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DIO

Belated Decline of Slavery & Other Tortures

Civilization Grows Less Uncivilized

by

George Burns

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Publisher's Note:

George E. Burns (1946-) is an attorney who is also a dedicated antiquarian bibliophile. He graduated from Johns Hopkins University and is retired after decades of handling appeals for the Baltimore City Office of the Public Defender. Most of the antique volumes cited within reside in his own knowledgeably accumulated personal library.

Despite political differences, George shares with *DIO*'s publisher a particular disgust at torture — and at slavery's lifesentence-torture. In the context of 5000 years of human history, featuring the birth of "Democracy" 2500 years ago, when slavery was so taken for granted that ***not a single extant ancient religion or gov't even thought to proscribe it***,[1] we are deeply appalled at the implications — for the measure of humanity — of how ***recently*** (*after well over 9/10 of man's history*) the official abolition occurred, at-last, of:
[1] *gov't-condoned* torture &
[2] ***LEGAL OWNERSHIP*** of human beings.
And we are further jointly dismayed at the seeming immortality of local and international poverty, which preserves to this day degrading remnants[2] of both of those mass-agony sins.

Did ancient&medieval seafaring nations fear attack-vulnerability[3] absent enough galley slaves to power-row their quinquereme-battleships in critical[4] war-showdowns? When sail&steam and ***cannon*** finally obsolesced quinqueremes, and other machines appeared, which performed parallel slave-replacing tasks, is ***that*** when governments became "morally repulsed" by slavery? Does general ordinariness of slavery throughout prior millennia argue that man can get used to any brutality when survival is at stake?

[1] Some list Marcus Aurelius & ex-slave Epictetus as opponents, but neither sought to more than soften slavery — not to abolish it. Indeed, Marcus backed a runaway-slave-apprehension law.

[2] What fraction of ostensibly free folk today actually feel semi-slavishly-unfree? Captives to bosses, mortgages, alimony, taxes, wheelspinning ambition, in-laws, etc. An immortal cartoon from over a 1/2-century ago hints at a majority. It featured a chained galley-slave boasting to the slave next to him:

Hey I'm just in this to make a quick buck & then get out — how about yourself?

[3] Are there current parallel potentially-destabilizing vulnerability-panics from mutual perceptions of insufficient weaponry? Whether nukes or whatever. Risking that *Dr.Strangelove* can't happen. Though it's already happened — via military virus — starting in late 2020. At the cost of millions of lives & trillions in damaged economies.

[4] In classical antiquity, it's thought most quinquereme rowers weren't slaves. In any case, for crucial mega-battles deciding who ran empires, slaves were heavily resorted-to in mutual desperation.

‡1 Torture & the Law

Torturing Suspects

Standard Wartime Resort
The Perpetual Temptation

by

George E. Burns

A Legal History of Torture

A1 Torture, one of humankind's darker activities, has been in the news in recent years. It is a subject that arises whenever there seems to be a pressing need for an easy way to punish or obtain information from enemies. Fantasists revel in imagining a ticking clock marking the minutes before a catastrophe, while an enemy with vital inforation is fortuitously in custody and only torture will force him to reveal his secret. Overlooked is the torture victim's defense: lying. The less time before the impending disaster, the more effective lying is in misleading interrogators until it is too late.

A2 Should there be any need to discuss the use of torture in the 21st century? Put another way, the question is: what is the law regarding government agents using torture? In the United States, 18 U.S.C., §2340 defines and punishes torture used under the color of law. It punishes anyone who, under the color of law, inflicts "severe mental pain or suffering." It specifically provides that states may enact their own laws punishing the use of torture.

A3 The statute is not an innovation: it is the result of a long history. It must be remembered that torture can be used as a means of interrogation or as a method of punishment. Most of the historical debate has focused on torture as a way of obtaining information: either eliciting a confession or naming accomplices.

A4 In the Western World, there are 2 very different traditions: European and English. Early modern European governments considered torture an integral part of the justice system. "In principle, it was a general rule that everybody could be subjected to torture, unless expressly exempted by law."[1] Exemptions usually included nobles, the very young, the very sick, and pregnant women. Torture was always considered a last resort to be used when there was a reasonable suspicion but not sufficient evidence to establish guilt. At a time when satisfactory proof might require the testimony of 2 eyewitnesses or a voluntary confession (a confession under torture could only be used if it were "voluntarily" repeated in court), torture was the means by which a suspect (guilty or innocent) became a convicted felon.[2]

[1] Prof. Friedrich Merzbacher, "Torture" at p.177 in John Fosberry (trans.) *Criminal Justice Through the Ages* (Rothenberg 1981).

[2] John H. Langbein *Torture and the Law of Proof* pp.12-16 (Chicago 1981).

B Mercy Blinks Awake

B1 By the beginning of the 18th century, there was an escalating attack on the use of torture in interrogating suspects. The shortcomings of torture were well known. Victims were tortured because the authorities were unsure of guilt. But: ***there was no correlation between guilt-vs-innocence and resistance to pain***. Victims of torture "sometimes falsely incriminate not only themselves but others as well. . . . [In the end] the judge cannot be any more certain . . . after someone confesses to a crime under torture than before, since those who can endure pain lie and those who cannot also lie."[3]

B2 The law of proof was becoming more flexible, allowing, e.g., circumstantial evidence to provide proof for conviction thus lessening the "need" for torture.[4] There was also the power of example. Frederick the Great was something of an international desperado and is best remembered as a soldier. But he also had a pacific side and enjoyed philosophy, literature, and was a patron of serious music.[5] As a result he sometimes experienced liberal uplift: "I read the *Meditations* of Marcus Aurelius Antoninus [121-180 AD; Roman co-emperor 161-169 AD; emperor 169-180 AD] which teach me that I came into the world to pardon offenders, and not to abuse my power to their destruction."[6] Frederick restricted the use of torture when he came to the throne in 1740 and abolished it in 1754. Abolition of the use of torture by despotic, militaristic Prussia provided a potent example and inspiration — and made it clear that torture was a declining instrument of justices in 18th century Europe.

B3 William Blackstone admitted there were instances of torture in England where in the Tower of London "it was occasionally used as an engine of state, not of law, more than once in the reign of Elizabeth."[7] His colleague on the King's Bench, Michael Foster, agreed that although it had been used from time to time, it was illegal under the law of England.[8]

B4 Blackstone had more difficulty dealing with the quaint custom of putting an accused who stood mute (refused to plead) on a diet of bread&water while gradually increasing the weights applied to his chest (pressing). Blackstone first maintained that the procedure was unlike torture applied to gain a confession, because pressing was part of the actual trial. His second line of thought was that pressing was a 13th century innovation that had not existed at early common law and should be abolished.[9] Parliament complied in 1772 and made standing mute the equivalent of pleading guilty. Today, the problem is solved by entering a plea of not guilty on behalf of the accused.

C Illegal Torture

C1 Over a 1/2-century later, David Jardine considered the use of torture in English legal history. He notes, as had Blackstone and Foster, that as early as 1628 the judges had been of the opinion that torture was not allowed by the law of England.[10] Similarly, according to Lord Coke "there is no law to warrant tortures in this Land . . . ."[11] Nevertheless, Jardine was able to find evidence of "writs of torture" having been used in the late 16th & 17th centuries in the records of the Privy Council. Jardine explained this dichotomy by concluding that

[3] Martin Bernhard *Introductory Juridical Dissertion on the Prescription of Torture from Christian Court Procedures* pp.22-24 (Halle 1705) [transl. courtesy Dr. Edward Strictland].

[4] Langbein *op cit* pp.54-60.

[5] Frederick II (1712-1786) King of Prussia was a capable flautist and sometime composer & librettist, assisted by Carl Philipp Emanuel Bach and his own court musician, Johann Joachim Quantz.

[6] Thomas Holcroft *Posthumous Works of Frederic II of Prussia* vol.12 p.34 (London 1789).

[7] William Blackstone *Commentaries* vol.4 p.326 (15th ed. London 1809).
[A fatal case of Elizabethan gov't torture is dramatized at *DIO 26* (www.dioi.org/jq00.pdf) §D4.]

[8] Michael Foster *Crown Cases* p.244 (London 1762).

[9] Blackstone *op cit* pp.327-329.

[10] David Jardine *A Reading on the Use of Torture in the Criminal Law of England* p.12 (1837).

[11] Edward Coke *Pleas of the Crown* p.35 (6th ed. London 1680).

torture was used only in cases involving "grave accusations" and at the "discretion of the King and the Privy Council, and uncontrolled by any law besides the prerogative of the Sovereign[12]

C2 The King's Prerogative was not so broad and in the case of criminal law it was quite narrow. The king could pardon offenders and he might suspend a law "hurtful to the Publick" or he could "dispense with a Penal Statute" in which his subjects had no "Interest." He could not "by Proclamation introduce a new law," and he must do nothing "injurious to his Subjects; . . ."[13] In effect, the king's special power in criminal law was limited to protecting his subjects from harsh laws and the unfair application of laws.

C3 John Langbein re-examined the issue and was able to extend Jardine's list of writs of torture to 81 cases ranging from 1540 to 1640. He rejected Jardine's prerogative thesis, noting that there was no contemporary evidence that the King's Prerogative included the right to torture his subjects.[14] Instead, Langbein proffered a variation of prerogative as a basis for the king's power to authorize sovereign immunity for a torturer. Sovereign immunity is a defense to tort claims and the case Langbein relied on to make his point concerns a subject (later evidence suggests he was innocent) whose torture resulted in his disability. The torturers were immune from a civil suit for damages.[15] However, if torture were legal, the guilt of innocence of the subject would be irrelevant as long as the correct legal formalities were followed. The case is no different from that of a police officer who, with probable cause, arrests a suspect who is in fact innocent. The officer has violated neither the criminal law, nor the law of torts.

C4 That sovereign immunity has no application to the criminal law is demonstrated by the established common law species of murder known as duress of imprisonment. Thus a jailer, whose "ill usage" of a prisoner caused that prisoner's death, was guilty of murder.[16] William Bird was a jailor who confined Phillis Wells, together with about 20 other prisoners, to a small room for 80 hours. Wells died during her confinement, and Bird was convicted of murder and sentenced to death.[17]

C5 It is not a coincidence that almost all of the cases found by Langbein occurred during the reign of the Tudors (53 were in the time of Elizabeth). Of Elizabeth and the other best-remembered Tudor, Henry VIII, it has been said, they were "dominated by cold and ruthless egotism, whose careers were studded with acts of atrocious cruelty and false dealing, and who were never more than stonily indifferent to the well-being of the people they ruled."[18]

C6 Bad governments and bad monarchs do bad things. Blackstone and Foster were right: torture was used sporadically in England, but it was never legally used. This conclusion is buttressed by the Scottish experience with torture. Sir George Mackenzie wrote that because torture is unreliable as an instrument of justice, "Torture is seldom used with us; . . ."[19] King James II of England (simultaneously King James VII of Scotland) was deposed in 1689 in the Glorious Revolution; among the many wrongful acts he was accused of by the Scots was "That the using of torture without evidence, or in ordinary Crymes is contrary to law."[20] The clear implication is that the use of torture was legal in Scotland

[12] Jardine *op cit* p.13.

[13] Giles Jacob *A New Law Dictionary* entry "King" (London 1729).

[14] Langbein *op cit* pp.129-131.

[15] *Ibid* pp.130-131.

[16] Strange vol.2 p.884 (1730).

[17] Old Bailey Proceedings Online (www.oldbaileyonline.org [2011/6/2]) 1742 trial of William Bird (t17421013-19).

[18] G.J.Meyer *The Tudors* xxiii-xxiv (New York 2010).
[An alternate view by Joel Levy is found at www.dioi.org/ji00.pdf p.70.]

[19] George Mackenzie *The Laws and Customs of Scotland in Matters Criminal* p.272 (2nd ed. Edinburgh 1699).

[20] *An Abridgement of the Acts of the Parliaments of Scotland* p.338 (Edinburgh 1841).

if there was some evidence incriminating the person to be tortured and the crime being investigated was not an ordinary crime. As a practical matter, this means that the crime was some form of treason. The Scottish Parliament disappeared in 1707, when Scotland was united with England. A year later the British Parliament abolished the use of torture in Scotland beginning on 1709 July 1, "no person accused of any capital offense of other crime in Scotland shall be or be subject or liable to any torture."[21]

C7 It would have looked unreasonable for the British Parliment to have abolished torture in one part of the kingdom while retaining it in England; but, then, the use of torture was legal in Scotland and had to abolished, whereas it was already illegal in England so no new prohibition was needed. Thus, at the time of United States independence, torture as a means of interrogation was disappearing in Europe and was illegal in Britain. Because US jurisdictions adopted the common law, torture as a method of coercing recalcitrants has never been lawful in the United Sates.

D Official Torture Becomes Embarrassing

D1 Torture in the form of particularly horrific punishments for "grave" crimes continued to flourish throughout the Western world during the 18th century. Petty treason, when "a Servant kills his Master, or a wife kills her husband, as when a secular or religious man shall kill his Prelate,"[22] was one of these grave offenses. An especially grim case occurred in Massachusetts in 1755 where "Mark and Phillis" 2 slaves of Capt. John Codman were convicted of petty treason for having poisoned Codman. Mark was hanged and Phillis was "burned at a Stake about Ten Yards distant from the Gallows." In addition, Mark's body was "hanged in chains" in "Charlestown Common."[23] The case's notoriety increased with time because Mark's remains were on display "until a short time before the Revolution" and on the route of Paul Revere's famous ride in 1775.[24]

D2 The United States' innovation came with the adoption of the Eighth Amendment in the late 18th century.

D3 The most important historical fact is the use of torture has never been lawful in the United States. Even without the federal torture statute, an offficial using torture in this country would be guilty of, at least, assault. Why then does the debate about torture continue? The problem is that even the clearest laws will be ineffective, if they are not enforced. It is easy to condemn and punish torturers among our enemies; but when United States officials engage in torture there is always the seductive argument that they do it for a higher purpose and to protect us. It is an argument that should and must be rejected. Torture will end only when officials who practice it, for any reason, are consistently prosecuted and punished. Moreover, if even harsh, despotic Prussia could set an enlightened and ultimately beneficent example for Europe in the 18th century, it does not seem too much to expect the 21st century's most powerful democracy to set an example for the world in ending the outrage of torture.

[21] *The Scots Statutes Revised* vol.1 p.38 (Rptr. Memphis 2010).

[22] Walter Young *An Epitome of Mr.Stamford's Pleas of the Crown* p.65 (London 1663).

[23] Abner Cheney Goodell, Jr. *The Trial and Execution for Petty Treason of Mark and Phillis* p.29 (Cambridge 1883).

[24] *Ibid* p.30.

‡2 Slavery & the Law

Five Millennia Human History's 1st Execution of a Slave Owner for Murdering His Slave

1811

WHAT TOOK SO LONG?

by

George E. Burns

A A Shamefully-Delayed Milestone

A1 On 1811 May 8, on the island of Tortola in the British Virgin Islands, convicted murderer Arthur Hodge was "launched into eternity."[1] Hodge's execution by hanging was for killing a slave, and he was deemed — in the thousands of years slavery has disgraced civilization — "***the first white man ever to be executed for such a crime***."[2]

A2 It is possible that there are earlier undocumented cases of whites being executed for killing slaves. For example, in defending the slave trade, Admiral George Rodney testified before a Parlimentary Committee in 1790 to vaguely recalling such an incident during his service in the West Indies.

> He was at the trial of a white man (about 1772 or 1773) for wantonly murdering a slave. The court condemned the man, and he believes he was executed. He spoke to the governor that he hoped he would not pardon him. The man he believes was not the owner of the slave.[3]

[1] *The Trial of Arthur Hodge* p.186 (1812).

[2] P.Varlack & N.Harrigan, *The Virgins: A Descriptive and Historical Profile* p.29 (1977). Emphasis added.

[3] *Abridgement of the . . . Evidence . . . [on the] Slave-Trade* p.193 (1790).

Similarly, Sir Ashton Bryan, Attorney-General for Grenada, testified that "in 1775 or 1776, a white man was executed for murder of a slave, either his, or in his service."[4]

A3 Whatever the accuracy of these recollections, it is certain that Hodge was not the first person tried for killing a slave. In 1792, in London, Captain John Kimber was tried for the wilful murder of an African girl while he was on the high seas as captain of the ship *Recovery*. Thomas Dowling testified that he had been the surgeon on the *Recovery* the previous Spring when the ship had taken on a cargo of slaves off the coast of Africa. Among the Africans taken on board was a 14 or 15 year-old girl, who "was affected with gonorrhea or clap and lethargy or drowsy complaint."

A4 According to Dowling, the girl did not "eat as hearty as the rest of the slaves did" and Captain Kimber flogged her with a 5-foot long whip. About 3 weeks after sailing, the girl did not join the "exercise of dancing" and Kimber flogged her with the "greatest severity." He then had her repeatedly suspended by arms or legs while he flogged her. The punishment lasted for about a half-hour. After the girl was released, she "walked down to the ladder, walked down two or three steps, and slided down the rest, unable to walk." The next day, the girl was "convulsed" and, although Dowling treated her, she did not recover and died 4 days later. In Dowling's opinion, the girl's pre-existing medical problems were "stationary" and "the convulsions were occasioned by the flogging, and . . . her death was occasion[ed] by convulsions."

A5 Dowling had told a horrifying story, but was it true? Dowling did not fare well during cross-examination — he admitted that he had neither reported the incident when the ship arrived in Grenada nor immediately when the ship arrived in England. There was no reference to the incident in the log Dowling had kept as required by law. He also admitted having quarrelled with and struck Kimber at the outset of the voyage. As a result, Dowling had been placed in irons for 24 hours, but he denied having told various people that he would be "revenged of Captain Kimber." Stephen Devereux told an equally terrible, although somewhat different, tale. Devereux had joined the *Recovery* off the coast of Africa, having sailed from England aboard the *Wasp*. Devereux remembered that the girl "had a bent knee; the Captain clapped his hand on her knee, and endeavored to straighten it; and flogged her." Devereux had seen the "suspensions" and said that "the boy was ordered to pull her leg to make it straight . . . ." He said he had been dismissed from the *Wasp* for "giving the Captain the lie" but he denied having been tried for mutiny.

A6 Walter Jacks, a part owner of the *Recovery*, said that when he had paid Dowling his wages, Dowling had said "Captain Kimber was a rascal and a cheat, and that he would ruin him if it was in his power . . . ." Thomas Laugher recalled that Dowling had told him that Kimber had "behaved very ill to him, for which he was determined to be revenged."

A7 William Riddler, surgeon on the *Wasp*, swore that Dowling had said he would ruin Kimber and that Devereux had been dismissed from the *Wasp* for "mutiny and misconduct." Thomas Lancaster, also from the *Wasp*, confirmed that Devereux was mutinous and was "deemed an improper person to remain in the ship, even in irons." The trial ended abruptly.

> Devereux: It is as false as God is true.
> *Foreman of the jury*: We are all satified.
> *Court*: If you are satisfied, Gentlemen, I shall not sum up the evidence.
> *Jury*: We are perfectly satisfied, my Lord.
>
> ACQUITTED

Kimber was released, while Dowling and Devereux were committed for trial for perjury.[5]

A8 The Kimber trial at least demonstrates that the authorities in London were prepared to prosecute for the murder of a slave. It is impossible 2 centuries later to determine what actually happened on the *Recovery*, but given the quality of the prosecution witnesses, the jury's verdict seems both correct and inevitable.

[4] *Ibid* p.43.

[5] *The Lawyer's and Magistrate's Magazine 391-407 (1792).*

A9 The colonial structure of society in the West Indies was similar on all of the European controlled islands. The original inhabitants had been wiped out and large numbers of African slaves imported.[6] Small white populations ruled the islands, but their oppression was punctuated by bloody rebellions. The most notable rebellion was in Haiti and dragged on from 1791 until 1804, when the oppressor-whites simply fled for-good the gruesome war (§A10) their own cruelty had initiated.

A10 Although France was the primary European power involved in Haiti, Britain had intervened for a time. A young officer with the British Army tried to explain the shocking cruelties [text's spelling uncorrected here]:

> As revenge is the ruling Passion of Negro, and as I am much Affraid cause sufficent existed from the inhumanity of some Whites to their Slaves, the whole island was immediately filled with Murder and Atrocites of every kind.[7]

Notwithstanding his recognition that justice and mercy were scarce commodities in the West Indies, Lieutenant Howard optimistically believed that a "Master had no power over the Life of his Slave, and was he condemned for the Death of one would be hanged, the same as if he had killed a White Man."[8] Thus, on the islands of the West Indies, there were populations divided between an angry oppressed majority and a nervous ruling minority.

B The Fugitive

B1 Tortola was distinguished only by its obscurity. A 1772 reference work described the "Caribbee Islands" as "thirty in number" and listed the 22 "chief" islands, including 3 which were uninhabited; tiny Tortola did not even make the list.[9]

B2 Arthur Hodge arrived on Tortola in the 1790s. A 1798 estate map shows the Hodge estate extending inland from a small bay and nearly abutting the estate of Isaac Pickering where in 1790 there was an insurrection "triggered by a rumour that the Imperial Government had ordered the abolition of slavery and that the planters would not grant it."[10]

B3 On 1811 March 4, a free black woman named Perreen Georges gave a depostion charging that, 3 or 4 years earlier, Hodge had caused the death of slaves by having them repeatedly flogged and providing no medical treatment for their injuries. She also swore that Hodge had ordered kettles of boiling water be poured down the throats of slaves who offended him. This treatment had been inflicted on the cook (who subsequently died) and a washer because Hodge "said they were going to poison Mrs.Hodge and the children." Another deponent swore that he had "probable cause to suspect" that Hodge was responsible for the murder of several slaves. This man posted a bond of £1000 as a guarantee that he would appear to prosecute the case. An arrest warrant was issued for Hodge.

B4 On 1811 March 10, Stephen M'Keough gave a deposition describing Hodge's mistreatment of slaves. One of the victims was a small mulatto child reputed to be Hodge's natural child. According to M'Keough, the Hodge estate's number of slaves was so reduced by Hodge's cruelties: *there were not enough slaves to dig a grave for Hodge's wife, Ann.*

B5 Two days later, a proclamation was issued stating that it was suspected that the by-then-fugitive Hodge was being harbored by friends and that a reward was being offered for his apprehension. Hodge was taken into custody shortly thereafter.

[6] [*DIO* question *en passant*: Why did slavers go to the trouble of importing blacks instead of enslaving the already-conveniently-at-hand original natives, whom they mass-murdered instead?]

[7] *The Haitian Journal of Lieutenant Howard, York Hussars, 1796-1798, p.78 (1985).*

[8] *Ibid* p.108.

[9] R.Brookes & J.Collyer *A Dictionary of the World* (1772). The total population of the British Virgin Islands in 1805 was 10,520. (Varlack&Harrigan *op cit* p.64.)

[10] Varlack&Harrigan *op cit* pp.26-27.

C The Trial

C1 Richard Hetherington, the President of the British Virgin Islands and President of the Court, charged the Grand Jury. Hetherington clearly wanted action.

> The Government of the Virgin-Islands has too long, Gentlemen, been considered, not only weak, but perhaps pusillanimously [[*sic*]] by offenders; it has too long been believed so, and it is high time that the energy of the laws should be used to prove the contrary.

The Grand Jury returned an indictment against Hodge, charging that he had murdered a slave named, ironically, Prosper.[11]

C2 The 1st question addressed by the court when the case came to trial was to what extent Hodge was to be allowed legal representation. Although in England the rôle of counsel in felony trials was limited and counsel could not argue to the jury, the Chief Justice of the Virgin Islands said that "he should be sorry to sit where a prisoner was debarred counsel in the fullest extent." Hodge was granted full representation by his 3 counsellors. He was also awarded a 4 day postponement so that his counsel could read, but not copy, the depositions obtained by the Crown prosecutors.[12]

C3 Jury selection was the 1st task. The defense was able to successfully challenge for cause jurors who admitted being prejudiced against Hodge or, in one instance, when a prospective juror said: "my private opinion of Mr.Hodge is very bad." More interesting was the challenge to Robert Green, who was providing lodging and protection for prosecution witnesses. Green said he did not want to serve, but that he could fairly judge the case. The prosecution argued that Green was qualified because even though he had had private conversations with the witnesses, he bore no malice toward the defendant. The defense retorted that such private conversations would necessarilly influence Green and, therefore, his service as a juror would risk prejudice against the defendant. The court excused Green.

C4 The Crown's challenges were primarily directed at friends and relatives of the defendant. John M'Donough presented a different problem, since without "being questioned, he said he thought the case would be hurtful to the West-Indies Islands: it would make the negroes saucy." The Solicitor General said he was "astonished at such a declaration." The defense argued that M'Donough might be qualified to sit as a juror because it was the trial, not the verdict, that would have a bad effect in the islands. M'Donough was dismissed.[13]

C5 The heart of the Crown's opening statement was an extensive review of the law of murder.[14] The prosecution also said that this murder was especially atrocious because the victim was "a poor defenseless fellow creature."[15] The jury was told that the defendant must be proved guilty "beyond every reasonable doubt," i.e., "by the most clear and unquestionable testimony."[16] It was conceded that the fact that the crime had occurred 3 or 4 years earlier weighed against the prosecution. However, there were extenuating circumstances, particularly the rule that slaves "could not testify against free persons."[17] Perreen Georges and Stephen M'Keough were the principal witnesses against Hodge. Prosper's death was said to have occurred 3 or 4 months before the death of Mrs.Hodge in 1808 October.[18] Georges also described the murder. Hodge had insisted that Prosper must pay 6 shillings for a "mango which fell off a tree." When Prosper could produce only 3 shillings, he was held to the ground and flogged for "better than an hour. The next day, when Prosper still could not produce 3 shillings, he was tied to a tree and flogged until he fainted. He was then taken to the sick-house where, untreated, he died about 2 weeks later."[19] M'Keough testified that he saw Prosper a few days before his death "in a cruel state, so bad, I could not go near him for the blue flies."[20]

C6 In examining the witnesses, the defense suggested the witnesses had been encouraged by other persons to testify, although who these persons were was unclear.[21] M'Keough admitted that Hodge owed him money and said in the past when he tried to collect, "I was armed with a good stick in case of need, but he did not offer me any violence."[22] The defense made an interesting tactical decision during the cross-examination of Georges — she was questioned about the circumstances of the murder of Hodge's cook, which she had mentioned in her deposition. The Crown counsel warned that this might open up the matter for further inquiry. The defense persisted, attempting (with little success) to show contradictions with her deposition. Nevertheless, the defense objected when the prosecution began to examine the witness on the subject. Crown counsel agreed that evidence of uncharged crimes was generally inadmissible, but successfully argued that the defense had opened the door to the limited extent that questions could be asked to rebut the suggestion of inconsistent statements.[23] The defense gained nothing from its tactics, but also probably lost nothing because it is inconceivable in such a small society that jurors were unaware of the fact that the Crown was prepared to bring numerous additional charges against the defendant.

C7 The defense's opening statement dwelled on the argument that it was unbelievable that Hodge would have been engaged in such cruelty without the possibility of gain for himself. The defense also emphasized the long delay between the alleged murder and the indictment. According to the defense, because M'Keough had not reported Hodge's offense until 1811, "M'Keough is a guilty man — he is guilty of misprison of a felony."[24]

C8 The 1st defense witness was a disaster. She was a "very old" black woman who had seen no evil. Unfortunately for the defense, she could not see much of anything. Crown counsellor Mr.Lisle asked her if she had ever seen "Mr.Lisle." She replied that her eyesight was very bad. She was unable to correctly state how many months were in a year; how many weeks in a month; or how many days in a week. The court agreed with the prosecution that the testimony was worthless.[25]

C9 The defense then offered witnesses to attest that they had not seen Hodge mistreat slaves and to impeach the Crown witnesses. The problem was that the witnesses had had insufficient contact with Hodge to make their failure to see mistreatment meaningful. The only clear successful impeachment was that M'Keough suffered from intemperance. One witness put the matter: "he would [not] take his soup, inclined to liquor."[26]

C10 Hodge's sister, Anne Rawbone, testified that Hodge had neiher mistreated slaves, nor been responsible for Prosper's death. The prosecution produced rebuttal witnesses who testified that Rawbone had previously said that she had knowledge that could hang her brother, but that she would try to save him. Moreover, she had seen nothing because whenever Hodge was about to punish a slave, she went to her room.[27]

C11 The closing arguments were predictable — the prosecution emphasized the enormity of the crime, and the defense insisted that the Crown witnesses should not be believed.[28]

[11] *Trial . . . Hodge* pp.7-47.
[12] *Ibid* pp.48-53.
[13] *Ibid* pp.54-60.
[14] *Ibid* pp.75-82.
[15] *Ibid* p.65.
[16] *Ibid* p.63.
[17] *Ibid* pp.66&91.
[18] *Ibid* p.100.
[19] *Ibid* pp.95-97.
[20] *Ibid* p.112.
[21] *Ibid* pp.94&111.
[22] *Ibid* p.119.
[23] *Ibid* pp.104-109.
[24] *Ibid* pp.122-127.
[25] *Ibid* pp.128-133.
[26] *Ibid* p.134.
[27] *Ibid* pp.143-145 & 150-152.
[28] *Ibid* pp.158-180.

C12 Hetherington went too far in instructing the jury, saying (emph added), "if you believe the murder was committed, *as I do*, you must find the prisoner guilty . . . ."[29] Hodge was permitted to address the jury before it retired to deliberate. His statement was brief and bizarre. He said he knew that the country thirsted for his blood, and he was ready to "sacrifice it"; however, he averred that "I acknowledge myself guilty in regard of many of my slaves, but I call God to witness my innocence in respect of the murder of Prosper."[30]

D The Verdict

D1 After deliberating for about an hour and a half the jury returned a verdict of guilty, but the "majority of the jury recommended the prisoner to mercy." Instead, Hodge was sentenced to death and hanged 8 days later.[31]

D2 The case was well tried. Counsel understood the law and did everything that could be done for the respective parties. The defense was handicapped by the weakness of its case. Nevertheless, there are 2 interesting questions left unanswered by the proceedings.

D3 The evidence suggests that Prosper was the last Hodge murder victim and that his murder occurred about 3 years before charges were brought against Hodge. This leaves open the question of what Hodge was doing during those 3 years. A 2nd question is what manner of man Hodge was. Certainly his conduct was monstrous; however, why he acted the way he did is unclear. His counsel correctly noted that he could not profit from his misconduct; 2 pieces of evidence are suggestive: 1st is the evidence in Georges's deposition that when Hodge punished his cook, he insisted she was trying to poison his wife&children. A 2nd revealing fact was Hodge's "custom" of "keeping a dagger at the head of the bed."[32] It seems that not all was quite right with Hodge.

D4 A 2nd point that emerges from the proceedings is the pivotal rôle played by Richard Hetherington. The estate map of 1798 Tortola shows Hetherington having 2 estates, but it was not until 1811 that he became "President" of the British Virgin Islands.[33] Notably, *that was the year* that legal action was initiated against Hodge — for alleged crimes *several years past* (§B3). It was also Hetherington who "pushed" the Grand Jury toward indicting and the jury toward convicting (§C12). The need for pushing demonstrates how difficult it was to persuade the ruling white minority to protect even the most fundamental rights of black slaves. Moreover, it shows how naïve Lieutenant Howard was in assuming (§A9) that, as a manner of course, the murder of a black slave would result in the execution of a white owner.

D5 It would be equally naïve to suppose that Hodge was the only miscreant. His trial did, however, bring attention to the problem.

> We believe that this is the first Englishman who suffered capital punishment for flogging his own slaves to death; at least since the amelioration of their wretched condition, but we are very sure that numbers — as well French, Spaniards, Dutch, Portuguese *and above all, Americans* — have deserved the fate of Hodge, for barbarity to their fellow-men, differing in nought but colour.[34]

[29] *Ibid* p.182.
[30] *Ibid* pp.184.
[31] *Ibid* pp.185-186.
[32] *Ibid* pp.10&68.
[33] Varlack&Harrigan *op cit* pp.27&65.
[34] A.Knapp & W.Baldwin *The Newgate Calendar* p.265 (c.1825). Italics added to emphasize the reputation the American hemisphere possessed 200 years ago, as the prime international home of slavery: Dixie and Brazil in particular.

E Slavery's Excesses Continue

E1 Long after the death of Arthur Hodge, there was an allegation regarding Rev. George Brydges, a respected member of the community, indicating that cruelty to slaves continued. Correspondence flowed between Jamaica and London.

E2 A female slave was punished for "insolence". Brydges had expected a dinner guest who didn't show up. Brydges asked about the girl who was coming to dinner and the slave replied "the turkey." Brydges reduced her to a sorry mess. The West Indian authorities were directed by London to punish Brydges. Nonetheless, it was only due to the death of one of his victims that there was official intervention. He was charged with murder. He was found not guilty of murder, but guilty of manslaughter. The London authorities realized there was no basis for the verdict: he should have been guilty of murder or not guilty of either crime. The lesser verdict paved the way for a trivial penalty of a £200 fine. This was consistent with the thinking of a slaveholder culture where a person's worth was measured in terms of monetary value. One question that emerges is whether Acts of Cruelty to slaves were the result of the cruel men of a few "serial" criminal estate owners or whether the offenders were simply representative of a society which had little or no regard for human beings who were reduced to slavery.

E3 The authority to intervene was limited.[35] Except for the striking of Brydges' name from the Commission of Persons, his cruelty went unpunished.[36] It also became known around the same time that a slave had been murdered on the estate of Rev.Rawlins (apparently another lapsed clergyman). He too got-off on manslaughter and a fine.

E4 The West Indies authorities had another use for manslaughter.[37] Manslaughter is indeed a usable crime: it shows a societal recognition of human frailties which serves to mitigate extreme penalties for murder, while at the same time forcing the need to punish homicide.

E5 Henry and Helen Moss were estate owners in Crooked Island, Bahamas, who put a woman slave in the stocks, flogged her, and rubbed peppers into her eyes. Fined £300. The victimized slave woman, Kate, ultimately died from a plague that was sweeping the island. But before her demise, petitions were circulated by local residents asking that the fine be remitted.

F Huggins

F1 Hodge plumbed the depths of human depravity, but another planter may have exceeded him in notoriety: Edward Huggins was a brutish thug who was infamous, not only for what he did, but for where he carried out his crimes. Huggins seemed to prefer the public square for floggings, delivering savage floggings when magistrates "were in attendance and even near the homes of magistrates." It was only after a severe flogging causing a death that there was official intervetion, and he was charged with murder.

F2 The first count against Huggins charged: a series of cruel floggings. One slave was given 147 lashes, another 165, another 187; to another woman 83; 149 to another woman, who appeared to be young and the most cruelly flogged.[38] The well-disposed jury found him guilty of manslaughter. Ultimately, he paid a fine of £200, *for having taken a life*.

F3 The clemency-supportive petitions cited earlier (§E5) go a long way in showing that the refusal to treat slaves in a humane manner was part of the culture of the island and, by reasonable projection, the entire West Indies.

[35] *Treatment of female slaves* (H.C.1831).
[36] *Idem*.
[37] *Further Papers Relating to the Treatment . . . St.Christopher's* (1818).
[38] *Idem*.

F4 The case of Mrs.Jackson and her daughter, Ann, is a striking example of what can happen without reason in a society with 2 classes: the powerless versus the largely unrestrained. The girl Ann was involved in some trifling dispute regarding alleged insolence. Ann's mother supported her daughter and said that she had not been *insolent* — a rather all-embracing "crime".[39] But, ultimately, the trifle would result in floggings, confinement in stocks, and related physical damage.

G Well-Hanged Hodge Helps Civilize Civilization

G1 So, obviously, the execution of Hodge did not end slavery or even eliminate its worst abuses. It was, however, a forceful recognition of the equal value of every person's life and thus was a small step, along with the decline of official torture (‡1), on the long road to the ultimately-achieved goal of ***racial equality under the law*** (though the tragic history of racial frustration stubbornly persists to this day) — a welcome trend which culminated in the British Empire's official abolition of slavery in 1833, followed in 1865 by its abolition throughout the entire US.

G2 It is impossible to applaud any execution; however, it can at least be said in this case that Arthur Hodge's life was sacrificed for a good cause.

The bulk of the foregoing judicial-history chronicle originally appeared in the *Maryland Bar Journal 30.6*:44-46 (1997 Nov-Dec) entitled "Race and Justice: The Trial and Execution of Arthur Hodge." Information the author has gleaned since 1997 has led to our publication here of an expanded-updated edition.

[39] "Correspondence in Relation to the punishment of two female slaves" (1852).

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