A Precarious Freedom: the Foundation and Justifications of Acts of Attainder for Enslaved and Free Persons of Color in the 18th Century British Caribbean

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Introduction

The evening of October 11th, 1736 came and went like any other night on British colonial Antigua.[1] The King's annual ball, celebrating King George II's ascension to the throne, had been set for that night. But it had been suddenly switched to the 30th, instead, because of the unexpected death of a general's son at St. Christopher's.[2] Unknown to the white inhabitants, their small change of plans had saved their lives: a group of enslaved people as well as a few free Black men had planned a violent revolt to coincide with the ball, aiming to take over the island and kill all the white inhabitants.[3] The revolt, had it succeeded, would have predated the Haitian Revolution by over fifty years as the first successful enslaved insurrection to overthrow a colonial government. However, due to the schedule change, the conspiracy was left vulnerable. After only a few short days, it was uncovered by the white masters and island officials.[4]

Two of the free Black men implicated in the conspiracy were Benjamin and William "Billy" Johnson. Evidence against them, however, was inadmissible.[5] The only testimonies that linked the brothers to the conspiracy were from enslaved conspirators, which was not allowed in trials of free Antiguans.[6] Governor William Mathew and the justices of the peace overseeing the trial chose to use a bill of attainder as a means to get around the evidentiary problem and pursue

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[1] Gaspar, David Barry. "The Antigua Slave Conspiracy of 1736: A Case Study of the Origins of Collective Resistance," *The William and Mary Quarterly*, Vol. 35, no.2 (April 1978): 308-323, 308.

[2] Vernon, John, Ashton Warner, Nath. Gilbert, and Robert Arbuthnot. *A Genuine Narrative of the Intended Conspiracy of the Negroes at Antigua: Extracted from an Authentic Copy of a Report, made to the Chief Governor of the Carabee Islands, by the Commissioners or Judges appointed to try the Conspirators*. Dublin: Arno Press, 1972, 3-24, 10.; "Extract of another Letter from Antigua, Dated October 24, 1736." *Boston Gazette* (Boston, Massachusetts), no. 881, November 29, 1736. *Readex: America's Historical Newspapers*.

[3] Gaspar, David Barry. *Bondmen and Rebels: A Study of Master-Slave Relations in Antigua*. Baltimore: Johns Hopkins University Press, 1985, 4-5.

[4] Gaspar, "The Antigua Slave Conspiracy of 1736," 309.

[5] George II, King of England. *Order of Committee of Council for Plantation Affairs. Whitehall*. Vol. 44. Abingdon, Oxfordshire: Taylor & Francis Ltd, 1738.

[6] Governor, William Mathew. *Governor William Mathew to Alured Popple, Enclosing the Following. St Christopher's*. Vol. 43. Abingdon, Oxfordshire: Taylor & Francis Ltd, 1737.

litigation against the brothers.[7] A bill of attainder, a relic of old English common law, was a legal writ primarily used by Parliament against those suspected of conspiring against the Crown. Because it could be a legislative act, the writ could circumvent due process: it had the power to simultaneously charge and convict the accused, while punishing them with loss of property and rights, along with the possibility of execution.[8] On appeal, however, the Crown, in conjunction with the Privy Council and the Board of Trade and Plantations, repealed the writs of attainder.[9]

The acts of attainder used on the Johnson brothers permitted the inadmissible enslaved evidence. It also moved the conviction from a courtroom to a legislative context (the Antiguan assembly). I argue that the bills represented much more than a short-term solution in the aftermath of an unsuccessful insurrection; rather, the bills, in conjunction with their successful appeal, revealed the precarious nature of British common law as a tool of the empire. For the expansive empire, the rule of law was necessary for order, both in the metropole and in the colonies. However, the use of attainder in the case of the Johnson brothers was brash, and had the potential to discredit and devalue the legal instrument. To be effective, the law had to be uniform across the colonies in order to be seen as legitimate and powerful — the use of attainder in Antigua had to be repealed since it was an inversion of the legal principle. In essence, a writ of attainder could not have different meanings across the Empire; if the case had been allowed to exist, it would have voided the meaning overall of the writ. The Johnson case illuminates how even a relatively small case in Antigua could affect conversations surrounding plural legal systems at play during the eighteenth century.

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[7] Ibid.

[8] Blackstone, Sir William. *The Commentaries on the Laws of England.* Vol. 2, Oxford: Clarendon Press, 1765, s. 380.

[9] Gaspar, *Bondmen and Rebels*, 58–9; Council of Trade, and Plantations. *Council of Trade and Plantations to Committee of Privy Council. Whitehall*. Vol. 44. Abingdon, Oxfordshire: Taylor & Francis Ltd, 1738.

Legal pluralism is at the center of this work, precisely because the cases examined detail how the law is shaped as much by those above, the home authorities in England, as those below, the colonial governments and the colonial subjects. Legal pluralism is a theory that exists primarily in imperial law, and in scholarship surrounding colonial legal relationships. Although her work does not solely focus on the institution of slavery, Lauren Benton's *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900* is nonetheless important in the study of colonial slavery and slave law because it details how colonial law was formed much more haphazardly than previous scholars have argued.[10] Benton argues against prevailing ideas that Western imperialism brought forth the organized and uniform legal regimes; rather, she argues that, given the geographic extent of empires, there was little uniformity, and that the colonial subjects also had influence over the construction of the legal regimes.[11] In effect, Benton claims that legal pluralism exemplifies the multiplicity inherent within the legal structures in colonies where there was always tension among multiple legal orders.[12] Benton further argues that historians need to abandon the ideas that European imperials powers dictated the structure of colonial law.[13] Instead, she describes an interplay between the colonizers and the colonized that often shaped the development of legal structures.[14] Benton's thesis is simple, yet effective: the lauded imperial institutions that were attributed to European exceptionalism were actually the product of encounters among natives, enslaved Africans and Native Americans, and free persons of color, free and indentured white populations in colonized areas.[15]

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[10] Benton, Lauren. *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900.* New York and Cambridge: Cambridge University Press, 2002, 3.
[11] Ibid., 5.
[12] Ibid., 9.
[13] Ibid., 10.
[14] Ibid., 16–7.
[15] Ibid., 28.

In *Legal Pluralism and Empires, 1500-1850*, Benton, along with Richard Ross, argue that legal pluralism must be viewed with empires at the center in order to best understand how legal systems have functioned throughout history.[16] Namely, they note that one must view imperial law as having a certain fluidity between the metropoles and the colonies when it came to legal practices and infrastructure.[17] One of the main points in their overall work is the distinction of "jurisdictional pluralism" within empires, citing an example from the British Empire where, they state, "metropolitan observers viewed legal pluralism itself as a source of disorder because it protected private jurisdictions and the exercise of arbitrary and unauthorized power in the colonies."[18] The tensions they describe in the formation of imperial sovereignty can be seen in the case of the Johnson brothers, which instigated a metropolitan-colonial conflict over the use of attainder.

David Barry Gaspar has written extensively on it, examining in particular the power dynamic at play during and after the foiled insurrection. He argues that the conspiracy was an important event in Caribbean history, even if it was ultimately a failed plot.[19] The suspected conspiracy, he suggests, terrorized the small island colony, particularly the white Antiguan planters who would have been the targets of the attack.[20] The rebels' plans echoed other insurrections in the region in their intent to overthrow the white ruling class, and emancipate the slave population.[21] In Gaspar's view, the enslaved leaders sought to exploit the weak points in

[16] Benton, Lauren and Richard Ross. *Legal Pluralism and Empires, 1500-1850*. New York: New York University Press, 2013, 1-2.
[17] Ibid., 2.
[18] Ibid., 8-9.
[19] Gaspar, *Bondmen and Rebels*, 308–9.
[20] Ibid., 310–1.
[21] Ibid., 323.

the cultural and societal infrastructure of the island, turning the demographic dominance of the enslaved to their advantage.[22]

Gaspar's work, however, did not explore the use of and implications of attainder in the conspiracy of 1736 from the perspective of jurisdictional conflicts. Instead he examines how the case of the Johnson brothers reflected on race and class; the bills of attainder are only recognized through this lens, narrowing the analysis.[23] This thesis builds on Gaspar's insights into the racial implications of the conspiracy, while extending the analysis to consider how the writs of attainder functioned to reinforce legal and cultural construction of white supremacy.[24]

Much of the recent scholarship on the Caribbean, such as Gaspar's work, has focused on the paradoxical relationship between race and subjecthood. Historian Daniel Livesay, for instance, considers those mixed-race people within the British Empire who descended from powerful bloodlines and successfully carved out spaces for themselves in English society.[25] He directly addresses the strict, yet simultaneously fluid racial hierarchy in the British Caribbean, particularly in Jamaica.[26] During the eighteenth and nineteenth centuries, the children of both African and British heritage were, effectively, part of two worlds.[27] As Livesay argues in his work, their acceptance into Jamaican society as white exposed both the fragility of the racial infrastructure as well as the malleable nature of the racial hierarchy.[28] As mixed-race children moved to Britain, their family dynamics in the metropole helped shift the prevailing ideas of race and inheritance within some of England's wealthiest and most powerful families.[29] Livesay's

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[22] Ibid., 314–5.
[23] Ibid., 309.
[24] Gaspar, *Bondmen and Rebels*, 50.
[25] Livesay, Daniel. *Children of Uncertain Fortune: Mixed-Race Jamaicans in Britain and the Atlantic Family, 1733–1833.* Chapel Hill: University of North Carolina Press, 2018, 1–2.
[26] Ibid., 18.
[27] Ibid., 3.
[28] Ibid., 400–1.
[29] Ibid., 8–9.

work sheds important light on how the movements and actions of the mixed-race peoples of the British Atlantic contributed to the changing definitions of race and racial attitudes throughout the empire.[30]

Brooke Newman's *A Dark Inheritance* also considers Jamaica, delving into issues of birthright and subjecthood for mixed-race Jamaicans in the 18th-19th centuries.[31] She argues that the mixed-race children of white English fathers and Black enslaved mothers were forced a reckoning with a mixed lineage, one that contradicted whiteness with hereditary nature of slavery as well as the inheritable nature of English subjecthood and liberties.[32] Newman's work analyzes how English inheritance, which favored the paternal line, changed within the Jamaican colonial context.[33] To receive the benefits of their paternal lines, mixed-race people depended on their English fathers to recognize them as their, albeit illegitimate, offspring. Such recognitions happened for some, but certainly not for all.[34] Thus, at the center of Newman's research is a critique of the legal fictions of race and bloodlines that were borne from the institution of slavery.[35] Definitions of race and rights were up for debate, but only for those who had the privilege and abilities to argue before the colonial legislatures and courts. The focus of Newman's work is on the children, grandchildren, and, often, great-grandchildren of white masters and enslaved women in this British colony as they tried to carve out space for themselves as free subjects with slave ancestry. Some were successful, but their victories often hinged on the presence, and willingness, of a powerful white father.[36] Blood is a central topic in Newman's book, and she argues that the pervasive relationship between English rights and

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[30] Ibid., 9–10.
[31] Newman, *A Dark Inheritance*, 5.
[32] Ibid., 69.
[33] Ibid., 23.
[34] Ibid., 149.
[35] Ibid., 79.
[36] Ibid., 70.

whiteness was memorialized, metaphorically, in the blood of white families and bloodlines.[37] Blood in Jamaica, and more broadly the British Caribbean, was inextricably tied to race, allowing white English officials to define white blood as pure, and barring British subjecthood for any mixed-race people or families.[38]

With its connection to blood and bloodlines, attainder has also been a subject of study for scholars of law and race in the eighteenth and nineteenth centuries. Colin Dayan has argued that slavery in the Caribbean and American South was a form of attainder because it was linked to blackness, which was framed as corrupted blood. [39] Dayan's thesis rests on the idea and operation of legal fictions: how ideas about racial difference became social structure through the codification of white supremacy and slavery, leaving enslaved persons of color without a voice or humanity within the law.[40] In a similar framework, Orland Patterson, in his seminal work, *Slavery and Social Death*, argued that enslavement caused a "social death" for the enslaved population in the law because their humanity and inalienable rights as humans were stripped from them.[41] Thus, because slaves were seen as property within the law, they experienced a "social" or "civil death."[42] An enslaved person is seen and perpetuated as powerless by not only the master, but the slave society, as a whole. Through this perverted socialization, the slave experiences the ultimate death, as Patterson puts it, because she is only seen as a tool of the master and not as an independent person.[43]

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[37] Ibid., 18.
[38] Ibid., 69–70.
[39] Dayan, Colin. *The Law is a White Dog: How Legal Rituals Make and Unmake Persons*. Princeton: Princeton University Press, 2011, 40–1, 48.
[40] Ibid., 158–9
[41] Patterson, Orlando. *Slavery and Social Death*. Cambridge: Harvard University Press, 1982, 2.
[42] Ibid., 38–9.
[43] Ibid., 37.

Along with discussions of attainder and legal rights, discussions on enslaved resistance are also at the heart of this work. In *Slavery, Freedom, and the Law in the Atlantic World,* 1420-1807, Robert Paquette built on Patterson's arguments to explore enslaved resistance and its historiography in the west.[44] With a particular focus on the Caribbean and the American South, he cast enslaved uprisings and rebellions as challenges to the "social death" that enslaved people experienced.[45] Paquette argues a broad, yet powerful, point: enslaved resistance and the existence of slavery were simultaneous; slavery was always accompanied by resistance, wherever it existed.[46] He traces the various forms such resistance took, from simple individual acts of disobedience to organized uprising.[47]

David Brion Davis, too, in *Inhuman Bondage: The Rise and Fall of Slavery in the New World,* focused on American chattel slavery, argued that it was the ultimate form of dehumanizing bondage.[48] Particularly, he centered on the uniqueness of American slavery, especially in the South, and how its foundations were so inhuman, so intent on stripping away any form of humanity.[49] Davis states that, in order to understand how the institution functioned, one must study slavery through the lens of slave resistance. [50] Like Paquette, Davis rejects the argument that enslaved persons in the South were more passive than the enslaved people in the Caribbean because of the difference in numbers of revolts and uprisings.[51] Davis maintains that

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[44] Peabody, Sue, and Paquette, Richard L. "Slavery, Freedom, and the Law in the Atlantic World, 1420–1807." Introduction and Chapter XII. In *The Cambridge World History of Slavery*, edited by David Eltis and Stanley L. Engerman, 3–19; 272–95. The Cambridge World History of Slavery. Cambridge: Cambridge University Press, 2011.

[45] Ibid., 272.

[46] Ibid., 275–6.

[47] Ibid., 287.

[48] Davis, David Brion. *Inhuman Bondage: The Rise and Fall of Slavery in the New World*. Oxford: Oxford University Press, 2006, 3–4.

[49] Ibid., 3.

[50] Ibid., 206–7.

[51] Ibid., 207–8.

there were substantial similarities between the rebellions in both regions, but, more often, slave resistance was silenced from the historical record in the South, making it seem as though Southern enslaved populations did not revolt.[52] In effect, his argument is in sync with Paquette and his work; slave resistance was always present in reality, but not always in history, mostly due to the people who wrote down the history and chose which events were to be highlighted.[53]

However, the study and historiography of slave resistance, although integral to my research, does not fully encompass my question. The study of slave law and the differing approaches of scholars on how slave codes were created and perpetuated is equally as important. In her chapter, "The Fragmented Laws of Slavery in the Colonial and Revolutionary Eras," which is found in *The Cambridge History of Law in America*, Sally Hadden writes about the splintered and confusing approach that white colonists in the early North American colonies had to slave law and codes.[54] Hadden specifically focuses on the influence of English common law, while also noting slavery's rise and fall in popularity during the Age of Revolutions.[55] Although early North American slave law differed by region and colony, reflecting the different European imperial projects and differing reliance on slavery, Hadden argues that North American slave law as a totality shows the nearly indestructible foundation that kept slavery intact and accepted for so long.[56] Despite differing laws and approaches, all the large Western empires readily subscribed to slavery, albeit with some differing laws and approaches. Thus, slavery was something that everyone agreed on, giving the institution an almost universal acceptance.[57] In an

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[52] Ibid., 221.
[53] Ibid., 230.
[54] Hadden, Sally. "The Fragmented Laws of Slavery in the Colonial and Revolutionary Eras." Chapter. In *The Cambridge History of Law in America*, edited by Michael Grossberg and Christopher Tomlins, 1:253–87. The Cambridge History of Law in America. Cambridge: Cambridge University Press, 2008, 254.
[55] Ibid., 253.
[56] Ibid., 255.
[57] Ibid.

example, Hadden discusses how the English Caribbean colonies, without any pre-existing law or legal structures from the metropole, created their own slave codes. The colonists heavily borrowed concepts from Roman legal precedents, a common law for all European nations.[58]

Thomas Morris also discusses the context of American Southern slave law, but with a greater focus on the laws in each state.[59] In his work, *Southern Slavery and the Law, 1619–1860*, he examines the origins and context of Southern law as it pertained to slavery, specifically noting that the law was odd in the way that it understood the enslaved population.[60] Enslaved persons were understood to be property, but their humanity complicated the law: it could not be just like other property law because the enslaved were human beings, and not plots of land.[61] Morris' analysis lies in the property claims and disputes over slaves, which highlight how slave law was connected to property law, but also fundamentally different from it.[62] He also argues that Southern slave law could not be inherently racialized because not all black people in the South were enslaved. Due to the presence of free black populations across the region, slave law could be tied to race.[63] Morris notes that, unlike in Jamaica where whites extended rights to the free people of color in order to bolster their hold on the society, Southern law always sought to separate whites and nonwhites, and group together the nonwhites who were free and those who were enslaved.[64]

In a narrowed focus on early Southern slave law, Betty Wood explores the peculiar nature of Georgian slave laws.[65] In particular, Wood notes how the policing of enslaved people

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[58] Ibid., 262.
[59] Morris, Thomas D. *Southern Slavery and the Law, 1619–1860*. Chapel Hill: University of North Carolina Press, 1999, 2.
[60] Ibid., 2–3.
[61] Ibid., 64–5.
[62] Ibid., 13–14.
[63] Ibid., 29-30.
[64] Ibid., 29.

was borne out of fears of insurrection.[66] For the first few years of slavery in the colony, masters were entrusted by the public and officials to maintain order in their enslaved populations.[67] However, after four years without much legal infrastructure, Georgian officials decided that the reliance on slaveholders was not enough to protect the safety, and sanctity, of the white population.[68] Thus, Georgia's first slave code was introduced in 1755, which allowed for more organized policing of slaves as well as the idea of "Natural Justice."[69] Even though slaves were seen as property in the law, and not members of the society like white subjects, Georgia's first slave code recognized an inherent form of justice for all living beings, and held that slaves had the right to have a trial.[70] Wood's research into early Georgian slave codes deepens understanding of slave laws and how they evolved in complex and contradictory ways because of the humanity of slaves.

Michael Johnson's famous inquiry into the case of Denmark Vesey also highlights the complexity of slave resistance and legal responses to it.[71] In his article, Johnson argues, with powerful evidence to back up his claims, that the conspiracy of Denmark Vesey in Charleston was almost entirely fabricated by the court.[72] In effect, the conspiracy was a fiction, pursued and elaborated on by forced testimonies and a paranoid white population.[73] Johnson begins by noting that the surviving case documents and the subsequent trials are all mostly in the *Official Report*, which was written by the judges and law clerks. It was also not produced during the trials, but

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[65] Wood, Betty. "'Until He Should Be Dead, Dead, Dead': The Judicial Treatment of Slaves in Eighteenth Century Georgia." *The Georgia Historical Quarterly*, Vol. 71, No. 3 (Fall, 1987), p. 377–98, 377–8.

[66] Ibid., 378.

[67] Ibid., 377.

[68] Ibid.

[69] Ibid., 380.

[70] Ibid., 382.

[71] Johnson, Michael P. "Denmark Vesey and His Co-Conspirators." *The William and Mary Quarterly*, Vol. 58, No. 4 (Oct. 2001), p. 915–76, 915.

[72] Ibid., 915–6.

[73] Ibid., 934.

much later on with edits.[74] He suggests, in short, that the surviving documentation reveals much more about the white psyche in the city than the insurrection itself.[75] His analysis demonstrates the necessity of deconstructing the sources, rather than assuming they are truthful and trustworthy. His thesis, in particular, calls into question the true purpose of the court manuscripts.

My investigation of attainder in Caribbean legal practices provides a new insight into the evolution of colonial legal regimes and practices of slavery from the perspective of the evolution of rights of the free people of color. The first chapter explores the legal definitions of attainder by Sir Edward Coke and Sir William Blackstone. Both note attainder in their legal discourse and treatises, specifically focusing on the permanent effects of the writ on both subjecthood and inheritance. Following that, there will be two sections focusing on cases of attainder: its application in England, and its usage by colonial assemblies in similar, yet broader, cases. In the metropole, attainder was used by Parliament in the prosecution of plots to overthrow the sovereign. Colonists, borrowing the historically Parliamentary power for their legislatures, used bills of attainder in cases where the authority of their constituted power was threatened, thus not necessarily the Crown.

Chapter Two then turns to consider how race and freedom statuses influenced British Caribbean law. Through examinations of cases of attainting enslaved runaways, maroon communities, and free people of color, the chapter highlights how acts of attainder became an integral tool of control for the white British populations in the Caribbean. It traces effectively how acts of attainder, which were often used against enslaved runaways, gradually began to shift to a way to police free people of color. In effect, the chapter sets up the foundation from which

[74] Ibid., 921.
[75] Ibid., 965.

the cases of attainder of the free Black men allegedly connected to the conspiracy of 1736 – John Corteen, Thomas Winthorp, Benjamin and Billy Johnson – were founded.

The final chapter focuses on the case of Benjamin and Billy Johnson, arguing that it provided significant insight into the imperial legal infrastructure in the English Caribbean. The chapter will also include the narrative of the cases of Corteen and Winthorp, the other two free Black men attainted for involvement in the conspiracy. Through a full retelling of their cases, including from arrest to the repeal and voiding of their bill of attainder, the chapter reveals that the case of the Johnson brothers was noteworthy, not solely because the metropolitan authorities intervened, but because they chose the side of the Johnson brothers over their colonial officials' side.

Chapter 1: The Origins of Attainder: The Foundations of Bills of Attainder in England and the Greater British Atlantic, 1628-1746

A bill (or a writ) of attainder was a rather strange legal concept, mostly because it had the ability to proceed, to carry out its purpose, outside of jurisprudence.[76] In its judicial form, as simply "attainder," it was the punishment of a permanent stain on the convict's bloodline in cases of rebellion and high treason. In its legislative form, it was an act that carried the power to act and perform judicial actions outside of the courtrooms.[77] Of those actions, the most notable were corruption of blood and forfeiture.[78] The procedural rules to which courts and judicial bodies we held did not necessarily apply in the legislative body, allowing for a bill of attainder to proceed without judgment.[79] It was often an obscured punishment in the legal history not only in Britain, but also the empire from the sixteenth through the nineteenth centuries.[80]

Attainder was one of the cruelest punishments in English common law.[81] As J.R. Lander argued, part of what made attainder so unique in its power was its creation as an act of Parliament.[82] Through Parliament, the judicial process could be simplified: "All that was necessary to condemn opponents was the reading of the bill in the parliament chamber, the mere acquiescence of the commons and its acceptance by the king."[83] Through this extra-judicial procedure, acts of attainder had few obstacles to impede them, making them formidable penalties. As such, they were reserved for the punishment of direct challenges to the governmental structure, in cases where the traditional legal process was deemed insufficient. As

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[76] Steilen, Matthew. "Bills of Attainder," Houston Law Review 53, no. 3 (Winter 2016): 767-908, 775.
[77] Ibid., 769-70.
[78] Ibid., 774.
[79] Ibid., 770
[80] Ibid., 776.
[81] Lander, J.R. "Attainder and Forfeiture, 1453 to 1509." The Historical Journal, Vol. IV, no. 2 (1961): 119-151, 119.
[82] Ibid., 120.
[83] Ibid.

Matthew Steilen noted, bills of attainder came to be, at least partially, parliamentary tools to deal with treasonous peoples within, as well as outside, the British population.[84] In the "court" of Parliament, where neither evidence nor previous judgments were often considered, bills of attainder were used especially in cases of high treason.[85]

Part of what made attainder so powerful in terms of estate and land forfeiture was its immediacy. Once the convicted were attainted, the forfeiture of their lands began from the moment the offence was committed, rather than when the conviction happened. [86] As K.J. Kesselring argues, during the tumultuous years of sixteenth and seventeenth centuries, even members of Parliament became increasingly worried about the wide scope of forfeiture and attainder.[87]

Two of the most influential thinkers on English common law, Sir Edward Coke and Sir William Blackstone, provide insight into how the principles and bills of attainder were understood in the seventeenth and eighteenth centuries. Coke's legal treatises on attainder focused on how it signaled the corruption of the accused's blood, which in turn effectively voided any inheritance of the family line. For Coke, the use of attainder in cases of high treason was telling of its powerful influence on English jurisprudence. Attainder, especially in its legislative form, revealed much about the crown and its authority over the realm, as well as its

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[84] Steilen, "Bills of Attainder," 772.

[85] Ibid., 773.

[86] K. J. Kesselring, "Felony Forfeiture in England, c.1170-1870," Journal of Legal History 30, no. 3 (December 2009): 201-226, 206-7.

[87] Ibid., 212.

"The contests around uses presumably sharpened men's thinking about the nature and security of their own property, particularly as these contests occurred in the midst of the dissolution of the monasteries - the biggest land-grab since the Norman Conquest. So, too, might the numerous attainders of men of their own ilk - both treason and felony - have encouraged the men who sat in parliament to see themselves and their families as potential victims of forfeiture."

ability to stop rebellion.[88] On the other hand, Blackstone's legal treatises on eighteenth-century English common law interpretations of attainder placed greater importance on the mark of attainder, itself. Blackstone made similar points to Coke with regard to the forfeiture of estates and outlawry, but he spent much of his analysis on how attainder affected personhood in the law, reflecting contemporary concerns with natural and positive law.[89] In effect, attainder, although not widespread, was certainly up for debate and discussed in legal circles.

English legislative, particularly Parliamentary, uses of attainder provide important context for understanding the application of attainder in the case of the Antiguan Johnson brothers. By detailing how attainder was meant to work in theory, one can trace why, and how, the Antigua legislature decided to use a bill of attainder to try the two men. Moreover, the contrast between the theoretical foundations of attainder and the practical uses of the bill in the metropole versus the colonies reveal the reality of legal pluralism within the British Empire. While colonial officials and legislatures based their usage of attainder on principles defined by Coke and Blackstone, their local contexts prompted them to adapt the writ to best fit what they felt necessitated it.

Sir Edward Coke, Sir William Blackstone, and Legal Treatises on Attainder

One of the most famous and earliest descriptions of attainder is in Coke's prominent and seminal work of the seventeenth century: *The Institutes of the Lawes of England* (1628).[90] Coke contextualized the legal justifications and consequences of attainder, especially with regards to

[88] Coke, Sir Edward. *The First Part of the Institutes of the Lawes of England*. Vol. 2., 18th ed. London: Printed for J. & W.T. Clarke, 1823, s. 745, 390b-390a.

[89] Blackstone, Sir William. *The Commentaries on the Laws of England.* Vol. 2, Oxford: Clarendon Press, 1765, s. 380.

[90] Coke, Sir Edward. *The First Part of the Institutes of the Lawes of England*. Vol. 1., 18th ed. London: Printed for J. & W.T. Clarke, 1823, lxix-lxx.

cases of treason.[91] Primarily, he focused on the principles that laid down the foundation for the either judicial or prejudicial action. Attainder, in Coke's definition, is a divided concept: attainder is either a specific punishment that is issued in judgment and conviction, or it is applied before judgment, but only in cases of outlawry.[92] Outlawry was a specific type of criminal behavior. To be labeled an outlaw meant that one had intentionally broken the laws and bounds of civil society, and, because of those actions, had effectively renounced one's place in that society. The subtle, yet clear distinction between the two types of attainder was crucial to Coke's understanding and subsequent analysis of bills of attainder because it shed light on how attainder allowed for judicial procedures to become possibly flexible. In the broad category of outlawry, attainder, unlike other legal acts or writs, had the ability to supersede the whole of the legal process.[93]

Coke's interpretation of attainder was shaped by the not infrequent instances of high treason in England, especially in plots against the crown.[94] Coke equated the judicial process of attainder to a conviction through confession: "But in cases of high-treason, if the partie refuse to answer according to the law, or say nothing, hee shall have such judgement by attainder, as if he had beene convicted by verdict or confession."[95] Thus, the punishment of high treason was one that could be determined without the agency of the accused. By refusing to speak (including because they had fled) the accused were issued acts of attainder, without any form of trial or due process.[96] Coke's analysis highlights the importance of "the realme": for those outside of

[91] Ibid., cxxiii.
[92] Coke, *The First Part of the Institutes of the Lawes of England*. Vol. 2., s. 745, 390b-390a.
[93] Ibid., s. 745, 391b.
[94] Ibid., s. 440, 261b.
[95] Ibid., s. 745, 391a.
[96] Ibid., s. 514, 294b.

England, or at the very least not able to stand before the Court of the King's Bench, or other high-ranking justices, writs of attainder made their cases virtually impossible to fight.[97]

One of the most important aspects of attainder for Coke was the corruption of blood: "The statute…doth declare, that is treason by the common law to adhere to the enemies of the king within the realme…if hee bee thereof [provable] attaint of overt fact…shall forfeit all his lands &c."[98] For Coke, the "taint" of attainder was a "stain" that lives in infamy.[99] That metaphorical image of a bill of attainder as a permanent, bodily mark was its most popular description. Because of the word's root in "taint," attainder was most often associated with and described as the corruption of blood.[100]

To corrupt the accused's blood was a fiercely aggressive legal act. A stain on one's family bloodline was effectively an unsalvageable mark, and, as Coke noted, conviction was only reversible by an act of Parliament: "If a man be attainted of treason or felony… for that by his attainder his blood is corrupted. And this corruption of blood is so high, as it cannot be absolutely be salved and restored but by an act of parliament."[101] Given that the cases were presented before Parliament and pardons only accessible through Parliament, the central power behind all acts of attainder lay firmly in the hands of the government and Crown.[102]

Over a century later, Sir William Blackstone responded to Coke's *Institutes* in his, *The Commentaries on the Laws of England* (1765). For Blackstone, the threat of attainder lay in the mark and the legal death it conferred: "When sentence of death, the most terrible and highest judgment in the laws of England, is pronounced, the immediate inseparable consequence from

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[97] Ibid., s. 440, 261b, s. 514, 294b.
[98] Ibid., s. 440, 261b.
[99] Ibid., s. 514, 294b.
[100] Ibid., vol. 1, s. 1, 8a.
[101] Ibid.
[102] Ibid., s. 514, 294b.

the common law is *attainder*."[103] Blackstone's analysis brought the cruelty of attainder to the forefront of the discussion of the legal writ in a way that Coke had; by highlighting and explaining the realities of "*attinctus*," Blackstone underlined its uniqueness in common law: it was closely connected, and almost equal, to the punishment of death. No other writ could make a man "dead in law," which, although not an execution, completely annihilated any semblance of rights and agency within the law: "He is no longer of any credit or reputation; he cannot be a witness in any court; neither is he capable of performing the functions of another man: for, by an anticipation of his punishment, he is already dead in law."[104] Blackstone argued that a writ of attainder was a metaphorical form of execution; it meant the death of the person as a member of the society. Blackstone's analysis of attainder as it fit into English common law grounded itself in the distinction between person and criminal. Attainder clouded the line between person and criminal, making the accused into both a convicted criminal and, at least in name, a nonperson in the law.

Both Coke and Blackstone elaborated on the type of attainder that resulted from outlawry. For Blackstone, it followed that the punishment of attainder should mirror the outlaw's relationship to the law and community because the only way to punish those who have chosen to abscond was to permanently excommunicate them and strip them, effectively, of their personhoods.[105] Blackstone's focus on the "stain" or the "blackened" nature of attainder raises an important aspect of it: how it not only permanently marks a person, but how it marks a person as a criminal forever: "He is then called attaint, *attinctus*, stained or blackened."[106] That stain gave Blackstone pause; there is no recourse for it, and the finality of it is what makes it both terrifying

[103] Blackstone, *The Commentaries on the Laws of England.* Vol. 2, s. 380.
[104] Ibid.
[105] Ibid.; Coke, *Institutes*, vol. 2, s. 745, 391b.
[106] Ibid., s. 388, s. 380. "Attinctus" is the Latin word for attainted, stained, or blackened.

in nature and akin to death.[107] As Blackstone describes, "the criminal is no longer fit to live upon the earth, but is to be exterminated as a monster and a bane to human society, the law sets out a note of infamy upon him, puts him out of protection, and takes no further care of him than barely see him executed."[108] It was a mark that permanently isolated the criminal and their descendants from society. Forfeiture of lands, property, and personhood was a means to deter people from renouncing the law.[109]

Cases of Attainder in England, 1640-1746

The fact that acts of attainder could affect those at any class level caused mounting anxieties among those in Parliament during the precipice and aftermath of the English Civil War. And they were right to worry. Men of high society, including lords and wealthy titled men, were subject to acts of attainder that corrupted their family bloodlines and strippped them of their estates and titles.[110] A famous example occurred in 1641, the year before the breakout of the English Civil War, when Parliament successfully tried and executed Thomas Wentworth, the Earl of Strafford.[111] Wentworth was a close ally and advisor to King Charles I, and ultimately it was their friendship that led to his downfall.[112] Wentworth initially faced an impeachment trial because Parliament blamed him for recent military failures and mounting tensions between the Crown and Parliament.[113] However, when it appeared that he may be acquitted after an impressive speech was made in his defense, the House of Commons introduced and

[107] Ibid., s. 380–1. While pardons were possible, they were nonetheless rare.
[108] Ibid.
[109] Ibid., s. 383.
[110] Steilen, "Bills of Attainder," 796-7.
[111] Cobbett, William. *Cobbett's Parliamentary History of England from the Norman Conquest, in 1066 to the Year 1803*. London, Printed by T. C. Hansard, 758.
[112] Timmis, John H. "Evidence and I Eliz. I, Cap. 6: The Basis of the Lords' Decision in the Trial of Strafford." *The Historical Journal* 21, no. 3 (1978): 677-83, 680.
[113] Cobbett, *Cobbett's Parliamentary History of England*, 751-3.

overwhelmingly passed a bill of attainder against him.[114] The House of Lords followed suit, putting King Charles I in a difficult position.[115] The king ultimately assented to the bill, but, in an effort to save his friend, he wrote a letter to the House of Lords, asking them not to execute his friend. However, that was all for naught. As had been the plan all along with the writ of attainder—a means to summarily try one for high treason—Wentworth was executed on May 12th, 1641 on Tower-Hill.[116] The Earl of Strafford's case exemplified the unique power of a parliamentary bill of attainder. Because of the legislative context of the writ, the process was expedited. Since it was only bound to parliamentary procedures, a writ of attainder was a tactic for Parliament to proceed with cases that otherwise would have been thrown out.

The Earl of Strafford's case was highly politicized due to the English Civil War, but attainder was not always high-profile. The case of Major-General Gordon in February of 1719 also highlighted the relationship between acts of attainder and high treason in Parliamentary proceedings, as well as the limits of attainder.[117] Gordon was attainted of high treason because of his involvement in the Jacobite Rebellion of 1715. His case was peculiar because the House of Lords attainted the right person, but used the wrong name.[118] Because of this mistake, the forfeiture of the estate was thrown into question: did the attainder still count for Major-General Gordon, whose name was Alexander and not Thomas, the name stated on the act? As the Commissioners and Trustees of the Forfeited Estates argued, the wrong name may have been in the act, but his other titles—Major-General Gordon and Laird of Auchintoule—could only refer to him, therefore the act must have been valid.[119] In the end, however, the House of Lords ruled

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[114] Ibid., 747-8.
[115] Ibid., 758-9.
[116] Ibid., 761-2.
[117] The Commissioners and Trustees of the Forfeited Estates v. Major-General Gordon, English Reports Full Reprint Vol. 3 - House of Lords (1719), s. 254-7.
[118] Ibid., s. 254.
[119] Ibid.

that the use of the wrong "Christian" name made the act void.[120] By treating Thomas Gordon as a person in the law, the act of attainder, in a strict reading, had to be valid, and therefore, inapplicable for Alexander Gordon.[121] In particular, the legal language of "interest" reveals the roots of attainder and the consequence of forfeiture: there must be a vested interest of the person attainted. Simply put, there must be a connection between the person attainted to the lands in order for them to be eligible for forfeiture. Therefore, since Major-General Thomas Gordon had no rights to, or interests in, the estates of Major-General Alexander Gordon, there was no basis for the forfeiture.[122] By recognizing Thomas Gordon as a person in the law, and noting the difference between him and Alexander Gordon, the lawyers on the side of the respondent argued that there was no legal process nor procedure to transfer the attainder, especially given the circumstances of the act.[123] Gordon's case exemplified the limits of attainder because the attainder in this case was voided, but without a writ of error or parliamentary pardon. The punishment of forfeiture and corruption of blood were extreme, and so its use was strictly surveilled.

Nearly forty years later, after he was issued an act of attainder, Alexander Lord Forbes of Pitsligo tried to argue against his act by claiming that it was a misnomer as well.[124] Unlike Major-General Gordon, Pitsligo was not as lucky in his ultimate judgement; in a clear switch in legal precedence, the justices stated that he was sufficiently named and described in the act of attainder, and therefore stood attainted.[125] Pitsligo was accused of high treason and participation in the Jacobite rebellion of 1745 against King George II, and he, along with his fellow

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[120] Ibid., s. 255-6.
[121] Ibid.
[122] Ibid., s. 256.
[123] Ibid.
[124] The Case of Alexander Lord Pitsligo, in the House of Lords, English Reports Full Reprint Vol. 168 - Crown Cases (1746), s. 79-80.
[125] Ibid., s. 87-88.

conspirators, had evaded justice.[126] Due to his lack of appearance in the court, he was issued an act of attainder as Alexander Lord Pitsligo, which he argued voided the attaint because his name, as per his family's title, was Alexander Lord Forbes of Pitsligo. Initially, Pitsligo was granted a reversal by the Court of Session, but this was quickly appealed by the Crown, and was once again brought before the House of Lords.[127] At the heart of any misnomer case was the belief that there must be a clear indication, preferably by full name and description, that the person in the act matched the person who was meant to be attainted.[128]

The case of Lord Pitsligo, nevertheless, turned the previous precedent established by Gordon on its head. It revealed that the nature of precedence in the case of acts of attainder, even for men of high social standings, was rather grey. Attainder was a writ taken seriously by the justices as well as Parliament, but it was also not well-defined in terms of its boundaries.[129] Although there were cases, such as Gordon's, where one could argue against Parliament or the Crown, and be successful, it appears from Pitsligo's case that there were many others, with similar grey areas, where the attainder was seen as justified.[130] In effect, attainder, despite beings the harshest penalties in English common law, had a malleable nature.

These three instances of attainder reflect the centrality of rebellion to Coke and Blackstone's conceptions of the legal tool. In the case of Strafford, it was his rebelling against Parliament, and siding with the King that led to his attainder and execution. For Gordon and Pitsligo, it was their support of the Jacobite Rebellions – uprisings against the Crown – that led

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[126] Ibid., s. 80.
[127] Ibid.
[128] Ibid., s. 80-81.
"…yet in an Act so penal as that which is the subject of the present question, the persons who are the objects of it ought to be described by their proper names ; so that one man may not suffer for the act or default of another."
[129] Ibid.
[130] Ibid., 85-6.

to their attainder. Rebellion, however, took on new forms and significance in the wider British colonial world, bringing new opportunities and challenges to the use of attainder.[131]

Cases of Attainder in the Greater British Atlantic, 1674-1702

In the British Atlantic, which encompassed the British colonies from North America to the Caribbean, writs of attainder took on a different meaning. While acts of attainder had traditionally been vested in Parliament, that legislative body was too far away to handle the local rebellions in the colonies. Thus, colonial legislatures used acts of attainder in cases where they felt that it was justified. These cases tended to be similar to those in England in that they targeted rebellions against the established authority and sovereign. Nevertheless, since colonial assemblies were not technically recognized as holding an authority equal to Parliament, their acts of attainder broadened its application to acts of resistance against colonial authority structures. The cases of Nathaniel Bacon, Jacob Leisler, and Colonel Nicholas Bayard demonstrate how these colonial applications of attainder rendered the writ much more about policing subversive and treasonous behaviors, instead of merely punishing them. What becomes clear, however, in the metropolitan response to such writs is that use of attainder became a key site in the articulation of imperial sovereignty.

One of the earliest rebellions in the nascent American colonies was Bacon's Rebellion, which historians have described as a precursor to the American Revolution. Nathaniel Bacon was a planter in the Virginia colony from 1674 until his death in 1676.[132] Because of his family's wealth, he was able to own a fair amount of land. Due to a familial connection to Governor

[131] Coke, *The First Part of the Institutes of the Lawes of England*. Vol. 2., s. 745, 390b-390a; Blackstone, *The Commentaries on the Laws of England.* Vol. 2, s. 380.

[132] Rice, James D. "Bacon's Rebellion in Indian Country." *The Journal of American History* 101, no. 3 (2014): 726-50, 730.

Berkeley, Bacon was also a member of the governor's council.[133] A point of contention between Bacon and Berkeley was the policy concerning relations with neighboring native tribes.[134] Bacon's lands were vulnerable to attacks from native peoples, and he sought approval from the governor to counter-attack and protect his property. The governor refused, leading Bacon and other like-minded planters and colonists to take up arms against the local native population.[135] Thus, with Governor Berkeley and Bacon at odds, Bacon's rebellion had officially begun, with Bacon arguing that he was protecting Virginia from dangerous and violent threats, and Berkeley simultaneously labelling Bacon and his followers as traitors not only to the commonwealth, but also to the Crown.[136]

Bacon was successful at changing the minds of many of his fellow settlers, but Berkeley, with the power of the Virginia assembly, had the ability to permanently demarcate members of Bacon's rebellion, including Bacon, himself, who was already dead, as treasonous through acts of attainder.[137] The act of attainder against the rebels passed the Virginia Grand Assembly in June of 1676. The royal commissioners sent from the metropole sought to pardon the men, but were firmly rebuffed by Berkeley and his allies.[138] In the eyes of the royal authorities, without Bacon, who was the rebels' leader, the uprising would, and did, dissipate, leaving the justifications for the attainder as nothing more than revenge.[139] Nevertheless, the act was voided, with strong support from the Crown. In 1680, the King, in tandem with Governor Thomas Colepepper – Berkeley had been relieved of his duties and sent back to England shortly after the

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[133] Benton, Lauren. *A Search for Sovereignty: Law and Geography in European Empires, 1400–1900*. Cambridge: Cambridge University Press, 2009. doi:10.1017/CBO9780511988905, 96.

[134] Ibid., 96-97.

[135] Ibid., 97.

[136] Ibid., 97-8.

[137] "*An act of [attainder]*" (Legislation, The National Archives, Kew, CO 5/1376 1677/02/20). http://www.colonialamerica.amdigital.co.uk.proxy.library.vanderbilt.edu/Documents/Details/CO_5_1376_162

[138] Benton, *A Search for Sovereignty*, 98.

[139] Ibid., 97.

rebellion – repealed all the acts passed during the rebellion: "And whereas the King's most Excellent Majesty, by his gracious Proclamation, and the Right Honourable Governor by his Proclamation, hath long since declared all the Proceedings of the said Assembly to be void in Law."[140] Metropolitan British authorities, while far away, were not against intervening in local matters of attainder, high treason, and rebellion. Rather, as seen in Bacon's case, the officials in England, including the King, were more often part of the driving force to show mercy and repeal the acts of attainder.

Another famous rebellion was Jacob Leisler's uprising in New York. In the wake of England's Glorious Revolution in 1688, many of the Dutch colonists in the British colonies believed they would gain greater political access with the enthronement of the Dutchman William III and resented the hesitancy with which colonial governments recognized the transition in power.[141] In the colony of New York, where Leisler, who was Dutch, successfully helped dispose of Governor Francis Nicholson, with whom Leisler had previously worked with on his council. In the subsequent power vacuum, he installed himself as the new leader. Leisler took control over parts of the province from 1689 until 1691, frustrating both colonial and royal officials alike.[142] In the end, Leisler, because he refused to step down and allow the newly appointed royal governor to serve over the totality of New York, was attainted with high treason, and executed on May 16, 1691.[143]

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[140] "*Acts of the Virginia assembly, 20 February 1677*" (Legislation, The National Archives, Kew, CO 5/1382 1677/02/20). http://www.colonialamerica.amdigital.co.uk.proxy.library.vanderbilt.edu/Documents/Details/CO_5_1382_018

[141] Howe, Adrian. "The Bayard Treason Trial: Dramatizing Anglo-Dutch Politics in Early Eighteenth-Century New York City." *The William and Mary Quarterly* 47, no. 1 (1990): 57-89, 62.

[142] Ibid., 64.; Foner, Eric, John Arthur Garraty, and Society of American Historians. 1991. *The Reader's Companion to American History*. Boston: Houghton Mifflin Harcourt Publishing Company.

[143] Ibid.

Like Bacon, Leisler's attainder was repealed posthumously, and, once more, the process to void the act went back to the authorities, namely Parliament and the Crown, in England. Parliament successfully passed a bill reversing the bill of attainder for Leisler in 1695, but not without debate. While the bill to repeal argued that, " *Jacob Leisler* was constituted Commander in chief by the General Assembly of the Province of *New York*…That immediately upon Col. *Slaughter's* Arrival as Governor in Chief, *Leisler* delivered the fort to his Order," the reasons to support the bill were primarily focused on Leisler's lack of estate and wealth.[144] Namely, those in the House of Commons who opposed the repeal of the attainder hinged their argument on the differing accounts of Leisler leaving the fort, and the fact that, "*Jacob Leisler*, came into that Province a poor German Musqueteer, was never naturalized, left not Estate sufficient to pay his Debts."[145] Thus, for the lower house of Parliament, Leisler's poverty proved that the voiding of the attainder was meaningless because there was nothing left to salvage for the family, having already been saddled with debt. Those who opposed the bill to repeal focused much more on the minute details of the rebellion's end, highlighting the image of Leisler as a traitor, and unwilling to surrender to royal authorities. Nevertheless, Leisler's attainder was reversed in 1695, and what was left of the estate was given back to the family, which was not without its own problems.[146]

Despite the repeal, Jacob Leisler's family was left feeling the lasting effects of the writ.[147] In a petition from Leisler's family to King William, Leisler's son, also named Jacob, asked the

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[144] *Reasons humbly offered to the honourable house of commons against passing the bill for the reversing the attainder of Jacob Leisler, Jacob Milburn, Abraham Governour and others*" (Legal Document, The National Archives, Kew, CO 5/1039 1691/04/17-1696/12/31).
http://www.colonialamerica.amdigital.co.uk.proxy.library.vanderbilt.edu/Documents/Details/CO_5_1039_004

[145] Ibid.

[146] "*Votes of the House of Commons, including those relating to corruption, fixing prices and the reversal of the [[attainder]] of Jacob Leisler*" (Legislation, The National Archives, Kew, CO 5/1039 1695/04/11-1695/04/18).
http://www.colonialamerica.amdigital.co.uk.proxy.library.vanderbilt.edu/Documents/Details/CO_5_1039_005

[147] Ibid.

King for his mercy, while simultaneously calling into question the nature of his father's conviction: "…by the influence and malice of your Majesties and his Enemies…he was convicted…[of] high Treason…leaving Alice Leisler,…and your Petitioner his only Son, with six Daughters in very deplorable Circumstances having a great measure exhausted all their substance."[148] The fate of attainder on a family was showcased prominently in the petition. Notably, Leisler reiterated the issue of the debt that the family faced, which was at the center of his plea to the Crown: "Your Petitioner therefore humbly prays your Majesty would be graciously pleased to direct that the said Money's may be paid to your Petitioner at *New York*." For the children left behind, with the stain of their father's conviction and execution on the grounds of treason, their lives were changed forever. Petitioning the King of England, while bold, was the son's best hope to repair the debt his father had left the family, in the wake of the repeal of his attainder.

Connected to Leisler's uprising, Colonel Nicholas Bayard and his own trial for high treason happened shortly after in 1702.[149] Bayard was one of the men that caused Leisler's arrest. Leisler's allies subsequently blamed him for Leisler's execution.[150] The illegal acts that necessitated Bayard's trial were not connected to Leisler's Rebellion directly, but were nonetheless, rebellious against the colonial authority in New York. Soldiers stationed at Fort William Henry alleged that they had been forced by Colonel Bayard to sign papers that

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[148] *Journal of the House of Burgesses of New York, 19 Aug - 18 Oct 1701*" (Minutes, The National Archives, Kew, CO 5/1184 1701/08/19-1701/10/18). http://www.colonialamerica.amdigital.co.uk.proxy.library.vanderbilt.edu/Documents/Details/CO_5_1184_031

[149] Salmon, Thomas. *Tryals for high-treason, and other crimes. With proceedings on bills of attainder, and impeachments. For three hundred years past. To which are prefix'd, a preface, giving an account of the nature and usefulness of the work. And an alphabetical table of the respective persons try'd, ... By the same hand that prepared the folio edition for the press. In six parts.* London: Printed for D. Browne, G. Strahan, W. Mears, R. Gosling, and F. Clay, vol. VI, 1720-31, 22.

[150] Howe, "The Bayard Treason Trial, 64.

undermined and condemned the local government.[151] Shortly after these allegations came to light, Bayard was arrested. Bayard's charging document was essentially a charge of attainder and high treason. However, while not connected to the criminal charges, Bayard's trial was deeply ingrained in the politics that followed Leisler's Rebellion. In an expedited effort to try him, the Provincial Council called a special court to session, specifically a Court of Oyer and Terminer, which was headed by Chief Justice Willian Atwood, whose fall from grace would help grant Bayard's voiding of his attainder.[152] Bayard had a jury in his trial, who moved to convict him on March 9, 1702, with a sentence of execution.[153] However, a new governor, Lord Cornbury, arrived and saw Atwood's actions as deeply political and steeped in revenge. Bayard's attainder was reversed, and all his rights and estates were restored to his person.[154]

Colonel Bayard's trial was problematic for many reasons, but the most salient issue was that the treasonous petitions were never admitted as evidence, or reviewed by the court. Similar to the case of the Johnson brothers, Bayard's trial should have never have made to court; without the hard evidence, Lord Cornbury condemned Chief Justice Atwood's actions in his letter of suspension: "The prosecution of Col. Bayard and Alderman Hutchins etc. which had appeared so scandalous and unjust…Notwithstanding the Addresses were never produced in Court in those trials, nor the matter contained in them ever duly proved, [Atwood] proceeded to condemn them

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[151] Ibid., 65.

[152] Ibid., 65-66. A Court of Oyer and Terminar was essentially a criminal court that, in British jurisprudence, oversaw cases of high treason, especially those that could result in execution and death. Thus, the use of this type of court makes sense with Col. Bayard's trial for high treason.

[153] "*An Account of the Illegal Prosecution and Tryal of Coll. Nicholas Bayard, In the Province of New-York, For Supposed High-Treason*" (Minutes; Pamphlet, The National Archives, Kew, CO 5/1047 Part 2 1702)., 44. http://www.colonialamerica.amdigital.co.uk.proxy.library.vanderbilt.edu/Documents/Details/CO_5_1047_PART_2_004

[154] Historical Society of New York Courts. "The Trial of Colonel Nicholas Bayard, 1702," accessed February 28, 2021. https://www.nycourts.gov/history/legal-history-new-york/legal-history-eras-01/history-new-york-legal-eras-nicholas-bayard-trial.html; *Papers Received by the Council of Trade and Plantations from Governor Lord Cornbury, Nov. 30*. Vol. 20. Abingdon, Oxfordshire: Taylor & Francis Ltd, 1702.

for High Treason and passed sentence of death on them."[155] Atwood had tried, convicted, and sentenced a man to death based on evidence that was never seen by the court. Thus, upon further inspection by the royal authorities, the use of attainder was voided because it was misused. Had Bayard's trial stood, with his execution and attainder intact, the precedence of attainder in the colony would have differed immensely from the metropole. Especially considering the death sentence, with the punishment of being castrated, drawn and quartered, Lord Cornbury argued, the case should have never been investigated without the petitions.[156] The repeal of the attainder and high treason revealed that the use of attainder was exploited to bring upon the alleged criminals a punishment of death and fueled by political and personal tensions.

The cases of Bacon, Leisler, and Bayard concluded in the repeal of attainder, all with the assistance, in some form, of the Crown. Within the duality of the legal systems – the colonial courts and legislatures versus Parliament and metropolitan courts – attainder and high treason became a particular site of conflict. While they entrusted the colonists to rule, they were keenly aware of affronts to the established authority, and never too far away to insert their supremacy over the local officials.

Conclusion

The interplay among colonies when it came to the definitions and uses of attainder did differ, inherently, from the metropole. While in England, and to a certain extent Scotland, it was much simpler to find clear-cut reasons to either pass acts of attainder or use attainder as a criminal punishment — a civil war, or a rebellion to overthrow the Crown – the colonies, with

[155] *Papers Received by the Council of Trade and Plantations from Governor Lord Cornbury, Nov. 30*, 1702.

[156] "*An Account of the Illegal Prosecution and Tryal of Coll. Nicholas Bayard, In the Province of New-York, For Supposed High-Treason,*" 44.

the backdrop and context of slave societies, had a much more complicated and muddled picture of attainder. As the American Revolution made clear in the next century, the creation of colonial assemblies generated legislative bodies whose relationship to Parliament was ill-defined. That conflict becomes especially apparent in the colonial writs of attainder, which assumed to the assemblies a legal power granted to Parliament, and in their reversals, which articulated the supremacy of Parliamentary authority over assemblies. While the cases in this chapter did not directly interrogate the intricacies of the British slave societies, where the lines that defined subjecthood were constantly being redrawn and redefined among the differing provinces and colonies, the rebellions mentioned in this chapter begin the process to understand why attainder, a powerful legal writ that was often paired with execution and treason, was used to police subversive acts.

If the colonial cases against these white men resembled those in Britain itself in that they targeted white, often elite, men accused of rebellion against the crown or colonial governments, others exposed the very different social and racial dynamics shaping the use of the attainder in the colonial world. While attainder for all the men mentioned in this chapter, from the Earl of Stafford to Jacob Leisler, was seen as necessary because of their treasonous actions, the next chapter explores the uses of attainder in the cases of runaway enslaved Africans and maroon communities in the Caribbean.[157] With this form of attainting, colonial officials in the Leeward Islands chose to use acts of attainder to punish acts much more akin to outlawry than to treason, in the distinctions posed by Blackstone.[158] Because enslaved runaways had attained their freedom by physically removing themselves from the bounds of society, colonial legislatures

[157] Antigua Act no. 176, "An Act for attainting several Slaves now run away from their Master's Service, and for the better Government of Slaves."; Governor, William Mathew. *Governor William Mathew to Alured Popple, Enclosing the Following. St Christopher's*. Vol. 43. Abingdon, Oxfordshire: Taylor & Francis Ltd, 1737.

[158] Blackstone, *The Commentaries on the Laws of England.* Vol. 2, s. 380.

chose to use acts of attainder as a way to both punish and police their behavior because, with them living outside of the law, attainder was one of the few means to punish them, since they could not easily be arrested or stand trial.

Chapter 2: Attainder in the Greater Caribbean: How Acts of Attainder Were Used to Control & Punish Enslaved Persons and Free People of Color

English Caribbean slave societies, from their inception, had to contend with issues and definitions of race and freedom, especially concerning how racial and freedom statuses intersected.[159] In the colonies, as a means to preserve the structure of white supremacy and slavery, whiteness was linked to freedom and full rights, but for free people of color, inclusive of free Black and mixed-race people, their identities further complicated conversations and laws surrounding English subjecthood and rights in the far-reaches of the empire.[160] If one was free, but not white, what did this mean in the law?

To begin, one's racial and freedom statuses played important roles in determining the course of one's legal treatment. In the colonies, there was a dual court system of sorts: one for enslaved persons, and another for full English subjects.[161] In parts of the British Caribbean, including Jamaica, but notably not Antigua, free Black people were relegated to the legal status of slaves, in terms of the courts, but considering their status as free people meant that this practice did not fit well within existing legal codes.[162] The use and admission of enslaved persons testimonies as evidence against a free person was a particular site of conflict in the case of free Blacks.[163] By gaining the right to be tried in courts like white, male English subjects, free Black Caribbean men pursued an argument that they deserved to be granted freedom beyond just in name only.[164] In short, they wanted to be treated both socially and under the law as free subjects of the British Empire.

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[159] Newman, *A Dark Inheritance*, 16.
[160] Ibid., 21–2.
[161] Ibid., 61.
[162] Gaspar, *Bondmen and Rebels*, 162, 166.
[163] Ibid., 63–4.
[164] Ibid., 64.

The arguments that free Black men made threatened an already anxious white planter class.[165] For example, in Antigua, the enslaved population grew steadily, from 19,800 in 1724 to the 24,408 by 1734, whereas the white population rapidly decreased from 5,200 to 3,772 in the same years.[166] Greater Caribbean slave societies relied on the legal fiction that a clear line demarcated the enslaved from the free, but the dependency on the transatlantic slave trade meant that the experience of that demarcation quickly became racialized.[167] Put simply, Blackness became a mark of enslavement, and whiteness was a mark of freedom.[168] Interracial relationships that led to children, however, as well as numbers of free Black, unpropertied white, and native peoples, complicated matters.[169]

The routes to freedom for enslaved Blacks were varied. In Jamaica, for instance, John Williams managed to obtain the privileges and rights of a white Englishman in Jamaica was John Williams. Williams had not been born free; rather, he was a freed slave who had earned his freedom.[170] Through a private act passed by the Jamaican colonial legislature in 1708, which considered the family's Christianity and wealth, Williams was able to gain the right to be tried as an Englishman. This right meant that, if he should be brought before the court, he would not be brought before the slave court and no enslaved evidence could be admissible. In essence, he was granted access to the rights of a full Englishman in the courtroom, giving himself and his family a step into whiteness, at least towards its legal definition.[171]

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[165] Ibid., 56.
[166] Sharples, Jason T. "Hearing Whispers, Casting Shadows: Jailhouse Conversations and the Production of Knowledge during the Antigua Slave Conspiracy." *Buried Lives: Incarcerated Lives in America*, no. 1 (2011): 35-59, 39.
[167] Ibid., 31.
[168] Ibid., 46–7.
[169] Livesay, *Children of Uncertain Fortune*, 4.
[170] Ibid, 61.
[171] Ibid., 64.

However, the privileges of the Williams family, while powerful, were not fixed. Francis Williams, the youngest son, faced targeted discrimination from the legislature. In 1730, for instance, he was forced to contend with an act that would strip himself and all other free Black people in Jamaica of important rights.[172] The bill's enactment divested him, as a free Black man, of the crucial right for which his father had fought: "…severe clauses are laid on all free negroes in general…such free negro for the first offence is to forfeit 10/(£83), for the second 20/(£166), and for the third his or her freedom and to be transported etc., on conviction before any two Justices of the Peace and three Freeholders."[173] With this bill, free Black people had a limited number of offences before they were stripped of their freedom and transported outside of the colony. It signaled to free Black Jamaicans that their freedom had boundaries, and these limits were grounded in the law. While there were families like the Williams' who had private bills passed by the legislature, the enactment of this bill overshadowed, and effectively voided, the private bills.

White fears of the crumbling racial infrastructure and hierarchy in Jamaica helped the bill to pass.[174] With free Black men like Francis, who had lived almost their entire lives with some of the privileges of a white Englishman, the definition of blackness as inextricably linked to enslavement was perilous. Colonial officials had accused Francis of flaunting the rules and blatantly refusing to accept his supposed racial inferiority. The bill against Francis exemplified the fragile nature of freedom for free Black subjects in the Caribbean during the early eighteenth century. The bill was passed a few years short of the Johnson brothers' case, and showcased how the status free Black men was growing more and more precarious in the Caribbean. While there

[172] *Case of Francis Williams of Jamaica*. Vol. 38. Abingdon, Oxfordshire: Taylor & Francis Ltd, 1731.
[173] Ibid.
[174] Newman, *A Dark Inheritance*, 64–5.

were means that could elevate the status of free people of color, namely private bills and acts that granted some privileges, like the one for John Williams in Jamaica, they were exclusive. Beyond the fact that only fellow family members were entitled to the privileges, there were few families who had the ability and wherewithal to petition the colonial legislatures.

Private bills were not, however, the only means to achieve freedom. Newman and Livesay both detail the different routes for people of color in the British Caribbean to gain their freedom. Newman argues that manumission did not immediately equate to the free status that white subjects in Jamaica experienced.[175] Rather, the importance of blood and sanguinary inheritance from white Englishmen trumped all other forms of freedom.[176] One of the most successful means to achieve freedom, on the scale of white subjects, was to be a mixed-race child with a prominent white English father, a fate that was completely out of the control of the person seeking freedom. Similarly, Livesay underlines that the free people of color who had the most rights and access in colonies were the ones who belonged to white privileged families.[177] Like the Williams family, the colonial legislature opened up avenues for mixed-race children of white British fathers to access privileges of subjecthood and whiteness as a means to maintain the racial hierarchy, since the white populations were shrinking rapidly throughout the eighteenth century.[178]

Free people of color were not the only people in the British Caribbean seeking to change their status within the racial hierarchy. Maroon communities in the Caribbean are another example of a path to freedom as a means for enslaved persons to extricate themselves from slavery and establish their own freedoms. Kathleen Wilson has argued, for instance, that

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[175] Ibid., 20
[176] Ibid., 20-21.
[177] Livesay, *Children of Uncertain Fortune*, 10
[178] Ibid., 399.

maroons and maroon communities bring nuance to discussions of the structure of British Caribbean slave societies, precisely because they did not neatly fit in the distinctions between free and enslaved, white and black.[179] Her argument centers on the idea of performance. By this, she references how the roles of individuals within the society, such as free people of color, enslaved persons, and white masters, hold up the infrastructure of white supremacy. However, this overall performance is complicated by maroons because their freedom exists outsides of the bounds of the society.[180] Since their freedom was forged by themselves, and not granted by the white planter class or the colonial governments, maroon communities represented an affront to the structures that upheld the British Caribbean slave societies, and thus became targets for legal punishments and repercussions.[181]

This chapter's focus is on how the differing uses of attainder bolstered white efforts to regulate freedom in the British Caribbean, namely those that pertained to race and the maintaining of slavery and white supremacy. Three separate examples demonstrate how colonial officials and courts used attainder to punish and deter actions that went against the narratives that they had carefully created. The first instance was the punishment of maroon communities, whose very existence posed a powerful threat to the racial logic undergirding the institution of slavery. The use of attainder against enslaved runaways, while in part a reflection of the fact that it was one of the few means to punish criminals without their presence, effectively meant that these individuals no longer had recourse to achieve their freedom, because any rights were voided in the law. The second instance was, also borne out of enslaved persons running away, was the

[179] Wilson, Kathleen. "The Performance of Freedom: Maroons and the Colonial Order in Eighteenth-Century Jamaica and the Atlantic Sound," The William and Mary Quarterly , Jan., 2009, Third Series, Vol. 66, No. 1 (Jan., 2009), pp. 45-86, 48.

[180] Ibid., 52.

[181] Ibid., 54-5.

punishment of white assailants for killing enslaved runaways. And, finally, the third usage of attainder was a means to allow for enslaved persons to testify against free people of color in courts. In effect, the privilege of not being tried in the slave courts, which had created a clear division within the Black population, was blurred by the machinations to allow enslaved testimony in cases where the free subject was Black. These legal maneuvers with attainder sought to maintain the connection between blackness and slavery and to facilitate prosecution of free Blacks.

"An Act for the better Government of Slaves, and Free Negroes," Antigua, 1702

Antigua released its first act dedicated to governing the enslaved population in 1702, eighty years after the island's incorporation into the empire. It focused on how to control the growing numbers of enslaved persons on the island.[182]

	British Caribbean
	Antigua
1676-1700	7,922
1701-1725	29,541
1726-1750	45,971
1751-1775	63,074
1776-1800	12,924
1801-1825	5,437
Totals	164,869

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[182] Antigua Act no. 130 (1702), "An Act for the better Government of Slaves, and Free Negroes."

[183] "Trans-Atlantic Slave Trade," Slave Voyages, accessed February 28, 2021, https://www.slavevoyages.org/assessment/estimates

A graph from the Slave Voyages database that exhibits how many enslaved Africans were forcibly taken to Antigua from 1676 until 1825, in order to highlight the great differences in numbers between the white planter population, and the enslaved population.

As one can see in the graph above, the turn of the eighteenth century led to a rapid increase in the forced importation of enslaved Africans to Antigua, with the peak of imported enslaved persons happening in the 1750s. Within the piece of legislation, specific clauses defined the rights and privileges of free Black Antiguans, reflecting how the intersection of race and freedom was creating new legal issues in the small island colony. The Greater Caribbean region during the seventeenth and eighteenth centuries was rather haphazardly settled.[184] The British colonized many different islands, at various distances from each other and far away from the metropole. It is understandable, as a result, that colonial laws and treatises were often constituted ad-hoc. As slavery did not legally exist in England, colonial laws governing that institution were especially novel, made up by the colonial legislatures and governors as they saw fit.[185] Antigua's act was not, however, a work unique to itself; rather, it borrowed much of its structure and language from the Barbados Slave Code of 1661.[186] When Barbadians adopted their own slave code, and subsequently adapted it throughout the end of the seventeenth century, Jamaica and Antigua, with similar infrastructure and racial make-up, followed suit, with Jamaica's initial act in 1664 and Antigua's in 1702.[187] Echoing the title of the Barbadian act, the Antigua act was called, "An Act for the better Government of Slaves, and free Negroes."[188] It grouped together the enslaved population and the population of free Black people, with only an awkwardly placed comma between them, distinguishing both from the free white Antiguans, who were clearly separated in

[184] Peabody, Sue, and Paquette, Richard L. "Slavery, Freedom, and the Law in the Atlantic World, 1420–1807." Introduction and Chapter XII. In *The Cambridge World History of Slavery*, edited by David Eltis and Stanley L. Engerman, 3–19; 272–95. The Cambridge World History of Slavery. Cambridge: Cambridge University Press, 2011.

[185] Goveia, Elsa S. "The West Indian Slave Laws of the Eighteenth Century," *Revista de Ciencias Sociales* (Mar. 1960): 75-105, 75.

[186] Barbados 1661 Slave Code, Clause 1, Barbados MSS Laws, 1645-1682, Colonial Office Series, Public Record Office 30/2. See Nicholson, "Legal Borrowing and the Origins of Slave Law in the British Colonies" (1994).

[187] Ibid., 85-6.

[188] Antigua Act no. 130 (1702).

another act from white indentured servants.[189] Central to the development of Caribbean slavery was this recognition, or rather creation, of the fragile freedom status for free Black people.

Keeping with English common law, and its foundation in Lockean ideals, free people of color were limited by this Antiguan act in their property holdings: "…That for the future no Free Negro shall be Owner or Possessor of more than eight Acres of Land, and in no Case shall be deemed and accounted a Freeholder."[190] Property was linked to full subjecthood, meaning limits on property rights translated into a restricted freedom status. Through this clause, the legislature was allowed to keep a firm and rigid hold over the ability of free Black Antiguans to exercise their rights as free subjects of the Empire. By keeping the land holdings of free Black Antiguans to eight acres, the colonial officials were able to maintain, and codify, the precarious nature of the rights of free Black people.

Beyond that, the act does not define the rights of free people of color, but more so the punishments they faced if they crossed the boundaries of their freedom. In particular, the offense of beating a white person resulted in the same punishment for both enslaved persons and free Black people: whipping.

> And if any sturdy Slave should impudently strike…any White Person, any Justice, upon Complaint or Proof made, shall order a Constable to cause such Slave to be publickly whipped, at their discretion…And if any Free person, not being White, shall presume to strike a White Servant, he shall be by Order of the next Justice (on Proof of his striking) severely whipped, at the discretion of said Justice.[191]

Through the nearly identical language, with the main difference being the location of the whipping, the Antiguan legislature made calculated, yet small distinctions between enslaved Africans on the island, and free Black people. When it came to cases where white people were the victims, the legal treatment, especially in criminal instances, of free Black people and

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[189] Ibid., Clause XXII.; "An Act for encouraging the Importation of White Servants to this Island," Antigua Act no. 153 (1701)

[190] Antigua Act no. 130, Clause XXII.

[191] Ibid., Clauses VI, XXII.

enslaved persons matched in order to maintain the racial hierarchy. Thus, through these clauses, the legislative body was able to begin to racialize punishments and set a precedence for the rest of the 18th century.

In no. 176 of the Laws of Antigua, passed in 1725, enslaved persons were written into the law, again, but this time under the use of attainder: "An Act for attainting several Slaves now run away from their Master's Service, and for the better Government of Slaves."[192] In one of the first instances in the collection of the laws, there is a reference to, as Governor Mathew put it, the frequent practice of attainting enslaved runaways.[193] Based on the language and descriptions in the clauses, the act of attainting an enslaved person for running away boiled down to an indelible punishment.[194] In the act, four enslaved men are named in the writs – Sharper, Africa, Papa Will, and Frank – and the reason that was stated for attainting the men with high treason and the punishment of death was because they had absconded the service of their masters and fled to the mountains.[195] In effect, the justification behind their attainder recalls the work of Blackstone and his own contextualization of attainder and its uses in English common law.[196] For the colonial officials of Antigua, the actions on the part of Sharper, Africa, Papa Will, and Frank constituted a form of outlawry because they had illegally run away from their plantations and were, according to the act, engaging in theft (of themselves), which would fall under the purview of outlawry.

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[192] Antigua Act no. 176, "An Act for attainting several Slaves now run away from their Master's Service, and for the better Government of Slaves."

[193] Governor, William Mathew. *Governor William Mathew to Alured Popple, Sending in a Box in Capt. Conway's Care a Duplicate of the Nevis Militia Act. St Christopher's*. Vol. 43. Abingdon, Oxfordshire: Taylor & Francis Ltd, 1737.

[194] Antigua Act no. 176, Clause II.

[195] Ibid., Clause I-II.

[196] Blackstone, Sir William. *The Commentaries on the Laws of England.* Vol. 2, Oxford: Clarendon Press, 1765, s. 380-1.

"…the criminal is no longer fit to live upon the earth, but is to be exterminated as a monster and a bane to human society, the law sets out a note of infamy upon him, puts him out of protection, and takes no further care of him than barely see him executed."

Thus, in early Antigua, attainder was already used as a means to try self-emancipated Blacks as criminals without trial or court proceedings. In essence, attainder, or the act of attainting, became a conviction in and of itself—in these cases, a death sentence, without any due process.

Both acts happened before the cases of the Johnson brothers, Corteen, and Winthorp, providing a precedent in the court proceedings following the 1736 conspiracy. Attainder use in Antigua adhered to Blackstone's characterization of it as an almost automatic punishment, similar to an ex-communication, of the criminal because he has chosen to live outside society, thus breaking the social contract and governing laws.[197] Antiguan use differed, however, because the law's application was meant to maintain the organization of slavery.

The Precedent of Attainder in 18th Century Greater Caribbean: Runaway Enslaved Persons

Attainder was attached, as described by Sir William Blackstone, to outlawry and rebellion, but for it to be used against enslaved and freed people in the Caribbean brought the act of tainting one's bloodline and being dead in the law to a new level of complexity.[198] As seen in the case of Francis Williams, the status of freemen in Jamaica was not fixed; rather, it was left up to the courts to decide.[199] Personhood was deemed through a legal context, meaning that one's freedom and subjecthood status was connected to how they were treated legally. The use of "attainting," therefore, as a criminal punishment for enslaved runaways became two-fold: it was not only a punishment for breaking the law, but it was a permanent judgment for breaking the status quo of the racial hierarchy.[200] By choosing to rebel, to try to fight the white supremacy

[197] Blackstone, *Commentaries on the Laws of England*, s. 380-1.
[198] Ibid., s. 380.
[199] *Case of Francis Williams of Jamaica*, 1731.
[200] Mathew. *Governor William Mathew to Alured Popple*, 1737.

forged through the institution of slavery, enslaved runaways occupied a space in the law almost always vilified by the white British subjects of the Caribbean.

The act of attainting became a means for the white Caribbean elite to control the enslaved population by punishing the enslaved people who ran away. When Antiguan governor Mathew remarked that acts for attainting runaway enslaved persons were not new, he pointed to a long-standing precedent.[201] In two separate correspondences in 1722 and 1724, Martinique governor John Hart also supported acts of attainder and their legal justifications. He addressed the Board of Trade and Plantations on June 21 of 1722, noting the necessity for an act to attaint runaways in St. Christopher's:

> The fifth is an Act for *attainting several negroes etc. and the more effectual preventing negroes from running away etc*…as the number of slaves is the wealth of the inhabitants, and there being no law to restrain the fugitives, which might endanger the safety of the Island, to prevent which this Act is prepared, which tho' it may seem to contain several severities to those that are not acquainted with the sullen and barbarous temper of the negroes, yet I presume when it is compared with Acts of the same nature provided in Jamaica and Barbados, these severities will be thought excusable and even absolutely necessary.[202]

The act of attainting that Hart described is one that is akin to death.[203] By placing on the runaways a form of civil death by making them dead in the law, enslaved people who ran away met the terrible punishment of being alive, but with no claim to any rights, including human life, within the British colonial settlement.[204] Hart recognized the act's "severities," justifying it by its similar to Barbadian and Jamaican laws and the "sullen and barbarous temper of the negroes."[205] The use of attainder in the case of the Johnson brothers had a firm foundation in the slave societies of the Caribbean; it was a legal instrument meant to further oppress and reaffirm non-personhood on runaways and rebels.

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[201] Ibid.

[202] Hart, Governor. *Governor Hart to the Council of Trade and Plantations. Antigua*. Vol. 33. Abingdon, Oxfordshire: Taylor & Francis Ltd, 1722.

[203] Blackstone, *The Commentaries on the Laws of England*, 380.

[204] Ibid.

[205] Hart, *Governor Hart*, 1722.

Two years later, Governor Hart another piece of correspondence about an act of attainting runaways for Antigua: "The intention of passing this Act is…to prevent the inhumane murdering, maiming and castrating of slaves by cruel and barbarous persons (as has been too much practiced) by laying a fine on those that shall be guilty of such crueltys."[206] While attainder still carried with it civil death in this act, its purpose was different—making enslaved runaways effectively dead was intended to stop the unnecessary, in Hart's eyes, killing of enslaved people in Antigua.[207] Attainting them for running away aimed to deter the white inhabitants and slave owners from killing them as punishment, since they had already legally lost their lives, and had no means, even if they were manumitted it appears, to regain them.[208]

Conclusion

Attainder proved itself to be a powerful structural tool in the British Caribbean slave societies. Not only was it a means to punish and curtail efforts on the part of enslaved people to run away and gain their freedom, but it was also a way to try to control the population of free people of color, and to try to ensure that their status would not rival or hurt the status of the ruling white planter class. However, as the next chapter will showcase with cases of John Corteen, Thomas Winthorp, Benjamin and Billy Johnson, the acts were not well-received by metropolitan officials when used against free people. Whereas the policing of enslaved persons with writs of attainder was allowed to occur, and did with some frequency, acts against free subjects crossed a line. In short, acts of attainder could not have multiple meanings across different parts of the empire. Unlike slave codes and laws, where colonies had to create their own

[206] Hart, Governor and of Martinique Governor. *Governor Hart to the Council of Trade and Plantations. St Christophers*. Vol. 34. Abingdon, Oxfordshire: Taylor & Francis Ltd, 1724.
[207] Ibid.
[208] Ibid.

given the absence in metropolitan law, bills of attainder, a noted Parliamentary tool, was not allowed to be broadly used as the colonial assemblies saw fit. Rather, as a means to preserve its strength, metropolitan

While this chapter highlighted how attainder was a means of control in British Caribbean slave societies, the next chapter will focus on the central case for this manuscript: the case of Benjamin and Billy Johnson. The upcoming chapter will detail how attainder came to be used in the Johnson brothers' case, and how their case exemplifies the legal pluralism at work within the eighteenth century British Empire. It will go into the correspondences between the Antiguan officials and the home authorities in order to outline the back and forth relationship of the plural legal orders within the Empire. While the case of the Johnson brothers was not famous, it still had enough of an impact on the imperial legal system that the authorities in the metropole, namely the Privy Council, became involved.

Chapter 3: Writs in the Attainder and the Admission of Enslaved Testimony: The Case of Benjamin and Billy Johnson in Antigua, 1736-8

In October of 1736, a group of enslaved persons and free people of color masterminded a plan to overthrow the colonial rule on the island of Antigua.[209] However, the uprising never happened because of logistics.[210] On the evening of October 11th, there was supposed to be the annual ball, chaired and planned by prominent members of the white planter class, to honor King George II's ascension to the throne.[211] The event, however, was switched to the end of the month, to celebrate the King's birthday, instead.[212] Because of that rescheduling, the uprising's plan was thrown into chaos, with opposite sides debating whether to go through with the plan on the original date, or switch to the new date. In the end, the debate did not matter; with the conspirators left scrambling, the uprising was in a vulnerable state. Authorities discovered the plot shortly after the ball's original date.[213] While the uprising failed, the trials that followed exemplify how the conspiracy still caused an abrupt and rude awakening for the white colonists.

The history of this island colony did not differ greatly from the histories of other Caribbean colonies. Antigua became a part of the British Empire in 1632, after the Spanish initially colonized the island in 1493.[214] Under British rule, and following the explosive global demand for sugar, Antigua became an established sugar colony towards the latter half of the seventeenth century, as more and more imports of enslaved persons arriving on the island

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[209] Gaspar, "The Antigua Slave Conspiracy of 1736," 308.
[210] Gaspar, David Barry. *Bondmen and Rebels,* 4-5.
[211] Ibid.
[212] Vernon, John, Ashton Warner, Nath. Gilbert, and Robert Arbuthnot. *A Genuine Narrative of the Intended Conspiracy of the Negroes at Antigua: Extracted from an Authentic Copy of a Report, made to the Chief Governor of the Carabee Islands, by the Commissioners or Judges appointed to try the Conspirators*. Dublin: Arno Press, 1972, 1-24, 10.
[213] Gaspar, "The Antigua Slave Conspiracy of 1736," 309.
[214] Lightfoot, Natasha. *Troubling Freedom: Antigua and the Aftermath of British Emancipation*. Durham: Duke University Press, 2015, 24–5.

bolstered the plantation economy.[215] By the turn of the eighteenth century, whites on the island were already heavily outnumbered by the enslaved population.[216] Thus, not long after its annexation by the British, Antigua resembled other slave societies in the Caribbean: a rapidly increasing enslaved population with a small, diminishing white population.[217] A growing population of free people of color who lived in Antigua, which included mixed-race people, former enslaved African and native people.[218] Near the end of the eighteenth century, they numbered a little over a thousand, occupying a small percentage of the overall population, which was about 27,000 by the mid-1730s.[219] The rights of the free men and women of color on the island were limited, but not non-existent. Although they were not able to hold office, serve in a jury, or have the full political rights of white men, they were able to own property, and could be tried in free courts.[220]

The implementation of a bill of attainder in the case of the Johnson brothers is notable because the circumstances of the overall trial are unusual.[221] Tensions on the small island were high in the wake of the foiled plot against the white planter class.[222] Already anxious over the disparity in population numbers, white Antiguans were terrified of slave rebellions in the abstract, and were even more horrified by the realization of one within their own midst.[223] In a

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[215] Gaspar, *Bondmen and Rebels*, 65.
[216] Lightfoot, *Troubling Freedom*, 25–6.
[217] Ibid., 27–8.
[218] Ibid., 27.
[219] Ibid.; Sharples, Jason T. "Hearing Whispers, Casting Shadows: Jailhouse Conversations and the Production of Knowledge during the Antigua Slave Conspiracy." *Buried Lives: Incarcerated Lives in America*, no. 1 (2011): 35-59, 39.
[220] Gaspar, *Bondmen and Rebels*, 162; 166.
[221] George II, King of England. *Order of Committee of Council for Plantation Affairs. Whitehall*. Vol. 44. Abingdon, Oxfordshire: Taylor & Francis Ltd, 1738.
[222] "HORRID EXECUTIONS IN ANTIGUA." *The Mirror of Literature, Amusement, and Instruction, Nov.1822-June 1847* 1, no. 17 (Feb 22, 1823): 269-270.
[223] "Extract of a Letter from a Gentleman in Antigua to His Friend in Boston, Dated October 18, 1736." *Boston Gazette* (Boston, Massachusetts), no. 881, November 29, 1736. *Readex: America's Historical Newspapers*.

letter written from a white British subject to a friend in Boston, then published in *The Boston Gazette*, the man from Antigua wrote, as the trials were happening that, "We have been for this Fortnight, and are still continually in Arms, expecting an Attacks every Moment, and I believe will continue so for some Time."[224] The heightened paranoia led the trials in the wake of the conspiracy to be executed in rather violent, and legally-grey, haste.[225]

During the court proceedings, the Johnson brothers were issued a bill of attainder as a means to charge them with high treason. But the only evidence against them were the confessions from the enslaved conspirators, many of whom were already convicted and awaiting execution. And such evidence was inadmissible of trial. Through the bill of attainder and its passage by the legislature, the legal status of the brothers, not as secure as the legal status of white men, but certainly imbued with a few English rights and liberties, could be permanently diminished. [226] The Crown, through the Board of Trade with the Privy Council, declared that these writs illegal and a dangerous precedent, reversing the attainder for the two men.[227]

Gaspar argues that the Johnsons' case was less about the brothers than about the lives and legal statuses of all freedmen in Antigua.[228] He notes that the actions on the part of officials were nonetheless troubling because they exposed how deeply ingrained anxieties over white supremacy were in the slave society.[229] Building on Gaspar's analysis, this chapter examines the intersection between the enslaved testimony against the Johnson brothers and the writs of attainder placed on them by the colonial government. The argument of this chapter rests on how

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[224] Ibid.

[225] Governor, William Mathew. *Governor William Mathew to Alured Popple, Enclosing the Following. St Christopher's*. Vol. 43. Abingdon, Oxfordshire: Taylor & Francis Ltd, 1737.

[226] George II, King of England. *Order of Committee of Council for Plantation Affairs.*

[227] Gaspar, *Bondmen and Rebels*, 58–9; Council of Trade, and Plantations. *Council of Trade and Plantations to Committee of Privy Council. Whitehall*. Vol. 44. Abingdon, Oxfordshire: Taylor & Francis Ltd, 1738.

[228] Ibid., 50.

[229] Ibid., 61.

the bill of attainder revealed a legal conversation between the British officials in London and the colonial officials in Antigua, specifically on the multiple definitions of attainder at play in the case, which was not mentioned in Gaspar's work. For the home authorities and agents of the Crown, the use of attainder in Antigua was not justified and posed an affront to imperial law in the name of rather arbitrary use of colonial power. The attainting of the Johnson brothers, moreover, signaled not only that the case failed without enslaved testimony, but that the only way to prosecute the case was to go outside the traditional constraints of justice, and, evidently, the courtroom. Through the bill attainder, the justices of the peace were able to make the case against the brothers into something of a summary trial. With the trial being held by the assembly sitting as a court, and considering the assembly was part of the legislative action to pass the bill, the Johnson brothers were left at a severe disadvantage. Attainder, instead of being used as a punishment adjunct to a conviction, was used to shift the case of the brothers from one in a free court, without enslaved evidence and with due process, to one more akin to a court for enslaved persons, with the admission of enslaved testimonies and without distinguishing between the charging and deciding parties.

Thus, the use of a bill of attainder as a means to charge the Johnson brothers of high treason further reveals the intricacies of attainder as both a legislative and legal tool in the racial and social organization of colonial Antigua.[230] The brothers' case was based in inadmissible, enslaved testimonies, making attainder one of the few means to try them.[231] With this, the bill of attainder for the Johnson brothers much more closely adhered to attainder's usage by Parliament than as a punishment. It was a means to get around the procedural laws of the judicial branch and

[230] Governor, William Mathew. *Governor William Mathew to Alured Popple, Enclosing the Following. St Christopher's*. Vol. 43. Abingdon, Oxfordshire: Taylor & Francis Ltd, 1737.

[231] Gaspar, David Barry. *Bondmen and Rebels: A Study in Master-Slave Relations in Antigua*. Durham: Duke University Press, 1993, 44-5.

subject them to the more efficient and simplified legislative process. Attainder and high treason shared similar foundations as convictions and punishments: they were necessitated by actions that threatened the Crown's authority.[232] The racial and social origins of that threat were very different in England than in the British Caribbean. Yet, in both places, bills of attainder implied an inherent disadvantage for the accused because the same body that charged them (in the case of the Johnson brothers the Antiguan assembly) was the exact same one that would assess their conviction.[233]

A Genuine Narrative: The Story of the First Court

The trials and court sessions that followed the conspiracy can be broken up into two different phases, as distinguished by the justices of the peace and the legislature.[234] Much of the story of the initial trials and cases, the first court, that followed the uncovering of the conspiracy are found in a small book published in Dublin in 1737.[235] The book, which contains only thirty-two pages dedicated to the report, is titled, *A Genuine Narrative of the Intended Conspiracy of the Negroes at Antigua*. Its subtitle explains that it is an "Extract from an Authentic Copy of a Report, made to the Chief Governor of the *Caribbean* Islands."[236] Keeping in mind that the justices of the peace who wrote the report were instrumental in making sure the trials proceeded, the report nevertheless provides insights into the white colonists' justifications for the legal proceedings and how they were actualized.

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[232] Charles H. Wilson Jr., "The Supreme Court's Bill of Attainder Doctrine: A Need for Clarification," California Law Review 54, no. 1 (March 1966): 212-251, 214-215.

[233] Ibid., 46.

[234] Gaspar, *Bondmen and Rebels*, 43.

[235] Vernon, et al. *A Genuine Narrative of the Intended Conspiracy of the Negroes at Antigua* Dublin: R. Reilly, 1737, 1.

[236] Ibid., 1-2.

The report is dated to December 30, 1736, placing it within the overall timeline between the first court and second court.[237] Its contents detail the procedures taken in the first court to ensure a speedy set of trials.[238] In particular, the report appears to have been used to make light of the conspiracy, first, but also as a way to justify the strange, and rather questionable, legal actions made by the justices of the peace. For example, the justices noted that the courtroom dynamic, given the haste of the trials and the persons being tried, was atypical: "There were some Steps of an uncommon Nature…Our trying the Criminals privately, and excluding all white Persons, more particularly the Masters of Slave…the other was admitting Slaves to Witnesses, after Conviction of what we termed a treasonable Conspiracy."[239] Even in the first court, where all the enslaved conspirators who were accused and arrested were tried, the Antiguan officials were changing the rule of law to better match their desired outcome. By trying criminals in private and allowing the admission of enslaved evidence, due to treasonable convictions, the justices of the peace warped the law to fit the conspiracy and ensure the maximum amount of trials and cases. This haste revealed much about the nature of the first court, and how its legacy would follow through to the second court, and the cases of the free men of color, namely the Johnson brothers.

The Case of John Corteen and Thomas Winthorp, 1736-1738

Benjamin and Billy Johnson were not the only free men of color accused of aiding the conspiracy of 1736. During the course of the first court, where the rest of those tried were the enslaved conspirators, only four free men were named as suspects in the report: John Corteen,

[237] Ibid., 24.
[238] Ibid., 3-4.
[239] Ibid., 18.

Thomas Winthorp, Mulatto Jack, and Free Simon.[240] Due to lack of evidence, Mulatto Jack and Free Simon, also known as Simon Nichols, did not have their cases go through, and were let go.[241] However, for Corteen and Winthorp, like the Johnson brothers, they had a fair amount of evidence, albeit enslaved testimonies from the convicted conspirators, against them, and the Antiguan legislature was set on prosecuting them.[242]

Nevertheless, proceeding with cases against free men with only testimonies from enslaved persons was not simple. During the first court, both Corteen and Winthrop were implicated in the conspiracy, but, due to the constraints of the justices' power, they were not able to prosecute the men because the justices were only allowed to try enslaved persons.[243] While they were not permitted to proceed with cases against the freemen, the justices were able to collect the evidence against Corteen and Winthorp, and submit it to the legislature, effectively putting the burden of the cases on the legislative branch, in hopes that they could find a means to try the men, even with inadmissible evidence. And, in this way, the justices were successful.

On April 13, 1737 the Antigua legislature passed a bill against Corteen and Winthorp.[244] However, the legislative action ended there: Corteen and Winthorp were tried in a court with a jury.[245] Although they were tried by a jury, the treatment of their case was peculiar; they were tried as their act was being sent and deliberated over by the English authorities, placing both their lives and possessions at risk. If they were convicted, they were found guilty of high treason, resulting in death sentences and forfeiture to the Crown. However, the act, which carried

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[240] Ibid.
[241] Gaspar, *Bondmen and Rebels*, 43-4.
[242] Ibid., 50-1.
[243] Ibid., 43-4.
[244] Ibid., 50.
[245] Ibid., 55.
Although it is not explicitly stated why Corteen and Winthorp were tried in a court with a jury, it is most likely because of the failures of the case of the Johnson brothers, namely having the legislature sit as a court.

precedence over the trial and conviction, had a clause where the verdict was suspended until the Crown and the Home authorities decided if the act should be passed.[246] It is precisely this point where Governor Mathew's letter to the Board of Trade becomes a key insight into the decisions and justifications behind arresting and trying the two free men.

Governor Mathew's letter, dated May 26, 1737, noted the frequent use of attainder in cases of runaways. He also voiced his reservations over the attainting of high treason of Corteen and Winthorp.[247] In the second act submitted to Governor Popple, aptly named "An Act for the trial of John Corteen, a free negro, and Thomas Winthorp, a free mulatto man for an intended insurrection to destroy the white inhabitants of this island and declaring the same to be high treason and rebellion," he described the necessity of their trial, given the grave circumstances: "The other is entitled an Act for the trial of John Corteen, a free negro, and Thomas Winthorp, a free mulatto…declaring the same to be high treason and rebellion…making the testimony of slaves evidence against them…This is an Act of an extraordinary nature as the lives of two free men are concerned."[248] Once again, the use of enslaved testimony is a key factor in deciding how to go about legally in the criminal cases of free people of color. For Corteen and Winthorp, it appears that Mathew's argument was that their status as freemen granted them privileges up until they chose to help the rebellion.

Moreover, Governor Mathew wrote that, "Acts for attainting runaway negroes or for inflicting punishments on negroes are so frequent in these parts and the Act itself fully explaining the occasion of its passing I need not take up your time with any explanations upon

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[246] Ibid. 55-6.

[247] Governor, William Mathew. *Governor William Mathew to Alured Popple, Sending in a Box in Capt. Conway's Care a Duplicate of the Nevis Militia Act. St Christopher's*. Vol. 43. Abingdon, Oxfordshire: Taylor & Francis Ltd, 1737.

[248] Ibid.

it."[249] The use of attainder and high treason in the cases and trials for the slave conspiracy of 1736 in Antigua were founded on legal precedents, but that does not mean that they were necessarily justified in the eyes of the Crown.[250]

Governor Mathew did recognize the extralegal argument he was pursuing by allowing the admission of evidence from the enslaved conspirators. In particular, he, throughout the letter, attempted to appeal to the Crown and Home authorities, and argue that the actions of the act were justified given the circumstances of the conspiracy.

> I at first was doubtful how such an Act could pass…But here lay two very great difficulties….These free men were to be convicted by proofs of their guilt from ten or more negro evidences. The maintaining these evidences for many months till H.M. should please to approve the Act…it would have been a very great expense…The other reason was that these evidences themselves were all of them principal conspirators and it was high time to rid the island of such dangerous villains by immediate banishment…For these reasons I passed the Act…And thus I hope you will think I have consulted as well my duty and obedience to H.M. as the good of the island on an unforeseen but extraordinary as well as necessary occasion.[251]

In effect, Mathew decided to bolster the decision by using the extraordinariness of the conspiracy as license for invoking this extraordinary form of punishment. Mathew specifically noted that the island was burdened financially with the jailing of the convicted conspirators, a far stronger point to highlight than fear of the conspirators rising up again. Nevertheless, Mathew still wrote in a safety net for himself: he kept on discussing his doubt over the act. With this, Mathew was able to protect himself somewhat from critique and reprimand from the Home authorities because, by his own words, his hand was forced due to "an unforeseen but extraordinary as well as necessary occasion."[252] Mathew's decision to pass the bill, especially considering his worry over its passage, actually highlights the underlying issue with it: it allows for the precedence that free

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[249] Governor, William Mathew. *Governor William Mathew to Alured Popple, Sending in a Box in Capt. Conway's Care a Duplicate of the Nevis Militia Act. St Christopher's*. Vol. 43. Abingdon, Oxfordshire: Taylor & Francis Ltd, 1737.

[250] Mathew, *Governor William Mathew to Alured Popple*, 1737.

[251] Ibid.

[252] Ibid.

people can be stripped of their rights, and attainted, effectively, as equals in the courtroom to enslaved persons.

The disenfranchisement of free subjects did become an issue. In a letter, Francis Fane, who was a member of the Board of Trade and Plantations, he argued against Mathew's act, and, using his own language, called the act "extraordinary."[253] For him, the legal precedence alone made the act unreasonable and dangerous; if enslaved evidence was deemed legal and just in this case, especially without the consent of the Crown, the staying power of these cases could have had a lasting effect on the jurisprudence of the Greater Caribbean region, especially with regards to free subjects.

> In that light it appears to me to be an act of a very extraordinary and unprecedented nature and highly dangerous to the lives and properties of H.M.'s free subjects. For if once the testimony of slaves is occasionally to be introduced in criminal cases against free men it may open a door to the greatest oppression and injustice.[254]

Using the same language as Mathew, "extraordinary," Fane posed a completely different argument. The act was not justified; even if the burdens were so great, and the conspiracy had affected the island in terrible ways, the act was far too powerful, and had the capacity to carry precedence not only in the Greater Caribbean, but throughout the British Empire. By invoking "the lives and properties of H.M. 's free subjects," Fane reoriented the consequence of the act to white English subjects, and their standing in common law. If the act had been approved by the Crown, it could have had dire consequences for the both the criminal trials of free persons of color, and white people of the Empire. By choosing to focus on the rights of "free subjects," Fane argued in favor of Corteen and Winthorp by emphasizing their freedom status, rather than

[253] Fane, Francis. *Francis Fane to Council of Trade and Plantations*. Vol. 44. Abingdon, Oxfordshire: Taylor & Francis Ltd, 1738.

[254] Ibid.

their racial status, knowing full well that the counter could only gain the support of white British officials if they feared for their own rights.

On June 21, 1738, the Board of Trade sent along Fane's correspondence to the Crown, and with that, asked for the bill to be voided.[255] On November 30, the Home authorities officially revoked the bill against Corteen and Winthorp. Winthorp had already been acquitted, but Corteen had been convicted, leaving the English authorities' official call only applicable to him.[256] In the end, the legislature allowed Corteen to be freed, and the long ordeal for both free men was finally at a close.

The Case of the Johnson Brothers

Originally, the Johnson brothers were not implicated in the conspiracy.[257] In fact, during a later investigation into the Johnson brothers and their bill of attainder, the Board of Trade learned that the brothers had even been employed as trusted watchers over the imprisoned conspirators during the course of the first court.[258] According to *A Genuine Narrative*, only the free men John Corteen, Thomas Winthorp, Mulatto Jack, and Free Simon were suspected of involvement.[259] The reason for this was because there were two separate courts; the first court, which oversaw many of the executions of the enslaved persons connected to the plot, was not able to prosecute fully the freemen of color because of the lack of evidence—namely non-

[255] Gaspar, *Bondmen and Rebels*, 59.
[256] Ibid., 60.
[257] Throughout this section, I have used the third chapter in David Barry Gaspar's book, *Bondmen and Rebels: A Study of Master-Slave Relations in Antigua, with Implications for Colonial British America* for the bulk of the references and footnotes. While I recognize that this is a secondary source, due to the pandemic I have no means to access the primary sources that Gaspar cites in his work. Thus, I have chosen to use Gaspar's work precisely because he is a well-regarded historian, and his work is grounded in the original documents from the Johnson brothers' case.
[258] Ibid., 58-9.
[259] Vernon, et al. *A Genuine Narrative of the Intended Conspiracy of the Negroes at Antigua*, 22.

enslaved evidence—against them. Because the officials in Antigua wanted to fully eradicate the threat of rebellion and all those who were connected to the foiled plot, the legislators charged the Johnson brothers with high treason using a bill of attainder, which acted as the charging document.[260]

Therefore, the arrest of the brothers is where the story of their attainder and trial for high treason begins. In December of 1736, based on evidence from enslaved persons that came forth during the second court for the conspiracy, the Antiguan legislature decided to prepare a bill of attainder on the brothers and try them for high treason.[261] Although originally the bill of attainder was meant to be for all the suspected free men of color suspected, on January 3, 1737, it turned out to be only for Benjamin and Billy Johnson. Over a week later, on January 12, the brothers plead not guilty at their arraignment. At the same time, Robert Arbuthnot was the prosecutor chosen, who was one of the justices of the peace from the first court and someone who knew the case almost too well.[262]

Thus, on the 17th of January in 1737, three months after the uncovering of the plot, the Johnson brothers' trial began.[263] The trial lasted six weeks, and heard, in the very least, 76 witnesses, 38 on both the sides of the prosecution and the defense.[264] Notably, the prosecution called 20 enslaved persons as witnesses, as well as 17 whites, while the defense relied heavily on the opposite: 35 white witnesses, and only three enslaved witnesses. The imbalance of evidence in the trial was a point of contention, and, given the free status of the brothers and overwhelming

[260] Gaspar, *Bondmen and Rebels*, 44-5.
[261] Ibid., 44.
[262] Ibid., 45.
[263] Ibid.
[264] Gaspar, *Bondmen and Rebels*, 46.

use of enslaved testimony on the part of the prosecution, the matter had to be addressed.[265] This procedure was highly unusual, and such is noted by the assembly:

> Proceedings therein against Benjamin Johnson and William alias Billy Johnson two free Negroes not being in the Ordinary manner but by Bill of Attainder This House will admit Slaves to give Evidence…because this House in its Legislative Capacity doth not [Conceive] itself bound in this Case by the Ordinary rules of Law, Observed by Inferior Courts, and that this House is at Liberty to give such Credit thereto as they shall think it in their Conscience deserves.[266]

Since such evidence from enslaved persons was barred in both civil and criminal cases of free men of color, the assembly decided to make itself a court because it was the only feasible means to prosecute the brothers outside the "Ordinary Courts of the Judicature."[267] Since the bill was a legislative act, the trial that followed for the brothers remained in the legislature: the Antiguan assembly decided to sit as a court and oversee the case. Because the court was really the assembly, the case began on grey legal grounds. The same body that had charged the brothers with a bill of attainder was the same body that would decide if the bill should be passed and enacted, which would effectively charge them with high treason. And, because it was all processed through the legislative branch, the assembly decided that it was not bound by the laws of the courts. Moreover, the assembly justified its use of enslaved evidence by noting the circumstances of the case; notably, it was a case of high treason tried in the legislature, so the rule of law was entirely different, making it so that there was no impediment to admission of the enslaved evidence. In short, the procedural bar for the admission of enslaved testimony did not apply to the assembly.

On February 28, 1737, the assembly passed the bill of attainder against the Johnson brothers, charging them with high treason.[268] However, since the procedure was done through the

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[265] Ibid., 48-9.

[266] Ibid., 46, excerpt taken from Assembly Mins., Jan. 12 1737, CO 9/12; Council Mins., Jan 12, 1737 CO 9/10.

[267] Ibid., 46-7.

[268] Ibid., 49.

legislative branch, it still needed a few more steps to be accepted and enacted. After its initial passage by the assembly, the bill went to the council next for deliberation. On April 12, the council passed the bill of attainder for the Johnson brothers, further cementing their conviction by the assembly.[269] But, not all was lost: the Home Authorities, notably the Board of Trade, the Privy Council, and the Crown, still had the final say. A month later, Governor Mathew wrote a report of the case to the Board of Trade as a means to explain the proceedings and justify the passage of the bill of attainder and high treason.[270] Much like the assembly had argued during the initial passage of the bill, Mathew noted that the evidence, although it was primarily from enslaved persons and therefore inadmissible, was too strong to let the case go: "I must now come to Billy Johnson. The evidence against him is much stronger than against his brother, and as there seems to have been great intimacies between them the guilt proved upon Billy seems to be very circumstantial against Benjamin."[271] Through this report, Mathew was attempting to link both the brothers to the conspiracy, and, in turn, justifying the case to the authorities in London. Especially in the quotation above, where Mathew recognizes that the evidence has gaps, including the acknowledgment that there was not much tying Benjamin to the crimes other than his close relationship with his brother, one can ascertain that he felt that, regardless of evidence, the implications of the case were too great to refrain from prosecuting simply because of procedural law.

Following the passage of the bill of attainder against the Johnson brothers, which effectively found them guilty of treason, the Antigua legislature set up a small committee in June of 1737 to petition John Yeamans, then an agent who represented Antigua in London, to help

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[269] Ibid., 50.

[270] Governor, William Mathew. *Governor William Mathew to Alured Popple, Enclosing the Following. St Christopher's*. Vol. 43. Abingdon, Oxfordshire: Taylor & Francis Ltd, 1737.

[271] Ibid.

argue its justification and efficacy to the Home authorities.[272] Within this committee, the legislature in Antigua once more reinforced their knowledge of the bill's wary legality, while simultaneously communicating their commitment to and confidence in their legal actions. During this time, two other major events were happening: the investigation on the part of the Board of Trade, and the Johnsons' petition to the Crown.[273] The investigation by the Board of Trade revealed much more about the circumstances of the trial than it did about the case, itself, because, simply, there were few to no records of testimony or any of the evidence, leaving the governor to put together a summary of evidence from miscellaneous and private records.[274] On the other hand, the Johnsons' petition to the King was a powerful document in their favor, and will be discussed in detail in a later section in this chapter.[275]

After their petition, the Johnson brothers also had powerful men on their side to argue for their innocence. John Douncker, who knew the brothers from Antigua, wrote a letter to the Duke of Newcastle, stating in plain, yet nonetheless robust, language that the brothers had been ill-treated by the laws of Antigua, and their lives should be spared: "It is against the laws of God that a heathen should be against a Christian and against the laws of men that a slave should be against a free man… I beg you will do all that lies in your power to save their lives."[276] Douncker's letter, much like the Johnsons' petition, places great importance on the illegal admission of enslaved testimony. This tactic was clever because, instead of arguing the facts of the case, which were murky and certainly repeating a story of an uprising would not sit well with the officials in London, Douncker and the Johnsons' solicitor argued against the legislature's

[272] Gaspar, *Bondmen and Rebels*, 56.
[273] Ibid., 56-7.
[274] Ibid., 57.
[275] George II, King of England. *Order of Committee of Council for Plantation Affairs.*
[276] Douncker, John. *John Douncker to Duke of Newcastle. Antigua*. Vol. 44. Abingdon, Oxfordshire: Taylor & Francis Ltd, 1738.

handling of the case.[277] Dated March 22, 1738, the letter was one of the documents seen by the Board of Trade as they investigated the case.[278]

From March until May, the Board of Trade carried out a full inquiry into the facts and consequences of the Johnson brothers' case. Antiguan officials, especially speaker of the assembly Thomas Kerby, finally noted their reservations and lack of confidence in the evidence. Kerby explained that it was not until the end of the second court for trying the rest of the enslaved and free people accused of involvement in the conspiracy that the Johnsons were implicated in the conspiracy, and even then, it was not immediately taken as noteworthy. He added that he was not in full agreement with the assembly and legislature about the facts of the case.[279] In particular, Kerby is cited in the letter written from the Board of Trade to the Privy Council stating "that the evidence was in no sort satisfactory to him and he produced a letter…by the attorney-general…by which it appears he was of opinion that the evidence…was nothing but a heap of inconsistencies and incoherencies."[280] On May 11, 1738, the Board of Trade made their decision, and in a correspondence with the Privy Council, declared that if was not in favor of the bill of attainder. To underscore the point, the Board, once more, pointed to the dangerous precedent set by the inclusion of evidence from enslaved persons:

> But upon the whole, as the matter seems to us at least to be doubtful, the evidence being almost entirely that of blacks, some of whom were under condemnation and consequently under a double incapacity both as slaves and persons under sentence of death, we are of opinion it would be more advisable to incline to the side of mercy and therefore recommend that H.M. direct the governor not to give his assent to the bill. [281]

Two months later, on July 20th, the Privy Council voided the bill of attainder against the brothers. Benjamin and Billy were given back all the rights they had enjoyed before the attainder, trial,

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[277] Ibid.
[278] Ibid; Gaspar, *Bondmen and Rebels*, 58.
[279] Council of Trade, and Plantations. *Council of Trade and Plantations to Committee of Privy Council. Whitehall*. Vol. 44. Abingdon, Oxfordshire: Taylor & Francis Ltd, 1738.
[280] Ibid.
[281] Ibid.

and entire proceedings. The Antiguan legislature enacted the necessary remedial measure on November 29th, 1738. After two long years, the brothers were finally free, once more.[282]

"Petition of Benjamin Johnson and William alias Billy Johnson of Antigua to the King," 1738

The case against the Johnson brothers, therefore, hinged on the admission of enslaved testimony, and the means through which officials justified admitting the evidence—a bill of attainder—revealed a legal paradox. In response to the actions of the legislature, the solicitor for the Johnson brothers, William Sharpe, argued against the use of enslaved testimony: "Because by the laws in that island the testimony of slaves is not admissible as evidence against freemen an Act of attainder was passed against the petitioners, suspended till H.M.'s pleasure should be known."[283] Immediately, Sharpe noted the illegality of the trial. His argument in the petition is two-pronged: the first was how the case lacks legal and admissible evidence, and the second questioned the reliability of the evidence from the enslaved conspirators. In terms of the enslaved testimony, to build a case on inadmissible evidence is, simply, a perversion of justice. Without evidence, there was no case, and the prosecution, or the Antiguan officials who accused the Johnson brothers of taking part in the conspiracy, had no means to substantiate their claims.

Sharpe was not the only one to note the illegality of the case.[284] More than once, Governor Mathew referred to the bills of attainder as "extraordinary," which further highlighted how the writs did not fall neatly into their legal definitions.[285] Sharpe argued that the reason why the bills felt so "extraordinary" in nature for Mathew was because attainder, in this case, was

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[282] Ibid., 59.
[283] Ibid.
[284] Mathew, *Governor William Mathew to Alured Popple*, 1737.
[285] Ibid; Governor, William Mathew. *Governor William Mathew to Alured Popple, Enclosing the Following. St Christopher's*. Vol. 43. Abingdon, Oxfordshire: Taylor & Francis Ltd, 1737.

akin to a conviction before trial, and the evidence for expedient proceedings was waning and, in some instances, non-existent: "…it is scarcely credible they would have sacrificed their substance by becoming party to a design which must have reduced them to a level with if not in subjection to their own slaves."[286] Sharpe, in this short sentence, made a clever argument, that reinforced his overall argument against the admission of the enslaved testimony. In essence, he argued that there was no reason as to why the Johnson brothers, as free Black men, would join this conspiracy.[287] The use of the phrase, "in subjection to their own slaves," highlights Sharpe's overall point: Benjamin and Billy would not have sacrificed their privileged status to aid the enslaved conspirators.[288] By making this argument, and placing great importance on the dichotomy between free men and enslaved people, Sharpe was able to keep the focus of the petition on the freedom status of the brothers and not the conspiracy, which he knew would ultimately be the argument the Crown and the British officials would agree to in the end.[289]

In the second half of his argument, or the other part of it, Sharpe advanced that the evidence, taking away its inadmissibility, was unreliable.[290] Since the only testimonies the officials had against the Johnson were the ones taken from the conspirators who were either under torture, threat of torture, or awaiting execution, the evidence, as Sharped noted in the petition, was most likely not true, and should not have been taken as truth, especially since it is the only evidence the prosecution has in the case.

> Petitioners represent the inconveniences arising from allowing slave-testimony against freemen: in this case the testimony not only comes from slaves but arises chiefly from persons under sentence of death, one of whom had been for several hours fastened to a gibbet to starve to death, under which circumstances it may be supposed he would have accused anyone.[291]

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[286] George II, King of England. *Order of Committee of Council for Plantation Affairs.*
[287] Ibid.
[288] Ibid.
[289] Gaspar, *Bondmen and Rebels*, 61.
[290] George II, King of England. *Order of Committee of Council for Plantation Affairs.*
[291] Ibid.

By noting the "inconveniences," Sharpe, once again, paralleled the experience of the Johnson brothers to that of free people overall, including, albeit subtly, hinting at white people and how this case could affect criminal procedures for white persons. Testimonies taken from torture reinforced how the evidence was untrustworthy, and should not be admitted in the trial. His vivid descriptions of the torture raised the specter of a precedence that could be highly dangerous for cases for other people, namely white people accused of criminal acts. Ultimately, it was this argument that succeeded, and allowed for the case to, effectively, dissolve.[292]

The Aftermath of the Case

While the act of attainder did not remain permanent, its repeal does not render it unimportant. Rather, the writ in the case of the Johnson revealed a strange and rather twisted form of the legal instrument and legislative act. Act of attainting runaway enslaved persons, most notably those who also committed theft and robbery, were fairly common in Antigua, but the justification to use the same legal writ on free Black men exposed the conflict that free Black personhood created for white Caribbean colonists in their negotiation of imperial law. In the cases of enslaved people, as the justices of the peace who presided over the trials of the conspiracy remarked in their trial notes, they lack personhood in English common law and to attaint enslaved persons was a means to render that non-personhood permanent, effectively taking away the possibility of manumission. By contrast, to attaint free persons was to make freedom tenuous by empowering a legislature (in which no free person of color had the right to sit) with judicial oversight.

[292] Council of Trade, and Plantations. *Council of Trade and Plantations to Committee of Privy Council. Whitehall*. Vol. 44. Abingdon, Oxfordshire: Taylor & Francis Ltd, 1738.

Therefore, the case of the Johnson brothers offered insight into the plural legal orders and socio-economic systems in the eighteenth century British Empire. As seen in the first chapter, the authorities and officials in the metropole did not hesitate to get involved in cases of attainder, especially in cases where they spearheaded the reversal and dissolution of bills because the power of the colony had appeared arbitrary or corrupted in some way. Thus, the case of Benjamin and Billy becomes a part of this pattern in the empire, where the principles of legal pluralism, while at play, were quashed by the imperial forces in the name of its own power and supremacy over the colonies. In order to hold the empire together, the law had to be uniform and the power of the metropolitan officials, especially in regards to the law, had to be unquestioning, and, in the case of the Antigua, one can see this inherent dynamic, specifically between Governor Mathew and the members of the Privy Council and the Board of Trade.

Conclusion

Ultimately, the Johnson brothers' act of attainder was reversed, and the brothers returned to their normal lives, before the conspiracy, trial, and petitions to the Crown.[293] The use of attainder in their case revealed how attainder was not wholly permanent, even though it was still an impressively powerful legal tool in 18th century English common law. Attainder, like other legal actions, must have a firm foundation of facts and evidence, in order to justify its usage and power. The reason for this lies in the paradoxical nature of legal pluralism. While empires were spaces for plural thoughts and policies, cases of attainder, as seen through the actions of British imperial agents, were not up for pluralistic interpretations. The colonial legislatures in the Caribbean were not allowed to take control of the Parliamentary power of attainting subjects, especially considering that they were making the precedence more abstract. Without a proper case, where the rules of justice are followed, attainder could be voided, repealed and lose its meaning entirely. And that is precisely what happened in the case of Benjamin and Billy Johnson.

The case, like the conspiracy of 1736, is almost a non-event in history. It ultimately failed; Governor Mathew, Robert Arbuthnot and Thomas Kerby were not successful in attainting Benjamin and Billy Johnson of high treason. The brothers' lives were spared by the Home authorities in England, with the help of politically powerful and influential friends in Antigua; had the case gone through, the brothers would have been executed. While the brothers' lives were spared and the case's consequences were erased, those actions do not negate the case's effects on English colonial jurisprudence. To have forced the Crown, the Board of Trade and

[293] Gaspar, *Bondmen and Rebels*, 59-60, with reference to "Copy of an Order in Council Disapproving a Bill passed in Antigua by the Assembly, for attainting the Johnsons of High Treason, and for restoring them to their former State of Liberty as before that Bill passed," July 20, 1738 CO 152/23, X57.

Plantations, and the Privy Council to be involved means that this case held enough importance, enough consequences, that it had to be reviewed by the highest officials of the empire. In conjunction with my overall argument, the imperial power was central to the case, from the moment the bill of attainder was written by the Antiguan legislature.

In effect, the bills of attainder issued for the Johnson brothers were simultaneously a short-term solution and a representation of the limits of British common law in the borderlands of the empire. The case revealed the tensions that existed between colonial officials, like Governor Mathew, and the Home authorities, notably the Board of Trade. Mathew and the legislature of Antigua felt their actions were justified. However, they recognized the unprecedented nature of the case and how it could legitimize and further more unprecedented court proceedings. However, the use of a bill of attainder to get around a procedural law, especially a law that protected the free subjects' rights in the Empire, could not stand, thus highlighting how important a uniform common law was for the Empire. Once more, the constraints of legal pluralism are highlighted. The colonial usage of attainder could not stand if it contradicted the precedents of the metropole. Thus, the bills of attainder in the Johnson brothers' case showcased an instance of imperial legal supremacy.

The fact that the Board of Trade chose the side of the Johnson brothers is simultaneously remarkable and logical. For one, it is initially shocking to see that the colonial officials in Antigua were not supported by their own imperial leaders. The apparent schism between the colonial officials and the imperial officials is notable from a legal standpoint. In effect, it became a standoff on the basis of interpretation of the law. For the Antiguan legislature, it felt that its use of bills of attainder were just; the circumstances of the conspiracy and its aftermath in unveiling allegedly disloyal subjects necessitated their hasty and legally hazy actions. Nevertheless, while

Governor Mathew tried to argue on behalf of his own actions and the actions of the legislators and assembly members, it was all for naught: The British officials were not to be swayed.[294] The misuse of attainder was, simply put, a subversion of English common law, and, notably, a case that could not stand. The precedent would have had consequences that could extend, as both Francis Fane and the overall Board of Trade stated, to the "free subjects" of the Empire, which was a coded way of referring to white British subjects.[295] With this example, it is clear that imperial law had supremacy over colonial law, leading to an impasse in the scholarship of legal pluralism. While colonial law still had the power to shape the empire from below, its influence had limits. Imperial law, especially in the British context, maintained its power by overturning and closely overseeing colonial cases and policies. While I recognize that British Caribbean colonies had independence in the structuring of their legal systems, specifically with regards to slavery, they did not have the ultimate say. Rather, as the cases of attainder discussed in this manuscript have shown, the Privy Council, the Board of Trade, and other British officials were closely invested in preserving the common law as it was practiced in the metropole. Especially with acts of attainder, historically a right primarily and almost exclusively for Parliament, colonial legislatures could not be allowed to use the writ as they saw fit, if it was to maintain its strength throughout the empire and common law.

The actions on the part of the Board of Trade and the Crown beg the question: did they choose to grant more importance to class and freedom status than to race? The answer to this is complicated, but, ultimately, the British authorities, in conjunction with the sovereign, were

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[294] Governor, William Mathew. *Governor William Mathew to Alured Popple, Enclosing the Following. St Christopher's*. Vol. 43. Abingdon, Oxfordshire: Taylor & Francis Ltd, 1737.

[295] Council of Trade, and Plantations. *Council of Trade and Plantations to Committee of Privy Council. Whitehall*. Vol. 44. Abingdon, Oxfordshire: Taylor & Francis Ltd, 1738; Fane, Francis. *Francis Fane to Council of Trade and Plantations*. Vol. 44. Abingdon, Oxfordshire: Taylor & Francis Ltd, 1738.

acting in the better interests of the Empire and all of its free subjects, including the free Black men at the center of this case, Benjamin and Billy Johnson. Because of how the bill of attainder and case were prepared, where the language was such that it could be construed against all free people, it had the power to change the rights of white subjects.[296] While the Home authorities did choose to repeal the bill, it was not because they felt that the right of free Black men in the colonies needed to be protected. While they saw the rights of free British subjects as important, the case for the metropolitan officials was much more about preserving parliamentary powers. Acts of attainder were traditionally vested in Parliament, and given their permanence, they could not be used as differing colonial assemblies saw fit.

The significance of the Antigua case, however, does not end in 1738; it is worth noting the evolution of the statuses of free people of color at the end of the eighteenth century. Namely, the Abridgment of the Laws of Jamaica, in 1793, demonstrated how attainder, forfeiture, and the rights of free people of color were constructed and affirmed in at the end of the eighteenth century.[297] In essence, the Abridgment marks an end of a rather tumultuous century. It signals a clearer, yet still murky and paradoxical, understanding of the rights, privileges, and spaces of free people of color, as well as, broadly, racial definitions. Namely, the importance of testimonies of enslaved persons and their admission in courts was at the heart of the Abridgment's classification of free people of color. It divided the free population, not just from the enslaved population, but along racial lines within. The first definition of free people of color in the Abridgment is that they are able to serve as evidence, and give testimonies, for other free

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[296] George II, King of England. *Order of Committee of Council for Plantation Affairs. Whitehall*. Vol. 44. Abingdon, Oxfordshire: Taylor & Francis Ltd, 1738.

[297] Jamaica. *An abridgment of the Laws of Jamaica; being an alphabetical digest of all the public Acts of Assembly now in force, from the thirty-second year of King Charles II. to the thirty-second year of King Charles II. to the Thirty-Second Year of his present Majesty King George III*. inclusive, as published in two volumes, Under the Direction of Commissioners appointed by 30 Geo. III. cap. xx. and 32 Geo. III. cap. xxix. St. Jago de la Vega, Jamaica, M.DCC.XCIII. [1793]. Eighteenth Century Collections Online. Gale. Vanderbilt University.

people of color.[298] Immediately, the definition of a free person in Jamaica is defined in legal terms, inside the physical legal space of a courtroom. The importance of personal testimony and evidence were such cornerstones in the laws of the colony that they are the first points in the definition of free people.

However, the definitions for free people of color in Jamaica at the end of the century became murkier with the inclusion of manumitted people. Namely, the importance of freedom status, and subsequent rights, for those who were formerly enslaved lies in the terms and length of manumission. For those persons of color who were born free, the endowment of rights is more seamless; they had no previous legal status. However, for those who gained their freedom, either through buying it or receiving it through the will of their former master, there was a minimum time of freedom to gain their rights as free people in the law.[299] Instead of being fixed in the law, freed people, at the end of the eighteenth century in Jamaica, still exist in a liminal space in the law. While they have achieved their freedom, their former status of enslaved person still has the power to overshadow themselves, opening up a vulnerable section of the law for an already legally weak population.

Therefore, in the last few years of the century, there was not much progress for free people of color, either born free or manumitted, in terms of their rights and freedom statuses. While the Johnson brothers were acquitted and their attainder was reversed, the precedence of their case did not hold any positive influence on the legal treatment of free people of color in British slave societies in the latter half of the eighteenth century. Rather, the definitions and rights granted to free people of color narrowed and the avenues to achieve privileges, like those awarded to the Williams family in the beginning of the century in Jamaica, were severely

[298] Ibid., 126.
[299] Ibid, 126.

limited, if not effectively abolished.[300] The case of the Johnson brothers, thus, appears to have been a rare case, and not a general example of the legal rights of free people of color. In effect, as the eighteenth century continued, racialized categories of both subjecthood and legal statuses became more deeply ingrained and pronounced as a means to preserve and bolster white supremacy and racial hierarchies in British Caribbean slave societies.

[300] Ibid., 178; Newman, *A Dark Inheritance*, 64.

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