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Slave Gambling in the Antebellum South

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*Robert M. Jarvis**

INTRODUCTION

In the Antebellum Era (*c.* 1800-60),[1] Southern slaves gambled regularly, both with each other and with free blacks and poor whites.[2]

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1. Individual historians mark the beginning of the Antebellum Era according to their own tastes, with some feeling that it started in 1783, when an amendment was proposed to the Articles of Confederation declaring slaves to be "three-fifths" of a person. *See* 8 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 191-92 (Gaillard Hunt ed., 1922). This suggestion subsequently found its way into the U.S. Constitution, see U.S. CONST. art. I, § 2, cl. 3, *repealed by* U.S. Const. amend. XIV, § 2, causing other historians to date the period's inception as either 1787 (drafting of the constitution) or 1789 (entry into force of the constitution). Still other historians use the end of the War of 1812, see A Treaty of Peace and Amity, U.S.- Gr. Brit., Dec. 24, 1814, 8 Stat. 218, as the period's birth year, although a few push the date back to as late as 1820. For a further discussion, see Elizabeth Cali, *Antebellum*, *in* ENCYCLOPEDIA OF DIVERSITY AND SOCIAL JUSTICE 64 (Sherwood Thompson ed., 2015) ("Within the U.S. context, some refer to any time following the end of the Revolutionary War in the United States (1776) and leading up to the beginning of the Civil War as antebellum."). There is, of course, only slight disagreement as to when the period ended, with some historians preferring 1860 (election of Lincoln) and others 1861 (actual start of the Civil War).

2. *See infra* note 3. In this respect, Southern slaves were no different from those in other historical periods or geographic locations. *See, e.g.*, CATHERINE ADAMS & ELIZABETH H. PLECK, LOVE OF FREEDOM: BLACK WOMEN IN COLONIAL AND REVOLUTIONARY NEW ENGLAND 16 (2010) ("[D]uring slavery [in 18th century New England, on special days known as] Elections Days[,] whites sanctioned gambling, drinking, athletic contests, and parades among their slaves, which they thought a harmless way to boost slave morale for a couple of days as the winter cold was ending."); NEVILLE A.T. HALL, SLAVE SOCIETY IN THE DANISH WEST INDIES: ST. THOMAS, ST. JOHN, AND ST. CROIX 121 (B.W. Higman ed., 1992) ("Slaves no less than their masters were given to games of chance, especially to cards and dice. . . . It was taking place, it would appear, not only in houses and on galleries, but also on the streets."); R. Shell, *Introduction to S.E. Hudson's Slaves*, *in* 9 KRONOS 44, 61 n.56 (1984) ("At the Cape [Cape Town, South Africa] gambling had a strong and long-lived tradition, Otto Mentzel, writing of the 1740s: 'The usual frequenters of such taverns are soldiers[,] sailors[,] and slaves. The slaves come not so much to drink as to gamble. They have their master's permis-

This fact has received a fair amount of scholarly attention.[3] Curiously, however, the reported court opinions involving such gambling have been all but overlooked.[4] Accordingly, this article collects and discusses

sion for which they pay 6 stuivers daily and are free to pocket their winnings.'"); Colin A. Palmer, *Negro Slavery in Mexico, 1570-1650*, at 52 (unpublished Ph.D. dissertation, University of Wisconsin-Madison) (on file with author) ("In 1557, Spaniards in Mexico City expressed alarm over the spectacle of slaves gambling and dancing in the public square on feast days.").

3. *See*, *e.g.*, SERGIO A. LUSSANA, MY BROTHER SLAVES: FRIENDSHIP, MASCULINITY, AND RESISTANCE IN THE ANTEBELLUM SOUTH 50 (2016) ("Enslaved men regularly met with other men to drink and gamble—usually at night or on the Sabbath; they held these . . . gatherings in secret, sometimes beyond the boundaries of the plantations in woods, swamps, or outhouses. . . . Gambling—especially cards and craps—was a popular activity enjoyed by groups of enslaved men."); JEFF FORRET, SLAVE AGAINST SLAVE: PLANTATION VIOLENCE IN THE OLD SOUTH 193 (2015) [hereinafter PLANTATION VIOLENCE] ("Gambling ranked among the more popular leisure-time pursuits of enslaved men across the South. Bondmen usually wagered their money and property in contests held on Saturday nights or Sundays."); CLAYTON E. JEWETT & JOHN O. ALLEN, SLAVERY IN THE SOUTH: A STATE-BY-STATE HISTORY 127 (2004) ("Slaves broke the monotony of their life by fishing and hunting, gambling, playing music, and dancing."); JEAROLD WINSTON HOLLAND, BLACK RECREATION: A HISTORICAL PERSPECTIVE 90 (2002) ("[M]any slaves looked forward to Sundays when they were exempt from ordinary plantation jobs and could make some independent choices in their free time, engaging in a broad array of activities [including] gambling[.]"); BERNARD E. POWERS, JR., BLACK CHARLESTONIANS: A SOCIAL HISTORY, 1822-1885, at 24-25 (1994) ("Gambling was a favorite amusement for some [slaves], who participated in lotteries or played 'rattle and snap,' one of several popular card and dice games. . . . In a revealing case, after the Charleston Police entered a house they found six slaves gambling, two of which were runaways that had been missing for several weeks."); DICTIONARY OF AFRO-AMERICAN SLAVERY 624 (Randall M. Miller & John David Smith, eds., 1988) ("[L]ike other recreational activities, the bondsmen found ways to transcend the various condemnations made against gambling and continued to place bets with a high degree of seriousness. To elude the eyes of their masters or a concerned white community, slaves often resorted to gambling in the woods or some other secluded spot. Possessing little money with which to gamble, the bondsmen's stakes often consisted of particular objects to which they attached special importance.").

4. In contemporary times, Professor Jeff Forret of Lamar University has done considerable work with unpublished North Carolina and South Carolina trial court records. *See* PLANTATION VIOLENCE, *supra* note 3; JEFF FORRET, RACE RELATIONS AT THE MARGINS: SLAVES AND POOR WHITES IN THE ANTEBELLUM SOUTHERN COUNTRYSIDE 56-61 (2006) [hereinafter MARGINS]. Similarly, historian-turned-lawyer Michael S. Hindus's study of crime in South Carolina provides valuable information regarding the frequency with which slaves were accused of gambling. *See* Michael S. Hindus, *Black Justice Under White Law: Criminal Prosecutions of Blacks in Antebellum South Carolina*, 63 J. AM. HIST. 575, 583 (1976) (reporting that of the 1,044 slaves who were prosecuted between 1818 and 1860 in Anderson and Spartanburg counties for whom detailed trial records still exist, 55, or 5.2%, were tried for gambling offenses).

During the Antebellum period, there were three principal treatises on the law of slavery. Two mentioned slave gambling only once, with both citing an early case from North Carolina, see *State v. Pemberton*, discussed *infra* notes 21-24 and accompanying text, which held that gambling between a white and a slave was not prohibited at common law. *See* JACOB D. WHEELER, A PRACTICAL TREATISE ON THE LAW OF SLAVERY 441 (1837); THOMAS R.R. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY 264 (1858). The third merely cited three statutes barring whites from gambling with slaves: South Carolina—1834, Georgia—1837, and

these decisions.[5] As will be seen, Southern judges often were exasperated by the less-than-precise wording of the laws that were put in place to punish slaves who gambled and whites who facilitated or participated in such gambling.[6]

Louisiana—1848. 2 JOHN CODMAN HURD, THE LAW OF FREEDOM AND BONDAGE IN THE UNITED STATES 98, 107, 164 (1858).

5. Excluded from this article are gambling cases involving free persons of color. *See*, *e.g.*, Moore v. State, 30 Ala. 550 (1857) (upholding a white defendant's conviction for betting in rooms belonging to Shandy Jones, a free black who used the space above his Tuscaloosa barbershop to conduct gambling games). Jones's dual operation was quite typical: "The most common [free] black enterprises were small cookshops and groceries, which usually doubled as saloons and gambling houses where free Negroes, slaves, and occasionally whites gathered." IRA BERLIN, SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH 241-42 (1974).

Likewise excluded is gambling by slave owners, which often involved slaves being used either as betting stakes or as a means of paying losses. *See*, *e.g.*, Bank v. Hodges, 12 Ala. 118, 119 (1847) ("Booth had won Bob at a game called *Faro*, in . . . 1838."); Whatley v. Murrell, 32 S.C.L. 389, 392 (1847) ("Murrell then said he would bet [the] witness two negroes to one he could whip Gomilion."); Rice v. Gist, 32 S.C.L. 82, 83 (1846) ("It was not proved whether the plaintiff bet another negro against Bill, or only the value of Bill."); Hockaday v. Willis, 28 S.C.L. 379, 379 (1843) ("The facts were, that Wilson won at faro from one Saunders, who was banker, a large sum of money and two negro boys."); Vernot v. Yocum, 3 Mart.(o.s.) 406, 407 (La. 1814) ("The bill of sale for the negro . . . was placed in the hands of Johnston . . . who held it as a stake against another negro and $200 . . . to be delivered as a forfeit by either party who should . . . fail to run the race.").

In 1858, Alabama plantation owner Timothy Meahar went so far as to bet $1,000 that he could defy the federal ban on importing slaves from Africa. *See* SYLVIANE A. DIOUF, DREAMS OF AFRICA IN ALABAMA: THE SLAVE SHIP CLOTILDA AND THE STORY OF THE LAST AFRICANS BROUGHT TO AMERICA 21 (2007). After winning the bet, Meaher and William Foster, the ship's captain, were arrested, but the government could not make the charges stick due to a lack of evidence. *Id.* at 86-87. In 2018, after more than a century of searching, the ship's remains finally were located. *See* Matthew Haag & Niraj Chokshi, *Last Known U.S. Slave Ship Appears to Have Been Found*, N.Y. TIMES, Jan. 25, 2018, at A12.

6. Like other Southern elites, Southern judges were supportive of slavery and publicly intolerant (but privately forgiving) of gambling. *See generally* LOCAL MATTERS: RACE, CRIME, AND JUSTICE IN THE NINETEENTH-CENTURY SOUTH (Christopher Waldrep & Donald G. Nieman eds., 2011) (discussing the South's support for slavery) [hereinafter "LOCAL MATTERS"]; TIMOTHY S. HUEBNER, THE SOUTHERN JUDICIAL TRADITION: STATE JUDGES AND SECTIONAL DISTINCTIVENESS, 1790-1890 (1999) (profile of six prominent Southern judges); Laura F. Edwards, *The Forgotten Legal World of Thomas Ruffin: The Power of Presentism in the History of Slave Law*, 87 N.C. L. REV. 855 (2009) (describing the North Carolina Supreme Court in the antebellum era). *See also* JAMES M. VOLO & DOROTHY DENNEEN VOLO, THE ANTEBELLUM PERIOD 191 (2004) ("The dominating vice of the antebellum period was gambling. Wagering was an exciting way of spending leisure time. In the early days, gambling among the social elite was essentially private. Isolated wagers would be made on a cockfight, the turn of a card, a steamboat race, or a horserace.").

I. BACKGROUND

Gambling by slaves was illegal throughout the South,[7] with whipping the standard punishment for those found guilty.[8] The nominal reason for this directive was that slaves, being legally unable to own property, had nothing with which to place a bet.[9] The real reason was that gambling was felt to encourage drinking, which many whites believed made slaves either lazy[10] or rebellious.[11] A second fear was

7. In addition to state legislation, many local governments enacted slave gambling bans. *See, e.g.*, JEFFREY C. BENTON, RESPECTABLE AND DISREPUTABLE: LEISURE TIME IN ANTEBELLUM MONTGOMERY 23 (2013) ("[L]ocal ordinances prohibited both slaves and free blacks from gambling and drinking."). The power to make such laws was taken as self-evident. In State ex rel. Fanning and Lord v. City of Charleston, 46 S.C.L. (3. Rich.) 480, 481 (1860), for example, the court casually remarked: "It is not perceived that the city ordinance, prohibiting slaves or free persons of color from gambling or playing at cards, &c., is contrary to the law of the land."

8. *See, e.g.*, LOCAL MATTERS, *supra* note 6, at xi ("Most slave encounters with the law took place in special slave courts. Presided over by magistrates and planters, these courts administered justice to slaves charged with non[-]capital offenses. The records of one South Carolina slave court operating between 1830 and 1865 document cases in which authorities charged slaves with such crimes as gambling, consuming liquor, disorderly conduct, theft, insolence, assault, arson, rape, and insurrection. The records of a similar court in Tennessee reveal the same range of crimes, and the defendants in that court rarely escaped a guilty verdict. Almost all the guilty were sentenced to be whipped, with half receiving 39 lashes, the maximum allowed by the law."); CLAUDE H. NOLEN, AFRICAN AMERICAN SOUTHERNERS IN SLAVERY, CIVIL WAR AND RECONSTRUCTION 59-60 (2001) ("Memphis police hauled slaves charged with various offenses before city judges who sentenced them, as a rule, to 10 to 39 lashes at the whipping post. Among these unfortunates . . . [were] Giles, Cyrus, Moses, and Peter[, who] were sentenced to 25 lashes each for gambling. Charles also had to take a whipping for gambling. Five other gamblers were fined three dollars each, their masters paying their fines."); RICHARD C. WADE, SLAVERY IN THE CITIES: THE SOUTH, 1820-1860, at 90 (1967) ("Richmond newspapers readers were also accustomed to stories where 'Peter and William, slaves to George Mills were caught by the Police, on Sunday last, in the company of six other blacks, pitching coppers. . . . They were taken to the 'cage' and given 15 'stripes.'").

9. *See generally* JOSEPH R. CONLIN, THE AMERICAN PAST: A SURVEY OF AMERICAN HISTORY 322 (10th ed. 2014) ("The slave codes of the southern states specified that slaves had no civil rights. They could not own property under the law; therefore, they could not legally buy and sell anything.").

Slaves who were "boarded out" (*i.e.*, leased by their masters to others as hired hands) sometimes were permitted to keep any bonus money they earned. While some observers believed this incentivized them to work harder, others insisted it only led to bad habits:

> The *Daily Dispatch* spoke for many white Richmonders in arguing that the overwork system was a "curse" to many valuable factory slaves, for "Money in their hands leads to drinking and gambling, and these, in their turn, to other vices and crimes." Paying slaves for work they ought to perform, when their basic material wants were already provided, was a "mere waste of means" that should be "suppressed," the paper reasoned.

John T. O'Brien, *Factory, Church, and Community: Blacks in Antebellum Richmond*, 44 J. S. HIST. 509, 518 (1978).

10. *See, e.g.*, Paul D. Lack, *An Urban Slave Community: Little Rock, 1831-1862*, 41 ARK. HIST. Q. 258, 270-71 (1982) ("Little Rock provided many irrepressible, if illegal, forms

that gambling inspired slaves to commit crimes.[12] Yet another worry was that a slave would be injured or killed while gambling.[13]

Most states also made it illegal for whites to gamble with slaves.[14] The principal concern with such gambling was that it blurred class lines, thereby making it easy for slaves to forget "their place." As a result, "[a]uthorities especially tried to prevent slaves from gambling, drinking, dancing, and trading with free blacks and whites,"[15]

of social life, often centered around liquor-dispensing 'groceries.' Addressing the city council in 1850, Mayor David J. Baldwin called 'very particular attention' to these establishments where 'drunkenness, gambling, and other abominable vices are carried on' with the result that 'domestic and laboring slaves are rendered worse than useless.'").

11. *Id.* at 271 ("Slaveowners worried about the violent mood and other rebellious tendencies of those who gathered at these places [grog shops], and advertisements for runaway slaves suggest that such concerns were justified. A large number of these notices describe the fugitive as 'addicted to drinking or gambling' or 'fond of liquor.'") (footnotes omitted). *See also* Reuel E. Schiller, *Conflicting Obligations: Slave Law and the Late Antebellum North Carolina Supreme Court*, 78 VA. L. REV. 1207, 1222 (1992) ("North Carolina society protected itself from the threat of slave rebellion primarily by statutory restrictions on slaves' actions: running away, conspiracy, insurrection, possession of weapons, hunting, raising livestock, teaching other slaves to read, gambling, meeting and dancing without a permit, selling or receiving liquor, and preaching in public were all prohibited.").

12. *See, e.g.*, EUGENE D. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE 22 (1974) ("Many of the slaves who stole their masters' goods sold them to poor whites at drinking and gambling parties[.]"); *see also* State v. Cheatwood, 20 S.C.L. (2 Hill) 459 (1834) (punishing a white gambler who regularly encouraged slaves to steal from their masters to obtain gambling stakes).

13. *See, e.g.*, Leggett v. Simmons, 15 Miss. (7 S. & M.) 348 (1846) (action by a slave owner to recover damages after one of his slaves was killed by the defendant's slave following a night of drinking and gambling). For other such examples, see PLANTATION VIOLENCE, *supra* note 3, at 193-97.

14. *See, e.g.*, HENRY W. FARNAM, CHAPTERS IN THE HISTORY OF SOCIAL LEGISLATION IN THE UNITED STATES TO 1860, at 203 (Clive Day ed., 1938) ("A ban was often put upon gambling. Thus[,] whites gambling with Negroes were liable to imprisonment from one to three years under a Georgia law of 1837. Louisiana, in 1852, punished by fine and imprisonment any white person guilty of gambling or betting with free Negroes or slaves, and Kentucky in 1856 subjected to fine or imprisonment a free Negro who was found gaming with slaves or with whites, while in 1858 white persons who offended were subjected to the additional disqualification of exclusion from public office."); *see also Slavery in New-Mexico*, 26 DE BOW'S REV. 601, 601 (J.D.B. De Bow ed., 1859) ("Negro slavery is fully recognized, and property in slaves amply protected, by a recent act of the New-Mexican Legislature. . . . [Under the law, g]aming with slaves is prohibited under a penalty of not over one hundred dollars or three months imprisonment."); *see also* HURD, *supra* note 4. *But see* A.E. Keir Nash, *Fairness and Formalism in the Trials of Blacks in the State Supreme Courts of the Old South*, 56 VA. L. REV. 64, 98 n.142 (1970) ("[In 1842,] the [Tennessee] Senate rejected by [a vote of] 17 to 4 a bill to make gambling with slaves a felony. [TENN. SEN. J.] of 1841-43, at 599.").

15. Kimberly Hanger, *Conflicting Loyalties: The French Revolution and Free People of Color in Spanish New Orleans*, 34 J. LA. HIST. ASS'N 5, 32 n.50 (1993).

and whites who engaged in such activities were viewed with hostility and suspicion.[16]

Nevertheless, such intermingling was both common and of long duration. As one commentator has written, "[t]he rapidly growing towns of the late-eighteenth-century Chesapeake were especially notable for interracial conviviality—blacks and non[-]elite whites drank and danced together. One white storekeeper who served liquor to slaves in Richmond also played 'Five Corns' with them at 'two Cents per Game.'"[17]

Gambling between poor whites and slaves was the natural outcome of the lowly status each group occupied in the Antebellum South,[18] as well as their physical proximity to one another:

> [M]any slaves and poor white men found no more relaxing way to spend their leisure time on Saturday or Sunday than at an interracial game of seven up, rattle-and-snap, pitch-and-toss, or chuck-a-luck. As in the case with drinking, this may have reflected sincere friendships. On the other hand, it may suggest that slaves and poor whites each considered the other's money easy pickings. . . . Free blacks sometimes participated in these contests as well. . . .
>
> Impromptu games of chance broke out in any number of locations. The most popular venue for interracial play was the grog shop. A peek behind the front door of almost any urban watering hole or crossroads store shows slaves and poor whites placing their bets and mingling together familiarly. . . . Interracial games sometimes boldly took place directly under the master's nose, on or near

16. *See, e.g.*, DONALD E. REYNOLDS, TEXAS TERROR: THE SLAVE INSURRECTION PANIC OF 1860 AND THE SECESSION OF THE LOWER SOUTH 78 (2007) ("Most communities in . . . frontier [Texas] could count a generous sprinkling of white settlers who had only recently arrived from other states, and some of those from northern climes were thought to be entirely too friendly with African Americans. In some instances, so it was said, these familiarities had taken the form of trading liquor to slaves, gambling with them, and instilling in them an unhealthy dissatisfaction with their enslaved condition.").

17. PHILIP D. MORGAN, SLAVE COUNTERPOINT: BLACK CULTURE IN THE EIGHTEENTH-CENTURY CHESAPEAKE AND LOWCOUNTRY 416 (1998). These same social dynamics were repeated in other parts of the South. *See, e.g.*, TIMOTHY JAMES LOCKLEY, LINES IN THE SAND: RACE AND CLASS IN LOWCOUNTRY GEORGIA, 1750-1860, at 45-46 (2003) ("In Savannah six white men were fined by the City Council for gambling with slaves. . . . [But g]ambling by slaves enriched those who provided the location for 'cards, dice and other games in secrecy' [and e]asy and regular sociability flourished because it did not challenge the social or racial status of non[-]slaveholders in the low[ ]country. Such racial barriers as existed in the low[ ]country were loose enough to permit voluntary interactions [and allowed] ordinary whites [to] relat[e] to African Americans in whatever manner they chose.").

18. *See* KRISTOFER ALLERFELDT, CRIME AND THE RISE OF MODERN AMERICA: A HISTORY FROM 1865-1941, 119 (2011) ("With little to stake, the planters' slaves gambled among themselves, or against equally poor whites. Perhaps they were motivated by the example of their masters [who engaged in reckless gambling.]").

> his own plantation. . . . Other games occurred "in the woods" or in an "old field," wherever the chances of detection seemed small.
>
> The close living and working quarters of some slaves and poor whites made illegal gaming a convenient pastime. Laboring poor white men in their twenties often gambled with slaves. . . .
>
> Like poor white laborers, tenant farmers, often in their thirties and forties but with no land to call their own, found slaves suitable gaming partners. . . .
>
> Slaves and poor whites both faced harsh penalties if caught gambling with one another. A North Carolina law that went into effect in May 1831 entirely forbade slaves from gambling. Any violator "receive[d] a whipping on his or her bare back, not exceeding thirty-nine lashes." The same act warned whites and free blacks not "to play at any game of cards, dice, nine pins or any game of chance or hazard, whether for money, liquor, or any kind of property, or not, with any slave or slaves." The law awarded free blacks convicted of gambling with bondspeople the same thirty-nine lashes granted slaves, while whites who disregarded the prohibition faced a fine and a maximum of six months in jail. South Carolina went one step further. That state inflicted as many as thirty-nine stripes on whites—men only—caught gambling with slaves or free blacks, in addition to fines and imprisonment that both men and women faced. . . . Fines and jail sentences of less than the maximums the law allowed were the rule for whites convicted of gambling with slaves, and there is no way to tell whether those South Carolina offenders who were ordered whipped did suffer the lash. That such severe punishments existed at all reveals the seriousness with which lawmakers viewed interracial gambling.[19]

II. COURT CASES

At the start of the Antebellum Era, slave gambling laws did not exist.[20] As a result, in *State v. Pemberton*,[21] the parties argued over whether the common law prohibited gambling with a slave. After a jury found Simon Pemberton and John A. Smith guilty of playing cards with a group of slaves, "Judge Strange arrested the judgment, being of [the] opinion that the fact charged as an offence was one which never could have existed in England, and therefore could not be deemed an

19. MARGINS, *supra* note 4, at 56-61. In a footnote, Professor Forret adds: "[W]ealthy white youth coming of age composed another group likely to gamble with slaves." *Id.* at 57 n.96. Presumably such persons reveled in engaging in an activity that, if discovered, would bring instant shame and condemnation.

20. *See, e.g.*, David K. Wiggins, *Good Times on the Old Plantation: Popular Recreations of the Black Slave in the Antebellum South, 1810-1860*, 4 J. SPORT HIST. 260, 274 (1977) ("Most states in the early Antebellum period had no specific laws concerning the gambling of slaves.").

21. 13 N.C. (2 Dev.) 281 (1829).

offence at common law."[22] He also found that "there was no statute prohibiting" what the defendants had done.[23] In a one sentence *per curiam* opinion, the North Carolina Supreme Court affirmed "[f]or the reasons given by the Judge below. . . ."[24]

The outcome in *Pemberton* was unexpected and quickly led the North Carolina legislature to ban slave gambling:

> There was no specific law in the early ante-bellum period [in North Carolina] aimed at Negroes' gambling, although occasionally there were arrests for this offense, as, for instance, in Halifax County in 1814 when three white men were indicted for playing cards on Sunday with slaves.
>
> In 1829, however, the Supreme Court handed down the [*Pemberton*] decision [holding] that "it is not an offense either at common law or by statute to gamble with a slave."
>
> The following year the Legislature prohibited slaves from playing "at any game of cards, dice, nine-pins, or any game of hazard or chance, for any money, liquor, or any kind of property, whether the same be staked or not" upon pain of receiving thirty-nine lashes.
>
> The same act made it unlawful for free Negroes to gamble with slaves or to permit slaves to gamble at their houses. An act of 1838 attempted to strengthen the law by punishing a white man for gambling with a slave, but gambling continued nevertheless. The rapidity with which all signs of crap shooting might be effaced made arrests infrequent, and, in case of an arrest, the difficulty of proving that betting took place made the convictions few.[25]

In the wake of *Pemberton*, other jurisdictions began enacting their own slave gambling laws. Florida, however, did not, leading to the question of whether slaves were subject to the state's general gambling laws. In *Murray v. State*,[26] the Florida Supreme Court held that such laws did not reach slaves.

Clem Murray was an Apalachicola slave who was ordered to be whipped fifty times for conducting gambling games inside his master's barber shop.[27] On appeal, Murray argued that the state's gambling

22. *Id.* at 281.

23. *Id.*

24. *Id.*

25. GUION GRIFFIS JOHNSON, ANTE-BELLUM NORTH CAROLINA: A SOCIAL HISTORY 557 (1937) (footnotes omitted).

26. 9 Fla. 246 (1860).

27. *Id.* at 246-47.

laws did not apply to him, inasmuch as they did not specifically mention slaves.[28] This point was deemed decisive:

> The legislative enactments of our State prohibit the slave from acquiring or holding property, and from being and living alone and without being under the charge of some white person. The same may be said of a slave playing and betting at any gaming table, or in any gambling house, &c. He cannot, he has nothing to bet with; the money is not his, and if he should lose, his master could claim it; if he won, his winnings belong to his master. Thus we think it is not in the nature of things that the slave could commit the offence laid in the indictment, unless the statute expressly enacts such acts of theirs shall be [an] offence against the law.
>
> Where our legislation does not specify how far slaves and free persons of color are within its provisions, it is a difficult task to determine under [a] statute [regulating] offences against morals whether such persons can commit the offences or not.
>
> The only rule to govern us is the peculiar relation they bear in society and towards their superiors.
>
> Thus our general code provides and creates the offence of adultery and fornication, and like the act under consideration, does not discriminate between white persons and negroes. Yet no one would think of indicting a slave for such an offence, and why? Because they are not supposed to be within the act creating the offence.
>
> Nor would anyone think of indicting a slave for passing counterfeit money, and why? [B]ecause they cannot own any money, and if they passed it, the benefit derived belongs to the master.
>
> From a view of the whole statute, the legislation of our State, and the circumstances not rendering the offence committable by a slave, we are of the opinion the legislature did not intend to include slaves within this provision of the act.[29]

Even in jurisdictions with a slave gambling statute, however, prickly questions of interpretation could arise. In *State v. Nates*,[30] for example, William Nates was found guilty of playing rattle and snap

28. Of course, Murray's master, rather than Murray himself, made this argument. This fact caused the court to remark:

> It is urged with some force and propriety that this conduct of slaves is a crying evil; if so, the remedy is with the legislature. It is much better for the master, the slave, and the community at large that provisions be made for the summary punishment of slaves for such offences before a Justice of the Peace, than that the slave be dignified and brought into court with the same importance with the white man, and the master in consequence thereof put to heavy expense in employing counsel and protecting his slave.

Id. at 254.

29. *Id.* at 253-54.

30. 21 S.C.L. (3 Hill) 200 (1836).

with a slave.[31] On appeal, he argued that his conviction was improper because no proof was introduced that any betting occurred.[32] In turning aside this objection, the South Carolina Court of Appeals made it clear that the mere playing of a gambling game with a slave was enough to violate the statute:

> The general meaning of the word game, is to play at any sport; but in common parlance, it means more commonly to play at some game of chance for money. This latter meaning is, however, narrowed by the Act of 1817, which prohibited play at all games of chance (except whist) with or without betting: ever since its passage, the word game has been understood to mean to play at an unlawful game, without any reference to the fact whether anything was bet or not.
>
> This meaning would govern me in the construction of the Act of 1834. It however carries with itself the key to the meaning of the word. It provides for the punishment of any person, "who shall be willingly present, aiding and abetting where any *game of chance is played as aforesaid*." The words, "any game of chance is played as aforesaid," refer to the previous part of the clause, in which the word *game* is used, and show that the Legislature intended to prohibit any white person from playing at any game of chance with a free negro, person of color, or slave. Construing the Act in this sense, the defendant was properly convicted, without proof of betting at the game of *Rattle and Snap*, which is a game of chance.[33]

The same issue surfaced in *Johnson v. State*.[34] Joseph Johnson was found guilty of gambling with a slave.[35] On appeal, he argued that the verdict should be quashed because the indictment merely alleged that he had been seen playing cards with a slave and the state failed to prove that any betting had taken place.[36] In rejecting this contention, the Georgia Supreme Court reluctantly came to the conclusion that the

31. *See id.* As explained in *supra* note 3, rattle and snap was a popular dice game similar to craps. Its distinctive name came from the fact that "players would 'rattle' beans and throw them out with a quick 'snap' of the wrist." Ned Hémard, *Games of Chance*, NEW ORLEANS B. ASS'N: NEW ORLEANS NOSTALGIA, http://www.neworleansbar.org/new-orleans-nostalgia.html (last visited May 10, 2019).

32. *See Nates*, 21 S.C.L. (3 Hill) at 201. Because of the severe penalties that awaited those who gambled with slaves, lying was common.

33. *Id.* The holding in *Nates* was reaffirmed in *State v. Laney*, 38 S.C.L. (3 Rich.) 193 (1850), a case with nearly identical facts. *See id*. at 194 ("As to the ground for a new trial, I have only to remark that the proof was clear that the defendant played at cards with the slave mentioned in the indictment, and that it was decided in *Nates*'s case (3 Hill, 200,) that it was not necessary to allege or prove there was any betting.").

34. 8 Ga. 453 (1850).

35. *Id.*

36. *Id.* at 456.

statute placed the burden on Johnson to prove that no betting had occurred:

> The Act is miserably drafted, but the . . . intent is to suppress the demoralizing and impolitic practice of gambling with slaves or free persons of color. . . .
>
> The Act . . . farther defines the mode of proof on the trial. By the 2d section, it is declared, "that on the trial of all indictments for said offence, the prosecution shall not be required to prove the game or games played, but shall be required to prove the playing or betting only." The last clause, in terms, sends the case to the Jury on proof of playing, and makes the other ingredient in the offence, an inference from that fact; which inference, the accused must rebut at his peril—that is, if his playing was without betting, and without a purpose that others may bet—merely for amusement—he must show it in defence.
>
> The 2d section will bear this construction, but I must say that I am not fully satisfied with it; for I am not sure but that the generality of the last clause in the section is limited and restrained by the first clause. The construction is, however, in accordance with the policy of the Act, and may be justified by the difficulty of proving the offence at large.
>
> The same policy and the same necessity dictated the enactment that the presence of a slave in a tipling shop within certain hours, or on the Sabbath day, shall be presumptive evidence of selling spirituous liquors to him, against the law. *Hotchkiss*, 771. These views dispose of all the assignments which relate to the charging, and refusal to charge, of the Court.[37]

The question arose yet again in *Commonwealth v. Garland*.[38] The defendants were indicted for playing cards for five dollars with a slave named Dave Wright.[39] At the end of the trial, the judge instructed the jury: "[U]nless the Commonwealth [has] prove[d] that there was five dollars bet, won, or lost, [you] must find the defendants not guilty."[40] Based on this instruction, the jury acquitted the defendants and the government appealed. In ordering a new trial, the Kentucky Court of Appeals wrote:

> The statute of which this indictment is founded defines an offense consisting of two degrees. To convict of the first degree, it is necessary to show that "money or other thing of value" shall have been bet, won, or lost, whatever may have been the amount or the value of the money or thing so bet. To convict of the lower degree, as defined by the second section, it is only necessary to prove the gam-

37. *Id.* at 455-56 (paragraphing inserted to aid readability).

38. 60 Ky. (3 Met.) 478 (1861).

39. *Id.* at 479.

40. *Id.*

> ing; and under an indictment charging the facts necessary to constitute the higher degree of the offense, the defendant might be convicted of the lower degree. So that in every aspect of the case, the instruction was erroneous.[41]

Ward v. State[42] also involved a flawed jury instruction. Based on an eye witness's description, Redding Ward was charged with gambling with a slave named Cain.[43] The trial judge instructed the jury that if it believed the evidence, it had to return a verdict of guilty.[44] According to the Alabama Supreme Court, this improperly took the case away from the jury, thereby rendering its "guilty" verdict invalid:

> The testimony recited in the bill of exceptions, shows that the defendant and the slave were seated on opposite sides of a box, each holding in his hand four, five, or more cards,—while beside them lay the pack, with the top card face-upwards. On seeing the witness, the defendant and the slave bunched the cards, and some expressions were indulged as to fortune-telling. This was all the evidence tending to prove the defendant's guilt.
>
> We concede, that these circumstances may have been strong, and from them the jury may have inferred that the parties had seated themselves to play at cards, and had so far entered upon the game as to deal out hands and turn up a trump; yet, in order to establish the defendant's guilt, it was necessary that the jury should find a further fact or facts than were positively sworn to by the witness. Such further fact or facts, the law, unassisted by a jury, could not infer. We think the court, in its charge, invaded the province of the jury.[45]

Throughout this period, proof problems were particularly acute because slaves could not testify against white persons.[46] Nevertheless, in *Berry v. State*,[47] the Georgia Supreme Court held that, out of necessity, this rule had to be relaxed in interracial criminal cases, including gambling prosecutions:

41. *Id.* at 480.

42. 37 Ala. 158 (1861).

43. *Id.* at 158-59.

44. *Id.* at 159.

45. *Id.* at 160 (paragraphing inserted to aid readability).

46. *See, e.g.*, THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW, 1619-1860, at 229 (1996) ("Slaves could not testify against whites."); JUDITH KELLEHER SCHAFER, SLAVERY, THE CIVIL LAW, AND THE SUPREME COURT OF LOUISIANA 1 (1994) ("In no case could slaves testify for or against whites[.]"); JOHN B. BOLES, BLACK SOUTHERNERS, 1619-1869, at 161 (1984) ("[S]laves could not testify against whites in civil courts."). *See also* Sue Peabody, *Slavery, Freedom, and the Law in the Atlantic World*, *in* 3 THE CAMBRIDGE WORLD HISTORY OF SLAVERY: AD 1420-AD 1804, at 594, 608 (David Eltis & Stanley L. Engerman eds., 2011) (explaining that the testimonial incapacity of slaves dated from Roman times).

47. 10 Ga. 511 (1851).

> Reject this testimony and several of our most important Penal Enactments become a dead letter. Conversations are overheard between a slave and a white man, in which a plot is laid for stealing, harboring or carrying off a slave, to a free State; is it not competent to give evidence of what was said by both of the speakers?
>
> We have a stringent Statute against trading with slaves. The owner of a slave loses a bale of cotton or some other article of value[.] [S]uspecting that it has been sold to some one in the neighborhood, he causes his negro to be closely watched; and he [the slave] is overheard a few nights thereafter, demanding payment of the purchaser, who acknowledges the liability and discharges it. Is it possible that the guilt of the offender could not be established upon evidence like this?
>
> So with regard to gambling with slaves, selling or furnishing them with spirituous liquors, and all other offences in which our slave population are joint participaters [sic].[48]

Because slave gambling cases were not heard in a vacuum, other laws sometimes came into play. In *Kitrol v. State*,[49] for example, Craven Kitrol was indicted by a grand jury on a charge of gambling with slaves. Kitrol objected on the ground that one of the grand jurors—Thomas Andrews—was 67, even though the governing statute limited grand jury service to those under 60.

By the time of Kitrol's challenge, Andrews was dead. According to his son David, the family did not know when Andrews was born. After reviewing the evidence, the trial court ruled that Andrews had been qualified to serve, a conclusion the Florida Supreme Court refused to disturb on appeal:

> The Court below took testimony on the plea in abatement, on the inquiry whether the said juror was in truth over sixty years of age at the finding of said indictment, and upon hearing the testimony decided that fact was not established.
>
> We see no reason for reversing the decision in this respect. The testimony in support of the affirmative consists, as will be seen by reference to it, of vague and uncertain declarations of the juror made both before and after the finding of the bill of indictment. The juror did not seem to know how old he was himself.
>
> When called upon for his "poll tax," he was over age; but when asked by the court, when about to be sworn as a Grand Juror, whether he was over sixty years of age, made no reply, but afterwards took the oath of a Grand Juror, thus solemnly acknowledging he was under that age.

48. *Id.* at 520 (paragraphing inserted to aid readability).

49. 9 Fla. 9 (1860).

> There being testimony on both sides of the issue, and the Court having weighed the same, and having given more weight to one declaration of the juror than others, we are not prepared to say it decided contrary to the weight of evidence.[50]

Not every slave gambling case presented such complexities. In *Withers v. Coyles*,[51] for example, a Mobile slave named Battiste was whipped and spent four months in jail. He had been discovered by police officers "with some eighteen other negroes, in a cotton-press . . . where it was unlawful for him to be . . . [engaging in] singing, dancing, and gambling."[52] Making the crime worse in the opinion of the magistrate was the fact "that when ordered by the officers to open the door of the house, [the group] refused, and the door had to be pried open by the officers."[53] Interestingly, Battiste's master, James Coyles, was able to recover $200 from the judge for the time Battiste spent in prison due to the fact that only whites could be incarcerated for gambling.[54]

CONCLUSION

With the advent of the Civil War in 1861, the South's priorities shifted. As a result, no reported appellate cases involving either slaves gambling or whites gambling with slaves have been located. Summary punishments, however, clearly continued to occur, albeit sporadically due to the fact that law enforcement entities had been thinned by military enlistments.[55] Following the conflict's end in 1865, the slave gambling laws, like much of the South's legal system, were swept away by the Reconstruction Amendments to the U.S. Constitution.[56]

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50. *Id.* at 14-15.

51. 36 Ala. 320 (1860).

52. *Id.* at 322-23.

53. *Id.* at 323.

54. *See* JENNY BOURNE WAHL, THE BONDSMAN'S BURDEN: AN ECONOMIC ANALYSIS OF THE COMMON LAW OF SOUTHERN SLAVERY 108 (2002) ("An Alabama magistrate paid damages of $200 in 1860 for imprisoning slave Battiste. The man knew Battiste was a slave but sentenced him to four months for gambling as if Battiste were free. If the evidence had indicated that the magistrate had reasonably thought Battiste was free, he would have paid nothing. Here, however, the defendant had ample knowledge [from a prior case] of Battiste's bondage.").

55. *See, e.g.*, WILLIAM WARREN ROGERS, CONFEDERATE HOME FRONT: MONTGOMERY DURING THE CIVIL WAR 85 (1999) ("A group of slaves caught gambling out on the Old Plank Road one night in January 1864 was whipped the next morning.").

56. Of course, the "Slave Codes," which included the slave gambling laws, quickly were replaced by the nearly-identical "Black Codes." Together with contract and convict labor laws, these edicts were used to punish African-Americans who engaged in "anti-social" behavior, including gambling. *See generally* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2008) (telling the story of John Jones, who in 1908 was arrested in Birmingham for gam-

bling with a group of other black men and sentenced to dig coal for a local railroad); *see also* DANIEL A. NOVAK, THE WHEEL OF SERVITUDE: BLACK FORCED LABOR AFTER SLAVERY (1978).

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