The Impact of the Thirteenth Amendment on the Common Law

A slave has no independent enforceable legal rights, because he or she is the property of another person. These characteristics define the status, but slavery has an even greater effect than its legal definition might suggest. The Thirteenth Amendment abolished slavery and involuntary servitude and empowered Congress to enforce the prohibition against their existence.[1] But the Amendment had an even greater impact than its words suggest. It altered laws that did not expressly turn on slave status, because courts took a different view of African-Americans after abolition.

One theme of the abolition movement was that slavery corrupted the masters and the society that tolerated or approved it. The abolition of slavery should affect not just the narrow conception of status, but impact a broad network of ideology and relationships. Thus, one way to understand the effects of slavery is to look at the effects of its abolition, and in particular the way abolition altered the common law with respect to common carriers.

Section 1 – neither slavery nor involuntary servitude shall exist

The adoption of the amendment invalidated laws that treated humans as someone's property. Some courts took a broad view of its effect. When Maryland adopted abolition in its Constitution early in 1865, Judge Hugh Lennox Bond of the criminal court in Baltimore held that it invalidated the separate apprentice laws for black children.[2]

> "The present constitution, when it prohibits involuntary servitude prohibits such servitude for free negroes as well as for whites, and must disable any

[1] U.S. Constitution, Amend. XIII. "Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

"Section 2. Congress shall have power to enforce this article by appropriate legislation."

[2] State v. Dashiell, reported in NY Times, June 4, 1865

> machinery by which, under the injustice of a former system, any free man could be reduced to such servitude or deprived of the enjoyment of the proceeds of his own labor. And in rendering void and of no effect the former provisions of the code in relation to negro apprentices, whereby unjust distinctions were made against them because of, and for the safety of slavery, which is now abolished, the new constitution has remitted them to the beneficent provisions in relation to all apprentices, and to which, in the proper circumstances, the children of all freemen are subject.
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> The same rule, by which slavery was the fundamental law, every statute was made to support the interest of the master, requires that now where freedom is the basis, courts should construe liberally and in favor of freemen all laws affecting the person. Hence any law which was suffered because of a system now passed away, and the consequence of which was to destroy the family relation among a portion of the freemen of the State; and to deprive by force the parents of the labor and the comfort and society of their children, and to prevent the children from supporting their aged parents; and whose further consequence would be to maintain an involuntary and unrequited servitude, and to enable masters to uphold and enforce under another name and as a sort of compensation to themselves for what, by its right name, has been forever abolished in Maryland, must be held to be repealed -- not less by every necessary intendment of such abolition than by the express words of the Bill of Rights. "

Bond contrasted the law applicable to black children with the general apprentice law that protected the children and required them to be educated.[3] Whites could not be assigned to others, but African-Americans did not have such rights in their indentures and were even described as property and interest of the master. The Maryland legislature restructured the state court system to remove jurisdiction from Bond, but U. S. Supreme Court Justice Salmon P. Chase on circuit struck down the apprentice law in 1867 as an involuntary servitude prohibited by the Thirteenth Amendment to the U.S. Constitution.[4]

Some laws fell of their own accord. Any law triggered by or expressly dependent on slavery no longer had force. Former slaveholders like the masters in the apprentice cases might continue to treat their former slaves as though nothing had happened, but the situation had

[3] See The Freedman's Record, July 1865; Richard P. Fuke, "Hugh Lennox Bond and Radical Republican Ideology," *Journal of Southern History* 45, no. 4 (November 1979): 569-86. .

[4] In re Turner, 24 F. Cas. 337 (1867)(He also found it violated the Civil Rights Act of 1866).

changed. Powers that slaveholders had against their slaves, such as a right to use physical force - "moderate correction" – were taken away by the abolition of slavery.[5] The presumption of slave status upheld by the Supreme Court lost its meaning when slavery was abolished.[6] But ending slavery also impacted laws that did not explicitly turn on slave status, because it destroyed some of the assumptions on which common law racial discrimination was based.

Section 2 – The Power of Congress

Section two of the Amendment authorized Congress to legislate against the incidents of slavery to assure that it did not exist. This provided a basis for statutes that established a remedial framework for persons held in involuntary servitude or made holding another in slavery criminal. Pursuant to that section, Congress passed the Civil Rights Act of 1866. When white citizens broke into the home of a black woman in Kentucky and assaulted her, United States Supreme Court Justice Noah Swayne on circuit found that a federal court had jurisdiction of their prosecution under the Civil Rights Act of 1866 because Kentucky law prevented African-Americans from testifying against whites.[7] Swayne held that Congress had power to enact the provisions for equality in testimony in the Act as a means to enforce the Thirteenth Amendment.

> Slavery, in fact, still subsisted in thirteen states. Its simple abolition, leaving these laws and this exclusive power of the states over the emancipated in force, would have been a phantom of delusion. The hostility of the dominant class would have been animated with new ardor. Legislative oppression would have been increased in severity. Under the guise of police and other regulations slavery would have been in effect restored, perhaps in a worse form, and the gift of freedom would have been a curse instead of a blessing to those intended to be benefited. They would have had no longer the protection which the instinct of property leads its possessor to give in whatever form the property may exist. It was to guard against such evils that the second section of the amendment was framed. It was intended to give expressly to congress the requisite authority, and to leave no room for doubt

[5] Moody v. Georgia, 54 Ga. 660 (1875)
[6] Prigg v. Pennsylvania, 41 U.S. 539 (1842)
[7] State v. Rhodes, 27 F. Cas 785 (1866)

> or cavil upon the subject. The results have shown the wisdom of this forecast. Almost simultaneously with the adoption of the amendment this course of legislative oppression was begun. Hence, doubtless, the passage of the act under consideration. In the presence of these facts, who will say it is not an "appropriate" means of carrying out the object of the first section of the amendment, and a necessary and proper execution of the power conferred by the second? Blot out this act and deny the constitutional power to pass it, and the worst effects of slavery might speedily follow. It would be a virtual abrogation of the amendment.[8]

Republican Congressmen argued that the abolition of slavery also authorized them to prohibit racial discrimination in contracts, property and rights in court as provided by the Civil Rights Act of 1866. As Senator Trumbull argued

> With the destruction of slavery necessarily follows the destruction of the incidents to slavery. When slavery was abolished, slave codes in its support were abolished also.
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> Those laws that prevented the colored man going from home, that did not allow him to buy or to sell, or to make contracts; that did not allow him to own property; that did not allow him to enforce rights; that did not allow him to be educated, were all badges of servitude made in the interest of slavery and as a part of slavery.[9]

Nevertheless, when Congress enacted the Civil Rights Act of 1868 prohibiting racial discrimination in public accommodations, the Supreme Court held that "it would be running the slavery argument into the ground" to find the Amendment authorized such legislation.[10] The type of discrimination outlawed by the Act had long been common in the North where slavery did not exist but discrimination against free African-Americans did. It took a century before the Supreme Court held that the Civil Rights Act of 1866 constitutionally outlawed racial discrimination in private transactions as a badge or incident of slavery under Congress'power to enforce the Thirteenth Amendment.[11]

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[8] Rhodes, supra at 794.
[9] Congressional Globe, 39th Cong. 1st Sess. (1866) p. 322.
[10] Civil Rights Cases, 109 U.S.3, (1883)
[11] Jones v. Mayer,

The Common Law Impact of Abolition

The abolition of slavery did more than end the peculiar institution and empower Congress. It also changed the context for common law decisions. Many laws discriminating against free African-Americans arose from concern to maintain the institution of slavery.[12] Fearing slaves might revolt against their masters, legislatures prohibited unlicensed meetings of free blacks, possession of dogs and guns, and immigration into the state. Attempting to prevent slaves from escaping, states imposed licensing requirements for travel out of state and excluded free black testimony that might help free slaves or limit master's power over them. Concerned that rebellious slaves might steal from their masters, states required licenses for African-Americans selling farm goods. In *Dred Scott*, Taney argued that free African-Americans were not citizens because they could have their rights stripped from them, but the laws stripping them of rights tended to be entwined with maintaining the institution of slavery. Thus, the destruction of the institution meant that many racially discriminatory laws lost their rationale.

Some Republicans advocating for the Amendment emphasized the impact of slavery on free men of both races.[13] Senator Henry Wilson of Massachusetts said

> Twenty million free men in the free States were practically reduced to the condition of semi-citizens of the United States; for the enjoyment of their rights, privileges and immunities as citizens depended upon a perpetural residence north of Mason and Dixon's line. South of that line, the rights which I have mentioned [freedom of speech, of religion and the right to peaceably assemble and petition for redress of grievances], and many more which I might mention could be enjoyed only when debased to the uses of slavery.[14]

[12] See Bogen, *The Maryland Context of Dred Scott: The Decline in the Legal Status of Maryland Free Blacks 1776-1810*, 34 THE AMERICAN JOURNAL OF LEGAL HISTORY 381-411 (1990).
[13] JACOBUS TENBROEK, EQUAL UNDER LAW 161-69 (Collier Books, 1965)
[14] Cong. Globe, 38th Cong., 1st Sess. 1202 (1864)

Similarly, Representatives John Kasson of Iowa and Green Smith of Kentucky argued for the amendment by stresing the loss of free speech that had occurred in the slave states.[15] The debates were not clear on how the amendment would secure fundamental rights such as free speech, but it seems that proponents believed that slavery had corrupted the society and ending slavery would result in changing the society itself.

Transportation was one area where the abolition of slavery had an impact. African-Americans resisted segregation on transportation for years, but they had little success until after the Civil War. In southern states like Maryland, African-Americans might even be completely excluded from travel.

Antebellum Common Law of African-American Rights on Common Carriers

Prior to the Civil War, African-Americans could be refused passage on common carriers in the South on the grounds that the master feared that they might be slaves trying to escape. In Maryland, railroads and steamboats carefully guarded against transporting slaves, for by the law of 1839 the company would be liable for a penalty of five hundred dollars for transporting any slave without the written permission of the slave's owner, and in the event the slave escaped, the transportation company would also be liable to the owner for the value of the slave.[16] Earlier laws provided for fining ships captains $3 per hour for carrying away negroes without passes and allowing slaves on board ship. In 1824 the statute was amended to require clerks and captains to keep lists of all negroes allowed to sail and providing a fine of one thousand dollars for carrying away a colored person contrary to the act.

The law did not merely impose travel limits on slaves. Any negro or mulatto leaving the state for more than thirty days without leaving a written statement of his plans and intention to

[15] Cong. Globe, 38th Cong. 2d Sess. 193 (1866)(remarkes of Rep. Kasson. Id. At 237 (remarks of Rep. Smith)
[16] Maryland Laws 1838 Ch. 376.

return with the clerk of the county court or bringing back a certificate showing that he was restrained from returning by illness or coercion would be treated as a resident of another state.[17] The free negro would thus be subject to all the laws prohibiting immigration from another state. The corollary of exclusion empowered common carriers to refuse to carry African-Americans whose transport they feared might violate the laws of the state.

Before the war, African-Americans received second class treatment even in northern states like Michigan[18] and Pennsylvania[19] where companies excluded them from the enclosed portion of vehicles. New York street railways excluded blacks from some of their cars, with one car for whites only and another open to both races. Samuel Ringgold Ward wrote of his wife and children's exclusion from a ship's cabin on a trip from New York to Canada,[20] while William Chambers wrote of the inferior eating areas for colored on a steamer crossing the Susquehanna river.[21] Steamboats had separate quarters for negroes, often in the hull next to the crew.[22]

Northern courts were not concerned with runaway slaves, so they were willing to find carriers had some obligations. Michigan courts held that common law required carriers to accept African-American passengers, but permitted the carrier to refuse to allow them inside the vessel.[23] The Ohio court held in State v. Kimber[24] that common carriers are bound to carry all races, but the decision was based on the carriers total exclusion and not on variations of treatments of passengers.

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[17] Maryland Laws 1831 Ch. 323 §1, 2.

[18] Day v. Owen, 5 Mich. 520 (1858) (steamboat must carry African-American passengers, but may exclude them from using the cabins.)

[19] Goines v. M'Candless, 4 Phila. Reports 255 (1861)(upholding exclusion of negroes from riding inside passenger cars).

[20] SAMUEL RINGGOLD WARD, AUTOBIOGRAPHY OF A FUGITIVE NEGRO 147 (1855)

[21] WILLIAM CHAMBERS, THINGS AS THEY ARE IN AMERICA 85 (1857)

[22] Lila Line, *Steamboat Days on Chesapeake Bay*, NAUTICAL COLLECTOR August 1995, p. 50. p. 51; HOLLY, DAVID, TIDEWATER BY STEAMBOAT 53; 222-23 (1991)

[23] Day v. Owen, 5 Mich. 520 (1858)

[24] 3 Ohio Dec. Reprint 197 (Ct. Common Pleas 1859).(Henry Kimber ejected Fawcett (Sarah and/or Mary) from city passenger railroad in Hamilton County Ohio and was convicted of battery on the grounds that common carriers bound to carry all races)

Impact of Abolition on the Common Law

Northern states outlawed discrimination in public accommodations after the War,[25] but some courts found that the abolition of slavery altered the common law and prohibited discrimination in transportation even without legislation.

As Professor Joseph Singer has written[26]

> The year 1865 marked an enormous turning point in the history of public accommodations law. At the same time the Black Codes were passed in the South, successful court challenges to exclusionary practices became more common in the North. After invalidation of the Black Codes, plaintiffs often prevailed with such claims in the South as well. . . . The case law that emerged after 1865 is absolutely consistent in affirming a common-law right of access to places of public accommodation without regard to race until the time of the Jim Crow laws of the 1890s. This right of access is premised not only on the traditional duties of places of public accommodation, but also on newly emerging conceptions of racial equality.
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> The increasing number of cases affirming a right of access to places of public accommodation regardless of race did mark a substantial change in the law, which was reflected in significant changes in social practice. One might argue that no change in the law occurred, on the ground that the antebellum law had clearly required common callings to serve the public and that no exception was ever made with regard to race. The first cases to address the question simply ratified this long-standing principle. On the other hand, the extensive practice of excluding African-Americans from various public accommodations in the North, not to mention the South, was challenged for the first time **by** court rulings affirming the illegality of this conduct. It thus seems more accurate to characterize the case law that emerged after 1858 as a deliberate attempt to alter social custom by affirming that places of public accommodation had no right to exclude African-Americans. At the same time, the law changed in the opposite direction **by** beginning the process of *limiting* the categories of places subject to the duty to serve.

For example, a Philadelphia lower court in 1865 found ejection from a streetcar was actionable because the War had changed the common law, even before the Thirteenth Amendment was ratified.[27]

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[25] 1867 Pennsylvania statute prohibited railroad companies from making any distinction on account of race or color. See Cent. Ry. Co. of N.J. v. Green, 86 Pa. 427, 430-32 (1878); 1885 Michigan enacted a public accommodations law. See Ferguson v. Gies, 82 Mich. 358 (1890).

[26] Joseph W. Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 Northwestern L. Rev. 1283, 1357, 1358 (1996)

[27] Derry v. Lowry, 6 Phila. Reports 30 (1865)

> The logic of events of the past four years has in many respects cleared our vision and corrected our judgment; and no proposition has been more clearly wrought out by them than that the men who have been deemed worthy, to become the defenders of the country, to wear the uniforms of the soldier of the United states, should not be denied the rights common to humanity.[28]

The changes in the common law were not limited to the North. In Maryland, a federal judge struck down streetcar discrimination in Baltimore as a violation of the common law, holding that the abolition of slavery had eliminated the grounds for such discriminatory treatment.

> As long as slavery existed a slave could make no contract, and the laws were very stringent to prevent common carriers from transporting colored persons who were slaves; in fact, some of the common carriers of the State refused to carry colored people as passengers without first obtaining a bond of indemnity signed by white persons to save them harmless in the event that the passengers should turn out to be slaves. This grew out of the fact that the Court of Appeals had decided that color was presumptive evidence of the condition of servitude. All that, however, has passed away. Slavery has been abolished, and the reason for such rule and regulation no longer exists. Under the Fourteenth Amendment to the Constitution of the United States the colored man has become a citizen, and can sue in the United States Courts. After citing several authorities, Judge Giles said: It appears to me that no common carrier has a right to refuse to carry any peaceable man who is willing to pay his fare."[29]

The application of the common carrier law to African-Americans gave them a common law right of access to passage, and, moreover, that right included equal treatment with other passengers. On this basis, African Americans brought numerous suits in the latter half of the nineteenth century and "separate but equal" became the legal standard behind which they won numerous victories.[30]

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[28] Id at 33.

[29] Alexander Thompson v. The Baltimore City Passenger Railway Company, reported in Baltimore American and Commercial Advertiser, Saturday, April 30, 1870, p. 1

[30] *See* Bogen, *Why the Supreme Court Lied in Plessy*, Villanova Law Review (2007)