

# ARTICLES

## THE BLACKS WHO “GOT THEIR FORTY ACRES”: A THEORY OF BLACK WEST INDIAN MIGRANT ASSET ACQUISITION

ELEANOR MARIE LAWRENCE BROWN\*

*The impediments to property acquisition and market success among African Americans are a significant area of inquiry in legal scholarship. The prevailing narrative on the historical relationship between Blacks and property is overwhelmingly focused on loss. However, in the political science, economics, and sociology literatures there is a countervailing narrative of successful property acquisition and retention among what might be termed a “market dominant” subset of migrant Blacks. The most successful subset of Black property owners in the United States*

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\* Copyright © 2014 by Eleanor Marie Lawrence Brown, GWIPP Fellow and Associate Professor of Law, George Washington University Law School; J.D., Yale Law School (1999); M.Phil. Politics, Oxford (1997) (Rhodes Scholar). Former Schwartz Fellow, New America Foundation; Former Chairman of the Jamaica Trade Board; Former Reginald Lewis Fellow, Harvard Law School; Former Law Clerk to the Honorable Patricia Wald (ret.), U.S. Court of Appeals for the District of Columbia Circuit; Former Law Clerk to the Honorable Keith Ellison, U.S. District Court for the Southern District of Texas. I have benefited from workshops at the law schools of the University of North Carolina (Chapel Hill), the University of Southern California, Fordham University, the University of Notre Dame, the University of Minnesota, George Washington University, and the University of Chicago, as well as the CRT colloquium jointly sponsored by Columbia and Fordham Law Schools and the Property colloquium at Fordham Law School. Comments received at the Lutie Lytle Conference for Black Female Legal Scholars and the American Society of Comparative Law Workshop were particularly helpful. I have also benefited from conversations with or comments from Bruce Ackerman, Orlando Patterson, David Wilkins, Kendall Thomas, Olati Johnson, Dorothy Roberts, Bernadette Atuahene, Lee Fennell, Guido Calabresi, Frank Upham, Sonya Katyal, Dan Kelly, Paul Butler, Marcella David, Dan Sharfstein, Paulette Caldwell, Mary Dudziak, Nestor Davidson, Ruth Okediji, Jill Hasday, Scott Kieff, Hari Osofsky, Dan Sokol, Camille Gear, Nomi Stolzenberg, Karen Brown, Kevin Johnson, Charles Ogletree, Ken Mack, Steve Legomsky, Jim Coleman, Nicole Garnett, Kimani Paul-Emile, Brad Snyder, Devon Carbado, Cindy Hahamovitch, Aubrey Bonnett, Calvin Holder, Adam Cox, Anne Alstott, Arden Rowell, Jennifer Gordon, Peter Schuck, Eduardo Peñalver, Joe Singer, Henry Smith, Richard Brooks, David Martin, Peter Henry, Angela Banks, Angela Onwuachi-Willig, Tomiko Brown-Nagin, Audrey McFarlane, Lant Pritchett, Dillon Alleyne, Neville Lewis, Tony Harriott, Richard Bernal, Kerry Abrams, Stephen Lee, Eric Posner, Sylvia Lazos, Alison Tirres, Deep Gulasekaram, Naomi Cahn, David Fontana, Carol Rose, Robert Ellickson, Claire Priest, Rose Villazor, Wendy Greene, Ernesto Hernandez-Lopez, Renee Lerner, Jackie Ross, Maximo Langer, Kim Lane Scheppelle, Jerry Davila, Daniel Hamilton, and Bob Cottrol. I am grateful to the librarians and/or archivists at the University of the West Indies, the Planning Institute of Jamaica, the Caribbean Community (CARICOM) Secretariat, the Ministry of Labor and the Statistical Institute of Jamaica. Finally, I am grateful for the aid of my research assistants, Diane Eikenberry, Jared Stipelman, and Jenna Brofsky.

today are descendants of Black migrants who were enslaved outside the United States. These free Black migrants, overwhelmingly British subjects originating from the West Indies, are largely invisible in the legal scholarship. Questions have arisen in other disciplines about what differentiated this subset of Black people. Why was their experience of property ownership so different?

Debates in the sociology, political economy, and political science literature have often focused on what Francis Fukuyama has controversially termed “cultural questions,” namely, the view that early West Indian migrants—like Korean or Japanese migrants—possessed a particular set of cultural traits that were distinctly well suited to asset acquisition. This Article focuses on a far more prosaic rationale, contending that the success of West Indian migrants may be rooted in the early grant of what I term “de facto property and contract rights” to West Indian slaves, which allowed their freedmen descendants to become the largest independent Black peasantry in the Americas. Between 1880 and 1924, U.S. immigration officials may have inadvertently selected for propertied migrant “types” when admitting immigrants. Through their own historical exposure to property and contract rights frameworks in the West Indies, as well as internal communal networks which supported informal banking schemes, these Blacks were particularly well placed to take advantage of opportunities for home and business ownership upon arrival in the United States.

The broader point is that there is a glaring omission amidst the “cultural” controversy: What about law? I use the term “law” in this context as it is used by many proponents of new institutional economics, as a proxy for an institutional framework that supports property acquisition, regardless of whether this framework is formal (state-supported) or customary. Moreover, the law and economics scholarship has focused extensively on institutional frameworks that allow certain religious and ethnic groups to dominate particular sectors, such as Orthodox Jews in the diamond industry or Koreans in the grocery sector. The insights of this literature allow us to interrogate whether Black West Indians had early access to institutions that facilitated contracting and property ownership and if so, whether this institutional history might contribute to their long-term asset acquisition patterns. The question necessarily arises: Why would we think of Black migrants any differently from the way we think of other ethnic and religious minorities who have been successful asset acquirers?

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INTRODUCTION

In a landmark reflection on the interplay between markets and ethnicity, Amy Chua writes that “[i]n First World countries, markets have tended to reinforce the economic dominance of a perceived ethnic majority over those countries’ most salient ethnic minorities.”<sup>1</sup> However, in the United States, sometimes the market-dominant groups are not “perceived ethnic majorities,” such as Whites, but instead other ethnic minorities, such as Korean Americans.<sup>2</sup> Indeed, Chua characterizes Korean Americans—who are disproportionately likely to own businesses in inner-city neighborhoods compared with their representation among the neighborhood’s residents—as “an increasingly glaring market-dominant minority vis-à-vis the relatively economically depressed African American majorities around them.”<sup>3</sup> This market dominance has been cited as a primary source of racial tension, culminating at times in boycotts of Korean businesses.<sup>4</sup>

The calls for “market-correcting”<sup>5</sup> affirmative action programs for racial minorities are rooted in this example.<sup>6</sup> However, these calls

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<sup>1</sup> Amy L. Chua, *Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development*, 108 YALE L.J. 1, 5 (1998).

<sup>2</sup> Chua’s use of ethnicity has been criticized by scholars of ethnicity. See, e.g., Nicholas Tarling & Edmund Terence Gomez, *Introduction to THE STATE, DEVELOPMENT AND IDENTITY IN MULTI-ETHNIC SOCIETIES: ETHNICITY, EQUITY AND THE NATION* 1, 1–7 (Nicholas Tarling & Edmund Terence Gomez eds., 2008); Jill Goldenziel, *Fire Prevention: A Book Review of Amy Chua’s World on Fire*, 23 UCLA PAC. BASIN L.J. 78 (2005).

<sup>3</sup> AMY CHUA, *WORLD ON FIRE: HOW EXPORTING FREE MARKET DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY* 207 (2003).

<sup>4</sup> One need only recall the final scene of director Spike Lee’s well-known movie *Do the Right Thing*, in which an angry crowd of African Americans threatens a Korean supermarket. *DO THE RIGHT THING* (Universal Pictures 1989). This tension is discussed throughout Kyeyoung Park, *Use and Abuse of Race and Culture: Black-Korean Tension in America*, in *KOREANS IN THE HOOD: CONFLICT WITH AFRICAN AMERICANS* 60 (Kwang Chung Kim ed., 1999). A good summary of the history of the tension between Korean Americans and African Americans can also be found in FRANCIS FUKUYAMA, *TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY* 295–306 (1995).

<sup>5</sup> Chua, *supra* note 1, at 5 (internal quotation marks omitted).

<sup>6</sup> One such market-correcting affirmative action program, the Community Reinvestment Act, aims to ensure that low- and moderate-income neighborhoods in which Black Americans are more likely to live have access to credit. See, e.g., Michael S. Barr, *Credit Where It Counts: The Community Reinvestment Act and Its Critics*, 80 N.Y.U. L. REV. 513 (2005) (discussing the Community Reinvestment Act as a market-correcting policy that provides credit opportunities to historically disempowered minorities); Keith N.

have been complicated by extensive evidence that some Blacks are themselves “market-dominant minorities” who dominate particular business sectors.<sup>7</sup> West Indian Americans comprise one such market-dominant minority. For example, after 1920, among Black businesspersons in New York, West Indians were disproportionately likely to dominate business, particularly in the real estate, grocery, restaurant, and retail sectors.<sup>8</sup> Indeed, since as early as the first decade of the twentieth century, only shortly after West Indians had begun arriving in the United States in significant numbers, they were over-represented among business owners in Harlem.<sup>9</sup>

Recent studies indicate that over fifty percent of New York’s Black businesses have historically been owned by West Indians even though West Indians constituted less than one third of the city’s Black population.<sup>10</sup> West Indian Americans are also disproportionately represented on lists of Black multimillionaires.<sup>11</sup> West Indian entrepre-

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Hylton & Vincent D. Rougeau, *Lending Discrimination: Economic Theory, Econometric Evidence, and the Community Reinvestment Act*, 85 GEO. L.J. 237 (1996) (examining the theories and evidence of lending-market discrimination used to justify the Community Reinvestment Act); A. Brooke Overby, *The Community Reinvestment Act Reconsidered*, 143 U. PA. L. REV. 1431 (1995) (examining the difficulties and controversies arising from the implementation of the Community Reinvestment Act); Anthony D. Taibi, *Racial Justice in the Age of the Global Economy: Community Empowerment and Global Strategy*, 44 DUKE L.J. 928, 946–56 (1995) (discussing affirmative action principles and structural discrimination in lending markets).

<sup>7</sup> Chua defines market-dominant minorities as “ethnic minorities who, for widely varying reasons, tend under market conditions to dominate economically, often to a startling extent, the ‘indigenous’ majorities around them.” CHUA, *supra* note 3, at 6.

<sup>8</sup> See Calvin B. Holder, *Making Ends Meet: West Indian Economic Adjustment in New York City, 1900–1952*, 1 WADABAGEI 31, 52–54 (1998) (noting the relative entrepreneurial success of West Indian Blacks after 1920 as compared to other Blacks in America).

<sup>9</sup> See George Edmund Haynes, *The Negro at Work in New York City: A Study in Economic Progress* 101, 108 (Apr. 1, 1912) (unpublished Ph.D. dissertation, Columbia University) (on file with the *New York University Law Review*) (documenting the disproportionate share of West Indian business proprietors in 1909 in relation to their proportion in the Black population).

<sup>10</sup> Reed Ueda, *West Indians*, in HARVARD ENCYCLOPEDIA OF AMERICAN ETHNIC GROUPS 1020, 1026 (Stephan Thernstrom et al. eds., 1980). According to a recent study, Black Caribbean immigrants accounted for less than a third of New York’s Black population. THE NEWEST NEW YORKERS: CHARACTERISTICS OF THE CITY’S FOREIGN BORN POPULATION 196 (2013), available at [http://www.nyc.gov/html/dcp/pdf/census/nny2013/nny\\_2013.pdf](http://www.nyc.gov/html/dcp/pdf/census/nny2013/nny_2013.pdf) (“The Afro-Caribbean population, for example, numbered in excess of 601,000 in 2011, or nearly one-third (32 percent) of the black nonhispanic population, up from less than 10 percent in 1970.”).

<sup>11</sup> It was clearly documented in the 1930s that West Indians were disproportionately represented among Black professionals in New York City. See Holder, *supra* note 8, at 53–54 (1998) (“By the 1930s, . . . West Indians were clearly the majority of black businesspersons in New York and were, for all intents and purposes, the only blacks with businesses connected to the skilled trades.”); John C. Walter, *The Caribbean Immigrant Impulse in American Life: 1900–1930*, 11 REVISTA INTERAMERICANA 522, 529–30 (1981).

neurs in inner-city communities have attracted far less media attention than their Korean and Jewish counterparts and have largely escaped economic boycotts, perhaps in part because most West Indian migrants are themselves Black. Despite this lower external profile, West Indian market dominance has been a source of resentment in the African American community for some time.<sup>12</sup> For example, Jamaicans in Harlem were controversially dubbed “Jewmaicans,” and in the 1930s, there was a common joke that if a West Indian had ten cents more than a beggar he started a business.<sup>13</sup>

While the legal scholarship has tried to account for the market dominance of other minority groups—such as Chinese and Jewish Americans—by focusing on internal communal norms that reduce transaction costs, encourage contractual relationships, and facilitate property acquisition, very little has been written about Black West Indians’ role in the marketplace.<sup>14</sup> The prevailing narrative in legal

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<sup>12</sup> A good summary of the tension between African Americans and other Black migrants, with a particular focus on West Indians, can be found in GODFREY MWAKIKAGILE, *RELATIONS BETWEEN AFRICANS, AFRICAN AMERICANS AND AFRO-CARIBBEANS: TENSIONS, INDIFFERENCE AND HARMONY* 36–79 (2007). Malcolm Gladwell discusses long-standing tensions in identity between African Americans and West Indian migrants in a discussion about his Jamaican cousins in New York, including differential perceptions and treatment by employers. Malcolm Gladwell, *Black Like Them*, NEW YORKER, Apr. 29, 1996, at 74, 78. There are also related accounts of these tensions in the quasi-autobiographical fiction of Barbadian American Paule Marshall. Consider, for example, the discussion of parental attempts to restrict their children from non-West Indian (i.e. African American) influences in Destiny O. Birdsong, *The Mother’s Mark: Matrilineal Inscription, Corporeality, and Identity Formation in Mother-Daughter Relationships in Black Women’s Literature* 45 (Aug. 2012) (unpublished Ph.D. dissertation, Vanderbilt University), available at <http://etd.library.vanderbilt.edu/available/etd-07182012-105942/unrestricted/Birdsong.pdf> (discussing PAULE MARSHALL, *BROWN GIRL, BROWNSTONES* (1959) and particularly the attempt of the protagonist’s Barbadian mother to restrict her children’s access to non-Barbadian African Americans).

<sup>13</sup> Winston James, *Explaining Afro-Caribbean Social Mobility in the United States: Beyond the Sowell Thesis*, 44 COMP. STUD. SOC’Y & HIST. 218, 229 (2002). West Indians were also believed to be prominent “number runners” (that is, proprietors of illegal gambling rings) in the 1920s. Numerous examples can be found in popular media. For example, Spike Lee’s film *Malcolm X* (based on MALCOLM X & ALEX HALEY, *THE AUTOBIOGRAPHY OF MALCOLM X* (1965)) portrays the titular character working for a numbers runner called “West Indian Archie” during his early days in Harlem. Moreover, Stephanie St. Clair, the famous operator of a numbers ring who inspired Cicely Tyson’s character Hoodlum in the movie, was of (French) West Indian heritage. MALCOLM X (40 Acres and a Mule Filmworks 1992); HOODLUM (MGM Studios, 1997).

<sup>14</sup> See, e.g., Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 138–41 (1992) (describing the private law system among historically ethnically homogeneous diamond merchants, with a particular focus on Jewish merchants); Lan Cao, *Looking at Communities and Markets*, 74 NOTRE DAME L. REV. 841, 874–92 (1999) (describing the operations within multiple immigrant groups of savings and credit associations undergirded by trust relationships). See generally Anupam Chander, *Diaspora Bonds*, 76 N.Y.U. L. REV. 1005, 1038, 1060–95 (2001) (describing business relationships within the Indian American community and their

scholarship on the historical relationship between markets and Blacks in the United States is overwhelmingly focused on loss.<sup>15</sup> Much has been made of a repeatedly cited statistic: The median wealth of the average Black family is five percent that of the average White family,<sup>16</sup> and fewer than half of African American families own their own home, a number that lags thirty percentage points behind White Americans.<sup>17</sup>

Despite being largely neglected in legal scholarship, other disciplines describe West Indians as an economically powerful minority group within the larger community of people of African descent.<sup>18</sup>

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willingness to extend credit to the Indian government); Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. CHI. L. REV. 133, 165–75 (1996) (describing informal contracting among Korean, Japanese, and West Indian migrants, particularly in informal credit associations); Teemu Ruskola, *Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective*, 52 STAN. L. REV. 1599 (2000) (discussing Chinese American business relationships in the context of the larger Chinese diaspora).

<sup>15</sup> See generally Hylton & Rougeau, *supra* note 6 (discussing racial discrimination in lending with a particular focus on the Community Reinvestment Act); Taibi, *supra* note 6, at 928–31 (discussing how globalization negatively impacts “non-elite” people—especially people of color—and arguing that old strategies for fighting racial subordination must adapt to the modern globalized environment).

<sup>16</sup> See, e.g., RAKESH KOCHHAR ET AL., PEW RESEARCH CTR., WEALTH GAPS RISE TO RECORD HIGHS BETWEEN WHITES, BLACKS, HISPANICS 1 (2011), available at <http://www.pewsocialtrends.org/2011/07/26/wealth-gaps-rise-to-record-highs-between-Whites-Blacks-hispanics/> (“The median wealth of white households is 20 times that of black households . . . .”); THOMAS M. SHAPIRO ET AL., BRANDEIS UNIV., INSTITUTE ON ASSETS AND SOCIAL POLICY, THE RACIAL WEALTH GAP INCREASES FOURFOLD 1 (2010) (graphing median wealth holdings of White and African American families from 1984 to 2007); Sabrina Tavernise, *Recession Study Finds Hispanics Are Hit Hardest*, N.Y. TIMES, July 26, 2011, at A1, available at <http://www.nytimes.com/2011/07/26/us/26hispanics.html> (“Median wealth of whites is now 20 times that of black households . . . .”); cf. Hope Yen, *Census: Wealth Gap Widens Between Whites, Minorities*, SAN JOSE MERCURY NEWS (July 26, 2011), [http://www.mercurynews.com/ci\\_18550917](http://www.mercurynews.com/ci_18550917) (citing the statistic incorrectly, claiming that Whites post-recession now have “on average . . . 20 times the net worth of blacks”).

<sup>17</sup> See Press Release, U.S. Census Bureau, Residential Vacancies and Homeownership in the Third Quarter 2013, at 9 (Nov. 5, 2013), available at <http://www.census.gov/housing/hvs/files/qtr313/q313press.pdf> (explaining that non-Hispanic White families reported 73.3% homeownership, while Black families reported 43.1%).

<sup>18</sup> See NATHAN GLAZER & DANIEL PATRICK MOYNIHAN, *BEYOND THE MELTING POT: THE NEGROES, PUERTO RICANS, JEWS, ITALIANS, AND IRISH OF NEW YORK CITY* 34–36 (2d ed. 1970) (noting that West Indians were generally more successful than the “native” Blacks in America); see also IRA DE A. REID, *THE NEGRO IMMIGRANT: HIS BACKGROUND, CHARACTERISTICS AND SOCIAL ADJUSTMENT, 1899–1937*, at 119 (Arno Press 1969) (1939) (providing a broad exploration of the experience of West Indian immigrants to the United States, including their large contributions to the business community). See generally James, *supra* note 13 (comparing the experiences of Afro-Caribbean and Afro-American Black immigrants and discussing factors that contributed to Afro-Caribbean immigrants’ relative social mobility); Winston James, *New Light on Afro-Caribbean Social Mobility in New York City: A Critique of the Sowell Thesis*, in *NEW CARIBBEAN THOUGHT: A READER* 395 (Brian Meeks & Folke Lindahl eds., 2001) (arguing

Indeed, recent analysis shows that median West Indian net worth is remarkably similar to that of all other Americans.<sup>19</sup> What differentiates this subset of Black people?<sup>20</sup> Why has their experience of asset acquisition been so different from that of other Black Americans? I address these questions by looking closely at the lives and experiences of a particular subset of early Black West Indian migrants who entered the United States in the late nineteenth and early twentieth centuries: the "Blacks who got their forty acres."

In the public vocabulary, the "Blacks who got their forty acres" refers to descendants of persons enslaved in the United States who were able to overcome legal bars to property ownership shortly after Emancipation and who are disproportionately likely to own property today.<sup>21</sup> Despite popular perception, however, the most successful subset of Blacks today are not descendants of American slaves, but

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against the theory that the market dominance and social mobility of Afro-Caribbean migrants is attributable primarily to culture).

<sup>19</sup> See Calvin B. Holder, *West Indies: Antigua, Bahamas, Barbados, Grenada, Guadeloupe, Guyana, Martinique, St. Kitts, Trinidad*, in *THE NEW AMERICANS: A GUIDE TO IMMIGRATION SINCE 1965*, at 674, 683–84 (Mary C. Waters & Reed Ueda eds., 2007) ("The 2000 Census shows the median household income for West Indians . . . compares quite favorably with the median household income for the general population . . ."). More recently, West Indian Americans' median household income ranges from \$42,000 to \$54,000, depending on the island of origin. Contrast these median household incomes with that of African Americans generally (\$40,946) and Americans generally (\$52,762). Thus, Black West Indian incomes are generally closer to the American median than the African American median. See U.S. CENSUS BUREAU, 2006–2010 AMERICAN COMMUNITY SURVEY SELECTED POPULATION TABLES (2010) (identifying the median household income for Americans of Jamaican origin as \$49,634, of Trinidadian and Tobagonian origin as \$51,057, of Barbadian origin as \$53,978, and of Bahamian origin as \$41,925).

<sup>20</sup> I will regularly refer to two groups of Blacks. The first group, African Americans (often pithily referred to in the literature as "native" Blacks), includes those descended from Africans who were enslaved here in the United States. The second group, West Indians, has a different historical heritage. These are persons who were enslaved in the West Indies but were not enslaved in the United States and who later became migrants to the United States, mostly after the abolition of slavery in the United States. The term "West Indians" as utilized in this Article does not generally include West Indian immigrants to the United States of other ethnic backgrounds. See Holder, *supra* note 19, at 674–75 (describing the migration of West Indians to the United States and identifying the group as racially diverse, but predominantly Black).

<sup>21</sup> The phrase "got their forty acres" has been famously used by Whoopi Goldberg as relayed by Henry Louis Gates, Jr. in a *New York Times* op-ed. Henry Louis Gates Jr., Op-Ed., *Forty Acres and a Gap in Wealth*, N.Y. TIMES, Nov. 18, 2007, § 4, at 14, available at <http://www.nytimes.com/2007/11/18/opinion/18gates.html?pagewanted=all>. The idea has also been used by the late rapper, Tupac. 2PAC + OUTLAWZ, *Letter to the President, on STILL I RISE* (Interscope Records 1999) ("What happened to our forty acres and a mule?"). Gates argues that his highly successful African American interviewees in the PBS miniseries, *African American Lives* (2006) and *African American Lives 2* (2008), are disproportionately likely to be descendants of freedmen who became property owners early on. See Gates, *supra* (explaining that of twenty successful African Americans profiled, fifteen were descendants of former slaves who had obtained property by 1920); see also

instead descendants of free Black migrants whose ancestors were enslaved outside the United States.<sup>22</sup> Properly accounting for successful West Indian Blacks paints a more inclusive, accurate picture of wealthy Black Americans. Colin Powell—whose family included J. Bruce Llewellyn, a Black beverage distributor in the United States and a multimillionaire who was the largest Black telecommunications entrepreneur—epitomizes this second group.<sup>23</sup> The group also includes ancestors of Eric Holder and Susan Rice, whose parents and grandparents became property owners after migrating to the United States from the Caribbean.<sup>24</sup> Upon their arrival in the United States, each of these families began what appears to have been a speedy ascent up the property ladder.

Despite this accumulation of wealth and property, unlike Korean Americans, Lebanese Americans, Chinese Americans, and others,<sup>25</sup>

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*African American Lives* (PBS television broadcast 2006); *African American Lives 2* (PBS television broadcast 2008).

<sup>22</sup> See Sol Ahiarah, *Black Americans' Business Ownership Factors: A Theoretical Perspective*, 22 REV. BLACK POL. ECON. 15, 22 (1993) (citing Thomas Sowell, *Ethnicity: Three Black Histories*, WILSON Q., Winter 1979, at 96, 102) (noting the relative entrepreneurial success of West Indian Blacks as compared to other Blacks in America); Holder, *supra* note 8, at 48–50, 53–56, 62 (noting the relative success of West Indian Black professionals as compared to other Black professionals in America).

<sup>23</sup> Former Secretary of State Powell tells this story in his biography. See COLIN L. POWELL, *MY AMERICAN JOURNEY* 3–38 (1995) (recounting his parents' Jamaican origins and their early acquisition of a home in the United States). Powell's extended family included a cousin, J. Bruce Llewellyn, another son of Jamaican immigrants. He was one of the largest Black players in the telecommunications industry, president of the Overseas Private Investment Corporation, chairman of the board of Philadelphia Coca-Cola Bottling Company, and chairman of the board of Freedom National Bank. Douglas Martin, *J. Bruce Llewellyn, Who Forged a Path for Blacks in Business, Is Dead at 82*, N.Y. TIMES, Apr. 9, 2010, at A21, available at <http://www.nytimes.com/2010/04/10/business/10llewellyn.html>; Frank McCoy, *In Appreciation of J. Bruce Llewellyn (1927–2010)*, THE ROOT (Apr. 8, 2010, 3:25 PM), [http://www.theroot.com/articles/culture/2010/04/rip\\_j\\_bruce\\_llewellyn.html](http://www.theroot.com/articles/culture/2010/04/rip_j_bruce_llewellyn.html).

<sup>24</sup> Holder and Rice are also of West Indian heritage. Holder's father was Barbadian. Javier C. Hernandez, *A High Achiever Poised to Scale New Heights*, N.Y. TIMES, Dec. 1, 2008, at A23. Rice's grandfather was a Jamaican janitor who financed the education of all of his children at Bowdoin College and Harvard University by repeatedly mortgaging a home that he acquired. Kelley Bouchard, *Rice Family Enjoys a "Fantastic Journey,"* PORTLAND PRESS HERALD (Nov. 15, 2012), [http://www.pressherald.com/archive/rice-family-enjoys-a-fantastic-journey\\_2008-12-07.html](http://www.pressherald.com/archive/rice-family-enjoys-a-fantastic-journey_2008-12-07.html).

<sup>25</sup> The literature on each of these groups is well summarized in a number of scholarly articles. See generally Cao, *supra* note 14 (arguing that social capital can supplement economic collateral in immigrant communities, which would then provide greater access to lending markets); Posner, *supra* note 14 (discussing the influence of nonlegal sanctions and their interactions with the legal regime and using ethnicity-based informal economic groups such as the Korean rotating credit group, the "kye," as an example). Lisa Bernstein's work on how ethnically homogenous minority groups have leveraged communal ties to dominate particular industry sectors, such as the diamond sector, is recognized as a landmark contribution in this area of scholarship. Bernstein, *supra* note 14.



West Indians are virtually invisible as a market-dominant minority in existing legal scholarship. In failing to address the factors that account for the particular success of these free Black migrants<sup>26</sup>—overwhelmingly British subjects originating from the West Indies<sup>27</sup>—legal scholarship neglects the attention paid to West Indians in disciplines such as political science, economics, history, and sociology precisely because they are a *Black* market-dominant minority. In these fields, West Indian material success has not only been extensively examined but has fueled compelling debates, such as what is pithily referred to as the “native Black” versus “migrant Black” question.<sup>28</sup>

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<sup>26</sup> James’s article includes comprehensive statistical summary analyses of pre-1965 Black immigration to the United States by region of origin. See generally James, *supra* note 13. Early Black migrants were overwhelmingly of Caribbean origin. See *id.* at 222 tbl. 1 (showing that 75.6% of Black immigrants from 1899 to 1932 were from the Caribbean).

<sup>27</sup> I use the definition of West Indians conventionally used in the social science literature, namely, Anglophone Caribbean nationals originating from a past or present British colony in the West Indies. SUZANNE MODEL, WEST INDIAN IMMIGRANTS: A BLACK SUCCESS STORY? 168 (2011). The migrants were overwhelmingly descendants of slaves and “coloreds.” Sociologist-historian Orlando Patterson provides a summary of the significance of the West Indies from which the migrants originated and its social structure as follows: “The sugar plantations . . . made the Afro-Caribbean societies the richest areas of the world . . . [and] set the basic social structure and tone of these societies. African slaves were brought in on a large scale, resulting in the early demographic dominance of Black people.” Orlando Patterson, *Context and Choice in Ethnic Allegiance: A Theoretical Framework and Caribbean Case Study*, in ETHNICITY: THEORY AND EXPERIENCE 305, 314–15 (Nathan Glazer & Daniel P. Moynihan eds., 1975). In addition to these slaves, and the small minority of White planters who ruled them, “a third group soon emerged—the coloreds—or people of mixed ancestry. This group formed a useful racial and socio-cultural buffer between the Whites and Blacks. By the end of the eighteenth century a substantial number of them were freedmen.” *Id.*

<sup>28</sup> The controversial implication is that West Indians are useful as a comparative “sample” since West Indians were arriving in Northern cities in significant numbers at around the same time that significant numbers of African Americans were migrating from the South. Indeed, social scientists have conducted comparative studies of West Indian (international) migrants and African American (internal) migrants. This literature is summarized in MODEL, *supra* note 27, at 84–90. Like African Americans, West Indians faced discriminatory barriers to property ownership in Northern cities, such as exclusion from certain neighborhoods and red-lining in early iterations of both federal and private mortgage programs. For a comprehensive discussion of the discrimination faced by West Indians in New York including federal and state employment, public utilities, and skilled trades and the professions, see Holder, *supra* note 8, at 31–45. For sometimes controversial discussions of these issues, see REYNOLDS FARLEY & WALTER R. ALLEN, THE COLOR LINE AND THE QUALITY OF LIFE IN AMERICA 362–407 (1989) (using census data to compare native-born and Afro-Caribbean immigrant Black populations on numerous statistics, including gender, education, employment, and income, among others); FUKUYAMA, *supra* note 4, at 295–306 (discussing discrimination faced by Blacks in America, with particular emphasis on access to credit, and comparing their experience to that of other ethnic groups in the United States, focusing especially on economic performance); PHILIP KASINITZ, CARIBBEAN NEW YORK: BLACK IMMIGRANTS AND THE POLITICS OF RACE 90–95 (1992) (noting the relative economic and political success of West Indians in New York compared to native Blacks); THOMAS SOWELL, RACE AND CULTURE: A WORLD VIEW 254–57 (1994)

The prominent Harlem commentator and activist W.A. Domingo observed that West Indians are “forever launching out in business, and such retail businesses as are in the hands of Negroes in Harlem are largely in the control of the foreign-born.”<sup>29</sup> Thirteen years later, Daniel Patrick Moynihan and Nathan Glazer, in a survey of New York’s ethnic landscape, controversially argued that West Indian New Yorkers’ patterns of asset acquisition were substantially different from “native” Black Americans’ acquisition patterns.<sup>30</sup>

Debates about this disparity in sociology, political economy, and political science contexts have focused on what have been termed “cultural” questions. This scholarship has examined the perception that West Indians (in contrast to “native Blacks,” that is, African Americans) possessed a particular set of cultural traits<sup>31</sup> (such as an

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[hereinafter SOWELL, RACE AND CULTURE] (discussing the pitfalls of verbal and statistical abstractions of racial and ethnic groups); THOMAS SOWELL, *THE ECONOMICS AND POLITICS OF RACE: AN INTERNATIONAL PERSPECTIVE* 106–07 (1983) [hereinafter SOWELL, *THE ECONOMICS AND POLITICS OF RACE*] (discussing the coincident West Indian immigration to the United States and internal migration of American Blacks to northern cities and noting that West Indian immigrants were much more successful than the native Blacks). See generally GLAZER & MOYNIHAN, *supra* note 18 (providing historical background information on African Americans and West Indian immigrants in America and describing the social, political, and economic environment of these communities and groups); STEPHEN STEINBERG, *THE ETHNIC MYTH: RACE, ETHNICITY, AND CLASS IN AMERICA* (1989) (arguing that the primary factors in creating and maintaining economic inequalities between American racial and ethnic groups are locality, class conflict, and selective migration, and rejecting the view that cultural and ethnic traits and values are the dominant factors); Sherri-Ann P. Butterfield, “*We’re Just Black*”: *The Racial and Ethnic Identities of Second-Generation West Indians in New York*, in *BECOMING NEW YORKERS: ETHNOGRAPHIES OF THE NEW SECOND GENERATION* 288 (Philip Kasinitz et al. eds., 2004) (discussing the experience of West Indians in New York and exploring the interplay between race and ethnicity on their views of self-identity and emphasizing how neighborhood composition and geographic segregation influence these views); Suzanne Model, *Caribbean Immigrants: A Black Success Story?*, 25 *INT’L MIGRATION REV.* 248 (1991) (analyzing the 1980 earnings and earnings attainment process of Afro-Caribbean immigrants and concluding that the data do not indicate that region of origin accounted for the income disparity between West Indians and native Blacks).

<sup>29</sup> W.A. Domingo, *The Tropics in New York*, *SURVEY GRAPHIC*, Mar. 1925, at 648, 649 available at <http://www.unz.org/Pub/TheSurvey-1925mar01>. KASINITZ, *supra* note 28, at 93 (explaining the entrepreneurial success of West Indian Blacks in America); Dennis Forsythe, *Black Immigrants and the American Ethos: Theories and Observations*, in *CARIBBEAN IMMIGRATION TO THE UNITED STATES* 55, 65–66 (Roy S. Bryce Laporte & Delores M. Mortimer eds., 1983) (same). See generally MILTON VICKERMAN, *CROSSCURRENTS: WEST INDIAN IMMIGRANTS AND RACE* (1999) (discussing subjective viewpoints of race from the perspective of Jamaican immigrants in New York).

<sup>30</sup> See GLAZER & MOYNIHAN, *supra* note 18, at 35–36 (positing that West Indians’ ethos included saving, hard work, investment, and education).

<sup>31</sup> The most famous proponent of this view is Thomas Sowell. See THOMAS SOWELL, *Three Black Histories*, in *ESSAYS AND DATA ON AMERICAN ETHNIC GROUPS* 7, 41–45 (Thomas Sowell ed., 1978) (distinguishing West Indian Blacks as a distinct social group). Culture is a notoriously amorphous concept consisting of phenomena such as attitudes,

emphasis on saving) that were distinctly well suited to asset acquisition.<sup>32</sup> This social science literature contains a glaring omission: the law.

In noting the omission of the law in the existing scholarship investigating West Indian asset acquisition, I use the term “law” as a proxy for an institutional framework that supports property acquisition, whether this framework is formal (state-supported) or customary.<sup>33</sup> Today, there are widely-employed methodologies used to assess historical wealth differentials among countries based on access to various institutional frameworks.<sup>34</sup> These same logics may be used to explore differentials in patterns of asset acquisition between different groups of people (as opposed to different countries). Relying on this literature, we can ask whether Black West Indians had early access to institutions for the protection of property and contract, and if so, whether this institutional history might have contributed to the group’s long-term asset acquisition patterns.

This Article contends that the success of West Indian migrants may be rooted in the early grant of what I term “de facto property and contract rights” to West Indian slaves. In different iterations of immigration reform in the early twentieth century, Congress sought to make it progressively more difficult for Blacks to migrate to the

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values, norms, and customs. See FUKUYAMA, *supra* note 4, at 34–35 (using the term “culture” to mean ethical or moral habits rather than rational choices); Orlando Patterson, *Taking Culture Seriously: A Framework and an Afro-American Illustration*, in CULTURE MATTERS: HOW VALUES SHAPE HUMAN PROGRESS 202, 208 (Lawrence E. Harrison & Samuel P. Huntington eds., 2000) (defining culture as a “repertoire of socially transmitted and intra-generationally generated ideas about how to live and make judgments, both in general terms and in regard to specific domains of life”).

<sup>32</sup> Authors who have addressed these debates include Model and Sowell. See Model, *supra* note 28, at 259 (examining earnings of African Caribbean immigrants relative to African Americans in 1980); Sowell, *supra* note 31, at 48–49 (offering a cultural explanation for the disparity).

<sup>33</sup> See Peter Blair Henry & Conrad Miller, *Institutions vs. Policies: A Tale of Two Islands* 1 (Nat’l Bureau of Econ. Research, Working Paper No. 14604, 2008), available at <http://www.nber.org/papers/w14604.pdf> (discussing the importance of “law” in the “institutions” school developed by Douglass North); see also *infra* note 212 (discussing North’s theory of property rights).

<sup>34</sup> See, e.g., Tom Ginsburg, *Does Law Matter for Economic Development? Evidence from East Asia*, 34 LAW & SOC’Y REV. 829, 830–34 (2000) (examining the relationship between law and economic development); Paul G. Mahoney, *The Common Law and Economic Growth: Hayek Might Be Right*, 30 J. LEGAL STUD. 503, 504–07 (2001) (arguing that legal origin affects financial growth beyond just its effects on financial markets); Richard A. Posner, *Creating a Legal Framework for Economic Development*, 13 WORLD BANK RES. OBSERVER 1, 2–3 (1998) (using both formal and informal legal frameworks to explain historical differentials); Kenneth W. Dam, *Land, Law and Economic Development* 6–9 (Univ. of Chi. John M. Olin Law & Econ., Working Paper No. 272, 2006), available at <http://www.law.uchicago.edu/files/files/272-kd-land.pdf> (emphasizing the special importance of land law and institutions on economic development).

United States.<sup>35</sup> Importantly, in seeking to restrict Black migration, immigration officials may have inadvertently selected for propertied “types,” that is, more elite Blacks. Through their historical exposure to property and contract rights frameworks in the West Indies and their tight-knit communal networks—which approximated “law” and reduced the transaction costs of business dealings—these Blacks were particularly well equipped to take advantage of opportunities for home and business ownership upon arrival in the United States.

This Article proceeds as follows. Part I traces the genealogy of West Indian migrant asset acquisition from present-day New York<sup>36</sup> back to slave plantations in the Caribbean. In doing so, I demonstrate the link between patterns of asset acquisition in the United States and historical exposure to property and contract regimes in the West Indies. Addressing the complex issues of causality, I note that it is one thing to argue that West Indians were longtime market participants and well prepared for U.S.-style capitalism. It is, however, another thing entirely to address the precise mechanisms by which exposure to a property and contract rights framework in a migrant’s country of origin contributes to this migrant’s asset acquisition patterns once he arrives in the United States. I examine these mechanisms by pinpointing a number of specific contributory factors, including West Indian migrants acting as classic “middlemen,” this population’s dominance of the Black realtor business in New York, and Black informal savings networks that provided West Indians with access to capital and

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<sup>35</sup> David Johns Hellwig, *The Afro-American and the Immigrant, 1880–1930: A Study of Black Social Thought* 216–20 (Aug. 2, 1973) (unpublished Ph.D. dissertation, Syracuse University) (on file with the *New York University Law Review*) (providing historical examples of legislative attempts to exclude Black immigrants).

<sup>36</sup> I focus on West Indians in New York because New York was an early epicenter of the West Indian migrant business community. Holder, *supra* note 8, at 48–49. Business establishment is well correlated with the places that West Indians have settled. For much of the early twentieth century, West Indians were business leaders in the Black community in New York. *Id.* at 48–52. Calvin Holder argues that West Indian success in business is in part an extension of their access to skilled trades in the West Indies. *See id.* at 683 (documenting West Indian migrants’ activities in New York); *see also* Calvin B. Holder, *The Causes and Composition of West Indian Immigration to New York City, 1900–1952*, 11 *AFRO-AM. N.Y. LIFE & HIST.*, Jan. 1987, at 7, 16 (attributing professional and skilled West Indians’ preference for immigrating to New York over other U.S. cities to its comparatively better racial climate and economic opportunities). Since 1965, West Indians have mainly migrated to the Bronx, Queens, Brooklyn, and Long Island. Holder, *supra* note 19, at 676. The communities with significant West Indian representation now include the North Bronx, Richmond Hill, Cambria Heights, Laurelton, Rosedale, Elmont, Uniondale, Hempstead, East Flatbush, Flatlands, and Baldwin, in addition to the earlier-established concentrations in Bedford-Stuyvesant, Crown Heights, Flatbush, and Canarsie. *Id.* at 675–76 (citing census figures indicating that sixty-two percent of West Indians live in New York and identifying the neighborhoods in which they are concentrated).

that I show helped facilitate the conversion of White ethnic housing to West Indian–dominated housing enclaves.

In Part II, I consider the counterintuitive notion that West Indian slave societies were a propitious context for the development of a propertied migrant Black class. Unlike “settler societies” (the quintessential example being Massachusetts Bay), in which property protections were spread broadly and early, the West Indies has been classified as a classic “extractive society,” in which property protections only existed for a tiny minority of elites.<sup>37</sup> How could slaves (themselves property) come to own property? The answer lies not in formal law, but in customary law, which created a system of property ownership among slaves that eventually approximated formal law.<sup>38</sup> The British—in perhaps an inadvertent instance of institutional design—created incentives for slaves to become what I term “property owners in waiting.”<sup>39</sup>

In Part III, I explain that by the time of Emancipation, many West Indian slaves were not merely property owners but also full-fledged market participants, particularly in the food markets. Thus, many slaves were already “contractors in waiting.” This market security had two effects. The newly freed slaves (1) were enthusiastic participants in formal land markets, and (2) developed an entrepreneurial realtor class, employing the contracting experience these individuals had cultivated during slavery to broker land deals between plantation owners and newly freed slaves.

What is the relevance of the foregoing to the United States context? The history I trace in the first two Parts of this Article uncovers the roots of the West Indian peasantry, the largest class of independent Black property owners in the Americas. It was from this population—what I metaphorically term “the Blacks who got their forty acres”<sup>40</sup>—that many U.S. migrants would later originate.<sup>41</sup> Although

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<sup>37</sup> See Daron Acemoglu et al., *The Colonial Origins of Comparative Development: An Empirical Investigation*, 91 AM. ECON. REV. 1369, 1370 (2001) (characterizing “extractive states” as institutions whose main purpose was to transfer resources of the colony to the colonizer without much protection of private property).

<sup>38</sup> See THOMAS C. HOLT, *THE PROBLEM OF FREEDOM: RACE, LABOR, AND POLITICS IN JAMAICA AND BRITAIN, 1832–1938*, at 66–67 (1992) (discussing customary rights that attached to provision grounds); Sidney W. Mintz & Douglas Hall, *The Origins of the Jamaican Internal Marketing System* (Yale Univ. Publications in Anthropology, Paper No. 57, 1960), reprinted in *PAPERS IN CARIBBEAN ANTHROPOLOGY* 3, 15–16 (Sidney W. Mintz ed., 1960) (describing slaves’ rights and access to markets).

<sup>39</sup> The term “property owners in waiting” is a play on Hiroshi Motomura’s famous “Americans in waiting.” See HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* (2010).

<sup>40</sup> The failure to meet the Reconstruction-era promise of “forty acres and a mule” is well documented in BLACK ECON. RESEARCH CTR., *ONLY SIX MILLION ACRES: THE*

this group obtained their property *prior* to migrating to the United States, I argue that this property provided a base for later business success once this population was in the United States.

This narrative is partly about property, but it is also about contract: namely, the informal contracting arrangements undergirded by communal networks which allowed entrepreneurial West Indians to leverage their property advantages into business success in the United States. As with the property narrative, a contract narrative is unusual in a discussion traditionally dominated by conversations about race and culture. This is precisely my point. West Indians have been successful in particular sectors for reasons that are already familiar from

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DECLINE OF BLACK OWNED LAND IN THE RURAL SOUTH (Robert S. Browne ed., 1973). By way of background, in early 1865, General Sherman authorized freed slaves to establish forty-acre plots in parts of South Carolina and Georgia. He also provided them with former military mules. However, Sherman's field order was later revoked, and the land restored to its Confederate owners. Although Sherman's promised land distribution was never formally enacted in law, rumors of "forty acres and a mule" quickly spread among the former slaves and have been part of American historical folklore ever since. The impediments to African Americans acquiring and then maintaining their "forty acres" remains a significant area of inquiry in the legal scholarship. Scholars have unpacked the complex group of legal forces—from the period just following Reconstruction in which much Black-owned land was seized to more modern forces, particularly partition sales of land held under tenancies in common—which caused an involuntary loss of much Black-owned farmland. Legal scholars rely heavily on the leading historian of Reconstruction, Eric Foner, and his book, ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877 (1988). The most comprehensive article documenting Black land loss is by Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 NW. U. L. REV. 505, 511–23 (2001); see also Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 YALE L.J. 549, 603–04 (2001) (using Black land loss as an example of the systematic limitations of the co-ownership model); Ellen D. Katz, *African-American Freedom in Antebellum Cumberland County, Virginia*, 70 CHI-KENT L. REV. 927, 958–74 (1995) (describing the nature and scope of Black ownership during the antebellum period in one part of Virginia); Thomas W. Mitchell, *Destabilizing the Normalization of Rural Black Land Loss: A Critical Role for Legal Empiricism*, 2005 WIS. L. REV. 557, 608–09 (providing further observations on the impact of forced sales of Black-owned property); Thomas W. Mitchell, Stephen Malpezzi & Richard K. Green, *Forced Sale Risk: Class, Race, and the "Double Discount,"* 37 FLA. ST. U. L. REV. 589, 646–58 (2010) (elaborating on the wealth impacts of forced sales on minorities in particular); Melinda C. Miller, *Essays on Race and the Persistence of Economic Inequality* 1–2 (2008) (unpublished Ph.D. dissertation, University of Michigan) (on file with author) (using a comparative study involving freed slaves of the Cherokee Nation to explore the effects of whether the economic conditions of former slaves would have been altered had the "forty acres" plan been effectively implemented).

<sup>41</sup> Given their experience as both property owners and contractors, this peasantry proved useful to the British, not only in the West Indies, but throughout the Empire. For example, it was from the ranks of this landed Black peasantry that colonial administrators were recruited, particularly in the African colonies, to implement and administer land use systems. See NEMATA AMELIA BLYDEN, WEST INDIANS IN WEST AFRICA, 1808–1880: THE AFRICAN DIASPORA IN REVERSE 44–45 (2000) (exploring the history of hiring Black West Indians to civilian posts in colonial Sierra Leone).

the law and economics literature regarding other populations. It is widely understood that informal contracting helps explain the success of particular ethnic and religious groups in certain business sectors. Lisa Bernstein's study of the dominance of Orthodox Jews in the diamond industry is essentially about internal communal norms that are so powerful within this ethnically and religiously homogenous group as to provide "glue" that approximates law.<sup>42</sup> The same is true of Eric Posner and Lan Cao's discussions of informal lending among Cantonese and Japanese migrants.<sup>43</sup> Amy Chua's work on Chinese and Korean migrant dominance of particular business sectors points in a similar direction.<sup>44</sup>

Conversations about what makes this particular group of Black people successful are understandably heavily freighted. Yet why should we think about Black migrants any differently than Orthodox Jewish diamond merchants or Korean grocery store owners? I seek to introduce law and economics into the broader debate on Black migrants' asset acquisition to help answer this question. In doing so, I introduce an ostensibly counterintuitive case study that nevertheless accords with broader research on the implications of network effects and institutional design for how certain groups accumulate assets.

## I

### USING PROPERTY TO MIGRATE

There has long been evidence that immigrants are self-selected with respect to observable human capital characteristics, such as education and occupational status.<sup>45</sup> Evidence also suggests that members

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<sup>42</sup> See Bernstein, *supra* note 14, at 138–41 (describing private law systems among historically ethnically homogenous diamond merchants, with a particular focus on Jewish merchants).

<sup>43</sup> See Cao, *supra* note 14, at 874–92 (describing the operations of savings and credit associations undergirded by trust relationships within multiple immigrant groups); Posner, *supra* note 14, at 165–76 (describing informal contracting among Korean, Cantonese, Japanese, and West Indian migrants, particularly in informal credit associations); Ruskola, *supra* note 14, at 1726 (discussing Chinese American business relationships in the context of the larger Chinese diaspora); see also Chander, *supra* note 14, at 1060–78 (discussing business relationships within the Indian American community and the community members' willingness to extend credit to the Indian government as an example of influential economic resources within migrant communities).

<sup>44</sup> See Chua, *supra* note 1, at 28, 30–32 (explaining how the respective social networks of Chinese and Korean immigrants, among other ethnic minorities, benefit these groups' business endeavors).

<sup>45</sup> The theory of immigrant selectivity, most prominently associated with the economist Barry Chiswick, has been applied to West Indians. See generally Barry R. Chiswick, *Are Immigrants Favorably Self-Selected? An Economic Analysis*, in *MIGRATION THEORY: TALKING ACROSS THE DISCIPLINES* 61, 70 (Caroline B. Brettell & James F. Hollifield eds., 2000) (discussing theoretical models demonstrating immigrant self-selection). The

of some immigrant groups arrive in the United States not only with education but also with capital.<sup>46</sup> Therefore, to understand how migrants accumulate assets, we must first understand what assets they possessed upon arrival in the United States. In this Part, I discuss evidence that indicates that early West Indian migrants were likely to be propertied upon arrival in the United States and explain what this meant for their property acquisition patterns once present. In Part I.A, I offer evidence suggesting that many West Indians financed migration and settlement in the United States by leveraging property they held in the West Indies, thus demonstrating their property ownership upon arrival. In Part I.B, I suggest that West Indians may have taken advantage of specific West Indian mechanisms of acquisition to acquire property in the United States, thus explaining how their prior property ownership influenced their property acquisition in the United States.

### A. *The Connection Between West Indian Immigration and Property Ownership Prior to Migration*

Historically, immigration and consular officials, sometimes with the tacit—if not explicit—assent of Congress, created a barrage of barriers to Black West Indian migration.<sup>47</sup> These barriers

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literature on immigrant selectivity amongst Blacks is best summarized in Mosi Adesina Ifatunji, *Socioeconomic Disparities Between African Americans and Afro Caribbeans In the U.S.: Re-Examining the Role of Immigrant Selectivity* 10–14 (unpublished manuscript) (on file with the *New York University Law Review*) (discussing recently collected data on socioeconomic disparities between African Americans and Afro Caribbean immigrants, and analyzing potential causes therefor), and Douglas S. Massey et al., *Black Immigrants and Black Natives Attending Selective Colleges and Universities in the United States*, 113 *AM. J. EDUC.* 243, 245–48 (2007) (discussing the various economic and social factors contributing to Black immigrant selectivity and corresponding achievement in the United States).

<sup>46</sup> For example, Japanese migrants often arrive with capital derived from familial networks that benefit their business enterprises in the United States. See IVAN H. LIGHT, *ETHNIC ENTERPRISE IN AMERICA: BUSINESS AND WELFARE AMONG CHINESE, JAPANESE, AND BLACKS* 62–80 (1972) (describing the historical and cultural frameworks that gave rise to the social ties many Japanese immigrants relied on for economic support upon immigration to the United States).

<sup>47</sup> In 1924, comprehensive immigration reform brought Black West Indian entry to the United States to a virtual halt, with the exception of those entering as temporary guest workers, many of whom were elites posing as farm workers. Eleanor Marie Lawrence Brown, *How the U.S. Selected for a Black Bourgeoisie: A Narrative of Inadvertent Institutional Design*, 28 *GEO. IMMIGR. L.J.* (forthcoming 2014) (manuscript at 8–9) (on file with the *New York University Law Review*).



inadvertently selected “elite” West Indian migrants by making it more likely that those who were property-rich would migrate successfully.<sup>48</sup>

Despite this conjecture about which West Indians were able to successfully migrate to the United States, there is virtually no data on how West Indian migrants accessed the resources necessary for migration. Relying on census reports and informal data from colonial authorities, historians have pieced together details of the occupation and place of origin of migrants, but they have recovered little detail on the financing of migration. Although the colonial authorities had rudimentary data on numbers of migrants leaving the islands, they had no data on the source of *funds* used for passage. In the absence of this quantitative data, I rely on ethnographic studies of both early West Indian migrants in the United States and West Indians who remained on the islands but maintained close ties with relatives in the United States. I also look to circumstantial evidence—including high levels of turnover in the West Indian property markets, which appear to correlate with high levels of migration.

This ethnographic research confirms the lengths to which migrants went to obtain resources to finance their passage to the United States. Not only were funds necessary to pay for transportation, but such resources were paramount in helping migrants demonstrate to skeptical U.S. consular and immigration officials upon arrival (themselves empowered to deny entry to poor migrants who were at risk of becoming state charges) that they were sufficiently resourced.<sup>49</sup> For example, the historian-ethnographer Irma Watkins-Owens recounts narratives of property sales to finance migrations in her interviews with early West Indian migrants.<sup>50</sup> The work of the

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<sup>48</sup> Cf. Holder, *supra* note 36, at 8 (documenting increases in the costs of passage to the United States in addition to the need for money for personal expenses and “show money” required by the immigration authorities to enter the United States).

<sup>49</sup> The public charge doctrine, namely the power to exclude persons likely to become reliant on public support, is one of the oldest components of American immigration law. See THOMAS ALEXANDER ALEINIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP* 601 (7th ed. 2012) (noting how “[c]oncern about an influx of paupers underlay many of the earliest attempts . . . to restrict immigration” so that Congress enacted the first federal provision barring from entry people likely to become public charges, and that “[t]here has been a public charge excludability or inadmissibility ground ever since”); see also STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY* 422 (5th ed. 2009) (describing such legislation dating back to 1875); Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1846–59 (1993) (detailing historical limitations of mobility by various states based on concern about the burden paupers placed on local communities).

<sup>50</sup> Irma Watkins-Owens, *Early-Twentieth-Century Caribbean Women: Migration and Social Networks in New York City*, in *ISLANDS IN THE CITY: WEST INDIAN MIGRATION TO NEW YORK* 25, 30 (Nancy Foner ed., 2001) (recounting the the story of Vera Clarke Ifill, a

celebrated author Paule Marshall<sup>51</sup> also supports the view that property often financed migration during the first half of the twentieth century.<sup>52</sup> Many migrants described the sale of “family ground,” denoting ownership by the entire family.<sup>53</sup> There is also evidence that money originally intended to purchase family ground was used for travel instead. In fact, it was through such a financing scheme that Paule Marshall’s own mother came to New York from Barbados.<sup>54</sup> Others appeared to have secured financing for their migration by borrowing against land they held in the West Indies.<sup>55</sup>

Elizabeth Thomas-Hope’s comprehensive study on early West Indian migration chains cites circumstantial evidence of turnover in the West Indian property markets<sup>56</sup> at the same time that large

Barbadian interviewee whose “mother sold her property [one-quarter acre]; she got very little for it” in order to finance immigration (alteration in original)).

<sup>51</sup> Paule Marshall, a MacArthur Fellow, was designated a “Literary Lion” by the New York Public Library. *Paule Marshall, Faculty of Creative Writing Program*, N.Y. UNIV., <http://cwp.fas.nyu.edu/object/cwp.faculty.paulemarshall> (last visited Feb. 21, 2014).

<sup>52</sup> See Paule Marshall, *Black Immigrant Women in Brown Girl, Brownstones*, in *FEMALE IMMIGRANTS TO THE UNITED STATES: CARIBBEAN, LATIN AMERICAN, AND AFRICAN EXPERIENCES* 3, 3–5 (Delores M. Mortimer & Roy S. Bryce-Laporte eds., 1981) (describing the various ways women from Barbados financed their migration after World War I).

<sup>53</sup> *Id.* at 5. It is striking that Marshall uses the term “family ground,” which connotes that the land belonged not to the individual migrant, but to the migrant’s family. In electing this term, Marshall’s point is that the sale of family ground would often have entailed an entire family investing in an immigrant’s long-term migration prospects. See *id.* (describing the different ways in which a migrant’s family would support his or her migration efforts). Given the difficulties that freedmen and their descendants experienced in acquiring land and the cultural attachment to family land—which was often inherited and owned communally—it would not be surprising if some migrants experienced ambivalence about selling their property, even if it was to finance passage to fairer shores.

<sup>54</sup> Marshall’s uncle sent the family money to purchase land back in Barbados. The family, however, decided that investing in Marshall’s mother’s relocation to New York was a better use of the resources. See *id.* at 5 (describing the various ways Paule Marshall’s mother and other women from Barbados financed their migration after World War I); see also Birdsong, *supra* note 12, at 41–77 (discussing Paule Marshall’s quasi-autobiographical literary account of a mother and daughter’s early experiences as immigrants in the United States).

<sup>55</sup> See Richard Frucht, *A Caribbean Social Type: Neither “Peasant” Nor “Proletarian,”* 16 *SOC. & ECON. STUD.* 295, 299 (1967) (citing evidence that residents of the Eastern Caribbean island of Nevis borrowed informally through communal networks and used family land as collateral to finance their passage to the United States).

<sup>56</sup> See Elizabeth M. Thomas-Hope, *Population Mobility and Land Assets in Hill Farming Areas of Jamaica*, 4 *CARIBBEAN GEOGRAPHY* 49, 60 (1993) [hereinafter Thomas-Hope, *Population Mobility and Land Assets*] (noting that migrants to the United Kingdom from Jamaica were not able to earn as quickly as migrants to the United States, reducing their need and ability to engage in “substantial amounts of agriculture”); see also Elizabeth M. Thomas-Hope, *Population Mobility in the West Indies: The Role of Perceptual and Environmental Differentials* (1977) (unpublished Ph.D. dissertation, University of Oxford) [hereinafter Thomas-Hope, *Population Mobility in the West Indies*] (contextualizing West Indian emigration by comparing subjective and objective assessments of the local

numbers of West Indians were migrating to the de facto U.S.-controlled areas of the Caribbean<sup>57</sup> beginning in the 1850s, and then to the United States in multiple waves thereafter.<sup>58</sup> For example, between 1911 and 1921, three-quarters of what would have been the natural population increase of Jamaica migrated to find work. Many went to work on the U.S.-controlled Panama Canal, while many others ended up in the United States capitalizing on the active shipping routes that resulted from increased U.S. demand for Jamaican agricultural products.<sup>59</sup> Barbadian colonial authorities from the period reported that much of the money in circulation in the region was connected to land sales made specifically to finance migration. Migration fueled land sales and purchases, which in turn fueled more migration, and a cycle of migration and land turnover soon developed.<sup>60</sup>

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environment, including local employment opportunities, environmental factors, and individual perceptions in Jamaica, Barbados, and St. Vincent).

<sup>57</sup> See Dawn I. Marshall, *The History of Caribbean Migrations: The Case of the West Indies*, 11 *CARIBBEAN REV.* 6, 8 (1982) (suggesting that U.S. investments in expanding specific economic sectors in Cuba, Panama, Dominican Republic, and Central America between 1885 and 1920 encouraged heavy West Indian immigration to these Hispanic Caribbean regions during this time); Elizabeth M. Thomas-Hope, *The Establishment of a Migration Tradition: British West Indian Movements to the Hispanic Caribbean in the Century After Emancipation*, in *CARIBBEAN SOCIAL RELATIONS* 66 (Colin G. Clarke ed., 1978) (describing the economic and social factors that encouraged Caribbean migration to the Hispanic Caribbean). For further discussion, see also ELIZABETH THOMAS-HOPE, *CARIBBEAN MIGRATION* (2d ed. 2002) (providing a conceptual framework of Caribbean migration that includes a consideration of international factors of influence—including the labor markets of railway construction in Central America, the cutting of the Panama Canal, and the sugar industry in Cuba—as well as national and household factors); Vaughan A. Lewis, *Geopolitical Realities in the Caribbean*, in *PERSPECTIVES ON CARIBBEAN REGIONAL IDENTITY* 5, 5–7 (Elizabeth M. Thomas-Hope ed., 1984) (discussing how political perceptions of Hispanic countries in the Caribbean region have affected other Caribbean countries).

<sup>58</sup> As an epicenter of sugar exportation and slave importation in the British empire, Jamaica had long been a regional shipping center. See SELWYN H.H. CARRINGTON, *THE BRITISH WEST INDIES DURING THE AMERICAN REVOLUTION* 32–33 (noting that as early as the American Revolution, Jamaica's exports to Britain exceeded those of the far larger American colonies that would become the United States); SIDNEY W. MINTZ, *CARIBBEAN TRANSFORMATIONS* 60 (2d ed. 1989) (summarizing Phillip Curtin's finding that only Saint Domingue (later Haiti) and Brazil, far larger countries, imported larger number of slaves than Jamaica in the region). Most Jamaican migrants to Panama took commercial shipping lines, and Thomas-Hope argues that emigration was "precipitated and given direction by European and American economic activities in canal, railway and fruit company operations." Thomas-Hope, *Population Mobility in the West Indies*, *supra* note 56, at 14; see also VICKERMAN, *supra* note 29, at 60–61 (tracing the economically motivated immigration of West Indians to Central America in the mid-nineteenth century and from there to the United States beginning around the turn of the twentieth century).

<sup>59</sup> G.W. Roberts, *Growth of the Population*, in *RECENT POPULATION MOVEMENTS IN JAMAICA*, *supra* note 58, at 1, 8.

<sup>60</sup> BONHAM C. RICHARDSON, *PANAMA MONEY IN BARBADOS, 1900–1920*, at 192 (1985) ("Land availability, in part created by the sudden presence of so much money, had caused

Moreover, liquidity resulting largely from land sales to returning migrants or by soon-to-be migrants flowed into banks.<sup>61</sup> Several men returned from Panama and conducted land transactions on behalf of wives and mothers, only to then travel to the United States to earn money to settle debts incurred in purchasing yet more land.<sup>62</sup>

On the much smaller island of Nevis, a similar narrative emerges. The anthropologist Richard Frucht argued that for his Nevisian subjects, land and migration were inextricably intertwined. Land was historically understood partly as a mechanism of providing an income stream to support migration to the United States, which in turn provided an income stream to support further property acquisition both in Nevis and in the places to which Nevisians migrated,<sup>63</sup> such as New Haven, Connecticut.<sup>64</sup>

While immigrant narratives need to be viewed critically, it is telling that they appear to support Frucht's contentions. For example, Paule Marshall's now iconic coming-of-age quasi-autobiographical story *Brown Girl, Brownstones* is woven around a Barbadian migrant family's desire for their own property, not only in New York (as the title connotes), but also in Barbados.<sup>65</sup> Indeed, Marshall has written elsewhere that her mother used inherited money to migrate to New York, where a brownstone was the ultimate goal.<sup>66</sup> This was the

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its own migration momentum, stimulating yet more travel abroad to earn yet more money.”).

<sup>61</sup> *Id.* at 193 (referring to “[b]anking” as “an alternative chosen by hundreds of blacks possessing cash from Panama,” but noting that this was usually a temporary prelude to land purchase, which was preferred to banking); see also F.A. HOYOS, *BARBADOS: A HISTORY FROM THE AMERINDIANS TO INDEPENDENCE* 187 (1978) (noting that by 1930 the number of small landholdings in Barbados had risen to 18,000 from 934 in 1840).

<sup>62</sup> RICHARDSON, *supra* note 60, at 192.

<sup>63</sup> According to Frucht, Nevisian families used the returns of land ownership (for example, bank loans) to support the migration of an enterprising family member, who would then provide an income stream for the family members who remained at home. See Frucht, *supra* note 55, at 299 (explaining that after 1955, remittances replaced agricultural production as the primary source of wealth for the laboring class, who would use the funds to invest in land and secure bank loans to support further migration).

<sup>64</sup> Karen Fog Olwig, *Cultural Sites: Sustaining a Home in a Deterritorialized World*, in *SITING CULTURE: THE SHIFTING ANTHROPOLOGICAL OBJECT* 17, 19 (Karen Fog Olwig & Kirsten Hastrup eds., 1997). In one example, the parents of civil rights attorney and later Judge Constance Baker Motley migrated to New Haven from Nevis. *2007 Honorees: Constance Baker Motley*, NAT'L WOMEN'S HIST. PROJECT (Sept. 27, 2013), [http://www.nwhp.org/whm/motley\\_bio.php](http://www.nwhp.org/whm/motley_bio.php).

<sup>65</sup> MARSHALL, *supra* note 12. *Brown Girl, Brownstones* has been described as “seminal.” E.g., Evelyn Hawthorne, *The Critical Difference: Paule Marshall's Personal and Literary Legacy*, 30 *BLACK SCHOLAR* 2, 4 (2000).

<sup>66</sup> Marshall, *supra* note 52, at 89 (referring to low-wage jobs that Barbadian women accepted as “a means to an end: the end being the downpayment on a brownstone,” among other things).

primary point of migrating in the first place.<sup>67</sup> Marshall also writes that the goal of home acquisition allowed Barbadian women to justify almost any indignity. In her words: "Looking back on it now it seems to me that those Barbadian women accepted these ill-paying, low status jobs with an astonishing lack of visible resentment. For them they were simply a means to an end: the end being the down payment on a brownstone house . . . ."<sup>68</sup>

Although again the evidence is circumstantial, the high levels of landholding in certain islands also provide support for the notion that many migrants were likely to have been landholders before arriving in the United States. Consider the levels of landholding in Jamaica in the 1920s, presented in Table 1.<sup>69</sup> Lord Sydney Olivier estimates, based on the figures in the table, that more than twenty percent of Jamaica's estimated 1,022,150 inhabitants possessed real property of at least a

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<sup>67</sup> See RICHARDSON, *supra* note 60, at 192 (explaining that the influx of remittances to Barbados from Panama Canal workers pulled property prices into an inflationary spiral which resulted in even more immigration). Moreover, Marshall's mother raised questions about the Barbadian bona fides of a neighbor whom she deemed to be not sufficiently focused on home ownership: "No . . . he ain no Bajan [Barbadian]." MARSHALL, *supra* note 12, at 148.

<sup>68</sup> IRMA WATKINS-OWENS, BLOOD RELATIONS: CARIBBEAN IMMIGRANTS AND THE HARLEM COMMUNITY, 1900–1930, at 46 (quoting Marshall, *supra* note 52, at 7).

<sup>69</sup> These data were compiled by Lord Sydney Olivier, an academic and former governor of Jamaica from 1907 to 1913, in LORD SYDNEY OLIVIER, JAMAICA: THE BLESSED ISLAND (1936). Darryl Lundy, *Person Page 18294*, PEERAGE, <http://thepeerage.com/p18294.htm#i182931> (last updated Oct. 7, 2013). Although these data were published in 1936, they were based on land holdings in the 1920s, as recorded in the 1930s tax roll, which was the most recent data source to which Olivier had access. The 1920s saw the passage of the National Origins Immigration legislation, which, as explained *supra* note 47, brought West Indian migration to a virtual halt. While there was turnover in the land markets, it was unlikely that there would have been significant differences in the overall numbers of landowners in the preceding decades, since the primary mechanism of generating small landholdings for the general population would have been the breaking up of large estates, and very few such large estates had been broken up. For example, between 1920 and 1930, only 38 of 276 estates between 1000 and 2000 acres were sold (much less broken up); similarly few numbers of larger estates were broken up. See OLIVIER, *supra*, at 275 (finding that the number of estates exceeding 2000 acres were only reduced by four properties between 1920 and 1930). I include here a brief note on the methodology utilized by Olivier and provide a table of his data, supplemented by data from official statistics. *Id.* at 270 (citing FRANK CUNDALL, THE HANDBOOK OF JAMAICA FOR 1933–34, at 24 (1934)). To obtain the total acreage of each class, Olivier multiplied the mean lot size of each class (the assumed average areas) by the number of lots in the class to obtain the total acreage each class held. *Id.* at 272. He noted that, although the distribution was likely positively skewed, using the mean (rather than the median) area was still acceptable, since many of the various proprietors had likely intentionally understated the figures submitted to the Office of the Collector General as a mechanism of lowering their tax burden. *Id.* at 271. These figures were then checked against official governmental estimates from Harrison. *Id.* at 270 (citing CUNDALL, *supra*, at 24 (1934)). While the overall figures resulted in a shortfall of 5.59%, this was attributed primarily to consequences of rounding and inaccurate surveying, and it was not seen as cause for concern. *Id.* at 272.

house. Notably, two out of every eleven persons owned at least half an acre. Olivier's calculation is relatively simple. Based on the assumption that each family unit typically consisted of five persons, he argued that ten out of every eleven families had some kind of formal relationship with land.<sup>70</sup> Even discounting Olivier's estimates significantly,<sup>71</sup> it is likely that well over half of Jamaican families had a formal relationship with real property. Moreover, it is this property-owning pool—Jamaicans—that provided most of the Black migrants to the United States before 1924.<sup>72</sup>

TABLE 1. LANDHOLDING IN JAMAICA IN THE EARLY TWENTIETH CENTURY

|   | NUMBER  | ASSUMED AVERAGE AREAS                  | TOTAL ACREAGE OF EACH CLASS |
|---|---------|--|-----------------------------|
| House lots  | 25,792  | ¼ acre                                 | 6448                        |
| ½ acre  | 44,929  | ½ acre                                 | 22,464                      |
| ½ acre to 5 acres   | 108,477 | 3 ¼ acres                              | 352,550                     |
| 5 acres to 10 acres   | 18,277  | 7 ½ acres                              | 137,078                     |
| 10 acres to 50 acres  | 12,761  | 30 acres                               | 382,830                     |
| 50 acres to 100 acres   | 1161    | 75 acres                               | 86,075                      |
| 100 acres to 200 acres  | 607     | 150 acres                              | 91,050                      |
| 200 acres to 500 acres  | 591     | 350 acres                              | 206,350                     |
| 500 acres to 1000 acres   | 371     | 750 acres                              | 278,250                     |
| 1000 acres to 2000 acres  | 276     | Actual area as computed from schedules | 381,072                     |
| 2000 acres and upwards  | 153     | Actual area                            | 502,793                     |
| Total   | 213,395 | Total                                  | 2,446,960                   |
| Add nontaxable properties owned by the government for institutions and farms, or for municipal bodies, parochial boards, the government railway, etc. |         |  | 8968                        |
| Crown lands as shown on the valuation roll  |         |  | 232,953                     |
| Total for the island  |         |  | 2,688,881 acres             |
| Total officially estimated area of the island   |         |  | 2,848,160 acres             |

<sup>70</sup> OLIVIER, *supra* note 69, at 271–75.

<sup>71</sup> For example, Olivier concedes that his estimates of the percentage of Jamaican families which have some relationship with landholding may have been an overestimate due to the problem of “overlap,” since “there are a good many landless adults, and many owners have more than one registered holding.” *Id.* at 273. He noted that half an acre is not enough land on which to provide for a family of five, but larger parcels “yield substantial and often quite adequate incomes,” with the largest tier allowing for “very comfortable independence.” *Id.*

<sup>72</sup> James makes it clear that Jamaicans dominated migrant streams. See James, *supra* note 13, at 226 (“Jamaicans have been the largest group of black Caribbean migrants to the United States since the 1950s.”).

B. *An Alternative Account of West Indian “Exceptionalism”: How West Indian Property Ownership Prior to Migration Influenced Property Acquisition in the United States*

In Part I.A, I presented circumstantial evidence to support the proposition that many West Indians appear to have financed their migration and settlement in the United States by taking advantage of their property bases in the West Indies. In this Subpart, I draw on early narratives of West Indian migrant life to suggest that West Indians may have imported mechanisms of land acquisition used in the West Indies to the United States that helped them to acquire property. This is in contrast to the social science literature on West Indian exceptionalism in asset acquisition, which focuses on West Indian cultural characteristics rather than the historical experience.<sup>73</sup>

West Indians made it into the “prime time” when they were featured in sociologists Nathan Glazer and Daniel Patrick Moynihan’s classic 1970 study of New York’s ethnic groups.<sup>74</sup> Glazer and Moynihan made much of the “striking difference” between West Indians and “Southern Negroes.”<sup>75</sup> They emphasized the business ethic of West Indians (implicitly in contrast to the “Southern Negro”), which “emphasized saving, hard work, investment, [and] education.”<sup>76</sup> Nearly one decade later, Thomas Sowell brought to light 1970 census data which indicated that the family income levels of second-generation West Indians living in the New York City area had surpassed that of first-generation West Indians and native Blacks.<sup>77</sup>

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<sup>73</sup> With the exception of sociologist Ira Reid’s 1939 study, *The Negro Immigrant*, there was virtually nothing in social science literature on West Indian migrants prior to 1970. See James, *supra* note 13, at 219 (quoting a lament that, with the exception of Reid’s 1939 study, “black immigrants had ‘escaped the concerns of the large majority of mainstream social scientists and historians’” (quoting Roy Simon Bryce-Laporte, *Black Immigrants: The Experience of Invisibility and Inequality*, 3 J. BLACK STUD. 29, 30 (1972))). See generally REID, *supra* note 18 (exploring the experiences of Black immigrants to the United States and analyzing the resultant social, economic, and political stratification among the immigrant and native Black populations). Nearly four decades later, in the 1970s, Reid’s study was still being cited as the primary source of information on West Indian immigration. See KASINITZ, *supra* note 28, at 93 (stating that Reid’s “description of West Indian businesses in Harlem is often cited by later observers”). In addition to Reid, the work by Ivan Light provides a good summary of West Indian immigration. See LIGHT, *supra* note 46, at 33–34.

<sup>74</sup> See Jane Perlez, *Beyond “Beyond the Melting Pot,” Moynihan and Glazer Feel Vindicated*, N.Y. TIMES (Dec. 3, 1983), <http://www.nytimes.com/books/98/10/04/specials/moynihan-vindicated.html> (detailing how the various hypotheses posited in Moynihan and Glazer’s “now classic” work have been proven since the study of ethnic and immigrant behavior has become “academically fashionable”).

<sup>75</sup> GLAZER & MOYNIHAN, *supra* note 18, at 35.

<sup>76</sup> *Id.*

<sup>77</sup> SOWELL, *supra* note 31, at 44.

Building on Glazer and Moynihan, Sowell made the case that West Indian exceptionalism was rooted in a business ethos.<sup>78</sup>

Glazer, Moynihan, and Sowell appear to have introduced the notion of the West Indian business owner into the broader public intellectual culture.<sup>79</sup> These scholars' focus on West Indians as successful businesspeople was not unreasonable, particularly given the minimal availability of quantitative data and the scholars' disproportionate reliance on narratives of West Indian immigrant life. Yet I argue that these scholars' interpretation of the existing data was also limited. If one relies instead on an ethnographic and narrative-based methodology—an admitted limitation based on the evidence of the period—there is significant support for an alternative account of West Indian migrant asset acquisition. This account, rather than emphasizing the business prowess highlighted by Glazer, Moynihan, and Sowell, emphasizes the historical access of West Indian migrants to property and capital prior to their migration from the West Indies.<sup>80</sup>

For example, West Indian realtors—some of whom appear to have had experience in West Indian property markets prior to migration—seem to have played a disproportionate role in the process of asset acquisition in the United States. West Indians were well represented among realtors, the gatekeepers to homeownership, as well as among communally organized providers of capital to purchase

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<sup>78</sup> *Id.* at 47. *But cf.* James, *supra* note 13, at 235 (critiquing Sowell's central argument that West Indian success is attributable to the group's culture). West Indians later received treatment in Fukuyama's study of ethnic and religious groups traditionally associated with a business ethos such as Jewish, Japanese, Mormon, and Korean Americans. *See* FUKUYAMA, *supra* note 4, at 302–03 (noting that slavery in the United States disrupted social and economic cohesion for African Americans in a way that slavery in the West Indies did not for its Black population); Holder, *supra* note 8, at 52–53 (summarizing early discussion of the West Indian business ethos and attributing this in part to the message of Black economic nationalism associated with Marcus Garvey, himself a West Indian). The notion of West Indians as a “model minority” is substantially less influential in the current literature, particularly in light of recent empirical work by demographer Suzanne Model. *See* MODEL, *supra* note 27 (analyzing census data on the income, employment rates, self-employment rates, and other measures of upward mobility of West Indian migrants and their descendants). Model has called into question the historical assumption that West Indians were disproportionately likely to be entrepreneurial. *Id.* at 18–19.

<sup>79</sup> *See* Walter, *supra* note 11, at 529–31 (discussing the persona of the West Indian business owner); *see also* Holder, *supra* note 8, at 51–59 (detailing how West Indians became perceived as disproportionately entrepreneurial relative to the underlying data).

<sup>80</sup> Historian Winston James offers a comprehensive critique of the notion that West Indians are “exceptional.” *See* James, *supra* note 13, at 241 (claiming that selective migration and previously acquired skills influenced the advancement of West Indians in the United States, and using data to “remove the aura of magic and mystery from their trajectory in the United States”). A property-based account of West Indian exceptionalism (that is, an account which emphasizes early West Indian access to the property markets) raises further questions as to whether West Indians are in fact that exceptional.



homes,<sup>81</sup> it would be unsurprising if West Indians had privileged access to certain enclaves that might not have been available to Blacks who did not originate from the West Indies. This process may help to explain more recent scholarship, which contends that despite being Black, West Indian New Yorkers have historically exercised their “ethnic option” (typically available to White ethnics, but not to native African Americans) of choosing housing accommodations in higher-quality neighborhoods.<sup>82</sup>

Nowhere was the West Indian influence in business more comprehensive than in real estate. Consider A.A. Austin, a West Indian who was described in 1949 by the *New York Age*, a popular Black newspaper, as heading “the largest business in the country owned and managed by foreign-born Negroes.”<sup>83</sup> By the 1940s, Austin was the most prominent Black realtor in Manhattan.<sup>84</sup> Austin’s foray into business did not begin in the United States, however; before immigrating, Austin worked as a printer.<sup>85</sup> A pattern of West Indian dominance of Black access to segregated housing markets through their control of the realty business appears to have been present throughout New York. In Brooklyn, for example, the Carringtons were prominent Black players in residential real estate.<sup>86</sup> Fellow West Indians were believed to have privileged access to homes that the Carringtons controlled.

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<sup>81</sup> Holder, *supra* note 8, at 55–60 (documenting West Indian representation among realtors, credit providers for home purchase, and insurance companies).

<sup>82</sup> See RONALD SCHMIDT SR. ET AL., *NEWCOMERS, OUTSIDERS, AND INSIDERS: IMMIGRANTS AND AMERICAN RACIAL POLITICS IN THE EARLY TWENTY-FIRST CENTURY* 111 (2010) (noting that West Indian immigrants purposefully elect to live in neighborhoods that are not all Black in order to distance themselves from stigma affiliated with their native Black counterparts and that West Indians are able to do this because, unlike native Blacks, they have the “ethnic option” to live in higher-quality neighborhoods); see also EMILY ROSENBAUM & SAMANTHA FRIEDMAN, *THE HOUSING DIVIDE: HOW GENERATIONS OF IMMIGRANTS FARE IN NEW YORK’S HOUSING MARKET* 121 (2007) (describing the concentration of West Indians in formerly White middle-class neighborhoods); Kyle Crowder, *Residential Segregation of West Indians in the New York/New Jersey Metropolitan Area: The Roles of Race and Ethnicity*, 33 INT’L MIGRATION REV. 79, 79, 100 (1999) (examining the relative impact of ethnicity and race on the different residential patterns of West Indian immigrants and native Blacks in the greater New York City area).

<sup>83</sup> WATKINS-OWENS, *supra* note 68, at 128. In 1929, Austin’s property holdings in Harlem alone were estimated at \$2 million. *Id.* Moreover, he owned several of the most prestigious Black addresses. Austin was sufficiently prominent to have been the host of a dinner in Harlem to benefit Booker T. Washington’s successor at Tuskegee. *Id.*

<sup>84</sup> See Holder, *supra* note 8, at 55 (describing Austin as the head of the Antillean Holding Company, which was the most successful West Indian realty company in New York and the city’s major Black realty company by the 1940s).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 55.

Moreover, there appears to have been integration across housing-related businesses, so that West Indian advantages in one line of business carried over to another. For instance, the Paragon Credit Union, which provided mortgage support to Brooklyn-based West Indians (especially Barbadians), received referrals primarily from the Carrington brothers.<sup>87</sup> The same referral process appears to have been important to the West Indian–founded Victory Insurance Company, which provided insurance for West Indian–owned homes and businesses.<sup>88</sup> In addition, Watkins-Owens documents a plethora of far smaller but highly influential West Indian real estate market participants.<sup>89</sup> For example, there were hundreds of operators of boarding houses who provided West Indians with an early foothold in neighborhoods where they would later become homeowners.<sup>90</sup> This was arguably the genesis of the West Indian advantage in home ownership.<sup>91</sup>

There is additional evidence that early West Indian business owners in New York had previously been either business or property owners in the West Indies. In a 1911 study of Black businesses in Manhattan, sociologist George Edmund Haynes found that 19.7% of businesses surveyed were Caribbean-owned, even though Caribbean migrants constituted only 9.4% of Manhattan's Black population.<sup>92</sup> While Haynes seems skeptical of the notion that Caribbean migrants had greater access to capital than other groups, he does identify what he calls "initiative"<sup>93</sup> as contributing to the disparity. It is unclear precisely what Haynes means by "initiative," although he notes that the

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<sup>87</sup> See *id.* at 58 (describing how the availability of legitimate capital allowed West Indian immigrants to purchase homes).

<sup>88</sup> There were several other successful West Indians who through their realty businesses exercised substantial influence over Black access to real estate and affiliated businesses in New York. An early successful Black-owned department store in Harlem, Hart and Company, was launched by Arthur Hart, a Jamaican, and was managed and staffed by Caribbean Blacks. WATKINS-OWENS, *supra* note 68, at 43, 132.

<sup>89</sup> See *id.* at 42–43 (including "Millionaire Solomon Riley" in land speculation, John E. Nail and Henry C. Parker in the real estate firm of Nail and Parker, and A.A. Austin in the Antillean Holding Company, among others).

<sup>90</sup> See *id.* at 43 (noting that many Caribbean families would become landlords and rent rooms to the expanding Black population after purchasing their property).

<sup>91</sup> Cf. Crowder, *supra* note 82, at 106–07 (discussing West Indian systems of credit as one of many reasons why West Indians may have ended up in neighborhoods thought to be of a higher quality). Similarly, sociologist Roger Waldinger argues that early "Caribbean immigrants engaged in considerable property speculation, with the result that real estate had emerged as a small, but still significant, Caribbean niche by the eve of World War II." ROGER WALDINGER, STILL THE PROMISED CITY? AFRICAN-AMERICANS AND NEW IMMIGRANTS IN POSTINDUSTRIAL NEW YORK 119 (1996).

<sup>92</sup> Haynes, *supra* note 9, at 101.

<sup>93</sup> See *id.* at 147 (describing the role of this initiative in economic advancement).

atmosphere of relative liberty in the West Indies might have played a role in cultivating such initiative.<sup>94</sup> Indeed, he notes that one prominent subject of his study, a grocery store owner, had previously owned a grocery store in the West Indies.<sup>95</sup> Thus, perhaps "initiative" is used to connote the business experience that West Indian migrants carried with them to the United States.

Another study notes West Indian dominance of the import-export firms, which distributed imported foods to Black grocery stores in Harlem, and speculates that many importers had previously operated businesses in the West Indies.<sup>96</sup> The implication is that West Indians parlayed their prior experience to gain advantages in import-export firms. The cash flows stemming from these operations then translated into dominance of elite business sectors such as upscale retail establishments and financial service firms.<sup>97</sup>

Yet, in all of this analysis, Haynes and others overlook a crucial advantage that West Indians had, and which made these stories of dominance possible: access to capital. Supporting the viewpoint that West Indians' access to capital was central in completing the story of their business dominance, subsequent commentators have been critical of Haynes's contention that West Indians did not have an advantage in relation to African Americans in accessing capital. For example, sociologist Roger Waldinger argues that West Indians financed their early foray into the housing markets "through rotating credit associations" or "susus."<sup>98</sup> These susus were "imported with

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<sup>94</sup> *Id.* at 101.

<sup>95</sup> *Id.* at 128.

<sup>96</sup> See Garrie Ward Moore, *A Study of a Group of West Indian Negroes in New York City* 25–26 (1913) (unpublished M.A. thesis, Columbia University) (discussing the business experience of West Indians), cited in James, *supra* note 13, at 229 n.48.

<sup>97</sup> W.A. Domingo, writing in the Harlem Renaissance scholar Alain Locke's classic *New Negro*, noted that "[o]n Seventh Avenue [in Harlem] a West Indian woman conducts a millinery store that would be a credit to Fifth Avenue." W.A. Domingo, *Gift of the Black Tropics*, in *THE NEW NEGRO: AN INTERPRETATION* 341, 345 (Alain Locke ed., 1968); see also Holder, *supra* note 8, at 56–60 (discussing West Indian participation in the financial service sector).

<sup>98</sup> WALDINGER, *supra* note 91, at 119. A rotating savings and credit association, or ROSCA, is a group of individuals who agree to meet for a defined period of time in order to save and borrow together. ROSCAs are widespread in many countries, particularly among the poor and middle classes, and are a primary mechanism of financing for the financially marginalized. See Clifford Geertz, *The Rotating Credit Association: A "Middle Rung" in Development*, 10 *ECON. DEV. & CULTURAL CHANGE* 241, 249–54 (1962) (describing the rotating credit association in Asia). For a deeper discussion of ROSCAs, see generally Timothy Besley et al., *The Economics of Rotating Savings and Credit Associations*, 83 *AM. ECON. REV.* 792 (1993).

them from the islands.”<sup>99</sup> Susus were essentially informal banking mechanisms, undergirded entirely by West Indian networks that were only able to function because the tight-knit community ensured that participants did not default.<sup>100</sup> Similar mechanisms have been discussed by Cao and Posner in the context of Korean, Cantonese, and Japanese communities.<sup>101</sup> Susus appear to have been ubiquitous in West Indian migrant society from the early 1900s, “[f]rom the daily domestic worker [to] the sleep-in maids, the elevator operator, to the factory worker, from the porter to the government servant, the migrants got together to form their ‘susus’ . . . .”<sup>102</sup> Thus, a narrative that seeks to explain West Indian success in the United States, but which ignores the very mechanisms through which this success was funded, fails to provide a complete narrative.

Immigrant narratives further support the view that susus played a critical role in enabling West Indian access to housing markets, both in the West Indies and in New York. In the West Indies, newly emancipated slaves financed land acquisition from the planter class using susus.<sup>103</sup> In New York, a prominent Barbadian businesswoman, Louise Burnham, bought a home in Harlem and financed the purchase of two boarding houses in part from money obtained from a susu.<sup>104</sup> Also in New York, Constance Payne, a Barbadian businesswoman, rented a three-story home that she turned into a profitable boarding house using the proceeds of a transnational susu which included participants living in Barbados.<sup>105</sup>

The proceeds of susus were also applied to underwrite entrepreneurial activities more generally. Amy Ashwood Garvey was

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<sup>99</sup> WALDINGER, *supra* note 91, at 119; *see also* LIGHT, *supra* note 46, at 35–36 (arguing that susus, which originated in Yoruba land, persisted as a mechanism of saving among West Indian slaves and freedmen, but not among African American slaves and freedmen).

<sup>100</sup> AUBREY W. BONNETT, *INSTITUTIONAL ADAPTATION OF WEST INDIAN IMMIGRANTS TO AMERICA: AN ANALYSIS OF ROTATING CREDIT ASSOCIATIONS* 55 (1981).

<sup>101</sup> *See* Cao, *supra* note 14, at 874–76 (noting the existence of rotating credit associations among various ethnic groups such as the “kye” in the Korean community, the “tanamoshi” in the Japanese, and the “hui” in the Chinese); Posner, *supra* note 14, at 165–71 (discussing how kin-based networks and ethnicity-based organizations provided contacts, rooms, credit, aid, dispute mediation, and other advantages that allowed immigrants such as the Japanese to attain an above-average standard of living).

<sup>102</sup> BONNETT, *supra* note 100, at 55.

<sup>103</sup> Light argues that susus have historical antecedents in West Indian slave societies. *See* LIGHT, *supra* note 46, at 35–36 (discussing the African origins of susus—then referred to as “esusus”—and their use in the West Indies).

<sup>104</sup> *See* Watkins-Owens, *supra* note 50, at 37 (indicating that Burnham financed her purchases with profits from a hairdressing business as well as a “rotating credit association”).

<sup>105</sup> *Id.* at 37–38. Notably, Payne also financed the passage of several other migrant family members through her informal credit arrangements. *Id.*

the first wife of the civil rights agitator Marcus Garvey, and the “mother” of the United Negro Improvement Association—a proprietor of several businesses which were advertised as showcasing the Black man’s economic potential, including a school of domestic science for Black women. Watkins-Owens argues that Garvey’s emphasis on entrepreneurship attracted several business-oriented women who were already participants in rotating credit associations.<sup>106</sup> Amy Jacques Garvey, the second wife of Marcus Garvey, confirmed the significant role that rotating credit associations played in financing early West Indian businesses.<sup>107</sup>

There is also evidence that community-based informal credit associations later evolved into formal financial institutions, facilitating even higher levels of home and business ownership. This, for example, was the genesis of the Paragon Credit Union in Brooklyn, which provided loans for its West Indian members to purchase homes.<sup>108</sup> Larger and more ambitious financial entities are also believed to have their genesis in informal savings arrangements. For example, the United Mutual Life Insurance Company—at one point one of the largest Black-owned enterprises in New York—developed from a burial society, namely, an informal credit association formed to subsidize funeral costs, consisting of mostly West Indian members.<sup>109</sup> Similarly, West Indians were instrumental in the formation of Carver Federal Savings Bank—later the largest Black-owned financial institution in the United States—which was founded in part to provide capital for customers of West Indian realtors.<sup>110</sup>

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<sup>106</sup> See TONY MARTIN, *AMY ASHWOOD GARVEY* 161, 170 (2007) (discussing Amy Ashwood’s activities in the West Indian community, including the United Negro Improvement Association (UNIA), after the death of Marcus Garvey); Watkins-Owens, *supra* note 50, at 46 (explaining Amy Ashwood’s role in the UNIA cultivating an entrepreneurial immigrant community using enterprises and rotating credit associations).

<sup>107</sup> See LIGHT, *supra* note 46, at 33–34 (explaining the relationship between susus and West Indian capital accumulation in the 1920s and 1930s).

<sup>108</sup> Holder, *supra* note 8, at 58.

<sup>109</sup> *Id.* at 57.

<sup>110</sup> *Id.* at 59. The legal scholarship emphasizes the importance of informal savings mechanisms in allowing borrowers to circumvent credit constraints caused not only by discriminatory lending, but also by market imperfections such as information asymmetry between lenders and borrowers. In this light, the emphasis on the historical importance of susus appears to be justified. See Cao, *supra* note 14, at 879–81 (describing the historical role of rotating credit associations in the economic development of immigrant communities in the United States); Posner, *supra* note 14, at 168–70 (describing how rotating credit groups often form in response to hostility from the larger population).

## II

## THE EVOLUTION OF A FREE BLACK LANDOWNING CLASS

In this Part, I explore the manners in which West Indian slaves came to own property. In Part II.A, I acknowledge that while West Indian slave societies did not have a strong record of formal property protections for African slaves, paradoxically many slaves were in fact property owners. In Part II.B, I track the evolution of this landholding regime and identify the centrally important role played by customary law in building and maintaining the regime. I further explain how formal law later came to coincide with customary law. Finally, in Part II.C, I argue that the strength of the West Indian customary law framework—and the manner in which formal law came to embody this customary law—may require a reevaluation of traditional views of slave ownership of property.

*A. Evolution of a Landowning Class: Reflections on the Economics Literature and Census Data*<sup>111</sup>

I show in this Part that a property-owning class of Blacks (from which the U.S. migrant class later originated) evolved within West Indian slave society. That such an evolution could take place might be surprising. The West Indies are hardly a propitious context for the development of a propertied Black peasantry. Orlando Patterson, a sociologist who has spent extensive time studying slavery, has detailed the particularly cruel nature of West Indian slavery and the profound difficulties experienced by freedmen in trying to assert their personhood, even after emancipation.<sup>112</sup> Indeed, West Indian slave society and its offspring institutions were legendary for their brutality.<sup>113</sup> Even West Indian “seasoning”—a phase during which new

<sup>111</sup> I credit Frank Upham for the inspiration for the title of this Subpart.

<sup>112</sup> ORLANDO PATTERSON, *THE SOCIOLOGY OF SLAVERY* 70–71 (1967) [hereinafter PATTERSON, *SOCIOLOGY OF SLAVERY*]. See also ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY* 249 (1982) [hereinafter PATTERSON, *SLAVERY AND SOCIAL DEATH*] (describing how freedman status did not bring an end to the marginalization of former slaves).

<sup>113</sup> B.W. HIGMAN, *SLAVE POPULATIONS OF THE BRITISH CARIBBEAN 1807–1834*, at 4–5 (1984) (noting that even with the imminent abolition of the slave trade, West Indian slavery was particularly cruel and specifically that the “harshness of the regimes under which the slaves labored . . . made . . . extinction a real possibility”). For discussions of the relative brutality of West Indian slavery, see generally HILARY McD. BECKLES, *NATURAL REBELS: A SOCIAL HISTORY OF ENSLAVED BLACK WOMEN IN BARBADOS* 43 (1989) (arguing that Barbados had the least protective laws for slaves in the British Caribbean); Hilary McD. Beckles, *Social and Political Control in the Slave Society*, in 3 *GENERAL HISTORY OF THE CARIBBEAN: THE SLAVE SOCIETIES OF THE CARIBBEAN* 194, 198–206 (Franklin W. Knight ed., 1997) (describing how slave codes evolved and differed between Spanish, French, and British colonies); HIGMAN, *supra*, at 322–25 (discussing differences in

slaves were “broken in” to their new tasks in an effort to ensure their long-term survival—was characterized by high mortality.<sup>114</sup> Moreover, the region did not boast any *formal* property rights protections for African slaves.<sup>115</sup>

I focus first on the relationship between property ownership and formal property rights structures. A distinguished body of academic work focuses on the correlation between a country’s institutions for the protection of property rights and the inclination of its citizens to accumulate assets.<sup>116</sup> Countries where the median investor can rely on secure property rights and effective contract enforcement tend to be wealthier.<sup>117</sup> In poorer countries, on the other hand, investors tend to face the prospect of the arbitrary taking of property by either the

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mortality rates between African and Creole slaves); RICHARD B. SHERIDAN, *DOCTORS AND SLAVES: A MEDICAL AND DEMOGRAPHIC HISTORY OF SLAVERY IN THE BRITISH WEST INDIES, 1680–1834*, at 127 (1985) (“Caribbean plantation economies and societies were . . . notorious for their treatment of slave laborers.”).

<sup>114</sup> SHERIDAN, *supra* note 113, at 132.

<sup>115</sup> See Daron Acemoglu, *Root Causes: A Historical Approach to Assessing the Role of Institutions in Economic Development*, 40 *FIN. & DEV.* 27, 28 (2003) (characterizing the West Indies as an example of an “extractive” approach to colonization which did not protect the property rights of the non-European population).

<sup>116</sup> See generally W. ARTHUR LEWIS, *THE THEORY OF ECONOMIC GROWTH* (1955) (proposing a framework for studying factors that contribute to economic development); DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* (James Alt & Douglass North eds., 1990) (examining the role of institutions in economic development).

<sup>117</sup> See Acemoglu et al., *supra* note 37, at 1369–70 (claiming that countries with more secure property rights will more efficiently achieve greater income levels); see also ROBERT D. COOTER & HANS-BERND SCHÄFER, *SOLOMON’S KNOT: HOW LAW CAN END THE POVERTY OF NATIONS* 64 (2012) (arguing that property law is necessary to incentivize innovation and productive labor); Acemoglu, *supra* note 115, at 27 (identifying property rights as a key characteristic of good institutions in developed countries); Donald C. Clarke, *Economic Development and the Rights Hypothesis: The China Problem*, 51 *AM. J. COMP. L.* 89, 89–91 (2003) (pointing out that China does not have strongly enforced property rights, yet has achieved substantial economic growth); Dam, *supra* note 34, at 2–3 (describing how legal uncertainty around property rights in land can hinder both the investment in and productivity of agriculture); Ginsburg, *supra* note 34, at 830 (discussing an academic debate about the centrality of law in Asian economic development); Rafael La Porta et al., *Law and Finance*, 106 *J. POL. ECON.* 1113 (1998) (arguing that common-law countries generally have stronger investor protections than civil-law countries); Rafael La Porta et al., *The Economic Consequences of Legal Origins*, 46 *J. ECON. LITERATURE* 285, 285–86 (2008) (discussing evidence that the existence of strong investor protections in common-law countries leads to greater financial development); Mahoney, *supra* note 34 (arguing that the common law produces faster economic growth through protection of property and contract rights); Posner, *supra* note 34, at 1 (explaining why a nation’s economic success depends upon the existence of some infrastructure to protect property and contract rights); Michael J. Trebilcock & Paul-Erik Veel, *Property Rights and Development: The Contingent Case for Formalization*, (U. Toronto Fac. L. Legal Stud. Res. Series, Paper No. 08-10, 2008) (questioning the conventional wisdom that strong property rights are a necessary condition for economic growth).

government or privileged elites, both of whom are unconstrained by independent judges.

A more modern body of work moves beyond correlation to causal claims by contending that countries where colonizers established strong property rights have experienced much higher levels of economic growth compared to countries with different colonial trajectories.<sup>118</sup> European colonizers pursued widely different colonization strategies and employed a variety of institutional frameworks. At one end of the continuum, colonizers set up extractive institutions. The goal of these institutions was to facilitate the speedy transfer of wealth to the colonial powers. The associated institutions neither protected the property rights of the median person, nor constrained elite power.<sup>119</sup> At the other end of the continuum, Europeans created settler societies, in which they reproduced European institutions for the protection of property.<sup>120</sup> On the settler-extractive continuum, there has been little controversy as to where the West Indies should fall: The West Indies were paradigmatic “extractive” societies, with minimal property protections.<sup>121</sup>

Much has been written by property scholars about the early evolution of property rights in United States history;<sup>122</sup> one need only think of the Puritan settlers in Massachusetts Bay and their introduction of property protection institutions in the American colonies.<sup>123</sup> The literature also highlights the stark differences between these

<sup>118</sup> See Acemoglu et al., *supra* note 37, at 1369–70 (claiming that countries with more secure property rights will more efficiently achieve greater income levels).

<sup>119</sup> *Id.*

<sup>120</sup> Daron Acemoglu, *Why Not a Political Coase Theorem? Social Conflict, Commitment, and Politics*, 31 J. COMP. ECON. 620, 628–29 (2003).

<sup>121</sup> See *infra* note 124 and accompanying text.

<sup>122</sup> See Gregory S. Alexander, *Time and Property in the American Republican Legal Culture*, 66 N.Y.U. L. REV. 273 (1991) (discussing the importance that the framers placed on small independent landholdings); Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 886–88 (2000) (noting the elevated status of property as a constitutional matter); Eduardo Peñalver, *Property as Entrance*, 91 VA. L. REV. 1889, 1890 (2005) (noting that historically property rights have had “almost mythical status within American political thought”); Claire Priest, *Creating an American Property Law: Alienability and Its Limits in American History*, 120 HARV. L. REV. 385, 387–88 (2006) (noting the historical ties between early American views of the importance of broadly-based property rights and Republican political ideals). Carol M. Rose, *Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 329, 331–33 (1996) (noting that the framers considered property rights highly important in establishing a liberal constitutional order). *But see* Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1 (1991) (noting that despite the prioritization of property rights, much of early American real property was forcibly taken from Native Americans).

<sup>123</sup> See Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1338–39 (1993) (describing Massachusetts colonists’ privatization of land as a means to increase agricultural productivity).



Massachusetts Bay property institutions and rights and those in existence in the British Caribbean colonies during the same period. For example, Daron Acemoglu contrasts the strikingly different institutions established for the protection of property rights by a single group—the Puritans—in New England and in Providence Island (off the coast of Central America in the Caribbean Sea), pointing out that while “the colony of Massachusetts Bay . . . is often hailed as an example of good institutions introduced in the colonies by a group of British colonists seeking economic and religious freedom,” the Providence Island settlers immediately adopted slavery and made their greatest profits by pirating passing Spanish ships.<sup>124</sup> At first glance, this climate dominated by slavery was hardly a promising context for the emergence of a broad class of Black property owners.

Yet despite this seemingly hostile environment, early West Indian census data—although spotty—support the contention that a broad class of Black property owners emerged shortly after the abolition of slavery and continued to thrive.<sup>125</sup> A census of Jamaica in 1921

<sup>124</sup> Acemoglu, *supra* note 120, at 632 n.18.

<sup>125</sup> As early as 1861, “there were 50,000 small proprietors owning an average of three acres each.” SWITHIN WILMOT, *FREEDOM IN JAMAICA: CHALLENGES AND OPPORTUNITIES, 1838–1865*, at 6–12 (1997). This is significant since the total population of Jamaica was about 441,000. 53 HOUSE OF COMMONS AND COMMAND, *CENSUS OF ENGLAND AND WALES FOR THE YEAR 1861*, at 178 (1863), available at [http://books.google.com.jm/books?id=keQSAAAAYAAJ&pg=PA178&lpg=PA178&dq=total+population+of+jamaica+in+1861&source=bl&ots=np84Rq\\_Q5M&sig=y4l6Wn\\_L5n1e9rMXWpPoWRzHnww&hl=en&sa=X&ei=RJp5UvPUENHfsASO-oKADw&ved=0CD8Q6AEwBA#v=onepage&q=total%20population%20of%20jamaica%20in%201861&f=false](http://books.google.com.jm/books?id=keQSAAAAYAAJ&pg=PA178&lpg=PA178&dq=total+population+of+jamaica+in+1861&source=bl&ots=np84Rq_Q5M&sig=y4l6Wn_L5n1e9rMXWpPoWRzHnww&hl=en&sa=X&ei=RJp5UvPUENHfsASO-oKADw&ved=0CD8Q6AEwBA#v=onepage&q=total%20population%20of%20jamaica%20in%201861&f=false). Based on levels of land ownership in his own community, an English Baptist minister involved in securing land for former slaves estimated in 1852 that “two-thirds” owned land, although it is unclear whether he meant the slave population or the whole population. OLIVIER, *supra* note 69, at 115 (citing minister John Clarke). Even if the figure is not as high as the “two third” estimate provided, given the estimate of land ownership cited by Wilmot in 1861 relating to the overall population, it is reasonable to assume that a significant proportion of the population had some association with formal land ownership. Given that the population was overwhelmingly comprised of former slaves and colored persons (mixed slave and European ancestry), GEORGE W. ROBERTS, *THE POPULATION OF JAMAICA 64–70* (1957), most of these landowners would have had to have been Black or colored. There are similar patterns of widespread Black land ownership in several other West Indian territories, particularly the larger ones (such as British Guyana), where land was more freely available. See MALCOLM JARVIS PROUDFOOT, *POPULATION MOVEMENTS IN THE CARIBBEAN 9–11, 24–26, 73 tbl.14* (1950) (discussing the availability of land and low agricultural unemployment in larger colonies like British Guiana in conjunction with a discussion of Black peasant farmers themselves entering the labor market on smaller islands like Puerto Rico). See generally BARBARA P. JOSIAH, *MIGRATION, MINING, AND THE AFRICAN DIASPORA: GUYANA IN THE NINETEENTH AND TWENTIETH CENTURIES 13–15* (2011) (discussing Black land ownership in British Guyana); Rawle E. Farley, *The Rise of Village Settlements in British Guiana*, 3 *CARIBBEAN Q.* 101 (1953) (describing how Blacks in British Guyana transitioned from slavery to widespread land ownership in the mid-nineteenth century); Barbara P. Josiah, *After Emancipation: Aspects of Village Life in Guyana, 1869–1911*, 82 *J.*

(during the heyday of early Black migration to the United States) found that the majority of adult men identified themselves as “planters” (that is, working their own farms) as opposed to “labourers” (that is, working another person’s farms).<sup>126</sup> This is perhaps unsurprising in a country with a primarily agricultural economy, similar to that of the American South.<sup>127</sup> Critically, though, unlike in the American South, sharecropping was virtually nonexistent in the West Indies.<sup>128</sup> That is, many of those identifying as farmers were themselves small landowners cultivating their *own* land—self-identified farm owners,<sup>129</sup> as opposed to farmers leasing land within a sharecropping arrangement. Perhaps most importantly, these farm owners were descendants of slave farmers.<sup>130</sup> This lineage has led to their characterization as “reconstituted peasantry” in the historical literature.<sup>131</sup> Unlike the descendants of slaves in the American South, these were indeed slaves that “got” their forty acres.

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NEGRO HIST. 105, 105–06, 109–18 (1997) (describing how former slaves pooled their money together to buy vast tracts of land used to create communal villages).

<sup>126</sup> Census of Jamaica and Its Dependencies, Taken on the 25th of April, 1921, at 9. The overall population number was 858,118. *Id.* at 6. Of these, 373,663 were under the age of 15. *Id.* at 7. There were somewhat more women than men (456,145 versus 401,973), but more male planters than female planters (86,510 versus 42,602). *Id.* at 8. If you leave aside the indefinite and non-productive categories, *id.* at 7, planters clearly constituted the largest occupational class.

<sup>127</sup> Most of these farmers would have been descendants of African slaves, and their livelihoods were still partially dependent on the agricultural plantation economies for which their forebears’ slave labor was critical. In this way, Jamaica would not have been much different from the American South. See Jess Gilbert et al., *Who Owns the Land? Agricultural Land Ownership by Race/Ethnicity*, 17 RURAL AM. 55, 55–57 (2002) (highlighting that Black agricultural land owners are highly concentrated in the South in areas where the plantation economy dominated during slavery, and that many Black farmers were tenants rather than owners for a century following Emancipation). See generally BLACK ECON. RESEARCH CTR., *supra* note 40, at 14–41 (discussing the relationship of Black people with land in the American South).

<sup>128</sup> See MINTZ, *supra* note 58, at 196–97 (explaining that the Jamaican estate system made it impractical for estate managers to collect shares of food voluntarily produced by slaves); Mintz & Hall, *supra* note 38, at 3–4, 12–14 (discussing the absence of estate-supervised food production systems for feeding slaves in Jamaica).

<sup>129</sup> MINTZ, *supra* note 58, at 209–10.

<sup>130</sup> See *id.* at 146–56 (describing the origins of various groups of Caribbean peasantries, including former slaves).

<sup>131</sup> See *id.* at 248 (referring to post-emancipation communities in Jamaica as such). The term is meant to contrast West Indian small farmers with conventional descriptions of the peasant labor that supported agricultural economies prior to European industrialization. Unlike conventional European “serf”-like peasants who typically worked on estate land, West Indian peasants were working their “own” land, even within the institution of slavery. MINTZ, *supra* note 58, at 131–45 (describing the origins of this independent peasantry). Moreover, many of these Jamaican farmers were also independent businesspersons, actively involved in marketing their produce at commercial markets, again within the institution of slavery. See Mintz & Hall, *supra* note 38, at 3 (noting that within the plantation system of the Caribbean, some estates provided slaves with access to small quantities of

The demographers further note that such property ownership, while typical in the Anglophone Caribbean, was atypical in the Americas, "[s]ince the slave plantation [system] elsewhere . . . served to destroy the peasantry rather than to create it . . . ." <sup>132</sup> That is, these independent Black Jamaican farm owners differed in an important respect from descendants of slaves in plantation economies in other parts of the Americas, where slave-descendant farmers were typically cultivating land that was not their own. <sup>133</sup> As property owners, the Jamaican peasant class appeared to have a stronger foothold in the mainstream economy than analogous groups elsewhere in the Americas. <sup>134</sup> Thus, the West Indian farming class was arguably the largest independent Black peasantry to have emerged from the institution of slavery in the Americas. <sup>135</sup>

This historical period in the West Indies raises a question, however. Specifically, how was it possible for slaves (themselves property) to own property? As in the United States, slaves in the British West Indies—the descendants of Black Africans—were considered property. <sup>136</sup> Property could not own property, and the law generally did

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land to produce food items for subsistence and for sale). There is a very large literature on the evolution of peasant classes in diverse societies, which I will acknowledge elsewhere, but is beyond the scope of this article. See generally Sidney W. Mintz, *A Note on the Definition of Peasantries*, 1 J. PEASANT STUD. 91 (1973) (providing an overview of the literature pertaining to the study of peasant societies).

<sup>132</sup> Mintz & Hall, *supra* note 38, at 3.

<sup>133</sup> See MINTZ, *supra* note 58, at 146–56 (discussing the contrast between Black farmers in Caribbean peasantries and Black freedmen working as farmers in North America). Sharecropping is a system in which a landowner allows a tenant to use the land in return for a share of the crop produced on the land. Given the exigencies of plantation economies, sharecropping evolved in many post-slave societies as a compromise which allowed land-rich but cash-strapped plantation owners to enter into economic arrangements with former slaves, who lacked the means to finance independent farming. IRA BERLIN, *SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH* 381 (1974) (describing sharecropping as a form of "social control" that "tie[d] blacks to their employers, to landlords, or to the planter-merchants who rented them land and provided credit while their crops still had to be harvested").

<sup>134</sup> MINTZ, *supra* note 58, at 158–59; Mintz & Hall, *supra* note 38, at 3.

<sup>135</sup> It is perhaps for this reason that the historical literature often cites a famous English planter who argues that the standard of living of West Indian Blacks compares favorably with European peasant classes. See JOHN STEWART, *AN ACCOUNT OF JAMAICA, AND ITS INHABITANTS* 213–22 (1808) (describing the condition of Black slaves of the West Indies). This analysis should be viewed with some skepticism given the contrast between the guarantees and rights granted to Western European peasantries and the lack of rights which characterizes the institution of slavery.

<sup>136</sup> B.W. Higman, *Jamaican Port Towns in the Early Nineteenth Century*, in ATLANTIC PORT CITIES, 117, 140–41 (Franklin W. Knight & Peggy K. Liss eds., 1991). Prior to the American Revolution, the American colonies and the West Indies (as British colonies) had similar historical trajectories. See RODERICK A. McDONALD, *THE ECONOMY AND MATERIAL CULTURE OF SLAVES: GOODS AND CHATTELS ON THE SUGAR PLANTATIONS OF JAMAICA AND LOUISIANA* (1993) (conducting a comparative study of slavery in the West

not recognize the ownership of property by slaves.<sup>137</sup> Moreover, the superiority of the English plantation class over the Black population was inextricably tied to their control of land because of their miniscule numbers, a form of control plantation owners would not easily relinquish.<sup>138</sup> Far from granting slaves property rights, a complex legal

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Indies and in parts of the American South). It was precisely this point that Ulrich Phillips, the early American slave historian, emphasized:

As regards negro slavery the history of the West Indies is inseparable from that of North America. In them the plantation system originated and reached its greatest scale, and from them the institution of slavery was extended to the continent. The industrial system on the islands, and particularly on those occupied by the British, is accordingly instructive as an introduction and a parallel to the continental regime.

ULRICH B. PHILLIPS, *AMERICAN NEGRO SLAVERY: A SURVEY OF THE SUPPLY, EMPLOYMENT AND CONTROL OF NEGRO LABOR AS DETERMINED BY THE PLANTATION RÉGIME* 46 (1918). As the historian Betty Wood establishes, most early African slaves who were imported into the English colonies (that later became the United States) came from the West Indies. Prior to the early 1700s, it was difficult to acquire slaves from Africa in the colonies that became the United States; most Africans were sold in the West Indies. One of the early large-scale importations of African slaves in the American colonies occurred when Barbadian planters—who played a significant role in the founding of South Carolina in 1670—imported slaves from Barbados. See BETTY WOOD, *THE ORIGINS OF AMERICAN SLAVERY* 64–65 (1997) (discussing the connection between the Lowcountry, as the English called present-day South Carolina, and settlers from Barbados).

<sup>137</sup> The practice of customary grants to slaves was recognized by early English commentators. See, e.g., Mintz & Hall, *supra* note 38, at 17 (“Their right of property in what they thus acquire, is never questioned; but seems completely established by custom.”). The word *customary* bears emphasis: These grants clearly exist against a background of slaves not *formally* owning property. As Mintz and Hall mentioned:

[N]o slaves held provision grounds by legal right of property in land. The land belonged to the estate owner. The use of it was *allowed* to the slaves. What slaves were permitted to bequeath was certainly not a plot of land, but rather the right to continue to cultivate a certain piece of land for as long as the owner or estate manager permitted the land to be cultivated in provisions.

*Id.* at 22 (emphasis added) (citations omitted).

<sup>138</sup> A similar point has been made about the American South. While several scholars have questioned the widely held view that land alone would have significantly altered the economic conditions of former slaves, most agree that the dominance of the White elite was inextricably tied to their dominance of land holdings. See, e.g., FONER, *supra* note 40, at 245 (asserting that “the failure to distribute land prevented the freedmen from achieving true autonomy and made their civil and political rights all but meaningless”); Stanley L. Engerman, *Economic Adjustments to Emancipation in the United States and British West Indies*, 13 J. INTERDISCIPLINARY HIST. 191, 219–20 (1982) (describing the lack of physical capital, including land, and human capital, such as education and literacy, and “deficiencies” that ensured Blacks “would remain far behind . . . whites for very prolonged periods”); Robert Higgs, *Accumulation of Property by Southern Blacks Before World War I*, 72 AM. ECON. REV. 725, 725 (1982) (“[T]he freedmen’s lack of tangible property at the time of emancipation was the overriding cause of their low income relative to Southern whites.”); Roger L. Ransom, *Reconstructing Reconstruction: Options and Limitations to Federal Policies on Land Distribution in 1866–67*, 51 CIVIL WAR HIST. 364, 370 (2005) (describing the potential “modicum of economic independence” that land ownership would have secured for freed blacks). Scholars have noted a similar pattern in the Jamaican context. See Douglas Hall, *Jamaica*, in NEITHER SLAVE NOR FREE 193, 196–97 (David W.

framework persisted that limited opportunities for colored freedmen (people of mixed English and African heritage) to acquire the requisite amount of property for voting privileges.<sup>139</sup> Despite this entrenched formal legal framework, which largely excluded non-Whites from property ownership, there existed an informal customary framework in which slaves were in fact understood to be property owners.<sup>140</sup> This second structure—which later took hold in the formal legal structures of these territories—laid the groundwork for the development of the sizable Black land-owning class in the West Indies from which many U.S. migrants later emerged.

The contradiction inherent in the simultaneous existence of the institution of slavery—which generally precluded property ownership—alongside the grant of property to slaves was less a matter of English *noblesse oblige* than of enlightened self-interest. Following the British capture of most of the West Indian islands in the mid-1600s, sugar cane production rapidly became a major commercial operation for the British Empire.<sup>141</sup> Indeed, in the heyday of the trade in the mid-1700s, the West Indian colonies were “the most cherished” imperial possessions and their sugar enterprises “the greatest and most famous industrial enterprises in the world.”<sup>142</sup> However, the British faced a major difficulty: The slaves that fueled these commercial operations needed to be fed.<sup>143</sup> When planters imported food, however,

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Cohen & Jack P. Greene eds., 1972) (discussing how the social superiority of Whites over non-White freedmen in Jamaica rested on their control of property).

<sup>139</sup> In 1761, Jamaica passed a law forbidding colored freedmen from purchasing land exceeding a value of £2000 in Jamaican currency (three-fifths sterling) or to inherit property or money in excess of that amount from a White person. See Hall, *supra* note 138, at 197 (describing the 1761 law); C. Roy Reynolds, *Tacky and the Great Slave Rebellion of 1760*, 6 JAMAICA J., June 1972, at 5, 7 (1972) (summarizing these measures); see also Jerome S. Handler & Arnold A. Sio, *Barbados, in NEITHER SLAVE NOR FREE*, *supra* note 138, at 214, 232 (citing the governor of the potential dangers he found inherent in the ‘strange inconsistency in our laws and customs’ by which freedmen were denied ‘any civil right,’ particularly that of giving testimony [in a court of law], and yet were ‘allowed to acquire and possess land and other real property’”).

<sup>140</sup> *Infra* Part II.B.

<sup>141</sup> The Napoleonic introduction of beet sugar, which posed a major threat to the conventional sugar trade over which the British West Indies had a virtual monopoly, occurred in the early 1800s, one hundred and fifty years after the British foray into the West Indies. See PHILIP SHERLOCK & HAZEL BENNETT, *THE STORY OF THE JAMAICAN PEOPLE* 231 (1998) (noting the effect of competition from European beet sugar).

<sup>142</sup> Ulrich Phillips devotes significant attention to West Indian plantations. Ulrich B. Phillips, *A Jamaica Slave Plantation*, 19 AM. HIST. REV. 543, 543 (1914).

<sup>143</sup> The importation of food from either Europe or North America was a risky venture. War often disturbed merchant shipping routes rendering food importation risky, unpredictable, and expensive. The historian Selwyn Carrington is a particularly strong proponent of the influence of war, which has been disputed by other historians and summarized neatly in Veront Satchell, *Slave Labour and Sugar Production in Jamaica 1760–1830*, at 11–12 (1997) (noting Carrington’s argument that the American Revolutionary War prompted the

they faced “a vicious circle” of high prices, malnourished slaves, reduced productivity, and lower profits.<sup>144</sup> This dilemma was a matter of interest for the British Crown, which was deeply disturbed by the prospects of reduced productivity and profits on the plantations.<sup>145</sup> Governors of the West Indian territories were regularly reporting to the colonial authorities the status of their efforts to achieve food sufficiency, reports that accelerated in periods of war—for example, during the American Revolution—when food supplies might be cut off.<sup>146</sup> The territories eventually institutionalized a system in which slaves grew their own food,<sup>147</sup> allowing the British to guarantee stable food supplies, even if the importation routes to the colonies were cut off.<sup>148</sup>

As it happens, planters had been experimenting with more efficient means of food production for the slaves since shortly after the English takeover of Jamaica in 1655.<sup>149</sup> Facing a choice between

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decline of the British West Indies as “Caribbean sugar producers were extremely dependent on British North America for all commodities necessary for them to produce sugar”). However, Carrington’s assertion that the West Indies fell into decline after the American Revolution is disputed by other historians. See generally Seymour Drescher, *Economic Revolution and Slavery: A Commentary*, 36 BOLETIN DE ESTUDIOS LATINOAMERICANOS Y DEL CARIBE 49 (1984) (Neth.) (critiquing Carrington’s view of West Indian decline, slavery, and the American Revolution).

<sup>144</sup> Mintz & Hall, *supra* note 38, at 3.

<sup>145</sup> The islands had become important to the economic wellbeing of the British Empire as a major source of revenue for the British Treasury, which levied ample taxes on the planters’ profits. See SHERLOCK & BENNETT, *supra* note 141, at 281–82 (discussing the high customs duties on consumer goods).

<sup>146</sup> Examples of voluminous correspondence between governors in the British West Indian colonies and the Crown regarding the status of their food supplies have been documented. See, e.g., CARRINGTON, *supra* note 58, at 106 (discussing in letters the report of Governor Hay of Barbados in a letter to the Crown denying reports of imminent famine and further assuring that “scarcely any one Article of provisions and live stock of the Island has raised in price for near these three years” (citation omitted)).

<sup>147</sup> This system, as appears to have resulted from repeated skirmishes with the French, is best explained in MINTZ, *supra* note 58, at 180–82).

<sup>148</sup> *Id.* at 181–82.

<sup>149</sup> See HIGMAN, *supra* note 113, at 204 (discussing three methods West Indian slave-owners used to provide nutrition); LUCILLE MATHURIN MAIR, A HISTORICAL STUDY OF WOMEN IN JAMAICA 1655–1844, at 59–60 (Hilary McD. Beckles & Verene A. Shepherd eds., 2006) (discussing a change in food production method during the war); SHERIDAN, *supra* note 113, at 154–55 (describing the economic factors influencing food production). Indeed, according to one historian, shortly after the British takeover of Jamaica in 1655, plantation owners understood that crops would have to be grown locally to feed the slaves. See HOLT, *supra* note 38, at 66 (noting the development of the provisioning system). In response, different plantations took different courses of action. For example, some plantation owners set about growing crops as part of the estate’s work, alongside sugar cane. The produce would then be allocated to the slaves. *Id.* Others undertook a system of collectivized agriculture, in which slaves were fed from estate farms which they were forced to cultivate. See HIGMAN, *supra* note 113, at 204–09 (discussing three main methods of providing food for Barbadian slaves). These yields were then subdivided among the slaves.

allocating plantation lands to grow food in order to feed the slaves or providing incentives for the slaves to feed themselves, many plantation owners chose the second course.<sup>150</sup> Slave owners believed that devising systems to encourage slaves to produce their own food would be more efficient.<sup>151</sup>

To accomplish this goal, plantation owners allocated "provision grounds," individual plots of land at the edge of plantations, to slave heads of household to grow their own food.<sup>152</sup> The incentives were clear: Those who did not farm their provision grounds successfully would not eat. Soon, further innovation to incentivize food production appeared. By the early eighteenth century, owners decreed that the proceeds of slave provision grounds would accrue entirely to the slaves on several plantations.<sup>153</sup> The English administration in Jamaica quickly caught on to the practice.<sup>154</sup> In 1672, only seventeen years after the English takeover of Jamaica, an early English governor issued a decree with the force of formal law: Any plantation owner who acquired a new plantation was obligated to allocate individual plots of land to slaves so that the slaves could feed themselves and their families.<sup>155</sup> Moreover, the institutionalization of the system was undoubtedly aided by financial incentives for self-sufficiency in food production.<sup>156</sup>

One plantation owner, who is often cited in histories of the period, noted that after the decree on nearly every plantation "[e]ach slave has . . . allotted to him . . . a provision-ground. This is the principal means of his support and so productive is the soil . . . that this

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Finally, many plantation owners left slaves instead to grow their own foods on their own provision grounds. See HOLT, *supra* note 38, at 66 (describing slaves' small plots of land for growing their own food and livestock).

<sup>150</sup> See Mintz & Hall, *supra* note 38, at 4 (characterizing food production as largely voluntary).

<sup>151</sup> See *id.* at 3 (noting the costs associated with importing food).

<sup>152</sup> HIGMAN, *supra* note 113, at 204.

<sup>153</sup> Cf. *id.* at 211–12 (discussing how slaves would grow food on their provision grounds for their own sale and profit at the market).

<sup>154</sup> See Mintz & Hall, *supra* note 38, at 12 (noting the quick adoption of this practice after the English occupation).

<sup>155</sup> Excerpts of the early statute are replicated in later publications. See, e.g., THE ACT OF ASSEMBLY OF THE ISLAND OF JAMAICA, FOR THE BETTER ORDER AND GOVERNMENT OF SLAVES, COMMONLY CALLED THE CONSOLIDATED ACT 6 (London, B. White & Son 1788); see also STEWART, *supra* note 135, at 100 (citing an early law by which all estates and settlements were required to allocate at least ten acres per one hundred slaves for the cultivation of ground provisions and root vegetables).

<sup>156</sup> For a general discussion of the financial incentives for self-sufficiency in food production, particularly in Barbados, see Richard B. Sheridan, *Why the Condition of the Slaves was "Less Intolerable in Barbadoes than in the Other Sugar Colonies,"* in INSIDE SLAVERY: PROCESS AND LEGACY IN THE CARIBBEAN EXPERIENCE 31, 44–45 (Hilary McD. Beckles ed., 1996).

spot will not only furnish him with sufficient food for his own consumption, but an overplus to carry to market."<sup>157</sup> It was customary practice that not only should each slave have his own plot of arable land, but he should also be provided time off to work the land, and that the proceeds of the plot should be his.<sup>158</sup> Notably, the plot and the slave's time in cultivating this plot were also to be protected.<sup>159</sup> Reflecting precisely this sentiment, another plantation owner noted: "All kinds of ground provisions and corn are . . . successfully cultivated . . . by the negroes in their own grounds [i.e., provided individually by the owner or overseer] and on those days which are given to them for this particular purpose, *it does not enter into the mass of plantation-labour . . .*"<sup>160</sup> The plantation owner further noted: "A quarter of an acre . . . will be fully sufficient for the supply of a moderate family, and may enable the proprietor . . . to carry some to market . . . ." <sup>161</sup> He continued:

[B]ut then the land must be of a productive quality . . . and protected from the trespass of cattle . . . . [T]hose negroes will hardly ever have good grounds, and of consequence plenty of provisions, who are not allowed to make for themselves a choice of situation, and who are not well assured that it will be well guarded and protected.<sup>162</sup>

If possible, slaves would rotate their provision grounds so as to improve crop productivity and generate surpluses. Where space permitted, "the Negroes ma[d]e it a practice to enlarge their own grounds, or exchange them for fresh land, every year. By these means, having quicker and better returns, they raise[d] provisions in abundance, not only for their own use, but also a great surplus to sell."<sup>163</sup>

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<sup>157</sup> JOHN STEWART, A VIEW OF THE PAST AND PRESENT STATE OF THE ISLAND OF JAMAICA 267 (Edinburgh, Oliver & Boyd 1823).

<sup>158</sup> These customary practices were later embodied in the Consolidated Slave Law passed in 1816. The law essentially codified what was already customary practice, requiring "[s]uitable provision grounds to be supplied rent free" and mandating that slaves "be allowed one day in every two weeks [in addition to Sundays] for work on their provision grounds except during the harvest season. The minimum of free days was not to be less than twenty-six in a year." 2 NOEL DEERR, THE HISTORY OF SUGAR 301-02 (1950).

<sup>159</sup> See HIGMAN, *supra* note 113, at 210 (describing a 1799 Dominica law that set out that masters should provide food for their slaves or "sufficient land and time to produce it").

<sup>160</sup> Mintz & Hall, *supra* note 38, at 6 (alteration in original) (emphasis added) (quoting 2 WILLIAM BECKFORD, A DESCRIPTIVE ACCOUNT OF THE ISLAND OF JAMAICA 129-30 (London, T. & J. Egerton 1790)).

<sup>161</sup> *Id.* (quoting 1 BECKFORD, *supra* note 160, at 256).

<sup>162</sup> *Id.* (quoting 1 BECKFORD, *supra* note 160, at 256-57).

<sup>163</sup> Richard B. Sheridan, *Strategies of Slave Subsistence: The Jamaican Case Reconsidered*, in FROM CHATTEL SLAVES TO WAGE SLAVES: THE DYNAMICS OF LABOUR BARGAINING IN THE AMERICAS 53 (Mary Turner ed., 1995).



In the absence of diaries from the slaves themselves on property ownership, we are left with oral histories of descendants of "coloreds"<sup>164</sup> and slaves, which reflect the historical practice of slaves farming *their* property.<sup>165</sup> Moreover, it is striking that the aforementioned planter diaries reflect that even in the absence of a system of free labor, at least some of the planters believed that they were providing incentives to encourage slaves' individual initiative.<sup>166</sup>

In the larger islands of the West Indies, such as Jamaica, where flat, fertile plantations were surrounded by hilly land that was less suited to sugar production, the costs of allocating land to the slaves were lower and the institutionalization of the practice appears to have occurred widely and early on.<sup>167</sup> In smaller islands, such as Barbados and the Eastern Caribbean, however, where virtually all fertile land was used for highly profitable sugar cultivation, the practice of allocating plots to slaves was less widely institutionalized.<sup>168</sup> Nevertheless, similar systems of land allocation to slaves appear to have taken hold, albeit with smaller plots and as part of a less formal system. In Barbados, for example, the shortage of land meant that slaves were partially fed from their masters' imported food stocks, rather than providing the entirety of their own sustenance, as in Jamaica.<sup>169</sup> Despite receiving some nourishment from imported food, each Barbadian slave was still allocated a small garden plot "generally no more than 15 square yards," and from these small plots they were remarkably productive, generating food not only for subsistence, but also to sell at slave markets.<sup>170</sup>

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<sup>164</sup> ERNA BRODBER, *THE SECOND GENERATION OF FREEMEN IN JAMAICA, 1907-1944*, at 1 (2004) (defining "coloreds" as the offspring of relations pairing "white-skinned Europeans with black-skinned Africans").

<sup>165</sup> See *id.* at 74-75 (observing that descendants of slaves strove to become farmers in order to become autonomous from the surrounding plantations); Janet Momsen, *Land Settlement as an Imposed Solution*, in *LAND AND DEVELOPMENT IN THE CARIBBEAN* 46, 47 (Jean Besson & Janet Momsen eds., 1987) (describing how slaves "controlled neither the land nor their time or labour" but, nonetheless, were largely self-sufficient with respect to food).

<sup>166</sup> HOLT, *supra* note 38, at xxii (summarizing the titular "problem with freedom" as one of "socializing ex-slaves to respond to the work incentives of freemen"); *id.* at 47, 71, 83 (describing planters' motives for and attempts to introduce such incentives post-Emancipation).

<sup>167</sup> See BECKLES, *supra* note 113, at 77-78 (describing how Jamaica's geography informed land allocation practices).

<sup>168</sup> See *id.* (describing how the relatively flat and arable nature of islands such as Barbados and Antigua resulted in much smaller plots for slaves and a greater overall reliance on imported food stocks); HOYOS, *supra* note 61, at 180 (describing how a dearth of unoccupied land in Barbados dampened enthusiasm for land allocation to slaves).

<sup>169</sup> BECKLES, *supra* note 113, at 44.

<sup>170</sup> *Id.* at 78.

B. *Order Without Law: The Dominance of Customary Practice in Slave-Allocated Property*

Historically there were two systems of land tenure in British Caribbean societies.<sup>171</sup> The first was provided for in a legal system defined by statute and common law.<sup>172</sup> The second was a “customary and traditional” system that “neither observe[d] the forms nor directly invite[d] the sanctions of law.”<sup>173</sup> The system described *supra*, which allocated ownership and use of land to the slaves, reflects the dominance of this second “customary” system.

The system through which land was allocated to slaves is notable for its autonomy from English common and statutory law.<sup>174</sup> Having allocated plots to the slaves, the English generally did not interfere with how these slaves then allocated land amongst themselves according to their own customary arrangements; this hands-off approach demonstrates “the mutual respect for customary arrangements which held between the estate owners or managers and the slaves.”<sup>175</sup> Not only does this allocation system provide an example of customary law, but it also serves to demonstrate the dominance of customary law. For example, while provision grounds were typically allocated to family heads, other family members who worked the land were understood, within the community of slaves, to be able to stake a claim to the land under customary rules.<sup>176</sup> The customary rules that appear so dominant in this setting appear to have been influenced by norms—“creole convention[s]”<sup>177</sup>—first imported from West Africa<sup>178</sup> by the slave population and subsequently widely respected.

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<sup>171</sup> M.G. Smith, *The Transformation of Land Rights by Transmission in Carriacou*, 5 SOC. & ECON. STUD. 103, 103 (1956).

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> See PATTERSON, *SOCIOLOGY OF SLAVERY*, *supra* note 112, at 70 (“Jamaica is best seen more as a collection of autonomous plantations, each a self-contained community with its internal mechanisms of power, than as a total social system.”). In any event, the historian-sociologist Orlando Patterson cautions that the broader statutory framework in Jamaica was weak and poorly enforced. *See id.* at 71 (describing the slave laws of Jamaica, which were largely ignored by planters, as “severe and ineffective” and “incompetent”).

<sup>175</sup> MINTZ, *supra* note 58, at 189.

<sup>176</sup> See MAIR, *supra* note 149, at 262 (describing how a female slave could stake a claim to land by virtue of her right as an individual producer); Lucille Mathurin-Mair, *Women Field Workers in Jamaica During Slavery*, in *WOMEN PLANTATION WORKERS: INTERNATIONAL EXPERIENCES* 17, 26 (Shobhita Jain & Rhoda Reddock eds., 1998) (same).

<sup>177</sup> MAIR, *supra* note 149, at 262.

<sup>178</sup> See Edith Clarke, *Land Tenure and the Family in Four Selected Communities in Jamaica*, 1 SOC. & ECON. STUD. 81, 87 (1953) (describing how the West African principle of equal rights for all family members informed slaves’ conceptions of land ownership).

Within this system of customary land rights, slave owners established internal systems of adjudication on their plantations.<sup>179</sup> Barbadian plantation owner Joshua Steele, a planter who was known for his efforts to ameliorate the harsher effects of plantation life, established and sanctioned internal "courts" among the slaves on his plantation.<sup>180</sup> Another prolific plantation owner-diarist, John Stewart, noted that on many estates, the richer slaves "erect[ed] themselves into a sort of bench of justice, which [sat] and decide[d], privately, and without the knowledge and interference of the whites, on all disputes and complaints of their fellow slaves."<sup>181</sup> The judges would be offered rum, which was considered "an indispensable preliminary to the dispensing of justice."<sup>182</sup> The sentences of this court typically "consist[ed] in pecuniary fines, which often exceed[ed] the means of the party."<sup>183</sup> At times, Stewart himself, a plantation owner, had been asked to hear appeals from these slave courts, with appellants "complaining of enormous damages and costs of suit which the appellants were utterly unable to make good."<sup>184</sup> Although the author "reversed or softened [the] sentences,"<sup>185</sup> this may have been to no avail since the slaves operated according to their own customary rules.<sup>186</sup> Moreover, his repeated attempts to abolish the courts had been "without success."<sup>187</sup> Stewart made it clear that he was a rare bird; plantation owners were typically disinclined to interfere with slave courts.<sup>188</sup> Indeed, Stewart's own lack of success in abolishing the courts spoke to the wisdom of others' aversion to interference. The disinclination of even the powerful planter class to tamper with "creole convention" fits well with a meta-narrative in the property law scholarship that customary rules are often more relevant than formal law to the structure of interpersonal relationships.<sup>189</sup>

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<sup>179</sup> See Larry Gragg, *Steele, Joshua (c. 1700–1796)*, in OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (H.C.G. Matthew & Brian Harrison eds., 2004), available at <http://www.oxforddnb.com/view/article/26345> (highlighting Barbadian plantation owner Joshua Steele's court of "elder slaves" to judge plantation offenses).

<sup>180</sup> Sheridan, *supra* note 156, at 37.

<sup>181</sup> STEWART, *supra* note 135, at 258–59.

<sup>182</sup> *Id.* at 259–60 (emphasis omitted).

<sup>183</sup> *Id.* at 259.

<sup>184</sup> *Id.* (emphasis omitted).

<sup>185</sup> *Id.*

<sup>186</sup> See *id.* at 258–59 (discussing the customary rules that the slaves would unflinchingly abide by during their disputes).

<sup>187</sup> *Id.* at 259.

<sup>188</sup> See *id.* at 258–59 (noting that slave courts were usually held "without the knowledge and interference of the whites").

<sup>189</sup> See Richard L. Abel, *What We Talk About When We Talk About Law*, in THE LAW AND SOCIETY READER 1, 3 (Richard L. Abel ed., 1995) (explaining briefly social scientists' focus on "the relationship between formal rules and internalized norms"); ROBERT C.

Ellickson and multiple other scholars in the “norms” literature recount numerous examples of subjects who follow certain rules, irrespective of formal legal arrangements, because of a fear of informal sanctions.<sup>190</sup> Although the evolution of customary rules with regard to slave property holding in the West Indies has heretofore been untouched by the norms scholarship, the widespread use and implementation of provision grounds appear to be classic examples of what Ellickson has deemed “order without law.”<sup>191</sup> To emphasize this point, one need only consider the fact that the customary local norms, while informal, had such force that plantation owners rarely sought to eject a slave from land that was understood in the community of slaves to belong to the slave.<sup>192</sup> That is, even powerful English plantation owners were disinclined to tamper with customary understandings of who owned particular provision grounds. This fact reinforces the

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ELICKSON, ORDER WITHOUT LAW 284 (1991) (discussing the inverse relationship between law and informal social control mechanisms).

<sup>190</sup> ELICKSON, *supra* note 189, at 123–26 (1991) (describing an “interdisciplinary literature on cooperation”).

<sup>191</sup> See *id.* at 284 (1991) (outlining the basic features of the titular concept). Although the economics literature appears to be the most influential in modern “norms” scholarship, the discussion of norms has a distinguished heritage that predates these contributions, with interdisciplinary contributions from the fields of anthropology and sociology playing an important role as well. For a summary of anthropological and sociological work in this area, see Sally Falk Moore, *General Introduction to LAW AND ANTHROPOLOGY: A READER* 1, 1–4 (Sally Falk Moore ed., 2005); Abel, *supra* note 189, at 1–10 (Richard L. Abel ed., 1995). Many landmark pieces discussing norms scholarship in economic terms have all been written by Robert Ellickson. See ELICKSON, *supra* note 189 (describing the way in which social norms impact behavior); Robert C. Ellickson, *A Critique of Economic and Sociological Theories of Social Control*, 16 J. LEGAL STUD. 67, 68 (“[L]aw-and-economics has exaggerated the role that the legal system plays in the overall system of legal control.”); Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 36 STAN. L. REV. 623 (examining the development of norms in Shasta County, California, as a way to test assumptions set forth by economist Ronald Coase). A number of other scholars have also contributed to the vast literature on this topic. See, e.g., ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000) (discussing the role that law plays in a society where order is largely maintained by norms); Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585 (1998) (describing an economic theory of expressive law); Lawrence Lessig, *Social Meaning and Social Norms*, 144 U. PA. L. REV. 2181, 2186–97 (1996) (discussing the changeability of norms); Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661 (1998) (reconciling economic and norm accounts of behavior); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 339–50 (1997) (describing the emerging economic literature on the interaction of formal and informal rules); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2027–28 (1996) (describing the expressive meaning of action); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996) (arguing that behavior is a function of norms).

<sup>192</sup> See JEAN BESSON, *MARTHA BRAE’S TWO HISTORIES: EUROPEAN EXPANSION AND CARIBBEAN CULTURE-BUILDING IN JAMAICA* 29 (2002) (“I do not believe that an instance can be produced of a master’s interference with his Negroes in their peculium thus acquired.” (citing MINTZ, *supra* note 59, at 207)).

power these customary understandings held within the society's formal and informal legal structure.

The same customary understandings were also embodied within the region's system of inheritance. For example, one anthropologist has noted that "[o]n many plantations in English colonies, slaves assumed a proprietary right to their portion [of the land] and willed it to their heirs, a practice many masters honored."<sup>193</sup> In 1793, plantation owner Bryan Edwards noted such a system of customary inheritance among the Jamaican slaves:

I do not believe that an instance can be produced of a master's interference with his Negroes in their peculium thus acquired. They are permitted also to dispose at their deaths of what little property they possess; and even to bequeath their grounds or gardens to such of their fellow-slaves as they think proper. These principles are so well established, that whenever it is found convenient for the owner to exchange the negro-grounds for other lands, the Negroes must be satisfied, in money or otherwise, before the exchange takes place. It is universally the practice.<sup>194</sup>

One commentator argued that "the strictest laws of primogeniture" were observed in the case of the slave's sudden death.<sup>195</sup> This system of bequeathment demonstrates not only the importance of inheritance, but also that such inheritance was possible. Furthermore, as ancestral burial grounds were considered sacred in many African traditions.<sup>196</sup> Slaves may have strategically buried their dead on particular pieces of land in order to ensure that the land would remain with their family.<sup>197</sup> Out of respect for the dead, unrelated slaves would have been unlikely to use such land, even if it were allocated to them.<sup>198</sup>

<sup>193</sup> ELIZABETH ABBOTT, *SUGAR: A BITTERSWEET HISTORY* 108 (2009).

<sup>194</sup> BESSON, *supra* note 192, at 29 (citing MINTZ, *supra* note 58, at 207).

<sup>195</sup> MAIR, *supra* note 149, at 253 (quoting BERNARD M. SENIOR, *JAMAICA AS IT WAS, AS IT IS, AND AS IT MAY BE* 48 (1835)). Jean Besson in her study of post-emancipation village life argues that a more fluid approach of unrestricted cognatic descent (establishing equality in the treatment of children irrespective of gender, birth order, or legitimacy) later displaced the system of "restricted colonial primogeniture on which the plantation system was based." BESSON, *supra* note 192, at 143.

<sup>196</sup> MELVILLE J. HERSKOVITS & FRANCES S. HERSKOVITS, *TRINIDAD VILLAGE* 300–01 (1947) (exploring the important societal role that death and burial rites play in certain African societies).

<sup>197</sup> See Clarke, *supra* note 178, at 89 ("[F]orbears are invariably buried on family land, and, where this is the case, it is another bulwark against alienation."); Jean Besson, *Agrarian Relations and Perceptions of Land in a Jamaican Peasant Village*, in *SMALL FARMING AND PEASANT RESOURCES IN THE CARIBBEAN* 39, 48 (John S. Brierly & Hymie Rubenstein eds., 1988).

<sup>198</sup> Jean Besson, *The Creolization of African-American Slave Kinship in Jamaican Free Village and Maroon Communities*, in *SLAVE CULTURES AND THE CULTURES OF SLAVERY*

In sum, the system of customary rules carried mutual benefits for plantation owners and slaves alike. The system provided plantation owners with clear economic benefits.<sup>199</sup> Specifically, “the savings which accrued to the planter class as a result of the enslaved feeding themselves [may have] made the critical difference in the profitability of [certain] sugar plantations.”<sup>200</sup> Slaves also experienced clear benefits from the system by receiving the autonomy and privilege of land ownership. Thus, the English appear to have, inadvertently, designed a system that provided incentives for slaves to become property owners in waiting.

While customary law was dominant, customary rules did not exclusively govern slave farming plots forever. Formalization of the traditional rules discussed *supra* did occur, albeit belatedly. Central to the process of formalization was the Consolidated Slave Act (CSA) of 1792.<sup>201</sup> Notably, the CSA contained several provisions relating to the farming grounds of slaves. Each adult slave was entitled by the Act to “a sufficient quantity of land” as her “proper ground.”<sup>202</sup> Moreover, under the Act, plantations were required to allow each slave “sufficient time to work the same, in order to provide him, her, or themselves, with sufficient provisions for his, her, or their

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187, 196–97 (1995) (discussing the transition from a communal land system and the role that burial grounds played in this process) See HERSKOVITS & HERSKOVITS, *supra* note 196, at 302 (discussing rites for the dead held on All Souls Day).

<sup>199</sup> See Arnold Bertram, *Jamaican Higglers’ Marketing System and the Future of Kingston (Part 1)*, THE GLEANER (Oct. 31, 2010), <http://jamaica-gleaner.com/gleaner/20101031/focus/focus6.html> (describing the economic importance of the market system); Arnold Bertram, *The Jamaican Higglers: Prosperity Against the Odds—Part 2* (Nov. 7, 2010), <http://jamaica-gleaner.com/gleaner/20101107/focus/focus6.html> [hereinafter Bertram, *Part 2*] (discussing the savings to the planter class that resulted from the enslaved feeding themselves); Arnold Bertram, *The Jamaican Higglers: Part 3—Things Fall Apart* (Nov. 14, 2010), <http://jamaica-gleaner.com/gleaner/20101114/news/news2.html> (noting the central role peasants and higglers carved out in the Jamaican economy); Arnold Bertram, *(Part 4) The Jamaican Higglers: ‘Can Take It No Longer . . .’* (Nov. 21, 2010), <http://jamaica-gleaner.com/gleaner/20101121/letters/letters1.html> [hereinafter Bertram, *Part 4*] (detailing the economic downturn that resulted from a decrease in the number of plantations); Arnold Bertram, *The Jamaican Higglers: (Part 5) ‘Into the Jaws of Hell . . .’* (Nov. 28, 2010), <http://jamaica-gleaner.com/gleaner/20101128/letters/letters1.html> (describing the higglers as making the market large and lucrative).

<sup>200</sup> Bertram, *Part 2*, *supra* note 199.

<sup>201</sup> See McDONALD, *supra* note 136, at 23, 25 (describing how the Acts allocated both land and working time to slaves).

<sup>202</sup> Consolidated Slave Act of Jamaica § II (1792), 32 Geo. 3, reprinted in 2 BRYAN EDWARDS, THE HISTORY, CIVIL AND COMMERCIAL, OF THE BRITISH COLONIES IN THE WEST INDIES 371, 373 (3d ed. 1806). This legislation ameliorated the most egregious conditions among the slaves. See *id.* (“[E]very master, owner, or possessor, of any plantation or plantations, pens, or other lands whatsoever, shall allot and appoint a sufficient quantity of land for every slave he shall have in possession . . . as and for the proper ground of every such slave . . .”).

maintenance.”<sup>203</sup> Although slaves were not provided with title, the Act did provide for tenure security. For example, the slave was normally compensated in the event that he lost land that had been allocated to him, provided he and his family remained with the plantation.<sup>204</sup> In this way, formal law came to embody customary practice.

### C. *The Evolution of Constructive Property “Rights”*

This fascinating period invites a reconsideration of the process by which property rights are established. As explained in detail *supra*, in the absence of formal legal norms, slaves nevertheless developed a concept of property based on communal understandings. These communal understandings were tacitly acknowledged by both fellow slaves and Whites, even in the absence of legal sanction. Indeed, the customary norms were so pervasive that the English plantation class rarely interfered with slave-owned property.<sup>205</sup> Only later did this customary framework of property ownership among slaves evolve into formal law. This history demonstrates that formal legal instruments are not the sole means of defining and attaining property rights. More importantly, this observation demands a reconsideration of how exactly property rights are formed.

As has often been pointed out, there are three general categories of property rights: the exclusive right to use an asset, the right to appropriate its economic value, and the right to sell or otherwise alienate that asset.<sup>206</sup> As a matter of customary practice, West Indian slaves had the first two of these three rights, namely the exclusive right to use an asset and the right to appropriate its economic value, and even elements of the third: As long as a slave remained with the plantation, the land set aside for his personal use was his alone to tend; it would not be allocated to someone else.<sup>207</sup> Thus, through these rights, a slave essentially had *constructive* control of the property. When the system first developed and prevailed, the slave’s control was not codified in law. Rather, as a matter of law, the land remained under the control of the plantation owner. Therefore, the

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<sup>203</sup> *Id.*

<sup>204</sup> See Mintz & Hall, *supra* note 38, at 21 (“[P]lanters so fully recognized the slaves’ rights to these grounds that they offered compensation wherever it became necessary to convert an area of slave cultivation to estate purposes.”).

<sup>205</sup> See *infra* Part III.B (discussing plantation owners’ responses to these customs).

<sup>206</sup> THRÁINN EGGERTSON, *ECONOMIC BEHAVIOR AND INSTITUTIONS* 34–35 (1990).

<sup>207</sup> See *infra* Part III.B (discussing the informal customs that arose between the plantation class and slaves with regards to slave land ownership).

slave's "control" of the land was a matter of customary practice.<sup>208</sup> This control is further reflected in the fact that trespass by others (particularly other slaves) was systematically discouraged.<sup>209</sup> Hence, the system embodied the principle of exclusive control, even if this principle was not codified.

Second, slaves had the right to appropriate their land's economic value—whatever the slave farmed, she was allowed to keep.<sup>210</sup> Again, however, the operative principle is constructive benefit. The proceeds of the property were technically those of the plantation owner, given his formal ownership of the property. However, as a matter of practice, the proceeds of the slave's plot were his own. When slaves were later informally allowed to sell produce and livestock from their plot, the principle of constructive benefit was further augmented.

Finally, aspects of the principle of transfer—the third property right—were also featured in this system, if only constructively. If a slave had children, upon his death, the land was then allocated to his children.<sup>211</sup> While the slave may not have been able to formally transfer the land, in local parlance it was "passed down" upon his death to his children, who most likely remained with the plantation. In so doing, the system also approximated the property right principle of transfer.<sup>212</sup>

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<sup>208</sup> See Mintz & Hall, *supra* note 38, at 21–22 (pointing out that under slavery, Jamaican slaves were allowed much freedom in the cultivation of their lands).

<sup>209</sup> See *id.* (explaining that planters usually compensated slaves who were made to give up their lands).

<sup>210</sup> See *infra* Part III.B (discussing the benefits slaves derived from their allocated land).

<sup>211</sup> See BESSON, *supra* note 192, at 28–29 (noting a customary inheritance system amongst the slaves in which they could bequeath land rights to whomever they thought proper).

<sup>212</sup> It is perhaps useful to recall the work of Douglass North, the modern father of the "institutions school." See Claude Ménard and Mary M. Shirley, *The Contribution of Douglass North to New Institutional Economics*, in *ECONOMIC INSTITUTIONS, RIGHTS, GROWTH, AND SUSTAINABILITY: THE LEGACY OF DOUGLASS NORTH* (Sebastian Galiani & Itai Sened eds., forthcoming 2013) (manuscript at 2) (chronicling the contribution of Douglass North to the "development and institutionalization of NIE," New Institutional Economics). North explained that property rights mean little without institutions to enforce them. See *id.* at 10 (emphasizing the key role of institutions and contract enforcement in protection of property rights). North's definition of "institutions" is broad. See *id.* at 8, 23 (explaining that North included not only laws and formal written codes, but also social norms and beliefs in the umbrella concept of "institution"); see also NORTH, *supra* note 116, at 4 (explaining that his analysis of institutions includes both formal and informal constraints). Modern law and development literature, in contrast, equates "institutions" with a formal legal system, including a set of laws, practitioners, courts, and judges. Tom Ginsburg, Review Essay, *Does Law Matter for Economic Development? Evidence from East Asia*, 34 *LAW & SOC'Y REV.* 829, 832 (2000) (noting that North's focus on constraining institutions resulted in a new wave of law and development). It is in precisely this sense that I argue that slaves were part of a property rights framework undergirded by an informal set of "rules."



### III SLAVES AS CONTRACTORS

In Subpart III.A, I discuss evidence from slave merchants in food markets of the de facto contracting power of slaves. In Subpart III.B, I discuss the transition to formal property ownership and contracting power following emancipation.

#### A. *Slaves as Merchants*

“Order without law” also emerges in the domain of contract. Slaves were able to gain protections that functioned similarly to formal legal protections through a body of “customary rights.”<sup>213</sup> Slaves were active participants in plantation economies, which allowed them to monetize the proceeds of their property, including ground provisions and livestock.<sup>214</sup> On many islands, slaves’ produce was so important to the local food supply that the general population—including Whites and free Blacks—became almost entirely dependent on the slave markets for food.<sup>215</sup> British elites clearly appeared to have developed some comfort level with the notion of slaves running the West Indian food markets.<sup>216</sup> It is clear that slave participation in surplus production and sale of goods was a core aspect of the Jamaican import/export economy.<sup>217</sup> In these transactions, slaves sold their surplus production directly into the export market.<sup>218</sup> Given the extent of slave marketing activities, it is perhaps unsur-

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<sup>213</sup> McDONALD, *supra* note 136, at 16.

<sup>214</sup> HIGMAN, *supra* note 113, at 212; *see also* MAIR, *supra* note 149, at 258–64 (describing provision grounds and focusing in particular on women’s work in these plots); VERENE A. SHEPHERD, *LIVESTOCK SUGAR AND SLAVERY: CONTESTED TERRAIN IN COLONIAL JAMAICA* 140–43 (2009) (detailing how slaves became part of the market economy by selling crops and livestock from their provision grounds); Jean Besson, *Land Tenure in the Free Villages of Trelawny, Jamaica: A Case Study in the Caribbean Peasant Response to Emancipation*, 5 *SLAVERY & ABOLITION* 3, 4 (1984) (explaining the symbolic value and meaning of slave provision grounds to the slaves themselves and their descendants); Lorna Simmonds, *Slave Higglering in Jamaica 1780–1834*, *JAMAICA J.*, Feb.–Apr. 1987, at 31, 32–37 (explaining the ways in which slaves participated in the market economy).

<sup>215</sup> According to Edward Long, a prolific chronicler of events in this period, despite attempts to curtail their marketing to particular types of produce, higglers came to dominate local markets by supplying produce, livestock, and crafts to locals. *See* Mintz & Hall, *supra* note 38, at 13–14 (citing 1 EDWARD LONG, *THE HISTORY OF JAMAICA* 282–83 (1774)) (detailing the heavy involvement of slaves in local food markets).

<sup>216</sup> *See id.* at 12–15 (explaining that elites were wary of interfering with slave involvement in the food markets).

<sup>217</sup> *See id.* at 20–21 (detailing the breadth of slave involvement in the Jamaican market economy); Simmonds, *supra* note 214, at 31 (noting the large number of female slaves who, together with those connected with the shipping trade, controlled the capital structure of the food market).

<sup>218</sup> Mintz & Hall, *supra* note 38, at 16–17.

prising that by 1774, at the height of the British slave trade, slaves controlled twenty percent of the currency in circulation in Jamaica.<sup>219</sup>

The evolution of an internal marketing system with slaves as the central actors appears to have been slow, but steady. In their “constructive” ownership of property and its proceeds, the slaves experimented with a variety of crops, often with high levels of productivity. Once their own household needs were met, many moved steadily into cash crops that were not needed for their own consumption, but that were in demand in the broader economy. Slaves were initially allowed to barter their surpluses with fellow slaves on their own plantations. Soon, they visited neighboring plantations to sell their produce.<sup>220</sup> Eventually, such bartering morphed into full-blown marketing.

John Stewart, the prolific diarist and plantation owner discussed in Part II.B, observes that “[b]y means of this ground and of the hogs and poultry which he may raise (most of which he sells), an industrious negro may not only support himself comfortably, but save something.”<sup>221</sup> He further notes that there were businesspersons, including “merchants,”<sup>222</sup> who “succeed astonishingly” in their business by dealing “chiefly or solely in negro goods, or such merchandise as is adapted for the use of the negroes, for which they receive cash alone.”<sup>223</sup> Indeed, in Jamaica, “unsupervised cultivation of food stocks by slaves themselves grew steadily more important” to Jamaica’s food supply, eventually growing to feed the entire island.<sup>224</sup> This food fed both the slaves and the English, who purchased significant amounts of produce from slave markets.<sup>225</sup> While property allocation provided an

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<sup>219</sup> *Id.* at 15. Indeed, slaves came to play such an important role as both sellers and buyers in West Indian commerce that on various islands a complex terminology developed to describe their marketing activities. For example, slave marketers were known alternatively as hagglers and higglers (Jamaica), hucksters (Barbados), and hawkers (Barbados and the Eastern Caribbean). See HIGMAN, *supra* note 113, at 237–42 (explaining use of the terms huckster and hawkers); SHERLOCK & BENNETT, *supra* note 141, at 170 (citing M.F. Katzin, *Higglers of Jamaica* (1959) (unpublished Ph.D. dissertation, University of the West Indies at Mona)) (detailing the use of the word higgler).

<sup>220</sup> Mintz & Hall, *supra* note 38, at 4–5 (describing the steady evolution of slaves’ food production).

<sup>221</sup> *Id.* at 8 (citing STEWART, *supra* note 157, at 267).

<sup>222</sup> STEWART, *supra* note 135, at 148.

<sup>223</sup> *Id.* at 149.

<sup>224</sup> MINTZ, *supra* note 58, at 182.

<sup>225</sup> Female slaves appear to have been the dominant actors in these slave markets. There is a consensus view among historians—such as Lucille Mathurin Mair, Verene Shepherd, Janet Momsen, and Lorna Simmonds—that female dominance of the markets reflected a gendered division of labor imported from African marketing systems (Igbo, Akan, Yoruba) where women played a dominant role. In addition to areas which now constitute modern Nigeria (Igbo and Ibibio, from the Calabar area next to modern Cameroon and potentially some Yoruba), Jamaican slaves originated in Ghana (Akan and Chamba) and Congo-Angola. Mair, *supra* note 149, at 258–64 (detailing the significant participation of

initial mechanism of incorporating slaves into the larger economy, the system seems to have been substantially augmented by slave marketing, which initially occurred entirely extralegally.<sup>226</sup> It was only later, in a belated recognition of widespread marketing, that laws were promulgated that formally permitted slave sales of excess produce at markets.<sup>227</sup> Thus, as in the development of slaves' property rights, contract rights too began as an informal, customary practice, and were only later formalized in law.

The reflections of a prominent clergyman (clearly disturbed by the dominance of commerce among "heathens" on a Sunday) give some sense of the vibrancy of the markets:

It was on a Sunday, and I had to pass by the Negro Market, where several thousands of human beings, of various nations and colours, but principally Negroes, instead of worshipping their Maker on His Holy Day, were busily employed in all kinds of traffick in the open streets. Here were Jews with shops and standings as at a fair, selling old and new clothes, trinkets and small wares . . . ; there were some low Frenchmen and Spaniards, and people of colour, in petty shops and with stalls; some selling their bad rum, gin, tobacco . . . ; others, salt provisions, and small articles of dress; and many of them bartering with the Slave or purchasing his surplus provisions to retail again; poor free people and servants also, from all parts of the city.<sup>228</sup>

Based on the size, complexity, and early emergence of the slave-dominated food markets, historians have speculated that slaves were replicating food markets in the Igbo, Akan, and Yoruba areas of West Africa, from where significant numbers of West Indian slaves

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slave women in the markets); see also SHEPHERD, *supra* note 214, at 140–41 (noting the "tenacity" of slave women in the markets); Janet Henshall Momsen, *Changing Gender Roles in Caribbean Peasant Agriculture*, in SMALL FARMING AND PEASANT RESOURCES IN THE CARIBBEAN 83, 84 (John S. Brierley & Hymie Rubenstein eds., 1988) (noting the high rates of participation of female slaves in markets and explaining the significant role this mobility played in the organization of slave resistance); Simmonds, *supra* note 214, at 32–36 (detailing the significant involvement of slave women in Sunday markets and the origins of Jamaican slaves).

<sup>226</sup> See Mintz & Hall, *supra* note 38, at 17–18 (noting that the marketing system was augmented by an "increasing dependence of townsmen and free people on slave production" and that the system evolved "to some extent . . . outside the law").

<sup>227</sup> See BECKLES, *supra* note 113, at 75–77 (identifying laws that, although aimed at restricting slaves from trading in markets, in fact had little effect at stemming this growing trade). Demonstrating the continued and undiminished presence of slave traders, slave market traders appear to have benefited from periods of apprenticeship on behalf of their owners. HIGMAN, *supra* note 113, at 234. Some slaves even traveled extensively between plantations to trade crops on behalf of their owners. *Id.* at 237–42.

<sup>228</sup> Mintz & Hall, *supra* note 38, at 19 (quoting R. BICKELL, THE WEST INDIES AS THEY ARE 66–67 (London, J. Hatchard & Son 1825)).

originated.<sup>229</sup> Slaves were sufficiently sophisticated market actors that English customers complained that some slave traders were even able to extract monopoly prices by artificially reducing the supply of certain foods.<sup>230</sup>

The widespread nature and complexity of slave commerce is supported by evidence of considerable specialization among slave contractors, who came to be known in local parlance as “higglers.”<sup>231</sup> On Barbados, for example, a historian has identified five different types of “higglering” (that is, slave contracting): plantation field slaves who sold groundstuff raised on their small plots to individual consumers for themselves; field slaves who sold their produce for their own profit to White, colored, or free Black businessmen or to shops; specialist slaves, such as domestics, who sold on the streets on behalf of their owners; slaves who ran small shops on behalf of their owners; and small marketers who sold food and drink without a storefront.<sup>232</sup>

The different classes of slave merchants underline the remarkable nature of the slave-dominated marketplace. Not only were slaves trading on their own account, but many were trading on behalf of their masters. Indeed, one commentator suggests that some slave market traders appear to have benefited from periods in which they were effectively acting as apprentice traders on behalf of their owners.<sup>233</sup> For example, some traveled extensively to trade on behalf of their owners, delivering their earnings on a daily basis or on a fixed schedule to their masters.<sup>234</sup> Urban slaves in particular were given the responsibility for both purchasing and retailing goods on behalf of their owners, competing directly with White members of the mercantile class.<sup>235</sup>

Remarkably, these slaves-turned-traders appear to have had a significant degree of autonomy in their commercial relations with other buyers and sellers and even with their masters.<sup>236</sup> These high levels of autonomy reinforce the idea that certain slaves appear to have had *de facto* contracting power. While the slave owner derived income from the slave’s activities, the slave, through a commission

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<sup>229</sup> See, e.g., Simmonds, *supra* note 214, at 32 (discussing the influence of traditional Yoruba markets).

<sup>230</sup> *Id.* at 36–37.

<sup>231</sup> See *id.* at 32 (describing urban marketers as “higglers”).

<sup>232</sup> BECKLES, *supra* note 113, at 79.

<sup>233</sup> See Simmonds, *supra* note 214, at 38 (discussing the view of one scholar that Jamaican slaves benefited upon emancipation to a greater degree than American slaves).

<sup>234</sup> *Id.* at 33.

<sup>235</sup> HIGMAN, *supra* note 113, at 237–38.

<sup>236</sup> See *id.* at 32–33 (discussing ways in which slaves who sold goods attained a measure of independence in their trade).

structure, was able to earn extra income and, as such, had an incentive to maximize profits.<sup>237</sup> Moreover, these transactions were beneficial not only to the parties involved but also to the larger population. Indeed, the principal-agent relationship created between the slave owner and the slave in this context appears to have been integral to commerce in plantation economies. The higgler slave served as a go-between for the planter and mercantilist class and the broader slave population.<sup>238</sup>

Even in the face of clear evidence that slaves were integral market participants, it is important not to minimize the difficulties that slaves experienced as market actors. While slaves were arguably *de facto* contractors, they rarely had access to a formal system of law. For example, slave higglers were constrained by lack of access to an independent judicial entity to enforce the terms of their commercial arrangements in the event of a dispute.<sup>239</sup> Unless a slave was trading for his master's account, the law was stacked against him—particularly if he was in competition with a marketer selling similar goods who happened to be white.<sup>240</sup> They had to be careful of who they traded with because if they were robbed, they likely had no redress; given their history of trading with neighboring plantations on their masters' accounts, they were well practiced in selling to those who they knew well.<sup>241</sup> This theme accords well with broader themes in the law and economics literature that explain how business operators insulate themselves from bad actors by dealing primarily with either those who they know or who are co-ethnics.<sup>242</sup>

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<sup>237</sup> See *id.* at 33 (discussing how slaves derived income from such markets).

<sup>238</sup> HIGMAN, *supra* note 113, at 237. The lucrative nature of slave commerce is supported by evidence demonstrating that slave higglers might accumulate sufficient earnings to buy their freedom. See Rhoda Reddock & Jasmine Huggins, *Agriculture and Women's Place: The Impact of Changing National Policies on Women's Agricultural Work in Trinidad and Tobago*, in GENDER: A CARIBBEAN MULTI-DISCIPLINARY PERSPECTIVE 324, 328 (Elsa Leo-Rhynie et al. eds., 1997) (explaining how some slave women in Trinidad and Tobago used their proceeds from Sunday markets to purchase their freedom).

<sup>239</sup> See Bertram, *Part 4*, *supra* note 199 (noting that planters used "their dominance of [the] judiciary to deny [slaves] justice in the courts of the land").

<sup>240</sup> See BECKLES, *supra* note 113, at 72–85 (delineating a series of laws that were biased against slave marketers and in favor of white marketers).

<sup>241</sup> See BECKLES, *supra* note 113, at 82–83 (noting that slave marketers had minimal redress if they were robbed); Bertram, *Part 1*, *supra* note 199 (noting that the slave marketers had a history of selling to neighboring plantations).

<sup>242</sup> Both the diamond and cotton trades that Lisa Bernstein has studied in detail demonstrate this phenomenon. Both trades appear to be closed, with participation limited to businesspersons from particular religious, ethnic, or family groups. See Bernstein, *supra* note 14, at 116 (arguing that one of the ways that the diamond industry is able to enforce contracts without resorting to the legal system is by dealing with ethnically homogeneous groups); Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1750–52

In some respects, formal law appears to have recognized the de facto contracting power of slaves early on by default. In an effort to protect their own monopolies in certain sectors of the economy, colonial authorities promulgated legislation in Barbados in the early 1700s indicating items that higglers could not sell.<sup>243</sup> In so doing, the colonial authorities implicitly indicated that they would not interfere with the higgler trade as long as they did not trespass on the listed protected areas of the economy.<sup>244</sup> That is, any item that did not appear on the prohibited list was fair game. Moreover, it appears that the English recognized early that continued expansion of slaves' marketing activities was inevitable. For example, in Jamaica, the colonial authority granted legal rights to slaves to market specific commodities as early as 1711.<sup>245</sup> By 1735, slaves' trading activities played such an important economic role that a new law was promulgated allowing the slaves to

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(2001) (explaining how the cotton industry assures contractual performance by encouraging family and social bonds within the industry). Other scholars have indicated similar closed universes in other industries. *E.g.*, Jack L. Carr & Janet T. Landa, *The Economics of Symbols, Clan Names, and Religion*, in *TRUST, ETHNICITY, AND IDENTITY: BEYOND THE NEW INSTITUTIONAL ECONOMICS OF ETHNIC TRADING NETWORKS, CONTRACT LAW, AND GIFT-EXCHANGE* 115 (Janet T. Landa ed., 1994) [hereinafter *TRUST*] (considering the ethnicity-based rules that different closed groups in particular sectors use to enforce contracts); Avner Grief, *Contract Enforceability and Economic Institutions in Early Trade: The Maghribi Traders' Coalition*, 83 *AM. ECON. REV.* 525, 526, 530–31 (1993) (discussing reputational reinforcements to contracting in the context of Maghribis, early Medieval Jewish traders in the Mediterranean region); Janet T. Landa, *A Theory of the Ethnically Homogeneous Middleman Group: An Institutional Alternative to Contract Law*, in *TRUST*, *supra*, at 101 (arguing that market exchanges based on ethnic ties economize the enforcement of contracts within less-developed economies).

<sup>243</sup> See Mintz & Hall, *supra* note 38, at 15 (explaining that as early as 1711, slaves were restricted from selling certain goods and permitted to sell others).

<sup>244</sup> See *id.* ("Formal legal acknowledgement of the slaves' rights to market had been given, in negative form at least, as early as 1711 . . ."); see also BECKLES, *supra* note 113, at 75–76 (describing a 1708 Barbados law that, although ineffectively aimed at restricting slaves from trade markets, formally legalized their right to trade with Whites as long as they limited their marketing to certain categories of products). In Barbados, the authorities initially appeared less inclined to tolerate slave commerce than they were in Jamaica, as indicated by the promulgation of the 1688 Slave Code in Barbados prohibiting slaves from carrying "goods and wares" from home to home. Moreover, the 1688 Slave Code made clear that slaves carrying goods outside of the plantation would be assumed to be in possession of stolen goods. Yet, reflecting the ineffectiveness of law in the face of customary arrangements, the slaves' marketing activities continued with the implicit cooperation of the English planter class. See BECKLES, *supra* note 113, at 74–79 (describing the vitality of slave marketing activities in Barbados despite legislative action aimed at stopping it); see also Handler & Sio, *supra* note 139, at 241 (discussing several seventeenth- and eighteenth-century laws that attempted to arrest and circumscribe slave marketing activities).

<sup>245</sup> *Id.*

“carry about, and sell, all manner of provisions, fruits, fresh fish, milk, poultry, and other small stock of all kinds . . . .”<sup>246</sup>

The tacit recognition of slaves as market players appears to have spread quickly to other islands, such as Antigua and Barbados, among others.<sup>247</sup> This convergence around a *de facto* grant of property rights and contracting power to slaves in different islands reinforces the view that even across islands, plantation owners understood “the convergence of interests” between themselves and the slaves. As one planter noted:

The practice which prevails in Jamaica of giving Negroes land to cultivate . . . is universally allowed to be judicious and beneficial, producing a happy coalition of interests between the master and the slave. The negro who has acquired by his own labor a property in his master’s land has much to lose, and is therefore less inclined to desert his work.<sup>248</sup>

The bottom line, recognized by this planter and by numerous others, was that “planters recognized the peril of . . . breaking what had the effect of a compact”<sup>249</sup> and of ruining a relationship that carried benefits for both the plantation owner and the slave. As a result, this system of land ownership and marketing became so institutionalized that “it would have been profitless and dangerous to interfere”<sup>250</sup> with it.

Moreover, this system also had important macroeconomic implications. Through their industry, the slaves accumulated assets, and these assets were important to the local economy. Edward Long, an oft-quoted gentleman-farmer who functioned as an informal economist, estimated that in 1791, there were approximately 50,000 pounds sterling in circulation in Jamaica, and that of this, 10,000 pounds

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<sup>246</sup> *Id.* (quoting 2 LONG, *supra* note 215, at 492). Take for example the following 1711 statute promulgated by the British Governor of Jamaica: “Hawking about and selling goods (except provisions, fruits and other enumerated articles) to be punished, on conviction before a magistrate . . . . This restraint is construed to extend only to beef, veal, mutton and saltfish; and to manufactures, except baskets, ropes of bark, earthen pots, and such like.” Mintz & Hall, *supra* note 38, at 15 (internal quotation marks omitted) (quoting 2 LONG, *supra* note 215, at 486–87).

<sup>247</sup> Consider the writings of a West Indian planter-commentator who approvingly reflects on the model, used in both St. Vincent and Jamaica, of allowing slaves to produce for themselves from their own provision grounds: “[T]he situation of the negro is in proportion to his industry; but generally speaking, it affords him a plenty that amounts to comparative wealth, viewing any peasantry in Europe.” Mintz & Hall, *supra* note 38, at 10 (quoting WILLIAM YOUNG, *A TOUR THROUGH THE SEVERAL ISLANDS OF BARBADOES, ST. VINCENT, ANTIGUA, TOBAGO, AND GRENADA, IN THE YEARS 1791 & 1792* (1801)).

<sup>248</sup> DEERR, *supra* note 158, at 344.

<sup>249</sup> McDONALD, *supra* note 136, at 16.

<sup>250</sup> MINTZ, *supra* note 58, at 194.

belonged to the slaves.<sup>251</sup> By the time of the American Revolution, the West Indies were among the most valuable colonies in the empire.<sup>252</sup> The slaves appear to have been critical economic actors in this wealth generation. Precisely because the formal and informal sectors were so intertwined, the colonial authorities ultimately came to understand that slave higglers made significant economic contributions to the viability of the island states, and by extension to the British Treasury.<sup>253</sup>

*B. The Transition to Formal Property Ownership and Acquisition Among the Newly Freed*

In 1838 slavery was abolished in the British West Indies.<sup>254</sup> In Jamaica, the largest of the West Indian colonies, about 300,000 former slaves received their freedom during emancipation.<sup>255</sup> Around half of these slaves had previously been rural slaves employed on sugar estates.<sup>256</sup> It was from this group of de facto property owners and contracting parties that real property owners and contractors soon emerged.<sup>257</sup>

Prior to full emancipation, there was a period in which newly freed men served as apprentices on plantations.<sup>258</sup> Apprenticeship was conceived as a mixed slave labor, free labor period to prepare for full emancipation. Although in practice many slaves continued to be treated as they had been in slavery, during an apprenticeship, the slave was technically to be compensated for work beyond the time allocated for compulsory labor.<sup>259</sup> While many slaves continued to

<sup>251</sup> Mintz & Hall, *supra* note 38, at 15.

<sup>252</sup> *Supra* note 142 and accompanying text.

<sup>253</sup> See Mintz & Hall, *supra* note 38, at 19–20 (describing the increasing importance of slave marketing to the Jamaican economy and its consequent acceptance by planters).

<sup>254</sup> See HOLT, *supra* note 38, at 7–8 (explaining that in the early 1800s, “Great Britain took its first steps toward dismantling its American slave empire . . . [by] abolish[ing] the slave trade in 1807, requir[ing] . . . slaveowners to ameliorate the living and working conditions of slaves in 1823 . . . and proclaim[ing] complete emancipation in 1838”).

<sup>255</sup> SHERLOCK & BENNETT, *supra* note 141, at 213 (noting that there were more than 300,000 slaves on the island).

<sup>256</sup> HOLT, *supra* note 38, at 121.

<sup>257</sup> WILMOT, *supra* note 125, at 6–12 (describing the foundation of religious settlements and independent communities shortly after emancipation which resulted in 50,000 former Jamaican slaves owning an average of three acres each).

<sup>258</sup> See SHERLOCK & BENNETT, *supra* note 141, at 230 (discussing the apprenticeship system that was enacted throughout the British West Indies and served as a predecessor to full freedom); see also HOYOS, *supra* note 61, at 127–30 (discussing the extensive use of the apprenticeship system and noting that only the colony of Antigua rejected it). In examining Antigua, the lone holdout to the apprenticeship system, Hoyos explains that Antiguan planters argued that apprenticeship was unnecessary, would be expensive, might negatively affect labor relations, and had the potential to incite unrest and revolt. *Id.* at 127–28.

<sup>259</sup> As described in detail:



work the land that had been allocated to them as slaves during the period of apprenticeship, formal property rights were not, however, generally granted to them during the apprenticeship period.<sup>260</sup>

During this period and the period directly following apprenticeship, missionaries bought large parcels of land in trust for the former slaves.<sup>261</sup> In so doing, the missionaries appear to have circumvented the denial of formal property rights to the newly freed men.<sup>262</sup> Thus, the newly freed men could acquire land and even enter into longer-term contracts for the sale of produce, secure in the knowledge that they were more than constructive landowners: They were property owners in waiting.<sup>263</sup> Remarkably, Baptist missionaries in particular appear to have acted not only as trustees, but also as real estate agents, actively seeking out land for their congregants.<sup>264</sup> The cash required for these land purchases overwhelmingly was provided directly by the slave apprentices; the missionaries simply acted as facilitators.<sup>265</sup>

During this period of apprenticeship, another group of slaves was able to secure land entirely through their own efforts. This second

Apprenticeship was a half-way covenant in which the relationship between the planter and the worker was much the same as that between master and slave for forty and one-half hours of the work week, but during the balance of the week they were to assume the respective statuses of employer and employee freely negotiating conditions of work and wages.

HOLT, *supra* note 38, at 56–57.

<sup>260</sup> This is supported by the writings of a special magistrate in Jamaica who noted that while apprentices (only recently slaves) were willing to work, they were clearly saving to facilitate a transition to formal land ownership when their apprenticeships formally ended and they became free persons. *Id.* at 143.

<sup>261</sup> See SHERLOCK & BENNETT, *supra* note 141, at 236–37 (explaining that missionaries obtained loans from their English friends to buy plots of land for sale to former slaves).

<sup>262</sup> *Id.*

<sup>263</sup> WILMOT, *supra* note 125, at 6–7 (“[T]he establishment of these villages was a family enterprise as the freedpeople . . . pooled their resources to establish a place/space in which to cement their freedom. . . . [M]issionaries were primarily the intermediaries who purchased the land while the freedpeople provided . . . resources to develop the new villages.”).

<sup>264</sup> SHERLOCK & BENNETT, *supra* note 141, at 236–37; see also WILMOT, *supra* note 125, at 6–12 (providing an overview of various missionary land purchases for the purposes of growing communities and congregations after emancipation); MARY TURNER, *SLAVES AND MISSIONARIES: THE DISINTEGRATION OF JAMAICAN SLAVE SOCIETY 1787–1834* (1998) (discussing the role of Baptists and other missionaries in the Jamaican struggle for emancipation).

<sup>265</sup> The five free villages in the Dry Harbour Mountains provide one such example. By 1841, the freedpeople of the area spent £10,000 purchasing land to establish these villages through their minister John Clark. WILMOT, *supra* note 125, at 9. In 1839 alone, Clark purchased 120 acres of land, most of the cost of which was put down by a group of eighty people. See, e.g., *id.* (“Clark recalled . . . that his church members were ‘anxious to get land of their own . . . they applied to [him] . . . to buy such properties, on their behalf, as were in the market.’”).

group of newly freed men was able to secure hilly land that had been deemed infertile but which adjoined existing plantations.<sup>266</sup> As one commentator notes, “two years after abolition . . . some apprentices were already purchasing small plots of [mountain] land to work at the end of their apprenticeship either in their spare time or exclusively.”<sup>267</sup>

A third group of former slaves remained on their provision grounds.<sup>268</sup> While under formal law, these freedmen would technically have been squatters (particularly if they declined to continue working with the plantation), under creole convention there was little doubt that many slaves considered their former provision grounds to be their own.<sup>269</sup> Not only did the freedmen consider the land to be their own, this “ownership” seemed to be recognized by outsiders as well. That is, newly freed men who remained on their provision grounds were often left on these plots undisturbed.<sup>270</sup>

A fourth group of slaves was able to acquire title to whole plantations. This group acquired “[s]ome of the plantations which could not compete under the [post-emancipation] changed labor and marketing conditions.”<sup>271</sup> As one commentator explained, these were “purchased by the new peasantry, and thereby passed into the peasant sector.”<sup>272</sup> Thus, poetically, some slaves became freeholder owners of their former plantations. Within ten years of emancipation, “the pattern was clear[ ]. Often entire plantations were purchased and subdivided among the tenant[ ]” freedmen.<sup>273</sup> This pattern was replicated

<sup>266</sup> See DOUGLAS HALL, *FREE JAMAICA 1838–1865: AN ECONOMIC HISTORY* 16–22 (1959) (discussing the locations former slaves were limited to in buying land after emancipation).

<sup>267</sup> HOLT, *supra* note 38, at 143–44.

<sup>268</sup> Some of these slaves, who by remaining on the provision grounds remained in close proximity to the plantations, nevertheless declined to work for pay on the plantations. See *id.* at 66–67 (discussing how slaves’ decisions whether to continue to work on the plantations were influenced by the availability and productivity of their provision grounds).

<sup>269</sup> See BESSON, *supra* note 192, at 142–43 (discussing the survival of slaves’ land rights to these provision grounds upon emancipation); cf. Smith, *supra* note 171, at 103 (noting that land use in British Caribbean societies is often governed by a “customary and traditional” system, “which neither observes the forms nor directly invites the sanctions of law”).

<sup>270</sup> See HOLT, *supra* note 38, at 137 (describing Governor Metcalfe, the colonial governor during the period of apprenticeship, observing “the old connexion” between planter and ex-slave, the planter wanting to keep his labor force close by and the ex-slave wanting to stay on the property that he had long occupied). It bears emphasis that this did not preclude some planters charging rent, which was a source of resentment for many former slaves. *Id.* at 136–37.

<sup>271</sup> NORMAN GIRVAN, *FOREIGN CAPITAL AND ECONOMIC UNDERDEVELOPMENT IN JAMAICA* 7 (1971).

<sup>272</sup> *Id.*

<sup>273</sup> HOLT, *supra* note 38, at 145.

throughout the West Indies. For example, in Guyana there is substantial evidence of newly freed men functioning as entrepreneurs in the real estate markets. Newly freed men bought substantial portions of Guyana's best-known plantations; some even assumed the roles of realtors and were actively involved in brokering land deals between the owners of failing plantations and newly freed slaves.<sup>274</sup>

All in all, the changes were dramatic. In 1845, less than a decade after the emancipation of Jamaica's slaves, the best estimates are that in Jamaica registered land alone supported as many as 66,000 people—over twenty percent of the formerly enslaved population.<sup>275</sup> Moreover, although freedmen lacked access to formal credit markets, robust land markets appear to have fueled the growth of informal collective savings schemes, which provided credit to participants.<sup>276</sup> Preceding the informal financing arrangements that undergird later West Indian success in the real estate sector in New York, these savings schemes allowed the newly freed men to finance land purchases. These schemes were supported by a system of customary norms and enforcement mechanisms that minimized default among borrowers.<sup>277</sup>

#### CONCLUSION

I have argued that informal conditions in the West Indies' slave economy approximated formal property regimes, allowing for and reinforcing asset acquisition among Black West Indians who, upon immigration to the United States, leveraged their past experiences of property ownership and contracting to become successful in the vibrant U.S. property market. This narrative is not new. It has shades of Hernando de Soto, who has famously documented the positive asset-building implications of property regimes, particularly when

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<sup>274</sup> For example, in Guyana, a newly freed man bought a portion of a plantation, subdivided this plantation into lots, and sold the lots to other Africans at a profit. Odeen Ishmael, *The Guyana Story (from Earliest Times to Independence)*, Ch. 54: *The Village Movement*, GUYANA.ORG, <http://www.guyana.org/features/guyanastory/chapter54.html> (last visited Feb. 21, 2014). There is also evidence of Africans forming collectives to purchase former plantations. In Guyana, the English owner of Northbrook, another well-known plantation, sold his property to a collective of eighty-three newly freed men for £2000 (\$10,000). *Id.* With the rising demand for property, prices quickly appreciated. One year later, a smaller plantation, Beterverwagting, was bought by a collective of sixty-one Africans for \$22,000. *Id.* Arguably the most famous freed village in the West Indies, Buxton (named after the abolitionist parliamentarian), was formerly a plantation of 800 acres that was purchased by a collective of 128 Africans. *See id.*

<sup>275</sup> HOLT, *supra* note 38, at 144.

<sup>276</sup> A description of the connection between land, informal collective savings schemes, and credit more generally among free Africans is included in JOSIAH, *supra* note 125, at 145.

<sup>277</sup> *Id.*

they are formal.<sup>278</sup> It is also remarkably similar to that of the early European migrants to Jamestown or Plymouth. Both these groups made very early transitions to individual property ownership<sup>279</sup> and, in doing so, laid the groundwork for later success. Like the Jamestown and Plymouth settlers, West Indian Blacks experienced an early and rapid shift to individual property ownership. This Article contends, however, that the root of this shift lies within the institution of slavery and outside the United States.

In one sense, this history is unremarkable. We have heard it before with respect to other groups in other contexts. We have also heard the narrative with respect to contracting before.<sup>280</sup> We understand that informal contracting helps explain the success of particular ethnic and religious groups in certain business sectors.<sup>281</sup> Yet this history *is* remarkable in how little attention it has been given in the specific context of West Indian migrants. Instead, the literature has been focused on comparing West Indians and African Americans in light of cultural and institutional (including racial) barriers to asset acquisition.

On first glance, the historical narratives of informal property and contracting rights seem to support a structural account of West Indian asset acquisition.<sup>282</sup> A structural narrative would emphasize that, precisely because of their history of property ownership and informal contracting, West Indians were likely to possess assets that compounded over time. Yet these historical narratives could support either a cultural or a structural account of West Indian asset

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<sup>278</sup> See HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* (2000) (claiming that the institution of formal property rights will transform dead assets that are unable to produce capital into capital-producing assets); HERNANDO DE SOTO, *THE OTHER PATH: THE ECONOMIC ANSWER TO TERRORISM* 159–60 (2002) (noting that secure property rights “encourage holders to invest in their property because of their certainty that the property will not be usurped. . . . [T]herefore, the true purpose of property rights is . . . to give [owners] incentive to increase the value of their assets by investing, innovating, or combining them advantageously”).

<sup>279</sup> These three pioneer settlements are discussed extensively in Ellickson’s work. See Ellickson, *supra* note 122, at 1335–39 (discussing the settlers’ switch to private ownership and subsequent gains in productivity).

<sup>280</sup> See *supra* notes 42–44 and accompanying text (discussing how communal norms can approximate some functions of contract law).

<sup>281</sup> See, e.g., Bernstein, *supra* note 14, at 138–41 (1992) (describing the importance of reputation and social bonds in ethnically homogeneous markets).

<sup>282</sup> Supporters of the structural school of thought argue that most asset acquisition can be traced back to institutional factors that systematically favor some groups and disadvantage others. Cf. WILLIAM JULIUS WILSON, *MORE THAN JUST RACE: BEING BLACK AND POOR IN THE INNER CITY* 5–6 (2009) (describing the impact of structural differences on racial group outcomes, including indirect economic forces that can leave particular racial groups unable to fully participate in economic life, to the benefit of other groups).

acquisition. The cultural account would argue that the individual and collective experience of (de facto) ownership, contrary to the typical plantation tradition associated with the West Indies, created a cultural outlook that empowered West Indians to respond well to conditions in the United States. Accordingly, this Article does not tell a story that is entirely structural or entirely cultural. Rather, it seeks to reframe the debate such that property and contract rights—a heretofore unappreciated narrative thread—reenter the equation.

What does this mean in concrete terms? First, it bears noting that this unconventional narrative may have an analytical payoff with respect to the native African American (as opposed to West Indian) business community. Much has been made in the historical literature of the tight-knit African American business community that existed in spite of (and one might even say because of) segregation. The contention is essentially that contractual relations were aided by the close ties that undergirded the African American business community in conditions of segregation.<sup>283</sup>

This appears to be a softer version of the narrative offered by Bernstein, Posner, Chua, and others in relation to ethnically and religiously homogeneous groups who are highly successful in particular business sectors.<sup>284</sup> Ironically, in the aftermath of the civil rights movement, integration (despite providing innumerable opportunity-enhancing benefits) opened up communities to outsiders, and in so doing, undermined the tight-knit nature of those communities. The question is whether these new conditions undermined the communal norms that were so integral to market relations.<sup>285</sup>

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<sup>283</sup> See, e.g., *Small Business and Economic Development in the Negro Community: Hearing Before the Select Comm. on Small Bus.*, 91st Cong. 2–5 (1969) (statement of Andrew F. Brimmer, Member, Board of Governors of the Federal Reserve System), available at [http://fraser.stlouisfed.org/docs/historical/federal%20reserve%20history/bog\\_members\\_statements/brimmer\\_19690725.pdf](http://fraser.stlouisfed.org/docs/historical/federal%20reserve%20history/bog_members_statements/brimmer_19690725.pdf) [hereinafter *Hearing*] (discussing the economic impact of segregation and desegregation on the African American business community).

<sup>284</sup> See Bernstein, *supra* note 14, at 140–41 (finding “Jewish law provided detailed substantive rules of commercial behavior, and the Jewish community provided an array of extralegal dispute resolution institutions” for the “modern organization of the diamond industry”); Chua, *supra* note 1, at 32 (attributing the successful development of “commercial advantageous cultural traits” in the Chinese and Indians to their exclusion from “positions of political influence” as well as their “small size and social connectedness”); Posner, *supra* note 14, at 165–75 (describing informal contracting among Korean, Japanese, and West Indian migrants, particularly in informal credit associations).

<sup>285</sup> See, e.g., *Hearing, supra* note 283, at 3 (statement of Andrew F. Brimmer, Member, Board of Governors of the Federal Reserve System) (“The recent progress toward desegregation in the United States . . . has eroded the position of many Negro businessmen who were dependent upon segregation to protect their markets.”).

These are controversial questions, but they cannot easily be dismissed. Because the narrative offered here is not only about property, but is also about contract—namely the informal contracting arrangements undergirded by communal networks which facilitated West Indian business success—the prediction that African American business would suffer when tight-knit communal networks were undermined may have indeed been prescient. Clearly, there are other factors at play, such as the opening of markets that integration necessarily facilitated, but this particular factor should not be easily dismissed. These questions provide fertile ground for further scholarship.

One final point bears emphasizing: Why would we think of Black migrant asset acquirers any differently than we would think of other groups? Even Francis Fukuyama, arguably the most famous cultural theorist, notes that the patterns of asset acquisition among certain successful minority migrant groups in the United States have been influenced by long-held patterns of property acquisition and contracting in their historical experience.<sup>286</sup> For example, while not drawing a straight line from the emphasis on individual property ownership among early Mormon migrants in Salt Lake City to Mormons' modern success in asset acquisition, Fukuyama evidently believes that a community's historical relationship to property ownership is relevant.<sup>287</sup> So the question becomes: Why would we view West Indians any differently? Moreover, if the property narrative is augmented by communal networks that approximate formal law by reducing transaction costs and facilitating contractual relationships, the question should not be: Why have West Indians done so well at asset acquisition? Rather, the question should instead be: Why wouldn't they?

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<sup>286</sup> For a discussion of the influence of historical patterns of property acquisition with respect to various immigrant ethnic groups, see FUKUYAMA, *supra* note 4, at 97, 290–92, 304 (discussing the influence of historical patterns of property acquisition with respect to Chinese, Mormon, and Jewish Americans).

<sup>287</sup> See *id.* at 290–92 (discussing early migration, property enhancement, and community amongst Mormons as one of the predicates of modern Mormon economic success and group cohesion).