Introduction: "A Crime Against Humanity": Slavery and The Boundaries of Legality, Past and Present

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Nowhere in legal history has the nexus between past and present received more attention in recent years than in the study of slavery. The memory of slavery has become a field of study in itself, and competing histories of slavery have animated contemporary legal and political debates.[1] Today, new histories of capitalism have further illuminated the central role of slavery and the slave trade in building the modern Atlantic world.[2] Across

1. See, for example, Ana Lucia Araujo, *The Politics of Memory: Making Slavery Visible in Public Spaces* (Routledge, 2012); Douglas Hamilton, Kate Hodgson, and Joel Quirk, eds., *Slavery, Memory and Identity: National Representations and Global Legacies* (Routledge, 2012); and Johann Michel, *Devenir Descendant D'Esclaves: Enquête sur les Régimes Mémoriels* [Becoming A Slave Descendant: An Investigation into Memorial Regimes] (Presses Universitaires de Rennes, 2015). See also the works discussed in Ariela J. Gross, "'All Born To Freedom': Comparing the Law and Politics of Race and The Memory of Slavery in the U.S. and France Today," *Southern California Interdisciplinary Law Journal* 21 (2012): 523–60; and Ariela Gross, "The Constitution of History and Memory," in *Law and Humanities: An Introduction*, ed. Austin Sarat, Matthew Anderson, and Cathrine O. Frank (Cambridge University Press, 2010).

2. Recent books include Sven Beckert, *Empire of Cotton: A Global History* (New York: Vintage Books, 2014); Edward E. Baptist, *The Half Has Never Been Told: Slavery and The Making of American Capitalism* (New York: Basic Books, 2014); and Sven Beckert and Seth Rockman, eds., *Slavery's Capitalism: A New History of American Economic*

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Europe, the United Kingdom, Africa, the Caribbean, and the United States, new memorials, museums, and commemorations of slavery and abolition have brought new kinds of public engagement to the slave past.[3] In the era of Black Lives Matter, understanding the connections between that past and the present day has never seemed more important, and historians are struggling with the question of how to engage the present in a historically nuanced way.[4] One kind of engagement between past and present, among historians, lawyers, and activists, has been to draw connections between slavery in the past and in the present.[5]

This symposium issue presents new research on slavery and the slave trade in the Atlantic world in the sixteenth to nineteenth centuries, and explores the connections between the historic institution and slavery in the present day. The articles in this issue thus contribute to the transnational study of slavery and the slave trade, and push legal historical scholarship in new, interdisciplinary directions. The issue brings into dialogue the work of historians of law, slavery, and the slave trade in the Atlantic world, and that of scholars of international law and human rights and memory studies.

Several landmark works have led the way in making these connections. In *The Slave Trade and The Origins of International Human Rights Law*, Jenny Martinez called attention to the history of the international slave trade tribunals as the first international human rights courts.[6] In recent articles, Rebecca Scott has portrayed the construction of "legal" ownership of human beings in the past as involving a kind of legal fiction, giving us a

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Development (University of Pennsylvania Press, 2016). These build on classic works by Eric Williams, *Slavery and Capitalism* (Chapel Hill, NC: UNC Press, 1944); and Barbara J. Solow, *The Rise of The Atlantic System* (Cambridge, UK: Cambridge University Press, 1991).

3. See, for example, in the United States, the new Whitney Plantation Museum and the Gateway to Freedom International Memorial to the Underground Railroad, as well as university initiatives such as the Emory University Conference on Slavery and the University, and the Brown University Steering Committee on Slavery and Justice; in France, the many activities of the National Committee on the History and Memory of Slavery; in the United Kingdom, the International Slavery Museum in Liverpool and the Bicentenary of the Abolition of the Slave Trade in 2007; in Guadeloupe, the Caribbean Center for the Expression and Memory of the Slave Trade and Slavery; and in Ghana, the Cape Coast Castle.

4. See James Grossman, "Again and Again: Historians, Politics, and Public Culture," *Perspectives On History* (Spring 2016) https://www.historians.org/publications-and-directories/perspectives-on-history/may-2016/again-and-again-historians-politics-and-public-culture (last accessed November 8, 2016).

5. Perhaps the leading organization in this effort is Historians Against Slavery, www.historiansagainstslavery.org.

6. Jenny S. Martinez, *The Slave Trade and The Origins of International Human Rights Law* (New York, NY: Oxford University Press, 2011).

definition of slavery that encompasses some forms of exploitation of labor existing today.[7] Historians of the "illegal" slave trade, led by Brazilian scholars, have documented the scope of the movement of human bodies across the Atlantic in contravention of international and national laws.[8] This new work calls into question the sharp distinction between "legal" and "illegal" enslavement, complicates understanding of slavery and the law, and makes possible new connections and conversations among scholars of the past and present.

The Trans-Atlantic Slave Trade, Past and Present

Historians conventionally mark the end of the legal slave trade to the United States in 1808, to the French colonies in 1818, to the Spanish Caribbean in 1820, and to Brazil in 1831 (or 1850).[9] According to this traditional definition, David Eltis estimates that "about 1.5 million Africans—a large number of them children—arrived illegally in the Americas—that

7. Rebecca J. Scott, "Under Color of Law: *Siliadin v. France* and the Dynamics of Enslavement in Historical Perspective," in *The Legal Understanding of Slavery: From the Historical to The Contemporary,* ed. Jean Allain (Oxford, UK: Oxford University Press, 2012), 152–64; Rebecca J. Scott, "'She ... Refuses To Deliver Up Herself as the Slave of Your Petitioner': Émigrés, Enslavement, and the 1808 Louisiana Digest of the Civil Laws," *Tulane European and Civil Law Forum* 24 (2009): 115–36; Rebecca J. Scott, "Paper Thin: Freedom and Re-enslavement in the Diaspora of the Haitian Revolution," *Law and History Review* 29 (2011): 1061–87; and her article in this issue.

8. See, for example, Sidney Chalhoub, *A Força da Escrividao: Ilegalidade e costume no Brasil oitocentista* [The Force of Slavery: Illegality and Custom in Brazil in the Nineteenth Century] (Lisbon, Portugal: Companhia das Letras, 2012); Sidney Chalhoub, "Illegal Enslavement and the Precariousness of Freedom in Nineteenth-Century Brazil," in *Assumed Identities: The Meanings of Race in the Atlantic World,* ed. John D. Garrigus and Christopher Morris (College Station, TX: Texas A&M University Press, 2010): 88–115; Keila Grinberg, "Re-enslavement, Rights and Justice in Nineteenth-Century Brazil," in Mark Lambert, Translating The Americas 1 (2013), https://doi.org/10.3998/lacs.12338892.0001.006 (last accessed November 8, 2016); Keila Grinberg, Re-escravização, direitos e justiças no Brasil do século XIX," in *Direitos e justiças: ensaios de história social,* ed. Silvia Lara and Joseli Mendonça (Campinas: Editora da Unicamp, 2006): 101–28; Beatriz Mamigonian, "Conflicts over the meanings of freedom: The liberated Africans' struggle for emancipation in Brazil (1840s–1860s)," in *Paths to Freedom: Manumission in the Atlantic World,* ed. Rosemary Brana-Shute and Randy J. Sparks (Columbia: University of South Carolina Press, 2009), 235–64.

9. Traditionally, historians downplayed the importance of the 1831 law in Brazil, arguing that 1850 was the relevant date; more recent research has shown the importance of the 1831 law outlawing the trade. See Beatriz Mamigonian and Keila Grinberg, "Para inglês ver? Revisitando a lei de 1831 [Just for Show? Revisiting the Law of 1831]," in *Dossiê da revista Estudos Afro-Asiáticos* [Dossier of the Afro-Asian Studies Journal] (2007): n. 1–3 . None of these dates are without controversy save perhaps the one related to the United States.

is, about 15 percent of the [number of] people who remained alive at the end of the Middle Passage during the whole slave-trade era."[10] During the nineteenth century, the leading slave economies of the world, the United States, Cuba, and Brazil, experienced dramatic economic growth; the price of native-born slaves in these three plantation societies rose quickly, whereas the price of African imports fell. Despite the costs and risks of illegal trading, the incentives were high.

In particular, historians have in recent years excavated a broad network of illegal trading to Brazil, and chronicled the challenges illegally imported enslaved people created for the system of legal slavery, on the one hand, but also for the status of free people of color in Brazil, on the other.[11] The "africanos livres" (liberated Africans) rescued from slave ships by the British were placed under the tutelage of the Brazilian imperial government for 14 year terms of service, after which they had to petition for "full freedom." These proceedings resembled manumission suits in which liberated Africans sought to prove not only that their terms had run out, but also that they were worthy of emancipation.[12] As the British became active in the suppression of the trade, they began to pressure the Brazilian government to treat *all* Africans imported after 1831 as liberated Africans, not only the 4000 or thereabouts who had been seized from slave ships. Sidney Chalhoub chronicles a post-1831 "practice that became increasingly a *customary seigneurial right* during the 1830s, that of randomly and massively enslaving Africans smuggled into the country and their Brazilian-born descendants as well."[13] And Keila Grinberg has shown how often such illegal enslavement found its way into the court system in a rising number of "re-enslavement" lawsuits, in which slaves sued for "maintenance of freedom" or would-be masters sued to regain possession of former or alleged slaves.[14] This work also calls into question the boundary between "legal" and "illegal" trading, depending upon where one fixes the date of the trading ban.

Crossing jurisdictional boundaries put forced migrants under the authority of overlapping and conflicting domestic and international legal regimes, including treaties as well as statutes, codes, judicial cases, and customary practices. Often, this left them without a clear status, subject to competing property claims. Chalhoub argues that illegal enslavement made freedom an increasingly precarious status in nineteenth century Brazil. Beatriz

10. David Eltis, "The Economics of the Illegal Slave Trade" abolition.nypl.org/essays/illegal_ slave_trade (last accessed November 8, 2016). Eltis uses the 1831 date for Brazil.
11. See note 8.
12. Mamigonian, "Conflicts."
13. Chalhoub, "Illegal Enslavement," 88.
14. Grinberg, "Re-enslavement."

Mamigonian suggests that the liberated Africans in Brazil took on an in-between status, "that is, those who were neither slave nor free."[15] Likewise, African "recaptives" in United States custody, those liberated from slave ships near the Cuban coast by the United States Navy, lived in a liminal, stateless condition, detained in government camps and something less than fully free.[16]

One historian in particular, Rebecca Scott, has argued forcefully that the permeable boundary between "legal" and "illegal" enslavement in the Atlantic World complicates understanding of slavery's definition, in the present as well as the past. In several articles, Scott explores the case of Adélaïde Métayer, one of the Saint Domingue refugees who had been emancipated by the legal abolition of slavery in the colony but whose former masters and others tried to claim them as slaves in Cuba and then in New Orleans. Métayer lived as free in Cuba, but once in New Orleans, her former owner's business partner, Louis Noret, claimed her in payment of an alleged debt from the former owner, and seized her, along with her children. As Scott argues, in the attempted enslavement of Métayer, we can see the "*exercise* of one of the 'powers attaching to the right of ownership,'" making ownership appear legal. Hence, she argues, in interpreting the Slavery Convention's definition of slavery as "the exercise of the rights of ownership on a person," courts should not expect to find a "genuine right of legal ownership." If courts look for such a "genuine right," they will "set the bar unrealistically high," comparing contemporary slavery to an imagined past slavery that was self-evidently legal "rather than tangled and contradictory." This attempt at enslavement by prescription, making someone a slave by treating that person as a slave, shows the blurriness of the line between slave and free. In the end, Métayer won her appeal by invoking the doctrine of freedom by prescription, claiming that she was legally free under prior Spanish doctrine because she had lived as free for a specified term of years.[17]

15. See, generally, Grinberg, "Re-enslavement"; and Mamigonian, "Conflicts," 236.

16. See Sharla M. Fett, "Middle Passages and Forced Migrations: Liberated Africans in Nineteenth-Century US Camps and Ships," *Slavery and Abolition* 31 (2010):75–98; Sharla M. Fett, *Recaptured Africans: Surviving Slave Ships, Detention, and Disclocation in the Final Years of the Slave Trade* (Chapel Hill, NC: University of North Carolina Press, 2017); John T. Noonan, Jr., *The Antelope: The Ordeal of The Recaptured Africans in the Administrations of James Monroe and John Quincy Adams* (Berkeley, CA: University of California Press, 1990); and Jonathan M. Bryant, *Dark Places of the Earth: The Voyage of the Slave Ship Antelope* (New York: W.W. Norton & Co., 2015).

17. Scott, "Under Color of Law," 152–64. See also Scott, "Paper Thin"; Scott, "She...Refuses to Deliver Up Herself"; and Jean Allain and Robin Hickey, "Property and The Definition of Slavery," *International and Comparative Law Quarterly* 61 (2012): 915–38.

In addition to the conceptual connections between the history of illegal enslavement and the definition of slavery in international human rights law in the present, there are also substantial historical connections between the prosecution of the illegal slave trade and the development of the international law of human rights in the past. Jenny Martinez has excavated the history of the Courts of Mixed Commission for the abolition of the slave trade as the first international courts of human rights.[18] In the 1830s and 1840s, abolitionists referred to the slave trade as a "crime against humanity," long before this concept was codified in domestic or international law. Martinez argues that these courts set a precedent for the contemporary use of international courts to adjudicate human rights violations, and put into perspective objections to international law based on originalist interpretations of the United States Constitution.[19]

The abolition of slavery has continued to be a central object of international human rights law, throughout the twentieth and into the twenty-first centuries. As several of the articles in this issue chronicle, international law has raised difficult definitional issues when attempting to address the modern problem of slavery and of human trafficking. The leading definitions addressed in this issue include the 1926 League of Nations Slavery Convention, defining slavery in terms of "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised"; the European Court of Human Rights decisions in *Siliadin v. France* and *Rantsev v. Cyprus and Russia*, more recently modified in *C. N. & V. v. France*; the Australian High Court's decision in *The Queen v. Tang*; the Brazilian Constitution's emphasis on "conditions *analogous* to slavery," "degrading conditions of labor," and "debilitating workdays"; and the definitions of human trafficking in the Palermo Protocol, Article 4(a) of the Anti-Trafficking Convention of the Council of Europe, and the 2011 European Union Directive.[20] The 1926

18. Jenny S. Martinez, *The Slave Trade and The Origins of International Human Rights Law* (Oxford University Press, 2012). Keila Grinberg discusses the Rio de Janeiro Mixed Commission Court in "Re-enslavement."

19. For the objections, see Eugene Kontorovich, "The Constitutionality of International Courts: The Forgotten Precedent of Slave-Trade Tribunals," *University of Pennsylvania Law Review* 158 (2009): 75–81; for Martinez's response, see Jenny S. Martinez, "International Courts and The U.S. Constitution: Reexamining The History," *University of Pennsylvania Law Review* 159 (2011): 1069–134.

20. Allain and Hickey, "Property and The Definition of Slavery,"; Leonardo Barbosa, "Behind the Definition of Contemporary Slavery in Brazil: Concepts of Freedom, Dignity, and Constitutional Rights," *Brésil/s* (forthcoming, 2017). Cristina Pixao and Leonardo Barbosa, "Perspectives on Human Dignity (On Judicial Rulings Regarding Contemporary Slavery in Brazil)," *Quaderni Fiorentini* 44 (2015): 1167–84; and Tenia Kyriazi, "Trafficking and Slavery, The Emerging Legal Framework on Trafficking in

Convention emphasizes the property and control aspects of slavery, whereas the trafficking definitions focus more on violations of human rights. However, all of these have come into play as scholars and lawyers attempt to define which aspects of contemporary labor and servitude can be understood as slavery, and what it means for a practice of enslavement to be legal or illegal.

The Three Themes in this Symposium

The articles in this issue illuminate three central themes. First, how is slavery defined? More specifically, how can scholars define slavery in a way that is both broad enough to encompass some practices in the present as well as the past, but not so broad as to dilute the power and efficacy of the term? Should universalist, transhistorical definitions be used, or instead should enslavement be defined through its historical practices and through the practical effects of individuals and communities performing enslavement or freedom?

Second, how is the legality of slavery understood? What makes slavery or the slave trade "legal" or "illegal"? How are the boundaries of slavery/freedom and the legal/illegal slave trade defined? To what extent do a variety of actors define legal norms? What role do international treaties, courts, and conventions play as compared with domestic laws, and how are they shaped by the border crossings of voluntary and forced migrants?

Third, what is, and what should be, the relationship between slavery in the past and in the present, and/or between our narrative of slavery and the slave trade in the past and in the present? What are the problems and possibilities inherent in the uses of analogy and contrast between the present and the past, especially as used by lawyers, historians, politicians, and activists?

All three of these themes implicate international law in particular, as international law and treaties have supplied definitions of slavery, have set the boundaries of legality of the slave trade, and have been an arena for arguing about the relationship between past and present.

The first three articles in the symposium take on the topic of illegal enslavement and the illegal slave trade in the past. Rebecca Scott's article draws attention to the ways that both the status "free" and the status "slave"

Human Beings—Case-law of the European Court of Human Rights in Perspective," *International Human Rights Law Review* 4 (2015): 33–52; Bridgette Carr, Anne Milgram, Kathleen Kim, and Stephen Warnath, *Human Trafficking Law and Policy* (Durham, NC: LexisNexis 2014).

could in practice be effected "by prescription," calling into question a clear line between legal and illegal slavery. Keila Grinberg's essay examines the new "frontiers of enslavement" that were created at the boundaries between states that maintained and those that abolished slavery, in this instance Brazil and Uruguay. Randy Sparks' article documents the extent of United States involvement in the illegal slave trade in the nineteenth century, and the inefficacy of efforts to prosecute smugglers in United States courts.

The next two articles discuss the connections between the contemporary campaign against slavery and the historical slave trade. Jenny Martinez and Lisa Surwillo's article examines the use of the metaphor of "slave traders" employed in the contemporary migrant crisis in the Mediterranean, and other instances of the history of the slave trade as it is used in contemporary law, film, and media representations. Ariela Gross and Chantal Thomas's article critiques some publicists and jurists involved in the contemporary campaign against slavery and in the memorialization of the Atlantic slave trade for the ways in which they draw parallels between the historical slave trade and contemporary conditions. Both articles argue that the analogy may in some instances deflect attention away from the modern legacies of the Atlantic slave trade, and from responsibilities for redress for that particular set of historical abuses. Gross and Thomas recommend instead a framework for understanding the exploitation of vulnerable populations that focuses on reform of immigration and labor law regimes. The concluding article, by Alejandro de la Fuente and Ariela Gross, suggests some of the implications of more complicated definitions of "legal" and "illegal" slavery, and of blurrier boundaries between slavery and freedom, both in the past and in the present.