

The Last *Legally* Beaten Servant in America: From Compulsion to Coercion in the American Workplace¹

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A master may by law correct his apprentice or servant³

– Blackstone’s *Commentaries*

The relation of master and slave begins in violence; it must be sustained by violence—the systematic violence of general laws, or the irregular violence of individual caprice.⁴

– Theodore Parker, 1830

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1. This piece is intended both as a free standing article and as a chapter in a book that I have had in mind for many years, entitled *The Master Narrative of the Nineteenth Century*. In that book, I proceed by isolating and examining different privileges and prerogatives of the master-servant relation. My article, *The Legal Ways of Seduction*, 48 STAN. L. REV. 817 (1996) [hereinafter VanderVelde, *Legal Ways*] concerns the writ of seduction. My article, *The Gendered Origins of the Lumley Doctrine: Binding Men’s Consciences and Women’s Fidelity*, 101 YALE L.J. 775 (1992) [hereinafter VanderVelde, *Gendered Origins*] concerns negative specific performance. This piece addresses violent chastisement and corporal punishment.

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3. 1 WILLIAM BLACKSTONE, COMMENTARIES *416.

4. THEODORE PARKER, *Condition and Treatment of Slaves*, in 5 THE COLLECTED WORKS OF THEODORE PARKER 30, 31 (Francis Power Cobbe ed., 1863).

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INTRODUCTION

Historically, the law of master-servant allowed corporal punishment. Today it seems strange to contemplate that intentionally inflicted violence was ever an acceptable method of compelling workers to labor in America. Strange as it seems, the practice of striking servants to discipline them was considered a legitimate, implicit part of the relationship between masters and servants.⁵ Servants, as well as slaves, could be subjected to cuffings and even severe beatings as means of “correction” and compulsion to labor.⁶ Menial servants, apprentices, and domestic serv-

5. The master’s right to chastise his servants was widely cited in nineteenth-century American treatises. See treatises cited *infra* note 8. Only the highest level of service providers, professional men, were excluded from the group who could be subjected to chastisement. 1 WILLIAM BLACKSTONE, COMMENTARIES *410–20. “Servants” could include anyone

who is employed to render personal services to his employer, otherwise than in the pursuit of an independent calling, and who, in such service, remains entirely under the control and direction of the latter, who is called his master.’ The term “servant” includes, not only menial and domestic servants, but all other employés [sic] who are hired or who volunteer to perform services for their employer, and who remain under his direction and control during the time for which they are hired. Thus, it includes a bookkeeper or clerk in a business office, a salesman in a shop, railroad employés [sic], workmen in factories, etc. All such employés [sic] are subject to the law governing the relation of master and servant.

WALTER C. TIFFANY, HANDBOOK ON THE LAW OF PERSONS AND DOMESTIC RELATIONS 454 (1896).

6. See Evelyn Atkinson, *Out of the Household: Master-Servant Relations and Employer Liability Law*, 25 YALE J.L. & HUMAN. 205, 219 (2013) (citing SAMUEL PUFENDORF, OF THE LAW OF NATURE AND NATIONS 614 (Basil Kennett trans., J. Walthoe, R. Wilkin, J. & J. Bonwicke, S. Birt, T. Ward & T. Osborne, 1729) (1672)) (“[P]ufendorf wrote in 1710 that a master may ‘correct [his

ants could be beaten with hands, fists, straps, sticks, and sometimes whips, all in the name of correction and chastisement.⁷ Children and wives could also be subject to corporal punishment.⁸ Certainly there were varying degrees of beating deemed appropriate for different statuses of dependent persons within the household—a slap was the slightest, whippings were severe—yet our legal system authorized the master to impose corporal punishment on all persons subservient to him. Some early statutes even shored up this prerogative by holding a master harmless for injuries done to his servants while in the act of “correcting” them.⁹

servants’] . . . by such Methods of Severity as are most likely to prevail on their particular Dispositions.”).

7. See *id.* at 219. As written in the 1618 treatise *Country Justice*, “the master may strike his servant with his hand, fist, small staffe, or stick, for correction: and though he do draw blood [sic] thereby, yet it seemeth no breach of peace” provided “hee doth it not outrageously [sic].” *Id.* (quoting ROBERT STEINFELD, *THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATION IN ENGLISH AND AMERICAN LAW AND CULTURE, 1350–1870*, at 78 (2002) (quoting MICHAEL DALTON, *THE COUNTRY JUSTICE* (1618)).

For purposes of this Article, I will refer to all of these actions of striking employees as “workplace corporal punishment.”

8. See, e.g., *Iowa v. Bitman*, 13 Iowa 485, 486 (1862). In a case where a parent was charged with assault and battery for “inhumanly whipping and beating his own child,” the court noted that it is “the right of a parent to chastise his child, but . . . where . . . the parent or master goes beyond the line of reasonable correction, his conduct becomes more or less criminal.” *Id.*

By 1853, some states were heeding the “more progressive rule.” *Cooper v. Mcjunkin*, 4 Ind. 290, 293 (1853) (“The husband can no longer moderately chastise his wife; nor, according to the more recent authorities, the master his servant or apprentice. Even the degrading cruelties of the naval service have been arrested. Why the person of the school-boy . . . should be less sacred in the eye of the law than that of the apprentice or the sailor, is not easily explained. . . . Admitting the right to chastise moderately, it does not follow that a choleric schoolmaster will be justified in beating and cutting the head and face of a wayward boy with any weapons his passions may supply.”).

For another example of how women and children can be punished, see *Dix v. Martin*, 157 S.W. 133, 136 (Mo. App. 1913). The court ruled against Martin for assaulting a minor who lived with Martin as a servant with her guardian’s permission. Martin argued that the girl’s subordinate position as a child rendered the relationship that of parent and child, and hence, the assault was warranted. The court found that in this case the guardian’s grant of permission for Dix to live with Martin did not change his position to that of one standing “in loco parentis” to the child and was instead the “relation of master and servant.” As such, the court stated that “a master has no authority to chastise his servant, no matter how flagrant his violation of duty may be.” *Id.* (citing 2 *AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW* 965 (David S. Garland & Lucius P. McGehee eds., 2d ed. 1896)).

See generally H.G. WOOD, *A TREATISE ON THE LAW OF MASTER AND SERVANT* (1877) [hereinafter WOOD, *MASTER AND SERVANT*]; H.G. WOOD, *A TREATISE ON THE LAW OF MASTER AND SERVANT COVERING THE RELATION, DUTIES AND LIABILITIES OF EMPLOYERS AND EMPLOYEES* 82 (San Francisco, Bancroft-Whitney Co. 2d ed. 1886) [hereinafter WOOD, *RELATION, DUTIES, AND LIABILITIES*]; CHARLES MANLEY SMITH, *A TREATISE ON THE LAW OF MASTER AND SERVANT* (Philadelphia, The Blackstone Publishing Co. 1852); IRVING BROWNE, *ELEMENTS OF THE LAW OF DOMESTIC RELATIONS AND OF EMPLOYER AND EMPLOYED* (Boston, Charles C. Soule 1890); TAPPING REEVE, *THE LAW OF BARON AND FEMME, OF PARENT AND CHILD, OF GUARDIAN AND WARD, OF MASTER AND SERVANT, AND OF THE POWERS OF THE COURTS OF CHANCERY* (New Haven, Oliver Steele 1816).

9. “A law of 1668, entitled ‘An act about the casuall [sic] killing of slaves,’ declares that if the slave shall die from the correction, the master shall not be considered guilty of felony; and one of

In sharp contrast, the common law has always considered non-consensual intentional touching to be tortious. A battery occurs when one person touches another to even the slightest degree, Blackstone wrote.¹⁰ Yet, Blackstone added that there was an exception specifically for servants.¹¹ The existence of an employment relationship authorized the master to strike a servant with the very intention of inflicting pain. Masters held a right of chastisement over everyone under their dominion, including those who lived in their households or worked for them.¹² Together, the authorization in one chapter and this exception to tort doctrine in another, constitute Blackstone's rule on corporal punishment of servants. Yet servants could never strike their masters. There is no more graphic indicia of legal asymmetry than a rule that authorizes the dominant actor to strike the subordinate and forbids the subordinate from fighting back.¹³

This Article will explore the demise of Blackstone's rule in the legal discourse, examining its transformation, and situating that transformation in the context of other social sites where striking a subordinate was deemed acceptable.

In contemporary popular understanding, the fact that our society no longer tolerates whippings—the most extreme form of corporal punishment—is a difference thought to distinguish our more evolved, progres-

1723 decrees that no person concerned in the correction shall undergo punishment for the same. By act of 1788 this was repealed." MARY TREMAIN, *SLAVERY IN THE DISTRICT OF COLUMBIA, THE POLICY OF CONGRESS AND THE STRUGGLE FOR ABOLITION* 36 (New York, G. P. Putnam's Sons 1892).

10. Blackstone identified torts as

battery; which is the unlawful beating of another. The least touching of another person wilfully, or in anger, is a battery; for the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it: every man's person being sacred, and no other having a right to meddle with it, in any the slightest manner. . . . But battery is, in some cases, justifiable or lawful; as where one who hath authority, a parent, or master, gives moderate correction to his child, his scholar, or his apprentice.

3 WILLIAM BLACKSTONE, *COMMENTARIES* *127.

11. *Id.*

12. "Relying on such hierarchical relationships to maintain social order in the absence of a standing police force, the legal system largely protected the meting out of brutal assault under the cloak of 'discipline.'" Elizabeth B. Clark, "*The Sacred Rights of the Weak*": *Pain, Sympathy, and the Culture of Individual Rights in Antebellum America*, 82 J. AM. HIST. 463, 464 (1995).

13. Chris Tomlins identifies "the presumption that a contract to deliver labor for money delivers the employee's assent to serve; assent, that is, that for as long as the relationship continues the employer shall control and direct the disposition of the labor to be delivered" as the most obvious expression of legal asymmetry in the nineteenth-century employment relationship. CHRISTOPHER L. TOMLINS, *LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC* 226–27 (1993). I believe that Blackstone's rule of corporal punishment, who may strike whom, is an even more obvious expression of legal asymmetry.

sive, and civilized present from our barbarous past.¹⁴ Rarely does one hear about a supervisor slapping an employee today, and when it occurs, the incident is sensationally publicized as barbaric and anomalous to our American values and tradition.¹⁵ Today there are boards of review for any funded experiment that may conceivably entail pain for human subjects. Though we tend to believe that whipping was the *sine qua non* of slavery,¹⁶ in fact, striking workers was not restricted to slavery. Not only could workers and family members be beaten, they could be apprehended if they ran away.¹⁷ Running away in apprehension of beating or because of a beating is a common theme in many historical memoirs and legal documents.¹⁸

So when and how did this barbaric practice cease to be legal in America? Who was the last *legally* beaten servant? And what, if any, legacy remains from such a past?

Since we conventionally equate physical compulsion with slavery, we expect that workplace corporal punishment legally ended in 1865 when slavery was abolished by the Thirteenth Amendment to the United States Constitution.¹⁹ But that attribution simplifies and overdraws a much longer, more complex story of how corporal punishment was regulated and how the broad generic authorization became restricted to cer-

14. Indeed one recent writer self-consciously describes his idea as “crazy” when he writes advocating the return of flogging as a substitute for prisons. PETER MOSKOS, IN DEFENSE OF FLOGGING, at vi (2011).

15. The two sensational incidents in the last twenty-five years were the caning of Michael Fay in Singapore for the crime of vandalism and Nike workers being beaten by their supervisors with the soles of shoes as they were sewing. After CBS reported that Nike workers had been slapped while at work, news media covered the issue from 1996 through 1998. See, e.g., *4,000 Workers Violently Protest at Nike Factory*, CHI. TRIB., Apr. 27, 1997, at 16; Julia Angwin, *The Tired Souls Behind Nike’s Soles; Indonesian Worker Tells of Suffering*, S.F. CHRON., July 26, 1996, at B3; Associated Press, *Nike Plants’ Workers are Abused, Says Labor Activist*, CHI. TRIB., Mar. 28, 1997, at 16; Verena Dobnik, Associated Press, *Group Cites Abuses by Nike Subcontractors Inspection Finds Viet Women Being Fondled and Beaten*, BOSTON GLOBE, Mar. 28, 1997, at E2; *Nike Contractors Accused of Worker Abuse*, ASSOCIATED PRESS, Mar. 29, 1997.

Fay’s beating was the result of his criminal conviction. The Nike workers beatings were acts of employee chastisement by their employers. Both incidents drew public outcry and extensive media coverage. For a discussion of Fay’s caning, see Scott Bloom, *Spare The Rod, Spoil The Child? A Legal Framework For Recent Corporal Punishment Proposals*, 25 GOLDEN GATE U. L. REV. 361, 361–62 (1995).

16. “For good reason, the master’s whip has long served as a ubiquitous symbol of slavery everywhere.” JAMES OAKES, *SLAVERY AND FREEDOM: AN INTERPRETATION OF THE OLD SOUTH* 4, 6 (1990). Being auctioned from one master, or employer, to another is a practice that similarly is seen as an indicia of slavery.

17. In the words of one treatise writer, “He must enter into his master’s service and continue in it, and should he fail to do so, *at common law*, he may be compelled to return, or may be imprisoned till he becomes tractable.” WOOD, *RELATION, DUTIES AND LIABILITIES*, *supra* note 8, at 82.

18. See e.g., BENJAMIN FRANKLIN, *THE AUTOBIOGRAPHY OF BENJAMIN FRANKLIN* 19–20 (First Avenue Editions 2016) (Charles W. Eliot ed., 1909).

19. U.S. CONST. amend. XIII.

tain assailants and certain limited classes of servants before its eventual demise. For most American workers, vulnerability to corporal punishment ended decades before the Civil War. Consequently, in overdrawing the connection between the end of corporal punishment and the end of slavery, a lesson is lost.

By taking the longer view, beginning in 1800, one gains a more nuanced insight into how progressive social change occurs.²⁰ By taking the broader view of comparing the legitimacy of workplace corporal punishment to its legitimacy in other settings, one can observe—sometimes by consonance, sometimes by contrast—arguments that differentiate or supplement its legitimacy.

Further, by situating this disciplinary method in a range of social sites, one complicates the American progress meta-narrative as well. Did workplace beatings end because American society as a whole became more civilized and humane? Did the disappearance of this prerogative of authority actually render workers and masters more equal? Did masters actually lose ground and workers gain ground as the practice eroded? Or was the prerogative that masters once enjoyed simply recast in different terms, terms that did not necessarily equalize the disparity of status. Finally, by this examination, a difficult truth is revealed. The evidence revealed here suggests that masters' prerogatives of dominion may simply have assumed different forms without making the relationship more egalitarian.

The sequence seems to be as follows. Workplace corporal punishment was initially the undisputed province of masters. But thereafter in certain jurisdictions, it was regulated, and simultaneously legitimated, by statutes and ordinances that placed conditions upon the masters' authority to impose discipline. Regulations protected some workers, notably indentured servants and apprentices, from excessive abuse by regulating the reasons that justified workplace corporal punishment and the proportionality of the punishment. But as workplace corporal punishment eroded, so too did state regulations of employer overreaching. It was that most extreme form of corporal punishment, whipping, that presented the most obvious subject of regulation. When that practice vanished, the state ceased its regulation of the master's decision to discipline subordinates and the gravity and proportionality of the punishment. The state never resumed focus on the injustices of other forms of workplace punishment such as undue coercion. Beating servants was the states' regulatory anchor—it was where state regulation got its grip—and when whip-

20. I selected the year 1800 quite arbitrarily because it was after nationhood, though soon enough after U.S. independence that many colonial statutes on the subject of master and servant were still in force.

ping servants fell out of favor, there ceased to be any review of a master's unjust exercise of authority.

Thereafter, doctrines of contract obscured the continuing conditions of unequal status²¹ and subsequently, contract doctrines gave rise to laissez-faire attitudes that allowed masters virtually free reign over their servants to do whatever they wanted so long as they didn't strike them. In the transition, masters regained their position of unfettered power over servants, albeit with different methods of exercising that power. By availing themselves of nonphysical methods, like keeping employees in precarious legal statuses and being able to summarily expel them from the source of their livelihood, masters could coercively abuse their servants without being held accountable.

Striking subordinates always existed along a continuum. Society clung to these demographic categories and these categories were used in comparison in determining the proportionality of the blows. The rule of thumb—that a wife could not be struck with any stick larger than the size of a man's thumb—is the most well-known of these guidelines.²² Less well-known rules maintained that though slaves could be whipped by a variety of instruments, they could not be pistol-whipped in circumstances where Native Americans could be.²³

Society clung to these demographic categories as well when different subordinate groups sought relative improvements in their status as compared to others. Thus, rather than uniting the victims of this oppression, the very differentiation of status allowed one group to play itself off and be played off against another. Similar practices deployed against servants and wives left open the criticism that male servants were effem-

21. Chris Tomlins and Robert Steinfeld had described the rise of contractualization in the nineteenth century. *See, e.g.*, TOMLINS, *supra* note 13, at 227. In the twentieth century, the principle of liberty of contract ascended significantly enough to preclude state regulation of employer abuse. *See, e.g.*, *Coppage v. Kansas*, 236 U.S. 1 (1915); *Adair v. United States*, 208 U.S. 161 (1908); *Lochner v. New York*, 198 U.S. 45 (1905); *see also* Jedediah Purdy, *People as Resources: Recruitment and Reciprocity in the Freedom-Promoting Approach to Property*, 56 DUKE L.J. 1047, 1078 (2007). The North Carolina Supreme Court reasoned that coercion of an employee, while “harsh,” is a consequence of the “reciprocal rights of free labor relations” and that “any free employee stood . . . ‘upon an equality’ with his employer.” Purdy, *supra*, at 1078 (citing *State v. Mann*, 13 N.C. (2 Dev.) 263 (1829)).

22. Beirne Stedman, *Right of Husband to Chastise Wife*, 3 VA. L. REG. N.S. 241, 241 (1917).

23. *See State v. Wilson*, 25 S.C.L. (Chev.) 163 (1840). In *Wilson*, the court states,

The Act . . . designates the horse-whip, cow-skin, switch, or small stick, as instruments proper to be used for the correction of slaves. To [so] strike, therefore, with a pistol, . . . constituted such a beating as . . . was punishable by indictment.

Id. at 164–65. The assailant himself recognized the limitations of certain types of instruments for certain types of peoples as he pled that the reason he felt privileged to whip the person with a pistol was because he thought the man was an Indian—in which case he thought pistol-whipping was an appropriate instrumentality. *Id.* at 164.

inated by comparisons to wives.²⁴ Servants were thought to be juvenilized in the case of comparison to children.²⁵ Since slaves occupied the lowest status of all, both socially and legally,²⁶ comparisons of similar treatment between servants and slaves was often argued to “demean” the servant most of all. (It was at this time that the very use of the term “servant” began to be supplanted by its French substitute, “employé.”²⁷) Unfortunately, claims in some reform moments—that the mobilizing group not be treated like slaves—simply reinforced the diminished status of slaves by tacitly acknowledging that slaves could be subject to such treatment.

Of course, in the social construction of the master’s authority, corporal punishment was simply one method of punishment; there were other methods also. Some involved self-help; some involved the state. Using self-help, a master could deprive the servant of his liberty by various means: locking him in, docking his pay, limiting his food or drink, and recapturing him when he ran away.²⁸ Each method of control had advantages for the master in different situations. Chastisement was espe-

24. See PAUL KENS, *LOCHNER V. NEW YORK: ECONOMIC REGULATION ON TRIAL* (1998). In his chapter, “Not like Grandma Used to Bake,” Kens demonstrated that male bakers could be perceived as not needing, and hence, not deserving worker safety protection because they engaged in a process that had been done by women in the home previously. *Id.* at 6–14.

25. However, eventually this rationale could arguably only apply in situations where the home and market were considered to fall under the same sphere, as “only the head of a family could legally exercise control over and responsibility for the person of his dependents, whereas an employer could not exercise such control over his employees.” Atkinson, *supra* note 6, at 218.

26. Showcasing a facet of the master-servant relationship, the North Carolina Supreme Court “held that a renter of a slave had exactly the same power of labor discipline as a master” due to the fact that the “master’s power was not part of ‘domestic relations,’ . . . but a legally unique relationship governed by the functional requirements of labor discipline.” Purdy, *supra* note 21, at 1065.

27. In fact, workers resisted being called “servants” because the word had come to be associated with enslavement. About the same time, the word “employee” came into parlance as a more acceptable substitute for the term, “servant.” The French term replaced “servant” in popular usage. Robert Steinfeld has documented that the very term “servant” became anathema as connoting hierarchy and dependence. Steinfeld reports the comment of the “help” of an American gentleman in the early nineteenth century that “none but negers are sarvants.” ROBERT J. STEINFELD, *THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATION IN ENGLISH AND AMERICAN LAW AND CULTURE, 1350–1870*, at 127 (1991).

By 1874, treatise writer James Schouler addressed the other word, “master,” stating, “In these days we dislike to call any man master. . . . [I]t cannot be denied that master and servant is rather a repulsive title, and fast losing favor in this republican country. . . .” JAMES SCHOULER, *A TREATISE ON THE LAW OF THE DOMESTIC RELATIONS: EMBRACING HUSBAND AND WIFE, PARENT AND CHILD, GUARDIAN AND WARD, INFANCY, AND MASTER AND SERVANT* 7 (Boston, Little, Brown, and Co. 2d ed. 1874).

28. For example, there was an action for trespass called enticement wherein “the employee [was] treated as the property.” As the employee was treated as property, “the employer . . . had a right to exclude other ‘users’ of the employee’s labor.” Some states criminalized enticement. VanderVelde, *supra* note 2, at 491 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 941 (1866) (remarks of Sen. Trumbull) (quoting a Freedmen’s Bureau report from Houston, Texas)).

cially convenient because it was quick, direct, and relatively costless. Of course, all of these master prerogatives were antithetical to the concept of free labor.²⁹

The question of when a practice ceased to be *legal* is fraught with added complexity. It is almost impossible to get any real data on the prevalence of workplace corporal punishment, much less rulings on its legality. Christopher Tomlins has expertly demonstrated that there were multiple local practices and degrees of free and unfree labor in the early American republic.³⁰ If practices could be pluralistic within a single jurisdiction, then the fact that the workplace was its own jurisdiction of authority rendered individual workplaces microclimates with their own rules and practices. Some masters may have resorted to beatings frequently and some not at all. Moreover, how could the issue of legality be raised? Most likely, it would be if the servant sued for assault and battery.³¹ (Occasionally, the information surfaces obliquely when the fact of beating is noted in a case between other parties.³²) But very few servants ever sued their masters for anything in the nineteenth century.³³ The circumstances would have to be severe because servants rarely could avail themselves of lawyers to initiate a suit. Servants rarely litigated at all, let alone against their masters.

We are left with only a handful of lawsuits—all of which involved severe whippings—to track the demise of Blackstone's rule.³⁴ Thus, this Article can only address the legal reasoning of the common law rather than that much vaster, more variegated, and virtually hidden realm of actual practices. Of course, there was considerable local variability in custom and regulation. Robert Steinfeld reminds us that local municipalities could choose to regulate whipping or choose not to.³⁵

29. Robert Steinfeld writes: "The term 'free' labor is a shorthand way of expressing a complicated societal judgment that employers should not be permitted to force laboring people to make certain difficult choices as they decide whether to perform their labor agreements." ROBERT J. STEINFELD, *COERCION, CONTRACT, AND FREE LABOR IN THE NINETEENTH CENTURY* 239 (2001). See generally VanderVelde, *Labor Vision*, *supra* note 2.

30. CHRISTOPHER TOMLINS, *FREEDOM BOUND: LAW, LABOR, AND CIVIC IDENTITY IN COLONIZING ENGLISH AMERICA, 1582–1865*, at 296 (2010); see also TOMLINS, *supra* note 13, at 261–68.

31. See *Commonwealth v. Baird*, 1 Ashmead 267 (1828); *Matthews v. Terry*, 10 Conn. 455 (1835). These cases are discussed *infra* notes 165–173, 179, 182.

32. See *Milburne v. Byrne*, 17 F. Cas. 283 (C.C.D.C. 1805) (No. 9,542).

33. Except perhaps for wages, but the rules concerning wage claims were not at all straightforward. See generally Robert Gordon, *Britton v. Turner: A Signpost on the Crooked Road to "Freedom" in the Employment Contract*, in *CONTRACT STORIES* (Douglas G. Baird ed., 2007).

34. See *Milburne*, 17 F. Cas. at 283; *Baird*, 1 Ashmead at 267; *Matthews*, 10 Conn. at 455.

35. "A given polity might decide to establish criminal sanctions to punish contract breaches, but it might also decide not to. That choice, moreover, was only one of the numerous decisions that would into the construction of a labor practice." STEINFELD, *supra* note 29, at 33.

Yet, a narrative emerges by examining the only data that we have about the legality of the assaultive practice: common law cases and legal treatises. The cases and treatises articulate assessments of the legitimacy of workplace corporal punishment and, from treatise to successive treatise over the course of the century, the discourse shifts as the assessment changes. It appears that the prerogative of striking workers evolved in two stages. Originally, the master had virtually free reign to impose such punishment. The master ruled as prosecutor, judge, jury, and executioner in meting out discipline, much as tribes and clans mete out punishment and discipline in stateless societies. With the advent of the more organized state, the law intervened occasionally to make these disciplinary punishments more rational in their application. These restrictions could take the form of direct regulation, when beatings went too far, or nuisance actions, when chastisement was done in public and disturbed the peace. In some municipalities, communities passed legislation restricting the master's prerogative. Courts and legislatures imposed some limits on the extent to which a servant could be whipped and, at the same time, the reasons that justified such severe punishment.³⁶ These legal restrictions sought to prevent wanton or vindictive beatings by masters. Thereafter, the second change occurred when physical chastisement ceased to be an acceptable workplace practice.³⁷ Even cuffing with the hand could subject the assailant to tort liability.³⁸ By the 1840s, masters no longer enjoyed the perquisite of striking workers. The treatises narrowed the rules' scope of application and finally rebuked Blackstone's rule. Thus, in Hohfeldian terms,³⁹ the rule completely reversed: what began as the master's privilege was re-assigned to the worker as a right of bodily integrity

36. See Virginia and Maryland statutes discussed *infra* at text accompanying notes 128–131, 139–143.

37. See, e.g., Atkinson, *supra* note 6, at 223–24 (citing *Davis v. State*, 6 Tex. App. 133, 139 (1879)).

38. Treatise writer Horace G. Wood wrote:

He must enter into his master's service and continue in it, and should he fail to do so, *at common law*, he may be compelled to return, or may be imprisoned till he becomes tractable. He is bound to observe all the reasonable regulations established by the master . . . and if he fails in this respect, the master may reprove, or even moderately chastise him, if a minor, but not if of full age. . . . The master has no right to chastise a servant for disobedience, negligence, or any cause except such as would justify him in assaulting a stranger. From the relation (except as to apprentices) no right is acquired to punish him by corporal punishment. If the servant's conduct is such as to merit punishment, the master's only remedy is to discharge him, or bear his misconduct with patience and moderation.

WOOD, RELATION, DUTIES AND LIABILITIES, *supra* note 8, at 303–04.

39. See *generally* WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS, AS APPLIED IN JUDICIAL REASONING: AND OTHER LEGAL ESSAYS (1919). There were still plenty of workplace dangers exposing workers to accidents and pain, but masters were generally absolved from liability for employees' workplace accidents by the three common law defenses.

from intentionally inflicted pain, and masters engaging in such conduct were deemed to have committed an unlawful assault.

Despite the centrality of whipping's demise as a master narrative of Western progress, the discursive narrative within legal texts by which this reversal occurred has not been examined.⁴⁰ Slight changes of direction of the law are often signaled in the words used in judicial opinions and treatises. What is said leaves open the unsaid. Moreover, it is worth examining these texts because the manner in which changes occur can influence the legitimacy of what follows. The fact that violence structured the work relationship may have left some social residual. A full account of the social norms at play is beyond the scope of this Article. This Article can only mark the stages of legal change articulated through legal documents. Legal discourse matters, and legal discourse is the subject of this Article.⁴¹

There is no question that corporal punishment established masters' dominance, but for a while the practice was subject to at least some accountability. Now, Americans have a default employment law that allows employers to discipline employees without accountability. Employers may discipline employees without reason or for reasons that are never subject to any review.⁴²

The nineteenth-century prerogative of chastisement shaped modern employment law in two ways. First, as workplace corporal punishment ceased to be socially acceptable and eroded, it left in its place a command and control discipline that was no longer regulated by the state for rationality or proportionality.⁴³ Although workplace corporal punish-

40. One book brought together an analysis of campaigns against corporal punishment, but the subject of servant chastisement is not included. *See generally* MYRA C. GLENN, *CAMPAIGNS AGAINST CORPORAL PUNISHMENT: PRISONERS, SAILORS, WOMEN, AND CHILDREN IN ANTEBELLUM AMERICA* (1984).

41. Tomlins states:

The social and political antipathies of the populace were one thing, however; the professional discourse of law quite another.

. . . Resort to the same nomenclature in the generality of cases involving employment issues coming before the courts in the industrializing states during the first half of the nineteenth century testifies to the tendency of lawyers and the judiciary to construe the broad spectrum of employment relationships using a comprehensive common law discourse of master and servant . . . [and] legal discourse has social consequences.

TOMLINS, *supra* note 13, at 224–25.

42. An employer can, potentially, threaten her employees “without that threat being legally recognized as coercive or without providing the employee with a remedy for unjust dismissal” as things like economic pressure (“absent specific statutory restrictions”) do not “fall within the legal definitions of ‘duress’ or ‘coercion.’” Alan Story, *Employer Speech, Union Representation Elections, and the First Amendment*, 16 *BERKELEY J. EMP. & LAB. L.* 356, 407 (1995).

43. The history of corporal punishment in Russia seems to have followed a similar course, an attempt to rationalize and standardize before full abolition at a time of the creation of prisons in

ment is now an anomaly, modern employment law retains a similar dominance structure to what existed when servants could be whipped by masters without the mediating influence of the state. In other words, even though that earlier practice no longer determines the workplace organization, its vestigial imprint remains. What corporal punishment once symbolized has simply been split into various modern components. The components that replaced physical compulsion include coercion, obedience, loyalty, and most of all, termination at the employers' whim under the at-will doctrine.

Most often, what the leather strap once symbolized in terms of instilling fear by the threat of unilaterally inflicted punishment has been replaced with the "pink slip."⁴⁴ As whipping is a severe sanction, so too being fired from one's job can be a very severe sanction. More than just *corporal* punishment, it is described as the "*capital* punishment" of employment relations.⁴⁵ It is a penalty whose severity increases the longer that a worker remains with the same employer, over time tying his dependence to the employer more tightly because of the worker's diminishing opportunities as he ages. And the operative law for most American workers is that they can be discharged under the at-will doctrine for no reason at all, or even for reasons of vindictiveness that are reprehensible.⁴⁶ Although more modern idioms have replaced corporal punishment, the employment relation retains a well-recognized structure in which employers retain out-sized claims to prerogative, discipline, and loyalty. The relation is not really structured as a mutually beneficial agreement of equal contracting parties engaged in advancing the enterprise; given the default, it retains the stamp of master and servant status.

This hints at a possible explanation of the practice's erosion. Perhaps, the privilege of beating servants eroded not because civilization and progress produced a more humane society, but because the practice was no longer suited to the needs for workplace organization and was no longer necessary to achieve a master's prerogatives. A master's commanding control can now be continually achieved by the coercion of being under the perennial threat of discharge. Coercion has replaced compulsion as the control mechanism and, by operating under the radar of

Siberia. See generally ABBY M. SCHRADER, *LANGUAGES OF THE LASH: CORPORAL PUNISHMENT AND IDENTITY IN IMPERIAL RUSSIA* (2002).

44. See Story, *supra* note 42, at 408 n.270. "Courts still hold that the threat of termination is not coercive." *Id.*

45. See, e.g., David E. Feller, *Arbitration: Its Glory Days Are Numbered*, 2 BERKELEY J. EMP. & LAB. L. 97, 104 (1977).

46. See, e.g., *Bammert v. Don's Super Valu, Inc.*, 646 N.W.2d 365 (Wis. 2002) (declaring that it was reprehensible that an employer would fire an employee because her husband, a state trooper, had charged the employer's wife with drunk driving).

review for possible injustice, coercion gives employers the broadest authority to impose discipline. Coercive practices, which are nonphysical, are less susceptible to observation and quantification, and hence, less susceptible to regulation and review by the state.

Second, the emergence of workers' protection against corporal punishment never evolved into a more fulsome security of personal dignity, autonomy, and privacy in the workplace as a consequence of the reversal. Although the practice of assaulting workers eroded, it did so uncoupled from a social movement to articulate and create an affirmative and robust concept of worker dignity, privacy, and partnership in its place. Hence, twenty-first century American courts have trouble identifying a legal source for employee claims of dignity, personal autonomy, and privacy.⁴⁷ Although free labor requires all three aspects to ensure that workers are not coerced unfairly, these aspects of workers' freedom have yet to fully blossom and bear fruit in the American nation. In this particular change of law and convention, there was no broader germinal reform idea from which a more solidly rooted notion of a worker's right to dignity could sprout. Although now an employer can no more strike his employee than he can a stranger,⁴⁸ strangers still retain much greater protections against intrusions upon their privacy and assaults upon their dignity than do workers from their employers.

A sustained examination of how the at-will doctrine arose is beyond the scope of this Article; this Article can only tell the story of the decline of workplace corporal punishment and hint at its replacement.

I. PRIVATE RELATIONSHIPS AND CORPORAL PUNISHMENT

Consider three parallel settings where persons in authority once held the prerogative of imposing corporal punishment on their subordinates: 1) the family—the propriety of a master to strike his wife and his children; 2) the penal systems—the propriety of the state to whip criminals as punishment for crime;⁴⁹ and 3) the military—the propriety of an

47. *See, e.g.,* *Wagenseller v. Scottsdale Mem'l Hosp.*, 710 P.2d 1025 (Ariz. 1985). In this case, the Arizona Supreme court flailed around to find a basis on which a woman could sue when she alleged she was fired because she refused to pull down her pants in a skit with other employees. *Id.* There are only a handful of states that have a right of privacy in their state constitutions that can serve as a basis for an employee's claim that an invasion of privacy is a matter of public policy. The Restatement of Employment Law attempted to remonstrate against this deficiency, but other than states that have privacy rights enumerated in their constitutions, there are few cases where an employee's privacy rights are recognized. *See generally* MATTHEW FINKIN, *PRIVACY IN EMPLOYMENT LAW* (3d ed. 2009).

48. WOOD, *RELATION, DUTIES AND LIABILITIES*, *supra* note 8, at 303–04 (explaining “[t]he master has no right to chastise a servant for disobedience, negligence, or any cause except such as would justify him in assaulting a stranger”).

49. *See* discussion *infra* notes 52, 65, 91, 101.

officer to strike his subordinates for insolence.⁵⁰ This comparison is useful because societies acculturated to corporal punishment in other settings are more likely to tolerate corporal punishment in the workplace. Social tolerance of beating one's wife or child reinforced acceptance of the notion that servants similarly could be struck.⁵¹ After all, if a person as weak or defenseless as a wife or child could suffer beatings, why would one believe that it would be too much for an adult worker to endure? Reversing the argument, if corporal punishment toughens soldiers to discipline in the army, shouldn't it function to similarly desirable ends when men are asked to perform difficult work?

One is tempted to think that common law had little role to play in the organization of private employment but, in fact, it is exactly the private-public distinction that authorized masters to enjoy the privilege of corporal punishment in organizing their private domains. Under the common law, the workplace domain remained its own juridical sphere.⁵² By refusing to come to the aid of the weaker party in these private disputes, the state was essentially complicit in this practice.

Moreover, the carryover from one status category to another was strengthened because the common law structured these relationships *as parallel*. Blackstone organized his catalogue of the great relations of private life as a set of parallel chapters, beginning with the master and servant (the longest, most detailed chapter)⁵³ and following it with husband and wife and parent and child as basically devolutions of master and servant. Within the "great relations of private life," as Blackstone called them,⁵⁴ the world was divided up into many mini-sovereign households in which the master's discipline provided the core unit of societal disci-

50. See discussion *infra* notes 162, 247, 253, 256.

51. According to Blackstone's section on "Correction of the Wife,"

Under the old law, the husband might give his wife moderate correction. For as he is to answer for her misbehavior, the law intrusted him with the power of restraining her by domestic chastisement, as he would punish a child or an apprentice. But this power of correction was confined within reasonable bounds, and he was prohibited from using violence. The civil law gave a man even a larger authority over his wife, permitting him to whip her, if he deemed it necessary. This form of correction was checked in the reign of Charles II, and has not been revived, but the courts of law still permit a husband to restrain his wife of her liberty, in case of any gross misbehavior.

1 WILLIAM BLACKSTONE, COMMENTARIES *147.

52. See Atkinson, *supra* note 6, at 210–11 (noting that local officials also "enforced good household government by policing household heads to make sure they exercised sufficient control over profligate dependents).

53. 1 WILLIAM BLACKSTONE, COMMENTARIES *136–475.

54. *Id.*

pline and responsibility.⁵⁵ The state stayed out of the way so that the master could assume the role of controlling (governing) his dependents.

Obviously, the quality of privacy accorded the private domains of workplaces and family life differ. Feminist scholars have explored domestic relations quite thoroughly, detailing how the intimacy that families are accorded provided an obstacle to state-intervention to protect the victim in domestic abuse. Most often, the distinction drawn between public and private in feminist jurisprudence, for example, has been viewed as an insulating factor—insulating intra-household violence from public scrutiny and intervention.⁵⁶ According to Blackstone, the husband was authorized to “correct” his wife because he could be held responsible for her actions,⁵⁷ but, in fact, outsiders rarely intervened because given coverture, no one was thought to have the authority to interfere with these acts.⁵⁸ Acts of private violence within the nuclear family, for example, even if brutal, were customarily regarded as “none of the public’s business” and private in the nature of “intimacy,” and hence, beyond the scope of state regulation. The intimate relation was itself curtailed off within the private sphere.⁵⁹ Strangers would not dare to interfere with the manner in which a husband governed his wife or raised his children,⁶⁰ and hence, his decision to strike them was regarded as beyond interference.

The workplace, however, was never as permanently curtailed off and tightly sealed as was the family. First, blood ties and marriage bonds were permanent. One could disown a wife if she ran away, but it was impossible in many states to divorce. By comparison, in the work relation, one could rid oneself of a servant or sell a slave to someone else.

55. Similarly, in describing the public utility of this ideal type, political philosopher William Paley wrote that it achieved “the better government of society, by distributing the community into separate families; and appointing over each, the authority of a master of a family, which has more actual influence, than all civil authority put together.” WILLIAM PALEY, *THE PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY* 241–42 (Boston, West and Richardson 1785).

56. Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 *YALE L.J.* 2117, 2206–07 (1996).

57. 1 WILLIAM BLACKSTONE, *COMMENTARIES* *421–33.

58. “In short, a view of marriage as a sacred ordinance and a basis for ‘respectability’ blunted public discussion of marital violence. The allegedly private nature of the domestic, especially marital, bond also hindered widespread public discussion of wife beating.” GLENN, *supra* note 40, at 80; see also Elizabeth Pleck, *Wife Beating in Nineteenth-Century America*, 4 *VICTIMOLOGY* 60, 61 (1979). See generally Siegel, *supra* note 56.

59. Siegel, *supra* note 56, at 2178–87.

60. *Cook v. Cook*, 124 S.W.2d 675 (Mo. Ct. App. 1939). Cook, a foster child, sued his foster parent, accusing him of “malicious and unprovoked” assault. *Id.* at 675. The court ruled in favor of the foster parent, citing *Mannion v. Mannion*, 129 A. 431 (N.J. Cir. Ct. 1925), “that a minor child cannot sue one of his parents, at least during minority, for the negligent act of such parent from which that child suffers injury to his person.” *Id.* at 677. The court went on to note that this finding was “based upon the interest that society has in preserving harmony in the domestic relations.” *Id.*

The master could unfasten the bond he had with servants by assigning them to someone else.

Second, patterns of cases suggest that outsiders occasionally interfered in work relations if they saw something awry. There are recorded instances where third parties interfered when servants, or even slaves, were severely beaten, particularly when the beating took place in public view. This kind of third-party intervention may have been occasioned in the same manner that led a stranger to implore a man ruthlessly beating a horse on the street to stop.⁶¹ Third parties showed less inhibition from interceding to protect a horse, a slave, or a servant as a sentient being, than they did to protect a man's wife or child from him. However, although third parties sometimes interceded, they rarely questioned the master's right to raise his hand against the servant.

To be sure, the interventions by third parties may simply have depended upon the situs where the beating took place. Beating someone in the street could become a common law nuisance if it interfered with passersby. Some jurisdictions held that beating a worker in public view was a common law nuisance to be restricted accordingly.⁶² The prudent master was advised to "take it inside," so to speak. Still further, outsider interference with the master who chose to whip his servant sometimes backfired into even more prolonged disputes between the master and the intermeddler.⁶³ These common law cases are based upon the stranger's

61. NADINE GORDIMER, *BURGER'S DAUGHTER* 209–10 (1979) (detailing the emergence of a sense of social consciousness in the protagonist through witnessing a donkey being brutally whipped); *see also* *United States v. Jackson*, 26 F. Cas. 555, 555 (C.C.D.C. 1834) (No. 15,453) (holding that public cruelty of beating a cow to its death near a public street in Washington is an indictable offence at common law, as a public nuisance). The defendant moved to quash the indictment arguing that under The Maryland Act of 1809, c. 138, § 4, cruelty to brutes was not punishable at common law. *Id.*; *see also* *United States v. Logan*, 26 F. Cas. 990, 990 (C.C.D.C. 1821) (No. 15,263) (holding that public cruelty to a horse is an indictable offence). The indictment was for cruelty to a horse in a public street in Washington; the defendant was found guilty and sentenced to both a fine and 20 days' imprisonment. *Id.*

62. The Virginia cases are founded upon the peculiar qualities of slavery. *See, e.g.*, *United States v. Brockett*, 24 F. Cas. 1241 (C.C.D.C. 1823) (No. 14,651). To cruelly, inhumanly, and maliciously cut, slash, beat, and ill treat one's own slave, is an indictable offence at common law. *Id.* at 1242. Defendant's attorney contended that "if the whipping be private, there is no limit, so that it does not extend to voluntary killing or mutilation. But in order to prevent the necessity of the court's giving any instruction on this point, he admitted that if the jury should be of opinion that the offence justified the language of the indictment, it is an indictable offence." *Id.* The jury found the following verdict: "We of the jury find the traverser not guilty of the counts as stated in the indictment, but recommend that the Court should express their strong disapprobation of similar conduct." *Id.*

63. Disputes between the person attempting to have the subject laborer whipped and some person who seeking to halt the beating form a distinct subcategory of cases involving the law of the whip. These cases defy a binary categorization as purely private or purely-public.

trespass upon the master's authority.⁶⁴ These disputes then required some public involvement to examine the limits of the master's authorization.

In addition, some localities regulated workplace punishment directly. State intervention limited the number and force of the blows, the part of the body that could be struck, and the weapon that could be used.⁶⁵ More severe beatings were justified by more severe infractions.⁶⁶ Correlatively, beating was unjustified when there was no insolence or infraction at all. Such a master was simply ruthless and cruel in exercising his dominion over others without justification for the mere sport or meanness of it.⁶⁷

II. BEATINGS' PURPOSES

The fundamental purpose of corporal punishment is to inflict pain with the intent to influence the victim's behavior. This is the "stick" part of the carrot and the stick. One thinks of whipping as a method to induce people to work harder.⁶⁸ But, striking a subordinate had additional purposes consistent with maintaining the master's authority.

64. See cases cited *infra* notes 203–07.

65. See discussion of *Milburne v. Byrne* *infra* Part II.B.2; see also Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740 (2006).

Under Jewish Biblical law, punishment can be no more severe than is necessary to achieve the punitive purpose without unnecessarily humiliating the offender. Irene Merker Rosenberg & Yale L. Rosenberg, *Of God's Mercy and the Four Biblical Methods of Capital Punishment: Stoning, Burning, Beheading, and Strangulation*, 78 TUL. L. REV. 1169, 1204 (2004). Regarding flogging, the Torah mandates strict limits on the number of lashes:

[I]f the guilty one is to be flogged, the magistrate shall have him lie down and be given lashes in his presence, by count, as his guilt warrants. He may be given up to forty lashes, but not more, lest being flogged further, to excess, your brother be degraded before your eyes.

Deuteronomy 25:2–3. Talmudic law limits the number to thirty-nine to avoid exceeding forty by accident. The commentary states that because the flogging itself is degrading, the concern must be that excessive flogging would lead to something even more degrading. ETZ HAYIM, TORAH AND COMMENTARY 1132 (David L. Lieber ed., Rabbinical Assembly, 2001). I thank Matt Finkin for this insight.

66. This was seen most clearly in criminal codes that varied the number of lashes based upon the severity of the crime.

67. In Richard Dana's memoir, he recounts witnessing a whipping in which his master called out, "If you want to know what I flog you for, I'll tell you. It's because I like to do it!—because I like to do it! It suits me!—That's what I do it for!" CHARLES FRANCIS ADAMS, RICHARD HENRY DANA: A BIOGRAPHY 104–06 (Boston, Houghton, Mifflin and Co. 1890) (reproducing the written memoirs of Richard Henry Dana).

68. GEORGE RYLEY SCOTT, THE HISTORY OF CORPORAL PUNISHMENT: A SURVEY OF FLAGELLATION IN ITS HISTORICAL, ANTHROPOLOGICAL AND SOCIOLOGICAL ASPECTS 71 (1838). "In all parts of the world and all through the ages wherever and whenever slavery has existed, the whip has been the favourite method of securing from these forced labourers the utmost possible amount of work." *Id.*

First, whipping served as a means of displaying and establishing hierarchical dominance.⁶⁹ As Dan Kahan writes: “Corporal punishment was . . . perceived to be distinctive of hierarchical relationships; the infliction of acute physical pain was the way that sovereigns disciplined their subjects, husbands their wives, parents their children, and masters their servants or slaves.”⁷⁰ The dominance function is well-illustrated by the fact that this practice was never reciprocal. Servants could not take up a stick against a master or slap him without grave penalty.⁷¹

Second, when this kind of punishment was done publicly, it carried the additional and sometimes more important meaning of shaming the subordinate rather than simply injuring him.

Third, these displays of dominance can be directed at maintaining class or caste hierarchy as well as interpersonal hierarchy.⁷² Interpersonal hierarchy is at stake when men contest each other’s prowess using the taunt of whipping the other’s pudendum. Even members of subordinated social groups like sailors, young boys, and enslaved men used the metaphor as a taunt. Fistfights were bragged about in the terms, “I whipped him” or “I gave him a licking.” In these instances, “whipping” was completely unrelated to achieving work. These displays of dominance were not necessarily class or race-based. Parties to the contest could be near equals of the same race.⁷³ In these instances, whipping was simply a means by which men attempted to best each other. The person who struck another displayed his dominance over the person struck. Dominance could be demonstrated even if no blows were struck, if one party turned and ran at the prospect of a beating.

But, in a fourth category, the practice could be used to reinforce class and racial distinctions. Cases from the American south demonstrate that over time the class of persons who were legally permitted to exercise the prerogative expanded to such a degree that some persons could strike slaves even when they were not the slave master and his overseer. Mem-

69. Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 611–12 (1996).

70. *Id.* at 612.

71. Blackstone wrote: “A master may by law correct his apprentice or servant for negligence or other misbehavior But if any servant, workman, or labourer assaults his master or dame, he shall suffer one year’s imprisonment, and other open corporal punishment, not extending to life or limb.” 1 WILLIAM BLACKSTONE, COMMENTARIES *416.

Even in the eastern code of Manu, much more severe penalties attach when a lower order individual transgressed upon his superior than when the transgression was top-down. THE LAWS OF MANU 301 (Georg Bühler trans., 1886).

72. Kahan, *supra* note 69, at 612.

73. Cranch reports that two members of the House of Representatives, William Stanbury and Cave Johnson, threatened to whip the other to settle the dispute between them. *United States v. Houston*, 26 F. Cas. 261 (C.C.D.C. 1832) (No. 15,347).

bers of patrols and even strangers from the public at large were allowed to exercise the prerogative. As workplace corporal punishment eroded in the north, it became increasingly associated with enslavement until it reached a point that whipping in particular was reserved almost exclusively to the treatment of slaves.⁷⁴

Concomitantly, enslavement became the last remaining category of bound labor in the United States at the same time that it was increasingly racialized by being limited to African-Americans. During the early republic, bound apprenticeship died out.⁷⁵ Courts declared that Native Americans could no longer be enslaved.⁷⁶ And once the native born population grew to fulfill the nation's need for potential workers, the practice of bringing redemptioners from Europe became less profitable, virtually ending that practice of bound labor.⁷⁷ Enslavement came to be the exclusive category of bound labor at the same time that slavery, as a legal status, became completely racialized.⁷⁸

And as corporal punishment, and particularly the use of the whip, became increasing racialized, it was transformed from the master's personal prerogative to the group prerogative of the entire class of masters (almost exclusively white) over slaves (now exclusively black).⁷⁹ A master whipped a slave to get work done or to maintain his personal authority, but other members of society might do so solely for purposes of racial and class subjugation. As a prerogative of dominance, whipping became a prerogative shared by the slave's master (or mistress) with other members of the dominant class, such as neighbors, strangers, and patrols.⁸⁰

74. Kahan, *supra* note 69, at 613–14 (citing LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 74 (1993); HERBERT ARNOLD FALK, CORPORAL PUNISHMENT: A SOCIAL INTERPRETATION OF ITS THEORY AND PRACTICE IN THE SCHOOLS OF THE UNITED STATES 14–15 (1941)).

75. W.J. RORABAUGH, THE CRAFT APPRENTICE: FROM FRANKLIN TO THE MACHINE AGE 209 (1988).

76. See *Dred Scott v. Sanford*, 60 U.S. 393, 420 (1857); see also *Marguerite v. Chouteau*, 3 Mo. 540, 541, 571–72 (Mo. Sup. Ct. 1834), discussed in LEA VANDERVELDE, REDEMPTION SONGS: SUING FOR FREEDOM BEFORE DRED SCOTT (2014).

77. Mary Sarah Bilder, *The Struggle Over Immigration: Indentured Servants, Slaves, and Articles of Commerce*, 61 MO. L. REV. 743, 783 (1996). See also STEINFELD, *supra* note 27, at 164 for a discussion of how the practice of bringing redemptioners ended.

78. Bilder, *supra* note 77, at 808–09 (pointing out that by 1843, the debate over possession of persons had been limited to black slaves).

79. See Reuel E. Schiller, *Conflicting Obligations: Slave Law and the Late Antebellum North Carolina Supreme Court*, 78 VA. L. REV. 1207, 1223 (1992) (stating that state laws allowed non-slave owners to discipline unruly slaves) (citing *State v. Jowers*, 33 N.C. (11 Ired.) 555 (1850); *State v. Tackett*, 8 N.C. (1 Hawks) 210, 216 (1820) (explaining that “turbulence and insolence” from a slave could constitute adequate provocation for his murder by a white man).

80. See, e.g., *infra* text accompany note 213; see also *infra* note 209. I generalize here, based on my reading of the Caterall cases, but I believe that this is a topic that merits closer study.

Thus, the larger narrative reveals that in the nineteenth century, as the master's right of chastisement was slowly stripped from higher-order labor statuses, one-by-one, it remained the norm for the slave status and its usage expanded. As each line of differentiation was made, at each stage of removal from higher-order labor statuses, it appears that there was an accompanying entrenchment of beatings for lower-order labor statuses, such as slaves and sailors.⁸¹

In public and private terms then, all three functions of corporal punishment—(1) disciplining a servant to workplace norms, (2) whipping to best or shame another, and (3) whipping to secure racial subjugation—shared two attributes. The corporal punishment had to be [A] a public, or semi-public display and [B] it was subject to a certain political economy. The blows had to be semi-public: what good was besting another if there was no one to witness one's dominance? Spreading one's reputation of besting required there be witnesses. To be effective, whipping had to serve as a general deterrent as well as a specific deterrent. That is, it had to be known or observed by others in the subordinated group.⁸² Even if the master personally distanced himself from the beating by ordering the overseer to whip the slave at some cloistered place, and even if the perpetrators of violence covered their faces and identities with masks or hoods, the fact of whipping had to be known to chill other subordinates from challenging that authority.⁸³ The violent effects of whipping had to be on display if it was to be effective in attaining its objective of subjugation. Accordingly, when disciplining to labor was the beating's primary purpose, the intended audience consisted of others in the same workplace.

81. See JOEL P. BISHOP, COMMENTARIES ON THE CRIMINAL LAW 534 (7th ed. 1882). In England, "the master has right of chastisement." *Id.* In the United States, "only to the masters of apprentices and other minors to whom they stand in loco parentis." *Id.* "In these cases the right does exist; yet most fully, though perhaps not exclusively, where the minor is domesticated in the household." *Id.* "The relations of master and apprentices is for the instruction of the child, and there may be an analogy between it and the teacher and pupil." *Id.* "But one who has simply hired a minor from the father is not, therefore, put in loco parentis, with the right of chastisement, where no parental consent thereto has been given . . . [a] master who beats his apprentice immoderately is indictable for battery." *Id.* This was true even in the articulation of the meanings of "involuntary servitude" in the congressional debates on the Thirteenth Amendment. VanderVelde, *Labor Vision*, *supra* note 2, at 454–59.

82. Kahan, *supra* note 69, at 611 ("Shame was an even more salient ingredient of corporal punishment than physical pain.").

83. In these instances, the master might prefer to do the whipping himself taking care to avoid scarring the servant's flesh. Scars revealed the servant's insubordinate nature and consequently lowered his sale price. "Brown said that he would Whip the negro himself, but he did not wish the law to whip him—that he did not want him cut up, as he intended to sell him." *Hudson v. Brown*, 45 S.C.L. (11 Rich.) 643, 644 (1858). But these private circumstances also had a semi-public dimension, even though more covert, since the public visibility of the slave's skin would reflect on the slave's docility and his or her value in the public light of the marketplace.

Moreover, in terms of political economy, corporal punishment had to be utilized somewhat sparingly. Such discipline could never be visited on every subordinate; nor could the practice be resorted to daily. It was fear that spread the effect from the victim to others. Racial subjugation, similarly, could not be visited on every member of the subjugated class. Invoking the punitive practices was best done in circumstances where the punishment was severe enough that that servant and other servants would comply quickly and regularly with the master's commands in order to avoid experiencing it again.

In summary, although the practice began as a right that the master could exercise over all in his household, it assumed its distinctly race- and status-based connotations in America by the 1830s and 1840s, which manifested in two ways. First, racial subjugation sustained the practice in the antebellum South long after the practice lost respectability in the North.⁸⁴ As such, it was seen as a means of disciplining an entire race of human beings that was perceived as inferior. Second, corporal punishment also was sustained because the slave was deemed chattel with whom the master could do much as he pleased.⁸⁵ Yet, the close association of whipping with slavery was the merely the last act, the end-game of two phenomena: the demise of corporal punishment in the higher-order statuses and the last institution of bound labor: racialized enslavement.⁸⁶

84. See Schiller, *supra* note 79, at 1210–11 (describing how violent class subjugation of slaves was permitted to help maintain control of the growing slave class). Lisa Cardyn, who has systematically documented violence against African-Americans in Reconstruction and thereafter, devotes an entire section to the practice of “whipping.” Lisa Cardyn, *Sexualized Racism/Gendered Violence: Outraging the Body Politic in the Reconstruction South*, 100 MICH. L. REV. 675, 704–16 (2002).

85. See *State v. Maner*, 20 S.C.L. (2 Hill) 453, 454 (1834) (“The criminal offense of assault and battery cannot at common law be committed on the person of a slave.”). *But see United States v. Butler*, 25 F. Cas. 212 (C.C.D.C. 1806) (No. 14,697). The report reads:

Assault and battery of a slave is an indictable offence.

Indictment for beating a woman of color (a slave) to her damage, and against the peace and dignity of the government of the U.S.

Mr. Hamilton, for the traverser, contended that beating a slave was not an indictable offence.

CURIA. *contra*. The property which a man has in a slave is not of the same nature as his property in a horse. It is a right to his perpetual service.

Id.

Yet, early on masters had property rights in all who owed them service. Certainly throughout this period, a husband could treat a wife as he pleased. See 1 WILLIAM BLACKSTONE, COMMENTARIES *421–34 (stating that by the old law a husband could chastise his wife as long as it was not unreasonably so).

86. Similarly, after the final curtain, after slavery was abolished, enslavement as so strongly identified with chattelization may have been a distinguishing rationale employed to a greater extent after slavery's abolition to limit the extent of the antislavery reforms than as an explanatory rationale when slavery was legal.

The stick, the strap, and the whip represented a different, more purposeful form of violence: that of violent compulsion. Corporal punishment represented directed violence, in which its ferocity was not only intentional but also subject to measurement in at least two ways: one, by counting the number of stripes laid on the person, and two, by limiting the instrumentalities of force.⁸⁷ Its susceptibility to measurement rendered it susceptible to regulation. At the time, such regulation was thought to civilize the use of intentional violence.⁸⁸

A. Hypotheses: Whipping as the Litmus Test in Four Progress Narratives

It is difficult to appreciate just how prevalent bound labor was in American history because we believe that our refusal to endorse corporal punishment defined our claim to “western-ness.” Certainly, corporal punishment is widely endorsed in the Code of Manu, the ancient Hindu law text.⁸⁹ By comparison, Joseph Conrad wrote, “[i]t would never occur [to a citizen of the West] that he could be beaten with whips as a practical measure”⁹⁰ The Western eyes of which Joseph Conrad writes never focused on the American legacy of workplace corporal punishment.

87. *State v. Robbins*, 48 N.C. (3 Jones) 249, 255–56 (1855). Where a master was indicted for murdering his slave, the court found the master guilty of murder and refused to allow the homicide to be mitigated to manslaughter, stating: “The prisoner [master] then had a right to chastise the deceased for the only offense of which there is the slightest testimony that he was guilty. . . . Punishment, thus immoderate and unreasonable in the measure, the continuance, and the instruments, loses all character of correction *in foro domestico*, and denotes plainly, that the prisoner [master] must have contemplated the fatal termination which was the natural consequence of such barbarous cruelties.” *Id.* See also *State v. Wilson*, 25 S.C.L. (Chev.) 163 (1840). The assailant himself recognized the limitations of certain types of instruments for certain types of peoples as he pled that the reason he felt privileged to whip the person with a pistol was because he thought the slave was an Indian—in which case he thought pistol-whipping *was* the appropriate instrumentality. *Id.* at 164.

88. In a case submitted to Judge Cranch by the U.S. Attorney General and the U.S. Marshall to answer questions regarding fees to be collected for the custody of runaways, the court discussed the statutes of Maryland. Maryland had a statute that “provides for the humane treatment of servants by their masters, and limits their correction to ten lashes, unless by order of a magistrate, who cannot order more than thirty-nine.” *In re Runaways & Petitioners for Freedom*, 21 F. Cas. 1 (C.C.D.C. 1834) (No. 12,137); see also Schiller, *supra* note 79, at 1212 (describing how regulation of slave punishment became the norm).

89. See generally THE LAWS OF MANU, *supra* note 71. Brahmins were not supposed to exercise corporal punishment. *Id.* at ch. 4, § 164. “Let him, when angry, not raise a stick against another man, nor strike (anybody) except a son or a pupil; those two he may beat in order to correct them.” *Id.* The exception, here too, was for correcting purposes. Kings, on the other hand were expected to mete out corporal punishments and liberally. *Id.* at ch. 9, § 230. “On women, infants, men of disordered mind, the poor and the sick, the king shall inflict punishment with a whip, a cane, or a rope and the like.” *Id.*

90. JOSEPH CONRAD, UNDER WESTERN EYES: A NOVEL 25 (1911). A Western mind “would not have an hereditary and personal knowledge of the means by which an historical autocracy represses ideas, guards its power, and defends its existence.” *Id.*

Accounts like Joseph Conrad's are the subject of elegy as evidence of progressive legal reform and change. This has been a classic myth of Western progress. In the popular narrative, this change alone is thought to distinguish our modern present from the barbarous past.⁹¹ Despite its popularity as a progress narrative, the precise terms through which this legal change occurred have been left unexamined.

I outline four progress narratives in order to demonstrate differences.⁹² First, and most familiar, there is Sir Henry Maine's rosy view detailing the decline of status relations as inevitable in the march of progress toward contract.⁹³ Was the decline of violence actually the natural side-effect of the move from status to contract? Does it really instantiate the reform?

The second explanation is that this form of "progress" was due to a humanitarian impulse. Humanitarian impulses are a noble explanation, which appeals to us as flattering our sense of "our better selves." There has been extensive work on the subject of abolitionism.⁹⁴ And the rise of abolitionism in political rhetoric and in literature⁹⁵ could be considered a humanitarian impulse significantly contributing to the cessation of corporal punishment. But who can predict when and why more sensitive impulses arise? Why does an accepted practice like cuffing a servant suddenly, (or even gradually) become the subject of humanitarian reflection?

Third, historian Richard Morris suggests a more sophisticated explanation: the humanitarian impulse only tells half of the story.⁹⁶ He writes: "[J]ustice for the laboring man was precariously dependent upon

91. Even nineteenth-century writers began to use the term "barbaric" to describe unregulated whipping. See, for example, REEVE, *supra* note 8, and annotations in the later nineteenth-century editions of William Blackstone, *Commentaries*.

92. There may be more.

93. See SIR HENRY MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS* 109–65 (1861) (Fourth American from the 10th London ed. 1906).

94. See generally Clark, *supra* note 12. Clark criticizes Foucault's approach for obscuring "particular uses of humanitarian rhetoric in struggles against such figures as masters and patriarchs, who in their traditional roles were deputized to use violence against their subordinates." *Id.* at 491–92. See generally RICHARD H. BRODHEAD, *CULTURES OF LETTERS: SCENES OF READING AND WRITING IN NINETEENTH-CENTURY AMERICA* 13–14 (1993); JAMES D. ESSIG, *THE BONDS OF WICKEDNESS: AMERICAN EVANGELICALS AGAINST SLAVERY, 1770–1808* (1982); David Brion Davis, *The Perils of Doing History by Ahistorical Abstraction*, in *THE ANTISLAVERY DEBATE: CAPITALISM AND ABOLITIONISM AS A PROBLEM IN HISTORICAL INTERPRETATION* 290–309 (Thomas Bender ed., 1992); Thomas L. Haskell, *Capitalism and the Origins of the Humanitarian Sensibility, Part 2*, in *THE ANTISLAVERY DEBATE: CAPITALISM AND ABOLITIONISM AS A PROBLEM IN HISTORICAL INTERPRETATION*, *supra*, at 136–60.

95. Harriet Beecher Stowe's *Uncle Tom's Cabin* published in 1852 was the single most popular book in the nineteenth century and the century's longest running play on Broadway.

96. RICHARD B. MORRIS, *GOVERNMENT AND LABOR IN EARLY AMERICA* 523 (1946).

a fortuitous conjunction of the humanitarian impulses and economic interests of those in power.”⁹⁷ Humanitarian impulses may have been insufficient to accomplish the reform by itself. Skeptics must then search for what those in power could gain from such a change. Morris’s thesis explains why a more powerful party might yield one of his prerogatives—that is, because it may actually serve other economic interests.

The explanatory effectiveness of this narrative will be seen in the evidence that follows. Why the impulse arose and why there was ambivalence about eliminating the beatings of working subordinates in some settings may be revealed by seeing court cases as markers in a chronology and evolving classification schema.

There is, of course, a fourth progress narrative provided by Max Weber,⁹⁸ that the state takes over “a monopoly of the legitimate use of physical force” and “[t]he state is considered the sole source of the ‘right’ to use violence.”⁹⁹ Was the move away from workplace corporal punishment simply an act of state-evolution in Weberian terms? Did the end of master-inflicted violence spell the beginning of the state’s monopoly of this particular means of violence for social control?

B. The Evidence

To consider these hypotheses as well as to identify the dynamics of the demise of Blackstone’s rule, I turn to nineteenth-century treatise writers and law cases.¹⁰⁰

97. *Id.* This explanation received modern form in Derrick Bell’s works.

98. MAX WEBER, *Politics as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77, 78 (H.H. Gerth & C. Wright Mills eds., 1946).

99. *Id.* at 78. Max Weber’s theory identifies three inner justifications or basic legitimations of domination: the authority of the traditional, of the patriarch, of the eternal yesterday, and that of the legal.

First, the authority of the ‘eternal yesterday,’ i.e. of the mores sanctified through the unimaginably ancient recognition and habitual orientation to conform. This is ‘traditional’ domination exercised by the patriarch . . .

There is the authority of the extraordinary and personal *gift of grace* (charisma), the absolutely personal devotion and personal confidence in revelation, heroism, or other qualities of individual leadership. This is ‘charismatic’ domination, as exercised by the prophet or—in the field of politics—by the elected war lord, the plebiscitarian ruler, the great demagogue, or the political party leader.

[The third] is domination by virtue of ‘legality,’ by virtue of the belief in the validity of legal statute and functional ‘competence’ based on rationally created *rules*.

Id. at 78–79.

100. I am keenly aware that different texts, newspapers, statutory codes, or even sermons or journals could be used as evidence to test the hypotheses about this social reform.

1. Nineteenth-Century Treatise Writers: Chastisement as a Common Refrain

One way to track the legal changes taking place in this area is through the changes in legal discourse in influential treatises. Legal treatises were extremely influential in the nineteenth century in organizing and disseminating law. Treatises functioned to help lawyers and judges find case citation in an era without digital searching, and even without Shepard's citations. Legal treatises disseminated more recent rulings by listing them in the volume's footnotes, in amplification of the principles stated in the main text. As new cases were decided, successive editions added them, sometimes in tiers of footnotes. This gave these treatises significant influence as *the texts* that articulated the common law for expansion into new territories where the law was not known. The treatises also inculcated common law theories in the training of new lawyers.

Of all the nineteenth-century treatises, Blackstone's *Commentaries* continued to be the most influential in American law. Almost all early nineteenth-century treatises structured their content around Blackstone's "Master and Servant" chapter.¹⁰¹ Hence, Blackstone's rule on corporal punishment—that masters were entitled to chastise their servants—was a refrain repeated in treatises over the entire century.¹⁰² Blackstone's *Commentaries* continued to have broader appeal than did specialized treatises on the subject of master and servant. As Timothy Walker wrote in his book intended as an introduction for those studying law: "There is no work on American Law, at all suitable for a *first book*; and we are compelled, for want of such a work, to commence with Blackstone's *Commentaries on English law*, to learn the rudiments of *American law*."¹⁰³

101. For a description by a contemporary treatise writer of how treatises structured their chapters, see SCHOULER, *supra* note 27, at 3–5. Chris Tomlins has divided nineteenth-century treatise writers into first- and second-stage treatise writers: first-stage followed Blackstone's taxonomy, while second-stage departed from the taxonomy to provide a more universally available conceptualization of master and servant. TOMLINS, *supra* note 13, at 266. With regard to corporal punishment the trend is the reverse. Blackstone stated the rule as a universal when he included the word "servant" as a relation susceptible to corporal punishment. Later treatises proceeded to limit the category more and more by an increasingly narrow definition of which servants were susceptible.

102. For Blackstonian replication, see treatises cited *supra* note 8.

103. TIMOTHY WALKER, INTRODUCTION TO AMERICAN LAW: DESIGNED AS A FIRST BOOK FOR STUDENTS 3 (1837). Though Walker wished for a truly American compendium, "Our great desideratum is, a work which would be to us, precisely what that work is to the English. And that man would be a great public benefactor, who should *Americanize* Blackstone's *Commentaries*; that is, who should give this work with just such additions, omissions, and corrections, as would make it an accurate exposition of American law", he realized that there could be none because "among the various obstacles in the way of such an enterprise, there is one, which if not insurmountable, is certainly formidable. I refer to the great diversity of state laws. This renders it almost impossible to

Yet, despite Blackstone's prevalence and his clarity about masters' prerogatives, it is difficult to find any American case supporting the rule. Where does one find an American case where a particular master's beating was deemed legitimate by a court of law? Does the lack of cases suggest that beatings did not occur or, instead, was the practice so well accepted that its legitimacy went unquestioned when beatings did occur? Or perhaps beatings occurred but it was simply impossible for servants to sue.¹⁰⁴

The case citation in the master-servant treatises is thin, and on the subject of chastisement almost threadbare.¹⁰⁵ For instance, Hilliard in his treatise *The Law of Torts or Private Wrongs* gives a single, unusual example: "With regard to the right of the master to chastise his servant, it has been held that a master has no right to flog a choir-boy of a cathedral for singing at private parties without his leave."¹⁰⁶ Even this example contrasts with rather than supports Blackstone's rule. That a choir boy who sang elsewhere should not be whipped for doing so seems reasonable. That in 1859 his master even considered it suggests how jealous and controlling masters could be.

But by 1827, there are writings questioning the rule's legitimacy in the name of contract. Writing in 1827, the influential Chancellor Kent in his commentaries stated:

It is said that the master may give moderate corporal correction to his servant, while employed in his service, for negligence or misbehavior. . . . But this power does not grow out of the contract of hiring; and [one English scholar] justly questions its lawfulness, for it is not agreeable to the genius and spirit of the contract.¹⁰⁷

Kent was already beginning to isolate its field of acceptability with the sentence that followed: "And without alluding to seamen in the merchants' service, it may safely be confined to apprentices and menial servants while under age, for then the master is to be considered as standing *in loco parentis*."¹⁰⁸

prepare a work of any reasonable compass, which shall be equally adapted to every part of the United States; and yet sufficiently full and complete, to answer the end proposed." *Id.* at 4.

Since there could never be an American counterpart to Blackstone, Blackstone's *Commentaries* continued to occupy the central role of organizing the common law, and master-servant law, for most states.

104. See discussion *supra* accompanying notes 31–32.

105. I used a similar method to generate numerous cases on negative specific performance and seduction for two previous articles on master and servant.

106. 2 FRANCIS HILLIARD, *THE LAW OF TORTS OR PRIVATE WRONGS* 569 (1859) (citing *Newman v. Bennett*, 2 Chit. R. 195 (Eng.)).

107. 2 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 307 (Boston, Little, Brown and Company, 10th ed. 1860). The English legal scholar that Kent referred to was Doctor Taylor.

108. *Id.*

Other treatises continued to state that “[t]he master has a right to give moderate corporal correction to his servant for disobedience to his lawful commands, negligence in his business, or for insolent behavior.”¹⁰⁹ Yet, despite this mid-century hesitation to condone chastisement—one might say ambivalence toward the practice—none of the treatise writers seemed prepared to condemn workplace corporal punishment entirely.¹¹⁰

In the 1870s treatise writers openly questioned its legality. James Schouler and H.G. Wood both wrote treatises in the 1870s and both concluded that, generally, corporal punishment was illegal but was reserved for special cases. Both suggested that the master’s alternative to chastising hired servants was “either to bring an action against him, or . . . ‘to expel the lazy drone from his family, and leave him to his own beggarly condition.’”¹¹¹

But Schouler and Wood differed upon the significant issue of whether employers needed reasons to expel a worker from employment. While Schouler implied that reasons were necessary for such drastic action, Wood took the opposite position.

Schouler expressed concern that the master–servant relationship entailed caste-like circumstances that were unsuited to the American republic. He exalted the republican thinking that masters and servants should be social equals in America, and he invoked concerns about power disparity when concerning certain workplace common law rules. Schouler went to some length to describe the reasons that justified the master in terminating the relationship.

109. Reeve ended such a broad and open statement with a qualification: “This, however, is confined to apprentices and menial servants, who are members of his family; and not, indeed, to all such, if of full age, as hired men of full age If other servants be thus corrected, they may leave the master’s service.” REEVE, *supra* note 8, at 534. The treatise also repeats Kent’s earlier observation: that chastisement “does not grow out of the contract of hiring, and . . . [is] not being consonant with the spirit and genius of contract.” *Id.* at 534–35 n.1.

110. Torts treatise writers were prepared to abandon the master’s exception earlier than master-servant writers. In 1873, Torts treatise writer, Thomas W. Waterman wrote: “Except in the case of sailors the master cannot lawfully chastise his hired servant. If he beat his servant, though moderately and by way of correction, it is good ground for the servant’s departure, and the servant may support an action against the master for the battery.” 1 THOMAS W. WATERMAN, *A TREATISE ON THE LAW OF TRESPASS IN THE TWOFOLD ASPECT OF THE WRONG AND THE REMEDY* 186 (New York, Baker, Voorhis & Co., Publishers 1875).

111. *See, e.g.*, SCHOULER, *supra* note 27, at 658 (quoting Pufendorf). Both Schouler and Wood appear to have borrowed upon the British Charles Manley Smith. Smith was an English legal scholar but many of his treatises, like the one cited, were published and distributed in the United States as well. SMITH, *supra* note 8, at 126. Smith carefully qualified the terms for this expulsion—the master must have good reasons for leaving a servant destitute by expelling him—and then proceeds to list and specify legitimate reasons, such as good cause, for expelling the servant. *Id.* at 113. Schouler repeated similar qualifications, but Wood did not.

We are now to inquire in what manner the relation of master and servant may be terminated. The causes which justify discharge by the master are various, and the rule depends somewhat upon the nature of the particular employment in question. But most decisions are reducible to three leading classes: *First*, wilful disobedience of a lawful order; *second*, gross moral misconduct; *third*, habitual negligence in business, or other serious detriment to the master's interests.¹¹²

Schouler also provided a nuanced account of the consequences for general hirings where the term was not specified, suggesting that pay schedules were good guidelines for determining the duration of employment.¹¹³ In essence, if work was to be terminated, servants should receive one payment upon termination, but, Schouler maintained, custom rather than rigid rule determined the scope of the master's ability to terminate an employee in any particular setting.

Wood was much more categorical. He stated: "The master has no right to chastise a servant for disobedience, negligence, or any cause except such as would justify him in assaulting a stranger."¹¹⁴ Wood twinned this statement with the following statement: "If the servant's conduct is such as to merit punishment, the master's only remedy is to discharge him."¹¹⁵

Gone from Wood's statement is the qualification that the master needed reasons to expel the servant from his work and what conduct merited punishment. This is because Wood's blockbuster innovation came later in the volume: it was not going to be that corporal punishment had ceased to be legally authorized, it was the introduction of the at-will doctrine. Wood stated categorically, "With us [we Americans] the rule is inflexible, that a general . . . hiring is *prima facie* a hiring at will."¹¹⁶ Thus, Wood reasoned as a consequence, "a mere hiring at will . . . may be put an end to by the master."¹¹⁷ Period. Without qualifications and without needing justification or reasons.

As we know, in time, Wood's at-will rule won out. Later cases filled in the blanks of the privilege: a servant could be discharged not

112. See SCHOULER, *supra* note 27, at 612.

113. See *id.* at 607. "We find at the outset, then, a distinction made in practice between servants, menial or domestic, and other servants; which distinction is founded upon a custom of dissolving the relation, not at the end of a year, but at any time upon giving the other a month's wages." *Id.* at 608. Schouler's treatment is much more nuanced than Wood's. Schouler spends several pages distinguishing the policies and circumstances that would affect the duration of hiring and grounds for terminations. *Id.* at 606–10.

114. WOOD, MASTER AND SERVANT, *supra* note 8, at 303–04.

115. *Id.* at 304.

116. *Id.* at 283.

117. *Id.* at 285.

only for good cause, but for bad cause or for no cause at all, just as feudal peasants and at-will tenants could be.¹¹⁸ After the at-will rule came to prominence, employees could be suddenly expelled from the workplace and left to their beggarly condition without any justification at all. Previously the master's exercise of dominance, physical chastisement was only justified by reasons, but no reasons conditioned terminating an employee under the at-will doctrine. Twenty years later in 1896, the century ended with Tiffany's simple statement that "the master *cannot* chastise his servant,"¹¹⁹ and that specific prerogative was never resuscitated. To examine this change with a somewhat finer grain, one must look at the few cases upon which the treatises were based.

2. In the Early Republic, the State Takes the Whip from the Master's Hand: *Milburne v. Byrne*

Although whipping and enslavement were regarded as affiliated circumstances by 1805, *Milburne v. Byrne*¹²⁰ concerns the punishment of John Leonard, an Irish adult white man and fairly recent immigrant to America. Notwithstanding his demographic characteristics, John Leonard was whipped by the justice of the peace when he left one master and went to work for another.

In the colonial and post-colonial period, both who was subject to bound labor and who was subject to workplace corporal punishment seem to have been more racially fluid. Persons of European descent as well as persons of African descent could be subject to indenture, enslavement, whipping, or a combination thereof for running away, failure to work, or circumstances amounting to a common law crime.¹²¹ If the

118. See generally *Payne v. W. & Atlantic R.R. Co.*, 81 Tenn. 507 (1884).

119. See TIFFANY, *supra* note 5, at 505 (emphasis added).

120. 17 F. Cas. 283 (C.C.D.C. 1805) (No. 9,542). This case is well-known because it is one of the few cases on master and servant listed in the first Centennial digest of American law. This case has also been analyzed by STEINFELD, *supra* note 27, at 134, 235–36.

121. See, e.g., 4 HELEN TUNNICLIFF CATTERALL, JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO 469 (1968).

Re Haslewood, 1 Mass. Recs. 246, December 1638. "John Haslewood, being found guilty of severall thefts, and breaking into severall houses, was censured to bee severely whiped, and delivered up a slave to whom the Court shall appoint Giles Player, [for similar offences] . . . was censured to be severely whiped, and delivered up for a slave to whom the Court shall appoint."

....
Re Kempe, 1 Mass. Recs. 269, September 1639. "John Kempe, for filthy, uncleane attempts wth 3 yong girls, was censured to bee whiped both heare, at Roxberry, and at Salem, very severely, and was committed for a slave to Leif't Davenport."

....
Re Dickerson, 1 Mass. Recs. 284, December 1639. "Thomas Dickerson was censured to bee severely whiped, and condemned to slavery."

wrongdoer was already enslaved, the punishment would most likely be a whipping.¹²² If the wrongdoer was indentured, the person might be whipped and years might be added to their term. If, however, the wrongdoer's service was already life-long, there was then no point to a further deprivation of liberty. Whipping provided an additional penalty for someone whose liberty was already curtailed. Whipping in these instances responded to the lack of an ability to otherwise worsen the slacker's status.

Tremain writes that “[f]or some time slaves are scarcely mentioned in the laws [governing the District of Columbia]. The inference is that, in general, laws made for white servants would be applicable to slaves.”¹²³ Early statutes did not refer to slaves at all, they simply referred to bound servants and these statutes, written in terms of bound servants, came to be applied to slaves, rather than written for that legal category of persons as the target.¹²⁴ Tremain notes that, generally, “laws concerning indentured servants were applied to slaves, probably until the latter became the more numerous class.”¹²⁵

Milburne v. Byrne demonstrates both the state's willingness to compel the enforcement of labor contracts through the courts as well as judicial reluctance to endorse violence as the means of enforcement.¹²⁶ The case, however, revolved around a statute that regulated violence.¹²⁷ The operative Virginia statute on master-servant relations authorized both the lawsuit and some kind of whipping.¹²⁸ (Maryland had similar

Re Savory, 1 Mass. Recs. 297, June 1640. “Thom: Savory, for breaking a house in the time of exercise, was censured to bee severely whiped, and for his theft to be sould for a slave until hee have made double restitution.”

Id. (footnotes omitted).

122. William E. Nelson, *The Utopian Legal Order of the Massachusetts Bay Colony, 1630–1686*, 47 AM. J. LEGAL HIST. 183, 217–18 (2005); see also CATTERALL, *supra* note 121, at 469–534.

123. TREMAIN, *supra* note 9, at 30. She adds: “Some [laws], passed as early as 1715, were in force in the District of Columbia up to 1862. Those relating to servants and slaves were especially severe. In both States these laws had been considerably modified even before 1800.” *Id.* at 13.

124. *Id.* at 36.

125. *Id.* at 54. An increasing severity of the measures may be noticed during the change from the system of indentured service to that of slavery. “By the laws of 1782 and 1796, in Alexandria and Washington counties respectively, emancipation was allowed, and by the acts of 1799 and 1796 the sale of free persons was prohibited.” *Id.*

126. *Milburne v. Byrne*, 17 F. Cas. 283 (C.C.D.C. 1805) (No. 9,542).

127. *Id.*

128. 1 THE REVISED CODE OF THE LAWS OF VIRGINIA: BEING A COLLECTION OF ALL SUCH ACTS OF THE GENERAL ASSEMBLY, OF A PUBLIC AND PERMANENT NATURE, AS ARE NOW IN FORCE 418–19 (Richmond, Thomas Ritchie 1792) [hereinafter REVISED CODE] (referencing “*An Act Reducing Into One, the Several Acts Concerning Servants*,” ch. 110, § IV–V); A COLLECTION OF ALL SUCH ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA OF A PUBLIC AND PERMANENT NATURE AS HAVE PASSED SINCE THE SESSION OF 1801, at 228 (Richmond, Samuel Pleasants, Junior 1808) [hereinafter COLLECTION]. The Virginia statute was in force in the District of Columbia by reason of

statutes.¹²⁹) The Virginia statute authorized a justice of the peace to order that a servant be whipped for running away, which was how Leonard's departure was viewed.¹³⁰

Like many others, John Leonard came to America from Ireland, apparently on passage paid by another. Once in this country, Leonard executed an indenture promising to work for Milburne for eight months in exchange for Milburne relieving him of his pre-existing debt.¹³¹ When Leonard left Milburne before the expiration of his eight-month term and went to work for Byrne, Milburne sued Byrne for enticing his servant away. Milburne also had John Leonard whipped by the justice of the peace under a local statute authorizing servants to be whipped.¹³² Milburne's two responses are illuminating: one sued men of equal or higher status (assuming one had the wherewithal to sue), and one whipped lower-class men.

Milburne prevailed on the enticement action against the other employer,¹³³ but the whipping was declared illegal.¹³⁴

Based upon the statute, the court declared Leonard's whipping illegal because the contract that indentured Leonard was executed in the United States. The court held that since that indenture was signed in the

the fact that Virginia statutes applied south of the Potomac on District land that was originally part of Virginia. TREMAIN, *supra* note 9, at 11.

According to Cranch,

The laws thus adopted [by act of 1801] consisted of so much of the common law of England as was applicable to this country; of bills of rights, constitution, and statutes of Virginia and Maryland, modified by the Constitution and laws of the United States, and also (in regard to that part of the District which was ceded by the State of Maryland) of such of the English statutes as existed at the time of the first emigration to Maryland, "and which by experience had been found applicable to their local and other circumstances, and of such others as had been since made in England or Great Britain, and had been introduced, used, and practised by the courts of law or equity" of that State.

Id. at 12–13. The Virginia statute was subsequently copied in the Northwest Territory.

129. *Milburne*, 17 F. Cas. at 284.

130. *Id.*

131. Alexander Smith was the holder of John Leonard's original debt. Although Smith is a common name, "Alexander Smith" was involved in several other cases in Cranch Reports for the District of Columbia. The nature of these cases suggests that he was some sort of broker of laborers since the other suits involved matters of finance and slaves (presumably to the person who had paid Leonard's passage).

132. *Milburne*, 17 F. Cas. at 284.

133. Although the court declined to validate the whipping, it allowed Milburne to prevail against Leonard's second master and accepted an evidentiary presumption very favorable to his original master. Essentially, Milburne did not need to show that the second master had actively enticed Leonard. It was sufficient to show that Leonard was now working for him. *Id.*

This meant that Leonard was not free to quit. The court ruling effectively eliminated all of Leonard's other employment options by imposing a civil liability for loss of his services upon any prospective employer. Leonard might flee, but he couldn't get work in order to eat.

134. *Id.*

United States and not in Ireland, it was not within the statute's specific terms and, hence, the whipping was unauthorized and illegal.

Although the court declared Leonard's whipping illegal, it expressed no condemnation of the fact that this adult white man had been whipped. Leonard was not a party to this suit, but there is also no record of any follow-up to provide Leonard compensation for being subjected to a whipping illegal under the statute.

In declaring Leonard's whipping illegal, the case holding has a distinctly new world flavor in which the situs of the contract's formation, as occurring in the new world, is salient. "A contract made in this country does not create such a relation of master and servant as will authorize a justice of the peace to compel a specific service, and to inflict stripes for disobedience, under the [statute]."¹³⁵ Such a contract made in Ireland could conceivably be enforced by a whipping. But that wasn't Leonard's situation. The court implicitly drew this line, implying that even though "they" (Old Worlders) may be subject to "barbaric" penalties such as whipping as a means to enforce those contracts, this was an American contract of indenture; thus, the whipping was invalid.

As to the importation of indentured laborers, this formalism is rather silly. Byrne's attorney took pains to point out that Leonard had signed some sort of contract in Ireland.¹³⁶ In all probability that contract paid for passage to America, and that contract had produced the debt which Milburne then paid on Leonard's behalf.¹³⁷ What difference should the situs make in enforcing a contractual debt?¹³⁸ Presumably, none at all, but after this ruling, the situs of the debt determined which master could subject a servant to whipping for running away. This prerogative of mastery was not transferable as the debt and labor obligation was transferable by successive contracts made first outside and then inside the United States. Pragmatically, the distinction creates a new division between the consequences for a new world master of buying an indentured servant and buying a slave.

135. *Id.*

136. *Id.*

137. For a comprehensive account of the redemptioner's practice, see DAVID GALENSON, *WHITE SERVITUDE IN COLONIAL AMERICA: AN ECONOMIC ANALYSIS* (1984).

138. As a legal matter, why should the Court quibble about whether Leonard's indebtedness was made directly to Milburne when he was in Ireland, or whether it was made initially to another party and then transferred to Milburne? One possible doctrinal answer would be privity. Certainly, privity was still an important concept in the early nineteenth century and a punitive statute like Virginia's should be narrowly construed. But the court did not bother to consider whether Leonard came into the country on a "contract to serve another" under the strict terms of the Virginia statute and whether that legislative enactment was for the benefit of assignees of the indentured immigrant's debt every bit as much as for the original creditor who procured the immigrant's passage. *Milburne*, 17 F. Cas. at 284.

The Virginia statute deserves a closer look. Consider another specific provision of the Virginia statute. The statute also delimited the circumstances in which whipping would be deemed appropriate.¹³⁹ The provision recited the circumstances: “Any such servant, being lazy, disorderly, guilty of misbehavior to his master, or in his master’s family, shall be corrected by stripes, on order from the justice”¹⁴⁰ This limited the master’s discretion to impose punishment by providing reasons when such extreme punishment could be resorted to.¹⁴¹ By including these conditional circumstances, the statute limited the authorization of violence. By stating a specified list of reasons that could justify beating, the statute accordingly proscribed other rationales.¹⁴² The master no longer enjoyed the prerogative of beating the servant on a whim, beating at will, beating out of despair, out of spite, out of bad humor, frustration, drunkenness, class or ethnic hatred, or economic downturn or ill-fortune. The servant’s misfortune in being whipped was authorized, but limited to specific justifications that the state recognized as legitimate.

The Virginia statute maintained the dominance of class in that it accorded masters and servants quite different nonreciprocal rights.¹⁴³ But, importantly, it prohibited the master whipping a servant simply because he was master and the subject was servant and it qualified those behaviors that were acceptable in the class relation.¹⁴⁴

This statute illustrates a broader precept about punishment in Western culture. An activity as extreme as whipping required that there be reasons that justified the action, reasons couched in terms of the victim’s culpability. For an example, consider Stedman’s famous accounts of a trip to Surinam, a book that played an important role in the early anti-slavery movement in Britain. Stedman routinely distinguishes the many floggings that he witnessed in terms of the reasons that the action was taken.¹⁴⁵ Instances of flogging for very slight reasons or for no reasons at

139. See REVISED CODE, *supra* note 128, at 419 (referencing “*An Act Reducing Into One, the Several Acts Concerning Servants*,” ch. 110, § IV); COLLECTION, *supra* note 128, at 227.

140. REVISED CODE, *supra* note 128, at 419.

141. See *id.*; COLLECTION, *supra* note 128, at 227.

142. These reasons were somewhat open-textured, but they were much more limited than whenever the master wanted to strike the servant or felt like doing so.

143. REVISED CODE, *supra* note 128, at 418–19 (referencing “*An Act Reducing Into One, the Several Acts Concerning Servants*,” ch. 110, §§ II, IV, VII); COLLECTION, *supra* note 128, at 247–48.

144. REVISED CODE, *supra* note 128, at 418–19 (referencing “*An Act Reducing Into One, the Several Acts Concerning Servants*,” ch. 110 §§ II, IV, VII); COLLECTION, *supra* note 128, at 247–48.

145. See generally 1 JOHN GABRIEL STEDMAN, NARRATIVE OF A FIVE YEARS’ EXPEDITION, AGAINST THE REVOLTED NEGROES OF SURINAM, IN GUIANA, ON THE WILD COAST OF SOUTH AMERICA; FROM THE YEAR 1772, TO 1777: ELUCIDATING THE HISTORY OF THAT COUNTRY, AND DESCRIBING ITS PRODUCTIONS . . . WITH AN ACCOUNT OF THE INDIANS OF GUIANA, & NEGROES OF GUINEA (London, 2d ed. 1813).

all call forth Stedman's strongest condemnation.¹⁴⁶ The severity of the punishment required some culpability on the victim's part and some proportionality.

The Virginia statute went further by providing servants certain specific benefits, too. The statute guaranteed minimal terms of survival for the servant for the duration of his service.¹⁴⁷ For example, the statute obligated that the master provide the servant with "wholsome [sic] and sufficient food, cloathing and lodging . . ." ¹⁴⁸ Further, the servant was guaranteed freedom wages at the end of service.¹⁴⁹ The statute also provided a forum to redress the servant's grievance of ill-treatment.¹⁵⁰

On close reflection, the Virginia statute served another purpose. Ironically, but importantly, the statute may be seen as a means of progressive law reform at the very time that it inscribes legal authorization of violence—the permission for masters to use physical violence against servants—as a matter of statute. In all likelihood, before this statute was enacted, it was simply customary that employers themselves whipped their servants, sometimes brutally or for sufficiently slight of a provocation. Prior to the statute, no positive law authorized the whipping of servants. Beating a servant (even with a whip) was probably considered a prerogative that the master, as the more powerful individual, assumed by virtue of his unfettered power. The statutory reform prevented unduly

146. See generally *id.* A slave was whipped for the non-performance of a task to which he was apparently unequal. *Id.* at 215. Another slave was severely flogged "only for breaking a tumbler." *Id.* at 236. Particularly outrageous in Stedman's account were those slave owners like one "lady, who flogged her negro slaves for every little trifle." *Id.* at 517. One slave was flogged for "coughing, who had a severe cold." *Id.* at 174. Still another for failure to rinse out the glasses, spoiling the ragout, refusing to work, and for oversleeping. *Id.* at 321, 517.

Non-work related instances of flogging were appearing "in the streets or on the river, without a proper pass signed by his owner." *Id.* at 306.

147. See REVISED CODE, *supra* note 128, at 418.

148. *Id.*

149. Servants were also secured some limited control of the masters to whom they could be assigned in that contracts of service were assignable only with the servant's consent, the voluntariness of which was overseen by the justice of the peace. *Id.*

150. REVISED CODE, *supra* note 128, at 419 ("If any master shall fail in the duties prescribed by this act, or shall be guilty of injurious demeanor towards his servant, it shall be redressed on motion, by the court . . . wherein the servant resides, by immediate discharge from service, if the injury were gross, or by a specific order for a change in his demeanor, and a discharge from service, if such order be disobeyed.")

The Virginia statute was in effect in this area of the District of Columbia, but Maryland statutes similarly regulated masters' harsh treatment of servants. TREMAIN, *supra* note 9, at 34–35. "In Maryland, by act of 1715, any one not providing sufficient food and clothing for a servant or slave, or excessively beating or burdening him with hard labor, or giving above ten lashes for any one offence, the same being sufficiently proved before the justices of the county courts, might be fined not to exceed one thousand pounds of tobacco. Virginia had similar laws to insure the good treatment of servants and slaves. There are many rumors, though perhaps no well authenticated account of actual violations of these statutes." *Id.*

severe and unfair whippings.¹⁵¹ But by outlawing only these abuses of the practice, the reform also served the authorizing function that legitimated whipping, an extralegal practice previously not directly sanctioned by law.

Moreover, this reform *legitimated* the practice of whipping of servants *precisely at the time* that it took the whip out of the master's hands. The statute took the leather strap from the master's hand and put it in the hands of an officer of the state, doing the master's bidding with the authorization of the justice of the peace.¹⁵² This may in fact have been a moderating influence if the sheriff was expected to whip more dispassionately; a master may have been tempted to whip out of anger or vengeance. The statute regulated the number of stripes as well. The *civilizing* reform indirectly gave the master something as well; by articulating the acceptable limits, it directly authorized a prerogative which previously had only been assumed and engaged in extralegally.

The case raises the question then of how we evaluate legal reform. Was this Virginia statute a progressive move at all? Or was it instead an example of legal change as a pattern of compromise where the stronger parties' interests actually were served by the purportedly progressive changes of law? The implication is that as long as the stronger party still sits at the table while reform is being negotiated, any legal change will accommodate or enhance patterns of compromise in which the stronger parties' interests are accommodated or perhaps actually served by the new law. If the stronger party participates in the legislative compromise claimed to be a reform,¹⁵³ the stronger party will always attempt to retain and may succeed in re-securing some measure of its previous prerogative of power. This re-securing of privilege further legitimates the exercise of that prerogative previously enjoyed, but perhaps not previously articulated as law, that is, the prerogative of dominance.

151. See REVISED CODE, *supra* note 128, at 419 (referencing "*An Act Reducing Into One, the Several Acts Concerning Servants*," ch. 110, §§ IV–V, VII); COLLECTION, *supra* note 128, at 227–28.

152. This is similar to provisions in New Jersey. Gary K. Wolinetz, *New Jersey Slavery and the Law*, 50 RUTGERS L. REV. 2227, 2232 (1998) (explaining that "upon conviction (before two justices of the peace and without a jury), the owner of the slave was required to reimburse the damaged party and pay the constable the costs to whip his slave not more than 'forty stripes'").

Along the same lines, Chancellor Kent mentions that early New England towns would appoint a paid "whipper." "[E]ach town was authorized to appoint a common whipper for their slaves, to whom a salary was to be allowed." KENT, *supra* note 107, at 255.

153. Slave masters' interests were completely vanquished in the enactment of the Thirteenth Amendment of the Constitution, in part because with secession most slave states were no longer represented in Congress. VanderVelde, *Labor Vision*, *supra* note 2, at 443.

This is perhaps why Richard Morris's explanation seems so plausible.¹⁵⁴ The humanitarian impulse may be the impetus to progressive legal change; the fortuitous conjunction of the impulse with the economic interests of those in power allows it to happen in such a way that the more powerful parties receive something in return.

Under the obligations placed upon masters by the Virginia statute, masters were never exposed to similarly heavy sanctions.¹⁵⁵ When a master violated the relationship's terms, it does not seem that the servant would be entitled to damages or even to have punishment visited upon the master. Instead, if the master breached one of his statutory duties, the servant could be discharged from further service to that master.¹⁵⁶ Discharge from service was the *remedy* for each and every servant's grievance regardless of severity!¹⁵⁷ The one and only remedy for any wrongfully abused servant was simply to be able to exit the relationship. One wonders if the servant would be entitled to freedom dues for the premature end of the servant's bound term, or whether the servant left penniless as he sought a new source of support.

There is a modern counterpart even to this. Leaving the job as the only appropriate legal response for the master's breach of duty has been retained in employment conceptualizations. The colloquial expression is that the remedy for the master's abuse of the servant, whether the abuse was overwork, undernourishing, failing to clothe or shelter the servant or actual physical abuse, the beating of his head against the wall, is simply "to get the master to stop," to release the servant from the master's thrall, rather than to actually redress the aggrieved circumstances in the first place. Similarly, in modern employment settings, extreme overreaching by employers is often met with the similar societal response: the employee should simply have quit as soon as the employer's bad behavior began. Exit is the one and only cure.

The Virginia statute also drew express racial and citizenship lines. The statute limited the individuals covered by the statute in both racial and citizenship terms. At first blush, interpreted in the context of a mixed labor system that encompassed both slaves and indentured employees,

154. See MORRIS, *supra* note 96.

155. The lack of reciprocity, the lack of symmetry between those occupying the position of master and those occupying other classes was also apparent in the conversion table for penalties for crimes. In those circumstances in which free persons normally would be fined for a crime, a servant would be whipped at the exchange rate of twenty lashes for every eight dollars. REVISED CODE, *supra* note 128, at 419 (referencing "*An Act Reducing Into One, the Several Acts Concerning Servants*," ch. 110, § V); COLLECTION, *supra* note 128, at 228 (listing consequences upon the master (with whipping noticeably missing)).

156. See sources cited *supra* note 128.

157. See sources cited *supra* note 128.

the legislation appears to draw a racial line. The act specifically applies to “all *white* persons, not being citizens of any of the confederated states of America, who shall come into this commonwealth under contract, to serve another in any trade or occupation.”¹⁵⁸ Within its ambit were white indentured servants, white redemptioners, white individuals held to debt service, and white alien apprentices. Outside the ambit would be two racially distinct groups: first, all persons of African heritage;¹⁵⁹ and second, all white persons who were also citizens. Although the Virginia statute did not apply to Americans of African descent, it legitimated the remaining practices by bifurcating the excluded classes into one privileged and one nonprivileged. Lest white citizen-servants be excluded from the beneficial provisions of the statute, a further provision provided courts with jurisdiction over the complaints of servants *who were citizens* of any of the states.¹⁶⁰

3. Corporal Punishment Is Deemed Neither Transferable nor Delegable

Fathers sometimes came to the aid of children who were chastised excessively by their masters.¹⁶¹ The presence of some other person, the apprentice’s father, with full legal capacity to sue on the articles of apprenticeship, was crucial in challenging these abuses. The father’s legal capacity to object to his child’s abuse was premised on his right to his child’s services and the relation of privity he had to the master in contracting the bonds of apprenticeship.¹⁶²

In the early decades of the nineteenth century, supervisors in manufacturing concerns attempted to use a leather strap against unruly boys

158. REVISED CODE, *supra* note 128, at 419 (referencing “*An Act Reducing Into One, the Several Acts Concerning Servants*,” ch. 110, § I) (emphasis added).

159. The Virginia statute drew one more explicitly racial line. It precluded people of color from entering the class of masters who could hold white servants. “No negro, mulatto, or Indian, shall at any time purchase any servant, other than of their own complexion, and if any of the persons aforesaid shall, nevertheless, presume to purchase a white servant, such servant shall immediately become free, and be so held, deemed and taken.” *Id.* at 420 (referencing “*An Act Reducing Into One, the Several Acts Concerning Servants*,” ch. 110, § IX).

160. COLLECTION, *supra* note 128, at 248.

161. See RORABAUGH, *supra* note 75, at 43 (discussing how an apprentice’s father “wrote a frank letter to a friend concerning his son and [his son’s master]”). Similarly, fathers came to the aid of daughters who were seduced while in service to a different master under the tort of seduction. See generally VanderVelde, *Legal Ways*, *supra* note 1.

162. Various state reporters include suits by fathers against masters for the ill-treatment of their sons. The only other option available to sons was the unlawful one of running away to the west or to sea (the sailing trade was always ready to enlist disaffected apprentices).

who were working in factories.¹⁶³ Two suits, one in Connecticut and the other in Pennsylvania, set the course for legal development.

In the 1823 case of *Commonwealth v. Baird*,¹⁶⁴ the judge distinguished the legitimacy of striking apprentices, who had been formally bound under articles of indenture, from that of striking other young workers like fourteen-year-old William Mervine, the young man in question. William's father hired him out to the factory. Due to William's youth and his father's participation in the boy's hire, he could have been mistaken for an apprentice. Apprenticeship followed much the same structure: fathers bound their underage sons out as apprentices to work for masters, although each state had strict formal technicalities to establish the bonds of apprenticeship. The defendant pleaded as a defense that given William's young age, he could appropriately be "castigated" by his employers, their foreman, or overseers.

The court declared otherwise. In Pennsylvania, children could be bound out as apprentices to learn a trade¹⁶⁵ but William was not hired to receive any special training. "[O]ur courts have always frowned upon every attempt to bind them out as servants."¹⁶⁶ The term, servant, used here signified lowered status and diminished opportunity. Mervine's father "had neither the right or inclination to put his child in the station of a servant."¹⁶⁷ Conceding Blackstone's directive, the Pennsylvania court instructed that the provision was inapplicable because this particular boy, William Mervine, was not apprenticed—he was a mere *servant*.¹⁶⁸ This, the court concluded, notwithstanding Blackstone's explicit mention that the "master may by law correct his servant" as well as his apprentice.¹⁶⁹

Further, the court distinguished American law from English law declaring that even if in England, servants can be whipped, that has no effect under our laws. This suggests somewhat smugly that Americans need not look to English practices.¹⁷⁰

163. *Commonwealth v. Baird*, 1 Ashmead 267 (1828); *Matthews v. Terry*, 10 Conn. 455 (1835).

164. 1 GEORGE WARTON PEPPER & WILLIAM DRAPER LEWIS, *PEPPER AND LEWIS' NEW DIGEST: A DIGEST OF THE LAWS OF PENNSYLVANIA FROM 1700 TO 1894*, at 153 (Philadelphia, T. & J.W. Johnson & Co., 1896) (referencing *Commonwealth v. Baird*, 1 Ashmead 267 (1828)).

165. *Commonwealth v. Baird*, 1 Ashmead 267, 268 (1828) ("Children may be bound apprentice to some useful trade, art or mystery, but our courts have always frowned upon every attempt to bind them out as servants.").

166. *Id.* (emphasis added).

167. *Id.*

168. *Id.* at 267.

169. The court claimed it could find no decision in which the same power extended to servants in the broad and popular sense of the term. *Id.*

170. The court mistakenly inverted the relationship between master's self-help in punishing their servants and state-assisted punishment. The court opined that that statutes to regulate laborers

The *Baird* case could have come out the other way if Blackstone's rule had held sway. Whipping an apprentice seemed no more or less justified than whipping a young boy classified as a mere servant. Employers needed some form of workplace discipline. Large factories required many "hands" and a hierarchical structure of intermediate supervisors for the purpose of task organization and workplace discipline. The defendant, Baird, had superintendence of the room,¹⁷¹ and Baird was the man who had beaten William severely with a leather strap. The Pennsylvania court declared not only that youthful William was not susceptible to whipping, but also, another reason, that the law did not authorize a supervisor to whip anyone because the prerogative of corporal punishment could not be delegated. By declaring that the privilege of exercising corporal punishment over an underling was not delegable, the court made this method of discipline unsuited to the modernizing factory workplace.

The allowable dimensions of corporal punishment in the *Baird* case contrast with John Leonard's vulnerability to whipping under the Virginia statute in force in the District of Columbia. John Leonard was susceptible to the whipping penalties, although he was an adult white man, but not upon a writ instigated by Milburne, the assignee of the Leonard's debt. Under the statute, only a party to the original debt incurred outside the United States, (presumably the person who had financed Leonard's passage) could have him whipped under the statute. *Milburne v. Byrne* held that the prerogative was not transferable (alienable) to the assignee who undertook Leonard's debt in exchange for the promise of his labor. Importers of labor could avail themselves of corporal punishment under the statute, but not their assignees.

In *Commonwealth v. Baird*, the court went further in restricting corporal punishment by declaring that the authority to inflict such punishment was not delegable. Blackstone and Bacon had written that the master alone can beat the servant.¹⁷² "The same authorities which recognize the right of the master to beat the servant deny his right to delegate that authority to another."¹⁷³ Accordingly, though Baird was the intermediate manager in charge of the shop floor and had the obligation to keep

and servants in England, such as the Statute of Laborers and Artificers, had been enacted because the master lacked the authority to punish his servants himself. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 268. Blackstone had stated simply that although a master may beat apprentices, his wife may not. 1 WILLIAM BLACKSTONE, COMMENTARIES *428. "A master may, by law, correct his apprentice [or servant] for negligence or other misbehavior, so it be done with moderation; *though, if the . . . master's wife beats . . . it is good cause of departure.*" *Id.* (emphasis added). The line of delegation could also have been drawn based upon gender—that wives held insufficient authority to correct their husbands' apprentices.

order, he had no right to beat any of the thirty boys in his workroom in order to maintain discipline.¹⁷⁴ That right, if it existed at all, attached only to the person designated as the boy's master, *not* to a supervisor or overseer hired by the master. Therefore, the court concluded that Baird, the supervisor, had committed assault and battery because the organizational structure of the workplace gave him no legal defense.¹⁷⁵ Thus, even with the words of Blackstone, words often repeated as authorizing corporal punishment, factory owners could not immunize their supervisors if they chastised the workers.

This meant that large scale factories would need other means of workplace discipline. During the 1830s and 1840s, American manufacturing and transportation enterprises substantially grew in scale.¹⁷⁶ Workplace organization continued to evolve into new business forms, such as corporations of stockholders supplanting small-scale artisan workshops. Factories needed efficient methods of discipline that were both legally transferable and legally delegable. American Southern slavery solved the problem by allowing such authority to be extended. In the South, large plantations adopted an overseer system for the management of multiple slaves. The overseer's authority was *delegated* to him by the master, the slave's owner, and when the slave was sold, the master's authority to whip him was *transferable* to the new master along with ownership of the slave.

In the North, a different mechanism for discipline would take its place: the at-will doctrine. With the emergence of the at-will doctrine, workers would become vulnerable to discipline through having insecure jobs dependent on the pleasure of their employers. Under the at-will doctrine, employees could be expelled without justification, "for no reason at all or for bad reasons."¹⁷⁷ This new method of workplace punishment would assume two incidents of authority that corporal punishment lacked: it would become both transferable and delegable. (Still later, middle manager supervisors would be recognized as having a constitutional liberty to terminate workers, a liberty that even the middle manager supervisors could not be deprived of by duly enacted legislation.¹⁷⁸)

In 1835, in the Connecticut case of *Matthews v. Terry*, an American court effectively reversed the Blackstonian rule announcing that masters

174. Reeve then popularized the ruling of *Commonwealth v. Baird*, stating, "In Pennsylvania the right is expressly denied . . . and the better opinion now is that it cannot be extended beyond apprentices and menial servants under age." REEVE, *supra* note 8, at 534–35 n.1.

175. *Baird*, 1 Ashmead at 267–69.

176. TOMLINS, *supra* note 13, at 284.

177. *Payne v. W. & Atlantic R.R Co.*, 81 Tenn. 507, 518 (1884).

178. *See generally* *Coppage v. Kansas*, 236 U.S. 1 (1915); *Adair v. United States*, 208 U.S. 161 (1908).

could not chastise their servants.¹⁷⁹ By 1835, physical chastisement was clearly losing social acceptability.¹⁸⁰ In this case, a master had horse-whipped a troublesome fourteen-year-old boy who worked in his clock factory.¹⁸¹ When the young man sued for assault and battery, his youth was again an issue. The court stated that “[h]ad he been of full age, it would hardly be claimed, that he would have been liable to corporal chastisement.”¹⁸² Yet, since he was underage, the court addressed the situation analogizing to the youthful statuses of apprenticeship and students enrolled in schools. “There is no doubt but that, for just cause, a parent may reasonably correct his child, a master his apprentice, and a schoolmaster his pupil. Yet that power cannot be lawfully exercised, by a master over his *hired servant*, whether that servant is employed in husbandry, in manufacturing business, or in any other manner, except in the case of sailors. And if the master beat such servant, though moderately, and by way of correction, it is good ground for the servant’s departure; and he may support an action against the master for battery.”¹⁸³

Since there are so very few cases concerning workplace chastisement, we can’t know how these decisions fell within the nation’s experience in tens of thousands of workplaces. The two boys were severely whipped, an aggravation that might have pressed them on to seek legal recourse. How many more workers struck less severely simply let the incident pass or walked away? Matthews found an attorney to press charges in civil assault, and Mervine pursued criminal assault charges. How many more workers failed to seek legal recourse because it was simply so far beyond their means, or beyond their ken, to do so?

The 1835 decision in *Matthews v. Terry* may have occurred at the beginning or end of the change in norms. The three individuals whipped in these three cases—the Irish immigrant John Leonard, and the child laborers, William Mervine and young Matthews—were socially at the margins of American working society. The permission that Blackstone’s rule accorded to all masters generally had splintered into application only in particular categories of working people still further at the social margins. Physical chastisement increasingly became associated with those even more marginalized classes of workers, persons accorded less dignity in the laboring schema, schoolchildren, slaves, and sailors. The further

179. *Matthews v. Terry*, 10 Conn. 455, 455 (1835).

180. See text accompanying notes 251–253 *infra*.

181. *Matthews*, 10 Conn. at 456.

182. *Id.* at 458.

183. *Id.* (emphasis added).

marginalization of physical chastisement left it applicable only in those instances where employees could not effectively flee.¹⁸⁴

Notwithstanding these American courts' disapproval of workplace corporal punishment, Blackstone continued to cast a long hoary shadow on American common law. Almost all lawyers and judges trained by reading Blackstone. Blackstone was almost universally regarded as authoritative on the common law. Blackstone's *Commentaries* was one of the best-selling books in the United States with multiple editions issued every decade.¹⁸⁵ If lawyers were asked whether masters could beat their servants, Blackstone's *Commentaries* is where they would check, and they wouldn't find the ruling in *Matthews v. Terry* until it showed up in one of the later treatises. Employers could take some comfort in Blackstone's rule on correcting servants, if they chose to.

4. Whipping Slaves in the Antebellum South to Discipline Them to Work

It would be an oversight when examining this subject to overlook the obvious comparison to the circumstances of slaves. The objective is not simply to conclude that slaves were chattel property, but to demonstrate how different the prerogatives of masters were as a result of the distinction. The point is not simply that masters could treat their slaves however they liked because slaves were their chattel property. The message in the southern case law was instead that slaves *should* be beaten, to

184. It is a defense if it can be shown that servant or scholar was merely being corrected by master, but if it "exceed the bonds of moderation and inflict cruel and merciless punishment, he is a trespasser, and liable to be punished by indictment." FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES: COMPRISING A GENERAL VIEW OF THE CRIMINAL JURISPRUDENCE OF THE COMMON AND CIVIL LAW 618 (Philadelphia, 4th ed. 1857).

While Bishop does not name master-servant relation specifically as a case where force is lawful, he does acknowledge the practice by saying that "if [one] inflicts legal chastisement to an illegal extent,—he becomes guilty of an assault. And, generally, any excess of authorized force will be criminal." BISHOP, *supra* note 81, at 23, § 38.

Under the heading of "Assault," May writes that a master may correct his apprentice and not be guilty of assault/battery, but

"[t]his right, however, must be exercised with discretion, and must not, in degree or in kind of force, surpass the limits of necessity and appropriateness. The modern tendency is to construe strictly against the person using the force. . . . The mere relationship of master and servant . . . will not now, whatever may have been the law heretofore, authorize the use of force."

JOHN WILDER MAY, THE LAW OF CRIMES 193–94 (Joseph Henry Beale, Jr ed., Boston, 2d ed. 1893).

Emlin McClain adds: "Correction or restraint by one in loco parentis must be reasonable; in determining whether excessive, nature of instrument used should be considered by jury—if find immoderate or excessive, can infer malice—general rule: not reasonable if it causes lasting injury. See 1 EMLIN MCCLAIN, A TREATISE ON THE CRIMINAL LAW 206–07 (1897).

185. The popularity of Blackstone's *Commentaries* was rivaled only by the Bible and *Uncle Tom's Cabin* in the nineteenth century. See WILFRID PREST, BLACKSTONE AND HIS COMMENTARIES: BIOGRAPHY, LAW, HISTORY (2009).

correct them, to induce them to work harder, and for purposes of maintaining the social order. And furthermore, if a master did not keep his slaves orderly, the authority to beat slaves could be extended to others.

While one struggles to find three lawsuits about workplace corporal punishment in northern courts, there are hundreds of common law cases mentioning the beatings of slaves in the southern states.¹⁸⁶ Violence against slaves took place against a backdrop, not only of an ideology of racial hierarchy, but also one in which the cultural preference favored resolving all manner of disputes by private, often violent, means. For the most part, Southern gentlemen did not sue to resolve their disputes. Rather than turning to the courts, different measures of violence were preferred. In the South, dueling, lynching, and whipping were culturally preferred to invoking a more unitary punitive response from the state to resolve a conflict.¹⁸⁷ Southern gentlemen settled conflicts by dueling.¹⁸⁸ Gentlemen cuffed or whipped lower-order men. And periodically, lower-order men, like the Regulators or the Klan, ganging together in vigilante groups collectively imposed mob violence. Thus, in this social climate, it is not surprising that the case law reflected much higher numbers of instances of the whipping of slaves and free Blacks than were ever recorded in the dockets of northern states with regard to servants or apprentices.

For a source of cases and further insight into corporal punishment's supporting rationales, I turned to Helen Catterall's extensive compendi-

186. Two excellent references on the violent practices to which slaves were subject are ROBERT WILLIAM FOGEL & STANLEY L. ENGERMAN, *TIME ON THE CROSS: THE ECONOMICS OF AMERICAN NEGRO SLAVERY* (1995), and EUGENE D. GENOVESE, ROLL, JORDAN, ROLL: *THE WORLD THE SLAVES MADE* (1976).

187. VanderVelde, *Legal Ways*, *supra* note 1, at 836; W. FITZHUGH BRUNDAGE, *LYNCHING IN THE NEW SOUTH: GEORGIA AND VIRGINIA, 1880-1930*, at 86-87 (1993) (explaining that lynchings were perceived as "the rightful action of good citizens provoked by fiendish crimes" and that "southerners during the late nineteenth century had lost faith in the courts"). Some scholars have begun to explore the complex history of white-on-white extralegal violence. In the white communities, lynching seemed to be reserved for two categories of men: those who engaged in sexual misconduct, and those who grossly violated what the community understood to be appropriate patriarchal authority. *See, e.g.*, RICHARD MAXWELL BROWN, *STRAIN OF VIOLENCE: HISTORICAL STUDIES OF AMERICAN VIOLENCE AND VIGILANTISM* 214-18 (1975) (discussing lynching of African-Americans in the post-Reconstruction South); Jane M. Pederson, *Gender, Justice, and a Wisconsin Lynching, 1889-1890*, 67 *AGRIC. HIST.* 65, 65-66 (1993) (discussing the lynching of a Norwegian immigrant by other Scandinavians in the community because he cruelly beat his wife and terrorized his children); Michael James Pfeifer, *Iowa's Last Lynching: The Charles City Mob of 1907 and Iowa Progressivism*, 53 *ANNALS IOWA* 305 (1994) (examining the extralegal actions of a mob who hung a wealthy white man for the murder of his wife and son); *see also* EDWARD L. AYERS, *VENGEANCE AND JUSTICE: CRIME AND PUNISHMENT IN THE 19TH-CENTURY AMERICAN SOUTH* 266 (1984) (quoting Thomas J. Kernan, *The Jurisprudence of Lawlessness*, 29 *A.B.A. REP.* 450, 451-53 (1906)); Richard Maxwell Brown, *The History of Vigilantism in America*, in *VIGILANTE POLITICS* 80-87 (H. Jon Rosenbaum & Peter C. Sederberg eds., 1976).

188. VanderVelde, *Legal Ways*, *supra* note 1.

um of slave cases.¹⁸⁹ Helen Catterall methodically gathered court cases dealing with slavery and Free Blacks from each state. Using digital techniques, I searched Catterall's volumes and collected those cases that mentioned corporal punishment and classified them in terms of what triggered the case, where the violence was situated within legal cognizance, and how such violence was portrayed in the legal decisions.¹⁹⁰ There was no shortage of cases involving circumstances where African-Americans were whipped, and severely. In fact, from the perspective of the Catterall cases, the southern common law appears to be riven with the circumstances of beatings and floggings. These incidents run through the civil and criminal law dockets requiring judges to acknowledge the existence of violence and its relation to all manner of other legal rules, from cases of trespass to inheritance.¹⁹¹

In both tort and criminal assault the master's prerogative to whip the slave was virtually unquestioned.¹⁹² Since slave masters owned their slaves they could use or abuse their property as they saw fit.¹⁹³ These cases did not question the appropriateness or proportionality of whipping in the circumstances, like workplace corporal punishment cases in the North did. Slaves were vulnerable to beating for a variety of infractions: drunkenness,¹⁹⁴ insolence,¹⁹⁵ running away,¹⁹⁶ unsatisfactory work,¹⁹⁷ or

189. See generally CATTERALL, *supra* note 121.

190. *Id.*

191. *Id.*

192. See *State v. Hale*, 9 N.C. (2 Hawks) 582, 582 (1823) (explaining that while a master can be criminally indicted for assault and battery on his slave, "every battery on a slave is not indictable, because the person making it may have matter of excuse, or justification, which would be no defence for committing a battery on a free person."); see also *Jacob v. State*, 22 Tenn. 493, 520 (1842) ("The right of the master to the obedience and submission of his slave in all lawful things, is perfect, and the power belongs to the master, to inflict any punishment on his slave, not affecting life or limb, which he may consider necessary for the purpose of keeping him in such submission, and enforcing such obedience to his commands.").

193. Of course, the injured slave could not sue for his or her injuries. These cases may significantly underrepresent the number of beatings that took place. These cases proceeded without the benefit of the victim's testimony, in part because evidentiary rules prevented parties from testifying on their own behalf, and in part because many states prevented Blacks from testifying against Whites.

Free blacks who received beatings could file suit, and they did; but not in large numbers. Free blacks, who had been beaten, did not necessarily stay in the jurisdiction long enough to press charges. Beatings of free blacks usually occurred outside the master-servant relationships, and hence, these suits provided the contemporary backdrop that tolerated social and racial violence more generally.

For suits involving free persons of color who had sustained beatings, see, for example, *Talley v. Robinson*, 63 Va. (1 Gratt.) 888 (1872); *State v. Harden*, 29 S.C.L. (1 Speers) 152, 154 (1832); *Pepoon v. Clarke*, 8 S.C.L. (1 Mill) 137 (1817).

194. *Souther v. Commonwealth*, 48 Va. (7 Gratt.) 673, 677 (1851).

195. *Johnson v. Perry*, 21 Tenn. (2 Hum.) 569 (1841).

196. *Puryear v. Thompson*, 24 Tenn. (5 Hum.) 397, 397-98 (1844); *Markham v. Close*, 2 La. 581, 581-82, 587 (1831).

malfeasance,¹⁹⁸ and they could also be beaten simply to drive them to work harder to avoid the lash. Of course, in larger plantations, slaves could be beaten by overseers or drivers hired by their masters for those purposes.¹⁹⁹

There was no Weberian move—no attempt by the state to obtain a monopoly on violence by taking the whip out of the master’s hand and assigning it to an official who could moderate the blows. Instead, when corporal punishment gave rise to disputes in the southern courts it occurred when there was a difference of opinion between white men about *who* could beat the slave. Only to a lesser degree was there any question about *how severely* a slave could be beaten. The question of severity surfaced only rarely: first, when a master had beaten a slave to death or second, when someone other than a master did the beating, and in the course of examining that person’s legitimacy to do so, the court sometimes commented upon whether the beating had been done wantonly.

As to the first, despite the master’s broad prerogative to beat his slave, it appears that the criminal law took the violence seriously enough to intervene at the point that the whipping resulted in the slave’s death.²⁰⁰ The Virginia Court articulated the policy directly:

It is the policy of the law in respect to the relation of master and slave, and for the sake of securing proper subordination and obedience on the part of the slave, to protect the master from prosecution in all such cases, even if the whipping and punishment be malicious, cruel and excessive. But . . . if death ensues in consequence of such punishment, the relation of master and slave affords no ground of excuse or palliation.²⁰¹

I found no reported instances of criminal prosecution for injuries which fell short of death of the victim. This left a tremendously broad range of intentionally inflicted violence virtually unregulated by law.

197. *Martineau v. Hooper*, 8 Mart. (o.s.) 699, 700–02 (1820); *Echols v. Dodd*, 20 Tex. 190, 194 (1857).

198. *Cook v. Gourdin*, 11 S.C.L. (2 Nott & McC.) 19, 20 (1819). The man who steered the ferry boat “instead of exerting himself, in order to bring the head of the flat up, to stem the current again, left his pole and went to the stern of the flat, to chastise the helmsman; and did beat him for his inattention and carelessness. In the mean time, the current took the broadside of the flat, the hands threw down their oars and poles, and refused to make any further exertions.” *Id.*

199. When the primary purpose of striking the slave was to compel him to labor, masters sometimes preferred to do the whipping themselves so as to hide the scars of the flesh. Scars gave evidence of the enslaved person’s insubordinate nature that might lower his price in future sales.

200. See *Echols*, 20 Tex. at 197. A black boy who was hired to work in a sawmill was beaten so severely by the mill’s superintendent for the boy’s alleged misconduct that he died. The court held that the mill owner was responsible because the chastisement was done by the superintendent in the course of his employment. *Id.* at 194–97.

201. *Souther v. Commonwealth*, 48 Va. (7 Gratt.) 673, 680 (1851).

Death of the slave was the incident that required an explanation, a justification, or a defense.²⁰²

As to the second, beatings by third parties could conceivably be a tortious trespass or a criminal assault upon the master's interest in the slave.²⁰³ The tortious assault was styled as a trespass on the property of the slave owner.²⁰⁴ In the civil dockets, the violence was regulated when the slave master sued someone who had beaten his slave without his consent or in an unauthorized manner. Generally, one could not beat a slave without state authority or the master's consent, but occasionally circumstances occurred, obviating even that.²⁰⁵ The issue of the beating's justification also arose in cases where the slave was hired out to another master,²⁰⁶ or in overseers' employment contracts when overseers were terminated because they whipped slaves too frequently. The assailant could then raise arguments of legitimation and justification.

When the courts questioned the disciplining function of the beating, they were more likely to remark upon its purposelessness. For example,

202. See MARK TUSHNET, *THE AMERICAN LAW OF SLAVERY, 1810–1860: CONSIDERATIONS OF HUMANITY AND INTEREST* 73–75, 97–104 (1981). Few justifications that the assailant could offer justified the beating of a slave to death. See *id.* As Mark Tushnet has pointed out, these criminal cases set the limits of even the master's power. See *id.* These prosecutions recognized the slave's value as a human being even within chattel slave status.

I suggest another possible explanation: with much of the region's wealth reflected in its captive labor force, it is possible that the American state's involvement was only to conserve slave labor from unnecessary destruction. These cases were akin to criminal prosecution for the destruction of a tree in an area where trees were specially valued. It is possible that these prosecutions were permitted because of the danger of waste of a resource—the resource of slave labor.

203. See *Carsten v. Murrat*, 16 S.C.L. (Harp.) 113 (1824) (regarding a plaintiff who sued the defendant for beating his slave). “Force committed on a slave, is . . . an immediate injury to the master.” *Id.* at 115.

204. See *Belmore v. Caldwell*, 5 Ky. (2 Bibb) 76 (1810) (regarding Belmore, who sued Caldwell in trespass for beating his slave); *Carsten*, 16 S.C.L. at 115. “The injury of which the plaintiff . . . complains, is that the defendant beat his slave . . . the remedy was trespass vi et armis. . . . Force committed on a slave, is . . . an immediate injury to the master.” *Id.*

205. *Tillman v. Chadwick*, 37 Ala. 317, 318–19 (1861). In the case of a person who hired a slave from his master to perform work, the court noted that “[a]bsolute obedience, and subordination to the lawful authority of the master, are the duty of the slave; and the master or hirer may employ so much force as may be reasonably necessary to secure that obedience.” *Id.* at 318. The court also noted that “the hirer of a slave, when there are no qualifying stipulations in the contract of the hiring, is, for the time being, armed with the power of the owner in this respect.” *Id.* “[T]he master, hirer, or overseer, should ever bear in mind, that the main purpose of correction is to reduce an offending and refractory slave to a proper state of submission, respect and obedience to legitimate authority” and “[t]his chastisement should be so attempted and applied as to secure the end aimed at, with as little risk of permanent injury or danger to the slave or his owner as is reasonably compatible with the surroundings.” *Id.* at 319.

206. *Helton v. Caston*, 18 S.C.L. (2 Bail.) 95 (1831) (regarding a trespass action for cruelly beating the plaintiff's slave). The slavewoman had been hired to the defendant for twelve months, under a contract stipulation, that he was not to beat or abuse her; she was severely beaten by the defendant, and in consequence returned to her master. *Id.* The jury found for the plaintiff. *Id.*

in one case a court wrote: “The beating [of the plaintiff’s negroes, who had tickets] consisted in the infliction of about fifteen stripes with a whip. The negroes were at a store, on Sunday, behaving themselves peaceably and orderly; and the flogging was without any excuse, and *done in mere wantonness of power.*”²⁰⁷ In other cases, slaves with passes or full permission of their masters were whipped by patrols who refused to honor the master’s passes. In South Carolina, where patrols regulated slaves’ coming and going on the highways, there were incidents where the patrol assaulted African-Americans who were publicly seen too visibly engaging in some liberty, such as being present at a store, attending a church meeting, attending a wedding, or a quilting bee, despite having tickets to do so from their masters.²⁰⁸ Slaves’ enjoyment of liberty had evoked in the white patrol the decision to repress them by beatings. Slaves’ ability to enjoy public space was clearly contested, even when their masters granted them that liberty. I say the ground was contested because masters could be motivated to sue either for the injury inflicted on their slaves by the whipping or for the affront that their duly issued tickets were not recognized.²⁰⁹ Thus, slaves were vulnerable to beating by a variety of individuals in addition to their masters and overseers. Slaves were beaten on the roads or in public for pass enforcement, insolence, or lack of a properly submissive attitude.²¹⁰ With the exception of a master beating his servant to death, whippings that reached the court’s notice were done with the purpose of maintaining racial dominance.

207. *Caldwell v. Langford*, 26 S.C.L. (1 McMul.) 275, 275 (1841) (emphasis added).

208. See cases cited *infra* note 209.

209. There are other cases where slaves with their master’s full permission and passes were whipped by patrols who refused to honor the passes. *Bell v. Graham*, 10 S.C.L. (1 Nott & McC.) 278, 279 (1818) (explaining how at a Sunday church meeting the plaintiff “acting under a regular authority from the captain of the militia . . . came with a party of three or four . . . with hickory switches, the usual instruments with which they executed their commission. On their approach, the blacks began to seek their safety by flight—they caught and whipt one, at a little distance from the meeting house. They also caught several others near the house, whom they threatened, and were preparing to whip, but dismissed, on the entreaties of the defendant and the tears of a lady who interceded for them.”).

In *Hogg v. Keller*, the defendant, a patrol captain, and the others acting under his authority, whipped the plaintiff’s slave, who had a pass from his master. *Hogg v. Keller*, 11 S.C.L. (2 Nott & McC.) 113, 113 (1819). A witness said, each member of the patrol gave some stripes in the “usual mode of whipping by patrols.” *Id.*

In *State v. Boozer*, the jury convicted members of a slave patrol for unlawfully whipping Rikart’s slaves who were attending a quilting with their master’s permission. *State v. Boozer*, 36 S.C.L. (5 Strob.) 21, 21–23 (1850). In *State v. Cole*, the Court said: “A patrol is not authorized to . . . commence its operations by killing a man’s dogs[,] . . . carry them on by beating his negroes, and conclude with abusing himself.” *State v. Cole*, 13 S.C.L. (2 McCord) 117, 123 (1822).

210. See *Reid v. Colcock*, 10 S.C.L. (1 Nott & McC.) 592, 593 (1819). After someone “asked *Frank*, then a boy, to whom he belonged, and on his replying that he did not know, . . . [plaintiff’s father] gave him a severe chastisement, saying to him, he belonged to plaintiff, and desired that he might remember it for the future.” *Id.*

Slaves could also be the innocent victims of the masters' battles between themselves.²¹¹ Slaves were uniquely vulnerable as thing-object representatives of their owners. Some slave beatings were occasioned by individuals who were not angry with the slave but were feuding with his or her master.²¹² When a feuding neighbor could not directly afflict his neighbor, the true object of his enmity, he could take it out on his neighbor's slave, who he was more likely to catch unawares and who he could command to come within striking range. Slaves sometimes found themselves pawns in these situations. In these scenarios, the whipping was purposeful rather than an act of random violence, but the purpose of the whipping was to do injury to the property of that master rather than to chastise the servant for anything that he or she could be accused of doing wrong.²¹³

In other instances, slaves' beatings occurred because slaves found themselves in an uncertain command of authority either between persons of authority within the household or between their master and someone to whom they had been hired out. Contests for dominance within a household, between fathers and their adult sons, or fathers and their sons-in-law, prompted a scramble for dominance in which the slaves took all the whacks. Both masters could order the slave to obey him. Whichever master the slave did not obey beat the slave for disobedience.²¹⁴

There was no question that slave masters could delegate the authority to impose corporal punishment. There are a few cases where overseers went too far and were discharged for their over-zealousness. In these circumstances, the incidents find their way to court because the overseers sue for violation of their labor contract, urging that their con-

211. Sometimes a master is even drawn into disputes between his slaves and others. *Grimke v. Houseman*, 26 S.C.L. (1 McMul.) 131, 132 (1841) (defendant "undertook, by unauthorized violence, to redress the grievance of his own slave"). Masters sometimes whipped the slaves of neighboring masters because of enmity or dominance feuds between themselves. *Hendrix v. Trapp*, 31 S.C.L. (2 Rich.) 93, 93 (1845).

[W]hile the slave was pursuing the highway to a neighbor's house, whither he had written leave to go from his master, the defendant met him, and struck him several severe blows over his head and arms with a hickory stick. A witness for the defendant testified that he heard the plaintiff admit that he had told the defendant, if he caught his negroes on his place to whip them, and that he, the plaintiff, was to do the same with the defendant's negroes.

Id.

212. *Id.*

213. *Id.*

214. See Sally Greene, *State v. Mann Exhumed*, 87 N.C. L. REV. 701, 731 (2009) (stating that "the inherent conflict between owners and hirers often erupted into actual conflict, putting individual slaves at risk and posing a systematic risk to white solidarity").

duct was justified. Or, the master sued the overseer for damages for the value of the slave who had been killed by the overseer's abuse.²¹⁵

5. Whipping Blacks in the Antebellum South to Establish Racial Subjugation

The rationale of class and race dominance allowed members of the general free white public, with no specific relation to the slave, to strike slaves. This expanded the class of persons who could exercise the prerogative of whipping. This expansion of authority to exercise prerogatives of racial abuse was in stark contrast to the trend occurring in the North, where the right to strike a servant was a *personal prerogative* belonging only to the servant's master. With southern slaves, however, the privilege could not only be transferred and delegated, it could also be exercised by members of the public out of a rationale that routine whippings were necessary and useful to prevent slaves as a group from becoming insolent.

This more broadly held collective prerogative of white persons to discipline slaves could sometimes be done even without the master's acquiescence. Masters who sued others for interfering with their slaves by whipping them without permission found themselves nonsuited. For example, in *Hervy v. Armstrong*,²¹⁶ the township patrol arrested the plaintiff's slaves on their way home from an orderly and well-conducted Sunday religious meeting. The slaves were tied and whipped by the patrols.²¹⁷ The Court said the whipping was not cruel or excessive, though their cries and the sound of the blows were heard by persons at a distance.²¹⁸ And, although the court found that the circumstances were *exasperating* to the slave master, the court ultimately ruled against the plaintiff.²¹⁹

[I]t may be supposed the circumstances were such as to exasperate the plaintiff in a high degree. But he did not prove . . . any special damage

. . . We apprehend the reason why the master cannot have a civil action for the battery of his slave without special damage is, that it would encourage slaves . . . to be insolent The elevation of the

215. *Brunson v. Martin*, 17 Ark. 270, 271 (1856); *Craig's Adm'r v. Lee*, 53 Ky. (14 B. Mon.) 119, 119–20 (1853); *Watson v. Hamilton*, 40 S.C.L. (6 Rich.) 75, 75 (1852); *State v. Raines*, 14 S.C.L. (3 McCord) 533, 533–34 (1826).

216. *Hervy v. Armstrong*, 15 Ark. 162, 164 (1854).

217. *Id.* at 165.

218. *Id.* at 165–66.

219. *Id.* at 169.

white race and the happiness of the slave, vitally depend upon maintaining the ascendancy of one and the submission of the other.²²⁰

The whip was used as a way to keep order at this border and preserve this hierarchy.

Ever the apologist for slavery, Georgia legal commentator Thomas Cobb articulated the same reason: the potential insolence of slaves.

Reasons of policy and necessity . . . require that so long as two races of men live together, the one as masters and the other as dependents and slaves, to a certain extent, *all* of the superior race shall exercise a controlling power over the inferior. If the slave feels that he is *solely* under the power and control of his immediate master, he will soon become insolent and ungovernable to all others.²²¹

Cobb explained that various police and patrol regulations gave “to white persons other than the master, under certain circumstances, the right of controlling, and, in some cases, correcting slaves. But if the white person exceeds the authority given, and chastises a slave who has given no provocation, he is liable for the trespass.”²²²

However, in *State v. Stephenson*, the Texas court sustained an indictment for an assault and battery upon a slave.²²³ The court stated that slaves were to be regarded as persons under the criminal law, because, “[u]pon the contrary hypothesis every white person would have *prima facie* the right to whip any slave; . . . a principle not recognized either by the public opinion and usage, or by the laws of the country.”²²⁴ Similarly, a court ruled that “to no white man does the right belong of correcting, at pleasure, a free negro.”²²⁵ At first blush this ruling looks progressive. At least, until the court stated the following:

The only difference in the law . . . seems to me to consist in the *different justification* which would excuse an assault and battery on the one or the other. Free negroes belong to a degraded caste of society [T]hey ought, by law, to be compelled to demean themselves as inferiors, . . . words of impertinence . . . addressed by a free negro, to a white man, would justify an assault and battery. As a general rule, . . . whatever, in the opinion of the jury, would induce

220. *Id.* at 166–68.

221. THOMAS R. R. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA. TO WHICH IT IS PREFIXED, AN HISTORICAL SKETCH OF SLAVERY 106 (Negro Universities Press, 1968) (1858) (second emphasis added) (footnote omitted).

222. *Id.* (citing *Caldwell v. Langford*, 26 S.C.L. (1 McMul.) 275 (1841)).

223. *State v. Stephenson*, 20 Tex. 151, 153 (1857).

224. *Id.* at 152.

225. *State v. Harden*, 29 S.C.L. (2 Speers) 152, 154 (1832).

them, as reasonable men, to strike a free negro, should, in all cases, be regarded as a legal justification in an indictment.²²⁶

Of all these instances, the greatest up-turn of the racial hierarchy was considered the most serious social and legal infraction, that is if a free person was whipped by a slave. This threatened the greatest humiliation for a free man.²²⁷ Thus, the beating of slaves must be seen as a particular circumstance of public display of violence for the purposes of racial subjugation that endured long beyond the prerogative of employers to physically chastise other servants. Northern whites rallied around the possible threat that physical chastisement would spread to white, working-class statuses. But, in fact, even by the late 1830s, this manifestation of violence adhered strongly to the racial divide directed at a race of people who were considered inferior.²²⁸ As Elizabeth Clark writes, “[O]nly in the thirty years before the Civil War did reformers mount an aggressive and highly public assault on violence as a tool of governance in the master-slave relationship.”²²⁹

C. Other Sites Where the Practice of Whipping Was Acceptable

As Blackstone’s rule eroded with regard to most servants, and beatings maintained legitimacy with regard to slaves of African descent, the authority to use corporal punishment against subordinates still remained in force in certain pockets. The practice increasingly became associated with the marginal labor done by less dignified persons in the laboring schema: children, wives, slaves, sailors, and finally criminals.²³⁰ Although this Article’s focus is on the demise of workplace chastisement, it is useful to see the arguments of legitimacy that were occurring in the margins as the rule splintered.

226. *Id.* at 155 (emphasis added).

227. *Paige v. Smith*, 13 Vt. 251, 251 (1841). The court stated that “the plaintiff had made frequent and violent threats . . . that he would way-lay the defendant, beat, flog, and whip him, and that he would hire some negro to whip him.” *Id.*

In *Stachlin v. Destrehan*, 2 La. Ann. 1019, 1021 (1847), the court stated that the outrage upon the plaintiff was not only without excuse, but was the “most ignominious to which a free man can be subjected” when the plaintiff was whipped on the defendant’s order by the defendant’s slave. *Stachlin v. Destrehan*, 2 La. Ann. 1019, 1021 (1847).

228. “This theory of the dominant and subordinate standings of different races contributed to the belief, widely held in the nineteenth century, that racial groups differed in their physiological responses to pain.” Clark, *supra* note 12, at 474. Clark’s excellent article demonstrates how Abolitionists had to first persuade their audiences that persons of African descent were fully sentient in order to make the larger humanitarian argument that slavery was wrong.

229. *Id.* at 464.

230. Jonathan M. Gutoff, *Fugitive Slaves and Ship-Jumping Sailors: The Enforcement and Survival of Coerced Labor*, 9 U. PA. J. LAB. & EMP. L. 87, 88 n.9 (2006).

Setting workplace chastisement in its context still requires setting the comparison in two other social contexts: punishment for crime and military discipline. The degree to which whipping is deemed to be socially acceptable as punishment for a crime provides a basis for normalizing the practice in the master-servant context. Similarly, the degree to which whipping is deemed socially acceptable in the military for officers correcting or punishing their subordinates provides another point of reference.

1. Beating Sailors and Soldiers

Corporal punishment was considered acceptable longer in the merchant marine, the navy, and the army.²³¹ The distinctions made here seemed to rest on the premise that the well-being of the ship or “the ship of state” was at risk if the slightest insolence was not immediately squelched. Other times the shipboard practices were viewed as legitimate because the ship or the institution was a world of its own. For example, in 1839, the Federal District Court for the Eastern District of Pennsylvania considered the beating of a ship’s cook and concluded that a “blow with a dirty frying pan” levied against the person whose duty it was to keep those articles clean was not an aggravated or cruel assault.²³² The court explained that “[n]obody will believe that the law which governs the deportment of men on shore to each other, can be applied to their habits and conduct on board of a ship.”²³³ As Jonathan M. Guttoff has written, even though most maritime labor was free, “by entering into a particular voyage, a seaman subjected himself to labor discipline more severe than any other type, with the exceptions of slaves and men in the army and navy. The vessel’s master could discipline a seaman through confinement or beating.”²³⁴

Congress finally abolished flogging in the Navy in 1850 in a series of steps that paralleled the sequence that took place in workplace corporal punishment.²³⁵ The Navy first sought to measure the instances of flogging, and subsequently required reports and justification.²³⁶ Eventu-

231. *Id.*

232. *Forbes v. Parsons*, 9 F. Cas. 417, 420 (C.C.E.D. Pa. 1839) (No. 4,929).

233. *Id.* at 419.

234. Guttoff, *supra* note 230, at 101–02 (citing RICHARD B. MORRIS, *GOVERNMENT AND LABOR IN EARLY AMERICA* 262–63 (1946)). In the sailing trade, the case of *Robertson v. Baldwin* continued the marginal treatment of sailors by permitting the recapture of fleeing seamen. 165 U.S. 275 (1897).

235. *See* Act of Sept. 28, 1850, ch. 80, 9 Stat. 513, 515 (appropriating money for the Navy to provide mail service with the proviso that “flogging in the navy and on board vessels of commerce, be, and the same is hereby, abolished from and after the passage of this act”).

236. GLENN, *supra* note 40, at 128. “In 1840 President Van Buren further regulated the practice of naval corporal punishment by requiring the navy to make quarterly reports on the subject.”

ally, in 1850, the Senate narrowly passed a law outlawing corporal punishment in the Navy. The voting pattern followed the sectional overtones of the anti-corporal punishment campaign with the majority of senators who voted to abolish coming from northern states.²³⁷

While the United States Army routinely used whipping as a punishment for soldiers who had been duly court-martialed,²³⁸ there was a deeper question about whether army officers could summarily beat their soldiers for insolence. This summary action was thought to quickly reinforce the hierarchical order between officer and soldier. A sharp immediate response was extremely useful when insolence threatened insurrection. The official response, though not to condone the practice, was to treat it with ambivalence.

In two parallel incidents, occurring between 1832 and 1842, two young lieutenants reacting almost instinctively, beat insolent soldiers under their command with their canes.²³⁹ These young men were reacting the same way that masters had traditionally responded to their servants' disrespect. (Canes were the instrument army officers carried at the time.²⁴⁰) Was this conduct legitimate in the Army's eyes? The Army lacked clear rules about how a junior officer was to respond to insolence by soldiers under their command.²⁴¹ The army's treatment of each young officer demonstrates ambivalence on the subject.²⁴²

The legitimacy of their respective actions was tested when each officer was subjected to a court-martial for his deed.²⁴³ The Army sent

Id. The reports had to "stat[e] the names of the persons punished, their offences, and the extent of punishment inflicted, together with such explanations or remarks as the commanding officer may deem necessary." *Id.* "[N]avy officials sought to mollify public opinion against flogging by regulating and restricting th[e] practice." *Id.*

237. *Id.* at 130.

238. "Flogging was the most frequently prescribed corporal punishment in the Legion, and its use was common in civilian law at that time as well." Bradley J. Nicholson, *Courts-Martial in the Legion Army: American Military Law in the Early Republic, 1792-1796*, 144 MIL. L. REV. 77, 87-88 (1994).

If a soldier was caught sleeping at his post and found guilty, he could be whipped up to 100 times, forced to walk the gauntlet, or shot. The indeterminate, almost whimsical nature of sentencing in the Legion was a rational combination of terror reinforced by unpredictability. The military court thus selectively singled out certain men for exemplary punishment and hoped to frighten the rest into proper behavior.

Id. at 86-87.

239. LEA VANDERVELDE, MRS. DRED SCOTT: A LIFE ON SLAVERY'S FRONTIER 125, 357 n.41, 208-09 (2009).

240. *Id.*

241. Both officers were West Point-trained and well-trained in the culture and formality of military hierarchy. *Id.* at 208; Thomas W. Cutrer, *Smith, Edmund Kirby*, TEX. ST. HIST. ASS'N, <https://tshaonline.org/handbook/online/articles/fsm09> (last visited Apr. 4, 2016).

242. VANDERVELDE, *supra* note 239, at 208.

243. *Id.*

mixed signals in both cases about whether “caning” insolent soldiers was legitimate or not. In Lieutenant Smith’s case, the court-martial declared his actions to be a breach of conduct and discharged him from the Army.²⁴⁴ But, the norms were not set.²⁴⁵ So a few years later, on his petition, Lieutenant Smith was reinstated to his former place in the same unit as if nothing had happened. What explained this turn-about? In the intervening years, the generals had reversed their position on the matter.²⁴⁶

In Lieutenant Buell’s case, the court-martial initially excused him only to have the lenient decision reversed on appeal. On appeal the generals thought that Buell deserved punishment.²⁴⁷ The panels split about whether the practice was permissible. Buell’s superiors held strong but contradictory beliefs about whether the conduct was legitimate, but the numbers split almost evenly. The case ended in a draw.²⁴⁸ Thus, the issue was not definitively resolved.

During this period, flogging was still acceptable punishment for serious infractions, like desertion, after a duly administered court-martial. Yet, flogging was eventually banned in the Army before the Civil War²⁴⁹ only to be reinstated as a permissible practice during the Civil War.²⁵⁰

244. *Id.* at 126. This was viewed as a tragic but necessary end to an otherwise promising career of a young man raised in a military family.

245. In the procedure by which incidents like this were tested, the U.S. Army Generals promulgated rules only after the norms had settled. This occurred in a manner that was something like the common law. A court-martial was sent to a higher officer for approval, and it could be appealed yet higher. The rule on the matter could only really be ascertained when all appeals had ended and the issue had been resolved.

246. E. Kirby Smith’s entry in Cullum’s Register describing his military career says “Dismissed, Oct. 6, 1830, for Inflicting Corporal Punishment on Mutinous Soldiers, and Reinstated, Apr. 26, 1832.” 1 GEORGE WASHINGTON CULLUM, BIOGRAPHICAL REGISTER OF OFFICERS AND GRADUATES OF THE U.S. MILITARY ACADEMY AT WEST POINT, N.Y. FROM ITS ESTABLISHMENT, IN 1802, TO 1890 WITH THE EARLY HISTORY OF THE UNITED STATES MILITARY ACADEMY 386 (3d ed. 1891).

247. VANDERVELDE, *supra* note 239, at 208. Unlike Lieutenant Smith’s entry, Lieutenant Buell’s entry in Cullum’s Register does not even mention his infraction or the subsequent court-martial because he was not convicted in the court-martial, despite the prolonged complaints of higher-ups on appeal that he should have been. 2 CULLUM, *supra* note 246, at 95.

248. The debate spun off into a debate over which set of officers had authority to make the call in this case. The debate only ended when the President of the United States called it to a close by viewing the debate as squabbling between his officers.

249. Act of Aug. 5, 1861, ch. 54, § 3.

250. Herbert L. Meschke & Ted Smith, *Judicial Values: The Justice Robinson Experience*, 82 N.D. L. REV. 25, 28 n.24 (2006).

[Robinson’s] only reference to the Civil War that we have found was this fragment in an editorial he wrote condemning conscription for military service in World War I: Even in our day and generation, poor white soldiers were tied to posts and flogged on the bare back with a rawhide by order of snobbish, well-paid officers. And it would not be far amiss to say that they were flogged because of being poor and ill-paid. If the soldiers had received a man’s pay of \$100 a month, then there would have been no flogging and no Bull’s Run.

2. Beating in Civil Society as Punishment for Crime

In the eighteenth century, flogging criminals as punishment for their crimes was a standard penal measure in many American communities. Thereafter more established communities built prisons and shifted from floggings to incarceration during the early decades of the 1800s. There were still whippings carried out within prison, but the advent of the prison meant that whipping ceased to be the primary sanction. During the 1830s and 1840s American society turned away from corporal punishment, in part as a result of public campaigns.²⁵¹ Campaigns against corporal punishment in Northeastern prisons and schools animated a change in popular opinion.²⁵² During this decade, “the *total* amount of corporal punishment, especially floggings, administered in Northeastern penitentiaries declined in the latter half of the 1840s.”²⁵³

The whipping post endured longer on the American frontier. Whipping had particular usefulness because frontier communities could ill-afford to build prisons, let alone guard and feed prisoners for extended periods of time. So, the expediency of whipping delivered the punishment, communicated the severity of the sanction to the convicted and the community, and allowed the community to move on.

Residents were self-conscious of this connection. One wrote: “As characteristic of the period, we note that the punishment for crimes, owing to the want of prisons, were generally of a summary character: Death for murder, treason, and arson (if loss of life ensued therefrom); whipping with 39 lashes, and fine, for larceny, burglary and robbery”²⁵⁴ Thus, although it was not mandated by state or territorial law, municipalities could set up whipping posts where the whipping would be publicly done.²⁵⁵

In Robinson’s view, conscription was an unconstitutional taking of a person’s right to the fruits of his labor.

Id. (citation omitted).

251. There must have been something about the decade of the 1830s. Michel Foucault identifies this decade as the end of sensational public whippings in town squares in Europe. He stated that “[b]y 1830–48, public executions, preceded by torture, had almost entirely disappeared. Of course, this generalization requires some qualification.” MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 14 (1977).

252. GLENN, *supra* note 40, at 146.

253. *Id.* at 132. One particularly striking fact is that “the average number of lashes per month declined from 1,121 in 1843 to 38 in 1847.” *Id.* at 133.

254. ALEXANDER DAVIDSON & BERNARD STUVE, *A COMPLETE HISTORY OF ILLINOIS FROM 1673 TO 1873*, at 213 (1874).

255. Regarding whipping posts and pillories, Timothy Walker writing in 1837 from Ohio said: “I may here add, however, that corporal punishment, by whipping, pillory, and the like, though not prohibited, is now seldom resorted to.” WALKER, *supra* note 103, at 182. Walker’s rationale for preferring incarceration to whipping was instrumental rather than humanitarian:

Yet, after the 1830s, it appears that even frontier communities were abandoning the practice and instituting prisons. In Michigan, whipping was specifically authorized by territorial statute in 1815, and subsequently repealed in 1831.²⁵⁶ The timing was similar on the Canadian side of the border.²⁵⁷

In Illinois, already a state by the 1830s, Governor John Reynolds was instrumental in eliminating the use of whipping as punishment for crime.²⁵⁸ Illinois had a criminal code with itemized numbers of lashings for itemized crimes, but it had no prison. To switch from corporal punishment to incarceration, the cash-strapped state of Illinois had to build one.

[I]mprisonment . . . since it physically disables the offender, for the time being, from continuing his depredations upon society. The man who has been whipped or fined, is forthwith let loose upon society, with the power, and probably a disposition sharpened by exasperation, to repeat his transgression. But the man who is immured between prison walls, cannot do harm.

Id. at 425–26.

256. Farmer wrote:

An Act of the Governor and Judges, passed July 27, 1815, provided that any justice of the peace might order the whipping of “lewd, idle, or disorderly persons, stubborn servants, common drunkards, and those who neglect their families, with ten stripes, or the hiring of them out for three months at the best wages that can be secured, for the benefit of the poor fund.” The first sale under this Act took place at auction about the middle of September, 1818, when twenty-eight shillings were paid for the services of one bad citizen. In the summer of 1821 the services of a drunken white vagabond were bought by a black man for ten days, for the sum of one dollar. The whipping was performed at the old market on Woodward Avenue below Jefferson. The law was repealed March 4, 1831.

SILAS FARMER, *THE HISTORY OF DETROIT AND MICHIGAN, OR, THE METROPOLIS ILLUSTRATED; A CHRONOLOGICAL CYCLOPAEDIA OF THE PAST AND PRESENT, INCLUDING A FULL RECORD OF TERRITORIAL DAYS IN MICHIGAN AND THE ANNALS OF WAYNE COUNTY 190–91* (1884).

“I remember seeing the whipping post, that was close by the market, but I never saw anyone whipped there, nor do I think any unfortunate underwent that ordeal after 1826.” FRIEND PALMER, *EARLY DAYS IN DETROIT 311* (1906).

257. Read opined:

In 1789 a local Court of Common Pleas was organized, having both civil and criminal jurisdiction. Appeal lay to the Governor, and the Council and the Judges were selected from among the wealthier citizens, who whipped, branded, banished, and imprisoned, as their caprice or the state of their digestive organs dictated. It thus seems that the branding was in fashion in Detroit in 1789, when Detroit was still in possession of the British and part of the District of Hesse.

DAVID B. READ, *THE LIVES OF THE JUDGES OF UPPER CANADA AND ONTARIO, FROM 1791 TO THE PRESENT TIME 22* (1888). But for the history in Missouri, see HARRIET C. FRAZIER, *SLAVERY AND CRIME IN MISSOURI, 1773–1865* (2d ed. 2009).

258. In his memoir, Reynolds writes: “I had reflected on the subject of punishment of criminals, and had reached the conclusion that the criminal law should be changed, and that the ancient barbarous system of whipping, cropping, and branding for crimes, should be abolished and the penitentiary substituted.” JOHN REYNOLDS, *REYNOLDS’ HISTORY OF ILLINOIS 172* (1879). See generally Hannah Margaret Graber, *The Last of the (Legal) Lash: Illinois Abolishes Whipping Posts* (2015) (paper submitted in completion of *The Law of the Frontier*, University of Iowa College of Law) (on file with author).

Reynolds's solution was to build a penitentiary and pay for it by the sale of public land which he persuaded the legislature to do. Yet, Illinois' criminal code then had to be rewritten, equivalences and proportionality worked out. This process took even longer than building the house of corrections. As late as 1853, the Illinois legislature felt it necessary to reiterate their abolition of whipping as punishment for crime in supplemental legislation.²⁵⁹

Reynolds explained the transformation as a "humane provision: 'the object of punishment is reformation, and not for extermination.'"²⁶⁰ Incarcerating in buildings that were going to be called "Houses of Correction" was in keeping with the "spirit of the age,"²⁶¹ according to Reynolds. Reynolds was a trained lawyer, not really an intellectual, yet his choice of words draws close to Kent's own language.²⁶²

Although the antebellum frontier abandoned whipping posts in "the spirit of the age," free Blacks continued to be whipped, sometimes for minor infractions. Just across the river from the Illinois penitentiary, two decades later in the 1850s, the St. Louis city council enacted an ordinance requiring that all free Blacks be licensed. Although the enforcement was often lax, when the ordinance was enforced, the punishment for failure to obtain a license was subjecting the unlicensed free Black person to flogging and then expulsion from the state.²⁶³ No one in St. Louis at the time publicly expressed the sentiment that free Blacks should not be whipped for this minor infraction because whipping was inconsistent with "the spirit of the age."

III. THE SEQUENCE AND ITS LEGACY

Thus, workplace corporal punishment ended quietly, lacking the political uplift of any widespread affirmation directed at workers' interests in respect and fair treatment. What began as a commonly recognized prerogative of masters over everyone in their workshop household was altered by some states that attempted to curb masters' vindictiveness and the most extreme mistreatment. These regulations targeted at whippings required that masters have reasons, limited the number of lashings, and

259. See Graber, *supra* note 258. On February 12, 1853, thirty years after John Reynolds's original bill, the Eighteenth General Assembly again reiterated its ban on whipping: "Be it enacted by the People of the State of Illinois, represented in the General Assembly, that all laws and parts of laws of this State which provide for the punishment of crimes and offenses against the law by whipping, shall be and the same are hereby repealed." Act of Feb. 12, 1853, § 1, 1853 Ill. Laws 181-82; see also DAVIDSON & STUVE, *supra* note 254, at 213.

260. REYNOLDS, *supra* note 258, at 172.

261. *Id.* at 173.

262. See *supra* text accompanying note 107.

263. See VANDERVELDE, *supra* note 249, at 244-46 (discussing licensing).

even sometimes assigned a neutral to carry out the punishment. In later cases, the legal discourse changed, first, by declaring that the prerogative was personal and hence, not transferable and next by declaring that it was not delegable. As workplaces grew in scale, requiring several layers of supervisory personnel, the old doctrine of correction could not be stretched to authorize intermediate authorities to impose correction on their subordinates. The rule splintered into subcategories. The subcategories that remained subject to the rule were exceptions to the new norm.

Although in the North the rule's scope of application narrowed, in the South the scope broadened to allow an entire class, free white men, to inflict corporal punishment on slaves for mere insolence. Slave masters could continue to inflict corporal punishment even for vindictiveness, provided the slave was not killed. In its expansion it became a method of racial oppression rather than workplace discipline. When slavery was finally abolished, the well-known mechanisms of the "Wheel of Servitude" and Jim Crow emerged to become substitute forms of racial domination.²⁶⁴

How did workplace corporal punishment reach its quiet end? Perhaps with a substitute: the at-will doctrine. In the 1870s at the time that treatise writers were ready to declare that masters could no longer strike their servants, there was a ready replacement. Masters could expel workers from the workplace, not only for sufficient reason, but under the predominant at-will rule even for reasons of vindictiveness or no reasons at all. Intermediate managers gained the right to fire workers with impunity. The livelihood of the worker hung precariously on a string that could be severed by his employer at any moment. These legal developments left us without legal accountability for workers' grievances and a pervasive and enduring belief that flight is the solution to workplace abuse.

The Supreme Court later recognized a significant foundational truth: "When the master can compel and the laborer cannot escape the obligation to go on, there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work."²⁶⁵ Yet instead of providing redress for such overlordship, the American legal system responded in the late nineteenth century simply by liberalizing the right to "escape the obligation to go on." Employees were accorded the right to quit while at the same time in a world where there is generally a shortage of jobs and an abundance of workers, em-

264. See generally DANIEL A. NOVAK, *THE WHEEL OF SERVITUDE: BLACK FORCED LABOR AFTER SLAVERY* (2014).

265. *Pollock v. Williams*, 322 U.S. 4, 18 (1944).

ployers received a much more powerful sanction—the prerogative to fire employees at will.²⁶⁶

In essence, the legal system seemingly obviated judicial involvement in workplace grievances by simply liberalizing flight. As a consequence, the American legal system has never developed a tradition of reviewing workers' grievances or actually penalizing an employer's overreaching. The remedy for abusive employment was and still is simply to leave. And in leaving, one forfeits one's stake in the enterprise; and grievances are left unresolved, unreviewed, and unaccounted for. Thus, in a sense, the history of workplace corporal punishment leaves a legacy for modern employment law. In the present day, when working people experience grievances or overreaching abuses, they find little justice by going to court. The law tacitly assumes that terminating the employment relationship is not the cataclysmic (and for the worker perhaps catastrophic) end of the escalating workplace dispute. It is viewed, instead, as the full remedy.

Of all the progress narratives, Richard Morris's explanation that justice for the working man is "precariously dependent upon a fortuitous conjunction of the humanitarian impulses and economic interests of those in power"²⁶⁷ seems most plausible. What employers gained served their interests better than what they lost.

And who was the last *legally* beaten servant in America?²⁶⁸ That question can't be answered. The categories shifted. It depends upon how one interprets the words, "servant" and "legal." The term "servant" had originally applied broadly, generically, but the term disaggregated by repeated comparison with other categories of laborers. As Blackstone's rule narrowed to apply to only more marginal categories of unfree labor, the last legally beaten servant was probably an African-American slave or a seaman under American jurisdiction.²⁶⁹ And in the case of African-American slaves, the purpose was less likely to have been for workplace discipline, than for a different dominance objective.

266. "[I]n general the defense against oppressive hours, pay, working conditions, or treatment is the right to change employers." *Id.*

267. See discussion *supra* accompanying notes 96–97.

268. Some years ago, Rob Steinfeld, Chris Tomlins, and I tried to figure out the identity, time and place of the last servant ordered by a court to specifically perform a labor contract.

269. Of course, if the term, "servant" included family members, then the last was a wife or child, because those categories of persons could be beaten by the head of household long into the twentieth century.