SLAVES, FREE BLACKS, AND RACE IN THE LEGAL REGIMES OF CUBA, LOUISIANA, AND VIRGINIA: A COMPARISON*

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This Article analyzes the legal regimes regulating slavery and race at the ground level as they evolved in three different locations in the Americas (Virginia, Cuba, and Louisiana), showing how they shaped, and were shaped in turn, by the actions of people of color. The Article attempts to compare law "from the bottom up": regulatory efforts by local legislatures, slaves' claims in court, trial-level adjudications, and interactions among ordinary people and low-level government officials. We begin with the greatest commonality of racial status across the Americas: all over the New World, slaveholders built discriminatory legal regimes that sought to equate "negro" and "slave." We then follow the trajectories of these legal systems in three different periods: the early years of these colonies, until roughly the 1760s; the Age of Revolution, from the 1770s

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Many quotations in this piece have been transcribed from original source materials, which includes sources using Old English spellings and terminology. The *Law Review* has retained these spellings and terminology where possible.

through the early nineteenth century; and the nineteenth century, up to the U.S. Civil War and the Cuban wars of independence. We pay special attention to the ways slaves attempted to attain freedom, and the development of communities of free people of color. We show that in the earliest period, Iberian legal precedents meant a quicker establishment of racial distinctions than in Virginia, but that as slave legal regimes developed, the Iberian legal precedents limited the ability of colonial slaveholders to close down avenues to freedom in both Cuba and Louisiana. The size of the communities of free people of color that resulted from freer manumission policies had significant repercussions for black citizenship after emancipation.

INTRODUCTION

In 1778, a slave named George petitioned the Virginia House of Delegates for his freedom.[1] Arguing that his late master had promised him freedom, effective at the time of his death, and having fulfilled his duties as a faithful "domestic servant" for years, George requested that his manumission be officially acknowledged.[2] That same year, two slaves, Maria de la Merced and Maria Silveria, living in Santa Clara, Cuba, petitioned the Lieutenant Governor to obtain their manumission letter, claiming that they were entitled to purchase their freedom after many years of loyal and devoted service.[3] Their

1. *See* EVA SHEPPARD WOLF, RACE AND LIBERTY IN THE NEW NATION: EMANCIPATION IN VIRGINIA FROM THE REVOLUTION TO NAT TURNER'S REBELLION 28 (2006).

2. *See id.*

3. *See* Letter from Antonio de Camba, Lieutenant Governor of Trinidad (Apr. 20, 1778) (collection of Archivos General de Indias, legajo 1257, no. 30).

cases were similar to that of Catherina, a New Orleans slave who in 1773 sued the estate of her master.[4] Catherina insisted that she had served her master's family for many years, that she was sick from an accident that had injured her, and that she had been promised her freedom.[5] Although the administrator of the estate refused his consent, "considering her bad conduct, her iniquity, [and] her dissimulation," Catherina was able to win freedom for herself and her five-year-old child.[6]

These examples point to a widely shared feature of slave societies in the Americas: slaves similarly attempted to make use of legal and institutional resources to press claims, fight against the most egregious forms of abuse, and in some cases even obtain freedom, with or without the cooperation of their masters. In territories as distant as New York and Buenos Aires, under republican, monarchical, or colonial regimes, slaves consistently sought to improve their working and living conditions, engaging the support of secular and religious authorities whenever possible and convenient.[7] When faced with comparable institutional openings and opportunities, slaves across the Americas reacted in similar ways. They seized those opportunities and tried to use them to their own advantage and to improve the lives of their loved ones.[8]

Slaves' interactions with legal and religious institutions have taken center stage in a rich new literature on slavery and law in the Americas.[9] During the last two decades, historians and legal scholars have studied how, through the cumulative effects of legal suits and claims, slaves participated in the creation of legal meanings, customs, institutions, and rights. In contrast to earlier analyses of legal regimes of slavery through legal codes, statutes, precedents, and doctrinal influences,[10] the recent scholarship approaches the study of the law not as a fixed set of principles and precepts, but as a contentious social and political space in which different interests, including those of slaves, constantly collided.[11]

4. *See* Laura L. Porteous, *Index to the Spanish Judicial Records of Louisiana XIV*, 9 LA. HIST. Q. 553, 556 (1926) (summarizing Catherina's case against her master's estate).

5. *See id.*

6. *Id.*

7. *See* Alejandro de la Fuente & Ariela Gross, *Comparative Studies of Law, Slavery, and Race in the Americas*, 6 ANN. REV. L. & SOC. SCI. 469, 473–74 (2010).

8. *See infra* Parts III–IV.

9. For more on this literature, see generally de la Fuente & Gross, *supra* note 7.

10. *See id.* at 470–72.

11. *See id.* at 472–73.

By focusing on slaves' legal activities and strategies, historians have also questioned traditional distinctions among slave legal regimes in the United States and Latin America. These distinctions owe much to Frank Tannenbaum's comparative work on slavery, in which he sought to demonstrate that differences in modern race relations resulted from the development of different slave regimes in "Anglo-Saxon" versus "Latin" America.[12] The law was central to these foundational differences.[13] In "Latin" America, slavery developed under the influence of a well-established body of ancient law, of Roman and canonical roots, that conferred on slaves a legal and moral personality.[14] In "Anglo-Saxon" America, by contrast, slavery developed in the absence of a previously established legal system, so the planters were free to treat slaves as chattel.[15] Slaves had no rights under the law, their families enjoyed no legal recognition, and their marriages had no civil effects.[16] Whereas law and custom favored freedom in "Latin" America, the social and legal environment in "Anglo-Saxon" America was hostile to freedom, where "being a Negro was presumptive of a slave status."[17]

Revisionist historians in the 1970s–1990s criticized Tannenbaum for a focus on legislation that provided a misleading top-down history without sufficient attention to the conditions of slavery on the ground. The "New Social" historians demonstrated the brutality of Latin American sugar plantations, the persistence of racial hierarchy and inequality in Latin America after emancipation, and the lack of enforcement of paternalist laws about slave treatment. They pointed to demographic factors to explain variations in slavery regimes—for example, imbalances in sex ratios to explain higher rates of interracial marriage or sex, and fluctuations in commodity prices to explain changing rates of manumission.[18]

Thus, for several decades, historians of slavery in both the United States and Latin America de-emphasized the centrality of the

12. *See* FRANK TANNENBAUM, SLAVE AND CITIZEN: THE NEGRO IN THE AMERICAS 65–66 (1946).

13. *See id.* at 65–67.

14. *See id.* at 62–65.

15. *See id.* at 103.

16. *See id.* at 66–82 (listing examples of the lack of legal rights and recognition for slaves in early America).

17. *Id.* at 66.

18. For an in-depth summary of this literature, see generally Alejandro de la Fuente, *From Slaves to Citizens? Tannenbaum and the Debates on Slavery, Emancipation, and Race Relations in Latin America*, 77 INT'L LAB. & WORKING CLASS HIST. 154 (2010); Alejandro de la Fuente, *Slave Law and Claims-Making in Cuba: The Tannenbaum Debate Revisited*, 22 LAW & HIST. REV. 339 (2004).

law to the culture and economy of slavery. But as they studied slaves and their initiatives, actions, and social networks, social historians inevitably reencountered the law, which shaped many important aspects of slaves' lives. The recent scholarship on the legal history of slavery builds on this body of work and studies the formation and evolution of legal regimes through the contentious interactions of slaves, masters, judges and other jurists, government officials, and sometimes free blacks. Through the prism of these interactions, former distinctions between "Anglo-Saxon" and "Latin" America lose salience. What scholars find everywhere, as in the opening paragraph of this Article, are slaves' remarkably similar attempts to exploit whichever openings were available to improve their lives. As one historian states, "[D]espite different legal traditions, the destinies of discrete groups of Africans and their descendants in cities throughout the Atlantic world were remarkably similar. By developing similar ideas and attitudes, these slaves succeeded in creating spaces that allowed them to change their own social and legal conditions."[19]

Yet that slaves reacted similarly to openings in the legal and institutional settings they encountered does not mean that opportunities were similar across the Americas or that the legal culture in which slaves operated was irrelevant. Slaves lived within legal and institutional cultures that were, in fact, vastly different.[20] These different legal regimes did have a significant impact on slaves' lives and their opportunities to achieve freedom.

By widening our scope to emphasize change over time, we see that slaves' strategies and "destinies" changed along with the place and period in which they worked and lived. Legal doctrines, institutions, and procedures were not static, but transformed in response to both endogenous and exogenous factors. Once we take into account these transformations, the influence of law and legal institutions across the Atlantic world comes into relief.[21] Yet at the

19. Keila Grinberg, *Freedom Suits and Civil Law in Brazil and the United States*, 22 SLAVERY & ABOLITION 66, 78 (2001).

20. For examples, see *infra* Part III.

21. *See, e.g.*, Martha S. Jones, *Time, Space, and Jurisdiction in Atlantic World Slavery: The Volunbrun Household in Gradual Emancipation New York*, 29 LAW & HIST. REV. 1031, 1034 (2011) (discussing the distinct legal culture in New York during emancipation reforms). For a broader discussion about this topic, see generally REBECCA J. SCOTT & JEAN M. HÉBRARD, FREEDOM PAPERS: AN ATLANTIC ODYSSEY IN THE AGE OF EMANCIPATION (2012); EDLIE L. WONG, NEITHER FUGITIVE NOR FREE: ATLANTIC SLAVERY, FREEDOM SUITS, AND THE LEGAL CULTURE OF TRAVEL (2009).

same time, any generalization based on a specific moment is bound to be inaccurate when applied to a different time period.[22]

This Article seeks to analyze how legal regimes regulating slavery evolved in three different locations in the Americas and how they shaped, and were in turn shaped by, slaves' legal actions. We revisit a comparison that was famously used, decades ago, to uphold the notion that slavery's "legal structure" in the two Americas was fundamentally different: Virginia and Cuba.[23] To this dyad we add a third point of comparison: the hybrid legal system of Louisiana, where it is possible to assess how slaves took advantage of different legal regimes as they changed during the eighteenth and nineteenth centuries.[24]

As part of our comparative analysis, we reassess how legal precedents and mores informed the formation of legal regimes concerning slavery in the Americas. Following Tannenbaum, most historians have assumed that the only way to think about Iberian legal precedents is in terms of their ameliorative effects on the lives of blacks and slaves.[25] Less attention is given to the fact that, however protective, these precedents delineated the legal position of slaves (and to some degree, of free people of color as well) in terms that were significantly clearer and more rigid than those found in the British colonies. As a result, in the formative period of Virginia's slavery, the condition of a slave was considerably more fluid and ambiguous than in the Iberian colonies.

As we compare the formation and consolidation of slave legal regimes in these territories, we analyze roughly similar forms of legislation. When studying slavery in the Spanish empire, previous historians typically concentrated on precedents such as the *Siete Partidas* or on the *reales cédulas* issued by the Spanish monarchy for

22. *See* Ira Berlin, *Time, Space, and the Evolution of Afro-American Society on British Mainland North America*, 85 AM. HIST. REV. 44, 44 (1980).

23. *See* HERBERT S. KLEIN, SLAVERY IN THE AMERICAS: A COMPARATIVE STUDY OF VIRGINIA AND CUBA 37–85 (1967).

24. For studies dealing with slavery and the law in Louisiana over time, see generally GILBERT C. DIN, SPANIARDS, PLANTERS, AND SLAVES: THE SPANISH REGULATION OF SLAVERY IN LOUISIANA, 1763–1803 (1999); THOMAS N. INGERSOLL, MAMMON AND MANON IN EARLY NEW ORLEANS: THE FIRST SLAVE SOCIETY IN THE DEEP SOUTH, 1718–1819 (1999); JUDITH KELLEHER SCHAFER, BECOMING FREE, REMAINING FREE: MANUMISSION AND ENSLAVEMENT IN NEW ORLEANS, 1846–1862 (2003) [hereinafter SCHAFER, BECOMING FREE]; JUDITH KELLEHER SCHAFER, SLAVERY, THE CIVIL LAW, AND THE SUPREME COURT OF LOUISIANA (1994) [hereinafter SCHAFER, SLAVERY AND THE CIVIL LAW]; Hans W. Baade, *The Law of Slavery in Spanish Luisiana, 1769–1803*, *in* LOUISIANA'S LEGAL HERITAGE 43 (Edward F. Haas ed., 1983).

25. For a discussion of this scholarship, see sources cited *supra* note 18.

different colonial territories beginning in the sixteenth century.[26] These regulations are important points of reference, but they reflect priorities and concerns which are very different from those reflected by the legislative assemblies in the British colonies, controlled as they were by slaveowners and planters. For this reason, our analysis of Cuban statutes relies heavily on local law; that is, on regulations issued by the *cabildos*, or municipal powers, particularly those of Havana. In addition to "royal enactments" and "prior metropolitan law," these regulations constituted an important source of slave law in Cuba and in other Spanish colonies[27]—one that has not received adequate attention in a comparative context. These regulations are particularly interesting for our present study of legal trends in "Anglo-Saxon" and "Latin" America for at least two reasons. First, they are roughly comparable to the statutes approved by colonial assemblies and councils in the British and French colonies, and better reflect the aspirations and goals of local slaveowners than other sources of slave law. Second, these regulations were not produced in a cultural vacuum. They were part of an Atlantic culture of slave ownership, which, by the sixteenth century, had produced a vast body of knowledge about the social standing of Africans and their descendants.[28] In other words, such local regulations were themselves informed by the very precedents that comparative scholars of previous generations so frequently invoked to extol the virtues of the Spanish law of slavery.

At this local level, slaveowners of all nationalities attempted to build rigid racial distinctions into law that guaranteed not only the obedience and subservience of their slaves, but also the social subordination of Africans and their descendants, regardless of social status. After examining how discriminatory legal regimes were built on the ground in each setting during the early colonial period, we follow the trajectories of these legal systems once slavery was firmly established. We pay special attention to the evolution of manumission—that is, a slaveowner's right to bestow freedom on his slaves—to slaves' legal suits for freedom, and to their efforts to turn self-purchase customary arrangements into legally protected personal rights. Although the existence and frequency of manumission is not necessarily a good indicator of slave treatment or of the alleged

26. For a discussion of this scholarship, see sources cited *supra* notes 7, 18.
27. KLEIN, *supra* note 23, at 39.
28. *See* sources cited *infra* notes 29–30.

"openness" or benevolence of a slave regime,[29] we do agree with previous scholars that this institution is key to understanding dominant ideas about slavery as a permanent status, and especially about the possible integration of free people of color into society.[30] Whenever opportunities for manumission were available, the development of communities of free people of color followed, because, among other reasons, free blacks contributed funds to purchase the freedom of relatives or to help slaves purchase their own freedom.[31]

The existence of communities of free people of color made a difference to slave societies in a number of ways. Their claims to subjecthood or citizenship shaped the meanings of race in a given society both during the era of slavery and after emancipation. We briefly trace the evolution of the status of free people of color, the conflicts they brought to the forefront of the law, and the adjudication of the boundaries between free and enslaved, black, white and Indian. We also suggest that legal precedents interacted with politics, racial ideology, and demographics to create differential opportunities for slaves and free people of color to make legal claims.

As we trace the evolution of these slave societies over time, shifts in politics and racial ideology also play a role. The Article examines three periods: the early years of the three colonies, until roughly the 1760s; the Age of Revolution, from the 1770s through the early nineteenth century; and the nineteenth century, up to the U.S. Civil War in 1861 and the Cuban wars of independence in 1868. In each of these three periods, different political and legal configurations helped to shape the status of slaves and free people of color in their interactions with legal institutions.

Legal precedents seem to have been particularly important during the initial, formative period, although in paradoxical ways. The process of formation and organization of Iberian colonial societies was informed by a legal culture that clearly demarcated the inferiority of slaves and, more generally, of "negroes," Africans, and their descendants. Such doctrinal clarity was notoriously absent in early

29. For a summary of the debates surrounding manumission, see Rosemary Brana-Shute, *Manumission*, *in* A HISTORICAL GUIDE TO WORLD SLAVERY 260, 260–66 (Seymour Drescher & Stanley L. Engerman eds., 1998).

30. *Cf.* STUART B. SCHWARTZ, SUGAR PLANTATIONS IN THE FORMATION OF BRAZILIAN SOCIETY: BAHIA, 1550–1835, at 251–53 (1985) (discussing Brazil's slave society).

31. *See, e.g.*, *id.* at 252 (discussing how Brazilian slaves "were willing at great sacrifice and effort to scrape together enough money to purchase their own freedom or that of their children").

colonial Virginia. However, as slave legal regimes developed, the Iberian legal precedents, recycled by royal regulations, limited the ability of colonial slaveholders to completely dehumanize the slaves, to close down on manumission, and to get rid of free blacks. Given their greater autonomy, and the absence of precedents, slaveholders in Virginia were much more successful in limiting manumission and the growth of the free population of color. By the 1770s, the community of free people of color was significantly larger in Havana (about 14%)[32] than in Virginia (about 1%)[33] or New Orleans (about 3%),[34] which had recently come under Spanish control.

As revolutionary ideas swept across the Atlantic, opportunities for manumission and for slaves' legal claims-making probably increased everywhere, but were significantly expanded in Virginia. The small size of the free colored community there, however, probably helps explain why free blacks were unable to make lasting gains and why limitations on manumission were reinstated by 1806.[35] Legal limits on manumission were reinstated also in Louisiana once it became part of the American union, but the free population of New Orleans (at about 20%)[36] was by then much larger than that of Virginia, and the lingering influence of Spanish and French legal practices allowed greater rights of manumission than in other areas of the South. In Cuba, despite the phenomenal growth of plantation slavery, no legal limits were placed on manumission or on slaves' access to self-purchase. By the early nineteenth century, the free population of color in Cuba was too significant and too large to be obliterated. Legal principles and practices allowing slaves to obtain freedom were too entrenched to be curtailed.

The debates about equality and citizenship that criss-crossed the Atlantic during the Age of Revolution had similar effects on all territories. The specter of slave revolt filled slaveowners with fears of racial cataclysm. They were terrified by the Haitian example.[37] Slaveowners reacted by deploying racist ideologies that reasserted the inferiority of blackness and stripping blacks of political rights. These ideologies found legislative expression in all three cases, but the

32. *See* KENNETH F. KIPLE, BLACKS IN COLONIAL CUBA 1774–1899, app. (1976) (Census of 1774).

33. *See* WOLF, *supra* note 1, at 3 (citing 1% "at the time of the Revolution").

34. *See* Jennifer M. Spear, Book Review, 58 WM. & MARY Q. 276, 277 (3d ser. 2001) (reviewing DIN, *supra* note 24); *infra* note 219 and accompanying text.

35. *See infra* notes 249–50 and accompanying text.

36. *See* Spear, *supra* note 34, at 277; text accompanying note 219.

37. *See infra* note 243 and accompanying text.

process of identifying race with status advanced much more in Virginia than in Havana, with New Orleans remaining an intermediate case. Slaves reacted to these changes in legal regimes. Whereas in Havana they continued to press for freedom using traditional avenues and legal tools, in Virginia, where the association between slavery and blackness was much clearer, slaves pursued freedom by claiming non-black (i.e., free) ancestry. The goal remained the same—to escape slavery—but the legal arguments changed.[38]

Part I of this Article sets the stage for our comparison by examining the legal precedents each of the colonies inherited from Spain, France, and Britain. We then continue in Part II to show the way local legislatures and courts built racial distinctions into the law, using the precedents they had brought with them to the New World. This was an easier process in Havana than in Virginia because the Spanish colonizers had a much larger toolkit of precedents regarding race and slavery. By the time Louisiana was settled, there was already a well-worn template for race law. Part III surveys the legal regime regarding slaves' access to freedom and the status of free people of color in each jurisdiction in three eras—the formative period up to about 1760; the Age of Revolution (1770s to 1820s); and the nineteenth century. We find strong commonalities across regions in the Age of Revolution, but divergence in the nineteenth century. Part IV turns to local adjudications involving race and people on the borders between free and slave, and black and white, in the nineteenth century, arguing that differences in legal and political regimes help explain the very different strategies people of color used to make legal claims in this period.

I. LEGAL PRECEDENTS

The first Europeans to transport Africans to the New World did so as part of an international trade in human beings that had already generated legal precedents regarding statuses of unfreedom. Spanish and Portuguese colonizers in the Americas brought with them ideas about race and slavery formed on the Iberian Peninsula and drew on their experience with Iberian local legal regulation. By contrast, British settlers in Virginia did not have the same set of legal precedents, although ideas about race were certainly in circulation in the Atlantic world. Louisiana, established a century later, had not

38. *See infra* Parts III.C, IV.

only the legal code of the French empire, but local examples to draw on as well.

By the time of the British colonial settlement in North America, slavery was fairly widespread and was already becoming associated with sub-Saharan Africans, in what is now known as Latin America. Many of the colonizers came from (or through) cities in Mediterranean Europe, such as Seville, Lisbon, or Valencia, which were very familiar with slavery in general and with black slavery in particular. Seville and Lisbon were the slaveholding capitals of sixteenth-century Western Europe.[39] These colonizers knew a legal culture of slavery that placed some restrictions on the power of slave owners over their slaves. At the same time, this legal culture left little doubt about the implications of the slave condition and had begun to associate slavery with certain human groups, particularly those from sub-Saharan Africa.

The process of association between status (slavery) and African ancestry as defined by color ("negro" or occasionally "mulato" or "pardo" as well) was fairly advanced in Iberia as early as the sixteenth century.[40] A significant body of legal doctrine and knowledge helped cement this association that turned blackness into a synonym of degradation and ignominy. By the early sixteenth century, when the proportion of sub-Saharan Africans among slaves in the Iberian Peninsula was fast growing, "negros" were already deemed to be people "without honor and faith" and qualified as ugly, barbarous, and savage.[41] Hell itself was associated with blackness.[42] As a tutor of the Prince of Portugal explained in 1535, once he landed in Evora he

39. *See* JOSÉ LUIS CORTÉS LÓPEZ, LA ESCLAVITUD NEGRA EN LA ESPAÑA PENINSULAR DEL SIGLO XVI 45–46 (1989); ALFONSO FRANCO SILVA, LA ESCLAVITUD EN SEVILLA Y SU TIERRA A FINES DE LA EDAD MEDIA 59 (1979); WILLIAM D. PHILLIPS, JR., HISTORIA DE LA ESCLAVITUD EN ESPAÑA 164–67, 194–95 (1990); A. C. DE C. M. SAUNDERS, A SOCIAL HISTORY OF BLACK SLAVES AND FREEDMEN IN PORTUGAL, 1441–1555, at 54 (1982); ALESSANDRO STELLA, HISTOIRES D'ESCLAVES DANS LA PÉNINSULE IBÉRIQUE 78 (2000).

40. On the importance of blacks among slaves in Seville, Lisbon, and the Canary Islands in the sixteenth century, see CORTÉS LÓPEZ, *supra* note 39, at 204–05; FRANCO SILVA, *supra* note 39, at 150–51 (finding that black slaves were the most numerous and most desirable race of slaves in Seville and Lisbon, two of the most important slave markets of the period); MANUEL LOBO CABRERA, LA ESCLAVITUD EN LAS CANARIAS ORIENTALES EN EL SIGLO XVI: NEGROS, MOROS Y MORISCOS 147–49 (1982); PHILLIPS, *supra* note 39, at 163–66; SAUNDERS, *supra* note 39, at 54, 166, 174.

41. *See* CORTÉS LÓPEZ, *supra* note 39, at 91–94.

42. *See* James H. Sweet, *The Iberian Roots of American Racist Thought*, 54 WM. & MARY Q. 143, 154 (3d ser. 1997).

felt "transported to a city in hell; indeed, everywhere [he] looked [he] saw nothing but blacks."[43]

These beliefs were normalized in legal ordinances that tended to blur the line between social status and skin color or African ancestry. Several regulations in early sixteenth-century Lisbon and other Portuguese cities established prohibitions on blacks regardless of social condition. As of 1515, "black women," either slave or free, "could only sell their wares" in certain designated spaces,[44] and by mid-century these black petty traders, again regardless of social condition (and this time also gender), were subject to the city council's jurisdiction when they defrauded customers.[45] "Blacks" were also forbidden from holding dances and gatherings in the city of Lisbon.[46] The legal salience of race is perhaps best seen in the regulations concerning the city's municipal fountain, which had separate spouts for whites and for members of other groups, regardless of social condition.[47]

Although many regulations did not target blacks as a separate group, and despite the fact that by the early sixteenth century the proportion of "white slaves" (that is, from North Africa or the Eastern Mediterranean) in Iberia was far from negligible, slavery in the New World became associated with Africans in just a few decades.[48] The ordinances approved by the Audiencia de Santo Domingo[49] in 1528, probably the first body of statutes regulating slavery in the New World, contained several prohibitions which referred to "negros" in general, under the assumption that all blacks were slaves.[50] Mirroring similar local rules approved by municipal councils in Mediterranean Spain and Portugal, these regulations

43. CORTÉS LÓPEZ, *supra* note 39, at 45.

44. *See* SAUNDERS, *supra* note 39, at 78.

45. *See id.* at 76.

46. *See id.* at 106.

47. *See id.* at 77.

48. *See* ALEJANDRO DE LA FUENTE, HAVANA AND THE ATLANTIC IN THE SIXTEENTH CENTURY 147–48 (2008). But "white slaves" were more important than usually acknowledged in the Spanish colonies in the sixteenth century. *See* DEBRA BLUMENTHAL, ENEMIES AND FAMILIARS: SLAVERY AND MASTERY IN FIFTEENTH-CENTURY VALENCIA *passim* (2009) (discussing slavery developments in Valencia, Spain).

49. As the first court of appeals created by the Spaniards in the New World, the Audiencia de Santo Domingo created some of the earliest legal documents concerning slaves and slavery in the Americas. *See* M.C. MIROW, LATIN AMERICAN LAW: A HISTORY OF PRIVATE LAW AND INSTITUTIONS IN SPANISH AMERICA 22–24 (2004).

50. *See* JAVIER MALAGÓN BARCELÓ, CÓDIGO NEGRO CAROLINA 128–37 (J.A. Caro Alvarez ed., 1974) (1784) (reproducing the 1528 ordinances).

prohibited "negros" from consuming wine,[51] carrying weapons,[52] gathering,[53] and so on.

This body of local law, restrictive and racially discriminatory, informed the legislative efforts of the council of Havana and other Latin American cities from the sixteenth century onwards. Despite the existence of sizeable urban communities of free blacks since early colonial times, or perhaps because of them, local authorities across Latin America attempted to circumscribe the social and economic opportunities of "negros" (slaves and free) as much as possible.[54] So if on one hand the Iberian legal precedents and mores placed certain cultural and institutional limits on what slaveowners in the colonies could do, they also helped them structure a racially hierarchical and segmented world in which blacks were naturally placed at the very bottom of the social ladder.

The Virginia colonists, in turn, lacked these cultural and legal references. It is likely that by the 1620s many Virginians had already internalized some negative images of Africans from travelogues and other writings regarding European encounters in Africa, and they may already have associated Africans with a degraded form of servitude. It is quite possible that Iberian racial thought was transmitted to the Americas on the very slave ships that began to bring Africans to the Caribbean, Latin America, and then Virginia.[55] Yet slavery was not established in Virginia law until several decades later, so that the colony functioned for several decades without clear legal definitions of race or of status for people of African descent.

The first Africans who arrived in Virginia in the 1620s came to "a society that lacked a legal institution of slavery."[56] The situation of African "servants" in Virginia during the early decades of the colony was characterized by a high degree of uncertainty. There were no provisions for slavery in English common law, because slavery had disappeared several centuries earlier, and villeinage, the British form of serfdom, was not seen as a suitable precedent for the regulation of slaves.[57]

51. *See id.* at 135–36.

52. *See id.* at 130.

53. *See id.*

54. *See infra* Part II.A (discussing race developments in Cuba).

55. *See, e.g.*, Sweet, *supra* note 42, at 144.

56. KATHLEEN M. BROWN, GOOD WIVES, NASTY WENCHES, AND ANXIOUS PATRIARCHS: GENDER, RACE, AND POWER IN COLONIAL VIRGINIA 109 (1996).

57. *See* Sally E. Hadden, *The Fragmented Laws of Slavery in the Colonial and Revolutionary Eras*, *in* 1 THE CAMBRIDGE HISTORY OF LAW IN AMERICA 253, 257–58 (Michael Grossberg & Christopher Tomlins eds., 2008).

While apprenticeship, which bound a servant to a master for a period of years, bore some similarities to slavery, and early colonial statutes sometimes referred to indentured servants from England together with African slaves, master-servant law left important questions open regarding the regulation of slaves.[58] The first British colony to develop a slave code, Barbados, did so in 1661, a full four decades after the first slaves set foot in Virginia. The Barbadian code drew on French and Spanish colonial slave laws as well as "English legal conceptions about bound labor,"[59] but Virginia's lawmakers did not borrow wholesale from Barbados as their fellow colonists in South Carolina did.[60] To a surprising degree, Virginia operated without major legal precedents. Thus, the situation of blacks in early colonial Virginia was, paradoxically, characterized by a degree of ambiguity and variation that was unthinkable in the Spanish colonial world.[61]

When, a full century after the first Africans arrived in Virginia, the French sought a legal basis for slavery in Louisiana, they drew on a different set of legal precedents—the 1685 slave code for French colonies in the Caribbean, and the French experience of administering slavery in those colonies—to draft the Louisiana Code Noir of 1724.[62] The 1685 Code Noir was drafted by high officials in the Antilles based on the first fifty years of French experience with slavery in its colonies.[63] Like Spanish law, it established certain protections for slaves, including the right to observe Sundays free

58. *See id.* at 258.

59. *Id.* at 260.

60. *See id.*

61. *See id.* at 259–60, 264. Other colonies established in North America after Virginia adopted slavery codes by borrowing and transplanting from slave systems that were up and running already. Christopher Tomlins has argued that the "first explicit definition of those who might be appropriately enslaved that was advanced by the English on the American mainland" appeared in Nathaniel Ward's 1641 *Body of Liberties*. Christopher Tomlins, *Transplants and Timing: Passages in the Creation of an Anglo-American Law of Slavery*, 10 THEORETICAL INQUIRIES L. 389, 394 (2009). Ward's definition borrowed from Biblical principles and was codified in the Massachusetts *Lawes and Libertyes* in 1648. *Id.* South Carolina adopted the slave code of Barbados almost verbatim when it passed "An Act for the Better Ordering of Slaves" in 1690–1691. *See id.* at 396, 400. The Mid-Atlantic states adopted similar regimes as well, between the 1690s and the 1710s, including Barbados's slave courts. *See id.* at 412–19.

62. *See* Vernon Valentine Palmer, *The Origins and Authors of the Code Noir*, 56 LA. L. REV. 363, 389–90 (1995); Guillaume Aubert, To Establish One Law and Definite Rules: Race, Religion, and the Transatlantic Origins of the Louisiana Code Noir 1–2 (Apr. 4–5, 2008) (unpublished manuscript) (on file with the North Carolina Law Review).

63. *See* Alan Watson, *The Origins of the Code Noir Revisited*, 71 TUL. L. REV. 1041, 1041–42, 1055 (1997).

from work,[64] and the right to petition if masters did not feed, clothe, and support them in accordance with the regulations.[65] Masters over the age of twenty had the right to manumit their slaves for any reason and without permission,[66] and freedpeople gained all "the same rights, privileges and liberties enjoyed by persons born free,"[67] although they were also required to "retain a particular respect for their former masters, their widows and their children," with any insult "punished more severely tha[n] if it had been done to another person."[68] This code was in force in St. Domingue, Martinique, and Guadeloupe for nearly forty years before the colony of Louisiana was established. By the time the French established Louisiana, they already had a great deal of practice with the regulation of slaves, both African and Indian.

Virginia stands out among the three colonies as the most experimental and open with regard to the status of Africans in its early years. Yet it is worth emphasizing not only the surprising effects of legal precedents—in the opposite direction to what Tannenbaum suggested—but also that by the early eighteenth century, all three colonies had established firm racial distinctions through legal regulation. While it took longer in Virginia, full slave codes were in place by the turn of the eighteenth century.

II. BUILDING RACIAL DISTINCTIONS INTO LAW

In all three colonies, slaveholders set about trying to establish "order" among their laborers from the time they transported Africans to the New World. Yet the legal production of clear racial orders proceeded at varying rates. Precisely because slaveowners in the Iberian colonies operated within well-known cultural and legal frameworks, their attempts to create racially segmented societies were unremarkable and non-controversial. This was not as simple in Virginia, with its smaller number of Africans and larger number of Indians and indentured servants from England working alongside in a system without well-established legal and cultural norms of race. Louisiana fell somewhere in between. The colony was created a full

64. *See* John Garrigus, *The "Code Noir" (1685)*, IND. U. NW., http://www.iun.edu/~histgkp/Code%20Noir.htm (last visited Mar. 17, 2013) (translating article six of the 1685 Code Noir).

65. *See id.* (translating article twenty-six of the 1685 Code Noir).

66. *See id.* (translating article fifty-five of the 1685 Code Noir).

67. *Id.* (translating article fifty-nine of the 1685 Code Noir).

68. *Id.* (translating article fifty-eight of the 1685 Code Noir).

century later, with established legal precedents for slave regulation, but a more complicated demographic situation.

A. Cuba[69]

In the case of Havana, the efforts of local elites to establish racial orders are evident as early as the documents are available. In the 1550s, when Havana was still a village with a very small population and limited urban functions, the members of the town council were already busy building into law differences that made "negros" and "negras" a clearly separate, inferior social group.

To that end, the town councilors of Havana followed several strategies. There were regulations that spoke about "negros" generally, but were clearly aiming at slaves. For example, the *cabildo*, or town council, issued an ordinance on January 28, 1554, after local officials bemoaned that "some blacks, men and women" ("negros y negras") lived in houses "separate from the house of their masters," where suspicious gatherings of blacks "and even Spaniards" took place.[70] The *cabildo* ordered "that no black man or woman could have his own house to live outside the houses of his master."[71] Though the regulation did not directly reference slaves, the word "masters" suggests it dealt primarily with them (although, as we shall see, masters were sometimes mentioned with reference to freedmen as well).[72]

But other regulations targeted "negros" of all social statuses. "In this town," the town council complained in 1553, "some *negras* have lodging houses and serve food and sell wine which is of great damage to this town . . . . [I]t is convenient to remedy it."[73] In 1561, the council ordered collection of the weapons that "many negros of this town have in their houses and estancias."[74] The council also forbade wine sales to blacks in 1585 "given that there is little wine."[75] A 1612

69. Portions of the discussion in this subpart are substantially similar to a corresponding portion contained in DE LA FUENTE, *supra* note 48, at 179–81.

70. DE LA FUENTE, *supra* note 48, at 179 (translating Jan. 28, 1584 ordinance); *see also* 1 MUNICIPIO DE LA HABANA, ACTAS CAPITULARES DEL AYUNTAMIENTO DE LA HABANA 1566–1574, at 89 (1937) (Jan. 28, 1554 ordinance).

71. DE LA FUENTE, *supra* note 48, at 179 (translating Jan. 28, 1554 ordinance); *see also* 1 MUNICIPIO DE LA HABANA, *supra* note 70, at 89 (Jan. 28, 1554 ordinance).

72. *See* DE LA FUENTE, *supra* note 48, at 179.

73. *Id.* (translating Jan. 9, 1553 ordinance); *see also* 1 MUNICIPIO DE LA HABANA, *supra* note 70, at 75 (Jan. 9, 1553 ordinance).

74. DE LA FUENTE, *supra* note 48, at 179 (translating Jan. 9, 1561 ordinance); *see also* 1 MUNICIPIO DE LA HABANA, *supra* note 70, at 223 (Jan. 9, 1561 ordinance).

75. DE LA FUENTE, *supra* note 48, at 179 (translating Jan. 1585 ordinance).

regulation blocked the sales of meat outside the butcher shop to all persons "of any quality or condition," but stipulated different penalties for Spaniards than for "negras y mulatas."[76] The same strategy was evident in a 1550 regulation that prevented "negros" from cutting trees around the town, under penalties of 300 lashes and ten days in jail.[77]

Still, other regulations delineated explicitly between enslaved blacks and freed blacks. Despite the clear difference in social status, however, the law established similar prohibitions and penalties to both groups, a sign that race could trump freedom as a marker of status and that the line separating freedmen from slaves could be tenuous. One 1556 ordinance, for instance, made reference to "those who have been recently manumitted" as "free slaves."[78] A 1551 ordinance prohibited the sale of crabs and fruits to hired-out slaves "and to any other negro."[79] One in 1565 banned blacks "slave and freed" from hunting cattle on their own.[80] Another in 1570 forbade black "freedwomen and captives" from selling wine.[81] In 1589, a regulation stipulated that those selling corn tortillas at unfair prices "being the person slave or black should be jailed until her master" paid a penalty.[82] A 1599 ordinance prohibited "negras captives and freed" from going to the estancias to make a living.[83] One in 1621 stipulated that no black, either "captive or freedman" was allowed to sell meat in the streets under penalty of 200 lashes.[84]

Finally, some regulations limited the actions of "negros horros," or free blacks, specifically. One in 1565 prohibited free blacks from hosting slaves in their homes.[85] A 1603 ordinance against vagrancy ordered all "mulatto youngsters and freedmen to take on a master in the following month" and settle in farms.[86] It is notable that this

76. *Id.* (translating Nov. 1612 ordinance).

77. DE LA FUENTE, *supra* note 48, at 180 (translating Sept. 12, 1550 ordinance); *see also* 1 MUNICIPIO DE LA HABANA, *supra* note 70, at 7 (Sept. 12, 1550 ordinance).

78. *Id.* at 180 (translating Feb. 8, 1556 ordinance); *see also* 1 MUNICIPIO DE LA HABANA, *supra* note 70, at 110 (Feb. 8, 1556 ordinance).

79. DE LA FUENTE, *supra* note 48, at 180 (translating June 19, 1551 ordinance); *see also* 1 MUNICIPIO DE LA HABANA, *supra* note 70, at 28 (June 19, 1551 ordinance).

80. DE LA FUENTE, *supra* note 48, at 180 (translating Aug. 22, 1565 ordinance); *see also* 1 MUNICIPIO DE LA HABANA, *supra* note 70, at 286 (Aug. 22, 1565 ordinance).

81. DE LA FUENTE, *supra* note 48, at 180 (translating Sept. 2, 1570 ordinance); *see also* 2 MUNICIPIO DE LA HABANA, *supra* note 70, at 202 (1939) (Sept. 2, 1570 ordinance).

82. DE LA FUENTE, *supra* note 48, at 179 (translating Oct. 1589 ordinance).

83. *Id.* at 180 (translating July 1599 ordinance).

84. *Id.* (translating Feb. 1621 ordinance).

85. *Id.* (discussing Nov. 23, 1565 ordinance); *see also* 1 MUNICIPIO DE LA HABANA, *supra* note 70, at 296 (Nov. 23, 1565 ordinance).

86. DE LA FUENTE, *supra* note 48, at 180 (translating Jan. 1603 ordinance).

regulation placed "freedmen" and "masters" in the same sentence—another example of the authorities' desire to reduce the social distance between slaves and freedmen.[87] Another one in 1623 restricted a freedwoman's ability to wear gold and silk, two materials that members of the elite viewed as worn by them alone.[88]

Taken as a whole, these local laws discriminated against, and diminished the freedom of, both free and enslaved blacks. Free blacks in particular were barred from certain economic activities, kept away from some forms of consumption, and assessed penalties that were in many cases as stiff as those suffered by slaves. Though the *cabildo* mostly lacked enforcement power over its regulations—hence their repetition—every new ordinance reinforced the image that blackness was inexorably associated with slavery and inherently dishonorable. Every piece of local legislation contributed to the formation of a racial knowledge that would become one of the central traits of the Atlantic system and a defining element in Cuba's history.[89]

The local authorities' goal of linking race (blackness) and status (slavery) together was exemplified in 1557. That year, Havana's emerging local elite attempted to expel all freed people of color from the town.[90] Alleging that freed people's presence was "damaging," the town council sought "to throw them out and banish them from this town and Island."[91] Free blacks certainly resisted with some success, but many of the details of the legal process are unknown. We know that the Audiencia de Santo Domingo heard the case, found against the *cabildo*, and condemned it for the expenses of the trial. Not only were the free blacks vassals, however low, of the Spanish crown, but the *cabildo*'s proposal took place when royal policy was to populate Havana at almost any cost.[92]

B. Virginia

In a marked contrast to the Iberian colonies, evidence regarding the status of Africans in early Virginia is tantalizing in its silence. From other records, we know that Africans, Indians, Irish, and other

87. *Id.*

88. *Id.* (discussing June 1623 ordinance).

89. *See id.*

90. *See id.* at 181 (translating Apr. 23, 1557 ordinance); *see also* 1 MUNICIPIO DE LA HABANA, *supra* note 70, at 150 (Apr. 23, 1557 ordinance).

91. DE LA FUENTE, *supra* note 48, at 181 (translating Nov. 26, 1565 ordinance); *see also* 1 MUNICIPIO DE LA HABANA, *supra* note 70, at 297 (Nov. 26, 1565 ordinance).

92. *See* DE LA FUENTE, *supra* note 48, at 181 (translating Nov. 1577 ordinance); *see also id.* at 83–85 (discussing the Crown's desire to increase Havana's population and subsequent policies to that end).

Europeans worked alongside one another as servants. People appear in legal records designated as "negroes" who were free or became free after some years of service, so we know that people of African descent were not all slaves, and slaves were not all of African descent. Yet much of the evidence is ambiguous. How should we interpret the absence of a racial designation in the records, or the decision to exempt someone from a particular statute, or to give him a different sentence for a similar crime? Given the paucity of records, such interpretive decisions have carried great weight among historians.

The first mention of a "negro" in an extant document from Virginia appeared in 1620 letter noting that "20[] and Odd Negroes" had been brought by a Dutch man of war and bought for a good price.[93] This observation does not settle whether those twenty ended up as slaves for life or merely servants for a term. Some slaves were clearly freed by virtue of being Christian. For example, in 1624 the General Court of Virginia ruled that "John Philip A negro" was qualified as a free man and Christian to give testimony, because he had been "[c]hristened in England 12 years since."[94] In 1630, the same court sentenced Hugh Davis to whipping for "abusing himself to the dishonor of God and shame of Christianity by defiling his body in lying with a negro," without mentioning the sex or status of the "negro."[95] Nevertheless, it is worth noting that only "negroes" or "Indians" had any notation of racial status at all; whites were mentioned by name without a racial designation, or by nationality, in itself an indication of a distinction between whites and others.

The first statute to mention "negroes" was a 1639 act excluding them from a state subsidy for arms and ammunition.[96] Some historians have emphasized this act as drawing a clear racial distinction between "negroes" and others,[97] but the language of the statute does not justify such a conclusion. The Act of 1639 directed that "all masters of families . . . use their best endeavours for the firnishing of themselves and all those of their families which shall be capable of arms (excepting negroes) with arms both offensive and

93. 3 THE RECORDS OF THE VIRGINIA COMPANY OF LONDON 243 (Susan Myra Kingsbury ed., 1933).

94. MINUTES OF THE COUNCIL AND GENERAL COURT OF COLONIAL VIRGINIA 33 (H.R. McIlwaine ed., 2d ed. 1979) (minutes from Nov. 30, 1624) (emphasis omitted).

95. *Id.* at 479 (minutes from Sept. 17, 1630).

96. *See* Act of Jan. 6, 1639, act 10 (1639), *in* 1 THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 226, 226 (William Waller Hening ed., New York, R. & W. & G. Bartow 1823) [hereinafter LAWS OF VIRGINIA].

97. *See, e.g.*, WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO 1550–1812, at 78 (1969).

defensive."[98] As historians Timothy Breen and Stephen Innes have pointed out, the statute neither prevented all blacks from bearing arms nor made it illegal for blacks to engage in offensive or defensive warfare: "The [1639] law seems to have been an *ad hoc* decision related more directly to taxation than to domestic security," and the legislature did not consider the question of blacks bearing arms again for another two decades.[99]

The General Court of Virginia handed down several more ambiguous decisions in 1640. In that year, three of Hugh Gwyn's servants were punished for running away together.[100] Two Europeans, a Dutchman and a Scotchman, were each sentenced to a term of additional years, while "negro . . . John Punch" was sentenced to serve for his natural life.[101] A few weeks later, servants of Captain William Pierce plotted to run away.[102] Christopher Miller, identified as a Dutchman, was sentenced to whipping, branding with a letter "R," working with a shackle on his leg for one year, and giving an additional seven years of service; Peter Wilcocke was sentenced to whipping, branding, and giving three years of additional service; Richard Cookson, giving an additional two and a half years of service; Andrew Noxe, whipping; and John Williams, working seven additional years.[103] The only servant who was named with a racial label, "Emanuel the Negro," was sentenced to whipping, branding, and working with a shackle on his leg for at least one year.[104]

How can we interpret these sentences? It is certainly plausible to infer that there was already developing a presumption that Africans would serve their masters for life while Europeans would serve only for a period of years, but that is not the only possible conclusion. Although it was possible that only Emanuel was already serving Captain Pierce for life, Christopher Miller, the Dutchman, received almost an identical sentence to Emanuel, Andrew Noxe received only a whipping, and one other servant, Richard Hill, got off on good

98. T.H. BREEN & STEPHEN INNES, 'MYNE OWNE GROUND': RACE AND FREEDOM ON VIRGINIA'S EASTERN SHORE, 1640–1676, at 26 (25th Anniversary ed. 2005) (quoting *Acts of General Assembly, Jan. 6, 1639–40* (pt. 2), 2 WM. & MARY Q. 145, 147 (2d ser. 1924)).

99. *Id.* at 26.

100. *See* MINUTES OF THE COUNCIL AND GENERAL COURT OF COLONIAL VIRGINIA, *supra* note 94, at 466 (minutes from July 9, 1640).

101. *Id.*

102. *Id.* at 467 (minutes from July 22, 1640).

103. *See id.*

104. *Id.*

behavior.[105] Thus, we have clear evidence that people designated as "negroes" as well as those identified by European nationality or unidentified by race (and therefore presumably accepted as white) ran away together or conspired to run away together, along with ambiguous evidence that "negroes" may have been viewed as more appropriately serving their masters for life rather than for a period of years. This interpretation grows stronger when read in light of later statutes that make direct reference to cases where negroes could not serve additional years because they were already serving for life.[106]

Yet there continued to be cases in the records of free "negroes," such as "Graweere[,] . . . a negro servant" allowed by his master to live as free, whose child was decreed free in 1641.[107] In 1655, there is a brief note of a "[m]ulatto held to be a slave and appeal taken,"[108] as well as a woman servant who became free if her master consented to her marriage.[109] In 1668, the court noted another "[j]udgment for a negro for her freedom,"[110] and in 1672, "a Negro man," Edward Mozingo, became free after his indenture was completed.[111]

A case briefly noted in 1669 hints at the multiple dimensions of racial status in colonial Virginia, yet leaves many questions unanswered: "Hannah Warwick's case extenuated because she was overseen by a negro overseer."[112] From this single sentence, we do not even know what Hannah Warwick's crime was. Because Hannah's racial status was not noted, it is likely that she was white; on one hand, we observe that it was possible for a white servant to work under a negro, while on the other hand, the extenuation of her case suggests a belief that a white person working under a "negro" was a violation of the natural racial order. But the sparse records do not allow us to draw firm conclusions.

The connections between race and status began to be drawn more clearly after 1660. As many as one third of the people of color

105. *See id.*

106. *See* English Running Away with Negroes, act 22 (1660–1661), *in* 2 LAWS OF VIRGINIA, *supra* note 96, at 26, 26 ("[I]n case any English servant shall run away in company with any negroes who are incapable of makeing satisfaction by addition of time, . . . the English so running away in company with them shall serve for the time of the said negroes absence as they are to do for their owne by a former act.").

107. MINUTES OF THE COUNCIL AND GENERAL COURT OF COLONIAL VIRGINIA, *supra* note 94, at 477 (minutes from Mar. 31, 1641).

108. *Id.* at 504 (minutes from Mar. 12, 1655).

109. *See id.*

110. *Id.* at 513 (minutes from Sept. 24, 1668).

111. *Id.* at 316 (minutes from Oct. 5, 1672).

112. *Id*. at 513 (minutes from Apr. 23, 1669).

in some Virginia counties in the late seventeenth century were free,[113] and white elites increasingly feared political alliances among white indentured servants, blacks, and Indians.[114] As in Havana or the Iberian colonies more generally, the colonial elites of Virginia sought to identify blacks with slavery and to restrict the social opportunities of free blacks as much as possible. The first direct reference to "negroes" *as slaves* in Virginia legislation appeared in a 1659 statute imposing reduced import duties on slave merchants.[115] In 1662, the General Assembly made clear that slave or free status would follow the condition of the mother:

> Whereas some doubts have arisen whether children got by any Englishman upon a negro woman should be slave or free, *Be it therefore enacted and declared by this present grand assembly,* that all children borne in this country shalbe held bond or free only according to the condition of the mother, *And* that if any christian shall commit fornication with a negro man or woman, hee or shee soe offending shall pay double the fines imposed by the former act.[116]

The first clear statutory racial distinction among free people was a 1668 law proclaiming that "negro" women were not exempted from the head tax because, though free, they "ought not in all respects to be admitted to a full fruition of the exemptions and impunities of the English."[117] As historian Kathleen Brown has argued, these first laws engendered racial difference by designating different consequences for production and reproduction by black and white women.[118]

In 1670, the Virginia legislature made clear that even baptized slaves would not be "exempt . . . from bondage,"[119] severing the link

113. *See* PHILIP D. MORGAN, SLAVE COUNTERPOINT: BLACK CULTURE IN THE EIGHTEENTH-CENTURY CHESAPEAKE AND LOWCOUNTRY 11–12 (1998) ("[F]ree blacks in late-seventeenth-century Virginia seem to have formed a larger share of the total black population than at any other time during slavery. In some counties, perhaps a third of the black population was free in the 1660s and 1670s.").

114. *See id.* at 308, 477; *see also* EDMUND S. MORGAN, AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA 155, 328 (1975).

115. *See* An Act for the Dutch and All Other Strangers for Trading to This Place, act 16 (1659), *in* 1 LAWS OF VIRGINIA, *supra* note 96, at 540, 540.

116. BROWN, *supra* note 56, at 132 (quoting Negro Womens Children to Serve According to the Condition of the Mother, act 12 (1662), *in* 1 LAWS OF VIRGINIA, *supra* note 96, at 170, 170).

117. Negro Women Not Exempted from Tax, act 7 (1668), *in* 2 LAWS OF VIRGINIA, *supra* note 96, at 267, 267.

118. *See* BROWN, *supra* note 56, at 108, 133.

119. An Act Declaring that Baptisme of Slaves Doth Not Exempt Them from Bondage, act 3 (1667), *in* 2 LAWS OF VIRGINIA, *supra* note 96, at 260, 260.

between Christianity and freedom. A restriction was added on "negroes," regardless of status, by the provision that "noe negroe or Indian though baptised and enjoyned their owne freedome" would be allowed to buy Christians, although they could buy "any of their owne nation."[120] Finally, the legislature clarified that non-Christian servants who arrived in the colony "by shipping" became slaves for life, whereas those who arrived by land—namely, Indians—would be indentured servants.[121]

In 1672, Virginia's first comprehensive act for apprehending and suppressing runaways, "negroes," and slaves was passed.[122] It included a reward to neighboring Indians for apprehending runaways, as well as indemnifying masters whose servants were taken or killed.[123] The law allowed "any person who shall endeavour to take them, upon the resistance of such negroe, molatto, Indian slave, or servant for life, to kill or wound him or them soe resisting" and provided that the person who kills a runaway "shall not be questioned."[124]

This Virginia law still distinguished several categories of slaves and servants, but by the 1680s, when the first major slave codes in the North American colonies were approved, "negroes" were singled out as a separate group. The codes drew numerous distinctions on the basis of race rather than status, including laws against carrying arms—similar to those approved by the town council of Havana a century earlier—and against leaving the owner's plantations without a certificate. A penalty of thirty lashes met "any Negro" who "lift[ed] up his hand . . . against any christian."[125] Furthermore, a 1705 Virginia law decreed that

> all servants imported and brought into this country, by sea or land, who were not christians in their native country, (except Turks and Moors in amity with her majesty, and others that can make due proof of their being free in England, or any other christian country, before they were shipped, in order to transportation hither) shall be accounted and be slaves, and

120. Noe Negroes nor Indians to Buy Christian Servants, act 3 (1670), *in* 2 LAWS OF VIRGINIA, *supra* note 96, at 280, 281.

121. *See* What Tyme Indians to Serve, act 12 (1670), *in* 2 LAWS OF VIRGINIA, *supra* note 96, at 283, 283.

122. *See* An Act for the Apprehension and Suppression of Runawayes, Negroes and Slaves, act 8 (1672), *in* 2 LAWS OF VIRGINIA, *supra* note 96, at 299, 299.

123. *See id.* at 299–300.

124. *Id.* at 299.

125. An Act for Preventing Negroes Insurrections, act 10 (1680), *in* 2 LAWS OF VIRGINIA, *supra* note 96, at 481, 481.

> such be here bought and sold notwithstanding a conversion to christianity afterwards.[126]

The law established that a slave's mere presence in England, without proof of his manumission, was insufficient to free him.[127] Perhaps most significantly, the legislature in 1705 also passed a series of laws establishing rights for white servants, increasing the legal distinctions between white servants and people of color, whether slave or free.[128]

In sum, racial differentiation took hold only gradually in seventeenth-century Virginia. There were three mechanisms for racial formation: regulations of sexual conduct and reproduction, laws distinguishing negroes from Indians, and statutes severing racial status from religion. Together, this legislation helped firmly establish African slavery in the legal system. The tobacco economy guaranteed that the institution would grow. Between 1700 and 1740, the number of slaves grew tenfold to 60,000,[129] and by the time the first census was taken in the new republic in 1790, slaves made up 44% of the population of Virginia.[130]

C. Louisiana

In Louisiana, slaves arrived with the first French settlers. By the time of the 1726 census, there were a total of 1385 black slaves, 159 Indian slaves, 1663 "habitants," or French citizens, 245 "engagés," or indentured servants, and 332 military personnel in the colony,[131] although substantial numbers of slaves did not live in New Orleans until after 1732. Almost from the start, African slaves became the

126. An Act Concerning Servants and Slaves, ch. 49, § 4 (1705), *in* 3 LAWS OF VIRGINIA, *supra* note 96, at 447, 447–48 (William Waller Hening ed., Phila., Thomas Desilver 1823).

127. *See id.* § 6, at 448.

128. The 1682 legislature enacted a law providing that "all servants not being christians" when purchased would be slaves. *See* An Act to Repeale a Former Law Making Indians and Others Free, act 1 (1682), *in* 2 LAWS OF VIRGINIA, *supra* note 96, at 490, 490–91. Then in 1705, the legislature made a number of updates, providing, for example, that it was not permissible to "whip a christian white servant naked," and that if those deemed "infidels . . . notwithstanding, purchase any christian white servant," then the white servant would instantly be relieved of service. An Act Concerning Servants and Slaves, ch. 49, §§ 7, 11 (1705), *in* 3 LAWS OF VIRGINIA, *supra* note 96, at 448, 450 (William Waller Hening ed., Phila., Thomas Desilver 1823).

129. PHILIP J. SCHWARTZ, TWICE CONDEMNED: SLAVES AND THE CRIMINAL LAWS OF VIRGINIA, 1705–1865, at 62 (1988).

130. *Id.*

131. RICHARD MIDDLETON & ANNE LOMBARD, COLONIAL AMERICA: A HISTORY TO 1763, at 392–93 (4th ed. 2011).

major labor force in the colony, unlike the Chesapeake, which had substantial numbers of white and Indian servants.[132] Blacks were a majority throughout the French period, and slavery was the major basis of wealth.

Almost as soon as the colony was established, the Crown promulgated a revised version of the colonial "Black Code," or Code Noir, for Louisiana, in 1724. The new code included a number of changes from the 1685 original, based on concerns that had arisen in the intervening forty years, particularly regarding uprisings in the colonies. The fear that freedmen might ally with whites to rebel led to a ban on interracial marriage that was not in the original Code Noir.[133] In addition, even free blacks were forbidden to "live in a state of concubinage" with slaves.[134] Manumission required permission of the Superior Council, and the master had to be twenty-five years old,[135] whereas in the 1685 Code, any master twenty years old could manumit a slave without reason given.[136] Additional provisions elaborated criminal regulations for slaves[137] as well as free blacks who abetted fugitive slaves.[138]

In 1751, a set of police regulations was issued by the governor to control the actions of both masters and slaves.[139] Like previous regulations in Havana and Virginia, it eliminated distinctions between slaves and blacks, claiming that "every individual . . . should punish his Negroes with moderation."[140] The new regulations aimed at limiting the market activities of slaves, but also subordinating all "negroes," whether free or enslaved, to all white men in a variety of ways. "Negroes or Negresses" were not allowed to assemble "under the pretext of dancing, or for any other cause";[141] to be in the streets or public roads carrying a cane or stick or without a pass;[142] or to be

132. For more about the comparison between the labor forces of these colonies, see generally MORGAN, *supra* note 114.

133. *See A Translation of the Black Code of Louisiana*, *reprinted in* 3 HISTORICAL COLLECTIONS OF LOUISIANA 89, 89 (New York, D. Appleton & Co. 1851) (translating article six of the 1724 Code Noir).

134. *Id.* at 90 (translating article six of the 1724 Code Noir).

135. *See id.* at 94 (translating article fifty of the 1724 Code Noir).

136. *See* Garrigus, *supra* note 64 (translating article fifty-five of the 1685 Code Noir).

137. *See A Translation of the Black Code of Louisiana*, *supra* note 133, at 92–93 (translating articles twenty-six through thirty-nine of the 1724 Code Noir).

138. *See id.* at 93 (translating article thirty-four of the 1724 Code Noir).

139. *See* 2 CHARLES GAYARRÉ, HISTORY OF LOUISIANA 53–55 (New Orleans, Armand Hawkins, 3d ed. 1885).

140. *See id.* app. at 364 (article nineteen of Louisiana's police regulations).

141. *Id.* (article twenty of Louisiana's police regulations).

142. *See id.* app. at 365 (article twenty-three of Louisiana's police regulations).

"insolent" to white people.[143] Any white person who met a black person in public without a pass, or carrying a stick, or considered the black person insolent in any way, was exhorted to whip the slave, or even to have him branded with a *fleur de lis* on his backside.[144]

In other words, the 1724 code and the 1751 regulations were designed to shore up a regime of racial hierarchy, with all whites on top and all blacks on the bottom. As Thomas Ingersoll has written, "The main intent and effect of legal distinctions between the races embodied in these laws were the same as in Virginia: few blacks were freed, and those who were freed remained under social and legal disabilities."[145] By the time Louisiana changed hands from the French to the Spanish in 1763, racial distinctions had been firmly established in the colony through regulations that limited the reach of manumission, and created distinct rules for "negros" and "freed or free-born negros."

Although colonial elites in all three jurisdictions sought to create social orders built on clear and fixed racial distinctions produced through law, they had varying degrees of success. With the tools of Castilian and French Caribbean legal precedents, legislators in Havana and Louisiana were able to build racial distinctions into their laws rather quickly, whereas Virginians took longer to establish clear racial lines. However, by the end of the seventeenth century, racial distinctions were built into law in all three jurisdictions. Demography also made a difference. In Virginia and Louisiana, the presence of Indians and the real possibility of maroon blacks allying with Indians against the colonists meant an unrulier frontier in the early years, muddying racial distinctions. Yet legislators were also able to use legal regulation to shape demography, as we describe in the next section.

III. MANUMISSION, FREE PEOPLE OF COLOR, AND THE LAW

Efforts to permanently identify blackness with slave status took place in all three locations, but Virginia was the most successful, followed by Louisiana, and finally Cuba. This section of the Article analyzes how legal regimes regarding slaves' access to freedom evolved in each of these jurisdictions over three eras: the formative period up to about 1760; the Age of Revolution, from the 1770s to the

143. *Id.* app. at 366 (article twenty-eight of Louisiana's police regulations).

144. *See id.* app. at 364–66.

145. Thomas N. Ingersoll, *Free Blacks in a Slave Society: New Orleans 1718–1812*, 48 WM. & MARY Q. 173, 179 (3d ser. 1991).

1820s; and the nineteenth century. Manumission was a marker of how closely racial identity would be associated with slave or free status in a given society, and it became directly correlated with the size of the community of free people of color. Important distinctions developed during the formative period. Whereas Spanish legal practices and precedents gave manumission a solid legal footing in Havana, legislators in Virginia began to place significant limitations on manumission beginning in the late seventeenth century. Some limitations existed in Louisiana as well, but the colony remained a frontier post for most of the eighteenth century. Opportunities for manumission increased in all three jurisdictions during the Age of Revolution, but divergences increased again in the nineteenth century. Manumission became limited in Virginia as soon as 1806 and was curtailed significantly in the 1830s and 1840s. Restrictions increased in Louisiana as well, but slaves continued to invoke Spanish and French legal precedents to press claims for freedom with some success. Meanwhile, well-entrenched legal customs and principles concerning manumission continued to operate in Cuba, despite the development of a sugar plantation economy in that island.

A. The Formative Period—Beginnings to the 1760s

As we have seen up to this point, colonial elites in Havana, New Orleans, and Virginia all sought to create a social order built on clear and fixed racial distinctions protected by law. Although legal precedents regarding colonial slavery, and differences in the distribution of power within each colonial system, gave more tools to embed race within the law to Spanish and French colonial lawmakers than to British colonists, the Spanish and French also found themselves constrained in other ways—notably by the legal avenues to freedom for slaves under Spanish law.

The Mediterranean legal culture provided local elites with the tools and language to create racial hierarchies, but it had another important consequence: the legal regime enabling manumission helped to create a demographic situation that undermined the very racial order put into place by the statutes detailed above. Opportunities for manumission were always limited, but the possibility of escaping slavery was well-entrenched in Iberian slaving practices and in Castilian law. Although masters were not compelled legally or morally to grant freedom to their slaves, manumission was considered a pious act, and its legitimacy never questioned. Furthermore, the law protected the practice of self-purchase, and slaves had a legal right to bring freedom claims before the justices.

More important, these principles were ratified in subsequent legislation. A *real cédula*, or decree, of 1529 asked the Governor of Cuba whether it was expedient to give freedom to slaves after they had served some time and paid a given amount.[146] When the King was informed that many soldiers in Havana had fathered children with slaves during the late 1500s, he quickly instructed that these soldiers be given preference in any sales "if" their intention was to liberate them.[147] The Crown also reiterated the slaves' right to initiate a legal process for their freedom.[148]

Purchasing freedom was facilitated by a legal custom which developed in at least some of the Spanish colonies, and perhaps in the Peninsula itself, since the sixteenth century: *coartación*. Through *coartación* slaves were allowed to agree with their masters on a fixed price for their freedom and to make payments towards it.[149] In other words, slaves could buy their freedom through installments. Such agreements were legally binding and restricted the master's capacity to dispose of the slave in several important ways. A slave who had paid a fraction of the price could not be mortgaged or sold for a higher value.[150] Furthermore, slaves claimed that after paying a portion of their price they had also acquired control over a similar portion of their time and labor thus becoming, in fact, partially free.[151]

These regulations, which could not be superseded or supplanted by local legislative initiatives, significantly curtailed the ability of Spanish colonial elites to construct the neat, dichotomous social order that many of them envisioned.[152] By the late sixteenth century,

146. *See* R. Carta a la Audiencia Real de las Indias Sobre el Tratamiento de los Esclavos Negros (Nov. 9, 1526), *in* 1 COLECCIÓN DE DOCUMENTOS PARA LA HISTORIA DE LA FORMACIÓN SOCIAL DE HISPANOAMÉRICA 1493–1810, at 88 (Richard Konetzke ed., 1953)

147. *See* R.C. Sobre la Venta de los Hijos de Soldados que Tuvieren en Esclavas Negras de la Isla de Cuba (Mar. 31, 1583), *in* 1 COLECCIÓN DE DOCUMENTOS PARA LA HISTORIA DE LA FORMACIÓN SOCIAL DE HISPANOAMÉRICA 1493–1810, *supra* note 146, at 547.

148. For example, the Crown passed an act on April 15, 1540, that commanded audiences to hear cases of blacks who claimed to be free. *See* 2 RECOPILACIÓN DE LEYES DE LOS REINOS DE LAS INDIAS 362 (Madrid, 4th ed. 1791).

149. *See* Frederick P. Bowser, *The Free Person of Color in Mexico City and Lima: Manumission and Opportunity, 1580–1650*, *in* RACE AND SLAVERY IN THE WESTERN HEMISPHERE: QUANTITATIVE STUDIES 331, 338–46 (Stanley L. Engerman & Eugene D. Genovese eds., 1975) (discussing the many ways slaves were manumitted, including payments to their masters).

150. *See id.* at 344.

151. *See id.* at 346.

152. *See* HERMAN L. BENNETT, AFRICANS IN COLONIAL MEXICO: ABSOLUTISM, CHRISTIANITY, AND AFRO-CREOLE CONSCIOUSNESS, 1570–1640, at 3–4 (2003)

significant communities of free blacks and mulattoes existed in all major colonial cities, from Lima to Mexico.[153] In Havana, despite the town council's efforts, free blacks represented about 10% of the city's fast-growing population around 1600.[154] In a local ordinance approved in 1574, free blacks were described as numerous and catalogued as "vecinos," that is, as legal heads of established households.[155] As such, they participated in many of the duties and shared in some of the honors associated with military service. They helped in nightly watches to spot enemy vessels, particularly in times of war, and had their own company in the militias, which was placed under the command of a black officer. They also participated in the local economy mostly as salaried workers, but also as small owners of land, businesses, and houses. It is worth mentioning that in the early 1600s the free colored community of Havana was wealthy enough to sustain two confraternities, those of Our Lady of the Remedies and the Holy Spirit.[156] The latter would eventually become a separate parish several decades later.[157]

In Louisiana, the population of free people of color who were counted by the census never went above 200 people during the French period (1724–1763),[158] although there were a significant

(discussing the "absolutist" Spanish monarchy, which wanted a "prominent role" in governing the colonies and its people, including slaves).

153. *See* Bowser, *supra* note 149, at 334–39 (discussing the increasing free black and mulatto populations of Lima and Mexico City that resulted from manumission). On the development of communities of free people of color in Latin America, see Lyman L. Johnson, "*A Lack of Legitimate Obedience and Respect": Slaves and Their Masters in the Courts of Late Colonial Buenos Aires*, 87 HISP. AM. HIST. REV. 631, 631–34 (2007) [hereinafter Johnson, *Slaves and Their Masters*]; Lyman L. Johnson, *Manumission in Colonial Buenos Aires, 1776–1810*, 59 HISP. AM. HIST. REV. 258, 261–62 tbl. 1 (1979) (displaying major cities and their respective numbers of manumitted negroes and mulattoes); Frank "Trey" Proctor III, *Gender and the Manumission of Slaves in New Spain*, 86 HISP. AM. HIST. REV. 309, 310–11 tbls. 1 & 2 (2006) (displaying slave populations by gender and age for cities including Lima and Mexico City); Stuart B. Schwartz, *The Manumission of Slaves in Colonial Brazil: Bahia, 1684–1745*, 54 HISP. AM. HIST. REV. 603, 611–12 (1974) (noting the numbers of manumitted blacks and mixed race peoples in Brazil).

154. *See* DE LA FUENTE, *supra* note 48, at 174–75.

155. *Ordenanzas Municipales de Alonso de Cáceres*, *in* 2 LEVÍ MARRERO, CUBA: ECONOMÍA Y SOCIEDAD 429, app. at 437 (1974); *see also* DE LA FUENTE, *supra* note 48, at 82 (specifying that "vecinos" means households).

156. *See* DE LA FUENTE, *supra* note 48, at 168.

157. *See id.* at 169.

158. *See generally* GWENDOLYN MIDLO HALL, AFRICANS IN COLONIAL LOUISIANA: THE DEVELOPMENT OF AFRO-CREOLE CULTURE IN THE EIGHTEENTH CENTURY (1995) (outlining various census figures of free people of color throughout the French period).

number of maroons or runaway slaves living among the Indians.[159] The restrictions on manumission placed by the 1724 Code Noir, as well as the ban on intermarriage,[160] which limited manumissions of families, kept this population relatively small.[161] Nevertheless, interracial relationships continued, and the records of the Superior Council are filled with examples of manumissions, including some that are clearly based on self-purchase.[162] For example, in 1739, "[n]egroes Louis and Catharine, acting also for their fellow slaves Jeanne Marguerite, Baptiste, and 'little Louis'; as likewise for mulattoes Pierre, Marianne and Francoise," petitioned the Superior Council for a copy of their late master's will because he had "promised them their liberty."[163] The manumission was confirmed two days later by Governor Bienville and Intendant Salmon after an examination of the will.[164] In 1741, Pantalon, a "negro slave," petitioned the council for his freedom based on his master's will, provided that he pay the price "at which he and his family [would] be appraised."[165] They were appraised at "3000 livres."[166] A Mr. Fabry pledged himself as security for the 3,000 livres, and Pantalon, his wife, and children were set free.[167] Governor Bienville himself freed an enslaved couple in recognition of twenty-six years of service in

159. *See id.* at 203, 214, 236, 307 (noting instances of the presence of maroons and runaway slaves).

160. *See A Translation of the Black Code of Louisiana*, *supra* note 133, at 89 (translating article six of the 1724 Code Noir).

161. *See supra* Part II.C.

162. *See, e.g.*, Heloise H. Cruzat, *Records of the Superior Council of Louisiana XXV*, 8 LA. HIST. Q. 118, 143 (1925) (granting petition for "[m]anumission of Marie Charlotte and Louise, her small daughter, by their master, St. Pierre . . . for the services rendered him by said slave"); G. Lugano, *Records of the Superior Council of Louisiana LXXXIV, March–April, 1762*, 23 LA. HIST. Q. 889, 924 (1940) (granting slaveowner a petition "wishing to recognize the faithful services of a negress named Mimi," when he "decided to set her free, so that she may enjoy her freedom like the other affranchised subjects of his Majesty"); *Records of the Superior Council of Louisiana XVI*, 5 LA. HIST. Q. 377, 403 (1922) (granting slaveowner petition "to be authorized to free a negress named Jeanneton, in reward for her zeal and fidelity in his service").

163. *Records of the Superior Council of Louisiana XIX*, 6 LA. HIST. Q. 283, 303 (1923).

164. *See id.* at 304.

165. Heloise H. Cruzat, *Records of the Superior Court of Louisiana LXII*, 18 LA. HIST. Q. 430, 440 (1935).

166. *Id.*

167. *See id.*

1733.[168] There is also considerable evidence of "unenforced" and unsanctioned manumission.[169]

At the end of the French period, Louisiana was still a small frontier outpost and not yet a plantation society. It remained a place of considerable social mixture, including "an underclass with origins in three continents representing at least seven different types of legal status . . . . To those newly arrived from Europe, New Orleans looked like a carnival town, always threatening to turn upside down."[170] Although the population of free people of color was not large, blacks played important military roles in Indian wars, and a significant number were freed for their service in the Natchez War between 1729–1731.[171] An African named Louis Congo was named the colony's executioner in 1725,[172] and it was not uncommon to use free blacks to punish slaves, or even white or Indian servants or runaways.[173]

In colonial Virginia, the population of free people of color reached its peak as a percentage of the total population in the late seventeenth century, and legislators responded by circumscribing manumission in law and practice.[174] After several decades in the seventeenth century during which poor whites, Indians, and Africans mixed and their status as free or unfree remained relatively unclear, Virginian elites sought to drastically curtail opportunities for collusion among these groups at the end of the seventeenth century.[175] Edmund Morgan, in his influential history book, *American Slavery, American Freedom*, argued a generation ago that Bacon's Rebellion in 1676 led to the hardening of racial distinctions in Virginia.[176] Whether he is right that the rebellion was the key turning point, it is certain that the late seventeenth century saw several important legal

168. *See Records of the Superior Council of Louisiana XV*, 5 LA. HIST. Q. 239, 250 (1922). Almost two years later, the wife to whom Governor Bienville granted freedom petitioned the government to confirm and approve her freedom. *See id.* at 265.

169. SHANNON LEE DAWDY, BUILDING THE DEVIL'S EMPIRE: FRENCH COLONIAL NEW ORLEANS 181 (2009).

170. *Id.* at 143.

171. *See* CARL A. BRASSEAUX ET AL., CREOLES OF COLOR IN THE BAYOU COUNTRY 3 (1994).

172. *See* DAWDY, *supra* note 169, at 189–91 (discussing Congo's time as executioner); *see also Records of the Superior Court of Louisiana X*, 3 LA. HIST. Q. 403, 414 (1920) (describing a "murderous attack" on Congo by "three runaway savages").

173. *See* DAWDY, *supra* note 169, at 200–01.

174. *See* MORGAN, *supra* note 113, at 11–12, 15.

175. *See id.* at 8–9, 14.

176. *See* MORGAN, *supra* note 114, at 269–70.

shifts. In 1691, an act was passed "for suppressing outlying slaves,"[177] which included stringent punishments for runaways and rewards for those who apprehended them; penalties for bastardy by Englishwomen with "negroes" or mulattoes; and the requirement that manumitted slaves be transported "out of the countrey within six moneths" or risk re-enslavement.[178] Furthermore, manumission was no longer at the pleasure of the master, but required approval of the governor and council.[179]

The council continued to approve manumissions, but an increasing number were conditional, requiring the slave to continue working for a term, unless the slave had performed an extraordinary service. In 1710, Will, a slave who collaborated with his master to discover a slave conspiracy, was given his freedom by the general court as "a reward of his fidelity and for encouragement of such services."[180] In 1723, a new regulation declared that "no negroe . . . shall be set free upon any pretence whatsoever" unless he performed "meritorious services."[181] Many cases, however, seemed to interpret "meritorious" simply as "faithful," and continued to allow masters to manumit slaves who had served them, or would go on to serve them, for a period of years. The law regarding transportation did have an effect.[182] At least one slave, Okree, from Essex County, chose re-enslavement so as to remain with his enslaved family.[183]

Other limitations on the rights of free people of color were added, however. In addition to a 1691 ban on intermarriage,[184] in 1705, comprehensive legislation regulating slavery added a number of statutes applying also to free people of color,[185] including a disqualification from testifying in court.[186] The 1705 statute also

177. An Act for Suppressing Outlying Slaves, act 16 (1691), *in* 3 LAWS OF VIRGINIA, *supra* note 96, at 86, 86 (William Waller Hening ed., Phila., Thomas Desilver 1823).

178. *See id.* at 86–88.

179. *See id.* at 86.

180. An Act to Set Free Will, a Negro Belonging to Robert Ruffin, ch. 16 (1710), *in* 3 LAWS OF VIRGINIA, *supra* note 96, at 537, 537 (William Waller Hening ed., Phila., Thomas Desilver 1823).

181. An Act Directing the Trial of Slaves, ch. 4, § 17 (1723), *in* 4 LAWS OF VIRGINIA, *supra* note 96, at 126, 132 (William Waller Hening ed., Richmond, W.W. Gray 1820).

182. *See* MORGAN, *supra* note 114, at 15.

183. *See id.*

184. *See* An Act for Suppressing Outlying Slaves, act 16 (1691), *in* 3 LAWS OF VIRGINIA, *supra* note 96, at 86, 87 (William Waller Hening ed., Phila., Thomas Desilver 1823).

185. *See* An Act for Establishing the General Court, and for Regulating and Settling the Proceedings Therein, ch. 19 (1705), *in* 4 LAWS OF VIRGINIA, *supra* note 96, at 287, 287 (William Waller Hening ed., Richmond, W.W. Gray 1820).

186. *See id.* § 31, at 298.

defined a "mulatto" in the law for the first time, as the "child of an Indian, and the child, grand child, or great grand child, of a negro."[187] In 1723, free people of color lost their right to vote.[188]

On the eve of the American Revolution, the position of free people of color in Virginia was considerably more precarious than in Cuba or Louisiana. Nevertheless, while the free black populations of Louisiana and Virginia were far smaller than that of Cuba, colonial officials' fear of alliances between blacks and Indians led to efforts to divide the two communities. These efforts meant that racial hierarchies were not clear-cut: in some instances, blacks could be favored over Indians, and vice-versa; and mixing among the groups remained widespread. In Louisiana, blacks served as executioners and overseers to punish whites, and in military expeditions against Indians. In Virginia, Bacon's Rebellion led to a slew of regulations designed to separate blacks from Indians and poor whites, yet that separation remained incomplete.

B. The Age of Revolution: 1770s–1820s

The late eighteenth century marked a change in the status of slaves across the New World. Urban slaves in both North and South America took advantage of revolutionary ideologies and social unrest to make claims for freedom.[189]

In Virginia, some legislators were motivated by their own sentiments in favor of liberty to pass laws loosening manumission restrictions. The Importation Act of 1778,[190] which banned importation of slaves from Africa or from other states, indirectly provided slaves with a major opening for freedom suits.[191] Because the penalty for illegally importing slaves included emancipation, a slave who had been brought from Maryland to Virginia, for example, could sue for freedom on the basis of illegal importation.[192] This

187. An Act Declaring Who Shall Not Bear Office in this Country, ch. 4 (1705), *in* 3 LAWS OF VIRGINIA, *supra* note 96, at 252, 252 (William Waller Hening ed., Phila., Thomas Desilver 1823).

188. *See* An Act Directing the Trial of Slaves, ch. 4, § 23 (1723), *in* 4 LAWS OF VIRGINIA, *supra* note 96, at 133, 133–34 (William Waller Hening ed., Richmond, W.W. Gray 1820).

189. *See* Grinberg, *supra* note 19, at 67.

190. An Act for Preventing the Farther Importation of Slaves, ch. 1 (1778), *in* 9 LAWS OF VIRGINIA, *supra* note 96, at 469, 469 (William Waller Hening ed., Richmond, J. & G. Cochran 1821).

191. *See* A. Leon Higginbotham, Jr. & F. Michael Higginbotham, *"Yearning to Breathe Free": Legal Barriers Against and Options in Favor of Liberty in Antebellum Virginia*, 68 N.Y.U. L. REV. 1213, 1248–49 (1993).

192. *See id.*

remained one of the significant bases for freedom suits for several decades.[193] Another major new law was the Manumission Act of 1782,[194] providing for private manumissions as well as the right of slaves to sue for freedom.[195] The Freedom Suit Act of 1795[196] expanded the possibilities for slaves to claim freedom by providing lawyers for indigent slave petitioners.[197]

Many masters and slaves took advantage of the greater ease of freeing slaves, so by 1790 the population of free people of color in Virginia had nearly doubled, and reached 12,000, or about 1.7% of the total population.[198] Other states followed suit, relaxing regulations on manumission and often combining them with plans for "colonization," sending freed slaves back to Africa.[199] From the American Revolution through the 1820s, there was a relatively high rate of manumission across the southern United States,[200] and practices looked quite similar to the Spanish colonies. Despite grand schemes for colonization, most free people of color remained in the United States. By 1820, the free population of color in Virginia had tripled in size, representing about 3.5% of the whole population.[201]

During this period, slaves played an increasingly active role in manumissions, negotiating self-purchase or the purchase of family members, or enlisting the help of a sympathetic white person or free person of color. Most freedom suits took advantage either of the limitations placed on importation of slaves into the state that was part

193. *See* Michael L. Nicholls, *'The Squint of Freedom': African-American Freedom Suits in Post-Revolutionary Virginia*, 20 SLAVERY & ABOLITION 47, 51–53 (1999).

194. An Act to Authorize the Manumission of Slaves, ch. 21 (1782), *in* 11 LAWS OF VIRGINIA, *supra* note 96, at 39, 39 (William Waller Hening ed., Richmond, George Cochran 1823).

195. *See id.* § 1, at 39; *see also* Higginbotham & Higginbotham, *supra* note 191, at 1257 (discussing the Manumission Act of 1782).

196. An Act to Reduce into One the Several Acts Concerning Slaves, Free Negroes, and Mulattoes, and for Other Purposes, ch. 11, 1795 Va. Acts 16.

197. *See* Higginbotham & Higginbotham, *supra* note 191, at 1235.

198. OFFICE OF SEC'Y OF STATE, CENSUS FOR 1820, at 8 (1821). At the time of the revolution free blacks represented only about one percent of the population. WOLF, *supra* note 1, at 3.

199. *See, e.g.*, THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW, 1619–1860, at 387 (1996) (stating that the judges in North Carolina "believed it was possible for slaves to elect freedom" and giving an example of one slaveholder who "gave her slaves to the American Colonization Society to be sent with their consent to Africa").

200. *See, e.g.*, *id.* at 392–98 (using the increasing number of manumissions in Virginia as a case study depictive of the increasing rate of manumissions across the South at the time).

201. *See* OFFICE OF SEC'Y OF STATE, *supra* note 198, at 18 (1821) (showing that the free, non-white population composed 36,889 out of the 1,065,633 total inhabitants of Virginia); *supra* note 198 and accompanying text (estimating the population of free blacks in Virginia in 1790 to be 12,000).

of the revolutionary restrictions on the slave trade, or of the rule that status followed the mother, and that Indian ancestry in the maternal line could lead to a presumption of freedom.[202]

Slaves who could trace their roots to both Indian and African ancestors used that fact to their advantage in their claims to freedom. In Virginia, late eighteenth-century newspapers were filled with advertisements for runaway slaves who had insisted upon their free Indian ancestry. Take October 1772, when Paul Michaux advertised for "a Mulatto Man named Jim, who [was] a Slave, but pretend[ed] to have a Right to his Freedom."[203] Jim was the son of an Indian man and had "long black hair resembling an Indian's"; Michaux suspected that "he was gone to the General Court to seek his freedom."[204] Likewise, William Cuszens complained that his "Mulatto Slave" David, who "sa[id] he [was] of the Indian breed" had gone "down to the General Court . . . to sue for his freedom."[205]

In bringing lawsuits for freedom based on claims of Indian maternal ancestry, slaves also took advantage of a growing contrast in the legal treatment of "negroes" and "Indians." A series of cases established that Indians would be presumed free, and "negroes" presumed enslaved, so that people who could claim Indian ancestry might escape slavery.[206] The first cases began to appear in the 1770s, presenting relatively arcane legal issues about which piece of legislation had in fact repealed a 1682 act that had allowed Indian slavery.[207] A series of eighteenth-century cases affirmed that Indians could only be held as slaves between 1682 and 1705;[208] an 1806 case narrowed this window to 1682–1691.[209]

This legal differentiation between "negro" and "Indian" paralleled a growing gulf between the way whites viewed blacks and Indians in racial terms. During the Revolutionary era, the category of "race" crystallized in contrast to the new sense of "nation" as the unit

202. *See infra* note 206 and accompanying text.

203. THE DEVIL'S LANE: SEX AND RACE IN THE EARLY SOUTH 62 (Catherine Clinton & Michele Gillespie eds., 1997) (internal quotation marks omitted).

204. *Id.* (internal quotation marks omitted).

205. *Id.* (internal quotation marks omitted).

206. *See, e.g.*, Hudgins v. Wright, 11 Va. (1 Hen. & M.) 134, 141 (1806) (opinion of Roane, J.).

207. *See, e.g.*, *id.* at 138–39 (opinion of Tucker, J.).

208. *See id.* (discussing how 1705 was previously considered the last year that Indians could be deemed slaves).

209. *See id.* at 139.

of political organization, a people with a state.[210] In the American context, the "negro" came to stand for "race"—a race fit for servitude, in contrast to the "Indian" who was a member of a nation inferior in civilization, but capable of improvement.[211] Drawing the contrast between blacks and Indians served to divide and conquer two groups who threatened the new slave societies being built in the American republic.[212] Thus, in Virginia (and Louisiana as well), the legal construction of slaves' racial status grew out of the contrast between "Indian" and "negro" in a way that it did not in Cuba.[213] Nevertheless, the greater availability of freedom through manumission and lawsuits during the Revolutionary era produced a substantial population of free people of color in Virginia by 1820, one that remained the largest in the United States throughout the antebellum era.[214]

In Louisiana, the Age of Revolution coincided with the passing of the colony into Spanish hands. During the four decades of Spanish rule, the practice of *coartación*, as well as liberal rules regarding manumission, contributed to the growth of a substantial population of free peoples of color, or *gens de couleur libre*.[215] Almost 2,000 slaves were freed between 1763 and 1803; nearly 100 slaves per year by 1803.[216] Slaves in New Orleans were nearly three times more likely to win their freedom than slaves in post-Revolutionary Virginia.[217] Likewise, *coartación* was quite frequent; while only about two cases per year went to court, Hans Baade estimates that "nine out of ten paid-for manumissions were obtained by agreement rather than litigation, and that 500 or more manumissions in the Spanish period

210. *See* Nicholas Hudson, *From "Nation" to "Race": The Origin of Racial Classification in Eighteenth-Century Thought*, 29 EIGHTEENTH-CENTURY STUD. 247, 248, 251 (1996).

211. *See id.* at 250–52.

212. *See id.* at 251.

213. *See* Pallas v. Hill, 12 Va. (2 Hen. & M.) 149, 160–61 (1807); Coleman v. Dick & Pat, 1 Va. (1 Wash.) 233, 237 (1793); Jenkins v. Tom, 1 Va. (1 Wash.) 123, 124 (1792); Robin v. Hardaway, 1 Jeff. 109, 118, 122, (Va. Gen. Ct. 1772).

214. In 1820, 36,889 "free colored persons" accounted for nearly 3.5% of Virginia's population. OFFICE OF SEC'Y OF STATE, *supra* note 198, at 18. This portion of the population grew to a total of 47,348 in 1830, ABSTRACT OF THE RETURNS OF THE FIFTH CENSUS, H.R. DOC. NO. 22-263, at 18 (1st Sess. 1832), and up to 58,042 in 1860, JOSEPH C. G. KENNEDY, POPULATION OF THE UNITED STATES IN 1860; COMPILED FROM THE ORIGINAL RETURNS OF THE EIGHTH CENSUS 515 (1864).

215. *See* JENNIFER M. SPEAR, RACE, SEX, AND SOCIAL ORDER IN EARLY NEW ORLEANS 110 (2009).

216. *Id.*

217. *Id.*

were obtained by these two devices in combination."[218] The population of free people of color "grew from three percent of the total population of New Orleans in 1771 to almost twenty percent in 1805"[219] on the eve of the Louisiana Purchase, even though the slave population nearly tripled in the same period.[220]

Coartación was not only an important route to freedom for Louisiana slaves but provided slaves an opportunity to challenge their masters directly in courts of law. For example, Maria Juana invoked "the recourse that for charity is conceded to all slaves, namely to go look for masters more to their liking," as well as calling on "Divine Law which is in her favor," to escape "captivity [in which] she, herself, is exposed continually to punishment where through suffocation or desperation she might die."[221] Maria Juana did not succeed in her claim against her owner, as the court did not agree that *coartación* included the right to force an owner to sell to another buyer,[222] but many slaves did win their claims to self-purchase.

Luckier than Maria Juana, Marie-Therese claimed her freedom from Marie-Francoise Girardy in 1782.[223] The slaveowner refused to answer the suit and argued that Marie-Therese was a runaway who should compensate her for lost labor; Marie-Therese claimed that she had served her mistress for twenty-five years and had the right to purchase her freedom.[224] The case followed the typical procedure in *coartación* cases in New Orleans, in which a slave demanded the right to have an appraiser appointed to set her purchase price.[225] One appraiser would be appointed on her behalf, one on behalf of the owner, and if they disagreed, a third to settle the matter.[226] The arguments over valuation are interesting; slaves argued infirmity and age, while masters emphasized the slave's skills and abilities—even a slave who was a fugitive. Marie-Therese's owner insisted that she was "one of the most perfect servants in this Province, a good washer and ironer, also a seamstress and embroiderer, as well as an excellent

218. Baade, *supra* note 24, at 76; *see also id.* at 47–48 (discussing the frequency of *coartación*).

219. Spear, *supra* note 34, at 277.

220. *See* SPEAR, *supra* note 215, at 110 (noting how the slave population increased from 3,000 to 8,000 during this period).

221. Laura L. Porteous, *Index to the Spanish Judicial Records of Louisiana XXI*, 11 LA. HIST. Q. 314, 339 (1928).

222. *See id.* at 338–40 (discussing Maria Juana's case against her owner).

223. *See* Laura L. Porteous, *Index to the Spanish Judicial Records of Louisiana LXIX*, 19 LA. HIST. Q. 510, 512–15 (1936) (discussing Maria Theresa's case against her owner).

224. *See id.* at 513–14.

225. *See, e.g.*, *id.* at 512.

226. *See, e.g.*, *id.* at 514–15.

cook," and that the only significance of her being a runaway was that she owed her master wages for the time absent.[227] Nevertheless, Marie-Therese succeeded in winning a low purchase price ($600, where she had claimed $500 and her owner $900) based on her advanced age, between forty-eight and fifty; she did, however, have to pay back wages for her time as a runaway.[228]

As in Virginia, the Age of Revolution was the most important period in Louisiana for establishing a large and significant population of free people of color, especially in New Orleans, where they made up more than 17% of the total population by 1820.[229]

In Cuba, the relative importance of free people of color increased throughout the eighteenth century, when Cuba began to experience a rapid process of economic, social, and demographic changes that would turn it into a major plantation society.[230] By 1792, around the dawn of the plantation economy, free blacks and mulattoes represented 39% of the non-white population in the island and 20% of the population as a whole.[231] About 19% of the inhabitants of Havana and its suburbs were counted as "negros," "mulatos," or "libres."[232] They continued to play a prominent role in the militias, which constituted a route to social standing and consideration.[233] Free colored soldiers represented 29% of the military forces in the colony in 1770.[234]

The Bourbon reforms of the late eighteenth century may have contributed to the expansion of opportunities for slaves to demand freedom and press other claims. As Bourbon reformers sought to unify and clarify legal and bureaucratic practices across their vast empire, they encountered entrenched practices and customary rights that could not be obliterated. Some of these practices, such as *coartación*, were potentially favorable to slaves. A poorly defined institution, *coartación* was used by slaves to claim the "right" to purchase freedom, as well as ancillary customary rights such as the "right" to change owners at will or the "right" to control a portion of their time and labor. Bourbon reformers issued new regulations to

227. *Id.* at 514.

228. *See id.* at 515.

229. *See* OFFICE OF SEC'Y OF STATE, *supra* note 198, at 123.

230. *See* FRANCISCO CASTILLO MELÉNDEZ, LA DEFENSA DE LA ISLA DE CUBA EN LA SEGUNDA MITAD DEL SIGLO XVII, at 191–201, 241–44 (1986).

231. *See* KIPLE, *supra* note 32, at 28 (using the numbers from Ramón de la Sagra's research).

232. *See id.* app. (Census of 1792).

233. *See* 5 LEVÍ MARRERO, *supra* note 155, at 28–29.

234. *See* KLEIN, *supra* note 23, at 217–18.

contain those practices and "rights," which owed much to slaves' initiatives and creativity, but in the process acknowledged their existence and gave them a clearer legal footing.[235]

Furthermore, the new regulations served as grounds for new claims and as foundations for new rights. Scholars of slavery and the law in several colonial territories in Spanish America have noted that in the late eighteenth century slaves approached the courts in growing numbers to make claims, assert rights, and sue masters.[236] This was surely influenced by the debates over individual freedoms, equality, and citizenship that criss-crossed the Atlantic in the Age of Revolution,[237] but it was facilitated as well by the efforts of Bourbon reformers who sought to clarify the "slave law" of the empire.[238] Slaves "demanded outright freedom more frequently"[239] and legal suits "began to have a new meaning in the late eighteenth century, one that implied the recognition of individual rights."[240]

Thus, the period from 1770 to the early nineteenth century could be said to be the era of greatest commonality across our three jurisdictions. In all three, manumission had become a regularized aspect of the regime of slavery during a period of rapid growth in the staple plantation economy and the slave trade. In all three, manumission was used as a way to reward service and to provide incentives for hard work during the term of slavery. And in all three, slaves and free people of color took advantage of the new opportunities created by political change to press freedom claims. All of this was to change in the nineteenth century, when the United States and Cuba diverged considerably in their policies with regard to free people of color.

235. On the Bourbon reforms and their impact in Latin America, see generally STANLEY J. STEIN & BARBARA H. STEIN, APOGEE OF EMPIRE: SPAIN AND NEW SPAIN IN THE AGE OF CHARLES III, 1759–1789 (2003); D. A. Brading, *Bourbon Spain and Its American Empire*, *in* 1 THE CAMBRIDGE HISTORY OF LATIN AMERICA 389 (Leslie Bethell ed., 1984).

236. *See* Grinberg, *supra* note 19, at 72.

237. *See id.* at 71.

238. The most important codification effort is the famous Real Cédula of 1789, which slaveowners adamantly opposed. *See* MANUEL LUCENA SALMORAL, LOS CÓDIGOS NEGROS DE LA AMÉRICA ESPAÑOLA 101–02, 123 (1996).

239. Camilla Townsend, *"Half My Body Free, the Other Half Enslaved": The Politics of the Slaves of Guayaquil at the End of the Colonial Era*, 7 COLONIAL LATIN AM. REV. 105, 108 (1998).

240. Grinberg, *supra* note 19, at 78.

C. Nineteenth Century

During the nineteenth century, elites in all three jurisdictions sought to curb the power of free people of color, yet they were far less successful in Cuba than in Virginia and Louisiana. This difference can be attributed in part to the sheer size of the free colored population in Cuba, and in part to political and ideological developments in the United States that had no counterpart in Cuba.

In Cuba, free blacks experienced an assault on some of their rights and privileges during the early nineteenth century, as the fast-growing sugar economy and the concomitant expansion of slavery increased racial and social tensions in unprecedented ways.[241] The participation of free blacks in several real or alleged conspiracies did little to reduce those tensions.[242] Despite these fears, which were associated with the possibility of another slave uprising like the Haitian Revolution, and despite the fact that the relative importance of free blacks declined, the community continued to represent a sizeable proportion of the total population.[243] Between the 1820s and the 1840s, their percentage of the population of the island as a whole declined to 15%,[244] but the community kept growing in absolute terms, and its proportion climbed to almost 17% by 1861;[245] in the city

241. *See* VERENA MARTINEZ-ALIER, MARRIAGE, CLASS AND COLOUR IN NINETEENTH CENTURY CUBA: A STUDY OF RACIAL ATTITUDES AND SEXUAL VALUES IN A SLAVE SOCIETY 74–76 (1974) (describing how the stigma of slavery affected the social status of free blacks).

242. *See* MATT D. CHILDS, THE 1812 APONTE REBELLION IN CUBA AND THE STRUGGLE AGAINST ATLANTIC SLAVERY 46–47 (Louis A. Pérez, Jr. ed., 2006) (describing a violent slave rebellion during which a slave named Tiburcio attacked his overseers with a machete); KLEIN, *supra* note 23, at 220–22 (describing how royal officials imprisoned and executed suspected conspiracy leaders, despite the absence of evidence or verified informants' tips); FRANKLIN W. KNIGHT, SLAVE SOCIETY IN CUBA DURING THE NINETEENTH CENTURY 81 (1970) (noting that "whites and free persons of color" participated in Cuban slave revolts); 1 MANUEL MORENO FRAGINALS, EL INGENIO: COMPLEJO ECONÓMICO SOCIAL CUBANO DEL AZÚCAR 128–29 (1978) (discussing the increase in tension in the bourgeois freedom ideology resulting from slave uprisings); 2 MORENO FRAGINALS, *supra*, at 83 (discussing the "Conspiración de la Escalera," a conspiracy involving slaves and free blacks); ROBERT L. PAQUETTE, SUGAR IS MADE WITH BLOOD: THE CONSPIRACY OF LA ESCALERA AND THE CONFLICT BETWEEN EMPIRES OVER SLAVERY IN CUBA 71–72 (1988) (describing a series of slave revolts on Cuban plantations, noting that there were "no fewer than 399 reported cases of slave violence from 1825 to 1850 in Matanzas province alone").

243. On fears of Haiti in Cuba, see generally MARIA DOLORES GONZÁLEZ-RIPOLL ET AL., EL RUMOR DE HAITÍ EN CUBA: TEMOR, RAZA Y REBELDÍA, 1789–1844 (2004); Ada Ferrer, *Haiti, Free Soil, and Antislavery in the Revolutionary Atlantic*, 117 AM. HIST. REV. 40 (2012).

244. *See* KIPLE, *supra* note 32, app. (Census of 1827).

245. *See id.* (Census of 1861).

of Havana, the free population of color remained an important minority, 26% in 1841.[246] Despite significant efforts by the planters to curtail traditional avenues for self-purchase such as *coartación*, slaves and their allies managed in fact to *expand* these rights during the nineteenth century. In their study of the slave market in Cuba from 1790–1880, Laird Bergad, Fe Iglesias García, and María del Carmen Barcia found that *coartado* slaves represented 13% of all sales.[247] If this ratio was, as the authors suggest, "close" to the percentage of *coartados* in the slave population at large, then traditional avenues for freedom remained entrenched in Cuban colonial society even at the height of the plantation period.[248] Only a fraction of these slaves were able to complete the payments required to purchase their total freedom, but this traditional legal custom remained in full effect and seems to have been widely used.[249]

In Virginia, restrictions on manumission began to increase again as early as 1806, with passage of a law requiring freed slaves to leave the state within the year. Manumissions declined, yet local records suggest that the law was rarely enforced, and that most freed slaves remained in Virginia. More stringent limitations on the liberties of free people of color were added to the statute books in the 1830s and 1840s. In particular, the Nat Turner insurrection of 1831 led to a host of very specific restrictions on the freedoms of free people of color,[250] because Turner was a foreman—a near-free slave.[251] These restrictions were also part of the reaction to anti-slavery sentiment in the North, beginning as early as the turn of the century, but accelerating in the 1830s.

Because Virginians and other U.S. southerners did not dominate their own federal government, but rather operated within a system in

246. *See* 2 COMITE ESTATAL DE ESTADISTICAS, INSTITUTO DE INVESTIGACIONES ESTADISTICAS, LOS CENSOS DE POBLACIÓN Y VIVIENDAS EN CUBA 98 (1988) (Havana Census of 1841).

247. LAIRD W. BERGAD, FE IGLESIAS GARCÍA, & MARÍA DEL CARMEN BARCIA, THE CUBAN SLAVE MARKET 1790–1880, at 123 (1995).

248. *See id.*

249. *See id.* at 122–31. Visitors to the island frequently referred to this institution. For some examples, see generally SLAVES, SUGAR, AND COLONIAL SOCIETY: TRAVEL ACCOUNTS OF CUBA, 1801–1899 (Louis A. Pérez, Jr. ed., 1992); Alejandro de la Fuente, *Slaves and the Creation of Legal Rights in Cuba:* Coartación *and* Papel, 87 HISP. AM. HIST. REV. 659 (2007).

250. *See* A. Leon Higginbotham, Jr. & Anne F. Jacobs, *The "Law Only as an Enemy": The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia*, 70 N.C. L. REV. 969, 989 n.73 (1992).

251. *See* Herbert Aptheker, *The Event*, *in* NAT TURNER: A SLAVE REBELLION IN HISTORY AND MEMORY 45, 47 (Kenneth S. Greenberg ed., 2003).

which the northern states had abolished and turned against slavery, sectional politics helped to consolidate a racially based defense of slavery, and of "white men's democracy,"[252] that had no counterpart in Cuba. Slaveholders in Cuba had to defend the institution as well, but their most frequent argument pointed to the alleged benevolence of slavery on the island and to the humanity of Spanish laws and civilization rather than to the innate inferiority of blacks.[253] Departing from the view that freedom was a natural state for all human beings, southern white ideologues—including judges and lawyers—began to argue that blacks were incapable of self-government, and so slavery was the best possible institution to allow them to flourish. One treatise writer explained: "[A] state of bondage [for the negro], so far from doing violence to the law of his nature, develops and perfects it; and that, in that state, he enjoys the greatest amount of happiness, and arrives at the greatest degree of perfection of which his nature is capable."[254] As southerners articulated the positive-good defense of slavery more often in terms of race, they increasingly emphasized a dual image of the black person: under the "domesticating" influence of a white master, the slave was a "happy child," a Sambo, while the free black outside the bonds of slavery was a savage beast.[255] This new racial defense of slavery put growing pressure on the increasingly anomalous free people of color, as well as people of mixed race.

Along with increased restrictions on manumission, the most important new limitations on the rights of free people of color were constraints on their freedom of movement. In 1793, free blacks in Virginia were required to register with the state and to carry their freedom papers with them wherever they went; after 1831, these rules were strengthened. Free people of color were frequently stopped by slave patrols who often mistook them for slaves and asked for their passes. If their papers were not in order, they could be taken to jail or even cast into slavery. A host of laws were passed forbidding

252. *See generally* GEORGE M. FREDRICKSON, THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY, 1817–1914, at 58–64 (1971) (describing opposing justifications for slavery and support for "*Herrenvolk* democracies" that were democratic only for the dominant white race).

253. *See* Jamie Holeman, *"A Peculiar Character of Mildness": The Image of a Humane Slavery in Nineteenth-Century Cuba*, *in* FRANCISCO ARANGO Y LA INVENCIÓN DE LA CUBA AZUCARERA 41, 44 (Maria Dolores González-Ripoll & Izaskun Àlvarez Cuartero eds., 2010).

254. THOMAS R. R. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA 51 (Univ. of Ga. Press 1999) (1858).

255. *See* GEORGE M. FREDRICKSON, THE ARROGANCE OF RACE: HISTORICAL PERSPECTIVES ON SLAVERY, RACISM, AND SOCIAL INEQUITY 209 (1988).

preaching by people of color, gathering in religious meetings or other assemblies, selling liquor, or owning slaves.[256] For minor offenses, free blacks were whipped thirty-nine lashes in the public square, but they also risked banishment and re-enslavement. About the only rights that remained for them were property rights, including the right to own family members as slaves.[257]

Virginian legislators also struggled with people of mixed race. Despite legal efforts to increase fines on interracial fornication and systematic prohibitions against interracial marriages, the number of offspring of white-black liaisons increased over time, producing individuals that did not fit into any of the legal categories. When the Virginia legislature imposed new limits on free people of color in 1832 (when mulattoes were legally indistinguishable from blacks), it had to face the uncomfortable fact that there were "Indians and other persons of mixed blood, who [were] not free negroes or mulattoes"[258] but who could not be legally characterized as white either. A law approved in 1833 authorized county courts to grant certificates indicating that a free person who was not white, but who was not "a free negro or mulatto" either, was to be exempted from the legal limitations imposed on such free people of color.[259] As in Latin America, to be white was not just a question of ancestry, but of social standing and perceptions in the local community.

By the eve of the Civil War, white Virginians had made every effort to guarantee that "free" and "white" would be synonymous, as would "black" and "slave." These efforts were never totally successful—free people of color and people of mixed race, both slave and free, confounded them—but legislators in Virginia were much more effective than Cuban planters, or even those in New Orleans, in curtailing manumission and limiting the growth of the free population of color.

Louisiana became an American territory in 1806, after a brief reversion to France in 1803 and three more years of Spanish rule. Due to its peculiar legal history and to the existence of an unusually large free population of color, Louisiana remained exceptional with regard to slaves' abilities to win freedom in the nineteenth century.

256. For a list of Virginia laws affecting free persons of color during this time, see generally JUNE PURCELL GUILD, BLACK LAWS OF VIRGINIA 94–124 (1936).

257. *See id.*

258. JOSHUA D. ROTHMAN, NOTORIOUS IN THE NEIGHBORHOOD: SEX AND FAMILIES ACROSS THE COLOR LINE IN VIRGINIA, 1787–1861, at 210–11 (2003) (internal quotation marks omitted).

259. *Id.* at 211.

Slaves continued to purchase themselves, manumissions continued at a higher rate than in other states, and, although Louisiana sought to limit these rights, they continued to exercise them throughout the period.

Perhaps most surprisingly, despite both French and American efforts to abolish the Spanish practice, *coartación* continued well into the nineteenth century. During the twenty-day interlude of French rule in 1803, the Code Noir was reenacted;[260] nonetheless, there were some two hundred instances of *coartación* from 1803 to 1806.[261] The new American state drew on a true hodgepodge of French, Spanish, and Roman legal influences, particularly with regard to slave policy. The territory adopted a Black Code for the regulation and punishment of slaves that reenacted much of the Code Noir.[262] In 1807, an act regarding emancipation decreed that "no person shall be compelled either directly or indirectly, to emancipate his or her slave

260. SCHAFER, SLAVERY AND THE CIVIL LAW, *supra* note 24, at 3; *see also* An Act Prescribing the Rules and Conduct To Be Observed with Respect to Negroes and Other Slaves of this Territory, ch. 30, § 4 (1807), *in* ACTS PASSED AT THE FIRST SESSION OF THE FIRST LEGISLATURE OF THE TERRITORY OF ORLEANS 188, 188–90 (New Orleans, Bradford & Anderson 1807) [hereinafter ACTS OF ORLEANS] (enacting provisions of the Code Noir).

261. SCHAFER, SLAVERY AND THE CIVIL LAW, *supra* note 24, at 3.

262. *See, e.g.*, An Act to Regulate the Conditions and Forms of the Emancipation of Slaves, ch. 10 (1807), *in* ACTS OF ORLEANS, *supra* note 260, at 82, 82–89. A year later, the Digest of 1808 represented itself as a compilation of "all the law now in force in the territory" but also left in force the 1807 Black Code. While most historians agree that the Digest was largely inspired by French law, many jurists continued to rely on Spanish law; regardless of the exact proportion of French to Spanish influence, Louisiana jurists continued to draw on French, Spanish, and Roman law in addition to the 1808 Digest, and the 1825 Civil Code that remained in force until 1870 drew heavily on the French Civil Code. For more on these developments, see generally Rodolfo Batiza, *Sources of the Civil Code of 1808, Facts and Speculation: A Rejoinder*, 46 TUL. L. REV. 628 (1972); Rodolfo Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, 46 TUL. L. REV. 4 (1971); Robert A. Pascal, *Sources of the Digest of 1808: A Reply to Professor Batiza*, 46 TUL. L. REV. 603 (1972). For additional guidance on the debate between the level of French and Spanish influences, see generally RICHARD HOLCOMBE KILBOURNE, A HISTORY OF THE LOUISIANA CIVIL CODE: THE FORMATIVE YEARS, 1803–1839 (1987); VERNON VALENTINE PALMER, THE LOUISIANA CIVILIAN EXPERIENCE: CRITIQUES OF CODIFICATION IN A MIXED JURISDICTION (2005); Hans W. Baade, *The Bifurcated Romanist Tradition of Slavery in Louisiana*, 70 TUL. L. REV. 1481 (1996); A. N. Yiannopoulos, *The Early Sources of Louisiana Law: Critical Appraisal of a Controversy*, *in* LOUISIANA'S LEGAL HERITAGE, *supra* note 24, at 96–100. For more about the French influence on Louisiana law, see generally A LAW UNTO ITSELF? ESSAYS IN THE NEW LOUISIANA LEGAL HISTORY (Warren M. Billings & Mark F. Fernandez eds., 2001); GEORGE DARGO, JEFFERSON'S LOUISIANA: POLITICS AND THE CLASH OF LEGAL TRADITIONS (rev. ed. 2009); 1 THE LOUISIANA PURCHASE BICENTENNIAL SERIES IN LOUISIANA HISTORY: THE FRENCH EXPERIENCE IN LOUISIANA (Glenn R. Conrad ed., 1995).

or slaves,"[263] thereby implicitly abolishing *coartación*. The act required judicial permission for manumission—including proof that a slave was thirty years old and had exercised good behavior for four years.[264] Additional acts limited the emigration or settlement of "free negros or mulattos."[265] Compared to other states in the United States, the lingering influence of civil law in Louisiana allowed greater rights of manumission, including the right to sue for freedom without a next friend or guardian ad litem. The Supreme Court of Louisiana confirmed in an 1816 ruling that self-purchase was still enforceable in the state.[266]

Louisiana did follow the U.S. southern trend of increasing restrictions on manumission in the nineteenth century, passing laws requiring freed slaves to leave the state and new regulations on free people of color, culminating in re-enslavement laws in the 1850s.[267] Yet the removal provisions were almost never enforced and manumission continued at a higher rate than in other states in the region, although less than in Cuba.[268] And the 1825 Code retained the right of self-purchase for slaves in article 174: "The slave is incapable of making any kind of contract, except those which relate to his own emancipation."[269] This right to contract for freedom was a watered-down version of *coartación*, because it did not force a master to sell his or her slave if the slave put together the purchase price, and slaves could accumulate property and money only with the consent of their owner.[270] Nevertheless, Louisiana was the only state where slaves' freedom enjoyed some legal support.[271] The Supreme Court of

263. An Act to Regulate the Conditions and Forms of the Emancipation of Slaves, ch. 10, § 1 (1807), *in* ACTS OF ORLEANS, *supra* note 260, at 82, 82.

264. *See id.* § 2, at 82.

265. *See, e.g.*, An Act to Prevent the Emigration of Free Negroes and Mulattoes into the Territory of New Orleans, ch. 28 (1807), *in* ACTS OF ORLEANS, *supra* note 260, at 180, 180–83.

266. *See* Victoire v. Dussuau, 4 Mart. (o.s.) 212, 213 (La. 1816); *see also* SCHAFER, SLAVERY AND THE CIVIL LAW, *supra* note 24, at 225 (discussing *Victoire* and the court's affirmation of the right of self-purchase, and the judge's focus on insufficiency of oral evidence to prove the existence of a contract).

267. *See* SCHAFER, BECOMING FREE, *supra* note 24, at 1–2.

268. *See infra* text accompanying notes 273–88.

269. LA. CIV. CODE ANN. art. 174 (1825).

270. *See* SCHAFER, SLAVERY AND THE CIVIL LAW, *supra* note 24, at 224.

271. *See id.* ("Slaves in other states were occasionally able to purchase their freedom if the master allowed it, but only in Louisiana did they have the capacity to enter into a contract for their liberty.").

Louisiana heard a number of appeals in which slaves tried to enforce self-purchase contracts, and found for the slaves in some cases.[272]

Empirical studies of manumission in antebellum Louisiana reach some interesting conclusions. First, Louisiana continued to free a steady stream of slaves, a majority of whom were women, after the adoption of the 1825 Code.[273] Laurence Kotlikoff and Anton Rupert studied petitions to the Police Jury of New Orleans to manumit slaves, and counted 1,159 successful petitions in twenty years.[274] Second, a large proportion of these slaves, 36.5%, were freed by free people of color.[275] One eighth of free black households were involved in emancipating a slave, and a slave owned by a free black had 3.5 times the chance to be manumitted as a slave owned by a white.[276] At least 63% of slaves freed by free blacks were family members.[277] After 1827, manumission required the approval of three fourths of the parish police jury, and the freed slave had to leave the state unless the police jury permitted her to stay; in every case, however, the police jury allowed freedpeople to stay.[278] Even after a new state constitution was adopted in 1845, and manumissions were further restricted,[279] the district courts continued to hear manumission cases, including self-purchase; slaves continued to win some of these cases.[280] The Supreme Court of Louisiana even set slaves free on the basis of sojourns on free soil at a time when the consensus among other states was that a brief visit to the North was not enough to free a slave.[281]

Self-purchase trials in the nineteenth century reveal not only the established nature of this practice, but the courts' resort to Spanish as well as Roman law in deciding self-purchase cases. An 1818 appeal of a slave woman's suit for freedom based on an agreement her father made during the Spanish period was argued on the basis of Roman law principles, which allowed her to work for the "residue" of her

272. *See* SCHAFER, BECOMING FREE, *supra* note 24, at 45–58; SCHAFER, SLAVERY AND THE CIVIL LAW, *supra* note 24, at 224–34.

273. *See* Laurence J. Kotlikoff & Anton J. Rupert, *The Manumission of Slaves in New Orleans, 1827–1846*, 1980 S. STUD. 172, 176.

274. *Id.* at 172.

275. *Id.*

276. *Id.* at 172, 179.

277. *Id.* at 180.

278. *See id.* at 173.

279. *See* Judith Kelleher Schafer, *Roman Roots of the Louisiana Law of Slavery: Emancipation in American Louisiana, 1803–1857*, 56 LA. L. REV. 409, 420 & n.60 (1995).

280. *See* SCHAFER, SLAVERY AND THE CIVIL LAW, *supra* note 24, at 228–49.

281. *See* SCHAFER, BECOMING FREE, *supra* note 24, at 15–33.

purchase price.[282] Another New Orleans slave who had raised most of his purchase price "by voluntary contributions among the free people of color," Louis Doubrére, won his freedom suit citing not only the Louisiana Civil Code but the Spanish *Siete Partidas*.[283] As late as 1842, a Louisiana jury found in favor of the freedom of an enslaved man who had purchased himself, despite the Code's rejection of *coartación*.[284]

Thus, in nineteenth-century Louisiana, manumission (including self-purchase) continued to be more frequent than in other parts of the United States, although legislators were imposing restrictions in response to the same ideological and political imperatives as in Virginia. It does appear that the Spanish practice of *coartación* made substantial inroads in Louisiana, and this left a lasting legacy in two ways. First, by expanding the class of free people of color, it indirectly expanded the practice of manumission, because free people of color were the most likely to emancipate a slave, to help a slave raise the money for self-purchase, and to buy family members in order to free them. Free people of color were also willing to agitate for greater rights, and in general acted in solidarity with slaves. Second, the practice of self-purchase continued even when it was technically prohibited by statute, and courts continued to uphold the practice, even turning to Spanish and Roman law principles in deciding cases.

By comparison to Cuba, the practice was relatively modest in terms of the rights slaves were able to carve out. Louisiana slaves could not force owners to sell them, they could not seek out new owners on their own, they could not use time served to pay a contract price, and they could not demand a sale for violations of their rights. The distinct community of *gens de couleur libres* in New Orleans did, however, develop its own political traditions, which became the basis for strong claims to citizenship both before and after the U.S. Civil War.[285]

282. *See* Cuffy v. Castillion, 5 Mart. (o.s.) 494, 495–96 (La. 1818).

283. *See* Transcript of Trial at 992, Doubrére v. Grillier's Syndic, No. 860 (La. New Orleans Parish Ct. July 1822) (collection of Earl K. Long Library, Special Collections & Archives, Univ. of New Orleans, New Orleans, La., Supreme Court Records), *rev'd*, 2 Mart. (n.s.) 171 (La. 1824) (granting slave his freedom).

284. *See* Transcript of Trial at 15, Mathews v. Boland, No. 5119 (La. New Orleans Dist. Ct. July 1842) (collection of Earl K. Long Library, Special Collections & Archives, Univ. of New Orleans, New Orleans, La., Supreme Court Records), *rev'd on other grounds*, 5 Rob. 200 (La. 1843).

285. *See* Rebecca J. Scott, *Public Rights, Social Equality, and the Conceptual Roots of the* Plessy *Challenge*, 106 MICH. L. REV. 777, 791 (2008).

Attempts to create fixed, dichotomous social orders where race and status were perfectly aligned were never totally successful. But differences in the evolution of the legal regimes of Virginia, Louisiana, and Havana did have an impact. Differential regimes of manumission resulted over time in the development of communities of free people of color of vastly different size—with all the consequences that the very existence of these communities entailed. On the eve of the Civil War in the United States (1861) and of the first War of Independence in Cuba (1868), free people of color were in relative terms over five times as numerous in Havana (at 18.4% of the population)[286] as in Virginia (at 3.6%)[287] and almost three times as numerous as in New Orleans (6.3%),[288] which remained an intermediate case in terms of the freed population. As scholars of slavery and race relations in Latin America have argued, the existence of large free populations of color was crucial to the elimination of the caste systems across the region.[289] Even in Brazil, the largest slaveholding society in the Americas during the nineteenth century, independence resulted in the elimination of legal racial distinctions.[290] In this sense, manumission, a key legal institution under slavery, may have had long-term consequences for race relations in the Americas.

IV. "RACE TRIALS" IN THE NINETEENTH CENTURY

As we have seen in all three jurisdictions, slaves and free people of color took advantage of openings in the legal system to press for freedom, using whatever means were available. But different legal regimes meant different avenues and opportunities for claims-making. Furthermore, as the number of free people of color grew or shrank, their political power and ability to consolidate legal gains shifted. In Cuba, the continuing significance of the class of free people of color meant consolidating the practice of self-purchase into a legislative right, whereas in Louisiana and Virginia, most paths to freedom were curtailed in the nineteenth century, and the already-small populations of free people of color found themselves under increasing attack.

286. *See* KIPLE, *supra* note 32, app. (Census of 1861).

287. *See* KENNEDY, *supra* note 214, at 515.

288. *See id.* at 194.

289. *See* GEORGE REID ANDREWS, AFRO-LATIN AMERICA, 1800–2000, at 86–92 (2004); *see also* MARIXA LASSO, MYTHS OF HARMONY: RACE AND REPUBLICANISM DURING THE AGE OF REVOLUTION, COLOMBIA, 1795–1831, at 9–11 (2007).

290. *See* ANDREWS, *supra* note 289, at 89–91.

These differences help explain why slaves followed different litigation strategies in the mature slave societies of Cuba, Louisiana, and Virginia. In Cuba, slaves used institutional and doctrinal continuities to press for freedom the way they had done for centuries.[291] Since the owners' rights to manumit were never curtailed, the Cuban courts continued to hear cases concerning manumission.[292] Many of these cases were initiated by slaves who claimed that their masters' promises of manumission had not been honored, usually by their heirs; others were initiated by heirs or by creditors who claimed ownership over those slaves. Slaves also pressed claims for mistreatment and abuse to change owners and improve their personal situation.[293] Others used the highly contentious legal practice of *coartación* to impose manumission on reluctant masters, change owners, lower their manumission price judicially, or simply to control more of their time and labor.[294]

In Virginia and Louisiana, by contrast, slaves' freedom suits came to center on claims about ancestry and race. The most important rules regarding racial and slave status were laid down in the 1806 case of *Hudgins v. Wright*,[295] in which a slave named Hannah sued for her freedom, claiming that her mother had been not black, but Indian—a woman known as Butterwood Nan.[296] Hannah brought

291. *See* de la Fuente, *supra* note 249, at 663–65.

292. *See id.* at 687.

293. *See* ANDREWS, *supra* note 289, at 34.

294. *See* de la Fuente, *supra* note 249, at 659–92. The literature on manumission claims in Latin America has grown significantly. *See generally* Sherwin K. Bryant, *Enslaved Rebels, Fugitives, and Litigants: The Resistance Continuum in Colonial Quito*, 13 COLONIAL LATIN AM. REV. 7 (2004) (analyzing suits brought by slaves against their masters in colonial Quito, Ecuador); Camillia Cowling, *Negotiating Freedom: Women of Colour and the Transition to Free Labour in Cuba, 1870–1886*, 26 SLAVERY & ABOLITION 377 (2005) (arguing that women of color were crucial in the legal transition from slave labor to free labor in late nineteenth-century Cuba); de la Fuente, *supra* note 249 (discussing slaves' rights of gradual self-purchase and request for paper to seek a new master in eighteenth- and nineteenth-century Cuba); Johnson, *Slaves and Their Masters*, *supra* note 153 (analyzing three types of court cases in the late colonial period in Buenos Aires—individuals who contested their legal statuses as slaves, slaves who sought the right to purchase their freedom or the freedom of family members, and slaves who demanded the right to request new masters due to abuses suffered under their present owners); Bianca Premo, *An Equity Against the Law: Slave Rights and Creole Jurisprudence in Spanish America*, 32 SLAVERY & ABOLITION 495 (2011) (analyzing the importance of judges' political philosophies in establishing and developing the practice of Spanish American slaves suing their masters for freedom in colonial courts); Townsend, *supra* note 239 (exploring political beliefs of slaves through courtroom testimony in Guayaquil, Ecuador, during the colonial independence wars).

295. 11 Va. (1 Hen. & M.) 134 (1806).

296. *See id.* at 134 (discussing procedural history of case).

in a wide variety of evidence to defend her claim. Her witnesses agreed that Hannah appeared white, though that alone was not enough to free her.[297] Witnesses also testified that Hannah's father had been an Indian, but that was not enough to free her either: the system of chattel slavery depended upon the premise that every child of an enslaved mother would be enslaved as well.[298] For Hannah to win her freedom, she had to show that she was the descendant of a free Indian woman. Witnesses testified that her mother, Butterwood Nan, was "called an Indian," and though a slave, could have had her freedom had she wanted it.[299] Hannah's putative owners argued that despite Nan's Indian reputation, Nan's mother could well have been black; or possibly she was an Indian who had been enslaved during that period of legal Indian slavery.[300] In the end, no one was able to prove whether Nan was really an Indian or only reputed to be one.[301] Nor could anyone prove whether Nan descended from Indians who had been legally enslaved.[302] Yet the court's decision makes clear the early American tendency to consider Indians as citizens of free nations—while insisting that Africans were a degraded race of slaves. Because of Hannah's "copper complexion,"[303] the court ruled, she enjoyed a legal presumption of freedom.[304] By contrast, a person who appeared "negro" would be presumed a slave, unless affirmative evidence could prove that she was free.[305]

This contrast between racial and national identity extended even to different modes of fact-finding. The rare freedom suit to be appealed all the way to the United States Supreme Court, *Negro John Davis v. Wood*,[306] in 1816, established the rule that hearsay and reputation evidence would be allowed only to establish "pedigree" (that is, race), and not, for example, one's status as slave or free.[307] Community members might testify as to their understanding of a person's race, and the jury could rule on that race accordingly.[308] To determine slave status, however, the jury would require firsthand

297. *See id.*
298. *See id.* at 137 (opinion of Tucker, J.).
299. *Id.* at 134 (discussing procedural history of case).
300. *See id.* at 135.
301. *See id.* at 141–43 (opinion of Roane, J.).
302. *See id.*
303. *Id.* at 137 (opinion of Tucker, J.).
304. *See id.* at 142 (opinion of Roane, J.).
305. *See id.* at 141.
306. 14 U.S. (1 Wheat.) 6 (1816).
307. *See id.* at 6.
308. *See id.* at 6–7.

evidence, documentation, or something more persuasive than hearsay.[309]

Some years later, in *Gregory v. Baugh*,[310] the Virginia Supreme Court of Appeals ruled that the same distinction held when litigating between Indian identity and one's status as "black."[311] Just as Hannah had done in *Hudgins*, the slave James Baugh sued his Chesterfield County owner for his freedom, claiming that his maternal grandmother was an Indian woman entitled to her freedom, despite being enslaved.[312] Twice James won his freedom, and twice his owner appealed the case to Virginia's highest court.[313] At the second trial, James submitted the deposition of an eighty-three year old witness discussing his grandmother's Indian identity.[314] The Virginia Supreme Court of Appeals ruled that this hearsay testimony about Indian tribal status was inadmissible—in striking contrast, as the dissent pointed out, to the general rule about the admissibility of reputation evidence regarding "pedigree," i.e., racial status.[315]

In trials drawing the line between black and white, courts routinely allowed every kind of hearsay or reputation evidence, no matter how remote, to be heard by the jury, on the grounds that reputation was often the only way to know someone's race.[316] But Indian identity was not yet conceptualized legally in racial terms. Hence the *Gregory* court sharply distinguished "the country, nation or tribe, of [James Baugh's] ancestor" from his "[race or] pedigree."[317] This fact-finding distinction sharpened the contrast between "Indians" (citizens of a nation) and "negroes" (members of a race).[318]

Just as the United States parted ways with Latin America with regard to manumission in the nineteenth century, we see real differentiation with regard to the ideology of race during the same period. The kind of racial justification for slavery that developed in

309. *See id.* at 7; *see also* Pegram v. Isabell, 12 Va. (2 Hen. & M.) 193, 203, 210–11 (1808) (permitting evidence from previous case to prove mother's freedom, though not to show the mother was free because of her possible Indian lineage).

310. 25 Va. (4 Rand.) 611 (1827).

311. *See id.* at 621 (opinion of Carr, J.).

312. *See id.* at 617.

313. *See* Gregory v. Baugh, 29 Va. (2 Leigh) 665, 665–66 (1831) (discussing procedural history of case).

314. *See id.* at 667–68.

315. *See id.* at 693–98 (Brooke, J., dissenting).

316. *See id.* at 679 (opinion of Carr, J.).

317. *See id.*

318. *See id.* at 679–80.

the United States as a governing ideology[319] had no counterpart in Cuba or Brazil because, among other things, of the large size of the free population of color in those countries.[320] Equally important, southern slaveholders had to navigate a system committed to political liberalism and, increasingly, to democracy, at least in name.[321] Thus, unlike planters in other parts of the New World, they worried about the loyalty of poor and non-slaveholding whites in a slave system. For southern whites, the ideology of white supremacy and "white man's democracy" provided the glue for their society.[322] In this version of "herrenvolk democracy," all white men could partake in citizenship and honor because of their race, despite the fact that they were poor or did not own slaves themselves.[323] Again, there was no counterpart to this ideology in Latin America.

This does not mean, however, that whites in Cuba did not deploy racial ideologies to deny blacks a place in the political community. Some ideologues invoked arguments which were very similar to those used by southern slaveholders at the time, claiming that it was only thanks to slavery that Africans were lifted from the state of savagery and stupidity in which they naturally lived.[324] But several factors limited the influence of these arguments—starting with the size of the communities of free people of color, which were large enough to represent a real threat if pushed towards an alliance with slaves. As royal subjects since the early colonial period, the members of these communities had obtained corporate privileges and rights that could not be easily obliterated.[325]

Furthermore, despite efforts to police an ideal caste system, extensive racial mixing and mobility undermined it. Legal efforts to prevent intermarriage or, in the legal language of the Royal Pragmatic on Marriages of 1776, "unequal marriages," had to contend

319. *See* ARIELA J. GROSS, WHAT BLOOD WON'T TELL: A HISTORY OF RACE ON TRIAL IN AMERICA 4 (2008) ("Because blacks were incapable of self-government, slavery was the best possible institution to allow them to flourish.").

320. *See* ANDREWS, *supra* note 289, at 40–41.

321. *See* GROSS, *supra* note 319, at 40–41.

322. *See id.* at 48.

323. *See id.* at 54; *see also* FREDRICKSON, *supra* note 255, at 138–41 (discussing the features of a "*herrenvolk* democracy").

324. For a good example from elsewhere in the Iberian colonial world, see JUAN BERNARDO O'GAVAN, OBSERVACIONES SOBRE LA SUERTE DE LOS NEGROS DEL AFRICA 5–8 (Madrid, Imprenta del Universal 1821).

325. These considerations were explicit in the debates surrounding coartación in the mid-nineteenth century. *See* de la Fuente, *supra* note 249, at 661, 669, 692.

with the ambiguities of contested racial and legal statuses.[326] In nineteenth-century Cuba, individuals of different racial status secured official permission to marry by claiming compensatory social features.[327] In 1791, for instance, a white girl in Cuba successfully litigated her right to marry a mulatto man because, as authorities argued, "the girl's illegitimate origin offset her suitor's inferior colour."[328] In cases such as this, authorities approached what we would today call race as one of several features determining a person's worth and social station.[329]

Despite the fact that there were more people "in between" black and white in the United States than is usually portrayed, and the fact that the slavery era was *not* characterized by a rigid "one-drop-of-blood" rule,[330] racial fluidity did not weaken white supremacy. And in this way, Louisiana was very similar to the rest of the U.S. South. It shared the same commitment to white supremacy and to a racial justification for slavery.

Thus, it is not surprising that Louisiana, like other southern states, saw an increasing number of trials in the decades before the Civil War and saw an increasing number of trials brought to determine an individual's racial identity. In Louisiana, as in Virginia, racial-identity litigation before 1830 turned on claims of Indian ancestry. For example, in 1820, Ulzere, the son of Mary Ann, a "Chickasaw squaw" who was "considered as an Indian woman," sued for his freedom based on his Indian ancestry.[331] Ulzere won at trial but lost on appeal because he had relied on reputation rather than documentation.[332] As it became more urgent to draw the line between slave and free as a line between black and white, litigation increased and became more hotly contested. Despite state statutes setting rules for the determination of "negro" or "mulatto" status, usually in terms

326. *See* VERENA MARTINEZ-ALIER, MARRIAGE, CLASS AND COLOUR IN NINETEENTH CENTURY CUBA: A STUDY OF RACIAL ATTITUDES AND SEXUAL VALUES IN A SLAVE SOCIETY 11 (1974).

327. *See id.* at 22–25.

328. *Id.* at 11–12.

329. *See id.* at 15–18. For more on the 1776 Royal Pragmatic and its effects, see ANN TWINAM, PUBLIC LIVES, PRIVATE SECRETS: GENDER, HONOR, SEXUALITY, AND ILLEGITIMACY IN COLONIAL SPANISH AMERICA 307–13 (1999).

330. *See* GROSS, *supra* note 319, at 13.

331. Ulzere v. Poeyfarre, 8 Mart. (o.s.) 155, 155 (La. 1820); *see also* Seville v. Chretien, 5 Mart. (o.s.) 275, 290–91 (La. 1817) (finding that Indian ancestry alone did not entitle plaintiff to freedom under Louisiana law).

332. *See Ulzere*, 8 Mart. at 160–61.

of fractions of African "blood,"[333] these definitions could not resolve disputes about an individual's racial identity. Often, litigation just pushed the dispute back a generation or two as courtroom inquiry turned from the racial identity of the individual at issue to the racial identity of one's grandmother.[334] Still, the question remained: how could one *know* race?[335]

In practice, two ways of "knowing" race became increasingly important in courtroom battles over racial identity in the first half of the nineteenth century; one a discourse of race as "science" and the other of race as "performance." During the 1850s, as the question of race became more and more hotly contested, courts began to consider "scientific" knowledge of a person's "blood" as well as the ways she revealed her blood through her acts.[336] The mid-nineteenth century thus saw the development of a scientific discourse of race that located the essence of racial difference in physiological characteristics, such as the size of the cranium and the shape of the foot, and attempted to link physiological attributes with moral and intellectual difference. Yet the most striking aspect of "race" in trials of racial identity was not so much its biologization, but its performative and legal aspects. Proving one's whiteness meant performing white womanhood or manhood, whether doing so before the court or through courtroom narratives about past behavior.[337] While the essence of white identity might have been white "blood," because blood could not be transparently known, the evidence that mattered most was evidence about the way people acted out their true nature.[338]

Enslaved women suing for their freedom performed white womanhood by showing their beauty and whiteness in court and by demonstrating purity and moral goodness to their neighbors.[339] To the extent they could fit this ideal of white womanhood, women of ambiguous racial identity could call upon the protection of honorable gentlemen—and of the state.[340]

333. *See* GROSS, *supra* note 319, at 43–44 (discussing various states' rules for determining racial status).

334. *See supra* notes 295–318 and accompaying text (discussing the earlier *Hudgins* and *Gregory* cases).

335. For more detailed discussions of this topic, see GROSS, *supra* note 319, at 16–139; Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth Century South*, 108 YALE L.J. 109, 124–32 (1998).

336. *See* GROSS, *supra* note 319, at 38.

337. *See id.* at 48–63.

338. *See id.*

339. *See id.* at 58.

340. *See* Gross, *supra* note 335, at 176.

Men, on the other hand, performed white manhood by acting like gentlemen and by exercising legal and political rights: sitting on juries, mustering into the militia, voting, and testifying in court.[341] At trial, witnesses translated legal rules based on ancestry and "blood" into wide-ranging descriptions of individuals' appearances, reputation, associations, and racial performances, especially of civic acts.[342] There was a certain circularity to these legal determinations of racial identity.[343] Status depended on racial identity, but status was also part of the essence of racial identity.[344] Degraded status signified "negro blood."[345] Conversely, behaving honestly, industriously, and respectably and exercising political privileges signified whiteness.[346]

Despite the more established community of free people of color in New Orleans, and the fact that free people of color sometimes appeared as slaveholders in these trials, the lawsuits proceeded quite similarly in Louisiana to the way they did in Virginia and other states. Even in cases involving witnesses and litigants from Santo Domingo testifying about racial practices there, most witnesses made clear that "negroes had no priviledges at all."[347] Another testified that "[i]f a white man or a white woman had married a coloured man or woman at San[to] Domingo they would have been disgraced . . . . The whites fought in company with the Blacks but did not admit them in the families."[348]

What limited research exists in other parts of Latin America on racial definition adjudications at the local level in the nineteenth century suggests that legal officials and courts relied far more heavily on documentation to determine racial identity than U.S. courts could.[349] The fact that the Catholic Church recorded marriages, births,

341. *See* GROSS, *supra* note 319, at 49.

342. *See* Gross, *supra* note 335, at 159.

343. *See* GROSS, *supra* note 319, at 54.

344. *See id.*

345. *See, e.g.*, State v. Cantey, 20 S.C.L. (2 Hill) 614, 615 (S.C. 1835).

346. *See, e.g.*, *id.* at 616; *see also* GROSS, *supra* note 319, at 54–55 (describing the *Cantey* decision as the "clearest judicial statement of white manhood as civic performance").

347. *See* Transcript of Trial at 24–26, Boullemet v. Phillips, No. 4219 (La. New Orleans Parish Ct. June 1837) (collection of Earl K. Long Library, Special Collections & Archives, Univ. of New Orleans, New Orleans, La., Supreme Court Records), *rev'd*, 2 Rob. 365 (La. 1842).

348. *See id.* at 39–43 (third alteration in original); *see also* Cauchoix v. Dupuy, 3 La. 206, 207–08 (1831) (discussing how a man was able to recover partial damages for slander for being mistakenly accused as being a "man of color").

349. *See generally* Jean Hébrard, *Esclavage et dénomination: imposition et appropriation d'un nom chez les esclaves de la Bahia au XIX^e Siecle*, 53/54 CAHIERS DU BRÉSIL CONTEMPORAIN, 2003, at 31 (analyzing the role of naming practices in determining slave status in nineteenth-century Salvador, Brazil); Richard Lee Turits, *Par-*

and deaths, including notations of racial identity, meant less reason for courts in Latin America to rely on reputation and performance.[350] Perhaps this is part of the reason for the greater recourse to discourses of racial science and performance in the United States. But an equally significant factor in the importance of performance to racial definition in the United States was the ideological connection between whiteness and fitness for citizenship that was part of the politics of "white man's democracy."[351] Racial identity litigation was shaped by that ideology and reinforced it as well.

CONCLUSION

A careful comparison of the legal regimes of Cuba, Louisiana, and Virginia concerning race under slavery, one based on local statutes and litigation practices, reveals some unexpected results. First of all, there is an important commonality: slaveowners in all places sought to construct a social order based on clearly delimited, fixed, binary categories in which race and status were coincidental. But whereas local legislators in colonial Havana and Louisiana could rely on well-established doctrinal and legal principles in their efforts, those of Virginia lacked such precedents. Thus, the legal situation of blacks was much more uncertain in early colonial Virginia than it ever was in Havana or in other Spanish colonies.

Legal precedents, however, provided Spanish colonials with ready-made molds of social organization that also included significant limitations on the slaveowners' ability to legislate their world. Among these limitations was the possibility (and, at least theoretically, the desirability) of manumission. As much as slaveowners in the Spanish colonies sought to create a dichotomous world of slaves and masters, they could not prevent the formation of sizeable communities of free people of African ancestry. These communities, ubiquitous throughout the Iberian New World colonies, considerably complicated the desired association of race and status, an association that slaveowners had sought to fix in law since the sixteenth century. The masters' right to manumit their slaves was never legally

delà les plantations. Question raciale et identités collectives à Santo Domingo, GENÈSES, Mar. 2007, at 51 (exploring how, following the decline of the prosperous sugar economy in sixteenth-century Santo Domingo, the power of "race" as a collective social identity and symbol of social divisions went into decline).

350. *See* Hébrard, *supra* note 349, at 50–58 (discussing the process of naming in pro-slavery Brazil during the nineteenth century).

351. *See supra* notes 252, 323, 341–46346, and accompanying text.

restricted, and slaves used some institutions, particularly *coartación*, to increase their legal avenues to fight for freedom.

In Virginia, by contrast, the absence of precedents allowed slaveowners to legislate their world in terms that were closer to their own ideal. Once the initial period of relative uncertainty concerning the legal situation of Africans was completed, legislators found ways to restrict manumission in significant ways; so at least since the early eighteenth century the proportion of freedmen and women in Virginia never approached the levels found in Cuba or in Louisiana, even after Louisiana became a U.S. territory and state. The initial period of legal uncertainty in Virginia was surely used by entrepreneurial slaves to improve their situation; it was certainly used by slaveowners to restrict opportunities for their slaves and even for free blacks in ways that local legislators in Spanish America could not achieve.

Still, the goal of dichotomous societies in which race and status were perfectly coincidental was never achieved in any of these jurisdictions. In each place, slaves found ways to escape slavery and free blacks managed to survive and carve out social and economic spaces for themselves. During the Revolutionary era, slaves across the Americas took advantage of relaxed rules regarding manumission, or, in the case of Spanish America, of legislative reform, to press for their freedom. In the nineteenth-century United States, however, because of the development of a racialized political ideology of "white man's democracy," as well as the pressure of sectional conflict over slavery, white southerners increasingly turned to the courts to draw the line between black and white. Racial-identity litigation drew a connection between whiteness and citizenship that did not develop in Cuba.

A comparison of the legal regimes concerning slavery in Cuba, Louisiana, and Virginia, based on local statutes, trials, and slaves' initiatives, reveals a number of similarities and differences that a previous generation of comparative scholars could not grasp. The reason for this gap in analysis is largely a question of methods and sources. Previous comparisons relied on disparate bodies of legislation (local statutes in Virginia versus metropolitan law in the case of Cuba) and paid little attention to slaves, free people of color, and their legal initiatives. But if recent scholarship on slaves and the law has taught us anything, it is that such initiatives helped to define legal institutions and practices in crucial ways. In all three jurisdictions, slaves and free people of color took advantage of the legal tools that were available to them. Their success depended in

part on the political clout of their communities, the legal and political environment in which they acted, and the extent to which customary practices had become embedded in legal institutions. In Cuba, well-worn avenues to freedom for a limited number of slaves made it less possible for the kind of crackdown on free people of color that occurred in Virginia and Louisiana in the mid-nineteenth century to be successful. Nevertheless, across all jurisdictions, people on the border between slave and free, black and white, challenged the efforts of elites to enshrine an indelible line between debased and enslaved blacks, and free white citizens.