

# Transplants and Timing: Passages in the Creation of an Anglo-American Law of Slavery

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*This Article applies the concept of "legal transplant" to the slavery regimes that sprang up in all regions of settlement during the first two centuries of English colonization of mainland America. Using a distinction between "extrastructure" and "intrastructure," we can divide the Anglo-American law of slavery into discourses of explanation/justification and technologies of implementation. The two components were produced from distinct sources. English law possessed few intellectual resources that could be mobilized to justify and explain slavery as an institution. Here we find the law of nature and nations uppermost. English law offered many resources, however, for the management, distribution and control of movements of people. Thus, the Anglo-American law of slavery combined two transplanted resources within itself. As colonial settlements turned into slave societies, local innovations increasingly supplemented original transplants, compensating for their deficiencies and limitations and becoming, in turn, a third species of transplant. Assembly laws moved from colony to colony, creating commonalities within regions of settlement, and also — more interestingly — among regions usually thought quite distinct. Together the three species of transplants created densely instrumental slave regimes that enumerated all the ways in*

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## INTRODUCTION

Perhaps because one cannot imagine a relationship of starker extremes than that between slaves and their minders, American historians have tended to write about slavery in a peculiarly essentialist fashion, as a timeless phenomenon.<sup>1</sup> But in mainland Anglo-America slavery was a dynamic phenomenon in time and space. Spread across eleven settlements clustered in four distinct regions, the practice of slavery had a beginning — more accurately beginnings — an eventual end, and considerable variety.

Slavery's dynamism is particularly evident in its demography and its law: demography, because the history of mainland slavery during the seventeenth and eighteenth centuries is a history of the supply of and demand for enslavable people to perform forced labor; law, because slavery was a regime of governance, and, like all regimes of governance, it was created and sustained through the instantiation of its practices in rules of conduct.

The mainland's mature slave regimes were dense in law, earthy and instrumental, butchers' bills of ends and means dedicated to enslaving people and perpetuating their enslavement. Still, Anglo-American slave law per se has been deemed paradoxical — lacking "initial authority or systematic legal rules," conjured "*ex nihilo*."<sup>2</sup>

Anglo-American slave regimes were not conjured *ex nihilo*. Their sources are quite easily identified: long-established ideas that furnished a respectable genealogy; familiar practices adapted to serve new purposes. The availability of such resources should not surprise us, nor should their adaptability. As Orlando Patterson insists, "There is nothing notably peculiar about the institution of slavery."<sup>3</sup>

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1 See, for example, the classic general histories of antebellum slavery, KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTEBELLUM SOUTH* (1956) and EUGENE D. GENOVESE, *ROLL JORDAN ROLL: THE WORLD THE SLAVES MADE* (1972). See also MARK TUSHNET, *THE AMERICAN LAW OF SLAVERY, 1810-1860: CONSIDERATIONS OF HUMANITY AND INTEREST* (1981).

2 Jonathan A. Bush, *Free to Enslave: The Foundations of Colonial American Slave Law*, 5 *YALE J.L. & HUMAN.* 417, 418-19, 421 (1993).

3 ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY*, at vii (1982).

Slaves inhabited England's New World *imaginaire* from the very outset.<sup>4</sup> Still, to explain the course that the Anglo-American law of slavery followed during the first two centuries of English colonizing requires more than an assertion that slaves as such were always part of the enterprise. What requires elaboration is the formation of Anglo-American slavery as an institution — the creation in each colony of a legal condition of being for a particular segment of the population, qualitatively set apart from and absolutely subordinate to all other social and legal conditions of existence, along with the means (dedicated institutions, distinct specialized jurisdictions, elaborated punishments and mutilations, sanctioned killings) necessary to ensure its indefinite perpetuation on a massive scale.

Two concepts guide this work of elaboration. First, *transplantation* charts the construction of Anglo-American slavery's legalities. Occidental concepts and legal resources furnished the ideological and technical means from which Anglo-American slave regimes were fashioned. As those regimes developed, "second order" transplants — the movement of ideas and techniques from regime to regime — filled in much of the regulatory detail. But second, to understand the precise course of Anglo-American slavery law one must attend to *timing*. Slaves were present on the mainland within a few years of the beginning of continuous English settlement, but for the first half of the seventeenth century they were a minor and incidental component of labor supply. The early mainland settlements were remote from the extensive trade in slaves that served the European plantation colonies in the Caribbean and not wealthy enough to attract vendors' attention. Labor overwhelmingly took the form of migrant English family groups and single adolescent males. Mainland settlers did engage in occasional slave purchases. English settlement in the Caribbean and the expansion of slavery there created points of "local" origin for the acquisition of slaves in coastal trading.<sup>5</sup> Still, demand for slaves was insignificant before the 1660s.<sup>6</sup> African slavery did not become institutionally entrenched on the mainland until the second wave of English colonizing began after the Stuart Restoration, when it was aggressively promoted as the key to development of the new proprietary

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4 REBECCA ANN BACH, *COLONIAL TRANSFORMATIONS: THE CULTURAL PRODUCTION OF THE NEW ATLANTIC WORLD, 1580-1640*, at 175-76 (2000).

5 LORENZO J. GREENE, *THE NEGRO IN COLONIAL NEW ENGLAND, 1620-1776*, at 16-17, 60 (Atheneum 1968) (1942); 4 ELIZABETH DONNAN, *DOCUMENTS ILLUSTRATIVE OF THE HISTORY OF THE SLAVE TRADE TO AMERICA* 89 (Hein 2002) (1935).

6 Except where noted otherwise, all statements regarding early American populations are derived from 5 *HISTORICAL STATISTICS OF THE UNITED STATES, EARLIEST TIMES TO THE PRESENT: MILLENNIAL EDITION* tbl. Eg1-59 (2006).

colonies of the southern Atlantic and mid-Atlantic regions — Carolina and New York, and New York's offshoots in the Jerseys and Pennsylvania.

As a process, English colonization was in largest part a deliberate transplantation of peoples undertaken to "man, plant and keep" mainland territories. To that end, promoters of colonies had resort both to a broad, discursive *extrastructure* of ideas that explained and justified their enterprises, and a more detailed, technical *intrastructure* of institutions and processes that managed mobility and distributed migrants. In both aspects, law was of major institutional and ideological importance.<sup>7</sup>

The establishment of Anglo-American slave regimes broadly conformed to this pattern. It rested initially upon an explanatory *extrastructure* that rendered enslavement conceptually and legally familiar — appropriate, reasonable and legitimate — and a technical *intrastructure* of processes to manage and oversee an enslaved population. The distinction conforms to the relatively distinct legal resources upon which English colonizers drew in their general enterprise. English statute and common law offered few intellectual resources that could establish a legal basis for slavery. *Extrastructure* came instead from the law of nature and nations. This is quite consistent with the whole intellectual thrust of English colonizing — the law of nature and nations served precisely to explain and justify the larger colonizing enterprise of which mainland slavery regimes were subsystems. But English law did offer important resources for slave law's *intrastructural* management of people. Anglo-American slave law thus began by joining within itself intellectual arguments and justifications from *ius naturae* and *gentium* with the peculiarly protean transactional capacities and policing technologies of English common and statute law.<sup>8</sup>

Both *extrastructure* and *intrastructure* were transplants, each lifted from one context to be embedded in another. Taken together, they suggest that Anglo-American slave regimes had plural origins. But these resources did not express anything like the full morphology of the "social death"

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<sup>7</sup> See, e.g., Christopher L. Tomlins, *The Legal Cartography of Colonization, the Legal Polyphony of Settlement: English Intrusions on the American Mainland in the Seventeenth Century*, 26 LAW & SOC. INQUIRY 315, 321 (2001), and generally *id.* at 315-72; KEN MCMILLAN, SOVEREIGNTY AND POSSESSION IN THE ENGLISH NEW WORLD: THE LEGAL FOUNDATIONS OF EMPIRE, 1576-1640 (2006).

<sup>8</sup> On early slavery and the common law of property and inheritance, see THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW, 1619-1860, at 39-43 (1996). On police laws, see Bradley J. Nicholson, *Legal Borrowing and the Origins of Slave Law in the British Colonies*, 38 AM. J. LEGAL HIST. 38, 40-49 (1994). For the law of nations, see below.

characteristic of Anglo-American slave law. As colonial settlements turned into slave societies, local innovations increasingly supplemented Occidental transplants, compensating for their deficiencies and limitations. Local innovations in turn became transplants themselves, creating commonalities within regions of settlement, and also — more interestingly — among regions usually thought quite distinct. Assembly laws moved from settlement to settlement, enumerating all the ways in which summary mutilations and executions defined the slave's life on the edge of death.

### I. "SLAVERY IS ALL BUT DEATH"

Slavery was well known to the Christian law of nature and nations that structured sixteenth century European colonizing. It was a central and accepted component of the law of war, said Francisco de Vitoria (c.1486-1546), citing Justinian, that whatever was captured in war became the captor's property, extending to people themselves. Vitoria, however, distinguished wars against infidels and heathen, whose enslavement was indubitably lawful, from wars among Christians. It was "a received rule of Christendom that Christians do not become slaves in right of war."<sup>9</sup>

Exposition of the law of nations and of war was taken up in England by the Italian jurist Alberico Gentili (1552-1608), Regius Professor of civil law at Oxford, whose treatise *De Iure Belli* (1588-9) was the first on the subject published in England. Gentili followed Vitoria in two respects. First, there should be no slavery among Christians. Christians might hold slaves — "The condition of slavery is a just one" — but not other Christians *as* slaves.<sup>10</sup> Second, slavery originated in capture. As such, slavery was death postponed, permission to continue to live subject to the captor's dominion. It was "no hope of freedom . . . the condition of a beast . . . all but death."<sup>11</sup>

Gentili, however, gave slavery an additional foundation, the Thomistic

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9 FRANCISCO DE VITORIA, *DE INDIS ET DE IURE BELLI RELECTIONES* 155-56, 181 (Ernest Nys ed., John Pawley Bate trans., Carnegie Inst. 1917) (1557).

10 ALBERICO GENTILI, *DE IURE BELLI LIBRI TRES* 329-30 (John C. Rolfe trans., Clarendon Press 1933) (1612). Gentili noted, however, that commentators had held "a baptized person may remain the slave . . . of a Christian." *Id.* at 332. See also PIERINO BELLI, *DE RE MILITARI ET BELLO TRACTATUS* 85-86, 95-96, 115-16 (Herbert C. Nutting trans., Clarendon Press 1936) (1563).

11 GENTILI, *supra* note 10, at 328. BELLI, *supra* note 10, at 85, held that enslavement by capture extended beyond war to the seizure of strangers without ties of hospitality or friendship to the captor.

argument that "liberty is according to nature, but only for good men." Whereas capture could ensnare anyone, this identified a distinct population properly subject to slavery, the sinful and wicked whom Gentili elsewhere classed among the common and perpetual enemies of mankind: pirates and robbers; thieves and criminals; savages. The means of their enslavement was judgment by higher authority: "If some earthly city should decide to commit certain great crimes," Gentili wrote, quoting Augustine, "it would have to be overthrown by decree of the human race."<sup>12</sup>

## II. TIMING

The first explicit definition of those who might be appropriately enslaved that was advanced by the English on the American mainland embraced slavery more or less precisely in Gentili's vein: "lawfull Captives taken in just warres," along with heathen outsiders — "strangers . . . sold to us" — and those "judged thereto by Authority." The words appear in Nathaniel Ward's *Body of Liberties* (1641), married to biblical rules (*Leviticus* 25:38-46) that underscored slavery as a condition for heathen, in perpetuity. Ward's definition was formulated for the Massachusetts Bay colony General Court and formally embraced in the colony's *Laws and Libertyes* (1648).<sup>13</sup> The definition was quietly broadened in 1658,<sup>14</sup> and in 1664 it was transplanted, somewhat restated, to the entire mid-Atlantic region through adoption by the *Duke's Laws*.<sup>15</sup>

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12 GENTILI, *supra* note 10, at 122. Note generally Sir Edward Coke, in *Calvin's Case*, (1608) 77 Eng. Rep. 377, 397: "All infidels are in law . . . perpetual enemies."

13 See 1 THE LAWS AND LIBERTIES OF MASSACHUSETTS, 1641-1691, at 10 (John D. Cushing comp., 1976).

14 GEORGE H. MOORE, NOTES ON THE HISTORY OF SLAVERY IN MASSACHUSETTS 14-17 (New York, D. Appleton 1866). Dropping the word "strangers" and attendant corrections "removed the necessity for alienage or foreign birth as a qualification for slavery," and also removed profession of Christianity as a disqualification. Moore argues the amendment was intended both to extend parents' slavery to their children and to ensure continued enslavement of heathen converts.

15 "Noe Christian shall be kept in Bond Slavery, Villenage or Captivity, except Such as shall be judged thereunto by Authority or Such as willingly have sould or shall sell themselves . . . This Law shall not extend to sett at liberty Any Negroe or Indian Servant who shall turne Christian after he shall have been bought by Any Person." Duke's Laws (1664), in 1 THE STATUTES AT LARGE OF PENNSYLVANIA 78 (Gail McKnight Beckman comp., 1976). The *Duke's Laws* were compiled from the laws of the existing colonies, particularly Massachusetts Bay, for use in the new proprietorship of New York.

To identify Massachusetts in 1641 as the source of essential keywords for Anglo-American slavery is at odds with the usual chronology, in which mainland slavery begins in Virginia in 1619, more or less by chance.<sup>16</sup> In fact that beginning was no accident, but symptomatic of an occasional coastwise trade that would scatter a few hundred slaves among the mainland settlements during their first half century.<sup>17</sup> Nevertheless, though slaves were present in Virginia virtually from the beginnings of the colony,<sup>18</sup> colonists took no particular steps to "define" who might be enslaved. In 1640 the Virginia colony had no more than 150 blacks in a population of more than 10,000; in 1660 fewer than 1,000 in 26,000. During the 1640s and 1650s there were more slaves in New England and in the mid-Atlantic region than in the Chesapeake. Far from being the point of origin of an Anglo-American slave regime, during its first half century Virginia simply accumulated a few slaves by occasional purchase and subjected them to the same daily disciplines that policed its much larger population of youthful migrant servants.<sup>19</sup>

The legal-institutional structure of Anglo-American slavery was created, almost everywhere on the mainland, in a flurry of local enactments that began in the 1660s and accelerated between 1680 and 1715. By the 1660s a majority of the mainland's small black population had become concentrated in the Chesapeake, and the first enactments occurred there. But by then slavery was expanding and gaining definition everywhere — promoted as a source of labor for the vast new proprietary colonies of the mid-Atlantic and Carolina, and on the rise in New England as well. Over the next century the mainland's slave population grew from 3,000 (4% of total population) to well over 300,000 (21%). In the Chesapeake a black population of 1,700 in 1660 had grown to 20,000 by the end of the century, and to 150,000 by 1750. In the area that would become South Carolina, where settlement began in the late 1660s, there were some 1,500 slaves by 1690, and 50,000 (two-thirds of total population) by 1750. The slave population

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16 See Letter from John Rolfe to Sir Edwin Sandys (Jan. 1619/20), in 3 RECORDS OF THE VIRGINIA COMPANY OF LONDON 241, 243 (Susan M. Kingsbury comp., 1933).

17 See Engel Sluiter, *New Light on the "20. and Odd Negroes" Arriving in Virginia, August 1619*, 54 WM. & MARY Q. 395 (1997); LINDA M. HEYWOOD & JOHN THORNTON, *CENTRAL AFRICANS, ATLANTIC CREOLES, AND THE FOUNDATION OF THE AMERICAS, 1585-1660*, at 5-8 (2007).

18 Not all the region's blacks were enslaved, but overwhelmingly Virginia's "negroes" were owned for life. MORRIS, *supra* note 8, at 39-42.

19 Many of the institutions that scholars associate with control of slaves had their origins in a more general police of categories of population held to be dangerous or suspicious — servants, vagrants, debtors, Indians. SALLY E. HADDEN, *SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS* 3-4, 6-40 (2001).

of the mid-Atlantic and Southern New England (divided fairly consistently throughout, approximately one-third in New England, two-thirds in the Mid-Atlantic) grew from some 1,200 in 1660 to over 5,000 by 1700, 30,000 in 1750, and 50,000 (10% of the mainland's black population) by the 1770s.<sup>20</sup>

It was the 1660s, therefore, when slavery's mark on the mainland became indelible. David Brion Davis has argued that "no British founders of North American colonies, except for South Carolina, intended to create slave societies."<sup>21</sup> But slavery's chronology calls the contention into question. All the Restoration proprietors, not merely Carolina's, favored the introduction of slavery; most sought it avidly. The first mid-Atlantic proprietor, James, Duke of York, planned New York as the principal point of entry for the African slave trade on the northern mainland, and worked to encourage the development of markets for slaves throughout the province.<sup>22</sup> New York and its offshoots — the Jerseys, Pennsylvania — would all build closely related slavery regimes on the common foundation of the *Duke's Laws*.

Anglo-American slavery regimes emerged in multiple regional centers experiencing rapid expansion of their slave populations relatively simultaneously. Each center showed a clear propensity to embrace laws first formulated elsewhere. Key elements of the legal regimes established in the mid-Atlantic colonies, for example, were transplanted from their Restoration contemporary, South Carolina. In turn, crucial elements of South Carolina's slave law were transplanted from the Caribbean island of Barbados. Overall, mainland slavery regimes followed two relatively distinct paths, one characteristic of the original plantation colonies of the Chesapeake, the other more typical of the Restoration colonies.

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20 New York always had the largest slave population of all the northern colonies. In the mid-Atlantic, the larger part of the remainder was to be found in New Jersey. Slavery was not insignificant in Pennsylvania, but for most of the century after settlement Pennsylvania's slave population did not exceed 15% of the region's total. In New England Massachusetts and Connecticut had significant concentrations of slaves, but slaves' incidence in the overall population reached mid-Atlantic levels only in Rhode Island.

21 DAVID BRION DAVIS, *INHUMAN BONDAGE: THE RISE AND FALL OF SLAVERY IN THE NEW WORLD* 126 (2006).

22 LESLIE M. HARRIS, *IN THE SHADOW OF SLAVERY: AFRICAN AMERICANS IN NEW YORK CITY, 1626-1863*, at 26-27, 32-33 (2003). The same policy remained very much in evidence forty years on. See Instructions for Our Right Trusty and Well Beloved Edward Lord Cornbury (Nov. 16, 1702), in *FUNDAMENTAL LAWS AND CONSTITUTIONS OF NEW JERSEY, 1664-1964*, at 127, 148-49 (Julian P. Boyd ed., 1964).



### III. BARBADOS — SEED CRYSTAL

Barbados was the seed crystal for the slavery regimes of the Restoration colonies; it also had some influence on Virginia. Settled in the late 1620s and 1630s by English planters using indentured European labor to produce tobacco and cotton, by the 1650s Barbados was dominated by large, capital-intensive sugar plantations dependent on imported slave labor. Barbados slavery entered its phase of rapid growth well in advance of the mainland. Half the island's population (20,000 of 40,000) were slaves by the 1650s; by the 1680s, 70% (46,000 of 66,000).<sup>23</sup> In 1661, almost exactly at the moment that the strong Restoration push to establish slavery on the mainland was getting under way, Barbados became the first English colony to legislate extensively on slavery.

Barbados had established a legal basis for enslavement when slaves first began appearing on the island in the mid-1630s, ordering that "Negroes and Indians, that came here to be sold, should serve for Life, unless a Contract was before made to the contrary." For enforcement, Barbados relied upon English police laws disciplining the movement of population and forcing vagrants to work.<sup>24</sup> But in 1661 the assembly found the laws made "for the governing and regulating and ordering the Negroes Slaves in this Isle" comprehended neither the unique demands of the plantation system's massive concentrations of enslaved alien laborers nor the unique deviance of Negroes, "heathenish [and] brutish . . . uncertaine and dangerous." Hence the *Act for the Better Ordering and Governing of Negroes* (1661), considered "absolutely Needful for the publique Safety."<sup>25</sup>

The detail of Barbados' "better ordering" statute followed from these two claims, and from the further claim that English law offered "noe track to guide us . . . how to govern such slaves." Cast by necessity upon its own devices, the Assembly chose to "revive whatsoever wee have found necessary and usefull in the former Lawes" and to add such laws

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23 RICHARD DUNN, *SUGAR AND SLAVES: THE RISE OF THE PLANTER CLASS IN THE ENGLISH WEST INDIES, 1624-1713*, at 76, 87-89 (1972); *see generally id.* at 46-116.

24 RICHARD B. SHERIDAN, *SUGAR AND SLAVERY: AN ECONOMIC HISTORY OF THE BRITISH WEST INDIES, 1632-1775*, at 236 (Canoe Press 1994) (1974); David Barry Gaspar, *With a Rod of Iron: Barbados Slave Laws as a Model for Jamaica, South Carolina and Antigua*, in *CROSSING BOUNDARIES: COMPARATIVE HISTORY OF BLACK PEOPLE IN DIASPORA* 343, 344-45 (Darlene Clark Hine & Jacqueline McLeod eds., 1999).

25 CO 3/2/16-26, Public Record Office, London.

of its own devising as might promise "peace and utility." The resulting statute dealt comprehensively with relations between slaves and the white population as a whole; slaves and their masters; slave discipline; and slave protections. Slaves were merchandise until sold, and property thereafter. Like any other species of merchandise or property, they might be safeguarded against "evill disposed person[s]." Being human, slaves were deserving of protection "somewhat further." But being heathen, alien, increasingly numerous, increasingly rebellious, slaves were profoundly dangerous. The Assembly's foundational intent was rigorous coercive control: a regime of whipping, dismemberment and death administered as a separate jurisdiction by special courts of justices and freeholders.

Barbados' influence spread wide: Beginning around mid-century, substantial numbers of land-poor Barbadian planters began migrating elsewhere in the Caribbean, settling Jamaica and Antigua, taking their slaves and slave law with them. Barbadian planters also moved to the mainland. Carolina was their best-known destination, but Barbadian planters also moved to other mainland settlements along lines of passage created by the island's commercial networks. Not a few went to Boston. Others settled in East Jersey. Still others headed for Virginia.<sup>26</sup>

Barbadian transplants influenced the development of mainland slave regimes in each of its three main centers — the Chesapeake, but particularly Carolina and the mid-Atlantic. The timing of slavery's growth in each place explains the timing of the waves of statutes that followed. But other factors were also in play. As increasing demand for slaves outran the capacities of the coastwise trade in "Atlantic Creoles" (slaves already seasoned by a period of captivity), mainland markets turned decisively toward slaves directly imported out of Africa.<sup>27</sup> "Outlandish" Africans were physically and culturally distinct from the somewhat acculturated Atlantic Creoles. In the 1660s and afterwards, Anglo-American slavery began fashioning both a culture of work and a culture of absolute subjugation — the former an expression of greed, the latter of whites' fear of the growing numbers of aliens their greed had introduced into their midst.

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26 Gaspar, *supra* note 24; Nicholson, *supra* note 8, at 49-53; APRIL LEE HATFIELD, ATLANTIC VIRGINIA: INTERCOLONIAL RELATIONS IN THE SEVENTEENTH CENTURY 137-68 (2004).

27 Chesapeake evidence indicates the mainland slave trade gathered momentum after 1680, and particularly after 1698 when the Royal African Company lost its monopoly and new English suppliers entered the business. 5 DONNAN, *supra* note 5, at 89.

#### IV. SOUTH CAROLINA

Chartered in 1663, Carolina was fecund territory for slavery. Carolina's proprietors shared connections with the English slave trade and with Barbados, and they courted land-hungry Barbadian planters. In 1665 they negotiated "Concessions and Agreements" with "adventurers of the Island of Barbados" that allotted planters headrights in land for slaves they imported. Efforts to settle bore fruit in 1669/70, when a mixed expedition of English and Barbadian adventurers established continuous settlement under the sponsorship of proprietor Anthony Lord Ashley (later the Earl of Shaftesbury).<sup>28</sup>

Ashley had prepared the way for his expedition by persuading his fellow proprietors to enlarge the headright to 150 acres, which the Barbadians insisted should be granted to importers of "negroes as well as Christians."<sup>29</sup> Ashley had also drafted (with the assistance of John Locke, his secretary) the "Fundamental Constitutions of Carolina," which confirmed — in the course of establishing religious toleration — that Carolina slaveholders would enjoy the same absolute power over their slaves that Barbados' "better ordering" statute had guaranteed. Slaves might "be of what church or profession any of them shall think best," yet since "religion ought to alter nothing in any man's civil estate or right . . . no slave shall hereby be exempted from that civil dominion his master hath over him, but be in all things in the same state and condition he was in before." Hence "Every freeman of Carolina shall have absolute power and authority over his negro slaves, of what opinion or religion soever."<sup>30</sup> (The Constitutions' mingling of slavery with religion is no oddity, but actually fundamental to the terms of mainland slavery's post-1660 expansion: everywhere, we shall see, expansion was predicated on casting aside the fundamental concern of early modernity that Christians not hold Christians in slavery — a decisive point of departure and modernization in Anglo-American slave law.)

A detailed law of slavery to complement the basic law of the Fundamental

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28 Charter of Carolina (1663, 1665), Declaration and Proposals (1663) and Concessions and Agreements (1665), in 5 THE FEDERAL AND STATE CONSTITUTIONS 2743 (Francis Newton Thorpe comp., 1909); PETER WOOD, BLACK MAJORITY: NEGROES IN COLONIAL SOUTH CAROLINA FROM 1670 THROUGH THE STONO REBELLION 13-17 (1975).

29 WOOD, *supra* note 28, at 19-20.

30 The Fundamental Constitutions of Carolina (1669), in 5 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 28, at 2772, 2785.

Constitutions awaited the moment when slave numbers began to increase in the 1680s, and particularly when those directly out of Africa became a significant proportion of the slave population. As elsewhere, first moves took the form of piecemeal legislation policing the mobility of both servants and slaves and attempting to restrain trading with them.<sup>31</sup> Carolina's first general statute, *An Act for the Better Ordering of Slaves*, came in February 1690/91. It created a ticket-of-leave system that strictly constrained the movement of slaves outside home plantations and enlisted the entire planter population in policing observance and punishing slaves discovered at large without permission. It established detailed runaway regulation, set a graduated schedule of punishments for slaves who attacked any white person (whipping on the first offense; nose-slitting and burning on the second; death on the third), mandated frequent searches for weapons and stolen goods, adopted summary procedures and penalties peculiar to slaves in all criminal matters, from theft to insurrection, and created juryless courts of two justices and three "discreet and sufficient" freeholders to administer them. It required that slaves have "convenient clothes" once a year, rendered the killing of slaves by whites punishable only if purely wanton, affirmed that profession of Christianity would not free slaves, and declared them chattel property for the payment of debts, otherwise freehold.<sup>32</sup>

Carolina's first "better ordering" statute was a condensed, indifferently drafted version of the Barbadian *Better Ordering Act* of 1661. Its provisions can be found at the core of every subsequent attempt at comprehensive slave control in the colony. Unlike the Barbadian statute, however, Carolina's offered no explanatory preamble or general statement of policy. A strictly instrumental measure, its framers — thirty years after the Barbados Act — appear to have felt no need to explain the necessities of their invention. It made only incidental mention of its subjects — "negro or Indian slave[s]" — seeing no necessity for elaboration.

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31 See, e.g., *An Act to Prevent Runaways* (1683, 1685), *An Act Inhibiting the Trading with Servants or Slaves* (1682 (*quaere* 1683), 1686, 1691, 1692, 1695/6), in 2 THE STATUTES AT LARGE OF SOUTH CAROLINA, at v, 13-14, 22-23, 52-54, 73, 118 (Thomas Cooper ed., 1837).

32 *An Act for the Better Ordering of Slaves* (1690/1), in 7 STATUTES AT LARGE OF SOUTH CAROLINA 343 (David J. McCord ed., 1840). The Act's most important provision was its adoption of the summary *en banc* slave courts first created in Barbados in 1661 and reproduced throughout the Restoration colonies. The slave courts had no clear parallel in English law, though Nicholson, *supra* note 8, at 46, contends they were derived from provisions for trial of servants included in the Statute of Artificers, 1563, 5 Eliz., C. 4. The resemblance is approximate at best, but approximation may be all that is necessary for purposes of legal transplantation.

As slave numbers grew — at double the rate of Europeans — and particularly as directly imported Africans came to dominate the slave population, Carolina adopted successively revised and expanded iterations of "better ordering." The 1696 version expanded upon the procedures to be followed by Carolina's slave courts, created a graduated schedule of punishments for runaways that included bodily mutilation of repeat offenders (castration of males above sixteen years old, women to have one ear sliced off), and mandated white supervision of any location where slaves were present and of slave access to weapons. It also added the first explicitly constitutive statement of the ambit of slavery in Carolina: "All Negroes Mollatoes and Indians which at any time heretofore have been bought and sold or now are . . . or hereafter shall be Bought and sold for slaves are hereby made and declared they and their children slaves to all Intents and purposes." The definition was tautological — slaves were those who were sold as slaves. But the statement underlined that slavery was racial — Negroes and Indians — that it extended to the product of any European union with either — mulattos, mestizos — and that it was perpetual ("and their children").<sup>33</sup>

The 1696 Act was renewed in 1698, and revised and extended in 1701 and 1712. Amendments parsed content. In 1712, for example, the punishment schedule for runaways was carefully recalibrated to whip the first offender, brand the second, whip and mutilate the third, and castrate the fourth. The dedicated five-time recidivist was to be permanently crippled. Similar piecemeal adjustments occur throughout.<sup>34</sup>

But the most important change made in 1712 was the addition of a preamble in which, for the first time, Carolina planters explain themselves. Their explanation lacked originality; it was another transplant from Barbados, though not from the original 1661 statute but from its successor, *An Act for the Governing of Negroes* (1688).

WHEREAS, the plantations and estates of this Province cannot be well and sufficiently managed and brought into use, without the labor and service of negroes and other slaves; and forasmuch as the said negroes and other slaves brought unto the people of this Province for such purpose, are of barbarous, wild savage natures, and such as

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33 An Act for the Better Ordering of Slaves (1696), Records of the General Assembly — Acts (Governor John Archdale), South Carolina Department of Archives and History, Columbia, SC.

34 An Act for the Better Ordering and Governing of Negroes and Slaves (1712), in 7 STATUTES AT LARGE OF SOUTH CAROLINA, *supra* note 32, at 352.

renders them wholly unqualified to be governed by the laws, customs and practices of this Province; but that it is absolutely necessary, that such other constitutions, laws and orders should in this Province be made and enacted, for the good regulating and ordering of them, as may restrain the disorders, rapines and inhumanity, to which they are naturally prone and inclined; and may also tend to the safety and security of the people of this Province and their estates; to which purpose . . . .

The transplanted preamble was not completely faithful to the original, carefully excising statements of provision and protection, an excision replicated in the substance of the act, which ignored the Barbadian statute's censure of planters who did not "provid[e] what is necessary for their Negroes and other Slaves, or allow[] them time to plant or provide for themselves."<sup>35</sup> The Barbadian statements were modest — no more than an expression of sentiment — but their excision signifies a willful decision to make the Carolina statute unrelievedly a measure for the forced extraction of labor.

Further revisions came in 1722 and 1735. The 1722 restatement is particularly notable for its steady drumbeat of "death." Punishment schedules are once more meticulously recalibrated among the usual array of options — whippings, burnings, mutilations, hangings — but recidivists are turned off earlier in the schedule, with greater acceleration and lessened judicial discretion. Simultaneously, small changes in the preamble remind us that South Carolina has become a royal colony, hence that the point of comparison for judging the barbarity of slaves had changed. No longer were slaves "unqualified to be governed by the laws, customs and practices of *this Province*." Now their brutishness threatened the laws, customs and practice of *England*. It became the Crown's responsibility to do as a sovereign should, "tend to the safety and security of the people of this Province," by acknowledging that slaves' savage difference required their subjection to a severe regime of controls.<sup>36</sup>

Five years after the 1735 revision, the Assembly returned yet again to its slave regime. Although by 1740 the fifteen crude clauses of 1690/1 had become fifty-eight, the statute retained much of the substance and the

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35 ACTS, PASSED IN THE ISLAND OF BARBADOS. FROM 1643, TO 1762, INCLUSIVE, at 112, 112-13, 119 (Richard Hall comp., 1764).

36 An Act for the Better Ordering and Governing of Negroes and other Slaves (1722), in 7 STATUTES AT LARGE OF SOUTH CAROLINA, *supra* note 32, at 371, 371, 378 and *passim*.

institutional framework of its predecessors. Still, the 1740 statute is chiefly remarkable as a lasting reconceptualization of slavery in South Carolina. Thereafter revisions ceased — in all essentials the 1740 statute defined South Carolina's slavery regime for the next 125 years.

One might imagine that what precipitated this reconceptualization was the Stono slave rebellion, violently suppressed in September 1739.<sup>37</sup> The mark of Stono is certainly on the 1740 Act. Noting that circumstances at the time "would not admit of the formality of a legal trial of such rebellious negroes," that their own security required inhabitants "to put such negroes to immediate death," the Act's final clause granted blanket immunity from criminal complaint or civil action to all who had taken part in suppressing the revolt, declaring everything they had done "fully and amply [lawful]."<sup>38</sup>

Given that the woundings and killings had arisen in the course of suppressing a revolt, one of the most feared events in a slave society, it seems odd that the slaughter would call forth a formal statement of legal immunity. Yet the clause actually expresses a certain embarrassment that chaos had overwhelmed legal process. In this, it is of a piece with the 1740 Act as a whole. Throughout, the Assembly dresses the colony's established slavery regime in new clothes sedulously respectful of the proprieties expected of a *legal* regime, particularly (as first noted in 1722) an *English* regime.<sup>39</sup> Here was yet another transplant taking effect, this time not a bit of someone else's statute, but the learned *mentalité* of English law, invoked to allow the routines of a provincial slave society to echo metropolitan jurisprudence. Gone was the old preamble that pleaded the uniqueness of slavery and of the slave to justify distinct "constitutions, laws and orders." In 1740 slavery was fully assimilated to English law, as just one more form of social relation requiring legal categorization. Like other species of social relation, slavery had its own quirks and special needs; hence, like other categorizations, slave law had its own particularized conventions. But slavery could still be comfortably accommodated within a common discourse of procedures and ideals, all part of law "as such." Hence it was represented not as an exception, but as simple fact, that "in his Majesty's plantations in America, slavery has been introduced and allowed," that "negroes, Indians, mulattoes and mustizoes, have been deemed absolute slaves," and that positive laws

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37 ROBERT OLWELL, *MASTERS, SLAVES AND SUBJECTS: THE CULTURE OF POWER IN THE SOUTH CAROLINA LOW COUNTRY, 1740-1790*, at 21-24 (1998).

38 An Act for the Better Ordering and Governing Negroes and other Slaves in This Province (1740), in *7 STATUTES AT LARGE OF SOUTH CAROLINA*, *supra* note 32, at 397, 416-17.

39 OLWELL, *supra* note 37, at 66-67.

were required to keep slaves "in due subjection and obedience" and to preserve "public peace and order."<sup>40</sup>

The 1740 Act is densely procedural. Mistreatment is penalized, for "cruelty is not only highly unbecoming those who profess themselves Christians, but is odious in the eyes of all men who have any sense of virtue or humanity." The Act's recitation of punishments eschewed the exactitude with which prior statutes had enumerated whippings, burnings, mutilations and amputations, preferring the more decorous "corporal punishment, not extending to the taking away life or member," left in its exact measure to juridical discretion. Slaves were owed "natural justice."<sup>41</sup>

The Act's gestures toward legality and humanity were real, but deceptive. Its new, polite language reenacted all the familiar features of South Carolina's slavery regime: who were to be slaves, how to treat runaways, how to control movement, the multiplicity of regulations and restrictions, all carrying the familiar markers of disablement and death for their breach; and especially, the key to the regime itself, those Barbadian courts of justices and freeholders, with their parallel summary jurisdiction over all slave matters.<sup>42</sup> Little of the Act's substance, in other words, changed. Its novelty lay rather in the transplanted garb of humanity and justice in which the Assembly dressed the slavery regime. A half century after the crude list of threats and tortures that was Carolina's first attempt at a comprehensive law of slavery, the Act of 1740 took care to underline that its authors were virtuous and civilized men versed in natural justice and the rule of law. When, in the summer of 1740, just a few weeks after the Act was formally adopted, upwards of seventy slaves accused of a new conspiracy were brought to trial in St. John Berkeley Parish north of Charles Town, and a third of them executed,<sup>43</sup> one may be confident that the victims were dispatched with every regard to legal propriety. Carolina's statute was directly transplanted to neighboring Georgia in 1755, virtually word for word.<sup>44</sup>

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40 7 STATUTES AT LARGE OF SOUTH CAROLINA, *supra* note 32, at 397, 399.

41 7 *id.* at 402, 405, 410-12.

42 7 *id.* at 401 (cl. XI).

43 7 *id.* at 26.

44 An Act for the Better Ordering and Governing Negroes and other Slaves in this Province (1755), in 18 COLONIAL RECORDS OF THE STATE OF GEORGIA 102 (1910).



## V. VIRGINIA

As in Barbados and Carolina, rapid growth in the directly-imported African component of Virginia's slave population would prove the greatest spur to the creation of a comprehensive law of slavery. The move came in the thirty years following 1680: at least three thousand African slaves were imported into Virginia during the first half of the growth spurt, through 1695; more than twice as many during the second (1695-1710).<sup>45</sup> These imports far outstripped the earlier intake of Atlantic creoles from the Caribbean.

Early on, Virginia had assimilated its few slaves to English property and inheritance law for transactional purposes,<sup>46</sup> and for behavioral regulation had relied on general laws created piecemeal, largely on the English template of population controls — morals as well as mobility.<sup>47</sup> In addition, Virginia had developed an extensive and detailed regime policing indentured servant labor; Virginia's comprehensive law of slavery would eventually develop largely within the shell of the existing servant laws. But distinctions embedded within that body of law in the early 1660s made clear the difference between temporary migrant servitude and the permanence of enslavement.<sup>48</sup> And alongside Virginia's servant statutes there began to emerge at the same time a further body of law specific to blacks that constructed and underscored the terms of their absolute difference.

Three enactments were fundamental. In December 1662, considering whether children "got by any Englishman upon a negro woman should be slave or free," the Assembly provided that "all children borne in this

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45 PHILIP D. MORGAN, *SLAVE COUNTERPOINT: BLACK CULTURE IN THE EIGHTEENTH CENTURY CHESAPEAKE AND LOWCOUNTRY* 58-61 (1998).

46 The earliest legal acknowledgments of the presence of slaves came in local wills and estate inventories that categorized "negars" distinctly from "servants." ALDEN T. VAUGHAN, *Blacks in Virginia: Evidence from the First Decade*, in *ROOTS OF AMERICAN RACISM: ESSAYS ON THE COLONIAL EXPERIENCE* 128, 133-34 (1995); see generally *id.* at 128-35; MORRIS, *supra* note 8, at 40-41.

47 MORRIS, *supra* note 8, at 23, 40 (describing cases from 1630 and 1640). The first reference to "negroes" in Virginia legislation required "All persons *except* negroes to be provided with arms and ammunition" on pain of fine. Act X (1639/40), in 1 WILLIAM WALLER HENING, *THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA* 226 (1823) (emphasis added).

48 For example, Act XXII of 1660/1 requiring that English servants running away "in company with any negroes who are incapable of making satisfaction by addition of time" — that is, slaves — serve their companions' lost time as well as their own. 2 HENING, *supra* note 47, at 26.

country shalbe held bond or free only according to the condition of the mother."<sup>49</sup> The statute's genealogy is unclear — no such rule was then in place in any British colony, island or mainland.<sup>50</sup> Six years earlier the Assembly had endorsed conventional common law patrilineality. The likeliest source is the civil law maxim *partus sequitur ventrem* (literally "the offspring follows the womb").<sup>51</sup> In civil law and in law of nations doctrine, matrilineality was the clear rule in the case of slavery.<sup>52</sup> Had the rule been derived from English common law, one might expect it would have been widely adopted in English colonies. But it was not. Maryland's 1664 *Act Concerning Negroes & other Slaves* specifically endorsed common law patrilineality. Maryland revisited the matter in 1681, 1692 and 1715, but the 1664 rule remained intact (although by 1681 it was clear that patrilineality had been qualified in the case of mulatto children of freeborn white women, who were forced into service for up to thirty-one years rather than enslaved).<sup>53</sup> New York in 1706

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49 Act XII (1662), in 2 HENING, *supra* note 47, at 170.

50 HATFIELD, *supra* note 26, at 157, has argued that Virginia followed Barbados, but without providing specific evidence. HILARY BECKLES, *NATURAL REBELS: A SOCIAL HISTORY OF ENSLAVED BLACK WOMEN IN BARBADOS* 133 (1989) holds that matrilineality was "consistently" institutionalized in Barbadian slave codes, but no such rule appeared in either the 1661 or 1688 *Better Ordering* acts. Until 1740 South Carolina statutes enslaved *any* child born of an enslaved parent. This was also Antigua practice after 1672. See DUNN, *supra* note 23, at 228 n.8. (Before 1672 mixed-union children had been enslaved until age 18 or 21 in Antigua, then freed.)

51 Warren Billings, *The Cases of Fernando and Elizabeth Key: A Note on the Status of Blacks in Seventeenth-Century Virginia*, 30 WM. & MARY Q. 467 (1973). Thomas D. Morris argues that the source Billings uses to illustrate the possibility of civil law borrowing, HENRY SWINBURNE, *A BRIEF TREATISE OF TESTAMENTS AND LAST WILLES* (3d ed. 1635), did not support matrilineality in the case of slavery. MORRIS, *supra* note 8, at 43-44. In fact, Swinburne contrasted the outcomes of common law patrilineality and civil law matrilineality: "the Civil Law and the Laws of this Realm differ in this, whether the bondage of the Father or of the Mother do make the Child bound." See HENRY SWINBURNE, *A TREATISE OF TESTAMENTS AND LAST WILLS* 75-76 (5th ed. 1728). In civil law it was the mother. This was precisely what Act XII enacted.

52 SUMMA THEOLOGICA OF ST. THOMAS AQUINAS, SUPPLEMENTUM TERTIAE PARTIS questio 52, art. 4 (1274), available (in English translation) at <http://www.newadvent.org/summa/>. In 1625 Hugo Grotius affirmed the Supplement's matrilineality rule in the case of slavery. 2 HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* 256 (Francis W. Kelsey trans., Clarendon Press 1925) (1625); 3 *id.* at 692.

53 Maryland in effect moved to the position taken in Antigua prior to 1672. 1 ARCHIVES OF MARYLAND 533-34 (1883); 7 *id.* at 203-05; 13 *id.* at 546-49; 30 *id.* at 283-92, 289-90.

was the only other colony to endorse matrilineal heritability as a legal rule before the mid-eighteenth century.<sup>54</sup>

In 1667 a second and equally important measure declared that Christian baptism would not free a slave.<sup>55</sup> Exponents of *ius naturae* and *gentium* had long held it to be a convention among Christians that Christians might not enslave other Christians. The contemporary understanding in Barbados at mid-century was that the laws of England forbade enslavement of Christians;<sup>56</sup> among the Dutch in New Netherland, baptism of slaves had ceased in the 1650s because of unresolved doubts, as a matter of both religion and civil law.<sup>57</sup> In the English mainland colonies the tide turned when slave Christianity was addressed somewhat elliptically in Massachusetts in the late 1650s, then directly in the *Duke's Laws* in the early 1660s.<sup>58</sup> Virginia's was the first statutory declaration on the matter. Carolina's *Fundamental Constitutions* (1669) took the same position, and in 1671 Maryland followed and elaborated upon Virginia's example.<sup>59</sup> Subsequently, the Carolinas (1690/1), New Jersey (1704) and New York (1706) all adopted statutes following through on their basic laws.<sup>60</sup>

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54 Prior to 1664, New Netherland/New Amsterdam was a civil law jurisdiction that recognized matrilineality. HARRIS, *supra* note 22, at 22-24. South Carolina eventually adopted matrilineality in 1740, Georgia in 1755.

55 An Act Declaring that Baptisme of Slaves doth not Exempt them from Bondage. Act III (1667), in 2 HENING, *supra* note 47, at 260.

56 RICHARD LIGON, A TRUE & EXACT HISTORY OF THE ISLAND OF BARBADOES 49-50 (1673).

57 Gerald Francis De Jong, *The Dutch Reformed Church and Negro Slavery in Colonial America*, 40 CHURCH HIST. 423, 424, 430-32 (1971); HARRIS, *supra* note 22, at 17-18, 22-23.

58 See *supra* notes 14-15.

59 An Act for the Encourageing the Importacon of Negros and Slaues into this Province (1671), in 2 ARCHIVES OF MARYLAND, *supra* note 53, at 272. In 1639 Maryland had appeared to countenance the possibility that Christians might be held as slaves, but ambiguously. See An Act for the Liberties of the People (1638/9), in 1 ARCHIVES OF MARYLAND, *supra* note 53, at 41: "all the Inhabitants of this Province being Christians (Slaves excepted) Shall have and enjoy all such rights liberties immunities priviledges and free customs within this Province as any naturall born subject of England . . ."

60 An Act for the Better Ordering of Slaves (1690/1), in 7 STATUTES AT LARGE OF SOUTH CAROLINA, *supra* note 32, at 343; An Act for Regulating Negro, Indian and Mallatto Slaves (1704), in 2 NEW JERSEY ARCHIVES 28, 30 (Bernard Bush comp., 1977); An Act to Incourage the Baptizing of Negro, Indian and Mulatto Slaves (1706), in 1 COLONIAL LAWS OF NEW YORK 597 (1894). No follow-up statutes were passed in Massachusetts. Puritan divines contended none were needed. COTTON MATHER, THE NEGRO CHRISTIANIZED 26-27 (1706).

Virginia's refusal to allow a common Christianity to stand in the way of enslavement modernized the institution, overriding *ius gentium* conventions with the priorities of forced labor that attended slavery's mainland growth. Virginia's final major statute of the 1660s was entirely congruent, following Barbados in granting slaveholders an absolute immunity against liability for the death of slaves under punishment.<sup>61</sup> Fully committed to wide and unrestrained enslavement, Virginia also committed itself to the quantum of terror that sustaining the institution required.

Still, though the slave population was growing in the 1660s, the decisive turn to slavery in Virginia's labor force was not fully underway. For purposes of day-to-day policing, the Assembly left slaves within the ambit of its established laws of servitude. And, though none could doubt that since the beginning of English settlement slavery had possessed an overwhelmingly racial identity, the Assembly still traded on the early-modern distinction between Christian and non-Christian *origins* to identify those who might be enslaved.<sup>62</sup>

In 1682, however, the Assembly pulled all the piecemeal allusions of the previous twenty years together in a comprehensive statement defining who should be slaves that finally merged race completely into that older anthropology. Slaves had come to Virginia in two varieties, heathen — that is "negroes, moores, mollattoes" — and captives — "Indians that are taken in warre." From this evidence the Assembly developed a general definition that presaged the recreation of slavery as a self-contained, racially distinct jurisdiction. Slaves were those "brought or imported into this country, either by sea or land, whether Negroes, Moors, Mollattoes or Indians, who and whose parentage and native country are not christian at the time of their first purchase," though they might themselves be converts.<sup>63</sup>

Definitions aside, as rates of importation accelerated the Virginia legislature equipped itself, piece by piece, with the same panoply of procedures and punishments that Barbados had earlier adopted in one general enactment. Act VIII of 1672, *For the Apprehension and Suppression of Runawayes*, legalized the killing of any "negroe, molatto, Indian slave, or servant for life" who resisted capture.<sup>64</sup> Act X of 1680, *For Preventing Negroes Insurrections*, prohibited "any negroe or other slave" from bearing

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61 Act I (1669), in 2 HENING, *supra* note 47, at 270.

62 Slaves were "all servants not being christians imported into this colony by shipping." Act XII (Oct. 1670), in 2 HENING, *supra* note 47, at 283.

63 An Act to Repeale a Former Law Makeing Indians and Others Ffree (1682), in 2 HENING, *supra* note 47, at 490.

64 Act VIII (1672), in 2 HENING, *supra* note 47, at 299.

arms of any kind, and added three other clear echoes of Barbados' comprehensive slave regime: a ticket system for the detailed control of all movement; punishment for "any negroe or other slave" assaulting "any Christian"; and additional provisions for the slaughter of any slave runaway who lay "hid and lurking in obscure places." Act X's rebellious slave provision was further supplemented in 1691 by the first clause of Act XVI, *For Suppressing Outlying Slaves*, which closely resembled Clauses 18 and 19 of Barbados' 1661 act (as amended in 1688).<sup>65</sup> There followed, in 1705 and then roughly at twenty-year intervals corresponding with important demographic turning points, the enactment of comprehensive statutes that consolidated the laws hitherto passed piecemeal.

The first of these, *An Act Concerning Servants and Slaves* (1705),<sup>66</sup> underscored the radical reformation of the colony's labor force that had occurred during the previous quarter-century. In the 1670s the Chesapeake's migrant indentured servant population had topped out at approximately 5,500 — about 9% of the population and 15% of the labor force. The black population was over four thousand. By 1705 the servant population had fallen below 3,000, while the black population had grown beyond 17,000 — approaching 50% of the labor force. Virginia's 1682 and 1705 statutes thus bracket both a profound transition in the composition of the labor force and unprecedented growth in general dependence on bound labor.

Simple demography is a key marker of Virginia's transition. But so is law. Though the timing of the 1705 statute can be explained by the accelerating importation of African slaves, its precise purpose was to amalgamate the seventeenth century's law of European migrant servitude with the slave laws that had grown up in its shadow, and to reorganize the whole around slavery as the norm of bondage. The resulting slavery regime was similar in its essentials to those simultaneously being put in place elsewhere, but its details were *sui generis*. In 1692, for example, the Virginia Assembly had created special courts of particular and summary jurisdiction which dealt exclusively with slaves. Virginia's courts, however, were different from the courts of justices and freeholders invented in Barbados and transplanted to virtually every other mainland colony. Slaves' capital crimes were dealt with by special courts assembled by commission of *oyer* and *terminer* issued by the governor "to such

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<sup>65</sup> Act X (1680), in 2 HENING, *supra* note 47, at 480; Act XVI (1691), in 3 HENING, *supra* note 47, at 86.

<sup>66</sup> Ch. XLIX (1705), in 3 HENING, *supra* note 47, at 447.

persons of the said county as he shall think fitt." Other slave crimes were dealt with summarily by existing county courts.<sup>67</sup>

Virginia's ever-increasing reliance on racial slavery sparked periodic legislative revisions, as in 1723 "for the more effectual punishing conspiracies and insurrections" and generally "for the better government of Negroes, Mulattos, and Indians."<sup>68</sup> A restatement of the *Act Concerning Servants and Slaves* came in 1748 — the moment of peak incidence of slaves in total population. At mid-century, the colony had well in excess of 100,000 slaves, comprising some 45% of a total population of 236,000. The Assembly reaffirmed that origin in non-Christian lands was a key signifier of enslavement. But slaves ceased to be that subcategory of "servants" imported into the colony whose origins were non-Christian; instead they became all "persons" so originating. The substance of the Act differed in few respects from the 1705 Act, but the formalization in law of the distinction between white migrants imported under indenture and black slaves imported for sale (such that there was now no overlap at all between servant and slave) meant that the substantive provisions fell, quite neatly — and quite explicitly — into separate halves.<sup>69</sup> This was underlined in the same session of the Assembly by passage of an amended version of the colony's 1723 "conspiracies and insurrections" act, the title and preamble of which underlined the assimilation of all "negroes, mulattoes and Indians, bond or free" to one alien and dangerous category.<sup>70</sup>

Virginia amended its comprehensive slave law one more time, in 1769. Most of the Act is taken up with fiddling adjustments to the detail of long-established procedures for taking up slave runaways.<sup>71</sup> The very ordinariness of their tinkering suggests a certain complacency, even boredom, on the part of the burgesses. Slavery had long since become a routine. But in one respect their revisions hint at the same *mentalité* exhibited in South Carolina in 1740

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<sup>67</sup> Act III, An Act for the More Speedy Prosecution of Slaves Committing Capitall Crimes (1692), in 3 HENING, *supra* note 47, at 102.

<sup>68</sup> 4 HENING, *supra* note 47, at 126. The Act comprehensively revised the procedure of the 1692 slave courts, made conspiracy a capital crime, imposed very strict controls on slave movement, prohibited gatherings of more than five slaves from different plantations, and made manumission virtually impossible.

<sup>69</sup> Ch. XIV (1748), in 5 HENING, *supra* note 47, at 547 (cls. i-ii). Disallowed in 1751 for procedural reasons, reenacted as An Act for the Better Government of Servants and Slaves (1753), in 6 HENING, *supra* note 47, at 356.

<sup>70</sup> Ch. XXXVIII (Oct. 1748), in 6 HENING, *supra* note 47, at 104 (pmb.).

<sup>71</sup> Ch. XIX (Nov. 1769), An Act to Amend the Act Intituled an Act to Amend the Act for the Better Government of Servants and Slaves, in 8 HENING, *supra* note 47, at 358 (cls. iii-vii).

— a desire to display their capacity for humanity and respectability, to temper brute necessity with wise discretion. The impulse is visible in the Act's initial clause:

WHEREAS . . . the county courts within this dominion are empowered to punish outlying slaves who cannot be reclaimed, by dismembering such slaves, which punishment is often disproportioned to the offence, and contrary to the principles of humanity: Be it therefore enacted . . . That it shall not be lawful for any county court to order and direct castration of any slave, except such slave shall be convicted of an attempt to ravish a white woman, in which case they may inflict such punishment.<sup>72</sup>

One could be forgiven for finding little of significance in their words. What had the burgesses done but recycle one of the master class's more grotesque practices to deter trespass upon its patriarchal and sexual property, rather than to punish the obdurate for damaging its economic interests? On the other hand, in a century of slavery legislation whose overriding characteristic was a consistent display of no consciousness other than brute practicality, this was actually the first occasion on which the burgesses had indulged "principles of humanity" or evinced concern for "proportion." It was, of course, their own virtue for which they desired recognition. Nor should one allow their newfound humanity to camouflage the brutality upon which their rule daily depended. Rather, as in South Carolina, their sentiments signified their grasp of the ultimate transplant — that discourses of legality might serve both their regime *and* their self-esteem. So slavery matured in Virginia.

## VI. THE MID-ATLANTIC AND NEW ENGLAND

### A. New England

Slavery in the mid-Atlantic and New England colonies was less widespread than in the South Atlantic region. Chronologically, however, its trajectory was not much different. Slavery in mid-seventeenth century New England, for example, was not unlike slavery further to the south: low in incidence (1.7% of population), not fully differentiated in practice from unenslaved servitude, overwhelmingly racialized in identity, but not yet the only

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<sup>72</sup> 8 HENING, *supra* note 47, at 358 (cl. i).

identity for blacks. As numbers increased from the late seventeenth century onward, differentiation became much more pronounced, distinctions and identities sharpened, and disciplinary controls became more ubiquitous. The chronology of growth, definition and increasing brutality, in other words, was the same as elsewhere. But the incidence of slavery did not grow at Southern rates. Lacking staple agriculture, the diversified Northern economies did not generate the demand for mass concentrations of agricultural labor typical of the South Atlantic's plantation economies. Slaves instead became a component of the labor force adaptable to a variety of forms of economic activity.<sup>73</sup>

The legal character of slavery in the northern settlements varied as much as its occupational structure and distribution. In New England slavery regimes developed piecemeal through local and provincial enactment of police regulations. Such was the size of the region's slave population, however, that slave law never developed far beyond the essential menu of means to control a subordinated population that was its initial expression everywhere. Even in Rhode Island, where the incidence of slaves in overall population was triple that of Massachusetts and Connecticut, no slave "code" as such was ever adopted. But the colony's police laws were harsh, and in 1718 Rhode Island became the only New England settlement to create a separate slave court system with summary jurisdiction.<sup>74</sup>

## B. The Mid-Atlantic

Mid-Atlantic slavery followed a distinctive arc — numerically significant in particular concentrations and highly diversified, with strong links to both urban proto-industry and commercial agriculture. Mid-Atlantic slave populations were far more densely regulated than in New England, each colony adopting comprehensive enabling legislation that lent its slavery much of the severity on display in South Carolina.

Like Carolina, the English mid-Atlantic settlements originated as proprietary colonies established after the Restoration — at precisely the moment when the mainland overall began its "tilt" toward slavery. The first expression of proprietorial jurisdiction in the region, the *Duke's Laws*,

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73 HARRIS, *supra* note 22, at 30-31; Daniel Vickers, *The Northern Colonies: Economy and Society, 1600-1775*, in 1 STANLEY L. ENGERMAN & ROBERT E. GALLMAN, *THE CAMBRIDGE ECONOMIC HISTORY OF THE UNITED STATES* 209 (1996).

74 EARLIEST ACTS AND LAWS OF THE COLONY OF RHODE ISLAND 235-36 (John D. Cushing comp., 1977).



established a broad endorsement of enslavement. Over the following half-century, New Jersey, Pennsylvania and New York all developed detailed and interrelated slavery regimes.

Originally part of the Duke of York's proprietorship, the Jerseys were quickly granted by him to Sir George Carteret and Lord Berkeley of Stratton. Like the Duke, the Jersey proprietors encouraged slavery within their new patent "that the planting of the said Province may be the more speedily promoted." Like the Carolina proprietors, they offered settlers headrights for slaves brought into the region. Numbers of Barbadian slaveholders settled the Atlantic coast around Raritan Bay where they created what would become New Jersey's principal region of slave-based commercial farming.<sup>75</sup> After the division of the Jerseys in 1676, the East Jersey Assembly began to enact statutes formalizing and institutionalizing slavery.<sup>76</sup> Following reunification as one royal colony in 1702, East Jersey statutes supplied the core provisions for the colony-wide *Act for Regulating Negro, Indian and Mallatto Slaves* (1704). The Act included trading prohibitions, mobility and harboring restraints, summary trial procedures, and a schedule of bodily punishments that echoed contemporary Carolina legislation: 40 lashes for thefts valued over sixpence; if over 5/-, 40 lashes and branding — with obscene precision — "on the most visible part of the left Cheek near the nose." In the same Carolina tradition, the Act added castration to its repertoire — here to punish any slave convicted of any attempt "to Ravish or have carnal knowledge of any White Woman, Maid or Child." The Act denied slaves any possibility of liberty through baptism, and encouraged the departure of all manumitted slaves by refusing them or their posterity rights to own, bequeath or inherit land.<sup>77</sup>

In 1709 the Crown vacated the 1704 Act.<sup>78</sup> In 1712 the region was alarmed by an uprising in New York that provoked new legislation there; and in March

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75 Concessions and Agreements of the Lords Proprietors of the Province of New-Jersey (1664/5), in *FUNDAMENTAL LAWS AND CONSTITUTIONS OF NEW JERSEY, 1664-1964*, *supra* note 22, at 61.

76 *See generally* Ch. VIII, A Bill for the General Laws of the Province of East Jersey (1682), Ch. IX, A Bill Against Fugitive Servants, and Entertainers of Them (1682), Ch. IV, An Act against Trading with Negro Slaves (1682/3), Ch. II, An Act Concerning Slaves &c (1694), Ch. III, An Act Concerning Negroes (1695), in *THE GRANTS, CONCESSIONS AND ORIGINAL CONSTITUTIONS OF THE PROVINCE OF NEW JERSEY* 236, 239, 254, 340, 356 (Aaron Leaming & Jacob Spicer comp., 1881).

77 An Act for Regulating Negro, Indian and Mallatto Slaves within this Province of New Jersey (1704), in 2 *NEW JERSEY ARCHIVES*, *supra* note 60, at 28.

78 The castration clause was the culprit. *See* 5 *DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW YORK* 157 (1853-87). Castration was not a punishment for rape in English criminal law. Where there was no English point

1713/14 the New Jersey legislature passed a new general regulatory statute — *An Act for Regulating of Slaves*<sup>79</sup> — reenacting the central provisions of 1704. This became the New Jersey slave regime's core measure. Its timing was most likely a response to, successively, the disallowance of its predecessor, the New York uprising, and New York's own Act, significant elements of which it copied. Manumission was made virtually impossible,<sup>80</sup> and a free black population further discouraged by extension of ownership prohibitions to all inherited property. The Act's main innovations came in the realm of criminal punishment and procedure. Explicit bodily mutilation now appeared wrapped in the discretion of trial justices authorized "to Inflict such Corporal Punishment (not extending to Life or Limb) . . . [as] shall seem meet." Assaults on free persons "professing Christianity" were made subject to that treatment.<sup>81</sup> All other non-capital crimes were punished by whipping in various gradations of severity. All non-capital trials of slaves became summary en banc processes before two justices, and the Act extended en banc process to capital crimes, embracing the Barbadian courts of justices and freeholders.

Of the three mid-Atlantic encounters with slavery, New Jersey's was the median experience. New York was the regional leader, with 50-60% of the mid-Atlantic's rapidly expanding black population throughout the eighteenth century, a colony-wide incidence of blacks rising from 12% in the mid-1660s toward 15% over the following century, higher in New York City where the black population tended to concentrate. Pennsylvania was the laggard, its black population growing at half the rate of its neighbors.<sup>82</sup>

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of comparison, as in South Carolina's use of castration to restrain recidivist slave runaways, no intervention occurred.

79 *An Act for Regulating of Slaves (1713/14)*, in 2 NEW JERSEY ARCHIVES, *supra* note 60, at 136.

80 Free blacks being notoriously "Idle Sloathful People," and a charge on the places where they might sojourn, masters were required to pay any manumitted slave an allowance of £20 per annum for life. Failure to comply rendered manumission void. *An Act for Regulating of Slaves (1713/14)*, in 2 NEW JERSEY ARCHIVES, *supra* note 60, at 136, 140. This clause was copied from New York's Act for Preventing Suppressing and Punishing the Conspiracy and Insurrection of Negroes and other Slaves (1712), in 1 COLONIAL LAWS OF NEW YORK, *supra* note 60, at 761.

81 *An Act for Regulating of Slaves (1713/14)*, in 2 NEW JERSEY ARCHIVES, *supra* note 60, at 136, 139. This provision was also copied from New York's 1712 statute.

82 Pennsylvania's lag was not attributable to any lack of proprietorial enthusiasm. Penn owned slaves himself, and favored slavery over indentured servitude. GARY B. NASH & JEAN SODERLUND, *FREEDOM BY DEGREES: EMANCIPATION IN PENNSYLVANIA AND ITS AFTERMATH* 12 (1991).

Still, Pennsylvania was no laggard when it came to the construction of a slave regime. Pennsylvania's *Act for the Better Regulation of Servants in this Province and Territories* (1700)<sup>83</sup> took elements from East Jersey's 1694 and 1695 Acts underscoring the distinction between white servants and black, punishing the former with additional service after the expiration of their indentured time, but whipping the latter, whose time never expired. The *Act for the Trial of Negroes*,<sup>84</sup> passed the same day, improved upon East Jersey by introducing Barbados' slave courts to the region. The Trial Act also included the policing of weapons and assemblies: "any negro" carrying weapons without his master's license, or meeting in groups larger than four, was to be severely whipped.<sup>85</sup> The Act was also the first in the region to provide castration for slaves' attempts to rape or seek carnal knowledge of white women. But the slave courts were the centerpiece. As elsewhere, their creation stands as the key instantiation of slavery institutionalized as a racially distinct legal regime.

The castration clause got the Trial Act disallowed in 1705. The legislature promptly reenacted the statute in its entirety save only the castration clause, which it replaced with punishment in triplicate — whipping, branding, and sale out of the province.<sup>86</sup> The revised Act remained in place until the adoption of gradual emancipation in 1780.

The legislature did not revisit general slavery legislation until 1726, when it enacted a hybrid statute *For the Better Regulating of Negroes in this Province*.<sup>87</sup> The statute supplemented the colony's existing slavery regime with a variety of police laws transplanted from elsewhere. The legislature embraced New York's description of free blacks as "idle and slothful," then enacted Massachusetts' inhibitions on manumission requiring owners or executors to indemnify localities from the costs of supporting indigent manumittedes. Other clauses bound free black vagrants into service, and provided that free blacks might not trade with, harbor or entertain slaves.

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83 Ch. XLIX, in 2 STATUTES AT LARGE OF PENNSYLVANIA 54 (James T. Mitchell & Henry Flanders comp., 1896-1915).

84 Ch. LXI, in 2 STATUTES AT LARGE OF PENNSYLVANIA, *supra* note 83, at 77.

85 The same restrictions on assembly had been enacted in New York some years earlier. In 1702, New York reduced the allowable crowd to three, in line with city regulations adopted two years earlier. An Act for Regulating of Slaves (1702), in 1 COLONIAL LAWS OF NEW YORK, *supra* note 60, at 519.

86 Ch. CXLIII (1705/6), in 2 STATUTES AT LARGE OF PENNSYLVANIA, *supra* note 83, at 233.

87 Ch. CCXCII (1725/6), in 4 STATUTES AT LARGE OF PENNSYLVANIA, *supra* note 83, at 59.

Interracial marriage was banned, miscegenation punished. In its final five clauses the statute embraced nearly verbatim two clauses from New Jersey's 1714 statute (slave mobility and harboring),<sup>88</sup> two from Massachusetts (bans on tippling, a nine p.m. curfew),<sup>89</sup> and one from South Carolina (forbidding slaveowners from allowing slaves to hire themselves out in exchange for remittance of wages).<sup>90</sup>

By now it will be clear that the slave regimes of the Mid-Atlantic were constructed out of interchangeable parts. Some parts were transplants within the region; some were from slave regimes we might think quite unrelated to those of the mid-Atlantic — notably the mainland's premier "slave society" of South Carolina and its Caribbean inspiration, Barbados. Patterns of intercolonial commerce and migration help explain the transit of ideas.<sup>91</sup> To intercolonial mobility we can add spatial and temporal proximity. Spatial proximity helps explain local interchanges; temporal proximity, the similarities between the regimes of the mid-Atlantic and the lower South. All the Restoration proprietaries encountered slavery exactly on the cusp of its mainland expansion.<sup>92</sup> None thought it novel. All encouraged its spread.

New York confirms the importance of mid-Atlantic slavery. New York fell to the English with Dutch slavery attached. The *Duke's Laws* promptly entrenched a more severe genus. Actively promoted as a slave trading center, New York neither sought nor attracted European indentured migrants. By 1700, the colony had a black population of well over 2,000. The year before, Governor Bellomont had told the Lords of Trade there were "no other servants in this country but Negroes."<sup>93</sup> By the early 1770s, New York's black population had increased tenfold, to more than 20,000 — four times larger than Pennsylvania's.<sup>94</sup>

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88 See New Jersey's Act for Regulating of Slaves (1713/14), in 2 NEW JERSEY ARCHIVES, *supra* note 60, at 136, 139-40. New Jersey's harboring clause had itself been modeled on New York's Act for Regulating of Slaves (1702), *supra* note 85.

89 See Ch. 20 (1693/4), An Act of Supplement and Addition, and Ch. 11 (1703), An Act to Prevent Disorders in the Night, in 1 ACTS AND RESOLVES, PUBLIC AND PRIVATE, OF THE PROVINCE OF THE MASSACHUSETTS BAY 154, 535-36 (1869).

90 See L.H. Roper, *The 1701 "Act for the Better Ordering of Slaves": Reconsidering the History of Slavery in Proprietary South Carolina*, 64 WM. & MARY Q. 395 (2007) (discussing An Act for the Better Ordering of Slaves (Carolina, 1701)).

91 HATFIELD, *supra* note 26, at 1-7.

92 Total mainland black population increased from 2,900 in 1660 to 29,000 in 1700.

93 EDGAR J. MCMANUS, A HISTORY OF NEGRO SLAVERY IN NEW YORK 41-42 (1966).

94 Until the 1730s, New York represented the fourth largest concentration of slaves in the English mainland colonies, behind Virginia, South Carolina and Maryland. North Carolina overtook New York in the 1730s, Georgia not until the 1780s.

Like East Jersey, New York began constructing its provincial slave law piecemeal, at first amending the *Duke's Laws* in the early 1680s to bring slaves within the *Laws'* policing of servants.<sup>95</sup> Simultaneously, a detailed slavery regime was under construction in New York City, where some 40 percent of the colony's black population was concentrated. Between 1681 and 1700, the Common Council adopted serial police laws controlling slave mobility, banning gatherings, and generally regulating social life.<sup>96</sup>

New York's decisive step toward a comprehensive provincial slave regime came in 1702, with its *Act for Regulateing of Slaves*. The conjunction of legislation in New York (1702) with Pennsylvania (1700) and New Jersey (1704) suggests common concern in the mid-Atlantic settlements at rising rates of slave importation, and in certain respects the three Acts reproduce the same agenda. The 1702 Act extended New York City's prohibitions on assembly to the province as a whole and prescribed severe whipping for violators. It also prescribed severe penalties — imprisonment and corporal punishment "(not extending to life or limb)" at the discretion of any two justices — for assaults upon whites, male or female,<sup>97</sup> though it did not (unlike New Jersey) adopt Pennsylvania's rape and carnal knowledge clause. As elsewhere in the mid-Atlantic region, the Act embraced a public, colony-wide punitive regime for non-capital slave crimes based on whipping, requiring that every city and town establish "common whipper" as a paid public office. Simultaneously, the Act created a devolved and private punitive regime by endorsing the punitive authority of slaveowners. "Slaves are the property of Christians and cannot without great loss or detriment to their Masters or Mistresses, be subjected in all Cases criminal, to the strict Rules of the Laws of England" — a common sentiment in the Restoration colonies, but normally accompanied by the creation of segregated summary jurisdictions overseen by slave courts. In 1702, at least New York preferred summary private punishment.<sup>98</sup>

Subsequent provincial laws began to add summary public jurisdiction piecemeal to a slave regime characterized by a deep and simultaneously somewhat casual cruelty. For example, the *Act to Prevent the Running Away of Negro Slaves out of the City and County of Albany to the French at Canada* (1705) convicted runaways summarily on oath of two credible

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95 See A Bill Concerning Masters, Servants, Slaves, Labourers and Apprentices (1684), in 1 COLONIAL LAWS OF NEW YORK, *supra* note 60, at 157.

96 Harris, *supra* note 22, at 33.

97 This provision would be copied virtually word-for-word in New Jersey's Act for Regulating of Slaves (1713/14), in 2 NEW JERSEY ARCHIVES, *supra* note 60, at 136.

98 New York's Act for Regulateing of Slaves (1702), *supra* note 85, at 520.

witnesses. The process was casual, particularly in light of the penalty: death.<sup>99</sup> Evincing a like cruelty, though lesser consequences, the *Act for Suppressing of Immorality* (1708) required that slaves found by a justice to have talked "impudently" to any Christian be severely whipped.<sup>100</sup> More conventionally, the *Act for Preventing the Conspiracy of Slaves* (1708) required any slave accused of murder or attempted murder to appear before three justices, who were authorized "to hear *and determine* the same." The penalty, of course, was death, and in such manner "as the aggravation and enormity of the[] Crime . . . shall merit." In other developments, the legislature had earlier passed New York's *Act to Encourage the Baptizing of Negro, Indian and Mulatto Slaves* (1706), touching upon both Christian conversion and matrilineality.<sup>101</sup>

Following the 1712 New York City slave insurrection, the provincial legislature revisited the colony's slavery regime. At this point, the rate of black population growth in both province and city was accelerating, and in both cases (but particularly in the city) had exceeded white rates of growth. These demographic trends — rising rates of African slave importation, increasing slave densities in both city and country populations — furnished the environment for the "scare" of 1712 and the legislature's revision of provincial law.<sup>102</sup>

Despite the fears the insurrection excited, the legislature reenacted the 1702 Act largely as it stood — the same bans, penalties and allowances. Perhaps the 1708 Conspiracy Act had already supplied sufficient answer to emergency. However, two important new sections were added. The first completed the lockdown of blacks in slavery by enacting the extreme discouragements to manumission copied word for word two years later by New Jersey.<sup>103</sup> The second completed the slavery regime's complex of specialized institutions by finally embracing the familiar Barbadian slave courts.<sup>104</sup>

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99 1 COLONIAL LAWS OF NEW YORK, *supra* note 60, at 582-84. The justification was wartime fear that runaways would give the colony's enemies vital information. The Act would expire after the war was over. Indeed the Act did expire. It was then renewed, being judged "of great Use." 1 *id.* at 880-81.

100 1 *id.* at 617-18.

101 1 *id.* at 597-98.

102 City population data is reported in EDGAR J. MCMANUS, BLACK BONDAGE IN THE NORTH 208-11 (1973).

103 An Act for Preventing Suppressing and Punishing the Conspiracy and Insurrection of Negroes and Other Slaves (1712), in 1 COLONIAL LAWS OF NEW YORK, *supra* note 60, at 761, 764-65.

104 1 *id.* at 765-66. All the Restoration settlements thus adopted Barbados' slave courts

The 1712 Act completed New York's provincial slavery regime. But it was not quite the last word. The Act was revisited in 1730, penalties adjusted, and hitherto distinct statutes — the Conspiracy Act of 1708, for example — incorporated in a single, fully comprehensive enactment.<sup>105</sup> But unlike the culminating Carolina *Better Ordering* Act of 1740, or Virginia's 1769 amendments, there is nothing in New York's final statute that hints at any desire on the part of the master class to proclaim its own humanity, respectability or wisdom in the conduct of its slavery regime. Nor would any such language be seen in the years to come. New York seems to have preferred brutality unmoderated by pretensions to gentility — as would be seen in the aftermath of the 1741 conspiracy scare,<sup>106</sup> again in 1745 (second reenactment of summary execution of slaves running away to French Canada),<sup>107</sup> and again in 1755 (in times of "Alarm or Invasion" slaves found more than a mile from their owners' habitation without written permission might be killed on the spot).<sup>108</sup> For any signs of the elites' maturation as governors of subjects, one searches the legislation institutionalizing the mid-Atlantic slave regimes in vain.

### CONCLUSION

Law was one of English colonizing's most potent technologies — a means by which colonizers' designs, structures and institutions might be imagined, created, implemented and distributed. The statute law of slavery was precisely an exercise in the employment of law as a technology of and for colonizing. Jurisdiction after jurisdiction drew upon an ever-expanding bank of resources to create a series of regimes amounting collectively to an Anglo-American law of slavery. The law of nature and nations supplied

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seriatim — Carolina (1691), Pennsylvania (1697/1700), New York (1712), New Jersey (1714).

105 An Act for the more Effectual Preventing and Punishing the Conspiracy and Insurrection of Negro and other Slaves (1730), in 2 COLONIAL LAWS OF NEW YORK, *supra* note 60, at 679.

106 THOMAS J. DAVIS, A RUMOR OF REVOLT: THE "GREAT NEGRO PLOT" IN COLONIAL NEW YORK (1985); JILL LEPORE, NEW YORK BURNING: LIBERTY, SLAVERY, AND CONSPIRACY IN EIGHTEENTH-CENTURY MANHATTAN (2005).

107 3 COLONIAL LAWS OF NEW YORK, *supra* note 60, at 448-49. The Act differed little from its predecessors of 1705 and 1715, except in conforming procedure to the slave court process created in 1712.

108 An Act for Regulating the Militia of the Colony of New York (1755), in 3 COLONIAL LAWS OF NEW YORK, *supra* note 60, at 1051, 1061.

foundational ideas and general principles; the Tudor-Stuart policing of population supplied instruments; local innovations made up for English law's insufficiencies and spread through developing channels of migration and commerce; a later transatlantic commerce brought self-edifying trinkets of legality and humanity, imported like London fashions by maturing provincial slave societies desirous of imagining themselves civilized. Dipping again and again into this box of treasures, legislators constructed bodies of laws where none such had previously existed, individually congruent to the specifics of time and place and purpose, collectively an overlapping sequence of regimes dedicated to the forced extraction of labor under extreme and perpetual duress.

To chart the law of Anglo-American slavery is to discover "all but death" realized systematically in a series of interrelated legal regimes. Historians have represented mainland slavery *in action* as something distinct — "continuous, if unequal, dialogue, between rulers and ruled."<sup>109</sup> Scholarly commitments to human agency virtually require that oppression be met by a resistance that compels the oppressor to acknowledge the oppressed. "Even a brutal regime could not crush the slaves' unquenchable human spirit."<sup>110</sup> No doubt. Still, as Patterson argued some years ago, denying slaves their humanity was never the purpose of slavery regimes *per se*.<sup>111</sup> Not one of the regimes examined here relied upon defining the enslaved as nonhuman in order to keep them enslaved. Rather, slavery was conditional permission to continue to live granted the slave by the enslaver, at the enslaver's pleasure. The purpose of slavery regimes was to construct the terms and conditions of life on the edge of death — notably, when and how permission to live would be withdrawn. The essence of those terms was absolute control over life, expressed in some regimes systematically and comprehensively, in others haltingly and piecemeal, but always control. Control of entry, control of life within, control of exit, whether by manumission or execution. Slavery regimes established the means by which that category of humans named slaves might be placed uniquely and absolutely at the disposition of that category named owners.

Statute law expresses the desire of the legislator. Law placed on the books is never law one can assume is thereby entirely in action. Both capacity and resistance mediate the will to implement. But desire has teeth, nowhere more than in the Anglo-American slave regimes we have encountered here.

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109 OLWELL, *supra* note 37, at 6.

110 MORGAN, *supra* note 45, at xxiv.

111 PATTERSON, *supra* note 3, at 22-23.



In the statute law of slavery one encounters not simply the social death of the slave, but also the self-representation of the master, who whips, brands, dismembers and destroys (if he so wishes) the body he owns. Those unwilling to go along would be tortured until they did. Those who continued unwilling would be killed. In English America, such regimes began to be put in place in the middle of the seventeenth century at a time when they locked down some three thousand slaves. Two hundred years later they remained securely in place. At that time they locked down four million.

