Laws empower governments. They control behavior, shape attitudes and codify important societal values. As predominant means for promoting change or preserving the status quo, laws also reflect a people’s fundamental ideals, including their racial beliefs. Throughout most of American history, dominant beliefs in the inherent inferiority of blacks and the concomitant superiority of whites were impressed in law. Legally sanctioned racial inferiority appeared early in the country’s jurisprudence as a cornerstone justification for American slavery. This “peculiar institution” existed, flourished and, ultimately, was ended with the aid of an intricate array of statutes, court decisions and constitutions.  

Slavery in the Southern and Northern colonies vastly exceeded, in scope and severity, its more “benign” version in Michigan. Slavery in both regions, however, provides an important historical context for evaluating slavery in Michigan and for understanding race-based laws and customs extant during and after the slavery period in Michigan. Segregation and discrimination in post-slavery Michigan had their antecedents in the colonial and ante-bellum periods, in the South as well as the North. The rationale for these two modes of subjugation paralleled the principal justification for American slavery: blacks were an inferior race that racially superior whites had a right to keep in “their place.”

Although fundamental distinctions existed between the experiences of blacks in the North and the South, the study of one group and the laws that governed them, provide insights to the other. The contrast reveals as well a ubiquitous commonality in the unequal treatment that was accorded blacks throughout colonial and antebellum America. In order to provide a contextual understanding of the early history of blacks in Michigan, the

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2. Kenneth M. Stampp, The Peculiar Institution: Slavery in the Ante-Bellum South 6-14 (1989) (discusses and debunks the myth that Negroes as a race were more suited to slavery than whites).
complex evolution of American slavery and the laws that institutionalized and sustained it up to the Civil War are described briefly below.₃

A. Slavery in the South

African slaves were introduced into the New World in the early sixteenth century by the Spanish. They were exploited by West Indian and Caribbean Island planters as more suitable and profitable substitutes for indigenous Indians.⁴ Indians had fared poorly in captivity, and their numbers rapidly dwindled to near extinction from barbarous treatment and their high susceptibility to European diseases.⁵

America’s first blacks were brought forcibly into the American colonies in 1619 when twenty Africans were sold to colonist in Jamestown, Virginia from a “Dutch man of war.”⁶ At this time, white

₃. The focus is on the legal aspects of American slavery. The institution was enormously complex and involved the interplay of racial, class, social, political and economic forces, which cannot be discussed fully in a summary. Accordingly, footnote references to additional reading are suggested throughout the chapter. The literature on American slavery is voluminous. Among the many publications available, the author found the following publications particularly useful: see generally LERONE BENNETT, JR., BEFORE THE MAYFLOWER: A HISTORY OF BLACK AMERICA (6th rev. ed. 1993); CIVIL RIGHTS AND THE AMERICAN NEGRO: A DOCUMENTARY HISTORY (Albert P. Blaustein & Robert L. Zangrando eds., 1968); STANLEY M. ELKINS, SLavery: A problem in American Institutional and Intellectual Life (3d ed., rev. 1976); ROBERT W. FOGEL & STANLEY L. ENGERMAN, TIME ON THE CROSS: THE ECONOMICS OF AMERICAN NEGRO SLAVERY (1974); JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS (6th ed. 1988) [hereinafter FRANKLIN & MOSS]; EUGENE D. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE (1974); HERBERT G. GUTMAN, THE BLACK FAMILY IN SLAVERY & FREEDOM, 1750-1925 (1976); HINTON ROWAN HELPER, THE IMPEDDING CRISIS OF THE SOUTH: HOW TO MEET IT (New York, 1860); LEONARD W. INGRAHAM, SLAVERY IN THE UNITED STATES (1968); JULIUS LESTER, TO BE A SLAVE (30th ed. 1998); ROBERT DALE OWEN, THE WRONG OF SLAVERY, THE RIGHT OF EMANCIPATION AND THE FUTURE OF THE AFRICAN RACE IN THE UNITED STATES (Philadelphia, J.B. Lippincott & Co. 1864); PETER J PARISH, SLAVERY: HISTORY AND HISTORIANS (1989) (contains a very helpful bibliographic essay that discusses the major works on slavery by selected categories); ULRICH BONNELL PHILLIPS, AMERICAN NEGRO SLAVERY: A SURVEY OF THE SUPPLY, EMPLOYMENT AND CONTROL OF NEGRO LABOR AS DETERMINED BY THE PLANTATION REGIME (1918); and STampp, supra note 2.

₄. PHILLIPS, supra note 3, at 44 (discussing the tribal origins of slaves and tribal characteristics that were regarded as valuable or undesirable in slaves).

₅. OWEN, supra note 3, at 23-31 (describing the atrocious treatment of Indian slaves in Hispaniola and reports that one million Indians were reduced to 60,000 within a 15-year period); see also FRANKLIN & MOSS, supra note 3, at 47-48, and STampp, supra note 2, at 17, 23-24; see generally BENNETT, supra note 3, at 50-51; FRANKLIN & MOSS, supra note 3, at 46-70; and PHILLIPS, supra note 3, at 46-66 (for concise descriptions of slavery throughout the New World).

₆. BENNETT, supra note 3, at 28-29.
indentured or bound-servants were used in the colonies. These indentured workers usually entered their contracts voluntarily, often for payment of their passage to America. Later, when their term of service ended, they were freed. The first Africans sold in the colonies were treated similarly and were set free, usually within four to seven years. As freemen they could own property, including land and a few, in a seeming irony, held slaves. They voted, testified in court and worked for wages, many as skilled artisans. One important aspect of the socioeconomic status of early black settlers was that it carried few legal implications of racial inferiority—this stigma was to come later.

The institution of slavery evolved as a consequence of burgeoning colonial economies that created demands for cheap and perpetual servants. Indentured servants had become scarce and because they had to be replaced every few years, their limited service did not solve the colonies' growing labor problems. On the other hand, the supply of blacks seemed inexhaustible. They also had personal characteristics that made a forced labor status more practical and desirable if imposed on them rather than white indentured servants. They were not Englishmen and, accordingly, they could not invoke the protection of British law. As non-Christian foreigners, black Africans could be regarded as heathens whose enslavement and punishment would not evoke the resistance nor the guilt among whites that would attend the similar treatment of white Christians.

Also, their skin color, cultural dissimilation and the absence of nearby

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7. In Virginia, for example, county court records before 1661 refer to blacks as Negro servants or merely Negroes, not slaves. See Phillips, supra note 3, at 75.

8. See Phillips, supra note 3, at 425-53 (discussing freeman as slave owners and of the few freemen that held slaves in large numbers). Higginbotham and Bosworth report that only a few blacks owned slaves for economic reasons. Most slaves purchased by free blacks were family members. In Virginia, for example, the privilege free blacks had to purchase slaves for economic reasons ended in 1705 when Virginia enacted a statute, Ch. 49 VA. Stat. 447 (1705), which provided that if a black purchased a Christian servant, the servant became free. Later, in 1832, blacks were prohibited from purchasing any slave, other than one’s spouse or child. Ch. 22 VA. Stat. 20, 21 (1832). See A. Leon Higginbotham, Jr. & Greer C. Bosworth, “Rather Than the Free”: Free Blacks in Colonial and Antebellum Virginia, 26 Harv. C.R.-C.L.L. Rev. 17, *36 (1991) [hereinafter Higginbotham, Jr. & Bosworth].

9. Bennett, supra note 3, at 35; Franklin & Moss, supra note 3 at 70-71; Ingramah, supra note 3, at 3-7. Blacks voted in Virginia until 1723, in South Carolina until 1701, in North Carolina until 1715 and in Georgia until 1754. Bennett, supra note 3, at 38.

10. Bennett, supra note 3, at 35.

11. See Phillips, supra note 3, at 344-58 (for a survey of leading economists’ views on slavery. Most considered slavery economically infeasible...)

12. See Bennett, supra note 3, at 46, and Ingramah, supra note 3, at 7.
families and friends assured that the runaways would be unaided and could be easily recaptured.  

The economic growth that followed the adoption of slavery in the Southern colonies resulted in a corresponding increase in the importation of African slaves. At first, this change was gradual, and slavery developed slowly during the balance of the seventeenth century. In addition to the economic considerations and experimentation with non-slave labor systems, the slow pace was due to a reluctance “to populate the country where so many whites had resolved to live permanently with a race of people believed to be incapable of assimilation.” However, when the forces promoting a slave economy as a solution to the Southern colonies’ labor problems prevailed, the flow of slaves into the South escalated sharply. Between 1790 and 1820, the number of slaves doubled, and the problems of how to manage them exacerbated. Accordingly, a concomitant development was the enactment of slave codes in each of the slave states. These groups of laws defined the property rights masters had in their slaves as well as the authority they could exercise over them, the duties slaves owed to their masters and the protections available in the larger community to prevent slave revolts. “Beginning in the early 1830s, the severity of the codes increased as slavery matured into a system of race as well as labor control.”

Slavery, as a local institution, varied from state to state as did the laws that supported it. Virginia, the first Southern colony to legalize slavery, was a leader in developing the slave system and illustrates generally its growth throughout the South. In Virginia, the use of bound-servant contracts ended about 1640. Thereafter, blacks had no indentures that resulted in freedom after a term of service although some were given contracts cruelly styled as “servants for life.” About this time Virginia courts began upholding wills and contracts that bequeathed and sold black servants and their children “for life.”

Virginia’s courts also started imposing harsher sentences on blacks compared to those given whites for the same offenses and manifested a judicial willingness to enslave blacks who were not already subject to

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13. See Franklin & Moss, supra note 3, at 71-72; Ingraham, supra note 3, at 7-8; and STAMPP, supra note 2, at 6-14.
14. Franklin & Moss, supra note 3, at 86.
15. Hall, supra note 1, at 131.
16. Id.
17. See Higginbotham, Jr. & Bosworth, supra note 8 (for excellent discussions of the effects of statutes and cases on the evolution of slavery and the legal status of free blacks during Virginia’s colonial and antebellum periods).
18. Franklin & Moss, supra note 3, at 72.
19. Miller & Smith, supra note 1, at 393.
lifetime servitude. Both practices were evident in the 1640 Virginia decision, *In Re Negro John Punch.*

In *Punch,* three runaway servants, two white and one black (John Punch), were convicted and sentenced for the identical offense. All three were sentenced to be whipped, a common punishment for running away. The white servants were sentenced to four years additional service as further punishment. But as to the black servant, the court ordered an amazingly harsh additional penalty: “John Punch shall serve his said master or his assigns from the time of his natural Life here or elsewhere.”

In discussing the *Punch* case, Judge A. Leon Higginbotham, Jr. observed that a sentence to lifetime slavery was not based on any prior legislative enactment or judicial precedent. He concluded that:

Such differentiation of treatment reflected the legal process’s early adoption of social values that saw blacks as inferior. To make rigid the social stratifications these values called for, the court turned social biases, at will, into hard legal judgments. In the true sense of the word, the colonial judges constituted an activist court, in order to perpetuate disparate cruelty on blacks.

In 1661, Virginia gave formal statutory recognition to the practice of perpetual service. Blacks, thereafter, became property rather than human beings. They were bought and sold like animals that labored at the will of their owners. The neighboring colonies, with the temporary exception of Georgia, soon followed Virginia and adopted slavery as an economic institution.

Virginia’s population data show the escalation of slave holding that began early in the eighteenth century. In 1625, only twenty-three blacks lived in Virginia; by 1650, there were 300. In 1715, a quarter of Virginia’s

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21. Id. at 28.

22. Id.

23. See FRANKLIN & MOSS, supra note 3, at 72, 86 and INGRAHAM, supra note 3, at 8.

24. Georgia was planned as a rehabilitation settlement experiment comprised of former English prisoners. Its trustees forbade slavery as being inconsistent with the colony’s purposes and the intent that it be a non-slave buffer between slave-holding South Carolina and Spanish Florida. After much agitation by settlers, ownership of Negro slaves was allowed in 1750; and by 1773, a population of 15,000 slaves and 18,000 whites lived in Georgia. In 1775, Georgia eventually enacted an entire body of slave codes based on South Carolina’s, the South’s most stringent. FRANKLIN & MOSS, supra note 3, at 84-85.

25. In 1641, Massachusetts became the first colony to give statutory recognition to slavery. Other colonies followed: Connecticut in 1650, Maryland in 1663, New York and New Jersey in 1664, South Carolina in 1682, Rhode Island and Pennsylvania in 1700, North Carolina in 1715, and Georgia in 1750. BENNETT, supra note 3, at 443-44.
population was slave. By 1756, blacks represented over 40% of the population numbering 120,156 compared to 173,316 whites. By the turn of the nineteenth century, the 260,000 blacks in Virginia equaled the number of whites. In some Virginia counties, similar to the entire colony of South Carolina, slaves outnumbered whites.²⁶

Unlike the middle and New England colonies where slavery declined largely because of economic infeasibility and anti-slavery activism,²⁷ the South was well suited to the large-scale exploitation of slave labor in the cultivation of its staple crops, i.e., tobacco, rice, sugar cane and indigo.²⁸

In the late eighteenth century, however, the Southern crop markets had become so depressed that the institution of slavery was thought to be in jeopardy. At this time, coincidentally, the Industrial Revolution was underway in England and in the Northern colonies, and the newly developed spinning and weaving machines had created an insatiable demand for cotton. The Southern response was hampered by having to process cotton fiber with slave hand-labor, an incredibly slow and inefficient method. This critical problem was solved with the invention of the cotton gin in 1792, and mechanized “ginning” spurred a new Southern economic revolution.²⁹ Cotton became “king” and “a curtain of cotton rang down on some four million human beings…and they were systematically deprived of every right of personality.”³⁰

The dramatic increase in cotton production generated a need for many additional slaves to work the fields and harvest the crops.³¹ As a result, the

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²⁶. See id. at 73, 443-44 and INGRAHAM, supra note 3, at 12-13.

²⁷. For discussion of experimentation with slavery in the North as well as life for Northern freemen, including the racial hostility that led to major race riots, see FRANKLIN & MOSS, supra note 3, at 89-111 and 234-36; PHILLIPS, supra note 3, at 437-53. See generally LITWACK, NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790-1860 (1961).

²⁸. For discussions of slavery in the tobacco and rice colonies, see PHILLIPS, supra note 3, at 67-97.

²⁹. The cotton gin separated the seeds, seed hulls, and other small objects from the cotton fibers. The importance of the cotton gin in making cotton “king” is illustrated by pre-cotton gin and post-cotton gin production figures. In 1790, before Eli Whitney invented the cotton gin, approximately 3,000 bales (a bale equaled 500 pounds) of cotton were produced in the United States. By 1840, annual cotton production had increased to 1,300,000 bales. While a slave could only produce a pound of clean cotton in a day’s work, the use of mechanized gins raised production to a thousand pounds per slave per day. INGRAHAM, supra note 3, at 29.

³⁰. BENNETT, supra note 3, at 87.

³¹. See PHILLIPS, supra note 3, at 150-68 and 205-27, (discussing the effects of the introduction of cotton crops on slavery and the development of the cotton regimes).
South became inextricably bound to the plantation-slave system. By the end of the century, even though the Constitutional ban on importation after January 1, 1808 was only a few years away, slave trafficking flourished. The laws enacted against importation of slaves after 1808 were poorly enforced and widely disregarded. The traffic simply went underground. For the next half-century, notwithstanding crusades by Northern abolitionists, persistent criticism at home as well as abroad, and worldwide decline in slavery, the South stubbornly clung to slavery and the South of 1860, big and prosperous, still boldly defended its peculiar institution as it took up arms to preserve it.

B. Slavery in the North

Slavery in the North was more similar than different from its counterpart in the South. In the early stages of economic development,

32. FRANKLIN & MOSS, supra note 3, at 148-49. PHILLIPS, supra note 3, at 228-343 (discusses extensively the types of large plantations, their management, and living conditions on them).

33. In 1798, the U.S. CONST. art I, §9, cl. 1 provided that, “The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight. . . .” At the end of the seventeenth century, there were approximately 25,000 Negro slaves in the English colonies. By 1789, the year when the Constitution was adopted, the number of slaves had increased to 750,000 out of a total population of 4,000,000. Less than a half-century later, Negroes in America increased to 2,300,000, including 320,000 freemen, half of whom lived in the South. Although the importation of slaves was outlawed after 1808, it has been estimated that as many as 300,000 slaves were smuggled into the country between 1808 and the beginning of the Civil War in 1861. INGRAHAM, supra note 3, at 30-31. While precise calculations are not possible, slave trading data indicates that as many as 7,120,000 were imported into the American colonies between 1788 and 1860 and a New World total of 15,520,000 between 1508 to 1860. OWEN, supra note 3, at 34-39.

34. Congress enacted a total of seven statutes on the slave trade. The most important was the act approved on March 2, 1807, effective January 1, 1808, that enforced art. I, §9, cl. 1 of the U.S. Constitution. The first of the other six statutes was passed in 1794, entitled “An Act to prohibit the carrying on the Slave Trade from the United States to any foreign place or country” (1 Stat. 347). It was supplemented in 1800 (2 Stat. 70). Then, in 1803, Congress passed “An Act to prevent the importation of certain persons into certain states, where, by the laws thereof, their admission is prohibited” (2 Stat. 205). The . . . act of 1807 [was] supplemented and strengthened by . . . statutes in 1818 (3 Stat. 450) and in 1819 (3 Stat. 532). The 1820 statute (3 Stat. 600) defined certain slave-trading activities as acts of piracy, punishable by death. BLAUSTEIN & ZANGRANDO, supra note 3, at 53.

35. Outside of Africa itself, only Brazil, Cuba, Puerto Rico and Dutch Guiana maintained slave societies. STAMPP, supra note 2, at 21.

36. Id. at 20.

37. This brief summary of Northern slavery draws heavily from the excellent book, EDGAR J. MCMANUS, BLACK BONDAGE IN THE NORTH (1973). HIGGINbotham, Jr., supra note 1, discusses in depth slavery and slave laws in New York and Pennsylvania as
both regions totally subjugated blacks to white domination. The Northern colonies enacted harsh laws and special judicial procedures to control, regulate and punish slaves that closely paralleled the Southern slave codes. Slaves within both regimes were treated brutally. While lacking the systematic barbarism of the South, practices in the North often “rival the worst brutalities of the plantation colonies.” The Northern English colonies were also obsessed with maintaining racial purity and severely punished miscegenation. “So pervasive was the derogation of such contacts that racial intermixture virtually equated with racial contamination.” Thus, for blacks in the North, like their brothers and sisters in the South, their race and color became indelible and damning badges of inferiority.

Several aspects of Northern slavery differed from slavery in the South. These differences help in understanding slavery in Michigan and the origins of conditions for blacks in the state before and after emancipation.

Large slaveholding was uncommon in the North. Most slave owners required only one or two slaves to supplement their own work. Typically, slaves worked alongside their masters on small farms or as skilled artisans, often sharing the same living quarters. Many worked within a task system that allowed them to manage their own time, rate of work and spare time, which in turn developed qualities of independence uncharacteristic of Southern plantation slaves.

The slave regime in the North was also more varied than that in the South. Southern slaves were used primarily for agricultural work. In the North, they worked in the shipbuilding trades and as carpenters, printers, cooperers, blacksmiths, tailors, shoemakers and virtually every other trade practiced in the free labor market. Slaveowners frequently hired out their slaves in competition with white workers at lower than prevailing wages. Protests by whites, particularly skilled artisans, began as early as the late seventeenth century and intensified during the first half of the eighteenth century. This competition with white labor eventually aided the slaves’ emancipation. It was also a factor in the post-emancipation racist
“bondage” that blacks endured and which was to deny them full equality and freedom.

The abolitionist movement in the North peaked during the Revolutionary period and became more militant with dislocations caused by war. Manumission was granted to thousands of slaves for service in the colonial and British forces. In 1775, the constitution of the newly organized State of Vermont abolished slavery by a declaration that no person “ought to be holden by law to serve any person as a servant, slave, or apprentice after he arrives at the age of twenty-one years.”47 Other Northern states followed gradually, notwithstanding the widespread Negrophobic belief that blacks were not sufficiently civilized or ready for the civil rights that emancipation and legal equality would bestow on them. White abolitionists and blacks fully exploited the Revolutionary ideology and prevailing sentiments for liberty in the colonies. Aiding the revolutionary zeal and the intellectual and moral arguments against slavery was the fact that slave laborers were no longer crucial to the Northern economies.48 An abundance of white workers had made a slave economy obsolete.

In order to protect slaveowners’ property rights in their slaves, Northern abolition laws, which were enacted on a state-by-state basis, typically provided for gradual emancipation.49 For example, a 1780 Pennsylvania statute, similar to the statutes enacted in other Northern states, provided that children born after the date of enactment would not be considered slaves, but they would be “indentured servants” of their parents’ master until age twenty-eight.50 As a result, freedom in the North came slowly and was achieved through several different legal procedures.

Slavery was abolished gradually by statutes in some states: Connecticut (1784 and 1787), New Jersey (1804), New York (1799 and 1817), Pennsylvania (1780) and Rhode Island (1784); others did so by constitutional provisions or interpretation: Illinois (1818), Indiana (1816), Ohio (1802) and New Hampshire (1857); and Massachusetts (1783), by judicial decision.51

By 1810, the federal census reported only 418 slaves in New England; and the 18,000 slaves in New Jersey, New York and Pennsylvania

46. See id. at 143-59.
47. J. HURD, THE LAW OF FREEDOM AND BONDAGE IN THE UNITED STATES 36-37 (1862).
48. McMANS, supra note 37, at 162.
49. Id. at 160-79 (discussing the emancipation legislation in the Northern states).
constituted only 0.6 percent of the total population.\textsuperscript{52} Gradualism persisted, however, and as late as 1860, with the North and South primed for civil war, the federal census still reported slave holdings in New Jersey.\textsuperscript{53}

C. Law and the Dehumanizing Process: South and North

The bleak ante-bellum existence for slaves and freemen differed from the less harsh colonial period mainly due to the laws enacted during the eighteenth and the first decade of the nineteenth centuries.\textsuperscript{54} These laws, in addition to codifying prevailing customs, institutionalized and sanctioned the racial separation, the injustice and the iniquitous prejudice that endured in the United States long after they were nullified.

Blacks did not accept enslavement passively. Some preferred self-inflicted death to perpetual and degrading labor for a master’s profit. Others escaped and still others fought their captors, many in open rebellions.\textsuperscript{55} Slave revolts as well as individual, unorganized attacks on slaveowners increased with the South’s surging black population.\textsuperscript{56}

White fears of slave uprisings were pervasive. With security as a rationalization and with no regard for any religious and moral values, Southern legislators enacted stringent, nearly uniform, laws to control and punish rebellious blacks.\textsuperscript{57} The codes allowed the slave system to function

\textsuperscript{52} McManus, supra note 37, at 179. General declines had occurred in the black population and population growth rates throughout the North. Much of the decline was attributed to the illegal, forced emigration from Northern to Southern states after the sale of slaves was prohibited in the North. Id. at 182.

\textsuperscript{53} By law, New Jersey had reclassified slaves as “apprentices for life.” See Bergman, supra note 51, at 221-24 for detailed 1860 census data on blacks in the United States which included: slaves, freemen and mulattoes in each state, North and South.

\textsuperscript{54} For reasons of succinctness, the discussion of slaves in this section is limited to the Southern experience as generally representative of the role of law in the dehumanization process. As to freemen, both Southern and Northern conditions are discussed briefly primarily to contrast the importance of the economic/employment differences for freemen in both regions.

\textsuperscript{55} Blaustein & Zangranido, supra note 3, at 2. Slaves rebelled in the North as well as the South. The slave revolts in 1712 and 1741 in New York and in 1739 at Stono, South Carolina illustrate Negro resistance during the eighteenth century. Revolts increased as the number of slaves multiplied. For accounts of the slave uprisings and plots during the eighteenth and nineteenth centuries, including the two most famous led by Denmark Vesey and Nat Turner, see Phillips, supra note 3, at 463-88.

\textsuperscript{56} Phillips suggests that the number of slaves convicted of murdering their masters and overseers shows that rebellious acts by small groups were fairly common. Id. at 463.

\textsuperscript{57} Virginia in 1723 promulgated the first comprehensive American slave code. The act was nine pages long and had 24 sections. Black Laws of Virginia, VIRGINIA.EDU (Dec. 3, 2015, 2:00 PM), http://www.virginia.edu/woodson/courses/aas-hius366a/blackcodes.html. VA. STAT. (W.W. Hening ed. 1723).
at peak efficiency by keeping all blacks, free as well as slave, unorganized, ignorant and in awe of the white power. By 1800, the legalization of human bondage, its rationalization, and the extraordinary cruelty needed to sustain it were well established in a firm and rarely compromising legal foundation for the slave system. The slaves’ duality as both person and property had shifted in law almost totally toward a status of “things.” Slaves were regarded as sub-humans, so inferior that they, with the imprimatur of law, could be deprived of basic human rights.

Under the codes, slaves had no civil rights nor any legal protections beyond laws that putatively prevented uncharacteristic brutality and assured them of the most basic necessities. They were denied any juridical capacity, except in surrogate suits for their freedom. Their few personal rights yielded when in conflict with their owners’ property rights. Slaves were forbidden to learn reading and writing nor could they gather in small groups or hold religious services without a white minister present since it was believed black ministers encouraged slave rebellions.

Barbados was among the earliest of the permanent English settlements to promulgate legislation to regulate and control slave labor. The preamble and many provisions of the Barbadian act of 1688 were copied and enacted into law by South Carolina in 1712. After the Stono revolt in 1739, South Carolina added new and more restrictive provisions. Subsequently, complementary legislation was enacted throughout the South and in the West. Only Louisiana had a decidedly different and more liberal code, owing to its French rather than English governance.

58. The right was dubious in practice, however, as whites faced few restrictions when punishing slaves. For example, in Virginia if a slave resisted his master and the master in “correcting such slave” killed him, no felony was committed. Virginia Slave Code, THE GILDER LEHRMAN INSTITUTE OF AMERICAN HISTORY (Dec. 3, 2015, 2:12 PM), https://www.gilderlehrman.org/history-by-era/origins-slavery/timeline-terms/virginia-slave-code.

59. Even suits for freedom had to be pursued by a citizen acting as the slave’s guardian for purposes of litigation. In criminal prosecutions, however, slaves were deemed responsible persons. Since they could not pay fines nor be deprived further of their liberty, the punishments imposed for their criminal violations were usually death, deportation or lashes. PHILLIPS, supra note 3, at 500.

When permitted to testify in court, blacks could testify only in proceedings involving other blacks. Whites could never be convicted of a crime on the word of a Negro. See HIGGINbotham, JR., supra note 1, at 58, regarding representative Virginia laws.

60. See Higginbotham, JR. & Bosworth, supra note 8, at 55-62 for discussions of Virginian laws enacted, particularly during the 19th century, to prohibit the education, including religious teachings, of blacks. See also EUGENE GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES Made, 561-66 (1974) for discussion of illiteracy laws as a means of preventing slave uprisings; and PHILO TOWER, SLAVERY UNMASKED: BEING A TRUTHFUL NARRATIVE Of A THREE YEARS’ RESIDENCE And JOURNEYING In ELEVEN SOUTHERN STATES 25-26 (1856). Tower refers to South Carolina and Louisiana laws that proscribed the teaching of slaves and reports he, personally, was threatened with hanging if he “attempted to teach the slaves anything.” Id. at 26.

61. Contrary to prevailing English custom, slaves who converted to Christianity were not entitled to freedom. See VA. STAT. 3 (1667), “...baptism doth not alter the condition...
were bred as if horses or mules, and since their marriages lacked legal recognition, their families could be separated at the whim of their masters. Contrary to English common law, under the codes, children followed their slave mothers’ condition and were deemed slaves notwithstanding the race of their fathers. These laws permitted white men to breed slaves and, consequently, enslave their own children.

Most slaves worked under inhumane conditions, and they could be beaten, branded and even put to death for offenses that were ignored or treated less severely when committed by whites. They could not leave their owners’ land without a pass and if discovered without one, even a few miles from “home,” they could be severely punished, and if they resisted “lawful apprehension,” they could be killed.

Numerous lawsuits were filed on behalf of slaves in both state and federal courts. Because of their legal status as chattels, they, invariably, were the “objects” of litigation rather than actual parties in the suits.

Southern judges, with occasional exceptions, joined legislators in promoting racial solidarity and white security by denying slaves any basic

of the person as to his bondage or freedom.” FRANKLIN & MOSS, supra note 3, at 54 (quoting the Virginia assembly in 1667). In 1831, Virginia imposed a complete ban on meetings conducted by slaves or free blacks, including religious services. Ch. 22 VA. STAT. 20 (1832).

62. BENNETT, supra note 3, at 104-105, and INGRAHAM, supra note 3, at 58. Since slaves were market commodities, their breeding was lucrative. Slave births were usually listed in plantation records under “stock.” DENISE DENNIS, BLACK HISTORY FOR BEGINNERS 64 (1984). For discussion of masters’ property interest in slaves, see HIGGINbotham, JR., supra note 1, at 50-53. By law, Virginia treated slaves as real estate. Ch. 23 VA. STAT. (1705).

63. Virginia, for example, provided that “children got by an Englishman upon a Negro shall be bond or free according to the condition of the mother . . . .” VA. STAT. 12 (1662). Existing English doctrine provided that children followed the status of their fathers. If British law was followed, thousands of mulatto progeny of white males would have been free. HIGGINbotham, JR., supra note 1, at 43-44. Later statutes in Virginia prohibited interracial marriages. See, e.g., VA. STAT. 16 (1691). “Despite moral taboos and criminal sanctions, ‘white men of every social rank slept with Negro women . . . .’” W. WINTHROP JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812 137 (1968).

64. Often, free Negroes were treated similarly. See STAMPP, supra note 2, at 210-11.

65. For discussions of slave life on Southern farms and plantations, see BENNETT, supra note 3, at 82-111, and PHILLIPS, supra note 3, at 309-43.

66. See, e.g., JUNE PURCELL GUILD, BLACK LAWS OF VIRGINIA 45 (1936).

67. See generally, CATTERALL, supra note 1.

68. See, e.g., Ford v. Ford, 26 Tenn. 92, 95-96 (1846). The Tennessee Supreme Court, in manumitting a slave, emancipated by his master’s will, held the following: “A slave is not in the condition of a horse or an ox. His liberty is restrained, it is true, and his owner controls his actions and claims his services. But he is made after the image of the Creator. He has mental capacities and an immortal principle in his nature, that constitute him equal to his owner but for the accidental position in which fortune has placed him. The owner
human rights. Judicial protection of slaves required courts to recognize their humanity and derogate the white hegemony at the core of the slave-master system. The masters’ property rights in slaves, which the court vigorously protected, completely barred any contrary legal challenges to their dehumanized status. “This resulted in analytical contortions by courts of the period that would be humorous were the legal fictions adopted and suspended not so arbitrarily and predictably used to protect the slave system, usually but not always at the expense of the slaves.”

State v. Mann, an 1829 North Carolina decision, was a classic representation of the judiciary’s role in the tyranny of slavery. In Mann, the defendant was convicted of assault and battery upon a hired slave, Lydia. Lydia, who had run off while being chastised by the defendant for some minor offense, was shot and wounded by the defendant when she ignored his command to stop. On appeal, the Supreme Court of North Carolina reversed the defendant’s conviction and made clear a legal, if not a natural relationship that conferred absolute dominion to masters and imposed total subordination on their slaves.

The end [of slavery] is the profit of the master, his security and the public safety; the subject, one doomed in his own person, and his posterity, to live without knowledge, and without the capacity to make anything his own, and to toil that another may reap the fruits... The power of the master must be absolute, to render the submission of the slave perfect... We cannot allow the right of the master to be brought into discussion in the Courts of Justice. The slave, to remain a slave, must be made sensible, that there is no appeal from his master; that his power is in no instance usurped; but is conferred by the laws of man at least, if not by the law of God.

Northern jurists seldom fared better than their Southern brethren in resolving the moral dilemmas posed by the law. Slavery decisions almost uniformly protected the property interest of slave owners over those of slaves who sought freedom in the courts. While their discretion was limited by the constitutional provisions protecting slavery, many decisions went beyond the constitutional requirements and “even the greatest of

has acquired conventional rights to him, but the laws under which he is held as a slave have not and cannot extinguish his high-born nature nor deprive him of many rights which are inherent in man. Thus while he is a slave, he can make a contract for his freedom, which our laws recognize, and he can take a bequest of his freedom, and by the same will he can take personal or real estate.”

69. See Bell, supra note 1, at 24.
70. State v. Mann, 13 N.C. 263 (1829); Tushnet, supra note 1, at 54-65.
71. Mann, 13 N.C. at 266-67.
72. Bell, supra note 1, at 11.
antebellum jurists who, despite dicta-wringing over the moral evil of slavery, found it necessary to ‘follow the law.’”

With the exception of the District of Columbia where all cases were federal, the federal courts heard relatively few slave cases. Those decided in federal jurisdictions, particularly in the U.S. Supreme Court, tended to support slavery and the rights of slave owners. The Supreme Court provided little leadership on the controversy of slavery. In fact, under the leadership of Chief Justice Roger B. Taney, the Court between 1842 and 1859 issued pro-slavery decisions on questions of fugitive slaves, the rights of free blacks, slavery in the territories and interstate comity that affirmed black inequality and contributed to the sectional conflicts of the 1850s.

Free blacks were also affected by the codes. Slave owners considered freemen undesirable, if not dangerous, examples for their slaves. Their very presence was “an anomaly, a living denial, ‘that nature’s God intended the African for the status of slavery.’” Some Southern states did not permit freemen to visit relatives, and in 1793, Virginia, which had enacted a registration law for free blacks, actually barred their entry into the state. By the 1850s, private manumission was discouraged or prohibited by law in most states, even when it occurred outside of the

73. Id. at 11-12; HALL, supra note 1, at 140-41. See also ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 226-56 (1975), for interesting discussions of judicial responses to slavery.

74. MILLER & SMITH, supra note 1, at 395.

75. See Bell, supra note 1, at 13 for discussion.

76. MILLER & SMITH, supra note 1, at 395; See also, Prigg v. Pennsylvania, 41 U.S. 539 (1842); Jones v. Van Zandt, 46 U.S. 215 (1847); Moore v. Illinois, 55 U.S. 13 (1852); Scott v. Sandford, 60 U.S. 393 (1857); and Ableman v. Booth, 62 U.S. 506 (1859).

77. See PHILLIPS, supra note 3, at 425-53 for descriptions of the lives of free men in both the North and South. Manumission laws also became progressively restrictive. The common practice of emancipating slaves by last will and testament was made invalid by legislation in South Carolina in 1841, and most other Southern states followed with similar prohibitions. See also STAMPP, supra note 2, at 233-36.

78. STAMPP, supra note 2, at 215 (emphasis in the original).

79. 22 VA § 27 (1793) (repealed). Registration required certification of a Negro’s or a mulatto’s name, age, color, stature and whether the registrant was free born or granted emancipation through a court.

80. See INGRAHAM, supra note 3, at 57-58. While laws in the South were more severe, similar exclusions of free immigrants as well as discriminatory restrictions on established residents occurred in the North. PHILLIPS, supra note 3, at 440-41. In some Southern states, the expulsion of free Negroes was sought and if that failed, their re-enslavement ensued. STAMPP, supra note 2, at 216. See PHILLIPS, supra note 3, at 441-47 for discussion of kidnappings and re-enslavements of free Negroes. Notwithstanding restrictions, kidnappings, and other illegal attempts to reduce freemen to slavery, many remained in the South. In 1860, freemen numbered 83,942 in Maryland, 58,042 in Virginia, 30,463 in North Carolina, and a total of 250,787 in the South as a whole. Id. at 445.
state. Southern courts generally construed wills to defeat the masters’ intent to free their slaves post-mortem. In most slave states, blacks were presumed to be slaves and when challenged, they had to produce papers proving they were free at the risk of re-enslavement.

Freemen voted in some of the original Southern colonies, but they were denied the franchise in slave states that entered the Union after the Revolutionary War. Many state laws forbade their carrying arms, possessing liquor, holding meetings without special permission, pursuing certain occupations such as teaching or otherwise competing with whites for jobs.

Although free blacks in the North fared somewhat better than those in the South, they were denied the rights and privileges common to other free men. Emancipation did not equate with freedom or the acceptance of blacks as equals by whites. Many whites, particularly those in the working class who competed with slave labor for jobs, opposed slavery out of self-interest. Several Northern states outlawed slave trading specifically to protect the interest of white workers. After 1800, numerous Northern states barred free blacks the vote. In 1807, New Jersey became the first Northern state to disenfranchise blacks when it limited voting to “free, white, male citizens.” Other Northern states followed, and black suffrage was removed by constitutional amendments, statutes and court decisions.

In most Northern cities, Blacks were segregated and crowded into the poorest slum areas. Living in what Carter G. Woodson called “a sequel of slavery,” their children could not attend public schools with whites and

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82. MILLER & SMITH, supra note 1, at 396.
83. BENNETT, supra note 3, at 109.
84. Virginia’s Act of 1680 on Negro Insurrection was an early example of repressive laws in the South. The Act prohibited Negroes or slaves from carrying arms or leaving the owner’s plantation without a certificate, subject to 20 lashes; lifting up “his hand against any Christian,” subject to 30 lashes; or resisting apprehension after escape, an offense for which “he may be killed.” HIGGINBOTHAM, JR., supra note 1, at 39-40.
85. HIGGINBOTHAM, JR. & BOSWORTH, supra note 8, at 42-48. The authors also discuss the impact that Virginia’s 1793 Registration Act, Ch. 22 VA. STAT. 27 (1793)(repealed), had in limiting black participation in certain occupations.
86. See generally FRANKLIN & MOSS, supra note 3; INGRAHAM, supra note 3; and PHILLIPS, supra note 3 (for discussions that contrast freemen’s conditions in Northern and Southern states).
87. MCMANUS, supra note 37, at 180 citing laws in Connecticut and New Jersey.
89. See, e.g., Hobbs v. Fogg, 6 Watts 553 (Pa. 1837); CONN CONST. of 1818, art. VI; R.I. PUB. LAWS (1822).
were relegated to poorly funded and academically limited “Negro only”
schools. They were, however, required to pay taxes. Free men, unlike
slaves who performed virtually every type of work, could not hold jobs or
conduct businesses in competition with whites. Some who tried were
physically attacked and beaten by whites. Many lost their jobs to newly
arrived white immigrants and by the late 1830s, domestic work was
reported as the main employment open to blacks in the North’s major
cities.

Northern blacks were denied the use of public facilities and places of
public accommodations. Routinely, they were the scapegoats of politicians
and other demagogues who, for political gain and to exploit white
animosities, frequently portrayed them as subhuman miscreants. Between 1829 and 1839, race riots, ominous preludes to the “Draft Riots”
that occurred in 1863, broke out in Cincinnati, Columbus, Detroit, New
York City and Philadelphia.

Alexis de Tocqueville, the Frenchman who toured the United States
in 1831 and published his observations, concluded that blacks faced
ultimate extinction or expulsion. In the North, where segregation rather
than slavery was practiced, de Tocqueville wrote:

[T]he prejudice of race appears to be stronger in the states that have
abolished slavery than in those where it still exists; and nowhere is it so
intolerant as in those states where servitude has never been known . . . .
Thus the Negro is free, but he can share neither the rights, nor the
pleasures, nor the labor . . . of him whose equal he has been declared to
be; and he cannot meet him upon fair terms in life or in death.

Judge Higginbotham, Jr. in his introduction to In the Matter of Color
uses a passage from Huckleberry Finn as a parody of white attitudes to
suggest that as late as 1884, many white Americans still did not perceive
blacks as human beings. Mark Twain wrote:

“Good gracious. Anybody hurt?”
“No’m. Killed a nigger.”
“Well, it’s lucky because sometimes people do get hurt.”

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91. See HIGGINBOTHAM, JR. & BOSWORTH, supra note 8, at 39-41 for discussion of
Virginia’s tax laws that imposed disparate taxation on free blacks. While blacks could not
vote, they were often taxed at rates greater than those paid by whites.
92. McMANUS, supra note 37, at 185.
93. Id. at 187-88.
94. LITWACK, supra note 27, at 100-102.
95. Id. at 65 (citing ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 357 (P. Bradley
ed. 1945)).
96. Id.
97. HIGGINBOTHAM, JR., supra note 1, at 7 (citing MARK TWAIN, THE ADVENTURES OF
HUCKLEBERRY FINN 306-07 (1884)).
Because of the dearth of opportunities for education and employment, most freemen in the urban North lived in stark poverty. So bleak was their existence that in actuality they had merely exchanged one form of bondage for another.