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# Beyond *Somerset*?: Slavery and the Temporality of Law

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In "Creating a Common Law of Slavery for England and its New World Empire," Holly Brewer forces fundamental reconsiderations about the temporality of legal history with respect to the subject of the law of slavery: the question of how historians determine what past categories and concepts shape the contexts in which actors make decisions. Her article, and this forum discussion of its arguments and contributions, recalls the last significant treatment of *Somerset's Case* in the pages of *Law and History Review*, now nearly two decades past. In the lead article in that 2006 discussion, George Van Cleve argued that *Somerset* should be interpreted as an innovative break from a tradition of English law that had hitherto treated slavery with "fundamental uncertainty." For Van Cleve, *Somerset* settled an ambiguous attitude within English law toward the institution of "black involuntary servitude," which he argued "did not fit well within contemporary concepts of slavery or 'service.'"[1] Against this muddled attitude toward slavery, *Somerset* should be understood as a clarification, Van Cleve urged. In his assessment, the decision defined "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."[2]

Van Cleve's fundamental contention—that *Somerset* mattered—overlapped well with a broader historiographical consensus that has continually reiterated the case's fundamental importance to the history of legal, political, and cultural attitudes toward slavery. Yet, while many believe that *Somerset* was a crucial case, there has never been a uniform agreement as to why, including among those who most immediately inhabited the political economic space that the ruling

[1] George Van Cleve, "*Somerset's Case* and Its Antecedents in Imperial Perspective," *Law and History Review* 24 (2006): 605–7.

[2] Ibid., 636.

created. In the eyes of anti-slavery activists in early and mid-nineteenth century America, for example, *Somerset* had abolished slavery in any state where there were no positive laws governing slavery. For their pro-slavery opponents, *Somerset* established that all that was necessary to make slavery legal was the invocation of such positive laws, which they then cited by referring to Colonial-Era statues and subsequent state legislation legalizing slavery.[3] At the same time, modern historians have noted that in the immediate aftermath of the 1772 decision, the power of *Somerset* within the British Empire was constrained by what Eliga Gould has influentially described as a "legal geography" that condoned local practices of law-making, in turn creating social and political realities in imperial spaces, including the limitation of black people's access to courts, the prevalence of private kidnapping, and legal sanction for torture and terrorism against the enslaved, which challenged the liberatory power of the decision.[4] The history of *Somerset*'s recognition as a significant case is also a history of ambiguity, contestation, and argument about just what that significance is.

Brewer also treats *Somerset* as a significant, and indeed a groundbreaking case. Echoing Van Cleve, Brewer sees the development of the law of slavery as, in fundamental respects, a problem of the imperial constitution: the definition of the relationship between authorities situated at the center and those at the peripheries of imperial space. But she attributes importance to *Somerset* on very different, indeed irreconcilable grounds from Van Cleve and others who interpret the decision as a clarification of a set of otherwise muddled legal attitudes toward slavery. Instead of characterizing slavery as a phenomenon that English law struggled to make sense of prior to *Somerset* (as Van Cleve argues), and against a broader historiography that has seen slavery as "emerging largely outside English justice," Brewer contends that slavery as a legal category was in fact actively produced by English legal systems during the 1670s and 1680s. In Brewer's account, there had been nothing "uncertain" about the legal status of slavery for decades prior to *Somerset*. By the time Lord Mansfield announced the decision in that case in June 1772, she contends, a powerful strain of English law-making by the English crown had for over a century "used the courts to circumvent Parliament and to legitimate slavery," most crucially in the 1677 case known as *Butts v. Penny*.[5] It is a mistake to see *Somerset* as a clarification, Brewer contends; rather, we should recognize *Somerset* as a reversal, "a point that modern historians have overlooked because we have not understood that Butts was ever precedent."[6]

[3] Derek A. Webb, "The *Somerset* Effect: Parsing Lord Mansfield's Words on Slavery in Nineteenth Century America," *Law and History Review* 32 (2014): 455–90; and Patricia Hagler Minter, "'The State of Slavery': *Somerset*, *The Slave*, *Grace*, and the Rise of Pro-Slavery and Anti-Slavery Constitutionalism in the Nineteenth-Century Atlantic World," *Slavery & Abolition* 36 (2015): 603–17.

[4] Eliga H. Gould, "The Legal Geography of the British Atlantic, circa 1772," *William and Mary Quarterly*, 3rd ser. 60 (2003): 504–5. See also Matthew Mason, "North American Calm, West Indian Storm: the Politics of the Somerset Decision in the British Atlantic," *Slavery & Abolition* 41 (2020): 723–47.

[5] Holly Brewer, "Creating a Common Law of Slavery for England and its New World Empire," *Law and History Review* 39 (2021): 768.

[6] Ibid., 829.

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At stake in making sense of these contrasting scholarly interpretations of slavery as a matter of law in the early modern British Atlantic world lies specifying what categories of political subjectivity actually animated legal thinking and the time scales on which actors at the time constructed these categories. How deep into the past did lawyers and judges reach for a conceptual vocabulary to make sense of the institution of slavery as an imperial phenomenon? Van Cleve sees premodern categories of servant status as largely irrelevant for the constitution of imperial slavery, finding "little if any evidence that classical chattel slavery existed in England during the period 1540–1771" and feudal forms of servitude as "nearly extinct" by the beginning of the seventeenth century.[7] He makes relatively little of the language of lords and villeins in the judgement of *Butts*.[8] Instead, Van Cleve argues that before *Somerset*, in addition to the category of "chattel slavery," "legal rules" "created 'slavish servitude' or 'near slavery'" as categories to apply to "slaves who came to England" as opposed to those in the colonies.[9]

Brewer makes a different, indeed irreconcilable argument. For her, the deep time of feudalism matters for understanding the early modern law of slavery. Whatever the social and economic status that feudal forms of servitude may have taken by the seventeenth century, Brewer argues, feudal terms provided officials with the basic conceptual vocabulary in which they then cast arguments for the legal legitimation of imperial slavery. Crown judges and other royal officials under the Stuarts along with plantation owners invoked "feudal" categories such as *trover*, a writ of trespass that enabled the recovery of personal property, and radically twisted them to countenance something that they had, before the late seventeenth century, not approved: the treatment of people as goods. There was nothing called "slavish servitude" or "near slavery," in the British Empire, Brewer points out; these categories were not those of actors at the time and her argument suggests that they ought to be abandoned by historians as terms of analysis.[10] Instead of thinking in terms of these heuristic inventions, seventeenth and eighteenth century judges and lawyers reasoned about slavery in cases such as *Butts* by drawing analogies between enslaved and feudal categories.[11] The "ancient" past served as a living resource for the construction of contemporary legal and political vocabularies. Crucially, "invented" is the key word: as Brewer shows, there were no citations in the case report in *Butts* to "prior cases wherein humans had been considered goods"; instead, there were references only to cases in which animals used by princes in the hunt—such as dogs and hawks—had been defined as property. Thus, Brewer writes, *Butts*'s defining impact and legacy was to legitimate the idea that people who were "the Subjects of an Infidel

[7] Van Cleve, "*Somerset's Case*," 611.

[8] Ibid., 615.

[9] Ibid., 604.

[10] Ruth Paley made an analogous point in her comment on Van Cleve's article, noting the difficulty of defining "just what this 'near slavery' was and how it could be distinguished from actual slavery." See Paley, "Imperial Politics and English Law: The Many Contexts of *Somerset*," *Law and History Review* 24 (2006): 661.

[11] Brewer, "Creating a Common Law of Slavery," 792.

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Prince" could be treated as "property like hawks or dogs that one had trained to hunt, as in the cases . . . cited as precedents."[12] This was the precedential history that *Somerset* then "conceptually erased," burying *Butts* in time and leading historians to forget that the case ever existed.[13]

The longer history of how *Butts* came to referred to in law and in scholarship—or perhaps more precisely, ignored—serves as a fascinating example of the malleability of precedent and the contingent status of the past as a source of authority, bolstering Brewer's argument. In an 1824 common law case, *Forbes v. Cochrane*, for example, which concerned whether a plantation owner in East Florida could recover slaves who had escaped and sought refuge on a British naval vessel, one of the judges described *Butts* as "never decided" and "the mere extra-judicial dictum of a Judge" that had "been more than once over-ruled in subsequent cases."[14] Historians have subsequently tended to treat *Butts* as quickly "disapproved," leaving the law of slavery in England "unsettled."[15] But following Brewer, perhaps it would be more precise to see *Butts* as part of a longer history of legal contestation over slavery and its meanings in which the citation as well as burial of precedents formed part of the repertoire of techniques that judges and advocates used to forge the outcomes that they sought.

And yet it is on this point—the "feudal" origins of the legal categories that Brewer argues came to shape the early modern law of slavery, and the processes through which cases such as *Butts* were buried in time such that "modern historians . . . have not understood that *Butts* was ever precedent"—that the argument might be pushed further.[16] For what was this "feudalism," really? As Brewer remarks toward the end of the article, slavery's "feudalism" was "a bastard innovation associated with absolutism and with a particularly powerful form of capitalist ownership," a past invented and located in an "ancient" temporality whose purpose was to legitimate a contemporary governing regime of absolutist capitalism.[17] Here, Brewer's treatment brings to mind arguments by medieval historians such as Susan Reynolds and Kathleen Davis, who have urged scholars to recognize that the "feudal past" is not an empirically recoverable social reality but instead a narrative about the inter-relationship between law and time, constructed and then reconstructed in historically specific moments in order to justify particular constellations of sovereignty.[18] Brewer shows how "feudalism" became a legitimating fiction about time that in turn, formed a crucial conceptual building block of a

[12] Ibid., 793–94.

[13] Ibid., 830.

[14] *Forbes v. Cochrane*, published in James Dowling and Archer Ryland, *Reports of Cases Argued and Determined in The Court of King's Bench*, iii (London: S. Brooke, 1824), 688–89.

[15] James Oldham, *English Common Law in the Age of Mansfield* (Chapel Hill: University of North Carolina Press, 2004), 309.

[16] Brewer, "Creating a Common Law of Slavery," 829.

[17] Ibid., 832.

[18] Susan Reynolds, *Fiefs and Vassals: The Medieval Evidence Reinterpreted* (Oxford: Oxford University Press, 1994); and Kathleen Davis, *Periodization and Sovereignty: How Ideas of Feudalism and Secularization Govern the Politics of Time* (Philadelphia: University of Pennsylvania Press, 2008).

modern juridical system of imperial slavery. The history of the law of slavery as a juridical matter was, in significant part, a set of arguments and manipulations of time: what precedents controlled, what past categories shaped contemporary reasoning, and whose past mattered in the first place.

Centering time among Brewer's many interventions in turn both allows us to understand how conceptions of the past shaped constructions of the law of slavery in the seventeenth- and eighteenth-century Atlantic world, as well as opening the possibility of seeing cases like *Butts* and *Somerset* less as beginnings, middles, or ends, or as additive moments in a progressive history of human freedom, but instead as decisions in time whose working out remained contingent and uncertain, subject to the politics of history itself.

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