Slavery and the Law in Atlantic Perspective: Jurisdiction, Jurisprudence, and Justice

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The four articles in this special issue experiment with an innovative set of questions and a variety of methods in order to push the analysis of slavery and the law into new territory. Their scope is broadly Atlantic, encompassing Suriname and Saint-Domingue/Haiti, New York and New Orleans, port cities and coffee plantations. Each essay deals with named individuals in complex circumstances, conveying their predicaments as fine-grained microhistories rather than as shocking anecdotes. Each author, moreover, demonstrates that the moments when law engaged slavery not only reflected but also influenced larger dynamics of sovereignty and jurisprudence.

Natalie Zemon Davis, exploring criminal justice in colonial Suriname, seeks to unravel the processes by which guilt was determined and punishment imposed, both through the draconian systems controlled by slaveholders, and through alternative systems developed by men and women who were themselves held as slaves. In practice, although not in theory, enslaved African-born diviners and their African and Creole neighbors could deliberate and pronounce sentence upon members of their own

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community whom they viewed as having committed a transgression. In such internal deliberations, the same drivers and healers otherwise charged with carrying out the orders of their masters shifted toward exercising a different kind of leadership. Davis argues that members of the slave community often decided whether certain infractions would come to the attention of a master at all, or should best be dealt with through an administration of justice outside of the master's gaze. Restitution might thus take precedence over retaliation, except for crimes that terrified the entire community, such as poisoning, whose overtones of witchcraft made it particularly frightening, and whose stealth appeared to masters to indicate secret warfare. Once planters or the state took on a poisoning case, punishment was likely to be both exemplary and ferocious.[1]

If masters in Suriname were only obliquely aware of the deliberative processes taking place within their properties, so too were jurists in the metropolis able to overlook the extreme forms of criminal justice being meted out by planter-controlled colonial courts against slaves. Thus philosophical arguments over the legitimacy of brutal interrogations and "barbaric" punishments could unfold in Holland itself, without acknowledgment of the continued use of both in Suriname, governed by codes drafted by Europeans. As would be the case in other places and other times, the colonial exception did not need to be formalized in order to confer wide license on planters who drew their power as lawgivers not only from the state but also from their "domestic" dominion.

Malick Ghachem undertakes a parallel exploration of the logics of criminal jurisprudence, focusing in on one of the fiercest of crimes: torture. He carefully reconstructs a famous case that unfolded in the French colony of Saint-Domingue in the spring of 1788, as colonial officials confronted credible charges that a master named Lejeune had tortured two enslaved women, both of whom subsequently died. The Code Noir explicitly prohibited the torture of slaves by masters, but administrators and colonists disagreed sharply on whether prosecution was warranted.[2]

Prudential and strategic arguments seemed to cut both ways. To ignore the charges was to disregard the clear terms of the royal code, and thereby to undercut the claim that the king and the state actually monitored and disciplined the comportment of masters. To pursue the charges, however, might not only oblige masters to answer for their excesses, but would require colonial authorities to attend to the words of enslaved men and

1. Natalie Zemon Davis, "Judges, Masters, Diviners: Slaves' Experience of Criminal Justice in Colonial Suriname," *Law and History Review* 29 (2011): 925–84.

2. Malick W. Ghachem, "Prosecuting Torture: The Strategic Ethics of Slavery in Pre-Revolutionary Saint-Domingue (Haiti)," *Law and History Review* 29 (2011): 985–1029.

women over whom masters believed they should hold unquestioned—indeed sovereign—power. Each side in this dispute about strategy predicted catastrophe and revolt if the other side were to prevail. And this all took place in 1788, in Saint-Domingue, just three years before the uprising that planters would indeed see as catastrophe.[3]

Martha S. Jones picks up the analytic thread in the midst of the Haitian Revolution that began in 1791, but she shifts attention away from the classic dyads of metropolis and colony, master and slave. Instead, she follows the paths of refugees from the upheaval in Saint-Domingue, emphasizing the struggles over civil status that emerged as households left the French colony and settled in various port cities of the Atlantic littoral.[4]

The Haitian Revolution had brought the first large-scale abolition of slavery in the plantation Americas, fundamentally changing the boundaries of what would henceforth be imaginable. Under the pressure of events, France's revolutionary civil commissioners, and then its National Convention, declared slavery to be extinguished in the colony. The law took hold in 1793–1794 in French-controlled portions of Saint-Domingue, and expanded with the revolutionaries' advance into the areas of the colony temporarily under British occupation. From the mid-1790s onward, in symbol and in substance, Saint-Domingue/Haiti became free soil.[5]

When refugees from war and revolution in the colony of Saint-Domingue landed in the Northern states of the new republic of the United States, they found themselves back in a terrain of slaveholding, but one with a variety of laws aimed at limiting the perpetuity of masters' rights. In New York, in particular, slavery was soon under sentence of gradual extinction, with newborns declared to be free, and limits placed on the domestic slave trade. What, then, would be the status of persons who had accompanied former slaveholders from Saint-Domingue, and whom those masters might once again claim as their slaves upon arrival in the United States? To the question of sovereignty, in effect, was now added the question of jurisdiction.

3. For an astute examination of the question of potentially divided sovereignty as it emerged in civil suits for freedom in the Spanish colonies, see Bianca Premo, "An Equity against the Law: Slave Rights and Creole Jurisprudence in Spanish America," forthcoming in *Slavery and Abolition*.

4. Martha S. Jones, "Time, Space, and Jurisdiction in Atlantic World Slavery: The Volunbrun Household in Gradual Emancipation New York," *Law and History Review* 29 (2011): 1031–60.

5. I am indebted to Ada Ferrer for this formulation. See her essay, "Haiti, Free Soil, and Antislavery in the Revolutionary Atlantic," forthcoming in the *American Historical Review*.

Jones traces one group of refugees from Croix-des-Bouquets and Port-au-Prince as they made their way in the tangled political world of New York City. Both outside and inside the walls of the extended household headed by the redoubtable Mme. Volunbrun, widow of a Saint-Domingue planter, charges flew that she was holding free persons in bondage. The widow stoutly insisted that those accompanying her were legitimately her slaves, but a crowd of "French Negroes" in the street begged to differ. The ensuing physical and judicial fracas raised multiple questions of jurisdiction even as it pushed at the limits of what the cautious members of the local Manumission Society were willing to countenance. The widow eventually retreated to Maryland, but in the process she managed to extract from New York and bring with her by force those whose status as slaves had been contested. Baltimore would prove a more accommodating stopping place for this wily entrepreneur, though even there she would confront renewed questions about the legitimacy of her domestic dominion.

The final essay, by Rebecca Scott, takes as its starting point the last phase of the Haitian Revolution: armed resistance to the arrival of a French expeditionary force under General Leclerc, sent by Napoleon to subdue and defeat the black generals in command of the colony. This conflict ravaged the countryside of the colony anew in 1802, driving out more than 15,000 additional refugees. Many of them were ordinary people fleeing fire and war, rather than the émigré planters often evoked by the phrase "Saint-Domingue refugee."[6]

One of those refugees was a market woman and former slave named Adélaïde. The surname of her former master, Charles Métayer, was sometimes attributed to her, but she would eventually use a new surname of her own choosing, Durand. Her household was far smaller than that of the earlier migrant the widow Volunbrun, and initially consisted of just herself and her son. They made their way from Cap Français to Jamaica to Baracoa in Cuba, where she settled in with a partner, and gave birth to two daughters. But an anxious Spanish colonial government in 1809 expelled those deemed to be French nationals. As she crossed the Gulf of Mexico toward Louisiana, Adélaïde Métayer/Durand still maintained her legal freedom and that of her children.

In March of 1810, however, Adélaïde was confronted in New Orleans with a former neighbor, the tailor Louis Noret, who was determined to thrust her back into slavery, along with her three children. One after another legal struggle ensued as she tried to thwart the designs of the tailor. Adélaïde's best potential argument for asserting her own freedom,

6. Rebecca J. Scott, "Paper Thin: Freedom and Re-enslavement in the Diaspora of the Haitian Revolution," *Law and History Review* 29 (2011): 1061–87.

however, was precisely the one she could not make in slaveholding Louisiana. To insist that the emancipations of 1793–1794 had brought legal freedom to her, as they had to all other enslaved residents of Saint-Domingue, would be to imply that most of the 3,226 recently arrived refugees whom the government of Louisiana considered to be slaves were in fact free. This would have constituted a frontal attack on what the Louisiana courts implicitly took to be the deep "propertyness" that inhered in those who had once been slaves, a quality that made them again subject to ownership after their journeys across the Windward Passage and the Gulf of Mexico.

Adélaïde was obliged instead to find a legal argument specific to her own circumstances. In Cap Français her former master had signed a receipt acknowledging in writing that she was legally free, though the Louisiana court initially found that piece of paper to be inadequate as a proof of freedom. After a struggle of many years, and an ingenious use of the concept of "prescription"—claiming that she had lived in good faith as free long enough to trigger legal recognition of that freedom—an attorney representing her finally devised an argument that would work. But as pleaded, the argument could be applied only to her, not to the thousands who had been successfully re-enslaved by force as they disembarked from the boats that carried them.

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Together, these four essays shift the ground on which we are often accustomed to examine slavery's relationship to the law. Each case implies a clash of legal cultures, rather than a unitary state project of social control (or social reform) through law. Each author, moreover, has found a different method of research and exposition through which to explore and portray the tensions within the rule of law in slaveholding polities.

In her essay, Natalie Zemon Davis uses what might be termed the imaginative reconstruction of a nearly hidden dimension of criminal justice in Dutch colonial Suriname: the disciplining of members of the slave community by their peers. With years of experience drawing evidence from early modern judicial archives, Davis is well positioned to explore the multiple ways in which guilt is determined and punishment imposed, and to read descriptions of crime with a sharp eye for the particularities of participants' discourses and rhetorical strategies. Building on travelers' reports, plantation account books, descriptions of life elsewhere in the Caribbean, and a contemporary play from Suriname, Davis builds up an entirely plausible picture of that which we cannot see directly. She then juxtaposes this portrait with surviving formal judicial records that convey the dimensions of criminal justice that the Dutch colonial state did wish to memorialize.

In the process, as she uncovers the enforcement of norms that masters, the state, and their courts did not even know of, Davis expands the boundaries of legal history to encompass something closer to the philosophers' or the anthropologists' understanding of the sphere of law. Rather than remaining within the parameters of formal statutes and recorded litigation, Davis thus continues the push toward a fusion of the legal and the cultural history of slavery of the kind encouraged in a pathbreaking 2001 article by Ariela Gross.[7]

Malick Ghachem's method might be described as a microhistorical case study framed by doctrinal analysis. He initially takes French colonial jurisprudence on its own terms, carefully parsing the precise features of the Code Noir's prohibition on the torture of slaves by masters, and examining the competing arguments of planters, local magistrates, and French colonial administrators sent from the metropolis. The "private justice" of masters on the plantations of Saint-Domingue, however, like that of Suriname, was by its nature resistant to restraint by the state. To allow slaves the standing to bring a criminal complaint of torture would be to undermine the planter sovereignty that was at the heart of plantation life, and to press at the limits of the mixed person/property character of slavery itself.

In the 1780s, however, the governor and intendant of Saint-Domingue nonetheless invoked a still greater risk: that if the state abandoned all semblance of royal protection of persons held as slaves, as embodied in the Code's prohibition of torture, slaves themselves would have every reason to engage in organized retribution that might lead to a coordinated uprising. Indirectly, colonial authorities were implicitly acknowledging the existence of something like the vernacular legal system that Davis discerns within plantations, a system they believed might deliberate and then generate its own retributive justice. Such a prospect gives particular meaning to Ghachem's observations on "the nature of the law of slavery as a set of strategic techniques for mediating the anxious world of masters and their captive 'domestic enemies'."[8]

Ghachem's dialectical mode of inquiry, carefully tracking the competing logics of the parties, invites a comparison between the playing out of this tension in French colonial jurisprudence and its dynamic in the nearby island of Cuba. Drawing on a long-standing tradition from the Siete

7. On anthropological understandings, see the discussion in Davis, "Judges, Masters, Diviners." For a recent discussion of the philosophical dimensions of the question, "What is law?" see Scott J. Shapiro, *Legality* (Cambridge, MA: Harvard University Press, 2011). On expanding the scope of the study of law and slavery, see Ariela Gross, "Beyond Black and White: Cultural Approaches to Race and Slavery," *Columbia Law Review* 101 (2001): 640–90.

8. Ghachem, "Prosecuting Torture," 985.

Partidas of Alfonso the Wise, the underlying law in Cuba allowed for the presentation of slave grievances to a magistrate, and for the representation of slaves' interests in court by an appointed *síndico*. The Cuban archives contain many instances of inquiries into conditions on estates triggered by complaints from slaves. Scattered legal proceedings, of course, did not in and of themselves eliminate abuses, because intimidation could inhibit testimony and corruption could avert prosecution. But as Alejandro de la Fuente has recently argued, the very existence of the *síndicos* formalized an intrusion into masters' authority.[9]

The basic principle of a supervening state sovereignty was explicit in both Saint-Domingue and Cuba, however much masters complained about it. What differed was the precise dynamic of state assertion versus deference. Ariela Gross points out that a full acknowledgment of the role of shifting "relations of domination" in defining the very object of our study can make conventional comparative approaches unsustainable. Gross is writing about the construct of race itself, and drawing on evidence from trials of racial identity.[10] But the same could be said of the working out of criminal justice within slave societies.

It is not that Suriname, Saint-Domingue, and Cuba represented different "models" or different "slaveries." Instead, they all partook of the same model of divided sovereignty over the disciplining of "domestic enemies," in a context of pervasive uncertainty over whether persons held as property could, in practice, also be colonial subjects deserving of protection. There were many provisional resolutions to so fundamental a conflict, so that at one moment the exercise of law could diverge sharply between neighboring slave societies, whereas at another the state and planters might come to quite similar strategic *ententes* in otherwise quite different colonies.

Both Martha Jones and Rebecca Scott use a third method of inquiry, one that has elsewhere been described as "microhistory set in motion," with an emphasis on the crossing and re-crossing of boundaries and the consequences of shifts in jurisdiction.[11] Their focus is less the legal pluralism and layered sovereignty of a single colony, as explored by Davis and Ghachem, than the potential for renegotiation of status in a highly mobile Atlantic world. By tracking details of personal, economic, and legal transactions among otherwise obscure individuals, Jones and Scott are able to

9. Alejandro de la Fuente, "Slaves and the Creation of Legal Rights in Cuba: *Coartación* and *Papel*," *Hispanic American Historical Review* 87 (2007): 659–92.

10. Ariela J. Gross, "Race, Law, and Comparative History," *Law and History Review* 29 (2011): 549–65.

11. This phrase is used in the prologue to Rebecca J. Scott and Jean M. Hébrard, *Freedom Papers: An Atlantic Odyssey in the Age of Emancipation* (Cambridge, MA: Harvard University Press, forthcoming 2012).

use these moving households as tracers, illuminating the force fields that shaped and constrained the situations of thousands of other travelers and refugees.

The relationship between law and slavery along the itinerary of Mme. Volunbrun was anything but static. She was not only an émigrée from an anti-slavery revolution who had installed herself in an Atlantic port city, she was also a sojourner and potentially a resident of the state of New York, where the government had embarked on a cautious politics of gradual emancipation. Rumors about the internal management of her household could feed a complicated set of tensions about the French and particularly about "French Negroes." As free persons of color made their voices heard in the city, moreover, they asserted a strong set of vernacular claims about the enduring effects of emancipation in Saint-Domingue, and the impermissibility of re-enslavement. By identifying the members of the Volunbrun household with such precision, Jones makes clear just what the crowd knew to be happening inside the walls of the widow's house, and thus adds depth to what might otherwise be portrayed as simply another contentious gathering.

Adélaïde Métayer/Durand also crossed lines of jurisdiction, and was obliged at each step of the way to secure her freedom through the production of paper and the maintenance of a reputation as a *femme de couleur libre*. Her pitched legal battle in Louisiana was distinctive in the length and complexity of the struggle that set her first against the tailor Louis Noret, and then against Pierre Métayer, the son of her former owner. But the basic question illuminated by her suits was one that affected thousands of her fellow refugees, but that has oddly gone almost unnoticed by historians of the United States South: By what right did *anyone* claim a "Creole of Saint-Domingue" or an African from Saint-Domingue as a slave?

Variants of the phrase "Saint-Domingue refugees and their slaves" appear routinely in histories of the city of New Orleans. But to claim property in someone who had lived for years as a legally free person on legally free soil in a neighboring polity should have posed at least some problem for the law of slavery in Cuba and then in Louisiana. Perhaps only by tracing the details of individual family histories can we take the full measure of the meaning of illegal enslavement, as we watch scenes like that of a Louisiana judge who created out of whole cloth a permanent legal property right in Adélaïde's freeborn son, in order that he might be sold at auction.

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It sounds like a paradox, but it is not: The more closely we examine the problematics of law and slavery using refined tools of doctrinal analysis and social inquiry, the more clearly we see that law in slaveholding

societies did not and could not cohere. The divided sovereignty underlying planter and state rule over "domestic enemies" was inherently unstable, and could easily generate unresolvable conflicts like those characterizing the Lejeune case. And the absence of a consistent theory of the source of the property right in persons meant that the blunt force of visible enslavement could re-emerge in situations such as those of the Saint-Domingue refugees. The tailor Noret made a cursory case for his own rights of property in Adélaïde's person before a judge, and then he and the sheriff invaded her house to grab her and her children. "The law" therefore in some sense accompanied the tailor, but "the law" also offered no account of what might make Adélaïde a person in whom such a property right could be founded.

Some of the most penetrating analyses of enslavement under color of law have emerged from Brazil, where the outlawing of the importation of African captives in 1831 was followed by decades of contraband trafficking in persons. It is perhaps not surprising that it is in Brazil that we find one of the boldest statements that the state would stand back and allow the apparent fact of "possession," even if illegally acquired, to stand for a right of property in persons. When the first national registration of slave property was undertaken in Brazil, the enabling legislation carefully explained that at the time of establishing ownership through initial registration "no one shall be required to show the title by which he possesses a slave." Easy inscription in the *matricula* then formalized the slave status of thousands of Africans whose freedom had seemingly been granted under the terms of the ban on the international trade in captives.[12]

12. The text in question is Article 6, Chapter 1 of Decreto No. 151, April 11, 1842, reproduced in Section 33a, Part 2, of *Collecção das Leis do Imperio do Brasil* 5, 1842. The scholarship on illegal enslavement in Brazil has burgeoned in recent years, nourishing a political debate about impunity and state complicity in injustice. See, for example, Keila Grinberg, "Re-escravização, Direito e Justiças no Brasil do Século XIX," in *Direitos e Justiça no Brasil: ensaios de história socialI*, org. Silvia Hunold Lara and Joseli Maria Nunes Mendonça. (Campinas, Brazil: Editora Unicamp, Centro de Pesquisa em História Social da Cultura, 2006), 101–28; Sidney Chalhoub, "The Precariousness of Freedom," unpublished essay, forthcoming, cited with permission; and Beatriz Gallotti Mamigonian, "O Estado Nacional e a Instabilidade da Propriedade Escrava: A Lei de 1831 e a Matrícula dos Escravos de 1872," forthcoming in *Almanack Braziliense* http://www.almanack.usp.br/en/apresenta/index.asp?numero=11 On the potential contemporary political implications, see the presentation before the Brazilian Supreme Court by historian Luis Felipe de Alencastro in 2010, published under the title "O Pecado Original da Sociedade e da Ordem Jurídica Brasileiras," *Novos Estudos CEBRAP* (São Paulo) 87 (2010) http://novosestudos.uol.com.br/acervo/acervo_artigo.asp?idMateria=1387

A piece of official paper could thus be nothing or everything: superfluous for documenting ownership, sufficient to establish slave status, indispensable for proving freedom. To study law and slavery is to study many variations on the dance of deference between masters and the state, and to explore what remains of law in situations of widespread impunity for those who would hold others as property.