

A CASE STUDY IN RACIAL INJUSTICE:
JAMESTOWN, 1619 & THE COMMON LAW

by William H. Widen*

Introduction and Purpose of the Case Study

The essay beginning on the next page summarizes certain aspects of colonial legal history in Virginia which reflect profound racial injustice. Considering the essay requires students to engage with a multiplicity of legal concepts important to a course of study in law, including, but not limited, to: common law, equity, statutes, charters, the nature of law (positive versus natural), the force of precedent and the use of law to create incentives for behavior. Importantly, it provides a point of reference and return for multiple classes during a three-year course of legal study whenever these core concepts (and others raised by the essay) arise in different subject matter areas.

When students learn material in other courses, I want them to *remember* this early example presented at the very start of legal instruction so they remember a part of American history which is too often placed under erasure. Its brevity assures that a first introduction to core legal concepts through this lens does not disturb the particulars of the curriculum at any school. The essay attempts to distill selected scholarly research for student use. The hope is to create a manageable introduction to core legal concepts through the lens of a history of racial injustice.

As a matter of pedagogy, one often learns more about a system by examining its failures than its successes. The horrific legal history of colonial Virginia fits the bill, providing an example of a “train wreck” reflecting multiple failures in law of massive proportions at all levels: common law, statutes and, ultimately, the U.S. Constitution. Students often learn best by reflecting on mistakes and considering how to correct them.

An instructor might use the essay as a “hub” to introduce core legal concepts and then use her own materials as “spokes” to discuss a concept in depth: for example, by developing one lecture on the history and nature of the common law and another on the use and force of precedents.

* Professor, University of Miami School of Law; elected member, American Law Institute.

Essay

Law students should consider the nature of the common law and why it failed to curb the advance of slavery in America. This suggestion follows both [recent discussions in higher education](#) about how best to incorporate racial justice themes into the curriculum¹ and an [initiative by law students](#) at Howard University and the University of Miami. This inquiry supplements critique of the performative inconsistency between the words of the Declaration of Independence about equality and liberty and the reality of the institution of slavery.

The [1619 Project](#) directs attention to the year privateers brought enslaved African people to Jamestown. In 1619, prior to arrival of enslaved people, another important event took place at Jamestown: the Virginia Company of London replaced the harsh code written by Sir Thomas Dale to administer Jamestown with the common law (*Lawes Divine, Morall and Martiall, &c.*, or “Dale’s Code”). In April 1619, Sir George Yeardley declared that the future government would be by “those free laws which his Majesty’s subjects live under in England.”² The common law implicitly sanctioned the institution of slavery, without objection, when enslaved people arrived in August of 1619. In fact, Yeardley likely purchased some of these enslaved Africans, [making him one of the first slaveholders in Virginia](#).

An important question follows. Does the common law’s failure to address slavery reflect a flaw in its very nature or in its administration? Speaking of colonial law and slavery, Judge Higginbotham observed “it need not have been that way . . . [t]here were sufficient legal, theological, and philosophical foundations upon which a more uniformly just and humane social structure could have been built.”³ Economic considerations help explain this failing.⁴ The observations below begin this inquiry in the context of the Virginia colonial experience.

1 See, e.g., Tom Bartlett, *The Antiracist College, This May Be a Watershed Moment in the History of Higher Education and Race*, THE CHRONICLE OF HIGHER EDUCATION (Feb. 15, 2021).

2 See 1 WILLIAM E. NELSON, THE COMMON LAW IN COLONIAL AMERICA, THE CHESAPEAKE AND NEW ENGLAND, 1607-1660, ch. 1 (2008) [hereafter “NELSON VOL. 1”].

3 A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR, RACE & THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 390 (1978) [hereafter “HIGGINBOTHAM”].

4 For an example of use of an economic explanation, see CHARLES A BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913).

JAMESTOWN, 1619 & THE COMMON LAW

Virginia, from its founding by charter as the Virginia Company of London, was governed for profit. This transformed to protect the private profit of individual plantation owners when the Crown dissolved the Virginia Company in 1624, thereafter making Virginia a royal colony.⁵ The provision of minimal rights to laborers to induce them to sign indentured servant contracts, combined with creditor protections, remained a focus of law.

A myriad of factors explain the failure of the Virginia Company, and the subsequent struggles of the colony. Poor planning, aggression against Native Americans, agency problems with management of the Virginia Company, the social background of the indentured servants and high mortality rates all contributed to dysfunction, along with the experiment of martial law.

An examination of the historical record suggests that Sir Yeardley's reform had an economic motivation. Dale's Code negatively impacted incentives for white indentured servants to work by imposing harsh living conditions and tight controls over economic activity. Moreover, the reputation for strict martial law negatively impacted future immigration by indentured servants.

Early Virginia experienced chronic labor shortages. A return to government by rule under the common law from England provided an antidote to failed rule by martial law, both to restore work incentives and foster future immigration. Financial considerations likely led to use of Dale's Code in the first place. Some believe it was published in England to assure investors that management of Jamestown was on sound footing.⁶ But Dale's Code was not working.

Importation of enslaved workers provided a potential antidote as well—partially explaining the arrival of enslaved Africans in 1619. Financial considerations eventually drove the Virginia economy (primarily tobacco farming) toward slavery and away from indentured servitude. This was a long process of transition completed around 1700 when slavery had generally replaced inducement by

5 See NELSON VOL. 1, intro. "Virginia was founded primarily for economic profit; New England, primarily to create a religious utopia; and Maryland, primarily to establish a haven for persecuted Roman Catholics." *Id.* In 1624 King's Bench vacated the Virginia Company's charter. Virginia became a royal colony in 1625.

6 NELSON VOL. 1, chap. 1.

bargain.⁷ Prior to that time, Virginia planters preferred indentured servants over enslaved labor, trading servants as commodities by transfer of contracts.⁸

The high mortality rate among all immigrants (whether voluntary or enslaved) meant that initially it was cheaper to purchase an indentured servant for a term of years than an enslaved person for a natural life.⁹ An indentured servant who had survived a year of “seasoning” in the Virginia climate was worth more than one newly arrived with a longer remaining service term.¹⁰ As mortality rates declined, this calculus changed.

The presence of former indentured servants who had completed their terms of service created an ever increasing population of free persons who needed farm land to survive. Eventually, this population growth challenged the ability of aristocrats with large land holdings to add new land to their estates. Rules and practices allocating new land to established landowners caused migration of former indentured servants to other colonies and discouraged the arrival of new indentured servants..

Moreover, indentured servants began litigating over terms in their contracts of indenture.

The institution of slavery thus provided three direct economic benefits to the Virginian aristocracy. First, profits increased for those employing slave labor as mortality rates fell. Second, an enslaved labor force protected large landholdings from political demands of free persons completing servitude because an enslaved labor force never enters the land market. Third, no jury system existed under Dale’s Code. With the change to government under common law, an indentured servant could more effectively litigate the details of an indenture contract—a transaction cost for those holding property in servants.

The common law generally did not protect enslaved persons because enslaved persons had no contractual basis for litigation. Moreover, principles of equity failed to supply an implied in fact contract or similar legal fiction to accomplish

7 See EDMUND S. MORGAN, AMERICAN SLAVERY, AMERICAN FREEDOM, “Toward Slavery” chap. 15 at n.44 (1975) (“According to Edmund Jennings, writing in 1708, virtually no white servants had been imported in the preceding six years.”) [hereafter “MORGAN”].

8 See HIGGINBOTHAM at 392 (describing the commerce in indentured servant contracts).

9 MORGAN, “Toward Slavery” ch. 15 at n.4.

10 MORGAN, “Living with Death” ch. 8 at n.68.

JAMESTOWN, 1619 & THE COMMON LAW

any scintilla of justice which might have subjected an enslaved person to service for only a term of years. The failure of equity is, itself, an interesting question.¹¹

Even though the institution of slavery solved many problems for the Virginian aristocracy, a practical problem remained. Motivating an indentured servant to work was hard. It was even harder to motivate an enslaved person with no prospect of freedom. Rules extending the term of service for an indentured servant who ran away or shirked contractual duties provided an incentive to perform. Only terror and the threat of violence provided motivation for the enslaved person.

Thus, Virginia passed laws to approve terror and violence against enslaved African persons—a horrific but “rational” solution.¹² Cruelty inevitably followed. The planters had plenty of practice with cruelty as evidenced by violence both against their indentured servants and Native Americans. Records show cases in which masters beat indentured servants to death without consequence. The aristocracy merely took systematic cruelty to new levels with the transition to enslaved labor, rationalizing increased cruelty on the grounds that enslaved Africans were a brutish and inferior people.¹³ The legal system used racism as a cover to pass laws needed to create the proper “incentives” for enslaved people.¹⁴

This appalling history reveals at least two systemic failures. First, the marketplace for labor contracts using indentured servitude eventually failed. Mass production

11 For example, equitable considerations led a Virginia court to decline enforcement of a bargain when it found the “bargain unreasonable, and not fitting to continue.” *Kemp v. Panton*, Gen. Ct. 1634, cited in *NELSON VOL. 1*, ch. 1, n.16.

12 See EDWARD E. BAPTIST, *THE HALF HAS NEVER BEEN TOLD, SLAVERY AND THE MAKING OF AMERICAN CAPITALISM*, ch. 4 (2014)(noting that “[t]he enslavers choice was a rational one, if that which increases profitability and productivity is by definition rational”) [hereafter “BAPTIST”]. For example, in 1669, the Virginia assembly passed “An act about the casual killing of slaves” which absolved a master of a felony if an enslaved person “by the extremity of the correction should chance to die” because no presumption would lie that a master had malice and intent to destroy his own property. See MORGAN, “Toward Slavery” ch. 15 at n.55; see also HIGGINBOTHAM at 36. Subsequent statutes expanded on cruelty, including a law authorizing “dismemberment” of recalcitrant enslaved persons who did not respond to other forms of correction. MORGAN, “Toward Slavery” ch. 15 at n.57 & n.58.

13 This enhanced cruelty amounted to torture. See BAPTIST, ch. 4 at n.52 (noting that “[n]o one was willing . . . to admit that they lived in an economy whose bottom gear was torture”).

14 Overt racism against “Negroes” is found in a 1671 statute giving a court the flexibility to treat African people as either real estate or sheep, cattle or horses in the administration of an orphan’s estate. See HIGGINBOTHAM at 51.

of tobacco in Virginia made products available at low prices to a larger market in England, but could not be sustained by even minimally voluntary contracting. And so, the plantation owners abandoned the voluntary labor market altogether. In this sense, the internal workings of commodity *production* in Virginia abandoned capitalism *qua* “free markets” by abandoning the labor market.

However, critics of the 1619 Project [wrongly claim](#) that this project misrepresents the operation of capitalism in action.¹⁵ The economic press often promotes a false equivalency between capitalism and free and efficient markets. Capitalism is a means of production which, in practice, has no problem with suppressing competition and engaging in rent seeking when it can do so. Extracting excess value from labor reflects that—but so do many other forms of anti-competitive behavior. It just so happens that capitalist firms sometimes find themselves forced to sell products in a free market. The capitalist does not welcome competition or free markets—but must deal with them.

Second, while commodity *production* abandoned the voluntary labor market, plantation owners abandoned the labor market to better compete in the competitive marketplace for *distribution* of commodities. Mass production of tobacco required a labor force. When mass production and competition drove down prices, the commodity producers turned to enslaved labor, hoping to cut costs to preserve profits.

Regardless of whether use of enslaved labor was *in fact* more efficient economically ([a matter of academic debate](#)),¹⁶ the commodity producers perceived it as more efficient. And, use of enslaved labor had the political side benefit of reducing pressure for land reform from increasing numbers of persons completing terms of indentured service.

15 See Allen C. Guelzo, ‘The 1619 Project’ Tells a False Story About Capitalism, Too, WALL ST. J. (May 8, 2020).

16 See, e.g., Mark Thornton, *Rothbard on the Economics of Slavery*, 22 Q. J. AUSTRIAN ECON. 565 (2019)(discussing the academic debate and collecting sources). Thornton does not discuss BAPTIST, *supra* note 12, who makes a compelling case that cotton production using slave labor was profitable and, indeed, one of the primary engines that drove the entire economy in the United States and beyond. BAPTIST, ch. 4 at n.52 Accord Matthew Desmond, *If you want to understand the brutality of American Capitalism, you have to start on the plantation*, THE 1619 PROJECT, N.Y. TIMES MAGAZINE, Aug. 14 2019 (citing BAPTIST for his characterization of an economy based on torture).

JAMESTOWN, 1619 & THE COMMON LAW

No current economic system will ever exceed the horror of American slavery. The complete breakdown in contracting for labor services does, however, provide a window to question the legitimacy of modern labor practices. What limits a civilized society's drive for lower priced consumer goods? For goods produced by labor that does not earn a minimum wage? For products produced in oppressive labor markets?

The political answer in colonial Virginia favored slavery as an antidote to protect commodity producers from the impact of lower prices for tobacco—turning a blind eye to the means of commodity production no matter how evil. A dark side of unregulated capitalist production emerges when firms face stiff competition. This problem persists today to varying degrees in different industries. Reflection on the history of American slavery provides perspective by considering the reality of commodity production and the legal regimes that govern it. This circles back to the nature of common law.

In colonial Virginia, the common law failed to discipline the manner of commodity production. The market certainly did not. Only competition in the distribution of commodities to consumers, where low price reigned supreme, mattered. Why did the common law, described by [Lord Coke](#) as the “[perfection of reason](#),”¹⁷ not curb the institution of slavery when Jamestown restored common law rule in 1619? No statutes yet recognized the institution of slavery in Virginia at that time.¹⁸

In 1772 Lord Mansfield ruled, in [Somerset v. Stewart](#),¹⁹ that the common law of England did not support slavery: “It [slavery] is so odious, that nothing can be suffered to support it, but positive law.” This ruling, however, had no impact in Virginia. As detailed by Joseph Fred Benson, [a reenactment](#) of the [reception statute of Virginia](#) in 1776 received the common law of England as it existed prior to the “fourth year of the reign of King James the first”—i.e. 1607.²⁰ And, by

17 EDWARD COKE, THE FIRST INSTITUTES OF THE LAWS OF ENGLAND, Of Frankalmoign, s. 138 (Coke on Littleton)(1628).

18 See, e.g., HIGGINBOTHAM at 21 (noting that statutory enslavement began in 1660). Judge Higginbotham notes an earlier 1659 statute addressing import duties on “Negro slaves.” *Id.* at 34. The first major slave code was enacted in 1680. *Id.* at 38-39.

19 98 E.R. 499 (1772).

20 Joseph Fred Benson, *Reception of the Common Law in Missouri: Section 1.010 as Interpreted by the Supreme Court of Missouri*, 67 Mo. L. Rev. 595, 607 (2002) (including summary information about state reception statutes in an appendix).

1776, statutes in Virginia had long since sanctioned the practice of slavery, beginning around 1661.²¹

After Lord Mansfield ruled in *Somerset v. Stewart*, no believer in common law, natural rights and the power of precedent reasonably could accept a legal structure which tolerated enslaved labor. An adequate moral answer cannot rely on statutes as justification (though a statute may provide an explanation).²² Nor does it suffice to merely purchase a person already enslaved by another to create “distance” from the original act of enslavement.

Political expediency is the handmaiden to powerful economic interests. Though evolution in the common law already had branded slavery as illegitimate, in 1776 Virginia decided to confirm reception of the common law “as of” 1607, conveniently avoiding any uncomfortable implications of Lord Mansfield’s prior ruling in 1772.

When some justified slavery as acceptable for pagans but not Christians, Virginia passed a statute in 1667 confirming that conversion to Christianity did not establish grounds for emancipation.²³ The risk of freedom by baptism may trace to Lord Coke’s notion that [Christianity is part of the common law](#).²⁴ At the constitutional level, one need look no further than [Federalist No. 54](#) in which

21 See MORGAN, “Towards Slavery” chap. 15 and text accompanying n.53 (1975). Prior to statutes, Virginia courts recognized property in persons and their issue as evidenced by recorded deeds for enslaved persons. *Id.* at “Settling Down” ch. 7 n.69.

22 When Luther Martin of Maryland noted problems with the institution of slavery, including that it was “dishonorable”, Rutledge of South Carolina admitted that the question was not one of morality, but simple power politics: “Religion and humanity have nothing to do with this question. Interest alone is the governing principle with nations.” FREDERIC BANCROFT, *SLAVE TRADING IN THE OLD SOUTH* 7 (1931). Quite simply, the slaveholding states viewed themselves as independent countries. And, they refused to enter the Union if it did not permit and protect slavery. In modern times, the United States often overlooks practices in other countries which violate human rights in order to maintain commercial relations.

23 MORGAN, “Toward Racism” ch. 16 at n.43. Judge Higginbotham notes a particularly important example:

A black man, John Philip, was reportedly “baptized” in 1612 in England. As a result, in 1624 the General Court of Virginia ruled that “John Philip A negro, . . . was qualified as a free man and Christian to give testimony, because he had been ‘Christened in England 12 years since.’

HIGGINBOTHAM at 21.

24 Lord Coke is credited with the idea that the Christian religion is part of the common law. See A. H. Wintersteen, *Christianity and the Common Law*, AM. L. REG. 273, 275 (1890).

JAMESTOWN, 1619 & THE COMMON LAW

James Madison provided a weak defense for treating an enslaved person as “3/5” a person for apportionment of representatives.

The entire legal system failed—from common law, to statutes, to federal constitution—manipulated in the service of economic interests to facilitate slavery. This history invites comparison to modern examples, like the purported efficiency justification for subjecting civil rights, consumer and labor claims to arbitration. Consideration of economic interests and efficiency has its place, but only when tempered by considerations of justice, including equal rights of persons.

A framework for discussion of the nature and administration of the common law emerges. Why did the common law follow the needs of powerful economic actors rather than set rational boundaries within which economic activity takes place? How should one evaluate a legal system unable to set boundaries such as these? How might a society improve such a system? This leads to a discussion of appointment of judges (and their independence), the role of statutes and the role of state and federal constitutions as the ultimate guardian of rights in our legal system.

The Virginia example also motivates consideration of various justifications for law: an economic efficiency model, a natural rights model, and a critique of law as a mask for economic power. It raises the issue of whether the common law is made or discovered. Morton J. Horowitz noted “[t]he underlying argument between Jacksonian proponents of codification [of laws] and the orthodox defenders of the common law system turned on whether judges ‘make’ or ‘declare’ law.”²⁵ How does a discovery theory square with the fact of “reception” of common law at a discrete point in time—particularly a time over a century and a half earlier than the act confirming reception?

Moreover, it forces an appraisal of when statutes should change the common law. A progressive vision often sees statutory changes to common law as an improvement; for example, [Uniform Commercial Code](#) reforms, influenced by the legal realists,²⁶ changed common law for the [sale of goods](#) in a number of respects. Virginia colonial history illustrates how statutes can fail to improve law and, indeed, make it worse.

25 MORTON J. HOROWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960* (1992).

26 Karl Llewellyn, a leading legal realist, was the Reporter for the Uniform Commercial Code project.

Contracts, among other subjects in the first year of legal education, address both structure and theory, but typically not through the lens of the history of American slavery. This focus should change, broadening and deepening understanding of American law in the process.

[End of Essay]