B. 1769). *See also* *Collett v. Keith*, 2 East 260, 102 Eng. Rep. 368 (K.B. 1802) (Cape of Good Hope); *Atty Gen. v. Stewart*, 2 Meriv. 143, 35 Eng. Rep. 895 (Ch. 1816-17) (Grenada).

166. 2 DAVID OGG, *ENGLAND IN THE REIGN OF CHARLES II*, at 659-62, 668-69 (2d ed. 1956); SMITH, *supra* note 146, at 268.

167. CRAVEN, *THE SOUTHERN COLONIES*, *supra* note 6, at 190, 338-41; KEITH, *supra* note 151, at 39-43; RUSSELL, *supra* note 31, at 36.

168. C.U. Ilegbune, *British Justice in Southern Ghana, 1618-1901: Its Basis, Development, and Problems*, in *LAW, LITIGANTS, AND THE LEGAL PROFESSION* 162 (E.W. Ives & A.H. Manchester eds., 1983).

169. A “lag” explained in part because the dispossession of the native Catholic Irish occurred primarily in the 1640s and 1650s—long after the Tudor conquest and the *Tanistry* doctrine supporting such ousters. T.C. Barnard, *Planters and Policies in Cromwellian Ireland*, 61 PAST & PRESENT 31 (1973). For belated caselaw, *see*, for example, *Craw v. Ramsey*, Carter 185, 124 Eng. Rep. 905; Vaug. 274, 124 Eng. Rep. 1072; 2 Ventr. 1, 86 Eng. Rep. 273 (C.P. 1670), *rev. sub nom.* *Collingwood v. Pace*, 1 Ventr. 413, 86 Eng. Rep. 262, 1 Lev. 59, 83 Eng. Rep. 296 (Ex. Ch.) (Ireland); *Witrong v. Balany*, 3 Keb. 401, 84 Eng. Rep. 789 (K.B. 1674) (Wales). The complex *Ramsey* cases are discussed in KETTNER, *supra* note 75, at 36-42.

The other reason for the lag between historical conquest and legal classification relates to the double-edged associations of “conquest” to contemporary jurists. Conquest was a theme in the imperial discussion, defining the relationship between colonies and Crown. But conquest—particularly the Norman Conquest—was also a critical element in the domestic constitutional debate about how much power the king ought to have, as heir to a “conqueror” of some sort. Thus Hale retained such seemingly dormant issues as the conquest status of Aquitaine or Calais, as well as

Additionally, the applicability of statutory law to the colonies was reckoned a different matter than common law. After all, many statutes predated the colonies, and they could be understood either as clearly not intending application outside of England, or as incorporated into common law and applicable wherever common law was carried or given. Of those statutes post-dating colonial foundation, some expressly cited a colony or clearly implied colonial application, while others might but need not be applied to the colonies. Moreover, like the pre-colonial statutes, some recent acts were declarative of common law, others made new law, and still others, Lord Mansfield concluded, were in affirmance of common law but were mere police measures and so not applicable to the colonies.<sup>170</sup> Overall, the legal result was that the empire was a constitutional and administrative patchwork, under which the applicability of common law or British statutes and the prospect of conciliar review were highly irregular and often unclear—as contemporaries saw.<sup>171</sup>

But for the purposes of slave law, the differences between the colonial legal regimes were insignificant. The same constitutional result can be reached in conquered land that had not yet been given parliamentary status or common law but that was permitted some common law remedies; in settled land where post-settlement parliamentary statutes did not specifically include the colony; and in any colony that was able to resist the practical consequences of strong prerogative rule. The critical point is not that conquest or infidel status was used to authorize slavery, but that under all of the variants of prerogative governance, almost any local practice could be adopted by or made acceptable to English law. There was no difference in the essential status of slavery between settled Barbados, ceded Grenada, discovered and proprietary Maryland, and conquered Jamaica and Virginia.<sup>172</sup> Everywhere, planters received legal support for slavery, while the common law did not have to talk about it.

In “blaming” the prerogative rather than common law in this way for colonial slavery, there is a risk of our yielding to the powerful rhetoric of the common law, as colonists themselves did. It was an article of political faith to the colonists that common law was their birthright, the mark and guarantee of their freedom, and the best possible form of private governance. Early colonial charters and letters of instruction often contained clauses asserting that settlers should be subject to rules “as neere to the Common Lawe [of] England, and the equity thereof as may be”—

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discussing newly conquered colonies. HALE, *supra* note 156, at 44-46; see POCOCK, *supra* note 90, at 319 (2d ed. 1987) (Winstanley claims that even manorial custom was the result of conquest).

170. R. v. Vaughan, 4 Burr. 2494, 2500, 98 Eng. Rep. 308, 311 (K.B. 1769).

171. GREENE, *supra* note 157, at 43-44; NELSON, *supra* note 160, at 16 (Massachusetts attempts to block appeals to Privy Council); SMITH, *supra* note 146, at 473-75. See generally KEITH, *supra* note 151.

172. But see DAVIS, *supra* note 6, at 159-63 (Crown colonies conquered in early nineteenth century, including Trinidad and St. Lucia, given less autonomy, with result that Westminster later had easier time restricting slave trade to and slavery in those colonies than elsewhere).



though how close the results were to English common law has been debated.<sup>173</sup> Consistently, however, from the early seventeenth century to the eve of the Revolution, the colonists sought more. Through their local legislatures and in petitions to London for amendments to their charters, the colonists asserted the full common law rights of Englishmen.

Of course, there was irony in the colonists' invoking common law while relying on the prerogative for their ownership of slaves.<sup>174</sup> Claiming to possess the rights of Englishmen, the colonists consistently and firmly insisted they were not at the mercy of the prerogative. They opposed conquest theory and the application of *Blankard v. Galdy*, either by denying that their respective colonies had in fact been conquered or by asserting that the territory was conquered, but by them and their ancestors, English settlers who brought their rights with them.<sup>175</sup> In this view, conquering or settling prerogative lands in no way diminished the colonists' common-law rights, because, as Coke had written in another context:

the common law hath so admeasured the prerogatives of the king, that they should not take away, nor prejudice the inheritance of any: and the best inheritance that the subject hath, is the law of the realme.<sup>176</sup>

Prerogative law was for conquered, discovered, and otherwise annexed peoples, the argument ran; Englishmen and their descendants brought and retained common law. Notwithstanding the attractions of the common law for English colonists, however, prerogative status allowed room for slavery, while the status of slavery under the common law might be seen as unclear.

And so colonists benefitted by being under the royal prerogative, which allowed them to erect a system of slavery while also asserting common law status. But in the last decades prior to the Revolution, this attempt to have it both ways constitutionally proved no longer tenable. Suddenly, the rights of Englishmen were felt to be an inadequate defense

173. Billings, *supra* note 158, at 216 (citing supplemental instructions from Virginia Co. in London to provincial council in 1606).

174. Professor Wiecek has cited the imperial constitution in reference to colonial slavery, but in the context of mid-eighteenth-century developments, rather than the initial legal move to slavery. Wiecek, *supra* note 6, at 112.

175. See, e.g., RICHARD BLAND, THE COLONEL DISMOUNTED 20-21 (1764), reprinted in 1 PAMPHLETS, *supra* note 63, at 292, 319; JAMES OTIS, THE RIGHTS OF THE BRITISH COLONIES ASSERTED AND PROVED 34-35 (1764), reprinted in 1 PAMPHLETS, *supra*, 408, 444; KEITH, *supra* note 151, at 185. That the colonists should be deemed settlers with English rights, rather than occupants of conquered land, had ample precedent. OPINIONS OF EMINENT LAWYERS, *supra* note 49, at 206-07.

176. EDWARD COKE, SECOND INSTITUTES, Magna Carta, ch. 30, at \*63, discussed in KETTNER, *supra* note 75, at 27 n.44. Contrast this to the view of Lord Mansfield that "[a]n Englishman in Ireland, Minorca, the Isle of Man, or the plantations, has no privilege distinct from the natives while he continues there." *Campbell v. Hall*, Loft 655, 741, 98 Eng. Rep. 848, 895 (K.B. 1774), also cited in 1 Cowp. 204, 208, 98 Eng. Rep. 1045, 1047.

to perceived English abuses. After all, it was Parliament that had passed the hated new Stamp Act, Declaratory Act, and so on. One response was to reject the emerging new theory of parliamentary sovereignty, either because the colonies were not represented directly or because some steps were beyond the competence of any legislature, and with it to reject the common law that appeared to sanction parliamentary sovereignty.<sup>177</sup> Another response was to replace common law rights with the new natural rights, the rights of man, as the Declaration of Independence was to do.<sup>178</sup> Those who followed this course ran the risk that the natural right to be free (from Britain) might be invoked by American slaves too, and James Otis is only the best known of many abolitionists on the eve of the Revolutionary War who reminded opponents of imperial "enslavement" of the hard reality of plantation slavery.<sup>179</sup> But a third, unexpected alternative to the inadequacies of the old common-law rhetoric was to rely on the royal prerogative. Thus the Continental Congress in October 1774 "solemnly assured George III that they wished 'not a diminution of the prerogative,' " and thus such authors as James Wilson, James Iredell, John Dickinson, Daniel Dulany, and Moses Mather advanced various formulations by which the colonies *were* conquered or settled lands and *were* under the king but not parliament.<sup>180</sup> Behind this radical appropriation of royalist rhetoric was the knowledge that prerogative status in practice meant distance and constitutionalization of the colonies' practical autonomy.<sup>181</sup> It also meant that colonists often rested their claims to autonomy on a political theory that held they had no rights at all, as subjects in territories conquered or otherwise annexed to the unchecked power of the Crown.<sup>182</sup>

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177. It is important to note the two-fold character of this denial. On the one hand, the Americans contended that the competence of Parliament to make law was strictly limited to such laws only as affected those parts of the King's dominions from which parliamentary representatives were summoned. On the other hand, they held that there were certain fundamental rights which were inalienable, and could be neither altered, abridged, nor destroyed by any means whatsoever; they existed by the law of nature, which was a part of the British constitution.

MCILWAIN, *supra* note 155, at 19-20; see also GREENE, *supra* note 157, at 133 (citing both lack of representation and novel theory of sovereignty); KETTNER, *supra* note 75, at 134 (common law seen by some as limiting parliamentary sovereignty, by others as supporting it).

178. CARL L. BECKER, *THE DECLARATION OF INDEPENDENCE* 20-22 (1942).

179. Wiecek, *supra* note 6, at 114.

180. GREENE, *supra* note 157, at 134; MCILWAIN, *supra* note 155, at 2; 1 PAMPHLETS, *supra* note 63, at 134-35. See Opinion of Dulany (1767), reprinted in 1 H. & McH. 559, 564-65 (1809). For a rebuttal to this colonial appropriation of the prerogative, see MAGNA CHARTA, *supra* note 124, at 25-27, 176-81.

181. In so arguing, a number of the revolutionary-era texts prefigured the modern theory of the Empire and Commonwealth, as a partnership of essentially independent states under Queen and Privy Council.

182. Christopher Hill, *The Norman Yoke*, in *DEMOCRACY AND THE LABOUR MOVEMENT* 11, 39 (John Saville ed., 1954), reprinted in *PURITANISM AND REVOLUTION* 58, 95 (1958) (by mid-eighteenth century, conquest theory no longer seen as threat). The attempt of both colonial and metropolitan dissidents to blame Parliament and turn to the Crown was short-lived. PAULINE MAIER, *FROM RESISTANCE TO REVOLUTION: COLONIAL RADICALS AND THE DEVELOPMENT OF*

But that is to focus only on the end of the story. Long before the 1770s, the colonists espoused the rights of Englishmen. That much is a familiar story, and it is traditionally read as a part of the political and ideological matrix from which the Revolution developed. Slavery, however, presented the exceptional setting in which the colonists could not afford the full common law. Even as the colonists pressed toward Attorney-General Richard West's conclusion in 1720 that "[t]he Common Law of England, is the Common Law of the Plantations,"<sup>183</sup> what they wanted was not the common law as understood in England, with Holt's possibility that slavery would be unrecognized and unprotected.<sup>184</sup> What the colonists needed regarding slavery was the right to pick and choose common law doctrines to secure their non-common-law asset, the slave.

Given the widespread confusion among lawyers and political leaders over how the prerogative applied to particular colonies, and the realization that much common law was unnecessary to the needs of colonial society, selective reception of the common law was what the colonists sought.<sup>185</sup> Nor was such selectivity improper, for pre-positivist lawyers understood the common law to include not only syllogistic rules, but also a storehouse of principles, historical parallels, a vocabulary and a methodology.<sup>186</sup> Necessarily, the rules that colonists sought included security of property and the right not to be taxed arbitrarily, as well as other "rights of Englishmen." But the remaining details could be worked out later, by courts and legislatures.<sup>187</sup> In the end, the common law as

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AMERICAN OPPOSITION TO BRITAIN, 1765-1776, at 200-10 (1972). By the time of the Declaration of Independence, the strategy was completely reversed: blame the king, rather than Parliament, for all abuses. See BECKER, *supra* note 178, at 18-20.

183. OPINIONS OF EMINENT LAWYERS, *supra* note 49, at 206. West concluded with a lawyerly qualification "[l]et an Englishman go where he will, he carries as much of law and liberty with him, as the nature of things will bear." *Id.* at 206 (emphasis added).

184. The confusion over what common law was assimilated under colonial charters, and how the answer would affect even post-Independence slavery, is illustrated in *The Case of William P. Chaplin* 9-11 (1851), reprinted in 2 SLAVE REBELS, ABOLITIONISTS, AND SOUTHERN COURTS 318, 327-29 (Paul Finkelman ed., photo. reprint 1988) (slavery in District of Columbia debated in terms of whether Maryland colonial charter, with its typical clause incorporating "common law," thereby incorporated a law that had no knowledge of slavery).

185. KEITH, *supra* note 151, at 184-85; SMITH, *supra* note 146, at 473-75; WOOD, *supra* note 35, at 296-98.

186. 1 PAMPHLETS, *supra* note 63, at 26.

187. See, e.g., OGG, *supra* note 166, at 669-70 (Virginia adopts Magna Carta, Petition of Right, habeas corpus, jury trials, and so forth). The process of private-law reception can be seen in the earliest colonial legislation, with the handful of statutes that track, refer to, or incorporate by reference analogous English statutes. For illustrations from Virginia, see, for example, 1 THE STATUTES AT LARGE, *supra* note 22, at 167, 434, 552; COLONY LAWS OF VIRGINIA, 1619-1660: VOL. 1, 1619-1640, at 193 (John D. Cushing ed., 1978) (8 Car. I, ch. 28 illustrates tacit incorporation, in applying the substance of the English Statute of Artificers; 8 Car. I, ch. 29 illustrates express incorporation, with the preamble "Be it enacted accordinge to the lawes of England . . ." unlike the usual "be it enacted" or "it is ordered"). English resistance to colonial reception is shown in the Council's frequent veto of local statutes purporting to receive or adopt common law, *in toto* or in part. RUSSELL, *supra* note 31, at 139-41 (Maryland law including Magna Carta rejected; New York act disallowed as "too closely modelled on English laws inapplicable to conditions in the Colonies.") After the Revolution, the new states clarified the issue, principally by a series of reception statutes declaring which English acts were in force, ELIZABETH G. BROWN,

received, to the extent that it addressed slavery, varied among the colonies as to whether a master might entail his slave, or convey the slave by bargain-and-sale, or sue by trover or detinue. The important point is that, as received and then extended, nowhere did the colonial common law *systematically* address slavery. It was the doctrine of prerogative governance that allowed the retention of local customs like slavery, and the selective "reception" of various usable common law doctrines that facilitated the retention and management of slavery.

#### V. SLAVE LAW AND THE LEGAL IMAGINATION: A POSTSCRIPT

With its origins in local custom, its legal authorization based on an autonomous status within the Empire, and its supporting doctrines in the patchwork of received common law, an incomplete colonial American slave law could serve the needs of slaveowners. And this in turn helps explain the relative silence of the English jurists, and the consequences of that silence. One feature of systematic slave codes and treatises, as opposed to policing measures, is their mendacious idealism. A consequence of the lack of a systematic slave law was the lack of these lies. Charles Molloy knew that New World slavery was practiced widely and that it was unlike its classical antecedents. In the case of jurists like Molloy or Zouche or Swinburne, the inaccuracies of their sketchy treatments often derived from the stylized conventions of Roman law. But Roman law does not explain the lack of slave law. Bracton, whose Roman law knowledge also runs through his entire text, gave a formulation of villeinage unexpectedly generous to the unfree person. He described the orthodox doctrine that a serf could not bring or defend against certain actions, hold real property, or enter into contracts. But Bracton also described all sorts of ways in which the unfree person who *had* taken possession of land could defend it in court and litigate against third parties, with the explanation that "it is no concern of his [the third party's] whether he [the villein] is free or bond."<sup>188</sup> Indeed, Bracton described scenarios in which the serf almost seemed to self-manumit, by entering into certain transactions with his lord.

In fact, unrealistic doctrines like this one abound in the classic slave laws. Late Greek law defined the *paramone*, the slave who bought her freedom but bound herself to serve her master *like a slave* for the duration of the master's life, on pain of reenslavement. Roman law included the *statuliber*, or slave with a vested claim to future freedom, as well as

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BRITISH STATUTES IN AMERICAN LAW, 1776-1836 (1964), but also by judicial act, NELSON, *supra* note 160, at 8-10, 30.

188. 3 BRACTON, *supra* note 62, f. 196b, at 100. So complex are the embellishments of this villeinage that some have described it as not true serfdom at all, but as a sort of "relational" unfreedom, in which the villein was unfree to his master but free to the rest of the world. 1 POLLOCK & MAITLAND, *supra* note 160, at 415. See DAVIS, *supra* note 8, at 39 (qualifying the "relational freedom" characterization); HYAMS, *supra* note 64, at 124-60 (same).

slaves with legal conditions attached (e.g. not to be sent to a brothel or gladiatorial combat).<sup>189</sup> The Talmud describes a “half-slave,” owned by two masters, one of whom frees the slave such that he is free on alternate days, and in the late medieval Inns of Court a similar scenario was mooted.<sup>190</sup> Churchmen in Portugal, as elsewhere, insisted that only Indians captured in “just wars” or purchased from legitimate owners should be enslaved, and so priests accompanied seventeenth-century slavers up the Amazon to certify that each Indian brought back as a slave met the legal criteria.<sup>191</sup> All these doctrines, and Bracton’s relational serfdom too, are idealized or unrealistic. The scenarios they describe may occasionally have happened. There were privileged slaves, house slaves or tutors, and serfs who acted as free men much but not all of the time. But each of these intricate doctrines does not reflect how the vast bulk of slaves lived. They are systematic misrepresentations, implausible and in some instances wholly unknown in practice. Whatever was the purpose of such doctrines, accommodation of an isolated case, analytic completeness, moral comfort, law school pedagogy, they are luxuriant lies when measured against social practice.

One consequence of the relative lack of theories of slavery in the English colonies is the absence of these luxuriant lies. True, eighteenth-century polemicists complained that the slave system had been forced on them by English merchants and traders, and defenders of slavery came to argue that American slavery was justified by respect for the (slavery) customs of the African states whose princes sold slaves to European traders. But the first was really another count in the indictment against British governance, and the second an attempt to find a defense for slavery to replace the unconvincing “capture in just war” and “enslavement of infidels” doctrines. In other words, these were political claims, not really doctrinal lies or impossible rules.<sup>192</sup> A closer counterpart to the systematic mendacity of the classic slave codes could be found in the Southern statutes requiring food and clothing or prohibiting immoderate correction, or the laws that increasingly gave slaves formally fair trials in capi-

189. KEITH HOPKINS, *CONQUERORS AND SLAVES* 133-71 (1978) (paramone at Delphi); W.W. BUCKLAND, *THE ROMAN LAW OF SLAVERY* (1908) (Roman statuliber and slaves with conditions).

190. MISHNAH, *Gittin* 4:5; TALMUD, *Gittin* 41a-43b; READINGS AND MOOTS AT THE INNS OF COURT IN THE FIFTEENTH CENTURY: READINGS AND MOOTS, *supra* note 104, at lxii.

191. DAGMAR SCHÄFFER, *PORTUGUESE EXPLORATION TO THE WEST AND THE FORMATION OF BRAZIL 1450-1800*, at 58-59 (1988); David G. Sweet, *Francisca: Indian Slave, in STRUGGLE AND SURVIVAL IN COLONIAL AMERICA* 274, 282 (David G. Sweet & Gary B. Nash eds., 1981).

192. For the complaint that Britain inflicted black slavery on the Southern colonies, see, for example, BECKER, *supra* note 178, at 212-13 (citing Thomas Jefferson’s earlier draft of the Declaration); DAVIS, *supra* note 8, at 140, 202-03; DAVIS, *supra* note 6, at 121, 387; ENGLISH HISTORICAL DOCUMENTS, *supra* note 6, at 494. For the need to respect African sovereignties, see *The Antelope*, 23 U.S. (10 Wheat.) 66, 121 (1825); *Somerset v. Stewart*, Lofft 1, 7, 98 Eng. Rep. 499, 503 (K.B. 1772) (argument of counsel); COBB, *supra* note 6, at §§ 66, 83, at 65, 82; DAVIS, *supra* note 6, at 475. For retention of the infidel rationale, see JORDAN, *supra* note 6, at 94-95 (used by Virginia as late as 1753).

tal or in all felony cases.<sup>193</sup> But even these unrealistic laws were exceptions, representing the infusion of moral or legalistic values into slave governance. Generally, English and colonial lawyers did not lie about the mechanics of slavery. Molloy's implicit comparison of Virginian to Roman slavery is not only wrong, but uncharacteristic of lawyers. Most lawyers in the 125 years before Hargrave and Blackstone did not bother to construct any sets of doctrines, explanations, or analogies. They said little at all. Racism and the assumption of difference permitted them to do that.

Legal lies can serve purposes other than glossing over harsh realities. Such lies can also be transformative. Regardless of their descriptive accuracy, they can be used to alter social practice or political configurations. *Somerset's Case* illustrates the process by which a narrow holding is generalized into a major legal principle and political theory. Lord Mansfield clearly intended his decision neither to free all English slaves nor to threaten colonial slavery. But his and counsel Hargrave's rhetoric came to be an important part of the abolitionist movement throughout Britain, its empire, and the United States.<sup>194</sup> But there were no such transformative statements from the period before 1760, and that is the price of the lawyers' silence regarding slavery.

## VI. CONCLUSION

Slave law in the English colonies was not found in a systematic text like the *Code Noir* or *Las Siete Partidas*, and accordingly it lacked the breadth and analytic richness that characterize discussions in such texts. But slave law in the English colonies also consisted of more than an assemblage of local ordinances and truncated case decisions. In fact, the most significant step in colonial slave law had on its face nothing to do with slavery. It was, instead, a new version of the already old notion that substantive common law need not be the law of English foreign settlements. This step was largely unstated—indeed, it was often denied by the colonists, who claimed that they had brought the common law with them from England, *jus sanguinis*. But common law, when it crossed the Atlantic, was received selectively, which prerogative theory allowed. In this sense, the colonists were, like some of their descendants, “federalists.” In the case of the colonists, their prerogative framework permitted them to create a property interest in persons, as well as a private realm for slave governance. Centrifugal constitutionalism was consonant with

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193. See DAVIS, *supra* note 8, at 59 (“It is a curious fact that both abolitionists and apologists for slavery argued that the existing laws were meaningless”); STAMPP, *supra* note 6, at 217-22, 225-27 (laws protecting slaves and extending them fair trials widely ignored); STROUD, *supra* note 11, at 26-28, 31-33 (same). *But see* Nash, *supra* note 17, at 76-93 (appellate courts concerned with criminal rights of slaves).

194. BLACKBURN, *supra* note 77, at 100; COVER, *supra* note 1, at 87-88; DRESCHER, *supra* note 15, at 36-43, 59-60; WIECEK, *supra* note 41.

the rough ethos of a far-flung mercantile empire and, in the plantation colonies, it permitted enslavement to be legitimated into law.

This evolving constitutional relationship explains the formal underdevelopment of English slave law, in contrast to the systematic slave laws of the other colonial powers and the self-evident “success” of English slavery on the ground. Colonial constitutional law explains why the English courts faced only a handful of slave cases over a century. Like their medieval predecessors in the matter of villeinage, English jurists saw slavery as a private matter, under local men and local custom and under the oversight of a lord—here, the king. And unlike medieval judges and legal authors, colonial judges faced relatively few thorny questions of demarcation. Increasingly, white racism, black skin color, and local policing statutes did that for them.