Introduction

In the summer of 1750, South Carolina colonist Peter Manigault traveled to England to acquire a legal education.[1] At first Peter, the son of wealthy merchant Gabriel Manigault, saw "nothing" in England that he preferred to his "Native Country." However, he quickly changed his mind, throwing himself into the hustle and bustle of eighteenth-century metropolitan life and peppering his father with requests for funds, including money to purchase a gold watch, "a very Necessary Article" in his "present Situation."[2] When he was not sampling the delights of London's social season, he dedicated himself to his legal studies, moving from Bow Street, which was "situated in the very Center of all the bad Houses in Covent Garden," to the Inner Temple. From this convenient location, he frequented the Temple Library and snagged "Bargains" on used law books at sales "about Temple Bar."[3] He also rode the Oxford circuit, an

[1] "Six Letters of Peter Manigault," *The South Carolina Historical and Genealogical Magazine* 15 (1914): 113–123. Peter Manigault was one of many South Carolinians who traveled to England to acquire a legal education in the second half of the eighteenth century. In fact South Carolina colonists sent more sons to be educated in England than any mainland colony in the late colonial period. Some of these students were less dedicated to their studies than Manigault, including Jack Garden, who concluded that "a person can not be a good Lawyer & an honest Man at the same time" and instead became a "Hackney Writer," or Billy Drayton, the son of a famous planting family, who became embroiled in a scandal over dueling. Peter Manigault to Ann Manigault, December 8, 1753, Manigault Papers, 11/275/11, South Carolina Historical Society, Charleston, South Carolina (SCHS).

[2] Peter Manigault to Gabriel Manigault, August 1, 1750, Manigault Papers, SCHS.

[3] Peter Manigault to Ann Manigault, July 20, 1752, Manigault Papers, 11/275/8, SCHS; Peter Manigault to Ann Manigault, September 25, 1752, Manigault Papers, 11/275/8, SCHS; Peter Manigault to Gabriel Manigault, October 18, 1752, Manigault Papers, 11/275/8, SCHS.

"expensive" enterprise that involved not only hazardous travel conditions, but also the tedium of "attending the Courts all day & writing out any Notes in the Evening."[4] Indeed, after making "Notes of all Causes of Consequence that ha[d] been argued" since he arrived in England, after filling his "Law Books" with countless "Remarks and References," and after listening to "very tedious affidavits" at Westminster, Manigault came to the conclusion that "Mirth and Law are incompatible." Thus resigned to the dullness of his chosen profession, he was called to the Bar in 1754 and returned to South Carolina, where he became part of that "Respectable Body of Men, who (provided they are well paid for it) make it their sole Business in this Life, to take care of the Lives & Estates of their Fellow Creatures."[5]

Manigault never lost his distaste for law. Although he did practice in South Carolina for a decade, he ultimately abandoned the profession, selling his books "at 10 per Cent lower than they were bought" because his "Inclination" to quit was "so strong."[6] Nonetheless, Manigault's English legal education continued to provide him with the wherewithal to make a living. Applying his legal expertise to the running of his own plantations and those of absentee South Carolina planters whose affairs he managed, he leveraged his knowledge of English law to ensure his clients the greatest return on their investments in land and, most importantly, slaves. Indeed, as Manigault and other South Carolina colonists were well aware, knowledge of English law was the sine qua non of mastery over slaves. Because slaves were colonists' most significant form of productive property, the ownership of enslaved people made it necessary to acquire at least a rudimentary English legal education. Local statutes provided a legal superstructure that allowed colonists to own, police, and punish slaves, but most daily legal practices surrounding slave ownership were rooted in English precedents and procedures. Colonists categorized slaves as property using English legal terms; they bought and sold slaves with printed English legal forms; and they followed English legal procedures as they litigated over enslaved people in court. They did

[4] Peter Manigault to Gabriel Manigault, October 18, 1752, Manigault Papers, 11/275/8, SCHS; Peter Manigault to Ann Manigault, November 30, 1752, Manigault Papers, 11/275/8, SCHS.

[5] Peter Manigault to Gabriel Manigault, September 27, 1753, Manigault Papers, 11/275/11, SCHS; Peter Manigault to Ann Manigault, September 27, 1753, Manigault Papers, 11/275/11, SCHS; Peter Manigault to Gabriel Manigault, August 18, 1753, Manigault Papers, 11/275/11, SCHS; Peter Manigault to Ann Manigault, February 19, 1753, 11/275/9, SCHS.

[6] Peter Manigault to unknown, [October] 1768, Manigault Papers, 11/278/7, 80, Peter Manigault Letterbook, SCHS.

so not merely out of a desire to emulate metropolitan culture.[7] Rather, English law provided colonists with a discourse and with plural modes of proceeding that aligned with the commercial imperative to treat people as property in a variety of transactions. Slave law was an organic part of, not separate from, English law in colonial South Carolina and throughout plantation America.

***

It is tempting to think of slave law in colonial British America as a legal aberration. Although English people owned slaves and traded them at English ports, England had no statutory law of slavery.[8] Parliament never explicitly authorized the ownership of human beings, nor did the English Crown issue a definitive statement outlining how enslaved people should be treated at law – there was no English equivalent to the Spanish *Siete Partidas* and *Recopilacións*, or the French *Le Code Noir*.[9] This lack of statutory authorization was legally significant. As Lord Mansfield resoundingly claimed in the landmark case of *Somerset v. Stewart* (1772), slavery was "so odious" that it must be grounded in "positive law." Because it was not – because Parliament had never sanctioned chattel slavery, Mansfield concluded, a slave in England could not be detained against his will.[10] Scholars have shown that Mansfield's holding in *Somerset* was narrow in its application.[11] Nonetheless, his assertion has

[7] Robert Olwell, *Masters, Slaves, and Subjects: The Culture of Power in the South Carolina Low Country, 1740–1790* (Ithaca: Cornell University Press, 1998), 60–61; Christopher Tomlins, *Freedom Bound: Law, Labor, and Civic Identity in Colonizing English America, 1580–1865* (Cambridge: Cambridge University Press, 2010), 450–451.

[8] The custom of English merchants was to regard slaves as chattel property until they were sold. Moreover, English courts occasionally grappled with issues relating to slavery, including whether trover would lie for slaves as if they were chattels (courts initially held that it would), and whether assumpsit might be brought on the sale of a slave in England (no, but it would for the sale of a slave in Virginia). Additionally, "[s]laves were regularly sold on the Liverpool and London markets, and actions on contracts concerning slaves were common in the eighteenth century." J. H. Baker, *An Introduction to English Legal History*, 4th ed. (London: Butterworths Lexis Nexis, 2002), 475–477.

[9] Jonathan A. Bush, "Free to Enslave: The Foundations of Colonial American Slave Law," *Yale Journal of Law & the Humanities* 5 (2003): 422; Sally E. Hadden, "The Fragmented Laws of Slavery in the Colonial and Revolutionary Eras," in *The Cambridge History of Law in America*, edited by Michael Grossberg and Christopher Tomlins, 3 vols. (Cambridge: Cambridge University Press, 2008), 1: 259–260.

[10] *Somerset* v. *Stewart* (1772) 98 Eng. Rep. 499, 510.

[11] J. H. Baker cautions that *Somerset* – frequently misread by historians – did not specifically outlaw slavery in England, primarily because Lord Mansfield confined "himself to the narrow point that a slave could not be made to leave England against his will." Baker, *An*

left us with a lingering impression that "there was no slave law in England" and therefore that slave law developed apart from early modern English law.[12] From this presumption springs a portrait of legal deviance, of plantation colonists who warped English law to police their slaves, and of self-conscious slaveholders who became increasingly conflicted about the extent of their society's legal divergence from metropolitan norms over the course of the eighteenth century. By the early nineteenth century, according to historians, their strident defense of slavery masked an acute anxiety over treating people as things and hid a fractured system that was increasingly vulnerable to outside critiques and enslaved people's resistance.[13]

In *Bonds of Empire*, I follow South Carolina colonists of all sorts, from wealthy merchant-planters to illiterate sailors, as they used English law to maximize the value of the people they treated as property. I also place their activities in a larger Atlantic context, attending in particular

Introduction to English Legal History, 475–477. Elsa V. Goveia's reading of *Somerset* is, like Baker's, narrow. Indeed, according to Goveia, it was not because English law failed to recognize slavery that Somerset was freed, but due to "the lack of the superstructure raised on this basis." Prior to and after *Somerset*, "slaves were taken to and from England, as the case of the slave Grace shows; and so long as they did not refuse to serve, as Somersett did, it may be said that they remained property and did not become subjects in fact, though in theory this change was supposed to take place on their arrival in England." Elsa V. Goveia, "The West Indian Slave Laws of the Eighteenth Century," in *Caribbean Slavery in the Atlantic World: A Student Reader*, edited by Verene A. Shepherd and Hilary McD. Beckles (Kingston, Jamaica: Ian Randle, 2000), 584. See also George Van Cleve, "Somerset's Case and Its Antecedents in Imperial Perspective," *Law and History Review* 24 (2006): 602–603.

[12] Alan Watson, *Slave Law in the Americas* (Athens: University of Georgia Press, 1989), 62. An older historiography assumed *arguendo* that there was no English law of slavery, largely because England lacked a statutory framework that either authorized slavery or provided for the policing of slaves. Alan Watson, for example, begins his study with the premise that "[t]here was no slavery in England, hence there was no slave law in England." Indeed, "a law of slavery had to be made from scratch." *Ibid*., 62. More recently, historians have begun to challenge this characterization. For example, Elsa V. Goveia argues that under both West Indian and English laws, "trading in slaves was a recognized and legal activity. Under both, there were provisions for regulating the mortgage of slaves and obliging their sale as chattels in cases of debt. This point is worth stressing. The idea of slaves as property was as firmly accepted in the law of England as it was in that of the colonies." Goveia, "The West Indian Slave Laws of the Eighteenth Century," 584.

[13] An older literature that suggested slavery became less economically viable over the course of the colonial period has been thoroughly debunked. See Kenneth Morgan, *Slavery, Atlantic Trade, and the British Economy, 1660–1800* (Cambridge: Cambridge University Press, 2001); Trevor Burnard, "'Prodigious Riches': The Wealth of Jamaica before the American Revolution," *The Economic History Review*, new ser. 54 (2001): 506–524.

to Jamaica and other Caribbean colonies. Emphasizing legal practice rather than proscription, I offer a different narrative, one in which English law imbued plantation slavery with its staying power even as it insulated slave owners from contemplating the moral implications of owning human beings. Rather than describing a system destined to collapse under the weight of moralist critiques in an Age of Revolutions, I depict a legal culture of astonishing flexibility that emerged unscathed at the dawn of the new republic.[14] In fact, following plantation colonists as they cobbled together legal systems from the bottom up reveals that they engaged in the same practices of creative legal adaptation that scholars have observed in English colonial settlements around the world, from Bombay to Botany Bay. American slave owners were participants in a wider English legal culture, one in which settlers harnessed English law's astonishing flexibility to establish their societies at the expense of enslaved people and indigenous populations. Despite our tendency to conflate English legal and political institutions with liberty, the extension of English law into imperial spaces was not an unequivocal good; from India to Ireland to Australia, English law was a ready vehicle for dispossession and exploitation. Plantation slavery and the laws that governed it were not beyond the pale of English imperial legal history. They were yet another invidious manifestation of English law's protean potential.[15]

[14] This perspective supports and extends scholarship that depicts colonial Lowcountry planters as "calculative participants" in a transatlantic economy, as intelligent market actors who zealously pursued profit maximization. S. Max Edelson, *Plantation Enterprise in Colonial South Carolina* (Cambridge: Harvard University Press, 2006), 5; David W. Galenson, *Traders, Planters, and Slaves: Market Behavior in Early English America* (Cambridge: Cambridge University Press, 1986), 1. Also, it links with recent early republic and antebellum scholarship that characterizes planters as capitalist modernizers who were not immune to larger economic and cultural trends. Joyce E. Chaplin, *An Anxious Pursuit: Agricultural Innovation & Modernity in the Lower South, 1730–1815* (Chapel Hill: University of North Carolina Press, 1993); Michael Tadman, *Speculators and Slaves: Masters, Traders, and Slaves in the Old South* (Madison: University of Wisconsin Press, 1989); Walter Johnson, "The Pedestal and the Veil: Rethinking the Capitalism/Slavery Question," *Journal of the Early Republic* 42 (2004): 299–308; Steven Deyle, *Carry Me Back: The Domestic Slave Trade in American Life* (Oxford: Oxford University, 2005); Calvin Schermerhorn, *Money over Mastery, Family over Freedom: Slavery in the Antebellum Upper South* (Baltimore: Johns Hopkins University Press, 2011).

[15] For recent work on the impact of English legal plurality in colonial environments, see Tomlins, *Freedom Bound;* Lauren A. Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400–1900* (Cambridge: Cambridge University Press, 2009); Ken MacMillan, *Sovereignty and Possession in the English New World: The Legal Foundations of Empire, 1576–1640* (Cambridge: Cambridge University Press, 2006); and

THE PROBLEM WITH MANSFIELD

When Lord Mansfield opined on the primacy of positive law in *Somerset v. Stewart*, he did so at a historical moment in which legislation was in the ascendant. Throughout the early modern period, as Parliament morphed from an event into an institution, statutes became an increasingly significant source of English law and ultimately eclipsed other sources of binding legal authority. This trend began with the English Reformation, as King Henry VIII sought to ground his ecclesiastical authority in statute and continued through the eighteenth century, when most Britons conceded Parliamentary sovereignty.[16] This pattern also held in the American colonies and in the independent United States, where positive law has retained its importance into the twenty-first century. After all, when a modern-day American asks what "the law" is, they likely expect to receive a substantive answer, one based upon information gleaned from local or federal statutes. This conflation of "law" with legislation is understandable, but it was not always the case. In fact, in the early modern period (as well as today), law was much more complex and multifaceted than this emphasis on statutory law suggests. Legal historians have done much to promote this perspective, dispelling older assumptions about what law was and how people engaged with it throughout history. Rather than viewing law as something separate from society, scholars now see it as deeply imbricated within the very fabric of past societies. This broader definition of legal culture has had profound consequences for the study of legal history, freeing scholars to understand "the legal"

Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788–1836* (Cambridge: Harvard University Press, 2010).

[16] As Mark Knights notes, Parliamentary elections were held frequently after 1679. There were "sixteen general elections" between that date and 1716, and these elections were increasingly contested. "After 1689, there were sessions every year without fail," which in turn resulted in an increase in legislation. Between 1660 and 1688, "parliament passed on average about 26 statutes per session; between 1689 and 1714 this rose to 64 per session." Mark Knights, *Representation and Misrepresentation in Later Stuart Britain: Partisanship and Political Culture* (Oxford: Oxford University Press, 2005), 11–12. Justices of the Peace increasingly found their duties enumerated in statutes, and judges were "manifestly being discouraged from the creative exegesis they had bestowed on medieval statutes" as statutes became longer, and preambles became more specific. To complicate matters further, this sixteenth-century growth of legislation also can be attributed to a more amorphous but important shift in *mentalité*, as "humanist legislators confident in their ability to improve things by the right use of power" sought to shape society through statutes. And emphasis on the importance of positive texts was both driven by and contributed to significant changes in printing technology. Baker, *An Introduction to English Legal History*, 207.

much more broadly and therefore to tap underutilized sources to great effect. Whereas legal historians once focused solely upon narrow doctrinal disputes, statutes, or judicial opinions, we now peer past the sovereign-as-lawgiver and attend to how law shaped the lives of everyday people and how they, in turn, shaped law.[17]

Applying these insights to early modern England, scholars have already begun to uncover a legal culture that was much messier but infinitely more interesting than a fixation with statute implies. Law in early modern England "was a layered and hybrid affair, resting on multiple constitutional foundations and constantly negotiated."[18] It was astonishingly varied from a procedural as well as an institutional perspective. Parliamentary statutes, of course, were an important source of legal authority, but so too were proclamations, charters, and letters patent. English men and women also engaged in a variety of legal transactions that historians can never quantify: they made contracts and executed bonds; they bought and sold merchandise; they made wills and gave inter vivos gifts to sons and daughters. In fact, these quotidian activities are difficult to trace and recreate precisely because they were so commonplace.

Although much of law's daily business never saw the inside of a courthouse, a hodgepodge of courts also dotted early modern England's crowded jurisdictional landscape. These legal institutions proceeded in distinct ways and grounded their authority in different sources.[19] From the central courts at Westminster, to Vice Admiralty Courts, to ecclesiastical courts, to manor courts, each of these jurisdictions had its own rules, vocabularies, and practices, which in turn shaped the behavior of litigants who came to them for remedies. Adding layers of jurisdictional complexity, other institutions exercised judicial power in addition to executive and legislative functions. Parliament, the Privy Council, and the Council of the Marches and Wales, for example, also acted as judicial bodies on specific occasions. Moreover, corporate entities

[17] Hendrik Hartog, "Pigs and Positivism," *Wisconsin Law Review* 4 (1985): 934.

[18] Phillip J. Stern, *The Company State: Corporate Sovereignty and the Early Modern Foundations of the British Empire in India* (Oxford: Oxford University Press, 2012), 10.

[19] As J. H. Baker has noted, "we have made an error if we have treated the history of the common law solely as a history of decided cases. There is a whole world of law which never sees a courtroom." J. H. Baker, "Why the History of English Law Has Not Been Finished," *Cambridge Law Journal* 59 (2000): 78. Amy Louise Erickson, *Women and Property in Early Modern England* (London: Routledge, 1993), 5; Tomlins, *Freedom Bound*, 188.

like the East India Company ran Company courts as part of a broader exercise of their corporate "statehood."[20] Jurisdiction – the power to "speak law" – resided in many places and spoke in many competing voices in the early modern English world.

In this pluralistic jurisdictional landscape, legal procedure was often more significant than substantive law. This, in turn, owed much to the early development of English common law, which coalesced around a set of formal procedures and rules administered by the king's central courts in Westminster. Among the most important of these was the writ system, which gave litigants access to remedies in the Court of Common Pleas and the Court of King's Bench. Plaintiffs who sought relief in these new royal courts were first required to purchase a writ, which "worked like a pass admitting suitors to the kind of justice for which they had paid." Although there were a number of different writs that were used in various circumstances, what is important for our purposes is that the formulae of the writs were "frozen" in place in the thirteenth century and remained so until Parliament ushered in a series of sweeping legal reforms in the nineteenth century. A plaintiff who sought a remedy at common law therefore could not "concoct" a new writ to suit the facts of a case but was required to fit his complaint within a preexisting writ form.[21] As a practical matter, this was important because it meant that "remedies were only available, to the extent that appropriate procedures existed to give them form." Legal procedure acted as a barrier to entry and shaped the trajectory of litigation from start to finish, and this ultimately "gave rise to a formalistic legal culture which affected legal thought at every turn." As a result of this reification of form, early modern litigants, judges, and lawyers did not think of "law" as a creature of substance, as we do. Rather, they encountered "law" first and foremost as a creature of procedure.[22] For John Rastell, writing in the sixteenth century, this meant that law was as much a verb as it was a noun. "Law," he explained, was "when an action of debt is brought against one."[23] Contrast this definition with William Blackstone's perspective nearly two centuries later. When the first Vinerian Professor of English law penned his *Commentaries on the Laws of England*, he defined law as "a science,

[20] Stern, *The Company State*, passim.
[21] Baker, *An Introduction to English Legal History*, 55–56. [22] *Ibid.*, 53.
[23] John Rastell, *Les Termes de la Ley: Or, Certain Difficult and Obscure Words and Terms of the Common and Statute Laws of England, Now in Use, Expounded and Explained* (Boston: Watson and Bangs, 1812), 277.

which distinguishes criterions between right and wrong." Blackstone's definition conforms more closely to the vernacular understanding of law today, but it was itself the product of centuries of evolving legal thought rather than an inevitability.[24] Before Blackstone, early modern participants in English legal culture understood it first and foremost as performative and procedural.

In a world in which "law" was an action rather than an object, early modern litigants transformed legal procedure into a site of innovation. Although the common law writ system was rigid in form, clever litigants, advocates, and judges learned to work within its confines in order to accomplish their particular legal goals. They found ingenious ways to jump the writ system's barrier to entry by making new facts fit old forms. Legal fictions were a particularly useful tool in this regard. For example, early modern attorneys fine-tuned the fictitious "Bill of Middlesex," which allowed them to sue in debt in the Court of King's Bench without a writ.[25] The point of this complicated dodge was to allow a plaintiff to seek a remedy at common law, but without the constraints of the traditional forms of action. Instead, the plaintiff could initiate suit with a bill, which was a petition to the court setting out the facts of the case and demanding relief. More "convenient" for litigants, bill procedure allowed plaintiffs to bring multiple claims before the court simultaneously. Bills also were open-ended, unlike highly formulaic writs, and this gave litigants ample room to expand upon their many grievances.[26] The availability of the Bill of Middlesex in King's Bench, then, attracted business to the court, where the number of lawsuits "rose as much as tenfold" between 1560 and 1640.[27] Indeed, early modern litigants were savvy forum shoppers, preferring to sue in jurisdictions that offered the most advantageous procedures at the lowest cost. Judges, in turn, encouraged this by actively supporting procedural innovations that would "win back the patronage of litigants" from other jurisdictions and therefore increase their fees.[28] For example, in the sixteenth century, the central courts at Westminster all engaged in "an internecine struggle for business" by streamlining their procedures.[29] Two centuries later, Lord Mansfield himself attempted to drum up business for King's Bench when he allowed "actions on the case to enforce informal promises and negotiable

[24] Sir William Blackstone, *Commentaries on the Laws of England*, 4 vols. (Chicago: University of Chicago Press, 1979), 1: 27.
[25] Baker, *An Introduction to English Legal History*, 42. [26] *Ibid.*, 41. [27] *Ibid.*, 43.
[28] *Ibid.*, 40. [29] *Ibid.*, 41.

instruments of credit," which other jurisdictions would not do.[30] By tweaking procedures that no longer seemed relevant in an increasingly commercial society, Mansfield responded to the needs of litigants who wanted courts to recognize handshake deals and newer systems of monetary exchange. Like countless legal actors before him, he worked within the confines of extant procedures, creatively adapting them to meet the needs of legal consumers.

AN ENGLISH LAW OF SLAVERY

As colonists sought to impose order upon New World societies, they drew on an English legal culture characterized by diversity, not uniformity, one in which legal change occurred at the level of procedure. *Bonds of Empire* shows that this was as true in plantation societies organized around slave labor as it was in Massachusetts, Nova Scotia, or Delhi. Slave law was a natural extension of England's hybrid, improvisational legal system rather than an outlier. This idea that the legal practices of slavery were normative only becomes apparent, however, when we loosen the grip of positive law on our legal imaginary. Scholars – taking a cue from Mansfield – have conflated the law of slavery with the slave codes promulgated by colonial assemblies.[31] Cobbled together on an ad hoc basis, these statutes are among our only prescriptive sources for understanding the development of plantation legal regimes. Primarily comprised of criminal and policing provisions, they reveal how colonists erected an apparatus of legal terror to support white supremacy and promote their economic interests. They were bloody and punitive, prescribing tortuous punishments for alleged legal infractions while at the same time stripping enslaved people of the rights that English men and women had come to expect as their birthright. Occasionally, such laws attempted to set standards for the ways in which masters were to treat those they enslaved in the hopes of forestalling violent reactions. Recently, scholars have used slave codes to document the manifold ways in which slaves resisted their captivity and to highlight moments in which whites reckoned with their

[30] David Lemmings, *Professors of the Law: Barristers and English Legal Culture in the Eighteenth Century* (New York: Oxford University Press, 2000).

[31] David Barry Gaspar, "'Rigid and Inclement': Origins of the Jamaica Slave Laws of the Seventeenth Century," in *The Many Legalities of Early America*, edited by Christopher L. Tomlins and Bruce H. Mann (Chapel Hill: University of North Carolina Press, 2000), 78–96; William M. Wiecek, "The Statutory Law of Slavery and Race in the Thirteen Mainland Colonies of British America," *WMQ* 34 (1977): 266.