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**Condemned by Substance and Process: A Comment on "Doubly Condemned": Adjustments to the Crime and Punishment Regime in the Late Slavery Period in the British Caribbean Colonies and "Under the Present Mode of Trial, Improper Verdicts are Very Often Given": Criminal Procedure in the Trials of Slaves in Antebellum Louisiana**

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CRIMINAL PROCEDURE IN THE TRIALS OF  
SLAVES IN ANTEBELLUM LOUISIANA\*

Raymond T. Diamond\*\*

The substance of modern criminal law and the procedures through which that law is enforced are a subject of current debate. On the one hand, some call into question the use of criminal sanctions as a means of enforcing schemes of regulation meant to guarantee public welfare.<sup>1</sup> By the same token, violent crime and crime that is otherwise *malum in se* has caused increasing levels of fear and concomitant calls for more vigorous enforcement of the criminal law.<sup>2</sup> As a result, the rights that protect the accused from intrusions by a potentially tyrannical state and from arbitrary decision

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<sup>1</sup> See *Staples v. United States*, 114 S. Ct. 1793, at 1803-04 (1994) (citing with approval authorities suggesting that strict liability states that dispense with traditional mens rea requirements can only be justified by penalties that are relatively small).

<sup>2</sup> Consider that a majority of the public perceives that local crime rates had increased from 1992 to 1993. UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1994, at 166 (1995) [hereinafter JUSTICE STATISTICS SOURCEBOOK]. This perception is belied by actual statistics, the most recent of which report that both violent and property crimes decreased in the most recent years for which we have totals (758.1 violent crimes and 5,130.7 property crimes per 100,000 inhabitants in 1991; 757.5 and 4,902.7 in 1992; 746.1 and 4,736.9 in 1993). FEDERAL BUREAU OF INVESTIGATION, UNITED STATES DEPARTMENT OF JUSTICE, UNIFORM CRIME REPORTS FOR THE UNITED STATES 1993, at 58 (1995). There is no question, however, that rates of both violent crimes and property crimes have soared across the last two decades. *Id.* This resulted in 42% of the public reporting very little or no confidence in the criminal justice system, and 83% of the public regarding crime as a very serious threat. JUSTICE STATISTICS SOURCEBOOK, *supra*, at 144-45.

making by the state are under fire.<sup>3</sup> The resolution of criminal cases by jury verdict, especially unanimous jury verdict, is questioned.<sup>4</sup> The right of those convicted to appeal their sentences is

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<sup>3</sup> The exclusionary rule is the subject of heated criticism. For example, in *United States v. Cusumano*, Judge Kane stated that,

the exclusionary rule has harmful effects on society. Guilty defendants are freed, the truth finding process is distorted, aberrant results subject the courts to public scorn and ridicule, the focus of trial shifts from guilt or innocence to procedural niceties, court costs increase through delay and perjury becomes tempting to the very people supposed to be exemplars of law and order.

*United States v. Cusumano*, 67 F.3d 1497, 1512 (10th Cir. 1995) (Kane, J., concurring). One of the rule's supporters describes it as being

like a roller coaster track constructed while the roller coaster sped along. Each new piece of track was attached hastily and imperfectly to the one before it, just in time to prevent the roller coaster from crashing, but without the opportunity to measure the curves and dips preceding it or to contemplate the twists and turns that inevitably lay ahead.

Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-And-Seizure Cases*, 83 COLUM. L. REV. 1365, 1366 (1983). Of late, the limitations on the exclusionary rule have become a cottage industry of the courts. See, e.g., *New York v. Harris*, 495 U.S. 14, 21 (1990) (holding inadmissible a confession made after a warrantless in-home arrest that was invalid); *Murray v. United States*, 487 U.S. 533, 543-44 (1988) (discussing the independent source doctrine as it limits the exclusionary rule); *United States v. Leon*, 468 U.S. 897, 922-25 (1984) (discussing the good faith exception to the exclusionary rule). Moreover, legislative proposals to modify the exclusionary rule are under active consideration. See H.R. 666, 104th Cong., 1st Sess. (1995) (enacted) (attempting to control crime by reforming the exclusionary rule); and S. 54, 104th Cong., 1st Sess. (1995) (limiting the application of the exclusionary rule). The House passed H.R. 666 on February 8, 1995. See also Prepared Statement of Paul J. Larkin, Jr. before the Senate Judiciary Committee, FED. DOCUMENT CLEARING HOUSE (Mar. 7, 1995) (arguing that the exclusionary rule does not deter law enforcement officers from overstepping constitutional boundaries); Testimony of Akhil Reed Amar before the Senate Judiciary Committee, FED. DOCUMENT CLEARING HOUSE (Mar. 7, 1995) (stating that the exclusionary rule is "a perverse rule reflected by the founders, a rule whose principle effect is to protect guilty criminals").

<sup>4</sup> California has been a hotbed of calls for less than unanimous verdicts since the verdict of acquittal in *California v. Orenthal James Simpson*. See Bill Ainsworth, *Anti-Crime Politicians Quick to Exploit Verdict*, RECORDER, Oct. 4, 1995, at 14 (California D.A. Association backs proposal for constitutional amendment to make 10-2 verdicts sufficient to convict); Tony Mauro, *OJ Trial Could Spell Change to Justice System*, USA TODAY, Oct. 5, 1995, at 1A (California governor proposes to make 10-2 verdicts sufficient for conviction); *Simpson Case Spurs Changes in U.S. Legal System*, AGENCE FRANCE PRESSE, Oct. 7, 1995 (California governor proposes ballot initiative to amend state unanimous verdict); Harriet Chiang, *Jury System Reviewed by State Panel; Changes Considered in Wake of O.J. Trial*, S.F. CHRON., Oct. 31, 1995, at A13 (California Judicial Council creates special task force to review the conduct of jury trials, including the question of eliminating the need for unanimous verdicts). But see Bar Official Urges Slow Going with Legal Reforms, CHARLESTON GAZETTE, Oct. 7, 1995, at 5C (reporting that the president of the California State Bar Association urged cautious and thoughtful consideration of a proposed ballot initiative permitting 10-2 verdicts in non-capital cases). Such calls for non-unanimous verdicts in California did predate the Simpson verdict. See Harriet Chiang, *Jury System Reviewed by State Panel; Changes Considered in Wake of O.J. Trial*, S.F. CHRON., Oct. 31, 1995, at A13 (California state senate had held hearings on non-unanimous verdicts in non-capital crimi-

viewed as a hindrance to certainty of punishment,<sup>5</sup> and their right to challenge the terms of their punishment is viewed as a hindrance to the effectiveness of punishment as well as to societal retribution. Calls for harsh sentences resound,<sup>6</sup> including those for the death penalty<sup>7</sup> and for corporal punishment.<sup>8</sup>

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nal cases); Bill Kisliuk & Howard Mintz, *Defense Bar Dreading a Simpson Backlash*, RECORDER, Oct. 4, 1995, at 1 (California D.A. Association had backed proposal eliminating unanimity requirement before Simpson verdict).

Oregon and Louisiana are the only states to date that have eliminated the requirement for unanimous verdicts in non-capital criminal cases. See 14 OR. REV. STAT. § 136.450 (1993), and LA. CODE CRIM. PROC. ANN. art. 782(A) (West 1979). Less than unanimous verdicts were deemed constitutional in *Apodaca v. Oregon*, 406 U.S. 404 (1972).

<sup>5</sup> Chief Justice Rehnquist and Justice Scalia, for example, have advocated this position. *Penry v. Lynaugh*, 109 S. Ct. 2934, 2964-65 (1989) (Justice Scalia dissenting in part and concurring in part) and *Wainwright v. Spenkeliuk*, 442 U.S. 901, 903-04 (1979) (Justice Rehnquist dissenting).

<sup>6</sup> Consider, for example, gubernatorial elections of late. In a recently decided election, finally decided on November 18, 1995 in Louisiana, Buddy Roemer, a former governor and a major candidate who lost in the first primary, called for barbed wire and Army tents to house prisoners, and for chain gangs for two-time offenders. Curtis Wilkie, *Once Again, La. Governor's Race Fit for a Kingfish*, BOSTON GLOBE, July 30, 1995, at 15. Such comments may be extreme but are not unique. The sheriff of Phoenix's Maricopa County houses his prisoners in military surplus tents, and Alabama has brought back the chain gang thirty years after doing away with it. See Peter Morrison, *The New Chain Gang*, NAT'L L.J., Aug. 21, 1995, at A1; Elizabeth Levitan Spaid, *The Clink-Clink of Leg Irons Signals Return to Harsh Era*, CHRISTIAN SCI. MONITOR, Apr. 27, 1995, at 1. See also Howard Kurtz, *In 1994 Political Ads, Crime is the Weapon of Choice*, WASH. POST, Sept. 9, 1994, at A1 (citing political advertisements calling attention to a crime problem and calling for tough sentences by candidates in gubernatorial campaigns in Texas, Florida, California, New York, and Illinois). Concern about perceived laxity in punishments has led to a heightened level of discussion generally among states as to toughening sentences and terms of sentences, as well as to new legislation. See Adam Nossiter, *Making Hard Time Harder, States Cut Jail TV and Sports*, N.Y. TIMES, Sept. 17, 1994, at A1. Nor are such calls a matter only of state politics, but instead, also a matter of debate with respect to federal policy. See *id.* (citing political advertisements by incumbent United States Senators in California and Massachusetts running for reelection); Naftali Bendavid, *'No Frills' Prisons Movement Picks Up Speed*, RECORDER, Mar. 15, 1995, at 1 (reporting the progress of H.R. 663, a bill which would forbid federal funding for state prisons that do not ban the following: in-cell televisions and coffee pots, electric musical instruments, X-rated movies, body-building equipment, pornographic magazines, and any food better than United States soldiers receive).

<sup>7</sup> See D'Jamila Salem, *National Perspective: '94 Elections/Battles for Governor*, L.A. TIMES, Nov. 1, 1994, at A5 (New York gubernatorial candidate criticizes incumbent's opposition to the death penalty; Florida incumbent governor running for reelection backs the death penalty); Howard Kurtz, *In 1994 Political Ads, Crime is the Weapon of Choice*, WASH. POST, Sept. 9, 1994, at A1 (Florida gubernatorial challenger laments the fact that only three persons were executed in the previous year); *All Things Considered*, (Nat'l Pub. Radio Broadcast, Nov. 5, 1994) (Texas incumbent governor running for reelection touts the number of persons executed during her term of office).

<sup>8</sup> Note calls after the Singapore caning incident. After Michael Fay was caned in May 1994 in Singapore, calls for corporal punishment abounded. Proposals were raised in states as disparate as California, Louisiana, Mississippi, Missouri, New Mexico, New York, and Tennessee. See Larry Copeland, *Movement for Caning in U.S. Beginning to be Taken Seri-*

The expression of these themes of the modern debate over criminal law—what to punish, the swiftness, certainty, and effectiveness of punishment, and the procedures prefatory to punishment—and the dimensions of the debate thereon, say much about a society's moral precepts, its customs, and its need for order as well as protection about particular kinds of disorder. But these themes are not unique to today's world. Though current, these themes are perennials, and they find their expression in Anthony De V. Phillips's "*Doubly Condemned*": *Adjustments to the Crime and Punishment Regime in the Late Slavery Period in the British Caribbean Colonies*<sup>9</sup> and Judith Kelleher Schafer's "*Under the Present Mode of Trial, Improper Verdicts Are Very Often Given*": *Criminal Procedure in the Trials of Slaves in Antebellum Louisiana*.<sup>10</sup>

Professors Phillips and Schafer speak separately of the peculiar responses to the peculiar institution of geographically dispersed lawmakers and judges during the period of African slavery. Together, they show that the themes underlying discussion of criminal law have relevance across geographic distances and that the resolution of debate on these themes is similar when the societal determinants are similar.

Professor Phillips is perhaps more direct in pointing out the underlying reason for the harshness of substantive criminal law and criminal procedure: neither Louisiana nor the English Caribbean colonies were merely societies with slaves; instead, they were slave societies, with large numbers of slaves such that the law's concern was not simply to punish the individual slave transgressor, but instead to minimize the threat both the slave and his class brought to the social order.<sup>11</sup> Phillips suggests directly that owing to "their numbers and their ubiquity, slaves were at the forefront of the

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ously, HOUS. CHRON., Mar. 12, 1995, at A20; Larry Copeland, *Public Likes Proposed Public-Beating Laws; Experts Do Not*, SUNDAY GAZETTE MAIL, Mar. 12, 1995, at 5A; and *America's Brutal Solution to Crime; Victims Want Pain Inflicted to Bring Them Justice*, EVENING STANDARD, Mar. 9, 1995, at 22. This reaction to the caning of Michael Fay is not unique to this country. Simona de Logu, *UK Lawmaker Calls for Live Caning on TV*, UNITED PRESS INT'L, Mar. 20, 1995. Indeed, calls for canings are not out of line with a more generalized desire for corporal punishment befitting particular crimes. In response to a *Newsweek* poll in April 1994, 59% of respondents supported surgical or chemical castration of men repeatedly convicted of rape or child molestation. Michael Elliott, *Crime & Punishment*, NEWSWEEK, Apr. 18, 1994, at 18.

<sup>9</sup> 18 CARDOZO L. REV. 699 (1996).

<sup>10</sup> 18 CARDOZO L. REV. 635 (1996).

<sup>11</sup> See Robert J. Cottrol & Raymond T. Diamond, Book Review, 56 TUL. L. REV. 1107, 1110-12 (1982) (reviewing A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD* (1978)) (discussing

minds and concerns of all white people."<sup>12</sup> This might well have been the case: the slave population in the British Caribbean colonies constituted 86.2% of the whole population in 1810, and 81.2% in 1830.<sup>13</sup>

Louisiana had a large population of slaves as well. The slave population in Louisiana between 1810 and 1860 ranged from 93% to 124% of the white population.<sup>14</sup> The concerns with respect to security that resulted from the existence of such a large cadre of dispossessed, often truculent, and potentially hostile individuals were significant.<sup>15</sup> These concerns account for the certainty and harshness of punishments that both Professors Phillips and Schafer report for matters such as rebellion, killing, raping, or striking a

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the implications of small numbers of slaves on the criminal law of slavery and its enforcement).

<sup>12</sup> Phillips, *supra* note 9, at 700. The early nineteenth century saw whites in the British Caribbean as a minority population with dwindling numbers. They feared an increase in the slave population "as highly conducive to slave rebellion and a threat to their very lives." B.W. Higman, *Slavery and the Development of Demographic Theory in the Age of the Industrial Revolution*, in *SLAVERY AND BRITISH SOCIETY 1776-1846*, at 164, 189 (James Walvin ed., 1982).

<sup>13</sup> B.W. HIGMAN, *SLAVE POPULATIONS OF THE BRITISH CARIBBEAN, 1807-1834*, at 77 (1984).

<sup>14</sup> The following chart, gathered from census data, shows population figures for Louisiana, rounded to the nearest thousand:

	total nos.	White		Slave		Free Blacks		slaves as % of white total
		nos.	%	nos.	%	nos.	%	
1810	77,000	34,000	44	35,000	45	8,000	10	103
1820	153,000	74,000	48	69,000	45	10,000	7	93
1830	216,000	89,000	41	110,000	51	17,000	8	124
1840	352,000	158,000	45	168,000	48	26,000	7	106
1850	518,000	255,000	49	245,000	47	17,000	3	96
1860	940,000	357,000	38	332,000	35	19,000	2	93

BUREAU OF THE CENSUS, DEPARTMENT OF COMMERCE, *NEGRO POPULATION, 1790-1915*, at 57 (1918); BUREAU OF THE CENSUS, DEPARTMENT OF COMMERCE, *1 HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970*, at 28 (1975).

<sup>15</sup> See Phillips, *supra* note 9, at 706 (reporting that of 11,000 slave adults in Trinidad, from June 1824 to June 1826, 251 slaves were imprisoned for insubordination. Informal plantation punishments included 1,825 instances of disobedience and refusal to work, 1,423 instances of insolence or insubordination, and 1,181 of absconding, and 6 of physical resistance to authority. *Id.* at 707. HILARY McD. BECKLES, *WHITE SERVITUDE AND BLACK SLAVERY IN BARBADOS, 1627-1715*, at 98-114 (1989) (suggesting that running away and rebellion were matters of significance for masters in Barbados). Michael Craton suggests that rumors of plots and rebellions affected white treatment of slaves as much as actual plots and rebellions. Michael Craton, *Slave Culture, Resistance and the Achievement of Emancipation in the British West Indies, 1783-1838*, in *SLAVERY AND BRITISH SOCIETY 1776-1846*, at 100-22 (James Walvin ed., 1982). Cf. HERBERT APTHEKER, *AMERICAN NEGRO SLAVE REVOLTS* (1943).

white person.<sup>16</sup> The status of Louisiana and Caribbean colonies as slave societies suggests special policing, patrol, and enforcement mechanisms, the subject of which is beyond the scope of these authors' works but is certainly suggested by other literature.<sup>17</sup>

Concerns for security in a slave society may account also for the truncated process slaves received when charged and tried for crimes. As both Professors Phillips and Schafer point out, however, this process was also a function of a related concern with the integrity of the slave system. A "total institution" that dominated the entirety of the lives of the slaves and did not recognize slave rights or allow the subordination of authority to the interests of the slave.<sup>18</sup> The total institution demanded that criminal procedure be rendered not as a means of protecting the slave from the vagaries of the authority of the state, but instead, as "a mechanism for visiting swift, brutal, exemplary punishment on persons who must always be reminded of their subordinate status."<sup>19</sup> Thus, Louisiana and Caribbean law established procedural requirements for prosecutions of slaves that allowed for factfinding by abbreviated slave courts, with such rights for slaves as were consistent with the protection of their masters' interests,<sup>20</sup> and not those of the slaves.

If, in speaking to the criminal law of slavery in the Caribbean and in Louisiana, Professors Phillips and Schafer have demonstrated that there are correspondences between slave regimes in

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<sup>16</sup> See Phillips, *supra* note 9, at 706-08, and Schafer, *supra* note 10, at 639-40.

<sup>17</sup> See, e.g., B.W. Higman, *supra* note 12, at 390-93; KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH* 214-15 (1956); ULRICH BONNELL PHILLIPS, *AMERICAN NEGRO SLAVERY: A SURVEY OF THE SUPPLY, EMPLOYMENT AND CONTROL OF NEGRO LABOR AS DETERMINED BY THE PLANTATION REGIME* (1959).

<sup>18</sup> Phillips, *supra* note 9, at 700-01.

<sup>19</sup> Schafer, *supra* note 10, at 639.

<sup>20</sup> Consider, for example, Professor Phillips's report that under the 1826 Consolidated Slave Act, bail was available in all cases including murder, not in the interest of the slave, but of the master who "needed the slave's labor." Phillips, *supra* note 9, at 710. Consider also that under the Black Code in Louisiana, a master was entitled to compensation for a slave that a slave tribunal condemned to execution, but that a master received no compensation if the slave had been taken in an insurrection or rebellion or if a slave were killed when being apprehended as a runaway. An Act Prescribing the rules and conduct to be observed with respect to Negroes and other Slaves of this Territory (Crimes and Offences), § 12, amended by "An Act Supplementary to the Act Entitled, 'An Act to Repeal All Laws or Provisions of Laws Prescribing the Manner of Remunerating the Owners of Slaves Sentenced to Death or Killed Whilst Runaway,'" (Act of Feb. 22, 1814, LA. ACT 1814, §§ 1-4, at 18-20). Moreover, masters were entitled to compensation when a slave was sentenced to life imprisonment or had his sentence commuted to life imprisonment. "An Act to Amend an Act, Entitled 'An Act Supplementary to an Act for the Punishment of Crimes and Misdemeanors,' and Other Supplementary Acts, (passed on the 20th March, 1818.)," (Act of Mar. 5, 1823, LA. ACT 1823, §§ 1-2, at 16; Act of March 16, 1830, LA. ACT, 1830, §§ 1-8, at 144-46. See also Schafer, *supra* note 10.

the British colonies of the Caribbean and the American state of Louisiana, they have not only spoken to the developments in the jurisdictions they survey. Their work also questions difference and distinctiveness, and comparative law and history. A comparison of the work of Professor Phillips and Schafer implicitly challenges the chauvinistic notion of many students of American slavery that slavery in the United States was the norm. Professor Schafer's article, by implication, calls into question whether the criminal law of slavery in civil law Louisiana was a matter separate and apart from that in the states of the rest of the nation, which traced their criminal laws and procedures to English common law. Thus, these questions of difference and distinctiveness that Professors Phillips and Schafer raise are not only relevant but, important, especially given that slavery was a hemispheric phenomenon practiced in different jurisdictions by different peoples and cultures.

The United States is a single nation with multiple jurisdictions. Given that at its maturity, slavery held sway in the District of Columbia and in fifteen states that together comprised the slave South,<sup>21</sup> a comparative appraisal of Professor Schafer's article begins at home.

Louisiana's law had its origin with the French.<sup>22</sup> The differences between common law and the statutory protections that follow it in criminal proceedings and French law, are spoken to elegantly by the fact that under French law the accused was considered guilty until proven innocent.<sup>23</sup> Yet and still, Louisiana was no island. Two prominent Louisiana personages are illustrative. Edward Livingston, a former mayor of New York City and a former congressman representing New York State, helped revise the Louisiana Civil Code of 1804.<sup>24</sup> Further, William Claiborne, Louisiana's

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<sup>21</sup> See PETER KOLCHIN, *AMERICAN SLAVERY, 1619-1877*, at 242 (1993).

<sup>22</sup> This statement is nearly a matter of faith, as well as the subject of academic discourse. See, e.g., Rodolfo Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, 46 TUL. L. REV. 4 (1971) (arguing that the Civil Code of 1808 was primarily French in origin). *But cf.* Robert A. Pascal, *Sources of the Digest of 1808: A Reply to Professor Batiza*, 46 TUL. L. REV. 603 (1972) (arguing that although the Civil Code of 1808 followed the French Code Civil in form, it followed Spanish-Roman law in substance). Nevertheless, Louisiana's legal origins tap civilian roots, whether of Gallic or Iberian persuasion, and not those of the common law.

<sup>23</sup> Schafer, *supra* note 10, at 636.

<sup>24</sup> Edward Livingston, who was the brother of New York Chancellor Robert R. Livingston who negotiated the Louisiana Purchase, led a distinguished career in New York, in Louisiana, and at the national level. In addition to his service to New York, he served Louisiana as a member of its legislature and of its delegation in Congress, both as a representative and as a senator. He also served in the national government as Secretary of State and as Minister to France. He was active in law reform in the state of Louisiana, where he



first American governor, was a Virginia lawyer who successfully persuaded the legislature to establish for free people the procedural protections and criminal prosecutions that existed in the common law states.<sup>25</sup> The slave courts, which had separate and distinctly inferior procedural protections for slaves, were in fact of a kind with slave courts in other states.<sup>26</sup> The increased procedural protections for slaves in later years and in capital cases were either a function of a desire to protect the financial interest of the masters and the state that had to compensate the masters in case of capital punishment or were a result of an interest in fairness to the slaves accused. This increase in procedural protections for slaves and, presumably, a concomitant increase in the reliability of the criminal law process was coincident with a trend in the rest of the slave South.<sup>27</sup>

If Louisiana figuratively was no island, neither were England's colonies in the Caribbean. Students of American slave law will

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drafted the Code of Civil Procedure that was in force between 1805 and 1852, and in 1804 proposed a major revision of the Louisiana Penal Code. In addition, he prepared the *Project of 1823*, the basis for the Louisiana Civil Code of 1825. See *Edward Livingston*, in 1 A DICTIONARY OF LOUISIANA BIOGRAPHY 514-15 (1988); *Edward Livingston*, in 5 THE NATIONAL CYCLOPAEDIA OF AMERICAN BIOGRAPHY 295 (1894); *Robert R. Livingston*, in 2 THE NATIONAL CYCLOPAEDIA OF AMERICAN BIOGRAPHY 396-97 (1895); and Rodolfo Batiza, *The Actual Sources of the Louisiana Project of 1823: A General Analytical Survey*, 47 TUL. L. REV. 1, 2 (1972).

<sup>25</sup> Schafer, *supra* note 10, at 636.

<sup>26</sup> Both the practice of truncated criminal procedures for slaves and later amendments granting more procedural rights have correspondences throughout the slave South. Kenneth Stampf reports that in colonial days, slaves were always tried "before special 'Negro courts,' [that were] less concerned about the formalities of traditional English justice than about speedy verdicts and certain punishments." STAMPF, *supra* note 17, at 224. These courts were continued for misdemeanors until the end of slavery, but for capital cases and, in some states, in felony cases slaves were tried in regular courts with regular procedures. *Id.* at 225.

In North Carolina, for example, slaves in 1741, for both capital and minor offenses were accorded a trial by a court consisting of two or more justices of the peace and four freeholders. 1741 N.C. Laws. In 1783, the legislature determined that non-capital crimes were to be tried by a justice of the peace "in a summary way." Acts of Assembly of the State of North Carolina, ch. 14 (1783). In 1793 slaves received the benefit of a jury of twelve slave holders for crimes involving life, limb, or member, with the trial to be conducted "in a summary way." Laws of North Carolina, ch. 5 (1793). In 1816, the legislature guaranteed that slaves charged in capital offenses be tried in Superior Court as opposed to County Courts. Laws of North Carolina, ch. 14 (1816). In 1818, slaves were granted the right to challenge jurors in capital cases. See John S. Basset, *Slavery in the State of North Carolina*, in SLAVERY IN THE STATES: SELECTED ESSAYS 1, 10-14 (photo. reprint 1969) (1899). See also RALPH B. FLANDERS, PLANTATION SLAVERY IN GEORGIA 233-36 (1933); IVAN E. McDUGLE, SLAVERY IN KENTUCKY 1792-1865, at 35-37 (photo. reprint 1970) (1918); and JULIA F. SMITH, SLAVERY AND PLANTATION GROWTH IN ANTEBELLUM FLORIDA 1821-1860, at 103 (1973).

<sup>27</sup> See SMITH, *supra* note 26.

find Professor Phillips's description of slave courts in the 1820s in the West Indies familiar.<sup>28</sup> In capital cases, these courts employed informal procedures; there were no juries, but rather, a five man tribunal—quick and simple justice.<sup>29</sup> Similarly, even more informal trials before justices of the peace or magistrates were held for other slave crimes.<sup>30</sup>

Quick and simple justice could be had as well, however, through the informal summary discipline of plantation justice. As on the mainland, both male and female slaves could be whipped by plantation authorities for either major or minor infractions.<sup>31</sup> Professor Phillips has uncovered statistics in Trinidad from 1824 to 1826 showing that over 87% of floggings by plantation authorities involved infractions that he labels as minor.<sup>32</sup> He includes in this category offenses such as refusing to work, disobedience, absconding, biting the overseer, false pretense of sickness, lying, idleness and laziness, insolence, and insubordination.<sup>33</sup> If, as Professor Phillips rightly indicates, the purpose of flogging as a slave punishment was "to maintain the value of slave property and labor efficiency on the plantation,"<sup>34</sup> these were not minor offenses at all. These offenses went to the heart of the slave system. They involved the ability of masters to maintain control.

What bears examination is that masters made use, apparently in significant numbers, of the option to have slaves tried and punished by the authorities.<sup>35</sup> The Trinidad statistics are revealing. Two thousand six-hundred and four slaves were subjected to informal plantation summary discipline because of insolence, insubordination, or absconding; this was 29% of those flogged.<sup>36</sup> Six hundred eighty-six slaves were tried and imprisoned for these same offenses instead of being handled informally through plantation flogging; this number was 79% percent of those tried and imprisoned,<sup>37</sup> with the remainder imprisoned for what Professor Phillips calls "crime proper."<sup>38</sup>

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<sup>28</sup> See *supra* notes 24 and 25 and accompanying text.

<sup>29</sup> Phillips, *supra* note 9, at 710.

<sup>30</sup> *Id.* at 712.

<sup>31</sup> Cf. STAMPP, *supra* note 17, at 174-79.

<sup>32</sup> Phillips, *supra* note 9, at 707.

<sup>33</sup> *Id.* at 707.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 706.

<sup>36</sup> *Id.* at 707.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

Professor Phillips has properly noted that slaves in the Caribbean lived their lives for the most part on plantations, Hobbesian nightmares where life was literally nasty, brutish, and short. Where every facet of slave life was controlled, and thus, where slaves were inmates and victims of a total institution, a totalitarian regime under which punishments could be visited immediately and without the inconvenience of intervention by governmental authority.<sup>39</sup> Consequently, it should not surprise us that so few criminal proceedings occurred in comparison to punishments meted out by owners and plantation authorities.<sup>40</sup>

Yet, by reporting the numbers of slaves formally and informally punished, many for the same sorts of offenses, Professor Phillips raises the question of why certain offenses merited attention for the slave criminal justice system while others were left to the authorities within the plantation. Professor Phillips's work raises the possibility that those offenses that threaten the person, the lives of those outside the plantation would have been subject to the criminal justice system, other matters to be dealt with inter-

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<sup>39</sup> *Id.* at 702-05. Slavery on the plantation in the American South was much the same: Slaves could hardly turn around without being told what to do. They lived by rules, sometimes carefully constructed and formally spelled out and sometimes haphazardly conceived and erratically imposed. Rules told them when to rise in the morning, when to go to the fields, when to break for meals, how long and how much to work, and when to go to bed; rules also dictated a broad range of activities that were forbidden without special permission, from leaving home to getting married; and rules allowed or did not allow a host of privileges, including the right to raise vegetables on garden plots, trade for small luxuries, hunt, and visit neighbors. Of course, all societies impose rules on their inhabitants in the form of laws, but the rules that bound slaves were unusually detailed, covered matters normally untouched by law, and were arbitrarily imposed and enforced, not by an abstract entity that (at least in theory) represented their interests, but by their owners. Slaves lived with their government.

KOLCHIN, *supra* note 21, at 118.

<sup>40</sup> During the period from June 1824 to June 1826 in Trinidad, 864 slaves were referred to the authorities and sentenced to imprisonment. In comparison, 8,841 slaves were flogged by plantation authorities. Phillips, *supra* note 9, at 706.

In the United States as well, the whip seems to have been the preferred form of punishment for slaves. Consider Peter Kolchin's comment on informal punishments within the institution of slavery:

[A]lmost all masters punished, most more than they would have been willing to admit. By far the most common punishment was whipping, and it was a rare slave who totally escaped the lash. A whipping could be a formal occasion — a public, ritualized display in which a sentence was carried out in front of an assembled throng — or a casual affair in which an owner, overseer, or hirer impulsively chastised an “unruly” slave. Either way, the prevalence of whipping was such a stark reminder of slave dependence that to the bondpeople . . . the lash came to symbolize the essence of slavery.

KOLCHIN, *supra* note 21, at 121. See also STAMPP, *supra* note 17, at 174-77.

nally, as seems to have been the case on the mainland in the United States.<sup>41</sup> An important caveat to this is that a threat to the lives of whites, and perhaps even of slaves, on the plantation would merit the attention of the authorities as well. In many jurisdictions in the United States, records concerning slave crime are lost, due to faults of recordkeeping as well as to the informality of slave courts,<sup>42</sup> and quite often records of informal punishments on the plantation would not even have been kept. The records Professor Phillips has reported bear further examination, and further research may explicate certain punishment choices made on the mainland as well as the Caribbean.

Professor Phillips properly delivers attention to the subject of slave rebellions and revolts, for such actions by slaves were a matter of fear to whites in the British Caribbean and were put down viciously.<sup>43</sup> Not surprisingly, the penalty for such crimes was severe, including death, transportation, imprisonment, and flogging.<sup>44</sup> Professor Phillips takes the severity of response to slave revolt as indicative of "a planter class clinging to a system whose days were clearly numbered."<sup>45</sup>

The days of slavery in the Caribbean were in fact short numbered, and the colonial experience with violent slave revolts helped bring those days to an end.<sup>46</sup> The severity of response of the legal system to slave revolts, however, was no less than that in the American South,<sup>47</sup> but Southerners, while threatened, did not perceive that the days of slavery were numbered.<sup>48</sup> The specter of

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<sup>41</sup> Generally speaking, in the United States, [i]f a bondsman ran away, if he stole the goods, injured the property, or disobeyed the commands of the master, he was guilty of a private and not a public offense; and the state left the prevention and punishment of such offenses to the owner. In governing his bondsmen, therefore, the master made the law, tried offenders, and administered penalties.

STAMPP, *supra* note 17, at 141 (footnote omitted). In Missouri, for example, "punishment of the slave for indolence, sedition, and other forms of misconduct was largely left to the master. The State punished the negro for crime, but could hardly be expected to enforce the master's personal demands upon him." HARRISON ANTHONY TREXLER, *SLAVERY IN MISSOURI, 1804-1865*, at 97 (1914).

<sup>42</sup> Phillips, *supra* note 9, at 713-15.

<sup>43</sup> *Id.*

<sup>44</sup> Flogging was no easy thing, with sentences usually ranging from between three hundred to five hundred lashes. *Id.* at 715.

<sup>45</sup> *Id.*

<sup>46</sup> Craton, *supra* note 15, at 121-22.

<sup>47</sup> See generally APTHEKER, *supra* note 15.

<sup>48</sup> Indeed, such a perception would not have been justified. At every critical juncture in antebellum history when political forces rose against Southern interests in slavery, compromise was called for. But compromise in this context in fact meant capitulation, and the

slave revolts was most certainly a matter of constant concern to white Southerners in the United States.<sup>49</sup> They were aware that slaves were a troublesome species of property, with a tendency to rebel that ran from shamming illness, faking the completion of work, malingering, and sabotage,<sup>50</sup> to running away or temporarily absconding,<sup>51</sup> to outright slave revolt.<sup>52</sup> If the response of the Southern criminal justice system was as harsh as that of the Caribbean,<sup>53</sup> then the reason for the harshness of Caribbean responses to slave revolts may well be other than a fear that slavery's island days were nearly over. This inquiry that Professor Phillips's work suggests is one to be taken perhaps by other than legal historians, an inquiry the outcome of which may be capable of offering greater insight as to the comparative history of the forms of slavery that underlay such similar response in their respective criminal legal systems.

The papers by Professors Schafer and Phillips speak to the substance of what behavior was illegal for slaves, the procedure by which slaves were tried, and the punishments to which slaves were subjected. Each of these aspects of the criminal law of slavery was meant, like other aspects of the law of slavery, to order relationships and responsibilities among persons in society, including slaves.

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history of the call for compromise is the history of Northern surrender to Southern demands. See generally WILLIAM J. COOPER, *THE SOUTH AND THE POLITICS OF SLAVERY, 1828-1856* (1978); A. CRAVEN, *THE GROWTH OF SOUTHERN NATIONALISM, 1848-1861* (1953); GLOVER MOORE, *THE MISSOURI COMPROMISE 1819-1821* (1953); DONALD L. ROBINSON, *SLAVERY IN THE STRUCTURE OF AMERICAN POLITICS, 1765-1820* (1971); Raymond T. Diamond, *No Call to Glory: Thurgood Marshall's Thesis on the Intent of a Pro-Slavery Constitution*, 42 VAND. L. REV. 93 (1989); and Albert F. Simpson, *The Political Significance of Slave Representation, 1787-1821*, 7 J.S. HIST. 315 (1941). Even at the dawn of the Civil War, after several states had seceded in the wake of Abraham Lincoln's resounding victory in the 1860 presidential election, Congress offered a compromise in the form of an amendment it proposed for ratification by the states:

No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State.

J. Res. 13, 36th Cong., 2d Sess., 12 Stat. 251 (1861). The proposed Thirteenth Amendment would have continued slavery in return for continued union, a compromise that surrendered to the South the freedom to continue slavery indefinitely. See Diamond, *supra*, at 128-29.

<sup>49</sup> APTHEKER, *supra* note 15, at 18-52.

<sup>50</sup> STAMPP, *supra* note 17, at 98-104.

<sup>51</sup> *Id.* at 109-24.

<sup>52</sup> *Id.* at 132-40.

<sup>53</sup> See APTHEKER, *supra* note 15.

The criminal law recognized, however, what the law otherwise denied, the autonomy of slaves, the exercise of which might violate the careful and vulnerable order on which slave society was based. If the criminal law of slavery recognized the personal responsibility of the slave, it struggled to impose personal accountability in a way that might establish deterrence, and exact retribution, while protecting the slave, the slave system, the slave society, and the property interest of the slave owners.

We struggle today in the debate over crime with issues that the slave societies that Professors Schafer and Phillips have presented once faced: issues of capital punishment, certainty of punishment, harshness of punishment, and criminal procedure. Perhaps these articles are valuable not only to scholars of comparative legal history but also to those of us who seek to understand what it means to be a society that demands maximum hardship for those who violate societal order, and that reaches to extremity in the pursuit of criminal justice.