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A Comment on Christopher Tomlins, Transplants and Timing: Passages in the Creation of an Anglo-American Law of Slavery

A Comment on: "Transplants and Timing: Passages in the Creation of an Anglo-American Law of Slavery" by Christopher Tomlins.

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A Comment on Christopher Tomlins, *Transplants and Timing: Passages in the Creation of an Anglo-American Law of Slavery*

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Christopher Tomlins has written an article that greatly enriches our picture of the history of colonial British America.¹ Tomlins' analysis of slave codes buttresses the current tripartite periodization of the English colonies in North America: the first stage from 1607 to 1660, during which the first permanent settlements were founded in the Chesapeake and New England; the second from 1660 to 1715, an era during which new colonies were founded in the South and mid-Atlantic regions, and which witnessed the unfolding of the institution of slavery and the organization of the plantation; and the third from 1715 to 1776, a time of extraordinary growth in all parameters, together with a conscious attempt to anglicize the British colonies.

Transplants and Timing demonstrates how the creation of the legal-institutional structure of Anglo-American slavery on the mainland participated in the articulation of these phases: in the early years of settlement, during the first phase, colonial societies were still societies with slaves, but not yet slave societies, and thus did not necessitate elaborate slave codes; the enactment of slave codes in a great flurry that began in the 1660s — and accelerated between 1680 and 1715 — marked the second phase in the history of British North America, and closely corresponds with the period that historians identify as the second phase in the history of the colonies. The 1740 Act of South Carolina, which Tomlins underscores for its ornate and articulate language as well as its euphemisms to circumvent

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1 Christopher Tomlins, *Transplants and Timing: Passages in the Creation of an Anglo-American Law of Slavery*, 10 THEORETICAL INQUIRIES L. 389 (2009).

the harsh reality of slavery, represents the persistent attempts to cultivate and anglicize American sensibilities by the mid-eighteenth century, as worked out in the legal arena.

The creation and development of the legal institution of slavery that Tomlins so aptly describes further illuminates larger processes at work during the creation of an early modern Atlantic world, providing a possible approach to better understanding that world. The most influential historiographical trend in the past fifteen years in the study of British North American colonial history, namely Atlantic history, has advanced the notion that the Americas, Africa, and Europe composed a "regional system" from the late fifteenth century. Thus, the study of Atlantic history encompasses a wide range of demographic, social, economic, political, legal, military, intellectual, and religious topics. Such an attitude has bearing upon the ways in which we understand slave laws in British North America.

First, it offers rich opportunities for comparing sub-regions, of which *Transplants and Timing* takes full advantage; second, Atlantic history offers fruitful ways to explore the interactions of cultural components within the Atlantic, in our case the British Atlantic, as a whole. One of the more interesting such cases is the ways in which slave law entailed what Tomlins rightly recognizes as "second order" transplantations, the repeated exportation of slave laws out of colonies that themselves received legal transplants from other polities that went through such transplantations in earlier periods. Indeed, Atlantic history itself may be conceived as a history of transplantation (an earlier generation talked in terms of a Columbian exchange²), but also as one of creolization, in which law is set in a larger context of other transplantations, and of a variety of cultural, material and intellectual interactions.

Transplants and Timing also enriches the ways in which we understand the process of state-building in the early modern period. Tomlins' article underscores the extent to which the American societies were not "founded" at independence in 1776, but rather had already constructed themselves through a long process during which civil society (the irony in the case of slavery in general, and slave codes in particular, is glaring) in British North America emerged. These societies settled and reconstructed the spaces they occupied, thus creating the social structures that enabled them to live in the New World. Their political agents, in the form of representatives and magistrates, largely fashioned the laws and governance that enabled them

2 ALFRED W. CROSBY, *THE COLUMBIAN EXCHANGE: BIOLOGICAL AND CULTURAL CONSEQUENCES OF 1492* (1973).

to regulate social and economic interactions and to govern the acquisition and circulation of property in land, slaves, and material goods. One of the most important facets of this history is the extent to which these societies were built on slavery and other sorts of social exploitation, but also upon Enlightenment notions associated with the idea of civil society (such as agriculture, prosperity, equality, social stability, religious tolerance, and improvement). Hence, slave laws provide a promising venue for assessing the uniquely American interaction between the Enlightenment and slavery.

Another issue *Transplants and Timing* illuminates is the extent to which American settlers were not entirely free agents in the process of creating slave codes. As long as they saw themselves as British agents, they consequently were restricted by a deep attachment to their Old World legal inheritance. In the English colonies, this attachment meant that they were reproducing variants of the common law cultures they had left behind, especially in the pre-1776 slaveholding South, which in particular was socially, culturally as well as constitutionally similar to England. Varying from one political entity to another according to local custom and circumstances, this legal inheritance gave settlers enormous flexibility in adapting the law to local conditions, while marking them as Britons. Thus we may appreciate the important perspective that *Transplants and Timing*, as well as other studies focusing on state formation, provides: namely, that most of the agency in the construction of the new polities that constituted British North America, and probably New World polities in general, rested in the hands of colonizers and settlers.

Tomlins' article demonstrates once more the centrality of law in projecting European political, social, and economic forms upon early American circumstances. Indeed, it encourages an appreciation of how law functioned as a principal instrument of cultural projection and domination, and eventually as a powerful signifier of European emigrants' deepest aspirations to retain their identities as members of European societies. Finally, the article underscores the fact that law was not simply one social institution among many, but was central to what settlers thought about their place in time, the nature of the societies they were creating, and their identities as agents of an English culture that prided itself on its unique — and paradoxical — system of law and liberty.

I will conclude with two remarks: First, we still need to map out the extent, pace and timing, as well as the general character, of the legal expansion of slave law change after the creation of the United States. Was the frantic westward expansion during the early Republic merely an extension and magnification of colonial expansion of slave codes, with a weak American federal state, which replaced a weak British Empire, presiding over it? Or

was it rather a qualitatively different process altogether? In other words, we still need to understand postcolonial American legal transplantation.

Second, I would advise caution regarding the use and application of the notion of "transplantation," not only as in this particular case with regard to the migration of legal systems, but in describing historical processes in general. In the past few decades, one of the main motivations of colonial, arguably also of much broader historiographies, has been to bring to the fore the ways in which subdued people participated in creating the social spaces they inhabited. Such efforts were meant to generate a more balanced, less Eurocentric history, one that emphasizes interaction and mutual influence. Atlantic history is an example of such an attempt to underscore the voices of "losers" of all types, from slaves through indigenous populations to declining imperial states that were defeated both in the fields of Mars and in the competition for historical recognition. The metaphor of transplantation, which all too easily may be seen as a one-sided, extra-contextual process, seems to go against the grain of this recent turn in historiography toward understanding socio-political transatlantic processes. History, one should remember, is almost always a consequence of negotiation. It is hardly ever a matter of imposition.