ADVANCE SHEET– APRIL 2, 2021

President's Letter

In this issue we present a notable article by our Board Member John Connolly on the law of slavery in Maryland, one of the most detailed explorations extant of the details of this subject, about which there are many facile generalizations. Readers might want to look at a comprehensive bibliography of the subject on a national level, which John Connolly's work renders obsolete as to Maryland, https://www.amazon.com/Slavery-Courtroom-Annotated-Bibliography-American/dp/188636348X.

Our second article deals with the subject, important to Baltimore City, of youth unemployment. The transition from school to work of teenagers, particularly male teenagers, was a much discussed subject during the Progressive Era, giving rise to several of the writings of Baltimore's Mary Ellen Richmond, the leading American social worker of her time included in an anthology of her writings *The Long View* (Russell Sage Foundation, 1930). It also gave rise to the Y.M.C.A. movement, far more important in the Edwardian era than in ours. One of its manifestations was a famous article by the Philosopher William James on *The Moral Equivalent of War* (1906) which we reprint here. Neil Maher, a speaker at the Bar Library, states without citation in his book on the Civilian Conservation Corps that Franklin Roosevelt denied having read James' essay before proposing that agency and its predecessors in New York State; others believe that it had an influence on the climate of opinion that made these agencies possible. The compulsory nature of James' scheme rendered it anathema to thoughtful American conservatives; Robert Taft vehemently and successfully opposed proposals in 1944-47 for the conscription of labor, universal military training, and the conscription of strikers. But the CCC was a successful voluntary program, its approach not discredited by the maladministered and inappropriately targeted Job Corps of Lyndon Johnson and Americorps of Bill Clinton.

Our judicial opinion in this issue, the dissenting opinion of Justice Wiley Rutledge in *In re Yamashita*, 327 U.S.1 (1946) was suggested in a conversation with the late Judge Bryan Beaumont, former Chief Justice of Australia, who pronounced it to be his favorite judicial opinion. Justice Rutledge was appointed to the Supreme Court despite Felix Frankfurter's campaign on behalf of FDR using Hand's age, rather than his less reliable liberalism as an excuse for his nonappointment. Rutledge died of a stroke at the age of 51 after only six years on the court, according to Justice Jackson because of over-work; Hand outlived him by several decades. His Yamashita opinion, joined only by Justice Frank Murphy, is nonetheless a classic discussion

of the fundamentals of due process, rendered more impressive against the background of the passions of the time.

George W. Liebmann

Living In The Past?

Although my wife and I do not watch an inordinate amount of television, what we do watch is an episode of four shows we like once a week. Our schedule is Monday – *The Invaders* (1967-1968); Tuesday – *The F.B.I.* (1965-1974); Wednesday – *Checkmate* (1960-1962) and Friday – *Jake and the Fatman* (1987-1992). Previous shows included *77 Sunset Strip* (1958-1964) and *Tales of the Gold Monkey* (1982-1983). The d.v.d. player in our house does in fact get a lot of use. So you see, even though our shows are thirty to sixty years old, we are sort of living in the present, even though the humble d.v.d. is rapidly making its way to the back of the technological line on its own trip to becoming a thing of the past.

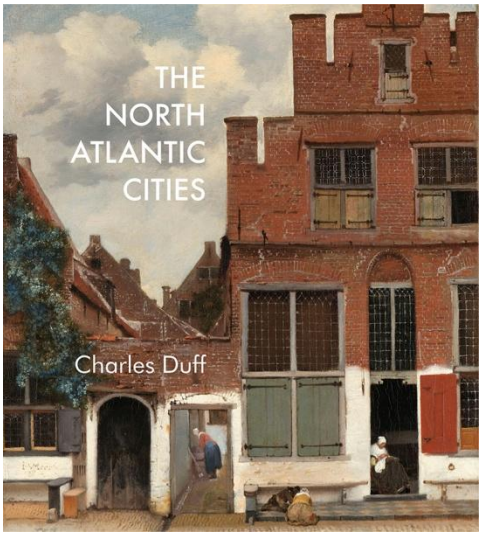
The Bar Library was of course here when all of these shows were in first run. It was here before television itself, as well as radio, movies and Messieurs Guglielmo Marconi and Thomas Alva Edison. Far from being a thing of the past, however, the Library remains, as it were, "must see t.v."

The key to success is to change, not just for the sake of change, but to improve, not just to stay current with the times but in some ways ahead of them. A massive collection of Westlaw databases, accessible not just from Library terminals but from your very laptops (inside the Library), is currently available for your viewing enjoyment. Other top ten hits include the e-mailing of material not just from Library treatises, but from on-line databases; the loaning of material for use in member offices; the M.V.A. search service; Zoom presentations featuring judges, lawyers and scholars from around the country; and the Library *Advance Sheet* featuring scholarly and thought provoking articles. First and foremost, the Library listens to what you have to say. We are, in fact, an "interactive technology." You would like us to purchase a certain treatise; add a Westlaw database; look into sponsoring an event or speaker as part of the Library lecture series, more often than not, we will.

Nat King Cole once sang about a man who was "old at thirty-three." Well, although I am not going to sing, I am happy to say that the Library is in fact "young at 181."

Take care, stay well, and I look forward to seeing you soon.

Joe Bennett



The North Atlantic Cities

On Wednesday, April 21, 2021, at 6:00 p.m. Charles Duff will speak on his book *The North Atlantic Cities*. The lecture will be presented by way of Zoom. We invite those that will be watching to participate by contributing their questions. Zoom is an interactive platform.

Charles Duff is a planner, teacher, developer, and historian. He combines scholarship with practical work as a developer and a community planner. Since 1987, as President of Jubilee Baltimore, he has built or rebuilt more than 300 buildings in historic Baltimore neighborhoods. Known as an expert in historic architecture and urban history, he has also pioneered in the development of residential and commercial buildings for artists and arts organizations. A graduate of Amherst College and Harvard University, he studied at St. Andrews University in Scotland and has walked every city and neighborhood to which he refers. He is a past President of the Baltimore Architecture Foundation and has served on the boards of many community and professional organizations. He lectures widely and has taught at Johns Hopkins and Morgan State Universities. Mr. Duff co-wrote *Then and Now: Baltimore Architecture* in 2005, contributed to *The Architecture of Baltimore,* and has translated two books about the tragedies of Sophocles.

Why do London and Baltimore have row houses while Paris and Houston do not? This was the question that led Charles Duff to explore the world's row house cities, a remarkable group of cities in four nations, and find that they form an urban family, bound together by architecture, commerce, and politics for more than 400 years. The result is *The North Atlantic Cities*. A loving but critical portrait, it starts in Amsterdam in 1600 and ends in the present. It covers Dutch, British, Irish, and American cities that house more than 100 million people. Baltimore figures prominently, as do London, Amsterdam, Dublin, and many other cities.

The North Atlantic Cities, a work of lively prose and 180+ pictures, provides a wonderful window for us to watch as the North Atlantic cities grow, become beautiful, and invent many of the things we take for granted today: parks, mass transit, downtowns, even suburbia. These are great stories, well told and well illustrated.

If you would like to join us for what should be a fascinating evening, please e-mail me at **jwbennett@barlib.org** and I will forward the **Zoom Link** to you the week of the program. If technology is not your cup of tea, do not let that stop you. Zoom is incredibly easy to use and we will send you the very simple instructions to use Zoom should you need them. Stay safe and we hope to see you with us on April 21.

Time: 6:00 p.m., Wednesday, April 21, 2021.

Reviews of *The North Atlantic Cities*

"It has been some time since I enjoyed a book so much, one that takes a topic that spans 400 years, 4000 miles, and 20 cities, and still manages to drive home a clear and simple point. The only other book I've read that accomplished such a marvelous feat was Jared Diamond's *Guns, Germs, and Steel."*

Bruce Laverty, Gladys Brooks Curator of Architecture, Athenaeum of Philadelphia

"Charles Duff's story is elegantly constructed around the principal features and innovations of a family of great cities. These cities have a very special character. Duff helps the reader to understand what they are, how they came to be, and what they should do next. Above all, he has a remarkable ability to help a reader *see* streets, squares, buildings, and ports – and see them as a physician might, with a view to their well-being, or the weakening of it."

Orest Ranum, Johns Hopkins University

"Duff loves cities, Glasgow, Delft, and Dublin, say, and even more likes to visit them. He speaks of Hampstead Garden Suburb (North London) as he does Highlandtown [Baltimore]. He is full of insights, and is amazing that he has been able to compress so many of them within these pages."

Jacques Kelly, Baltimore Sun

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RACIAL LAWS IN MARYLAND 1776-1864
(and what they mean for me)

by John J. Connolly†

For Maryland's first 88 years as a state, slavery and other forms of race-based oppression were lawful. Racial oppression was not merely tolerated; it was public policy, written into numerous acts of the General Assembly and protected by the state constitution. Not until 1864, deep into the Civil War, did a new state constitution abolish slavery in Maryland,[1] followed the next year by repeal of most of the "Negroes" article of the Code of Public Laws.[2] By then, racism had been baked into the brick and mortar of the state's governing institutions. Decontamination efforts would continue for generations, often impeded by less blatant forms of oppressive laws enacted long after emancipation. But the openly racist laws in force during the slavery era reflect public policy as the new state formed its governing institutions and practices. They present the clearest expression of the teleology of state-based racial discrimination—its objectives, practices, justifications, and incoherencies.

It may be painful to exhume these laws and display them to a modern audience. Virtually everyone today would stipulate that slavery-era laws were appalling, but many also would consider them anachronistic and irrelevant. Yet the nation's recent racial awakening has demonstrated the long tail of racist practices such as voter suppression, property redlining, employment and housing discrimination, educational inequities, and disparities in criminal enforcement. Scholars, journalists, and truth-and-reconciliation commissions have exposed these inequities in a growing body of work.[3] One purpose of these studies is to restructure the current generation's understanding of what it means to be an American. The idea is that the nation will never achieve racial equality until the populace

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† Private practitioner in Baltimore, Maryland. Views expressed herein are solely the author's in his personal capacity. Please send comments to connoljohn@gmail.com.

[1] Md. Const. (1864), Decl. Rts. Art. 24 ("That hereafter, in this State, there shall be neither slavery nor involuntary servitude, except in punishment of crime, whereof the party shall have been duly convicted; and all persons held to service or labor as slaves, are hereby declared free.").

[2] See 1865 Md. Laws ch. 166; see also Md. Code (1860) art. 66 ("Negroes"); cf. Md. Code (1860) art. 30 §§ 146-150, 153-154, 174-180, 194-200 (criminal provisions applicable to Blacks and slaves).

[3] E.g., The 1619 Project, N.Y. Times Magazine (Aug. 18, 2019); Ta-Nehisi Coats, *The Case for Reparations*, The Atlantic (June 2014).

recognizes the scope of prior inequality and its enduring effects on Blacks in particular.

If that is true, then it is worth examining the original laws that laid the foundation for racism and racial oppression. Maryland, a border state both geographically and philosophically, provides an intriguing specimen. Its racial laws reflect a tortured internal dialogue, akin to a slaveholder struggling to suppress occasional eruptions of conscience.[4] From Maryland's formation in 1776, slaves co-existed with a number of "free" Blacks, small at first but eventually becoming the largest cohort in the land.[5] This is not to say that free Blacks were welcomed; on the contrary, during the slavery era Maryland founded and for 20 years operated its own colony in west Africa, whose ostensible purpose was to resolve the "Negro problem" in the state by encouraging if not compelling free Blacks to emigrate. Notwithstanding these efforts, by the time slavery was abolished in 1864, slaves and free Blacks were about evenly divided in Maryland and together comprised one-quarter of the state's population.[6] "Free" did not mean "equal to whites" or anything close, but it did mean that by 1860 about 85,000 Black Marylanders were legally classified as people while another 85,000 with the same skin color were legally classified as property.

How could the ruling classes reconcile such starkly disparate treatment among people with the *same* skin color? Indeed, given the frequent instances of enslaved persons becoming free – and vice versa – how could Marylanders reconcile such disparate treatment of the same *person*? This article attempts to answer those questions by focusing chiefly on Maryland law and legislative policy.

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[4] See, e.g., An address delivered by John H.B. Latrobe, President of the American Colonization Society, at the anniversary meeting of the Massachusetts Colonization Society (May 25, 1853). Latrobe was one of Maryland's leading citizens in the Nineteenth Century and a founder and president of the Maryland State Colonization Society as well as a president of the American Colonization Society.

[5] See Md. State Archives Online, Legacy of Slavery in Maryland (available at: http://slavery.msa.maryland.gov/html/research/census1790.html) (reporting numbers from 1790 U.S. Census); see generally James M. Wright, The Free Negro in Maryland, 1634-1860, at 94-95 (1921).

[6] See Md. State Archives Online, Legacy of Slavery in Maryland (available at: http://slavery.msa.maryland.gov/html/research/census1860.html) (reporting numbers from 1860 U.S. Census).

Background

Maryland's first constitution in 1776 provided that all acts of assembly in force on June 1, 1774, would remain binding.[7] As a result, a line of racial laws enacted by the provincial government – effectively by Great Britain – became the law of the new state of Maryland. Thus, although scholars have debated how British common law treated slavery, in Maryland one major question was settled in 1664, when the provincial General Assembly decreed that all "Negroes or other slaves … shall serve Durante Vita"[8] (*i.e.*, for life), and that the children of slaves would also be slaves for life. These "durante vita" laws, re-enacted and embellished in subsequent provincial acts,[9] meant that the state of Maryland was born with a legal presumption that Blacks were slaves.[10]

Many of the criminal laws incorporated by the new state were grossly inhumane. In 1723, the General Assembly enacted a comprehensive law "to prevent the tumultuous Meetings, and other Irregularities of Negroes and other Slaves."[11] The law required constables to search their local jurisdictions for "Negroes or other Slaves" who were away from their overseers without a license, and "to whip every such Negro on the bare Back, at his Discretion, not exceeding Thirty-nine Stripes." No judicial process was required. A Negro who struck a white person was punished by ear-cropping.[12]

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[7] See Md. Const. (1776), Decl. Rts. art. 3.

[8] An Act Concerning Negroes & other Slaues (Sep. 6, 1664).

[9] See 1715 Md. Laws ch. 44 ("all Negroes and other Slaves Already Imported or hereafter to be Imported in this province and all Children now born or hereafter to be born of such Negroes and Slaves shall be Slaves during their naturall lives"); id. ("no Negroe or Negroes by receiving the holy Sacrament of Baptism is hereby Manumitted or sett free nor hath any right or title to freedom or Manumission more than he or they had before any Law usage or Custome to the Contrary Notwithstanding").

[10] *See* Ross M. Kimmel, *Blacks before the Law in Colonial Maryland*, Ch. 3 (1974); Colored Population of Maryland, Niles' National Register 215-16 (Dec. 4, 1841) ("In our state we have a species of servant not known in England, and which therefore is peculiarly regulated by our own laws.").

[11] 1723 Md. Laws ch. XV.

[12] Id. The ear-cropping penalty in the 1723 act was repealed in 1821, see 1821 Md. Laws ch. 240, but other statutes that allowed ear-cropping were not repealed at that time. Many of these laws were enacted in part to restrain even more severe private punishments meted out by slaveowners and overseers. See C. Ashley Ellefson, The Private Punishment of Servants and Slaves in Eighteenth-Century Maryland (2010). Macabre punishments at the time were not limited to slaves or Blacks, but more such laws applied to them. Compare

A 1729 act "for the more effectual Punishing of Negroes and other Slaves" began by reciting that several "cruel and horrid Murders, have been lately committed by Negroes … because they have no Sense of Shame, or Apprehension of future Rewards or Punishments."[13] The law provided that "any Negro, or other Slave" convicted of "Petit-Treason, or Murder, or wilfully Burning of Dwelling Houses," could be sentenced "to have the Right Hand cut off, to be Hanged in the usual Manner, the Head severed from the Body, the Body divided into Four Quarters, and Head and Quarters set up, in the most public Places of the County where such Fact was committed."[14]

In 1751 the General Assembly broadened the number of other crimes for which slaves could be executed.[15] The act further provided that any slave who gave false testimony against another slave "shall have one Ear cut off on the Day of his or her Conviction, and receive thirty-nine Stripes on the bare Back, and that the other Ear shall be cropp'd the next Day, and the like Number of Stripes given the Offender on his or her bare Back." The 1751 law was expressly continued by the state's General Assembly in 1787.[16]

The provincial assembly punished miscegenation and interrace sexual relations,[17] with women bearing the brunt of the punishment.[18] A 1728 act punished free mixed-race women for having "Bastard Children by Negroes and other Slaves" and free Black women for "having Bastard Children by White Men" because "such Copulations are as unnatural and inordinate, as

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1723 Md. Laws ch. XVI (punishing blasphemers, swearers, drunkards, and Sabbath-breakers by "bor[ing] through the Tongue" and "Burning in the Forehead with the Letter B") (repealed by 1819 Md. Laws ch. XLIX).

[13] 1729 Md. Laws. ch. IV.

[14] 1729 Md. Laws. ch. IV.

[15] 1751 Md. Laws ch. 14.

[16] 1787 Md. Laws ch. XXXVIII.

[17] E.g., 1715 Md. Laws ch. 44 (ministers, pastors, and magistrates "shall not upon any pretence Joyne in Maryage Any Negroe whatsoever or Molatto Slave with any white person on the penalty of five thousand pounds of" tobacco).

[18] See id. ("any white woman whether ffree or a Servant that shall Suffer herselfe to be got with Child by a negro or other Slave or ffree negroe such woman soe begot with Child as af'd if ffree shall become a servant for and during a terme of Seven years if a Servant shall finish her time of Servitude together with the Damage that shall Accrue to such person to whome she is a Servant … And after such Satisfaction made shall againe become a Servant for & During the Terme of Seven year's af'd").

between White Women and Negroe Men, or other Slaves."[19] The 1728 law remained in force until 1815.[20]

Given the severity of these laws, it is not surprising that runaway slaves and servants were a problem in the province of Maryland. A series of laws enacted in the 1600s and early 1700s prohibited all servants from traveling more than ten miles from their masters' house "without a note Under their hands or Under the hand of his or their Overseer."[21] Persons who captured runaways received bounties of 200 pounds of tobacco, and "our neighboring Indians" could receive a matchcoat.[22]

Into this world a new state was born.

Slavery and the State Constitution

The incorporation of provincial laws meant that Maryland's first state constitution, adopted in 1776, could be comparatively restrained on issues of race. The 1776 constitution did not expressly limit political or civil rights to whites; instead, those rights were vested mainly in property-owning males, with racial limitations soon to follow. Nor did the 1776 constitution mention slavery directly. Instead, the legal basis for slavery inhered in provincial statutes, as amended and supplemented by the Maryland General Assembly over the next 88 years. The state had free rein to legislate in this area because the federal constitution would not exist for 13 years, and even then it imposed no ban on slavery until 1865 and no provision for equal protection until 1868. And as discussed below, the General Assembly enacted dozens of laws regulating slaves and free Blacks during this era, and the Maryland appellate courts issued hundreds of opinions interpreting those statutes and otherwise addressing specific legal problems that arose when a substantial segment of the population could be treated as property.[23] Neither the state nor the federal constitution stood in the way.

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[19] A Supplementary Act to the Act, entitled, an Act relating to Servants and Slaves (1728).

[20] 1814 Md. Laws ch. 92.

[21] 1715 Md. Laws ch. 44; *see also* An Act Relating to servants & slaves (June 2, 1692).

[22] 1715 Md. Laws ch. 44.

[23] The General Assembly rejected a proposal for gradual emancipation in 1789. See Votes and Proceedings of the House of Delegates of the State of Maryland, Nov. Session 1789, at 64-65; see also Votes and Proceedings of the House of Delegates, Nov. Sess. 1791, at 19.

Maryland did address the institution of slavery in its second constitution, drafted by convention in 1850 and ratified by the electorate in 1851. The 1851 Constitution did not abolish or limit slavery, however; on the contrary, it provided that "The Legislature shall not pass any law abolishing the relation of master or slave, as it now exists in this State."[24] By this point, geographical rifts over slavery were deepening throughout the country. Maryland had reason to fear that that "the relation of master or slave" would be altered by federal legislation or possibly even by state legislation should statehouse power shift to Maryland's urban and northern factions. The state itself was geographically divided over slavery, although the intrastate rift was not nearly as severe as the interstate one.

The constitutional endorsement of slavery prompted little debate or dissent at the 1850 convention.[25] The delegates had much more difficulty deciding how to treat slaves for the purpose of apportioning seats in the House of Delegates. Some delegates wanted to count all "souls" in the state; some wanted to count a fraction of the slave population in the vein of the original three-fifths clause in the federal constitution; and some wanted to count only white citizens.[26] In the end, the delegates decided to apportion representatives based on population as counted in the "National Census," which at the time still counted three-fifths of all slaves.[27] The dispute in 1850 had little to do with the morality of slavery. Instead it reflected the continual tension between the state's rural and urban areas and the fear that rapidly growing Baltimore City would dominate less populous areas.

In 1864, amid the turmoil of the Civil War, Maryland briefly elected a Unionist General Assembly, which promptly called for a new constitutional convention with emancipation as the chief objective.[28] The convention delegates themselves were disproportionately progressive, and the new constitution that emerged abolished slavery in terms that foreshadowed the Thirteenth Amendment.[29] The convention debates reflect extensive

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[24] Md. Const. (1851) art. III, § 43.

[25] See Proceedings and Debates of the 1850 Constitutional Convention 211, 447.

[26] See Proceedings and Debates of the 1850 Constitutional Convention 109-200.

[27] Md. Const. (1851) art. III, § 3.

[28] See William Starr Myers, The Maryland Constitution of 1864 10-35 (1902); Republican Press, supra n.31, at vi-vii.

[29] Md. Const. (1864), Decl. Rts. art. 24 ("That hereafter, in this State, there shall be neither slavery nor involuntary servitude, except in punishment of crime, whereof the party shall have been duly convicted: and all persons held to service or labor as slaves are hereby declared free."); Md. Const. (1864), art. III, § 36 ("The General Assembly shall pass

discussions about slavery from every perspective, including philosophical and moral.[30]

But the 1864 state constitution lasted only three years. After the war, as conservative Democrats returned to power, the first order of business was a new constitutional convention. With the Thirteenth Amendment now the supreme law of the land, the 1867 state constitution retained the abolition of slavery, although much more grudgingly.[31] The new provision declared "That slavery shall not be re-established in this State, but having been abolished, under the policy and authority of the United States, compensation, in consideration therefor, is due from the United States."[32] A few delegates at the 1867 convention extolled the virtues of slavery, and the debates were flecked with racist commentary about the presumed inferiority of Blacks. But most delegates ignored slavery as a moral issue and instead raged against the injustice of emancipation without compensation to the slaveholders.[33] The 1867 Constitution is the version that survives today, albeit with many of its racist provisions eliminated, slowly, over the course of 100 years.

Migration and Importation

Perhaps no racial issue occupied more of the General Assembly's time than the interstate movement of Blacks, free and slave. The transatlantic slave trade had been controversial in the colonies, and Thomas Jefferson had included it as one of his grievances against Britain in an early draft of the Declaration of Independence. Although that clause was excluded in the final version, in 1778 the new Commonwealth of Virginia declared that "no slave or slaves shall hereafter be imported into this commonwealth by sea or land, nor shall any slaves so imported be sold or bought by any person whatsoever."[34] Most of the other new states enacted comparable laws during the Revolutionary War, but many were driven by economic more than moral concerns. Great Britain dominated the transatlantic slave trade

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no law, nor make any appropriation to compensate the masters or claimants of slaves emancipated from servitude by the adoption of this Constitution.").

[30] See generally Proceedings of the State Convention of Maryland to Frame a New Constitution (1864).

[31] See generally John J. Connolly, Republican Press at a Democratic Convention, at xiv-xvii (2018) [hereafter "Republican Press"].

[32] Md. Const. (1867) Decl. Rts. art. 24.

[33] See Republican Press, supra n.31, at xvi.

[34] See 1778 Va. Laws ch. 1.

at the time and the new states did not want to support their enemy's economy.

Maryland did not get around to imposing an importation ban until 1783, when the Revolutionary War had all but ended. The 1783 act provided that "it shall not be lawful … to import or bring into this state, by land or water, any negro, mulatto, or other slave, or to reside within this state; and any person brought into this state as a slave contrary to this act, if a slave before, shall thereupon immediately cease to be a slave, and shall be free."[35] Exceptions were made for slaveholders coming to Maryland "with a bona fide intention of settling therein, and who shall actually reside within this state for one year at least."[36] Still, the Maryland law was a step away from the horrific practices of the transatlantic slave trade. And, unlike some states to its south, Maryland did not repeal its importation ban when the U.S. Constitution in 1789 barred Congress from prohibiting the "Migration or Importation of such Persons as any of the States now existing shall think proper to admit" prior to 1808.[37]

Instead, in 1796 the Maryland General Assembly enacted a comprehensive and complex law addressing importation of slaves, among many other racial issues.[38] The 1796 law continued the ban on importing or bringing into Maryland "any negro, mulatto or other slave, for sale, or to reside within this state; and any person brought into this state as a slave contrary to this act, if a slave before … shall be free."[39] But slaves and free Blacks crossed the state's borders for many reasons, and those crossings prompted innumerable concerns among slaveholders and the general (white) populace, and also created opportunities for slaves to petition for freedom. The General Assembly began restricting these opportunities in the 1796 law itself. One section of the act allowed the "real owner or proprietor" to bring back into the state slaves who had been taken out of the state without the owner's consent.[40] Other sections permitted slaveholders who owned property in Maryland and in adjoining states to move slaves

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[35] 1783 Md. Laws ch. XXIII.

[36] Id.; see also 1794 Md. Laws ch. XLIII (clarifying that slaveholders who had a bona fide intention of staying in Maryland could bring their slaves immediately, without having to live in the state for the requisite one year).

[37] U.S. Const. art. I, § 9, cl. 1; see also An Act to prohibit the importation of Slaves, 2 Stat. 426 (Mar. 2, 1807) (banning importation of slaves as of January 1, 1808).

[38] 1796 Md. Laws ch. LXVII.

[39] 1796 Md. Laws ch. LXVII, § I.

[40] 1796 Md. Laws ch. LXVII, § VII.

between their two properties.[41] The Maryland appellate reports address many petitions for freedom that arose from border crossings.[42] The Court of Appeals held that the laws banning importation could not be construed to prohibit a slaveholder from traveling temporarily to another state with his slaves.[43] But if a slaveholder moved to another state intending to reside there but harboring a "floating intention to return at some future period," a later return to Maryland entitled his slaves to petition for freedom.[44]

Ambiguities in the law prompted a steady stream of private bills that allowed individual slaveholders to bring particular slaves into the state under a variety of circumstances.[45] These private bills began around 1808 and ran through emancipation in 1864. In 1845, for instance, a private bill authorized "S. Teackle Wallis" to bring into Maryland "a negro slave named Oliver."[46] Wallis became one of Maryland's most prominent lawyers and politicians whose sympathies, like so many Marylanders, lay with the Confederacy.[47] His statue still stands in Baltimore's Mt. Vernon square.[48] Occasionally, private bills allowed the exportation of slaves to

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[41] 1796 Md. Laws ch. LXVII, §§ VIII, IX, X; see also 1798 Md. Laws ch. LXXVI (supplement to the 1976 act clarifying rule allowing landholders in adjoining states to bring slaves into Maryland for use on their Maryland land); 1802 Md. Laws ch. LXVII (after federal government took jurisdiction of District of Columbia, allowing slaveholders in District of Columbia to bring slaves into Maryland).

[42] E.g., Negro Harry v. Lyles, 4 H. & McH. 215 (1798) (denying petition for freedom of slave brought into Maryland from Virginia); Negro Plato v. Bainbridge, 4 H. & McH. 215 (Gen. Ct. 1799) (denying petition for freedom of slave brought into Maryland from South Carolina); Boisneuf v. Lewis, 4 H. & McH. 416 (1799) (granting petition of slave brought into Maryland from Santo Domingo); De Kerlegand v. Hector, 3 Md. 185 (1794) (petition for freedom rejected where petitioner was brought to Maryland from Santo Domingo by a French citizen who probably left after slavery was abolished on the island by France); Fulton v. Lewis, 3 H. & J. 564 (1815) (where former Santo Domingo resident emigrated to Maryland with slaves, sold one slave and then returned to the West Indies, slave was entitled to freedom).

[43] Cross v. Black, 9 Gill & J. 198, 214 (1837).

[44] Ringgold v. Barley, 5 Md. 186 (1853).

[45] E.g., 1809 Md. Laws ch. XLV (allowing Virginian who moved to Maryland to bring slaves into the state before meeting the one-year residency deadline); 1811 Md. Laws ch. 179 (same); 1812 Md. Laws ch. 16 (same); 1822 Md. Laws ch. 160 (same); 1821 Md. Laws ch. 189 (allowing U.S. military officer to retain his slaves while stationed in Maryland).

[46] 1844 Md. Laws ch. 164.

[47] For an illuminating discussion of Wallis's position on wartime issues, see the collected Correspondence between S. Teackle Wallis, Esq. and the Hon. John Sherman, Concerning the Arrest of Members of the Maryland Legislature (1863).

[48] See Wikipedia image (Severn Teackle Wallis).

other states.[49] The volume of private bills occasionally waned after an exasperated General Assembly, weary of private entreaties, issued numerous clarifications of the law, most of which expanded slaveholders' rights to bring slaves into Maryland from other U.S. states for the slaveholders' personal use.[50]

A few of these private acts benefited Blacks by making exceptions to the oppressive restrictions on the right to travel. Some bills allowed free Blacks to bring their slave spouses into the state.[51] Others allowed free Blacks to emigrate into the state,[52] or to return to the state when bureaucratic restrictions impeded their travel.[53]

These "beneficial" acts of the General Assembly were necessitated by its extraordinary act in 1806 that prohibited the emigration of *free* Blacks into Maryland. The 1806 law provided

> That no free negro or mulatto shall emigrate to, or settle in, this state, after the passage of this act, under the penalty of ten dollars for every week any such person shall remain in the state after the expiration of two weeks, and any free negro or mulatto who shall refuse or neglect to pay the fine imposed by this act, or who shall not give such security to any justice of the peace of the county in which they shall be found, for his departure from this state within two weeks … shall

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[49] See 1821 Md. Laws ch. 15.

[50] See 1812 Md. Laws ch. 76 (allowing hiring or working of slaves in Maryland from any county adjoining Maryland); 1813 Md. Laws ch. 56 (allowing movement of slaves between Maryland and the District of Columbia without entitling slave to freedom); 1818 Md. Laws ch. 201 (permitting importation of certain slaves acquired before 1783, and the descendants of such slaves); 1823 Md. Laws ch. 87 (permitting Maryland residents who acquired slaves who were residents of other states to bring the slaves into Maryland "for the purpose only of working or employing such slave or slaves within this state, for his own immediate services and not for any other purpose); 1842 Md. Laws ch. 213 ("any person coming into this State for the purpose of residing or remaining either permanently or temporarily, may bring with him any slaves for life from any other State or territory of the United States, and may carry said slaves out of this State again, and return with them again"); 1853 Md. Laws ch. 177 (permitting *free* Blacks "whilst in the employ of any white person in Cecil county, to leave the State of Maryland and return, without being subject to the penalties imposed on free negroes emigrating into this State" provided that "such free negro shall leave the State only for the purpose of transacting business for his white employer" and remains out of the state for no longer than twenty-four hours at any one time).

[51] E.g., 1826 Md. Laws ch. 120; 1826 Md. Laws ch. 121.

[52] See 1816 Md. Laws ch. 211.

[53] See 1856 Md. Laws ch. 37.

be committed to the gaol of the county, and may be sold therefrom by the sheriff of the county, after ten days notice of such sale, for a term sufficient to pay the fines herein imposed, with the costs.[54]

Another section of the act prohibited the employment of free Blacks who emigrated to the state. And a supplement in 1823 applicable in nine counties made clear that "no length of residence in this state shall exempt persons emigrating into this state contrary to the provisions of the act to which this is a supplement … and that if any free negro or mulatto shall return to this state after having suffered the penalty imposed by the act … it shall and may be lawful for any justice of the peace to punish such offender in the manner prescribed by the said act."[55]

The 1806 law articulated an unmistakable policy that Black people were not wanted in Maryland except as slaves and servants. As discussed below, this policy would soon be reinforced by a series of laws promoting or compelling colonization. The anti-immigration laws prohibited free Blacks from settling in the state, and the colonization laws pushed out those who were already residents. As a commentator wrote in 1841, "it is the general opinion now that it would be better if slavery not only had never prevailed here, but that all distinction between different classes could be obliterated by removing from the soil of the state those who never will be able to move in a sphere of political or civil equality, while the prejudices of society exist in the mind, or while the present ideas in relation to their inferiority continue."[56]

On the other hand, in 1817, upon finding that "the children of free negroes and mulattoes have been kidnapped from their masters, protectors and parents, and transported to distant places, and sold as slaves for life," the General Assembly tried to prevent the "heinous offences" of kidnaping free Blacks and short-term slaves for sale out of state.[57] The preventive means chosen by the General Assembly were complex and probably ineffective. An 1838 decision by the Court of Appeals, for instance, considered a slaveholder's attempt to recover the price of a slave the seller sold knowing the buyer intended to remove the slave from Maryland.[58] The

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[54] 1806 Md. Laws ch. LVI.

[55] 1823 Md. Laws ch. 161.

[56] Colored Population of Maryland, 61 Niles' National Register 215-16 (Dec. 4, 1841).

[57] 1817 Md. Laws ch. 112.

[58] Cheney v. Duke, 10 Gill & J. 11 (1838); see also Negro Harriett v. Ridgely, 9 Gill & J. 174 (1837) (Chapter 112 conveyed no right of slave to petition for freedom); Hobbs v.

sale was illegal under the 1817 act, but the Court of Appeals enforced the contract anyway.

Nat Turner's Rebellion in August 1831 prompted further oppressive legislation throughout the slave states,[59] including Maryland. In 1832, the General Assembly provided that

> [N]o free negro or mulatto shall immigrate to, or settle in this state; and no free negro or free mulatto belonging to any other state, district or territory shall come into this state, and therein remain for the space of ten successive days, whether such free negro or mulatto intends settling in this state, or not, under the penalty of fifty dollars for each and every week such person coming into, shall thereafter remain in this state; the one half to the informer, and the other half to the sheriff for the use of the county, to be recovered on complaint and conviction before a justice of the peace of the county in which he shall be arrested: and any free negro or mulatto refusing or neglecting to pay said fine or fines, shall be committed to the jail of the county, and shall be sold by the sheriff at public sale, for such time as may be necessary to cover the aforesaid penalty, first giving ten days previous notice of such sale and the said sheriff after deducting prison charges and a commission of ten per centum, shall pay over one half of the nett proceeds to the informer, and the balance he shall pay over to the levy court or commissioners, as the case may be, for the use of the county.[60]

The 1832 law contained numerous other oppressive rules restricting the rights of free Blacks to possess firearms, to use alcoholic beverages, to sell certain goods, to assemble for religious purposes "unless conducted by a white licensed or ordained preacher or some respectable white person," and to assemble with slaves.

In 1850 the General Assembly repealed "all laws prohibiting the Introduction of Slaves into this State," and replaced those laws with a new act that banned only the importation of slaves who had been banished from

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Magruder, 12 F. Cas. 265 (C.C.D.C. 1834) (Maryland act gave no rights to slave brought from Maryland to District of Columbia and sold in District of Columbia).

[59] See Colored Population of Maryland, 61 Niles' National Register 216 (Dec. 4, 1841); John H.B. Latrobe, MARYLAND IN LIBERIA 14-15 (1885).

[60] 1831 Md. Laws ch. 323. The General Assembly later made an exception for free Blacks traveling to Trinidad or British Guiana "with a view of ascertaining whether said places … are suitable for the emigration and settlement of themselves or other free persons of color." 1839 Md. Laws ch. 5.

some other state after conviction of a crime.[61] Newspapers thought the change hasty and inadvisable.[62] Although the purpose of the new policy is difficult to discern, it surely did not reflect a newfound amity toward Blacks.[63] Whether the General Assembly wanted more slaves or more slaveholders is not clear.

Maryland also regulated the interstate travel rights of Blacks. Slaves, of course, were governed by the myriad proscriptions against runaways, but these laws affected free Blacks as well. For instance, operators of vessels were not allowed to accept "any negro or mulatto, until such negro or mulatto shall produce a regularly authenticated certificate of freedom from some clerk or register of the county courts of this state."[64]

Manumission

In early Maryland, where skin color signaled slavery, an unaccompanied Black signaled a fugitive. Distinguishing free Blacks from slaves became a problem of legal proof, regulated by all three branches of state government. The presumption of slavery could be overcome by operation of law in certain circumstances, or through an enforceable instrument such as a slaveholder's deed of manumission or last will and testament.[65] Deeds of manumission could be purchased by the slaveholder or someone acting on the slaveholder's behalf, but contracts between slave and slaveholder were not enforceable.[66] Although slaves ordinarily had no

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[61] 1849 Md. Laws ch. 165. The act also banned importation of slaves for the purpose of selling the slaves outside of Maryland.

[62] See Cecil Whig, Jan. 26, 1850, at 2 ("The country has run mad upon the subject of slavery, and it is unwise and impolitic to commence the agitation of it in this State at this time."); Kent News, Feb. 9, 1850, at 2 ("Why this policy [of discouraging the introduction of negroes into our State] should be suddenly changed, without any expression of opinion from the public, we cannot imagine."); Kent News, Mar, 9, 1850, at 2.

[63] See Md. House of Delegates, Report of the Committee on Colored Population at 4 (April 19, 1852) (observing that the increasing population of free Blacks "is one, with which there never can be that amalgamation, that social and political equality, which shall unite it with the white and dominant population as one people, with common sympathies, interests and destiny").

[64] 1824 Md. Laws ch. 85.

[65] See Tongue v. Morton, 6 H & J. 1 (1823) (considering whether will manumitting slaves applied to children of slaves); Burke v. Negro Joe, 6 Gill & J. 136, 141 (1834) ("A negro in this state is presumed to be a slave, and on application for freedom, must prove he is descended from a free ancestor, or that he has been manumitted by deed or will.")

[66] See Bland v. Dowling, 9 G. & J. 19, 27 (1837).

civil rights and therefore could not in theory file lawsuits,[67] petitions for freedom were an exception[68] and Maryland courts during the slavery era adjudicated many petitions for freedom filed by slaves, with decidedly mixed results.[69]

In 1752 the provincial General Assembly enacted a "uniform and regular Manner of granting Freedom to Slaves."[70] The law permitted slaveholders to set free any able-bodied slave younger than 50 by a sealed writing evidenced by two witnesses. The instrument had to be acknowledged before a justice of the peace and entered in the county court records within six months. The same law banned manumission by last will and testament if the testator was in his or her "last Sickness."[71]

The 1752 act became the law of the State of Maryland in 1776, but in 1790 the General Assembly declared that "it is contrary to the principles of justice to prevent the manumission of slaves by last will and testament" and repealed the contrary provisions in the 1752 act.[72] The same act, declaring it "contrary to the dictates of humanity and the principles of the christian religion to inflict personal penalties on children for the offences of their parents," repealed provincial laws that imposed servitude on "the issue of

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[67] As Professor Martha Jones has demonstrated, Maryland Blacks in fact used the courts for a variety of purposes throughout the slavery era. See Martha S. Jones, Birthright Citizens: A History of Race and Rights in Antebellum America (2018).

[68] See Peters v. Van Lear, 4 Gill 249, 262 (1846).

[69] Compare Miller v. Negro Charles, 1 Gill & J. 390 (1829) (affirming grant of petition of freedom where slaveholder argued that condition in will required petitioner to pay $10 annually to testator's sister as long as the petitioner lives); Tongue v. Negro Crissy, 7 Md. 453, 465 (1855) ("The law presumes that as freedom is a most precious legacy, those on whom it is cast do accept it") with Negro George v. Corse's Adminstrator, 1 (1827) (petitioners not entitled to freedom where will manumitted them and permitted testator's debts to be paid from estate's real property, because creditors had a right to recover from personal property of the estate, which included slaves); Linstead v. Green, 2 Md. 82 (1852) (will that manumitted slave and her increase when slave reached 36, and slave died before reaching 36, did not manumit slave's child).

[70] Md. Acts of Assembly 1752, ch. 1, § V.

[71] Id. § III. The same law punished slaveholders who failed to provide for old and sick slaves. Id. § IV. In 1783, the General Assembly eliminated any right of suffrage for manumitted slaves. 1783 Md. Laws ch. XXIII, § III; see also 1796 Md. Laws ch. LXVII § V.

[72] See Tongue v. Morton, 6 H & J. 1 (1823) (considering whether will manumitting slaves applied to children of slaves); Burke v. Negro Joe, 6 Gill & J. 136, 141 (1834) ("A negro in this state is presumed to be a slave, and on application for freedom, must prove he is descended from a free ancestor, or that he has been manumitted by deed or will.")

certain inordinate copulations."[73] Slaveholders were permitted to manumit slaves who were under the age of 45 and "able to work and gain a sufficient maintenance and livelihood."[74]

Deeds of manumission could be conditional; *e.g.*, by granting freedom when the slave reached a certain age, or after the death of a spouse. Conditional manumissions raised many new legal problems. What would happen to a child born to a 29-year-old slave whose deed of manumission would set her free at age 31? An 1809 law declared the child would be a slave, but also authorized slaveholders to designate the child's status in their wills or deeds of manumission.[75]

Thus, manumission was again in favor, but proving it was a burden placed on the former slave. An 1806 law, aimed at the "great mischiefs" arising from slaves "running away and passing as free," raised the burden of proof. The law barred anyone except county clerks from issuing the vital certificates of freedom needed by former slaves.[76] A lost certificate was replaceable only if "such negro applying for the same shall make oath, or prove by some credible and disinterested witness, that he or she …has lost the former certificate."[77]

The General Assembly continually adjusted the mechanics of manumission during the slavery era.[78] After the 1831 Turner rebellion, the overall trend toward liberalizing manumission ceased[79]—unless the

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[73] See Bland v. Dowling, 9 G. & J. 19, 27 (1837).

[74] 1796 Md. Laws ch. LXVII § XIII.

[75] 1809 Md. Laws ch. CLXXI.

[76] 1805 Md. Laws ch. LXVI § II; see also id. § III (imposing criminal penalties on persons other than clerks who granted certificates of freedom); 1807 Md. Laws ch. CLXIV (limiting issuance of certificates of freedom to clerks who had recorded the deed of manumission or will granting freedom to applicant).

[77] Id. § IV.

[78] See 1810 Md. Laws ch. XV (making valid previously recorded deeds of manumission that lacked two or more witnesses); 1826 Md. Laws ch. 185 (extending the validity of deeds of manumission that lacked two witnesses unless manumitted slave was under 10 or over 45 at the time of execution of the instrument); 1832 Md. Laws ch. 296 (deeds attested by one witness as good and effectual as if attested by two); 1833 Md. Laws ch. 284; 1843 Md. Laws ch. 148 (proof in Howard district and Anne Arundel County); 1844 Md. Laws ch. 117 (allowing corporate slaveholders to manumit their slaves).

[79] See 1858 Md. Laws ch. 307 (slaves manumitted upon condition of leaving the state or any other condition not entitled to freedom until contingency happened).

manumission was for the purpose of removing the freed slave to Liberia.[80] As the Court of Appeals later explained, "the policy of the State [as of 1832] was to get rid of its free colored population of all ages."[81] Writing in in 1841, a commentator observed:

> [T]he laws have of late years rather tended to prevent than to favor emancipation; experience, as it is thought, demonstrating, that while colored persons reside in the state, they must be subject to civil disabilities and disqualifications; that the sense of their inferiority and their degradation entirely unfits them for the enjoyment of civil liberty, which, destitute as they are of moral and mental education, only enables them to indulge in that riotous or indolent life, alike destructive to their own best interests and to the proper regulation of domestic society.[82]

The General Assembly considered banning manumissions altogether as early as 1842, although the measure was not adopted at that time. The House Committee on the Colored Population reasoned that "Maryland, already having within her limits more free blacks than any other State in the Union, should not be further burdened."[83] According to the Committee, "[t]he evils arising from the idle and vagrant habit of a large portion of the free negroes of this State, both to themselves, to slaves, and to property holders of every description, are too universally felt and acknowledged to need illustration."[84]

Where the fear of idleness and vagrancy failed, the fear of rebellion prevailed. In 1860, after John Brown's raid on the federal arsenal at Harper's Ferry, the General Assembly banned manumission altogether.[85] The same act shockingly permitted any "free negro above the age of eighteen years" to apply to a circuit court "to select a master or mistress and become a slave for life." And "if such negro shall be a female, her children if any under five years of age, shall be included in such order and become slaves, and those

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[80] See 1831 Md. Laws ch. 281 § 3 (removing the age restrictions on manumission when conditioned on removal to Liberia).

[81] Tongue v. Negro Crissy, 7 Md. 453, 465 (1855).

[82] Colored Population of Maryland, 61 Niles' National Register 216 (Dec. 4, 1841).

[83] Md. House of Delegates, Report of the Committee on the Colored Population 4 (1842).

[84] Id.

[85] See 1860 Md. Laws ch. 322 § 1. See The Daily Exchange, Feb. 9, 1860, at 2 (explaining why the bill was bad policy for Maryland, even though a reduction in the free Black population was desirable). Earlier versions of the bill were much more oppressive.

above five shall be bound out."[86] Earlier versions of the bill were even more oppressive.[87]

Thus, as sectional disputes concerning slavery edged toward violence, tolerance for free Blacks waned in the Southern states. Banning manumission would have modest impact in Maryland, which already had a large population of free Blacks. But it exposed the lie at the heart of the Maryland "solution" to slavery: that a benevolent ruling class would allow it to die gradually, thereby minimizing harm to the slaveholder whose investment was sunk in human property, and to the slave whose master ostensibly protected him from a harsher fate.

Colonization

Perhaps the most insidious incident of the slavery era was the colonization movement: the "encouragement" of free Blacks to move to Africa, there to live in racial purity. Much of the white populace in Maryland and throughout the U.S. saw colonization as a great act of *noblesse oblige*[88] and, to be sure, colonization was perhaps the predominant racial dogma for much of the Nineteenth Century, including among many comparatively progressive figures.[89] But it also found favor among ardent racists, and most Blacks saw colonization as condescending, dehumanizing,

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[86] 1860 Md. Laws ch. 322 § 2. The tide turned after the war began and a Republican majority briefly controlled the legislature. An 1864 law encouraged slaveholders to manumit their slaves on condition that they enlist in the service of the U.S. army. 1864 Md. Laws ch. 15 § 3. That law and all other manumissions became moot later that year when a new state constitution abolished slavery.

[87] See The Daily Exchange, Feb. 18, 1860, at 2 (describing a pending bill that would have banished from the state or forced back into slavery Blacks who had been manumitted since 1831).

[88] See, e.g., Third Annual Report of the Board of Managers of the Maryland State Colonization Society 3 (1835) ("this Society believe … that colonization has a tendency to promote emancipation, by affording to the emancipated slave a home, where he can be happier and better, in every point of view, than in this country, and so inducing masters to manumit, for removal to Africa, who would not manumit unconditionally"); Latrobe, supra n.4; 3 J. Thomas Scharf, History of Maryland 320 (1879).

[89] See, e.g., James D. Lockett, *Abraham Lincoln and Colonization*, 21 J. Black Studies 428 (1991) (observing that ACS members included, from time to time, Abraham Lincoln, John Marshall, Henry Clay, Daniel Webster, and Patrick Henry). Among the notable Marylanders who were deeply involved in colonization: Francis Scott Key; John H.B. Latrobe; William F. Giles; and Montgomery Blair.

and oppressive.[90] Blacks and some white abolitionists believed that colonizers were motivated not by moral concerns, but by fear of rebellion from a growing domestic population of free Blacks, and by a "malignant colorphobia" that today would be called racism.[91]

The Maryland ruling class was deeply invested in colonization from 1827 through emancipation (and beyond), and the state's unique efforts to establish an African colony reflected its white citizens' conflicting beliefs that slavery was immoral at some level,[92] but that Blacks were nevertheless inferior beings who could not compete with whites and should not live in white-dominated America.[93] The state's leading citizens believed Maryland was optimally situated to "solve" its racial problems through colonization because its citizenry was (ostensibly) largely opposed to slavery and its "colored population … does not increase."[94]

The colonization movement began around 1816 with the formation of the American Colonization Society. The ACS, with the help of many Maryland members, helped establish an American colony on the west coast of Africa that became known as Liberia. In 1827, the Maryland General Assembly formally praised the ACS and appropriated $1000 per year for its use, provided "the officers of said society shall present satisfactory proof" that the appropriation "has been applied towards the colonization on the coast of Africa, of free people of colour, who had been actual residents of this state for twelve months."[95] The General Assembly incorporated the ACS in Maryland in 1831, for the purpose of "colonizing with their own

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[90] See, e.g., Frederick Douglass, *Colonization*, The North Star (Jan. 26, 1849); David W. Blight, FREDERICK DOUGLASS 238-40, 367-77 (2018); James M. McPherson, *Abolitionist and Negro Opposition to Colonization During the Civil War*, 26 Phylon 391 (1965).

[91] See McPherson, supra n.90, at 394 (quoting abolitionist William Lloyd Garrison).

[92] See, e.g., Third Annual Report of the Board of Managers of the Maryland State Colonization Society 5 (1835) (reporting the "prevailing sentiment among [Maryland] citizens" as "adverse to the perpetuation of slavery within her borders").

[93] See Charles C. Harper, Address at the Annual Meeting of the Maryland State Colonization Society 7-8 (Jan. 23, 1835); Report of the Committee on Colored Population to the House of Delegates 5 (1852).

[94] Id.

[95] 1826 Md. Laws ch. 172. The appropriations to the ACS were withdrawn after Maryland created its own colonization society. See 1832 Md. Laws ch. 314.

consent, on the coast of Africa, the free people of colour residing in the United States."[96]

The next term, after Nat Turner's rebellion, the General Assembly formally endorsed the Maryland State Colonization Society (MSCS). According to a future president of both the MSCS and the ACS, the rebellion displaced "a growing feeling in favor of emancipation in Maryland, Virginia and Kentucky."[97] In addition, Maryland had decided that "her views and feelings on [slavery] could no longer be efficiently represented by" the ACS – for "[i]t were surely better to remove a hundred men from Maryland, than ten men from ten different States."[98] The new law required the governor and council to appoint a board of managers, consisting of three persons "whose duty it shall be to remove from the state of Maryland, the people of color now free, and such as shall hereafter become so, to the colony of Liberia, in Africa, or such other place or places, out of the limits of this state, as they may approve of, and the person or persons so to be removed, shall consent to go to."[99] The act further appropriated up to $20,000 to the board of managers for the current year and $10,000 per year thereafter up to $200,000 total;[100] a material investment under the state's budget at the time.[101] Thus Maryland, "gloriously taking the lead in the cause [of colonization], declared herself its patroness and protector."[102]

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[96] 1830 Md. Laws ch. 189; see also 1836 Md. Laws ch. 274 (supplement provisions regarding incorporation of ACS). See also Report of the Committee on the Coloured Population (1834).

[97] John H.B. Latrobe, MARYLAND IN LIBERIA 14-15 (1885).

[98] Harper, supra n.93, at 5-6; see also Third Annual Report of the Board of Managers of the Maryland State Colonization Society 31 (1835).

[99] 1831 Md. Laws ch. 281.

[100] The appropriation was continued in 1852 for another six years at $10,000 per year, see 1852 Md. Laws ch. 202, and in 1858 for four years at $5000 per year. 1858 Md. Laws ch. 425.

[101] The earliest Comptroller's report, for the year ended December 1, 1852, records revenue of $1.28 million and expenditures of $1.36 million. Report of the Comptroller of the Treasury Department of the State of Maryland 4, 6 (1853). The appropriation was itself funded by loans and by a tax on real property in a fixed amount for each jurisdiction in the state. 1831 Md. Laws ch. 281 § 8; see also 1832 Md. Laws ch. 316 (imposing interest on late tax payments); 1834 Md. Laws ch. 197 (clarifying counties' obligations to levy and collect tax); 1837 Md. Laws ch. 275 (varying assessment for counties affected by formation of Carroll County); 1839 Md. Laws ch. 36 (same). Various other acts imposed fines that accrued to the benefit of colonization. 1835 Md. Laws ch. 329; 1839 Md. Laws ch. 38 § 1; 1842 Md. Laws ch. 213.

[102] Harper, supra n.93, at 7.

The 1832 act contained numerous other provisions to aid the removal of Blacks from Maryland. Court clerks were required to notify the MSCS board of managers about manumissions by deed or will, and the board was required to notify the ACS or MSCS for the purpose of removing the manumitted slave from the state, or to remove the slave through the board's own auspices. The manumitee had to consent to the place of removal, but:

> [I]n case the said person or persons shall refuse to be removed to any place, beyond the limits of this state, and shall persist in remaining therein, then it shall be the duty of said board to inform the sheriff of the county wherein such person or persons may be, of such refusal, and it shall thereupon be the duty of the said sheriff forthwith to arrest or cause to be arrested the said person or persons so refusing to emigrate from this state, and transport the said person or persons beyond the limits of this state ….[103]

If a manumitted slave declined to consent because removal would separate a family, the law magnanimously permitted the manumitee "to renounce the freedom so intended by the said deed or will … and to continue a slave."[104] Manumitted slaves who did not leave the state could receive an annual permit to "remain as free in said county, in cases where the said courts may be satisfied by respectable testimony, that such [slaves] … deserve such permission on account of their extraordinary good conduct and character.[105] The board of managers had authority "to hire out such slave or slaves so manumitted and so to be removed, until their wages shall produce a sufficient sum to defray all expenses attending their removal, and necessary support at the place or places of removal."[106] Finally, sheriffs were required to prepare lists of all "free people of color residing in their respective counties," and to deliver the lists to the board of managers.[107]

Thus, consent to removal, at least by the terms of the statute, was a canard. Nevertheless, there is scant evidence that Blacks were forcibly

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[103] 1831 Md. Laws ch. 281 § 3. A supplement to the act imposed a fine of $50 on sheriffs who failed to remove an affected person of color, if the MSCS provided the sheriff with a sum sufficient to pay for the removal. See 1832 Md. Laws ch. 145.

[104] 1831 Md. Laws ch. 281 § 4.

[105] Id. § 5.

[106] Id. § 6.

[107] Id. § 9.

exiled to Maryland's African colony or elsewhere;[108] indeed, relatively few made the journey to Africa at all.[109] The MSCS board of managers, in accordance with a legislative mandate, duly issued annual reports of its colonization efforts. Those reports left no doubt about the MSCS's policy: "That abolition is a curse to those whom it pretends to benefit, and that colonization presents the only practicable plan by which the condition of the coloured population can be ameliorated."[110] The reports also made clear, despite optimistic projections and outright propaganda,[111] that colonization was not at all popular among those who would be colonized. The Seventh Annual Report issued in 1839 stated that two ships had carried 89 total "emigrants" in the preceding year.[112] The managers complained that Blacks who had consented to emigrate often recanted after abolitionists intervened. The managers insisted that abolitionism would only "increase, more and more, the conviction, that the two races of men cannot live in the same country, enjoying as free men, equal rights."[113]

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[108] According to John Latrobe, writing in 1885, "[i]n but a single instance was the Sheriff called upon to remove a manumitted slave beyond the borders of the State." John H.B. Latrobe, MARYLAND IN LIBERIA 16 (1885). No citation is provided.

[109] See 1 Maryland Colonization Journal 11 (June 15, 1841) (reporting 624 emigrants to Africa between 1831 and 1839); The Cecil Whig, May 9, 1857 (reporting that to that point about 1000 emigrants had been sent to Maryland in Liberia by the MSCS). Africa was not the only destination for would-be colonists; at times, colonists promoted Haiti and other sites in the West Indies and Central American, and Lincoln himself advocated for a South American colony.

[110] Seventh Annual Report of the Board of Managers of the Maryland State Colonization Society 3 (1839); see also 1 Maryland Colonization Journal 15 (June 15, 1841) (reporting resolution of the Maryland Colonization Convention in 1841 "That the idea that the coloured people will ever obtain social and political equality in this State is wild and mischievous; and by creating among them hopes that can never be realized, is at war with their own happiness and improvement.").

[111] See generally the collected reports of the Maryland Colonization Journal, published from 1841, through 1858.

[112] Id. at 11; see also Third Annual Report of the Board of Managers of the Maryland State Colonization Society 36 (1835) (reporting 282 emigrants during board's first three years, although 29 of those went to Haiti); Eleventh Annual Report of the Board of Managers of the Maryland State Colonization Society, reprinted in 1 Maryland Colonization Journal 305, 307 (Jan. 15, 1843) (reporting one voyage in prior year bearing 111 emigrants from Maryland and 18 from Virginia); Report of the Committee on Colored Population to the House of Delegates 6-7 (1852) (reporting 1078 total emigrants from Maryland through 1852)

[113] Id. at 11. The initial Deed for Maryland in Liberia is reprinted in the Third Annual Report of the Board of Managers of the Maryland State Colonization Society 29-30 (1835). It lays out a comical metes-and-bounds description of the demised land ("commencing on the sea beach about three miles to the north-west of Cape Palmas at a

In 1834, using Maryland state money, the MSCS "purchased" a tract on the west coast of Africa near Cape Palmas.[114] The sellers of the land, local tribal kings, did not follow western customs or legal principles and had a very different understanding of the transaction.[115] Numerous military struggles ensued between west African colonists and the indigenous Africans, occasionally requiring intervention by Liberian or U.S. forces.[116] Nevertheless, the State of Maryland, through its agent the MSCS, formed and operated a colony on the west coast of Africa from 1834 through 1853 called Maryland in Liberia. By 1842, the MSCS had spent $156,174 on colonization efforts.[117] The colony had a constitution and laws, all drafted and approved by the MSCS's board of managers.[118] The constitution, in Article 1, provided that "The [MSCS] shall have full power and right … to make and ordain rules, regulations and ordinances, for the government of

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cocoanut tree, known as the large cocoanut … thence running east-south-east six hours walk ….") and, apart from certain reserved rights, grants the property to the Maryland State Colonization Society "to have and to hold the said land for its own special benefit and behoof forever." The purchase price is described as an itemized list of "4 cases of muskets, 20 kegs of powder, 110 pieces of cloth," and assorted beads, pots, knives, wine glasses, fish hooks, scissors, and other trinkets, plus "50 Spanish dollars." Id. It is signed by King Freeman, alias Parmah, of Cape Palmas; King Joe Holland, alias Baphro, of Grand Cavally; King Will, alias Weah Boleo, of Grahway; and James Hall as agent for the MSCS. See also Harper, supra n.93, at 7 ("The chiefs of the country willingly sold us the land for a trifling consideration, and on condition of the establishment of schools for the education of their children … reserving only their cultivated farms and villages, and to be governed among themselves by their own customs"); John H.B. Latrobe, MARYLAND IN LIBERIA 95-125 (1885) (reprinting additional deeds granting lands to the colony).

[114] See Third Annual Report of the Board of Managers of the Maryland State Colonization Society 6-7 (1835) (describing negotiations between Maryland agent as buyer and local African kings as sellers); Harrison Ola Abingbade, *The Settler-African Conflicts: The Case of the Maryland Colonists and the Grebo* 1840-1900, 66 J. Negro History 93 (1981); Harper, supra n.93, at 7.

[115] Abingbade, supra n.114, at 95; Third Annual Report, supra n.113, at 15. The benighted optimism of the MSCS is illuminated by one vignette recounted in its Third Annual Report. As part of the sale transaction, three tribal kings "agreed each to send one of their sons to the State Society to be educated in the arts of civilized life." Third Annual Report, supra n.113, at 10. Two boys made the long trip to Baltimore, where "[t]heir improvement here was rapid, and there seemed every reason to hope that they would grow up useful to themselves and their people." Regrettably, reported the board, one of the two died in Baltimore "after a short illness," id. at 10, which was possibly cholera given an outbreak at the time.

[116] Abingbade, supra n.114, at 94-98.

[117] Balance Sheet, 1842, reprinted in Maryland Colonization Journal 314. The balance sheet for 1855 reflected $394,054 total expenditures. Balance Sheet, Jan. 1, 1856, reprinted in 8 Maryland Colonization Journal 137 (Jan. 1856).

[118] See Constitution and Laws of Maryland in Liberia (1847).

the territory acquired by them in Africa, not repugnant to the provisions of this Constitution, until the state society shall withdraw their agents, and yield the government wholly into the hands of the people of the territory." Articles 2 and 3 imposed a requirement of temperance on all emigrants to the colony, and on all its officeholders. And so went the remaining articles in the spirit of benevolent oligarchy, a puzzling irony considering that some of the Maryland oligarchs may have been alive when their own country declared independence from Great Britain. The former colony had become a colonist. Nevertheless, the colonial constitution furnished an array of republican rights on the inhabitants of Maryland in Liberia. Some of these rights were not available in the mother State of Maryland, including a ban on slavery and involuntary servitude (except for the punishment of crimes).[119]

Despite the MSCS's benevolence, Maryland in Liberia declared its independence in 1854 and formed the independent Republic of Maryland.[120] The MSCS secured certain rights for future emigrants to the newly independent land. In 1857, after a war with local tribes,[121] the Republic of Maryland was annexed into Liberia, which assumed the former Republic's diminishing relationship with the MSCS.[122]

As the bonds between Maryland and its African colony dissolved, and as the clouds of civil war gathered in the homeland, the MSCS took a small swipe at the ungrateful Maryland Blacks who had rejected the MSCS's charity:

> We regret that the prejudices of the free colored population of Maryland, their indisposition to believe that those who advise their

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[119] Id. at art. 7, § 19.

[120] See John H.B. Latrobe, MARYLAND IN LIBERIA 76-77 (1885). According to Latrobe, the colony's request for independence arose organically from the residents' desire to align more closely with other colonies in Liberia, id. at 76, and the MSCS acquiesced after the residents ratified a new constitution. The one reluctance, according to Mr. Latrobe, was the new constitution's elimination of the temperance requirement, although he further observed that the residents later restored that prohibition. Id. at 77 & n.1.

[121] See 8 Maryland Colonization J. 337 (March 1857) (describing war and commenting that "This is the first war between the natives and Colonists at Cape Palmas, and it is certainly good evidence of there having existed a strong desire on both sides to preserve friendly relations, that twenty-two years should have passed … without one."); 8 Maryland Colonization J. 353 (April 1857) (recounting that several month war "between the Maryland settlers and the Grebo tribe" had ended with the help of 115 armed men sent by Liberia).

[122] Id.

> removal are actuated by friendly feelings towards them,--their unwillingness to give credit to the statements made to them whether by the white man or the black, of the real condition of their brethren in Africa,--and the tenacity with which in spite of all their experience, and of what is daily passing before their eyes, in all parts of the country, they still cling to the hope, that they may at length be allowed more toleration, and may be placed in a position of greater comfort in this country then has heretofore been the case, have continued to operate, to prevent much emigration from Maryland during the last two years.[123]

Within six years of these words Maryland would ban slavery, and within twelve the federal Reconstruction amendments would grant all U.S. Blacks a claim to equality. Colonization schemes in Africa and elsewhere began failing, although many Marylanders, including some of the more progressive figures like Montgomery Blair (onetime defender of Dred Scott), stained their legacies by defending colonization as a bulwark against "amalgamation" of the races.[124] It is fitting that colonization's greatest critic was a former Maryland slave, who grew up in bondage on Maryland's rural Eastern Shore and in its largest city. Frederick Douglass exposed the sophistries of colonization even when most of the nation's leaders and white populace, as well as some of its Black residents, saw colonization as a rare point of agreement in the volatile debate over slavery.[125] Of course, even after the Reconstruction amendments, true equality for Blacks lay more than a century in the future, so the MSCS patrons and others who scoffed at meaningful integration of the races were not entirely wrong. And doubtless their efforts at colonization succeeded, first and foremost, by alleviating white guilt at the appalling level of racial inequality in the state that would persist for decades, and by enabling an attitude of absolution that would linger long after colonization was forgotten. Indeed, few Marylanders today even know about their state's outsized commitment to colonization – i.e., banishment – of its Black citizens. Its lone memorial is in Liberia, whose 15 counties are all named for native African features, except an 887 square mile tract on the nation's southeastern border still called *Maryland*.

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[123] See McPherson, supra n.90, at 397.

[124] 9 Maryland Colonization J. 117 (Jan. 1858).

[125] See generally Blight, supra n.90, at 357-67.

Suffrage

When Maryland was formed, no law explicitly prohibited Blacks from voting for the relatively few offices subject to popular vote. To elect representatives to the House of Delegates, the 1776 constitution enfranchised "[a]ll freemen in this state, above twenty-one years of age" who satisfied certain property-ownership and residency standards.[126] A 1796 law further limited the pool of potentially eligible Black voters by disenfranchising slaves who had been manumitted in the preceding 13 years.[127] And the door was shut by an 1802-03 constitutional amendment that explicitly limited the franchise to white men.[128] Still, it was theoretically possible for a few Black men to have voted in the state's first elections,[129] and there is evidence that Blacks voted in northern states such as New York[130] and Pennsylvania[131] that had comparable laws limiting the vote to

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[126] Md. Const. (1776) art. 2; see also Md. Const. (1776) arts. 14, 42 ("[A]ll freemen above the age of twenty-one years, having a freehold of fifty acres of land in the county in which they offer to ballot, and residing therein, and all freemen above the age of twenty-one years, and having property in the state above the value of thirty pounds current money, and having resided in the county in which they offer to ballot one whole year next preceding the election, shall have a right of suffrage ….").

[127] 1796 Md. Laws ch. LXVII, § V.

[128] 1801 Md. Laws ch. XC ("That every free white male citizen of this state, and no other, above twenty-one years of age, having resided twelve months in the county next preceding the election at which he offers to vote, and every free white male citizen of this state above twenty-one years of age, and having obtained a residence of twelve months next preceding the election in the city of Baltimore or the city of Annapolis, and at which he offers to vote, shall have a right of suffrage, and shall vote by ballot in the election of such county or city, or either of them, for delegates to the general assembly, electors of the senate, and sheriffs."); see also 1802 Md. Laws ch. XX (confirming 1801 act; the constitutional amendment process at the time required passage of an act by one session of the General Assembly, publication of the act at least three months before a new election, and confirmation of the act by the first session of the General Assembly after the election. See Md. Const. (1776) art. 59).

[129] See Colored Population of Maryland, Niles' National Register 216 (Dec. 4, 1841) ("Free negroes formerly had the right of voting and to be elected to office in Maryland, but the act of 1796 ch. 67 § 5 provides that no slave manumitted since the act of 1783 ch. 23 or after this act shall be entitled to vote or to hold office, or to give evidence against any white person or to manumit any slave."); Wright, supra n.5 , at 119.

[130] See Dixon Ryan Fox, *The Negro Vote in Old New York*, 32 Pol. Sci. Q. 252, 255 (1917).

[131] See Eric Ledell Smith, *The End of Voting Rights in Pennsylvania: African Americans and the Pennsylvania Constitutional Convention of 1837-1838*, 65 Penn. History 279, 280-82 (1998).

freemen who owned property. But the evidence that Blacks voted in early Maryland is less clear.[132]

At any rate, after 1803 Maryland gave no serious consideration to enfranchising Blacks until the Fifteenth Amendment was ratified in 1870—and Maryland did not ratify the amendment until 103 years later. The 1851 Maryland constitution continued to limit the right of suffrage to "[e]very free white male person of twenty-one years of age or upwards," with certain residency restrictions.[133] Even the more liberal 1864 constitution limited the vote to "every white male citizen of the United States."[134] And the delegates to the 1867 constitution, who were well aware that "manhood suffrage" or "negro suffrage" would likely be imposed on the state by federal law, categorically rejected the concept as a matter of state law.[135] The 1867 delegates justified their position through a cluster of racist tropes about Blacks' perceived inferiority.[136] Thus Maryland staggered into the emancipation era by denying to its Black residents the first right of citizenship in a democracy.

Testimony and Jury Service

Two of the most significant rights denied to Blacks were the ability to testify in court and to serve on juries. Along with suffrage and eligibility for public office, these are core political rights that protect other rights in democratic societies. As Maryland lawmakers well understood, if Blacks were systematically barred from testifying against whites or serving on juries, they had little ability to protect themselves from abusive practices by whites. At the same time, *punishing* Blacks sometimes depended on the testimony of other persons of color, thereby requiring awkward exceptions to the general rule that persons of color were not "competent" to testify.

The baseline law against testimony by Blacks emanated from a 1717 provincial act that remained in force until 1867.[137] That law candidly explained its purpose: "it may be of very dangerous Consequence to admit and allow as Evidences in Law, in any of the Courts of Record, or before any Magistrate within this Province, any Negro, or Mulatto Slave, or Free

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[132] See Wright, supra n.5, at 119 & n.3.

[133] Md. Const. (1851) art. I, § 1; see also Md. Const. (1851) Decl. Rts. art. 5.

[134] Md. Const. (1864) art. I, § 1.

[135] See Republican Press, supra n.31, at xvii-xviii.

[136] See id. at xxiii.

[137] 1717 Md. Laws ch. XIII.

Negro, or Mulatto born of a White Woman, during their Servitude appointed by Law, or any Indian Slave, or Free Indian Natives of this or the neighbouring Provinces." If there were any doubt, Circuit Justice Roger B. Taney laid it to rest in *United States* v. *Dow*,[138] an excruciating 1840 decision that foreshadowed *Dred Scott*.

Dow, a Malay sailor from the Philippines, killed his ship's captain on the high seas. The only surviving witnesses were crewmembers: two free Blacks and one free Mulatto. When the prosecution called one of the Black crewmembers at trial, the defendant objected because under the 1717 Maryland act (Maryland evidence law applied in federal court at the time), a free Black was not competent to testify against a Christian white. If that rule prevailed, the defendant would go free because no white person was available to testify. "The only question," Taney wrote, is "whether [Dow] is to be regarded as a Christian white person." His answer was no ("the Malays have never been ranked by any writer among the white races"). Thus the testimony was admissible, and Dow was later convicted[139]—the only sensible result. But that was not enough for Taney, who felt the need to explain his rationale:

> These three races [white, Black, and Indian] existing in the same territory, one possessing all the power, and holding the other two in a state of subjection and degradation, it was natural, that feelings should be created by such a state of things, that would make it dangerous for the white population to receive as witnesses against themselves the members of the two races which it had thus degraded; hence free negroes and mulattoes, and free Indians of this or the neighboring provinces, as well as those who were held in slavery, were disqualified from being witnesses against Christian white men. No one who belonged to either of the races of which slaves could be made, was allowed to be a witness where any one was concerned who belonged to the race of which the masters were composed.[140]

Although the operative law in *Dow* was enacted long before statehood, subsequent acts of the Maryland legislature confirmed Taney's views. In 1801, the General Assembly allowed slaves to testify against free Blacks or other persons of color who were charged with stealing goods or receipt of

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[138] 25 F. Cas. 901 (C.C. Md. 1840).

[139] Dow was sentenced to death, but later pardoned by President Tyler on August 7, 1841.

[140] 25 F. Cas. at 903.

stolen goods.[141] And in 1808, all slaves and persons of color were authorized to testify for or against all other slaves or persons of color in all criminal prosecutions.[142] In 1820 the General Assembly allowed "any person" who was an informer of racial liquor laws to provide testimony.[143] And in 1846, the General Assembly amended the original 1717 act by removing the requirement that the benefiting white person be a Christian.[144]

Thus, as the war between the states opened, no Black person in Maryland was competent to give "evidence in law in any matter or thing whatsoever, that may hereafter be depending before any court of record or before any magistrate within this State, wherein any white person is concerned."[145] After the war, the federal Civil Rights Act of 1866 appeared to require admission of testimony regardless of race, but the question nevertheless became a subject of debate at Maryland's constitutional convention of 1867.[146] Ultimately the delegates decided to permit testimony irrespective of race "unless hereafter so declared by Act of the General Assembly."[147]

At the 1867 constitutional convention, some delegates worried that a right to testify would lead to a right to serve on juries.[148] But other delegates disagreed,[149] and the 1867 Constitution contained no explicit requirement that jury service be open to all races. It is clear that Blacks, free or slave, did not serve on juries in the slavery era,[150] although the legal basis for their

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[141] 1801 Md. Laws ch. CIX.

[142] 1808 Md. Laws ch. LXXXI.

[143] 1820 Md. Laws ch. 88.

[144] 1846 Md. Laws ch. 27.

[145] Id. § 1.

[146] See Republican Press, supra n.31, at xviii-xix.

[147] Md. Const. (1867) art. III, § 53.

[148] See Republican Press, supra n.31, at 186.

[149] See id. at 202 ("The one was a civil and the other a political right. As had been stated, women had testified for generations, and yet had never been admitted to political rights.").

[150] Indeed, at the 1867 convention, one delegate "inquired if there was provision enough made in the Declaration of Rights to exclude negroes from sitting in the jury box? Several members responded affirmatively, and [the delegate] expressed himself satisfied." Republican Press, supra n.31, at 215 (reports of convention debates by the Baltimore *American* newspaper); id. at 167 (*American* news report of legislative history of the original text of an article of the Declaration of Rights that prohibited religious restrictions on competence as a witness or juror "provided he believes in the existence of God," and

exclusion is difficult to pinpoint.[151] In 1777 the General Assembly provided that sheriffs could "summon to any of the courts within their respective counties, freemen … of the most wisdom and experience, having a freehold of fifty acres of land in his county, or property in this state above the value of three hundred pounds current money."[152] As explained above, "freemen" did not exclude all Blacks, although the property requirement surely would have limited the number eligible. What is clear is that *after* emancipation, delegates to the 1867 constitutional convention believed the constitution's Declaration of Rights contained "provision enough … to exclude negroes from sitting in the jury box,"[153] although the reports of their debates do not identify which provision they had in mind.[154] The right of Blacks to serve on juries came to Maryland through the federal Reconstruction amendments,[155] but its implementation in practice took much longer. A 1933 case in the Court of Appeals recounted that the single judge responsible for summoning all jurors in Baltimore County had not selected a Black man in 26 years.[156]

Other Civil Rights

Slavery and civil rights are antagonistic terms and it goes without saying that slaves lacked almost every form of legal protection taken for granted today. Because slaves were property, they could be bought and sold by others without their consent. The modest legal restrictions on how and where they could be sold are not worth recounting. Slaves were subject to corporal punishment by owners and overseers, with some legal limitations but few that were enforceable. Slaves generally could not own

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prohibited racial restrictions on competence as a witness; these clauses were later separated).

[151] See Booth v. Commonwealth, 16 Gratt. 519, 521 (Va. 1861) (two Virginia code provisions did not limit jury service to "free white male persons," "and yet no one ever supposed that under either, a free negro, Indian or woman could be a juror").

[152] 1777 Md. Laws ch. XVI.

[153] See Republican Press, supra n.31, at 202

[154] Possibilities would include Declaration of Rights Article 5 ("That the inhabitants of Maryland are entitled to the Common Law of England, and the trial by Jury, according to the course of that law …."); and Article 23 ("That no man ought to be taken, or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty or property but by the judgment of his peers, or by the Law of the Land.").

[155] See Strauder v. West Virginia, 100 U.S. 303 (1880) (striking down West Virginia law limiting jury service to white males as inconsistent with Fourteenth Amendment).

[156] Lee v. State, 163 Md. 62 (1933).

property, travel or assemble freely, file lawsuits, attend school, enter contracts, vote, or testify in court proceedings.[157] They could not seek or obtain employment.[158] They could marry within their race,[159] but the marriage had limited legal effect, and clerics could be penalized for performing slave marriages.[160] Most of these restrictions were not written into code; they were part of the common law of slavery.[161]

By contrast, legislation was required to deny these rights to free Blacks,[162] and the General Assembly often obliged. In theory, free Blacks could "intermarry" with whites – but the Black person in the marriage became a slave for life.[163] And ministers who performed marriage ceremonies "between a free person and a servant … without leave of the master or mistress of such servant" were subject to a fine.[164]

Racial laws at the time bore an unusual preoccupation with alcoholic beverages. A racist trope that emerged from the slavery era depicted Blacks as innately dipsomaniacal, and therefore in need of temperance laws to curb their natural appetites. Although the trope has been debunked,[165] it persisted for generations.[166] In the slavery era, the ruling class saw liquor both as an instrument of control and of concern. According to Frederick Douglass, slaveholders occasionally induced slaves to become "deplorably

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[157] See State v. Van Lear, 5 Md. 91, 95 (1853); Northern Central Co. v. Scholl, 16 Md. 331 (1860) (railroad could be liable in tort to slaveholder for selling train ticket to runaway slave).

[158] See 1817 Md. Laws ch. 104.

[159] See Jones v. Jones, 45 Md. 144, 159 (1876); Darlene C. Goring, The History of Slave Marriage in the United States, 39 John Marshall L. Rev. 299, 319 n.104 (2005-06).

[160] 1777 Md. Laws ch. XII § XI.

[161] See Williams v. Johnson, 30 Md. 500, 505 (1869) ("The radical error, which underlies the argument of the appellee's counsel, is the assumption, that negro slavery as it existed in this State, was the creature of statutory law.").

[162] Alternatively, sometimes the law granted rights only to whites. E.g., 1813 Md. Laws ch. 105 (granting privileges and immunities of owning and selling real property to "all free white persons" who moved to Maryland before adoption of the U.S. Constitution).

[163] See 1717 Md. Laws. ch. XIII § V.

[164] 1777 Md. Laws ch. XII, § XI.

[165] See Kenneth Christmon, Historical Overview of Alcohol in the African American Community, 25 J. Black Studies 318, 325-28 (1995).

[166] See Wright, supra n.5, at 244-45 ("Second only to the love of the crowd was the negroes' love of ardent spirits.").

drunk" for the amusement and sport of the slaveholders.[167] Douglass further contended that slaveholders used liquor to suppress any rebellious inclination—"[w]hen the slave was drunk the slaveholder had no fear that he would plan an insurrection, or that he would escape to the North."[168] Others believed that liquor emboldened slaves and created a risk of disturbances if not rebellions, and that view seems to have animated Maryland's laws at the time.

Thus, the state's earliest liquor law barred liquor sales to slaves or indentured servants "without leave or license in writing" from a master or owner.[169] In the comprehensive 1796 "Act relating to negroes," slaves were barred from selling liquor, on pain of up to twenty stripes.[170] An 1817 law banned liquor retailers in three southern counties from serving free Blacks or slaves "between sun-set in the evening, and sun-rise of the succeeding morning."[171] The next term the General Assembly banned liquor sales at any time of day to free Blacks and slaves in five other southern counties.[172] The ban was extended to the rest of the state in the post-Turner Rebellion legislation of 1832.[173] And so it continued through emancipation.[174]

The liquor laws were sometimes linked to laws suppressing the right of assembly or the right to bear arms, revealing a clear legislative fear of rebellion. The legislative bans on assembly began well before statehood. A 1723 act "to prevent the tumultuous Meeting, and other Irregularities of Negroes and other Slaves" gave constables roving authority to whip Blacks

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[167] Frederick Douglass, Life and Times of Frederick Douglass 182-84 (1892).

[168] Id. at 183.

[169] 1780 Md. Laws ch. XXIV § XVII.

[170] 1796 Md. Laws ch. LXVII § XX.

[171] 1817 Md. Laws ch. 227 (repealed as to Kent County by 1819 Md. Laws ch. XIV).

[172] 1818 Md. Laws ch. 184 (repealed as to Talbot and Dorchester counties by 1819 Md. Laws ch. 23; see also 1819 Md. Laws ch. 77 (excepting Annapolis)).

[173] 1831 Md. Laws ch. 323 § 10. Free Blacks could purchase liquor if they could produce "a certificate in the nature of a license or permit, from a justice of the peace"; slaves needed written authority from an owner, employer, or overseer. Id.

[174] See 1854 Md. Laws ch. 194 (generally banning liquor sellers or makers from allowing Blacks within the premises of their shops and storehouses during nighttime hours) (repealed by 1856 Md. Laws ch. 99); 1858 Md. Laws ch. 55 (banning liquor sales to minors and people of color within five miles of Annapolis); 1861 Md. Laws ch. 238 (banning all persons from selling, giving, or administering liquor to slaves). See also Franklin v. State, 12 Md. 236 (1858) (dismissing indictment against defendant who sold liquor to slave because indictment failed to allege the absence of a license).

who were away from home without permission with up to 39 stripes.[175] The law was essentially re-enacted in 1806.[176] Such laws would not have been nullified by the Maryland Constitution of 1776, which had no express right of assembly, or by the federal First Amendment, which did not apply to the states during the slavery era. The Maryland Constitution did have a qualified right to free exercise of religion,[177] and some restrictions applied to religious assemblies,[178] but the Maryland clause never impeded these restrictions.

The restrictions on assembly tightened after the Turner Rebellion. A section of the comprehensive 1832 act provided that "it shall not be lawful for any free negro or negroes, slave or slaves, to assemble or attend any meetings for religious purposes, unless conducted by a white licensed or ordained preacher or some respectable white person or persons of the neighborhood."[179] Ten years later it became unlawful for "any negro or mulatto in this state to become or continue to be a member of any secret society whatever."[180] A first conviction for a free Black brought a fine of at least $50; a second subjected the offender to sale "as a slave for life beyond the limits of the state." Slaves convicted under this law were to be sold out of state or inflicted with 39 lashes "upon … their bare backs."[181] Moreover, it was "the duty of all persons, and especially all constables, sheriffs and other peace officers, to disperse any and all assemblages of negroes, whose proceedings and objects are not public, and to arrest such negroes or mulattoes as shall be found in such assemblage or assemblages."[182] An 1845 law made some exceptions for the city of Baltimore, with its large

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[175] 1723 Md. Laws ch. XV § II.

[176] 1806 Md. Laws ch. LXXXI § III.

[177] See Md. Const. (1776) Decl. Rts. art. 33.

[178] See 1828 Md. Laws ch. 151 ("it shall not be lawful for persons of colour, whether slaves or free, to assemble at any house or other place in the fifth election district … of Prince-George's county, either under the pretext, or for the purpose of public worship," except on Sundays and certain religious holidays); see also infra n.179.

[179] 1831 Md. Laws ch. 323 § 7. An exception allowed slaves and free Blacks in Annapolis and Baltimore to attend worship meetings "if said meetings are held in compliance with the written permission of a white licensed ordained preacher, and dismissed before ten o'clock at night." Id.

[180] 1842 Md. Laws ch. 281 § 1.

[181] Id. Whites who induced Blacks to join secret societies were subject to 5-10 years' incarceration. Id. § 2.

[182] Id. § 3.

population of free Blacks.[183] But the exceptions were left to the discretion of the Mayor, and required the Mayor to appoint a police officer to attend any meeting he permitted.[184]

Both slaves and free Blacks had restrictions on their right to travel. All movement by slaves was privately controlled by slave masters, of course, but the law imposed additional restrictions. Interstate travel was sharply restricted for all Blacks, as explained above, but other restrictions applied to intrastate travel. As early as 1692 servants were required to carry a note from their masters if they were more than ten miles from home.[185] By 1806, any Black person born free who wished to travel out of his or her county of birth had to apply for a certificate of freedom.[186] In 1838 the General Assembly banned railroads and steamboats from carrying slaves without written permission from an owner.[187]

By 1842, a House of Delegates committee reported that "the slaves are leaving their owners in such numbers, and their efforts to escape are attended with so much success, as seriously to affect the demand for labor and value of cultivated lands."[188] And in 1860, "the officers and servants of the Baltimore and Ohio Railroad company shall have the right to arrest any colored persons whom they shall find on the line of the said railroad, within the State of Maryland, when such persons are on [the] railroad without a legal pass, or are unable to give … a sufficient account of themselves."[189]

Blacks did not have ordinary parental discretion over their own children. In 1818, the General Assembly declared that judges of orphans courts were authorized to "bind and put out" any child of "free negroes or mulattoes not at service or learning a trade."[190] The law was expanded in 1839 to give the orphans court discretion to bind out any child of free Blacks

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[183] 1845 Md. Laws ch. 284 § 1.

[184] Id. § 2.

[185] Act of June 4, 1692; see also 1715 Md. Laws ch. 44.

[186] 1805 Md. Laws ch. LXVI § VI.

[187] 1838 Md. Laws ch. 375; see also 1861 Md. Laws ch. 128.

[188] Md. House of Delegates, Report of the Committee on the Colored Population 1 (1842).

[189] 1818 Md. Laws ch. 189.

[190] 1860 Md. Laws ch. 119; see also 1825 Md. Laws ch. 161 (authorizing indentured servitude for children of vagrant Blacks).

"to some white person to learn to labor," if it appeared "that it would be better for the habits and comfort of such child."[191]

Critically, Black children in this era were excluded from the nascent right to public education. Unlike some southern states, Maryland had no comprehensive anti-literacy statute;[192] i.e., a state-wide law that banned education of Blacks. At least one law creating a public school district (in Cecil County) expressly limited enrollment to white children,[193] while laws creating other districts had no explicit racial component. But Blacks were nonetheless excluded from public education throughout the state, and their efforts to educate themselves were impeded by an array of private measures, including the burning of black schools. Moreover, when the right to public education arose at the post-emancipation constitutional convention of 1867, the delegates briefly considered including Blacks but overwhelmingly rejected the idea without serious debate.[194]

Lesser rights were also denied to Blacks. In 1806, the General Assembly passed "An act to restrain the evil practices arising from negroes keeping dogs, and to prohibit them from carrying guns or offensive weapons."[195] Free Blacks were "permitted to keep one dog," provided they obtained a license, renewable annually. No license? Then "it shall and may be lawful for any person to kill the [dog]."[196] By 1832 the prohibition on free Blacks' right to bear arms extended to "a firelock of any kind, any military weapon, or any powder or lead, without first obtaining a license" renewable

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[191] 1839 Md. Laws ch. 35 § 1.

[192] See Heather Andrea Williams, Self-Taught: African-American Education in Slavery and Freedom 203-213 (2005) (collecting antiliteracy laws).

[193] See 1849 Md. Laws ch. 221 § 30 ("That the schools to be established under this act shall be open and free to every white child or person between the ages of six and twenty years … [and] nothing in this act shall be so construed as to admit into any of the said schools any negro or mulatto child, or the child of any negro or mulatto person of any degree, or any white child or person who is not a bona fide resident of the said county."); see also id. § 32. The delegates at the 1850 constitutional convention considered adding a statewide right to public education, and the clause under consideration would have limited the right to white children, but the clause was rejected for budgetary concerns. See James Warner Harry, The Maryland Constitution of 1851 at 64 (1902).

[194] See Republican Press, supra n.31, at xix-xx.

[195] 1806 Md. Laws ch. LXXXI.

[196] Id.

annually.[197] Although Blacks served in both the Revolutionary[198] and Civil[199] wars, in between the state's militia was limited to "free white male citizens" – initially at the insistence of federal law.[200]

Free Blacks were subjected to a host of vagrancy laws. Constables in various counties were obligated to search for "any free negro or mulatto living idle, without any visible means of maintenance, or going at large through their counties or cities without any visible means of support."[201] First offenders were required to give security up to $30 for their good behavior, and on default could be banished from the state.

Free Blacks could not practice law.[202] They could not sell tobacco unless they could procure a certificate from a justice of the peace certifying the quantity and quality of the tobacco.[203] They could not operate vessels without a white man aboard.[204] They could not be employed if they emigrated to the state after 1806.[205] In some counties they could not sell merchandise "except by special order of the Circuit court … to be passed on the recommendation of not less than twelve respectable freeholders."[206] They could be prosecuted criminally for terminating a contract of

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[197] 1831 Md. Laws ch. 323 § 6.

[198] See Forgotten Patriots: African American and American Indian Patriots in the Revolutionary War 454-56 (Eric G. Grundset ed. 2008).

[199] During the Civil War, the governor was authorized to pay $300 to "every person except negro slaves" who enlisted to serve in the U.S. army, and $100 "to the owner of every negro slave who shall agree to the enlistment of his slave as above." But the slave owner was required to file a deed of manumission, and the slave would receive $50 on muster into service and $50 on honorable discharge. See 1864 Md. Laws ch. 105.

[200] See 1793 Md. Laws ch. LIII; see also 1807 Md. Laws ch. CXXVII. Black Marylanders served in the Revolutionary War, although their numbers were probably modest. See Forgotten Patriots: African American and American Indian Patriots in the Revolutionary War 454-56 (Eric G. Grundset ed. 2008). They also served in the Civil War.

[201] 1825 Md. Laws ch. 161 § 1.

[202] 1831 Md. Laws ch. 268.

[203] 1825 Md. Laws ch. 199.

[204] 1836 Md. Laws ch. 150.

[205] 1806 Md. Laws ch. LXI § II; see id. § 3 (exception for ship navigators, wagoners, and messengers).

[206] 1854 Md. Laws ch. 273; see also 1856 Md. Laws ch. 252.

employment.[207] And in some cases they could be sold as slaves for *not* working.[208]

Crime and Punishment

The criminal law has always served as the ultimate legal basis for suppressing undesirable conduct and as such it is all too tempting to bend criminal laws toward suppression of undesirable people. In Maryland, racially discriminatory criminal laws began long before statehood. The seminal 1729 act punished "any Negro, or other Slave" convicted of murder or house-burning with beheading and quartering and setting up the five pieces of the corpse "in the most Public Places of the County where such Fact was committed."[209] Other provincial laws recounted above imposed harsh physical penalties on slaves convicted of perjury, arson, rape, and other felonies.[210] The new state government either implicitly incorporated or expressly continued[211] most of these laws.

Yet the criminal law applied awkwardly to slaves because its chief implements, incarceration and monetary fine, have limited effect on persons who have neither freedom nor money. Moreover, incarcerating a slave deprives the *slaveholder* of property. As a result, criminal laws favored corporal punishment of slaves (and often free Blacks) when the conduct at issue was relatively minor.[212] For more serious crimes the punishment of slaves included incarceration as well as a corporal component, including execution for some crimes,[213] and the law usually provided for compensation to the slaveholder.[214] Another available punishment was banishment from the state or sale of the slave "without the state," generally meaning to the deep South where treatment of slaves was widely believed to be more severe. Here again the slaveholder would be compensated, generally from the proceeds of the sale.

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[207] 1852 Md. Laws ch. 288.

[208] 1860 Md. Laws ch. 232 (applicable to five counties).

[209] 1729 Md. Laws ch. IV.

[210] See supra text at nn.11-21.

[211] See 1782 Md. Laws ch. XXXVIII; 1789 Md. Laws ch. XLIV § XIII.

[212] See, e.g., 1817 Md. Laws ch. 72 § 3; 1818 Md. Laws ch. 197; 1825 Md. Laws ch. 93

[213] E.g., 1809 Md. Laws ch. CXXXVIII § XI.

[214] Id. § XXI.

These policies shifted in 1845, when the General Assembly concluded that exile from the state was not "adequate punishment for the higher grades of offences," and therefore subjected slaves to the same terms of punishment as other persons.[215] When incarceration was ordered, the slaveholder typically was entitled to compensation from the relevant jurisdiction.[216]

But if slaves were *property*, why were they subject to criminal laws that applied to *persons*? This obvious argument was finally presented to the Court of Appeals in 1859 by, of all people, Bradley T. Johnson, the future Confederate general who would terrorize Marylanders during the Civil War and subsequently be indicted, but not convicted, in the U.S. District Court for the District of Maryland. In *Negro Hammond* v. *State*,[217] the defendant was indicted as a "free negress," but it emerged during trial that she was actually a slave. The crime at issue, obtaining goods under false pretences, was statutory; the statute applied to "any person" and did not specifically mention slaves.[218] The prosecution amended the indictment to re-designate the defendant as a slave, and she was convicted. Representing the defendant on appeal, Johnson argued that slaves were not "persons," as evidenced in part by various statutes that imposed punishments on slaves different from those imposed on freemen. The Court of Appeals rejected Johnson's argument in a cursory opinion that did not seriously ponder the paradox of treating slaves as both persons and as property. Coincidentally, however, Circuit Justice Roger Taney issued a decision on the same issue at almost the same time, and the Court of Appeals appended Taney's opinion to its own.

In *United States* v. *Amy*,[219] the defendant was a Virginia slave indicted and convicted under a statute that prohibited stealing letters from the mail or post office by "any person." Whether a slave was a person was an issue preserved for consideration by Justice Taney when he could appear in his circuit-riding capacity. Taney, having recently decided *Dred Scott*, was not one to promote détente by skirting an incendiary legal issue. He explained that slaves are *both* persons *and* property. "It is true," he wrote, "that a slave is the property of the master," a property right "recognized and secured by the constitution and laws of the United States." And "it is equally true that

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[215] 1845 Md. Laws ch. 340.

[216] Id. §§ 2-3; see also 1849 Md. Laws ch. 124.

[217] 14 Md. 135 (1859).

[218] 1835 Md. Laws ch. 319 § 1.

[219] 24 F. Cas. 792 (C.C. Va. 1859).

[a slave] is not a citizen, and would not be embraced in a law operating only upon that class of persons." "Yet," Taney announced, the slave "is a person." The U.S. constitution, for instance, used "person" three times when referring to slaves.[220] Thus,

> In expounding this law, we must not lose sight of the twofold character which belongs to the slave. He is a person, and also property. As property, the rights of the owner are entitled to the protection of the law. As a person, he is bound to obey the law, and may, like any other person, be punished if he offends against it; and he may be embraced in the provisions of the law, either by the description of property or as a person, according to the subject-matter upon which congress or a state is legislating.[221]

And so it fell to Roger Taney to disentangle one of the fundamental logical incoherencies of slavery. Is the slave person or property? Like Schrödinger's cat, the slave occupies two seemingly incompatible statuses until observed by a particular judge, who will see one or the other but not both.

The same paradox did not apply to criminal punishment of free Blacks, but that did not mean the criminal law treated them equally with whites. The predominant difference was that a free Black was always a conviction or two away from slavery, whether for life or a term of years,[222] whereas white defendants could be incarcerated but never enslaved. In the waning days of slavery, these punishment-by-slavery laws became extremely harsh. Any free negro convicted of simple larceny "to the value of five dollars and upwards … shall be sentenced to be sold at public sale as slaves for the period of note less than two nor more than five years."[223] Robbery yielded either confinement in the penitentiary or sale "within or beyond the limits of the State, as a slave for the period of ten years."[224] And the penalties went up from there for a variety of other crimes, always permitting sale into slavery unless the penalty was death. The proceeds of the sale were payable first to the prosecuting jurisdiction for costs, second to the victim for

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[220] Id. at 809.

[221] Id.

[222] See Watkins v. State, 14 Md. 412 (1859) (in sentencing free Black convicted of petty larceny to sale as a slave out of the state for a five-year term, court erred because statute provided that sale should be either within or without the state); 1835 Md. Laws ch. 200 § 3.

[223] 1858 Md. Laws ch. 324 § 1.

[224] Id.

restitution, and finally to the county commissioners for the use and maintenance of any indigent child, children or wife.[225]

Maryland did impose civil or criminal penalties on slaveholders for some forms of mistreatment of slaves. In general, slaveholders were obligated to provide support and maintenance for their slaves, and they could not manumit or abandon old or "superannuated" slaves.[226] But enforcement of criminal laws protecting slaves was inconsistent at best. Frederick Douglass wrote from personal experience that "in Talbot Co., Maryland, killing a slave, or any colored person, was not treated as a crime, either by the courts or the community."[227] And the law discriminated against Blacks whether they were victim or perpetrator. In 1819, the General Assembly made it a crime to kidnap "any white child or children under the age of sixteen years."[228] Black children were not mentioned.

Taxation and Representation

Maryland's historic antipathy for poll taxes[229] meant that a substantial portion of government revenue came from property taxes.[230] Slaves were assessed and taxed like other personal property.[231] Although slaves did not pay taxes directly, their value as uncompensated laborers contributed to their masters' wealth, which was taxed, and the fruits of their uncompensated labor increased their masters' profit, which was available to pay the tax. Yet slaves were excluded from many of the benefits of tax revenues, like free or unfettered use of public schools, courts, roads, and railways.

Blacks did not serve in the General Assembly, which was open only to white males. But both slaves and free Blacks were counted, at least in part,

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[225] Id. § 2.

[226] See 1752 Md. Laws ch. 1 § II; 1790 Md. Laws ch. IX § III; 1796 Md. Laws ch. LXVII § XIII.

[227] Frederick Douglass, Life and Times of Frederick Douglass 78 (1892).

[228] 1819 Md. Laws ch. 159.

[229] See H.H. Walker Lewis, The Tax Articles of the Maryland Declaration of Rights, 13 Md. L. Rev. 83, 89-92 (1953).

[230] See, e.g., Report of the Comptroller of the Treasury Department of the State of Maryland 4 (1853) (showing that the state's single largest revenue source was a direct tax that accounted just over a third of $1.28 million in revenues collected in 1852).

[231] See, e.g., 1785 Md. Laws ch. XLI §§ XII, XVI; 1792 Md. Laws ch. LXXI § XXI; 1829 Md. Laws ch. 106 § 11; 1832 Md. Laws ch. 219; 1840 Md. Laws ch. 23.

when House districts were apportioned based upon resident population.[232] This tended to increase the number of delegates from slave-holding areas[233] while creating no incentive for delegates to represent the interests of slaves or free Blacks, who could not vote. Slaves and free Blacks were also counted when appropriations were made for certain services, like public schools, that did not benefit either group.[234]

Thus, a slave's uncompensated labor would have paid for schools that his own children could not attend, and created wealth that only his master's children could inherit. And the slave's conveniently protean status as both person and property would have enriched his master's vote while eliminating his own, thereby perpetuating laws and policies that would benefit his master's children long into the future.

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As the author was researching this article, his Maryland-born spouse was curating boxes of family papers that somehow came to rest with her. Like many Marylanders, her forebears fought on both sides of the Civil War. The papers at issue had descended from a Southern-leaning branch, although their dry contents were almost entirely void of political commentary. They tell an ordinary tale of the American experience from the perspective of its European immigrants. One branch of the family emigrated from Germany in the late 1700s. Members settled in Baltimore City and Cecil County. For a time in the early Nineteenth Century they enjoyed modest commercial success in lumber sales and fishing. Those businesses faded before the end of the century and subsequent generations were middle class.

A great-great-grandfather died in 1844. His estate administrator left behind a meticulous record of his accounts. Amid an itemization of "1 mahogany work stand" and "6 wood seat chairs" was the following entry: "slave george sold [piece] this day." One other entry indicates that "black boy slave George" was sold to another family member for $250. We were unable to find any other information about George's life, including a last name. The personal letters and diaries preserved with the family papers do not mention George. I found no private or public record of his manumission.

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[232] See supra n.27.

[233] See Republican Press, supra n.31, at 94 & n.113.

[234] See Republican Press, supra n.31, at 398-400.

What do I owe to George? To his forebears, his peers, his progeny? I owe him, first, a truthful reckoning with my state's legal history. An honest assessment about how Maryland, led by people who looked like me, barred or obstructed him and his peers from traveling, voting, testifying, assembling, marrying, working, drinking. How it denied them and their children an education. How it constantly told them, in official state documents, that they were members of an inferior race. How it banished them from the state for minor transgressions. How it urged them to pack their bags and leave the continent, forever. How it treated them as property when it came to rights but as persons when it came to responsibilities. And how all this was made possible by lawmakers, judges, and lawyers.

The Moral Equivalent of War
by William James

This essay, based on a speech delivered at Stanford University in 1906, is the origin of the idea of organized national service. The line of descent runs directly from this address to the depression-era Civilian Conservation Corps to the Peace Corps, VISTA, and AmeriCorps. Though some phrases grate upon modern ears, particularly the assumption that only males can perform such service, several racially-biased comments, and the notion that the main form of service should be viewed as a "warfare against nature," it still sounds a rallying cry for service in the interests of the individual and the nation.

The war against war is going to be no holiday excursion or camping party. The military feelings are too deeply grounded to abdicate their place among our ideals until better substitutes are offered than the glory and shame that come to nations as well as to individuals from the ups and downs of politics and the vicissitudes of trade. There is something highly paradoxical in the modern man's relation to war. Ask all our millions, north and south, whether they would vote now (were such a thing possible) to have our war for the Union expunged from history, and the record of a peaceful transition to the present time substituted for that of its marches and battles, and probably hardly a handful of eccentrics would say yes. Those ancestors, those efforts, those memories and legends, are the most ideal part of what we now own together, a sacred spiritual possession worth more than all the blood poured out. Yet ask those same people whether they would be willing, in cold blood, to start another civil war now to gain another similar possession, and not one man or woman would vote for the proposition. In modern eyes, precious though wars may be they must not be waged solely for the sake of the ideal harvest. Only when forced upon one, is a war now thought permissible.

It was not thus in ancient times. The earlier men were hunting men, and to hunt a neighboring tribe, kill the males, loot the village and possess the females, was the most profitable, as well as the most exciting, way of living. Thus were the more

martial tribes selected, and in chiefs and peoples a pure pugnacity and love of glory came to mingle with the more fundamental appetite for plunder.

Modern war is so expensive that we feel trade to be a better avenue to plunder; but modern man inherits all the innate pugnacity and all the love of glory of his ancestors. Showing war's irrationality and horror is of no effect on him. The horrors make the fascination. War is the *strong* life; it is life *in extremis;* war taxes are the only ones men never hesitate to pay, as the budgets of all nations show us.

History is a bath of blood. The *Illiad* is one long recital of how Diomedes and Ajax, Sarpedon and Hector *killed*. No detail of the wounds they made is spared us, and the Greek mind fed upon the story. Greek history is a panorama of jingoism and imperialism -- war for war's sake, all the citizen's being warriors. It is horrible reading -- because of the irrationality of it all -- save for the purpose of making "history" -- and the history is that of the utter ruin of a civilization in intellectual respects perhaps the highest the earth has ever seen.

Those wars were purely piratical. Pride, gold, women, slaves excitement were their only motives. In the Peloponesian war, for example, the Athenians ask the inhabitants of Melos (the island where the "Venus de Milo" was found), hitherto neutral, to own their lordship. The envoys meet, and hold a debate which Thucydides gives in full, and which, for sweet reasonableness of form, would have satisfied Matthew Arnold. "The powerful exact what they can," said the Athenians, "and the weak grant what they must." When the Meleans say that sooner than be slaves they will appeal to the gods, the Athenians reply, "Of the gods we believe and of men we know that, by a law of their nature, wherever they can rule they will. This law was not made by us, and we are not the first to have acted upon it; we did but inherit it, and we know that you and all mankind, if you were as strong as we are, would do as we do. So much for the gods; we have told you why we expect to stand as high in their good opinion as you." Well, the Meleans still refused, and their town was taken. "The Athenians," Thucydides quietly says, "thereupon put to death all who were of military age and made slaves of the women and children. They then colonized the island, sending thither five hundred settlers of their own.

Alexander's career was piracy pure and simple, nothing but an orgy of power and plunder, made romantic by the character of the hero. There was no rational purpose in it, and the moment he died his generals and governors attacked one another. The cruelty of those times is incredible. When Rome finally conquered Greece, Paulus

Aemilius, was told by the Roman Senate, to reward his soldiers for their toil by "giving" them the old kingdom of Epirus. they sacked seventy cities and carried off one hundred and fifty thousand inhabitants as slaves. How many they killed I know not; but in Etolia they killed all the senators, five hundred and fifty in number. Brutus was "the noblest Roman of them all," but to reanimate his soldiers on the eve of Philippi he similarly promises to give them the cities of Sparta and Thessalonica to ravage, if they win the fight.

Such was the gory nurse that trained soldiers to cohesiveness. We inherit the warlike type; and for most of the capacities of heroism that the human race is full of we have to thank this cruel history. Dead men tell no tales, and if there were any tribes of other type than this they have left no survivors. Our ancestors have bred pugnacity into our bone and marrow, and thousands of years of peace won't breed it out of us. The popular imagination fairly fattens on the thought of wars. Let public opinion once reach a certain fighting pitch, and no ruler can withstand it. In the Boer war both governments began with bluff, but they couldn't stay there; the military tension was too much for them. In 1898 our people had read the word "war" in letters three inches high for three months in every newspaper. The pliant politician, McKinley, was swept away by their eagerness, and our squalid war with Spain became a reality.

At the present day, civilized opinion is a curious mental mixture. The military instincts and ideals are as strong as ever, but they are confronted by reflective criticisms which sorely curb their ancient freedom. Innumerable writers are showing up the bestial side of military service. Pure loot and mastery seem no longer morally allowable motives, and pretexts must be found for attributing them solely to the enemy. England and we, our army and navy authorities repeat without ceasing, are solely for "peace." Germany and Japan it is who are bent on loot and glory. "Peace" in military mouths today is a synonym for "war expected." The word has become a pure provocative, and no government wishing peace sincerely should allow it ever to be printed in a newspaper. Every up-to-date dictionary should say that "peace" and "war" mean the same thing, now *in posse,* now *in actu*. It may even reasonably be said that the intensely sharp *preparation* for war by the nations is the *real war,* permanent, unceasing; and that the battles are only a sort of public verification of the mastery gained during the "peace"-interval.

It is plain that on this subject civilized man has developed a sort of double personality. If we take European nations, no legitimate interest of any one of them would seem to

justify the tremendous destructions which a war to compass it would necessarily entail. It would seem that common sense and reason ought to find a way to reach agreement in every conflict of honest interests. I myself think it our bounden duty to believe in such international rationality as possible. But, as things stand, I see how desperately hard it is to bring the peace-party and the war-party together, and I believe that the difficulty is due to certain deficiencies in the program of pacifism which set the military imagination strongly, and to a certain extent justifiably, against it. In the whole discussion both sides are on imaginative and sentimental ground. It is but one utopia against another, and everything one says must be abstract and hypothetical. Subject to this criticism and caution, I will try to characterize in abstract strokes the opposite imaginative forces, and point out what to my own very fallible mind seems the best utopian hypothesis, the most promising line of conciliation.

In my remarks, pacifist though I am, I will refuse to speak of the bestial side of the war-*regime* (already done justice to by many writers) and consider only the higher aspects of militaristic sentiment. Patriotism no one thinks discreditable; nor does any one deny that war is the romance of history. But inordinate ambitions are the soul of any patriotism, and the possibility of violent death the soul of all romance. The militarily-patriotic and the romantic-minded everywhere, and especially the professional military class, refuse to admit for a moment that war may be a transitory phenomenon in social evolution. The notion of a sheep's paradise like that revolts, they say, our higher imagination. Where then would be the steeps of life? If war had ever stopped, we should have to re-invent it, on this view, to redeem life from flat degeneration.

Reflective apologists for war at the present day all take it religiously. It is a sort of sacrament. It's profits are to the vanquished as well as to the victor; and quite apart from any question of profit, it is an absolute good, we are told, for it is human nature at its highest dynamic. Its "horrors" are a cheap price to pay for rescue from the only alternative supposed, of a world of clerks and teachers, of co-education and zo-ophily, of "consumer's leagues" and "associated charities," of industrialism unlimited, and feminism unabashed. No scorn, no hardness, no valor any more! Fie upon such a cattleyard of a planet!

So far as the central essence of this feeling goes, no healthy minded person, it seems to me, can help to some degree parting of it. Militarism is the great preserver of our ideals of hardihood, and human life with no use for hardihood would be contemptible.

Without risks or prizes for the darer, history would be insipid indeed; and there is a type of military character which every one feels that the race should never cease to breed, for everyone is sensitive to its superiority. The duty is incumbent on mankind, of keeping military character in stock -- if keeping them, if not for use, then as ends in themselves and as pure pieces of perfection, -- so that Roosevelt's weaklings and mollycoddles may not end by making everything else disappear from the face of nature.

This natural sort of feeling forms, I think, the innermost soul of army writings. Without any exception known to me, militarist authors take a highly mystical view of their subject, and regard war as a biological or sociological necessity, uncontrolled by ordinary psychological checks or motives. When the time of development is ripe the war must come, reason or no reason, for the justifications pleaded are invariably fictions. War is, in short, a permanent human *obligation.* General Homer Lea, in his recent book *The Valor of Ignorance*, plants himself squarely on this ground. Readiness for war is for him the essence of nationality, and ability in it the supreme measure of the health of nations.

Nations, General Lea says, are never stationary -- they must necessarily expand or shrink, according to their vitality or decrepitude. Japan now is culminating; and by the fatal law in question it is impossible that her statesmen should not long since have entered, with extraordinary foresight, upon a vast policy of conquest -- the game in which the first moves were her wars with China and Russia and her treaty with England, and of which the final objective is the capture of the Philippines, the Hawaiian Islands, Alaska, and whole of our Coast west of the Sierra passes. This will give Japan what her ineluctable vocation as a state absolutely forces her to claim, the possession of the entire Pacific Ocean; and to oppose these deep designs we Americans have, according to our author, nothing but our conceit, our ignorance, our commercialism, our corruption, and our feminism. General Lea makes a minute technical comparison of the military strength which we at present could oppose to the strength of Japan, and concludes that the Islands, Alaska, Oregon and Southern California, would fall almost without resistance, that San Francisco must surrender in a fortnight to a Japanese investment, that in three or four months the war would be over and our republic, unable to regain what it had heedlessly neglected to protect sufficiently, would then "disintegrate," until perhaps some Ceasar should arise to weld us again into a nation.

A dismal forecast indeed! Yet not unplausible, if the mentality of Japan's statesmen be of the Ceasarian type of which history shows us so many examples, and which is all that General Lea seems able to imagine. But there is no reason to think that women can no longer be the mother of Napoleonic or Alexandrian characters; and if these come in Japan and find their opportunity, just such surprises as *The Valor of Ignorance* paints may lurk in ambush for us. Ignorant as we still are of the innermost recesses of Japanese mentality, we may be foolhardy to disregard such possibilities.

Other militarists are more complex and more moral in their considerations. The *Philosophie des Krieges*, by S. R. Steinmetz is good example. War, according to this author, is an ordeal instituted by God, who weighs the nations in its balance. It is the essential form of the State, and the only function in which peoples can employ all their powers at once and convergently. No victory is possible save as the resultant of a totality of virtues, no defeat for which some vice or weakness is not responsible. Fidelity, cohesiveness, tenacity, heroism, conscience, education, inventiveness, economy, wealth, physical health and vigor -- there isn't a moral or intellectual point of superiority that doesn't tell, when God holds his assizes and hurls the peoples upon one another. *Die Weltgeschichte ist das Weltgericht*; and Dr. Steinmetz does not believe that in the long run chance and luck play any part in apportioning the issues.

The virtues that prevail, it must be noted, are virtues anyhow, superiorities that count in peaceful as well as in military competition; but the strain is on them, being infinitely intenser in the latter case, makes war infinitely more searching as a trial. No ordeal is comparable to its winnowings. Its dread hammer is the welder of men into cohesive states, and nowhere but in such states can human nature adequately develop its capacity. The only alternative is "degeneration."

Dr. Steinmetz is a conscientious thinker, and his book, short as it is, takes much into account. Its upshot can, it seems to me, be summed up in Simon Patten's words, that mankind was nursed in pain and fear, and that the transition to a "pleasure economy" may be fatal to a being wielding no powers of defence against its degenerative influences. If we speak of the *fear of emancipation from the fear-regime,* we put the whole situation into a single phrase; fear regarding ourselves now taking the place of the ancient fear of the enemy.

Turn the fear over as I will in my mind, it all seems to lead back to two unwillingnesses of the imagination, one aesthetic, and the other moral; unwillingness, first, to envisage a future in which army-life, with its many elements of charm, shall

be forever impossible, and in which the destinies of peoples shall nevermore be decided quickly, thrillingly, and tragically by force, but only gradually and insipidly by "evolution," and, secondly, unwillingness to see the supreme theatre of human strenuousness closed, and the splendid military aptitudes of men doomed to keep always in a state of latency and never show themselves in action. These insistent unwillingnesses, no less than other aesthetic and ethical insistencies, have, it seems to me, to be listened to and respected. One cannot meet them effectively by mere counter-insistency on war's expensiveness and horror. The horror makes the thrill; and when the question is of getting the extremest and supremest out of human nature, talk of expense sounds ignominious. The weakness of so much merely negative criticism is evident -- pacifism makes no converts from the military party. The military party denies neither the bestiality nor the horror, nor the expense; it only says that these things tell but half the story. It only says that war is *worth* them; that, taking human nature as a whole, its wars are its best protection against its weaker and more cowardly self, and that mankind cannot *afford* to adopt a peace economy.

Pacifists ought to enter more deeply into the aesthetical and ethical point of view of their opponents. Do that first in any controversy, says J. J. Chapman, *then move the point*, and your opponent will follow. So long as antimilitarists propose no substitute for war's disciplinary function, no *moral equivalent* of war, analogous, as one might say, to the mechanical equivalent of heat, so long they fail to realize the full inwardness of the situation. And as a rule they do fail. The duties, penalties, and sanctions pictured in the utopias they paint are all too weak and tame to touch the military-minded. Tolstoi's pacifism is the only exception to this rule, for it is profoundly pessimistic as regards all this world's values, and makes the fear of the Lord furnish the moral spur provided elsewhere by the fear of the enemy. But our socialistic peace-advocates all believe absolutely in this world's values; and instead of the fear of the Lord and the fear of the enemy, the only fear they reckon with is the fear of poverty if one be lazy. This weakness pervades all the socialistic literature with which I am acquainted. Even in Lowes Dickinson's exquisite dialogue, high wages and short hours are the only forces invoked for overcoming man's distaste for repulsive kinds of labor. Meanwhile men at large still live as they always have lived, under a pain-and-fear economy -- for those of us who live in an ease-economy are but an island in the stormy ocean -- and the whole atmosphere of present-day utopian literature tastes mawkish and dishwatery to people who still keep a sense for life's more bitter flavors. It suggests, in truth, ubiquitous inferiority.

Inferiority is always with us, and merciless scorn of it is the keynote of the military temper. "Dogs, would you live forever?" shouted Frederick the Great. "Yes," say our utopians, "let us live forever, and raise our level gradually." The best thing about our "inferiors" today is that they are as tough as nails, and physically and morally almost as insensitive. Utopians would see them soft and squeamish, while militarism would keep their callousness, but transfigure it into a meritorious characteristic, needed by "the service," and redeemed by that from the suspicion of inferiority. All the qualities of a man acquire dignity when he knows that the service of the collectivity that owns him needs him. If proud of the collectivity, his own pride rises in proportion. No collectivity is like an army for nourishing such pride; but it has to be confessed that the only sentiment which the image of pacific cosmopolitan industrialism is capable of arousing in countless worthy breasts is shame at the idea of belonging to *such* a collectivity. It is obvious that the United States of America as they exist today impress a mind like General Lea's as so much human blubber. Where is the sharpness and precipitousness, the contempt for life, whether one's own or another's? Where is the savage "yes" and "no," the unconditional duty? Where is the conscription? Where is the blood-tax? Where is anything that one feels honored by belonging to?

Having said thus much in preparation, I will now confess my own utopia. I devoutly believe in the reign of peace and in the gradual advent of some sort of socialistic equilibrium. The fatalistic view of the war function is to me nonsense, for I know that war-making is due to definite motives and subject to prudential checks and reasonable criticisms, just like any other form of enterprise. And when whole nations are the armies, and the science of destruction vies in intellectual refinement with the science of production, I see that war becomes absurd and impossible from its own monstrosity. Extravagant ambitions will have to be replaced by reasonable claims, and nations must make common cause against them. I see no reason why all this should not apply to yellow as well as to white countries, and I look forward to a future when acts of war shall be formally outlawed as between civilized peoples.

All these beliefs of mine put me firmly into the anti-military party. But I do not believe that peace either ought to be or will be permanent on this globe, unless the states, pacifically organized, preserve some of the old elements of army-discipline. A permanently successful peace-economy cannot be a simple pleasure-economy. In the more or less socialistic future toward which mankind seems drifting we must still subject ourselves collectively to those severities which answer to our real position upon this only partly hospitable globe. We must make new energies and hardihoods

continue the manliness to which the military mind so faithfully clings. Martial virtues must be the enduring cement; intrepidity, contempt of softness, surrender of private interest, obedience to command, must still remain the rock upon which states are built -- unless, indeed, we which for dangerous reactions against commonwealths, fit only for contempt, and liable to invite attack whenever a centre of crystallization for military-minded enterprise gets formed anywhere in their neighborhood.

The war-party is assuredly right in affirming and reaffirming that the martial virtues, although originally gain by the race through war, are absolute and permanent human goods. Patriotic pride and ambition in their military form are, after all, only specifications of a more general competitive passion. They are its first form, but that is no reason for supposing them to be its last form. Men are now proud of belonging to a conquering nation, and without a murmur they lay down their persons and their wealth, if by so doing they may fend off subjection. But who can be sure that *other aspects of one's country* may not, with time and education and suggestion enough, come to be regarded with similarly effective feelings of pride and shame? Why should men not some day feel that is it worth a blood-tax to belong to a collectivity superior in *any* respect? Why should they not blush with indignant shame if the community that owns them is vile in any way whatsoever? Individuals, daily more numerous, now feel this civic passion. It is only a question of blowing on the spark until the whole population gets incandescent, and on the ruins of the old morals of military honor, a stable system of morals of civic honor builds itself up. What the whole community comes to believe in grasps the individual as in a vise. The war-function has grasped us so far; but the constructive interests may some day seem no less imperative, and impose on the individual a hardly lighter burden.

Let me illustrate my idea more concretely. There is nothing to make one indignant in the mere fact that life is hard, that men should toil and suffer pain. The planetary conditions once for all are such, and we can stand it. But that so many men, by mere accidents of birth and opportunity, should have a life of *nothing else* but toil and pain and hardness and inferiority imposed upon them, should have *no* vacation, while others natively no more deserving never get any taste of this campaigning life at all, -- *this* is capable of arousing indignation in reflective minds. It may end by seeming shameful to all of us that some of us have nothing but campaigning, and others nothing but unmanly ease. If now -- and this is my idea -- there were, instead of military conscription, a conscription of the whole youthful population to form for a certain number of years a part of the army enlisted against *Nature*, the injustice would

tend to be evened out, and numerous other goods to the commonwealth would remain blind as the luxurious classes now are blind, to man's relations to the globe he lives on, and to the permanently sour and hard foundations of his higher life. To coal and iron mines, to freight trains, to fishing fleets in December, to dishwashing, clotheswashing, and windowwashing, to road-building and tunnel-making, to foundries and stoke-holes, and to the frames of skyscrapers, would our gilded youths be drafted off, according to their choice, to get the childishness knocked out of them, and to come back into society with healthier sympathies and soberer ideas. They would have paid their blood-tax, done their own part in the immemorial human warfare against nature; they would tread the earth more proudly, the women would value them more highly, they would be better fathers and teachers of the following generation.

Such a conscription, with the state of public opinion that would have required it, and the many moral fruits it would bear, would preserve in the midst of a pacific civilization the manly virtues which the military party is so afraid of seeing disappear in peace. We should get toughness without callousness, authority with as little criminal cruelty as possible, and painful work done cheerily because the duty is temporary, and threatens not, as now, to degrade the whole remainder of one's life. I spoke of the "moral equivalent" of war. So far, war has been the only force that can discipline a whole community, and until and equivalent discipline is organized, I believe that war must have its way. But I have no serious doubt that the ordinary prides and shames of social man, once developed to a certain intensity, are capable of organizing such a moral equivalent as I have sketched, or some other just as effective for preserving manliness of type. It is but a question of time, of skilful propogandism, and of opinion-making men seizing historic opportunities.

The martial type of character can be bred without war. Strenuous honor and disinterestedness abound everywhere. Priests and medical men are in a fashion educated to it, and we should all feel some degree if its imperative if we were conscious of our work as an obligatory service to the state. We should be *owned,* as soldiers are by the army, and our pride would rise accordingly. We could be poor, then, without humiliation, as army officers now are. The only thing needed henceforward is to inflame the civic temper as part history has inflamed the military temper. H. G. Wells, as usual, sees the centre of the situation. "In many ways," he says, "military organization is the most peaceful of activities. When the contemporary man steps from the street, of clamorous insincere advertisement, push, adulteration,

underselling and intermittent employment into the barrack-yard, he steps on to a higher social plane, into an atmosphere of service and cooperation and of infinitely more honorable emulations. Here at least men are not flung out of employment to degenerate because there is no immediate work for them to do. They are fed a drilled and training for better services. Here at least a man is supposed to win promotion by self-forgetfulness and not by self-seeking. And beside the feeble and irregular endowment of research by commercialism, its little shortsighted snatches at profit by innovation and scientific economy, see how remarkable is the steady and rapid development of method and appliances in naval and military affairs! Nothing is more striking than to compare the progress of civil conveniences which has been left almost entirely to the trader, to the progress in military apparatus during the last few decades. The house-appliances of today, for example, are little better than they were fifty years ago. A house of today is still almost as ill-ventilated, badly heated by wasteful fires, clumsily arranged and furnished as the house of 1858. Houses a couple of hundred years old are still satisfactory places of residence, so little have our standards risen. But the rifle or battleship of fifty years ago was beyond all comparison inferior to those we now possess; in power, in speed, in convenience alike. No one has a use now for such superannuated things."

Wells adds that he thinks that the conceptions of order and discipline, the tradition of service and devotion, of physical fitness, unstinted exertion, and universal responsibility, which universal military duty is now teaching European nations, will remain a permanent acquisition when the last ammunition has been used in the fireworks that celebrate the final peace. I believe as he does. It would be simply preposterous if the only force that could work ideals of honor and standards of efficiency into English or American natures should be the fear of being killed by the Germans or the Japanese. Great indeed is Fear; but it is not, as our military enthusiasts believe and try to make us believe, the only stimulus known for awakening the higher ranges of men's spiritual energy. The amount of alteration in public opinion which my utopia postulates is vastly less than the difference between the mentality of those black warriors who pursued Stanley's party on the Congo with their cannibal war-cry of "Meat! Meat!" and that of the "general-staff" of any civilized nation. History has seen the latter interval bridged over; the former one can be bridged over much more easily.

CASES ADJUDGED
IN THE
SUPREME COURT OF THE UNITED STATES
AT
OCTOBER TERM, 1945.

IN RE YAMASHITA.

NO. 61, MISC. APPLICATION FOR LEAVE TO FILE PETITION FOR WRIT OF HABEAS CORPUS AND WRIT OF PROHIBITION.*

Argued January 7, 8, 1946.—Decided February 4, 1946.

MR. JUSTICE RUTLEDGE, dissenting.

Not with ease does one find his views at odds with the Court's in a matter of this character and gravity. Only the most deeply felt convictions could force one to differ. That reason alone leads me to do so now, against strong considerations for withholding dissent.

More is at stake than General Yamashita's fate. There could be no possible sympathy for him if he is guilty of the atrocities for which his death is sought. But there can be and should be justice administered according to law. In this stage of war's aftermath it is too early for Lincoln's great spirit, best lighted in the Second Inaugural, to have wide hold for the treatment of foes. It is not too early, it is never too early, for the nation steadfastly to follow its great constitutional traditions, none older or more universally protective against unbridled power than due process

of law in the trial and punishment of men, that is, of all men, whether citizens, aliens, alien enemies or enemy belligerents. It can become too late.

This long-held attachment marks the great divide between our enemies and ourselves. Theirs was a philosophy of universal force. Ours is one of universal law, albeit imperfectly made flesh of our system and so dwelling among us. Every departure weakens the tradition, whether it touches the high or the low, the powerful or the weak, the triumphant or the conquered. If we need not or cannot be magnanimous, we can keep our own law on the plane from which it has not descended hitherto and to which the defeated foes' never rose.

With all deference to the opposing views of my brethren, whose attachment to that tradition needless to say is no less than my own, I cannot believe in the face of this record that the petitioner has had the fair trial our Constitution and laws command. Because I cannot reconcile what has occurred with their measure, I am forced to speak. At bottom my concern is that we shall not forsake in any case, whether Yamashita's or another's, the basic standards of trial which, among other guaranties, the nation fought to keep; that our system of military justice shall not alone among all our forms of judging be above or beyond the fundamental law or the control of Congress within its orbit of authority; and that this Court shall not fail in its part under the Constitution to see that these things do not happen.

This trial is unprecedented in our history. Never before have we tried and convicted an enemy general for action taken during hostilities or otherwise in the course of military operations or duty. Much less have we condemned one for failing to take action. The novelty is not lessened by the trial's having taken place after hostilities ended and the enemy, including the accused, had surrendered. Moreover, so far as the time permitted for our

consideration has given opportunity, I have not been able to find precedent for the proceeding in the system of any nation founded in the basic principles of our constitutional democracy, in the laws of war or in other internationally binding authority or usage.

The novelty is legal as well as historical. We are on strange ground. Precedent is not all-controlling in law. There must be room for growth, since every precedent has an origin. But it is the essence of our tradition for judges, when they stand at the end of the marked way, to go forward with caution keeping sight, so far as they are able, upon the great landmarks left behind and the direction they point ahead. If, as may be hoped, we are now to enter upon a new era of law in the world, it becomes more important than ever before for the nations creating that system to observe their greatest traditions of administering justice, including this one, both in their own judging and in their new creation. The proceedings in this case veer so far from some of our time-tested road signs that I cannot take the large strides validating them would demand.

I.

It is not in our tradition for anyone to be charged with crime which is defined after his conduct, alleged to be criminal, has taken place; [1] or in language not sufficient to inform him of the nature of the offense or to enable him to make defense.[2] Mass guilt we do not impute to individuals, perhaps in any case but certainly in none where the person is not charged or shown actively to have participated in or knowingly to have failed in taking action to

[1] *Cummings* v. *Missouri,* 4 Wall. 277; *Kring* v. *Missouri,* 107 U. S. 221.

[2] *Armour Packing Co.* v. *United States,* 209 U. S. 56, 83–84; *United States* v. *Cohen Grocery Co.,* 255 U. S. 81; cf. *Screws* v. *United States,* 325 U. S. 91. See note 17 and text.

prevent the wrongs done by others, having both the duty and the power to do so.

It is outside our basic scheme to condemn men without giving reasonable opportunity for preparing defense; [3] in capital or other serious crimes to convict on "official documents . . .; affidavits; . . . documents or translations thereof; diaries . . ., photographs, motion picture films, and . . . newspapers" [4] or on hearsay, once, twice or thrice removed,[5] more particularly when the documentary evidence or some of it is prepared *ex parte* by the prosecuting authority and includes not only opinion but conclusions of guilt. Nor in such cases do we deny the rights of confrontation of witnesses and cross-examination.[6]

Our tradition does not allow conviction by tribunals both authorized and bound [7] by the instrument of their creation to receive and consider evidence which is expressly excluded by Act of Congress or by treaty obligation; nor is it in accord with our basic concepts to make the tribunal, specially constituted for the particular trial, regardless of those prohibitions the sole and exclusive judge of the cred-

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[3] *Hawk* v. *Olson*, 326 U. S. 271; *Snyder* v. *Massachusetts*, 291 U. S. 97, 105: "What may not be taken away is notice of the charge and an adequate opportunity to be heard in defense of it." See Part III.

[4] The commission's findings state: "We have received for analysis and evaluation 423 exhibits consisting of official documents of the United States Army, The United States State Department, and the Commonwealth of the Philippines; affidavits; captured enemy documents or translations thereof; diaries taken from Japanese personnel, photographs, motion picture films, and Manila newspapers." See notes 19 and 20.

Concerning the specific nature of these elements in the proof, the issues to which they were directed, and their prejudicial effects, see text *infra* and notes in Part II.

[5] *Queen* v. *Hepburn*, 7 Cranch 290; *Donnelly* v. *United States*, 228 U. S. 243, 273. See Part II; note 21.

[6] *Motes* v. *United States*, 178 U. S. 458; *Paoni* v. *United States*, 281 F. 801. See Parts II and III.

[7] See Part II at notes 10, 19; Part III.

ibility, probative value and admissibility of whatever may be tendered as evidence.

The matter is not one merely of the character and admissibility of evidence. It goes to the very competency of the tribunal to try and punish consistently with the Constitution, the laws of the United States made in pursuance thereof, and treaties made under the nation's authority.

All these deviations from the fundamental law, and others, occurred in the course of constituting the commission, the preparation for trial and defense, the trial itself, and therefore, in effect, in the sentence imposed. Whether taken singly in some instances as departures from specific constitutional mandates or in totality as in violation of the Fifth Amendment's command that *no* person shall be deprived of life, liberty or property without due process of law, a trial so vitiated cannot withstand constitutional scrutiny.

One basic protection of our system and one only, petitioner has had. He has been represented by able counsel, officers of the army he fought. Their difficult assignment has been done with extraordinary fidelity, not only to the accused, but to their high conception of military justice, always to be administered in subordination to the Constitution and consistent Acts of Congress and treaties. But, as will appear, even this conceded shield was taken away in much of its value, by denial of reasonable opportunity for them to perform their function.

On this denial and the commission's invalid constitution specifically, but also more generally upon the totality of departures from constitutional norms inherent in the idea of a fair trial, I rest my judgment that the commission was without jurisdiction from the beginning to try or punish the petitioner and that, if it had acquired jurisdiction then, its power to proceed was lost in the course of what was done before and during trial.

Only on one view, in my opinion, could either of these conclusions be avoided. This would be that an enemy

belligerent in petitioner's position is altogether beyond the pale of constitutional protection, regardless of the fact that hostilities had ended and he had surrendered with his country. The Government has so argued, urging that we are still at war with Japan and all the power of the military effective during active hostilities in theatres of combat continues in full force unaffected by the events of August 14, 1945, and after.

In this view the action taken here is one of military necessity, exclusively within the authority of the President as Commander-in-Chief and his military subordinates to take in warding off military danger and subject to no judicial restraint on any account, although somewhat inconsistently it is said this Court may "examine" the proceedings generally.

As I understand the Court, this is in substance the effect of what has been done. For I cannot conceive any instance of departure from our basic concepts of fair trial, if the failures here are not sufficient to produce that effect.

We are technically still at war, because peace has not been negotiated finally or declared. But there is no longer the danger which always exists before surrender and armistice. Military necessity does not demand the same measures. The nation may be more secure now than at any time after peace is officially concluded. In these facts is one great difference from *Ex parte Quirin,* 317 U. S. 1. Punitive action taken now can be effective only for the next war, for purposes of military security. And enemy aliens, including belligerents, need the attenuated protections our system extends to them more now than before hostilities ceased or than they may after a treaty of peace is signed. Ample power there is to punish them or others for crimes, whether under the laws of war during its course or later during occupation. There can be no question of that. The only question is how it shall be done, consist-

ently with universal constitutional commands or outside their restricting effects. In this sense I think the Constitution follows the flag.

The other thing to be mentioned in order to be put aside is that we have no question here of what the military might have done in a field of combat. There the maxim about the law becoming silent in the noise of arms applies. The purpose of battle is to kill. But it does not follow that this would justify killing by trial after capture or surrender, without compliance with laws or treaties made to apply in such cases, whether trial is before or after hostilities end.

I turn now to discuss some of the details of what has taken place. My basic difference is with the Court's view that provisions of the Articles of War and of treaties are not made applicable to this proceeding and with its ruling that, absent such applicable provisions, none of the things done so vitiated the trial and sentence as to deprive the commission of jurisdiction.

My brother MURPHY has discussed the charge with respect to the substance of the crime. With his conclusions in this respect I agree. My own primary concern will be with the constitution of the commission and other matters taking place in the course of the proceedings, relating chiefly to the denial of reasonable opportunity to prepare petitioner's defense and the sufficiency of the evidence, together with serious questions of admissibility, to prove an offense, all going as I think to the commission's jurisdiction.

Necessarily only a short sketch can be given concerning each matter. And it may be stated at the start that, although it was ruled in *Ex parte Quirin, supra,* that this Court had no function to review the evidence, it was not there or elsewhere determined that it could not ascertain whether conviction is founded upon evidence expressly excluded by Congress or treaty; nor does the Court purport to do so now.

II.

Invalidity of the Commission's Constitution.

The fountainhead of the commission's authority was General MacArthur's directive by which General Styer was ordered to and pursuant to which he did proceed with constituting the commission.[8] The directive was accompanied by elaborate and detailed rules and regulations prescribing the procedure and rules of evidence to be followed, of which for present purposes § 16, set forth below,[9] is crucial.

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[8] The line of authorization within the military hierarchy extended from the President, through the Joint Chiefs of Staff and General MacArthur, to General Styer, whose order of September 25th and others were made pursuant to and in conformity with General MacArthur's directive. The charge was prepared by the Judge Advocate General's Department of the Army. There is no dispute concerning these facts or that the directive was binding on General Styer and the commission, though it is argued his own authority as area commanding general was independently sufficient to sustain what was done.

[9] "16. Evidence.—a. The commission shall admit such evidence as in its opinion would be of assistance in proving or disproving the charge, or such as in the commission's opinion would have probative value in the mind of a reasonable man. In particular, and without limiting in any way the scope of the foregoing general rules, the following evidence may be admitted:

> (1) Any document which appears to the commission to have been signed or issued officially by any officer, department, agency, or member of the armed forces of any government, without proof of the signature or of the issuance of the document.
>
> (2) Any report which appears to the commission to have been signed or issued by the International Red Cross or a member thereof, or by a medical doctor or any medical service personnel, or by an investigator or intelligence officer, or by any other person whom the commission finds to have been acting in the course of his duty when making the report.
>
> (3) Affidavits, depositions, or other statements taken by an officer detailed for that purpose by military authority.
>
> (4) Any diary, letter or other document appearing to the commission to contain information relating to the charge.
>
> (5) A copy of any document or other secondary evidence of its contents, if the commission believes that the original is not available or cannot be produced without undue delay. . . ."

Section 16, as will be noted, permits reception of documents, reports, affidavits, depositions, diaries, letters, copies of documents or other secondary evidence of their contents, hearsay, opinion evidence and conclusions, in fact of anything which in the commission's opinion "would be of assistance in proving or disproving the charge," without any of the usual modes of authentication.

A more complete abrogation of customary safeguards relating to the proof, whether in the usual rules of evidence or any reasonable substitute and whether for use in the trial of crime in the civil courts or military tribunals, hardly could have been made. So far as the admissibility and probative value of evidence was concerned, the directive made the commission a law unto itself.

It acted accordingly. As against insistent and persistent objection to the reception of all kinds of "evidence," oral, documentary and photographic, for nearly every kind of defect under any of the usual prevailing standards for admissibility and probative value, the commission not only consistently ruled against the defense, but repeatedly stated it was bound by the directive to receive the kinds of evidence it specified,[10] reprimanded counsel for continuing to make objection, declined to hear further objections, and in more than one instance during the course of the proceedings reversed its rulings favorable to the defense, where initially it had declined to receive what the prosecution offered. Every conceivable kind of statement, rumor, report, at first, second, third or further hand, written, printed or oral, and one "propaganda" film were allowed to come in, most of this relating to atrocities committed

[10] In one instance the president of the commission said: "The rules and regulations which guide this Commission are binding upon the Commission and agencies provided to assist the Commission. . . . We have been authorized to receive and weigh such evidence as we can consider to have probative value, and further comments by the Defense on the right which we have to accept this evidence is decidedly out of order." But see note 19.

by troops under petitioner's command throughout the several thousand islands of the Philippine Archipelago during the period of active hostilities covered by the American forces' return to and recapture of the Philippines.[11]

The findings reflect the character of the proof and the charge. The statement quoted above [12] gives only a numerical idea of the instances in which ordinary safeguards in reception of written evidence were ignored. In addition to these 423 "exhibits," the findings state the commission "has heard 286 persons during the course of this trial, most of whom have given eye-witness accounts of what they endured or what they saw."

But there is not a suggestion in the findings that petitioner personally participated in, was present at the occurrence of, or ordered any of these incidents, with the exception of the wholly inferential suggestion noted below. Nor is there any express finding that he knew of any one of the incidents in particular or of all taken together. The only inferential findings that he had knowledge, or that the commission so found, are in the statement that the "crimes *alleged to have been permitted* by the Accused in violation of the laws of war may be grouped into three categories" set out below,[13] in the further statement that "the Prose-

[11] Cf. text *infra* at note 19 concerning the prejudicial character of the evidence.

[12] Note 4.

[13] Namely, "(1) Starvation, execution or massacre without trial and maladministration generally of civilian internees and prisoners of war; (2) Torture, rape, murder and mass execution of very large numbers of residents of the Philippines, including women and children and members of religious orders, by starvation, beheading, bayoneting, clubbing, hanging, burning alive, and destruction by explosives; (3) Burning and demolition without adequate military necessity of large numbers of homes, places of business, places of religious worship, hospitals, public buildings, and educational institutions. In point of time, the offenses extended throughout the period the Accused was in command of Japanese troops in the Philippines. In point of area, the crimes extended throughout the Philippine Archipelago, although by far the most of the incredible acts occurred on Luzon."

cution presented evidence to show that the crimes were so extensive and widespread, both as to time and area,[14] that *they must* either have been *wilfully permitted* by the Accused, *or secretly ordered* by" him; and in the conclusion of guilt and the sentence.[15] (Emphasis added.) Indeed the commission's ultimate findings [16] draw no express conclusion of knowledge, but state only two things: (1) the fact of widespread atrocities and crimes; (2) that petitioner "failed to provide effective control . . . as was required by the circumstances."

This vagueness, if not vacuity, in the findings runs throughout the proceedings, from the charge itself through the proof and the findings, to the conclusion. It affects

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[14] Cf. note 13.

[15] In addition the findings set forth that captured orders of subordinate officers gave proof that "they, at least," ordered acts "leading directly to" atrocities; that "the *proof offered* to the Commission *alleged* criminal *neglect* . . . as well as complete failure *by the higher echelons* of command *to detect* and prevent cruel and inhuman treatment accorded by local commanders and guards"; and that, although the "Defense established the difficulties faced by the Accused" with special reference among other things to the discipline and morale of his troops under the "swift and overpowering advance of American forces," and notwithstanding he had stoutly maintained his complete ignorance of the crimes, still he was an officer of long experience; his assignment was one of broad responsibility; it was his duty "*to discover* and control" crimes by his troops, if widespread, and therefore

"The Commission concludes: (1) That a series of atrocities and other high crimes have been committed by members of the Japanese armed forces under your command against people of the United States, their allies and dependencies throughout the Philippine Islands; that they were not sporadic in nature but in many cases were methodically supervised by Japanese officers and noncommissioned officers; (2) That during the period in question you failed to provide effective control of your troops as was required by the circumstances.

"Accordingly upon secret written ballot, two-thirds or more of the members concurring, the Commission finds you guilty as charged and sentences you to death by hanging." (Emphasis added.)

[16] See note 15.

the very gist of the offense, whether that was wilful, informed and intentional omission to restrain and control troops *known* by petitioner to be committing crimes or was only a negligent failure on his part *to discover* this and take whatever measures he then could to stop the conduct.

Although it is impossible to determine from what is before us whether petitioner in fact has been convicted of one or the other or of both these things,[17] the case has been

[17] The charge, set forth at the end of this note, is consistent with either theory—or both—and thus ambiguous, as were the findings. See note 15. The only word implying knowledge was "permitting." If "wilfully" is essential to constitute a crime or charge of one, otherwise subject to the objection of "vagueness," cf. *Screws* v. *United States,* 325 U. S. 91, it would seem that "permitting" alone would hardly be sufficient to charge "wilful and intentional" action or omission; and, if taken to be sufficient to charge knowledge, it would follow necessarily that the charge itself was not drawn to state and was insufficient to support a finding of mere failure to detect or discover the criminal conduct of others.

At the most, "permitting" could charge knowledge only by inference or implication. And reasonably the word could be taken in the context of the charge to mean "allowing" or "not preventing," a meaning consistent with absence of knowledge and mere failure to discover. In capital cases such ambiguity is wholly out of place. The proof was equally ambiguous in the same respect, so far as we have been informed, and so, to repeat, were the findings. The use of "wilfully," even qualified by a "must have," one time only in the findings hardly can supply the absence of that or an equivalent word or language in the charge or in the proof to support that essential element in the crime.

The charge was as follows: "Tomoyuki Yamashita, General Imperial Japanese Army, between 9 October 1944 and 2 September 1945, at Manila and at other places in the Philippine Islands, while commander of armed forces of Japan at war with the United States of America and its allies, unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and of its allies and dependencies, particularly the Philippines; and he, General Tomoyuki Yamashita, thereby violated the laws of war."

presented on the former basis and, unless as is noted below there is fatal duplicity, it must be taken that the crime charged and sought to be proved was only the failure, with knowledge, to perform the commander's function of control, although the Court's opinion nowhere expressly declares that knowledge was essential to guilt or necessary to be set forth in the charge.

It is in respect to this feature especially, quite apart from the reception of unverified rumor, report, etc., that perhaps the greatest prejudice arose from the admission of untrustworthy, unverified, unauthenticated evidence which could not be probed by cross-examination or other means of testing credibility, probative value or authenticity.

Counsel for the defense have informed us in the brief and at the argument that the sole proof of knowledge introduced at the trial was in the form of ex parte affidavits and depositions. Apart from what has been excerpted from the record in the applications and the briefs, and such portions of the record as I have been able to examine, it has been impossible for me fully to verify counsel's statement in this respect. But the Government has not disputed it; and it has maintained that we have no right to examine the record upon any question "of evidence." Accordingly, without concession to that view, the statement of counsel is taken for the fact. And in that state of things petitioner has been convicted of a crime in which knowledge is an essential element, with no proof of knowledge other than what would be inadmissible in any other capital case or proceeding under our system, civil or military, and which furthermore Congress has expressly commanded shall not be received in such cases tried by military commissions and other military tribunals.[18]

Moreover counsel assert in the brief, and this also is not denied, that the sole proof made of certain of the specifi-

[18] Cf. text *infra* Part IV.

cations in the bills of particulars was by ex parte affidavits. It was in relation to this also vital phase of the proof that there occurred one of the commission's reversals of its earlier rulings in favor of the defense,[19] a fact in itself conclusive demonstration of the necessity to the prosecution's case of the prohibited type of evidence and of its prejudicial effects upon the defense.

These two basic elements in the proof, namely, proof of knowledge of the crimes and proof of the specifications in the bills, that is, of the atrocities themselves, constitute the most important instances perhaps, if not the most fla-

[19] On November 1, early in the trial, the president of the commission stated: "I think the Prosecution should consider the desirability of striking certain items. The Commission feels that there must be witnesses introduced on each of the specifications or items. *It has no objection to considering affidavits, but it is unwilling to form an opinion of a particular item based solely on an affidavit.* Therefore, until evidence is introduced, these particular exhibits are rejected." (Emphasis added.)

Later evidence of the excluded type was offered, to introduction of which the defense objected on various grounds including the prior ruling. At the prosecution's urging the commission withdrew to deliberate. Later it announced that "after further consideration, the Commission reverses that ruling [of November 1] and affirms its prerogative of receiving and considering affidavits or depositions, if it chooses to do so, for whatever probative value the Commission believes they may have, without regard to the presentation of some partially corroborative oral testimony." It then added: "The Commission *directs* the Prosecution again to introduce the affidavits or depositions then in question, and other documents of a similar nature which the Prosecution stated had been prepared for introduction." (Emphasis added.)

Thereafter this type of evidence was consistently received and again, by the undisputed statement of counsel, as the sole proof of many of the specifications of the bills, a procedure which they characterize correctly in my view as having "in effect, stripped the proceeding of all semblance of a trial and converted it into an ex parte investigation."

grant,[20] of departure not only from the express command of Congress against receiving such proof but from the whole British-American tradition of the common law and the Constitution. Many others occurred, which there is neither time nor space to mention.[21]

Petitioner asserts, and there can be no reason to doubt, that by the use of all this forbidden evidence he was deprived of the right of cross-examination and other means to establish the credibility of the deponents or affiants, not to speak of the authors of reports, letters, documents and newspaper articles; of opportunity to determine whether the multitudinous crimes specified in the bills were committed in fact by troops under his command or by naval or air force troops not under his command at the time alleged; to ascertain whether the crimes attested were isolated acts of individual soldiers or were military acts committed by troop units acting under supervision of officers; and, finally, whether "in short, there was such a 'pattern' of" conduct as the prosecution alleged and its whole theory of the crime and the evidence required to be made out.

He points out in this connection that the commission based its decision on a finding as to the extent and number

[20] This perhaps consisted in the showing of the so-called "propaganda" film, "Orders from Tokyo," portraying scenes of battle destruction in Manila, which counsel say "was not in itself seriously objectionable." Highly objectionable, inflammatory and prejudicial, however, was the accompanying sound track with comment that the film was "evidence which will convict," mentioning petitioner specifically by name.

[21] Innumerable instances of hearsay, once or several times removed, relating to all manner of incidents, rumors, reports, etc., were among these. Many instances, too, are shown of the use of opinion evidence and conclusions of guilt, including reports made after ex parte investigations by the War Crimes Branch of the Judge Advocate General's Department, which it was and is urged had the effect of "putting the prosecution on the witness stand" and of usurping the commission's function as judge of the law and the facts. It is said also that some of the reports were received as the sole proof of some of the specifications.

of the atrocities and that this of itself establishes the prejudicial effect of the affidavits, etc., and of the denial resulting from their reception of any means of probing the evidence they contained, including all opportunity for cross-examination. Yet it is said there is no sufficient showing of prejudice. The effect could not have been other than highly prejudicial. The matter is not one merely of "rules of evidence." It goes, as will appear more fully later, to the basic right of defense, including some fair opportunity to test probative value.

Insufficient as this recital is to give a fair impression of what was done, it is enough to show that this was no trial in the traditions of the common law and the Constitution. If the tribunal itself was not strange to them otherwise, it was in its forms and modes of procedure, in the character and substance of the evidence it received, in the denial of all means to the accused and his counsel for testing the evidence, in the brevity and ambiguity of its findings made upon such a mass of material and, as will appear, in the denial of any reasonable opportunity for preparation of the defense. Because this last deprivation not only is important in itself, but is closely related to the departures from all limitations upon the character of and modes of making the proof, it will be considered before turning to the important legal questions relating to whether all these violations of our traditions can be brushed aside as not forbidden by the valid Acts of Congress, treaties and the Constitution, in that order. If all these traditions can be so put away, then indeed will we have entered upon a new but foreboding era of law.

III.

Denial of Opportunity to Prepare Defense.

Petitioner surrendered September 3, 1945, and was interned as a prisoner of war in conformity with Article 9

of the Geneva Convention of July 27, 1929.[22] He was served with the charge on September 25 and put in confinement as an accused war criminal. On October 8 he was arraigned and pleaded not guilty. On October 29 the trial began and it continued until December 7, when sentence was pronounced, exactly four years almost to the hour from the attack on Pearl Harbor.

On the day of arraignment, October 8, three weeks before the trial began, petitioner was served with a bill of particulars specifying 64 items setting forth a vast number of atrocities and crimes allegedly committed by troops under his command.[23] The six officers appointed as defense counsel thus had three weeks, it is true at the prosecution's suggestion a week longer than they sought at first, to investigate and prepare to meet all these items and the large number of incidents they embodied, many of which had occurred in distant islands of the archipelago. There is some question whether they then anticipated the full scope and character of the charge or the evidence they would have to meet. But, as will appear, they worked night and day at the task. Even so it would have been impossible to do thoroughly, had nothing more occurred.

But there was more. On the first day of the trial, October 29, the prosecution filed a supplemental bill of par-

[22] Also with Paragraph 82 of the Rules of Land Warfare.

[23] Typical of the items are allegations that members of the armed forces of Japan under the command of the accused committed the acts "During the months of October, November and December 1944 [of] brutally mistreating and torturing numerous unarmed noncombatant civilians at the Japanese Military Police Headquarters located at Cortabitarte and Mabini Streets, Manila" and "On about 19 February 1945, in the Town of Cuenca, Batangas Province, brutally mistreating, massacring and killing Jose M. Laguo, Esteban Magsamdol, Jose Lanbo, Felisa Apuntar, Elfidio Lunar, Victoriana Ramo, and 978 other persons, all unarmed noncombatant civilians, pillaging and unnecessary [sic], deliberately and wantonly devastating, burning and destroying large areas of that town."

ticulars, containing 59 more specifications of the same general character, involving perhaps as many incidents occurring over an equally wide area.[24] A copy had been given the defense three days earlier. One item, No. 89, charged that American soldiers, prisoners of war, had been tried and executed without notice having been given to the protecting power of the United States in accordance with the requirements of the Geneva Convention, which it is now argued, strangely, the United States was not required to observe as to petitioner's trial.[25]

But what is more important is that defense counsel, as they felt was their duty, at once moved for a continuance.[26] The application was denied. However the commission indicated that if, at the end of the prosecution's presenta-

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[24] The supplemental bill contains allegations similar to those set out in the original bill. See note 23. For example, it charged that members of the armed forces of Japan under the command of the accused "during the period from 9 October 1944 to about 1 February 1945, at Cavite City, Imus, and elsewhere in Cavite Province," were permitted to commit the acts of "brutally mistreating, torturing, and killing or attempting to kill, without cause or trial, unarmed noncombatant civilians."

[25] See note 39 and text, Part V.

[26] In support of the motion counsel indicated surprise by saying that, though it was assumed two or three new specifications might be added, there had been no expectation of 59 "about entirely different persons and times." The statement continued:

> "We have worked earnestly seven days a week in order to prepare the defense on 64 specifications. And when I say 'prepare the defense,' sir, I do not mean merely an affirmative defense, but to acquaint ourselves with the facts so that we could properly cross examine the Prosecution's witnesses.
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> ". . . 'In advance of trial' means: Sufficient time to allow the Defense a chance to prepare its defense.
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> "We earnestly state that we must have this time in order to adequately prepare a defense. I might add, sir, we think that this is important to the Accused, but far more important than any rights of this Accused, we believe, is the proposition that this Commission should not deviate from a fundamental American concept of fairness . . ."

tion concerning the original bill, counsel should "believe they require additional time . . ., the Commission will consider such a motion at that time," before taking up the items of the supplemental bill. Counsel again indicated, without other result, that time was desired at once "as much, if not more" to prepare for cross-examination "as the Prosecution's case goes in" as to prepare affirmative defense.

On the next day, October 30, the commission interrupted the prosecutor to say it would not then listen to testimony or discussion upon the supplemental bill. After colloquy it adhered to its prior ruling and, in response to inquiry from the prosecution, the defense indicated it would require two weeks before it could proceed on the supplemental bill. On November 1 the commission ruled it would not receive affidavits without corroboration by witnesses on any specification, a ruling reversed four days later.

On November 2, after the commission had received an affirmative answer to its inquiry whether the defense was prepared to proceed with an item in the supplemental bill which the prosecution proposed to prove, it announced: "Hereafter, then, unless there is no [sic] objection by the Defense, the Commission will assume that you are prepared to proceed with any items in the Supplemental Bill." On November 8, the question arose again upon the prosecution's inquiry as to when the defense would be ready to proceed on the supplemental bill, the prosecutor adding: "Frankly, sir, it took the War Crimes Commission some three months to investigate these matters and I cannot conceive of the Defense undertaking a similar investigation with any less period of time." Stating it realized "the tremendous task which we placed upon the Defense" and its "determination to give them the time they require," the commission again adhered to its ruling of October 29.

Four days later the commission announced it would grant a continuance "only for the most urgent and unavoidable reasons." [27]

On November 20, when the prosecution rested, senior defense counsel moved for a reasonable continuance, recalling the commission's indication that it would then consider such a motion and stating that since October 29 the defense had been "working day and night," with "no time whatsoever to prepare any affirmative defense," since counsel had been fully occupied trying "to keep up with that new Bill of Particulars."

The commission thereupon retired for deliberation and, on resuming its sessions shortly, denied the motion. Counsel then asked for "a short recess of a day." The commission suggested a recess until 1: 30 in the afternoon. Counsel responded this would not suffice. The commission stated it felt "that the Defense should be prepared at least on its opening statement," to which senior counsel answered: "We haven't had time to do that, sir." The commission then recessed until 8: 30 the following morning.

Further comment is hardly required. Obviously the burden placed upon the defense, in the short time allowed for preparation on the original bill, was not only "tremendous." In view of all the facts, it was an impossible one, even though the time allowed was a week longer than asked. But the grosser vice was later when the burden was more than doubled by service of the supplemental bill on the eve of trial, a procedure which, taken in connection with the consistent denials of continuance and the commission's later reversal of its rulings favorable to the defense,

[27] The commission went on to question the need for all of the six officers representing the defense to be present during presentation of all the case, suggested one or two would be adequate and others "should be out of the courtroom" engaged in other matters and strongly suggested bringing in additional counsel in the midst of the trial, all to the end that "need to request a continuance may not arise."

was wholly arbitrary, cutting off the last vestige of adequate chance to prepare defense and imposing a burden the most able counsel could not bear. This sort of thing has no place in our system of justice, civil or military. Without more, this wide departure from the most elementary principles of fairness vitiated the proceeding. When added to the other denials of fundamental right sketched above, it deprived the proceeding of any semblance of trial as we know that institution.

IV.

Applicability of the Articles of War.

The Court's opinion puts the proceeding and the petitioner, in so far as any rights relating to his trial and conviction are concerned, wholly outside the Articles of War. In view of what has taken place, I think the decision's necessary effect is also to place them entirely beyond limitation and protection, respectively, by the Constitution. I disagree as to both conclusions or effects.

The Court rules that Congress has not made Articles 25 and 38 applicable to this proceeding. I think it has made them applicable to this and all other military commissions or tribunals. If so, the commission not only lost all power to punish petitioner by what occurred in the proceedings. It never acquired jurisdiction to try him. For the directive by which it was constituted, in the provisions of § 16,[28] was squarely in conflict with Articles 25 and 38 of the Articles of War [29] and therefore was void.

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[28] See note 9.

[29] Article 25 is as follows: "A duly authenticated deposition taken upon reasonable notice to the opposite party may be read in evidence before *any military court or commission in any case not capital, or* in any proceeding before a *court of inquiry or a military board, if* such deposition be taken when the witness resides, is found, or is about to go beyond the State, Territory, or district in which the court, commission, or board is ordered to sit, or beyond the distance of one hundred miles

Article 25 allows reading of depositions in evidence, under prescribed conditions, in the plainest terms "before *any* military court or commission *in any case not capital,*" providing, however, that "testimony by deposition may be adduced *for the defense in capital cases.*" (Emphasis added.) This language clearly and broadly covers every kind of military tribunal, whether "court" or "commission." It covers all capital cases. It makes no exception or distinction for any accused.

Article 38 authorizes the President by regulations to prescribe procedure, including modes of proof, even more all-inclusively if possible, "in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals." Language could not be more broadly inclusive. No exceptions are mentioned or suggested, whether of tribunals or of accused persons. Every kind of military body for performing the function of trial is covered. That is clear from the face of the Article.

Article 38 moreover limits the President's power. He is so far as practicable to prescribe "the rules of evidence generally recognized in the trial of criminal cases in the

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from the place of trial or hearing, or when it appears to the satisfaction of the court, commission, board, or appointing authority that the witness, by reason of age, sickness, bodily infirmity, imprisonment, or other reasonable cause, is unable to appear and testify in person at the place of trial or hearing: *Provided, That testimony by deposition may be adduced for the defense in capital cases.*" (Emphasis added.) 10 U. S. C. § 1496.

Article 38 reads: "The President may, by regulations, which he may modify from time to time, prescribe the procedure, *including modes of proof,* in cases before *courts-martial, courts of inquiry, military commissions, and other military tribunals,* which regulations shall insofar as he shall deem practicable, apply the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States: *Provided, That nothing contrary to or inconsistent with these articles shall be so prescribed: Provided further, That all rules made in pursuance of this article shall be laid before the Congress annually.*" (Emphasis added.) 10 U. S. C. § 1509.

district courts of the United States," a clear mandate that Congress intended all military trials to conform as closely as possible to our customary procedural and evidentiary protections, constitutional and statutory, for accused persons. But there are also two unqualified limitations, one "that nothing contrary to or inconsistent with *these* articles [specifically here Article 25] shall be so prescribed"; the other "that all rules made in pursuance of this article shall be laid before the Congress annually."

Notwithstanding these broad terms the Court, resting chiefly on Article 2, concludes the petitioner was not among the persons there declared to be subject to the Articles of War and therefore the commission which tries him is not subject to them. That Article does not cover prisoners of war or war criminals. Neither does it cover civilians in occupied territories, theatres of military operations or other places under military jurisdiction within or without the United States or territory subject to its sovereignty, whether they be neutrals or enemy aliens, even citizens of the United States, unless they are connected in the manner Article 2 prescribes with our armed forces, exclusive of the Navy.

The logic which excludes petitioner on the basis that prisoners of war are not mentioned in Article 2 would exclude all these. I strongly doubt the Court would go so far, if presented with a trial like this in such instances. Nor does it follow necessarily that, because some persons may not be mentioned in Article 2, they can be tried without regard to any of the limitations placed by any of the other Articles upon military tribunals.

Article 2 in defining persons "subject to the articles of war" was, I think, specifying those to whom the Articles in general were applicable. And there is no dispute that most of the Articles are not applicable to the petitioner. It does not follow, however, and Article 2 does not provide, that there may not be in the Articles specific provisions

covering persons other than those specified in Article 2. Had it so provided, Article 2 would have been contradictory not only of Articles 25 and 38 but also of Article 15 among others.

In 1916, when the last general revision of the Articles of War took place,[30] for the first time certain of the Articles were specifically made applicable to military commissions. Until then they had applied only to courts-martial. There were two purposes, the first to give statutory recognition to the military commission without loss of prior jurisdiction and the second to give those tried before military commissions some of the more important protections afforded persons tried by courts-martial.

In order to effectuate the first purpose, the Army proposed Article 15.[31] To effectuate the second purpose, Arti-

[30] Another revision of the Articles of War took place in 1920. At this time Article 15 was slightly amended.

In 1916 Article 15 was enacted to read: "The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals *of concurrent jurisdiction* in respect of offenders or offenses that by the law of war may be lawfully triable by such military commissions, provost courts, or other military tribunals." (Emphasis added.)

The 1920 amendment put in the words "by statute or" before the words "by the law of war" and omitted the word "lawfully."

[31] Speaking at the Hearings before the Committee on Military Affairs, House of Representatives, 62d Cong., 2d Sess., printed as an Appendix to S. Rep. 229, 63d Cong., 2d Sess., General Crowder said:

> "The next article, No. 15, is entirely new, and the reasons for its insertion in the code are these: In our War with Mexico two war courts were brought into existence by orders of Gen. Scott, viz, the military commission and the council of war. By the military commission Gen. Scott tried cases cognizable in time of peace by civil courts, and by the council of war he tried offenses against the laws of war. *The council of war did not survive the Mexican War period, and in our subsequent wars its jurisdiction has been taken over by the military commission,* which during the Civil War period tried more than 2,000 cases. While the military commission has not been formally authorized by statute, its jurisdiction as a war court has been upheld by the Supreme

Footnote 31—Continued.

> Court of the United States. It is an institution of the greatest importance in a period of war and should be preserved. In the new code *the jurisdiction of courts-martial has been somewhat amplified by the introduction of the phrase 'Persons subject to military law.' There will be more instances in the future than in the past when the jurisdiction of courts-martial will overlap that of the war courts,* and the question would arise whether Congress having vested jurisdiction by statute the common law of war *jurisdiction* was not ousted. I wish to make it *perfectly plain by the new article that in such cases the jurisdiction of the war court is concurrent."* S. Rep. No. 229, 63d Cong., 2d Sess., p. 53. (Emphasis added.)

And later, in 1916, speaking before the Subcommittee on Military Affairs of the Senate at their Hearings on S. 3191, a project for the revision of the Articles of War, 64th Cong., 1st Sess., printed as an Appendix to S. Rep. 130, 64th Cong., 1st Sess., General Crowder explained at greater length:

> "Article 15 is new. We have included in article 2 as subject to military law a number of persons who are also subject to trial by military commission. A military commission is our common-law war court. It has no statutory existence, though it is recognized by statute law. As long as the articles embraced them in the designation 'persons subject to military law,' and provided that they might be tried by court-martial, *I was afraid that, having made a special provision for their trial by court-martial, it might be held that the provision operated to exclude trials by military commission and other war courts; so this new article was introduced . . .*
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> *"It just saves to these war courts the jurisdiction they now have and makes it a concurrent jurisdiction with courts-martial, so that the military commander in the field* in time of war *will be at liberty to employ either form of court* that happens to be convenient. *Both classes of courts have the same procedure.* For the information of the committee and in explanation of these war courts to which I have referred I insert here an explanation from Winthrop's Military Law and Precedents—
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> " 'The military commission—a war court—had its origin in G. O. 20, Headquarters of the Army at Tampico, February 19, 1847 (Gen. Scott). Its jurisdiction was confined mainly to criminal offenses of the class cognizable by civil courts in time of peace committed by inhabitants of the theater of hostilities. A further war court was originated by Gen. Scott at the same time, called "council of war," with jurisdiction to try the same classes of persons for violations of the laws of war, mainly guerrillas. These two jurisdictions were united in the later war court of the Civil War and Spanish War periods, for which the general designation of "military commission" was retained. The military commission was given statutory recognition in section 30, act of

cles 25 and 38 and several others were proposed.[32] But as the Court now construes the Articles of War, they have no application to military commissions before which alleged offenders against the laws of war are tried. What the Court holds in effect is that there are two types of military commission, one to try offenses which might be cognizable by a court-martial, the other to try war crimes, and that Congress intended the Articles of War referring in terms to military commissions without exception to be applicable only to the first type.

March 3, 1863, and in various other statutes of that period. The United States Supreme Court has acknowledged the validity of its judgments (Ex parte Vallandigham, 1 Wall., 243, and Coleman *v.* Tennessee, 97 U. S., 509). It tried more than 2,000 cases during the Civil War and reconstruction period. *Its composition, constitution, and procedure follows the analogy of courts-martial.* Another war court is the provost court, an inferior court with jurisdiction assimilated to that of justices of the peace and police courts; and other war courts variously designated "courts of conciliation," "arbitrators," "military tribunals," have been convened by military commanders in the exercise of the war power as occasion and necessity dictated.'

"Yet, as I have said, these war courts never have been formally authorized by statute.

"Senator COLT. They grew out of usage and necessity?

"Gen. CROWDER. Out of usage and necessity. I thought it was just as well, as inquiries would arise, to put this information in the record." S. Rep. No. 130, 64th Cong., 1st Sess. (1916) p. 40. (Emphasis added.)

Article 15 was also explained in the "Report of a committee on the proposed revision of the articles of war, pursuant to instructions of the Chief of Staff, March 10, 1915," included in Revision of the Articles of War, Comparative Prints, etc., 1904–1920, J. A. G. O., as follows:

> "A number of articles . . . of the revision have the effect of giving courts-martial jurisdiction over certain offenders and offenses which, under the law of war or by statute, are also triable by military commissions, provost courts, etc. Article 15 is introduced for the purpose of making clear that in such cases a court-martial has only a concurrent jurisdiction with such war tribunals."

[32] Of course, Articles 25 and 38, at the same time that they gave protection to defendants before military commissions, also provided for the application by such tribunals of modern rules of procedure and evidence.

1 RUTLEDGE, J., dissenting.

This misconceives both the history of military commissions and the legislative history of the Articles of War. There is only one kind of military commission. It is true, as the history noted shows, that what is now called "the military commission" arose from two separate military courts instituted during the Mexican War. The first military court, called by General Scott a "military commission," was given jurisdiction in Mexico over criminal offenses of the class cognizable by civil courts in time of peace. The other military court, called a "council of war," was given jurisdiction over offenses against the laws of war. Winthrop, Military Law and Precedents (2d ed., reprinted 1920) *1298–1299. During the Civil War "the two jurisdictions of the earlier commission and council respectively . . . [were] *united* in the . . . war-court, for which the general designation of 'military commission' was retained as the preferable one." Winthrop, *supra,* at *1299. Since that time there has been only one type of military tribunal called the military commission, though it may exercise different kinds of jurisdiction,[33] according to the circumstances under which and purposes for which it is convened.

The testimony of General Crowder is perhaps the most authoritative evidence of what was intended by the legis-

[33] Winthrop, speaking of military commissions at the time he was writing, 1896, says: "The offences cognizable by military commissions may thus be classed as follows: (1) Crimes and statutory offences cognizable by State or U. S. courts, and which would properly be tried by such courts if open and acting; (2) *Violations of the laws and usages of war* cognizable by military tribunals only; (3) Breaches of military orders or regulations for which offenders are not legally triable by court-martial under the Articles of war." (Emphasis added.) Winthrop, at *1309. And cf. Fairman, The Law of Martial Rule (2d ed. 1943): "Military commissions take cognizance of three categories of criminal cases: *offenses against the laws of war,* breaches of military regulations, and civil crimes which, where the ordinary courts have ceased to function, cannot be tried normally." (Emphasis added.) Fairman, 265–266. See also Davis, A Treatise on the Military Law of the United States (1915) 309–310.

lation, for he was its most active official sponsor, spending years in securing its adoption and revision. Articles 15, 25 and 38 particularly are traceable to his efforts. His concern to secure statutory recognition for military commissions was equalled by his concern that the statutory provisions giving this should not restrict their preexisting jurisdiction. He did not wish by securing additional jurisdiction, overlapping partially that of the court-martial, to surrender other. Hence Article 15. That Article had one purpose and one only. It was to make sure that the acquisition of partially concurrent jurisdiction with courts-martial should not cause loss of any other. And it was jurisdiction, not procedure, which was covered by other Articles, with which he and Congress were concerned in that Article. It discloses no purpose to deal in any way with procedure or to qualify Articles 25 and 38. And it is clear that General Crowder at all times regarded all military commissions as being governed by the identical procedure. In fact, so far as Articles 25 and 38 are concerned, this seems obvious for all types of military tribunals. The same would appear to be true of other Articles also, e. g., 24 (prohibiting compulsory self-incrimination), 26, 27, 32 (contempts), all except the last dealing with procedural matters.

Article 12 is especially significant. It empowers general courts-martial to try two classes of offenders: (1) "any person *subject to military law,*" under the definition of Article 2, for any offense "made punishable by these articles"; (2) "and any other person who *by the law of war* is subject to trial *by military tribunals,*" not covered by the terms of Article 2. (Emphasis added.)

Article 12 thus, in conformity with Article 15, gives the general court-martial concurrent jurisdiction of war crimes and war criminals with military commissions. Neither it nor any other Article states or indicates there are to be *two* kinds of general courts-martial for trying war crimes; yet

this is the necessary result of the Court's decision, unless in the alternative that would be to imply that in exercising such jurisdiction there is only one kind of general court-martial, but there are two or more kinds of military commission, with wholly different procedures and with the result that "the commander in the field" will not be free to determine whether general court-martial or military commission shall be used as the circumstances may dictate, but must govern his choice by the kind of procedure he wishes to have employed.

The only reasonable and, I think, possible conclusion to draw from the Articles is that the Articles which are in terms applicable to military commissions are so uniformly and those applicable to both such commissions and to courts-martial when exercising jurisdiction over offenders against the laws of war likewise are uniformly applicable, and not diversely according to the person or offense being tried.

Not only the face of the Articles, but specific statements in General Crowder's testimony support this view. Thus in the portion quoted above [34] from his 1916 statement, after stating expressly the purpose of Article 15 to preserve unimpaired the military commission's jurisdiction, and to make it concurrent with that of courts-martial in so far as the two would overlap, "so that the *military commander in the field* in time of war will be at liberty to employ either form of court that happens to be convenient," he went on to say: "Both classes of courts have the same procedure," a statement so unequivocal as to leave no room for question. And his quotation from Winthrop supports his statement, namely: "Its [i. e., the military commission's] composition, constitution and procedure follow the analogy of courts-martial."

At no point in the testimony is there suggestion that there are two types of military commission, one bound by

[34] Note 31.

the procedural provisions of the Articles, the other wholly free from their restraints or, as the Court strangely puts the matter, that there is only one kind of commission, but that it is bound or not bound by the Articles applicable in terms, depending upon who is being tried and for what offense; for that very difference makes the difference between one and two. The history and the discussion show conclusively that General Crowder wished to secure and Congress intended to give statutory recognition to all forms of military tribunals; to enable commanding officers in the field to use either court-martial or military commission as convenience might dictate, thus broadening to this extent the latter's jurisdiction and utility; but at the same time to preserve its full preexisting jurisdiction; and also to lay down identical provisions for governing or providing for the government of the procedure and rules of evidence of every type of military tribunal, wherever and however constituted.[35]

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[35] In addition to the statements of General Crowder with relation to Article 15, set out in note 31 *supra*, see the following statements made with reference to Article 25, in 1912 at a hearing before the Committee on Military Affairs of the House: "We come now to article 25, which relates to the admissibility of depositions. . . . It will be noted further that *the application of the old article has been broadened to include military commissions, courts of inquiry, and military boards.*

"Mr. SWEET. Please explain what you mean by military commission.

"Gen. CROWDER. That is our common law of war court, and was referred to by me in a prior hearing. [The reference is to the discussion of Article 15.] This war court came into existence during the Mexican War, and was created by orders of Gen. Scott. It had jurisdiction to try all cases usually cognizable in time of peace by civil courts. Gen. Scott created another war court, called the 'council of war,' with jurisdiction to try offenses against the laws of war. The constitution, composition, and jurisdiction of these courts *have never been regulated by statute.* The council of war did not survive the Mexican War period, since which its jurisdiction has been taken over by the military commission. The military commission received express recognition in the reconstruction acts, and its *jurisdiction* has been affirmed and supported by all our courts. It was extensively employed during the

Finally, unless Congress was legislating with regard to all military commissions, Article 38, which gives the President the power to "prescribe the procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals," takes on a rather senseless meaning; for the President would have such power only with respect to those military commissions exercising concurrent jurisdiction with courts-martial.

All this seems so obvious, upon a mere reading of the Articles themselves and the legislative history, as not to require demonstration. And all this Congress knew, as that history shows. In the face of that showing I cannot accept the Court's highly strained construction, first, because I think it is in plain contradiction of the facts disclosed by the history of Articles 15, 25 and 38 as well as their language; and also because that construction defeats at least two of the ends General Crowder had in mind, namely, to secure statutory recognition for every form of military tribunal and to provide for them a basic uni-

Civil War period and also during the Spanish-American War. It is highly desirable that this important war court should be continued to be governed as heretofore, by the laws of war rather than by statute." S. Rep. No. 229, 63d Cong., 2d Sess., 59; cf. S. Rep. 130, 64th Cong., 1st Sess., 54–55. (Emphasis added.) See also Hearings before the Subcommittee of the Committee on Military Affairs of the Senate on Establishment of Military Justice, 66th Cong., 1st Sess., 1182–1183.

Further evidence that procedural provisions of the Articles were intended to apply to all forms of military tribunal is given by Article 24, 10 U. S. C. § 1495, which provides against compulsory self-incrimination "before a military court, commission, court of inquiry, or board, or before an officer conducting an investigation." This article was drafted so that "The prohibition should reach all witnesses, *irrespective of the class of military tribunal* before which they appear . . ." (Emphasis added.) Comparative Print showing S. 3191 with the Present Articles of War and other Related Statutes, and Explanatory Notes, Printed for use of the Senate Committee on Military Affairs, 64th Cong., 1st Sess., 17, included in Revision of the Articles of War, Comparative Prints, Etc., 1904–1920, J. A. G. O.

form mode of procedure or method of providing for their procedure.

Accordingly, I think Articles 25 and 38 are applicable to this proceeding; that the provisions of the governing directive in § 16 are in direct conflict with those Articles; and for that reason the commission was invalidly constituted, was without jurisdiction, and its sentence is therefore void.

V.

The Geneva Convention of 1929.

If the provisions of Articles 25 and 38 were not applicable to the proceeding by their own force as Acts of Congress, I think they would still be made applicable by virtue of the terms of the Geneva Convention of 1929, in particular Article 63. And in other respects, in my opinion, the petitioner's trial was not in accord with that treaty, namely, with Article 60.

The Court does not hold that the Geneva Convention is not binding upon the United States and no such contention has been made in this case.[36] It relies on other

[36] We are informed that Japan has not ratified the Geneva Convention. See discussion of Article 82 in the paragraphs below. We are also informed, however—and the record shows this at least as to Japan—that at the beginning of the war both the United States and Japan announced their intention to adhere to the provisions of that treaty. The force of that understanding continues, perhaps with greater reason if not effect, despite the end of hostilities. See note 40 and text.

Article 82 provides:

> "The provisions of the present Convention must be respected by the High Contracting Parties under all circumstances.
>
> "In case, in time of war, one of the belligerents is not a party to the Convention, its provisions shall nevertheless remain in force as between the belligerents who are parties thereto."

It is not clear whether the Article means that during a war, when one of the belligerents is not a party to the Convention, the provisions must nevertheless be applied by all the other belligerents to the prisoners of war not only of one another but also of the power that was

arguments to show that Article 60, which provides that the protecting power shall be notified in advance of a judicial proceeding directed against a prisoner of war, and Article 63, which provides that a prisoner of war may be tried only by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining power, are not properly invoked by the petitioner. Before considering the Court's view that these Articles are not applicable to this proceeding by their terms, it may be noted that on his surrender petitioner was interned in conformity with Article 9 of this Convention.

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not a party thereto or whether it means that they need not be applied to soldiers of the nonparticipating party who have been captured. If the latter meaning is accepted, the first paragraph would seem to contradict the second.

"Legislative history" here is of some, if little, aid. A suggested draft of a convention on war prisoners drawn up in advance of the Geneva meeting by the International Committee of the Red Cross (Actes de la Conférence Diplomatique de Genève, edited by Des Gouttes, pp. 21–34) provided in Article 92 that the provisions of the Convention "ne cesseront d'être obligatories qu'au cas où l'un des Etats belligérents participant à la Convention se trouve avoir à combattre les forces armées d'un autre Etat que n'y serait par partie et à l'égard de cet Etat seulement." See Rasmussen, Code des Prisonniers de Guerre (1931) 70. The fact that this suggested article was not included in the Geneva Convention would indicate that the nations in attendance were avoiding a decision on this problem. But I think it shows more, that is, it manifests an intention not to foreclose a future holding that under the terms of the Convention a state is bound to apply the provisions to prisoners of war of nonparticipating states. And not to foreclose such a holding is to invite one. We should, in my opinion, so hold, for reasons of security to members of our own armed forces taken prisoner, if for no others.

Moreover, if this view is wrong and the Geneva Convention is not strictly binding upon the United States as a treaty, it is strong evidence of and should be held binding as representing what have become the civilized rules of international warfare. Yamashita is as much entitled to the benefit of such rules as to the benefit of a binding treaty which codifies them. See U. S. War Dept., Basic Field Manual, Rules of Land Warfare (1940), par. 5–*b*.

The chief argument is that Articles 60 and 63 have reference only to offenses committed by a prisoner of war while a prisoner of war and not to violations of the laws of war committed while a combatant. This conclusion is derived from the setting in which these Articles are placed. I do not agree that the context gives any support to this argument. The argument is in essence of the same type as the argument the Court employs to nullify the application of Articles 25 and 38 of the Articles of War by restricting their own broader coverage by reference to Article 2. For reasons set forth in the margin,[37] I think it equally invalid here.

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[37] Title III of the Convention, which comprises Articles 7 to 67, is called "Captivity." It contains § I, "Evacuation of Prisoners of War" (Articles 7–8); § II, "Prisoners-of-War Camps" (Articles 9–26); § III, "Labor of Prisoners of War" (Articles 27–34); § IV, "External Relations of Prisoners of War" (Articles 35–41); and § V, "Prisoners' Relations with the Authorities" (Articles 42–67). Thus Title III regulates all the various incidents of a prisoner of war's life while in captivity.

Section V, with which we are immediately concerned, is divided into three chapters. Chapter 1 (Article 42) gives a prisoner of war the right to complain of his condition of captivity. Chapter 2 (Articles 43–44) gives prisoners of war the right to appoint agents to represent them. Chapter 3 is divided into three subsections and is termed "Penalties Applicable to Prisoners of War." Subsection 1 (Articles 45–53) contains various miscellaneous articles to be considered in detail later. Subsection 2 (Articles 54–59) contains provisions with respect to disciplinary punishments. And subsection 3 (Articles 60–67), which is termed "Judicial Suits," contains various provisions for protection of a prisoner's rights in judicial proceedings instituted against him.

Thus, subsection 3, which contains Articles 60 and 63, as opposed to subsection 2, of Chapter 3, is concerned not with mere problems of discipline, as is the latter, but with the more serious matters of trial leading to imprisonment or possible sentence of death; cf. Brereton, The Administration of Justice Among Prisoners of War by Military Courts (1935) 1 Proc. Australian & New Zealand Society of International Law 143, 153. The Court, however, would have the distinction

Footnote 37—Continued.

between subsection 2 and subsection 3 one between minor disciplinary action against a prisoner of war for acts committed while a prisoner and major judicial action against a prisoner of war for acts committed while a prisoner. This narrow view not only is highly strained, confusing the different situations and problems treated by the two subdivisions. It defeats the most important protections subsection 3 was intended to secure, for our own as well as for enemy captive military personnel.

At the most, there would be logic in the Court's construction if it could be said that all of Chapter 3 deals with acts committed while a prisoner of war. Of course, subsection 2 does, because of the very nature of its subject-matter. Disciplinary action will be taken by a captor power against prisoners of war only for acts committed by prisoners after capture.

But it is said that subsection 1 deals exclusively with acts committed by a prisoner of war after having become a prisoner, and this indicates subsection 3 is limited similarly. This ignores the fact that some of the articles in subsection 1 appear, on their face, to apply to all judicial proceedings for whatever purpose instituted. Article 46, for example, provides in part:

> "Punishments other than those provided for the same acts for soldiers of the national armies may not be imposed upon prisoners of war by the military authorities and courts of the detaining Power."

This seems to refer to war crimes as well as to other offenses; for surely a country cannot punish soldiers of another army for offenses against the laws of war, when it would not punish its own soldiers for the same offenses. Similarly, Article 47 in subsection 1 appears to refer to war crimes as well as to crimes committed by a prisoner after his capture. It reads in part:

> "Judicial proceedings against prisoners of war shall be conducted as rapidly as the circumstances permit; preventive imprisonment shall be limited as much as possible."

Thus, at the most, subsection 1 contains, in some of its articles, the same ambiguities and is open to the same problem that we are faced with in construing Articles 60 and 63. It cannot be said, therefore, that all of Chapter 3, and especially subsection 3, relate only to acts committed by prisoners of war after capture, for the meaning of subsection 3, in this argument, is related to the meaning of subsection 1; and subsection 1 is no more clearly restricted to punishments and proceedings in disciplinary matters than is subsection 3.

Neither Article 60 nor Article 63 contains such a restriction of meaning as the Court reads into them.[38] In the absence of any such limitation, it would seem that they were intended to cover all judicial proceedings, whether instituted for crimes allegedly committed before capture or later. Policy supports this view. For such a construction is required for the security of our own soldiers, taken prisoner, as much as for that of prisoners we take. And the opposite one leaves prisoners of war open to any form of trial and punishment for offenses against the laws of war their captors may wish to use, while safeguarding them, to the extent of the treaty limitations, in cases of disciplinary offense. This, in many instances, would be to make the treaty strain at a gnat and swallow the camel.

The United States has complied with neither of these Articles. It did not notify the protecting power of Japan in advance of trial as Article 60 requires it to do, although the supplemental bill charges the same failure to peti-

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[38] Article 60 pertinently is as follows: "At the opening of a judicial proceeding directed against a prisoner of war, the detaining Power shall advise the representative of the protecting Power thereof as soon as possible, and always before the date set for the opening of the trial.

"This advice shall contain the following information:

"a) Civil state and rank of prisoner;

"b) Place of sojourn or imprisonment;

"c) Specification of the [count] or counts of the indictment, giving the legal provisions applicable.

"If it is not possible to mention in that advice the court which will pass upon the matter, the date of opening the trial and the place where it will take place, this information must be furnished to the representative of the protecting Power later, as soon as possible, and at all events, at least three weeks before the opening of the trial."

Article 63 reads: "Sentence may be pronounced against a prisoner of war only by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining Power."

tioner in Item 89.[39] It is said that, although this may be true, the proceeding is not thereby invalidated. The argument is that our noncompliance merely gives Japan a right of indemnity against us and that Article 60 was not intended to give Yamashita any personal rights. I cannot agree. The treaties made by the United States are by the Constitution made the supreme law of the land. In the absence of something in the treaty indicating that its provisions were not intended to be enforced, upon breach, by more than subsequent indemnification, it is, as I conceive it, the duty of the courts of this country to insure the nation's compliance with such treaties, except in the case of political questions. This is especially true where the treaty has provisions—such as Article 60—for the protection of a man being tried for an offense the punishment for which is death; for to say that it was intended to provide for enforcement of such provisions solely by claim, after breach, of indemnity would be in many instances, especially those involving trial of nationals of a defeated nation by a conquering one, to deprive the Articles of all force. Executed men are not much aided by post-war claims for indemnity. I do not think the adhering powers' purpose was to provide only for such ineffective relief.

Finally, the Government has argued that Article 60 has no application after the actual cessation of hostilities, as there is no longer any need for an intervening power between the two belligerents. The premise is that Japan no longer needs Switzerland to intervene with the United

[39] Item 89 charged the armed forces of Japan with subjecting to trial certain named and other prisoners of war "without prior notice to a representative of the protecting power, without opportunity to defend, and without counsel; denying opportunity to appeal from the sentence rendered; failing to notify the protecting power of the sentence pronounced; and executing a death sentence without communicating to the representative of the protecting power the nature and circumstances of the offense charged."

States to protect the rights of Japanese nationals, since Japan is now in direct communication with this Government. This of course is in contradiction of the Government's theory, in other connections, that the war is not over and military necessity still requires use of all the power necessary for actual combat.

Furthermore the premise overlooks all the realities of the situation. Japan is a defeated power, having surrendered, if not unconditionally then under the most severe conditions. Her territory is occupied by American military forces. She is scarcely in a position to bargain with us or to assert her rights. Nor can her nationals. She no longer holds American prisoners of war.[40] Certainly, if there was the need of an independent neutral to protect her nationals during the war, there is more now. In my opinion the failure to give the notice required by Article 60 is only another instance of the commission's failure to observe the obligations of our law.

What is more important, there was no compliance with Article 63 of the same Convention. Yamashita was not tried "according to the same procedure as in the case of persons belonging to the armed forces of the detaining Power." Had one of our soldiers or officers been tried for alleged war crimes, he would have been entitled to the benefits of the Articles of War. I think that Yamashita was equally entitled to the same protection. In any event, he was entitled to their benefits under the provisions of Article 63 of the Geneva Convention. Those benefits he did not receive. Accordingly, his trial was in violation of the Convention.

VI.

The Fifth Amendment.

Wholly apart from the violation of the Articles of War and of the Geneva Convention, I am completely unable to

[40] Nations adhere to international treaties regulating the conduct of war at least in part because of the fear of retaliation. Japan no longer has the means of retaliating.

accept or to understand the Court's ruling concerning the applicability of the due process clause of the Fifth Amendment to this case. Not heretofore has it been held that any human being is beyond its universally protecting spread in the guaranty of a fair trial in the most fundamental sense. That door is dangerous to open. I will have no part in opening it. For once it is ajar, even for enemy belligerents, it can be pushed back wider for others, perhaps ultimately for all.

The Court does not declare expressly that petitioner as an enemy belligerent has no constitutional rights, a ruling I could understand but not accept. Neither does it affirm that he has some, if but little, constitutional protection. Nor does the Court defend what was done. I think the effect of what it does is in substance to deny him all such safeguards. And this is the great issue in the cause.

For it is exactly here we enter wholly untrodden ground. The safe signposts to the rear are not in the sum of protections surrounding jury trials or any other proceeding known to our law. Nor is the essence of the Fifth Amendment's elementary protection comprehended in any single one of our time-honored specific constitutional safeguards in trial, though there are some without which the words "fair trial" and all they connote become a mockery.

Apart from a tribunal concerned that the law as applied shall be an instrument of justice, albeit stern in measure to the guilt established, the heart of the security lies in two things. One is that conviction shall not rest in any essential part upon unchecked rumor, report, or the results of the prosecution's ex parte investigations, but shall stand on proven fact; the other, correlative, lies in a fair chance to defend. This embraces at the least the rights to know with reasonable clarity in advance of the trial the exact nature of the offense with which one is to be charged; to have reasonable time for preparing to meet the charge and to have the aid of counsel in doing so, as also in the

trial itself; and if, during its course, one is taken by surprise, through the injection of new charges or reversal of rulings which brings forth new masses of evidence, then to have further reasonable time for meeting the unexpected shift.

So far as I know, it has not yet been held that any tribunal in our system, of whatever character, is free to receive such evidence "as *in its opinion* would be *of assistance* in proving or disproving the charge," or, again as in its opinion, "would have probative value in the mind of a reasonable man"; and, having received what in its unlimited discretion it regards as sufficient, is also free to determine what weight may be given to the evidence received without restraint.[41]

When to this fatal defect in the directive, however innocently made, are added the broad departures from the fundamentals of fair play in the proof and in the right to defend which occurred throughout the proceeding, there can be no accommodation with the due process of law which the Fifth Amendment demands.

All this the Court puts to one side with the short assertion that no question of due process under the Fifth Amendment or jurisdiction reviewable here is presented. I do not think this meets the issue, standing alone or in conjunction with the suggestion which follows that the Court gives no intimation one way or the other concerning

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[41] There can be no limit either to the admissibility or the use of evidence if the only test to be applied concerns probative value and the only test of probative value, as the directive commanded and the commission followed out, lies "in the Commission's opinion," whether that be concerning the assistance the "evidence" tendered would give in proving or disproving the charge or as it might think would "have value in the mind of a reasonable man." Nor is it enough to establish the semblance of a constitutional right that the commission declares, in receiving the evidence, that it comes in as having only such probative value, if any, as the commission decides to award it and this is accepted as conclusive.

what Fifth Amendment due process might require in other situations.

It may be appropriate to add here that, although without doubt the directive was drawn in good faith in the belief that it would expedite the trial and that enemy belligerents in petitioner's position were not entitled to more, that state of mind and purpose cannot cure the nullification of basic constitutional standards which has taken place.

It is not necessary to recapitulate. The difference between the Court's view of this proceeding and my own comes down in the end to the view, on the one hand, that there is no law restrictive upon these proceedings other than whatever rules and regulations may be prescribed for their government by the executive authority or the military and, on the other hand, that the provisions of the Articles of War, of the Geneva Convention and the Fifth Amendment apply.

I cannot accept the view that anywhere in our system resides or lurks a power so unrestrained to deal with any human being through any process of trial. What military agencies or authorities may do with our enemies in battle or invasion, apart from proceedings in the nature of trial and some semblance of judicial action, is beside the point. Nor has any human being heretofore been held to be wholly beyond elementary procedural protection by the Fifth Amendment. I cannot consent to even implied departure from that great absolute.

It was a great patriot who said:

> "He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself."[42]

MR. JUSTICE MURPHY joins in this opinion.

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[42] 2 The Complete Writings of Thomas Paine (edited by Foner, 1945) 588.