

THE ETERNAL PROBLEM OF SLAVERY IN INTERNATIONAL LAW: KILLING THE VAMPIRE OF HUMAN CULTURE

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TABLE OF CONTENTS

| | |
|---|-----|
| INTRODUCTION..... | 755 |
| I. THE UNIVERSALITY OF SLAVERY | 756 |
| II. THE PROBLEM OF DEFINING SLAVERY | 766 |
| III. THE LAW OF SLAVERY IN THE ANCIENT AND MEDIEVAL WORLDS: INTERNATIONAL UNDERSTANDINGS BEFORE THERE WAS INTERNATIONAL LAW | 770 |
| IV. SLAVERY, INTERNATIONAL LAW, AND EUROPEAN EXPANSION | 775 |
| VI. THE INTERNATIONAL LAW OF SLAVERY | 782 |
| VII. THE INTERNATIONAL REJECTION OF SLAVERY | 784 |
| VIII. ANTISLAVERY AND THE CREATION OF MODERN INTERNATIONAL LAW | 793 |
| IX. NEW MODERN WORLD: THE FUTURE AND THE FUTURE PAST | 801 |

INTRODUCTION

This Article explores the variety of ways that legal systems, especially in the “West” and the Atlantic world, supported slavery from the ancient world to the present time. The Article shows how slavery helped create modern international law and, at the same time, how international law sometimes prevented limitations on slavery. We mostly focus on legalized slavery, while acknowledging and

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briefly discussing various kinds of modern exploitation such as human trafficking, which, unlike slavery, has never had legal sanction. We end with the realization that after two centuries of international condemnation and innumerable laws and treaties to suppress human bondage and the trade in slaves “in all its forms,”¹ slavery remains and has once again reemerged—in new guises. Like Dracula, it has arisen from its legal and political coffin to once again haunt our world.

With the exception of marriage, slavery may be humanity’s oldest and most ubiquitous organized social institution.² Most people in our time associate slavery with race, specifically Africans and their descendants toiling in New World plantations. But in fact, slavery has existed in almost every place and culture in the world.³ Like the mythical vampire, it always seems to be there, ready to pounce on the innocent and vulnerable, sucking out their life blood for the benefit of their masters and the larger culture. Even when abolished and killed off, like the vampire, it rises from the dead to reappear in a new guise.

I. THE UNIVERSALITY OF SLAVERY

People of every climate and culture have been masters and slaves, without regard to race, religion, or ethnicity. As the sociologist Orlando Patterson observed, “There is nothing notably peculiar about the institution of slavery. It has existed from before the dawn of human history right down to the twentieth century, in the most primitive of human societies and in the most civilized.”⁴

1. See G.A. Res. 217 (III) A, Universal Declaration of Human Rights, (Dec. 10, 1948) (“No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.”).

2. See Seymour Drescher & Paul Finkelman, *Slavery, in THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW* 890-916 (Bardo Fassbender & Anne Peters eds., 2012).

3. See, e.g., DAVID BRION DAVIS, *THE PROBLEM OF SLAVERY IN WESTERN CULTURE* 3, 29 (1966) (discussing slavery in the ancient world, medieval and early modern Europe, and its emergence in the Americas); SEYMOUR DRESCHER, *ABOLITION: A HISTORY OF SLAVERY AND ANTISLAVERY* 28 (2009) (detailing an expansive history of slavery in the Atlantic world and twentieth century Europe); DAVID ELTIS, STANLEY L. ENGERMAN, SEYMOUR DRESCHER & DAVID RICHARDSON, *THE CAMBRIDGE WORLD HISTORY OF SLAVERY* (2017); ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY* 1 (1982) (global and historical overview of slavery); 2 PAUL FINKELMAN & JOSEPH C. MILLER, *THE MACMILLAN ENCYCLOPEDIA OF WORLD SLAVERY* 461-63 (1998).

4. See PATTERSON, *supra* note 3, at vii.

Patterson found slavery in every “region on earth” and concluded that “probably there is no group of people whose ancestors were not at one time slaves or slaveholders.”⁵ Although we find slavery in all cultures and locations, this Article will mostly focus on the traditions of slavery and international law in western society, including the ancient near east, the Mediterranean basin, Europe, and the Americas, especially the United States and the British Caribbean.

Slavery on a mass scale did not emerge until the evolution of agriculture in the Neolithic period provided enough food to justify acquiring extra workers, or at least being able to feed them.⁶ But, before the Neolithic period, some people were clearly owned by others, and leaders of communities were likely to be slaveowners. Archaeological evidence suggests that people were held as slaves in some prehistoric and most ancient societies. Graves reveal that slaves were sometimes killed and buried with important leaders to serve them in the afterlife.⁷

Furthermore, slavery has always been important beyond any economic surplus value it produced. Slaves have been used for personal service, degrading labor, and in almost all societies, as objects of sexual pleasure and gratification.⁸ In many societies slave women were used as surrogate mothers to increase the number of children of the master or even to provide him with children if his wife was unable to have children.⁹

5. See *id.*

6. See DAVID BRION DAVIS, *INHUMAN BONDAGE: THE RISE AND FALL OF SLAVERY IN THE NEW WORLD* 32, 37 (2006).

7. See PATTERSON, *supra* note 3, at 239. For this practice beyond the ancient world, see Tia Ghose, *Viking Graves Yield Grisly Find: Sacrificed Slaves*, LIVE SCI. (Oct. 30, 2013, 7:28 AM), <http://www.livescience.com/40792-viking-slaves-sacrificed-burial.html> [<https://perma.cc/JPP7-AEHA>].

8. See *generally* SEX, POWER, AND SLAVERY 31-32 (Gwyn Campbell & Elizabeth Elbourne eds., 2014).

9. Under Islamic law, for example, the child of a slave woman and her master is a free person and the legitimate child of the father. Thus, Islamic masters might use slave women to increase the number of their heirs and children. Bernard K. Freamon, *Slavery, Freedom, and the Doctrine of Consensus in Islamic Jurisprudence*, 11 HARV. HUM. RTS. J. 1, 51-52 (1998). In the Biblical story of Abraham, he has a child, Ishmael, with his slave Hagar when his wife, Sarah, cannot bear a child. In this story Hagar takes on the role of surrogate mother. *Genesis* 16:1-5; 21:18-13 (JPS Tanakh 1985). He also has children with another slave woman, Keturah, and they were also treated as his legitimate children. *Id.* at 25:1-5. Later in *Genesis*, Jacob has children with his two wives, Leah and Rebecca, and two slave women, Bilhah and Zilpah. *Id.* at 30:3-12. The sons of all four women are his heirs.

Throughout human history, slavery symbolized the power of the master through the subjugation of the slave. Thus, slavery has often been found in cultures where the economic value of slaves was minimal but where there were strong cultural reasons for enslavement. The Tupinambá, in pre-Columbian Brazil, held slaves for ritual purposes, eventually killing and eating them. As David Brion Davis notes, this ritual ownership of slaves was not merely (or even) economically important; rather, it was tied to concepts of honor, power, prestige, and even political relations with neighboring peoples.¹⁰ All of these factors explain how slavery began and why it continues, in ever-changing circumstances, to bedevil the success of “the better angels of our nature” in obliterating it.¹¹

From the earliest period of human history until the mid-eighteenth century, there were few protests against slavery as a system and still less any collective opposition to it. As Joseph C. Miller recently observed, “the modern critical study of abolition of the Atlantic trade and emancipation of the enslaved as an intellectual application of modern humanism”¹² began with David Brion Davis’s pathbreaking *The Problem of Slavery in Western Culture*,¹³ in which “[h]e wondered why the same philosophical and religious traditions that had tolerated slavery in Europe for two millennia suddenly became sources of massive public opposition to the practice in eighteenth-century England, to a lesser degree in France, and belatedly also in the United States.”¹⁴

Before the eighteenth century there were some protests against specific kinds of slavery, such as Islamic and Catholic opposition to the enslavement of co-religionists, or some Catholic opposition to the enslavement of Indians. Bishop Bartolomé de las Casas (1474(?)–1566) famously condemned the enslavement of American Indians and had some success in persuading the Spanish Crown to limit the practice.¹⁵ But Spain immediately substituted African slaves for Indians with devastating consequences. Las Casas eventually publicly condemned the enslavement of Africans and implicitly all

10. See DAVIS, *supra* note 6, at 28-29.

11. See Abraham Lincoln, *First Inaugural Address—Final Text*, in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 262, 263, 271 (Roy P. Basler ed., 1953).

12. See Joseph C. Miller, *Introduction: Atlantic Ambiguities of British and American Abolition*, 66 WM. & MARY Q. 680 (2009).

13. See generally DAVIS, *supra* note 3.

14. See Miller, *supra* note 12, at 680.

15. See LEWIS HANKE, *ARISTOTLE AND THE AMERICAN INDIANS: A STUDY IN RACE PREJUDICE IN THE MODERN WORLD* 18-19, 28-37 (1959).

slavery. But, his condemnations had no impact on Spanish policy.¹⁶ The next—and somewhat more successful—attacks on slavery would come in the late seventeenth century in America, with the Germantown, Pennsylvania protest against slavery (1688) and Samuel Sewall's *The Selling of Joseph: A Memorial*, published in Massachusetts in 1700. Only in the mid-eighteenth century would Quakers and other pietists, Methodists, some Baptists, and some political activists, lawyers, and enlightenment thinkers begin a concerted attack on slavery *per se*.

Some early modern clerics, and even a few Popes, argued that slavery was contrary to natural law. In 1462, Pope Pius II declared slavery to be “a great crime” (“Magnum scelus”) but only applied this conclusion to “wicked Christians who were taking the recently baptized adult converts into slavery.”¹⁷ It did not prevent the enslavement of nonbaptized Indians or Africans. There were periodic individual condemnations of various aspects of the slave trade and slavery as it developed in the Atlantic world. A number of Catholic clerics attempted to appeal to royal or papal authority to condemn the transatlantic slave trade as it developed between the fifteenth and eighteenth centuries. In no case, however, was there a large-scale or continuous collective effort to bring the system to an end. These protests also had absolutely no effect on slavery on the Catholic northern rim of the Mediterranean, Iberia, or within the Church itself. The Vatican would continue to hold slaves until the end of the eighteenth century. Within three decades after Pius II's declaration,

16. The earliest known significant protest against slavery was by Bishop Bartolomé de las Casas, who argued against enslaving Carib Indians in the early sixteenth century, on the grounds that their continued enslavement would lead to their total annihilation, which was contrary to God's law. Las Casas in effect invented (or at least observed) the concept of genocide and urged the Spanish crown to prevent it. This was not a full-blown attack on slavery *per se*. Ironically, he suggested that Spain substitute African slaves for Indians. Spain was already in the process of this transition, and Las Casas's suggestion probably had no effect on the growth of African slavery in Spain's New World empire. Only later did Las Casas oppose all slavery in the Spanish Empire. He was probably the first modern thinker to reach this position. See DAVIS, *supra* note 3, at 169-83; HANKE, *supra* note 15, at 3-4, 9.

17. See JOHN FRANCIS MAXWELL, *SLAVERY AND THE CATHOLIC CHURCH: THE HISTORY OF CATHOLIC TEACHING CONCERNING THE MORAL LEGITIMACY OF THE INSTITUTION OF SLAVERY* 51-52 (1975); *Slavery and Christianity*, THE CATHOLIC ENCYCLOPEDIA, <http://www.newadvent.org/cathen/14036a.htm> [<https://perma.cc/3TCW-834J>] (last visited Jan. 22, 2018). For a comprehensive analysis of the limits and limitations of antislavery from antiquity to the late eighteenth century, see generally OLIVIER GRENOUILLEAU, *LA RÉVOLUTION ABOLITIONNISTE* 9-81 (2016).

Spain and Portugal would begin their 400-year rapacious enslavement of millions of American Indians and Africans, only to be joined a century later by their French Catholic neighbors. This process began with the full blessing and support of the Church. In 1452 Pope Nicholas V gave the Portuguese “full and free permission to invade, search out, capture and subjugate the Saracens and pagans and any other unbelievers and enemies of Christ wherever they may be, as well as their . . . duchies, countries, principalities, and other property . . . and to reduce their persons into perpetual slavery.”¹⁸ In addition to New World Indians, sub-Saharan Africans fit into these categories whether they were pagans or Muslims. Two years later, Pope Nicholas acknowledged the legitimacy of holding Africans as slaves in the Canary Islands and in “all territories that might henceforth be acquired” by Portugal.¹⁹ Pope Calixtus III, Pope Sixtus IV, and Pope Leo X “confirmed these grants” allowing Portugal to enslave Africans.²⁰

In the wake of Columbus’s first voyage to America, Pope Alexander VI authorized King Ferdinand and Queen Isabella—“Los Reyes Católicos” as the Spanish still call them—to enslave Africans and Indians in the New World.²¹ Both Spain and Portugal now had “full and free permission” from the Vatican to enslave the inhabitants of the “Saracen and pagan” lands they conquered.²² The Treaty of Tordesillas in 1494 confirmed all of this. International law, or the law of the nations as it was called at the time, literally “blessed” by the Pope, now supported the enslavement of Africans and Indians and set the stage for the great Atlantic slave trade. In 1506, Pope Julius II confirmed the terms of the Treaty. These Papal decrees led to various edicts by the Spanish crown authorizing the enslavement of the Carib Indians.²³

In the sixteenth century, there would be a few specific condemnations of some forms of slavery and some assertions that slavery was wrong, but they were half-hearted at best. Most were narrowly focused on the enslavement of the newly discovered people

18. See DRESCHER, *supra* note 3, at 62-63; MAXWELL *supra* note 17, at 53-54.

19. DRESCHER, *supra* note 3, at 62.

20. See *id.* at 62-63; MAXWELL *supra* note 17, at 53-54.

21. See DRESCHER, *supra* note 3, at 62 (explaining Pope Alexander’s authorization for King Ferdinand and Queen Isabella to enslave Africans and Indians).

22. *Id.*

23. See *id.* at 62-63; MAXWELL, *supra* note 17, at 55-62.

in the New World rather than against slavery per se, or were so general in nature that they seemed to apply to no specific practices. In 1537 Pope Paul III “declared that the sacraments should be withheld” from Spanish colonists who enslaved Indians by depriving them of their “natural liberty,” but a year later, Pope Paul revoked the penalties,²⁴ which meant that Catholics in America would not be deprived of the sacraments of the faith, even if they held Indians as slaves. Meanwhile, the Congregation for the Supreme and Universal Inquisition, created by Pope Paul III in 1542, explicitly allowed the Knights of Malta to enslave captives who had converted to Islam, even if after their capture they reconciled with the Church. Meanwhile, the Spanish philosopher Juan Ginés de Sepúlveda argued that the conquest and enslavement of Indians in America was justified and legitimate.²⁵

In the first half of the sixteenth century, the Spanish cleric and legal philosopher Francisco de Vitoria (1452–1546) expressed reservations about the enslavement of American Indians because their enslavement did not emanate from a “just war.” But Vitoria never condemned all slavery on the basis of natural law and approved the enslavement of captives captured in a just war. This would easily include slaves bought in Africa who had presumably been reduced to slavery in a just war or by some other “legal” means before they were sold to Europeans. Most importantly, in the end, Vitoria acquiesced to the practical reality of slavery in Spain’s emerging New World empire. The Jesuit Francisco Suarez (1548–1617) offered a theoretical condemnation of slavery, but as David Brion Davis noted, Suarez “accepted a sharp dualism between the eternal law of nature and a law of nations governed by expediency and conditioned by circumstance. Slavery, like private property, could not be justified by the highest moral law; yet its *expediency* had been revealed by the almost universal practice of nations.”²⁶ Thus, for Suarez, “it was unnecessary that an institution sanctioned by utility and common practice be shown as conformable to the absolute ideal of nature.”²⁷ With a few exceptions,²⁸ these objections to slavery were mostly theoretical and not attacks on the actual

24. See DAVIS, *supra* note 3, at, 170.

25. See HANKE, *supra* note 15, at 33.

26. See DAVIS, *supra* note 3, at 109.

27. See *id.*

28. In addition to Bishop de las Casas, his colleague Fray (Friar) Domingo de Soto “doubted whether there was any justice in Negro slavery.” DAVIS, *supra* note 3, at 187. However, nothing came of his views.

practice of slavery. Significantly, while the Church eventually condemned the enslavement of some Indians in America, “not one” of the Papal decrees from the 1400s to the early nineteenth century “makes any reference to the enslavement of the Negroes in West Africa nor to the transatlantic trade in Negro slaves.”²⁹

Thus, before the late eighteenth century slavery was still regarded as normal, even natural. Slavery was ubiquitous in all ancient cultures. In some, like Greece and Rome, slaves were so significant a portion of the population that they were essentially “slave societies.”³⁰ The leading philosophers, legal commentators, and intellectuals of ancient Greece and Rome all accepted both the existence and the necessity of slavery. The three major western religious traditions—Judaism, Christianity, and Islam—all accepted slavery and wove it into their legal codes. Christians may have professed to want to “do unto others, as you would have them do unto you,”³¹ but that did not stop churches from owning slaves in their corporate capacity, or priests, ministers, or pastors from buying and selling human beings and justifying slavery in their sermons.

In the fourth century C.E., the Synod of Gangra expressed concern that “slaves [were] also leaving their masters, and, on account of their own strange apparel, acting insolently towards their masters.”³² To counter this problem the Synod declared an anathema on anyone who “shall teach a slave, under pretext of *piety*, to despise his master and to run away from his service, and not to serve his own master with good-will and all *honour*.”³³ Early Canon Law allowed the imposition of slavery for various offenses, even when the “offender” was not the guilty party. In 655, the Ninth Council of Toledo mandated the enslavement of the children of priests, even though the fathers, and not the children, had been guilty of violating clerical vows of celibacy. The Council of Pavia reaffirmed this rule in 1012. While married men could not sell their wives into slavery,

29. See MAXWELL, *supra* note 17, at 73.

30. See MOSES I. FINLEY, *ANCIENT SLAVERY AND MODERN IDEOLOGY* 9 (1980). Moses Finley, the great historian of the ancient world and slavery, identifies five historical cultures—classical Greece, ancient Rome, Brazil, the Caribbean, and the United States South—as “slave societies.” *Id.*

31. See *Luke* 6:31 (New Revised Standard Edition) (“Do to others as you would have them do to you”); *Matthew* 7:12 (New Revised Standard Edition) (“In everything do to others as you would have them do to you; for this is the law and the prophets.”).

32. *Synod of Gangra*, NEW ADVENT, <http://www.newadvent.org/fathers/3804.htm> [<https://perma.cc/2DGM-TYAE>] (last visited Jan. 22, 2018).

33. *Id.*

the Church could effectively do it in some circumstances. Thus, in 1089 Pope Urban II “enforced clerical celibacy by granting to secular princes the power to reduce the wives of clerics to slavery.”³⁴ These rules on enslaving the children and wives of clerics were later “incorporated into the Western Church’s collection of canons.”³⁵ The acceptance of slavery by Christians continued virtually unabated for another eight centuries. With a few exceptions, neither the Renaissance nor the Reformation undermined slavery in the Christian world.

Islamic religious law, *sharī’a*, sanctioned slavery, especially when applied to unbelievers. Until the mid-nineteenth century there was no Islamic society “without slaves,” and in the modern world, Muslim states would be the last to formally prohibit slavery.³⁶ While there are antislavery implications in some Islamic texts, by 800 C.E. various religious leaders accepted that slavery could be based on capture or circumstances of birth, and other justifications came later. Although “Islam, as a system of belief, meaning and law[,] sought from its inception to mitigate enslavement and limit its scope,”³⁷ there was never any condemnation or prohibition of slavery, and the “practice and custom prevailed in most societies where Islam dominated the social order.”³⁸ Meanwhile, “[c]onverting to Islam after enslavement was no passport to liberty.”³⁹ This last point dovetailed perfectly with medieval Europe, where non-Christian slaves were baptized but not freed.⁴⁰ In early Virginia this practice was codified with “[a]n act declaring that baptisme of slaves doth not exempt them from bondage.”⁴¹ After that, settlers in the British

34. MAXWELL, *supra* note 17, at 37; Gil Brodie, *Timeline*, <http://www.kingscollege.net/gbrodie/Timeline%201012%20-%20Council%20of%20Pavia.html> [<https://perma.cc/M2W5-6P8G>] (last visited Jan. 22, 2018).

35. MAXWELL, *supra* note 17, at 37; Brodie, *supra* note 34.

36. See DRESCHER, *supra* note 3, at 18. See also WILLIAM GERVAISE CLARENCE-SMITH, *ISLAM AND ABOLITION OF SLAVERY 1* (2006); Bernard Freamon, *Definitions and Conceptions of Slave Ownerships in Islamic Law*, in *THE LEGAL UNDERSTANDING OF SLAVERY: FROM THE HISTORICAL TO THE CONTEMPORARY* 40-60 (Jean Allain ed., 2012).

37. Ehud R. Toledano, *Enslavement and Abolition in Muslim Societies*, 48 *J. AFRICAN HIST.* 481, 484 (2007).

38. *Id.*

39. CLARENCE-SMITH, *supra* note 36, at 22.

40. WILLIAM D. PHILLIPS, JR., *SLAVERY FROM ROMAN TIMES TO THE EARLY TRANSATLANTIC TRADE* 101 (1985).

41. Law of Sept. 23, 1667, Act III Va. Laws 260 (repealed) (“WHEREAS some doubts have arisen whether children that are slaves by birth, and by the charity

colonies and later the American states, just like the settlers in the Iberian and French colonies, regularly baptized their slaves, in part because formal religions functioned as a useful tool in controlling slaves.

English and Anglo-American Protestants had little problem defending slavery, even as they baptized their human property. In the mid-eighteenth century, Rev. George Whitefield, the most famous Anglican preacher of the Great Awakening, not only found scriptural support for slavery, but bought a plantation in Georgia with about seventy-five slaves on it. More than a century later, the essay “The Duties of Christian Masters,” won a prize from the Alabama Baptist Convention.⁴²

However, even as slavery emerged in the New World, there was a major development in juridical attitudes toward slavery within some Northwestern European nations by the time they joined the Spanish and Portuguese in the colonization of the New World. Their juridical systems had embraced the principle (although not always the practice) that their realms had become “free soil” zones. Natives or persons crossing their borders could not be enslaved or treated as slaves. This was to become a crucial distinction in the development of modern antislavery.⁴³ This emerging “freedom principle” did not apply in the New World. Thus, most French, Dutch, and English systems accepted the premise that “Beyond the Line,” that is beyond the jurisdiction of their home countries, this metropolitan exception did not apply. Most English and Anglo-American Protestant settlers from Massachusetts to the Caribbean adjusted to the norm. Most had little problem defending it or accepting it.

and piety of their owners made pertakers of the blessed sacrament of baptism, should by virtue of their baptism be made free; *It is enacted* . . . that the conferring of baptism doth not alter the condition of the person as to his bondage or freedom; that diverse masters, freed from this doubt, may more carefully endeavour the propagation of christianity by permitting . . . slaves . . . to be admitted to that sacrament.”)

42. See DAVIS, *supra* note 3, at 148; Rev. A. T. Holmes, *The Duties of Christian Masters*, in PAUL FINKELMAN, *DEFENDING SLAVERY: PROSLAVERY THOUGHT IN THE OLD SOUTH: A BRIEF HISTORY WITH DOCUMENTS* 107 (2003). For early abolitionist challenges to the norm, see DAVIS, *supra* note 3, at 165-96, 291-332. See GRENOUILLEAU, *supra* note 17, at ch. 2; John Donoghue, *Out of the Land of Bondage: The English Revolution and Atlantic Origins of Abolition*, 115 AM. HIS. REV. 943 (2010).

43. DRESCHER, *supra* note 3, at 20-25; DAVID ELTIS, *THE RISE OF AFRICAN SLAVERY IN THE AMERICAS* 1-28 (2000).

Starting in the late eighteenth century, states and nations began to legally abolish the institution. Since then there have been more than 100 treaties to end the slave trade. The Congress of Vienna in 1815 declared “that the commerce, known by the name of ‘the Slave Trade,’ has been considered by just and enlightened men of all ages, as repugnant to the principles of humanity and universal morality.”⁴⁴ The delegates declared that they could not

do greater credit to their mission, better fulfil their duty, and manifest the principles which actuate their august Sovereigns, than by endeavouring to carry this engagement into effect, and by proclaiming, in the name of their Sovereigns, their wish of putting an end to a scourge, which has so long desolated Africa, degraded Europe, and afflicted humanity.⁴⁵

But in the end, all the Congress of Vienna could do was recommend that European states end the trade. In the next seven decades individual nations would end the trade and Britain would sign numerous bilateral treaties to end the trade. But, there would be no further collective international action until conferences in Berlin and Brussels at the end of the nineteenth century in part focused on ending slavery worldwide.

The Berlin Conference of 1884 on Africa condemned the slave trade; the Berlin Act signed the following year declared that slave trading was “forbidden in conformity with the principles of international law,” although the Act provided no enforcement mechanisms.⁴⁶ “The Brussels Act of 1890 was the first comprehensive multilateral treaty directed specifically against the African slave trade.”⁴⁷ The League of Nations pushed hard to end it in the 1920s.⁴⁸ But slavery reemerged in the 1930s in the Soviet Gulag, the German Third Reich, and the Japanese empire. From 1939 to 1945, some 12 million foreigners would be transported to Germany, many as forced laborers. In addition, millions of Eastern Europeans, especially Jews, Roma, and captured Soviet prisoners of

44. Preliminary Treaty of Alliance, Great Britain-Austria, Act. No. XV, June 9, 1815.

45. *Id.*

46. General Act of the Berlin Conference on West Africa, Art. 9, Feb. 26, 1885.

47. Seymour Drescher, *From Consensus to Consensus: Slavery in International Law*, in *THE LEGAL UNDERSTANDING OF SLAVERY: FROM THE HISTORICAL TO THE CONTEMPORARY* 85, 98 (Jean Allain ed., 2012).

48. *Id.* at 98-99; see Drescher & Finkelman, *supra* note 2, at 907-13; Renee C. Redman, *Brussels Act (1890)*, in 1 PAUL FINKELMAN & JOSEPH C. MILLER, *MACMILLAN ENCYCLOPEDIA OF WORLD SLAVERY* 132 (1998).

war, would be used as slave labor both outside and inside Germany, often in inhuman, barbaric conditions where they were literally worked to death. Enslavement was one of the crimes against humanity for which Nazi leaders were prosecuted and hanged at Nuremberg. After the War, the United Nations forcefully condemned slavery in the Universal Declaration of Human Rights (1948) and subsequent documents. By 2013, every nation on earth had formally prohibited slavery, and numerous international agreements and treaties had also forbidden it.⁴⁹

II. THE PROBLEM OF DEFINING SLAVERY

Before turning to the relationship between slavery and international law, it is necessary to try to define both slaves and slavery, especially in the legal context. This is not as simple as it might seem. One issue is the difference between a “slave” and “slavery.” Although modern legal doctrine and international law prohibit both slavery and slave-like conditions, there is an important difference between treating someone as a slave and having a system of slavery. The first can happen outside the law and in violation of the law. But, such treatment does not create a system of slavery unless there is explicit or de facto acceptance of these conditions by the formal legal and political structures, or significant acceptance of such conditions by the general population. Thus, it is possible to have “slaves” without a system of slavery.

Most people in the modern world have a mental image of slavery, based in part on popular media. Slaves are imagined as Africans or their New World descendants, crammed into slave ships in the middle passage or laboring in the U.S. South, the Caribbean, or Brazil, depicted in movies like *Roots*, *Amistad*, *Twelve Years a Slave*, or *Glory*; they are Hebrews, building cities for Ramses in the iconic movie *The Ten Commandments*; they are Romans fighting for their lives as gladiators, or galley slaves, chained in the bottom of Roman ships in *Ben Hur*, or they are recaptured slaves dying horrible deaths after the failed rebellion of Spartacus. Most of these images

49. See Reuters, *Mauritania, Country with Most Slaves Per Capita, Must End Brutal Practice: UN*, HUFFINGTON POST (Oct. 31, 2013, 2:13 PM), http://www.huffingtonpost.com/2013/10/31/mauritania-slavery-un_n_4182422.html [<https://perma.cc/Q2TB-62GQ>]; John D. Sutter, *Report: Mauritania Is No Longer the World's Slavery Capital*, CNN, <http://www.cnn.com/2016/05/30/opinions/sutter-slavery-index-mauritania/> [<https://perma.cc/J655-9VXK>] (last updated June 1, 2016).

have some basis in history, filtered of course through the entrepreneurial lens of Hollywood cameras and producers.

For others, “slavery” has recently become expanded to apply to an increasingly wide range of human exploitation. Thus, the contemporary phenomenon of human trafficking is often referred to as “modern slavery,” especially by activists who are striving to raise awareness of the issue, recruit volunteers, gain political support, and solicit donations, grants, and other financial support for their cause. Agricultural or industrial laborers, people caught up in the sex industry, and child care workers in many countries are labeled slaves in this modern lexicon. Many scholars find the application of “slavery” to such conditions too imprecise and fluid. Slavery has always been associated with the legal ownership of people as distinct from the exploitation of their labor. As such, slavery is almost always supported by laws, governments, and widely accepted social practice. The criminal exploitation of people does not create a system of slavery, although it may lead to slave-like conditions for the people caught up in the webs of criminal enterprises and activities. Similarly problematic is the idea proclaimed by some modern activists that slavery is about “disposable people.”⁵⁰ This term may be overly broad since historically, and even in the modern age, many (perhaps most) slaves were not “disposable,” but were seen as valuable assets to be retained, sold, or inherited. In the ancient world, for example, when captured soldiers were enslaved they were not “disposed,” but rather kept alive precisely because they were valuable. On the other hand, Jews or Roma sent to death camps were usually quickly “disposed,”—that is, murdered. Those not exterminated were kept alive as slaves as long as they had value, but they were still disposable, in part because the German government was able to so easily replace them.

In the modern world, especially in western countries, many undocumented aliens are exploited, mistreated, and often held against their will by force or fear. But they are not permanently held as slaves or generally sold, gifted, or mortgaged as property. Eventually most escape or are released from the illegal conditions under which they are held. Slaves are held for life, their children usually inherit their status, and their bondage is supported by the state, the police, and the culture.

50. See generally KEVIN BALES, *DISPOSABLE PEOPLE: NEW SLAVERY IN THE GLOBAL ECONOMY* (2012).

Orlando Patterson defines slaves as people who are natively alienated—cut off from their communities or kin or the nations and places of their birth, and denied admission on the basis of equality in their new places of residence.⁵¹ Thus, they have suffered “social death.”⁵² This idea of isolation helps explain what happens to people who are kidnapped or captured and turned into slaves—such as people kidnapped in Africa and shipped to the New World as part of the Atlantic slave trade—but this concept is less compelling for people born into slavery and raised in slave communities. Moreover, there are many others in the world who have been natively alienated but were not slaves. The historian David Brion Davis talks of a “spectrum of states of freedom and dependency or powerlessness, with various types of serfdom and peonage shading off into actual slavery.”⁵³ He also stresses the dehumanizing aspects of slavery and the vulnerability of slaves. “The absence of a past and a future, of a place in history and society from which to grow in small increments, made each slave totally vulnerable. This may be the essence of dehumanization.”⁵⁴ Both these descriptions are helpful but problematic. Throughout history, people who were clearly not slaves have been natively alienated. Young teenagers (who were really still children) might be drafted into the Russian Army for a quarter century of service and never return to their families;⁵⁵ orphans who became wards or servants of a political or religious authority, immigrants, and refugees may lose their whole families and cultures; Native American children were alienated by spending years at residential schools in Canada and the United States, with some punished for merely speaking their own language. But, none of these natively alienated people were legally slaves, and many might eventually see their status and circumstances altered. Similarly, people have been vulnerable and subject to arbitrary dehumanization in industrial settings, in the military, or by their own abusive parents, but they were not slaves.

Slavery lacks a clear and concise definition, and the substance and experiences of slavery have varied from place to place and over

51. PATTERSON, *supra* note 3, at 7. Patterson says natal alienation is “the loss of ties of birth in both ascending and descending generations.” *Id.*

52. *Id.* at 38.

53. DAVIS, *supra* note 6, at 36.

54. *Id.* at 36-37.

55. DEREK J. PENSLAR, *JEWS AND THE MILITARY: A HISTORY* 28-30 (2013). Penslar argues that this was not as common as many people believe but nevertheless was the fate of many Russian-Jewish youth, especially those from poor families.

time. But as we have argued elsewhere,⁵⁶ systems of slavery include most, or all, of the following conditions:

(1) People are held as slaves for life and are legally considered to be property, and so they are owned by others and can be sold, traded, rented, given away, bequeathed and inherited, and exchanged for other slaves or things of value; where state slavery exists (such as Nazi Germany), they are acquired by the government, and even if there is no process for the government to sell them, the government can assign or rent state owned slaves to private actors;⁵⁷

(2) the status of “slave” is inheritable, usually (although not always) through the mother; Romans considered this rule—that the child follows the status of the mother—as being of the law of nations.⁵⁸ Thus while historically many free people—or people who had recognized standing within their home communities—were captured and enslaved by their captors from other societies, in many places, such as the later Roman Empire⁵⁹ or the antebellum U.S. South, the majority of slaves were born into that status;

(3) formal legal structures or customs that have the virtual force of law regulate the return of fugitive slaves who escape the immediate control of their owners; in this process the government sanctions the use of private force and violence to recover fugitive slaves, but the government may also choose to use its own forces to recover fugitives; in addition, the government may punish people who protect or harbor fugitives and allow private lawsuits by aggrieved slave owners against those who aided their runaway slaves;

(4) slaves have limited (or no) legal rights or protections; they can generally neither sue nor be sued; when prosecuted for crimes they have very few rights or protections; those “rights” they have are usually created to either protect the master’s property interest in the slave or to preserve the integrity of the legal system itself and not to protect the personal or individual rights of the slaves;

(5) slaves may be punished by slaveowners (or their agents) with minimal or no interference from the government or formal legal institutions; masters may punish slaves for any reason, or no reason at all; it is generally illegal for slaves to resist punishment or fight back; the state also maintains the right to punish slaves for crimes or violations of rules formally enacted by the state;

(6) masters may treat, or mistreat, slaves as they wish, although some societies required that masters treat slaves “humanely,” or banned some

56. This is an expansion of a list in Drescher & Finkelman, *supra* note 2, at 890-91. The original list is used in the legal definition of slavery in BLACK’S LAW DICTIONARY. *Slavery*, BLACK’S LAW DICTIONARY (10th ed. 2014).

57. For example, the S.S. rented workers from Auschwitz at a fixed daily rate to I.G. Farben and other industries. See DRESCHER, *supra* note 3, at 441-42.

58. ALAN WATSON, ROMAN SLAVE LAW 10 (1987).

59. See *id.* at 8, 12.

extreme or barbaric forms of punishment and torture; and some (like the antebellum Southern states) prohibited murdering slaves, even as they defined that term to be quite different from murdering free people; in others, like Rome, masters could kill slaves without legal constraints, and strangers who did so were only subject to penalties for destroying someone else's property;

(7) masters have unlimited rights to sexual activity with their slaves; slaves have no right to resist the sexual advances of their masters;

(8) slaves have no rights or very limited rights to appeal the actions of their masters to formal legal institutions;

(9) slaves have only a limited voice in legal proceedings and are not allowed to give testimony against their masters or (usually) other free people; where their testimony is permitted, courts will generally not give it the same weight as if coming from a free person;

(10) the mobility of slaves is limited by owners and often by the state as well;

(11) slavery is a lifelong (and inheritable) status; however, owners are able to make slaves into free persons through a formal legal process (manumission), but often these freedpersons may not be given full legal rights; the state almost always retains the right to limit, reverse, or completely forbid manumission; and

(12) the ownership of slaves is supported, usually explicitly, by laws, regulations, administrative activities, courts, and legislatures, including provisions for special courts and special punishments for slaves, provisions for the capture and return of fugitive slaves, and provisions and rules for regulating the sale of slaves.

All of these aspects of slavery have been part of the development of the international law regulating slavery.

III. THE LAW OF SLAVERY IN THE ANCIENT AND MEDIEVAL WORLDS: INTERNATIONAL UNDERSTANDINGS BEFORE THERE WAS INTERNATIONAL LAW

Some of the earliest existing written records of the ancient world discuss slaves. But there is also extensive evidence of slaveholding in nonwritten archaeological sources. Slavery was one of the first universally accepted statuses of human relationships to be justified in a code of laws. Most ancient legal codes and records—Mesopotamian, Assyrian, Babylonian, Biblical, Greek, and Roman—acknowledged and regulated slavery. The Ur-Nammu Code from about 2100 B.C.E., the code of Eshnunna from about 1770 B.C.E., the Code of Hammurabi from 1752 B.C.E., and the Hittite Code from 1500 B.C.E. all regulated slavery. The Book of Deuteronomy,

with its laws regulating slavery, is widely associated with King Josiah of Jerusalem from about 621 B.C.E. Greek codes on slavery date from sometime in the mid-500s B.C.E. A Mesopotamian legal record from 2030 B.C.E. contains an unsuccessful appeal for freedom from twelve slaves. This is the oldest known freedom suit in world history. Contract disputes over slaves date from 500 B.C.E., as do records of manumission—masters voluntarily freeing their slaves.⁶⁰ Legal records involving claims of freedom, sales of slaves, or the punishment of slaves are found throughout the artifacts and other records of the ancient world. Only in the eighteenth and nineteenth centuries—after nearly four millennia of known human history—did slavery as an institution come under sustained juridical and political attack.

Slavery was the backbone of the Roman Empire, and vigorous systems of slavery existed in parts of Europe well after the fall of Rome. From late antiquity to the end of the medieval period, Vikings brought slaves from the Baltic region, including what is today Poland, Russia, and Ukraine (they also brought slaves from Ireland and Scotland) to the northern shores of the Mediterranean. The word “slave,” which emerged in the twelfth century, reflected the ethnic origins of slaves arriving in southern Europe: The Slavs whom the Vikings brought were slaves, and the words “slave” and “Slav” became almost interchangeable. The word slave appeared in the English language in the thirteenth century, emerging from Old French, medieval Latin, and from the simultaneous Viking slave trade.⁶¹ By the mid-fifteenth century, on the eve of the European expansion into the America, slaves were found on both sides of the Mediterranean.

Throughout the Ancient World and into the modern period, legal systems and international law (or the Law of Nations as it was called at the time) recognized slavery. The status of “slave” could be created by local law, but that status was then almost universally recognized beyond the locality where the enslavement happened. People were born into slavery, sentenced to slavery because of a criminal act, or reduced to slavery (or sometimes self-enslavement)

60. *See id.* at 23.

61. The OXFORD ENGLISH DICTIONARY dates the first English use of the term in 1290. *See Slave, n.1*, THE OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/181477?result=1&rskey=k1ai8N&> (last visited Jan. 22, 2018). Before this, the word for slaves—“servus”—was taken from the Roman Civil Code. Neither the Scandinavian languages nor the Slavic languages use “slav” as a root word for slavery.

by economic or other circumstances. Insolvents might cover their debts by selling their children into slavery or find themselves condemned to bondage because of their debts.⁶² In some cultures, there is evidence of husbands selling their wives into slavery. China and Vietnam prohibited selling wives into slavery.⁶³ The formal promulgation of such a law strongly suggests that this was a common practice. The accepted law of war, until at least the 1500s, was that soldiers captured in battle could be summarily executed, and thus enslavement of prisoners offered a legitimate and legally recognized “humane” alternative to instant death. As late as 1370, Pope Clement declared that captured Venetian soldiers would be sold as slaves.⁶⁴ Captured civilians were also legitimately enslaved throughout the ancient world and into the medieval period.⁶⁵ Once enslaved, other jurisdictions rarely, if ever, questioned that status or the origin of that

62. See DAVIS, *supra* note 6, at 40; PATTERSON, *supra* note 3, at 23-24 (describing selling children and concubines into slavery); see also W.W. BUCKLAND, *THE ROMAN LAW OF SLAVERY: THE CONDITION OF THE SLAVE IN PRIVATE LAW FROM AUGUSTUS TO JUSTINIAN 420-21* (Cambridge Univ. Press 1970) (1908); KURT RAAFLAUB, *THE DISCOVERY OF FREEDOM IN ANCIENT GREECE* 47 (Renate Franciscano trans., Univ. Chicago Press 2004); ALAN WATSON, *ROMAN LAW AND COMPARATIVE LAW* 9-10 (1991); Trevor Bloom, *What Was It Like to Be a Slave in Ancient Rome?*, <http://www.trevorbloom.com/2010/12/what-was-it-like-to-be-a-slave-in-ancient-rome/> [<https://perma.cc/2BB9-G64C>] (last visited Jan. 22, 2018) (noting that debtors could be claimed as slaves in Rome); *Slaves & Freeman*, PBS, http://www.pbs.org/empires/romans/empire/slaves_freemen.html [<https://perma.cc/A8Q5-A3QZ>] (last visited Jan. 22, 2018) (describing Romans selling their children into slavery). On modern debt slavery, see Ann Jordan, *Slavery, Forced Labor, Debt Bondage, and Human Trafficking: From Conceptual Confusion to Targeted Solutions*, CTR. FOR HUM. RTS. & HUMANITARIAN L. (Feb. 2011), <http://traffickingroundtable.org/wp-content/uploads/2012/07/Issue-Paper-2-Slavery-Forced-Labor-Debt-Bondage-and-Human-Trafficking.pdf> [<https://perma.cc/G3R2-GMLX>]. In Biblical law, Exodus 21:6-7 provides for a man to essentially sell himself into slavery to keep his wife and for a father to sell his daughter into slavery.

63. PATTERSON, *supra* note 3, at 125. Roman law allowed a husband to kill his wife for adultery but did not allow him to sell her into bondage.

64. See DRESCHER, *supra* note 3, at 13. Where race was involved, enslavement of captured soldiers lingered. After the Pequot War in Connecticut captured Indians, men, women, and children were enslaved in New England and some were sold to the Caribbean. See LORENZO JOHNSTON GREENE, *THE NEGRO IN COLONIAL NEW ENGLAND 1620-1776*, at 62 (1942). During the American Civil War Confederate soldiers seized free blacks in the North, sold them into slavery, and threatened to sell captured U.S. Army soldiers if they were black. See generally Paul Finkelman, *Francis Lieber and the Modern Law of War*, 80 U. CHI. L. REV. 2071 (2013) (reviewing JOHN FABIAN WITT, *LINCOLN’S CODE: THE LAWS OF WAR IN AMERICAN HISTORY* (2012)).

65. See PATTERSON, *supra* note 3, at 105-15.

status. Vulnerability to enslavement—what we might call “enslaveability”—was not limited by race, religion, or ethnicity. And anyone, anywhere, in the wrong place at the wrong time, could be enslaved. On the other side of the Mediterranean, Islamic texts supported the idea that when dealing with captured soldiers or other captured enemies, “enslavement” was “a merciful substitute for death.”⁶⁶

Most cultures and communities preferred to enslave foreigners—the ancient Greeks considered all foreigners to be “barbarians,” ripe for enslavement, while Biblical law made it far easier to enslave a stranger than a fellow Hebrew. But members of both societies ended up in bondage in their own countries. As the historian M.I. Finley observed, while most classical slaves were “barbarians” from other cultures, there were also “Greek slaves in Greece [and] Italian slaves in Rome.”⁶⁷ Similarly, there were Chinese slaves in China, Russian slaves in Russia, and Muslim slaves in Islamic societies. Europeans enslaved each other throughout the ancient world and well into the modern period. In medieval Europe, foundlings as well as children fathered by Catholic priests were enslaved, even though they were ethnically members of the community that put them in bondage.⁶⁸ Across Africa, people were held in slavery by members of their own community as well as by outsiders. In West Africa, Igbos enslaved Yorubas and vice versa, but Igbos or Yorubas also held their kinsmen in bondage, just as Italians had held other Italians as slaves.⁶⁹ Sometimes the slaves were

66. CLARENCE-SMITH, *supra* note 36, at 26.

67. FINLEY, *supra* note 30, at 118.

68. *See* Brodie, *supra* note 34.

69. *See* DAVIS, *supra* note 6, at 38-39 (explaining Greek enslavement of foreigners); FINLEY, *supra* note 30, at 18; Yvon Garlan, *War, Piracy and Slavery in the Greek World*, in CLASSICAL SLAVERY 9, 13-14 (M.I. Finley ed., 1987) (exploring how Greeks sometimes enslaved their own); *see also* WATSON, *supra* note 58, at 2-3 (describing the multitude of races enslaved by Romans); WATSON, *supra* note 62, at 39. For examples of specialized studies of slavery, *see generally* MUHAMMAD A. DANDAMAEV, SLAVERY IN BABYLONIA: FROM NABOPOLASSAR TO ALEXANDER THE GREAT (1984); YVON GARLAN, SLAVERY IN ANCIENT GREECE (Janet Lloyd trans., Cornell Univ. Press 1988) (1982); RICHARD HELLIE, SLAVERY IN RUSSIA 1450-1725 (1982); RUTH MAZO KARRAS, SLAVERY AND SOCIETY IN MEDIEVAL SCANDINAVIA (1988); PHILLIPS, *supra* note 40; EHUD R. TOLEDANO, THE OTTOMAN SLAVE TRADE AND ITS SUPPRESSION: 1840-1890 (1982); CARL O. WILLIAMS, THRALDOM IN ANCIENT ICELAND (1937); SLAVERY IN AFRICA: HISTORICAL AND ANTHROPOLOGICAL PERSPECTIVES (Suzanne Miers & Igor Kopytoff eds., 1977); SLAVERY AND OTHER FORMS OF UNFREE LABOUR (Léonie J. Archer ed., 1988) (a collection of specialized studies of slavery in varying locations).

neighbors and enemies; sometimes they were people from within the community who ended up as slaves for economic, legal, or social reasons. For the development of international law the key point is that no ancient or medieval cultures questioned the status of those enslaved by other cultures.⁷⁰ In the ancient and medieval worlds, people accepted slaves as they found them.

Illustrative of the acceptance of slave status from one culture to the next is the story of the selling of Joseph in the Book of Genesis. Joseph was the favored and clearly spoiled youngest son of the patriarch Jacob, who had given his son “a coat of many colors.”⁷¹ At age seventeen, Joseph relished his father’s favoritism. He told his older brothers⁷² he had dreamed that one day they would be subservient to him. Given this favoritism combined with the teenager’s arrogance, it is perhaps not surprising that his many older brothers “hated him . . . [and] could not speak a friendly word to him.”⁷³ When their hatred boiled over, the brothers “sold Joseph for twenty pieces of silver to the Ishmaelites, who brought Joseph to Egypt.”⁷⁴ For ancient societies this was a plausible solution to rivalries. The Ishmaelites accepted Joseph as they found him: a youth devoid of any trappings of his status as the son (and especially a favored son) of an elite family. He appeared to be a slave, and those who sold him to the Ishmaelites clearly held him in captivity. According to the account, the Ishmaelites never asked how or why Joseph became a slave or who his family was. They took Joseph as they found him—a teenager in bondage. The Ishmaelites later sold Joseph into Egypt. No one in this story doubted that he was a slave, legitimately reduced to that status by the people who sold him to the Ishmaelites. The fact of Joseph’s slave status—and its acceptance by the Ishmaelites and later the Egyptians—is emblematic of the law of enslavement and of international practice at the time.

Violence was common to the process of enslavement from antiquity to the eve of the discovery of the New World. From the

70. An exception to this seems to be the Biblical laws, which encouraged Hebrews to shelter fugitive slaves—if they were also Hebrews—who escaped from foreign masters. “You shall not turn over to his master a slave who seeks refuge with you from his master. He shall live with you in any place he may choose among the settlements in your midst, wherever he pleases; you must not ill-treat him.” *Deuteronomy* 23:16-17 (JPS Tanakh 1985).

71. See *Genesis* 37:3 (JPS Tanakh 1985).

72. All of them were actually his half-brothers, since the father, Jacob, had children with his two wives and two slaves.

73. *Genesis* 37:4 (JPS Tanakh 1985).

74. *Id.* at 37:3, 4, 23-28 (JPS Tanakh 1985).

eighth century, Viking traders raided Slavic, Irish, and Scottish villages, bringing massive numbers of slaves to the European side of the Mediterranean. Later, as Europeans from nations bordering on the Atlantic and Mediterranean and Muslims from North Africa and the Indian Ocean basin would endorse (and sometimes participate) in the replication of this process of capture and enslavement throughout sub-Saharan Africa. Purchasers of Slavs or Celts in the Mediterranean never asked about the provenance of these slaves—the fact that the slaves arrived as captives and were available for purchase was sufficient to establish “good title” to the human chattels. Similarly, when Africans arrived in the New World, they came as merchandise—often with paperwork that constituted a transferrable title to this chattel property that was being sold in a legitimate and legally recognized form of commerce. No one questioned the provenance or legitimacy of the paper work. Courts in Europe saw the slave trade as just one more form of economic activity conducted under traditional and established notions of commercial law. On the other southern side of the Mediterranean, in the Islamic world, slaves arrived from sub-Saharan Africa (or Europe), and no one questioned their status. As “unbelievers,” they were inherently subject to capture and enslavement under Islamic law. Starting in the late fifteenth century, “the Ottomans demanded proof that imported slaves were prisoners of war,” but apparently the proof consisted of a document that could be purchased from Ottoman officials, thus “in effect becoming an import duty.”⁷⁵ The legal fiction of the purchased document simply underscored how law on both sides of the Mediterranean (and later on both sides of the Atlantic) simultaneously created and maintained systems of slavery. Other Muslims argued against “acquiring slaves who had lived as free people in ethnic groups known to be Muslim,” but they also concluded that “the benefit of the doubt” should be with the purchaser because “property rights were guaranteed in holy law.”⁷⁶ The same sort of practices and legal fictions were found on the Christian side of the Mediterranean as well.

IV. SLAVERY, INTERNATIONAL LAW, AND EUROPEAN EXPANSION

From its inception, the Atlantic slave trade emerged as one of the great engines of capital accumulation and the creation of wealth.

75. CLARENCE-SMITH, *supra* note 36, at 33.

76. *Id.* at 33, 129.

Individuals, ship captains, companies, investors, port cities, and eventually whole nations grew rich on the trade in human beings while slaveowners, and eventually industrialists, became wealthy from the agricultural and mineral products these slaves produced. The huge profits from precious minerals (gold, silver, and emeralds), sugar, tobacco, rice, cotton, and coffee were in part possible because the labor from slaves was so inexpensive. Some of this new wealth returned to Europe, some remained in the hands of European settlers in the New World, and some ended up in West Africa.

From the early sixteenth century until the middle of the nineteenth century, slavery flourished in the New World, with a growing body of law supporting it. By the end of the seventeenth century, the British settlements in the New World had a growing body of colonial statutes, precedents, executive actions, common practices, and imperial statutes and court decisions to regulate slavery. Traditional contract and commercial law supported the Atlantic trade while the American colonists adapted well-understood concepts of property, contract, personal injury (trespass at the time, which was before the invention of tort law), and criminal law to support slavery. In the non-English colonies, Roman and civil law traditions made the legal transition even easier. As one scholar has noted, “The Spanish and Portuguese came from slaveholding cultures, and simply expanded existing law to the New World. France, Holland, Sweden, and Denmark also easily adapted their civil law traditions and Roman law heritage to accommodate New World slavery.”⁷⁷ Thus, “the Romans left slavery as a major legacy, whose distant legatees were the slaves and slaveowners of the Americas.”⁷⁸

As noted above, until the 1770s there were few reformist challenges to slavery (although slaves themselves often resisted their status and condition). In the 1640s and 1650s, both the Massachusetts Bay colony and the Rhode Island colony passed laws to keep slavery out of their jurisdictions, but the laws were ineffective and ignored.⁷⁹ By the end of the century, slavery was

77. See ALAN WATSON, *SLAVE LAW IN THE AMERICAS* (1989).

78. PHILLIPS, *supra* note 40, at 16.

79. 1 JOHN RUSSELL BARTLETT, *RECORDS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, 1636-1663*, at 243 (Rhode Island, A. Crawford Greene & Brothers, State Printers 1856). The Rhode Island law of 1652 required that anyone brought into the colony as a servant or slave had to be freed after ten years. The law specifically referred to the “common course practised amongst English men to buy negroes.” *Id.*; see also 1 SAMUEL GREENE ARNOLD, *HISTORY OF*

openly practiced in both colonies. On the eve of the American Revolution most Quaker meetings, Mennonite and other pietist churches, some Baptist churches, and the newly founded Methodist church had denounced slavery and encouraged their members to give up slaveholding. But these faiths had only a small number of adherents, concentrated in a few places in the British colonies with some followers in England. The established western European churches—Roman Catholic; Anglican (Church of England); Scottish Presbyterian; Lutheran; and Dutch Reformed; as well as many minor, less powerful churches—all accepted slavery, with their members and the churches themselves participating in it. In England there were a few active opponents of slavery, but they had little influence and no power. Slavery and the African trade helped drive the English economy, but many in the country were probably unaware of the full extent of slavery's relationship to the economy and the rising prosperity of the nation. Most of those who did know had no interest in undermining that economic engine.

Before the nineteenth century, European legal scholars regarded the historical development of New World slavery as relatively insignificant. The traditional categories of the Civil Law weighed far more heavily in their scholarship. Echoing classical and medieval legal thought, slavery retained its traditional place as an integral and consensual element of the law of nations. Jurists, philosophers, and theologians considered slavery consistent with natural reason and natural law. As Aristotle had explained:

But is there any one thus intended by nature to be a slave, and for whom such a condition is expedient and right, or rather is not all slavery a violation of nature? There is no difficulty in answering this question, on grounds both of reason and of fact. For that some should rule and others be ruled is a thing not only necessary, but expedient; from the hour of their birth, some are marked out for subjection, others for rule.⁸⁰

St. Augustine did not argue that people were naturally slaves, but in 419 C.E. he asserted that slavery was a punishment for human sin and endorsed the legitimacy of the enslavement of captives acquired in a "just war." Other early Church Fathers, such as St. Gregory Nazianzen (about 380 C.E.) and St. John Chrysostom (about 400 C.E.), also accepted the notion that the source of slavery was sin,

THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, 1636-1700, at 240 (New York, D. Appleton & Co. 1859).

80. Aristotle, *Politics: Book 1, Part V*, <http://classics.mit.edu/Aristotle/politics.1.one.html> [<https://perma.cc/6RTN-P7E2>] (last visited Jan. 22, 2018); see also DAVIS, *supra* note 6, at 65; Drescher & Finkelman, *supra* note 2, at 897-98.

but also that it was a legitimate status as a result of actual or inherited sin. Later church leaders, such as St. Agobard of Lyon (ninth century), St. Thomas Aquinas (thirteenth century), and St. Bonaventure (thirteenth century), similarly accepted slavery. These views, and the support of so many church leaders, made slavery—and the status of a slave—fully accepted in the international law of early Christendom.⁸¹

Theological support for slavery dovetailed with the secular notions that slavery was logically derived from the virtually universal phenomena of war, captivity, and poverty. Ayala Balthazar, Cornelius van Bynkershock, Hugo Grotius, Samuel von Puffendorf, and other commentators from the fifteenth to the early eighteenth centuries all agreed that the law of nations sanctioned slavery, although they often cited or praised Western Europeans as having abandoned the practice within Christian Europe. Thomas More considered slavery as an integral part of society, and his *Utopia* (1516) assumed that every household would have slaves, either imported from another country where they were legally enslaved or local residents convicted of crimes.⁸² Nearly two centuries later, the English libertarian philosopher John Locke began his *First Treatise on Government* by asserting that “[s]lavery is so vile and miserable an estate of man, and so directly opposite to the generous temper and courage of our nation; that it is hardly to be conceived, that an *Englishman*, much less a gentleman, should plead for it.”⁸³ But, however “vile” slavery was, Locke provided for it in his draft of the Fundamental Constitution of Carolina (1669), and though an Englishman who doubtless considered himself a gentleman, he personally invested in the Royal Africa Company, which imported a steady supply of African slaves to the British Caribbean. His *Second Treatise on Government* (1690) provided the very argument for slavery that he said no English gentleman “should

81. MAXWELL, *supra* note 17, at 34-35, 38-39, 46-47. While designated as “saints” in this Article, it is important to remember that they did not have that status until after their deaths.

82. THOMAS MORE, *UTOPIA* (Edward Arber ed., Ralph Robinson trans., London 1869) (1516). More was knighted in 1621, after the publication of *Utopia*. He was beatified in 1886 and canonized, becoming St. Thomas More in 1935, four-hundred years after his execution in 1535. Because *Utopia* was not a religious text, and More’s positions on slavery were not connected to religious doctrine, we have not designated More as St. Thomas More in the text above.

83. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 1 (Thomas Hollis ed., London, A. Millar et al. 1794) (1690).

plead for.”⁸⁴ The *Second Treatise* affirmed a right to enslave others, arguing:

But there is another sort of servants, which by a peculiar name we call *slaves*, who being captives taken in a just war, are by the right of nature subjected to the absolute dominion and arbitrary power of their masters. These men having, as I say, forfeited their lives, and with it their liberties, and lost their estates; and being in the *state of slavery*, not capable of any property, cannot in that state be considered as any part of *civil society*; the chief end whereof is the preservation of property.⁸⁵

The theorists of the Enlightenment might have believed in self-government, but that was not incompatible with holding others in slavery. Indeed, some enlightenment thinkers argued that slavery was essential for self-government. This seeming paradox made some sense historically and also for contemporary slaveowners in the New World. Democracy began in Athens, where the majority of the population consisted of slaves. The availability of slaves allowed democracy to flourish for the master class because “the free male Greek citizen needed time and leisure to participate in civic society and make use of his rational thought and creative powers.”⁸⁶ Indeed, Aristotle noted, “[I]t is the mark of a free man not to live at another’s beck and call.”⁸⁷ This celebration of slavery as a civic virtue became a hallmark of proslavery thought in the American South. Edmund Morgan has argued that the presence of slavery ironically led to the beginnings of democracy and popular government in colonial Virginia and then to the Revolution itself. In the early eighteenth century, slavery “enabled Virginians large and small to join with other Americans in devotion to freedom and equality, in abhorrence of slavery—and in the preservation of slaveholding.”⁸⁸ Aristotle would have recognized the argument and agreed with it. As Morgan notes:

The presence of men and women who were, in law at least, almost totally subject to the will of other men gave to those in control of them an immediate experience of what it could mean to be at the mercy of a tyrant. Virginians may have had a special appreciation of the freedom dear to

84. *Id.*

85. DAVIS, *supra* note 3, at 118; LOCKE, *supra* note 83, at 85.

86. DAVIS, *supra* note 6, at 41. *See also* ARISTOTLE, RHETORIC, Book 1, Chap. 9.

87. *Id.*

88. EDMUND S. MORGAN, AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA 369 (1975).

republicans, because they saw every day what life without it could be like.⁸⁹

Morgan's argument does not explain why northerners who had no slaves and abhorred the institution, like Samuel Adams, John Adams, Gouverneur Morris, or Alexander Hamilton, were at least as committed to republican freedom as the slavemasters of Virginia. Morris had grown up in a slaveholding family in New York and deeply hated the institution, as did Hamilton, who had grown up in the British Caribbean, where slavery was a fundamental part of everyday life. Indeed, many of these northerners (as well as men who had or continued to have a few slaves, like Benjamin Franklin and John Jay) used the Revolutionary ideology to fight slavery and help end it in their home states. Adams drafted the Massachusetts Constitution of 1780, which was used to end slavery in the state; Franklin was the president of the Pennsylvania Abolition Society; as governor of New York, Jay signed that state's gradual abolition act of 1799. Both he and Hamilton were founding members of the New York manumission society. Thus the argument that slaveowning made some Americans more sensitive to liberty runs into a problem: Many patriots who owned no slaves and hated slavery were just as committed to liberty and freedom as their slaveowning fellow patriots from the South.

However, Morgan's argument helps explain why elite, wealthy southerners—men who aped the English nobility and fancied themselves to be an American version of Britain's aristocracy—so easily became revolutionaries, adopted Locke's political theory of the rights of man, and openly declared their support for equality, liberty, and extending political rights to men who were beneath them in social status, wealth, and education. They were just careful to exclude their slaves (and their tiny number of free black neighbors) from the benefits of the ideology. For them, slavery (and race) became the bright line separation between "free" men who were to be self-governing and "unfree" men who were forever excluded from participating in the polity.

Slavery also had an enormously practical effect on the Revolution. Slave-grown tobacco and the expectation of future wealth from tobacco helped the Americans secure loans in Europe. Meanwhile, many elite southerners served in the Army or the state or national governments throughout the war without worrying about making a living because their slaves back home were still toiling on

89. See *id.* at 376.

their behalf. The long list of slave-holding patriot leaders—Washington, Jefferson, Henry, Mason, various Lees, Madison, Monroe, various Pinckneys in South Carolina, and Carrolls in Maryland—was in part a result of the freedom slaveholding gave these gentlemen to pursue civic affairs. Virginia’s slaveowners thus became leaders of the Revolution and the New Nation, leading to the odd contradiction of masters of slaves arguing for universal liberty (except for their own slaves). The Virginians (and other southern aristocrats) evolved into a ruling class of slaveowners leading a revolution predicated on liberty but that simultaneously protected their right to keep their slaves. The English Tory Samuel Johnson noted the irony of this situation, asking, “How is it that we hear the loudest *yelps* for liberty among the drivers of negroes?”⁹⁰ But, the answer was in part that the “drivers of negroes” had the most time, the most money, and a great incentive to preserve their world from any future interference by Parliament, the English courts, or the Crown. The antislavery movement in Britain was extremely small at this time, and the decision in *Somerset v. Stewart* (1772), which we discuss below, was narrowly limited to England. But Lord Mansfield’s language in *Somerset*, that slavery was “odious,” was certainly a cause for concern among American masters. It would be too much to argue that a fear of emancipation by the British government led to the Revolution, but it is clear that many masters in the southern colonies were deeply troubled by the decision and by the apparent rise of passionate opponents of slavery in the Metropolis.

From the Revolution to the Civil War, southern intellectuals such as Thomas Jefferson, John C. Calhoun, and George Fitzhugh claimed that slavery allowed them the leisure to pursue philosophy, literature, and politics. Southern politicians similarly argued that slavery made democracy possible because it prevented the dangerous lower classes—what Senator James Henry Hammond called the

90. PAUL FINKELMAN, *SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON* 58 (3d ed.) (2014). For the impact of the American Revolution on British abolitionist emergence, see CHRISTOPHER LESLIE BROWN, *MORAL CAPITAL: FOUNDATIONS OF BRITISH ABOLITIONISM* 209-58 (2006). For British post-war emergence of an antislavery movement, see Seymour Drescher, *The Shocking Birth of British Abolitionism*, 33 *SLAVERY & ABOLITION* 571, 571-93 (2012).

“mudsill” of society—from participating in politics and corrupting the system.⁹¹

VI. THE INTERNATIONAL LAW OF SLAVERY

While slavery was developing in the New World in the early sixteenth century—first for Indians and later for Africans—the very nature of war still gave victors the power of life or death over captured enemy soldiers and civilians potentially attenuated by enslavement. Europeans were proud that they no longer invoked the power of enslavement over fellow Christians, noting this was a fortunate exception to the general rule that slavery remained integral to the law of nations. Christian Europeans no longer enslaved one another during and after wars. While the institution could be limited or modified by municipal law, it still remained part of the world’s rational legal order. Thus a French legal scholar, François Delaunay, “could affirm that colonial slavery was in no way contrary to Christianity, and yet take satisfaction from the fact that in France all men were free.”⁹² Even where major early modern commentators on the law of nations congratulated Europeans on having diminished the unlimited rights of enslavement by conquest, their focus was entirely Eurocentric. In the colonies—“Beyond the Line” of European law and society—the enslavement of Indians and then Africans was permitted.

It seems unlikely that any of these international law theorists were significantly influenced or even bothered by the enslavement of New World natives and the subsequent expansion of New World slavery with the African slave trade in the Atlantic world. They certainly paid little attention to this new development in world history, and the contrast between the lawyers’ treatment of slavery and piracy is striking. In no other aspect of early modern international law can the domination of antiquity be seen so clearly as in the differing treatment of slavery and piracy. The Civil Law tradition unequivocally declared that pirates were *hostis humani generis*—common enemies of the human race. Piracy was designated, without hesitation, as an affront to the consensual law of

91. Senator James Henry Hammond’s speech, known as the “Mudsill Speech” (1858), is reprinted in FINKELMAN, *supra* note 42, at 80-88.

92. DAVIS, *supra* note 6, at 110, 114-20.

nations. Its practitioners could be hung on the gibbet by the subjects of any ruler who seized them.⁹³

Those who had to deal with the maritime aspects of international law could not so easily dodge the increasing involvement of Europe in the slave trade. Charles Malloy's *De Jure Maritimo et Navali* (1682) still confidently assumed that slavery was a general, if not quite a universal, institution. Under certain conditions, Malloy reiterated, enslavement was not repugnant to "natural justice by covenant" (voluntary) or by "Transgression" (involuntary). European princes had universally agreed (the consensual requisite) "to esteem the words, *Slave, Bondsman or Villain* [as] barbarous."⁹⁴ In England, legal slavery no longer existed, and trover could not be maintained even for a "More [Moor] or other Indian." Yet Englishmen traded in slaves in the Atlantic world and in the New World. The idea of the absence of international law "Beyond the Line"—on the other side of the Atlantic or off the coast of Africa—came to the rescue to rationalize the difference between enslaving Europeans on one side of the ocean (which they rejected) and enslaving Indians and then Africans on the other side of the ocean (which they accepted). Natural and mathematical laws had more certitude than civil law. But human activities were subjected to different "certitudes" in different latitudes and longitudes.⁹⁵ It was not only the legal tradition, but also the reality of slavery that weighed upon lawyers and philosophers in considering the ubiquity of slavery in human society, even as Europeans proudly claimed they had eliminated it in their home countries.⁹⁶ From a global perspective, Europe's rulers appeared as committed to perpetuating bondage on the eve of the American Revolution as they had been when the Portuguese had purchased their first slaves on the coast of Africa three centuries earlier. In 1772 Arthur Young, a political arithmetician, offered a birds eye view of bondage in global

93. Compare Emer de Vattel's discomfort at having to even discuss slavery as part of the *ius gentium* with his zest in sanctioning of the casual dispatch of pirates to their fate. EMER DE VATTEL, *THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS, WITH THREE EARLY ESSAYS ON THE ORIGIN AND NATURE OF NATURAL LAW AND ON LUXURY* §§ 152, 233 (Béla Kapossy & Richard Whatmore eds., Liberty Fund 2008) (1758).

94. CHARLES MOLLOY, *MARITIMO ET NAVALI; OR, A TREATISE OF AFFAIRS MARITIME AND OF COMMERCE IN THREE BOOKS* 387 (Text Creation Partnership 2003) (1682).

95. *Id.* at 335-36.

96. These claims were of course not always true.

perspective. Young estimated that of the earth's 775 million inhabitants, all but 33 million could be classified as unfree.⁹⁷

VII. THE INTERNATIONAL REJECTION OF SLAVERY

There were scattered challenges to this legal world. In sixteenth century France, Jean Bodin had argued that slavery was wrong,⁹⁸ and there were a few cases in France and England of freeing slaves brought there from other jurisdictions, but there were also cases and legal opinions going the other way.⁹⁹

The great challenge to the accepted legal regime—that slavery was acceptable and legal—came in 1772, in *Somerset v. Stewart*.¹⁰⁰ Charles Stewart, a colonial customs official, had brought his slave James Somerset with him when he returned to England. When Somerset ran away, Stewart hired thugs to track him down and forcibly confine him in a ship headed for the West Indies, where Somerset would be sold. Lawyers with antislavery sentiments obtained a writ of habeas corpus, which brought Somerset's status before William Murray, Chief Justice Lord Mansfield of the Court of King's Bench. These issues boiled down to one simple question: Could a person be held against his or her will as a slave in England? Lord Mansfield had no doubt that English law respected the institution of slavery in the Empire, and thus the courts would settle a dispute over the sale or delivery of slaves in the American colonies: "Contract for sale of a slave is good here; the sale is a matter to which the law properly and readily attaches, and will maintain the price according to the agreement."¹⁰¹

97. Drescher & Finkelman, *supra* note 2, at 898.

98. See generally MALICK W. GHACHEM, *THE OLD REGIME AND THE HAITIAN REVOLUTION* (2012); SUE PEABODY, "THERE ARE NO SLAVES IN FRANCE": THE POLITICAL CULTURE OF RACE AND SLAVERY IN THE ANCIEN RÉGIME (1996).

99. See DAVIS, *supra* note 6, at 46; see generally Cartwright's Case (1569) 2 Rushworth 468 (Eng.) (freeing a Russian slave brought to England); *Smith v. Brown & Cooper*, 91 Eng. Rep. 566 (the date to the English Reports is unknown, but is assumed to be either the late seventeenth or very early eighteenth century) (holding by Chief Justice Holt that when a negro comes into England, he becomes free); Opinion of Sir Philip York, then Attorney-General, and Mr. Talbot, Solicitor-General, 33 Decision of the Court of Session in the Form of a Dictionary 14547 (1729) (asserting that a slave does not become free by being brought to England); *Shanley v. Harvey*, 2 Eden 126 (1762) (holding by Lord Chancellor that slaves brought to England became free).

100. (1772) 98 Eng. Rep. 499 (KB).

101. *Id.* at 509.

But the issue in this case was not the status of a slave in some remote colony thirty-five to forty-five hundred miles from England in the age of sail. In cases involving the sale of slaves in the Caribbean or the mainland colonies, the English courts literally, legally, and figuratively did not “see” the slave. The slaves were just objects mentioned in a contract, no different than horses or cords of wood. Somerset’s case was dramatically and visually different, as a living slave physically appeared to seek his freedom before England’s highest court. Mansfield felt the power of this distinction: “But here the person of the slave himself is immediately the object of enquiry; which makes a very material difference. The now question is, whether any dominion, authority or coercion can be exercised in this country, on a slave according to the American laws[.]”¹⁰² Such a relationship violated the common law of England and centuries of English public policy and tradition. More than that, the presence of a slave would necessarily lead to behavior that was unacceptable in England. “The difficulty of adopting the relation, without adopting it in all its consequences, is indeed extreme; and yet, many of those consequences are absolutely contrary to the municipal law of England.”¹⁰³ The very fact that Stewart hired men to capture Somerset, violently attack and abuse him in public, and cart him off tied up (or chained) to be held on a ship illustrated Mansfield’s fear of allowing slavery in the Metropolis. Mansfield understood that because it was impossible to separate slavery from the violence and unrestrained power that made any system of slavery possible.

After serious consideration, Mansfield ruled in favor of liberty at home, setting out why a slave brought to England was free:

So high an act of dominion [as holding someone as a slave] must be recognized by the law of the country where it is used. The power of a master over his slave has been extremely different, in different countries. The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from memory: it’s so odious, that nothing can be suffered to support it, but positive law.¹⁰⁴

Somerset was not an “emancipation proclamation” for the slaves in England—mostly domestic servants or maritime workers—

102. *Id.*

103. *Id.* While not discussed in the opinion, one subtext to this is that England did not have to follow the laws of its colonies, although plausibly, the colonies might have to follow the law of England.

104. *Id.* at 510.

brought over by colonial plantation managers, government officials (like Charles Stewart), absentee landlords who visited their West Indian plantations once in a while, or slave traders who took a liking to a particular slave or needed an extra crewman. Recent research suggests there were in fact very few slaves in England at the time and that the black population was substantially smaller than Mansfield believed.¹⁰⁵ Some blacks in England undoubtedly remained in the custody of their owners (or former owners) after *Somerset*. But those who chose to be free could simply walk away, and their owners—who no longer had a legal right to own them—could do nothing about it. More importantly, *Somerset* set the stage for an end to slavery in the British Isles and eventually the entire Empire. Mansfield had, with a few strokes of his pen, undermined the moral basis of bondage, as well as its legal basis in Britain.

Slavery was now officially “odious,” at least in England and perhaps by extension in the rest of Europe as well. One of the most distinguished jurists in the world had determined that slavery was purely a creature of municipal or local law and that without specific statutory authority, no jurisdiction was obligated to recognize the “status” of a slave created by another jurisdiction. Governments or courts might now determine that contracts for “odious” commerce were not enforceable. Or they *might* recognize contracts for the sale of slaves in places where slavery was legal. This was Mansfield’s position, which he maintained for the rest of his career. In *Somerset*, he acknowledged that the court would enforce a contract for the sale of a slave in the colonies.

The issue of contract for slaves came before Mansfield a decade later in the horrifying case *Gregson v. Gilbert*,¹⁰⁶ which involved insurance claims for the value of slaves thrown overboard from the slaver *The Zong*. Overloaded, mismanaged, and dangerously off course, the crew of *The Zong* had thrown about 150

105. In *Somerset* Lord Mansfield estimated there were 12,000 to 15,000 slaves in England. Recent research suggests there were in fact fewer blacks in England and that most were viewed as servants, rather than slaves. However, as “servants” brought to England by people who had owned them in America or the Caribbean, they may have seen themselves as mired in bondage or simple lacked the knowledge and resources to strike out on their own. Kathy Chater, *Black People in England, 1660-1807*, in *THE BRITISH SLAVE TRADE: ABOLITION, PARLIAMENT, AND PEOPLE* 66, 66-69 (Stephen Farrell, Melanie Unwin & James Walvin eds., 2007). Chater may undercount the total black and slave population, because of slaves being brought back from the colonies as transients, but her evidence shows that the population was still less than a tenth of what Mansfield thought it was.

106. See *Gregson v. Gilbert*, (1783) 99 Eng. Rep. 629 (K.B.).

slaves overboard, claiming that because the ship was running out of water, it was necessary to jettison some of the “cargo” to save the rest. When the insurance company refused to pay on the claim, Gregson, a major slave trader from Liverpool, sued.

At one level, this case simply involved maritime law and insurance law. It was permissible to jettison some cargo out of necessity to save the rest of the cargo, and under such a necessity the insurers were bound to pay on the policy. Callously, Mansfield noted that under English insurance and maritime law, if the slaves were thrown overboard because of necessity due to a shortage of water, “though it shocks one very much,” in terms of law “the case of slaves was the same as if Horses had been thrown overboard.”¹⁰⁷ With some understatement, Mansfield nonetheless concluded, “It is a very shocking case.”¹⁰⁸ In the end, the insurers did not have to pay on the policy because of compelling evidence that throwing the slaves overboard was unnecessary. Nevertheless, the case of *The Zong* underscored the horrors of the slave trade. That English insurance law traveled with a slaver complicated the law, but *The Zong* still demonstrated that “Beyond the Line” of European civilization, intentionally drowning about 150 human beings was not murder and might have been the basis of a legitimate insurance claim for lost property. The insurance company won because the facts of the case demonstrated that some of the drownings were unnecessary (because it had rained and the ship now had adequate water), and all of the drownings might have been the result of incompetence on the part of those managing the ship. But, with better facts, the owners of *The Zong* might have won because “Beyond the Line” jettisoning cargo—human cargo—was not necessarily wrong. Out on the Atlantic Ocean, “Beyond the Line” of European rules and legal culture, it was still business as usual for slave traders and their New World customers.

Nevertheless, despite the continued legal recognition of slavery on the African coast and in the New World and the willingness of English courts to uphold the legality of the business of the slave trade, *Somerset* marked a major and deeply significant change in the international law of slavery. Slavery had always been “odious,” at least to the slaves. But now, according to one of the most important jurists in the world, who sat on the highest court of the most

107. See JAMES WALVIN, *THE ZONG: A MASSACRE, THE LAW AND THE END OF SLAVERY* 153 (2011) (original emphasis removed).

108. *Id.*

powerful nation in Europe, it was odious to the law as well. *Somerset* signaled the beginning to the struggle to end slavery in Britain, and that would soon shift to an assault on slavery everywhere. The struggle to fundamentally alter centuries of international law had begun, even though the participants in the case did not realize this.¹⁰⁹

In the three decades following *Somerset*, a number of newly independent American states would either abolish or prohibit slavery outright (Massachusetts, 1780; New Hampshire, 1783; Vermont, 1791; Ohio, 1803) or adopt gradual abolition acts (Pennsylvania, 1780; Connecticut, 1784; Rhode Island, 1784; New York, 1799; New Jersey, 1804), which set slavery on the road to extinction.¹¹⁰

109. It is worth noting that courts in France and some jurisdictions in France reached a similar conclusion even before *Somerset*. In the 1550s, for example, a court in Toulouse ruled that a slave brought into that city from Genoa was “automatically free.” DAVIS, *supra* note 6, at 111. But French legislation overcame this problem, and masters were able to bring slaves into France for at least limited amounts of time. See PEABODY, *supra* note 98, at 16. At the beginning of the sixteenth century, slavery as an institution did not exist in France. WATSON, *supra* note 77, at 83. Even when France had no slavery, there had always been some slaves in France. Peabody’s title underscores the irony that France’s legal culture provided some institutional support for slavery. France did not wholly adopt Roman law, but French lawyers and judges regularly turned to Roman law. Concepts of slavery in Roman and Canon law meant that the legal principles on which slavery was based were not entirely foreign to France. Thus, it was possible for seventeenth century French settlers to establish slavery in the New World and for the government in Paris to regulate slavery in the colonies with the introduction of the *Code Noir* in 1685. Indeed, the *Code Noir* was created at the behest of the King, which illustrates how easily France accepted slavery as a legal concept. Vernon Valentine Palmer, *The Origins and Authors of the Code Noir*, 56 LA. L. REV. 363, 363 (1996). See also WATSON, *supra* note 77, at 85.

In 1716 French legislation explicitly allowed masters to bring slaves to France, under some limited circumstances, even as it also provided for the freedom of slaves brought to the metropolis contrary to the law. These laws illustrate how smoothly France, a nation which prided itself on not having slaves, adapted to slavery. Its Roman, Civil, and Canon law traditions made these legal developments possible.

See Paul Finkelman, *Slavery in the United States: Persons or Property?*, in THE LEGAL UNDERSTANDING OF SLAVERY: FROM THE HISTORICAL TO THE CONTEMPORARY 107 (Jean Allain ed., 2012).

110. On emancipation in the North, see generally PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM AND COMITY (1981) and ARTHUR ZILVERSMIT, THE FIRST EMANCIPATION: THE ABOLITION OF SLAVERY IN THE NORTH (1967). Final abolition took longer than many people might have expected, and a few people were held as slaves in the North in the 1840s, but by 1804 slavery was on the road to extinction in the North, and by 1850 it has disappeared, although a few thousand aged slaves in New Jersey had been converted, by statute, into indentured servants.

Abolition in Massachusetts was based on the state's 1780 Constitution, which began: "ALL men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness."¹¹¹ In addition, in 1793 the British province of Upper Canada (modern Ontario) became the first entity in the British new world to begin to end slavery with its own gradual abolition law, an *Act Against Slavery*.¹¹² Most of these places allowed visitors and sojourners to temporarily bring slaves into the jurisdiction, but violations of the time limits could lead to the immediate emancipation of slaves. Pennsylvania and New York allowed masters to visit their states with slaves for specific periods of time. The laws reflected concepts of comity and international law. They also reflected the legal power of *Somerset*, because without these laws, visiting slaves would become instantly free.

Gradual abolition was accomplished by statute, which of course could be altered by a new statute. The U.S. Constitution, written and ratified in 1787–88, contained a specific provision for the recovery of fugitive slaves, which was in part an acknowledgment of the force of Mansfield's opinion in *Somerset*.¹¹³ Because *Somerset* was part of the American common law at the time of Independence, the states would have been able to free any slave coming into their jurisdiction, whether brought in by a sojourner, or entering as a fugitive.¹¹⁴ Thus, the U.S. Constitution specifically protected the right of a master to recover a fugitive—in effect negating the power of *Somerset*, but the Constitution did not protect the right of visiting masters to travel to free states with their slaves.¹¹⁵

While the North was dismantling slavery, it flourished in the South, and politically and legally the United States remained a

111. See MASS. CONST. art. I, *annulled and amended* by MASS. CONST. art. CVI. On the end of slavery in Massachusetts, see generally FINKELMAN, *supra* note 110, at 20-45.

112. An Act to Prevent the Further Introduction of Slaves and to Limit the Terms of Contracts for Servitude Within This Province 1793, 33 Geo. 3 c. 7 (Gr. Brit).

113. See generally FINKELMAN, *supra* note 110.

114. U.S. CONST. art. IV, § 2, cl. 3.

115. FINKELMAN, *supra* note 110, at 38-39.

slaveholder's republic until the American Civil War.¹¹⁶ From the 1770s until the Civil War there would be legal conflicts between the states and the national government over slaves in transit, the domestic slave trade, fugitive slaves, and slavery in the federal territories. The U.S. Supreme Court would consistently protect slavery.¹¹⁷ Both Britain (1807)¹¹⁸ and the United States (1808)¹¹⁹ prohibited the Atlantic slave trade.¹²⁰ An 1820 law declared that the trade constituted piracy and that both American citizens engaging in the African slave trade and any foreigner bringing slaves into the United States “shall be adjudged a pirate: and [on conviction thereof] before the circuit court of the United States for the district wherein he shall be brought, or . . . found, shall suffer death.”¹²¹ Nevertheless, despite federal law declaring slaving to be piracy and emphatically prohibiting any slaves from being brought into the country, in *The Antelope*,¹²² decided in 1825, Chief Justice John Marshall allowed illegally imported slaves to be sold for the benefit of foreign claimants, even though existing precedent should have led to the Africans on the ship being freed and returned to the continent of their birth.¹²³ Marshall acknowledged that the African slave trade was “contrary to the law of nature,”¹²⁴ but then concluded—in the face of the clear American statute of 1820 and subsequent laws to the contrary¹²⁵—that it was “consistent with the law of nations” and

116. DON E. FEHRENBACHER, *THE SLAVEHOLDING REPUBLIC: AN ACCOUNT OF THE UNITED STATES GOVERNMENT'S RELATIONS TO SLAVERY* 15-38 (Ward M. McAfee ed., 2001).

117. See generally PAUL FINKELMAN, *SUPREME INJUSTICE: SLAVERY IN THE NATION'S HIGHEST COURT* (2018).

118. An Act for the Abolition of the Slave Trade 1807, 47 Geo. 333 c. 36.

119. An Act to Prohibit the Importation of Slaves into Any Port or Place Within the Jurisdiction of the United States, 2 Stat. 426 (1807).

120. Denmark did so in 1802. SUZANNE MIERS, *SLAVERY IN THE TWENTIETH CENTURY: THE EVOLUTION OF A GLOBAL PROBLEM* 14 (2003).

121. An Act to Continue in Force “An Act to Protect the Commerce of the United States, and Punish the Crime of Piracy,” 3 Stat. 600 (1820). The statute provided that this penalty was to be in force for only two years, but on January 3, 1823, Congress made it a permanent statute. An Act in Addition to “An Act to Continue in Force ‘An Act to Protect the Commerce of the United States, and Punish the Crime of Piracy,’” 3 Stat. 721 (1823).

122. 23 U.S. 66 (1825).

123. See FINKELMAN, *supra* note 117, at 90-102.

124. 23 U.S. at 66.

125. An Act to Continue in Force “An Act to Protect the Commerce of the United States, and Punish the Crime of Piracy,” 3 Stat. 600. The statute provided that this penalty was to be in force for only two years, but on January 3, 1823, Congress made it a permanent statute. An Act in Addition to “An Act to Continue in

“cannot in itself be piracy.”¹²⁶ Here, Marshall applied the concepts of traditional Roman civil law rather than the laws of his own country. Marshall thus upheld the property rights in slaves taken from Africa who had ended up in the United States. This holding, like many others, protected slavery within the United States, ultimately culminating with decisions in *Prigg v. Pennsylvania*¹²⁷ and *Dred Scott v. Sandford*,¹²⁸ both of which proclaimed that slavery was a specially protected form of property under the Constitution.

But, even as slavery became solidly secure in the United States, internationally it became increasingly insecure. Before the Civil War, Southerners in the United States often referred to slavery as “our peculiar institution.” The title of the most influential history of American slavery, Kenneth Stampp’s *The Peculiar Institution*, suggests the way most Americans have traditionally looked at slavery.¹²⁹ By the eve of the Civil War, white Southerners, while extolling the value of slavery—and preparing to fight and die to preserve it—fully understood that their system of organizing labor and controlling race relations was unacceptable to much of the world and was indeed “peculiar” in the mid-nineteenth century. In 1775, when the American Revolution began, slavery had been legal everywhere in the New World, from British Canada to Spanish Argentina and Chile—from Hudson’s Bay to Tierra del Fuego black slaves served their white owners. But by 1861 it existed only in Brazil, Cuba, Puerto Rico, the Dutch West Indies, and the American South. It had become peculiar even in the New World, which had been built to a great extent on the labor of African slaves and their American-born descendants.

During and shortly after the Revolution, the states of the U.S. North ended or started to gradually end slavery, as did Upper Canada (Ontario). In Haiti, slaves took matters into their own hands, in the

Force ‘An Act to Protect the Commerce of the United States, and Punish the Crime of Piracy,’” 3 Stat. 721.

126. *The Antelope*, 23 U.S. at 122.

127. 41 U.S. 539, 540 (1842). See Paul Finkelman, *Story Telling on the Supreme Court: Prigg v. Pennsylvania and Justice Joseph Story’s Judicial Nationalism*, 1994 SUP. CT. REV. 247, 256 (1994).

128. 60 U.S. 393, 407 (1857). See generally PAUL FINKELMAN, *DRED SCOTT V. SANDFORD: A BRIEF HISTORY WITH DOCUMENTS* (2d ed. 2016).

129. See generally KENNETH STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTEBELLUM SOUTH* (1956). Stampp’s work is important because, as Ira Berlin has noted, it “broke the back of the racist scholarship in which the history of slavery was entrapped.” IRA BERLIN, *MANY THOUSANDS GONE: THE FIRST TWO CENTURIES OF SLAVERY IN NORTH AMERICA* 487 (1998).

only fully successful slave revolt in history. In Haiti, the slaves succeeded in not only defeating the master class, but in creating a legally recognized sovereign nation governed by those who had previously been slaves. In the 1810s and 1820s, Spain's mainland American colonies had broken the chains of human bondage just as they had broken the fetters of the colonial rule. Between 1833 and 1838, Great Britain ended slavery in its American colonies, freeing more than 800,000 people.¹³⁰ In the 1840s, Sweden, France, and Denmark ended slavery in their American colonies.¹³¹ It bears repeating that by 1860, new world slavery was flourishing only in Cuba, Puerto Rico, Brazil, the Dutch colonies, and the American South.¹³² Thus, slavery had become "peculiar" in Europe and the Atlantic world. It became even more peculiar in the next decade. In 1861, Tsar Alexander II ended serfdom in Russia. In 1863, the Netherlands finally abolished slavery in its American colonies. From 1861 to 1865, Congress, President Lincoln, the United States army, and then a constitutional amendment ended slavery in the South.¹³³ Between 1873 and 1888, the last New World holdouts finally ended slavery—Puerto Rico (1873), Cuba (1886), and Brazil (1888). Thus slavery had come to end in the "civilized world," or at least Europeans flattered themselves into believing that it did at the Brussels Anti-Slavery Conference in 1890, during which European diplomats proudly, and imperialistically, asserted that they would end slavery everywhere in the world.

As noted at the beginning of this Article, we have mostly focused on the Atlantic World, which is admittedly Euro and American centric. However, at the end of the nineteenth century, while slavery was ending in the New World, it continued to flourish

130. See Slavery Abolition Act 1833, 3 & 4 Will. 4 c. 73 (UK).

131. See 2 ERIK GØBEL, *THE DANISH SLAVE TRADE AND ITS ABOLITION* 174 (2016).

132. See generally ROBERT J. COTTROL, *THE LONG, LINGERING SHADOW: SLAVERY, RACE, AND LAW IN THE AMERICAN HEMISPHERE* (2013). As in parts of the U.S. North, gradual abolition in the former Spanish mainland colonies could be an excruciatingly slow process. By 1830 slavery was over in Mexico, Central America, Chile, and the Dominican Republic, but final abolition did not come to much of South America until the 1850s and lingered in Bolivia and Paraguay until the 1860s. GEORGE REID ANDREWS, *AFRO-LATIN AMERICA, 1800-2000* 57 (2004).

133. See Paul Finkelman, *Lincoln v. The Proslavery Constitution: How a Railroad Lawyer's Constitutional Theory Made Him the Great Emancipator*, 47 ST. MARY'S L.J. 63, 63-66 (2015).

in Africa and Asia.¹³⁴ Moreover, even as Europeans flattered themselves on abolishing slavery, they continued to allow it and profit from it in their African and Asian colonies and trade zones. The best estimate is that in 1804 there were about three million slaves in the Americas, while in Asia there were thirty-seven million slaves, and five million in Africa.¹³⁵ By 1850, there were four million slaves in the Americas, thirty-one million in Asia, and eleven million in Africa.¹³⁶ In 1888, the bulk of the world's slaves were still located where they had been at the beginning of the age of abolition a century earlier. Asia had the greatest proportion of slaves in the world, and Africa was second. Ironically, the dramatic drop in the transatlantic slave trade after 1850 had allowed African slavery to more than double. Later in the century, Europeans would justify their takeover of Africa—what scholars call the “scramble for Africa”—as a way of ending slavery there. But slavery would linger there into the twentieth century as Europeans profited from it.¹³⁷

In Asia the British, in the 1840s, had adopted a more belated and less aggressive policy in overseeing the ending of slavery in their major imperial dominion. In India, they introduced a policy that has come to be called a Slow Death for Slavery, which they, and later other imperial powers, transferred to Africa. This was the last, and perhaps the most important, application of the “Mansfield strategy” of liberation.¹³⁸

VIII. ANTISLAVERY AND THE CREATION OF MODERN INTERNATIONAL LAW

In the period from 1772 to the Brussels Conference in 1890, the world had witnessed a flourishing of international law, much of which had to do with slavery. Before 1772, there was universal acceptance of enslavement as a legitimate status based on internationally accepted criteria. These principles included accepting

134. In the 1830s, England had abolished slavery in her New World colonies. In the 1840s, Britain had adopted a more belated and less aggressive policy in overseeing the ending of slavery in India. At this time, Britain introduced a policy that has come to be called a Slow Death for Slavery, which they, and later other imperial powers, transferred to Africa. See DRESCHER, *supra* note 3, at 269-70.

135. B.W. Higman, *Demographic Trends*, in 4 THE CAMBRIDGE WORLD HISTORY OF SLAVERY 20, 23-24 n.6 (David Eltis et al. eds., 2017).

136. *Id.*

137. See DRESCHER, *supra* note 3, at 390-97.

138. *Id.* at 391-96.

the slave status of persons from other jurisdictions under a theory of conflicts of law or comity and the universal recognition of the international trade or commerce in slaves. Unlike the ancient world, where anyone might be a slave, starting in the sixteenth century in the European world, including the American colonies, slavery was confined to Indians and then Africans. Starting in the early nineteenth century, Atlantic world nations began to proscribe the slave trade, although the process was slow and faced resistance on both sides of the Atlantic. New World masters wanted more slaves, and in Africa, all sorts of political regimes, kingdoms, warlords, and raiders had grown rich selling other Africans—not their own people—to European traders. Neither the African nor the European traders wanted to see this lucrative commerce die. But, by the end of the nineteenth century no one—even Africans—could legitimately be held as a slave. During this evolutionary process, nation-states began to deny comity to foreign owners because they declared that slavery was contrary to natural law and most municipal law and tenable only under local positive law. This ultimately led to the modern view that under international law, enslavement is unacceptable exploitation that constitutes a crime against humanity.

The Brussels Act of 1890 came from a conference attended by diplomats from thirteen European countries, the United States, the Ottoman Empire, Persia, Zanzibar, and the Congo Free State (which was a phony “country” controlled by King Leopold II in his private capacity through a mercenary army and agents of the Association Internationale du Congo, a for-profit company of European investors headed by Leopold). The signers of the Brussels Act—the world’s first comprehensive multilateral treaty aimed at ending the African slave trade—pledged to end slavery in Africa “as far as possible.” Ending the trade was seen as a way of bringing “civilization” to Africa, while simultaneously expelling slavers who were predominately Muslims. But, in the end, this goal and the Brussels Act merely provided legal cover for brutal and violent colonization of the continent. As Europeans embarked on colonizing almost all of Africa, they claimed it was for the purpose of “civilizing” the continent and ending slavery there. They used the authority of the Brussels Act to justify this often-brutal colonization. Under the Brussels Act, European colonizing regimes ruthlessly suppressed the local slave trade and existing forms of slave trading. Often the suppression was more cruel (and cost more lives) than the existing systems of indigenous slavery. At the same time, the Brussels Convention enabled the colonizing government to *justify* the use of

force, including in some places, the virtual enslavement of local people who were “recruited” (at gunpoint) to work for European governments and private companies. Various kinds of forced labor with “slave-like” conditions, especially in the cocoa industry, continued into the 1930s.¹³⁹

The most “ruthless and brutal” European intervention was in the Congo, where Leopold’s private company and mercenary army savagely oppressed the population, virtually enslaving vast numbers of people as he pretended to “civilize” the Congo. Under Leopold’s regime, “A terrorist system of hostage taking, beatings, and mutilation ensured that the laborers met their state-defined quotas in the production of exportable commodities. The shift from slave raiding to labor recruitment was here a distinction without a difference.”¹⁴⁰ By the turn of the century, “mounting reports of atrocities” in the Congo led to debates in the British Parliament and investigations of conditions in the Congo.¹⁴¹ These debates can be seen as an early example of the development of international human rights law, which is often enforceable through exposure and public pressure. Indeed, by 1908 international pressure forced the King to relinquish his private colony to the Belgian government.¹⁴²

Despite its hypocrisy and the human carnage it helped produce,¹⁴³ the Brussels Act nevertheless marked a major break in

139. See generally JAMES DUFFY, *A QUESTION OF SLAVERY* (1967); CATHERINE HIGGS, *CHOCOLATE ISLANDS: COCOA, SLAVERY, AND COLONIAL AFRICA* (2012) (describing the virtual enslavement of African workers in the production of cocoa in West African colonies of Portugal and Great Britain); LOWELL J. SATRE, *CHOCOLATE ON TRIAL: SLAVERY, POLITICS, AND THE ETHICS OF BUSINESS* (2005); IBRAHIM K. SUNDIATA, *FROM SLAVING TO NEOSLAVERY: THE BIGHT OF BIAFRA AND FERNANDO PO IN THE ERA OF ABOLITION, 1827-1930* (1996); see also Gervase Clarence-Smith, *The Hidden Costs of Labour on the Cocoa Plantations of São Tomé and Príncipe, 1875-1914*, 6 *PORTUGUESE STUD.* 152, 152-53 (1990). On the continuation of bondage in Africa and elsewhere, see generally MIERS, *supra* note 120.

140. DRESCHER, *supra* note 3, at 401.

141. *Id.*

142. *Id.* at 400-01. See also Drescher, *supra* note 47, at 98-99.

143. In addition to the carnage in the Congo and virtual enslavement in the cocoa industry, the most shocking atrocities were in German Southwest Africa (modern Namibia) where a policy of genocide was a forerunner of both the holocaust and of the use of state slavery through incarceration and mass exploitation of the local population. See JAN-BART GEWALD, *HERERO HEROES: A SOCIO-POLITICAL HISTORY OF THE HERERO OF NAMIBIA 1890-1923*, at 1-9 (1999); DAVID OLUSOGA & CASPER W. ERICHSEN, *THE KAISER’S HOLOCAUST: GERMANY’S FORGOTTEN GENOCIDE AND THE COLONIAL ROOTS OF NAZISM* 1-13 (2010). The German government used concentration camps, forced labor including allowing

the history of slavery and international law. A substantial European component of the international community had now declared that slavery and slaving were unacceptable. While once slavery was practiced and legal “Beyond the Line” of European laws and legal culture, the line had now been moved outward around the globe so that slavery could exist legally only beyond the scope of international law, hidden away in far corners of Africa, Asia, and the Middle East. After World War I, the League of Nations organized the Slavery Convention of 1926 with the goal of mobilizing international cooperation in rooting out slavery everywhere on the planet and the “abolition of slavery in all its forms.”¹⁴⁴ Slavery was now broadly defined as “the status or condition of a person over whom any or all of the powers attaching to the rights of ownership are exercised.”¹⁴⁵ It further defined the slave trade as

all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.¹⁴⁶

The Convention distinguished forced labor from slavery but stipulated that “forced labour may only be exacted for public purposes” and prohibited “compulsory or forced labour from developing into conditions analogous to slavery.”¹⁴⁷ Most League of Nations members, as well as the United States (which never joined the League), signed the 1926 Convention.

The Convention and the League of Nations had some successes, such as pressuring Nepal and Burma to formally end slavery.¹⁴⁸ But half a decade after it was signed, slavery reemerged in the Soviet Union and shortly after that in Nazi Germany. The Soviet Gulag would continue for more than three decades, effectively enslaving millions of Soviet citizens, prisoners of war, and even civilians taken from Axis countries in remote labor camps operated

private companies to use virtual slave labor, and even conducted medical experiments on natives placed in concentration camps.

144. League of Nations Slavery Convention art. 2, Sept. 25, 1926.

145. *Id.* at art. 1.

146. *Id.*

147. *Id.* at art. 5; David Weissbrodt & Anti-Slavery Int’l, *Abolishing Slavery and Its Contemporary Forms*, OFF. U.N. HIGH COMMISSIONER FOR HUM. RTS. 4-5 (2002), <http://www.ohchr.org/Documents/Publications/slaveryen.pdf> [<https://perma.cc/335W-TCS5>].

148. Weissbrodt & Anti-Slavery Int’l, *supra* note 147, at 5.

under legally unaccountable draconian authority.¹⁴⁹ Long after World War II was over, the Soviet Union replicated the practices of the ancient world by holding surviving German POWs as slaves in the Gulag.¹⁵⁰ Japan likewise enslaved massive numbers of civilians from conquered nations, and like Germany and the Soviet Union, replicated the ancient practice of turning prisoners of war into slave laborers.¹⁵¹ In the case of captured military nurses, Japan turned POWs into sex slaves, who, along with some 200,000 civilian women from conquered lands, were designated “comfort women.”¹⁵²

149. Most famously, the Soviets captured the Swedish diplomat Raoul Wallenberg from Budapest and brought him to the Gulag, where he eventually died. See generally PAUL A. LEVINE, *RAOUL WALLENBERG IN BUDAPEST: MYTH, HISTORY AND HOLOCAUST* (2010).

150. *Id.*; Solveig Grothe, “I Did Nothing Wrong” German Gulag Prisoners Recall Their Postwar Ordeal, *DER SPIEGEL* (Aug. 31, 2010, 5:54 PM), <http://www.spiegel.de/international/germany/i-did-nothing-wrong-german-gulag-prisoners-recall-their-postwar-ordeal-a-714947.html> [https://perma.cc/CWH9-PKZR]; *Russia: Last WW2 German Prisoner Finally Released from Gulag*, *WORLD NEWS DAILY REP.*, <http://worldnewsdailyreport.com/russia-last-ww2-german-prisoner-finally-released-from-gulag/> [https://perma.cc/2XHF-FQBY] (last visited Jan. 22, 2018).

151. Shannon Tiezzi, *Japanese Company Apologizes for Forced Labor During World War II*, *DIPLOMAT* (July 21, 2015), <http://thediplomat.com/2015/07/japanese-company-apologizes-for-forced-labor-during-world-war-ii/> [https://perma.cc/6UDT-QNMV]; Sayuri Umeda, *Japan: WWII POW and Forced Labor Compensation Cases*, *LIBR. CONGRESS* (2008), <https://www.loc.gov/law/help/pow-compensation/japan.php> [https://perma.cc/J45A-ZNZM].

152. Mindy Kotler, *The Comfort Women and Japan’s War on Truth*, *N.Y. TIMES* (Nov. 14, 2014), https://www.nytimes.com/2014/11/15/opinion/comfort-women-and-japans-war-on-truth.html?_r=0 [https://perma.cc/CYK5-8STQ]; Stephen Moynihan, *Abe Ignores Evidence, Say Australia’s “Comfort Women”*, *AGE* (Mar. 3, 2007), <http://www.theage.com.au/news/world/abe-ignores-evidence-say-australias-comfort-women/2007/03/02/1172338881441.html> [https://perma.cc/R5H7-6WEQ]; Norimitus Onishi, *Japan’s ‘Atonement’ to Former Sex Slaves Stirs Anger*, *N.Y. TIMES* (Apr. 25, 2007), <http://www.nytimes.com/2007/04/25/world/asia/25japan.html> [https://perma.cc/ZCW4-X5TP]. For the growing scholarship on this issue, see generally GEORGE HICKS, *THE COMFORT WOMEN: JAPAN’S BRUTAL REGIME OF ENFORCED PROSTITUTION IN THE SECOND WORLD WAR* (1997); Shigeru Sato, *The Japanese Army and Comfort Women in World War II*, in *SEX, POWER, AND SLAVERY* 258 (Gwyn Campbell & Elizabeth Elbourne eds., 2014); C. SARAH SOH, *THE COMFORT WOMEN: SEXUAL VIOLENCE AND POSTCOLONIAL MEMORY IN KOREA AND JAPAN* (2008); YUKI TANAKA, *JAPAN’S COMFORT WOMEN: SEXUAL SLAVERY AND PROSTITUTION DURING WORLD WAR II AND THE US OCCUPATION* (2002); YOSHIMI YOSHIAKI, *COMFORT WOMEN: SEXUAL SLAVERY IN THE JAPANESE MILITARY DURING WORLD WAR II*, *ASIA PERSPECTIVES* (Suzanne O’Brien trans., 2000) (1995).

Even more shocking than the Gulag or the enslavement of civilians and POWs under the Japanese was the massive enslavement of Europeans perpetrated by Germany from 1939 to 1945. Following the invasion of Poland in September 1939, Germany embarked on a deliberate and explicit program of enslaving the people of Europe. In the next five and a half years, approximately twelve million foreigners would be forcibly transported to Germany. This figure does not include millions of others who were forced to work for the government or the military outside the formal boundaries of the Reich. Emulating the ancient world, Germany used captured soldiers as slave laborers, as well as millions of Jews, Roma, and others who, if not simply slaughtered or starved, were literally worked to death as laborers.¹⁵³ The German government was fully aware, and even proud, of its rejection of modern prohibitions of slave labor. Heinrich Himmler told SS officers in 1942, “If we do not fill our camps with slaves—in this room I mean to say things very firmly and . . . clearly—with worker slaves, who will build our cities, our villages, our farms without regard to any losses?”¹⁵⁴ At Nuremberg, German officials would be charged with crimes against humanity, including enslavement. Fritz Sauckel, Hitler’s plenipotentiary for labor mobilization who managed the deportation and enslavement of at least five million people, was executed in part for this crime. Sauckel actually offered as a defense that he had told Hitler that this forced labor constituted slavery, in violation of international law.¹⁵⁵

As they left the trains, Jews, Roma, and others arriving at Auschwitz were “selected” for either labor or virtually immediate extermination in gas chambers. This selection was a modern industrialized version of the selection of slaves on the African coast. European purchasers—usually ship captains and surgeons—would examine available slaves to determine who was healthy enough or strong enough to survive the extreme rigors of the middle passage and then be sold in the Americas at a profit. If the ship’s surgeon

153. The expendability of Nazi slave labors was similar to the treatment of slaves in many of the seventeenth and eighteenth century sugar colonies, where slaves were worked to death in a relatively short period of time, because it was cheaper to replace them with new slaves from Africa than treat them in ways that would extend their lives.

154. DRESCHER, *supra* note 3, at 430-31. See also BENJAMIN B. FERENCZ, *LESS THAN SLAVES: JEWISH FORCED LABOR AND THE QUEST FOR COMPENSATION* 17-18 (1979).

155. DRESCHER, *supra* note 3, at 430-32, 449; Seymour Drescher, *European Antislavery: From Empires of Slavery to Global Prohibition*, in 4 *THE CAMBRIDGE WORLD HISTORY OF SLAVERY*, 373, 393-95 (2017).

determined that the captives were not good enough to be purchased, the surgeon was in effect denying them value as a commodity. The slave—if he or she could not be sold elsewhere—underwent what might be termed “commercial death.” As such, having suffered “commercial death,” their African owners often killed them on the spot.¹⁵⁶ At Auschwitz and other Nazi death camps, the history of slavery had come full circle from the shores of Africa to modern Germany. Slavery was once again legal under municipal law, even as the world had forbidden it, made it a crime against humanity, the twentieth century equivalent of historical piracy. In the mid-1940s there would be as many people enslaved inside Germany as there had been enslaved in all of the Americas at the highpoint of slavery in the nineteenth century. Even more—millions more—were enslaved and being worked to death outside of Germany, under the watchful eye of German soldiers and government officials.¹⁵⁷ It was all “legal” under the municipal law of the regime.

Following the war, the World community once again condemned slavery. In 1948, the Universal Declaration of Human Rights began with multiple condemnations of slavery, which incorporated the evolving legal rules of the previous two centuries. Article I summarized nearly two centuries of antislavery thought: “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”¹⁵⁸ This provision mirrored the clause in the Massachusetts Constitution of 1780 that ended slavery there: “All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.”¹⁵⁹ By 1783, the Massachusetts courts had used that clause to end slavery in the state, making Massachusetts the first slaveholding jurisdiction in the western world to do so. Articles I and IV of the UN Declaration also tracked the French Declaration of the Rights of Man (1789),

156. Jeremy Krikler, *A Chain of Murder in the Slave Trade: A Wider Context of the Zong Massacre*, 57 INT’L REV. SOC. HIST. 393, 397 (2012).

157. DANIEL JOHAN GOLDHAGEN, *HITLER’S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST* 173-74, 456 (1996).

158. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

159. MASS. CONST. art. I, *annulled and amended* by MASS. CONST. art. CVI. On the end of slavery in Massachusetts, see FINKELMAN, *supra* note 110, at 20-45.

which stated that “[m]en are born and remain free and equal in rights,” and

[L]iberty consists in the freedom to do everything which injures no one else; hence the exercise of the natural rights of each man has no limits except those which assure to the other members of the society the enjoyment of the same rights. These limits can only be determined by law.¹⁶⁰

After Article 1 the 1948 Declaration continued to reaffirm an end to slavery. Article 2 declares that “[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”¹⁶¹ (This clause also bound all signatories to implement this provision, which of course never fully happened). Reflecting the Declaration of Independence and the French Declaration of the Rights of Man, Article III asserted that “[e]veryone has the right to life, liberty and . . . security of person.”¹⁶² The Fourth Article offered the crescendo of the world community’s views of slavery, five centuries after the first Europeans went to Africa and came back with slaves: “No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.”¹⁶³

In the next half century, international pressure, diplomacy, and the moral force of the world community was brought against those places where slavery legally still existed in 1948. For example, “[a]s late as 1960, Lord Shackleton reported to the House of Lords that African Muslims on pilgrimages to Mecca . . . sold slaves upon arrival, ‘using them as living traveller’s cheques.’”¹⁶⁴ Indeed, slavery remained legal in Saudi Arabia until 1962. And as recently as 1993, an Islamic scholar in Iraq defended slavery based on “capture and birth.”¹⁶⁵ In 2013, Mauritania, by then the last nation to allow slavery, finally made slaveholding a crime. However, enforcement has hardly been complete. Some forms of bondage remained,

160. Declaration of the Rights of Man, Aug. 26, 1789, Fr., http://avalon.law.yale.edu/18th_century/rightsof.asp [<https://perma.cc/P3HJ-4NSR>].

161. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at art. 2 (Dec. 10, 1948).

162. *Id.* at art. 3.

163. *Id.* at art. 4.

164. DAVIS, *supra* note 6, at 63.

165. See CLARENCE-SMITH, *supra* note 36, at 131 (discussing Shaykh Fadhllalla Haeri’s defense of slavery); see *id.* at 181-83 (discussing Prince Faysal b. ‘Abd al-‘Aziz of Saudi Arabia’s distaste for slavery, leading to its demise in 1962).

especially in remote and rural regions in parts of Asia, Africa, and the Middle East. Some organizations suggest that five percent of the population of North Korea is “enslaved” in some fashion, although slavery is formally illegally there.¹⁶⁶ But, after 2013, slavery had at least been formally abolished everywhere.

IX. NEW MODERN WORLD: THE FUTURE AND THE FUTURE PAST

The legal vampire of slavery had finally been killed, by the “stakes” of laws, treaties, proclamations, court decisions, the precedents of Nuremberg, and international declarations driven through its heart. The vampire of human culture that had caused so much misery, death, and pain, which had always been protected by laws, statutes, precedents, and custom, was at last formally dead.

Despite the publicly proclaimed universal formal consensus that slavery is a criminal violation of human rights, in parts of Asia and Africa slavery is still practiced. In other parts of the world, prison labor conditions resemble slavery, especially where the criminal justice system is used to “manufacture” labor by selling or renting prisoners or in other ways using them for economic gain by either the state or individuals. In addition, human trafficking abounds throughout the world. While not slavery—in the sense that it is neither systematic nor supported by any formal or informal government institutions—this sort of labor exploitation has an eerie resemblance to some aspects slavery. The treatment of trafficked persons often rivals (or exceeds) the brutality of past oppressive exploitation of slaves. Evidence currently abounds of being able to purchase people in Haiti, some parts of Latin America, parts of Africa, the Indian Subcontinent, and Southeast Asia. In West Africa, Boko Haram is openly engaged in capturing and selling people as slaves.¹⁶⁷ None of these contemporary practices are sanctioned by law, although some have support from local custom.¹⁶⁸ They are

166. Reuters, *supra* note 49; Sutter, *supra* note 49.

167. Bernard K. Freamon, *ISIS, Boko Haram and the Human Rights to Freedom from Slavery Under Islamic Law*, 39 *FORDHAM INT’L L.J.* 245, 251-53 (2015).

168. David Blair, *Nigeria’s Boko Haram Isn’t Just Kidnapping Girls: It’s Enslaving Them*, *THE TELEGRAPH* (Jan. 13, 2015, 3:50PM), <http://www.telegraph.co.uk/women/womens-life/11342879/Nigerias-Boko-Haram-isnt-just-kidnapping-girls-its-enslaving-them.html> [<https://perma.cc/XY7N-KCFK>]. The one exception to this may be the continuation of state slavery in North Korea, although the government would doubtless argue that this is a system of punishment, not slavery. Sutter, *supra* note 49.

examples of enslavement but not of slavery. All of these forms of bondage happen outside the law, in violation of the law. They are all illegal, not only under international law, but at least formally under the laws of the countries where they take place. Slavery has finally become, under international law, what the U.S. Congress called it in 1820: a form of piracy with no legal legitimacy or protection.

Or has it? Has the Vampire risen from his coffin, to once again stalk vulnerable human beings under the guise of legalized slavery?

The advent of the Islamic State (ISIL or ISIS) tragically shows the resilience of slavery as a system, protected by law, endorsed by a government, albeit a pariah revolutionary government of a self-proclaimed state, and justified by the law of man and the law of God. It is clear that “the vast majority of Muslim scholars today, like their counterparts in Judaism and Christianity, roundly reject slavery.”¹⁶⁹ Nearly two decades ago a scholar of Islamic law, Bernard Freamon, argued that “the abolition of slavery is not and has never been an impossibility in Islamic jurisprudence,”¹⁷⁰ and that “the time has come for the formal recognition of the consensus that slavery is unacceptable to Muslims and that it has been juridically abolished.”¹⁷¹ But it is also clear that “[i]n modern times . . . literal interpreters of Islamic dogma and law continue[] to support the practice [of slavery] as divinely sanctioned.”¹⁷²

The Islamic State is now drawing on this tradition, making scripturally based arguments in favor of slavery. In essence, the Islamic State (within the boundaries of its jurisdiction) has once again made slavery, and the enslavement of free people, legal and open, at least in one place in the world.

In openly endorsing the enslavement of non-Muslims, the Islamic State published its own legal code to both justify slavery and to regulate it. As Kenneth Ross, the executive director of Human Rights Watch, noted, this document “sets forth an interpretation of sharia, or Islamic law, albeit an extreme one.”¹⁷³ The ISIS document

169. Usaama al-Azami, *ISIS, Slavery, and Islamic Abolitionism*, HUFFINGTON POST, http://www.huffingtonpost.com/usaama-alazami/isis-slavery-and-islamic-abolitionism_b_8050606.html [<https://perma.cc/52LK-6FDM>] (last visited Jan. 22, 2018).

170. Freamon, *supra* note 167, at 6.

171. *Id.* at 7-8.

172. TOLEDANO, *supra* note 69, at 484.

173. Kenneth Roth, *Slavery: The ISIS Rules*, HUM. RTS. WATCH (Sept. 25, 2015, 10:15 AM), <https://www.hrw.org/news/2015/09/05/slavery-isis-rules> [<https://perma.cc/KEY9-CBJQ>].

asserts that “[i]t is permissible to have sexual intercourse with the female captive. Allah the almighty said: ‘[Successful are the believers] who guard their chastity, except from their wives or (the captives and slaves) that their right hands possess, for then they are free from blame [Koran 23:5–6].’”¹⁷⁴ ISIS explains that “[i]t is permissible to buy, sell, or give as a gift female captives and slaves, for they are merely property, which can be disposed of as long as that doesn’t cause [the Muslim ummah][,] [or community of faith][,] any harm or damage” and at the death of their owner, “female captives are distributed as part of his estate.”¹⁷⁵ As with any system of slavery, the ISIS rules also legitimize the punishment of slaves. “It is permissible to beat the female slave as a [form of] *darb ta’deeb* [disciplinary beating], [but] it is forbidden to [use] *darb al-takseer* [literally, breaking beating], [darb] *al-tashaffi* [beating for the purpose of achieving gratification], or [darb] *al-ta’dheeb* [torture beating]. Further, it is forbidden to hit the face.”¹⁷⁶

And so, in our own time, the vampire of legalized slavery, protected and even venerated, has once again walked on the earth, brazenly, openly, and in full view of the world to see.¹⁷⁷ In the land where Babylonian and Assyrian slave owners and slaves left records of human bondage four millennia ago, new laws and new records of slaveholding have emerged. The Vampire is back; the question is, will it ever finally die?

174. *Id.*

175. *Id.*

176. *Id.* See also Atika Shubert & Bharati Naik, with Bryony Jones, *Convert or Die: ISIS Chief’s Former Slave Says He Beat Her, Raped U.S. Hostage*, CNN (Sept. 11, 2015, 3:39 PM), <http://www.cnn.com/2015/09/09/middleeast/al-baghdadi-isis-slave/index.html> [<https://perma.cc/85S3-UPWY>].

177. We note that ISIL (or ISIS) is only the most egregious example of contemporary slavery. It is estimated that world-wide some twenty-eight million people are held in some form of forced or coerced labor which might qualify as “slavery” under the UN Declaration and other international definitions. However, ISIL is the only nation-state (or would-be nation-state) that openly endorses and provides a legal structure to support a system of slavery. As this article goes to its final edit ISIL is weaker than it was when we started writing, but still holds on as an entity. For estimates on world-wide coerced labor, see generally Kevin Bales, *Contemporary Coercive Labor Practices – Slavery Today*, in 4 THE CAMBRIDGE WORLD HISTORY OF SLAVERY 655; David Eltis et al., *Introduction*, in 4 THE CAMBRIDGE WORLD HISTORY OF SLAVERY 3; Higman, *supra* note 135, at 20.