A BRUTAL ANOMALY: UNFETTERED OWNERSHIP AND THE ILLEGALITY OF TRANSATLANTIC CHATTEL SLAVERY

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The global movement for reparations for transatlantic chattel slavery (TCS), which has enjoyed significant momentum since 2020, increasingly frames its demands within the scope of international law. However, the legal foundations of these claims remain underdeveloped. The Articles on State Responsibility provide that reparations are due for "internationally wrongful acts" that breached international law when they were committed. The status of transatlantic chattel slavery under international law, as it existed before the nineteenth century, is therefore crucial to the viability of these reparations claims. This Article critically examines the status of TCS under early modern international law, challenging the prevailing notion that it was legally permissible until formally abolished by treaties and domestic legislation in the 19th century. To begin, this Article argues that focusing on treaty law is a flawed approach because it is both ahistorical and underinclusive of non-Western polities. Instead, this Article's analysis is based upon "general principles of law" as outlined in Article 38(1)(c) of the Statute of the International Court of Justice. This Article asserts that the TCS regimes implemented by Britain and France were illegal at the time of their practice. Unlike other forms of slavery, TCS gave slaveholders unfettered ownership rights over the enslaved. These maximalist ownership rights were contrary to the legal norms governing slavery in other societies at the time. The piece explores how the expansion of property rights and the lack of pre-existing legal frameworks for slavery in Britain and France created a situation in which slaveholders had broad discretion over the development of the law of slavery in the colonies and how their decision to adopt unrestricted ownership rights over the enslaved created an unprecedentedly brutal system of slavery. By analyzing TCS through the lens of general principles rather than treaty law or customary international law, this Article provides a novel framework for understanding the legal status of TCS and its implications for contemporary reparations claims.

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I. Introduction

The global movement for reparations for transatlantic chattel slavery has enjoyed momentum, media attention, and institutional support since 2020. Last fall, Patrick Robinson, a Jamaican judge on the International Court of Justice, publicly called on the United Kingdom to engage with calls for reparations resulting from transatlantic chattel slavery. Reparations, Judge Robinson said, "are required by history and required by law."[1] Robinson stressed that European former colonial powers "cannot continue to ignore the greatest atrocity, signifying man's inhumanity to man... Reparations have been paid for other wrongs and obviously far more quickly." This statement came several months after the Brattle Group, a consulting and accounting firm, published a report estimating the harms of transatlantic chattel slavery in dollar amounts. The report was unveiled in a symposium convened by the American Society of International Law. It included an estimate that the United Kingdom's involvement in the slave trade resulted in harms totaling $24 trillion. The report featured related calculations of reparations obligations due to each of its former colonial possessions in the Caribbean, where economies were dominated by slave-based plantation systems.

The United Nations Permanent Forum on People of African Descent, which operates as an advisory body to the United Nations Human Rights Council,[2] has made similar calls for reparations.[3] The Permanent Forum, acting in accordance with demands from civil society actors, has "affirm[ed] that reparations are a cornerstone of justice" and has recommended that the topic of reparations for transatlantic chattel slavery be formally taken up as a topic by the International Law Commission and that a Special Rapporteur be appointed "with a view to assisting Member States to codify and

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[1] Aamna Mohdin, *UK cannot ignore calls for slavery reparations, says leading UN judge*, THE GUARDIAN, 22 August 2023, *available at* https://www.theguardian.com/world/2023/aug/22/uk-cannot-ignore-calls-for-slavery-reparations-says-leading-un-judge-patrick-robinson.

[2] The U.N. Human Rights Council is an intergovernmental body within the United Nations system that is responsible for the promotion and protection of human rights. In carrying out its duties, it has the power to investigate alleged human rights abuses by member states, including through fact-finding missions and by appointing or convening independent experts or working groups, and by establishing commissions of inquiry. The Council is supported by the UN High Commissioner for Human Rights and the UN Development Program, among other UN bodies.

[3] The U.N. Permanent Forum on People of African Descent (UNPFAD) is "a consultative mechanism for people of African descent." The Permanent Forum was created through a General Assembly resolution in August 2021 and has since held three sessions, which have been open to state representatives and civil society groups. At each of these sessions, a significant amount of time was spent discussing reparations.

progressively develop international reparatory justice law."[4]

Reparations advocates have increasingly framed their demands for reparations in terms of international law. However, the specifics of possible reparations claims—and their potential viability—remain underdeveloped in both scholarship and statements by civil society actors. As a result, these claims have been largely dismissed or ignored by the relevant governments and many international law commentators so far. When the Caribbean Community (CARICOM)[5] first pledged to pursue reparations claims against European countries before an international tribunal, for instance, Roger O'Keefe, deputy director of the Lauterpacht Center for International Law at Cambridge University, described the prospect of a reparations claim as "an international legal fantasy."[6]

This Article will challenge what it calls "the Conventional Approach" to international (interstate) reparations claims, which posits that such claims are not viable because slavery was not prohibited by international treaty at the time it was practiced. This Article will explain why, prior to the late nineteenth century, other, non-treaty sources of international law are more informative and compelling than treaty law; treaty law was largely undeveloped at the time. When there are gaps in positive law, international law may refer to and be instructed by the "general principles of law" across societies. Surveying the "general principles of law" as applicable to the institution of slavery across societies during the seventeenth and eighteenth centuries reveals that slavery was not prohibited, but ownership rights over the enslaved were restricted. Societies that practiced TCS, like France and Britain, were outliers of the time in that slaveowners in those societies had unfettered ownership rights over the enslaved. This led to a system of unparalleled brutality, even compared with other societies in which slavery was permitted and widely practiced.

This argument contributes to an ongoing conversation about how possible reparations claims might be framed within international law. In November 2023, Ghanaian President Nana Akufo-Addo convened a meeting in Accra on the topic of reparations. It was attended by hundreds of people,

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[4] Human Rights Council, 54th Session, A/HRC/54/68, para 65, *available at* https://documents.un.org/doc/undoc/gen/g23/158/46/pdf/g2315846.pdf

[5] CARICOM is an intergovernmental organization that promotes cooperation among its 15 Caribbean member states. It has traditionally focused on economic integration and regional security, but it has become a locus for articulating calls for reparations and for advocating for the common interests of its membership of small island developing states.

[6] Stephen Castle, *Caribbean Nations to Seek Reparations, Putting Price on Damage of Slavery*, N.Y. Times, October 20, 2013, *available at* https://www.nytimes.com/2013/10/21/world/americas/caribbean-nations-to-seek-reparations-putting-price-on-damage-of-slavery.html.

including official representatives from African Union States, scholars, judges, and civil society actors. During that meeting, the discussion centered on the International Court of Justice (ICJ) as a potential tribunal for adjudicating reparations claims. The ICJ has jurisdiction over interstate disputes submitted to it by sovereign states. Claims for reparations made by countries in the Caribbean or Africa for transatlantic slavery against former colonial powers in Europe are, therefore, ostensibly of the kind that could fall within the jurisdiction of the court.

However, a claim brought before the ICJ would face serious obstacles. The first is that the court's jurisdiction over contentious cases depends upon the consent of states.[7] As if to preclude exactly the claims contemplated by CARICOM countries and others, the United Kingdom has placed specific reservations on the compulsory jurisdiction of the ICJ for disputes that arose before 1987, as well as disputes between it and other members or former members of the Commonwealth.[8] However, one final avenue for ICJ jurisdiction remains open: The court can issue a non-binding advisory opinion on legal questions referred to it by the UN General Assembly, the United Nations Security Council, or certain authorized UN organs or special agencies. As a result, some reparatory justice advocates have focused on seeking an ICJ advisory opinion as a way to have the Court opine on issues related to the historical injustice of transatlantic chattel slavery without being stymied by jurisdictional hurdles.

But even if the process of requesting an advisory opinion from the ICJ were successful, at least one important difficulty would remain for getting the court to opine on the legality of slavery—and thus the obligation to pay reparations: the non-retroactivity principle. The principle of non-retroactivity is widely recognized as a general principle of international law. It instructs that a law can only be applied to regulate acts that occur *after* that law is passed.

Commentators have taken at least two approaches to the non-retroactivity principle regarding TCS. This Article calls the first "the

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[7] Sometimes, consent to hear disputes related to a specific treaty is included as a provision of the relevant treaty. Some states have granted the Court broad compulsory jurisdiction over a variety of disputes, but have made reservations to the scope of that jurisdiction. Other times, states may agree to grant the ICJ jurisdiction on an *ad hoc* basis, although it is unlikely that a state would agree to do so if it did not perceive granting jurisdiction as in its own interest.

[8] *Declaration of the United Kingdom of Great Britain and Northern Ireland Recognizing as Compulsory the Jurisdiction of the International Court of Justice, in Conformity with Paragraph 2, Article 36, of the Statute of the International Court of Justice*, United Kingdom-United Nations, signed 2 June 1955, 110 UNTS 122, art 2.

Conventional Approach." Under the Conventional Approach, to the extent that the non-retroactivity principle has been discussed in the literature vis-à-vis international reparations claims, it has usually been applied in a Eurocentric way, referencing treaties between European and American powers as the only source of applicable law.[9] The slave trade and slavery were made illegal through a series of domestic legislative acts, and later bilateral and then multilateral treaties. This process began roughly in 1807, when the British Parliament formally abolished the slave trade. It arguably culminated in 1926 with the Convention to Suppress the Slave Trade and Slavery, a multilateral treaty that confirmed the illegality of the slave trade and slavery. In the context of an international reparations claim, the non-retroactivity principle instructs that even though slavery is clearly illegal today, a state's historical engagement in or encouragement of slavery or the slave trade was not illegal and, therefore, cannot trigger reparations.

However, a handful of scholars have recently suggested that transatlantic slavery *was* illegal—even before the slave trade and slavery began to be abolished. This idea has received considerable attention from the movement for reparatory justice because it would overcome the hurdle of the non-retroactivity principle. This approach—which this Article adopts and expands on—argues that in order to determine whether TCS was illegal under existing international law, one must evaluate not only whether a legal state of unfreedom known as "slavery" existed at the time, but also the specific details of those legal regimes. Nora Wittmann, for example, has looked to the practice of the African societies with which European powers traded (or, in some cases, from which they plundered).[10] She argues that although slavery existed in those societies, the enslaved had rights similar to serfs or peasants in European societies; they could not be abused or tortured, and they had certain property rights or rights to subsistence that could not be interfered with. Other scholars have demonstrated that certain acts of European enslavers involved in TCS violated aspects of European law that addressed and regulated slavery.[11] Other scholars have distinguished early modern

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[9] *See, e.g.* Andreas Buser, *Colonial Injustices and the Law of State Responsibility: The CARICOM Claim to Compensate Slavery and (Native) Genocide*, 2 HEIDELBERG JOURNAL OF INTERNATIONAL LAW 409, 417-426 (KFG Working Paper No. 4) (2017). Buser acknowledges that his analysis of CARICOM's claims under international law proceeds from a Eurocentric perspective, and he criticizes the limitations of European international law while summarizing many of the major challenges CARICOM claims face under it.

[10] Nora Wittmann, *International Legal Responsibility and Reparations for Transatlantic Slavery*, *in*, COLONIALISM, SLAVERY, REPARATIONS AND TRADE: REMEDYING THE PAST? 3 (F. Brennan & J. Packer eds., 2012).

[11] Mamadou Hebié has argued that the principle that only people captured in the context of a just war could be legitimately enslaved, which he grounds in European legal thought,

Atlantic slavery from other forms of coerced labor or unfreedom in highlighting the fact that enslaved Africans were uniquely "chattelized" under this system.[12] The process of chattelization, they argue, is what makes TCS especially brutal and, therefore, especially worthy of condemnation and repair.

None of these explanations is, on its own, sufficient to indicate that TCS was illegal at the time. While the practice of African societies vis-à-vis slavery is a necessary part of an analysis of the legality of TCS, it is insufficient for discerning the contours of international law at the time. Other societies—especially Muslim societies—regarded just war or religious war as a legitimate source of slaves. Other societies—beginning at least with the Romans—chattelized the enslaved.[13] Each of these arguments about the special nature of TCS, however, buttresses the intuition that there is something unique about that institution that was out of keeping with existing custom. Slavery is ancient, but TCS was new and unique; it pushed against older conceptions of slavery to create something so abhorrent that international law would soon rally around its abolition.[14] While many authors have explored legal approaches to reparations in the domestic context,[15] there

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was violated by Portugal itself in its conquest of Tangiers in 1436 and its war-making on the African coast later in the 15th century. These military actions resulted in the enslavement of those captured, but the military actions themselves did not constitute "just war" at the time they were waged. In fact, Hebié argues, these military incursions were only retroactively validated by Papal authority decades after they occurred. *See* Mamadou Hebié, *Examining the (Il)legality of Transatlantic Chattel Slavery under International Law: Transatlantic Chattel Slavery 1450–1550, in* STEFANELLI J.N. & LOVALL E. (EDS.), REPARATIONS UNDER INTERNATIONAL LAW FOR ENSLAVEMENT OF AFRICAN PERSONS IN THE AMERICAS AND THE CARIBBEAN: PROCEEDINGS OF THE SYMPOSIUM, May 20-21, 2021. American Society of International Law: Washington (2022). 39-43.

[12] Hillary Beckles and Patrick Robinson both stressed chattelization as unique to Atlantic slave societies and uniquely destructive. Patrick Robinson called chattelization "the central element of transatlantic slavery." Patrick Robinson, Remarks at Reparations under International Law for Enslavement of African Persons in the Americas and the Caribbean, convened by the American Society of International Law (May 20-21, 2021), transcript *available at https://www.asil.org/sites/default/files/reparations/2021%20Reparations%20Proceedings.pdf.*

[13] This is evident in the extensive treatment of slavery in the Roman private law code, which identified slaves as *res*, persons stripped of civic identity who could be traded, bought, and sold as things.

[14] For an account of how the abolition movement was an important milestone in the history of international law and the beginnings of human rights law, *see generally* JENNY MARTINEZ, THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL LAW (2014).

[15] *See, e.g.*, ALFRED BROPHY, REPARATIONS: PRO & CON (2006), ROY L. BROOKS, ATONEMENT AND FORGIVENESS: A NEW MODEL FOR BLACK REPARATIONS (2004); CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF

exists a gap in the legal literature when it comes to what makes TCS so different from other kinds of coerced labor, and how and whether those differences impact its status under international law.

This Article comprehensively examines the status of TCS under the international law of the time. Article 38(1) of the Statute of the International Court of Justice is widely regarded as an authoritative list of sources of international law. Article 38(1) lists four sources of international law, including: (1) treaty law, (2) customary law; (3) general principles of law recognized by civilized nations, and; (4) judicial decisions and the teachings of the most highly qualified publicists. The Conventional Approach of the viability of reparations claims begins and ends its analysis with the first listed source of law under Article 38: treaty law. Because slavery was not prohibited by treaty until the nineteenth century, the Conventional Approach reasons, TCS was not unlawful at the time it was practiced and therefore no reparations are due.

This Article, by contrast, challenges the Conventional Approach by looking beyond treaty law. This is necessary because the Conventional Approach's sole focus on treaty is flawed for two reasons. First, it is ahistorical. There was a relative dearth of treaty law in general prior to the twentieth century. It simply does not follow that because there was a lack of treaty law prohibiting slavery prior to the nineteenth century, all of the brutalities of TCS were permitted under international law. To the contrary, slavery, *because of its ubiquity*, was well-regulated, and owners' rights were generally constrained in ways that were similar across societies. However, these regulations were largely a matter of domestic law, not treaty law. The

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CENTURY OF BROWN V. BOARD OF EDUCATION (2004); RANDALL ROBINSON, THE DEBT: WHAT AMERICA OWES TO BLACKS (2000). A selection of law review articles include Danielle Boaz, *Religious Reparations from the Transatlantic Slave Trade: Creating Demons, Cults, and Zombies to Justify Black Enslavement*, 20 ST. THOMAS LAW REVIEW 604 (2008); Lisa Crooms-Robinson, *Remembering the Days of Slavery: Plantations, Reparations, and Contracts*, 26 HAWAII L. REV. 405 (2004); Adjoa Aiyetoro, *The Development of the Movement for Reparations for African Descendants*, 3 J.L. SOC'Y 133 (2000); Jeremy Levitt, *Black African Reparations: Making a Claim for Enslavement and Systematic De Jure Segregation and Racial Discrimination Under American and International Law*, 25 S. U. L. J. 1 (1998). Symposia on reparations for African Americans include *Reparations Symposium*, 20 HARV. L.J. 17 (2004); Symposium, *A Dream Deferred: Comparative and Practical Considerations for the Black Reparations Movement*, 58 N.Y.U. ANN. SURV. AM. L. 447 (2003); Symposium, *The Jurisprudence of Slavery Reparations*, 84 B.U. L. REV. 1135 (2004).

multi-lateral treaties that would eventually come to prohibit the slave trade and later slavery itself are widely regarded as among the first human rights treaties;[16] they were groundbreaking legal instruments, even though they reflected long-standing norms.

Second, the Conventional Approach, in its focus on treaty law, excludes societies that did not conform to Eurocentric notions of statehood. Treaty law privileges the kinds of societies that were deemed *capable of concluding* treaties: Westphalian, modern, sovereign states. Looking only at treaty law means excluding polities that did not fit that mold—arguably more than half the world until the twentieth century.

The analysis in this Article is guided instead by "the general principles of law recognized by civilized nations," which is identified as an independent source of law in Article 38(1)(c) of the Statute of the International Court of Justice. The "general principles of law of civilized nations" (or, more succinctly, "the general principles") is a term of art that refers to fundamental legal concepts and norms that are broadly accepted and applied across different legal systems around the world. Although Article 38(1)(c) refers to the general principles of law *of civilized nations*, the meaning of the term "civilized nations" has a complex and evolving history. While it was once used to differentiate between European states and those considered less developed and therefore less "civilized," it has evolved to include a wide array of states that generally adhere to principles of international law. A modern reading of Article 38(1)(c), then, allows for a broader, more inclusive, more accurate analysis of the law governing slavery during the seventeenth and eighteenth centuries than does reliance on treaty law.

By focusing on the "general principles" that governed slavery in societies around the world, this Article argues that TCS as practiced in the colonies of France and Britain prior to abolition diverged from the general principles regulating slavery in other societies at the time and was therefore illegal. It maintains that two factors combined to make France and Britain's TCS regimes unique and illegal. The first was contemporaneous developments in property law. The involvement of these States and their nationals in slaveholding began during a time in which ownership rights were being made more extensive and were becoming more robustly protected. The institution of TCS was bolstered and motivated by the growth of capitalism and the new legal concepts that came to undergird it.

The second factor, ironically, was the fact that Britain and France had

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[16]*See, e.g.* JENNY MARTINEZ, THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL HUMAN RIGHTS LAW (2014).

no experience with slavery at the time they embarked on their Atlantic projects. While coerced labor and even chattel slavery were widely practiced in societies around the world, Britain and France had abolished slavery centuries before, in the medieval era. As a result, they had no laws or customs in place regulating slavery and the treatment of the enslaved. This created an open field for powerful financial interests, which had a vested interest in maximalist versions of slavery, to shape the legal regimes that would determine the realities of British and French TCS. They used this freedom of movement, along with the contemporaneous trend toward maximalist property rights, to code the enslaved as chattels over whom they had unrestricted ownership rights. [17] The slaveholding class and their political allies argued for and were ultimately granted what this Article refers to as *unfettered ownership rights*—complete, modern ownership rights[18] that allowed slaveholders to possess, use, and alienate the enslaved so thoroughly. This created an exceptionally brutal system of slavery that was historically—and legally—unprecedented.

This decision of slaveholders to code the enslaved as chattels over whom they had unfettered ownership rights was, in itself, was not

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[17] Katharina Pistor, in her revealing and thoughtful book *The Code of Capital*, argues that the law can be used to "code" certain assets, transforming them into capital and endowing them with the power to protect or produce private wealth. KATHARINA PISTOR, THE CODE OF CAPITAL (2019). This Article adopts her approach in its discussion of how the planter and merchant classes most closely involved with slavery influenced the law at the time.

[18] This Article uses Anthony Maurice Honoré's incidents of ownership as a point of departure for discussing and analyzing complete ownership rights. Honoré identified eleven incidents that tend to characterize ownership, which together provide a comprehensive framework for understanding the concept of ownership. These include:

1. **Possession:** Physical control over the object.
2. **Use:** The right to use the object as one pleases. This may be subject to regulatory control or legal restriction.
3. **Management:** The power to decide how the object is used and managed.
4. **Income:** The right to the fruits or profits generated by the object.
5. **Capital:** The right to the proceeds from the sale or destruction of the object.
6. **Security/Exclusion:** The right to depend on the enforcement power of the state to ensure that the object will not be stolen, damaged, or destroyed.
7. **Transmissibility**: The right to transfer ownership to others through sale, gift, or inheritance.
8. **Absence of term:** Ownership may be perpetual, without a fixed duration.
9. **Prohibition of harmful use:** The duty to others to mitigate harms caused by the object or its use.
10. **Liability to execution:** The phenomenon whereby the object may be seized and sold to satisfy the owner's debts.
11. **Residuarity:** In case of the destruction or loss of the object, the right of the owner to the remnants or insurance proceeds.

remarkable. They were, after all, acting in their own interests. What was remarkable was the scope of the ownership rights that slaveowners insisted upon and received under British and French law. These unfettered ownership rights also existed vis-à-vis the state. This was unprecedented in the law and practice of slavery and led to extraordinary outcomes. Slaveholders could be compensated for slaves that were executed by the state pursuant to a special criminal legal code. When slavery was finally abolished in the British and French colonies, these ownership rights meant that it was the slaveholders—not the enslaved—who were compensated.

This Article argues that French and British TCS, at the time they were practiced, violated the general principles of the law recognized among contemporaneous societies that practiced slavery. General principles of law regulated slavery within and among polities before the eighteenth-century and limited slaveholders' ownership rights in myriad ways. While slavery was ubiquitous, so were restrictions on the sale, abuse, and murder of the enslaved. In many systems, the enslaved had access to courts to adjudicate claims against their owners, whose ownership rights were limited by the exigencies of criminal law. In many societies in which slavery was more long-standing, there were paths to manumission for the enslaved that eventually allowed them or their descendants full or partial access to civil life and rights comparable to citizens. The unfettered ownership rights enjoyed by slaveholders in French and British colonies contravened the coeval general principles of slavery.

Focusing on general principles rather than treaty law allows for a comprehensive and detailed evaluation of TCS's legality at the time. It makes room for a fuller consideration of the ways many polities regulated the institution of slavery and the treatment of the enslaved in an analysis of the legality of TCS and the unfettered ownership rights that undergirded it. Because every international legal situation is "capable of being determined as a matter of law," the legal status of unfettered ownership rights vis-à-vis TCS must be ascertainable. General principles, which are largely taken from domestic legal regimes, "complement international law and *fill[] its gaps*."[19] They do so in a "flexible and dynamic fashion." The appropriate methodology for discerning general principles has been disputed. In recent years, however, there has been an increased interest in the general principles as a source of substantive international law,[20] especially as the general principles can be used to give legal effect to moral values and principles, including those of international human rights. Several ICJ judges have

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[19] Samantha Besson, *General Principles in International Law – Whose Principles?* At 49 (2011), available at Swiss Open Access Repository .

[20] *Id.*, [pincite].

articulated the notion that general principles provide a framework for substantive rights.[21]

This Article will demonstrate that TCS was different from other kinds of slavery and coerced labor in a way that put it in tension with the general principles regulating slavery at the time. In focusing on the general principles of law over the treaty law preferred by the Conventional Approach, this Article engages in an analysis of the legality of TCS that includes non-Western states and polities. It makes an implicit argument that the sources of authority for international law must be considered more broadly, and that the contours of international law—even in historical perspective—must be wider than the borders of Europe and its territories.

The illegality of TCS, which this article asserts, also has significant implications for the global reparations movement. The movement may decide to push for a U.N. General Assembly resolution seeking ICJ advisory opinion on this question. Many countries throughout the global South have expressed support for this potential effort. While ICJ advisory opinions are legally non-binding, many have made substantive contributions to international law and have influenced the tone or starting point for diplomatic negotiations. The fight for reparatory justice will ultimately be political, not legal. While the very structure of international law has been roundly and fairly criticized from a third-world perspective, recent Global-South-led efforts to use international law as a tool for justice have been galvanizing.[22] Excitement around the possibility of engaging the ICJ to opine on the (il)legality of TCS would be

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[21] *See, e.g.*, Judge Cançado Trindade, Opinion, ICJ, Case concerning *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, par. 47 "It is indeed significant and it should not pass unnoticed that Uruguay and Argentina, concurring in their invocation of general principles of law, were, both of them, being faithful to the long-standing tradition of Latin American international legal thinking, which has always been particularly attentive and devoted to general principles of law, in the contexts of both the formal 'sources' of international law as well of codification of international law. Even those who confess to reason still in an inter-State dimension, concede that general principles of law, in the light of natural law (preceding historically positive law), touch on the origins and foundations of international law, guide the interpretation and application of its rules, and point towards its universal dimension; those principles being of a general character…." And later, at para 200 "Fundamental principles are consubstantial to the international legal order itself, wherein they give expression to the idea of an 'objective justice,' proper of natural law." In *South West Africa*, Judge Tanaka stated that "the concept of human rights and of their protection is included in the general principles" mentioned in Article 38(1)(c). Second Phase Judgment, [1966] ICJ Rep 6.

[22] *See, e.g.* The Vanuatu ICJ Initiative; the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*; the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*; *Legal Consequences for States of the Continued Presence of South Africa in Namibia*.

another powerful example of this trend.

Section II of this Article examines the general principles of law surrounding slavery in the early modern world. It first discusses general principles as a source of law, outlining some of the leading approaches to the articulation of this dynamic concept. It then takes a comparative approach, examining regulations on slavery under Islamic law, and in the Ottoman Empire, West Africa, Russia, and the Iberian Empires. It also describes the free-soil principle that existed in Northern Europe at the time, which essentially prohibited slavery and often operated to free enslaved people who entered and sojourned in the territory of the "free soil" countries. Section III examines the gradual development of unfettered ownership rights over the enslaved in French and British colonies during the seventeenth and eighteenth centuries. It argues that these ownership rights were originally curtailed by metropolitan courts, but that the courts eventually began to harmonize colonial and metropolitan law, accommodating the new ownership rights of an increasingly wealthy and powerful planter class. Section IV analyzes the existence of unfettered ownership rights in relation to TCS. It argues that these ownership rights made TCS different from other kinds of slavery and coerced labor of the time, and examines the legal and policy implications of this argument in the context of the global reparations movement.

II. Slavery and the Law in the Early Modern World

The modern principles of individual freedom and equality before the law as a benefit of citizenship are historical anomalies. Before the modern era, coerced labor (such as villenage, serfdom, or indentured servitude) and even slavery were ubiquitous—most peoples in the world have at some time been enslaved or been slaveholders, or both, sometimes even simultaneously.[23] Societies with imperial traditions (such as Roman, Islamic, and Aztec) contain many references to slavery and the enslaved in their commercial, marital, inheritance, civil, and criminal legal codes.[24] In societies that lacked written traditions or were isolated, these questions tended to be regulated by custom, which has sometimes made its way to the historical record through contact with societies that kept written records.[25]

To begin to answer the question as to whether TCS, as it existed in

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[23] David Eltis and Stanley L. Engerman, *Dependence, Servility, and Coerced Labor in Time and Space*, *in* CAMBRIDGE WORLD HISTORY OF SLAVERY 2 (David Eltis & Stanley Engerman eds. 2011) [Hereinafter: ELTIS AND ENGERMAN].

[24] Sue Peabody, *Slavery, Freedom, and the Law in the Atlantic World*, *in* CAMBRIDGE WORLD HISTORY OF SLAVERY 594 (David Eltis & Stanley Engerman eds. 2011) [Hereinafter: Peabody, *Slavery, Freedom and the Law in the Atlantic World*].

[25] *Ibid.*

British and French colonies, was legal under international law at the time, one has to look to the applicable law. While slave trading was connected to the law of the sea and therefore had international legal implications, slaveholding was primarily a matter of domestic law. There were no human rights treaties in effect governing the treatment of slaves, serfs, or citizens as a matter of international law. Absent treaty law, the general principles of law, which apply *in foro domestico* and are gleaned from observing the principles of law in various polities, can determine the substance of the legal principles that regulated slavery *within* the domestic sphere as a matter of international law. The writings of prominent jurists are another useful source of applicable law on this point, although most of these scholars focused on the eligibility criteria for slavery. Because of the ubiquity of slavery at the time and the prolific writings of jurists, there is plenty to study in determining the applicable law.

What emerges from observing the principles of law that governed slavery across societies during the early modern is the conclusion that slavery was broadly legal, but ownership rights were restricted. Many societies accorded a chattel status to the enslaved, but slaveowners did not have unfettered rights to use, destroy, sell, and control all aspects of the lives of the enslaved. Slave status also rarely existed in perpetuity. Even though the enslaved were coded as property within the law, they might have had the protection of criminal law, enjoyed marriage rights, been permitted to possess and control property, and contracted for their manumission. These rights curtailed the absolute ownership rights of the slaveowners, who may have been prevented from selling a slave in certain circumstances, overworking or abusing a slave, or transmitting ownership over the slave and her offspring in generation after generation.

Part II of this Article is divided into two Subsections. The first explores how applicable law can be derived from the general principles regulating slavery in various societies at the time. Because there was no treaty law to regulate slavery prior to the nineteenth century, the legality of TCS under international law can be ascertained by observing how general principles of law operated *in foro domestico* in slave societies of the time. The second Subsection examines general principles of law vis-à-vis slavery in detail, looking at the laws governing slaveholding in the Iberian Empire, Russia, the Ottoman Empire, and West Africa. This Section will also examine the laws regulating slavery in metropolitan France and Britain. Both had effectively eradicated slavery within their borders by at least the sixteenth century. This survey of general principles demonstrates that though the enslaved were legally classified as chattel in many societies, the rights of slaveowners were limited. Most slaves enjoyed some protections under the law and were afforded a modicum of rights. In many societies, slavery was a

status that was eventually shed in favor of full or partial membership.

A. Determining the Historical Legality of Slavery

The International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) most thoroughly explains when and whether a state is obligated to make reparations. According to Article 31 of ARSIWA, "The responsible state is under an obligation to make full reparation for the injury caused by the internationally wrongful act." Article 2 of ARSIWA defines an internationally wrongful act as "conduct consisting of an action or omission" that is both "attributable to the state under international law," and that "constitutes a breach of an international obligation of the State."[26]

Whether reparations for transatlantic chattel slavery are due turns, therefore, on whether transatlantic chattel slavery constituted a "breach of an international obligation" at the time it was practiced. Article 38 of the Statute of the International Court of Justice establishes what is widely held to be the sources of applicable law for international legal questions. It lists these sources, more or less in order of the relative weight they should receive, and includes: a) treaty law; b) customary international law; c) general principles of law recognized by civilized nations, and d) judicial decisions and teachings "of the most highly qualified publicists of various nations."

While a number of treaties exist abolishing and later outlawing the slave trade and slavery (having been enacted in 1815, 1926, and 1956 respectively), these conventions emerged relatively late vis-à-vis the emergence and practice of transatlantic chattel slavery. Treaty law regulating slavery from the sixteenth to the eighteenth centuries is therefore close to non-existent; the only relevant treaties during this period tended to regulate slave trading as a matter of maritime law, but not slaveholding. Roger O'Keefe, international law scholar and Deputy Director of the Lauterpacht Center for International Law, described CARICOM's reparatory justice claims as "an international legal fantasy" and stressed the notion that "slavery and the slave trade were not internationally unlawful at the time the colonial powers engaged in them."[27] But choosing to focus narrowly on treaty law is ahistorical. Prior to the twentieth century, treaty law was relatively

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[26] Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission*, 2001, vol. II (Part Two).

[27] Stephen Castle, *Caribbean Nations to Seek Reparations, Putting Price on Damage of Slavery*, N.Y. Times (Oct. 20, 2013), *available at* https://www.nytimes.com/2013/10/21/world/americas/caribbean-nations-to-seek-reparations-putting-price-on-damage-of-slavery.html?pagewanted=2&_r=0.

underdeveloped; customary international law, which was unwritten, was more central.[28] Looking only to treaty law, then, creates the flawed impression that transatlantic chattel slavery was legal at the time it was practiced simply because it was not exclusively prohibited. Reckoning with the question of whether transatlantic chattel slavery was legal at the time it was practiced requires engaging with other possible sources of applicable law.

Some scholars have suggested that transatlantic chattel slavery was illegal at the time by arguing that it was contrary to international customary law. The existence of customary rules can be discerned by looking at two sources: 1) the practice of states, and; 2) the extent to which that practice is informed by a sense of legal obligation.[29] Therefore, scholars have to make inferences about the extent to which state practice, which is objectively observable, is informed by a sense of legal obligation (or "*opinio juris*"), which is a subjective element. State practice consists of highly consistent acts indicating a widespread practice among a significant number of states. *Opinio juris* is the belief on the part of the states engaging in those acts that the law compels or obligates to act as they do.[30] Legal scholarship on the issue of state practice vis-à-vis slavery is underdeveloped on this point, although Nora Wittmann has written about how starkly West African forms of slavery diverged from transatlantic chattel slavery. She argues that transatlantic

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[28] Curtis Bradly and Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L.J. 202, at 209 (2010).

[29] See, e.g., Statute of the International Court of Justice, art. 38(1), June 26, 1945, 59 Stat. 1055, 1060 (stating that one of the sources of international law to be applied by the International Court of Justice is "international custom, as evidence of a general practice accepted as law"); Restatement (Third) of the Foreign Relations Law of the United States § 102(2) (1987) (defining CIL as the law of the international community that "results from a general and consistent practice of states followed by them from a sense of legal obligation").

[30] See *Military and Paramilitary Activities in and Against Nicaragua*, 1986 I.C.J. ¶ 207 ("[F]or a new customary rule to be formed, not only must the acts concerned 'amount to a settled practice', but they must be accompanied by the *opinio juris sive necessitatis*. Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is 'evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.'"); North Sea Continental Shelf (Ger. v. Den.; Ger.v. Neth.), Judgment, 1969 I.C.J. 3, 44 (Feb. 20) ("[A]n indispensable requirement would be that within the period in question, short though it might be, state practice, including that of states whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked, and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved."); Right of Passage Over Indian Territory (Port. v. India), Judgment, 1960 I.C.J. 6, 42-43 (Apr. 12); Asylum, 1950 I.C.J. at 276-77; Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 28 (Sept. 7) ("[O]nly if such abstention were based on [states] being conscious of a duty to abstain would it be possible to speak of an international custom.").

chattel slavery as practiced by European powers was far more brutal than the slavery practices of the West African societies from which slaves who entered the Atlantic trade were taken.[31]

However, engaging in a customary law analysis, which would require assessing both state practice and *opinio juris*, is a process beset by several significant challenges. First, a customary law analysis—even a well-intentioned one—will almost always be fundamentally Eurocentric. The notion of state practice as a source of international law emerged as part of international legal doctrine during the 19th century when natural law thinking was being replaced by legal positivism.[32] Francois Gény's work was particularly important in this development, as he is one of the first jurists to have identified state practice and *opinio juris* as the constituent elements of a custom.[33] The moment of transition between natural and positivist law played a role in his thinking. For Gény, positive law was "merely a body of rules adapted to the exigencies of time and place for the purpose of achieving in actual operation the balance of conflicting interests which is the essence of justice."[34] To Gény, "[o]nly natural law… furnishes the indispensable basis for a truly scientific elaboration of positive law."[35] Against this background, what counted as practice sprung organically from a shared European culture.

Of course, these challenges are compounded in historical perspective. The methods for determining state practice and *opinio juris* that have emerged are contemporary, and best accord with the action of states with a significant and fairly well-coordinated bureaucratic apparatus, sophisticated diplomatic correspondence, and legal advisers. *Opinio juris*, in the modern context, might be assessed on the basis of statements made before the U.N. General Assembly or in similar contexts. State comments on the draft text of international conventions are now recorded and published. Judicial decisions in most legal systems are recorded for posterity, along with the underlying reasoning. The details of a State's practice, even within its own territory, can and often does become knowable around the world. Finally, there is often coordination between various state organs—or at least procedures in place for such coordination—such that state practice vis-à-vis a particular question of international law is clear. It took many centuries of struggle and effort to

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[31] Nora Wittmann, *An International Law Deconstruction of the Hegemonic Denial of the Right to Reparations*, 68(3/4) SOCIAL AND ECONOMIC STUDIES 103 (2019).

[32] Anthony Carty, *Doctrine Versus State Practice*, in The Oxford Handbook of the History of International Law pg. 974 (Bardo Fassbender & Anne Peters eds., 2012)

[33] Peter Benson, *François Gény's Doctrine on Customary Law*, 20 Canadian Y.B. Int'l L. 267 (1983).

[34] Thomas J. O'Toole, *The Jurisprudence of François Gény*, 3 Villanova L. Rev., 460, 455-68 (1958).

[35] Cited by O'Toole, Id, at 461.

stand up parliaments and independent judiciaries in most countries, and coordination between the different branches of government—especially when it came to the contentious topic of slavery—was nonexistent. In other words, the kind of analysis contemporary scholars of international law engage in to analyze contemporary questions about custom is nearly impossible to replicate in a historical context, and even more difficult in an international one.

Another challenge with engaging in a customary law analysis of the status of the law vis-à-vis slavery is intrinsic to the topic of slavery itself. Customary international law can be most easily discerned when its subject matter consists in obligations that run *between states*. In other words, it is most obvious whether an obligation exists under customary international law *vel non* when it comes to state behavior vis-à-vis other states, because inter-state behavior has traditionally been the essence of international law. How can one know whether state behavior that occurs at a purely domestic level (such behavior regarding slaveholding) is influenced by a sense of international legal obligation, or whether it is just the result of religious or other mores, or a matter of local custom? Even if one could engage in a customary law analysis that comprehensively studied state practice vis-à-vis slavery around the world, it would be nearly impossible to tell whether any prevalent behavioral norms were influenced by *opinio juris*. Because slaveholding is a purely domestic practice, it is entirely logical (and indeed probable) that any consistency in state practice vis-à-vis slavery that can be observed is due more to religious and other mores that *happen to overlap* than collective adherence to perceived international legal obligation.

1. General Principles of Law

Aside from custom, the behavior of societies may be instructive in the ascertainment of unwritten international law in another way: the third source of international law mentioned in Article 38 is the "general principles of law recognized by civilized nations." Because "every international situation is capable of being determined *as a matter of law*,"[36] an international tribunal must have some source of law to draw on even if no immediately relevant statute or judicial precedent is available. Usually, this source is private domestic law. Private law, which has long been more developed than international law, "has always constituted a sort of reserve store of principles upon which international law has drawn."[37] Recognizing "general principles

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[36] Oppenheim's International Law, 13.

[37] Brierly, Law of Nations: An Introduction to the Role of International Law in International Relations 63 (2014).

of law" as a source of international law constitutes "an authoritative recognition of a dynamic element of international law, and of the creative function of the courts that administer it."[38] Although some scholars disagree,[39] most accept that the general principles constitute a source of law separate from treaty and custom.[40]

If an assessment of international customary law depends on an exhaustive accounting of state practice, the same is not true for general principles. A judge engaged in an analysis of general principles need not be an expert in every country's legal system.[41] There are common themes that run through many different legal orders that may be discerned through a survey of legal systems.[42] General principles do not necessarily have to be universal to be a viable source of law, but they do have to be generally accepted such that they constitute an *objective*, non-arbitrary source of law.[43] Many general principles that have been recognized by international tribunals through analogy to municipal law involve issues of procedure, evidence, and judicial process.[44]

Some scholars have advocated for a broader interpretation that "general principles of the law of civilized nations" may be broader than the rules that govern the judicial process and have substantive content.[45] The judicial philosophy of some ICJ judges demonstrates a willingness to include natural law principles within the realm of general principles, which results in a conception of general principles that is far more substantive and based in principles of morality and human dignity. Judge Tanaka takes this approach in his Dissenting Opinion in the *South West Africa* case. His account of the general principles is expansive and includes "the concept of human rights and

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[38] Brierly, Law of Nations: An Introduction to the Role of International Law in International Relations 64 (2014).

[39] Legal positivists, like the Soviet jurist Grigory Ivanovich Tunkin, regarded the general principles of law as reiterating fundamental precepts of international law that had already been set out elsewhere in treaty and customary law. *See generally* Chapter 7 of GRIGORY IVANOVICH TUNKIN, THEORY OF INTERNATIONAL LAW (1970).

[40] Shaw, pg. 73.

[41] Shaw, 74.

[42] Shaw, 74.

[43] On the drafting history of Art. 38 (1Xc) of the Statute of the International Court of Justice, see, e.g., van Hoof, note 13 above 136-139; Herezegh G, General Principles of Law and the International Legal Order 11-33 (1969).

[44] Shaw 74.

[45] *See, e.g.*, Philip Alston and Bruno Simma, *The Sources of Human Rights Law: Custom, Jus Cogens and General Principles*, 12 AUSTRALIAN YEARBOOK OF INTERNATIONAL LAW 82 (1989); Samantha Besson, *General Principles in International Law – Whose Principles?* (2011), available at Swiss Open Access Repository.

their protection"[46] because human rights are "an integral part of the constitutions of most civilized countries in the world."[47] On the topic of the methodology to be employed for assessing the content of the general principles, he noted that "recognition [of the general principles] is of a very elastic nature"[48] and that recognition by states of general principles that include human rights principles can be seen in the pronouncements of delegations before the U.N., but also in their customs and international conventions.[49] In *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judge Cançado Trindade described the general principles "as an indication of the *status conscientiae* of the members of the international community as a whole," and as principles that "ensu[e] from the idea of an objective justice, and guid[e] the interpretation and application of legal norms and rules." Both judges ultimately use a methodology for ascertaining these general principles that is similar to that used in other ICJ decisions that explore a more limited or non-substantive notion of the general principles, looking to a combination of domestic law, international conventions and international custom.[50]

Assessing the (il)legality of transatlantic chattel slavery based on general principles is preferable to assessing it in terms of customary international law, because customary international law requires an analysis of *state* practice. During the period relevant to this inquiry, the status of many of the polities that would be important to include in a legal analysis were not considered states—at least not from the Eurocentric international legal perspective. Many societies in West Africa and parts of the Islamic world would not constitute "states" in modern international legal terms. At what moment Russia became a state under international law is also difficult to discern;[51] but it had concrete laws regulating slavery for centuries.

2. The Writings of Prominent Jurists

Slavery has been historically justified by and through international law as expressed by Western jurists since at least the time of Aristotle. What is surprising to a modern reader is how little thinking about the justification for slavery changed over time, even as Europe embraced Christianity, reduced slavery and coerced labor within its borders, and embarked on the

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[46] *South West Africa* at 298.
[47] *South West Africa* at 299.
[48] *Ibid.*
[49] *Ibid* at 300.
[50] Yotova, *General Principles of Law Recognized by Civilized Nations*, 322.
[51] Whether what is now referred to as the Russian Federation constituted a state at the time the Grand Duchy of Moscow was formed in the 13th Century or only later after the emergence of tsardom in the sixteenth century is arguably open to debate.

transatlantic slave trade. Although the incidents, scope, and conditions underlying slavery transformed immensely from the period of antiquity to the early modern period, scholarly writing about it did not. Early modern European commentators on the law of nations (who were often also employed as jurists by monarchs) hardly seem to have registered the enormous expansion of the overseas slave societies. Just as their medieval predecessors did, early modern jurists continued to regard slavery as a fundamental, consensual element of the law of nations.

According to the Institutes of Justinian, a codification of Roman law, "Freedom is one's natural power of doing what one pleases, save insofar as it is ruled out by either coercion or law."[52] Slavery, under Roman law, is "a product of *jus gentium*, whereby someone against nature is made subject to the ownership of another."[53] The quintessential example of legitimate subjugation—which was seen as contrary but not repugnant to the laws of nature[54]—is captured in the context of a lawful war. The justification for this subjugation was that it was a mercy—the alternative would have been death. "Slaves (*servi*) are so called because commanders order captives to be sold and so spare (*servare*) rather than kill them." This justification for slavery would remain in operation for centuries. Paul Frédéric Gerard, writing six centuries after the Justinian Institutes were written, observed: "The victor, having the right to kill the vanquished has *a fortiori* the right to make him his property."[55]

Enslaving one's captives in the context of war had an important political logic. First, capture legitimately took place only where official hostilities occurred, and, by the laws of *jus gentium*, capture might occur on

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[52] "Libertas est naturalis facultas eius, quod cuique facere libet, nisi si quid vi, aut jure prohi betur. Servitus est constitutio juris gentium, qua quis dominio alieno contra naturam subiicitur. Servi ex eo appellati sunt, quod imperatores captivos vendere ac per hoc servare nec occidere solent."

D 1.5.4 (Florentinus, Institutes, bk 9), slightly amended version of translation in Alan Watson (trans.), The Digest of Justinian, 2 vols (University of Pennsylvania Press 1998).

[53] "D 1.5.4 (Florentinus, Institutes, bk 9), slightly amended version of translation in Alan Watson (trans.), The Digest of Justinian, 2 vols (University of Pennsylvania Press 1998)."

[54] According to the early modern Scottish jurist Andrew McDouall (1685–1760), "Slavery was introduced by the law and customs of nations. It is indeed contrary to the state of nature, by which all men were equal and free; but is not repugnant to the law of nature, which does not command men to live in their native freedom, nor forbid the preserving persons, at the expense of their liberty, whom it was lawful to kill." The law of nature during this time was seen to exist in harmony with *jus gentium*, even when it contradicted it. A. McDouall, Lord Bankton, An Institute of the Laws of Scotland in Civil Rights (Printed by R. Fleming, for A. Kincaid and A. Donaldson 1751–53) vol 1, 66–67 (I,ii,77), cited in JEAN ALLAIN, THE LEGAL UNDERSTANDING OF SLAVERY.

[55] PAUL FRÉDÉRIC GIRARD, MANUEL ÉLÉMENTAIRE DE DROIT ROMAIN 102–103 (1929).

both sides. Just as the Romans took captives in war, so they also might be taken captive.[56] This institution was also an encouragement to soldiers on the battlefield—it was better to fight to the death than to suffer the "civil death" of slavery. In societies that were frequently at war with one another, captives might also be traded or ransomed in an official negotiation. The reciprocity of the captive-taking may have lessened the permanence or abuses that might otherwise be associated with slave status. Later, Roman law would also come to permit the enslavement of the children of female slaves. This principle contradicted the rule that existed in Roman marriages, whereby the child followed the father's line of descent.[57]

European international law is rooted in Greek and Roman antiquity but is also in conversation with the Islamic Law of Nations, or *Siyar*, for which slavery was also fundamental.[58] Mohammed ibn al-Hasan al-Saybani codified the Siyar; this codification survives only partially until the present day. Still, it is clear that the *Siyar* distinguished between the territorial sphere in which Islam was the major religion and those in the so-called "Abode of War," which had yet to be incorporated into the *Pax Islamica*. Just as does the *jus gentium*, the *Siyar* specifically addresses conduct during war, including the taking of captives.[59]

According to *Sharia* law, there are only two valid means of enslavement—the capture in war of non-Muslims and slavery by birth.[60] These means of enslavement mirror those contemplated by the *jus gentium* in Roman law, with the caveat that Muslims did not enslave those of their same faith. During the millennium of conquest and expansion of Islam, slavery by capture was far more significant than slavery by birth.[61] In contrast with Roman law, *Sharia* law *only* permitted enslavement of a child if both parents were enslaved; the status of the father was also key. Law did not always translate to practice, however. The imposition of the "humanizing" influences of *Islam* in new territories was undermined by and "ever-widening search by Arab slavers for non-believing people," a practice that violated both the letter

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[56] JEAN ALLAIN, SLAVERY IN INTERNATIONAL LAW 16 (2013) [Hereinafter: SLAVERY IN INTERNATIONAL LAW].

[57] ALAN WATSON, ROMAN SLAVE LAW 8 (1987). It is worth noting that outside the realm of *jus gentium, jure civili* also permitted enslavement for certain crimes and recognized the slave status of children who had been sold into slavery because of poverty. W.W. BUCKLAND, A TEXT-BOOK OF ROMAN LAW: FROM AUGUSTUS TO JUSTINIAN 69–71 (1963).

[58] SLAVERY IN INTERNATIONAL LAW, *supra* note 56, at 18, citing Majid Khadduri, *The Islamic Law of Nations Shaybani's Siyar*, 1966.

[59] *Ibid*

[60] SLAVERY IN INTERNATIONAL LAW, *supra* note 56, at 18, citing Majid Khadduri, *The Islamic Law of Nations Shaybani's Siyar*, 1966.

[61] *Ibid.*

and the spirit of *Sharia*.[62]

European scholars in the medieval and early modern era echoed some of the elements that distinguished *Siyar* from Roman law. Giovanni de Legnano, a fourteenth century Professor of Canon Law at the University of Bologna, wrote that according to *jus gentium*, those captured in just wars can be enslaved, but this rule applies only to "enemy" States, "such as those of Muslim peoples."[63] Fellow Christians could not be enslaved. Therefore, in both the Christian and the Islamic realms, prisoners could be enslaved, but enslavement was forbidden for coreligionists.

The Age of Discovery presented another opportunity—and indeed an appeal—to European jurists to consider what circumstances could legitimize slavery. Christopher Columbus returned to his Spanish patrons with slaves in the form of tribute. In the Spanish-controlled Caribbean of the early sixteenth century, the native population was subjugated, and Spanish royal decrees allowed for the "reduction into captivity and the sale of the Caribs of the isles and of the mainland."[64] Francisco de Vitoria, a sixteenth-century Spanish theologian and jurist, was the first to provide a *jus gentium* justification for the enslavement of the native population outside of Europe. Because the Spanish had effectively invaded their territory, Vitoria had to elaborate an expanded notion of what constituted just war. According to Vitoria, *jus gentium* allowed Spaniards to "travel into the lands in question and sojourn there." If, however, the native population was hostile to the Spaniards, the Spaniards could make war on them and could impose the laws of war, including the enslavement of captives.[65] The Spanish Crown eventually distanced itself from this view,[66] preferring instead to incorporate the native population—which had begun to convert or be forcibly converted to Christianity—into the Spanish Empire. Spain had been granted permission by the Pope to settle the New World in order to evangelize and convert it. In

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[62] Bernard Freamon, "Slavery, Freedom and the Doctrine of Consensus in Islamic Jurisprudence", *Harvard Human Rights Journal*, Volume 11, 1998, [insert pincite].

[63] SLAVERY IN INTERNATIONAL LAW, *supra* note 56, at 20, citing Giovanni da Legnano, *De Bello, De Represaliis et De Duello, 1390*, 1927, pp. 269–270.

[64] SLAVERY IN INTERNATIONAL LAW, *supra* note 56, at 24, citing Ernest Nys, "Introduction", *in* FRANCISCI DE VITORIA, *DE INDIS ET DE IVRE BELLI REFLECTIONES* 85 (1917, originally published 1696.

[65] Francisco de Vitoria, *The First Reflecto of the Reverend Father, Brother Fransicus de Victoria on the Indians Lately Discovered*, in BROWN SCOTT, THE SPANISH ORIGINS OF INTERNATIONAL LAW: FRANCISCO DE VITORIA AND HIS LAW OF NATIONS, at Appendix A, pp. xiii-xiv (1934).

[66] *See, e.g.*, G.L. Huxley, "Aristotle, Las Casas and the American Indians", *Proceedings of the Royal Irish Academy*, Volume 80, 1980. Las Casas was an important figure in articulating the moral and legal wrongs of enslaving the native population in a manner that appealed to the Spanish Crown.

1542, the "New Laws" abolished slavery of the native population and ordered that:

> Neither by war nor by any other means, even if it be under the guise of rebellion, nor by barter, nor in any other way, shall any Indian whatsoever be made a slave, and we wish them to be treated as vassals of the Crown of Castile, for such they are.[67]

Although *jus gentium* allowed for the enslavement of captives, this rule had been all but abandoned in Europe, where Christianity reigned. Sixteenth century Italian jurist Alberico Gentili observed that "it is generally believed that in the wars of the Christians there was no slavery" and that therefore any enemies "may not be held captive perpetually." However, if Christians went to war against those of a different faith or against pagans and a person was captured, "he would remain a slave continually, even when the war was ended, if there is no provision about him in the terms of peace."[68]

Hugo Grotius, Dutch jurist and diplomat, wrote his *De iure bellis ac pacis* in 1625. Grotius, ever sensitive to the political exigencies of the moment, provided in *De iure bellis ac pacis* "ideological support for the institutions of slavery that was becoming important to the economies of the maritime colonial powers,"[69] of which the Netherlands was one. In contradistinction to many of the jurists who preceded him, who by and large sought to limit the scope of the institution of slavery, Grotius offers an *expanded* account of the grounds of legitimate slavery. Borrowing perhaps from Vitoria, he argues that not only are the captives in a just war eligible for enslavement, but also every person on enemy territory and their progeny.[70] In this, he provides what is essentially a justification for the slave trade beyond Europe. Ten years before Grotius picked up his pen, the Netherlands established a headquarters on the Gold Coast of Africa (in modern day Ghana), and slaves provided the main source of labor for the Dutch East India Company.

However much the justification of perpetual and widespread slavery he offered aligned with the actual practice of colonial maritime powers, Grotius was an outlier. Subsequent jurists would return to the narrower basis for eligibility for slavery—namely that slavery was a recourse for non-

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[67] HENRY WAGNER AND HELEN PARISH, THE LIFE AND WRITINGS OF BAROLOMÉ DE LAS CASAS, 114 (1967).
[68] ALBERICO GENTILI, DE IURE BELLI LIBRI TRES, *1612*, 328 (1933).
[69] SLAVERY IN INTERNATIONAL LAW, *supra* note 56, at 41.
[70] HUGO GROTIUS, DE JURE BELLIS AC PACIS LIBRI TRES, *1646*, 691 (1925).

Christian captives who had been captured in a just war.[71] Curiously, later writers often criticized the brutality of slavery and celebrated its disappearance from Northern Europe without a sense of hypocrisy or irony. Cornelius van Bynkershoek, a Dutch jurist, wanted to positively distinguish the Dutch from the Spanish, who used slaves in their territory. He wrote, "the Dutch do not use slaves… except in Asia, Africa and America."[72]

Examining the writings of the jurists at the time reveals widespread acceptance of slavery within international law, but strict and consistent limits on the eligibility for slave status. As detailed as the regimes regulating the enslaved were in French and British colonies (the particularities of colonial slave law will be examined in Section III), almost no attention was given to questions about how the enslaved came to be enslaved in the first place. Slave status, which attached to human chattel before they departed from Africa, was never questioned by the colonial slaveowners. There were no procedures in place for challenging it in the French and British colonies.

B. Eligibility for Slave Status

Societies often had strict rules about who could be a slave and how the status of slavery could befall someone; persons who were subject to coerced labor outside these conditions might have recourse to the law in seeking their freedom.[73] Eligibility criteria for slave status differed by time, geography, and society. A near universal criterion, however, was that of *otherness*: In general, criteria for slavery depended on being different than or behaving in ways that merited exclusion from the core group.[74] In most societies, eligibility for slave status was restricted to prisoners of war, debt peons, and criminals (although Islamic societies recognized only the first category as creating eligibility).

1. *Captives*

Capture in war has been a justification for slavery from classical

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[71] *See, e.g.*, SLAVERY IN INTERNATIONAL LAW, *supra* note 56, at 48-55, discussing the writings of Bynkershoek, Vattel, von Wolff, and other jurists who followed Grotius.

[72] CORNELIUS VAN BYNKERSHOEK, QUAESTIONUM JURIS PUBLICI LIBRI DUO, *1737*, 27-28 (1930).

[73] [Add examples here.]

[74] Slavery could also be seen as a punishment for crimes or misdeeds. Under Roman law, slavery might be imposed on captives of war, but also for drunkenness or personal indebtedness. See the *glossa ordinaria* to ad D. 1. C. 9, v. servitutes, cited by R.H. Helmholz, "The Law of Slavery and the European Ius Commune" in Allain.

times, and across societies in which it was practiced.[75] Until the late modern period, during which protections for the life and property of civilians were articulated and protected through multilateral treaties, victors enjoyed absolute power in conflict situations. On this logic, if a victor had the power to end a person's life, certainly they were permitted to enslave that person—trading a social death for a biological one.[76] Following a battle, adult males in a conquered population were often killed, while women and children were taken into custody and enslaved. In classical times, prisoners of war likely constituted the primary source of slaves, especially as the Roman Empire was expanding.[77] Islamic law also recognized the legitimacy of enslavement for those captured as a prisoner in a religiously motivated just war (*jihad*). European jurists who wrote about slavery similarly recognized the legitimacy of enslaving prisoners of war and other captives until at least the eighteenth century.

2. *Convicts*

Convicts were another source of enslaved labor across many societies. Depending on the crimes that precipitated slavery, the logic of enslaving convicts may have been similar to that of enslaving war captives—it was an alternative to being put to death. In Thomas More's *Utopia*, slavery was held out as a penalty for crimes that would otherwise carry the penalty of death.[78] In an example that is closer to life, King Philip III of Spain observed in a memorandum that modern and "ancient theologians, doctors of canon law, and jurists" recognized that those who "because of serious crimes have been condemned by their rulers may be held as legitimate slaves."[79] During the height of the Atlantic slave trade, Iberian empires often employed convicts as forced laborers, putting them to work, for instance, in the Havana harbor in the mid-sixteenth century.[80] Some convicts were employed in the unpleasant (and dangerous) task of working on slave ships. In Western Africa, many of the slaves eventually sold into the Atlantic slave trade had been convicted of crimes.[81] Some scholars suggest that as the Atlantic slave

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[75] ELTIS AND ENGERMAN, *supra* note 23, at 4.

[76] *Ibid.*

[77] *Ibid*.

[78] ROBIN BLACKBURN, THE MAKING OF NEW WORLD SLAVERY: FROM BAROQUE TO THE MODERN 1492-1800 58 (2010) [Hereinafter: BLACKBURN].

[79] BLACKBURN, *supra* note 78, at 177.

[80] CLARENCE-SMITH AND ELTIS, *supra* note 96, at 135.

[81] G. Ugo Nwokeji, *Slavery in Non-Islamic West Africa, 1420-1820*, *in* CAMBRIDGE WORLD HISTORY OF SLAVERY 97 (David Eltis & Stanley Engerman eds. 2011) [Hereinafter: NWOKEJI].

trade developed and grew, the sentence for more and more crimes (including relatively minor ones) became enslavement.[82]However, the use of convict labor or the enslavement was not seen as universally permissible. Islamic law forbade it—perhaps because it likewise forbade the enslavement of Muslims (which convicts might be).[83]

3. *Debt-Peons*

Debt bondage was another source of enslaved labor in certain societies, though Islamic law prohibited it. Debt bondage was distinct from other forms of coerced labor because it depended upon an initial agreement whereby a person sold herself into bondage in order to pay a debt or to secure a loan. This self-sale may have been for a limited period of time, but was sometimes infinitely renewable in a manner that made it effectively a lifelong condition In non-Islamic parts of West Africa during the modern period, for example, among the enslaved were debtors, or those whose families sold them out of economic necessity (during famine conditions, for example).[84] Debtors or their kin could sell a debtor in order to raise funds for the liquidation of those debts.[85] Some limits on the sale of debt peons existed for those that came to enslave them, however: Debt peons could usually not be sold beyond their natal society.[86]

In Russia, slavery could be enforced as a result of unpaid debt.[87] In the fifteenth century, social chaos and desperation created the institution of "limited-service contract slavery." Under this arrangement, a person (usually a male) who was in a financially desperate situation approached a person of means and asked him for a loan for a year. In exchange for the loan, the borrower agreed to work for the creditor in lieu of interest. If the borrower failed to repay the loan within a year's time, he became the permanent or "full" slave of the creditor. Full repayment within a year was uncommon, so

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[82] [Need citation: Cambridge World History of Slavery.]

[83] Bernard Freeman, Definitions and Conceptions of Slave Ownership in Islamic Law, in Allain Legality of Slavery.

[84] NWOKEJI, *supra* note 81, at 100-101. .

[85] *Ibid*.

[86] *Id* at 101 (describing how debt peons were usually not sold beyond West Africa into Atlantic slavery), and Cambridge World History of Slavery, Vol. 3, pg. 172 (describing how those enslaved due to debt in Southeast Asia could not be sold beyond their natal society). Presumably the logic here was that if fortunes changed, family members or kin groups could buy their relatives out of debt bondage—provided, of course, that they could locate them.

[87] Richard Hellie, *Russian Slavery and Serfdom, 1450-1804*, *in* CAMBRIDGE WORLD HISTORY OF SLAVERY 277 (David Eltis & Stanley Engerman eds. 2011) [Hereinafter: HELLIE].

this system created a source of slaves for those who were able to offer credit.[88] The number of limited-service slaves was further bolstered by the emergence of a crushing tax burden on all non-slaves in Russia (including serfs). Certain serfs may have sold themselves into slavery to avoid these taxes. Russian authorities, concerned with a shrinking tax base, did not decide to abolish slavery; indeed, slavery was widely seen as an important form of social welfare in a society where many lived close to or below subsistence level and masters were required to provide food and clothing to their slaves.[89] Instead, it was decided that slaves that entered slavery through a limited-service contract were to be freed when the owner died. Still, clever legal structures were created to avoid this requirement and to pass ownership of the enslaved person to heirs.[90] Even in cases when ownership was not transferred and the enslaved were manumitted, the freedmen frequently sold themselves back into limited-service contract slavery almost immediately.[91]

C. Slavery in Early Modern Societies

Slavery had different purposes in different societies, and these purposes in part determined how the enslaved were treated. Perhaps the most common purpose of slavery was to serve as a method of augmenting and sustaining the survival of the core (majority, enslaving) group. Such systems of slavery tend to be more "open," making provisions for the eventual entry into full membership of the core group.[92] This may happen within a single generation (in the Ottoman Empire, concubines who bore a child to their enslaver were often freed), or such full membership may be instead granted to the descendants of an enslaved person.[93] In Muslim parts of Africa, for example, there was a marked preference for women and children slaves, and the descendants of these enslaved people were often absorbed into extended kinship structures over generations.[94] Roman law, which informed the slave laws of the Spanish and Portuguese during the early modern period, also seemed to favor manumission.[95] As a result, procedures for manumission

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[88] *Ibid*.
[89] *Id.* at 281.
[90] *Id.* at 280.
[91] *Ibid*.
[92] ELTIS AND ENGERMAN, *supra* note 23, at 7.
[93] *Ibid.*
[94] Peabody, *Slavery, Freedom and the Law in the Atlantic World*, *supra* note 24, at 598.
[95] Manumission seems to have been relatively common in ancient Rome, even outside of situations in which blood was mixed (such as through concubinage or taking enslaved women as wives). A master could free his slaves with relatively few restrictions, and the children of freedmen had rights that were identical to the freeborn. *Id* at 600.

were similarly detailed in Spanish and Portuguese law, and Iberian New World colonies often had a sizeable mixed-race class of skilled laborers and property owners—descendants of enslaved people who had been accorded certain civil rights.

Another purpose that existed in the ancient world and had a handful of parallels in medieval or early modern Europe was the use of slave labor to achieve communal goals. In this system, the enslaved might be used to build or maintain public works, or to act as soldiers. The Janissaries of the Ottoman Empire—elite soldiers who became a power political force—fit into this category. A less politically formidable group of enslaved people in this category were the men employed in galleys and related physically taxing maritime tasks in southwestern Europe well into the eighteenth century. Sometimes working alongside convict labor, Muslim enslaved oarsmen were used by the Spanish during the Eighty Years' War with the Netherlands, which spanned the sixteenth and seventeenth centuries.[96] State-owned slaves also labored under difficult conditions in public works, such as mines or cleaning up after plagues. State-owned slaves were also often used as bargaining chips, held captive to be exchanged for enslaved Europeans who were being held in North Africa.[97] It is difficult to consider whether such enslaved persons' slave status was heritable, however, because of the nearly all-male nature of such coerced labor.

1. *Islamic Law*

Sharia law provided a comprehensive framework for defining slavery and the conditions through which people became eligible for slavery. Slaveholding and slave trading was widely practiced throughout the Middle East, the Indian Ocean and the Mediterranean world, and pre-dated Islam. Roman law, which contained provisions defining and regulating slavery, was in place in the Byzantine provinces, and the Sassanian Empire as well as law governing Jewish tribes made contributions to the legal culture surrounding slavery.[98] Customary law among Arab tribes contained well-developed rules on slavery and slave-trading.[99] The Quar'an, like the Bible, accepts slavery as part of social and political life.[100] Likely borrowing heavily from this

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[96] William G. Clarence-Smith and David Eltis, *White Servitude*, *in* CAMBRIDGE WORLD HISTORY OF SLAVERY 142 (David Eltis & Stanley Engerman eds. 2011) [Hereinafter: CLARENCE-SMITH AND ELTIS].

[97] *Id*. at 142-143.

[98] Freamon, 128.

[99] Freamon, 128.

[100] Freamon, 128.

established practice, the notion of slavery in Islamic jurisprudence was firmly rooted in property, but this notion was in tension with other aspects of that jurisprudence, which emphasized the humanity of the slave and encouraged manumission.[101]

Islamic law also changed the criteria for eligibility for slavery, prohibiting certain means of enslavement that seem to have been widely practiced beforehand. First, and perhaps most importantly, Islamic jurisprudence emphasized the importance and the desirability of emancipation. There were limits placed on the alienability of certain kinds of slaves, demonstrating that manumission was something worth striving for. Second, there was a prohibition on the enslavement of Muslims. Third, there were only two legally permissible bases for enslavement: capture as a prisoner in a religiously righteous war (*jihad*), or; birth to two lawfully enslaved parents. All other means of enslavement, including self-sale or sale by parents of a child, slavery as punishment for a crime, or slavery as a result of debt bondage were abolished.[102] Third, concubines, who were a significant proportion of the enslaved population, gave birth to free children (provided they were fathered by their owners) and were required to be emancipated upon the death of their owners.

The enslaved were coded as chattel in Islamic law. The Arabic text divided species of property into two classes. *Mal samit*, or "dumb property," was used in relation to inanimate things like goods or money. *Mal natik*, "speaking property," referred to livestock and enslaved people.[103] The first Arabic language dictionary, which was published two hundred years after the death of the Prophet Mohammad, describes ownership in terms of a *mulk* (possessory interest) that can exist in *khawal*, which connotes "chattels… especially consisting in livestock and slaves."[104] The concept of slaves as chattel, then, was bound up with the very notion of property.

Although the enslaved were coded as chattel, slaveholders in regions governed or at least influenced by Islamic law did not have full ownership rights over those they enslaved. Although Islamic jurists recognized ownership rights as applicable to property ("a legal relationship between a person and a thing that permits him, to the exclusion of others, to dispense

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[101] Freamon, Definitions and Conceptions of Slave Ownership in Islamic Law, 127. Allain.

[102] Freamon.

[103] Freamon, citing 'Mal' in The Encyclopaedia of Islam (new edn, 1986) VII, Fascicules 99–100.

[104] Freamon, citing Al-Khalil ibn Ahmed al-Farahidi, Kitab al-'Ayn (Abdul Al-Hamid Hindawi, ed, Beirut: Dar al-Kutub Al-almiyya, 2003) 453.

with [the thing] within the boundaries of the law")[105], the full slate of liberal ownership rights did not apply to enslaved people.

First, the Quar'an specifies that those who murder an enslaved person may be charged with homicide. A slaveholder did not have the right to determine whether those he possessed lived or died.[106] Secondly, free persons were permitted to marry enslaved persons (this was prohibited, for example, under Roman law), and for Muslims, marrying an enslaved Muslim was preferable to marrying a free non-Muslim.[107]

There were also rules about the alienability of certain enslaved persons laid out in the *Sunnah*,[108] a secondary source of Islamic custom. A concubine who had given birth to the child of her owner was considered *umm al-walad* and could not be sold. Similarly, a slave whose owner had promised him manumission upon the owner's death, a *mudabbar*, was treated like an *umm al-walad* slave and could not be sold. This restriction was subject only to the insolvency of the owner, which could result in a legitimate sale. Finally, the *mukatab* slave had made a contract for emancipation during the life of the owner by pledging to purchase her freedom. The *Sunnah* contains elaborate rules stipulating what is to be done if the contract is completed earlier than anticipated or if the owner died early. These principles, taken together and against a background whereby manumission was favored, demonstrate that a slaveowner's rights over those he enslaved were not total. The enslaved had the right to protections of their right to life, to seek marriage, and to be manumitted after the completion of certain requirements.[109]

2. *Ottoman Empire*

At its height, the Ottoman Empire ruled an expansive territory that spanned the western Mediterranean to the Persian Gulf and stretched from southern Poland to southern Sudan. For all its diversity, slavery was a universal institution in the Empire. Compared to the plantation slavery of the Atlantic, though, the enslaved were highly diversified and stratified—and constituted basic laborers, concubines, soldiers, and highly skilled and educated workers. Unfree domestic and agricultural laborers performed difficult, menial tasks. The elite enslaved, on the other hand, might serve the

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[105] Freamon, citing "Hallaq (n 2) 297, citing, at n 7, Ahmadnagari, Jami' al-Ulum III, 322."

[106] Freamon, citing to 2:178 of the Quar'an.

[107] Freamon.

[108] The *Sunnah* constitute the traditions and practices of the Prophet Mohammed, and after the Quar'an, are a secondary source of information about ideal Muslim practices and customs.

[109] Freamon.

sultan directly and occupy important positions in court or in the administration of the state. Such enslaved people sometimes enjoyed wealth and lived in relative luxury, but would have had no ability to pass on property to their children.[110]

The Ottoman Empire was governed by Mecelle-i Ahkam-i Adliye, a civil code that incorporated Islamic legal principles and was modeled on elements of French law. As set forth in the previous Subsection, Islamic law favored emancipation through manumission. There were various pathways for the enslaved to achieve liberty, including after long service. In Ottoman practice, this usually meant seven to ten years—although this custom was not observed by all slaveholders.[111] Also in accordance with Islamic law, women who were enslaved could be absorbed into the majority free society through concubinage. Concubines who became pregnant could not be sold and gave birth to free children.[112] At the same time, the enslaved were not purposefully bred to produce enslaved offspring and create a steady supply of slaves over time.[113] These practices, in aggregate, created supply challenges to those seeking enslaved labor. Enslaved labor was actively sought until the demise of the Empire in the early Twentieth Century.[114]

Although this view has begun to be challenged or nuanced by some scholars,[115] the fact that slavery existed longer in the Ottoman Empire than in many European societies drew European criticism. In response, the Ottomans argued that slavery in the Empire was much milder than transatlantic chattel slavery because the nature of the work was less extreme, and most or many slaves had the opportunity to integrate into Ottoman society through marriage or manumission. The enslaved, it was argued, were treated generally well and regarded as members of the extended kin group.[116]

3. Non-Islamic West Africa

Slavery and other forms of coerced or servile labor predate

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[110] Ehud R. Toledano, *Enslavement in the Ottoman Empire in the Early Modern Period*, *in* CAMBRIDGE WORLD HISTORY OF SLAVERY 28 (David Eltis & Stanley Engerman eds. 2011) [Hereinafter: TOLEDANO].

[111] *Id.* at 29.

[112] *Ibid*.

[113] *Ibid*.

[114] *Id.* at 30.

[115] *See, e.g.*, Madeline C. Zilfi, "Servants, Slaves, and the Domestic Order in the Ottoman Middle East," *Hawwa*, 2 (2004): 1–33. The author rightly points out that as laudable as Islamic-Ottoman manumission practices were, "they helped guarantee a supply of cheap labor in the form of ex-slaves," affecting mostly women (8).

[116] TOLEDANO, *supra* note 110, at 30.

Europeans' fifteenth century arrival in Western Africa via the Atlantic Ocean. Some scholars[117] have argued that the institution of slavery was extensive in West Africa and that it shaped the nature and extent of the transatlantic trade. The work of economic historians,[118] however, suggests that while the interaction of overlapping slave markets had implications for slavery in both the Atlantic and in West Africa, the slavery prior to European arrival was not extensive in most of the region. The Atlantic slave trade led to an intensification and spread of slavery in West Africa and loosened rules around eligibility for slavery.[119] These changes ultimately exposed more people to the Atlantic trade and had the secondary effect of expanding the slaveholding practices of West African rulers who came to depend more on slave labor to produce goods for trade with Europeans.

The arrival of the Atlantic slave trade in West Africa created two salient categories of enslaved people: those destined for trade, and those who would remain in the region. Often, the means by which a person became enslaved in the first place determined what category they ended up in.[120] Sale into the Atlantic slave trade destined a captive to a far more brutal and uncertain life and cut them off irrevocably from all kin networks. It was considered a form of punishment.[121] People captured in warfare and raiding would have been especially prevalent among captives bound to be shipped overseas.[122] The same was true of adult males who had been convicted of a crime and sentenced to enslavement, or enslaved for political reasons.[123] Indigenous slaveholders, by contrast, preferred to take the enslaved from

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[117] *See, e.g.,* JOHN K. THORNTON, AFRICA AND AFRICANS IN THE MAKING OF THE ATLANTIC WORLD, 1400-1680 (2nd ed. 1992).

[118] *See, e.g.*, Basil Davidson, The African Slave Trade (1988), and JOSEPH INIKORI AND STANLEY ENGERMAN (EDS.), THE ATLANTIC SLAVE TRADE: EFFECTS ON ECONOMIES, SOCIETIES, AND PEOPLES IN AFRICA, THE AMERICAS, AND EUROPE (1992).

[119] For a disavowal of the notion that widespread slave-sustaining markets existed in West Africa before the nineteenth century, *see generally* Ugo Nwokeji, Slavery in Non-Islamic West Africa, 1420-1820, in CAMBRIDGE WORLD HISTORY OF SLAVERY 81 (David Eltis & Stanley Engerman eds. 2011) [Hereinafter: NWOKEJI].

[120] NWOKEJI, 100.

[121] Nwokeji, 100.

[122] NWOKEJI, 98.

[123] *Id*, at 100. The argument Nwokeji offers for this notion draws on the work of Joseph Inikori. Most captives from war or raiding were women and children, while men tended to be killed in battle or flee. Women were preferred as slaves among indigenous communities, but European traders preferred men. Male slaves, therefore, were often taken from among convicts or from the ranks of enslaved brought to the region through the trans-Saharan trade, because the Islamic societies preferred female slaves as well. There may have been a surplus of men in the groups of enslaved who came to the region from the Trans-Saharan trade. *See* Joseph Inikori, *Export versus Domestic Demand: The Determinants of Sex Ratios in the Transatlantic Slave Trade*, 14 RESEARCH IN ECONOMIC HISTORY 117 (1992).

among the people sold by their families on the basis of economic necessity. Given religious and legal impediments to selling "insiders" into slavery, the supply of slaves from this method was far more modest; coastal people sold slaves only in times of "extreme want and famine,"[124] and some parents sold their children to satisfy outstanding debts. People enslaved through these methods were seen as less dangerous and perhaps more likely to be cooperative than those who had been taken captive or who had been convicted of a crime. For the purposes of conducting an analysis of the general principles of law regulating slavery, this Subsection will focus on rules governing the enslaved in West Africa—those in the second of the two categories distinguished above.

It is difficult to generalize about the treatment of slaves in West Africa, given the expansive area of the region, and the many polities and economies that it was home to. In general, however, Western African societies, like their counterparts in the Muslim world, had an absorptive property vis-à-vis their enslaved. This distinguished them from New World slave societies, in which the enslaved status was based on a system of near-total racial exclusion and domination. There were many paths to manumission in West African slave societies. It seems to be a near universal rule that enslaved women could marry freeborn men and be manumitted.[125] In some societies, a woman who gave birth to the child of a man who enslaved her would become free, as would her children—whether or not she had married him. Ransom was also a means of manumission. An enslaved person might be ransomed by his kin if they had the means and the interest to do so. The enslaved could also ransom themselves; this prospect was made more plausible by the fact that in many societies, the enslaved were allowed to engage in some level of independent economic activity, including in the slave trade itself. In some societies, slaves were permitted to work for themselves on specific days each week, and to at least possess property. For certain individuals, this allowed for self-ransoming, although this path was mostly restricted to men. The children of the enslaved were often absorbed into the broader kin network of the enslaver, gradually becoming nominal members of the family and eschewing their slave status.[126]

There were several jural conventions that limited the rights of slaveholders vis-à-vis the enslaved. Slaveholders had a general responsibility to protect the enslaved from outsider attacks or influences, although slaveholders' ability to provide this protection increased with increased social

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[124] Nwokeji, 100, quoting an account from a British Captain William Snelgrave, who travelled frequently to West Africa during the early 18th century.

[125] Nwokeji, 105.

[126] Nwokeji, 95.

status. Slaveholders in agrarian societies generally were required to allow their slaves some land to provide for their subsistence; in other economies, slaves might be given some leeway to engage in economic activities that would make them self-sufficient and free the master from obligations to provide them with provisions. Slaves were also protected from extreme or brutal forms of physical violence. Sometimes these constraints on violence were informed by religious beliefs or taboos.[127] Some enslaved people enjoyed privileges that are difficult—from an Atlantic perspective—to square with the status of slave at all. In parts of Senegambia, the *tyeddo* were employed as warriors and administrators to the rulers. The *tyeddo* participated in the slave trade as merchants and represented the aristocratic class in trade with the Europeans, could pocket some of the revenue from the slave trade, and were exempt from taxes.[128] Slaves in the Bight of Biafra could, under certain circumstances, even inherit property of their masters upon death.[129]

4. *Russia*

Perhaps surprisingly for modern readers, the institution of slavery in Russia preceded that of serfdom. Serfs (peasants tied to the land and generally not permitted to travel) were not a social organizational unit until the modern era. Medieval Russia, with its vast, empty lands, could not manage to force peasants into serfdom *en masse*. The slash-and-burn forest-clearing techniques being used at the time meant that many peasants had to farm a different site at approximately three-year intervals. The peasants who engaged in such agricultural work were used to picking up and moving and were therefore difficult to bind to the land.[130]

Slavery, by contrast, was an ancient institution, practiced by the Slavs even before Russia was settled.[131] Slavery was regulated by the Old Russian Law Code, *Russkaya Pravda*, which was compiled beginning in 1016 and was followed by a subsequent code, the *Sudebnik*, in 1550.[132] Captivity of outsiders seems to be the most common source of slaves, but slavery could also result from the non-payment of debt.[133]

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[127] The Songhay-Zarma people of the Upper Niger operated under the "threat of magical punishment." They did not mistreat their slaves because they believed them to have magical powers. Nwokeji, 102.

[128] Nwokeji, 95.

[129] Nwokeji, 102.

[130] HELLIE, *supra* note 87, at 276.

[131] *Id*. at 277.

[132] *Ibid*.

[133] *Ibid*.

Beginning in the fifteenth century, the phenomenon of what historian Richard Hellie translates as "limited-service contract slavery" evolved, whereby an impoverished person (usually a man) would seek a loan for the period of a year. In exchange for the loan, the borrower would work for the creditor in lieu of paying interest. If the borrower failed to pay back the amount of the loan within a year, he became the permanent "full" slave of the creditor.[134] If he married, his wife would also be burdened with slave status. Their offspring would also have the status of enslaved persons. There were no provisions for manumission.[135] The willingness of free persons to sell themselves into limited-service contracts increased as the tax burden on free persons did; serfs were also liable for taxes. In times of famine, the duties of a slaveholder to feed and clothe his slaves also became attractive. Finally, cavalrymen also sought out contract slavery as a way of escaping their lifelong service burden.[136]

Limited-service contract slavery continued to thrive from its emergence until the first half of the seventeenth century.[137] It was not rhetoric or changing mores that led to a decrease in the use or popularity of this institution, but government interference. In the 1630s, the government established a price of two rubles for every limited term contract slave (payable by the masters), which was soon increased to three rubles. Would-be slaveowners found this price too steep, with the result that those who sought to sell themselves into slavery were increasingly unable to do so.[138]

The fact that impoverished freemen and cavalrymen were so willing to sell themselves into slavery is all but inconceivable to readers more familiar with the kind of slavery that existed in the Atlantic. In Russia's case, this was a testament to the debased conditions in which impoverished free people lived, the frequent threat of famine, and the significant tax and military burdens heaped on free people from the central government. The difference in the living standards and life experiences of poor peasants and the enslaved was insignificant; and the institution of slavery, which deprived the enslaved of the rights of citizenship, also spared the enslaved from its increasingly heavy duties.[139]

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[134] *Id.* at 279.
[135] *Ibid.*
[136] *Id.* at 282.
[137] *Ibid.*
[138] *Ibid.*
[139] *See generally*, HELLIE, *supra* note 130.

5. *Iberian Empires*

Spain and Portugal, the two powers most responsible for the initial European discovery, conquest, and settlement of the Americas, were also the first European powers to bring slavery to the New World (where it already existed in many pre-Colombian societies, although in different forms). Slavery remained an important institution on the Iberian peninsula since ancient times and was first regulated by the Roman Code and then, under Muslim rule of Al-Andalus, shaped by Islamic law. The institution of slavery was, as Robin Blackburn put it, "part of the institutional repertoire of the Iberian powers."[140]

The most significant legal code that came to regulate slavery in the Iberian Peninsula and its eventual Atlantic Empire originated in the kingdom of Castile.[141] During the Christian Reconquest (*Reconquista*), the Castilian king Alphonso X promulgated a set of laws that was heavily modeled on the Roman Justinian Code.[142] These laws were known as the *Siete Partidas*, and they would come to form the backbone of Spanish private law—which included slave law—for five hundred years. The *Siete Partidas* would come to be supplemented by additional laws promulgated specifically for the Atlantic colonies. The 1512 Law of Burgos, for example, prohibited the enslavement of Indians in Spanish American territories (although it regulated nearly every aspect of Indian group life under the pretext of assimilating and Christianizing the native population).[143] The deliberations that preceded the promulgation of the Law of Burgos forced the rearticulation of the formal basis of Spain's purported right to conquer and rule in the Indies—namely, the 1493 Papal Bull, which tied the legitimacy of the Spanish Crown's title to a Christianizing mission.[144]

After the 1512 Law of Burgos prohibited the enslavement of the native population, the aspects of the legal code that regulated slavery came to be applied to Africans. *Las Siete Partidas* was framed within Christian doctrine and provided the enslaved a modest bundle of rights. The *Siete Partidas* included provisions for marriage (including marriage between slaves and free persons, and including marriage that was not supported by or even consented to by the enslaver, provided service continued).[145] Enslaved

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[140] BLACKBURN, *supra* note 78, at 49.

[141] Peabody, *Slavery, Freedom and the Law in the Atlantic World*, *supra* note 24, at 600.

[142] *Ibid.*

[143] ROBERT WILLIAMS, THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT 88 (1993) [Hereinafter: WILLIAMS].

[144] *Id.*, at 88-89.

[145] FRANK TANNENBAUM, SLAVE AND CITIZEN 49 (1947) [Hereinafter: TANNENBAUM].

persons who were married could not be sold into separation.[146] Enslavers were prohibited from killing and injuring their slaves, unless they had received express authorization from a judge, and they were prohibited from abusing and starving their slaves.[147] Enslaved people who suffered prohibited abuse or injury could make a formal complaint to a judge, and, if their allegations were verified, the enslaved person could be sold away from their enslaver.[148] An enslaver who killed his slave could be prosecuted for homicide.[149]

The Siete Partidas included numerous and detailed provisions on the conditions under which manumission could or must occur.[150] The enslaved had to be manumitted by their enslavers in person, but the act of manumission could be performed in a variety of contexts (it did not, for instance, have to be witnessed by a judge or performed in a church).[151] Manumission was often a contractual affair, generally done for a price to be paid by the enslaved to the enslaver, but the price had to be reasonable and could be fixed by a local judge.[152] There were other conditions that required manumission even without payment. For instance, Jewish or Muslims slaves could be manumitted upon conversion to Christianity. Enslaved persons could also be manumitted for reporting certain crimes.[153] A slave could also be manumitted if he became a cleric—although only with the consent of the enslaver—or, if the enslaver did not consent, if the slave-cum-cleric put another enslaved person in his place.[154]

The enslaved also had access to courts.[155] A slave could appeal to the court to secure manumission that had been provided in the enslaver's will and testament if the document had been hidden. A slave could also appeal to the court if a third party had made a payment to secure his freedom but that money had been fraudulently taken or the manumission had not been effectuated according to the prior agreement.[156] These were effectively contract enforcement actions; the detail of the *Siete Partidas* on these matters demonstrates that manumission was common, that it was commonly

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[146] *Ibid.*
[147] *Ibid.*
[148] *Ibid.*
[149] *Id.*, at 51.
[150] *Id.*, at 50.
[151] *Ibid.*
[152] *Ibid.*
[153] These included the rape of a virgin, counterfeiting of money, treason or disloyalty against the King, or the murder of the enslaver. TANNENBAUM, *supra* note 145, at 50.
[154] *Ibid.*
[155] *Id.*, at 51.
[156] TANNENBAUM, *supra* note 145, at 51.

effectuated by contract, and that the enslaved had standing to make contract claims in Spanish courts. Freemen who were held as slaves could argue for their free status themselves or through a representative, and relatives of the free person unjustly held in bondage might be heard as witnesses.[157] The enslaved could also he heard as witnesses—even against their masters—if their masters were accused of grave crimes.

The *Siete Partidas,* which was used to govern the African slaves in the New World, was eventually replaced by a new body of law in 1789 that was specific to the Atlantic, but the new code, as acknowledged in its preamble, was merely a summary of the more ancient code.[158] In contrast to the British and French slave codes that came to govern their respective New World colonies, Spanish slave law was influenced by Christian doctrines of equality and kept the ancient gates to manumission open, even in the New World. Indeed, the body of law that reigned in Spanish and Portuguese America "facilitated manumission, the tax-gatherer did not oppose it, and the church ranked it among the works singularly agreeable to God."[159]

6. *The* Free Soil *Principle in Western Europe*

When people in bondage elsewhere crossed over into parts of northwestern Europe during the medieval or early modern period, they were frequently freed under local law. The historian Susan Peabody has described this phenomenon as the "free soil principle."[160] By the sixteenth century at the latest, slavery had been abolished in most of northwestern Europe, and even the coerced labor that characterized serfdom had largely yielded to a contractual system of labor, in which labor was consciously traded for protection, wages, or access to land resources.[161] Peabody emphasizes, however, that "the historical trajectory of the free soil principle was neither consistent nor uniformly progressive in its effects." It was repealed and reinstated, limited or expanded, advanced or contested in relation to specific historical contexts and according to the interests and priorities of specific historical actors.[162] The Subsections that follow will examine elements of this

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[157] *Ibid.*

[158] *Id.,* at 53.

[159] *Ibid.*

[160] *See, e.g*., "Slavery, Freedom, Statehood and the Law in the Atlantic World, 1700–1888', in Democracy and Culture in the Transatlantic World: Third Interdisciplinary Conference, October 2004, The Maastricht Center for Transatlantic Studies, Maastricht, The Netherlands (Växjö, Sweden: Växjö University, 2005)."

[161] SEYMOUR DRESCHER, ABOLITION: A HISTORY OF SLAVERY AND ANTISLAVERY 22 (1ST ED. 2009) [Hereinafter: DRESCHER].

[162] Sue Peabody and Keila Grinberg, *Free Soil: The Generation and Circulation of an*

context in considerably more detail. Relevant now, however, is the fact that in the parts of Europe that would arguably come to play the most significant role in the transatlantic slave trade, a strong presumption of personal rights had taken hold in the metropole,[163] where slavery was no longer practiced.

a. France

As early as 1315, Louis X had declared that "following natural law, all men are born free" and that those held in servitude who step onto French territory could arrange for their freedom under "good and suitable conditions."[164] This "free soil" mythology was reinforced over the course of the early modern period, eventually coming to be defended as a fundamental principle of French law.[165] The arena for its reinforcement were tribunals throughout France. In 1402, a magistrate judge in Toulouse ruled that four slaves who had escaped to that city should be freed based on the "free air" principle that reigned there.[166] More than 150 years later, the *Parlement* (high appeals court) of Bordeaux invoked the principle to seize and free enslaved people brought to the port city by a Norman merchant.[167]

The free-soil principle began to be invoked with increasing frequency and fervor during the eighteenth and nineteenth centuries in France, when slaves who had been brought to France from the Americas, Africa and India invoked it to seek their freedom. Lawyers who represented these enslaved persons invoked the deep—and deeply *French*—origins of these principles to argue that they should be granted freedom. In addition to invoking the edict of Louis X that established the free soil principle and drawing on the decisions of late medieval courts and early modern Parlements that reinforced

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Atlantic Legal Principle, 32 SLAVERY & ABOLITION 331 (2011).

[163] DRESCHER, *supra* note 161, at 22.

[164] Sue Peabody, *Race Slavery, and the Law in Early Modern France*, 56:3 THE HISTORIAN 501, 502 (1994) [Hereinafter: *Race, Slavery and the Law in Early Modern France*].

[165] Sue Peabody, *An Alternative Genealogy of the Origins of French Free Soil: Medieval Toulouse*, 32 SLAVERY & ABOLITION 341, 362 (2011) [Hereinafter: *An Alternative Genealogy of the Origins of French Free Soil: Medieval Toulouse*].

[166] *Race, Slavery and the Law in Early Modern France*, *supra* note 164, at 502. Peabody writes separately in *An Alternative Genealogy of the Origins of French Free Soil: Medieval Toulouse*, *supra* note 165, about how the "free air" principle was articulated in Toulouse, which bordered the county of Rousillon, a formerly Catalan County in which people were engaged in slave-holding.

[167] *Race, Slavery and the Law in Early Modern France*, *supra* note 164, at 502. Peabody describes how this case came to be cited in a number of eighteenth-century cases, after the free-soil principle had come to a head following France's involvement in the slave trade.

it, these lawyers also invoked the sixteenth-century rivalry between France and Spain, which was given expression in part by the public manumission of people enslaved by Spanish authorities being freed upon arrival in France.[168] The lawyers were keen to demonstrate that the free soil tradition had arisen within the French kingdom and had been articulated and endorsed by the King, who was seen even during the modern constitutional era to be the ultimate source of legitimate law.[169]

b. Britain

Local "free soil" laws developed as a patchwork across England beginning already in the medieval era. A legal text from 1188 seems to invoke the free soil principle in describing how one might prove that he is not—or no longer—an unfree laborer (a *villein*): "If any villein resides undisturbed for a year and a day in any privileged town, to the point that he is accepted into its community (that is, guild), he is thereby freed from villeinage."[170] By the fifteenth century, London authorities defended long-time residents against accusations of a servile status by asserting that it had been customary since the Norman Conquest for any slave who resided in the city for a year and a day without being reclaimed by his master to have the privilege of remaining as a free person without a challenge.[171] Although local lords' invocation of the free soil principle was motivated less by high-minded faithfulness to notions of political liberty and more by a desire to attract labor and inhabitants, it spread across England during the medieval era and grew in popularity.[172]

Not only did the social upheavals of the early modern era lead to a competition between agricultural producers in England, it led to competition among city states and kingdoms across Europe that wanted to attract free commoners to their polities. Free people preferred to live with other free

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[168] *An Alternative Genealogy of the Origins of French Free Soil: Medieval Toulouse*, *supra* note 165, at 342.

[169] *Id.*, at 342-43.

[170] Stephen Alsford, "Urban Safe Havens for the Unfree in Medieval England: A Reconsideration, "

Slavery & Abolition, volume 32, issue 3 (September 2011) pp. 363–375, citing his own translation of D.G. Hall, ed., The Treatise on the Laws and Customs of the Realm of England Commonly Called Glanvill (London: Thomas Nelson, 1965), 58.

[171] Stephen Alsford, "Urban Safe Havens for the Unfree in Medieval England: A Reconsideration, "

Slavery & Abolition, volume 32, issue 3 (September 2011) pp. 363–375.

[172] *See generally* Stephen Alsford, "Urban Safe Havens for the Unfree in Medieval England: A Reconsideration, "

Slavery & Abolition, volume 32, issue 3 (September 2011) pp. 363–375.

people, not with masters and slaves.[173] By the same token, as the sovereign state emerged as a political reality in the seventeenth century, the notion of a slaveholder—as someone who held complete dominion over another person within the sovereign territory—became repugnant to the sovereign state. Slaveholders, because they claimed absolute power over others, were poor subjects. It was increasingly the *State*, and not the lord, who determined and guaranteed the rights of its subjects. Meanwhile, competition between these nascent states fueled narratives of nationhood and notions of civil liberty that the institution of slavery could only undermine. These new states "found slaveholder claims in Europe derogatory to their own power."[174] This doctrine was notably and memorably expressed in *Cartwright's case* in 1569. In that case, a man named Cartwright attempted to bring an enslaved person from Russia but was prevented from holding him in bondage because "England was too pure an air for slaves to breath[e] in."[175]

The free soil principle soon spread from cities or towns that wanted to encourage migration to the countryside.[176] By the middle of the sixteenth century, the villeins in England had become "so few that it is almost not worth the speaking."[177] In 1593, one observer wrote of free soil principle without naming it, claiming that "such is the privilege of our countrie by the especially grace of God, and bountie of our princes, that if any come hither from other realms, so soone as they set foot on land they become so free of condition as their masters, whereby all note of servile bondage is utterlie removed from them."[178] In Medieval England, it was not difficult to imagine a person as free in one place and unfree in another. Freedom was not a universal status that attached to a person anywhere she went; it was place dependent.

III. Modern Ownership Rights and New World Slavery

As oppressive and brutal as the institution of slavery was everywhere it existed, it was more so in French and especially in English colonies. The fact that the French and English metropole had so long had "free soil" meant that there was no legal or customary system in place to regulate slavery. French and English colonists and chartered companies, which began slave

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[173] BLACKBURN, *supra* note 78, at 60.

[174] BLACKBURN, *supra* note 78, at 61.

[175] https://legalhistorymiscellany.com/2018/10/10/slavery-and-cartwrights-case-before-somerset citing John Rushworth, Historical Collections.

[176] DRESCHER, *supra* note 161, at 23.

[177] DRESCHER, *supra* note 161, at 22, quoting Sir Thomas Smith.

[178] DRESCHER, *supra* note 161, at 22, citing a quote from William Harrison in Origins of Modern Freedom, Davis, ed. 13

trading and slaveholding in a near-complete legal vacuum, were unconstrained by any ancient custom regarding the treatment of slaves. They were equally unconstrained (or at least they perceived themselves as such) by the free soil principle that reigned in their home countries. The free soil principle was, by its very nature and evolution, not universal; it was a fundamentally geographic principle. Englishmen and Frenchmen in the colonies remained subjects of the Crown and were thus the beneficiaries of many of the rights that attended that status. African coerced laborers were treated essentially as legal aliens and fell completely outside the protections offered by the European sovereigns. This meant that French and English Crowns—for generations at least—had little or even nothing to say about how slavery should be regulated or how the slave trade should be organized and carried out. It was the colonists, therefore, who had often invested their own resources and had taken great personal risks to be involved in the colonial project and were presented with a voracious demand for colonial products back home—had almost complete discretion over how slavery was regulated in the New World.

Unsurprisingly, the colonial slaveholder classes chose legal structures that best suited them. They opted to code the enslaved as chattel and to endow slaveholders with ownership rights that were total or near total. These decisions about how the enslaved were coded in colonial law inevitably clashed with the law of the metropole, where the free soil principle reigned. In both England and France, slavery had been all but abolished centuries before and there was increasing pressure on the Crown to respect individual property rights and refrain from excessive taxation. This led to a period in both countries in which the enslaved might come to the metropole and be freed. However, the increasing power and wealth of the slaveholding class and the merchants who underwrote it tempered this phenomenon. Eventually the decision of colonial slaveholders to code the enslaved as chattel over whom they had complete ownership was underwritten by metropolitan law, even as Courts in both France and Britain held their respective noses.

A. British Case Study

British colonies were ruled under royal prerogative, which put them formally outside the reach of common law or statutory law. The Crown delegated a significant amount of legal discretion to colonial governments, who had broad latitude to make laws so long as they were not repugnant to English law. Governance by royal prerogative allowed for a "private ordering" of colonial life, whereby delegated power to planters could be exercised in an arbitrary and authoritarian manner vis-a-vis outsiders, such as indentured servants and the enslaved people, who were not eligible for the

protections that they would have enjoyed in the metropole. It also gave discretion to the colonial slaveholding class to independently enact laws to regulate slavery that gave them unrestricted ownership rights over the enslaved, who had no legal protections—even from murder.

Until the Glorious Revolution tempered royal power in a lasting way, the British Crown was especially interested in the prosperity of the colonies because they represented an attractive source of tax revenue. For most of the seventeenth century, the Crown installed sycophantic judges on the King's Bench whose opinions reinforced the chattel status of enslaved people in the colonies and reaffirmed broad ownership rights of slaveholders. After the Glorious Revolution, the decisions of the King's Bench reflected more respect for the individual required by English law, including the free soil principle. Under Chief Justice Holt, the chattel status of the enslaved was thrown into question, even in the colonies. This sent shock waves through the systems of credit and lending that undergirded the colonial slave economies.

After Holt left the King's Bench and merchants' interests became more firmly entrenched in Parliament as the colonies became major engines of wealth generation, the chattel status and unfettered ownership rights of slaveholders was reaffirmed in metropolitan law. The Debt Recovery Act, which was issued by the Parliament and applied to the colonies, affirmed the status of the enslaved as chattel that could be sold to recover debts. While the Recovery Act limited the property rights of slaveholders, it affirmed the rights of the creditors. The King's Bench also revived pre-Glorious Revolution precedent to harmonize the free soil principle in metropolitan law with the interests of colonial slaveholders to have security in their human property.

1. British Colonial Law

Until the nineteenth century, most legal issues that arose in England were governed by the unwritten common law. The legitimacy of the common law was based on claims of its immemoriality and its unbroken connection with the Anglo-Saxon period.[179] English jurists were eager to distinguish common law from Continental law with the argument that common law was particular and superior, and efforts to codify the law in the early modern

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[179] Ken MacMillan, *English Law and its Expansion*, *in* OXFORD HANDBOOK OF EUROPEAN LEGAL HISTORY 830 (Heikki Pihlajamäki, Markus D. Dubber, & Mark Godfrey eds., 2018) [Hereinafter: MacMillan]. Scholars such as Edward Coke and Sir Matthew Hale would come to emphasize the notions of immemoriality, custom, and continuity in the common law.

period were rejected on that basis.[180] Common law evolved at home; it had limited applicability and efficacy in the wider empire. As England expanded its influence and began the process of colonization, common law came to be supplemented by other forms of law, including Roman law.[181]

The apex of the English legal system in the early modern era was the Crown, which ruled by divine right. The Crown possessed prerogative rights that allowed him or her to exercise a full range of authority in certain areas. The common law was a bulwark against the Crown's power—but only domestically, and only with respect to certain areas of the law. The Parliament also served as a check on royal power, but its central function was to approve taxation and legislation, and at times its agenda and operations were beholden to the agenda of the King.[182] While major political changes in England cemented the role of the Parliament in lawmaking and the access of Englishmen to common law, the colonies were governed largely by royal prerogative. Prerogative powers were at their height outside of England—in Ireland, and in Scotland, but most of all in the broader empire.[183] Conquered Christian realms (such as Ireland) could continue to use elements of their own laws and constitutions because, by virtue of their Christian status, those laws were deemed to be reasonable (although the Crown reserved the right to change them at its own discretion).[184] In the "infidel realms," however, which included those in the New World, it was up to the conqueror (here, the Crown) to determine the laws under which the territory would be governed.[185] In this way, the governance structure in the colonies looked in many ways like medieval England, when royal power was unchecked by Parliament and notions of individual rights and was practically curtailed only by overlapping powers of local lords.

English colonial policy delegated law-making authority from the King directly to local colonial assemblies.[186] Company charters were issued by the King to create colonial settlements and permitted the colonists to "abrogate, revoke, or change" laws "as they in their good discretion, shall think to be fittest for the good of the inhabitants there" and to "correct, punish,

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[180] *Id.*, at 831.

[181] *Ibid.*

[182] This was especially true in the Tudor and Stuart periods. *Ibid.*

[183] Sir Edward Coke, an English jurist, wrote that "the common law meddles with nothing that is done beyond the seas." *Id.*, at 848, citing Daniel Hulsebosch, 'The Ancient Constitution and the Expanding Empire: Sir Edward Coke's British Jurisprudence' (2003) 21 Law and History Review 439.

[184] *Ibid.*

[185] *Ibid.*

[186] Thomas D. Morris, pg. 38.

pardon, govern, and rule all such the subjects of us."[187] In creating these new local legal systems, colonists could draw on common law, canon law, natural law, civil law, or other equitable laws, and at times incorporated aspects of indigenous laws.[188] In this way, colonists had substantial legal independence, provided only that laws be always "consonant to reason, and not be repugnant or contrary, but as near as may be conveniently agreeable to the laws… [of] England."[189]

The King had an outsized interest in the success of the colonies and the prosperity of the colonists because they represented a revenue source for the British Crown. Merchandise that had flowed to or from England on sea-faring ships were "goods of another nature" than property that was based in England, which was subject to common law.[190] Merchandise traveling to or from foreign markets was subject to regulation (and tax) by the Crown, because the King was also "Lord of the Sea."[191]

The dominance of the royal prerogative outside England impacted how the colonies were governed. English law *could be* imposed in conquered territories, but only at the pleasure of the King.[192] The King could also decide to impose elements of common law or statutory law selectively, or to rule the territories as a feudal sovereign, through a grantee, or even to permit the pre-Conquest rulers to remain (as sometimes happened later in the British colonial period). Conquered territories were wholly subject to the tacit

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[187] MacMillan, *supra* note 179, at 849, citing representative language from the 1609 Virginia Charter.

[188] *Ibid.*

[189] *Ibid.*, citing Mary Sarah Bilder, The Transatlantic Constitution: Colonial Legal Culture and the Empire (Harvard University Press 2004).

[190] Matters concerning import and export duties were held to be outside the scope of common law in the *Case of Impositions* in the early 17th Century. UTTERMOST PARTS, *supra* note 243, at 606. According to the Chief Justice, who wrote for a unanimous court, the matter was not to be tried under common law but was "most properly named Policy and Government." King James I's attorney general, Sir John Davies, argued that trade and traffic with foreign nations was properly regulated not by English common law, but by *lex mercatoria*, which was "a Law universal throughout the world." Uttermost Parts, *supra* note 243, at 606, citing SIR JOHN DAVIES, THE QUESTIONS CONCERNING IMPOSITIONS, TONNAGE, POUNDAGE, PRIZAGE, CUSTOM &C. 4-5 (1656).

[191] *Id.*

[192] This principle was articulated in *Blankard v. Galdy*, a debt action that arose in Jamaica and was decided on the King's bench in 1694. The defendant argued that the circumstances that arose to the debt violated an English statute. The court rejected the plea, holding that English statute did not apply to the colony. Jonathan Bush, Free to Enslave: The Foundations of Colonial American Slave Law, 5 Yale Journal of Law and the Humanities 417, 456-457 (1993), citing JOSEPH SMITH, APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS, 470-71 (1950).

delegation of royal power.[193]

In the context of the New World territories that were conquered or settled by England in the seventeenth century, the disjointed, plural nature of English law created a space in which planters and merchants (to whom the King had delegated broad power) could deploy slave labor and develop regulatory principles to govern it with little or no direct oversight from England.[194] Of course, this power was subject to review; colonists could not undertake major initiatives that were contrary to the wishes of the Crown. Colonial records and those of the local privy councils demonstrate that the King maintained the power to review local legislation and to reject legislation he found unsuitable, but the colonists set the agenda and the pace. The colonists developed their own form of constitutionalism but were free to arbitrarily decide whose property rights would be recognized and respected. This allowed the colonists to adapt a kind of slavery that was radical and total, completely out of keeping with its ancient predecessor. The colonists could deploy this new form of slavery and legitimize it through the law, without needing to articulate or justify a category of unfreedom that would have clashed with the strong rhetoric around the fundamental rights of Englishmen that had been developed and broadened in England for centuries by that point.[195]

Governance by prerogative allowed for a "private ordering" of colonial life, whereby the power that was effectively delegated to planters could be exercised in an arbitrary and authoritarian manner vis-a-vis outsiders, such as indentured servants and enslaved people who were not Englishmen and were therefore not eligible for the protections that came with being subjects of the King and common law. This kind of broad autonomy had been a feature of the common law in other contexts: medieval franchise rights accorded to towns and ecclesiastical corporations allowed them broad latitude to make their own rules. This system also harkened back to the medieval system of villenage, which left the matters between the serf and his lord mostly unregulated by English law. The contours of the lord/serf relationship were mostly governed by custom, and the lord enjoyed near total power to determine its contours.[196] Most common law of the time ignored villenage, just as later English law would ignore slavery. Both villenage and slavery relegated the people that they oppressed to the "private" realm; they were beyond the reach and the protections afforded under common law to Englishmen.

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[193] *Id.*, at 457.
[194] *Id.*, at 458.
[195] *Id.*, at 460.
[196] *Id.*, at 460.

2. The Colonial Slave Codes

This delegation of power to colonial authorities—many or nearly all of whom were wealthy planters—allowed a series of laws to emerge that regulated slavery in minute detail. It was in 1661 that the Council and Assembly of Barbados codified policies regulating the enslaved, although some of the practices the new law included had been in place long before. The 1661 Barbados Code was the first such law in the British Caribbean, and it would become the model for other British slave colonies throughout the Americas. The 1661 Slave Code was established to fill a gap in the law, and its Preamble is clear-eyed about that. It states, in relevant part:

> "And these former Lawes being in many clauses imperfect, and not fully comprehending the true Constitution of this Government in relation of their Slaves their Negroes, an heathenish, brutish, and an uncertaine dangerous kind of people, *to whom if surely in any thing we may extend the legislative power given us of provisionary Lawes, for the benefit and good of this plantation, not being contradictory to the Lawes of England, there being in all the body of that Law, noe tract to guide us where to walke, nor any rule sett us, how to governe such Slaves*, yet we well know by the right rule of reason, and order, we are not to leave them to the arbitrary, cruel, and outrageous wills of every evil disposed person, but soe farr to protect them as we doe many other goods and Chattels…"

It also made clear a distinction that until that point had been arguably blurry in the law: that between servants and the enslaved.[197] Indentured servants in the Caribbean were bound to serve for a number of years as unpaid labor (they arrived to the Caribbean essentially indebted for the cost of their voyage from England).[198] They were treated harshly and punished brutally, but they had some rights against their masters, who were nevertheless still subject to criminal law vis-à-vis servants. The 1661 Code, which described the enslaved as "an heathenish, brutish, and an uncertaine dangerous kind of people," discusses the enslaved in the same breath as chattel.

The 1661 Code demonstrates the ways in which the lives of the enslaved and even the regulation of their punishments were to follow a logic of profit; the Code was designed to respect the ownership rights of slaveholders. Slaveowners who killed their slaves while punishing them for

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[197] SUSAN DWYER AMUSSEN, CARIBBEAN EXCHANGES: SLAVERY AND THE TRANSFORMATION OF ENGLISH SOCIETY, 1640-1700 129-130 (2007) [Hereinafter: AMUSSEN].

[198] *Id.*, at 124-126.

misdeeds and especially for escape attempts were not liable for murder. If a slaveowner killed a slave with "wantonness" or "cruel intention," however, he could be required to pay a fine to the treasury.[199] If someone killed an enslaved person who belonged to another, they would be required to pay a fine to the treasury as well as double the value of the dead enslaved person to the owner.[200] Crimes against the enslaved were property crimes, and a slaveholder had the power to deny the enslaved life if he thought their behavior warranted such punishment. There would be no interference from the state; destruction is among the incidents of full ownership.

The 1676 Amendment to the Code also implicitly addressed the fact that the interest of the colonial government in maintaining slavery as locus of capital might sometimes interfere with the rights of individual slaveowners, and it compensated them for that interference. On the one hand, the 1661 Code allowed the colonial government to effectively prevent or discourage rebellion by meting out brutal punishments that might result in the execution of slaves. These punishments, however, would result in property loss to the slaveowners whose slaves were executed. The amended law acknowledged that if slaveowners were not compensated for their slaves who had been killed, the loss would be "too heavy for the owners only to bear."[201] The amended code allowed for compensation to be paid to owners of slaves executed by the state for any reason. Because planters had a shared interest in the proper punishment of slaves and the prevention of rebellion, the compensation payments were to be issued from the island's treasury and funded by a tax levied on all landholders.[202]

The 1661 Code and later amended versions also demonstrate that the enslaved were completely excluded from English law. The 1661 Code created a parallel system of justice which could convict and punish the enslaved for crimes, while denying them any legal protections. The enslaved were not granted trial by jury—a right claimed by English subjects—due to the "basenesse of their Condicons."[203] Similarly, they could not be imprisoned "for Danger of escape"[204] (not to mention because imprisonment would prevent them from laboring and thereby interfere with slaveholders' property rights).[205] If an enslaved person was charged with a petty crime that

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[199] 1661 Slave Code, Clause 19, *available at* https://slaverylawpower.org/barbados-slave-code.

[200] *Id.*

[201] AMUSSEN, *supra* note 197, at 137.

[202] *Id.*

[203] 1661 Slave Code, Clause 13, *available at* https://slaverylawpower.org/barbados-slave-code.

[204] *Id.*

[205] AMUSSEN, *supra* note 197, at 132.

might call for a fine or a short imprisonment, his owner would be called upon to make reparation to the injured party.[206]

Sometimes, however, the claims to full ownership over the enslaved chafed against the norms of the metropole. In 1683, the Council for Trade and Plantations[207] rejected a law proposed in Jamaica that would have imposed a fine for the "willful or wanton" murder of a slave.[208] The Council required that "some better provision be made to deter all persons from such acts of cruelty" because "the King is too Human to be paid for shedding man's blood." The colonial assembly obliged and the penalty for wanton murder of an enslaved person was set at three months imprisonment.

The British colonial legal regime did more than protect slaveowners' property interests and indemnify them against the property loss when the enslaved were executed. It also bolstered the institution of slavery in the colonies by imposing costs on manumission. While slavery-regulating codes like *Las Siete Partidas* were designed to grant a limited set of rights to the enslaved and to trace a pathway toward manumission, British laws regulating New World slavery were designed to shut that door and lock it. The operating presumption was that Blacks in the slave colonies were enslaved. Manumission was rare, and it was discouraged; in Demerara (a South American Dutch colony that eventually became British), no enslaved person could be manumitted without the consent of the Governor and Council. Even if manumission was granted in a British colony, the transaction was heavily taxed.[209] Belying a deep-seated fear of an increase in the free Black population, Barbados passed a law in 1801 that taxed the manumission of female slaves even more heavily than males, as slave status passed through mothers.[210] Third parties could not buy the freedom of the enslaved (even at full price) without the slaveholder's consent.[211]

All the while, however, there was no formal legal authorization of slavery within English law. These detailed rules existed alongside an utter lack of a broader jurisprudence of slavery in English law, one that would not grapple—or even attempt to grapple—with first principles. A unified theory

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[206] *Id*.

[207] A regulatory body established by the Crown to oversee activities in the colonies and advise the King and Parliament.

[208] AMUSSEN, *supra* note 197, at142, note 93, citing Colonial Office Records 138/4, at 128-129 from the 5, 12, and 20th of September 1683.

[209] As late as 1802, a law was passed in the British Virgin Islands that a slaveholder seeking to manumit his slave would be required to pay five hundred pounds into the public treasury, even if manumission occurred after the slaveholder's death. TANNENBAUM, *supra* note 145, at 66.

[210] TANNENBAUM, *supra* note 145, at 66.

[211] TANNENBAUM, *supra* note 145, at 66.

of the moral basis of slavery, including its limits and justifications, did not and would not exist.

3. Unfettered Ownership and the Stuart Monarchs

Over the course of the seventeenth century, the Crown and the Parliament were engaged in a serious struggle for power that culminated in the Glorious Revolution in 1688, and the substantial and permanent curtailing of the royal prerogative. This struggle took place during a concurrent significant centralization of the English state and the disappearance of the last vestiges of feudalism. Landholders in England were beginning to enter a system of competitive commercial production in which they could profit by economizing on labor and bringing goods to open market. With these changes, the state's role also changed. No longer was the King merely the top of a feudal pyramid, concerned mostly or only with external defense. Instead, the state was a tool by and through which the landed-class could protect and further its property and commercial interests.[212] As the Parliament claimed an ever-greater role in the administration of state power (and stood as a buffer between the property interests of the landed-class and the avarice of the king), it acted to guarantee landlords' property rights and transformed into a vehicle for channeling landlord interests in to state policy.[213]

Hampered by Parliament in his efforts to impose taxes on subjects at home, Charles II became ever more focused on increasing revenues through taxes on goods imported from the colonies, such as tobacco and sugar. The King had strong incentives to increase the production of these crops, and therefore to encourage policies that would expand the large estates and the numbers of enslaved people upon which production relied.[214] Charles II of England also established a Royal trading company in 1660. The company was initially established primarily to search for gold along the West Coast of Africa, but shortly after its creation, it was given a monopoly on England's Atlantic slave trade.[215] Members of the Royal family were among its main shareholders. By 1672, it was insolvent and surrendered its charter. It was followed up by the Royal African Company of England (RAC). The RAC's charter was broader and included the right to impose martial law in West Africa in pursuit of precious metals, African goods, and enslaved Africans. After the bankruptcy, Charles II tried to shore up his new involvement in the slave trade through legal means. Parliament refused to pass an imperial slave

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[212] UTTERMOST PARTS, *supra* note 243, at 607.
[213] UTTERMOST PARTS, *supra* note 243, at 608.
[214] Brewer, 778.

code, so he turned to the Courts. Judges that served at the pleasure of Charles II (and who would later be removed and overruled) wrote several opinions in a series of cases that followed closely on one another. These opinions shored up the status of enslaved people as property and provided for extensive ownership rights.[216] Using the courts in this way was also a bid to create laws without parliamentary consent and thereby to increase Royal revenue through the trade. Under the Stuart monarchs, courts became instruments of absolutism.

Until these judges began ruling to support the interests of the Stuart monarchs and the colonies developed their own Slave Codes, most English law concerning coerced labor was based on reference to feudal law or master/servant law.[217] Both of these legal regimes included a modicum of protections for the villein or servant; for instance, masters could not rape or murder their villeins.[218] This approach of repurposing feudal laws for enforced labor to apply to enslaved people proved insufficient for the level of business that the RAC was doing in the Atlantic slave trade. Slave trading was an expensive and risky business; it was characterized by long lead times and required significant upfront investment.[219] The RAC had to invest in ships, execute complicated transport missions, and establish forts to protect and further its trade off the West coast of Africa. When RAC company ships arrived in Barbados with valuable and highly perishable human cargo, they were often met with Caribbean planters who lacked sufficient crops to make an immediate exchange. Promissory notes, which began to circulate in the 1660s, were difficult to enforce. The RAC could not collect its debts from planters.[220] Suddenly the legal status of the enslaved as chattel (*i.e.*, the ability to be borrowed against or used to enforce outstanding debts) became a matter of royal concern. Metropolitan judges were mobilized to clarify the situation.

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[216] Brewer, 766.

[217] In an example of an instance in which feudal law was repurposed and retrofitted to accommodate chattel slavery, Governor Henry Hawley, who presided over Barbados, declared that from the time of his decision, Africans and Indians who arrived without contracts of indentured servitude to the island would serve those who purchased their labor for life. This position fit within notions of servitude that existed within feudal law, and Hawley's declaration also furthered the idea that non-Christians arriving to the islands could be considered as villeins. Brewer, 772.

[218] According to Coke, a villein "that is ravished by her Lord may have an Appeal of Rape against him." Thomas D. Morris, Southern Slavery and the Law, at pg. 53. Villeins also had the right to certain civil actions against people other than their masters.

[219] Brewer 778.

[220] Brewer, 778.

a. Butts v. Penny

Charles II installed Sir Richard Rainsford, a sycophantic judge, as chief of the High Court in 1676. Judge Rainsford presided over the case *Butts v. Penny*, which historian Holly Brewer skillfully illuminates in her work, but which has been largely overlooked in legal scholarship. The case originated in Barbados but was appealed through English courts, eventually landing in front of Rainsford. The plaintiff in the case, Thomas Butts, was a naval officer of a ship that served the RAC. In a voyage from Africa across the Atlantic, Butts captained a ship that arrived in Barbados with 73 men, women, and children. Butts sold these enslaved Africans by taking on personal debt, as was the practice at the time when planters had insufficient goods to exchange for enslaved laborers. The decision validated Butts' right to collect on his debt, observing in its verdict that "Negroes were infidels, and the Subjects of an Infidel Prince, and are usually bought and sold in America as Merchandise, by the Custom of Merchants, and that the Plaintiff bought these, and was in Possession of them until the Defendant took them." Meanwhile, the Defendants argued that "no Property could be in villains [sic] but by Compack, or Conquest." But the Court held "that Negroes being usually bought and sold among Merchants, as Merchadise, and also being Infidels, there might be a Property in them sufficient to maintain Trover."[221]

The defendant, Penny, argued through his lawyer that he should not have been liable for taking the "villeins," because the Lord (Butts) lacked sufficient property rights "in the Person of a Man" to bring a suit in trespass, a property action that could only apply to chattels.[222] The rights of a lord over his villein were broad, but there were limits: One man could not own another as a thing. Rainsford and other judges on the King's Bench found for Butts. They reasoned that Butts could recover the enslaved people from the indebted planter, thereby expanding common law doctrines previously used to protect simple property in a manner that protected property in enslaved people.[223]

The Court was laconic in its justification for this innovation. It seemed to base its decision on a combination of custom (referring to the notion that negroes were "usually bought and sold among merchants, as merchandise") and *jus gentium* (describing the enslaved as "infidels" beyond the protections

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[221] Brewer, at 791, citing 2. Lev. 201, in 83 Eng. Rep. 518. Creswell Levinz's Reports of Cases heard by the King's Bench was published first in 1702 in law French, with the approval of the then-sitting justices of the King's Bench, including Holt, as is printed verso to the title page, then republished in law French with English translation in 1722 (London: Nutt & Gosling, 1722), 201.

[222] Brewer, 793.

[223] Brewer, 794.

of domestic law) such that "there might be property in them sufficient to maintain trover."[224] Brewer observes that the reference of Butts' lawyer to the custom of merchants to treat enslaved people as merchandise—a characterization that seems to have been adopted by the judges on the King's bench—is deeply misleading. Indeed, the very substance of the *Butts v. Penny* case arises from the fact that merchants *had no system* of recovering their debts by seizing enslaved people as credit. The very fact that there was no such custom was what put Butts in a position to try to recover his debt by force, and what led to the dispute against him.[225]

The *Butts v. Penny* decision breaks with precedent in other ways. Brewer points out that only a year before *Butts* was decided, maritime law expert Charles Malloy had noted in a treatise that "[b]y the Laws of England, every Subject Born within the Kings Dominions, is a Freeman of this Realm" and that "those that are born at this day in Virginia, New England, Barbados, Jamaica, or any other of his Majesties Plantations and Dominions, are natural born Subjects, and not Aliens."[226] Even though the colonies were governed by royal prerogative, Malloy implies, they are peopled by English subjects who should be born into freedom, just as people in England were.

b. Sir Grantham's Case

In *Butts v. Penny*, Rainsford held that a property action (trespass, in that case) could lie for "infidels." A few years later, the King's Bench addressed the status of enslaved people who had been baptized in *Sir Thomas Grantham's Case*. By the time the King's Bench ruled in that case, even more judges had been unseated and replaced by the King, and the Bench was even more responsive to the motivations of the Crown. Thomas Grantham was a naval officer who claimed ownership of John Newmoone, who would become the subject of the case. Grantham had brought Newmoone to England from the East Indies. Newmoone, whom contemporaneous writings referred to as a "strange and wonderful monster"[227] was a grown man who had a congenital twin that had never grown from infancy because he lacked a thyroid. Grantham displayed Newmoone—whom he kept first as an indentured servant and later asserted rights over as an enslaved person—at markets and gatherings for profit.

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[224] Butts v. Penny, 83 Eng. Rep. 518, 519 at https://blog.umd.edu/slaverylawandpower/butts-v-penny-1677.

[225] Brewer, 806.

[226] Brewer, pg. 794, citing Charles Molloy, *de Jure Maritimo et Navali, or, A Treatise of Affairs Maritime and of Commerce* (London: John Bellinger, 1676), especially 201-2, 389, 402.

[227] Brewer, 808.

Months after arriving in England, Newmoone fled Grantham. Newmoone received help and shelter from someone in England and was eventually baptized. He sought to leave his status in bondage on the grounds that becoming a Christian would make him free. At the time, there seemed to be an assumption that if enslaved people converted to Christianity, their status as Christians would shift their lifetime status as hereditary servants to term servants, taking them out of perpetual bondage and endowing them with at least some aspects of subjects of the Crown—including a modicum of rights and protections. Only Christians, after all, could swear an oath of allegiance to the King.[228] *Butts* seemed to confirm this principle, distinguishing as it did between English subjects and "infidels" in determining the chattel status of the enslaved.

When Grantham sued Newmoone's protector to recover Newmoone, the case quickly moved to the King's Bench to be heard. Grantham based his case on the writ of *de homine replegiando*—a writ for injunctive relief based on a feudal law that had been used by lords to recover their villeins. Grantham sought not only Newmoone's return, but also the value of the labor that had been lost through his absence. He was asserting possession, use, and income rights over Newmoone. Although Newmoone had signed a contract binding himself to a limited term as an indentured servant, this contract was not discussed at any length by the court. Instead, it seemed to ignore the contract, finding that Newmoone's baptism did not free him from bondage, and that he could be returned to Grantham. In the language of the verdict, "*homine replegiando* lies for a baptized infidel detained from his master," meaning that Grantham could sue for his return. The legacy of this case was to reify the notion that enslaved Africans could be held in bondage in perpetuity—even if they converted from "infidels" to Christians, or if their state of bondage had a contractual limit; indeed, people held in bondage did not have full legal rights and therefore could not contract as to the terms of their labor.[229]

4. Unfettered Ownership after the Glorious Revolution

As the colonies became increasingly profitable to the Stuart kings, the excessive tax bounty of the English Crown interfered with the development of the plantations. In the mid-seventeenth century, colonial planters and the independent merchants were subject to increasingly burdensome forms of royal administration and increasingly heavy taxation regimes. The rights of royal governors were augmented at the expense of the rights of colonial

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[228] Brewer, 807, see also Brewer 807 at fn 85.
[229] Brewer, 808.

assemblies. These changes benefited a small handful of individuals in an arbitrary manner, a development that came at the expense of smallholders and the majority of planters.[230] This led many planters to return to England, where they sided with the opposition, taking up the cause of the Parliamentarians against the King.

This opposition resulted in the Glorious Revolution, following which William III and Mary took the throne. Under the new monarchs, the Parliament set about replacing the judiciary, which it saw as having been a tool for the absolutism of the previous Kings. It fined and imprisoned the bench of sycophantic judges that had served at the pleasure of the previous absolutist monarchs. The King's Bench was also removed, fined and replaced.[231] Parliament also appointed Sir John Holt to the King's Bench as Chief Justice. He oversaw a number of cases that curtailed the property rights of slaveholders who entered the metropole with their slaves and overturned precedent that emerged under the Absolutist bench that held that property actions could lie for human chattels.

a. Harvey v. Chamberlayne (1696)

The King's bench used its discretion to hear *Harvey v. Chamberlayne*, a civil suit involving a writ of detinue. Willoughby Chamberlayne, the plaintiff, was a prominent Barbadian planter who had recently come to England and was seeking to transition from political life in Barbados to a position as governor of London. Chamberlayne approached the court in an attempt to recover an enslaved person (who remains unnamed in the historical record) from London resident Robert Harvey. Chamberlayne claimed that he had inherited the enslaved person from a relative.[232] Chamberlayne introduced a writ of detinue[233] against Harvey.

Harvey, meanwhile, claimed that he had employed the unnamed man for wages, and that the man was an employee. Because the man was his employee, Harvey argued, he was under no obligation to return him to Chamberlayne, nor was he liable for damages. This case is significant because the success of Chamberlayne's action turns the question of whether the unnamed man can be treated as property for which an action in detinue can lie. The case made waves even before the opinion came down; the Crown was watching, and lawyers and judges would end up reporting the Bench's

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[230] BLACKBURN, *supra* note 78, at 261.

[231] Brewer, 809.

[232] Brewer, 814.

[233] Detinue is a tort action that allows for the recovery of specific goods (as contrasted with the value of goods) and damages.

findings in at least five separate, detailed reports.[234] In seventeenth century England, this level of judicial reporting was extraordinary.[235]

In a decision that threw into question the holding in *Butts*, the judges ruled that "no action of trespass would lie for the taking away a man generally" and that property actions, like trover and detinue, could not be applied to human beings. In their reasoning, the judges invoked the magna carta and the laws of England for the principle that no man could have property over another. The decision, unsurprisingly, echoed throughout the Empire. In response, slave traders were immediately less likely to allow the purchase of enslaved people to be financed, because recouping on loans made in human chattel suddenly seemed unlikely in English courts. The decision also blocked the enactment of a law introduced by the Barbados legislature that sought to protect property in enslaved persons by punishing detinue of them. Although the colonies had the discretion to fill gaps in the law, they could not enact laws that were repugnant to the law of England. Suddenly laws that clearly related to the ability to bring property actions vis-à-vis the enslaved fell into this territory.

b. Smith v. Gould (1706)

In *Smith v. Gould*, one of Holt's last cases involving the status of the enslaved, the King's Bench seems to extend the holding of *Chamberlayne* beyond England and even to the colonies. *Smith v. Gould* reversed a lower court decision that found that trover would lie for a negro, given his status as chattel. In this case, the King's bench invoked the common law, observing that trover "does not lie for a negro, no more than for any other man; for the common law takes no notice of negros being different from other men." The court explicitly overturned *Butts v. Penny*, stating that it was not law.

Holt's legacy was the notion that actions in property could not be brought against persons. The decisions issued by the King's Bench during this period made slave ownership in England less secure, which had repercussions in the colonies because of the repugnancy limits on colonial law; the law of the colonies could be different from, but not repugnant to, English law. After Holt's death, however, the important precedents set during his lifetime began to be ignored and superseded in new decisions, often without explicitly confronting or even discussing precedent from Holt's time on the bench. Colonial legislatures tried to breathe new life into *Butts v.*

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[234] Brewer, 816, citing to the original reports, which are reproduced and transcribed at https://slaverylawpower.org/chamberlain-v-harvey-1696/.

[235] For a detailed discussion of this case, including the arguments made by counsel for both the plaintiff and the defense, *see* Brewer, pgs. 816-818.

Penny to shore up the status of the enslaved as chattels within the colonies, even into the first decades of the eighteenth century.[236] The messiness of decisions raised fundamental questions as to whether slavery was based in English statutory law, the Crown prerogative, or in English common law.

5. *Unfettered Ownership Protected by Metropolitan* Law

Holt's tenure on the King's Bench represented a high water mark of tensions between English and colonial law vis-à-vis the status of the enslaved. After his time on the Bench, Parliament and the courts seemed to relent to the pressures of shoring up the lucrative colonial economy by not insisting too vehemently that full ownership rights over human chattels were antithetical to English law.

a. The Debt Recovery Act

As the England-based merchant class extended more and more credit to planters in the colonies, they often struggled to recoup the debt. Under English law, land was a special category of property that was protected from unsecured creditors; it could not be seized for outstanding debt. The decisions that emerged from the King's bench following the Glorious Revolution put the property status of the enslaved into doubt. Colonial legislatures at times also enacted laws characterizing enslaved people as "land" to put them beyond the grasp of creditors.[237] This classification also created perverse incentives; borrowers in the colonies might seek unsecured credit to purchase slaves, which could in turn be used to shield wealth (in the form of the enslaved) from creditors.[238] British merchants began to lobby the Parliament to pass legislation that would clarify the status of colonial property and the avenues available to them to secure their debt.

The 1732 Act for the More Easy Recovery of Debts in his Majesty's Plantations and Colonies in America ("The Debt Recovery Act") was the Parliamentary response to these demands and represented a confrontation of colonial legislatures. The Act required that, throughout the British colonies in America, all land, houses, and slaves were assets that could be made available to satisfy creditors' claims for outstanding debts. No longer would colonial legislatures be able to thwart debt collection efforts by throwing up

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[236] George van Cleve, *"Somerset's Case" and Its Antecedents in Imperial Perspective*, 24(3) LAW AND HISTORY REVIEW 601, 615-616 (2006).

[237] Priest, 76.

[238] *Id.*,

legal hurdles tailor-made to protect colonial debtors in a given jurisdiction.[239] The Act further required that colonial courts use the same enforcement procedures that were already in place for selling personal property to satisfy debts—transfers and public auction.[240] Suddenly these procedures could also be used as liquidation processes for land and enslaved people. Perhaps most remarkably, the Act made colonial debts recoverable in English courts. In putting transfer and public auction of the enslaved on the table for debt collection, the Debt Recovery Act affirmed and in fact insisted on the alienability of the enslaved. This incident of ownership was particularly cruel, because it ripped family networks of the enslaved apart and displaced many from the only homes they had known.

b. Somerset v. Stewart

Tensions between sources of applicable law continued until they were partially resolved by the decision in the *Somerset* case in 1772. In that case, Judge Mansfield concluded that slavery was based on positive law—as opposed to English common law or natural law. In making this argument, he advanced a rights-based notion of English citizenship. English law afforded core legal freedoms to those in England. These freedoms were available to English subjects as freedoms in accordance with the "rights of man" and were not dependent on birth, race, religion, or free status. The only way these rights could be legitimately denied was by statute or longstanding custom.

This decision effectively relieved the tension between the status of slavery in the colonies and laws protecting freedom in England. It allowed for the protections for freedom under English law that had been articulated under Holt to co-exist with slavery, which was a matter of limited positive law in the colonies. Slaves brought to England would not necessarily be manumitted on the basis of the freedom principle, but neither could their masters treat them cruelly or forcibly imprison them—because the enslaved had access to English courts as long as they were within England. This decision limited, but did not completely foreclose, slaveholders' rights of ownership. It has been suggested that the narrow ruling in this case reflected the fact that by the time it was decided in 1772, the Parliament was divided on the issue of slavery, and that the Crown did not want to push the issue there for fear of upsetting the status of the property of powerful plantation owners.[241] The *Somerset* decision went some way to appease those who were

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[239] Priest, 79.

[240] Priest, 79.

[241] The General Evening Post of 28 May 1772, "…[I]f the laws of England do not confirm the colony laws with respect to property in slaves, no man of common sense will,

opposed to slavery within England while offering protections and stability to English investments in colonial property.[242]

B. French Case Study

The interests of French slaveholders and planters overlapped with the interests of the Crown and clashed with those of the Courts in ways that were fascinatingly similar to the dynamics in Britain, despite important differences. The French Crown delegated considerable political and jural power to its colonial chartered companies, which had relatively wide latitude and little oversight until indebtedness and misrule attracted the attention of Louis XIV, whose policies drew the colonies into the bosom of the French state. Unlike in British colonies, the *Code Noir*, which regulated the enslaved, issued from the metropole. However, primary source research has revealed that the *Code Noir* was based on a close study of colonial custom and practice vis-à-vis the enslaved. Even though it was issued as a royal edict, its content was informed and determined by the interests, policies, and existing practices of the slaveowners and planters in the colonies. In this way, metropolitan law reflected the coding of the enslaved as chattel over which full ownership rights were possible.

Meanwhile, the free soil principle in the French metropole clashed with the interests of colonial slaveholders who wanted to sojourn in France with their slaves. The Admiralty court, which had unique jurisdiction over issues related to the enslaved in France, consistently decided to free enslaved people who petitioned it. This threatened the property rights of slaveholders, and the Crown reacted to protect it by issuing edicts that would allow slaveholders to shield their human property from the free soil principle if they followed certain registration requirements. Later edicts issued in relation to the enslaved were designed to keep Blacks—and especially free Blacks—out of France, requiring Blacks who did not properly register with the state or who failed to carry identification papers to be returned to the colonies. The *Parlement* of Paris, a quasi-legislative institution that had veto power over royal edicts, refused to cooperate. It effectively blocked the royal edicts in Paris, providing protections to enslaved people from the colonies and to Blacks in France. A power struggle ensued between the *Parlement* of Paris—which was acting to uphold the protections of the free soil principle and undermine what it perceived as despotic royal power—and the convergent interests of slaveholders and the Crown. Things briefly tipped in the Crown's

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for the future, lay out his money in so precarious a commodity. The consequences of which will be inevitable ruin to the British West-Indies."

[242] O'Shaughnessy, An Empire Divided, 36-40.

direction before the French Revolution abolished slavery and threw the property rights of planters into a tailspin that would only end when Napoleon Bonaparte came to power in 1799.

1. French Colonial Law

France's forays into the Western hemisphere began in 1626. It was that year that Richelieu, a bishop and a chief minister to King Louis XIII, formalized an association between himself and twelve others to explore, settle, and cultivate the islands of St. Christopher and Barbados for a period of twenty years.[243] The lands were to be held under the authority of the King, who would receive ten percent of the revenues produced by exploration and cultivation. Despite the formal necessity of the Crown's acquiescence, however, private actors took the primary role in the French colonization project until the 1660s.[244] The document formalizing the agreement between Richelieu and his associates contained the first mention of slaves in any French document of the time. It mentioned that the voyage to the West Indies would depart with forty men and "approximately forty slaves."[245]

The association was organized as a company, the *Compagnie des îles de l'Amerique*. Although it was formed under the authority of the King, there was almost no formal royal involvement. The initial venture was not profitable, so the company's area of operations was extended to nearby islands in hopes of turning the tide. This new territory came to include Martinique and Guadeloupe in 1642.[246] Company associates were granted property rights over the land on the islands and, with them, the right to distribute lands and titles to others.[247] There were hopes that at least 4,000 French emigrants would come to settle there; The company charter stipulated that settlers were to be given military and navy assistance to effectuate their occupation against competing European powers.[248] In 1648, Louis XIII specifically sanctions trade in enslaved Africans on the caveat that provisions be made to introduce the enslaved to Christian doctrine.[249] During this period, most enslaved people who the French purchased to labor in the colonies were sold by the Dutch.[250]

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[243] MARRTI KOSKENNIEMI, UTTERMOST PARTS OF THE EARTH: LEGAL IMAGINATION AND INTERNATIONAL POWER 513 (2021) [Hereinafter: UTTERMOST PARTS].

[244] BLACKBURN, *supra* note 78, at 279.

[245] UTTERMOST PARTS, *supra* note 243, at 513.

[246] *Id.*, at 514.

[247] *Ibid*.

[248] *Ibid*.

[249] BLACKBURN, *supra* note 78, at 281.

[250] BLACKBURN, *supra* note 78, at 281.

Despite its expanded mandate, the *Compagnie des îles de l'Amerique* was not profitable and was forced to give up parts of its operations. France's military and naval support was also lackluster. By 1662, only two or three of the vessels that serviced the French Caribbean were actually French.[251] The modest revenues that the company managed to generate did not flow back to France, but remained in the pockets of the proprietors.[252]

It was only under Louis XIV, and more specifically under his Minister of State Jean-Baptiste Colbert, that the French state could begin to truly focus on the colonies. In 1661, when Colbert assumed office, he found the colonies in a disastrous state.[253] Colbert learned from the English and Dutch experiences with colonization through private enterprise. Colbert adapted the free enterprise models of Britain and the Netherlands to the more centralized system of France, hand-picking financiers from the network of those close to the court for important positions in the colonies. Colbert also bought off and eliminated the private monopolies in the Caribbean, buying up Guadeloupe, Martinique and Granada and donating them to the newly created *Compagnie des Indes Occidentales* (West Indian Company, hereinafter "French WIC"), which was established in 1664. The French WIC eventually received all the French Atlantic possessions, including those in North America (although North American colonial possessions would soon come to be directly administered by the crown), "*à perpetuité en toute Proprieté, Seigneurie et Justice."*[254] In other words, the company could rule its vast new territories as a feudal lord. It had jurisdictional rights, whereby it could establish tribunals, appoint judges, and deal with criminal cases. Although these tribunals would apply French law and the custom of Paris, the company was also entitled to promulgate its own laws and regulations subject to confirmation by the King.[255]

These reforms treated the colonies as provinces of metropolitan France; their administration came to (mostly) mirror the French provincial pattern,[256] although the colonial governors were afforded equal power to the metropole-appointed intendants (who acted as extensions of the administrative state).[257] In France, provincial governors were largely

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[251] UTTERMOST PARTS, *supra* note 243, at 514.

[252] *Id.*, at 516.

[253] *Id.*, at 515.

[254] *Id.*, at 516.

[255] Acte de l'Etablissement de la Compagnie des Indes Occidentales (22 May 1664), Art. XXII, XXIII, XXVI, XXXI, XXXIII, XXXIV, XXXV in Edits, Ordonnances royaux, I, 35-7.

[256] D. K. FIELDHOUSE THE COLONIAL EMPIRES: A COMPARATIVE SURVEY FROM THE EIGHTEENTH CENTURY, 37 (1966) [Hereinafter: FIELDHOUSE].

[257] *Ibid*

honorific titles, but in the colonies they retained substantive power that could be exercised as a counterbalance to the metropole-appointed intendant.[258] The other colonial institution with substantive power was the *conseil soverain* or *conseil supérieur*, institutions derived from the *parlements* of metropolitan France. The intendant acted as the president of the *conseil*, and other colonists, civilian officials and military officers—all of which were appointed by the Crown—made up its ranks. The *conseils* had both administrative and legal functions, and had a quasi-legislative function of registering the edicts and other regulations from France such that they became enforceable and had the full effect of binding law within the colonies.[259] The *conseils* sometimes exercised their quasi-legislative powers to debate or even refuse to register regulations from the metropole or from the intendant that displeased them. The judicial system in the colonies, which was run by magistrate judges, enforced French customary law as modified by the royal edicts and other orders that the *conseil* had chosen to register.[260] These discretionary powers introduced legal gaps between colonial law and metropolitan law. However, these powers were eventually curtailed when, in 1763, the responsible metropolitan minister stripped them of their legislative functions.[261]

Colbert's reforms ended the pre-existing system of private, chartered rule in the Caribbean colonies, making them full dependencies of the Crown and establishing a tighter regime of administrative control designed to establish an economic system that subordinated the interests of the colonies to those of France.[262] Even though Colbert did not manage to revitalize the French colonies and make them profitable for the French state—at least not immediately—he did leave a number of administrative monuments that endured long after his death in 1683. First, and most importantly, he brought the administration of the colonies into the bosom of the French state. Where there had been no reliable source of information from and about the colonies before his tenure, he established a robust correspondence with them, leaving detailed annual correspondence with each.[263] He also established detailed ordinances regulating commerce, maritime issues, and most notably—slaves. The Code Noir came into effect in 1685, two years after his death.

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[258] *Id.* at 37-38.
[259] *Id* at 38.
[260] *Id* at 42.
[261] *Id* at 38.
[262] *Id* at 46.
[263] KENNETH GORDON DAVIES, THE NORTH ATLANTIC WORLD IN THE SEVENTEENTH CENTURY 239 (1974) [Hereinafter: KENNETH GORDON DAVIES].

2. The French *Code Noir*

Although French involvement in slave trade and slaveholding in the Caribbean began in the 1620s, it was not until 1685 that a fulsome set of regulations for slavery, the Code Noir, was issued by metropolitan France. The Code was originally promulgated by Louis XIV to regulate slavery in the Antilles, which he possessed.[264] However, it soon came to govern all French slave territories , with the exception of Saint Domingue (present-day Haiti). There was no existing slave law in the metropole. Because slaveholding and slave trading had been obsolete in France for centuries by the time the Code Noir was promulgated, there was also no legal precedent or institutional memory to draw on. The so-called *Coutume de Paris*—a compilation of customary law in statute form that was chosen by the King to govern his New World subjects—contained no provisions on slavery.[265]

Primary sources research performed by the legal comparativist Vernon Valentine Palmer confirmed that the substance of the Code Noir was informed by pre-existing colonial practice. Many of the provisions included in the Code Noir were taken from the customary law that had organically developed in the French Caribbean prior to 1685 in the legal vacuum left by French law from the metropole. The Code was drafted by two highly ranked Antillean officials selected by the Crown with the special purpose of promulgating it.[266] These officials acted on royal instructions, which referred to slave law as "new and unknown in the kingdom,"[267] and called on the officials to thoroughly "penetrate" local law on the subject. More specifically, the instructions required them to examine and incorporate the substance of previous ordinances and judgements of the Sovereign Councils in the French Caribbean (which at that time included Martinique, Guadeloupe and St. Christophe—later St. Kitts).[268] The Sovereign Councils were the dominant governing institutions of the French colonies, and occupied a mixed judiciary-legislative role, similar to the *parlements* of the metropole. The Governor-General and the Intendant of each island possessed a general police power that allowed them control over slave crimes, revolts, marronage, and escape.[269] Most official slave regulations were issued by these two officials as joint decrees.

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[264] Vernon Valentine Palmer, *The Origins and Authors of the Code Noir*, 56 LOUISIANA L. R. 363, at 363 (1995) [Hereinafter: Palmer].

[265] Palmer, *supra* note 264, at 366.

[266] Palmer, *supra* note 264, at 366.

[267] Palmer, *supra* note 264, at 372.

[268] [Need citation.]

[269] Palmer, *supra* note 264, at 369.

The Antillean officials charged with this task were also instructed to seek the advice and opinions of members of the Sovereign Councils, which enjoyed primary jurisdiction over the regulation of slavery (apart from the regulations that touched on police powers). Members of the Councils could make regulations that had the force of law for the relevant island upon all points not settled by prior law, edict, or ordinance. The Councils enjoyed wide judicial competence over issues related to slavery.[270] The so-called *arrêts* (judgments) of these Councils included most of the regulations that governed slavery in the French Caribbean. Taking into account these judgments and the advice of the members of the Sovereign Councils, the Antillean officials tasked with promulgating the code could incorporate attitudes on the regulation of slavery that may have been absent from formal official ordinances. They could ensure that what would become the *Code Noir* was aligned with what local custom had until then required.[271] Importantly, the historical record demonstrates that the members of the Sovereign Councils were highly likely to be slaveowners themselves.[272] In regulating slavery, they were acting as officials endowed with judiciary powers, but they were also choosing regulations that furthered their interests and addressed their concerns as slaveholders.

Once it was formally adopted, the *Code Noir* was issued by the metropole and therefore superseded existing local law. However, the Code was in fact a summary of local law, regulation, and custom. It represents a relatively rare example of the local practices of a colony being universalized and given the legal gravity and universality of a royal edict.[273] Colbert, in strengthening and centralizing the administration of the French colonies and undermining the power and influence of local proprietors, "made the colonists several degrees more aware of being Frenchmen."[274]

The *Code Noir* was far more comprehensive than its British counterpart, the Slave Codes, which were promulgated by local colonial authorities in a hodge-podge way over time.[275] The *Code Noir,* by contrast, regulated every aspect of an enslaved person's life, including his religion, marriage, his food and clothes, his relations with whites, his legal status, and

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[270] Palmer, *supra* note 264, at 370.

[271] Palmer, *supra* note 264, at 369.

[272] In reaching this conclusion, Palmer points to the fact that the Crown granted members of the Sovereign Council the privilege of tax exemption for twelve slaves. Palmer, 369, citing Cabuzel A. Banbuck, Histoire politique economique et social de **la** Martinique sous l'ancien regime Chapter IX (1935).

[273] KENNETH GORDON DAVIES, *supra* note 263, at 239.

[274] *Ibid*.

[275] The first of these was the Barbados Slave Code of 1661.

the rules and procedures surrounding manumission.[276] It unambiguously classified the enslaved as moveable property, settling a question that had persisted in the colonies of whether the enslaved were moveable or immovable.[277] The decision to classify the enslaved as moveable property made questions of inheritance easier, but the Code included special prohibitions designed to prevent the break-up of plantations and slave families, presumably to ensure a consistent valuation of plantation land. The *Code Noir* also required slaveowners to provide the enslaved with adequate food and clothing. Drafting notes indicate that this requirement was included not because of humanitarian concerns, but from a desire to prevent hungry enslaved people from running away in search of food or stealing from poorer white settlers, which—it was feared—would push them to leave the colonies.[278] The *Code Noir* prohibited grave mistreatment of the enslaved, including torture and mutilation. It included provisions setting out how enslaved people who had suffered grave mistreatment could complain to the *procureur-général* (attorney general), but it is unlikely that such complaints would lead to consequences for slaveholders who violated the *Code*. There is ample evidence of the widespread torture and mutilation of enslaved people in St. Domingue.[279]

The *Code Noir* coded the enslaved as chattel property, and provided slaveowners extensive ownership rights. The *Code Noir* makes this especially clear in a few notable provisions. First, the enslaved had limited ability to own and especially to sell property. Enslaved people were not permitted to sell goods at market without a letter of permission, and goods in possession of an enslaved person who lacked such a letter could be seized by any citizen.[280] The enslaved were subjected to the general liabilities and prohibitions set out in criminal law, but there were a number of crimes that only the enslaved could commit, for instance: striking a master, behaving insolently toward free persons, and running away.[281] At the same time, aside from homicide and severe mistreatment,[282] the enslaved were not entitled to the full panoply of *protections* afforded by criminal law. The Code Noir was

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[276] KENNETH GORDON DAVIES, *supra* note 263, at 239.

[277] Palmer, *supra* note 264, at 386, see also fn 104.

[278] Palmer, *supra* note 264, at 374.

[279] Chatman, There Are No Slaves in France, pg. 146.

[280] Palmer, *supra* note 264, at 384 citing Avant Projet Title III, 1 (1683).

[281] Palmer, *supra* note 264, at 384.

[282] Homicide by an owner or an overseer was prohibited, as was mutilation and torture. However, capital punishment and mutilation could be carried out as a punishment to an enslaved person with the acquiescence of public authority. These punishments would be meted out in public by the state in order to serve as a deterrent. Palmer, 384, citing Avant Projet Title IV, 1-3 (1683); Code Noir art. 42 (1685).

silent about crimes committed by one enslaved person against another, presumably because such offenses were considered property damage that could be regulated by compensation between private parties.[283] Finally, owners of an enslaved person who was sentenced to capital punishment by state authorities would receive compensation from the state. The justification for this practice, according to the preliminary notes of the officials whose research undergirded the *Code Noir*, was that slaveowners were not compensated for slaves put to death would be more likely to hide their crimes. It also reflected the notion that state prosecutorial power, when applied to the enslaved, interfered with the property rights of slaveholders.

The chattel status of the enslaved was also evident in provisions of the *Code Noir* that laid out their civil incapacitation. Slaves could not serve as witnesses, had no capacity to dispose of, acquire, or receive property, and could not be sued in civil proceedings. The enslaved were effectively denied all patrimonial rights, being instruments for their enslavers' own acquisition.[284] The enslaved could not make binding promises or obligations vis-à-vis property.[285] So limited was an enslaved person's ability to act in her own legal capacity with the outside world that slaveowners remained civilly liable for the commercial acts of their slaves executed according to the master's command if those acts resulted in a profit. If the acts resulted in no profit, the peculium[286] of the slave might be taken to satisfy the relevant liability.[287]

The *Code Noir* also addressed the rights of free blacks and mixed-race people. It permitted free blacks and mulattoes to own property, land, and even enslaved people. These differences demonstrate that the prohibitions put on the enslaved did not derive from their race alone, but from their status as property. Given these permissions, some blacks and mixed-race people would become wealthy, such as the *l'Affranchis*, or mulattoes, or *gens des coleurs* of St. Domingue.[288]

Along with Colbert's reforms, the 1789 French Revolution was the most significant turning point in colonial policy. The extreme subordination and institutions governed by principles of self-determination did not accord with the principles of the Revolution, and had been under attack by liberals in France (and, of course, by the colonists themselves) long before the

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[283] Palmer, *supra* note 264, at 384.

[284] Palmer, *supra* note 264, at 385.

[285] Palmer, *supra* note 264, at 385.

[286] A peculium consists of property held in possession of the slave for his personal use with the acquiescence of the slaveowner.

[287] Palmer, *supra* note 264, at 386.

[288] Chatman, There Are No Slaves in France, pg. 146.

Revolution began.[289] The colonists wanted commercial freedom; equality to trade with the metropolis, duty-free, as part of a closed imperial system. They also wanted greater control over their own domestic governments.[290] The political changes ushered in by the Revolution satisfied these desires. The colonies became completely legally assimilated into the metropolis: They were governed by French constitutional law; like French territory within the metropolis, they were divided into departments that were governed by commissioners and elected assemblies. Colonists were represented by the metropolitan legislature and they could trade with the metropolis unburdened by special duties, as other French departments did.[291]

The wrinkle, for the colonies, of metropolitan integration was that the metropolitan abhorrence of slavery was also part of the picture. Two years following the conclusion of the Revolution, citizenship and electoral rights were granted to free mulattoes and formerly enslaved people. In 1794, all slaves were declared free. Facing protests from the colonies that abolition would spell the collapse of the profitable plantation economy, metropolitan France restricted full political rights to those colonial citizens who practiced professions or worked as craftsmen, were members of the armed forces, or worked on the land. Napoleon Bonaparte seized power in France in 1799; three years later, he reinstated slavery in the colonies in an effort to appease the plantation owners.

3. Unfettered Ownership in Admiralty Courts

Of course, however, the free-soil doctrine soon bumped up against the interests of wealthy plantation-owners and merchants who, having amassed a fortune outside the metropole, wanted to bring their human property back home with them or gift their slaves to family in France. Although the strict racial hierarchy that prevailed in the colonies would eventually come to find its way into French jurisprudence, the free-soil principle had a long and legally significant half-life. Its protections stretched far into the eighteenth century, granting free status to enslaved people who travelled from the Caribbean to France, and lasting until just decades before Haitian independence.

In 1716, the threat to slave status posed by the free soil principle led the mayor of Nantes to urge the king's ministers to propose legislation that would clarify the situation of black enslaved people in France.[292] Nantes had

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[289] FIELDHOUSE, *supra* note 256, at 46.
[290] *Ibid.*
[291] *Ibid.*
[292] *Race, Slavery and the Law in Early Modern France*, *supra* note 164, at 502.

a special interest in this issue because it was among the largest and most significant slave-trading ports in France at the time. The mayor's proposals made their way into the Edict of October 1716, which established rules that provided property protections to colonists seeking to bring their slaves to France. The new law stipulated that enslaved people could be brought to France for two reasons: for religious instruction, or to be trained in a trade.[293] Slaveholders had to obtain permission from their colonial governors before departing with their slaves, and had to register the enslaved at the nearest office of Admiralty within a few short days of arriving in France. If slaveholders failed to comply with these requirements, they would lose their slaves to mandatory manumission.[294]

Although the Edict of 1716 seemed to open a path for slaveholders to bring those they enslaved to France, the king's ministers were soon called to provide more stringent legislation.[295] That year, Jean Boucaux and another enslaved man travelled with Sieur Verdelin, their enslaver, to France. Verdelin had failed to fulfil the requirements set forth in the Edict of 1716 completely: He had obtained a letter of permission from the colonial governor in St. Domingue to travel with Boucaux and another slave to France, but he had neglected to have their names included in the letter. He had also failed to register Boucaux and his traveling companion within eight days of arrival in France. The Admiralty Court in France ruled in Boucaux's favor. However, the court's reasoning in this decision was not preserved. However, the lawyers' arguments were. Boucaux's lawyer argued that Boucaux was a French citizen, that he was "born the subject of our monarch; our equal, as much by humanity as by the religion he professes; and citizen because he lives with us and among us."[296] Sieur Verdelin's lawyer, by contrast, focused on Boucaux's race, arguing that the free soil principle applied to "any other slave other than a negro slave." Verdelin's lawyer was arguing that because the *Code Noir* of 1685 recognized Negro slavery as "necessary and authorized," it applied as a kind of *lex specialis* to Negro slaves and

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[293] *Ibid.*

[294] *Ibid.* The 1716 Edict distinguishes itself from the Edict of Louis X or later decisions in the late medieval or early modern period in that makes specific and repeated mention of Negro slaves and sometimes simply of "*nègres,"* which is used as a shorthand for enslaved Africans. *Race, Slavery and the Law in Early Modern France*, *supra* note 164, at 503. The wording of the Edict demonstrates the extent to which race and slave status had become overlapping concepts by the eighteenth century. Indeed, the nature of slavery and the status and background of those who were enslaved had also undergone drastic changes by that time.

[295] *Ibid.*

[296] *Ibid.*

superseded the free soil doctrine.[297] Because the opinion does not survive, all that is clear is that the tribunal remained unconvinced by the racial logic of Sieur Vedelin's lawyer.

After the Admiralty Court ruled for Boucaux, the king issued a new and updated Declaration—the Declaration of 1738—to clarify and reiterate the requirements set forth in the Edict of 1716. The Declaration of 1738 also added several new provisions that were similarly aimed at reducing the number of free blacks in France. Slaves that were brought to France in violation of the Declaration were not to be manumitted; they were instead to be confiscated and sent back to the colonies, where they would be sold to new slaveholders. The king would keep the profit.[298] Enslaved people were not permitted to remain in France longer than three years.[299] The Declaration of 1738 reflected the language of the Edict of 1716 and that of Sieur Verdelin's lawyer, who used the terms *nègres* as a synonym to *esclave*, demonstrating the increasing conflation of Blackness and slave status in metropolitan law.[300]

However, the Edict of 1716 and the Declaration of 1738 both reflected the royal will and came about through royal acts. The Parlement of Paris refused to register both. The *parlements*, of which there were thirteen during the Ancien Régime, were provincial appellate courts that also wielded a semi-legislative power. They were a relic of the medieval French constitution[301] and a testament to the legal customs that had dominated the provinces before they were conquered and integrated into the French kingdom. They functioned as appeals courts and provided a basic level judicial review to the Crown's law-making powers.[302] While they were fundamentally different

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[297] *Race, Slavery and the Law in Early Modern France*, *supra* note 164, at 503-4, citing Pitaval, "Liberté Reclamée"

[298] *Race, Slavery and the Law in Early Modern France*, *supra* note 164, at 504.

[299] *Race, Slavery and the Law in Early Modern France*, *supra* note 164, at 503.

[300] *Ibid.*

[301] Alfred Cobban, *The Parlements of France in the Eighteenth Century*, 35 HISTORY 64 (1950) [Hereinafter: Cobban].

[302] The members of the parlements were aristocrats who had bought or inherited their offices, which they held independently of the King. There were approximately 1100 members of the *parlements*, who together constituted the *noblesse de robe*, a powerful corporation made up of important families of great wealth and influence. Admission to some *parlements* required noble birth. *Id*, at 64. The *parlement* of Brittany required noble birth for admission. Many of these noble families were "as old and as honorable as the monarchy itself," and the relationship between the monarchy and the nobility was an important one. Montesquieu reflected this relationship with his maxim: "No monarch, no nobility; no nobility, no monarch." Louis Gottschalk, *The French Parlements and Judicial Review*, 5 JOURNAL OF THE HISTORY OF IDEAS 105, 106 (1944). *Ibid.* In this way, the parlements were a structural counterbalance to the power of the Crown. Indeed, they played a crucial role in

from modern-day parliaments or legislatures, *parlements* were responsible for finalizing laws and edicts issued by the Crown[303]. Without the assent of the *parlement*, which was given by and through registration, a royal edict was not official and was therefore not enforceable.[304] Notably, other *parlements* in France registered these edicts, but the *Parlement* of Paris refused. In a kind of end-run around the non-registration of these Edicts, individual slaveholders could petition the King on an *ad hoc* basis if they wanted to prevent their slaves from working for others as servants, or from being returned to the Caribbean. These individual petitions, called *lettres de cachet*, allowed the crown to safeguard the property interest of slaveholders in the enslaved while they sojourned in the capital.[305]

The refusal of the *Parlement* of Paris to register these laws effectively ensured a number of lawsuits that further undermined these requirements and continued to irk royal authorities by resulting in the manumission of enslaved people. The number of lawsuits that slaves filed to secure their freedom during the 1760s increased sixfold compared to the number filed in previous decades. Petitions for freedom became more common and, over time, even routine.[306] A case was initiated when a slave petitioned the Admiralty Court through a *requête*.[307] A *requête* would have to be presented to the *procureur du roi* (an official affiliated with the Crown) or his substitute, who would authorize the petitioner's right to have the case heard by the court.[308] The involvement of the *procureur du roi* seemed to be pro forma, because even as the Crown expressed increasing concern with the number of petitions for freedom in France, the Admiralty Court granted freedom to every enslaved

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consolidating and articulating the demands of the nobility and clergy in the lead-up to the French Revolution.[302] Doyle, "The parlements of France and the Breakdown of the Old Regime 1771–1788."

[303] CITATION NEEDED

[304] *Race, Slavery and the Law in Early Modern France*, *supra* note 164, at 503.

[305] For a nuanced exploration of how l*ettres de cachet* operated, *see* Miranda Spieler, *The Vanaishing Slaves of Paris: The* Lettre de Cachet *and the Emergence of an Imperial Legal Order in Eighteenth-Century France*, *in* THE SCAFFOLDING OF SOVEREIGNTY (ZVI BEN-DOR BENITE, STEFANOS GEROULANOS AND NICOLE JERR EDS. 2017)

[306] SUE PEABODY, THERE ARE NO SLAVES IN FRANCE, 88 (1996) [Hereinafter: THERE ARE NO SLAVES IN FRANCE].

[307] Most *requêtes*, which would be prepared by a lawyer, began with the story of how the enslaved person had come to France, who had served as their master or masters, and provided some juridical grounds for the person's claim to freedom. In some cases, the *requête* stipulated that the person had been born free. In other cases, the petitioner argued that their master had not complied with the proper protocols, having failed to register them with the Admiralty clerk upon arrival in France. Sometimes petitioners argued that they had been horribly mistreated by their masters. *Id*, at 90.

[308] THERE ARE NO SLAVES IN FRANCE, *supra* note 306, at 89.

person who petitioned before it during the eighteenth century.[309] The most common juridical ground for freedom offered was the free soil principle, which was included with the words "*nul n'est esclave en France.*'[310] The lawyer Pierre Etienne Regnaud, who was among the most prolific lawyers in filing such petitions on behalf of enslaved people, began introducing a specific phraseology into the petitions he drafted. Beginning in 1767, he used it as a matter of course: "There is no slavery in France by the terms of the edicts, ordinances and declarations of his majesty."[311] Regnaud seemed to be pointing to a dearth of positive law on this point, implying that slavery was not acknowledged in the statutes that had been formally registered by the Parlement of Paris and that, by virtue of registration, were recognized by the Admiralty Court of France. However, of course, the Declaration of 1738—which was a royal edict—*did* acknowledge or refer to slavery explicitly, it simply was not recognized in the jurisdiction of the Parlement of Paris. Nevertheless, this phrasing was picked up by others at the bar who represented enslaved people before the Admiralty Court, reflecting how important the free soil principle in the adjudication of the *requêtes* had become.[312] These grants of freedom, which were issued as sentences, often explicitly protected the petitioner's status as a free person even when they traveled through jurisdictions that had registered the Declaration of 1738.[313] The Admiralty Court also rejected conditional manumission.[314] It was rare for slave owners to contest the Admiralty Court sentences that awarded enslaved people their freedom.[315] Still, some did—often, seemingly, out of pique. No slaveholder won an appeal in the Admiralty Court from 1730 to 1790.[316]

4. Unfettered Ownership and the French Crown

The French Crown and those at court were concerned with this growing tension between the interests of the slaveowners who had brought

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[309] *Ibid.*

[310] *Ibid.*

[311] *Id.*, at 90.

[312] *Ibid.*

[313] *Id.*, at 89.

[314] In a 1768 case, a slaveowner had granted Jean Baptise, whom he enslaved, freedom on the condition that he serve his master for the rest of his life. While such manumissions were common in the colonies, the Admiralty Court rejected this construction and awarded the previously enslaved Jean Baptiste his freedom immediately and without condition. *Id.*, at 92, citing the *Acte de liberté, requête, and sentence* of August 1, 1768 (A.N., ZD 133).

[315] *Id.*, at 90.

[316] *Id.*, at 89.

their slaves to France and the decisions of the Admiralty Court, which were uniformly friendly to the enslaved. Things came to a head in 1762 with the case of *Lestaing v. Hutteau*, named for the two lawyers who argued the case.[317] The case concerned the status of Louis, an enslaved mulatto man from St. Domingue who had been brought to France by Jean Jaques de Fabre. Louis sued his master before the Court of the Admiralty to secure his freedom, and won.[318] The details of this case have been preserved at least in large part through a report drafted by the Royal Procurator, Guillaume Poncet de la Grave, who was concerned with what he perceived as the implications of the decisions in the context of contemporary France.[319] De la Grave acknowledged the existence of the "free soil" principle in France, observing that no corporal bondage had existed since the Middle Ages. However, he also pointed out that slavery had developed in the colonies under government protection (which, in his view, legitimized it).[320] He further argued that the free soil principle, as it was existed and upheld in eighteenth century Paris, was leading to a situation in which Paris was becoming home to ever more slaves. In his words, "[t]here is not a bourgeois or worker who has not his Negro slave."[321] He went on to lament the arbitrary and total nature of the power that masters held over their slaves, and the fact that slaves were frequently thrown into prison on the whim of those that held them. However, his real worry seems to be not about the fate of the enslaved people who found themselves in Paris, but about the fact that Negroes in France—both enslaved and free—were becoming too numerous and that French society would "soon see the French nation disfigured."[322] He argued that those Negroes who had been granted their freedom under the free soil principle in France had "abused it" and that Negroes were "dangerous for society."[323]

Whether as a direct response to the fears articulated by de la Grave or as an independent expression of similar sentiments, an ordinance dated to the approximate time that de la Grave was reporting on the outcome of the *Lestaing v. Hutteau* decision was sent out to various admiralty courts in France requiring that Negroes and mulattoes—whether slaves or free—register their presence in France within a month.[324] The ordinance was certainly bolstered by de la Grave's report, which it cited to for the notions

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[317] SHELBY T. MCCLOY, THE NEGRO IN FRANCE 44 (1961) [Hereinafter: MCCLOY].
[318] *Ibid.*
[319] *Ibid.*
[320] *Ibid.*
[321] *Id* at 45.
[322] *Ibid.*
[323] *Ibid.*
[324] *Ibid.*

that the population of Negroes had become numerous in France and that enslaved people were being flagrantly bought and sold there.[325] The following year, the French administrative state communicated to the colonies that no further Negros would be permitted to sail to France, including free blacks and mixed-race people. It further ordered that the slaves who had been brought to France would be returned to the colonies later that year, in order to prevent the mixing of blood and the "debasement" of French culture. However, this order was countermanded shortly after it was issued, and no formal efforts at expulsion were ever made.[326]

Meanwhile, however, tensions between the Crown and the *Parlement* of Paris were boiling over. The *Parlements*—and especially the *Parlement* of Paris—has become sites of resistance to what was perceived as the increasingly despotic power of the Crown, and this resistance emerged separately from the issue of the status of people who were brought into France as slaves. The situation grew acute under Louis XV; tensions began to mount in 1749 and eased only after Louis XV's death in 1774.[327] The heart of many of these tensions was the Crown's taxation policies, imposed by the provincial governors, who were selected and acted at the pleasure of the King. In 1771, frustrated with various acts of resistance by the *Parlement* of Paris and provincial *parlements*, King Louis XV's newly-appointed Chancellor Maupeou divided the *Parlement* of Paris's former jurisdiction into six new and smaller districts that would each be headed by an administrative official that answered to the Crown, thereby severely curtailing its quasi-legislative powers.[328] In response, many of the *procureurs* and nearly half the members of the bar went on strike. The same year, Maupeou disbanded the Admiralty Court of France and did not resume hearing cases until 1775.[329] During that time, enslaved people in Paris had no recourse to the French judicial system to hear their petitions for freedom.[330]

As the Admiralty Court resumed its work, elite discontent with the number and status of Blacks in France raged anew. In 1776, Louis XVI issued *lettres patentes* lamenting the number of Admiralty Court cases in which Blacks petitioned for their freedom.[331] Days later, he established a committee to look into the matter and draft legislation to address it.[332] By 1777, a new

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[325] *Ibid.*
[326] *Id* at 46.
[327] THERE ARE NO SLAVES IN FRANCE, *supra* note 306, at 94.
[328] *Id* at 95.
[329] *Id* at 105.
[330] *Ibid*.
[331] *Id* at 114.
[332] *Ibid*.

royal enactment was underway called the *Police des noirs*. This declaration would remain in place for approximately ten years, until the end of the *ancien régime*.[333] Importantly, unlike other edicts of the eighteenth century, it was registered by the Parlement of Paris.[334] It included the terms of the 1762 ordinance, but also acknowledged that, because of the lack of white domestic servants in the colonies, slaveholders would be permitted to transport one enslaved servant or nurses to serve them on the transatlantic voyage. These enslaved persons, however, were not permitted to enter France and would be held in confinement at the port at the owner's expense before being returned to the colonies.[335] Sometimes enslaved Blacks were held not at the ports themselves, but in pre-existing prisons. Notably, provisions were made to hold these enslaved Blacks separately from criminals and to ensure that their quarters were habitable, that they received daily exercise, and masters were permitted to supplement the rations they received—which they sometimes did.[336] These "privileges" reflect that fact that the enslaved who were transported to France were likely to be the "favorites" of the white French masters, or to be nurses that were intimately involved in caring for the immediate health and physical needs of their masters or their children. Furthermore, under the 1777 ordinance, Blacks in France were required not only to immediately register with the authorities, but were also required to carry identity papers on their person at all times with a description of their physical appearance, name, age, trade or employment, and, if applicable, the name of their master. Blacks found to be without these identification papers could be arrested and sent to the colonies.[337]

By the late eighteenth century, then, the free air principle was under enormous tension, which revealed how fundamental it was to France's self-conception and French law. First, it became clear that the free soil principle was not automatic: Enslaved people were not immediately and automatically freed when they entered France. Many enslaved people sued for their freedom and prevailed, but their putative owners often had to be forced by authorities to reckon with the free soil principle; it was not a foregone conclusion. Second, while the free soil principle was an incontrovertible part of French law, the provisions of law that would allow slaveholders to bring and keep enslaved people in France were also part of the law. After the 1777 ordinance was enacted in 1788, an enslaved person could be brough to France and remain a slave there, provided that his master complied with the legal

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[333] MCCLOY, *supra* note 317, at 47.
[334] THERE ARE NO SLAVES IN FRANCE, *supra* note 306, at 106.
[335] MCCLOY, *supra* note 317, at 47.
[336] *Id* at 54.
[337] MCCLOY, *supra* note 317, at 48.

requirements of the time. By the late eighteenth century, slavery could and did exist in France—although its scope and terms were severely limited. For ten years, the racist fears of de la Grave came to be enshrined within domestic law, creating a system in which Negroes in France were subject to being sent to the colonies and enslaved if they failed to register and carry identification papers. Until that point, however, Negroes in France were largely presumed free and could secure their freedom unless their master could demonstrate that he had taken steps that would allow for a derogation from this norm.

IV. Unfettered Ownership and the Global Reparations Movement

In order to rationalize the slave trade and slave holding with the metropolitan "free soil" principle, France and England developed dual legal systems to incorporate colonial slavery. Early in the colonial project, the Crown offered charters to colonizing or trade companies that endowed them with the powers to formulate laws appropriate to their overseas activities. In England, an early legal formula that would be replicated throughout the empire gave English colonies in "remote, heathen and barbarous lands" the right to make laws that were "agreeable to the laws of England."[338] In France, the first Royal charters technically reserved "jurisdiction" to the French king, but gave the chartered companies full property rights over the islands, including the "rights and duties" attendant to land ownership—which included privileges that amounted to legislative and authority over those that inhabited the land. The "free soil principle" and the absence of slavery in England and France left a gap in the law. Acting within the realm of discretion provided to them by colonial charters, colonial governments and members of chartered companies filled the gap, coding the enslaved as chattels over whom they exercised complete ownership rights.

Complete ownership rights over chattels are taken as a given in the modern world. The incidents of ownership are taken as a point of departure—a state from which any derogation has to be justified. But the status because the status of chattels—and the nature of the ownership rights that accompanied them—was still being negotiated in the early modern era. The fact that the slaveholding class saw themselves as possessing unfettered ownership rights over their human chattel was out of keeping with the general principles governing slavery elsewhere in the world, but also with certain aspects of English and French property law at the time.

Property, under its medieval conception, arose from occupation and was transferred by delivery. Possession was perhaps the most important

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[338] DRESCHER, *supra* note 161, at 23, and; *An Alternative Genealogy of the Origins of French Free Soil: Medieval Toulouse*, *supra* note 165.

element of property. There was no modern notion of absolute ownership, or a right against all the world. The most a person who was not in possession of an object could claim was a better right to possession than the person in possession of it.[339] This changed around 1500, when it was decided that physical custody of a chattel could be given to another person without giving up possession of it.[340] Similarly, in 1459, an adjudicating body decided that a person could, through a will, separate the property in chattel from its "use and occupation."[341] About 75 years later, the "use and occupation" could be settled even outside the context of a last will.[342] Throughout the fifteenth century, English lawyers used the word "property" with increasing frequency and specificity with regard to chattels (but not to land),[343] presumably as these nuances of ownership were worked out.

Although land was frequently the subject of adjudication in medieval or early modern England, it was not usually the ownership of the land that was in question—but rather the division or nature of privileges that attended its occupancy or use. Chattels, on the other hand, were far more vulnerable than land to complete expropriation. The "possession" of goods and animals was potentially exclusive in a way that the "possession" of land would not necessarily be. The "on-off, all-or-nothing character that 'property took on… in Year Book debates was appropriate for things that were vulnerable to all inferences in a way that land was not."[344] Early common law lawyers used to notion of "property" nearly exclusively to refer to chattels—not to land. Land, instead, was governed by a complex and overlapping series of rights that resided in individuals; many individuals might have the same rights or privileges vis-à-vis a single piece of land.[345] Because early common law lawyers took chattels, not land, as their paradigm of a "property" interest, they may have found it easier to borrow, use, and incorporate notions of "property" as absolute, individualistic, pre-legal (natural) interests.[346]

The fact that attitudes toward property—both legal and philosophical—had fundamentally transformed was absolutely clear by the seventeenth century. Philosophers such as Locke and Grotius developed theories of property as a natural right that is nevertheless defended by the State. In the legal world, treatises and handbooks for students of the common

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[339] JOHN BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 414 (5TH VOL. 2019).

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[341] *Id.*, at 415.

[342] *Id*, at 415.

[343] David J. Seipp, *The Concept of Property in the Early Common Law*, 12 LAW & HIST. REV. 29, 34 (1994).

[344] *Ibid*.

[345] *Id.*, 47.

[346] *Ibid*.

law began to deal with both land and goods under the general rubric of "property." In the fierce political debates and civil war that followed, both lawyers and laymen identified the crucial function of law to be to protect "property" in a manner that was broader, more abstract, and more fundamental than before.[347] It was this modern notion of property, wrestled over and settled in the early modern era, that set TCS as practiced by France and England apart. This notion also ushered in the legal structures that undergirded global capitalism and made it possible for TCS to give rise to the industrial revolution that accelerated it.

A. Unfettered Ownership and the (Il)legality of British and French TCS

Although some scholars have argued that it was the chattelization of human beings that distinguished transatlantic slavery in the Americas from other forms of slavery, this Article has demonstrated that human beings were coded as chattel in other legal systems as well. Roman law (which influenced which Iberian slave law) and Islamic law both categorize the enslaved as chattel subject to certain principles of private law. What set British and French slave codes apart were instead the extensive rights of ownership that slaveholders enjoyed over the enslaved. In the other early modern societies surveyed in this Article, the ownership rights of slaveholders were restricted vis-à-vis their slaves. While the survey contained in this Article was not exhaustive, many of these same restrictions existed in other societies where slavery existed, including those in East Asia[348] and among the indigenous peoples of North and South America.

In reflecting on the limitations of the ownership rights of slaveholders in most early modern societies, it is useful to revisit the relevant incidents of ownership laid out by Honoré: the rights of possession, use, management, income, capital, security, and alienability, the absence of term, the prohibition of harmful use, execution, and residuarity. Not all of these rights can be applied to human property, and some of these concepts must be stretched to accommodate the example of the enslaved. Still, this Article's survey of principles regulating slave ownership during the early modern era demonstrates that slaveowners' rights to destroy, alienate, and to income in their slaves were commonly restricted. Slaveowners could not mutilate or kill slaves. In many cases, slaveowners could not sell slaves whom they had married, who had borne them children, or who had contracted for their own

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[347] *Id.*, 34.

[348] *See, e.g.*, Claude Chevaleyre, *Slavery in Late Ming China*, *in* Pargas and Schiel, (eds.) THE PALGRAVE HANDBOOK OF GLOBAL SLAVERY THROUGHOUT HISTORY (2023).

freedom. Many slaveholders had limited income rights to the labor or skills of their slaves; the enslaved were often granted time or land to provide for at least their own subsistence. Laws that provided for and encouraged manumission or allowed slaves to assimilate into kin networks worked to limit the term of ownership rights. The enslaved were frequently manumitted, or their descendants were. The rights of the enslaved to marry and form households arguably undermined their owners' rights to management; marriage opens the door to obligations and relationships that interfere with perfect control of an enslaved person's time, location, and family planning decisions. Slaveholders' ownership rights were tempered by the fact that they were subject to criminal law. In many societies, the enslaved could access the judicial system, or elements of it.

In French and especially in British colonies, slaveholders had recourse to incidents of ownership that were far broader than in slave societies elsewhere. British law permitted slaveholders to kill slaves who tried to escape. Murder of slaves for other reasons—or no reason—was punished with a small fine. While torture and mutilation was formally prohibited by the *Code Noir*, it was functionally permitted. Slaves under the British and French iterations of TCS could not own property, and even temporary possession of property was heavily regulated. Manumission in the colonies was all but impossible, and came to be discouraged through tax law. Prohibitions on property ownership for the enslaved and their distance from kin networks made ransom basically unfathomable. The enslaved had no or limited marriage rights. The *Code Noir* permitted the enslaved to marry, but only with the master's permission. The British slave codes made no provisions for marriage, and the enslaved could be sold away from their families—including from the children they had borne their enslaver. The Debt Recovery Act of 1732 confirmed execution as an incident of ownership under British law—slaves could effectively be seized to recover debts. In both French and British law, the heritability of slavery paired with the lack of pathways toward manumission demonstrated what Honoré referred to as the "absence of term." Slaves and their descendants could be held in perpetuity.

What is perhaps the most revealing of all about the extent of the ownership rights of French and British slaveholders were the ways that the state upheld these rights—often at its own expense. State interference to punish or free the enslaved were treated as a modern-day takings—government seizures of private property. The Barbados Slave Code, which was later modified and adopted in other British colonies, provided for compensation to slaveholders if their slaves were imprisoned or executed by

the state.[349] When slavery was eventually abolished by French and British metropolitan law, slaveholders were compensated for their lost human property from the coffers of the state. In England, the compensation package totaled £20 million in 1834, or more than £1.9 billion in today's currency, and 40% of the annual budget.[350] In France, the amount set aside for compensation to slaveholders in Martinque, Guadeloupe, French Guyana, and France's African slave colonies was 126 million francs, which represented the same proportion of the annual budget that €27 billion euro would today.[351]

B. Legal Implications

This Article proposes a method for assessing whether transatlantic chattel slavery as practiced by Northern European colonial powers in the seventeenth and eighteenth centuries was illegal under the international law of the time. Section II of this Article argued that given the dearth of treaty law on slavery during this time, the applicable law must be sought elsewhere. After explaining the challenges of engaging in a customary international law analysis of slavery, it asserted that general principles of law as set out in Article 38(1)(c) can be referred to as an independent source of law if other sources are lacking. A survey of the general principles of law governing societies during the early modern era reveals that the extensive ownership rights enjoyed by British and French slaveholders was out of keeping with the laws of other societies, and that the metropolitan's protections of these ownership rights contravene the limitations on slave ownership that existed at the time.

Demonstrating that the unfettered ownership rights that attended TCS violate general principles of law is powerful, but further hurdles must be cleared in order to make a viable reparations claim under international law. The Articles on the Responsibility of States for Internationally Wrongful Acts instructs that a "breach of an international obligation of a state" may make that state liable for reparations.[352] However, behavior out of keeping with the

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[349] *See infra*, Section III(A)(1).

[350] THOMAS PICKETTY, CAPITAL AND IDEOLOGY [pincite] (2019).

[351] "Compensation paid out to slave owners recorded in a database," Société de plantation, histoire & mémoires de l'esclavage à La Réunion, *available at* https://www.portail-esclavage-reunion.fr/en/compensation-paid-out-to-slave-owners-recorded-in-a-database.

[352] *See* Articles 2 and 31 of the Articles on the Responsibility of States for Internationally Wrongful Acts (2001), UN Doc. A/RES/56/83 (2001), 53 UN GAOR Supp. No. 10 at 43, Supp. No. 10 A/56/10 (2001), *available at* http://www.un.org/law/ilc [Hereinafter: ARWISA].

"general principles of the law of civilized nations"—as this Article asserts unfettered ownership rights are—does not necessarily constitute a breach of an international obligation. International law generally equates the breach of an international obligation to conduct contrary to the rights of other States.[353] Put differently, states have international obligations to other states *qua* states. Prior to the entry into force of major multilateral human rights treaties, for example, a state may have behaved with brutality toward its own people in a way that was out of keeping with customary law as established by the behavior of other states, but not have committed an internationally wrongful act. No internationally wrongful act can occur where no international obligation exists. Because the treatment of a state's own people did not—until recently—have any legal bearing on its relationships with other states, it was outside the scope of international law.

This changed with the introduction of multilateral human rights treaties that made a state's adherence to human rights principles within its own borders a matter of international law. Prohibitions on the worst excesses of human rights abuses are now considered to exist separately from treaty law as *jus cogens* norms, and each state is obligated to respect them regardless of whether it formally binds itself to do so via a treaty. As was recognized in the *Barcelona Traction* case, certain obligations may be owed *erga omnes*, or to the international community as a whole.[354] Today, *erga omnes* obligations are seen to include most *jus cogens* norms, including prohibitions on slavery and the slave trade, prohibitions on torture, and respect for the right to self-determination. A state that violates these obligations violates its obligation to any and every other state.

However, important questions remain as to which states can raise *erga omnes* violations, and under what circumstances. In other words, it may be difficult to satisfy standing requirements to bring claims related to violations of these norms if a given state has not been harmed. These difficulties can be overcome if reparations advocates seek an advisory opinion, which would allow the ICJ to opine on the (il)legality of TCS without regard for jurisdictional and standing requirements. Still, the question of the coeval (il)legality of TCS and whether it triggers liability for

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. Article 2 provides that "There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an obligation of the State." Article 31(1) provides that, "The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act."

[353] Commentary on ARSIWA, pg. 35, para. 8.

[354] Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Second Phase, Judgment, 1970 I.C.J. 3 (Feb. 5).

reparations would inevitably beg the question as to when TCS rose to the level of a *jus cogens* norm. Because *jus cogens* norms were first formally referred to in Article 53 of the Vienna Convention on the Law of Treaties, adopted in 1969, this moment almost certainly would have been after abolition. The answers to these questions are beyond the scope of this Article. The difficulties of building a strong legal case for reparations using principles of international law largely developed by states that engaged TCS, however, are significant. It is worth acknowledging these difficulties in order to emphasize that the value of arguments about the unique brutality of TCS are primarily political.

C. Policy Implications

The global reparations movement has gained increasing momentum since 2020. Regular meetings and conversations have begun between policy officials, scholars, civil society organizations, and activists in Africa and in every country in which there is a sizeable population of the African diaspora. The U.N. Permanent Forum for People of African Descent has become a kind of hub for these conversations, and it convenes an international meeting every several months. Beyond their consistency and volume, the calls for reparatory justice may have foreign relations implications, as well. China has been consistent and unabashed in its support for reparations for those in the African diaspora. At a 2022 meeting of the U.N. Permanent Forum on People of African dissent, the representative from China said that "colonialism, slavery and the transatlantic slave trade were the darkest episodes of human history, resulting in untold sufferings for the African people," calling out systemic racism and racial discrimination in the U.K., the U.S., Canada, and Australia explicitly and urging these and other relevant powers to take steps toward remediation.[355]

Pushing for an ICJ opinion for a U.N. Resolution that would invite the ICJ to opine on the status of transatlantic chattel slavery under international law may have important political consequences. First, a well-reasoned, public framing of the illegality of TCS would upset a long-standing narrative in Britain that it was the engine and leader of the global abolition movement. Second, former colonial powers that seek to resist the narrative that TCS was illegal will be forced to make morally compromising, odious arguments about their involvement in slavery, and to articulate those arguments in great detail with support from experts. Finally, a strong legal platform for reparations for TCS can undergird and give momentum to the

[355] Presentation of the Report of the Permanent Forum on the People of African Descent, 6 October 2023, *recording available at* https://webtv.un.org/en/asset/k1v/k1vz61hyt1.

distinct but overlapping movements for climate justice and sovereign debt relief. Insisting on the legal underpinnings of reparations can help shift conversations about foreign aid or development aid into a framework of justice.

V. Conclusion

The global reparations movement has argued that transatlantic chattel slavery was morally abhorrent and illegal, and that reparations from former colonial powers who engaged in it are due as a matter of law. However, the global movement has yet to completely articulate how and why TCS was illegal. Scholars that focus on the fact that TCS chattelized human beings are mistaken in their arguments that chattelization was unique to the transatlantic slave trade. So far, these calls for reparations have been largely ignored or even dismissed as an "international legal fantasy."

This Article has sought to challenge the Conventional Approach to determining the legality of transatlantic chattel slavery (TCS) under international law as practiced by Britain and France from the sixteenth to the early nineteenth centuries. The Conventional Approach focuses on treaty law, and concludes that transatlantic chattel slavery was not unlawful before the nineteenth century because no treaty or domestic legislation explicitly prohibited it. Framing the legal status of slavery through the lens of treaty law, as the Conventional Approach does, is ahistorical. This Article focuses instead on general principles of law as a source of substantive international law.

The general principles of law regulating slavery in across societies during the early modern period consistently limited slaveholders' ownership rights over the enslaved. French and British slaveholders had wide legal discretion to code the enslaved as chattel in colonial law, and to endow themselves with unfettered ownership rights. These rights, which granted slaveholders near-total control over the enslaved, including the power of life and death, were a historical anomaly and contravened the general principles regulating slavery at the time.

The development of unfettered ownership rights in French and British colonies was facilitated by the absence of pre-existing legal frameworks regulating slavery in these metropoles. This legal vacuum allowed colonial slaveholders to shape the law in their favor, leading to the codification of the enslaved as chattel with unrestricted ownership rights. This codification, driven by economic interests and a desire for maximum control, resulted in an exceptionally brutal system of slavery that deviated significantly from established norms.

The notion that TCS was contrary to international law during prior to formal abolition in the nineteenth century has significant implications for the

ongoing global reparations movement. It provides a legal basis for pursuing reparations claims and challenges the arguments often put forth by former colonial powers that their involvement in slavery was unfortunate but not unlawful. The legal framing of this argument is also timely: the movement has recently begun to speculate about pushing for a UN General Assembly resolution seeking an advisory opinion from the International Court of Justice (ICJ) on the (il)legality of slavery prior to the nineteenth century. While an advisory opinion would not be legally binding, it could carry significant moral and political weight and influence diplomatic negotiations and public discourse on reparations.