"Except as Punishment for a Crime"

The Thirteenth Amendment and the Rebirth of Chattel Imprisonment

Slavery was both the wet nurse and bastard offspring of liberty.

—Saidiya Hartman, *Scenes of Subjection*

It is true, that slavery cannot exist without law . . .

—Joseph Bradley, *The Civil Rights Cases*

Anyone perusing the advertisements section of local newspapers such as the *Annapolis Gazette* in Maryland, during December 1866, would have come across the following notices:

> Public Sale—The undersigned will sell at the Court House Door in the city of Annapolis at 12 o'clock M., on Saturday 8th December, 1866, A Negro man named Richard Harris, for six months, convicted at the October term, 1866, of the Anne Arundel County Circuit Court for larceny and sentenced by the court to be sold as a slave.
>
> Terms of sale—cash.
>
> WM. Bryan,
>
> Sheriff Anne Arundel County.
>
> Dec. 8, 1866

> Public Sale—The undersigned will offer for Sale, at the Court House Door, in the city of Annapolis, at eleven O'Clock A.M., on Saturday, 22d of December, a negro *[sic]* man named John Johnson, aged about Forty years. The said negro was convicted the October Term, 1866, of the Circuit Court for Anne Arundel county, for;

Larceny, and sentenced to be sold, in the State, for the term of one year, from the 12th of December, 1866.

Also a negro man convicted of aforesaid, named Gassaway Price, aged about Thirty years, to be sold for a term of one year in the State,

Also, a negro woman, convicted as aforesaid, named Harriet Purdy, aged about twenty-five years, to be sold for a term of one year in the State,

Also a negro woman, convicted as aforesaid, named Dilly Harris, aged about Thirty years, to be sold for a term of two years in the State.

Terms of sale—Cash.

WM. Bryan,

Sheriff Anne Arundel County

Dec. 26th, 1866.[1]

Congressional testimony and court dockets relating to these post–Civil War prison slave auctions reveal that each "negro" sold on the courthouse steps of Annapolis was actually charged with "petit larceny"—a small-scale property crime. In the men's cases, the list of alleged offenses included the theft of "6 barrels of corn," "1½ bushels of wheat," and "a hog"; and, in the cases of the women, it included taking "a pair of gaiter boots" and "stealing clothes from a lady." The docket also catalogues how the five black prisoners were sold for prices ranging from $27 to $50—and, while not including the names of each purchaser, does indicate that Harriet Purdy was "sold for $34.00 to Elijah L. Rockhold."[2] This small set of facts and figures, along with those contained in the advertisements placed in the local news by the county sheriff, represent the extent of information supplied by the historical archive in respect to the lives of these five "free" black people after being branded as *Negro criminal* by Maryland's legal system. Most of what we have in the way of any sort of encounter with their lives once they were converted into fungible black property for the alleged thieving of white property is the unspeakable conjecture allowed us by sonic, testimonial, and literary fragments of slaves and prison slaves—rememories gleaned from the wreckage of racial genocide as it piled over the mythological historical divide erected to convince us that scenes such as slave auctions had been forever vanquished with the culmination of the Civil War and the passage of the Thirteenth Amendment in 1865.[3]

However, as much as we do not know regarding the specific fate of one such as Harriet Purdy, who through her imputed theft of a pair of white "lady's" boots was literally sold, or at least *rented for a year*, to a white man on the steps of the Annapolis courthouse—the terror of what we do know, especially in terms of the "infinite uses" to which the chattelized black body had been subjected for well over two centuries leading up to her auction day, offers stark grounding for rumination. So far, my discussion of this element of recessed knowledge has mostly focused on the ways in which black writing, song, and testimony allow footholds of encounter with the terror, enormity, and unrepresentability of neoslavery. However, while doing so, I have also noted an equally important arena of neoslavery narration—that of the law. The various modes of legal discourse that allowed for the sale or lease of convicted bodies such as those of Purdy, Richard Harris, John Johnson, and Dilly Harris through criminal sanction supply a great deal of critical information insofar as they elucidate the conditions of possibility for the collective violence that black people have endured in the context of de jure freedom.

Indeed, as Joy James has pointed out, no discussion of neoslave narratives in the United States would be complete without centering the storytelling devices employed by the racial capitalist patriarchal state through the devastating fictive practices of the law.[4] This line of analysis is especially important given the law's dubious capacity to conjure the free black subject into a reenslaved object, a violent functionality that it had exhibited with all-too-efficient acumen well before December 1866. The border state of Maryland, where these courthouse auctionings of free black people occurred, is actually an illuminating political geography with which to begin such a discussion, since, because of its liminal physical and political positioning during the antebellum period, the state was home to easily the largest population of *free Negroes* in the country from the colonial period through the Civil War.[5] Therefore, when townspeople walking by the Annapolis County courthouse on December 8 and 26, 1866, bore witness to postemancipation auctions, the only novel aspect of the scene of a call for bids on "free" black bodies was the fact that it was occurring after the passage of the Thirteenth Amendment; for criminalized freepersons in the slave state had been the subject of disproportionate imprisonment and racially exclusive forms of punishment (both corporeal and capital) since its inception.[6] Such precariously free subjects had also been vulnerable to the spectacle of public auctioning since 1835, when, under its Black Code,

Maryland lawmakers passed the first of three statutory provisions that called for the sale or lease of criminally stigmatized free Africans.

The five auctioned black subjects mentioned above could very likely have resided in the state when the 1858 version of the code—that which led to their own public sale—was established by "an act to modify the punishment of free negroes, convicted of Larceny and other crimes against this State." The beginning of the legislation reads:

> SECTION 1. Be it enacted by the General Assembly of Maryland, That in all cases hereafter, where free negroes *[sic]* shall be convicted of the crime of simple larceny, to the value of five dollars and upwards, or accessory thereto before the fact, they shall be sentenced to be sold as slaves for the period of not less than two nor more than five years . . . and every free negro who shall be convicted of robbery, may in the discretion of the court, be either sentenced to confinement in the penitentiary, as now provided by law, or be sold either within or beyond the limits of the State, as a slave for the period of ten years.[7]

Indicative of the politically and geographically liminal position of Maryland, Section 324 of its Slave/Black Code of 1858 embodies the disavowed intimacies of southern and northern white supremacist law insofar as it had nearly exact replicas, public auctioning included, within the racially restrictionist state constitutions of northern states such as Indiana, Ohio, and Illinois until as late as 1864.[8]

Furthermore, as I will discuss later in this chapter, its haunting reappearance in a particular branch of a seemingly infinite array of "color-blind" criminal statutes that catalyzed the nationally sanctioned and administered postemancipation trade in southern black convicts further illustrates the problematic historical cordoning of chattel slavery as a pre-1865 phenomenon. Relative to its pre-emancipation counterparts in the former Northwest Territories, however, Maryland's version came with an especially terroristic provision dealing with those free black persons who may have exhibited revolutionary inclinations:

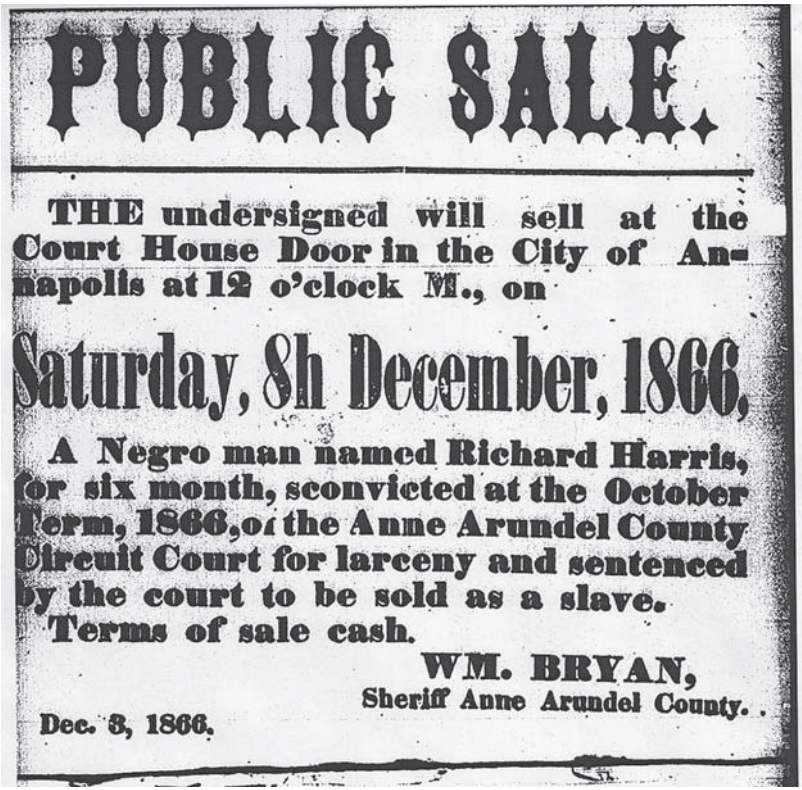
> [I]f any free negro shall after the passage of this act, be convicted of willfully burning any . . . Court House, county or public prison, or the penitentiary, poor house, warehouse or any building belonging

> to the State . . . such free negro, his aiders or abettors and counselors, being free negroes, and each of them shall be sentenced to be punished by hanging by the neck as now provided by law, or in the discretion of the court to be sold either within or beyond the limits of the State, as a slave for life.[9]

The discretionary power of the state to dispose of the would-be-free African body through either the public servitude of the penitentiary, the private servitude of chattel slavery, or capital punishment enacted by the lynch rope dramatizes the gothic exchanges of civil, social, and premature death that would continue to define black (and Indigenous) incarcerated existence after collective emancipation. Whether rebirthed in the form of the openly declared Black Codes of presidential Reconstruction, or those administered under the color of color-blind laws that have reigned since the late nineteenth century, the late antebellum white supremacist legal codes stand as stark embodiments of the process of forward haunting that I discussed in chapter 1 in reference to the chain-gang scene in *Beloved*. That is, the three intimately connected and cross-fertilizing methodologies of legally administered racial terror sanctioned in Maryland's statutory "modification" of its punishment of emancipated persons—imprisonment, enslavement, and lynching—represented necropolitical precursors to legal and extralegal formations of violence waged against countless free black subjects for generations after the Civil War. This forward-haunting quality of the Maryland Black Code and those of other southern states—along with that of the "Negro Codes" and "Black Laws" of the northern United States—disturbs a remark made by Republican senator John Creswell of Maryland, who attempted to account for post-1865 public sales of free black people by stating that the "law under which these decrees have been passed . . . and these sales have been made is a relic of that code in its worst aspect," a "vestige of [an] old spirit."[10]

As I will discuss at greater length below, the mix of public and private mastery exhibited in the antebellum Black Code's handling of the problematic presence of the free "Negro" within the civil body was far from a dead or flickering letter by the time of the public leasing of criminally branded free persons. The state's wielding of the power to submit the black subject to the official incarceration of the prison, the social incarceration of the individual convict purchaser, or outright public extermination represented a chilling prefiguration, a statutory dress rehearsal, for the large-scale

state-administered public/private carceral hybrids that would come to define zero-degree black unfreedom after 1865: the convict lease camp, the chain-gang camp, the county farm, the peonage camp, the prison plantation, and the "modern" penitentiary. Stated differently, the auctioning, imprisonment, and lynching of nominally free black subjects under the law of slavery issued specters of chattelhood that would secrete across the fabled frontera of freedom as the state assumed full-fledged mastery over the always already criminalized "free" black body. Read in this light, the ritualized legal spectacle of the courthouse slave auction was not an episodic or anachronistic remnant of a soon-to-be completely vanquished system of legal violence and public profiteering: this apparition from chattel slavery


PUBLIC SALE.

THE undersigned will sell at the Court House Door in the City of Annapolis at 12 o'clock M., on

Saturday, 8h December, 1866,

A Negro man named Richard Harris, for six month, sconvicted at the October Term, 1866, of the Anne Arundel County Circuit Court for larceny and sentenced by the court to be sold as a slave.

Terms of sale cash.

WM. BRYAN,
Sheriff Anne Arundel County.

Dec. 8, 1866.

Figure 4. "Postslavery" prison slave advertisement from "Sale of Negroes in Maryland," a hearing of the U.S. House of Representatives Committee on the Judiciary, January 11, 1867, unpublished transcript.

was also a premonition of the state's primary role in the production, industrialization, and direct administration of spectacular and banal mechanisms of neoslavery from the chain gang to the prison–industrial complex.

But this line of argument in respect to the undead, or forward-haunting, propensities of late antebellum reenslavement statutes begs the vitally important question of method. That is, just how, in the context of the grand narrative of emancipation, were such documents of legal sorcery able to reanimate in the form of postbellum Black Codes and the racially motivated and administered "color-blind" statutes that replaced them, such as those dealing with vagrancy, breach of contract, public disorderliness, gambling, and petty larceny, socially manufactured "crimes" associated with structural black dispossession, landlessness, and vulnerability to legal and extralegal terror? What was the main legal channel whereby the public auctionings of black freepersons on courthouse steps in states ranging from South Carolina, to Maryland, to Illinois, would transfigure into the generalized courtroom and boardroom rentings of emancipated black bodies that defined postslavery imprisonment? How exactly was the statutory criminalization of black freedom that occurred in the antebellum period lawfully propelled into the future, producing various formations of neoslavery from the privatized public dominative regimes of convict leasing, peonage, and criminal-surety to the no less dominative and economically interested public systems of the county chain gang, the County Farm, and penitentiary plantation? How, for instance, was it possible for the poverty- and hunger-induced crime of hog-stealing to move so nimbly from being deemed "petty larceny" by Maryland's state legislature (a discursive gesture that proffered a rationale for the auctioning and reenslavement of Gassaway Price in Annapolis in 1866) to being dubbed "grand larceny" by Mississippi's state legislature after the supposed suspension of its Black Codes (supplying one of the key "color-blind" statutory pillars for the state's penal reenslavement and murder of thousands of black people after its passage in 1876)?[11] Put more directly, what was the legal conjuring method that allowed for *imprisoned slave auctioning* to seamlessly transition into both officially and customarily sanctioned *enslaved convict leasing*?

The central answer to these questions represents one of the most devastating documents of liberal legal sorcery ever produced under occidental modernity: the Thirteenth Amendment to the U.S. Constitution itself. As I briefly articulated earlier in reference to the primary legal mechanism by which the Middle Passage carceral model was able to lay hold to

postemancipation black life, the very amendment to the Constitution that was to have performed the miraculous conversion of "chattel into man" actually facilitated his *and* her re-chattelization through imprisonment: "Neither slavery nor involuntary servitude, *except as punishment for a crime whereof the party shall have been duly convicted,* shall exist within the United States, or any place subject to their jurisdiction." The grandest emancipatory gesture in U.S. history contained a rhetorical trapdoor, a loophole of state repression, allowing for the continued cohabitation of liberal bourgeois law and racial capitalist terror; the interested invasion of "objective," "color-blind," and "duly" processed legality by summary justice and white supremacist custom; and the constitutional sanctioning of state-borne prison–industrial genocide.

That my attachment of such gravity and epochal meaning to the exception clause is no case of political hyperbole is registered by the publicly aired debate it caused, both at the time of its passage and in the years surrounding the implementation of the postbellum Black Codes. Carl Schurz spoke directly to the imminent reenslaving purposes to which postemancipation statutory law would be marshaled in filing a report on southern race relations just after the Civil War:

> The emancipation of the slaves is submitted to only in so far as chattel slavery in the old form could not be kept up. But although the freedman is no longer considered the property of the individual master, he is considered the slave of society, and all the independent state legislation will share the tendency to make him such. The ordinances abolishing slavery passed by the conventions under the pressure of circumstances will not be looked upon as barring the establishment of a new form of servitude.[12]

An explicit account of the primary role of the Thirteenth Amendment in the reenslavement of free black people was offered at the Joint Committee on Reconstruction in 1866, the same year that the neoslave auctions advertisements were posted in Maryland newspapers. In his testimony, a northern clergyman testified to having had a conversation with a white southern preacher who made a brazen declaration regarding the surreptitiously terroristic utility of the emancipation amendment, one that in its brutal accuracy expresses how the white supremacist opportunity afforded by the exception clause was a matter of southern common sense: "Alluding

to the amendment to the Constitution that slavery should not prevail, except as punishment for a crime, [the southern preacher said] 'we must now make a code that will subject many crimes to the penalty of involuntary servitude, and so reduce the Negroes under such penalty again to practical slavery.'"[13]

While the southern minister's reference to a "code" of virtual reenslavement obviously refers to the openly racist Black Codes that would immediately begin to terrorize the black population after the war's cessation, in the remainder of this chapter I will explore the ways in which the exception clause had temporal reverberations that extended long after the apparent demise of openly racist statutory law, as well as a geographical reach that was in no way cordoned to points south of the Mason-Dixon line. Through my discussion of congressional debates, the peonage cases, and the hybrid formations of public/private neoslavery that placed free black people in a constant state of collective jeopardy, I underline the degree to which "color-blind" juridical, legislative, and penal law all played central roles in constructing an overall *code of reenslavement*—states of legalized and racialized exception made possible in large measure by the Thirteenth Amendment's punitive exception.

Aside from episodic interventions by prisoners, antiprison activists, and a small number of scholars in respect to its dominative effectivity, the exception clause has received very little in the way of sustained treatment within legal, social, and political histories of Reconstruction, southern neoslavery, and the national system of racial capitalist patriarchal punishment that continues to ravage black, brown, Indigenous, and poor people.[14] Legal histories that do not simply laud the amendment as a marker of liberal legal progress have focused almost entirely on some aspect of the shifting juridical interpretation of its prohibitory dimensions relative to slavery and its "badges." Read collectively, these discussions focus on the ways in which the amendment's common law construction during the first fifty years of emancipation vacillated from a relatively expansive view during Reconstruction (marked by cases upholding the constitutionality of the Civil Rights Act of 1866); to a restrictive view in keeping with Lochner-Era laissez-faire ideology and the liberal white supremacist sanctioning of Jim Crow apartheid (signaled most infamously with the *Civil Rights Cases* [1883]); to a moment of brief reexpansion in the early twentieth century with the Supreme Court's rulings in the peonage cases (*Bailey v. Alabama* [1911] and *U.S. v. Reynolds* [1914]).[15]

Centering the legislative and juridical treatment of the penal exception, and its ominously shrouded presence within moments of ostensible legal progressivism such as that exhibited in *Reynolds*, allows us to engage with counter-historical realities rendered largely invisible by this focus on the amendment's prohibitory function. It unveils the ways in which the Thirteenth Amendment offered legal cover and social acceptability for Jim Crow apartheid at its most abject and murderous degree within spaces such as the chain gang, the convict lease camp, and the peonage camp—how these public/private hybrids of neoslavery were enacted not through the emancipation amendment's juridical restriction but through its very deployment as a Janus-headed weapon of reenslavement. Again, I am concerned with the fact that the very act of liberal legality that registered de jure recognition of hard-won black Jubilee actually reinstituted enslavement through criminal sanction. Along these lines, I want to explore how a centering of the exception clause and the chattelized penal law that it produced allows for a critical disenchantment of the state's racialized, gendered, and class-coded discourses of "public safety," "law and order," and "penal reform." Just as important, in the remainder of the chapter I show how a centering of the exceptional loophole within the emancipation amendment exposes the legal, cultural, and penological channels whereby liberal bourgeois white supremacist law resuscitated both the badges *and* fetters—the incidents *and* fundaments—of chattel slavery and the Middle Passage carceral model.[16]

What's in a Name? *Involuntary Servitude* as Liberal Legal Euphemism

Troubled about the possible regressive consequences that could unfurl should the exception clause be allowed into the constitutional amendment outlawing slavery, Massachusetts senator Charles Sumner attempted to sound an alarm of opposition during the Senate's original debates on the amendment's wording. In fact, before waging his critique of what ended up being the final version of the legislation, Sumner submitted his own version, inspired by the French Declaration of Rights (1787), a joint resolution based on the liberal principles of "natural rights" and equality before the law: "Everywhere within the limits of the United States, and of each state of Territory thereof, all persons are equal before the law, so that no person can hold another as a slave." Realizing that his proposed version

was a dead letter, the congressman focused on challenging the final version of the amendment coauthored by Senator John Henderson of Missouri, who was a slaveholder himself (at least until the Civil War). Sumner described how in its nearly exact repetition of the language of Article Six of Thomas Jefferson's Northwest Ordinance of 1787[17]—which in ostensibly outlawing slavery in the Northwest Territories also contained a provision for enslavement upon "due conviction" by law—Congress was in danger of resuscitating the very system it was purporting to cast into oblivion:

> There are words here . . . which are entirely inapplicable to our time. They are the limitation, "otherwise than in the punishment of crimes whereof the party shall have been duly convicted." Now, unless I err, there is an implication from those words that men may be enslaved as punishment of crimes whereof they shall have been duly convicted. There was a reason . . . for at that time . . . I understand it was the habit in certain parts of the country to convict persons or doom them as slaves for life as punishment for crime, and it was not proposed to prohibit this habit. *But slavery in our day is something distinct,* perfectly well known, requiring no words of distinction outside of itself.

In making his case against the exception clause, the abolitionist senator based his argument on the premise that there was a clearly discernible line of distinction between involuntary servitude and chattel slavery in 1864, a divergence that nullified the need to repeat the exception clause in an amendment attacking chattel slavery. His argument also rested on the fact that Jefferson's ordinance catered to the national "habit" in the late eighteenth century of submitting free and fugitive Africans to private slavery rather than public penal servitude as punishment for crimes associated with liberated blackness (a point also signified by Jefferson's unmentioned inclusion of a fugitive slave provision in the original language of the ordinance). Sumner concluded that the legislation relied on a "language that is not happy" insofar as it could be interpreted as a loophole for reenslavement. Other members of the judiciary committee, including fellow Republican Lyman Trumbull, who was acting chair, felt that Sumner's radicalist position on the wording amounted to nothing but a stubborn and misplaced grammatical fastidiousness: "I do not know that I should have adopted these words, but a majority of the committee thought they were the best

words; they accomplish the object; and I cannot see why the senator from Massachusetts should be so pertinacious about particular words."[18]

Sumner felt that he had uncovered irrefutable proof that his supposed fit of grammatical nitpicking was actually based on a clear and present danger when, on January 3, 1867, nearly three years after originally posing his misgivings in respect to the exception clause, he opened a Senate debate on a congressional resolution calling for a "supplementary amendment" to the Thirteenth Amendment. He began the discussion by holding up the very advertisement for the courthouse auctioning of Richard Harris that is illustrated above (Figure 4), an event that had occurred in Annapolis just one month before Sumner's speech. After relaying the contents of the advertisement, he proceeded to read a transcription of the other public notice that I mentioned earlier for the sale of John Johnson, Gassaway Price, Harriet Purdy, and Dilly Harris, a group neoslave auction about which Sumner reported to have been informed by a personal "correspondent" who saw the black prisoners "sold in his presence, before his very eyes." Meant to arouse horror, disapprobation, and disbelief, Sumner's exposure of the odious scene of black bodies being sold at public auction nearly within site of the nation's capitol partook of a long-established abolitionist tropology that rested on unveiling the spectacular depravities of chattel slavery of which whips, chains, and auction blocks were essential symbols.[19] For him, it was not the fact of normalized arrest and imprisonment of free black persons that was the problem, but the unseemly manner in which it was conducted; the prisoner auction was proof positive that something beyond "normal" publicly administered involuntary servitude was functioning under the banner of the punitive exception, allowing for the institution of a revived form of private chattel slavery. "But I presume that the Senate, at the time they passed upon the amendment supposed that the phrase 'involuntary servitude, except for crime whereof the party has been duly convicted,' was simply applicable to *ordinary imprisonment.*" Sumner went on to recall that at the time of the amendment's passage he "feared that it was not exclusively applicable to *what we commonly understand by imprisonment,* and that it might be extended so as to cover some form of slavery."[20]

The Massachusetts congressman was joined in this dramatic unveiling of the Maryland advertisements by John Kasson, a Republican representative from Iowa, who held them aloft in the House of Representatives just five days after Sumner's speech. As in the Massachusetts senator's case, Kasson rested his arguments for revisiting the emancipation amendment

on what he perceived to be a clear-cut boundary separating involuntary servitude to the state, as represented by "ordinary" imprisonment, and private servitude to an individual, as symbolized by the abhorrent spectacle of the courthouse auction block:

> I apprehend that few members of this House or of Congress, at the time of the passage of the amendment, supposed that in the very sentence abolishing slavery throughout the United States they had also made provision for its revival under another form and through the action of the courts of the country. The facts certified to us by the newspapers of the South, from week to week, show that the result of that action, as it is there construed, is to revive the institution of chattel slavery in all its odious characteristics; that free men . . . are put upon the auction-block today and sold to the highest bidder into slavery.[21]

Kasson could feel so emboldened to strike at the exception clause partly because of a more definitive syntactical partitioning of "slavery" and "involuntary servitude" within his own state's constitution, in which the language of Jefferson's Northwest Ordinance was converted into a more overtly abolitionist phraseology: "Slavery, being incompatible with a free Government, is forever prohibited in the United States; and involuntary servitude shall be permitted only as a punishment for crime."[22]

In the spirit of this ostensibly definitive separation of two systems of punitive domination, Kasson introduced a bill (H.R. No. 956) that would have criminalized any

> *unofficial subjection to slavery* [of] persons who may be convicted of offenses against the law, by reason whereof certain inferior tribunals have adjudged free citizens of the United States to be so disposed of as to reestablish chattel slavery for life or for years, against the principles of the Christian religion, of civilization, and the Constitution . . . which now recognizes no involuntary servitude except to the law and to the officers of its administration.

He concluded by positing what he considered to be a hermeneutical corrective in respect to the amendment's intended emancipatory function by stating that "no such thing as selling a man into slavery can possibly exist in

the present condition of the Constitution and the laws of the country; that there must be a direct condemnation into that condition under the control of the officers of the law, like the sentence of a man to hard labor in the State prison in regular and ordinary course of law and that is the only kind of involuntary servitude known to the Constitution and the law."[23] For Kasson and Sumner, the auction block consequently operated as something of an abolitionist fetish, an emblem of an uncivilized, obsolete, and domestic modality of incarceration and unfreedom under a private master that would ineluctably make way for a more regulated, rational, and humane technique of human entombment: "Hard labor in the State prison."

The most cursory glance at such articulations lends itself immediately to a countering of the liberal abolitionist attempt at positing a definitive borderline between the auction block and the cellblock, between penal and chattel servitude. Even within its own terms, the logic of Sumner's and Kasson's self-assured statements in this regard fall apart at the seams, pointing toward an open secret lying at the core of their liberal vision and at the center of Euro-American carceral modernity as a whole. Kasson most clearly exhibits the untenable nature of the mythical private/public carceral binary when in the course of reenacting his own state constitution's syntactical severance of "slavery" and "involuntary servitude," he repeatedly performs their reunification. This first appears in the wording of his proposed bill to criminally sanction anyone taking part in the sale of "free" human beings, wherein he describes private servitude as an "unofficial subjection to slavery," a phrase that immediately signifies an unspoken Other working alongside such odiously unregulated private arrangements—that is, an "official" or properly public form of slavery issuing from the quotidian, predictable, and "humane" operation of the state police power. The specter of public penal enslavement then reappears in one of Kasson's most apparently self-certain assertions of the unconstitutionality of one person being held as chattel by another person, "that there must be *a direct condemnation into that condition under the control of officers of the law,* like the sentence of a man to hard labor in the State prison." Far from dislodging the rhetorically wedded terms *slavery* and *involuntary servitude,* liberal pronouncements of the putatively "ordinary" and "official" operation of juridical and penal law ultimately perform the absolute impossibility of their divorce. As noted in my earlier discussion of the North American chain gang, there are an untold number of disavowed stories of unfreedom, corporeal rupture, psychic terror, and chattelized entombment suggested in

Kasson's inadvertent discursive acknowledgment of the filiations of "ordinary imprisonment" and *that condition* known as slavery—historically sealed necropolitical experiences that underline the degree to which "involuntary servitude" works as a liberal legal euphemism shrouding long-standing intimacies of penal and chattel incarceration.[24]

Indeed, the methodological interconnections of the two ostensibly distinct systems are largely indexable within the history of the very ordinance for the Northwest Territories that occupied the center of the debate regarding the Thirteenth Amendment. This critically important genealogy points to the fact that in adopting the punishment exception in respect to *involuntary servitude*—that is, state enforced "hard labor" as punishment for a duly convicted offense—Jefferson replicated the reformatory logic of Cesare Beccaria, the influential Italian criminologist and penal reformer of the Enlightenment era whom the American slave-owning statesman held in extremely high esteem.[25] However, in offering his vision of what Foucault would come to describe as modernity's incremental movement away from the blood-ridden modalities of premodern feudal punishment to a "disciplinary" and "disembodied" penal philosophy, Beccaria unveils how liberal reform, modernization, and rationalization were founded upon the substitution of the convict's sanguinary death by something deemed more productively and pedagogically "grievous"—his literal enslavement. "If it be said that permanent penal servitude is as grievous as death, and therefore as cruel, I reply that, if we add up all the unhappy moments of slavery, perhaps it is even more so, but the latter are spread out over an entire life, whereas the former exerts its force at a single moment."[26]

For Beccaria, the "unhappy" civil death produced through penal enslavement would not only function as an intensification of biological death but would eclipse its counterpart as a more efficient technique of criminal deterrence through the terror of temporal indefiniteness: "It is not the intensity, but *the extent of punishment* which makes the greatest impression on the human soul. . . . It is not the terrible but fleeting sight of the felon's death which is the most powerful break on crime, but the long drawn-out example of a man deprived of freedom, who *having become a beast of burden*, repays the society he has offended with his labour."[27] The matter-of-fact aspect of Beccaria's argument for the pedagogical value of penal enslavement highlights the terror and domination that underlay what has been cast historically as "penal reform" from the Enlightenment through the birth of the "modern" penitentiary. Beccaria was nearly singular among

his peers, however, in his open acknowledgment of the intimacies of penal and chattel servitude, a cross-fertilization that ranges at least as far back as the creation of the *servus-poeonae*—or criminally branded public slave—in Roman law,[28] and that continued into modernity with the transmission of plantation techniques of "labor management," surveillance, and corporeal rupture into European and U.S. prisons.[29]

Indeed, as David Brion Davis has pointed out, the penological ideas of Jeremy Bentham, the English penological theorist most closely associated with disciplinary carcerality, represented a "virtual caricature of the planter's ideal."[30] The inventor of the panopticon was incredulous, however, as to assertions that subjection to involuntary servitude amounted to any sort of transatlantic blowback of the colonial chattel principle of productive internment; but, as in Kasson's case, he raises the specter of the chattel moorings of modern imprisonment even while disavowing them:

> With regard to the popularity of this species of punishment in this country. Impatient spirits too easily kindled with the fire of independence have a word for it, which represents an idea singularly obnoxious to a people who pride themselves so much on their freedom. The word is slavery. Slavery they say is a punishment too degrading for an Englishman, even in ruins. This prejudice may be confuted by observing, 1st, that *public servitude is a different thing from slavery*. 2dly, That *if it were not, this would be no reason for dismissing this species of punishment without examination.* If then upon examination it is found not to be possessed, in requisite degree, of the properties to be wished for in a mode of punishment that, and not the name it happens to be called by, is a reason for its rejection: if it does not possess them, it is not any name that can be given to it that can change its nature.[31]

Leaving aside for the moment the tautological aspect of his claim that public servitude simply "is" a species of servitude distinct from slavery, I am interested in Bentham's depiction of an image of singularly "obnoxious degradation" arising in the mind of English commoners at the mere prospect of civil death. Notwithstanding the penal philosopher's initial words to the contrary, this grotesque social vision was based on the terrifying and utterly unthinkable prospect that criminal stigmatization would transmute the "white" convict into an ontological double of the most "degraded"

not-quite-human being in the modern world—those units of enslaved African labor defined at law as objects of globalized commerce and localized sadism.[32] Equally important to note here is the manner in which Bentham's ruminations ultimately express a totalitarianist animus embedded within his utilitarianist vision. In the end, the social-engineering dream of producing a poor population in total conformity with the legal, political, and economic dictates of liberal bourgeois market culture justifies any method, including a penal version of that mentally and physically terrorizing thing that the targets of state sovereignty would "call" slavery. This is not to say that the white English commoner faced the same formations of chattelism in the prison that the African slaves faced in the barracoon, the slave ship, or the plantation, but to highlight the fact that the "whiteness" of the English commoner was placed in relative jeopardy through the stigmata of criminality. It is also to suggest a channel by which the feudal moorings of modern imprisonment would ultimately be ghosted into penal modernity on an unprecedented scale once the carceral state set its sights on those whose chattel enslavement laid at the foundation of white civil personhood.

The repressive aspects of the Benthamite philosophy would find their way into nineteenth-century prisons such as Auburn and Sing Sing, the latter of which was actually built through the "involuntary servitude" of prisoners transferred from the former. Elam Lynds, the warden who oversaw the contract labor and prisoner transfer project in the late 1820s, was unequivocal in his recognition of the affinities of his role and that of slave master: "According to my experience, it is necessary that the director of a prison . . . should be invested with an absolute and certain power. . . . My principle has always been, that in order to reform a prison, it is well to concentrate within the same individual, all power and all responsibility." For Lynds, such total disciplinary dominion was unthinkable without recourse to the most commonplace "seasoning" instrument of the plantation, the literal referent for what Bentham called *the lash of the law*: "I consider it impossible to govern a large prison without a whip. . . . If you have at once completely curbed the prisoner under the yoke of discipline you may without danger employ him in the labor which you think best."[33]

Not to be outdone by his transatlantic counterpart, Bentham himself once envisioned a "disciplinary" tool that has received a great deal less discussion than his panopticon. While his purportedly disembodied system of prisoner surveillance has risen to the level of a meta-symbol within critical

treatments of modern carcerality, his idea for a slightly less subtle reform of feudal methods of publicly administered corporeal punishment (which again was to be reserved expressly for the English poor) speaks volumes for the parallel, intersectional, and mutually constitutive designs of "modern" punishment and "premodern" enslavement:

> A machine might be made, which should put in motion certain elastic rods of cane or whalebone, the number and size of which might be determined by law. The body of the delinquent might be subjected to strokes of these rods, and the force and rapidity with which they should be applied, prescribed by a Judge: [with] this everything which is arbitrary might be removed. A public officer . . . might preside over the infliction of punishment; and when there were many delinquents to be punished, his time might be saved, and the terror of the scene heightened, without increasing actual suffering, by increasing the number of machines, and subjecting all the offenders to punishment at the same time.[34]

That modern prison servitude originally amounted to a public simulation of the "private" practice of chattel slavery raises important questions in respect to Sumner's and Kasson's attempted abolitionist intervention on behalf of the emancipated. If at its outset modern state-borne penal servitude allowed for the white industrial worker to be subjected to some of the very mechanisms of corporeal rupture, private profiteering, dispossession, and social stigmatization that were essential to chattel carcerality (while also imagining innovations and calibrations of that terroristic modality such as the Benthamite whipping machine), then what were the legal or social grounds for challenging the state's wholesale auctioning of bodies whom white supremacist culture defined as metaphysically unproductive, incorrigible, atavistic, and whom liberal white supremacist law and custom had defined as undishonorable beings incapable of feeling the physical or psychic degradation of chattelhood? What was the logic of penal reform and criminal deterrence to do with the literal "beasts of burden" who were the objectified correlatives for Beccaria's metaphorics of civil death and who were thought incapable of either spiritual reformation or productive industrial discipline?[35] What were the limits of a liberal abolitionism that expressed horror at the site of free black people being auctioned on courthouse steps, but whose solution for such odious sites involved an enshrinement of more

"ordinary" formations of involuntary servitude that began to entomb free black people in massive numbers immediately upon the passage of the Thirteenth Amendment? How did their narrow focus on isolated instances of what they considered to be an anachronistic holdover from chattel slavery obscure the larger state "public safety" project that would make the discursive link between "Negro" and "criminal" as inseparable after emancipation as "African" and "slave" had been before it? Finally, what did the long-standing infusion of private industrial interest into the putatively normal imprisonment of white bodies in the North mean for subjects who had been defined at law as nothing but fungible, culpable, and disposable since the Middle Passage?[36]

At issue here is what Hartman has described as the untenability of categorical distinctions between the public and private in respect to both chattel and penal servitude, and the degree to which in proffering such distinctions Sumner's and Kasson's challenge of the exception clause actually amounted to a reaffirmation of its most essential terms.[37] In other words, even were Congress to have passed the legislation that Kasson proposed to outlaw the sale of one individual by another—and had amended the Thirteenth Amendment to read closer to the more clearly articulated distinction between chattel and penal subjection in Iowa's constitution—the national state police power would still have involved the necropolitical right not only to kill free black people but to submit them to innumerable public/private carceral hybrids through the hypercriminalization of black being and the productive legal euphemism of "involuntary servitude."

As if to make perfectly clear that the security of the racial state rested on the sovereign right to terrorize the black subject in whatever form (and by whatever name) it deemed necessary, the Senate Judiciary Committee indefinitely postponed Kasson's bill after its passage in the House by claiming that any issues relating to the punitive reenslavement of "duly convicted" free persons were mitigated by the Civil Rights Act of 1866.[38] The outright cynical quality of this claim rests on the fact that, in its ostensible protection of southern black people against openly discriminatory postbellum Black Codes, the original Civil Rights Bill repeatedly invoked the very exception clause that Kasson and Sumner attempted to challenge. On its face, "An Act to Protect All Persons in the United States in Their Civil Rights, and Furnish the Means of Their Vindication" represented a positive affirmation and clarification of the citizenship rights granted by the Thirteenth Amendment and the legislative birthplace of liberal constructions

of "color-blind" common law in reference to former slaves and other racially stigmatized persons. The first two sections of the bill read as follows:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, *except as punishment for a crime whereof the party shall have been duly convicted,* shall have the same right, in every State and Territory . . . to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease or sell, hold, and convey real and personal property, and to full and equal benefit of the laws and proceedings for the security of person and property, as enjoyed by white citizens, and shall be subject to like punishments, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.
>
> Sec. 2. And be it further enacted, That any person, who under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at one time been held in a condition of slavery or involuntary servitude, *except as punishment for a crime whereof the party shall have been duly convicted,* or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by a fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, at the discretion of the court.[39]

What appears to function as a "vindication" of the full-blown positive power of the Thirteenth Amendment vis-à-vis its granting of citizenship and civil liberties to all persons born in the United States (besides untaxed "Indians") actually joins the emancipation amendment as an outright justification of the state's right to deploy criminal sanction as the most actionable

and powerful means of dealing with the "problem" of the black (and Indigenous) presence within the national body. Note how an act that was to have put to rest the "whole subject" of black penal reenslavement—and more specifically the literal auctioning of black bodies—not only neglects to offer an outright ban on the sale or lease of human beings by the state, but actually reinforces that sovereign right by repeating the exception clause in both of its most important sections. The main reason that such an outright proscription against black fungibility could not occur was that the national government was busy inaugurating the wholesale renting-to-death of black bodies branded as both "felon" and "misdemeanant," otherwise know as convict leasing, at the very moment of the bill's crafting. This historical synergy has often been ignored in scholarly treatments of "southern" prison slavery during Reconstruction; or, when broached at all, it has been mystifyingly dismissed as a matter of "accidental" racism and political-economic expedience rather than a pivotal conjuncture based on the material force of white supremacy and the centrality of unfree black labor to the interconnected postbellum national projects of empire building and southern industrialization.[40]

In fact, the ease with which local and state regimes of racial apartheid would be able to maintain white supremacist legal practice under the color of color-blind law had already been made clear well before the act's passage with the proliferation of Black Codes that were racially nonspecific but teleologically white supremacist. As Donald Nieman has indicated, many of the most extremely racist statutes that were conducting thousands of black people into convict lease camps, chain gangs, and peonage at the time of this supposed "vindication" of black civil rights, immediately escaped any possibility of judicial scrutiny under the act's color-blind doctrine due to the removal of any mention of race from their wording: "Rather than being blatantly discriminatory, the black codes of 1866, while carefully designed to control the freedmen, were on their face non-discriminatory. Through contract and vagrancy laws that applied [formally] to whites and blacks alike, they gave state and local officials all the authority they need to provide planters with a cheap and dependable labor force."[41] Indeed, this loophole even made possible the renewal of the late antebellum slave code. Under the "color-blind" and "equal punishment" provisions of the bill, all the Maryland state legislature would have needed to do in order to resuscitate the slave code allowing for the sale or lease of free black subjects was to remove the word "Negro" from its wording and the odious

scenes of free blacks being made into commodified objects on courthouse steps could have continued apace.

However, as the history of racialized neoslavery has exposed for over one hundred years after the passage of the act "protecting" black civil rights, the legal reproduction of black fungibility not only continued but actually expanded to alarming proportions through the liberal loopholes of the exception clause and the color-blind racial statutes that put the punitive exception into material motion. In an example of its ability to practice a certain amount of productive self-disciplining, the racial capitalist patriarchal state removed what for the liberal onlooker represented the unsightly scene of courthouse auctioning from public view while continuing a de facto neoslave trade inside courthouse chambers, a legal ritual of human commodification that subjected a swelling number of black prisoners to multiple varieties of *opus publicum* (public hard labor) and *vincula publica* (public chains) under the normalizing ostent of "due conviction."[42] That is, various forms of ignominious public unfree work and punishment that did ultimately begin to be cast into the ashbin of history for white subjects as far back as the late eighteenth century were reinvigorated and expanded through the banal operation of municipal, state, and national penal law—representing a legal prosecution of the national cultural mythos that framed such disreputable labor and bodily rupture as commensurate with the supposed inborn criminality, unbreachable joviality, and inhumanly high pain threshold of former slaves. In other words, the law exchanged the offensive site of the open-air neoslave auction for the no less abject, if socially acceptable, scene of black neoslave labor and terror on the chain gang, the convict lease camp, and the peon camp.

Again, when read in this light, the Maryland auctioning of the free is unveiled as a "post" slavery analogue of the various modalities of racial commodification that secreted across the fictive border of emancipation. It is also exposed as a futuristic relic of sorts, demonstrating the liberal legal channels whereby various modalities of spectacular and banal dehumanization essential to chattel slavery were reanimated and reconfigured through the birth of the convict lease system, peonage, the prison plantation, and the chain gang. This last point is vividly recalled by Richard Wright's boyhood persona in *Black Boy* (1945), who in mistaking a Mississippi chain-gang coffle for a herd of trunk-tied "elephants"—or stripe-clad "zebras"—disenchants the discourses of color-blind jurisprudence and public safety that crafted the social acceptance of neoslavery:

> I saw that they were two lines of creatures that looked like men on either side of the road; that there were a few white faces and a great many black faces. I saw that the white faces were the faces of white men and they were dressed in ordinary clothing; but the black faces were men wearing what seemed to me to be elephants [or zebra] clothing. As the strange animals came abreast of me I saw the legs of the black animals were held together by irons and their arms were linked with heavy chains that clanked softly as their muscles moved.[43]

From the seemingly naive purview of childhood remembrance, we are allowed a momentary glimpse at unspeakable realities hovering at the periphery of the state's master narrations of law, order, and "Negro Problem" resolution. Such testimony supplies necessarily incomplete, contingent, and historically obscured entry into how the exception clause and the white supremacist ruse of color-blind statutory law represented not the cessation of black fungibility and dehumanization but their legalized transfer from courthouse steps into courtrooms, boardrooms, and "official" neoslave coffles. As Hartman reminds us in respect to the productive amnesia of liberal legal color-blindness, "The refusal to see race neither diminishes that originary violence nor guarantees equality but merely enables this violence to be conducted under the guise of neutrality."[44]

For the remainder of this chapter, I will focus on largely obstructed and distorted legal and social conjunctures wherein black fungibility was transplanted from a slave code funneling free and fugitive African bodies into "private" chattelhood to a color-blind code of reenslavement that has disappeared countless free black people and other socially stigmatized persons into hybrid formations of public/private state-administered bondage.[45] This trajectory offers a mapping of the law's amoeba-like functionality in transposing the discursively open racial language of the Slave Codes and Black Codes into the decidedly more tenacious racist practice of color-blind provisions dealing with crimes of dispossession and basic black existence such as vagrancy, petit larceny, public drunkenness and disorderliness, gambling, and breach of contract (behaviors that often amounted to talking, walking, or breathing in the presence of the wrong white person). It also charts the process by which free black people were converted into commodifiable units of unfree labor and sadistic pleasure through banal courtroom bureaucratic rituals such as the bail or fine/fee hearing.[46] As noted

above, the formations of neoslavery issuing from such legal violence ranged from the putatively regulated, ordinary, and nonpecuniary "involuntary servitude" found on the chain gang and prison plantation to zones of openly privatized penal slavery, such as convict leasing and the county-level consort of that genocidal system known as *criminal-surety*. By focusing mainly on the latter and lesser known of these two mechanisms of the black neoslave trade, I will address the juridical mythmaking and color-blind statutory violence that gave an all-too-powerful and durable afterlife to Chapter 324 of Maryland's 1858–66 slave code, and that offered essential legal cover to the overall postbellum mass seizure, rupture, and terrorizing of free black men, women, and children doubly branded as *Negro* and *criminal*—two monikers of "ontological subordination" that have been as productively inseparable to U.S. empire as *slavery* and *involuntary servitude*.[47]

"Someone to Go My Bail": *US v. Reynolds* and the Ever-Turning Wheel of Neoslavery

The following surreal exchange and bit of early twentiety-century social commentary represents the opening of E. Stagg Whitin's *Penal Servitude* (1912):

> "Will you buy me, Sah?" asked a boy convict in an Alabama convict camp, when approached by the writer. "Won't you buy me out, Sah?" he reiterated to the rejoinder, "I'm not buying niggers." "It'll only cost you $20, Sah, an' I'll work fer you as long as you say. I'se fined $1.00, Sah, and got $75 costs. I'se worked off all but $20. Do buy me out, Sah, please do." The wail was raised by a small boy of fourteen years, with black skin, in a particular camp, yet the appeal is the appeal of many thousands who from want, disease, or evil environment have passed for a time out of our world into the hell on earth which we, in our wisdom, have prepared for them; the appeal recognized the economic status of our penal system.
>
> The status of the convict is that of one in penal servitude—the last surviving vestige of the old slave system.[48]

Whitin's text was a prison reformist work sponsored by the National Committee on Prison Labor, an organization that promoted a conversion of the profit-centered national penitentiary system into a wage-based, regulated,

and uniform system of industrial training and redemptive individual reform. Notwithstanding its prominent placement at the head of the text, Whitin's exchange with the boy "with black skin"—along with a horrifying photo of a group of stripe-clad black men and a young boy shown seated, shackled, and long-chained to a tree at an unidentified chain-gang camp—represent the extent of the book's treatment of the racial dimensions of what the penal reformer describes as "the last vestige of the old slave system." Despite his attempted narrative evacuation from the site of southern neoslavery, however, the writer's brief interaction with the imprisoned adolescent child forces us to halt at the very moment he would have us depart along the main vectors of the text. Whitin's response to the unnamed boy's attempted marketing of his own body in the name of freeing himself from the convict camp—*I'm not buying niggers*—carries enough in the way of loaded meaning to demand that we stay with the young boy, at a place and time that a footnote to the encounter tersely informs us is "Banner Mine, Alabama, May 1911."

Indeed, the dateline alone carries a grim echo of the urgency heard in the unnamed prisoner's entreaty for the northern tourist to "buy" him out of the camp. That is, the "wail" he describes as emitting from a solitary *nigger boy* actually amounted to a chorus of haunting tones, the loudest of which were those still reverberating from the closely buried corpses of 111 of the child's fellow black male prison slaves who were killed in an explosion at the coal mine just days before Whitin's arrival.[49] With the absent presence of this revenant chorus in mind, I am concerned with how the white northern reformer's offhanded brandishing of the quintessential signifier of black subhumanity, fungibility, and zero-degree alterity actually bears critical significance in respect to the declared subject matter of his book insofar as it expresses in stark fashion the degree to which white supremacy—whether *southern-anachronistic* or *northern-progressive*—rested at the foundation of the system of national penal servitude that Whitin was hoping to fashion into a more "evolved" image. Along these lines, a more specific concern in respect to the scene has to do with the very fact that the white penal reformer could have actually purchased (or at least rented) a black neoslave child for $20 at a convict lease camp nearly fifty years after the Annapolis courthouse auctionings of Harriet Purdy, Richard Harris, and the other criminally branded "free" black bodies that I introduced at the beginning of this chapter. Notwithstanding Whitin's attempt at using the exchange as a representative point of departure for his

discussion of industrialized punishment in northern penitentiaries, something very particular was at work in the fact that the unnamed boy knew full well that the convict lease camp in which he and hundreds of other black males were entombed could be converted into a virtual auction block—that as a legally fungible body he could be subleased as easily as he was originally leased, thereby exchanging one form of privatized public neoslavery, the convict lease camp, for another, "criminal-surety."[50]

A variant of a widespread and nebulous state-profiteering apparatus of leasing public slaves to private planters and industrial concerns, the surety system was touted as a "humane" contractual avenue by which criminally branded black subjects could avoid the brutalities of the chain gang and convict lease camp through becoming party to a court-administered prison labor contract. Usually occurring while the black subject was literally sitting in a jail cell or standing before a local judge facing the possibility of being sent to a "hell on earth" such as Banner Mine, it involved a putatively consensual agreement whereby an individual white neoslave buyer, euphemistically described as the "surety," would post the exorbitant fees and costs associated with the black subject's alleged petty crime in exchange for his "confession of judgment." Upon signing a court-approved contract with the white bondholder, the black subject was legally conjured from a would-be public slave into a publicly borne private peon who was forced to supply unfree labor—among various other unspoken and uneconomic forms of terror-ridden travail—to the surety until the amount posted had been "worked off." In Alabama and Georgia, where such arrangements were codified in state law, the state supplied a statutory guarantee that the individual convict-lessee would receive a return on his investment by making the prisoner's breach of contract with the surety a criminal offense. In such cases, the black subject could, at the discretion of the court, either be rearrested and sent to the chain gang or rebound to a private master for an even longer period than stipulated in the original lease.[51]

The frequency of such neoslave contracts was so great in certain southern municipalities that their courthouses became de facto unfree labor agencies for local planters and industrialists. As historian Walter Wilson points out in an article published in *Harper's Monthly* in the early 1930s, the pecuniary gain associated with convict leasing, criminal-surety, and other customary "fee/cost" catalyzed systems of black prisoner trading was not limited to the near-absolute surplus value offered to private concerns; that is, just in the case of convict leasing, the submission of an untold number of

black prisoners to criminal-surety and other racialized bail arrangements designed specifically for misdemeanants was based on a lucrative system of localized *public profiteering* that fed an overarching public/private neoslavery complex: "Aside from prison officials and private business men who profit from convict labor, there is another group of men who profit from convict slaves. Sheriffs, judges, clerks, and others serve as employment agents. . . . Under the notorious fee system law-and-order enforcement, officials are paid commission on the basis of the number of arrests and convictions they secure." After citing the very instance just discussed of the child at Banner Mine having to work off seventy-five dollars in "costs" for a petty offense that demanded only a one-dollar fine, Wilson goes on to describe the lucrative nature of the widespread local trade in black convicts for public officials in both Mississippi and Alabama—including the very county in which the young boy was likely convicted before being disappeared to Banner Mine: "According to leading citizens of Alabama, the sheriff of Jefferson county in 1912 was earning $50,000 to $80,000 a year in fees. A clerkship in the county seat was worth at least $25,000 in fees. Several sheriffs in Mississippi in 1930 earned over $20,000 each. The leading one made $24,350. The average for eighty-two counties was only slightly less than $6,000."[52] Adjusted for inflation, the $50,000 conservative estimate of the Jefferson county sheriff's bounty from the convict trade in 1912 would equal well over $1.1 million in today's dollars; and, even the $6,000 Depression-era average for sheriffs in the respective Mississippi counties cited in Wilson's poll would equate to a yearly neoslave trade commission of approximately $81,300.

This largely ignored public dimension of the overall profiteering on imprisoned southern black bodies throws into stark relief the earlier referenced productive hybridity and virtual indivisibility of public and private formations of terror and incarceration waged against the free black population as a whole since the passage of the Thirteenth Amendment. However, notwithstanding this incestuous interface of public and private interests in the project of black reenslavement, juridical interventions against the overall system of postbellum state-sanctioned "indebted servitude" defined peonage in general, and criminal-surety in particular, through the liberal frames of contract, individual obligation, and private hostility rather than as state-sanctioned neoslavery based on structural white supremacy.[53] In *US v. Reynolds* (1914), the first of the Supreme Court peonage cases dealing specifically with criminal-surety, this partitioning of the public and private was taken to its most absurd extreme given the state's central role as trader,

broker, and neoslave patroller within that system. Indeed, as in the case of the supposed "vindication" of black citizenship found in the Civil Rights Act of 1866, the ostensible avenue of redress proffered in *Reynolds* against a particular form of involuntary servitude ultimately represented a further solidification of the state's sovereign right to reenslave the contaminating black presence within the national body.

The case involved a black man, Ed Rivers, who was arrested in Monroe County, Alabama, in May 1910, and charged with the crime of petty larceny. Just as in the circumstance of the young boy at Banner Mine, Rivers's poverty and dispossession were legally transmuted into the condition of possibility for his penal enslavement through the banal operation of inherently excessive bail. While the fine associated with his alleged petty theft amounted to $15.00, the fees that were levied by the court amounted to $43.75—an utterly unimaginable amount for a landless agrarian subject who most certainly would have never had anything close to that sum of cash on hand at any point in his life. At the inevitable acknowledgment of Rivers's inability to raise nearly $60, the law's swivel prerogative in respect to its handling of the criminalized black body swung into immediate and efficient motion. In order to recuperate Rivers's manufactured debt to society, the state's penal code allowed the court latitude either to transport him directly to the chain gang, thereby gleaning the money through his public neoslave labor, or lease him as a private "servant" (or peon), thereby retrieving the money in the form of the surety's bond payment. In order to avoid the protean forms of death that he knew he would face in at least sixty-eight days on a southern Alabama chain gang, Rivers elected to sign a surety contract with a white man, J. A. Reynolds, who, unlike Whitin, was indeed interested in "buying niggers" when he arrived at the Monroe County courthouse on a spring day in 1910.

Rivers ultimately signed a document with his surety, which read in part:

> I . . . Ed Rivers, agree to work and labor for him, the said J. A. Reynolds on his plantation in Monroe County, Alabama, and under his direction as a farm hand to pay fine and costs for the term of 9 months and 24 days, at the rate of $6.00 per month, together with my board, lodging, and clothing during the said time of hire, said time commencing on the 4th day of May, 1910, and ending on the 28th day of Feby., 1911, provided said work is not dangerous in character.[54]

Rivers would serve only a month's time on Reynolds's plantation before attempting to extricate himself from the court-administered peonage contract. Upon his escape, he was immediately rearrested under the provisions of Alabama criminal code (1907), section 6846, which called for the capture of any subject who "without good and sufficient excuse" failed "to do the act, or perform the service" owed to the surety. The code also allowed for an assessment of more fines and costs, and for the prisoner to be either sent to the chain gang or resold into peonage for an even longer duration. In Rivers's case, he was given a symbolic one-cent fine on top of what was left of the original $15.00, along with another $87.05 in phantom "costs." After the new bond was pronounced, Rivers once again attempted to avoid the chain gang by signing yet another surety contract with G. W. Broughton—a document that, according to the increased amount of fees levied after his first escape, called for Rivers to work as a peon for well over a year. The facts reported in the case culminated with Rivers again escaping his peon master, only to be rearrested once again.[55]

In offering the opinion for the case, Justice Day took pains to prove the rather astonishing thesis that criminal-surety represented a completely private affair between two freely contracting individuals, a portrayal that neglected to hold culpable the central state actors—the police, the court, and the general racist legal structure—without whom the surety "contract" would never have occurred in the first place. In spite of the state's central role in every step of the process, the court claimed that the moment Rivers's bond was paid and he walked out of the courthouse with Reynolds, he immediately ceased to be a prisoner and became party to a consensual contract between a *worker* and an *employer,* thereby making his labor under the threat of arrest for breach of contract a species of private involuntary servitude based on debt, or peonage:

> When thus at labor, *the convict is working under a contract* which he has made with his surety. He is to work until the amount which the surety has paid him—the sum of the fine and costs—is paid. The surety has paid the State and the service rendered is to reimburse him. This is the real substance of the transaction. The terms of the contract are agreed upon by the contracting parties, as the result of their own negotiations . . . in regard to which the State has not been consulted. (146)

The circumscription of the state-borne system of criminal-surety within the narrow parameters of "free" labor negotiation and exploitation was taken even further in John W. Davis's brief for the United States: "The terms, time, and character of service are matters of *purely private contract* between two parties, with which the state has no concern, notwithstanding the requirement of approval by the judge; and until the convict has in some way broken his agreement the State has *washed its hands of the whole transaction.*"[56]

In the clearest possible rendering of the law's absurd application of the liberal discourse of contractual "free will" to zones of racial apartheid, collective dispossession, and state domination, the court turned a blind eye to the actual circumstances of terror and physical jeopardy faced by the supposedly willful agent whom it unconsciously refers to as "the convict."[57] Moreover, in doing so, it also neglected to recognize the state's pecuniary interest in the postbellum reproduction of black alienability—how far from being disinterested referees of the surety arrangement, local municipalities, courts, police, lawyers, and clerks were actually awash in the money and power generated at every stage of this particular vector of the overall trade in criminalized southern black bodies.[58] Such considerations allow us to recognize that in submitting to work as Reynolds's peon, Rivers was not "agreeing" to a contract but hoping to avoid the zero-degree terror, natal alienation, and abjection that certainly awaited him on the chain gang. In this regard, his supposed freely negotiated "consent" to the surety arrangement actually amounted to a Hobson's choice—a sagacious blues reckoning with the gradient nature of civil, living, and premature death in carceral America. In other words, no one in a community ravaged by the genocidal operations of the chain gang and the system of convict leasing would ever choose *not* to avoid being coffled on a southern chain gang or at Banner coal mine even for a day, and even when such "choice" involved being transmuted into an object of liquid merchandise and submission to yet another horrifying species of neoslavery in the form of state-administered peonage.

Furthermore, any notion of a strictly private aspect to the surety arrangement is exploded by the fact that no white man would ever have agreed to supply the fees and costs associated with a black person's alleged petty crime were it not for the coercive threat of rearrest issued by the state, a fact that the court actually admits even as it attempts to reduce the surety system to a purely private affair: "This labor is performed under the constant

threat of coercion and threat of another possible arrest and prosecution in case he violates the labor contract which he has made with the surety, and this form of coercion is as potent as it would have been had the law provided for the seizure and compulsory service of the convict" (146). As stated above, the spectrum of coercion under the "humane" systems of criminal-surety and peonage extended far beyond the threat of rearrest, however; in the thousands of complaints registered at the Department of Justice by black peonage prisoners, the range of violent repression includes but is not limited to rape, whipping, kidnapping, and mass murder.[59]

Day's construction of criminal-surety as a matter of exceptional private labor exploitation rather than a matter of banal public/private neoslavery culminates with his claim that the court-administered peonage contract actually submitted Rivers to a more painful brand of involuntary servitude than he would have faced on a chain gang—that is, the very space of abjection that he and countless other black people tried so desperately to avoid in electing to being sold in open court as peons. For the court, the fact that, under the terms of the original contract, Rivers faced a theoretically greater duration of labor at the hands of Reynolds than he would have while chained to other black men as an officially recognized slave of the state qualified the system of surety as decidedly worse than its public counterpart: "Under the Alabama Code, he might have been sentenced to hard labor for the county . . . for 68 days as his maximum sentence. . . . Under the contract now before us, he was required to labor for nine months and twenty-four days, thus being required to perform a much more onerous service than if he had been sentenced under the statute, and committed to hard labor." The court goes on to contend that the statutory allowance of the peon's rearrest and the ever-increasing debt owed to the surety for furnishing his bond further illustrate the relative heinous quality of this system of peonage in comparison to official involuntary servitude: "Under this statute, the surety may cause the arrest of the convict for violation of his labor contract. He may be sentenced again and punished for this new offense, and . . . the convict is thus *chained to an ever-turning wheel of servitude*" (146–47). Of course, given the court's strained attempt at describing Rivers's role in the surety arrangement as that of a willfully contracting free laborer, the question that immediately arises is why—given that he would have known infinitely more about the intricacies of the southern "wheel of servitude" than the honorable judge could ever imagine—would Rivers willfully assent to the surety arrangement if it were so much more arduous

than the experience of official "hard labor"? In his concurring opinion, Oliver Wendell Holmes attempted to explain this contradiction within the court's deployment of the discourse of contractual free will by calling upon the time-honored racist mythos of black improvidence, ignorance, and irresponsibility: "There seems to me nothing in the Thirteenth Amendment or the Revised [peonage] Statutes that prevents a State from making breach of contract . . . a crime and punishing it as such. But impulsive people with little intelligence or foresight may be expected to lay hold of anything that affords a relief from present pain even though it will cause greater trouble by and by" (150).

Far from an aberrant moment of racial rhetoric within an otherwise progressive decision, Holmes's openly white supremacist comment actually represents a boldface expression of the liberal myopia and productive racial amnesia exhibited in the majority opinion itself, which remarkably attempts to use the facile and economically deterministic index of relative labor-time to isolate criminal surety as exceptionally onerous while normalizing two of the most brutal regimes of official punishment in U.S. history—the county chain gang and the state convict lease camp. The specter of these two public/private penal formations hovers over the entire decision, belying the apparent empirical certainty of Day's portrayal of criminal-surety as more arduous than its nominally public counterparts and unveiling a foundational element of state terror lying at the core of his performance of liberal legal progressivism. Indeed, the haunting presence of these dominative and profit-centered systems of public carceral terror is alluded to in documents pertaining to the case that the court neglects to include in its statement of "the facts." In correspondence with the U.S. attorney general in preparation of *Reynolds* as a test case of the constitutionality of criminal-surety, the U.S. attorney for the Southern District of Alabama, William H. Armbrecht, reveals a scene that is conveniently left out of the court's neat computations of the relatively humane, ordered, and temporally definite qualities of public involuntary servitude: "It does not appear in the indictment, but it is true that Rivers was sent to hard labor for the County for more than a year. In order to bring him before the Grand Jury I had to get an order from the Court directing that he be brought here. *He was brought here in chains with shackles riveted to his legs.* After he gave testimony to the Grand Jury, the Marshall took him back to the turpentine camp where he was performing hard labor for the County."[60]

It is not clear on which day of his "over a year" sentence Rivers was led from a county chain-gang camp situated deep in the woods of southern Alabama to the grand jury hearing in shackles and chains. His objectification and muzzling within the ritualized legal storytelling arena of the court opinion also disallows any discernible portal into the quotidian regiment of threatened death, chattelized internment, and unspeakable pain that he experienced with every passing minute as he was driven under a "red-heifer," a black-jack, or a rifle to the forest, coffled to other black men (and boys), and made to drive "cups" and "gutters" into trees to "catch resin that oozed from wounds opened by axe cuts through the bark."[61] We also are not given details as to exactly how much money was procured by those profit- and pleasure-seeking white men involved in every facet of the putatively public turpentine concern. Was the camp operated by the county itself or a private corporation that had successfully bid to lease the bodies of Rivers and his fellow neoslaves for "$11 a head"? How many of the camp prisoners were subjected to the turpentining coffle well after their official release date because of an escape attempt or because both their date and body had been obliterated from retrievable memory through the sorcery of racial state documentation? How many black captives were buried in unmarked graves in the middle of the woods after dying from "natural causes" at the age of twenty, or being "struck by lightning" on a bright sunny day? Did these burial mounds include the dishonored and dis(re)membered bodies of black women and girls interned at the camp just over a decade previously when women were still *mixed into the men* at such spaces of white supremacist misogynist horror? How many children of these women, born into this hell on earth as a result of their mothers having been raped by camp guards, were among the unremembered dead? Did the guards regularly cure fits of boredom on rare off-days by ordering prisoners to "strike it up lively" with a fiddle or dance the "buck and wing"?[62] What is clear from my earlier discussion of the terroristic operation of the chain gang, however, is that no matter whether he was shuttled to the courthouse on day one or day one hundred of his sentence, the terror and abjection that Rivers faced, as well as countless other black subjects who were literally chained to the "ever-turning wheel" of U.S. neoslavery, overflows the court's cynical reduction of the "onerous" qualities of imprisonment to the duration of involuntary labor supplied to the convict-slave master or even the amount of surplus value extracted from the entombed black body.

The example of juridical mythmaking offered in *Reynolds* bears a stark resemblance to the "progressive dehumanization" found in Kasson's and Sumner's earlier legislative call for the suspension of the courthouse auction block and the use of "normal" involuntary servitude as a more proper means of dealing with the problem of free incorrigible blackness. However, the mode of legal liberalism proffered in *Reynolds* represents an even more chilling exposition of the violent capacities of the law, since in offering a nominal check on a hyperpublic version of the supposedly hermetic system of peonage, the court did not even pretend to question the validity of the state's generalized leasing of black bodies; nor would it deign to acknowledge the publicly aired genocidal effects that the legal transposition of free black people into "duly convicted" commodified objects was producing at the very moment the decision was crafted. Like the peonage cases as a whole, *Reynolds* would offer only tepid reproof of what it constructed as an aberrant and improperly executed "private" branch of the general public/private trade in black convicts. The court's seeming blindness to the real effects of public neoslavery actually represented an interested liberal amnesia, a juridical accommodation and reproduction of the hugely profitable and socially edifying disappearance, sale, leasing, and subleasing of black people to places like the county turpentine camp and the chattelized industrial operations posing as "state penitentiaries" operated by companies such as U.S. Steel, Tennessee Coal and Iron (TCI), and Pratt Consolidated Coal Company. Again, according to the abhorrent color-blind racial logic of the court, Rivers's experience of being "chained" to the "wheel of servitude" would have been alleviated were he only to have been immediately disappeared to the purportedly more humane, regularized, and predictable living death he ended up enduring on the chain gang.

Far from challenging the fungible, disposable, and enslavable nature of emancipated blackness, *Reynolds* actually offered a backdoor affirmation of the genocidal state-administered trade in black bodies that began immediately after emancipation, the most obvious formation of which was convict leasing (a privatized system that was nothing if not a state-level version of the localized rental of black prisoners found in criminal-surety). This elephant in the white supremacist courtroom is openly acknowledged in Davis's brief for the United States: "We concede . . . that when a sentence to hard labor has been imposed it is entirely competent for the State either to employ the convict for itself or to hire him out for its profit. His time

and labor have been confiscated by the State and, within Constitutional limits, *it may use them as it sees fit.*"[63]

As I noted above in my discussion of the euphemistic violence of the term "involuntary servitude," post-1865 law presented virtually no limit to the pain, terror, and physical/psychic rupture the racial state could visit upon the "duly" convicted "Negro." This dubiously constitutional fact is underlined at the very end of *Reynolds* with the truncated yet horrifyingly fatal appearance of the exception clause: "There can be no doubt that the State has the authority to impose involuntary servitude as a *punishment for a crime*. This fact is recognized in the Thirteenth Amendment." Indeed this unimpeachable sovereign right to reenslave the criminally and racially stigmatized body is actually repeated in every state and federal case dealing with peonage from *Clyatt v. United States* (1904) onward. The gothic reemergence of the penal exception in *Reynolds*, a decision that was to have offered the free black population a modicum of redress against what had been cast as a migration of various archaic forms of involuntary servitude and slavery into the twentieth century, underlines the national, structural, and public character of the apparently exceptional, episodic, and private brands of white supremacy found in the specific statutory practice of criminal-surety and the wider system of "southern" neoslavery. In fact, the backdoor allowance of public neoslavery in *Reynolds* through the court's matter-of-fact wielding of the exception clause has been replicated in U.S. common law up to our current moment of mass incarceration, since nearly every case in which a prisoner has attempted to lay claim to the emancipation amendment's supposed protections against slavery and involuntary servitude has been quashed, with the state repeatedly maintaining that the "Thirteenth Amendment has no application to a situation where a person is held to answer for violations of a penal statute."[64]

Read in this light, this relatively obscure case begins to take on a rather ominous gravity, connecting it to more commonly recognized moments of legal white supremacy such as *Plessy v. Ferguson* (1896), the *Civil Rights Cases* (1883), and *Dred Scott v. Sanford* (1857). Unlike these more well-known cases from the mid- to late nineteenth century, however, *Reynolds* and other decisions pertaining to peonage appearing in the early twentieth century represent something of a hidden but tenaciously present danger—especially when considered with respect to the current manifestation of America's centuries-old complex of industrialized chattel carcerality. Insofar as they offered apparent relief from one form of private servitude while

simultaneously reaffirming the divine right of the law to treat the criminalized black body *as it sees fit*, such cases represent the ways in which color-blind liberal legality continues to function as an all-too-durable sanctuary for various modalities of racial capitalist patriarchal domination. They also signal how the genocidal practices of U.S. empire remain cloaked under the placebo-like discourses of liberal reform, rights recognition, and color-blind inclusion. Like the emancipation amendment itself, the progressive "protection" offered in *Reynolds* amounted to a liberal legal reproduction and entrenchment of the state's necropolitical right to publicly reenslave the black population and to make the penal enslavement of all bodies stigmatized as "criminal" a matter of public investment to the end of private profits (and sadistic pleasures) that both corporate interests and putatively disinterested purveyors of the law continue to enjoy.