Somerset's Case and Its Antecedents in Imperial Perspective

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James Somerset was taken from Africa as a slave to the Americas in 1749. He was sold in Virginia to Charles Steuart, a Scottish merchant and slave trader in Norfolk who served after 1765 as a high-ranking British customs official. In 1769, Steuart took Somerset with him to England.[1] After two years in England, Somerset escaped from Steuart, but was recaptured. Steuart decided to sell Somerset back into slavery in Jamaica, and, in late November 1771, Somerset was bound in chains on a ship on the Thames, the *Ann and Mary,* awaiting shipment.

Fortunately for Somerset, an ecumenical abolitionist network existed in London, operating in "close correspondence" with Pennsylvania Quakers.[2] At its heart was Granville Sharp, a High Church Anglican. Sharp's

1. For biographical information on Somerset and Steuart, see Mark S. Weiner, "New Biographical Evidence on *Somerset's Case,*" *Slavery and Abolition* 23 (2002): 121–36.

2. Paul Langford, *A Polite and Commercial People* (Oxford: Oxford University Press, 1989), 517.

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allies sought a writ of habeas corpus from Lord Mansfield, Chief Justice of the Court of King's Bench, to obtain Somerset's freedom. Thus began *Somerset's Case,* one of the most famous cases in the Anglo-American law of slavery.[3]

On June 22, 1772, Mansfield announced a decision in *Somerset* of about two hundred words that profoundly altered not just the English, but also ultimately the American, framework for the law of slavery.[4] The proceedings in *Somerset* were reported in at least thirteen British newspapers, several widely circulated magazines, and twenty-two out of twenty-four operating North American colonial newspapers. The case then became the subject of transatlantic pamphlet wars. *Somerset* played out before a transatlantic audience because contemporaries thought it had implications for England *and* for its Atlantic colonies. Mansfield fully understood the imperial context of slavery and made his decision with that context firmly in mind. *Somerset* was cited as authority—or disapproved of—by English and American courts for nearly one hundred years.[5]

Historians have argued for decades about what Mansfield actually said in his oral decision and its effects.[6] Today's prevailing view on the decision's narrow holding, which this article strengthens using new evidence, is that

3. *R. v. Knowles, ex parte Somerset,* (1772) Lofft 1, 98 E.R. 499, 20 S.T. 1. This case style is the form appropriate to a habeas corpus action. The case is referred to in the English Reports, and often in the literature, as *Somerset v Stewart.*

4. Wiecek concluded: "[f]ew English judicial decisions have figured so prominently in the growth of American constitutional law. . . . *Somerset* long held sway over the thinking of Americans concerned about the relationship between slavery and law. . . . [T]o Mansfield unwittingly was due 'the secret isolated joy of the thinker, who knows that, a hundred years after he is dead and forgotten, men who have never heard of him will be moving to the measure of his thought.'" William M. Wiecek, *The Sources of Antislavery Constitutionalism in America, 1760–1848* (Ithaca: Cornell University Press, 1977), 39 (footnote omitted).

5. On the subsequent history for England, see Ruth Paley, "Mansfield, Slavery and the Law in England, 1772–1830," in *Law, Crime and English Society, 1660–1830,* ed. Norma Landau (Cambridge: Cambridge University Press, 2002), 165–84; for the United States, Wiecek, *Antislavery Constitutionalism;* Paul Finkelman, *An Imperfect Union: Slavery, Federalism and Comity* (Chapel Hill: University of North Carolina Press, 1981).

6. The literature through 1973 is ably discussed by Carol P. Bauer, "Law, Slavery, and Sommersett's Case in Eighteenth-Century England" (Ph.D. diss., New York University, 1973). Later literature is summarized and discussed in James Oldham, *The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century* (Chapel Hill: University of North Carolina Press, 1992), 1221–44. More recent discussions of the law of slavery in England include William R. Cotter, "The Somerset Case and the Abolition of Slavery in England," *History* 79 (1994): 31–56; Paley, "Mansfield, Slavery," 165–84; and James Oldham, *English Common Law in the Age of Mansfield* (Chapel Hill: University of North Carolina Press, 2004), 305–23.

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in *Somerset* Mansfield did not intend to emancipate slaves in England. Yet this does not mean that *Somerset* had no significant effect on English slavery law, and had at most a sort of moral force in rhetorically challenging slavery.[7] Nor does it mean that *Somerset* had no important imperial consequences, addressing only slavery in England, while leaving colonial slavery legally intact.[8] As this article argues, *Somerset* matters because Mansfield's decision deliberately transformed both the law of slavery in England and the law governing slavery in England's colonies in subtle but powerful ways. In addition, it represented the clear emergence of a new idea of freedom in English law.

This article has two purposes. The first is to interweave the social-historical and legal-historical understandings of slavery in modern England, placing English slavery in historical context and using a conflict of laws analysis (focused on how a slave's status changed when the slave came to England) and new case law interpretations to develop an improved understanding of the English law of slavery prior to *Somerset.* A conflict of laws analysis also shows that arguments over slavery in England were often also arguments about imperial governance—i.e., the relationship between English and colonial law.

The second purpose of this article is to offer a new "imperial" interpretation of *Somerset* using this improved understanding of prior law, new sources regarding *Somerset,* and an analysis of its imperial context. *Somerset* is best read not simply as a case about the legality of slavery in England, or as a conflict of laws case, but as an "imperial conflict of laws" case. These two discussions produce the following conclusions.

First, during the period 1540 to 1771, despite the existence of involuntary servitude, Englishmen increasingly defined themselves as free and unenslaveable, but they encountered Africans outside Africa as "almost universally enslaved or . . . in conditions of extreme subordination."[9] English law complemented this cultural understanding of the disparity between English and nonEnglish status, particularly for Africans, because it recognized "slavish servitude" for slaves, usually blacks, who came to England, an intermediate "near slavery" legal status between "classi-

7. See, for example, Paley, "Mansfield, Slavery."

8. Eliga H. Gould, "Zones of Law, Zones of Violence: The Legal Geography of the British Atlantic, Circa 1772," *William and Mary Quarterly* 60, no. 3 (2003): 471–510.

9. Michael J. Guasco, "Encounters, Identities, and Human Bondage: The Foundations of Racial Slavery in the Anglo-Atlantic World" (Ph.D. diss., College of William and Mary, 2000), 8–9.

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cal chattel slavery,"[10] on the one hand, and full "emancipation"[11] on the other. Thus, the dominant view of the status of slaves in England during this period rejected two polar positions, classical chattel slavery and full emancipation on arrival in a "free" jurisdiction.

A conflict of laws analysis of English slavery law shows that courts prior to *Somerset* generally agreed that English law *governed* status, but also *limited* slavery, for slaves who came to England. Legal rules developed prior to *Somerset* created "slavish servitude" or "near slavery" for such slaves by: (i) rejecting the slave's status under foreign law as a basis for slavery in England; (ii) preserving powerful economic and physical control by masters over slaves who came to England; but (iii) nevertheless prohibiting masters from inflicting unlimited brutal punishment with impunity. English "near slavery" shared many characteristics with chattel slavery, but limited permissible physical brutality toward slaves and may not have been heritable. It resembled English indentured servitude if one conceives of that status as including an involuntary, alienable, perpetual form.

Second, in light of the law of slavery in England prior to *Somerset* there was little chance that Lord Mansfield would hold in *Somerset* that English common law permitted chattel slavery in England. Lord Mansfield's conflict of laws analysis, his rejection of chattel slavery, and his continuation of "near slavery" in *Somerset* were relatively predictable under earlier law and would not have made Mansfield's judgment historic.

Third, Lord Mansfield's decision that positive law, not common law, must authorize slavery both in England *and* in its colonies, as opposed to deciding *Somerset* under English common law and limiting its holding to

10. "Classical chattel slavery" as used here is a Weberian "ideal type" of legal regime where a slave was deemed property that could be sold, bequeathed, and physically damaged or destroyed with nearly complete impunity by its owner. Chattel slaves were forced to work and live at a master's arbitrary will. Slave status was perpetual and heritable, and slaves could not own property or sue in the courts. Slavery in Virginia, for example, during 1660–1770 approached this "ideal type." See Aloyisus Leon Higginbotham, *In the Matter of Color: Race and the American Legal Process: The Colonial Period* (New York: Oxford University Press, 1978), 53–58.

11. "Emancipation" as used here is an "ideal type" of legal status where legal disabilities attached to servile status were removed and where a person's rights and duties in private labor service were independent of any involuntarily acquired status such as race or gender. In the seventeenth century, emancipation would have been described as enfranchisement: the primary meaning of "enfranchise" then was to "set free (a slave or serf)" (Oxford English Dictionary). Emancipation did not, however, mean "freedom" in the modern sense of possession of an array of political and social rights, or even in the more limited modern sense of "free labor," but instead meant freedom from legal disabilities that accompanied servile status as a slave or villein. Steinfeld's description of "liberi homines" conveys a similar idea. Robert J. Steinfeld, *The Invention of Free Labor* (Chapel Hill: University of North Carolina Press, 1991), 95–96.

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slavery in England only, was a transformative decision. Mansfield's positive law holding was legally novel, unnecessary to Mansfield's *substantive* holding in *Somerset,* seemingly supportive of the status quo, and yet deliberately subversive of both metropolitan and colonial slavery. This article contends that Mansfield's holding had both domestic and imperial political motives, but reflected Mansfield's beliefs as well. As to English domestic politics, Mansfield's holding was an effort to eliminate slavery litigation in the English courts and to commit the slavery issue to Parliament. As to imperial politics, Mansfield's positive law holding avoided a difficult imperial governance problem, but did so by exacting a substantial price from colonial slaveholders.

To appreciate fully the implications of the positive law aspect of Mansfield's decision, its imperial context must be understood. For the better part of a century, England had engaged in disputes with its Atlantic colonies about whether, and to what extent, English law applied in them, disputes over the "transatlantic constitution" that deepened during the 1760s and "remained up to the eve of the Revolution."[12] Moreover, before *Somerset* English courts thought that since slaves were a form of property, slavery was based on common law principles. But there was a fundamental uncertainty underlying the colonial law of slavery—was colonial slavery established (or governed) by English statutes, by the Crown prerogative (or derivative colonial laws subject to limits on repugnancy to English law), by English common law (which arguably limited the Crown prerogative), or by some combination of these authorities? This uncertainty about colonial slavery was an important aspect of the larger uncertainty about the transatlantic constitution.[13]

Two major eighteenth-century English judges, Chief Justice Holt and Lord Chancellor Hardwicke, had differed sharply on whether the common

12. Mary Sarah Bilder, *The Transatlantic Constitution: Colonial Legal Culture and the Empire* (Cambridge: Harvard University Press, 2004), 39. Bilder's account contains an excellent discussion of the sources of this uncertainty in earlier English law.

13. The English courts played an important role in such governance disputes, including slavery disputes, throughout the eighteenth century because, among other things, they established the limits of the Crown prerogative. An excellent example of this role was Mansfield's 1774 decision in *Campbell v. Hall,* (1774) 1 Cowp. 204, 98 E.R. 1045, determining that Grenada was a settlement to which English common law applied and that the Crown prerogative therefore could not be used to tax, a "vital confirmation of [colonial] rights against the Crown prerogative." Andrew J. O'Shaughnessy, *An Empire Divided: The American Revolution and the British Caribbean* (Philadelphia: University of Pennsylvania Press, 2000), 131. This was true despite the fact that much of the colonial law of slavery in the empire was established through the Crown prerogative. Jonathan A. Bush, "The British Constitution and the Creation of American Slavery," in *Slavery & the Law,* ed. Paul Finkelman (Madison: Madison House, 1997), 379–418.

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law of slavery in England was independent from the law of slavery in the colonies, and Blackstone had addressed that issue shortly before Mansfield reluctantly faced it in *Somerset.*[14] By 1772, this dispute had become a hotly contested aspect of the broader issue of metropolitan-colonial governance. Slavery, and particularly the slave trade, were increasingly controversial in England and North America, a political reality that Mansfield had to balance against Britain's interest in the benefits of the trade and the allegiance of certain colonies that depended heavily on it, particularly the West Indies. To reconcile these conflicting interests, Mansfield avoided the issue of the relationship between English common law and colonial law on slavery by characterizing slavery as arising from positive law.

Mansfield's positive law holding politically benefited the West Indies and the southern North American colonies in the short run. In what was only a seeming paradox, however, Mansfield's holding also deliberately devalued colonial slave property, handing slaveowners a "poisoned chalice." This article posits that Mansfield was well aware that this holding would have a series of adverse legal, political, and economic consequences for colonial slavery.

Mansfield's transformation of the conceptual basis of slavery in English law was important for another reason: it represented the clear emergence in English law of a new English idea of freedom. This new idea of freedom was that in England, core legal freedoms such as access to the courts and protection from arbitrary, unlimited physical abuse, were available to all subjects as "rights of man," not dependent upon birth, race, religion, or free status, and could only be denied by statute or express, longstanding custom.

The first part of this article discusses the social conditions and the judicially sanctioned legal status of black "near slaves" in England prior to *Somerset.* It considers the significance of the popular myth that coming to England emancipated slaves and of England's legal conception of slaves in the slave trade. It then reinterprets the case law on slavery prior to *Somerset* and relates it to social conditions and imperial governance. The second part of this article analyzes *Somerset.* It reconstructs key arguments and the judgment in *Somerset* using new materials, such as recently discovered newspaper reports and a new report of a key subsequent case, *R. v. Inhabitants of Thames Ditton.* This part of the article then analyzes Lord Mansfield's judgment and its imperial political and legal context. It

14. Lord Chancellor Hardwicke attacked Holt's position in *Pearne v. Lisle,* (1749) Amb. 75, 27 E.R. 47 (see below, 620–21). For Blackstone's position, see William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1765; facsimile ed., Chicago: University of Chicago Press, 1979) (hereafter *Bl. Comm.*), 1:104–5, 123 (see below, 612).

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concludes by discussing the decision's effects on slavery in England and in the colonies.

I. Slavery in England and the Law, 1540–1771

This part considers the social and legal history of slavery in England in the two centuries prior to *Somerset.* It shows that black involuntary servitude, in particular, did not fit well within contemporary concepts of slavery or "service." In dealing with slaves who came to England, English society and the law avoided the extremes: the law did not emancipate such slaves, but neither did it continue their prior status as chattel slaves. Instead, such involuntary immigrants became "slavish servants," that is, "near slaves" with a legal position somewhat akin to that of involuntary, alienable perpetual indentured servants.[15]

The Rise of the Culture of "Near Slavery" in England

A substantial part of all labor performed in sixteenth- and seventeenth-century England was coerced or "unfree" labor. Substantial physical force and imprisonment could be used to compel performance, and in many cases no wages were paid for service.[16] However, seventeenth-century Englishmen never imposed slave "status on members of their own community."[17] As a sense of distinctively English identity developed during this period, Englishmen increasingly came to view themselves as free and unenslaveable by virtue of their English birth and "race."[18] Yet by 1600, English culture had not necessarily rejected socially "redemptive" human bondage for Englishmen and would have accepted enslavement or cognate involuntary servitude of Africans, among others.[19]

One distinctive aspect of coerced labor in England was the rise of black involuntary servitude there during the late sixteenth through the eighteenth

15. For the general characteristics of indentured servitude, see Steinfeld, *Free Labor,* 44–47.

16. Douglas Hay, "England, 1562–1875: The Law and Its Uses," in *Masters, Servants and Magistrates in Britain and the Empire, 1562–1955,* ed. Douglas Hay and Paul Craven (Chapel Hill: University of North Carolina Press, 2004), 59–116, 67, 78; David Eltis, "Labour and Coercion in the English Atlantic World from the Seventeenth to the Early Twentieth Century," in *The Wages of Slavery,* ed. Michael Twaddle (London: Frank Cass & Co., 1993), 208.

17. Eltis, "Labour and Coercion," 211.

18. Guasco, "Encounters," 188.

19. Ibid., 6–9, 67–68, 244–50.

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centuries.[20] English black "near slavery" was largely a result of the English slave trade and was a comparatively minor, though significant, social phenomenon.[21] Recent accounts emphasize that the black experience in England was not monolithic: in the Tudor era, there were at least some English blacks who were not "slaves or servants," while later blacks who lived in England served as "slaves, servants, drudges and entertainers."[22] Surveying the black experience in England in the eighteenth century, Bush concluded that most blacks there were "neither clearly slave nor clearly free. . . . "[23]

Many aspects of black servitude in England were consistent with the cultural attitudes and coerced labor conditions in English society at the time, as described by writers such as Steinfeld and Guasco. But other aspects of black servitude did not fit well within then-current legal models for slavery or involuntary servitude, and it appears to have had distinctive cultural features.[24] The available evidence suggests that black involuntary servitude in England was neither classical chattel slavery, nor socially "redemptive" slavery, but was instead "slavish servitude" or "near slavery," a status considerably more onerous than English indentured servitude as Steinfeld described it.

There is little if any evidence that classical chattel slavery existed in England during the period 1540–1771: there were no statutes that permitted or endorsed such slavery in England based on status or race, [25] and there

20. General treatments of black slavery in England are found in Guasco, "Encounters"; Peter Fryer, *Staying Power: The History of Black People in Britain,* 2d ed. (London: Pluto Press, 1985); Folarin O. Shyllon, *Black Slaves in Britain* (London: Oxford University Press for Institute of Race Relations, 1974); James Walvin, *Black and White: The Negro and English Society, 1555–1945* (London: Penguin, 1973); Seymour Drescher, *Capitalism and Antislavery: British Mobilization in Comparative Perspective* (Basingstoke: Macmillan, 1986); James Walvin, *Britain's Slave Empire* (Stroud: Tempus, 2000).

21. Drescher, *Capitalism and Antislavery,* 26–29.

22. Guasco, "Encounters," 244–50.

23. Bush, "British Constitution and Slavery," 389. In both the seventeenth and eighteenth centuries, persons who were unquestionably chattel slaves were often referred to as "servants," as in the Royal African Company euphemism "perpetual servants," so terminology must be considered in context to understand status.

24. It does not appear that in England during this period involuntary servants other than blacks were sold in public markets, routinely forced to wear unremoveable collars denoting their status as owned property (and painted into aristocratic portraits in such collars), denied baptism, or shipped out of the country into slavery as punishment. See Guasco, "Encounters," 231–405, and works cited above, n. 20, for the evolution of English attitudes toward Africans in various contexts during this period.

25. The Vagrancy Act 1547, 1 Edw. 6 c.3, based enslavement on "criminal" vagrancy, not civil status, and is therefore irrelevant. For its history, see C. S. L. Davies, "Slavery and Protector Somerset: The Vagrancy Act of 1547," *The Economic History Review,* 2d ser, 20 (1966): 533–49.

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was no reported English case that unequivocally endorsed heritable, perpetual chattel slavery in England based on status or race.[26] But the social reality was that, during most of those same two centuries, a form of "near slavery," mostly involving blacks, with many incidents of chattel slavery, such as sales, imprisonment or forcible shipment abroad for discipline[27] or punishment, collaring, chaining,[28] and wageless compelled perpetual service, did exist in England.[29] Although the evidence is limited, it appears that the major distinction between colonial chattel slavery and such English "near slavery" was that under chattel slavery, the use of considerably more brutal physical force against slaves, including dismemberment and extremely severe whippings (sometimes called "scourgings"), was permitted as compared to the limited, though substantial force that would probably have been legally permissible against "near slaves" in England at the time.[30] It is also unclear whether English "near slavery" was deemed a heritable status, while chattel slavery was heritable.

By the close of the English Civil War, black slavery "was becoming common" in England, and blacks were regarded as "'purchaseable commodit[ies].'"[31] For example, Samuel Pepys's Navy Board colleagues brought black slaves back to England in the 1650s, and Pepys himself later owned and sold slaves.[32] Beginning in the second half of the seventeenth

26. Some would make an exception for Scottish colliers. Eltis, "Labour and Coercion," 209–10.

27. Granville Sharp attacked the "tyrannical and dangerous" practice of disciplinary imprisonment. Granville Sharp, *A Representation of the Injustice and Dangerous Tendency of Tolerating Slavery or of Admitting the Least Claim of Private Property in the Persons of Men in England* (London, 1769), 90.

28. Morgan Godwyn, *Trade Preferr'd before Religion and Christ Made to Give Place to Mammon* (London, 1685), 4–5 (chaining followed by forcible shipment to colonies to avoid baptism).

29. Also see above, n. 24.

30. By the late seventeenth century, masters were limited to reasonable force in "correcting" apprentices. *R. v. Keller,* (1683) 2 Shower 289, 89 E.R. 545; *Keat's Case,* (1696) Skin. 666, 90 E.R. 298. There were claims as early as the 1670s that limits on use of physical force against apprentices applied to everyone in England, including former slaves. Charles Molloy, *De Jure Maritimo Et Navali or, a Treatise of Affairs Maritime and of Commerce* (London, 1676), 356. These claims may have had some merit. The argument that punishment even of slaves was limited was supported by *Cartwright's Case* (1569?), J. Rushworth, *Historical Collections,* 468 (London, 1686), and this limitation was conceded by slaveholder counsel in *Somerset.* Although Viner's 1746 *Abridgement* recognized a claim of trover (damages for unlawful property conversion, see below, n. 62, for details), for "Negroes" (slaves) it did not contain separate rules governing physical punishment for Negroes. Charles Viner, *A General Abridgement of Law and Equity* (Aldershot, 1746), 1:240 (13); 20:425 (8).

31. Larry D. Gragg, *Englishmen Transplanted: The English Colonization of Barbados 1627–1660* (Oxford: Oxford University Press, 2003), 117.

32. Claire Tomalin, *Samuel Pepys: The Unequalled Self* (New York: A. A. Knopf, 2002), 123, 177.

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century there were newspaper "hue and cry" advertisements to sell or recover slaves in England.[33] An advertisement from *The London Gazette* of March 1685, for example, sought return of a "black boy" who wore an unremoveable silver neck collar engraved with his owner's "coat-of-arms and cipher."[34] English artisans made a "thriving living" from such collars, advertised in one case as being "silver padlocks for Blacks or Dogs. . . . "[35]

Slave markets where "black men, women and children were sold . . . " existed in Liverpool, Bristol, Glasgow and London,[36] though such markets were comparatively small and the length of time for which they existed during the seventeenth and eighteenth centuries is uncertain. English slave sales continued at least through the time of *Somerset.*[37] The private use of limited, but substantial force against slaves also continued until the time of *Somerset.* A slaveowner used force against a nine-year-old slave girl during a London church service in 1760 to prevent her baptism.[38] Granville Sharp became involved in abolitionism in 1765 after he nursed back to health a slave, Jonathan Strong, who had been beaten nearly to death by his owner, David Lisle, who was not prosecuted.[39]

Historians have estimated that somewhere between three thousand and fifteen thousand blacks lived in England by 1772, a significant fraction of them in perpetual involuntary servitude as slaves or, as suggested here, "near slaves," though the data are open to interpretation.[40]

33. Folarin O. Shyllon, "The Black Presence and Experience in Britain: An Analytical Overview," in *Essays on the History of Blacks in Britain,* ed. J. S. Gundara and I. Duffield (Aldershot: Avebury, 1992), 203–4.

34. Shyllon, *Black Slaves,* 9.

35. Walvin, *Black and White,* 60.

36. Shyllon, "Black Presence," 203.

37. Drescher, *Capitalism and Antislavery,* 174 n. 34 (Liverpool 1766, 11 slaves); Prince Hoare, *Memoirs of Granville Sharp, Esq.,* 2d ed. (London: Henry Colburn, 1828), 73–75 (London 1769); Walvin, *Britain's Slave Empire,* 62 (1771 estate sale).

38. Drescher, *Capitalism and Antislavery,* 188 n. 24.

39. The assault could have been prosecuted privately or publicly. Oldham, *English Common Law,* 260. Lisle then sued Sharp for damages for theft of his slave. Sharp discovered that his prominent counsel, and other authorities he consulted such as William Blackstone, believed Sharp had no defense to Lisle's action. Hoare, *Memoirs,* 48–53, 55, 59.

40. Shyllon, "Black Presence," 203 (not less than 10,000 slaves by 1772, though precise data are lacking); Norma Myers, *Reconstructing the Black Past: Blacks in Britain, 1780–1830* (London: Frank Cass, 1996), 20, 35 (contemporary estimates of 20,000 or more London "Negro servants" by 1764; concludes that empirical data suggest between 5,000 and 10,000 blacks in London in 1780, an unknown number of whom were slaves).

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England as Emancipator and Slave Trader

Despite the social reality of "near slavery" in England through the time of *Somerset,* England had an apparently contradictory and longstanding popular tradition that a slave's coming to England by itself resulted in the slave's emancipation. Yet English law also permitted English citizens, living in England, to participate in every aspect of the Atlantic slave trade. This section discusses England's roles as "emancipator" and "slave trader" and then shows how the law reconciled these apparently contradictory social practices and beliefs by creating "near slavery" for slaves brought to England.

England as emancipator. By 1600, villeinage was nearly extinct.[41] One question this raised was whether English law would free slaves who came to England. Steinfeld described the growth of an English tradition celebrating English freedom and condemning villeinage and slavery.[42] In his widely circulated *Description of England,* for example, in 1577 William Harrison asserted that England emancipated slaves who came there: "all note of servile bondage is utterly removed from them."[43]

The claim that England emancipated imported slaves was repeated in later centuries. Despite the fact that at least one very knowledgeable contemporary of Harrison's did not endorse his position,[44] a series of seventeenth- and early eighteenth-century commentators echoed Harrison, but generally with the important qualification that such emancipation did not eliminate obligations to provide "ordinary service."[45] As discussed below, in the case of imported slaves, this service obligation often meant perpetual, alienable involuntary servitude.

41. Diarmid MacCulloch, "Bondmen under the Tudors," in *Law and Government under the Tudors,* ed. M. Claire Cross, David M. Loades, and J. J. Scarisbrick (Cambridge: Cambridge University Press, 1988), 91–109. Villeinage was a common law unfree legal status, a form of hereditary, lifetime involuntary servitude, distinguished from slavery by the fact that the villein had the rights of a freeman against persons other than his master, and very limited rights against the master himself. Villeins were sometimes termed "chattels" (a form of property), an "imperfect analogy," but a lord's rights over villeins could be bought and sold. See John H. Baker, *An Introduction to English Legal History,* 4th ed. (London: Butterworths, 2002), 468–72 (quotation at 469).

42. Steinfeld, *Free Labor,* 96–102.

43. Georges Edelen, ed., *The Description of England by William Harrison* (Washington: Folger Shakespeare Library and Dover Inc., 1994), 118.

44. Sir Thomas Smith's *De Republica Anglorum* was first published in the 1580s. If the law emancipated slaves once in England, one would expect Smith to have known about it and to have said so, and he did not. Smith, *De Republica Anglorum,* ed. Mary Dewar (Cambridge: Cambridge University Press, 1982), 137–38.

45. In 1669 Edward Chamberlayne claimed that slaves brought to England occupied an intermediate legal status: "free, but not from ordinary service." Edward Chamberlayne,

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In the first edition of his *Commentaries,* Blackstone asserted that under the common law slaves were emancipated upon coming to England.[46] Blackstone later modified his text on this point, some claim under pressure from Lord Mansfield, others claim for editorial consistency.[47] Blackstone also asserted that the North American colonies were not English settlements but instead conquests, so that they were not governed by English common law, but by the royal prerogative.[48] For Blackstone, the law on slavery in England was independent of the law on slavery in the colonies.

England as slave trader. Between 1650 and 1787, Parliament and the Crown provided unbroken support for the English slave trade. During the eighteenth century, English traders transported approximately 3 million slaves from Africa to the Americas.[49] English citizens, while living in England, were permitted to participate in every aspect of the trade. During the period 1600–1750 blacks were treated as a form of property in a variety of English transactions stemming from the slave trade. The Crown legal position from 1677 onward was that blacks were goods under the Navigation Acts,[50] a position endorsed by Chief Justice Holt and the major judges of England in a 1689 formal opinion.[51] In 1698, Parliament exempted only

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Angliae Notitia, or the Present State of England (London, 1669), 514. This statement remained unchanged in editions of Chamberlayne's work to the mid-eighteenth century. Drescher, *Capitalism and Antislavery,* 185 n. 5. Charles Molloy's position was similar: chattel slavery in England was unlawful, and an action of trover (an action to recover damages for property, see below, n. 62) could not be brought for a man there, but contracts for lifetime service were lawful. Charles Molloy, *De Jure Maritimo Et Navali, or a Treatise of Affairs Maritime and of Commerce,* 4th ed. (London, 1690), 355–56. In a 1704 popularizing introduction to the civil law, Thomas Wood relied on the writing of Arnold Vinnius for the proposition that slaves became entirely free upon coming to England. Thomas Wood, *A New Institute of the Imperial or Civil Law* (London, 1704), 37–38, citing Arnoldi Vinnii J.C. in *Quatuor Libros Institutionum Imperialum Commentarius Academicus & Forensis,* 4th ed. (Amsterdam, 1695), 25, ad J. Inst. 1.3.3., *Manu capiuntur.* (I thank Michael Macnair for providing and translating the Vinnius reference.) Vinnius asserted that emancipation was the rule in several European countries, but did not claim that that rule applied in England. A broad reading of *Smith v. Browne and Cooper* (see below, 617), however, would support Wood's position.

46. *Bl. Comm.,* 1:123.

47. Compare Edward Fiddes, "Lord Mansfield and the Sommersett Case," *Law Quarterly Review* 50 (1934): 499–511, 506–7, with Shyllon, *Black Slaves,* 55–76, and discussion in Oldham, *English Common Law,* 316–17.

48. *Bl. Comm.,* 1:104–5.

49. Herbert S. Klein, *The Atlantic Slave Trade* (Cambridge: Cambridge University Press, 1999), 33.

50. Kenneth G. Davies, *The Royal African Company* (London: Longmans, Green, 1957), 331–32.

51. 11 November 1689 opinion of Holt and nine other judges, Public Record Office (now part of the United Kingdom National Archives) (hereafter PRO) CO 137/2.

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"negroes" from import duties on "all Goods and Merchandize" coming to England or the colonies.[52] English contracts and insurance agreements stemming from the slave trade also rested on the premise that blacks were goods.[53] In 1732, Parliament legislatively classified slaves as a preferred, hybrid, form of property to induce and protect English investment in the slave trade.[54]

It is a fair inference that in the late seventeenth and early eighteenth centuries no one of influence in England thought that treating black slaves in the colonies as property was inconsistent with English common law. The case law discussed below suggests that this was because English law often accepted explicitly or implicitly the idea that blacks could be property in England as well, though why—and to what extent—this was so, and the relation between English and colonial law, were matters of dispute.

The Law of Slaves in England, 1540–1771

Against the social reality of "near slavery" in England and the seemingly contradictory popular belief that English law emancipated slaves who came to England, what did the law have to say about slavery in England?[55] Earlier studies of the law of slaves in England before *Somerset* concluded that the law was in "hopeless disagreement," "a confusing state of disarray," or "unsettled."[56] But the perceived confusion in the law resulted largely from the question generally asked: was "slavery" in England "legal"? If instead one asks questions stemming from a conflict of laws perspective, the law of slavery in England between 1540 and 1770 appears considerably less confused. These questions include: What did "slavery" mean in England during this period? What law governed the status of a slave who came to

52. *An Act To Settle the Trade to Africa,* (1698) 9&10 Will. III, c. 26.

53. Davies, *Royal African Company,* 294–95.

54. *An Act for the more easy Recovery of Debts in His Majesty's Plantations and Colonies in America,* (1731/2) 5 Geo. II, c. 7.

55. Although the separation of law and equity courts generally limits the use of precedents from equity in common law courts (Baker, *Introduction,* 97, 115), counsel and the court in *Somerset* cited precedents from both jurisdictions, and this article follows their example.

56. Fiddes, "Sommersett Case," 499; William M. Wiecek, "The Origins of the Law of Slavery in British North America," *Cardozo Law Review* 17 (1996): 1711–85, 1725; James C. Oldham, "New Light on Mansfield and Slavery," *Journal of British Studies* 27 (1988): 45–68, 48. Holdsworth and Baker suggest that the common law had an "open mind" about slavery at the beginning of the seventeenth century, when villeinage essentially ended as a social institution. William S. Holdsworth, *A History of English Law* (London: Methuen, n.d.), 3:507–8; John H. Baker, *The Common Law Tradition: Lawyers, Books and the Law* (London: Hambledon Press, 2000), 334.

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England? If enslavement ended when a slave came to England, did this necessarily result in the slave's full emancipation? The answers follow.

Most courts and legal authorities during this period were in broad agreement that: first, the common law did not recognize classical chattel slavery in England; second, the status of slaves who came to England was governed by English law; third, slaves who came to England were no longer subject to chattel slavery, but were not fully emancipated; they were held to a lesser but substantial form of "slavish servitude" that constituted "near slavery."

Case law on slaves, 1569–1689. No statute enacted between 1540 and 1780 spoke directly to the legal status of slaves brought to England, so the fate of slaves there was left to the courts and the common law.[57]

Cartwright's Case, apparently decided circa 1569, might support the position that slaves who came to England were emancipated. In *Cartwright,* a court was reported to have said, in sustaining a challenge to a slaveowner's desire to "scourge" a Russian slave brought to England, that "England was too pure an air for Slaves to breath [*sic*] in."[58] When it first appeared in later law, however, *Cartwright* was regarded as establishing limits on punishment of slaves in England, not as providing emancipation.[59] Thus, the emancipation tradition discussed above actually meant limits on owners' rights to brutalize slaves, not the elimination of "near slavery," a view confirmed by the late seventeenth-century and eighteenth-century case law.[60]

A well-known series of slavery cases occurred between 1677–1706. Although, as past writers have noted, these cases sharply disagree on whether slaves brought to England could be a form of common law property, it is equally important to understand where they agree with each other. In particular, it is important to understand what the cases say about chattel slavery, emancipation, and governing law, as well as what legal/economic rules control slaves in England.

The earliest reported English case on the legal status of slaves in England (after *Cartwright's Case*) was *Butts v. Penny.*[61] In *Butts,* a claimant

57. But see above, 612–13.

58. An unattributed hearsay report is J. Rushworth, *Historical Collections* (London, 1686), 468–69.

59. John Lilburne's counsel relied on it in 1645 in arguing that the severity of Lilburne's whipping exceeded lawful bounds. *The Trial of Lilburne and Wharton,* in *A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors from the Earliest Period to the Year 1783, with Notes and Other Illustrations, ed. Thomas B. Howell* (London: T. C. Hansard, 1816–26) (hereafter S.T.), 3:1353–54.

60. *Cartwright's Case* was not relied on in any of the English slavery cases prior to *Somerset's Case.* See also above, n. 30.

61. *Butts v. Penny,* (1677) 2 Lev. 201, 83 E.R. 518, 3 Keb. 785, 84 E.R. 1011, (as *Anon.*)

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to co-ownership of slaves brought trover for "10 negroes and a halfe. . . . " The court held that an action of trover would lie.[62] The Levinz and Keble reports of *Butts* stated that treating "negroes" as goods under English law was acceptable because merchants treated them as goods, which in turn was acceptable because "negroes" were infidels. *Butts* apparently rejected the contention that under English law no one could have greater property rights in a man than a lord had over his villein. Yet under the decision's reasoning, slavery in England could not have been classical chattel slavery, heritable, or permanent, because baptism would enfranchise slaves.[63] Moreover, the court's reasoning could readily have been applied to slavery in *all* English colonies.[64] Thus, instead of approving chattel slavery in England, *Butts* created an uncertain legal climate for *colonial* slaveholders *and* English investors.[65]

Butts was an influential view of the law on slaves at the time. Courts and counsel relied on it through the mid-1690s, and it was cited by counsel as useful, though questioned, authority as late as 1721 in argument before all the major judges of England.[66] Another 1677 trover case, *Lowe v. Elton,* reached the same result and employed the same religious rationale.[67] *Butts* was also consistent with a 1694 trover decision by the Court of Common Pleas in *Gelly v. Cleve.*[68] *Butts* was also cited as authority for the proposition that trover would lie for a "Negro" in 1746 by Viner's *Abridgement;* Chief Justice Holt's decisions, discussed below, rejecting *Butts* were treated as a dissenting view.[69] In the eighteenth century, the property principle of

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1 Freem. 452, 89 E.R. 338, Bodleian Library MS Rawl. C. 823 fo. 341. The attorney general intervened, so no judgment was entered, but the intervention probably had only to do with the *type* of property at issue (see below, n. 81).

62. A trover action was a claim for damages on the basis that personal property owned by the plaintiff had been wrongfully withheld ("converted") from plaintiff by the defendant. One predicate for that action was that the thing claimed was legally deemed property. On the history of trover, see Baker, *Introduction,* 397–99; Holdsworth, *History,* 7:401–47.

63. Walvin, *Black and White,* 110.

64. Ibid.

65. Bauer, "Law, Slavery," 6.

66. *Wedgewood and Others v. Bayly,* (1682) 2 Show. 177, 89 E.R. 874, 1 Freem. 532, T. Raym. 463, Skin. 39 (several judges of court acknowledge *Butts* precedent in survivorship case); *Chambers v. Warkhouse,* (1693) 3 Lev. 336, 83 E.R. 717; *Pickering v. Appleby,* (1721) 1 Com. 355, 92 E.R. 1109 (counsel cite *Butts* as precedent in trover dispute [*Chambers*] and in case raising question whether stock was a form of goods [*Pickering*]).

67. Baker, *Introduction,* 475, citing *Lowe v. Elton,* (1677) Girdler's entries, Cambridge University Library MS Add. 9430 (2) 373.

68. *Gelly v. Cleve,* (1694) 1 Ld. Raym. 147, 91 E.R. 994 (hearsay report). The report of *Lowe v. Elton* contains a consistent account of what appears to be the *Gelly* case *sub nom. Cleve v. Jolliffe.*

69. Viner, *General Abridgement,* 1:240 (13).

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Butts was followed in an influential, widely circulated Opinion of the Law Officers and in *Pearne v. Lisle,* both discussed below.

The law of slaves in England, 1690–1771. Between 1696 and 1706, in a series of cases contrary to *Butts v. Penny,* Chief Justice Holt held that men in England could not be chattels under English law.[70] Although it was (and is) widely believed that Holt also declared that slaves were emancipated by coming to England, this misreads Holt's (or at least his court's) actual position. In a series of decisions, the Court of King's Bench under Holt provided relatively strong legal protection to owners for their property in what it deemed "slavish servants" when they came to England, rather than emancipating them.[71]

In 1696, Holt decided his first major slave case, *Chamberlaine v. Harvey.*[72] *Chamberlaine* was an action of trespass *de bonis asportatis* seeking damages for the loss of value and services of a slave brought to England from Barbados.[73] *Chamberlaine* held that trespass would not lie for the taking away of the slave but only a "special" action of trespass *per quod servitium amisit.*[74] Under English law, a "negro cannot be demanded as a chattel."[75] The court refused to base the slave's status in England on Barbados law.

Equally importantly, the court did not declare the slave emancipated. Instead, it provided masters of what it termed "slavish servants" with a

70. Holt had, however, held that "negroes are merchandize" under the Navigation Acts. See above, n. 51.

71. In two cases that are instructive though they lack precedential effect, the 1690 case of Katherine Auker and the 1717 case of John Ceaser, Sessions Courts presided over by lay judges treated slaves as if they were neither fully slave nor free, and similarly to apprentices. The courts took jurisdiction as if the slaves were servants and ordered limited relief for both petitioners. Yet in both cases they declined to discharge petitioners from service, or order compensation, though in both cases the facts alleged would have justified such results. Auker had been imprisoned by her master and also alleged torture. Sessions Books No. 472, Middlesex County (February 1690). William J. Hardy, *Middlesex County Records* (London, 1905), 6. Ceaser had not been paid wages in fourteen years. Middlesex Records Calendar, September & October 1717.

72. *Chamberlaine v. Harvey,* (1696) 5 Mod. 182, 87 E.R. 596, 1 Ld. Raym. 146, 91 E.R. 994, Carth. 396, 90 E.R. 830.

73. The trespass writs discussed in this section belong to a group of writs used to make claims for civil wrongs. The specific phrase used in a particular trespass writ described the wrong, which in turn usually entailed proof of specific elements, and delimited damages recoverable for the wrong. For example, while trespass *de bonis asportatis* sought damages for the carrying away of goods, which could include their value, trespass *per quod servitium amisit* ("whereby he lost the service" [of his servant]) was a writ used by a master to claim damages for the loss of a servant's services, but could not be used to claim damages for injuries suffered by the servant.

74. 5 Mod. 190.

75. Carth. 397, 90 E.R. 830.

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trespass claim against parties who deprived them of the service of such servants.[76] The court did not explain why any master of a slave imported to England would have such a claim unless involuntary servitude continued in England, but why did involuntary servitude continue if slavery did not? The court's judgment thus appears to have been a compromise.

Carthew's report said that the court held that a master could not recover either for the "value" of a servant or for "damages done to his servant," but only for the "loss of his service."[77] The economic impact of this rule on slaveowners was uncertain. One possible interpretation, that the rule authorized damages for the difference between the cost of a slave's services and the cost of replacement services, might have limited a master's damages when compared to recovery of "value," but such damages could still often have been substantial enough to deter third parties from hiring "slavish servants" away without an owner's consent, thus maintaining involuntary servitude. If the rule had been read to limit damages merely to costs resulting from disruption of service until a replacement servant was hired, it would have rendered many masters unable to keep slaves in England, since the damages available would have been trivial in comparison to the master's economic loss. Even viewed most favorably to slaveowners, the *Chamberlaine* court made importation of slaves into England more costly, and limited owners' power over them, without declaring the slaves emancipated. A few years later, slaveowners' economic control was markedly strengthened in *Smith v. Gould.*

Early in the reign of Queen Anne, in *Smith v. Browne and Cooper,* Holt held that it was not possible in England to bring an action of *indebitatus assumpsit* for the value of a slave sold to a buyer where the sale was pleaded to be in England and the slave was pleaded to be in England.[78] But Holt then instructed the plaintiff that he should have pled that the contract occurred while the "negro" was in Virginia, because the law there was not English common law, but instead was based on the royal prerogative.[79] Use of that pleading fiction, which permitted sales of slaves when in

76. An earlier analysis of *Chamberlaine* also concluded that the court determined the slave was like a "bound or apprenticed laborer, 'a slavish servant,' a human being whose freedom was restricted but not annihilated." William M. Wiecek, "*Somerset:* Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World," *University of Chicago Law Review* 42 (1974): 86–174, 91.

77. Carth. 397, 90 E.R. 830.

78. *Smith v. Browne and Cooper,* (1702x1706) 2 Salk. 666, 91 E.R. 567, 2 Ld. Raym. 1274, 92 E.R. 338. *Indebitatus assumpsit* was a form of breach of contract action.

79. *Smith v. Browne and Cooper;* see Gavin Loughton, "The Extension of English Law Following Conquest and Settlement: The Origins of the Colonies Rule" (M. Phil. thesis, University of Oxford, 2001), 4.

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England, weakened Holt's practical position but preserved his theoretical position that slavery per se was not recognized by English law.[80] Holt's fictional distinction between Virginia law and English law avoided a court conflict over the permissibility of slave sales in England under English law, confirmed Holt's desire to maintain the position that colonial law and English law on slavery were independent, and showed the fragility of that position.[81]

In *Browne and Cooper,* Holt also famously stated that "as soon as a negro comes into England, he becomes free: one may be a villein in England, but not a slave."[82] However, it does not appear that Holt thereby endorsed the position that arrival in England meant an end to any labor servitude, though the decision can be and has often been read that way. Holt appeared to mean instead that a slave who came to England could not be treated as a "pure" chattel, and thus destroyed with impunity, but was instead like a villein, who had limited rights vis-à-vis his lord despite his servile labor and property status. This narrower reading makes *Smith v. Browne and Cooper* consistent with *Chamberlaine* and is confirmed by *Smith v. Gould.*

In *Smith v. Gould,* the court declined to permit a trover action for a black,[83] but in a significant change, the court held that an alternative action, trespass *quare captivum suum cepit,* would be available. It seems clear that by "slave," the court meant a servant whose master would have a right to kill or maim it with impunity (i.e., a "pure" chattel).[84] *Smith v. Gould* substantially strengthened a slaveowner's damages position. In trespass *quare captivum suum cepit,* "the plaintiff might give in evidence that the party was his negro, and he bought him,"[85] contrary to what Holt had said emphatically in *Chamberlaine.* Justice Powell also noted that a man may sell a captive and "he remains a captive to the vendee."[86] These rules were much more favorable to slaveowners and permissive of slave transactions than the ones in *Chamberlaine* and *Browne and Cooper.* The *Gould* rules permitted English slaveowners to maintain indefinite economic control of

80. Baker, *Introduction,* 475.

81. The attorney general intervened, asserting that slaves were inheritances (i.e., realty) by Virginia law and could be transferred only by deed, so no judgment was given, but that does not affect the analysis of Holt's approach to pleading.

82. *Smith v. Browne and Cooper.*

83. *Smith v. Gould,* (1706) 2 Salk. 666, 91 E.R. 567; 2 Ld. Raym. 1274, 92 E.R. 338, I.T. Mitford MS 32 fo. 7, H.L.S. MS 1109(1), fo. 22. I thank James Oldham for copies of his transcriptions of the Inner Temple (I.T.) and Harvard Law School (H.L.S.) MS reports.

84. Mitford MS; H.L.S. MS.

85. *Smith v. Gould,* 2 Salk. 666, 91 E.R. 567.

86. Mitford MS. Wiecek saw trespass as providing a means of asserting title to a slave. Wiecek, "*Somerset,*" 93.

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their slaves and were independent of any requirement to establish villein status; yet they *also* rejected classical chattel slavery.

Legal opinion and events after Holt's decisions. In the early 1720s, the Privy Council apparently adopted the position that the governing law in a colony would depend on whether it was conquered or settled.[87] This determination meant that different colonies would have different common laws; some would not follow English common law, often thought to be the "birthright" of Englishmen.[88] Moreover, the Privy Council decision also created the risk that slavery might be unlawful in certain colonies under the Holt decisions.

By 1729, responding to such uncertainties and religious pressures for slave Christianization,[89] slaveowners felt the need to seek legal clarification on key points relating to slavery, which they obtained in the 1729 Yorke-Talbot slavery "Opinion."[90] That Opinion—made by the Crown's principal Law Officers at an Inn of Court—cited no authority, and provided no rationale. Yet it was written to be relied upon and was widely published.[91] In summary, the Opinion held that a slave's status did not change when brought to England; that a slave could be compelled to return to the colonies; and that slave baptism did not constitute manumission.

The Opinion's conclusion that slave status was neither "determined nor varied" when a slave came to England, so that slaves were property throughout the empire, was profoundly new "imperial" law. On that point, the Opinion was completely at odds with the conclusions of commentators from Harrison and Molloy onward, as well as with the Holt decisions

87. *Case 15–Anonymous,* (1722) 2 P. Wms. 75, 24 E.R. 646. What law governed in the colonies had been an issue since the late seventeenth century, particularly in the case of Jamaica, which at one point asserted by statute that all English common law was in force in Jamaica. See also *APC Colonial* (1720–1745), vol. 3, 47 (26 July) (Jamaica), and Joseph H. Smith, *Appeals to the Privy Council from the American Plantations* (New York: Columbia University Press, 1950), 482–83.

88. Loughton, *Conquest and Settlement,* 69–79. See also Bilder, *Transatlantic Constitution,* 35–46 and passim. But cf. Daniel J. Hulsebosch, "The Ancient Constitution and the Expanding Empire: Sir Edward Coke's British Jurisprudence," *Law and History Review* 21 (2003): 439–82 (arguing that English law did not confer English rights on colonies).

89. Edmund Gibson, *Two Letters* (London, 1727), 10–13; Edmund Gibson, *Two Letters (with an Address)* (London, 1729), 10. Gibson was Bishop of London.

90. Philip Yorke later became Lord Chancellor Hardwicke, one of the most influential judges of the eighteenth century, and was an important mentor to Lord Mansfield. The Opinion was quoted in full in *Knight v. Wedderburn,* (1778) 8 Fac. Dec. 5, Mor. 14545 (Scot. Ct. Sess.).

91. David B. Davis, *The Problem of Slavery in Western Culture* (1966; reprint, Oxford: Oxford University Press, 1988), 209–10; M. W. Jernegan, "Slavery and Conversion in the Colonies," *The American Historical Review* 21, no. 3 (1916): 504–27, 507 n. 19.

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and even with *Butts v. Penny,* both regarding what law governed a slave's status in England and what that status was.

The 1732 statute that classified colonial "Negroes" (slaves) as property in debtor-creditor relations mandated uniform rules and remedies applicable to slave property throughout the empire and could have been seen as the commercial law analogue of the Opinion's conclusion that "imperial" slave property had uniform status throughout the empire.[92] A 1732 habeas corpus proceeding, *R. v. Cartor,* involved a black woman alleged to be a slave, but its facts suggest that the court did not consider the woman's status.[93]

In 1749, in *Pearne v. Lisle,*[94] Lord Chancellor Hardwicke (formerly Philip Yorke) wrote what amounted to a defense of his earlier Yorke-Talbot Opinion in a decision granting a motion to discharge a writ of *ne exeat regno.* Underlying *Pearne* was a dispute between an English resident, Pearne, and Lisle, an Antigua resident temporarily in England, related to fourteen slaves in Antigua.[95]

To show that Antigua law would grant full relief to the plaintiff, making English litigation unnecessary and thus justifying discharge of the writ, Hardwicke decided to prove, first, that English law would grant full relief, and, second, that Antigua law—that is, colonial law on slavery—*must* follow English law. Accordingly, Hardwicke needed to demonstrate first that English law permitted slavery. This occasioned his defense of the Yorke-Talbot Opinion.

The core of Hardwicke's defense was an attack on Holt's slavery position that had fundamental implications for the relation between slavery in England and slavery in the colonies: Holt had been wrong in stating that coming to England automatically freed slaves, because, if accepted, that principle would free all *colonial* slaves, since *all* colonies were ultimately "subject to" English law[96] (a quite remarkable conclusion in view

92. See Act, n. 54.

93. *R v. Cartor,* (1732) W Kel. 98, 25 E.R. 511, (as *Anon*) 2 Barn. 215, 94 E.R. 457, SC *R. v. Ann, a black,* (1733) Eng. Leg. MS H 1778–150 f. 46 (MSF 25), H.L.S. MS 4055[3]. The woman was imprisoned for assaulting her master and sought bail. The alleged owner offered to show that she was a slave, but the court refused to permit this. There are several reasons why refusal might have occurred, including the owner's earlier failure to allege slave status and the woman's apparent marriage to a freeman surety, so the case cannot be read more broadly.

94. *Pearne v. Lisle,* (1749) Amb. 75, 27 E.R. 47.

95. Complaint of Robert Pearne, PRO C11/1097/37.

96. Amb. 75, 27 E.R. 47. Davis argued that Hardwicke was relying on a statute of William III for his conclusion that Antigua law must follow English law, but there is no textual support in *Pearne* for the view that Hardwicke's position depended on a particular statute, as opposed to Hardwicke's "imperial Whig" view, shared with others, that English law was supreme, and colonial law could not be repugnant to it on a fundamental issue like whether

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of Hardwicke's intimate familiarity with the conquest/settlement doctrine stemming from his prior Crown legal service).[97]

Thus, England and the colonies necessarily followed one legal rule regarding slavery, which, in Hardwicke's view, was that it was lawful and slaves were property in both places. Lord Mansfield was intimately familiar with *Pearne v. Lisle* when he decided *Somerset* and, as discussed below, it was precisely because of *Pearne's* imperial implications that it was the major authority with which Mansfield grappled in making his decision.

Even had *Pearne* served only vigorously to reaffirm the earlier Yorke-Talbot Opinion, reaffirmance would have given that Opinion added force as precedent. Some lawyers prior to *Somerset* thought the 1729 Opinion represented a definitive statement of the law on slavery in England.[98]

In *Shanley v. Harvey* (1762), Lord Northington LC held that any slave who came to England was emancipated, was protected by habeas corpus if unlawfully restrained, and, if a servant, had a right to sue for "ill usage" by a master.[99] Although counsel in *Somerset* brought *Shanley* to the court's attention, it played no significant part in the decision.

R. v. Stapylton, the last slavery case prior to *Somerset,* involved the attempted forcible deportation of an African slave, Thomas Lewis, by Stapylton, Lewis's purported owner.[100] At the 1771 trial before Lord Mansfield, Stapylton defended on the ground that because the slave was property, the acts complained of were not criminal offenses.

In *Stapylton,* Lord Mansfield permitted extensive testimony by Lewis regarding his life history as it related to Stapylton's alleged title. Mansfield said that, if the jury found that Stapylton had a property interest in Lewis, they should bring in a special verdict; if not, "you will find the Defendant

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slaves were property. Reed Browning, *Political and Constitutional Ideas of the Court Whigs* (Baton Rouge: Louisiana State University Press, 1982), 170–71; P. J. Marshall, "Parliament and Property Rights in the Late Eighteenth Century," in *Early Modern Conceptions of Property,* ed. John Brewer and Susan Staves (London: Routledge, 1995), 530–44, 531–32; compare David B. Davis, *The Problem of Slavery in the Age of Revolution, 1770–1823* (1975; Oxford: Oxford University Press, 1999), 507.

97. Hardwicke also argued that Holt had ignored or misconstrued the precedent created by villeinage because slavery was no different than villeinage, which was lawful in England, thus tacitly agreeing with Holt that English law would not permit classical chattel slavery.

98. See above, n. 39, and 610.

99. *Shanley v. Harvey,* (1762) 2 Eden 126, 28 E.R. 844.

100. Granville Sharp procured Stapylton's indictment by a Middlesex grand jury for assault and false imprisonment. Stapylton removed the case to the King's Bench. Accounts of *Stapylton* include: Granville Sharp, *Minutes of the trial of Thomas Lewis* (N.Y. Historical Society MS 1771) (hereafter *Minutes*) and Lord Mansfield's trial notes (Oldham, *Mansfield Manuscripts,* 2:1242–43).

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Guilty."[101] The jury found Stapylton guilty.[102] After the jury verdict, Mansfield steadfastly refused to permit sanctions against Stapylton.[103]

During the trial, Lord Mansfield said he had granted "several" writs of habeas corpus to deliver "negroes" to their masters based on property claims. Thus, as late as 1771, it appears that Lord Mansfield continued to incline to the view that slave property could legally exist in England. As others have noted, Lord Mansfield stated in *Stapylton* that he would presume Lewis free unless the owner proved the contrary. Mansfield did not, however, hold that a slave became free on coming to England. If Mansfield had thought that the law emancipated a slave upon her coming to England, he could have ruled Stapylton's evidence of title inadmissible.

Mansfield added, "whether they [masters] have this kind of property or not in England has never been solemnly determined."[104] It appears quite likely that by a "solemn determination" Lord Mansfield had in mind taking a special verdict and hearing argument on this before the Twelve Judges, a procedure used at that time for determining points of law in criminal cases.[105] No such solemn determination had ever occurred regarding slavery in England. In *Stapylton,* Mansfield seems initially to have been willing to create a process that could lead to such a determination.

However, beginning a pattern of marked ambivalence about how to approach slavery, Lord Mansfield then sought to discourage both parties from pursuing the issue. Mansfield said he would prefer not to see the ultimate issue of slave property decided in England, which suggested a strong desire to avoid the issue entirely.[106]

Despite this, Mansfield went to greater lengths to raise questions about the slaveowner's claim than earlier writers have suggested.[107] Mansfield credited most, if not all, of Lewis's testimony, not just his testimony on the "chain of ownership" issue, and very clearly communicated his belief in Lewis's credibility to the jury.[108] It was predictable indeed that based

101. *Minutes,* 71.

102. Oldham, "New Light," 51.

103. Mansfield expressed concern about whether Lewis should have been permitted to testify, but it is uncertain whether this concern was genuine.

104. Fiddes, "Sommersett Case," 503.

105. Baker, *Introduction,* 139, 522–23. The "Twelve Judges" was composed of the judges of the three principal Crown courts: King's Bench, Exchequer, and Common Pleas.

106. Oldham, "New Light," 48 (quoting *Minutes* as quoted in Hoare, *Memoirs*).

107. Oldham argued that Mansfield thought it was likely that the jury would find that Stapylton had no property in the slave, Lewis, because Mansfield had indicated that there had been a break in the "chain of ownership" of Lewis by Stapylton. Oldham, *Mansfield Manuscripts,* 1:1225–28.

108. *Minutes,* 72.

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on Mansfield's summing up the jury would find that Stapylton had "no property" in Lewis. In addition, Mansfield tested Stapylton's title based on his view of what English law required, *sub silentio* determining the slave's status under English law.

Conclusions

The evidence from English social history is that black slaves brought to England occupied a very subordinate servitude status as "slavish servants" or "near slaves," not fully slave, but certainly not free. The ideological basis of such "near slavery" was not "redemptive," but rested fundamentally on the view that certain groups, including Africans, were properly enslaveable, unlike Britons. The popular tradition positing slave emancipation on arrival actually represented not a tradition of emancipation but instead appears to have meant that the rights of slave property owners physically to punish slaves brought to England were limited to punishment rights also exercisable over others in servitude in England. English "near slavery" shared many characteristics with chattel slavery, but limited permissible physical brutality toward slaves and may not have been heritable, thus resembling English indentured servitude if one conceives of that status as including an involuntary, alienable, perpetual form.

The law on slavery in England supported these social practices. The views of the English courts on the status of slaves imported into England during the centuries prior to *Somerset* contained broad areas of agreement, despite differences about substantive issues such as whether an action of trover could be brought for slaves. There was no support for the view that classical chattel slavery could exist under English common law. *Butts* and the Holt court's decisions rejected chattel slavery, but nevertheless provided a powerful framework of economic claims available to masters that legitimized and supported "near slavery" in England in the eighteenth century, thus also rejecting full emancipation. *Shanley v. Harvey* was an apparent late exception favoring actual emancipation, but not a historically important one. The courts rejected a slave's status under foreign (or colonial) law as a basis for slavery in England and prohibited masters from inflicting unlimited brutal punishment on slaves in England with impunity. Such legally sanctioned "near slavery" existed in England through the time of *Somerset.* The term "slave" was often used to describe what were in actuality "slavish servants."

There were exceptions to this broad consensus in law and social practice, but it is important to appreciate precisely their significance. The Yorke-Talbot Opinion announced a uniform "imperial property" view of slavery. *Pearne v. Lisle* held that slavery was lawful throughout the empire because

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it was lawful in England, thus sharply disagreeing with Holt's conclusion in *Smith v. Browne and Cooper* that the common law of England on slavery, and the laws of the colonies, were independent, so that England could reject slavery while imposing it on the colonies. Blackstone initially supported Holt's position. Thus, a sharp tension in English slavery law just prior to *Somerset* concerned whether English and colonial slavery law were identical or independent, a tension that was at least as significant as the tension regarding the precise legal contours of "near slavery" in England.

The social and legal struggles over the status of slaves who came to England and the relationship of English and colonial law came to the boiling point in *Somerset,* confronting Lord Mansfield with the potentially politically divisive task of deciding on a transatlantic stage what the law of the empire on those issues would be.

II. Somerset's Case: An Imperial Perspective

This part analyzes Lord Mansfield's judgment in *Somerset's Case.* It begins by briefly explaining the facts, setting, and key arguments of counsel and then considers the judgment. Was Lord Mansfield's decision intended fully to emancipate slaves who came to England? This issue, the focus of much of the earlier writing about the case, is one of several discussed here.[109] This part also considers further questions: If slaves were not emancipated upon coming to England, what was their status after the decision? What was the significance of Lord Mansfield's inclusion in the judgment of an epigrammatic positive law ruling? It is argued here that Mansfield's positive law holding was motivated by both domestic and imperial political considerations, but also reflected his personal beliefs. The part closes with a discussion of Mansfield's intent regarding colonial slavery, arguing that Mansfield knew and intended that his decision would have serious adverse consequences for colonial slavery.

109. Fiddes, "Sommersett Case," 499–511; C. H. S. Fifoot, *Lord Mansfield* (Oxford: Oxford University Press, 1936), 41–42; Jerome Nadelhaft, "The Somersett Case and Slavery: Myth, Reality and Repercussions," *Journal of Negro History* 51 (1966): 193–208; Bauer, "Law, Slavery," 96–146; Walvin, *Black and White,* 117–31; Wiecek, "Somerset"; Shyllon, *Black Slaves,* 77–124; Davis, *Slavery in Revolution,* 469–522; Jack R. Pole, "Slavery and Revolution: The Conscience of the Rich," *The Historical Journal* 20, no. 2 (1977): 503–13; Higginbotham, *Matter of Color,* 313–55; Edmund Heward, *Lord Mansfield* (Chichester: Barry Rose, 1979), 139–49; Drescher, *Capitalism and Antislavery,* 37–49; Fryer, *Staying Power,* 120–26; Oldham, "New Light," 45–68; Oldham, *Mansfield Manuscripts,* 1221–44; Cotter, "Somerset," 31–56; Paley, "Mansfield, Slavery," 165–84.

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Factual Background and Setting

On the morning of November 28, 1771, a somewhat piqued Lord Mansfield denied a renewed motion for judgment by plaintiff in the *Stapylton* case.[110] Yet, later that same day, Lord Mansfield issued a writ of habeas corpus to John Knowles, captain of the *Ann and Mary,* on which Somerset was "confined in irons . . . ,"[111] commanding that Knowles "immediately" produce Somerset before Mansfield.[112]

The return to the writ stated the following material points.[113] There were "Negro slaves" in Africa,[114] and the slave trade with Africa was necessary to supply slaves to the colonies.[115] By *colonial* law, slaves were "saleable and sold" in that trade as goods and chattels and when purchased were "slaves" and saleable "property."[116] Somerset was "a negro . . . native of Africa," brought to Virginia and sold to Charles Steuart. Steuart brought Somerset to England on business.[117] Somerset escaped and refused to return to Steuart's service.[118]

Somerset was a notorious "test" case. The hearings were widely reported in English and colonial newspapers.[119] Counsel for Somerset served without compensation.[120] The West Indian slaveholding interests controlled and financed the defense,[121] presumably because they believed their interests would be damaged by a decision in favor of Somerset.

It would have been difficult to find a more capable group of counsel to

110. *Minutes,* 5–6; compare Hoare, *Memoirs,* 91–92 (June 1771). Court records support the later date, PRO KB 21/40 (yet Thursday next fifteen days after the feast of Saint Martin 12 Geo. III), release of Stapylton's recognizances.

111. 20 S.T. 1–2.

112. The writ and return are in PRO KB 16/17/2.

113. Courts then were generally bound by the facts in the return. Robert J. Sharpe, *The Law of Habeas Corpus,* 2d ed. (Oxford: Oxford University Press, 1989), 23, 64.

114. 20 S.T. 8–9.

115. 20 S.T. 10–11.

116. 20 S.T. 11–14.

117. 20 S.T. 21–22.

118. 20 S.T. 22.

119. At least thirteen British newspapers—and twenty-two out of twenty-four North American colonial newspapers sampled by Bradley—reported the arguments or decision. Newspapers reviewed for this article included: *London Evening Post; Gazetteer & New Daily Advertiser; General Evening Post; Felix Farley's Bristol Journal; The London Packet; The Middlesex Journal; The London Chronicle; London Gazette; The Public Advertiser; The Morning Chronicle; The Edinburgh Advertiser; The Manchester Mercury; The Public Ledger; The Williamsburg Virginia Gazette;* and *The Charleston South Carolina Gazette.* The arguments and decision were also reported in various widely circulated periodicals. See Cotter, "Somerset," 32 n. 4 (citing Bradley).

120. Hoare, *Memoirs,* 124.

121. Wiecek, "*Somerset,*" 102.

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argue *Somerset.*[122] Serjeant William Davy, justly renowned as a sharp-witted and tenacious cross-examiner willing to confront Mansfield if necessary, opened and closed the arguments for Somerset. His co-counsel, the "famous radical" Serjeant John Glynn, was a Member of Parliament for Middlesex. James Mansfield (no relation to Lord Mansfield), another Somerset counsel, went on to become solicitor general and chief justice of the Court of Common Pleas. Francis Hargrave, a junior counsel, volunteered his services and made his reputation as a result.[123]

Steuart's counsel were equally eminent. John Dunning had been solicitor general and was a Member of Parliament. He had been the prosecutor *for the slave* in the *Stapylton* case. Lord Mansfield thought very highly of Dunning, whom many regarded as the best lawyer of the day. James Wallace, Dunning's co-counsel, later became solicitor and attorney general.

Mansfield's parliamentary role as administration spokesman had in previous years put him at odds with several of Somerset's counsel and with Lord Camden, chief justice of the Court of Common Pleas, on important legal issues, and on colonial policy in particular. In view of the strong support shown by Somerset's politically active lawyers for his cause, and the very substantial press and public discussion the case received, Lord Mansfield must have been acutely aware of its political sensitivity. Indeed, the *Somerset* arguments often amounted to political threats or persuasion in addition to (sometimes even in lieu of) more traditional legal argument.

Arguments of Counsel

During five days of hearings, Somerset's counsel made virtually every conceivable argument against the legality of slavery in England. Somerset's counsel also bluntly and in graphic terms made clear their abhorrence for colonial slavery and the slave trade, presenting a range of further arguments that would have challenged the legality of both institutions. They argued that slavery was contrary to natural law, and that there was no right of permanent enslavement. They argued that slavery was inconsistent with Christianity and also inconsistent with inherent limits on the right to contract.

In response, counsel for Steuart, the real party defendant, argued that English law authorized contemporary slavery in England because villeinage, its equivalent, was still legally permissible. They argued that English statutes authorized slavery not just in the colonies but in England. Alter-

122. The brief sketches here are taken from the *Dictionary of National Biography.*

123. The other Somerset counsel, Mr. Allen or Alleyne, appears to have been a young West Indian about whom little else is known. Bauer, "Law, Slavery," 99 n. 10.

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natively, they argued, slaves who came to England should be treated as servants while their masters were temporarily in England, but their return to the colonies should nevertheless be compellable. Finally, they argued, subtly but forcefully, that a decision emancipating slaves who came to England would endanger colonial slavery. A review of core arguments made by the adversaries is useful in understanding the judgment.[124]

Somerset's counsel's core arguments. Serjeant Davy began by attacking villeinage as a tyrannical "usurpation upon . . . natural rights,"[125] which had become extinct for compelling secular and religious reasons,[126] and which, even if legally still valid, could not apply to Somerset and would, in any event, be politically unacceptable as a basis for slavery.[127] Davy made an extended, politically very pointed, argument that the rival Court of Common Pleas, which could also hear slavery cases if Mansfield decided for the slaveowners, would never accept villeinage as a legal basis for slavery.

Davy contended that setting foot in England emancipated slaves:[128] "[A]ny slave being once in England, the very air made him a free man," citing *Cartwright's Case,*[129] because " . . . the Soil the Air of England . . . makes this part of our Constitution."[130] Davy asserted that Virginia law could not apply in England. England would not permit "a Turk" to "bring here his fair Circasian slaves" and rape them with impunity.[131] Virginia law would permit Steuart to beat Somerset to death with impunity, or cut off part of Somerset's foot for trying to escape.[132] Since such acts would

124. Arguments of counsel from the following sources, which are either primary or contain primary materials, were used here: Hoare, *Memoirs,* 103–33; Granville Sharp, *Proceedings Feb. 7, 1772, in the court of the King's Bench, London, before Chief Justice Mansfield, part of the case of James Sommersett, a slave belonging to Charles Stewart* (N.Y. Historical Society MS 1772) (hereafter *Proceedings*); newspapers (see above, n. 119); Henry Marchant, *Diary* (R.I. Historical Society MS 1771–2) (citations are to the typed transcript, Philadelphia Historical Society); Lincoln's Inn MS Dampier, Ashhurst Paper Books (hereafter cited as "APB"), 10b; and the Lofft and S.T. reports. I thank Michael Macnair for bringing to my attention the existence of the Marchant diary. Detailed discussions of the hearings are found in: Bauer, "Law, Slavery," 96–146; Shyllon, *Black Slaves,* 77–124; Davis, *Slavery in Revolution,* 469–522; Higginbotham, *Matter of Color,* 336–48.

125. *Proceedings,* 13.

126. *Proceedings,* 27–28. Davy said that for *Somerset* he would give up the position that baptism constituted manumission, an important concession. Ibid., 74. Somerset had been baptized. Paley, "Mansfield, Slavery," 169.

127. *Proceedings,* 34–35.

128. Marchant, *Diary,* 1:119.

129. *General Evening Post* (London) (hereafter *Post*), 6–8 February 1772, 3; Marchant, *Diary,* 1:119.

130. Marchant, *Diary,* 1:120.

131. Ibid.

132. *Proceedings,* 68; Marchant, *Diary,* 1:120.

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be crimes in England, Somerset's slave status in Virginia must be disregarded in England.[133] Finally, Davy discussed a number of precedents he claimed barred English slavery, among which were virtually all of the cases discussed above in Part I.

Serjeant Glynn then argued "very strongly" for Somerset.[134] Glynn immediately made clear his political focus by stating that he was certain the court would not be influenced by "any undue influence" from the slave colonies or their "convenience" in deciding the case.[135] Glynn asserted that slavery was dangerously expansive and dehumanizing.[136] Villeinage was so disfavored legally that any other species of slavery would have to have been authorized by statute.[137]

After listening to Davy and Glynn, Henry Marchant, a prominent American attorney, wrote in his diary for that day that there was no difference in principle between profiting from the slave trade and employing slaves in a business. In Marchant's view, the argument that "British soil and British air" were different from American "Soil and Air" where "Liberty" was concerned was nothing more than a "plausible Pretence" to "cheat an honest American of his slave."[138] Marchant thought that Davy's and Glynn's arguments attacking slavery in England would apply with equal force to the colonies.[139]

James Mansfield made a natural rights argument,[140] and concluded that slavery in England could only be imposed by "the legislature."[141] Francis Hargrave followed. His primary argument was that the procedures for establishing villeinage were exclusive, and therefore slavery could not now be established in England, "until the legislature shall interpose its authority. . . . "[142] Hargrave also asserted that colonial slavery rested only on positive law. Mr. Allen, final Somerset counsel, made a broad-ranging attack on the theoretical basis of slavery itself, an argument that would have outlawed colonial as well as English slavery.[143]

133. Marchant, *Diary,* 1:120.
134. *Post,* 3.
135. *Proceedings,* 98.
136. Ibid., 108.
137. Ibid., 102.
138. Marchant, *Diary,* 1:123.
139. Ibid.
140. Bauer, "Law, Slavery," 105; Hoare, *Memoirs,* 125–26. Davis's magisterial treatment on one occasion attributes to Lord Mansfield remarks that James Mansfield (see above, 626) made. Davis, *Slavery in Revolution,* 497; compare *London Evening Post,* 9–12 May 1772, 4.
141. Hoare, *Memoirs,* 126.
142. 20 S.T. 48.
143. 20 S.T. 68.

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Steuart's counsel's main arguments. In addition to the arguments summarized above, Wallace attacked the precedents on which Somerset's counsel had relied. He also argued—acknowledging the importance of the chronic runaway problem facing slaveowners—that if change of location were sufficient to change slave status, a slave who left Virginia to go "to the adjacent country" would be freed.[144]

Dunning's argument (quite probably approved by the slaveowners) took a very different tack from—and, indeed, undercut—Wallace's argument. Dunning emphasized that he did not intend to defend slavery per se. Instead, he subtly conveyed to Mansfield the slaveowners' core concern—which was not whether they won in *Somerset,* but rather, the precise grounds on which it was decided. Dunning did this by presenting an extended discussion of the economic value of slaves in Jamaica[145] and the dangerous effects a decision emancipating slaves in England would have on future insurrections there. This entire discussion was wholly irrelevant, as Dunning surely knew, unless the decision in *Somerset* would adversely affect colonial slavery. Dunning stated that he thought the same numbers of "negroes" would come to England no matter how *Somerset* was decided, thus making clear to Mansfield that slaveowner interests did not care fundamentally about the substantive outcome in *Somerset* itself.

Dunning's arguments demonstrate that the actual concern of the slaveowners was not primarily to prevail in *Somerset,* which they saw as marginal to their interests, but was instead to prevent a ruling in *Somerset* that had much broader adverse implications for them. Although Dunning framed the possible adverse effects in terms of colonial slave rebellions, a legitimate enough concern to avoid the charge that it was pure pretext, contemporary evidence shows that slaveowners were in reality very concerned that a ruling that slaves were not property in England would necessarily devalue or destabilize their colonial investments in what they thought was a risky trade.[146]

144. 20 S.T. 70.

145. Using Dunning's figures, about 580 million Great Britain pounds or $1 billion in today's purchasing power.

146. *Post,* 28 May 1772 (West Indians have "obtained a promise from Mr. Steuart not to accommodate the Negro cause, but to have the point solemnly determined; since, *if the laws of England do not confirm the colony laws with respect to property in slaves, no man of common sense will, for the future, lay out his money in so precarious a commodity. The consequences of which will be inevitable ruin to the British West-Indies. The price of slaves is, we hear, already greatly enhanced on account of the Negro question; and people say that, 'till it is finally decided, the African trade will be in a manner annihilated*'")(emphasis added). On slave rebellions in the West Indies, several of which had occurred in Jamaica in the early to mid-1760s, see O'Shaughnessy, *An Empire Divided,* 36–40.

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Dunning conceded that *Cartwright's Case* meant that when a slave was brought from Russia, the master could no longer punish him according to the slave laws of Russia.[147] However, Dunning argued, English law recognized a right to hold persons to involuntary lifetime service subject to limits on "cruel usage," and that was all that slaveowners sought. Dunning thus offered Mansfield a basis for sustaining Steuart's position far narrower than that suggested by Wallace. Even more importantly, Dunning had made clear that the slaveowners wanted to avoid losing the case on the broad grounds advocated by Somerset's counsel.

Posthearing Proceedings and Legislative Efforts

At the close of argument, Lord Mansfield announced that "though his brothers on the Bench should be unanimous, [the case] required . . . [a] consultation . . . among the twelve Judges. . . . "[148] According to Justice Ashhurst's notes, Mansfield said he thought that the "return renounce[d]" the idea of a "contract of service" because the owner insisted on the power to use force to send Somerset abroad for sale;[149] this claim meant "every idea of [such] a contract ceases. . . . "[150] Mansfield continued that complete liberty for English slaves would cost owners 700,000 pounds,[151] while if colony slave laws "be found binding . . . it must imply consequences altogether foreign" (i.e., unacceptable).[152] Mansfield listed as unacceptable consequences the power of killing slaves or enslaving their posterity.[153] Mansfield then explained that Steuart and the West India merchants could end the matter by manumitting Somerset; and that if the merchants chose to go through with the case, "judgement should be given according to the *strict letter of the law* . . . without . . . power to attend to . . . compassion . . . or the danger of the precedent . . . *fiat justitia ruat coelum*. . . . "[154]

The parties did not compromise, apparently because the slaveowners decided that they wanted a definitive legal ruling to resolve the uncertainty regarding their *colonial* property interests.[155] Slaveowner interests

147. APB, 10b.

148. *London Evening Post,* 21–23 May 1772, 4; *Gazeteer and New Daily Advertiser,* 26 May 1772, 4.

149. APB, 10 b.

150. *Gazetteer and New Daily Advertiser,* 4.

151. In today's purchasing power, approximately 50 million Great Britain pounds or $90 million.

152. *Gazetteer and New Daily Advertiser,* 4.

153. APB, 10b.

154. *London Evening Post,* 21–23 May 1772, 4.

155. See above, n. 146.

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nevertheless made an unsuccessful effort to obtain favorable legislation days after Mansfield's remarks.[156] Why Parliament declined to assist the slaveowners is unknown, but it is clear that by 1772 there was substantial English antislavery sentiment, at least in London, as evidenced by the vigorous presentation by Somerset's politically active counsel, and by the newspaper coverage of *Somerset* (which included related antislavery editorials, antislavery commentary, and correspondence).[157] As early as 1776, Parliament also refused to act on motions by abolitionists attacking the slave trade. It thus seems likely that in 1772 Parliament was already internally divided on slavery and that the administration, which usually had power to determine the parliamentary agenda, saw no useful political purpose to be served by a debate that would force Parliament to take sides on the issue, causing divisiveness not only over slavery but also over whether there should be two laws of slavery, one for England and one for the colonies, without colonial consent.

What is clear is that the slaveowners thought a court decision in *Somerset* was necessary to protect the stability of investments in colonial property.[158] A newly discovered newspaper report stated that slaveowners believed that they would "certainly" win if the issue was decided by the Twelve Judges, because the judges would conclude that colonial property created by virtue of English statute must be deemed property in England.[159] For that reason, the slaveowners may not have pressed Parliament particularly hard to assist them.[160]

The Content of Lord Mansfield's Judgment

On June 22, 1772, Lord Mansfield delivered his *Somerset* judgment. Subsequently, there has been considerable disagreement about what he actually

156. *Journal of the House of Commons* XXXIII 789 (25 May 1772); *Morning Chronicle,* 26 May 1772, 2. The slaveowners' motion suffered a type of procedural defeat that was a common Parliamentary tactic for avoidance of controversial issues; the agenda then contained no urgent business.

157. Langford noted that there had been a sharp growth of abolitionist sentiment among prominent Englishmen and in many colonies by the 1770s. Langford, *A Polite and Commercial People,* 517.

158. See above, n. 146.

159. *Manchester Mercury,* 2 June 1772, 1.

160. Fiddes, "Sommersett Case," 508–9 (slaveholders' Parliamentary efforts were not vigorous; assigns no reason). The West Indian lobby had limited, albeit substantial, power in Parliament and had other pressing issues that concerned its members. O'Shaughnessy, *An Empire Divided.*

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said.[161] Oldham compared five versions of Lord Mansfield's judgment.[162] Other versions of the judgment are found in approximately a dozen newspapers published at the time.[163] These other versions may be divided into the "brief reports" and the "detailed" newspaper report. Although the brief reports addressed important issues, and appear generally consistent with Mansfield's known views, given the possibility of bias, hearsay, confusion, and lack of corroboration, it seems best to exclude them from consideration in analyzing the judgment.[164]

The "detailed" report. The brief reports were quickly followed—in some newspapers—by a detailed account of Lord Mansfield's judgment that agreed in most respects with the Hill/Balguy report.[165] This contemporaneous newspaper report is probably the most accurate account of the judgment, not the considerably later Hill/Balguy report preferred by Oldham.[166] There were significant differences between the accounts.[167]

161. Several newspaper sources say the judgment was written, but no manuscript has been located.

162. Oldham, "New Light," 54–60. The reports were: Lofft 1; *The Scots Magazine,* vol 34, 297 (June 1772); Sharp Judgement (N.Y. Historical Society MS 1772); Ashhurst, LI Dampier MSS APB 10b; Hill MS 10, J. H. Baker, *English Legal Manuscripts,* 2:81 (H 1787–A87), MSF 92, f. 312–314. The Hill MS was a report copied from notebooks of John Balguy, a junior barrister who later became a Welsh judge. J. Bruce Williamson, *The Middle Temple Bench Book,* 2d ed. (London 1937), 198 (I thank Guy Holborn of Lincoln's Inn Library for this reference). Based on notations in Hill's notebook, which also identified Balguy as the report's author (hereafter Hill/Balguy report), it is unlikely that Hill copied the report before 1774; there is no indication that Hill compared it to other reports.

163. These included at least the newspapers listed above, n. 119.

164. *The brief reports.* Some newspapers reported that Lord Mansfield had indeed freed slaves who came to England, but subject to an important limitation: "Lord Mansfield . . . said, that every Slave brought into this Country ought to be free, and that no Master had a Right to sell them here . . . but he declared that the Owner might bring an Action of Trover against any one who shall take the Black into his service." *Manchester Mercury,* 30 June 1772, 1. Other newspapers carried a shortened, materially different version of that report. *Felix Farley's Bristol Journal,* 27 June 1772, 2. Yet other newspapers initially reported a much narrower decision by Lord Mansfield, "that [the] master had no power to compel him on board a ship, or to send him back to the plantations." *Post,* 20–23 June 1772, 3; *Daily Advertiser,* 23 June 1772, 1. Other newspapers combined this description of a narrow holding with a statement that the judgment provided a trover action for owners. *London Evening Post,* 20–23 June 1772, 3. Another report stated: "Lord Mansfield . . . delivered the unanimous opinion . . . that the man's being a Negro Slave, did not authorize his Master to transport him out of the kingdom. . . ." *London Chronicle,* 20–23 June 1772, 6.

165. *London Evening Post,* 23–25 June 1772, 1; *Post,* 21–23 June 1772, 4; *Edinburgh Advertiser,* 30 June–3 July 1772, 1–2. An identical report appeared in *The Scots Magazine vol. 34 (June 1772),* 298–99. See Appendix 1 of this article (online version only) for a transcript of this report.

166. Davis's account of *Somerset* also relied on this newspaper report, although he referred to it as the *Scots Magazine* report; the two are identical. Davis, *Slavery in Revolution.* The

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However, except as to whether Mansfield referred to the limited powers of "courts of justice" regarding slavery, the differences between these reports do not materially affect the major points made below regarding the judgment.

Analysis of Lord Mansfield's Judgment

Lord Mansfield's *Somerset* judgment managed to be both delphic and oracular, a rare feat. To avoid controversy, Mansfield provided as little insight as possible into his thoughts.[168] His brief statement of a compro-

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newpaper/*Scots Magazine* report is preferable for several reasons: (i) had Lord Mansfield regarded the report as inaccurate, he could easily have had it revised; (ii) if it had been materially inaccurate someone probably would have attacked it, which did not occur; (iii) the report is corroborated in several respects by Justice Ashhurst's notes; (iv) the Barbados London agent and attorney Samuel Estwick accepted this report as a reasonably accurate account of Lord Mansfield's decision even in the 1773 second edition of a pamphlet he wrote attacking the decision. Samuel Estwick, *Considerations on the Negroe Cause Commonly So Called,* 2d ed. (London, 1773). It has been suggested that Estwick would have preferred the newspaper report, but in view of the slaveowners' views on the necessity of judicial relief and Estwick's attack on the decision, this seems unlikely. More important, it seems fairly unlikely that Estwick would have relied on any report known to be inaccurate by the time his attack's second edition appeared, since to have done so would have damaged his credibility, and opposing pamphleteers like Francis Hargrave would have been quick to point this out; (v) the newspaper report was consistent with Mansfield's views in various cases discussed below.

167. The detailed newspaper report and the Hill/Balguy report disagreed on whether, as the newspaper reported, Mansfield stated that "courts of justice" could not introduce slavery now on "mere reasoning from any principles natural or political," or whether, as the Hill/Balguy report says, he instead stated his conclusion that slavery could not *ever* be based on such "natural or political" principles but could instead only be based on positive law. The better view, as discussed below (641–42), is that the judgment did refer to the limited powers of courts of justice.

Mansfield also said that because slavery was an "odious" condition, "it" or "immemorial usage" regarding it, depending on the account, must be "taken" or "construed" strictly. Mansfield meant that any alleged immemorial usage supporting slavery must meet stringent criteria (not met by contemporary slavery) to be deemed valid. Mansfield may also have meant that immemorial usage or positive law must clearly authorize any treatment of a person as only a chattel slave could be treated before such treatment would be deemed lawful.

Mansfield then concluded that under English law, a master had never been permitted to "take a slave [servant] by force to be sold abroad." The word "servant" appears at this point in the Hill/Balguy MS; "slave" appears in the detailed newspaper account. The "detailed" newspaper report is correct here. Mansfield used the term "slave" again later in explaining *Somerset,* see *R. v. Inhabitants of Thames Ditton,* (1785) 4 Doug. 300, 99 E.R. 891, Lincoln's Inn MS Misc.131 (Abbot) f.135, H 1787–C124 (MSF 113) f. 135, Middle Temple MS Gibbs, Cases in King's Bench 24 & 25 Geo. 3 f. 240 (Abbot MS).

168. Contrast e.g. *Raynard v. Chase,* (1756) 1 Burr. 2, 97 E.R. 155 (brewery investment challenged as unlawful). The judgment is analyzed using the "detailed" newspaper report (see n. 165), except as noted.

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mise result accompanied by a statement of much broader principles led to foreseeable controversy and misinterpretation on important points. Yet, certain aspects of Mansfield's judgment deliberately set forth a clear and powerful framework for the law of slavery in the empire.

The ruling outlawing private use of force. The ruling in *Somerset*, Mansfield himself later said, "only determined that a Master cannot by force carry his *Slave* out of England. . . . "[169] This was a technically correct account of the narrow holding, particularly where emancipation was concerned, but it was not a complete account of the effect of the judgment for several reasons. First, Lord Mansfield held that all aspects of Somerset's status as a servant must be determined under English law. Mansfield decided that point completely consistently with the decisions in *Chamberlaine, Smith v. Gould,* and, broadly speaking, even with *Butts v. Penny.* Second, although in context Lord Mansfield's reference to a "high act of dominion" was a reference not to all aspects of slavery but, instead, only to the use of force to compel someone to leave England,[170] his ruling implied that whatever a person's status outside England, any use of force against that person in England must be permissible under English law. In these two significant respects, the Yorke-Talbot Opinion was clearly contradicted, and *Somerset* was inconsistent with *Pearne v. Lisle.*[171]

If these points were all that *Somerset* had decided, it could fairly be seen as an unremarkable continuation of the basic principle established by earlier slavery cases that where conflicts of law occurred, England would not impose on persons in England a penal status based on foreign law.[172] Given earlier law and Mansfield's views on conflict of laws issues, there was no realistic possibility that Lord Mansfield would hold that Somerset's status in Virginia permitted him to be subjected in England to physical punishment or coercion that would be criminal under English law. In this

169. *R. v. Inhabitants of Thames Ditton,* (quotation in Abbot MS report) (emphasis added). See Appendix 2 of this article (online version only) for a transcription of the Abbot MS report.

170. This was Davis's position, Davis, *Slavery in Revolution,* 498, and is very consistent with Mansfield's comments throughout *Somerset* distinguishing between issues raised by the use of force and those raised by other aspects of servitude.

171. There is no substantial evidence that Lord Mansfield's judgment discussed any specific legal authority other than the Yorke-Talbot Opinion and *Pearne v. Lisle,* a telling omission.

172. *Chamberlaine, Smith v. Gould,* and *Somerset* are cited as the principal support for this proposition in a classic conflict of laws text. A.V. Dicey and J. H. C. Carlile, *Dicey and Morris on the Conflict of Laws,* ed. L. A. Collins, 13th ed. (London: Sweet and Maxwell, 2000), 85 n. 42.

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important respect, the outcome in *Somerset* was reasonably predictable, contrary to the conclusions of Holdsworth and Oldham.[173]

Lord Mansfield did not state explicitly that he disagreed with the Yorke-Talbot Opinion and *Pearne v. Lisle* only to the extent that they would permit the use of force against a slave where English law would not permit its use against other types of involuntary servants. Yet it is difficult to avoid the conclusion that that was Mansfield's view. If Mansfield had wanted to disagree with Yorke-Talbot's conclusion that coming to England did not emancipate slaves or with *Pearne v. Lisle* regarding trover, all he had to do was to say so.[174] Still, his silence on the limited extent to which he was rejecting these earlier opinions caused confusion. Even slaveowner attorneys such as Samuel Estwick were uncertain whether Mansfield intended only limited rejection of the Yorke-Talbot Opinion.[175]

Mansfield's unwillingness to state that slaves who came to England were thereby emancipated was especially telling in view of the fact that this was the central contention in Serjeant Davy's and Hargraves's arguments. Alternatively, Mansfield could have endorsed emancipation by adopting either a broad reading of Chief Justice Holt's position in *Chamberlaine* and *Smith v. Gould*[176] or by accepting Lord Northington LC's ruling in *Shanley v. Harvey*.[177] Instead, Mansfield entirely ignored both Somerset's counsel's contentions and their authority, strong circumstantial evidence that he did not intend his ruling to emancipate slaves in England.[178] Moreover, Mansfield could not have emancipated English slaves without, in his view, exposing English masters to property loss, claims for back wages, and possibly to other types of tort claims as well, and he thought this type of retrospective impact would be unacceptable.[179] Although other evidence seems unnecessary, Mansfield's private 1779 comments to Thomas Hutchinson, and a newly discovered report (the Abbot MS report) of his comments regarding the breadth of the *Somerset* decision in *R. v. Inhabitants of Thames Ditton* in 1785, both confirm his intent on emancipation.[180]

173. Each expressed the view that *Somerset* could have gone either way. Holdsworth, *History,* 3:507–8; Oldham, *Mansfield Manuscripts,* 1:1240 ("outcome was not inexorable").

174. That Lord Chancellor Hardwicke had been Mansfield's mentor does not alter this conclusion.

175. Estwick, *Considerations,* xii–xiii.

176. See above, 616, 618.

177. See above, 621.

178. Several writers relied on later events to explain intent, e.g., Fiddes, "Sommersett Case"; Cotter, "Somerset"; Paley, "Mansfield, Slavery."

179. Mansfield had expressed general concern on this point as early as *Stapylton.* Hoare, *Memoirs,* 91.

180. Thomas Hutchinson, *The Diary and Letters of His Excellency Thomas Hutchinson, Esq.* (Boston: Houghton Mifflin, 1884–86), 2:277; *R. v. Inhabitants of Thames Ditton*.

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Mansfield's *Thames Ditton* comments leave no doubt that he did not think that *Somerset* emancipated English slaves. In fact, the newly discovered manuscript report of *Thames Ditton* makes clear that it was generally accepted that *Somerset* had not emancipated English slaves; counsel for *both* parties accepted that the pauper there was either a slave or in involuntary servitude once in England.[181] This new report also makes clear that Mansfield believed that the ruling in *Somerset* turned on the fact that even villeins could not be compelled to leave England; thus, it appears possible that he thought the permissible treatment of English "slaves" was bounded by the authorized treatment of villeins.

Mansfield's decision to prohibit any use of force against slaves who came to England unless it was authorized by the common law meant that he had barred classical chattel slavery in England (absent positive law), despite his failure to emancipate slaves entirely. Mansfield's decision on this point also had broader implications. The first was that it would become more difficult legally to justify differences between treatment of slaves and other servants—for example, would a slave sale not be a "high act of dominion?" The second stemmed from the fact that Serjeant Davy had based the claim for emancipation on the idea that anyone who came to England had a right to equal benefit of the laws.[182]

Remarkably, Mansfield's decision adopted the "rights of man" principle that English common law provided certain minimum levels of substantive protection to anyone who came to England (though the decision limited the amount of substantive protection). This represented the emergence of a new English concept of legal freedom that divorced fundamental legal rights from race, birth, or free/servile status and based them instead on an individual's status as political subject. Mansfield's position on this point arguably transformed the concept of how English legal rights arose when compared to the classic account in *Calvin's Case.*[183]

The status of slaves brought to England. Mansfield's judgment was also deliberately silent regarding the legal status of slaves in England after *Somerset.* The better inference from Mansfield's unwillingness to declare them emancipated, in light of both prior law and the arguments of

181. *R. v. Inhabitants of Thames Ditton,* (Abbot MS report).

182. *Post,* 6–8 February 1772, 3; Marchant, *Diary,* 1:119.

183. *Calvin's Case,* (1608) 7 Co. Rep. 1a, 77 E.R. 377, 2 S.T. 559. I am indebted to Kim's excellent study on citizenship here. Keechang Kim, *Aliens in Medieval Law: The Origins of Modern Citizenship* (Cambridge: Cambridge University Press, 2000), 176–211. *Calvin's Case* held that someone born in Scotland after the accession of James I to the English throne would not be disqualified from holding property in England, because the Scot had been born into the allegiance of the English king. As infidel aliens, African slaves would not have benefited from *Calvin's Case.*

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counsel, is that he intended that a slave continue in "near slavery" once in England.[184] This view of Mansfield's position is consistent with his later statement in *Thames Ditton* that *Somerset* turned on the limits of power over villeins under English law. This outcome was reasonably predictable. "Near slavery" was the status of slaves who came to England established by the predominant view in the law prior to *Somerset,* which did not require a choice between slavery and full emancipation.

Nevertheless, it was also foreseeable that the public might conclude that in deciding that slavery must be established by positive law, Mansfield was also ending involuntary servitude or "near slavery" for slaves who came to England. Mansfield's judgment did nothing to avoid misunderstanding. Slaveowner attorneys were uncertain enough about Mansfield's intent on this point that some chose to argue that nothing had been decided.[185] As the next section shows, the inference is inescapable that Lord Mansfield's silence on emancipation and the status of slaves was his deliberate choice.

Public confusion about the judgment. Most recent historians have concluded that Lord Mansfield intended the substantive ruling in *Somerset* to be limited to a ruling on the use of force and that he did not intend emancipation.[186] That conclusion requires them to explain why much of the public—and many later observers—thought the decision was much broader in purpose or effect. A variety of explanations, from bad or biased reporting of the decision by newspapers or Capel Lofft, to unduly broad arguments by counsel, to propaganda regarding the decision spread by interested parties, or Lord Mansfield's lack of foresight, have been offered for this public perception.[187] These explanations are flawed.

The quality of the newspaper reporting of *Somerset* was generally quite high. While there may have been some mistaken reporting or political bias, what appear to be substantially accurate reports of the arguments and judgment itself were quickly and widely circulated. Similarly, the arguments of counsel were broad because they needed to be, given the issue raised by the return to the writ, and because the court understandably permitted this.

The elimination of earlier explanations for the distortion in public perception regarding the judgment leads to the ineluctable conclusion that the distortion actually occurred primarily because Lord Mansfield, after six

184. Davis concluded similarly that English law (including *Somerset*) "did not totally dissolve the pre-existing relationship between master and slave." Davis, *Slavery in Revolution,* 498 and n. 52. But cf. Drescher, *Capitalism and Antislavery,* 37–38.

185. Estwick, *Considerations,* 46.

186. Oldham, "New Light," 45. The prominent exception is Cotter, "Somerset."

187. Nadelhaft, "The Somersett Case," 199–201; Walvin, *Black and White,* 125; Paley, "Mansfield, Slavery," 181–84; Fiddes, "Sommersett Case," 508; Wiecek, "*Somerset,*" 108.

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months of deliberation, intentionally issued a compromise judgment that contained principles with potentially broad application and was silent on emancipation and on the status of slaves after they came to England.[188] Not only is it unquestionable that Mansfield was far too capable to have remained silent on these points through inadvertence or lack of foresight, Mansfield had told the parties in *Stapylton* that he believed such uncertainty about the status of slaves was desirable.[189]

As Mansfield must have known, his decision allowed the adversaries to read it the way they wanted to read it on emancipation, and they proceeded to do just that. Since the decision gave both sides what they most wanted from it, it was unlikely to be challenged, and this met Mansfield's immediate political goal. It is a strong inference from the political circumstances and from the structure of the decision itself that Lord Mansfield accepted that his judgment would be misinterpreted on emancipation and slave status as the necessary price of political peace on slavery in England. Having accepted that price, Mansfield was not about to articulate his reasoning publicly or to resolve the uncertainty on these points once controversy began.

The positive law holding. Unlike his position on emancipation, the gist of Lord Mansfield's positive law holding was unmistakably clear: slavery in *every country* had *always* originated from positive law, by which Mansfield meant either statute or its equivalent, immemorial usage or custom. The first point to notice about this holding is that it deliberately applied both to England *and* to its colonies, a breadth of application that was entirely unnecessary to Mansfield's decision if the decision applied only to slavery in England. The second point to observe is that Mansfield adopted the position advocated by Somerset's counsel, both for England and for the colonies.

Mansfield's positive law holding necessarily rejected the argument that villeinage could provide a legal basis for English (or colonial) chattel slavery. Mansfield's holding also necessarily rejected the argument that English statutes passed in support of the slave trade, or those governing slavery in the colonies, authorized slavery in England. Thus, Mansfield demolished both major arguments supporting English chattel slavery advanced by the West Indian slaveowners. But the ruling had much larger significance for imperial politics and slavery.

If positive law was required to support English slavery, and there was, as Mansfield thought, no such positive law, then chattel slavery was unlawful

188. Drescher agreed that Mansfield sought and deliberately maintained ambiguity about his position, though his reasoning was somewhat different. Drescher, *Capitalism and Antislavery,* 40–41.

189. Fiddes, "Sommersett Case," 503–4.

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in England. This apparent equivalence between a requirement of "positive law" to support slavery and a common law prohibition on slavery, the latter the "first tier" position advocated by Somerset's counsel, raises a central question about Lord Mansfield's judgment: why did Mansfield decline to state explicitly that English common law barred chattel slavery?

To put this another way, did Lord Mansfield think the legal effect in England and the colonies of the positive law holding was legally or politically the same as a holding that the common law of England prohibited slavery? There is strong though circumstantial evidence that Mansfield thought there were fundamental substantive and procedural differences between the two conclusions. But Lord Mansfield chose not to explain these differences.

The most persuasive evidence that Lord Mansfield did not think the "no positive law" and "common law prohibition" conclusions were equivalent is that if he had thought that they were equivalent, he could simply have endorsed the arguments made by Somerset's counsel on this point. He did not take this obvious course. To understand why, the critical clue is Mansfield's deliberately expansive statement that his positive law conclusion applied everywhere, not just to England, when he could easily have limited his conclusion to English law.

The main reason that Lord Mansfield chose not to declare that English common law prohibited chattel slavery was that to have done so would have confronted him with two equally unpalatable choices. Either, as Lord Hardwicke had reasoned in *Pearne v. Lisle,* Mansfield would also have outlawed slavery in at least part, if not all, of the British colonies, or Mansfield would have been forced to confirm Blackstone's position that there were two systems of law where slavery was concerned, one for England under the common law and one for the colonies that were governed "outside" that law as conquests. Either result would have been politically divisive, if not wholly unacceptable, in 1772, since one result would have politically threatened colonial slaveowners whose allegiance Britain wanted while the other would have offended both English and colonial opponents not just of slavery but of Crown American policy. The following considerations reinforce the conclusion that Mansfield decided to avoid this divisive issue.[190]

As is apparent from the stance of the parties, the arguments of counsel, and the newspaper coverage, both sides in *Somerset* were well aware that

190. The imperial political significance of the West Indies is made clear by the fact that during the 1760s and 1770s, "British colonial policy increasingly discriminated against the North American colonies in favor of the British West Indies." O'Shaughnessy, *An Empire Divided,* 106.

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Mansfield's decision could threaten the legality and stability of slavery in the colonies as well as in England. For example, Serjeant Davy's argument that the "soil and air" of England conferred freedom, if confirmed by Mansfield, would surely have been an argument that many thought applicable to any country inhabited by Englishmen, or at least to any English settlement, since it really referred to fundamental principles of English law, which many thought, rightly or wrongly, were the "birthright" of Englishmen and traveled with them.[191] Given Lord Mansfield's long experience with conflicts between English and colonial law, which began well prior to his accession to the bench and of which he made a classic "restatement" only two years later in *Campbell v. Hall,* he would certainly have understood Lord Hardwicke's position in *Pearne* that the colonies must follow English law on a fundamental issue like slavery. Thus, he would have understood the imperial implications of Davy's argument and others like it attacking the foundations of slavery in every part of the empire.[192] Mansfield would also have been acutely aware of the unpopularity of Blackstone's position, which had been a subject of heated dispute in the context of other "transatlantic constitution" issues. Given his political dilemma, Mansfield needed a legal theory that would avoid the imperial law problem and distinguish between England and the colonies, and the positive law holding provided it.

There was also an important procedural difference between a "positive law" ruling and one based on common law, one that had significant political consequences. The common law and natural law basis of Somerset counsel's arguments implied that English courts had the power to end or restrict colonial slavery and at least to restrict, if not to end, the slave trade. Lord Mansfield could readily foresee that if *Somerset* were considered by the Twelve Judges, there might be judges who would want to use this power as advocated by Somerset's counsel. In addition, as noted above, the proslavery forces thought that if the issue was elevated to the Twelve Judges, they would ultimately win.[193] But it is a reasonable inference that in 1772 such a fight over slavery, which would ultimately occur in the House of Lords, was a fight Lord Mansfield wanted to avoid, particularly after Parliament had declined to act at the slaveowners' request.

In 1772, a Parliamentary decision to end slavery in England, and hence

191. E.g., Marchant, *Diary,* 1:123.

192. *Campbell v. Hall.* Hardwicke thought all colonies were governed by English law on slavery (see above, 620–21). Blackstone's position (see above, 612) ignored the uncertainty and vacillation on this point that led to persistent conflict on the status of American colonies throughout the eighteenth century. Loughton, *Conquest and Settlement,* 84–87; Bilder, *Transatlantic Constitution,* 39.

193. *Manchester Mercury,* 2 June 1772, 1.

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to throw into doubt the political, and possibly the legal, foundations of the slave trade and colonial slavery, would have heaped fuel on the fire of the growing colonial revolt by threatening an important basis for continued loyalty to the empire. Having played a central role in defending the administration position vis-à-vis the colonial rebellion, Lord Mansfield unquestionably would have been aware of these political implications. When settlement or legislation did not occur despite Mansfield's concerted efforts to obtain resolution without a decision, Lord Mansfield was forced to consider how to avoid future slavery controversies.

The positive law ruling permitted Lord Mansfield to avoid predictable future disputes with other courts, such as Common Pleas, and the resulting fight in Parliament. Notably, in making his decision Mansfield reversed his position—one he took from the beginning to the end of the proceedings—that he would seek the opinion of the Twelve Judges on the issues raised by *Somerset.* In fact, Mansfield's decision was designed to prevent this from occurring.[194]

Was treating slavery solely as a matter of positive law a new idea in English law? None of the earlier slavery cases over more than a century relied on that principle; instead, they analyzed the issue of slave property as one controlled by common law principles (e.g., the law of trover). Lord Mansfield's positive law approach to slavery was a clear innovation (notably, one suggested several times by Somerset's counsel) that fundamentally transformed the character of slave property.

At least one possible source of Lord Mansfield's approach can be identified. During the decade prior to *Somerset,* Mansfield had been involved in a series of politically and personally bruising legal and political challenges to the authority of common law judges, as opposed to juries, and common law courts, as opposed to Parliament.[195] In an important case on the authority of common law courts, *Harrison v. Evans,* Lord Mansfield took the position that the common law could not create a crime where Parliament had decided none existed. In *Harrison,* heard in the House of Lords on appeal in 1767, a London by-law made it an offense punishable

194. There is no evidence that Lord Mansfield polled all of the other judges before announcing the judgment in *Somerset.* Bauer, "Law, Slavery," 123 n. 9. Lord Mansfield stated that the unanimity among the King's Bench judges *on the specific point to be decided* meant that further argument—before the other benches—was unnecessary. In short, despite *several* earlier statements that such argument would occur—even if the King's Bench judges *were unanimous*—Lord Mansfield sought to limit consideration of *Somerset* to the King's Bench.

195. A good survey of the eighteenth-century common law-statute law relationship is David Lieberman, *The Province of Legislation Determined* (Cambridge: Cambridge University Press, 1989).

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by a substantial fine for a Dissenter to decline to serve in Corporation offices such as sheriff.[196] However, Dissenters were by statute disabled from serving in such offices. Defending religious toleration, Lord Mansfield vigorously attacked Blackstone's position supporting the by-law, and the House of Lords sustained Mansfield's position. Mansfield argued that if nonconformity were a crime now, it must be by virtue of common law. He reasoned:

> [N]o usage or custom . . . makes Nonconformity a crime. . . . Natural Religion . . . [and] Revealed Religion are part of the Common law. . . . But it cannot be shewn from the principles of Natural or Revealed Religion, that . . . temporal punishments ought to be inflicted for mere opinions with respect to particular modes of worship. Persecution for . . . conscience, is not to be declared from reason or the fitness of things; it can only stand upon positive law. . . .[197]

Based on *Harrison,* and Mansfield's prior comments in *Somerset* regarding the desirability of slavery legislation, it seems reasonable to think that Mansfield did actually say in his *Somerset* judgment that it was impossible for "courts of justice" to introduce slavery on natural or moral "reasoning" or "inferences," as was widely reported in the press at the time, despite Oldham's favoring the Hill/Balguy report, which omits these words.[198] *Harrison* suggests that although there were political motives behind Mansfield's positive law holding regarding slavery, Mansfield personally agreed with Somerset's counsel that slavery as a legal institution in both England and its colonies must be based on positive law.

Colonial Slavery

Despite his threat to rule squarely for one side or the other, Lord Mansfield's judgment instead created a compromise designed to defuse the politically dangerous slavery issue, but it was a compromise that had important implications for colonial slavery.[199]

Given *Harrison,* Lord Mansfield surely appreciated that for the slaveowners, his decision was a "poisoned chalice." A positive law rationale

196. *Harrison v. Evans,* (1767) 3 Bro. P.C. 465, 1 E.R. 1437, described in detail in Philip Furneaux, *Letters to the Honourable Mr. Justice Blackstone Concerning His Exposition of the Act of Toleration, and Some Positions Relative to Religious Liberty, in His Celebrated Commentaries on the Laws of England,* 2d ed. (London, 1771).

197. Furneaux, *Letters,* 263–64, 278.

198. Oldham, "New Light," 57–60. Oldham is correct that Mansfield wanted any immemorial usage allegedly supporting slavery strictly construed.

199. Several writers have argued English law had no effect on colonial law on slavery, e.g., Davis, *Slavery in Revolution,* 469–522, 501 (English courts, including *Somerset*, permitted colonial slavery to develop unchecked); Bush, "British Constitution," 388–89 (prerogative supported the growth of slavery independent of English law); Gould, "Zones of Law," 471–510.

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without emancipation preserved the *short-term political*—but *not the long-term legal*—status quo on colonial slavery. Although Mansfield protected the colonial status quo until Parliament acted, he did so by creating a legal framework that also deliberately devalued slave property and did as much damage to the legitimacy of the slaveowners' position as possible, short of an outright ruling against them. Mansfield's deliberate devaluation of slave property had foreseeable adverse consequences for slavery's continuation throughout the empire. Not surprisingly, major slaveowner representatives immediately and vigorously attacked the decision, while abolitionists applauded it.

Mansfield's comment in the judgment that slavery had originated not just in England but in every country solely from positive law was a deliberate effort to demolish legal justification for slavery on any other basis, in England as well as in the colonies. Mansfield's positive law holding meant that slavery existed only within those jurisdictions where positive law sanctioned it, and only to the extent it was sanctioned. The fact that slavery became entirely a creature of positive law also meant that it could be selectively altered or abolished in the colonies. By the late eighteenth century, the English Crown had limited legal authority to govern in the colonies without Parliament's acquiescence; therefore, Mansfield's creation of a positive law framework for slavery in the context of rising abolitionist sentiment laid the groundwork for Parliamentary control of colonial slavery.[200] Perhaps equally important was that making slave property a creature of positive law raised substantial issues about whether compensation to slaveowners would be required if Parliament chose to alter or abolish slavery.[201]

Mansfield's positive law holding also knowingly devalued slave property by making slave status wholly dependent on the law of individual jurisdictions, which he (and slaveowners) knew meant that slave flight would increase because fugitive slaves could become free or protected against excessive force and compelled return, not just in England but in the colonies.[202]

200. O'Shaughnessy analyzed the political importance to England of the continued allegiance of the West Indies in the American Revolution. One important effect of the Revolution was to diminish sharply the political force of the British slaveowners' lobby, because it represented only half as many slaves after the Revolution as before. O'Shaughnessy, *An Empire Divided,* xii.

201. The Jamaican Assembly's 1789 protest regarding British slave trade legislation showed that the Assembly knew there was a substantial question about whether compensation would be required if slavery was limited. Ibid., 245–46.

202. For example, Spanish Florida, which emancipated British colonial slaves, had therefore been a "magnet" for fugitive slaves since the end of the seventeenth century. Ira Berlin, *Generations of Captivity* (Cambridge: Harvard University Press, 2003), 44. Mansfield's ruling meant that slaves who escaped there became free not just under Spanish law but under English law, depriving colonists of any basis for seeking their return or compensation.

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Whether Lord Mansfield qualified his remarks on slavery's origin by referring to limits on the powers of "courts of justice" to sanction slavery or not, a larger point remains. Reached after extraordinarily comprehensive and highly visible public arguments from England's preeminent lawyers, Lord Mansfield's conclusion on the origin of slavery, even if qualified, was inevitably, as he well knew, profoundly destructive of the moral and legal legitimacy of slavery, since it made slave property an artificial creature of statute and deprived slavery of the sanction of the common law.[203] The sanction of the common law was also the sanction of religion and morality because it was widely believed at the time that they were subsumed within the common law. Mansfield's argument in *Harrison* and the religious and political arguments of Somerset's counsel amply illustrate the power of the contemporary view that the common law must be consistent with morality and religious belief. The sweeping nature of Mansfield's statement on positive law intentionally undermined the moral and religious, and thus the political, legitimacy of colonial slavery.

Although Lord Mansfield's decision may have bought time for slaveowners, as intended it was "the handwriting on the wall" for them.[204] That colonial slaveowners understood Mansfield's unwillingness to defend their position largely accounts for their concerted attacks on the judgment that began almost immediately after it was announced.[205] Mansfield's public defection in *Somerset* meant that it was really only a question of time until public opinion deserted slaveowners as well.

The first part of Davis's conclusion in his classic analysis, after reviewing English law, including *Somerset,* that "English courts endorsed no principles that undermined colonial slave law" was technically accurate, but only because Lord Mansfield deliberately created a means to distinguish between English and colonial law on slavery in his *Somerset* judgment.[206]

Davis's further conclusion that colonial law and English law could "coexist and even interpenetrate within the larger imperial sphere" was mistaken formalism.[207] During the eighteenth century, English common law and colonial law on chattel slavery were regarded by many, including prominent English judges such as Lord Chancellor Hardwicke and Mansfield, as potentially or actually interdependent and were unquestionably in substantive conflict. Mansfield sought to find a way to avoid explicitly

203. Higginbotham, *Matter of Color,* 313.

204. Shyllon, *Black Slaves,* 154.

205. Estwick, *Considerations;* Edward Long, *Candid Reflections on the Negroe Cause* (London, 1772).

206. Davis, *Slavery in Revolution,* 501.

207. Ibid.

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addressing that conflict by creating a new legal framework for slavery, but did so quite knowingly at the price of undercutting the legal, economic, political, and moral basis of slavery as an institution throughout the Atlantic empire.

Conclusion

The manner in which Mansfield reframed the debate over slavery significantly influenced that debate for the next one hundred years. His judgment contained important silences and ambiguities. Yet, *Somerset* expanded freedom when it banished any doubt that English law protected certain fundamental "rights of man" even for African slaves in England, including the right of access to the courts to protect against unlawful imprisonment or abuse, and freedom from chattel slavery. *Somerset* was also a farsighted decision to narrow sharply the legal authority for slavery, devaluing slave property by destroying its "imperial property" status and its moral, and hence political, legitimacy. Mansfield was a loyal servant of the Crown, but he was also a friend of justice. Mansfield's decision in *Somerset*, though an effort to serve both masters at a time when many thought their interests conflicted, nevertheless commends him to history.

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Nothing But Liberty: *Somerset's Case* and the British Empire

DANIEL J. HULSEBOSCH

George Van Cleve places *Somerset's Case* squarely in the middle of Britain's imperial history. It belongs there. After clarifying the "narrow" holding in the case—that Charles Stewart could not forcibly remove James Somerset from England—Van Cleve argues that Chief Justice Mansfield and his Court of King's Bench "creat[ed] a new legal framework for slavery" and "did so quite knowingly at the price of undercutting the legal, economic and moral basis of slavery as an institution throughout the Atlantic Empire."[1] This argument that *Somerset's Case* transformed slavery law throughout the British Empire rests on three claims. First, Van Cleve views *Somerset's Case* as an imperial conflict of laws case because it involved a conflict between the laws of two royal territories, England and Virginia. Second, Van Cleve contends that Mansfield intended the decision and his remarks accompanying it about the positive law foundation of slavery to have abolitionist effects. Finally, these two points are related: Mansfield drew a distinction "between English and colonial law on slavery" in order to undermine slavery across the empire.[2]

Van Cleve is largely correct: *Somerset's Case* was a conflicts case; the

1. George Van Cleve, "*Somerset's Case* and Its Antecedents in Imperial Perspective," *Law and History Review* 24 (2006), 645.
2. Ibid, 644.

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distinction between English and colonial law was important within the empire's legal culture; and abolitionists embraced the decision. The problem comes in conflating intent with consequences and thereby directing attention away from the contemporary purposes served by the jurisdictional distinction between England and the other royal territories. The tentative argument proposed here is that the legal arguments in *Somerset's Case* more closely tracked an old discourse of English supremacy within the empire than the emerging language of human rights. Like most discourses, its sources reflected the past more than they controlled the future and resonated primarily with its local audience: those in England who were ambivalent about colonial slavery. Many there probably found slavery (as Mansfield did) "odious" while, at the same time (like Mansfield), understood that it was central to the imperial economy. The arguments and various reports of Mansfield's opinion suggest that the participants in *Somerset's Case* were most concerned to reconcile this tension: to keep slavery in the empire while keeping it out of England.[3]

For almost two centuries, the English constitution had been constructed by contrasting English legal liberties to those available elsewhere, including in other jurisdictions in the empire. This legal alterity emerged from a political culture that was caught between wanting the gains and glory of imperial expansion and fearing that royal dominions abroad would be training grounds for arbitrary government that might travel back home. The tragic endpoint of this reverse migration was called "slavery."[4] Therefore, when the lawyers and judges involved in *Somerset's Case* spoke of slavery, they spoke not only about the liberty of James Somerset and others who looked like him. They also expressed concern for the liberties of Englishmen. Seen in this light, the decision left the institution of colonial slavery almost untouched while at the same time insulating England from chattel slavery, the power of returning West Indian planters, and political despotism. Finally, as Van Cleve notes, Mansfield's remarks highlighted his

3. Christopher L. Brown argues similarly that the issue in *Somerset's Case* was "not only whether Africans in England could be slaves but also whether England would remain English and free." Brown, *Moral Capital: Foundations of British Abolitionism* (Chapel Hill: University of North Carolina Press, 2006), 97.

4. For political "slavery," see Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge: Belknap Press of Harvard University Press, 1967), 232–34; David B. Davis, *The Problem of Slavery in the Age of Revolution, 1770–1823* (Ithaca: Cornell University Press, 1975), 377, 402, 453. I agree with Eliga H. Gould's observation that Mansfield sought to "insulate" England from a colonial "contagion," but a conflict-of-laws analysis demonstrates that the problem facing British legal thinkers was more complicated than a conflict between separate zones of law and violence. Cf. Gould, "Zones of Law, Zones of Violence: The Legal Geography of the British Atlantic, circa 1772," *William and Mary Quarterly,* 3d ser., 60 (2003): 471–510.

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view (widely shared in London) that the British Parliament was supreme in the imperial constitution. Accordingly, Parliament had the power to make servants slaves and to make slaves servants, just as it had the power to alter all prerogatives, whether of planters, colonial governments, or even the Crown.

Van Cleve's claim that *Somerset* was a "conflicts case" adds to our understanding of both this case and the legal history of the British Empire. He is right to notice that each royal territory had its own political regime and laws, which meant that conflicts could arise when the law of one territory arose in the courts of another. Van Cleve also notes that the leading jurists of the British Empire never determined the best way to settle such conflicts, and we know little about how the courts in the colonies, dominions, and England actually resolved them.[5] Framing *Somerset* as a conflicts case begins to shed light on the formal and, more important, informal arrangements that royal subjects made in their legal arrangements as they traveled across the internal borders of the empire. Throughout the arguments in *Somerset's Case,* Mansfield urged the parties to settle the dispute, and Van Cleve fairly concludes that American slaves brought to England were treated in a variety of ways.[6] Other imperial legal conflicts were probably also resolved or ignored without litigation.

Van Cleve sums up the effect of conflicts law on the status of slaves in England: "slaves who came to England were no longer subject to chattel slavery, but were not fully emancipated; they were held to a lesser but substantial form of 'slavish servitude.'"[7] But he does not analyze the methods that the lawyers and judges in *Somerset's Case* used to resolve the conflict between the colonial law of slavery and English law of servitude. This is no simple task. The English courts sometimes obscured the problem by using legal fictions that united the forum and the jurisdiction in which the case arose, a bit of legerdemain that recalls the old Bill of Middlesex fiction through which King's Bench extended its civil jurisdiction by hearing

5. There are studies of Privy Council review of colonial legislation and judicial decisions against the standard of "repugnancy" to the laws of England. See Mary S. Bilder, *The Transatlantic Constitution: Colonial Legal Culture and the Empire* (Cambridge: Harvard University Press, 2004); Joseph H. Smith, *Appeals to the Privy Council from the American Plantations* (New York: Columbia University Press, 1950); Elmer B. Russell, *The Review of American Colonial Legislation by the King in Council* (1915; New York: Octagon Books, 1976); Arthur M. Schlesinger, "Colonial Appeals to the Privy Council," *Political Science Quarterly* 28 (1913): 279–97, 433–50. The Privy Council never used this power to adjudge slavery "repugnant" to English law. William M. Wiecek, "*Somerset*: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World," *University of Chicago Law Review* 42 (1974–75): 86, 112–13.

6. Van Cleve, "*Somerset's Case,*" 623.

7. Ibid., 614.

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civil cases tacked on to fictitious charges of trespass in the county where the court sat.[8] When the conflict was glaring and unavoidable by such means, as when Stewart sought to ship Somerset for sale in Jamaica, there was no imperial conflict-of-laws treatise to guide the lawyers and judges.[9] Only one attorney in *Somerset's Case,* Francis Hargrave, referred to the continental literature on what lawyers in the next century called private international law, or the conflict between forum and foreign law.[10] To the extent that there was an imperial conflict-of-laws jurisprudence at work, the historian must induce its principles from the casuist reasoning used during the arguments in the case. Even in the age of Lord Mansfield, who helped push the judicial opinion to the center of Anglo-American legal culture, these dialogues between lawyers and judges were more revealing than a court's typically brief, cryptic conclusion.

The dialogue in *Somerset's Case* indicates consensus on the general rule of *lex loci:* the courts of one country—the forum—should recognize a person's status created under the law of the jurisdiction where the action or legal relation at issue arose. The participants in the case assumed that civil status—like the state of servitude—translated from one legal system to another. But the court also "approved" of a limitation on this rule: while the forum court should recognize status conditions created in foreign jurisdictions, it need not recognize municipal regulations of the incidents of that status that were considered "inconvenient" or penal in the forum jurisdiction. Mansfield raised the case of marriage, which remains the classic example of how the conflict of laws operates. A marriage was recognized everywhere, but the incidents of marriage, such as "the regulations of power over children from it, and other circumstances, [are] very various."[11] The court grabbed this analogy to help determine the power of a slave master in England. Stewart remained Somerset's master, just as he had been in Virginia. But the incidents of that relationship, in particular

8. Even then the fiction functioned only to give the court jurisdiction; the substantive law remained foreign or colonial law. See, e.g., *Fabrigas v. Mostyn,* 20 State Trials 81, 98 Eng. Rep. 1021 (Exchequer Chamber, 1774). See also *Campbell v. Hall,* 20 State Trials 239, 98 Eng. Rep. 1045 (K.B. 1774) (cases arising in Minorca and Grenada stipulated as arising in London). For the Bill of Middlesex, see J. H. Baker, *An Introduction to English Legal History,* 4th ed. (London: Butterworths LexisNexis, 2002), 42.

9. At least not until the nineteenth century. See William Burge, *Commentaries on Colonial and Foreign Laws Generally, and in Their Conflict with Each Other, and the Law of England* (London, 1836).

10. *Somerset v. Stewart,* 20 *State Trials,* 2, 60 (K.B. 1772) (citing Huber). Cf. Alan Watson, *Joseph Story and the Comity of Errors: A Case Study in the Conflict of Laws* (Athens: University of Georgia Press, 1992), 67–70.

11. *Somerset v. Steward,* 98 Eng. Rep. 499, 504 (K.B. 1772).

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Stewart's power to command and discipline Somerset, were different in England than in Virginia. As Mansfield reportedly said, "So high an act of dominion"—detention and deportation—"must be recognized by the law of the country where it is used." Nothing but "positive law" could support an institution so "odious."[12] The power of a master over a slave derived from only local positive law, meaning either statute or usage that derived from statute. A slave master in Virginia had the power to detain and deport his slave; the master did not have that power when he brought his slave to England.

Van Cleve makes much of this positive law remark. Mansfield's statement that slavery could rest only on positive law, he argues, applied to the whole empire and thereby endangered colonial slavery. At the same time, Mansfield avoided the more inflammatory claim that English common law prohibited slavery. In other words, the positive law argument was a rhetorical compromise that did not imply immediate abolition but would ultimately undermine colonial slavery.[13] Arguably, though, the positive law rhetoric was *more* inflammatory because it could not be discursively restricted to England, while a holding based on English common law could. Still, it is not clear how much difference this rhetorical choice made or how the remark about positive law applied to the whole empire. First, the jurisdiction of King's Bench was limited to England and (for some purposes) Ireland. Its writs did not run to the whole empire; Mansfield's interpretation of slavery's legal basis did not, for example, bind colonial courts.[14] Second, the posture of the case required the master to justify the detention and locate a legal basis for his self-help remedy. The return on the writ of habeas corpus stated that Somerset was Stewart's slave. Therefore, he had the burden to prove the legal basis of slavery or at least this incident of slavery. The positive law holding meant that the common law did not offer a remedy for the slaveholder in this case. But neither did the common law have the capacity to condemn slavery. A statement that the English common law prohibited slavery would not have made much sense to a practicing attorney in the eighteenth century, when the common law was conceived more as a limited collection of remedies than a seamless regulatory system. It is, nonetheless, significant that Mansfield neither

12. 98 Eng. Rep., at 510.

13. Van Cleve, "*Somerset's Case,*" 638 (stating that "this holding . . . deliberately applied both to England *and* to its colonies").

14. Thus, *Campbell v. Hall,* 20 State Trials 239, 98 Eng. Rep. 1045 (K.B. 1774), does not stand for the proposition that the common law courts had jurisdiction, or that the common law operated, in overseas colonies. See above, note 8. Cf. Van Cleve, "*Somerset's Case,*" 641, 605 n. 13.

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found the master's right in the ancient law of villeinage nor incorporated the Atlantic practice of slavery and its legal remedies into the common law as he did much of commercial law, a choice that the positive law remark helps explain. Commercial law represented the customs of merchants in civilized nations; slavery was not included in that European body of "civilized" law but rather depended on municipal law.[15] Finally, as a practical matter, most contemporaries concluded that positive, municipal law supported slavery in the colonies. Indeed, the participants in *Somerset's Case* assumed the legality of colonial slavery. In the nineteenth century, American jurists who opposed slavery also found that British statutes regulating the slave trade, combined with colonial regulation and the practice of slavery itself, had formed the basis of the institution in the colonies.[16]

Consequently, King's Bench recognized the status condition of servitude but not the master's disciplinary powers that marked colonial slavery.[17] Mansfield seems to have felt that he should not, or perhaps could not, disregard that status *because* it arose in a royal dominion rather than a "foreign" country. Although Somerset's counsel implied that English courts could choose whether or not to follow the law of the foreign jurisdiction on the basis of "convenience," this was not the sense Mansfield conveyed when dealing with colonial law. A conflict between two sovereign kingdoms was different from a conflict between two royal territories loyal to the same king.[18] This distinction helped neutralize the comparative law examples cited by Somerset's counsel. These showed slaves being emancipated when brought from one kingdom to another that did not recognize slavery, including the unreported case of a Russian slave in which a sixteenth-century English judge is said to have exclaimed that English air was too pure for a slave to breathe. Mansfield doubted, for example, whether the relocation

15. See James Oldham, *The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century* (Chapel Hill: University of North Carolina Press, 1992), 2:1230; Davis, *Slavery in the Age of Revolution,* 478. Mansfield derived these categories of civilized law and municipal law from the law of nations, which he argued was part of the common law.

16. See Joseph Story, *Commentaries on the Conflict of Laws,* 5th ed. (Boston, 1857), 162 n. (concluding that slavery had "crept in" by "universal custom, prevailing through the European colonies, in the West Indies, and on the continent of America, and which was fostered and encouraged by the commercial policy of the parent State").

17. The continuation of servitude followed from the limited decision itself. Mansfield clarified this holding a decade later. Van Cleve, "*Somerset's Case,*" 635–36; Oldham, *Mansfield Manuscripts,* 2:1236.

18. Mansfield distinguished the French case from this one: there, "France was not bound to judge by the municipal law of Spain; nor was to take cognizance of those offences supposed against that law" (98 Eng. Rep., at 502). Here, by contrast, there was a closer relationship between the laws of England and those of the colonies.

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of a master and his slave from one royal territory to another was enough to emancipate the slave fully.[19] He also referred to various Parliamentary regulations of slavery, which proved that "the law"—meaning Parliamentary law—"has interfered for the maintenance of the trade in slaves and the transferring of slaves."[20] While the reports of his opinion are cryptic, this too indicates that Mansfield was taking notice of British Parliamentary policy to protect slave masters when they transferred their slaves from one place to another, including within the empire. Thus, although "the condition of slavery, in its full extent, could not be tolerated here," King's Bench implied that slaves brought to England were still servants.[21]

Many more English cases involving colonial law would have to be examined to establish whether there was a coherent choice-of-law practice emerging in the eighteenth century. All this suggests only that Mansfield was distinguishing the law of a royal territory from truly foreign law. In this limited sense he was developing an imperial conflict-of-laws jurisprudence: English courts could choose whether or not to recognize status conditions created under foreign law but were obligated to recognize status conditions created in other territories held by the English Crown. In one like the other, however, the English courts did not have to recognize incidents of status that were not valid under English law. Simply put, a master in England did not have the right to deport his servant from England; the courts would free a slave detained for that purpose. But the slave was still a servant.[22]

Process is not the only way to view *Somerset's Case.* It might also provide evidence of an emergent imperial master and servant law. Servants in one royal territory were bound as servants in another, though the definition of servitude changed as a master and his servant traveled from one territory to another. The incidents of slavery, in particular, varied across the empire. There had long been at least two slavery regimes in the British empire—one in England and another in the overseas colonies—and in reality many more than two.[23] Rarely had any Briton knowledgeable

19. He used the example of a slave leaving Virginia to "the adjacent country, where there are no slaves, if change to a place of contrary custom was sufficient," and implied that this was not sufficient. 98 Eng. Rep., at 504.

20. Ibid.

21. Ibid.

22. On imperial master-servant law, compare Douglas Hay and Paul Craven, Introduction to *Masters, Servants, and Magistrates in Britain and the Empire, 1562–1955,* ed. Douglas Hay and Paul Craven (Chapel Hill: University of North Carolina Press, 2004), 54–58, with Davis, *Slavery in the Age of Revolution,* 478.

23. See Jonathan Bush, "The British Constitution and the Creation of American Slavery," in *Slavery and the Law,* ed. Paul Finkelman (Madison, Wisc.: Madison House, 1997), 379–

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about the law argued that one law of slavery applied across the empire. Those who tried to manufacture a coherent body of imperial law usually failed because they trespassed on one or more territorial jurisdiction. In most situations, it was in the interest of few Britons to imagine the empire as a single jurisdiction requiring uniform law, including a uniform law of slavery.

There were exceptions. With the law of slavery, one was the Yorke-Talbot opinion in 1729. This was an unofficial opinion obtained by the West Indian lobby from the king's attorney general and solicitor general declaring that Christian conversion did not emancipate slaves and that planters could bring slaves from the colonies to England and still hold them as slaves.[24] Van Cleve presents the opinion as one of several bits of evidence showing that the law of English slavery was ambiguous. If the historical task is simply to show that reasonable legal minds differed across time about the status of slaves in England, then the Yorke-Talbot opinion serves as evidence of that ambiguity. If instead the task is to interpret how persistent scripts were used differently over time, then the emphasis would shift from the opinion to the procurement process. About the same time, these and other Crown lawyers opined that an Englishman carried as much of English "law and liberty with him, as the nature of things will bear."[25] Both of these scripts—that colonists enjoyed the liberties of Englishmen and that rights created in other royal territories should be recognized in England—had circulated in the Anglophone Atlantic world for more than a generation but had received little credence in the metropolis.[26] Why they both received some credence in the 1720s is an unanswered question. A starting hypothesis is that by then the reverse migration of planters reached a critical mass. These opinions would then become evidence of the influence of American slaveholders in English politics, influence that peaked on the eve of the American Revolution, when Prime Minister Lord North "used to say that they were the only masters he used to have."[27] Here was a moment in which leading lawyers expressed support for an empire-wide

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418 (arguing that the "conquest doctrine allowed *all the colonies* a private space in which planters and merchants could deploy slave labor with little oversight from England").

24. Edward Fiddes, "Lord Mansfield and the Sommersett Case," *Law Quarterly Review* 50 (1934): 499, 501–2.

25. George Chalmers, comp., *Opinions of Eminent Lawyers on Various Points of English Jurisprudence* (Burlington, Vt., 1858), 206–07. Yorke co-authored one of these opinions, too.

26. For the latter, see *Craw v. Ramsey,* 174 Eng. Rep. 1072 (K.B. 1670) (refusing to recognize Irish naturalization in England).

27. See Andrew J. O'Shaughnessy, *An Empire Divided: The American Revolution and the British Caribbean* (Philadelphia, 2000), 3–33 (quotation at 15).

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legal regime without addressing many specifics or resolving the tension inherent in the idea that English laws traveled to the colonies, while, at the same time, that some colonial law was valid in all royal territories, including England.

Under the more orthodox conception of the empire, each royal territory had its own lawmaking authority, although the authority of each was derived in whole or part from the Crown that united them all. The colonies could not make law contrary or repugnant to the laws of England, but what this meant as a matter of doctrine was never clear. Laws contradicting the English common law were more often upheld by the Privy Council than disallowed.[28] Harmonization was not the ideal of early modern English legal thinkers. Instead, English jurists, from Lord Coke to Lord Mansfield and Sir William Blackstone, were content to help build an imperial legal order in which the colonies made laws that conflicted with English common law. That difference in law reflected a difference in identity that, for the most part, those who remained in England—including ambitious Scots—were happy to maintain.

A conflict-of-laws approach to *Somerset's Case* reveals multiple imperial identities reflected in, or performed in, conflicting laws. Even the most abolitionist of Somerset's advocates admitted that slavery was an unfortunate "necessity" in the colonies.[29] It was not necessary at home, and a large reason why they opposed its importation was that for them the harsh labor institution was a synecdoche for arbitrary governance. The West Indian planters returning to England with slaves created a problem—the practice of slavery in England—and were symbols of a greater problem—they personified despotism in their treatment of slaves and the way that they used their wealth to obtain support for that oppression.[30] Although some observers, like Benjamin Franklin, dismissed this distinction as hypocritical,[31] it fitted within the traditional ideology of empire in which expansion was the means of greatness yet also sowed the seeds of corruption.[32]

In his argument before King's Bench, Francis Hargrave warned that

28. See, e.g., Smith, *Appeals to the Privy Council,* 576–77 (examining the Privy Council's treatment of partible inheritance statutes).

29. 98 Eng. Rep. 499 (Hargrave).

30. Granville Sharp, the abolitionist behind the Somerset litigation, warned that if private interests succeeded in obtaining public protection for their claims of human property, no poor Englishmen would be safe. Granville Sharp, *A Representation of the Injustice and Dangerous Tendency of Tolerating Slavery; or of Admitting the Least Claim of Private Property in the Persons of Men in England* (London, 1769), 90–91, 110, 132–34.

31. Wiecek, "*Somerset,*" 88.

32. See David Armitage, *The Ideological Origins of the British Empire* (Cambridge: Cambridge University Press, 2000), 125–45.

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slavery corrupted the "manners in the master" and "debase[d] the mind of the slave." In addition, the institution would "revive" the other "mischiefs of mere utter servitude." Those mischiefs were governmental rather than private and at odds with the "mild and just" English constitution, which was "ill adapted to the reception of arbitrary maxims and practices." To drive the point home, Hargrave asked, "In England, where freedom is the grand object of the laws and dispensed to the meanest individual, shall the laws of an infant colony, Virginia, or of a barbarous nation, Africa, prevail?"[33] His colleague John Alleyne continued this theme, asking the court to "preserve that liberty by which we are distinguished by all the earth." Allowance of slavery was an evil in itself, but he expressed even more fear of what might follow: "The horrid cruelties, scarce credible in recital, perpetrated in America, might by the allowance of slaves amongst us, be introduced here." He used the example of corporal punishment. Social historians know, as Somerset's lawyers must have known, that physical discipline was still central to labor relations in eighteenth-century England. But certain disciplinary tools distinguished slavery from ordinary servitude. One bright line was the whip. Alleyne asked the court to imagine the specter of masters whipping their slaves in fields just outside London. Would Englishmen become inured to such violence? What would follow from this loss of sensitivity? Instead of promoting gradual abolition, Alleyne warned of gradual political slavery in England, as the incidents of the institution "might by time become familiar [and] become unheeded by this nation."[34] Denying the West Indians who resided in England of their colonial prerogatives—the "high dominion" of physical control over their slaves—would reduce the threat of political despotism.

Somerset's lawyers were certainly trying to protect, even liberate, black servants in England. It is possible that they wished to abolish the slave trade or slavery itself across the empire. Their primary goal at King's Bench, though, was to keep slavery an ocean away. The judges agreed with that argument. The gift of liberty to each person, even a perpetual servant, was a sign of England's virtue. It was nothing but liberty; but liberty was, they claimed, so much.[35] The loss of even one individual's liberty to remain in England meant that everyone was endangered.

It is in this universalism—this premise of human rights—that Van Cleve rightly finds something new in *Somerset's Case.*[36] Somerset's humanity

33. 98 Eng. Rep., at 500 (Hargrave).

34. 98 Eng. Rep., at 502 (Alleyne).

35. Cf. Eric Foner, *Nothing But Freedom: Emancipation and Its Legacy* (Baton Rouge: Louisiana State University Press, 1983) (exploring the ambiguities of emancipation in post-slavery societies).

36. Van Cleve, "*Somerset's Case,*" 636.

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gave him legal protection from being physically removed from England by Stewart. This human right was not qualified by his race, birthplace, or subjectship. Any servant, of any race from anywhere, would presumably benefit from English protection against severe punishment and deportation by a master. In this sense, the case contributed to the abstraction of English liberty into a human right. Still, it remained a liberty available to people *in England* rather than everywhere, including the royal territories of Virginia and Jamaica. The empire's legal pluralism allowed Mansfield to rationalize the brutality of slavery while locating it offshore, thus facilitating the coexistence of slavery and freedom.

Eventually this coexistence ceased.[37] That, however, was the work of abolitionists and advocates of a later day.[38] I think it reads too much into Mansfield's remarks to conclude that his "studied avoidance of the larger questions," as James Oldham describes his opinion, was designed to promote abolition throughout the empire.[39] For Mansfield, any further resolution demanded Parliamentary legislation—his answer to all the imperial conflicts of the 1770s. In the end, his opinion mattered less than the continental colonists' jealousy of their internal government, for the loss by the West Indians' of their North American trading partners, after a revolution caused in part by Parliament's insistence on the supremacy that Mansfield championed, did more to devalue slave property in the British Empire than any remarks in *Somerset's Case*.[40] And when emancipation did come six decades later, it came in the form of Parliamentary legislation.

37. Which is not to say that emancipation brought full legal liberty. See, e.g., Mary Turner, "The British Caribbean, 1823–1838: The Transition from Slave to Free Legal Status," in *Masters, Servants and Magistrates,* ed. Hay and Craven, 303–22.

38. See Ruth Paley, "After *Somerset:* Mansfield, Slavery and the Law in England, 1772–1830," in *Law, Crime and English Society, 1660–1830,* ed. Norma Landau (New York: Cambridge University Press, 2002), 184.

39. Oldham, *Mansfield Manuscripts,* 2:1222.

40. Cf. Reginald Coupland, *The American Revolution and the British Empire* (London: Longmans, Green and Co., 1930), 209–14 (arguing that the Revolution deprived the West Indians of their North American allies in the battle against abolition).

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FORUM: COMMENT

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

RUTH PALEY

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.

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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.

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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).

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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.

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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.

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Mansfield's Decision: Toward Human Freedom

GEORGE VAN CLEVE

As Daniel Hulsebosch and Ruth Paley show in their perceptive and helpful comments,[1] *Somerset's Case* raises questions about several dimensions of the nature of British imperial slavery. As to those dimensions, we share considerable common ground. I agree with Paley that racism was an important element in the treatment of black slaves in England and in its colonies. Hulsebosch is correct that in the late eighteenth century protecting liberty in England by keeping England free from slavery could co-exist with the willingness or desire to maintain colonial slavery. However, as discussed below, the significance of the *Somerset* decision goes beyond racism and metropolitan protection.

Paley also rightly reminds us that there were gaps between the social reality of servitude and the law in English courts. This was true of the brutal treatment of some, perhaps even many, of those in servitude in England, narrowing the distinctions between indentured servants, "near slaves," and chattel slaves. It was also true of England's willingness to protect slavery against Christianization through colonial laws providing that baptism would not lead to manumission, disregarding early English court decisions implying that Christians could not be enslaved. Yet, for all the evasiveness Paley appropriately notes, English law struggled with labor status distinctions in part because society increasingly sought to honor them, particularly during the eighteenth century.

I also agree with Hulsebosch and Paley that political and socioeconomic

1. See Daniel J. Hulsebosch, "Nothing But Liberty: *Somerset's Case* and the British Empire," and Ruth Paley, "Imperial Politics and English Law: The Many Contexts of *Somerset,*" *Law and History Review* 24 (2006): 647–57 and 659–64.

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forces and events that had nothing to do with Lord Mansfield's decision in *Somerset* played more important roles in the abolition of slavery than did Mansfield's decision itself. My argument is a modest one: I think *Somerset* made a pivotal, though gradualist, contribution to abolition. Mansfield was a politically very cautious "reformer" where slavery was concerned, not an abolitionist. Nevertheless, Mansfield's decision in *Somerset* unequivocally rejected all major arguments in favor of permitting chattel slavery in England made by the slaveowners and was, as contemporaries recognized, a turning point in the fight against slavery there and in the colonies.

As to *Somerset*'s effects in England, Paley argues that Mansfield did not end slavery there (which I describe as "near slavery"), and I agree, but only because in my view he did not intend to end "near slavery." He did, however, intend to confirm the altered status of slaves who came to England, conferring on them clear legal rights against extreme physical abuse and protection against forcible deportation. Although it was not my purpose to trace *Somerset*'s effects in England, I note that the 1773 *Robin John* case, about which Paley has written, demonstrates that Mansfield had some success in doing this. Oldham analyzed a later Mansfield case that probably had a similar deterrent effect.[2]

Hulsebosch offers a helpful look at the conflict of laws dimension of *Somerset.* By the end of the eighteenth century, English courts had considerable experience with conflicts between English and foreign or colonial law stemming from conquest, settlement, business conducted by foreign merchants in England, and international prize and commercial disputes.[3] The English courts may have begun to grapple with the problem of conflict of laws on slavery as early as the 1560s in *Cartwright's Case,* which is thought to have involved a slave brought to England from Russia. One report of the 1677 decision in *Butts v. Penny* described it as a decision relating the international law merchant to English law.[4] The participants

2. Ruth Paley, "Mansfield, Slavery and the Law in England, 1772–1830," in *Law, Crime and English Society, 1660–1830,* ed. Norma Landau (Cambridge: Cambridge University Press, 2002), 165–84. Paley argued that the *Robin John* case demonstrated that slavery continued in England after *Somerset.* Although that case was settled by a court-approved compromise, the result was the release and return to Africa of unlawfully kidnapped Africans and a costly side payment to a colonial "owner," all quite probably as a result of the prospect of adverse action by Mansfield. James Oldham, *English Common Law in the Age of Mansfield* (Chapel Hill: University of North Carolina Press, 2004), 319–20 (Amissa case of 1779 resulted in large jury damage award, urged by Mansfield, against captain who unlawfully sold African sailor as slave in Jamaica).

3. On English law's treatment of foreign merchants, see Kim's account in his excellent and broad-ranging book, Keechang Kim, *Aliens in Medieval Law: The Origins of Modern Citizenship* (Cambridge: Cambridge University Press, 2000).

4. 1 Freeman 452, 89 ER 338 (first published 1742).

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in *Somerset* extensively canvassed foreign and English conflicts law on slave status. Hulsebosch is right, I think, to sense that Mansfield believed that a status issue might need to be resolved differently if it involved colonial law than if it involved foreign law. Hulsebosch's suggestion that Mansfield's decision adapted conflicts principles to the master-servant context is consistent with my conclusion that to this extent Mansfield was following the results reached in most earlier slavery cases, particularly since the law in England prior to *Somerset* on disregarding foreign penal status in conflicts cases consisted of precisely those slavery cases.[5]

As to the impact of *Somerset* on colonial slavery, I have a different view than Hulsebosch, who sees little effect. As Hulsebosch notes, the general legal character of the English empire was one of pluralism.[6] But the idea that English imperial law was pluralist can be taken too far. Slavery law is an important eighteenth-century counterexample of a potentially successful drive for uniformity that Mansfield deliberately defeated in *Somerset.* Hulsebosch is dismissive of the 1729 Yorke-Talbot opinion that slaves were "imperial property," despite its apparent preparation specifically for publication by the Crown's two chief Law Officers and the exceptionally high reputation of its principal author, later Lord Chancellor Hardwicke. Hulsebosch does not discuss the very significant parallel 1732 slavery statute, Parliament's only intervention in the substantive law of slavery in a two-hundred-year period, and one that explicitly deemed slaves a hybrid form of imperial property and markedly strengthened the enforceability of claims to slave property throughout the empire for the benefit of English creditors.[7] Hulsebosch's response does not address *Pearne v. Lisle.* Most prior writers agree that Hardwicke's 1749 decision in *Pearne* was a spirited defense of his 1729 Yorke-Talbot opinion. Not only was

5. A. V. Dicey and J. H. C. Carlile, *Dicey and Morris on the Conflict of Laws,* ed. L. A. Collins, 13th ed. (London: Sweet and Maxwell, 2000), 85 n. 42. However, several statements that Hulsebosch understandably attributes to Lord Mansfield (Hulsebosch, "Nothing But Liberty," 653 nn. 19–20) as a result of poor reporting of the decision were in my opinion quite probably made not by Mansfield, but by Wallace, counsel for the slaveholder. They are contained within the report of Wallace's speech and appear to have been Wallace's continuation of his argument after an interruption by Lord Mansfield. One of the quoted statements appears to have been the kind of statement that counsel would make to a court, not a statement that a prominent judge would make to counsel, and both support the rest of Wallace's argument, an argument with which Mansfield vocally disagreed in several key respects both at the time and in his decision.

6. One way of thinking about the limits of such pluralism is found in David Armitage, *The Ideological Origins of the British Empire* (Cambridge: Cambridge University Press, 2000). On another aspect of pluralism, see Kim, *Aliens in Medieval Law.*

7. *An Act for the more easy Recovery of Debts in His Majesty's Plantations and Colonies in America,* (1731/2) 5 Geo. II, c. 7.

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Pearne solely a colonial slavery dispute, but Hardwicke was *requiring* the English plaintiff to litigate in Antigua rather than in England or lose his claim. What Hardwicke did in *Pearne* was to assure the plaintiff that it was just to make him litigate in Antigua because he could get full relief in Antigua. Full relief was available in Antigua because a) trover lay for slaves in England and b) therefore, Hardwicke said, trover *must* also lie for *slaves* in Antigua. The most striking thing about Mansfield's decision in *Somerset* is that it decisively rejected this eighteenth-century drive for uniform "imperial" treatment of slave property by creating a new means to defend the legal diversity between England and the colonies where slavery was concerned.

The core of my argument on *Somerset*'s colonial impact is that it was the specific means that Mansfield chose to use to insist on imperial legal diversity on slavery that ultimately mattered. Here Hulsebosch and Paley and I disagree. Paley argues that I ignore the implications of diversity. Hulsebosch argues that Mansfield's grounding of slavery in positive law didn't really matter very much; it was a "rhetorical choice," although one that, Hulsebosch acknowledges, "could not be discursively restricted to England. . . ."[8] Hulsebosch gives three reasons for thinking that Mansfield's positive law analysis did not matter.

Hulsebosch argues first that the Court of King's Bench (hence Mansfield) had limited jurisdiction, and could not bind colonial courts, and that therefore Mansfield's decision could not have had imperial effects. Hulsebosch asserts that the 1774 King's Bench decision in *Campbell v. Hall* does not show that the common law courts had jurisdiction, or that the common law operated, in overseas colonies.[9] Hulsebosch's view on jurisdiction, though consistent with his important earlier writing, provides limited insight into the complex imperial politico-legal world of the late eighteenth century, particularly in the case of a politically charged issue like slavery.[10] *Campbell v. Hall* demonstrates this, but before discussing it, I describe the practical political, as opposed to purely legal, reach of the jurisdiction of King's Bench under Mansfield.

The key to understanding the imperial effects of a Mansfield commercial law decision like *Somerset* is that the colonial slave trade and slavery were uniformly regarded as very risky businesses. Stability and uniformity of law were essential to the willingness of London investors to conduct those

8. Ibid., 651.

9. Ibid., 651–52 and n. 14.

10. Daniel J. Hulsebosch, "The Ancient Constitution and the Expanding Empire: Sir Edward Coke's British Jurisprudence," *Law and History Review* 21 (2003): 439–82 (argued that English law did not confer English rights on colonies).

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businesses. It was this English need for legal predictability that largely accounted for the eighteenth-century effort to create a uniform imperial legal regime governing slavery, as the 1732 statute strongly suggests.

The Court of King's Bench could interpret English law in a way that would determine the behavior of London banks, investors, and the Crown in the colonies. Lord Mansfield dominated that court—and typically spoke for the administration—both there and in the House of Lords. While it might technically have been possible for a colonial court, or a coordinate English court, to defy Lord Mansfield, the result, given his overwhelmingly successful thirty-year track record on appeal in the House of Lords, would almost certainly have been an expensive loss. Cautious slavery investors were unlikely to be willing to take on such a fight (as, indeed, they were unwilling to do when they lost in *Somerset*). In short, when it came to the slave trade and colonial slavery, given their heavy dependence on English financing and legal mechanisms like insurance, Mansfield's word was likely to be law, and the slaveowners knew that. They also knew that King's Bench could determine whether English common law applied to an important colonial problem, as Mansfield did in *Campbell v. Hall.*[11]

In *Campbell v. Hall,* Grenada citizens argued that they had been promised by royal proclamation that Grenada would be governed not as a conquest by royal prerogative, but by the laws of England, after its acquisition by England. Mansfield held, over the opposition of the Crown, that they were correct. In his analysis, Mansfield held that English law sharply limited the power of the prerogative even where it applied to a colony. Mansfield stated categorically that the king's prerogative in conquered countries was "subordinate to his own authority in Parliament" and could not be used to "make any new change [in law]" in a conquered country "contrary to fundamental principles" of English law so that, for example, no inhabitant could be exempted from the laws generally or "from the laws of trade, or from the power of Parliament. . . ."[12] Mansfield then held that the prerogative would not operate at all in Grenada (and in a *dictum* added Jamaica, a major West Indian slave colony, for good measure), so that Grenada was governed by English common law.

The narrow issue in *Campbell* was one that could not have been more politically salient in 1774: who had the power to tax Grenada—the king or Parliament? But at least one party saw the decision's potential implications as far broader. Here is Alleyne, counsel for the Grenada residents:

11. *Campbell v. Hall,* 1 Cowp. 204, 98 E.R. 1045 (K.B. 1774).
12. 1 Cowp. 209, 98 E.R. 1048.

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> [T]he [royal] proclamation [of 1763] declares that all the inhabitants there . . . should have the full enjoyment of the laws of England. . . . By the proclamation . . . a recognition is made, of the practicability of governing this island of Grenada by the laws of England. . . . I argue, that the inhabitants of Grenada were considered as a colony annexed to the Crown of England . . . on a plan similar to that which issues from the common center, and pervades the whole system of our American settlements. . . . I then conclude by direct and necessary inferences from premisses which I think clear and uncontrovertible, that every constitutional right of the British subject necessarily belonged to them. . . .[13]

Hulsebosch's second argument for disregarding the significance of Mansfield's positive law analysis was that as a system of remedies, not a regulatory system, the common law did not "have the capacity to condemn slavery."[14] That was not the view of knowledgeable eighteenth-century legal observers such as Francis Hargrave. Hargrave argued that if English common law did not permit enslavement by means of a recognized remedy to enforce enslavement (as existed in the case of villeinage, for example), the common law prohibited slavery. Hargrave's conclusion would have raised questions about the legal basis for slavery in any colony that purported to follow the common law, a very destabilizing result for London investors. Nothing would have been easier than for Mansfield to accept Hargrave's elegant argument, banning slavery using common law reasoning that would (at least initially) have applied only to England, but he chose not to do that.

Nor is it entirely accurate to say, as Hulsebosch's third argument asserts, that "the participants" in *Somerset* accepted the legality of colonial slavery; some of them did, but several of Somerset's counsel made arguments that condemned both colonial slavery and the slave trade, while others may have refrained from such condemnation only for tactical reasons. On the other side, Dunning argued for the slaveowners that Mansfield should avoid a decision that would adversely affect colonial slavery. The slaveowners clearly thought English and colonial slavery were linked, and I have argued that they thought the linkage was the economic damage that would be done by a conclusion that slave property was not imperial property.

To maintain the distinction between English and colonial law on slavery, the inference is inescapable that Mansfield concluded that he could not (or would not) rely on an argument based on English common law. Instead, he abandoned the existing common law property and tort law framework for slavery, one that for a century had conceived of and legitimized en-

13. 98 E.R. 863 (*Campbell v. Hall,* argument).
14. Hulsebosch, "Nothing But Liberty," 651.

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slavement as a branch of the law of capture, whether of losers in war, wild animals, or lost property (e.g., actions for trover, trespass *quare captivum suum cepit*), and adopted a positive law framework for slavery that deemed it a purely artificial creation of state power. A series of important imperial consequences followed: the slavery issue was committed to Parliament (not just the House of Lords), which could legislate against such "positive law property"; all moral and religious justifications for "odious" slavery were rejected; the precise scope of slavery became entirely jurisdictionally dependent, and the nature of slave property could vary from colony to colony (weakening the marketability of slaves). In short, Mansfield made the colonial slaveholders pay a price for maintaining legal diversity, and he did not need to do that to reach the result he reached if his intention was to speak only to the law of England. The immediate and extensive published attacks on Mansfield's decision by colonial attorneys who were London colonial agents confirm that the colonial slaveholders believed Mansfield had damaged their interests, and they were right.

As Hulsebosch agrees, in *Somerset* Mansfield announced on the imperial stage in unmistakable terms that in England certain rights were human rights. Mansfield was too great a judge not to have recognized that the contagion of liberty defined as a human right would eventually spread outside England. Paley is right to warn against historical idolatry, but wrong, I respectfully suggest, to conclude that *Somerset* was merely confusion (or ingenious obfuscation) heaped upon legal confusion. In *Somerset,* Mansfield took limited but decisive steps in the progress toward human freedom in England and its colonies, despite the power of the West Indian lobby and the gathering clouds of war.

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