Imperial Politics and English Law: The Many Contexts of *Somerset*

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One might have thought that after nearly 250 years there would be nothing left to discuss about what Lord Mansfield did or did not intend to say when he delivered his ruling in *Steuart v. Somerset.* Yet, as Van Cleve's essay shows us, Mansfield's words continue to provide fertile ground for scholarly investigation. Sadly, this is almost certainly because *Somerset* continues to resonate in contemporary American society for reasons that are as much about perceptions of racism and black heritage as about the plight of Somerset himself.

The issues associated with slavery had caused problems for English lawyers and owners for a century before *Somerset.* As it became clear that the success of the Royal African company lay in trading slaves rather than goods, the question of the status of slaves in England—and the colonies—became more prominent. James, duke of York (later James II), one of the leading shareholders in the Royal African Company and a man so intent on saving souls that he lost his throne in the process, was committed to the wholesale conversion of African slaves to Christianity. He did not accept that conversion to Christianity altered slave status. Nor apparently did Lord Chancellor Nottingham.[1] Yet the belief that baptism created automatic manumission remained pervasive. Even after Yorke-Talbot fears about the link between baptism and manumission continued to worry slave

1. Morgan Godwyn, *Trade preferr'd before religion and Christ made to give place to mammon* (London, 1685), 6.

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owners. In 1772 the *Boston Post Boy* reported that, "Somerset having been baptised prosecutes for his freedom" although the return to the habeas corpus as finally settled made no mention of his baptism.[2] Those colonies with large and growing slave populations took out insurance against such claims by passing statutes specifically declaring that baptism did not confer manumission: Virginia did so as early as 1667.[3] The English slave interest also sought clarification of the status of slaves. In 1674 the introduction of a bill governing master/servant relationships into the House of Lords provided an opportunity for statutory intervention. The select committee appointed to consider the bill was instructed to add a clause defining "in what manner, and upon what terms, slaves, either blacks or any other foreigners, not being Christians, may be used in England."[4] A week later the select committee in its turn delegated the task to Viscount Halifax and Baron Holles (the former Denzil Holles).[5] The intervention seems to presuppose that Christians could not (or perhaps should not) be treated as slaves. But because the bill was lost at the end of the session, just what such a clause would contain remains a mystery.

The failure of the 1674 bill is perhaps the earliest known example of the reluctance of the English to make a clear decision about the status of slaves in their country. Indeed one of the points that comes out very clearly from Van Cleve's article is the difficulty of knowing precisely what the term "slave" actually meant to those who used it. Van Cleve's concept of "near slavery" is tantalizing. Africans took an extremely sophisticated view of slavery, recognizing differing degrees of enslavement and corresponding differences in the rights and obligations of both parties. Yet in Western civilization "slavery" came to mean "chattel slavery," especially the extreme form of chattel slavery practiced in the West Indian and American colonies. Even disregarding models from elsewhere in Europe such as Russian serfdom or obsolete English forms of service like villeinage, there were many other examples of unfree service that could have influenced Western attitudes. In the seventeenth century the term "slave" was applied to those accused of rebellious/treasonous activities who were consequently deported to the colonies as indentured labourers.[6] Scottish colliers who were able to marry at will and to hold personal and real estate were yet not fully free: the first statute to attempt their emancipation in 1774 specifically

2. *Boston Post Boy,* 27 July 1772 (reporting events of 15 May).

3. Gening, ed., *Statutes at large,* vol. 2, p. 260 (Act III).

4. *Journal of the House of Lords,* xii, 16 Feb. 1674.

5. House of Lords Record Office, Ctee bks, 23 Feb. 1674.

6. See, for example, the protests of those transported to Barbados and "sold for slaves" after the Salisbury rising of 1656. HLRO, HL/PO/JO/10/1/293. Similar language was used of the Monmouth rebels in 1685.

referred to them as being "in a state of slavery and bondage."[7] In the early eighteenth century the idea of introducing a benign form of slavery in order to deal with problems of chronic poverty was actively touted by a number of reformers.[8] The English were also familiar with slavery as practiced in Muslim North Africa. Throughout the seventeenth and eighteenth centuries thousands of white Europeans were seized to work as galley slaves. Some escaped and found their way back to freedom. Others were redeemed as a result of charitable collections or "briefs." English attitudes to Muslim slavery provide an interesting comparison to attitudes to the enslavement of black Africans. Can we seriously believe that an English court would have entertained a claim by a Muslim slave owner for the return of an escaped white slave? Or that an English court would in any way have limited the civil rights of one who had so escaped?

It is not difficult to argue therefore that the English were familiar with a number of different concepts of involuntary servitude and that forms of "near slavery" were both familiar and even welcome in certain elite circles as a way of retaining controls over the lives of working men and women. It is far more difficult to define just what this "near slavery" was and how it could be distinguished from actual slavery. Near slavery after 1772, according to Van Cleve, involved the enjoyment of certain basic human rights, but if the master's right to service continued, then so did the master's right to enforce that service. *Somerset* imposed only one restriction on the exercise of that right: an inability to force the slave out of the country. English law certainly did not permit the sort of physical mutilation that could be meted out to disobedient or runaway slaves in some colonies and limited physical punishment to the use of "reasonable chastisement." But it is important to remember that what was considered "reasonable" in the seventeenth and eighteenth centuries included brutal floggings akin to what colonials called "scourgings." Even in the army punishments of between 300 and 700 lashes for minor breaches of discipline were an everyday occurrence.[9] According to Blackstone the death of an apprentice or child following "moderate" physical chastisement ought to be deemed death by misadventure, as "the act of correction was lawful."[10] Surely no court in the twenty-first century could accept that correction resulting in death could possibly be described as "moderate."

7. P. E. H. Hair, "Slavery and Liberty: The Case of the Scottish Colliers," in *Slavery and Abolition* 21 (2000): 137–38, 140.

8. Michael J. Rozbicki, "To Save Them from Themselves: Proposals to Enslave the British Poor, 1698–1755," *Slavery and Abolition* 22 (2001): 29–50.

9. J. R. Dinwiddy, "The Early Nineteenth-Century Campaign against Flogging in the Army," *The English Historical Review* 97 (1982): 310.

10. Blackstone, *Commentaries on the Laws of England,* 4th ed. (London, 1771), 4:182.

Masters also had recourse to the law. A list of prisoners in the Southwark House of Correction in 1781 includes one William Boston "a Negro boy" who was serving a sentence of a month's hard labor for misbehaving himself in his mistress's service.[11] As in so many other cases it is difficult to be absolutely sure that Boston was a slave, but if he were an ordinary servant or apprentice one would expect that his misbehavior would have been punished far more simply—by discharging him from service. Mansfield's decision in the case of Charlotte Howe (*R. v. Inhabitants of Thames Ditton*), reaffirmed by Kenyon in *Alfred v. the Marquis of Fitzjames,* that a former slave had no right to wages or a settlement without an express contract of hiring seriously weakened the former slave's economic bargaining power. Even when a hiring was alleged to have taken place, it was unlikely that a court would accept the testimony of a servant (black or white) in preference to that of his/her master. The case of *Alfred v. the Marquis of Fitzjames* did not simply turn on Alfred's status as a slave freed by setting foot on English soil, but on his inability to substantiate his claim that at some point after his arrival in England there had been an explicit verbal agreement to pay him wages.[12] The inability of former slaves to claim wages was confirmed as late as 1830 when two enslaved sailors jumped ship in Cork.[13]

A more cynical reading of the record of Parliament and the English courts might conclude that the decisions Van Cleve analyzes as consistent with "near slavery" could more appropriately be characterized as the results of a determined attempt to avoid the issue. Before 1772 the precise status of slaves—or "near slaves"—in England had not been clearly defined. Even the language used to refer to slaves was confused. William Porter, who appeared as a witness at an Old Bailey trial in 1742, was described by his master as "what some call, a slave."[14] Matters were made no easier by the way that the English regularly used the terms "servant" and "slave" interchangeably when speaking or writing of Negroes. The earliest references to the trade of the Royal African Company refer not to slaves but to "Negro servants."[15] Similarly in 1773 the title page of the first (London) edition of Phyllis Wheatley's poems describes her as a "Negro servant" rather than as a slave. The *Somerset* decision did little to clarify the position of slaves in England because, as Van Cleve demonstrates, Mansfield, having failed to get the parties to agree, conducted it as an exercise in damage limitation. If he freed Somerset he risked inflaming colonial resistance to the mother country at a time when opposition sentiments already ran high; if he did not

11. Surrey History Centre, QS2/6/1781/Mid/2.
12. 4 Doug. 300 (1785); 3 Espinasse 3 (1799); *Times,* 30 Apr. 1799.
13. *Times,* 18 Nov. 1830.
14. *OBSP* 8 Dec 1742 case 27.
15. See, for example, Charles II's proclamation of 1674 (Wing 1629:109).

free Somerset he would, at the very least, have provoked an acrimonious debate in the House of Lords and would almost certainly have provoked a storm of opposition outside Parliament too.[16]

The conflict of laws perspective suggested by Van Cleve allows us to recognize just how ingenious was Mansfield's solution to a problem that lesser jurists might have found intractable. It also explains why the impact of the decision depended on which side of the Atlantic a slave happened to be. Although Britain drew substantial economic benefits from the slave trade and colonial slave labor, it did so at a distance: slavery was not a major factor within the internal economy of the British Isles. The size of the black population was fairly low: guesstimates range from 3,000 to 15,000, only some of whom were slaves or former slaves. Even the higher of these figures suggests that the black population of England formed less than 0.01 percent of the total population. Our occasional glimpses into the lives of black men and women suggest that, despite virulent strands of racism in some elite groups,[17] most were well integrated into the lower reaches of society. Slavery continued to exist. How else can we explain the gift of a six-year-old Negro boy to Lord Sydney in the 1780s[18] or why Mansfield himself thought it necessary to "confirm" the freedom of his slave and great niece Dido Belle in his will?[19] Yet it remained so rare that there was no need for either the courts or Parliament to clarify the confused boundaries between freedom, slavery, and near slavery.

What *Somerset* meant—or came to mean—in America is a very different story. There slavery was a major economic and demographic force. In Georgia, Maryland, Virginia, and South Carolina slaves made up between a third and 40 percent of the population at the 1790 census. In the nascent U.S.A., slavery was part of everyday life; it was an economic, moral, and legal issue that could neither be ignored nor fudged. To suggest that *Somerset* foreshadowed the end of slavery in these areas is surely too simplistic. It was after all going to take nearly a hundred years and the bloodshed of civil war before the U.S.A. ended chattel slavery and much longer before black men and women gained complete freedom by attaining equality of

16. At least one American newspaper reported that if the court refused to free Somerset, the duke of Richmond was determined to take the matter to the House of Lords. *Boston Post Boy,* 27 July 1772.

17. Particularly nasty racist sentiments are contained in Samuel Estwick, *Considerations of the negroe cause commonly so called addressed to the right honourable Lord Mansfield* (London, 1772) and *Candid reflections upon the judgement lately awarded by the court of King's Bench in Westminster Hall on what is commonly called the negroe cause by a planter* (London, 1772). But even those sympathetic to abolition readily accepted the inferiority of those of Negro or part Negro ancestry.

18. Bromley Local Studies and Archives, P92/1/2, baptismal entry for Thomas West.

19. The National Archives, PROB 11/1230, stamped fos. 147–8.

civil rights. By stressing that *Somerset* delegitimized slavery, Van Cleve ignores the central core of his own argument: that *Somerset* meant different things in different contexts. Mansfield's decision in *Somerset* was carefully phrased to ensure that it did not introduce a major change in the status of slaves either in England or in its colonies. It was open to American jurists to argue (as did Justice McLean in *Dred Scott*) that long usage and incorporation into colonial policy did legitimate slavery in those states where it was practiced. *Somerset* has come to enjoy iconic status in the story of emancipation in America for reasons that go far beyond the limited reality of the decision itself. Its place in the history of America and race relations from the nineteenth century to the present day is a cultural phenomenon in its own right—one that is potentially far more interesting and worthy of study than *Somerset* itself.