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Comparative Studies of Law, Slavery and Race in the Americas

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Abstract

This critical essay surveys the historical research comparing U.S. and Latin American law and slavery and how it informed the development of legal studies concerning slavery in the Americas. An earlier generation of comparative work on race and slavery drew heavily on law to draw sharp contrasts between U.S. and Latin American slavery. Revisionist social historians criticized these scholars for providing a misleading top-down history based on metropolitan codes, and pointed to demographic and economic factors to explain variations in slavery regimes. However, social historians who sought to study relationships of power in slaves' lives found that they had to reckon with law and legal institutions. More recently, legal historians have begun to explore law "from the bottom up" through slaves' claims in court, trial-level adjudications, and interactions among ordinary people and low-level government officials. While most studies stay within one national context, some scholars have begun to look at slavery and freedom in the transnational context of the Atlantic world, and others have attempted comparisons of manumission in localities across legal regimes.

Introduction

In the preface to his well-known 1789 royal instruction on the treatment and labor of slaves, King Carlos IV acknowledged that the legal corpus concerning colonial slavery was so vast that it had become impossible for owners and officials to know it. In addition to the traditional codes of the Kingdom of Castile such as the *Siete Partidas*, the sources of slave law in the colonies included a multitude of *cédulas* issued by the monarchs since the sixteenth century, some of which had made it into the 1680 *Recopilación de Leyes de los Reinos de las Indias*. In addition, there were hundreds of “ordenanzas” or police regulations issued by courts such as the *Audiencias*, by royal representatives such as the viceroys and governors, and by town councils across the colonies. Some of these ordenanzas had been brought to the attention of the Council of Indies and received royal approval, thus acquiring the full status of imperial law. Under these conditions, the king acknowledged, it was virtually impossible for his slave-owning subjects to comply with the law concerning slaves (Real Cédula of 31 May 1789, in Fernando Ortiz, *Los negros esclavos* (Havana: Editorial de Ciencias Sociales, 1975), 408-15).

A previous generation of scholars studied some of these regulations, particularly Castilian law, the real *cédulas* contained in the *Recopilación*, and similar rules issued by the monarchs. These scholars operated under the assumption that such laws constituted a valuable proxy to understand colonial social realities and slaves’ lives in the colonies. They conceived of the colonial legal system as a collection of rules, emanated from above, that reflected the moral and ethical concerns of Iberian legislators and theologians, on the one hand, while creating limited rights and protections for slaves on the ground, on

the other hand. Frank Tannenbaum summarized this view in his influential comparative study of law and slavery in the New World: “Spanish law, custom, and tradition were transferred to America and came to govern the position of the Negro slave” (Tannenbaum 1946, 52-53).

Yet this earlier generation of comparative scholars, informed by broad assumptions about the operation of law, left untouched a much greater archive of materials related to law “on the ground,” whether the regulations imposed by local authorities, the interactions of ordinary individuals and local officials, disputes among slaveholders, or claims made by slaves in local fora. After decades during which slavery scholars turned away from broad comparative legal histories like that of Tannenbaum towards fine-grained local studies, there is a renewed interest in comparative and transnational approaches to the history of law, race and slavery in the Americas. This new work explores the interaction of local law and local cultures on the ground. Yet our survey of recent approaches to comparative studies must begin with a brief sketch of an earlier generation of historiography, because it is striking to what degree studies of forty and fifty years ago are still setting the terms of research, even as debate has moved on from those studies in other respects.

The Influence of Frank Tannenbaum

In his landmark work *Slave and Citizen*, Frank Tannenbaum advanced some of the topics that informed the development of legal studies of slavery for decades. First of all was the issue of the legal standing, or “personality” of the slave. According to Tannenbaum and his followers, Spanish law “never forgot the personality of the Negro.”

The slave in a Spanish colony was “a legal person” and as such was entitled to “rights over which his master ha[d] absolutely no power” (Klein 1967, 38). In the United States, by contrast, “whatever right of personality” the slave may have retained was systematically eliminated by slaveholding legislators (Elkins, 1959, 42). But other scholars disagreed, noting that there were numerous instances in Iberian and Roman laws in which slaves were treated as *res se moventes*, objects of property which were basically indistinguishable from chattel. “The assimilation of ownership in slaves to property was comparable to that in the United States,” a scholar critical of Tannenbaum argued. Others explained that the tension between slaves as property and human beings was intrinsic to all slave regimes, regardless of legal foundations, and that the legal status of slaves in British America was more contradictory and ambiguous than Tannenbaum and his followers suggested (Sio 1965, Davis 1966). Among U.S. scholars, the “contradiction” or “dichotomy” of the slave’s character as person and as property became a defining principle in legal scholarship on slavery, with many scholars concluding that unlike in Latin America, slaves in the U.S. “had the character of persons in criminal cases and that of property all the rest of the time” (Gross 2000).

Equally contentious was the question of legal cultures and their transmission to the New World. Tannenbaum and his followers assumed that the legal culture and codes of Castile “were transferred to America” (Tannenbaum 1946, 52; Klein 1967, 39, 59). Other scholars, however, noted that it was necessary to take other economic and institutional factors into account. Key among these was the issue of who had the power to legislate slavery, whether local slave owners or distant metropolitan bodies. Also crucial was the type of economic activity in which slaves were engaged. In the plantation zones,

metropolitan regulations and legal traditions were usually sacrificed to profits (Mintz 1984, 71). Scholars of British America, searching for antecedents in the common law, concluded that there was no basis for legal slavery in the law of villeinage or other bodies of English law (Morris 1988, Morris 1996). Scholars of law and slavery in the U.S., therefore, concentrated for decades primarily on the antebellum era and on the law that emanated out of U.S. Southern courts and legislatures (Stampp 1965, Genovese 1974, Tushnet 1981).

The most controversial question raised by Tannenbaum's influential work was that of law enforcement. Tannenbaum's critics pointed out that he assumed a close connection between legal codes and social realities. Revisionists of the 1970s and 1980s, proponents of a "new social history," argued that there was a large gap between codes and slaves' lives on the ground (Eder 1976, 603; Rankin 1979, 8). This gap was particularly wide in those regions which became fully incorporated into world markets and produced under the logic of capitalist profits. "As soon as Latin American slavery was oriented towards production for the world market, it assumed the form of chattel slavery," historian Eric Williams asserted in the mid-1960s. Differences between Latin and British America, in consequence, were, "contrary to Tannenbaum... economic, not moral" (Williams 1966, 127). What came to govern the lives of slaves in the capitalist plantations of Spanish America was not Spanish law, the codes of Castile, or ancient traditions concerning the proper use of slaves, but the cold logic of production costs and the drive for profits (Harris 1964). In the plantations, some of the best case studies showed, slaves were reduced to the condition of "men-machinery," factors of production that could be replaced at will if it made economic sense for the owners (Moreno Fraginals

1978). Thus, to scholars of “material conditions,” law was at best a reflection of social realities or an imperfect compromise reached by competing institutional powers such as the colonial government, the Church, and the planter class (Tushnet 1981, 27-28).

Ironically, however, this “reflex model” of law and society, in which law was believed to reflect social forces, presaged a growing gulf between legal history and social history in the 1970s and 1980s. Social and cultural historians focused on the material aspects of slaves’ lives and emphasized that on the plantation, the master was the law. Students of U.S. Southern culture also treated justice as primarily an extra-legal matter. “On the ‘law’ side of this divide, slavery was primarily a problem of intellectual history and moral philosophy. Historians and constitutional scholars were reading the published opinions of Southern high courts, as well as the laws enacted by Southern legislatures, for evidence of Southern whites’ ideology—their beliefs and fears about the women and men they held in bondage—and for insights into judging and the ethical basis of the common law”(Gross 2001, 642; Ayers 1984; Cover 1975; Fehrenbacher 1981; Kolchin 1993; Wyatt-Brown 1982).

To be sure, there were exceptions, even in the 1970s. The best Marxist historiography began to question dogmatic distinctions between culture and material conditions and to note, as E. P. Thompson did, that value systems and modes of production were inextricably linked. Eugene Genovese urged attention to law as an instrument of cultural hegemony (Genovese 1976). New conceptions of power as permeating personal interactions at all levels of society rejected the notion that power should be seen as just repression or as a consequence of legislation. Critical legal scholars who came out of the Marxist tradition also began to criticize the reflex model with the claim that the legal

system enjoyed a “relative autonomy” and should not be seen as a fixed set of principles and rights (Tushnet 1981, 27-29). Furthermore, slave law was characterized, precisely, by the failure to develop “rigid categories” due to the “intractability of the social reality with which the law dealt,” that is, how to assimilate human beings into property (Tushnet 1981, 37-40; Genovese 1981). *New approaches to the legal history of slavery*

These critiques paved the way for a return to the study of slavery and the law, but the influence of social history led to a new emphasis on local sources, and new approaches that emphasized the aspirations and initiatives of slaves themselves. The new legal studies of slavery retreated from the big comparisons of Tannenbaum’s generation into empirically-rich, locally-grounded studies which analyzed slave law in action through the study of concrete legal cases. A very early example of one of these studies was Norman Meiklejohn’s “The Implementation of Slave Legislation in Eighteenth-Century New Granada” (Meiklejohn 1974). Meiklejohn called for geographical and temporal specificity in comparing the harshness of slavery regimes, including local economic circumstances. It was clearly not the same to study an area of plantation agriculture or one characterized, as was the case of New Granada, as a “weak and slowly developing economy.” As for legislation, it was not enough to consider only the relatively protective rules of the Siete Partidas; it was necessary to incorporate colonial legislation as well, which was frequently “quite restrictive.” A central concern of Meiklejohn’s study was the issue of implementation, which was assessed with the use of juridical records. The study of concrete legal cases, in turn, introduced new actors and problems to legal studies. Much to their surprise, scholars such as Meiklejohn encountered a group of legal mediators, such as attorneys and magistrates, who

represented slaves and did so in a competent fashion. Legislation was clearly not “a dead letter,” including traditional Spanish codes such as the *Siete Partidas*, which were invoked by attorneys and magistrates “in an impressive number of cases.”

A few such studies in the 1970s and 1980s led to a cascade of new research in the 1990s. Legal historians increasingly brought social actors—slaves, masters, legal mediators, judicial authorities—into sharper relief in the same ways that social historians had attempted to understand how slaves and other subordinate groups experienced, negotiated, and resisted the oppressive structures in which they lived. These legal historians turned to trial records as one of the precious few sources where members of the lowest social groups appeared as individuals with spiritual or political lives.

Furthermore, social historians who had not been trained to study law but who wanted to understand relationships of power in slaves’ lives, and the role of the state in those relationships, found that they had to reckon with law and legal institutions (Bowser 1974; Genovese 1976, Knight 1970). After the mid-1980s, a new generation of social historians began to pay increasing attention to processes of state formation and to the construction of legal regimes, as part of an effort to “bring the state back in” to social history (Evans et al. 1985; Skocpol 1979). Even if reconstructing the multilayered legal system created by the Iberians in their colonies, or by legislatures in the southern states was not one of their goals, the best social history of slavery in the Americas acknowledged that there were several key areas of slaves’ lives that could not be understood without reference to the law (Andrews 1980; Schwartz 1985; Russell-Wood 1982; Oakes 1990; Johnson 1999; Edwards 1999; Brown 1996). Included among these areas were manumission, marriage and family formation, and the perennial questions of

physical mistreatment and abuse—issues that comparative legal scholars á la Tannenbaum had identified as critically different in “Latin” and “Anglo Saxon” America.

Building on these trends, historians have returned to the study of the law with a vengeance since the 1990s, including the study of slave law. There has been a veritable boom of legal historical studies concerning slavery across the Americas during the last decade. This scholarship has gone back to some of the old problems, such as manumission, marriage, or the legal personality of the slaves, but it has also delved into new subjects, such as the social construction of legally-defined racial labels and barriers, the legal conflicts prompted by the movement of masters and slaves among Atlantic societies, state efforts to regulate children and family formation, and the impact of gender on legal institutions such as manumission. This work has advanced enough that it is beginning to produce new comparative studies, although none with the sweeping scope of Tannenbaum.

The change in approach could be represented as a shift from the study of slave legal “systems,” to an emphasis on slaves as social actors who used legal claims as part of a larger repertoire of initiatives and strategies. Scholars of Latin America have studied how legal suits took advantage of cracks in the normative system. Slaves tried to turn some of the potentially favorable principles contained in the Spanish codes into personal rights. Each claim created a precedent that made subsequent claims more likely, creating in the process “a corpus of case law” (Bryant 2004, 21). In the United States, where slaves’ access to the courts was more limited, scholars have approached the law of slavery from the perspective of other actors in the system, for example studies of

commerce and the marketplace that examine disputes among slaveholders and other whites with interests in slaves for an understanding of the way white men's relationships played out through and on the bodies of slaves (Gross 2000). And some scholars have begun to place slaves and masters in the context of a wider web of relations of dependency in households that included patriarchs, wives, children, slaves, and other servants (Edwards 2007a, 2007b, 1999). Finally, particularly in the U.S., scholars of comparative literature and cultural studies have also taken up the study of law and slavery, bringing a more cultural than social-historical perspective to slavery studies of the U.S. South. These scholars use ex-slave autobiographical narratives, WPA interviews with former slaves, and literary sources to illuminate slaves' understandings of the role of law in their lives (Suggs 2000, DeLombard 2007).

Marriage and Family

One area in which a great deal more research has been done on the Latin American side than the U.S. is on the intersection between law and family life. This may be accounted for in part by the prominence of the Catholic Church in Spanish America, with its traditions of record-keeping and its sanction of slave marriage. Scholars of Latin American slavery have used local records to explore cases in which slaves went to court—that is, when they went public—to accuse slaveholders of sexual transgressions or to complain against masters who did not allow their slaves to live Christian lives. By appealing to ecclesiastic and civil authorities, slaves not only challenged the authority of the masters, but also managed to inscribe in the public sphere embarrassing stories about them and their families (Johnson 2007, 635-36, 645). Slaves learned that, as Christian

subjects, they could invoke the sanctity of the sacraments to demand cohabitation with a spouse and make claims on behalf of their children (Bennett 2003; Townsend 1998; Cowling 2005, Bryant 2004). Some scholars have begun to study how authorities and the courts dealt with the peculiar situation of slave children, who were subject to multiple and conflicting sources of authority (Premo 2005). Others have noted that slave males, usually disadvantaged when it came to manumissions, sought freedom for their descendants by marrying legally free women (Lokken 2001).

It is generally understood that slaves in a variety of circumstances and in diverse Spanish colonial territories and in Brazil found ways to invoke and exercise their right to marry. The burgeoning literature on slave families in Brazil, which has developed in conversation with similar literature in the United States, has established that slave marriages were not uncommon in all regions of Brazil (Bergad 2007, 165-77). The same, however, cannot be said of other slave societies in Latin America, particularly Cuba, where studies of slave families remain seriously limited (Morrison 2007, Franklin 2006, Barcia 2003). In any case, the debates that surrounded the question of slave marriage in the British West Indies in the early nineteenth century were unnecessary in the Iberian colonies. Issues such as the legality of slave marriages or the legal consequences of slaves' marrying free people had been settled by the courts and ecclesiastic authorities of Iberian America for centuries (Green 2007).

This does not mean, however, that there were no changes in the legal regime of marriages in Spanish America. Although the Church had traditionally enforced the free will of the future spouses as a central principle in canonic law, in the eighteenth century the Crown attempted to assert greater control over marriages by giving parents and other

family members the right to object to unions that were deemed socially unequal. The new legal regime provoked much litigation around issues of status, honor, race, and legitimacy, and has received significant attention from scholars (Martinez-Alier 1974; Twinam 1999; Seed 1988). In many cases, disputes revolved around questions of lineage and centered on the race/caste of the individuals involved and their *limpieza de sangre*. Such disputes relied on a multitude of state and church records that “produced and reproduced categories of identity based on ancestry linked to particular legal statuses (to certain responsibilities, rights, or privileges)” (Martinez 2008, 6). Historians have also begun to study how ordinary people, including Africans and their descendants, used all sorts of legal documents and procedures to claim identities, negotiate and in some cases reject labels of race and status (Cope 1994; Lewis 2003; Twinam 2005; Graubart 2009).

By contrast, in colonial British America and in the United States, slaves had no legal right to marry. While courts occasionally recognized slaves’ informal marriage in various ways – for example, acknowledging a slave husband’s fury at his wife’s lover to reduce a homicide from murder to manslaughter – these moments are notable as exceptions to the rule. Legal studies of slavery and the family are much sparser on the U.S. side, while social histories of the slave family have burgeoned. Margaret Burnham’s article of twenty years ago, “Slave Law and Family Law,” remains a landmark piece (Burnham 1987). Other historians interested in the way law shaped the families of the enslaved have drawn on post-Civil War sources, such as the claims of slaves’ widows for pensions from the Union Army, to illuminate relationships under slavery. Anthony Kaye, in *Joining Places: Slave Neighborhoods in the Old South*, uses these sources to demonstrate the various forms of informal law and sanction that

distinguished marriage among slaves from “taking up” or “sweethearting” or living together (Kaye 2007). Dylan Penningroth, in *The Claims of Kinfolk: African American Property and Community in the Nineteenth-Century South*, uses the records of the U.S. Claims Commission to cast light on the ways freed people, in the immediate aftermath of slavery, used the courts to make claims on family relationships (Penningroth 2002). But most of the cutting-edge research on African American families focuses on this period after the Civil War, when ex-slaves had the opportunity for the first time to legalize their marriages (Edwards 1997, Franke 1999).

Emancipation and Manumission

One area where slaves’ actions clearly helped to shape evolving legal regimes in Latin America was emancipation. Most of the independent republics in Latin America had abolished slavery by the mid-nineteenth century. By 1870, slavery was legal only in Brazil and in the colonial territories of Cuba and Puerto Rico. Slaves used the independence wars to push for concessions from the contending parties, frequently demanding freedom in exchange for military support. Although slave owners throughout the region resisted efforts to equate political independence with emancipation and legal equality, in most countries they were forced to pass legislation resulting in the gradual abolition of slavery. Between 1811 and 1831, Free Womb Laws were approved in Chile, Argentina, Colombia, Ecuador, Uruguay, Peru, Venezuela, and Bolivia (Andrews 2004, 55-84; Blanchard 2008). These laws were remarkably similar: they granted formal freedom to the children of slave mothers and decreed that the nominally free were to remain under the tutelage of slave owners for a given number of years. Legislators in

each of the republics surely knew about similar statutes elsewhere, although reconstructing the process by which these ideas travelled from one place to another requires additional research.

Recent scholarship has approached the study of emancipation through the actions of the slaves themselves, rather than through the letter of the legal texts. As numerous studies have documented, slaves did not wait for potentially beneficial laws to be implemented from above. They used traditional and new legal means to expedite the process and obtain their freedom and that of their children (Aguirre 1993, Hünefeldt 1994, Andrews 1980, Blanchard 2008, Sanders 2004, Lasso 2007, Ferrer 1999, Cowling 2005, Townsend 1998). As Rebecca Scott explained in her pioneer study about slave emancipation in Cuba, published in 1985, although gradual laws of emancipation did not actually free those they declared to be free, they did create “a lever” or “a set of weapons” that slaves could use to challenge the authority of the masters. Furthermore, these laws brought slaves into the “legal culture”: it was through legal means and proceedings that many of the social conflicts surrounding emancipation were channeled (Scott 1985, 73, 141, 280). Less is known about how slaves who partook in these legal cultures interacted with the law and with the courts after emancipation, although some work has been done on that period (González 2001, Rios & Mattos 2005, de Cruz 2006, Scott 2001, 2005, Scott & Zeuske 2002, 2004).

Even after the promulgation of gradual emancipation laws, significant numbers of slaves continued to seek their freedom, or that of their loved ones, through traditional legal institutions such as manumission and self-purchase. Manumission continues to be one of the most studied topics concerning slavery in the Americas. But how scholars

approach the study of manumission practices and conflicts has changed considerably. Studies published in the 1970s and 1980s sought primarily to establish the frequency of manumission and the freedmen's demographic profile. These scholars argued that manumission was best understood as a functional element of the slave regime; that slaves were forced to pay for their freedom in most cases; and that manumission rates (which were always low), correlated with economic conditions and increased when a steady supply of slaves made their replacement possible and profitable (Russell-Wood 1972, Bowser 1975, Johnson 1979, Schwartz 1974).

Current scholarship has pushed into new areas, such as the gendered nature of manumission practices, slaves' claims of illegal or wrongful enslavement, their legal suits claiming rights to purchase freedom, and their access to social and family networks that seconded their efforts (Brana-Shute & Sparks 2009; Diaz 2000; Johnson 2007; Betancur and Aparicio 2006; Grinberg 2004; Higgins 1999; Mattos 1998; Proctor 1995; Owensby 2005; de la Fuente 2007). Some of these studies have also begun to reconstruct the activities of legal mediators, such as scribes and "defensores" or "procuradores" who occasionally assisted their slaves in their legal claims. Much work remains to be done on these representatives and on their political and religious motivations. Additional research is also needed on the diffusion of knowledge concerning legal practices in slave communities, or on the social costs slave owners incurred as the object of freedom suits. But what unites studies of freedom suits across the Americas is an emphasis on claims-making by slaves, as demonstrated by the titles of two new studies, Martha S. Jones' "By Leave of the Court: African American Claims-Making in the Age of Dred Scott," and

Alejandro de La Fuente's "Slave Law and Claims-Making in Cuba," both of which examine slaves' practices of claiming freedom (Jones 2007, de la Fuente 2004).

Manumission is the subject of the most explicitly comparative new legal history of slavery in the Americas, perhaps because it is one of the areas where it appears easiest to see law making a difference in the lives of enslaved people. As the futile question of the comparative harshness of slavery has receded, manumission has remained an institution that lends itself to productive comparisons. In addition, because it influences the size of the population of free people of color, manumission has also proven to be a focal point for contrasts between the United States and Latin American countries with much larger populations of free people of color.

Some of the recent work on freedom suits is directly comparative, but rather than taking the nation-state as its unit of comparison, it focuses on urban regions within the nation-state that have features in common. The chief example of this type of work is Keila Grinberg's study of freedom suits in Baltimore and Rio de Janeiro. Between the 1790s and the 1820s, slaves sued for freedom in both cities and Grinberg argues that the cases exhibit quite similar juridical discussions (Grinberg 2001). According to Grinberg, the explosion of freedom suits in the era of revolutions can be explained in part by what was happening in cities, burgeoning economic centers that afforded slaves possibilities to work outside the realm of their masters and to exercise freedoms that allowed them to mount successful challenges to their legal status as slaves. Despite the differences in legal traditions, in both Baltimore and Rio de Janeiro, the courts treated suits for freedom in terms of property, and viewed the cases as commercial transactions involving the purchase of oneself. In both jurisdictions, slaves used old strategies, such

as placing themselves on the King's mercy (in Rio) or claiming Indian maternity (in Baltimore) but gave them new meaning. Grinberg's work, along with many new U.S.-focused studies showing the extent of freedom suits in Southern states, suggest that what may need to be explained is why the U.S. diverged from other parts of the Americas after the 1820s, rather than a timeless distinction between one jurisdiction with manumission and another without (Schafer 2003, Whitman 1997).

Atlantic Crossings: Micro-Histories in a Transnational Context

Thus, in the U.S. as well as in Latin America, histories of law "from the bottom up" have proliferated. Yet this new work has not yet translated, for the most part, into new macro-historical comparisons of slavery and law across the Americas. Increasingly, legal historians are writing from comparative and transnational perspectives, but they have eschewed grand comparisons, in part because so many have chosen the form of micro-history.

Perhaps the leading proponent of micro-historical approaches to a trans-national subject is Rebecca Scott, whose recent work spans Louisiana, Cuba, and St. Domingue. She has traced the "Atlantic crossings" of one family in and out of various legal jurisdictions, chronicling their shifting legal status as they made claims on different legal systems – and those systems made different claims on them. Her essay, "'She...Refuses to Deliver Up Herself as the Slave of Your Petitioner': Emigrés, Enslavement, and the 1808 Louisiana Digest of the Civil Laws," looks at a set of cases involving Adelaide Métayer, who had once been a slave in Sainte Domingue, but became free during the Haitian Revolution. When she emigrated first to Cuba, and then to Louisiana, her status

was contested by the man who sought to enslave her. Scott uses the seven lawsuits regarding Métayer's status as an occasion to look at the "multiple layers of legality concerning slavery," including the 1808 Digest of the Civil Laws of Louisiana, territorial and state statutes, and the Spanish Siete Partidas (Scott 2009, Scott & Hébrard 2007). Martha S. Jones similarly traces the shifting legal status of one family's encounters with "the Atlantic world" in her recent excavation of the *Baptiste de Volunbrun* case, and Kristin Mann has used British records from Lagos as well as Brazilian court records to trace a family transported from Lagos to Bahía in their encounters with legal systems (Jones 2006, 2009, Mann 2009).

Edlie Wong's *Neither Fugitive nor Free: Atlantic Slavery, Freedom Suits, and the Legal Culture of Travel* takes a different kind of "Atlantic world" approach to freedom suits. She too traces individual's encounters with the legal systems of U.S. states and of Great Britain, but she also reads the records of freedom suits side by side with literary and cultural sources – ex-slave narratives, popular literature, newsprint, and legal pamphlets – in order to see how legal discourses about slavery and freedom circulated in popular culture (Wong 2009).

Other aspects of Rebecca Scott's research are more directly comparative, particularly when she explores the possibilities for citizenship after slavery in Louisiana and in Cuba, in *Degrees of Freedom: Louisiana and Cuba After Slavery* (Scott 2005). She notes that the legal and political formation in Cuba made possible claims to citizenship that could not be attained in the U.S. context. Her exploration of the "public rights" discourse of the free black community in New Orleans underlying their challenge to the segregation of railway cars in *Plessy v. Ferguson* suggests that free people of color

in Louisiana did have access to this Atlantic discourse of freedom and citizenship, but their claims were far less successful than those of the Cubans who had fought for independence (Scott 2008).

Hybridities and Legal Transplants

One approach to slavery across the Atlantic world has been to emphasize hybridities and legal transplants. No legal historian has had more influence on the notion of “legal transplants” than Alan Watson, the historian of Roman law, who insisted that most provisions of slave law in the Americas can be traced to Rome (Watson 1989). Furthermore, the harshness or mildness of a slave law regime correlates with its distance from Rome, in his view; France and Spain, with legal systems more influenced by Roman law, had milder legal provisions than Britain and Holland, whose legal systems were more removed from Rome. Watson rejected the “reflex model” of law and society by arguing that much legal development in the modern world can be attributed to the transplantation of legal provisions and structures from other systems and societies far removed in time and place. There can be no simple correlation between a society and its law, if most of its law is borrowed from elsewhere (Watson 1974 [1993]). Insofar as Watson provides a corrective to reductive theories that law is “all politics” etc., his perspective is valuable, but he represents an extreme pole in the debate, with an almost exclusively genealogical approach to legal development (Ewald 1995).

More recent work on transplantation, especially the very interesting volume of essays that emerged from a seminar held at the Institute for Advanced Studies in Jerusalem in 2008, instead focuses very closely on the local implementation and

transformation of codes transplanted from one jurisdiction to another. Chris Tomlins' contribution to that volume, "Transplants and Timing: Passages in the Creation of an Anglo-American Law of Slavery," considers the transplantation of regulations of daily life in slave societies from colonial assemblies in Jamaica and Barbados to Massachusetts and the Carolinas. Tomlins notes that "as colonial settlements turned into slave societies, local innovations increasingly supplemented Occidental transplants, compensating for their deficiencies and limitations. Local innovations in turn became transplants themselves, creating commonalities within regions of settlement, and also—more interestingly—among regions usually thought quite distinct" (Tomlins 2009, 393).

Other historians focus on the "mixed" jurisdiction of Louisiana as a case study for the influence of different legal traditions on the shape of slavery and freedom in one society. Whether emphasizing Spanish law "transplanted" into British America, or U.S. law grafted onto Spanish and French practice, historians have seen *coartación*, manumission, and the community of *gens de couleur* in Louisiana as an important case study for comparative and transnational approaches to the legal history of slavery and freedom. Louisiana is unique among American states in having been governed first by France, then by Spain, before becoming a U.S. territory and state in the nineteenth century. Unlike other slave states, it operated under a civil code, first the Digest of 1808, and then the Code of 1825. With regard to the regulation of slaves, these codes also incorporated a "Black Code," first adopted in 1806, which owed a great deal to both French and Spanish law. Comparisons of Louisiana with other U.S. slave states tend to emphasize the uniqueness of New Orleans' three-tier caste system, with a significant population of *gens de couleur libre* (free people of color), and the ameliorative influence

of Spanish law. In Louisiana, social historians have shown the harshness of plantation slavery, and legal historians have followed suit. Judith Schafer, the leading legal historian of slavery in Louisiana, suggests that the institution of slavery in Louisiana differed little from the rest of the Deep South, and that by 1806, when the territorial legislature adopted Louisiana's new slave code, only the harshest rules of French law survived (Schafer 1994).

Significant differences remained between Louisiana and other states in the ability of slaves to gain their freedom through legal means. By contrast, the everyday law of slavery differed little across the U.S. South (Ingersoll 1995). While it is a commonplace to describe Louisiana as a three-caste society, scholars are debating whether the *gens de couleur* should really be considered a separate caste (Scott & Hebrard 2008, Clark 2008). Colonial Louisiana was certainly unlike Cuba and Brazil, which had much larger populations of free people of color, comparable to their slave populations. And Louisiana was hardly unique in North America in recognizing individuals and communities of free people of color with an intermediate status between black and white. Yet it appears that the practice of *coartación*, which remained sanctioned in law well into the U.S. period, contributed to building a substantial community of *gens de couleur* who became important players in the fight for civil rights after the Civil War and beyond (Baade 1983, Spear 2009, Kotlikoff & Rupert 1980, Schafer 2003, Gross 2009, Scott 2003).

Racial identity and classification

Scholars of slavery in the Americas have also turned their attention to questions of race and racial ideology with increasing sophistication. The early comparative work of Tannenbaum and Degler had assumed a timeless category of the “Negro,” with an unproblematic biological identity. The “mulatto,” the child of a white person and a Negro, was recognized as a third category in Latin America, while he was not in the United States. This provided a stark contrast between the two regions, and helped explain the continuing legacy of Jim Crow that followed on slavery in the United States, and the seeming “racial democracy” of Cuba and Brazil, where racial mixing was both encouraged and recognized in intermediate racial categories.

More recent studies of race across the Americas depart from this earlier work in quite dramatic ways. Part of the departure is theoretical: approaching race as a social and legal construction, the new research emphasizes the contingent nature of racial classifications, the role of law in creating racial meanings, and the collaboration as well as conflict among many actors in producing racial knowledge – neighbors, jurors, lawyers, church officials, and judges. The new work on race, like other legal studies of slavery, also draws on new sources, especially trial records of lawsuits litigating racial identity or *limpieza de sangre*, as well as local church records, ships’ manifests, and other documents that provide insights into informal practices of racial identification that operated as law or intersected with law (Gross 2008, Garrigus 2006, Hébrard 2003, Turits 2007). These studies shift attention away from imperial discourses about race and towards the ways individuals negotiated their racial and legal identities, even “in a ‘public sphere’ from which they were officially excluded” (Garrigus 2006, 12).

The study of racial classification and law has also produced some of the most broadly comparative and transnational works on any subject related to the legal history of slavery in recent years, in part spurred by contemporary concerns about race-conscious policies across the Americas. These studies have their origins not in social history but in critical race theory and race studies, especially of the U.S. and Brazil. Tanya Hernandez and Robert Cottrol in particular have written numerous articles, and a forthcoming book, comparing U.S. and Brazilian legal histories of race and racial discrimination, building on the sociological and historical work of Edward Telles, Denise Ferreira Da Silva, George Reid Andrews, Thomas Skidmore, Seth Racusen, and many others (Cottrol & Hernandez, *The Long, Lingering Shadow: Law, Liberalism, and Cultures of Racial Hierarchy and Identity in the Americas*, unpublished manuscript; Cottrol 2001, Hernandez 2002, Racusen 2004, Greene 2009, Telles 2004, Da Silva 1998, Andrews 1991, Skidmore 2003). New research on racial formations in Brazil is explicitly preoccupied with the U.S. comparison, in part because of present-day concerns about affirmative action as a U.S. import. U.S. legal scholars have also turned to the Brazilian and Latin American comparison as part of a critical race theory interrogation of colorblind ideology as it operates in U.S. law and constitutionalism.

Conclusion

Ten years ago, Walter Johnson, in a review of legal studies of slavery, warned that the new “bottom up” histories of slaves’ encounters with the law, by emphasizing “inconsistency” and “contradiction” rather than over-arching theoretical frameworks, risked “complete confusion” (Johnson 1997). Ironically, this tendency to particularize

and find complexity may be even greater in the new comparative and transnational work on slavery, because it remains so relentlessly micro-historical. This careful, and often brilliant work, has done much to take us beyond the paradigms created by Frank Tannenbaum's generation of historians. But it has yet to replace it with a new comparative paradigm.

Rather than trying to characterize slave legal "systems" as abstract sources of oppression or rights, during the last few decades, scholars have studied how slaves and free people of color helped to shape those systems in practice. Constructing new comparative paradigms is difficult due not only to the proliferation of locally-grounded studies, but also to the fact that all these studies reach a similar conclusion: slaves everywhere sought to exploit or to create openings in the normative system in order to increase their autonomy and improve their lives. Slavery was an extreme form of oppression, whether slaves lived in Recife, Alabama, Saint Domingue, or Louisiana. Slaves in all times and places attempted to use legal means and the courts whenever possible to ameliorate their lives and perhaps even to escape slavery altogether.

But normative systems were not identical across the Americas, so the comparisons posed by previous generations of scholars continue to elicit interest, as the comparative work on race in Brazil and the United States illustrates. To complicate things further, such systems were not unalterable across time either, so comparisons need to be sensitive to historical variations. As the work on slave marriages and families suggests, some fundamental doctrinal differences did exist between the legal regimes of the British and Iberian colonies and they had concrete and important consequences for real slaves and for equally real masters. Furthermore, Spanish imperial concerns about unequal

marriages were not the same in the sixteenth and eighteenth centuries. Those changes also informed people's choices and legal strategies.

It is only now, after two decades of local studies concerning slaves and the law in the Americas, that a new systematic comparison can be attempted. It is unlikely that these comparisons will recreate the Manichean division between "Anglo" and "Latin" America that Tannenbaum and some of his followers defended. Atlantic historians have effectively cautioned against treating the colonial territories of Britain, France, Spain or Portugal as sealed and independent entities. But it is equally unlikely that comparisons will stop at the universal urge of all slaves to use and create legal or institutional means to assert their humanity.

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