

The Illegal Beginning of American Negro Slavery

by William J. Wood

Every Englishman treasured his birthright of liberty under the common law, which forbade slavery. The original Virginia Charter documents also guaranteed liberty. Yet the English colonies developed a form of total chattel slavery described as "as degraded as any in western civilization". How did this incredible aberration occur in view of the great Anglo-American tradition of freedom?

ALL ENGLISHMEN treasured their birthright of freedom, and for 100 years they looked with scorn on the Spanish New World venture to which slavery was so integral. Yet the Negroes brought to America, after a brief equivocal period during which their fate teetered between freedom and slavery, would fall into a form of total chattel slavery peculiar to the North American Continent and described by Professor Herbert S. Klein as "as degraded as any . . . in Western civilization".¹ In the case of Virginia, the fate of the Negro was sealed as total chattel slavery by 1662, forty-three years after the arrival of the first Negroes in Jamestown. What forces conspired during these four decades to produce this incredible aberration in the great Anglo-American tradition of freedom?

One thing is certain. Slavery was originally illegal in Virginia and the other English colonies. The first charter granted by James I to the Virginia Company in 1606 recited that all colonists "shall have and enjoy all liberties, franchises and immunities within any of our other dominions, to all intents and purposes as if they had been abiding and born within the realm of England". The accompanying royal orders directed the Council of the Virginia Company to follow the "common law and the equity thereof".² In 1609, a revised charter placed Virginia under the King "as of our manour of East Greenwich" and reiterated that colonists should enjoy all liberties of Englishmen as if they dwelt within the English realm.³

Most of the early Negro arrivals at Jamestown were former slaves pirated from New Spain, but there was no institutional basis for enslaving them in Virginia. So these early blacks entered

a legal limbo in which there coalesced certain fateful forces, some internal, some external, some by happenstance, but some by very foul design. Yet these forces could not have resulted in slavery but for the astonishing silence of seventeenth-century English lawyers, judges and public officials on both sides of the Atlantic. During this conspiracy of silence the colonists borrowed the institution of slavery from the vastly different culture and jurisprudence of Spain, adapting it to their own uses.

See No Evil, Hear No Evil

The initial illegality of slavery in the English colonies does not imply an unfamiliarity with the institution. When Jamestown was founded in 1607, New Spain had been a thriving enterprise in the Caribbean for about 100 years, and slavery was part of New Spain from its beginning. Unlike England, Spain had a tradition of slavery dating back to the Moors, when Moslem and Christian in turn enslaved one another. A body of Spanish jurisprudence therefore ex-

1. KLEIN, *SLAVERY IN THE AMERICAS—A COMPARATIVE STUDY OF VIRGINIA AND CUBA* 56 (1967). Generally, only direct quotations are footnoted herein. In addition to Professor Klein's brilliant treatise, the following were major sources:

ABBOTT, *THE CHILD AND THE STATE* (1938);
ANDREWS, *THE SOUL OF A NATION* (1943);
BALLAGH, *A HISTORY OF SLAVERY IN VIRGINIA* (1902);

BRUCE, *INSTITUTIONAL HISTORY OF VIRGINIA IN THE 17TH CENTURY* (2 volumes, 1896);

ECERTON, *A SHORT HISTORY OF BRITISH COLONIAL POLICY* (1897);

HOWISON, *A HISTORY OF VIRGINIA* (2 volumes, 1846);

THE NEGRO IN VIRGINIA (Federal Writers Project, Virginia, 1940);

SMITH, *COLONISTS IN BONDAGE* (1947);
TANNENBAUM, *SLAVE AND CITIZEN, THE NEGRO IN THE AMERICAS* (1947).

2. ANDREWS, *supra* note 1, at 45, 54.

3. *Id.* at 118-119.

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isted relating to the rights and obligations of master and slave.

The Spanish slave enjoyed the right to marriage and other family rights. Manumission was officially encouraged, and cruel punishment was illegal. Thus, the slave in New Spain remained a person in legal cognizance, in contrast to the English colonies, where he ultimately became a chattel with no rights in legal cognizance.

England's First Slaver —an Instant Hero

The allure of the vast Spanish undertaking in the New World, with its attendant wealth and sea power—and African slaving—was not lost on Elizabethan England. In 1562, John Hawkins, cousin of Sir Francis Drake, conceived the idea of selling slaves to Spanish colonists, despite the Spanish embargo on trade with non-Spaniards. Hawkins picked up a cargo of Negroes on the African coast and successfully peddled them in Spanish America, thereby becoming England's first **slaver**. For this feat Captain Hawkins became an instant hero at home.

Drake and the other sea dogs soon followed Hawkins into the exciting and profitable game of piracy on the Spanish Main, and English slaving became merely one aspect of English piracy. Negroes were considered simply one form of booty to be taken from the opulent Spanish.

Nevertheless, those first black arrivals at Jamestown were not enslaved immediately. Rather, they were assimilated into that singular institution known as indentured servitude for a term of years improvised by the Virginia Company from the child labor laws of Elizabethan England.

The Elizabethan period was hard on the poor in England. With idlers everywhere, it was generally thought that the cure-all for poverty was work, forced labor if necessary. In this situation, in 1562, forty-five years before the founding of Jamestown, Parliament borrowed from the guild system in London, where it was customary for youngsters to be apprenticed to a craftsman to learn a trade, under an indenture between the craftsman and

the parents, for a term of years. The Statute of Apprentices (1562) declared in part: "Every . . . householder . . . exercising any . . . occupation . . . may . . . retain the son of any freeman not occupying husbandry, nor being a labourer . . . to . . . be bound as an apprentice . . . for 7 years at the least, so as the term . . . do[es] not expire . . . afore such apprentice shall be . . . 24."⁴

This statute surely acclimated Englishmen to the concept of bonded servitude. But it failed in its purposes, for the unemployment problem remained, and by the 1590s famine gripped England.

At length Parliament passed the Poor Laws, intended to end the wanderings of the poor. The Act of 1601 declared: ". . . the church wardens of every parish . . . shall be overseers of the poor . . . and . . . shall take order . . . for setting to work the children of all whose parents shall not . . . be thought . . . able to . . . keep . . . their children . . . and . . . for putting out of such children to be apprentices . . ."⁵ Other sections authorized the putting to work of unemployed adults for terms of years. So by 1606, when James I chartered the Virginia Company to plant a colony on North America, the idea of forced labor in bonded servitude was an accepted national policy of Stuart England.

From 1607 to 1618 the company in London labored to recruit venturesome souls to ship over, but the Jamestown foothold remained tenuous. In 1618 the impoverished company finally hit on a simple method to assure a growing volume of new colonists—*privately* indentured servants. Under this arrangement, a planter in Virginia would guarantee payment of passage of a new colonist. The recruit would sign an indenture in London, becoming, on arrival at Jamestown, the indentured servant of the planter for a specified term, such as seven years. The concept of indentured servants in Virginia and the other colonies was thus borrowed from the English Poor Laws.

Soon the method was simplified further: An enterprising captain or ship owner would himself enlist recruits at

London. On arrival at Jamestown, the recruits would be auctioned off to the highest bidder for a specified term by the captain at dockside. This rapidly became the common method of immigration. The rule soon arose in Jamestown (and other colonial ports) that any person without fare on arrival would simply be auctioned at dockside into indentured servitude. This system, which was practical and economical, and legal by custom and usage, was probably considered fair by all concerned given the precedents for indentured labor in England.

Such was the situation when the first twenty Negroes arrived in 1619. As part of a prize taken by piracy from a Spanish ship in the Indies, they were simply indentured "for their passage". The proceeds of the auction went to the owners of the pirate ship. Had future arrivals continued on a casual basis, they might all have been absorbed as indentured servants and ultimately have become free Americans.

A More Than Casual Interest in Stolen Negroes

However, to the group of English traders who owned the pirate vessel, the arrival of the first Negroes at Jamestown was of more than casual significance, for they had already introduced stolen Spanish Negroes to Bermuda and planned to use Jamestown in a similar and larger pirate scheme. (There always had been and always would be enormous profit in slaving. At the peak of the trade, one could realize a 30 per cent gain on each Negro kidnapped in Africa and auctioned in Jamestown or some other colonial port, despite an average 50 per cent loss by death or suicide among the black cargo.)

This group of ship owners was loosely identified with James I and was led by **Robert Rich**, later to be the Earl of Warwick, a prominent investor in the Virginia Company.

4. This is a synoptic extract of Section 26 of 5 Eliz., c. 4 (also known as Statute of Artisans) from a translation quoted in ABBOTT, *supra* note 1, at 81 *et seq.*

5. ABBOTT, *supra* note 1, at 97.

Slaver, Pirate and Then Puritan Hero

Robert Rich, born in 1587, the educated son of a nobleman, displayed a remarkable talent throughout his life for thriving on adversity and an uncanny ability to cast his lot with the winning side in any conflict. History piously remembers him largely as a leader of the Puritan Revolution, but overlooks the fact that he was a pirate and the first English black **slaver** to put the gruesome traffic on a business-like basis.

Warwick and his group in 1614 first obtained a charter from James I for a joint stock company known as the Company for the Somers Isles. The ostensible purpose of the company was to colonize and develop trade with Bermuda (then known as the Somers Isles), but it was a thinly veiled disguise for pirating the Spanish Main. Under this charter Warwick initially outfitted two vessels in 1616, dispatching them to the West Indies for sugar cane and Negroes to introduce to the Bermudas.

After the promising results of this initial slaving venture, Warwick embarked on a more ambitious one in 1618. His apparent scheme was to use Jamestown and the Bermudas as a rendezvous for raiding the Spanish shipping in the Caribbean. For this, he allied himself with an infamous cut-throat, Captain Samuel Argall, the acting governor of Jamestown.

Argall made trouble in Jamestown from his arrival in 1609 until he fled in 1619 to escape arrest. It was he who kidnapped Pocahontas and constantly agitated the Indians. Later, serving as acting governor of the colony from 1616 to 1619, he sacked the storehouse, employed his office openly for personal enrichment and almost wrecked the entire Jamestown venture. Finally, the Virginia Company Council in London appointed a new governor, sending him to Jamestown to arrest Argall. But Lord Warwick quickly sent a ship ahead, whereby Argall escaped, returning with his booty to London before the governor arrived. Argall finally went to trial in London, but finagled his way out of the charges and

was actually knighted by James in 1622.

Before leaving Jamestown, Argall had enabled Warwick to initiate his Jamestown-based venture in piracy and slavery. The details are smothered with conflicting reports, and the whole affair was secret, but the facts appear to be substantially these: To give his venture a semblance of legality and to obscure the true English involvement, Warwick took his two newly outfitted pirate ships and placed one or both under commission of the Duke of Savoy, Charles Emmanuel I, who was at war with Spain. In addition, he obtained letters of marque from the Dutch Prince of Orange, also at war with Spain, to give his piratical acts a further appearance of legality. Warwick sent one of the ships, *The Treasurer*, to Jamestown, where Argall fitted it out and sent it forth for Spanish plunder. The sister ship apparently stopped at Bermuda, then captured the twenty Negro slaves from the Spanish that were delivered to Jamestown in 1619. The official records show that they were delivered by a Dutch ship, but most authorities agree that the pirate vessel was "Dutch" only insofar as it sailed under the Dutch letters of marque that Warwick simply had bought as a cover. Later in 1619 *The Treasurer* herself arrived with a second load of captured Negroes, but Argall had already fled from arrest and the Jamestown colonists feared Spanish reprisal, so *The Treasurer* unloaded only one Negro and departed with the rest of its black cargo for Bermuda.

Complicity on the Part of the King?

It is impossible to say whether or not King James himself may have had a share in the Warwick-Argall pirate-slaving enterprise. But in any case, after Argall was acquitted of all charges in London, pressure by the Crown on the Virginia Company's management increased.

From its beginning in 1606, the Virginia Company had been controlled by a relatively altruistic faction known as "the liberal party". But the Warwick group, allied with James I, had stead-



Noble Bretzman

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ily gained power in the company's council in London. Although friction between the liberals and James first became obvious in the case of Captain Argall, other troubles soon followed.

In 1622 Virginia suffered the Great Indian Massacre, during which 347 people out of a total population of 1,240 were slaughtered. This incident was seized on by the Warwick-Argall group as evidence of mismanagement. Finally, in 1624 the King dissolved the Virginia Company, taking direct control of the colony under royal decree.

The fall of the Virginia Company initiated a thirty-eight year period of transition during which the status of the Negro steadily deteriorated in the face of the growing profits realized from slaving by pirates like Warwick. This transition is difficult to trace because of its insidious development under the "official pretense"⁶ that lifetime servitude did not exist in Virginia or the other colonies. But the transition was evident in both the judicial process and the legislative process. Negro slavery evolved simultaneously, yet independently, in both branches of the colonial government.

In this period the county courts

6. BALLACH, *supra* note 1, at 35.

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began to recognize "the institution [of lifetime servitude] as it was being created in practice by the planters".⁷ So the Negro came to be held under "a loose approximation of the indenture system", to become free or remain in lifetime servitude at the whim of his master or perhaps some county court.⁸

A judicial inventory of a decedent's estate in 1643 showed a white boy with seven years to serve valued at only 700 pounds of tobacco, but an 8-year-old Negro girl was valued at 2,000 pounds and a Negro boy at 3,000 pounds.⁹ The difference in value implies that the Negroes were bound for life.

Other court cases reveal a growing difference in the treatment of whites and blacks. In a 1649 Maryland case,¹⁰ for example, three runaway servants (two white and one black) from Virginia were apprehended in Maryland. In ordering their return to Virginia, the court decreed that the two whites must serve added time for running away, but declared that no added time would be imposed on the Negro since he was already held to lifetime servitude.

A Negro Plaintiff Wins a Precedent for Slavery

Finally, this period of equivocal judicial recognition was climaxed with the ironic case of *Johnson v. Parker* in the Northampton County Court in Virginia in 1653.¹¹ Anthony Johnson was the first free Negro in North America and the first Negro landowner. He was also one of the first substantial holders of indentured servants and later of slaves. In 1653 one of Johnson's Negro servants named Casor complained that his seven-year term of indenture had expired but that Johnson continued to hold him in service illegally. One Robert Parker demanded that Johnson release Casor, amid threats that he, Parker, would testify for Casor in court that Johnson held him illegally, resulting under local law in a possible forfeiture of lands by Johnson. Under this duress Johnson freed Casor, who promptly bound himself to Parker for seven years! Realizing that he had been duped, Johnson sued Parker to repossess Casor. The

court ruled for Johnson, declaring that Parker was illegally detaining Casor from his rightful master, who legally held Casor for the duration of his life. This is the first case on record of a judicial determination of Negro servitude for life, a precedent set by a Negro as plaintiff!¹²

The *Johnson* case was clearly without foundation in the common law on which Virginia was founded. There were, however, two judicial concepts applied by the colonial courts to trap a Negro. First, there was a kind of circular syllogism: Insofar as Negroes were heathens, they could never become Englishmen; insofar as they were not Englishmen, they could not be entitled to the protections of the common law. Second, it seems to have been taken without dispute in the English New World colonies that the common law doctrine against slavery was "metropolitan" law, not applicable to the colonies. Although neither concept was adequately supported by precedent, both afforded colonial courts a convenient rationalization for the passive judicial acceptance of the growing practice of imposing lifetime servitude on the Negroes brought to the colonies by the English pirates. Moreover, English appellate tribunals largely ignored colonial courts. Since the appellate jurisdiction over these courts was obscure, the colonies generally refused to recognize any right in the Privy Council or any other English body to review colonial judgments.

During this transitional period in the colonial courts, the legislative process likewise saw the insidious deterioration of the Negro in Virginia amid the growing divergence between white indentured servants and Negro servants. All Negroes were listed on the rolls of Virginia as servants (not slaves) until at least 1644, and no statutory reference to lifetime servitude appeared in any statute until 1649; but various statutes repressing Negroes appeared with the advent of the 1640s. For example, a 1639 act forbade Negroes to bear arms.¹³

The official equivocation continued in a 1644 statute,¹⁴ which, while sanctimoniously declaring that Christian

Negroes could be held only for a term, dreadfully implied that heathen Negroes could be held for life. (Apparently most Negroes were unbaptized or their Spanish baptisms were ignored.)

Meanwhile, as the Negro's statutory status deteriorated, the colonial legislative bodies were taking steps to raise the status of indentured servants. In 1637, Maryland became the first colony to protect indentured servants by limiting their maximum terms of service to fourteen years.¹⁵ And in 1643 a Virginia act authorized indentured servants to register complaints against harsh masters.¹⁶

A Limbo Ends in Harsh Reality

This transitional period in the legislative treatment of Negroes finally ended in Virginia in 1662 with the enactment of the ancient Roman slave doctrine of *partus sequitur ventrem*, whereby the offspring of a slave took the status of the mother. This made final the Negro's fate in two respects. First, it declared that the issue of slaves were not free but enslaved ad infinitum. Second, it attempted to solve the troublesome mulatto problem by declaring such offspring to be slaves. (Most mulattos were fathered by white men.)

The enactment of the *partus sequitur* doctrine ended the legislative equivocation and effected the final divergence of the institutions of indentured servitude and of slavery. It also contradicted the common law, which gave a child the status of his father, not that of his mother. But there was little re-

7. KLEIN, *supra* note 1, at 43.

8. THE NEGRO IN VIRGINIA, *supra* note 1, at 13.

9. As reported in KLEIN, *supra* note 1, at 43.

10. The case of John Punch, as reported in KLEIN, *supra* note 1, at 43, and in THE NEGRO IN VIRGINIA, *supra* note 1, at 14.

11. See BALLAGH, *supra* note 1, at 32, and THE NEGRO IN VIRGINIA, *supra* note 1, at 11-12.

12. As reported in KLEIN, *supra* note 1, at 44.

13. As reported in BRUCE, *supra* note 1, at 115, and THE NEGRO IN VIRGINIA, *supra* note 1, at 14.

14. As reported in THE NEGRO IN VIRGINIA, *supra* note 1, at 13, and KLEIN, *supra* note 1, at 43.

15. As reported in TANNENBAUM, *supra* note 1, at 102.

16. *Ibid.*

course to the common law inasmuch as the Crown as well as Parliament interfered little with colonial legislative bodies. For example, although James I dissolved the Virginia Company in 1624, presumably to rule Virginia thereafter by royal decree, the Virginia Assembly nevertheless met continually thereafter without legal authority and without royal interference. "Virginia was thus allowed to grow in the light of its own immediate needs."¹⁷

"Black" Becomes a Synonym for "Slave"

Finally, in a 1699 act¹⁸ all free Negroes in Virginia were ordered deported. From that day all blacks were presumed slaves, so that to be a Negro was to be a slave forever.

Thus ended the successive legislative and judicial steps leading from the Jamestown dock in 1619 to total chattel slavery of Negroes in Virginia. The story in the other English New World colonies is not much different.

These steps could only have been halted in the beginning, perhaps in the courts no later than the *Johnson* case in 1653, or in the legislative assembly no later than the enactment of the *partus sequitur* doctrine in 1662, if only a few settlers in the struggling colony had spoken out against the evil of slavery. The record fails to show one voice in Virginia raised in protest.

This indifference is the most striking

aspect of the development of slavery in North America—the indifference of English lawyers, judges, public officials and all others who might have been concerned. But in fairness it must be conceded that the indifference was no more the result of callousness than of distractions. Throughout the entire period of coalescence of forces producing slavery, England was convulsed with internal strife, climaxed by its Great Civil War, the Puritan Revolution in 1642, followed by the Commonwealth from 1649 to 1660. Neither Cromwell nor later the restored King had the inclination or resources to interfere with the profitable trade in black flesh, largely pirated from the hated Spanish, and the tax revenue it engendered. Incidentally, Lord Warwick, the old *slaver* and pirate, sided with Parliament in the Puritan Revolution, delivering the royal fleet to the Puritan cause. For this he was made Lord High Admiral, attended Cromwell's ordination and lived to see his grandson marry Cromwell's daughter. He died peacefully at 71, assured of a place in history as one of Puritanism's heroes, doubtlessly enjoying his black wealth in the confident hope that history would ignore the primary part he had played in introducing Negro slavery to North America.

It must be remembered that these Englishmen were medieval, not modern. It is not so remarkable that these

medieval men practiced slavery as it is that in less than 150 years their descendants produced a Franklin, a Washington, a Jefferson, a Madison, a Monroe and those other architects of our modern concepts of liberty.

Nevertheless, at least two lessons in jurisprudence are evident from a review of the beginning of Negro slavery in North America. First, American slavery illustrates the danger of one society's borrowing a legal institution from another society out of context, with none of the necessary accompanying safeguards. English slavery was borrowed from Spanish and Portuguese slavery, with none of the legal safeguards that existed in those societies regarding care and treatment, manumission, marriage, and familial duties of the master. Second, that slavery became entrenched in America evidences the evil wrought by governmental passivity to the economic depredations of one social group on another. The English Crown, as well as the colonial courts and legislatures, remained indifferent to the perniciously declining status of the Negro in the colonies at the crucial time when their intervention could have saved the Negro from eventual chattel slavery.

17. KLEIN, *supra* note 1, at 36.

18. As reported in BRUCE, *supra* note 1, at 115, and BALLACH, *supra* note 1, at 119.

Congressional Committee Requests Views on Crime

THE SELECT Committee on Crime of the House of Representatives has requested suggestions and views from the Bar of the United States, through the committee's chairman, Representative Claude Pepper of Florida. The committee was created last year and will continue to hold hearings in selected cities across the nation in 1970.

The committee is now in the inquiry phase of its operations, and it is seeking ideas, views and suggestions from individual members of the Bar and legal organizations. The committee is especially interested in the problems of

youth crime, drug abuse and addiction, organized crime, street crime, and the system of criminal justice from apprehension of a suspect to correction and rehabilitation. "The real message of our hearings", Representative Pepper declared, "has been that despite the public fear of crime and the outcry for law and order, we are not doing enough to meeting the crime problem."

Several proposals have been advanced to the committee. Among these are the creation of a national institute on corrections and rehabilitation to assist state and local governments, a first

offenders act to segregate first offenders from hardened criminals, the elimination of large federal facilities for the treatment of narcotics addicts in favor of a nationwide system of public and private nonprofit community rehabilitation centers, and a national police academy and national police accreditation service.

Members with suggestions for the committee or questions about future hearings should write the Select Committee on Crime, 233 Cannon House Office Building, Washington, D. C. 20515.