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THE UNCONQUERABLE PREJUDICE OF CASTE— CIVIL RIGHTS IN EARLY PENNSYLVANIA*

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INTRODUCTION

The history of the Negro in the United States can be traced in a study of legal pronouncements. Uniquely, among the various nationality and ethnic groups which constitute America, the Negroes' history is found in legislative enactments and judicial decisions. From servitude to citizenship the story of the Negro is found in the law. To understand that story requires more than a mere reading of the law: one must understand its inconsistencies, its contradictions, its paradoxes, its ironies, its tragic and its comic face, its cruel and its self-destructive forces. One must understand its denial of, and quest for, humanity.

The use of the term "civil rights" may be somewhat unclear. Popular usage and application have blurred whatever precise definition the term may have had. Its use herein is defined generally as the interacting mosaic of social, legal, political, economic, and moral notions of racial equality, which, to some extent, are indicated by the statutory provisions and judicial decisions which shall be investigated. Thus, this discussion of civil rights in early Pennsylvania, while based on statutes and case precedents, is by no means limited to legalistic formulations; rather, the laws are employed in an effort to indicate climates and attitudes, to show the tug and pull of humanity at odds with its own definition.

Yet the law itself has played a most significant part in determining and supporting popular and institutional attitudes about the Negro. The law has not been neutral. In the absence of law, silence in the context of racial inequality had a negative effect upon the Negroes' participation in the affairs of life. Until recent times, the law authorized the perpetuation of systematic discrimination against Negroes. It set the patterns and sustained the atmospheres in which the Negro had to wage his struggle. Today, the massive legislative, judicial and executive effort aimed at reversing past governmental positions and popular attitudes is legal involvement with a different end in view.

The law, then, can be seen as one of the most important factors in

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American race relations. The patterns set in the past remain with us today; the Negro still bears the marks of his oppressive past. The nation, in fact, still exhibits the scars of racial discrimination. The wounds go deep. One question raised by the present-day civil rights effort is whether or not the law *can* remove the vestiges of its past when it supported and required discrimination and segregation on the basis of race, when it encouraged racial differentiation in public and private sectors.

Few, if any, states can claim immunity from the charge of having aided and abetted racial discrimination. The Commonwealth of Pennsylvania is not among the few. A review of the laws of this state affecting the status of the Negro shows that his position in society was damaged to such an extent—perhaps irreparably—that Pennsylvania is still engaged in a struggle with what one Justice of the Pennsylvania Supreme Court has called the "unconquerable prejudice of caste."

Pennsylvania's history in the civil rights struggle is both interesting and instructive. In a most uncanny fashion, Pennsylvania appears to have anticipated national legal positions on the status of the Negro and the question of his absorption into the American mainstream. While slaveholding was never wide-spread in the Commonwealth, the state was a center of slave importation and trading; it was the home of slave catchers and abolitionists. It attempted to prohibit the slave trade and slavery itself by legislation attempting to abolish slavery *gradually*. Its high court had to deal with the question of the human status of the Negro as a person held in bond slavery and with the citizenship status of the Negro as a free man. Twenty years before *Dred Scott v. Sanford*[1] the Supreme Court of Pennsylvania found, in effect, that the Negro had no rights which a white man was bound to respect. Despite the Civil War Amendments to the United States Constitution and especially the role Pennsylvanians played in drafting and working toward the adoption of those amendments, this Commonwealth permitted segregation in schools and in places of public accommodation. Finally, Pennsylvania was among the states which took the lead in building a legislative foundation for the protection of the rights of Negroes in employment, education, public accommodations, housing and other areas of human endeavor.

LEGISLATIVE ORIGINS

A majority of the persons who came to the colonies before their independence arrived under some form of servitude. The nature and types of service varied; they ranged from the indentured servant, who bound himself out to serve for a short term of years in return for his passage, to the captive person who was sold to a master for life.[2] While Pennsylvania colonists owned a number of indentured servants and while

1. 19 How. 393 (1856).

2. See CATTERALL, JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO, 53.

traffic in slaves formed a substantial portion of the business of the port of Philadelphia, there were relatively few slaves in the colony. The reasons for this were economic as well as ethical. The plantation system, so favorable to the increase of slaveholding, never took hold in Pennsylvania—predominantly a colony of small farms, manufacturing, and commerce. That kind of farming was not suitable to large ownership and the small farmer eking out a meager existence on the frontier was generally too poor to purchase slaves. Negroes were seldom used in commerce and, with the exception of iron work, few Negroes were used in manufacturing.

Moreover, the moral controversy over slavery early worked against the growth of slavery in Pennsylvania. The predominantly anti-slavery elements were the Germans and the English Quakers. The Pennsylvania Germans abstained from slaveholding from its colonial beginning and the Quakers became ashamed of the practice and worked to abolish it completely even though, as Philadelphia merchants, some were leading figures in the importation and sale of slaves.

Nevertheless, from the earliest days of the colony, some Negroes were bound to some form of servitude. Records from the times of the Dutch, Swedish and English occupations indicate that those who came to colonize also brought with them Negro servants.[3] The legal authority for such bondage in the early days is hard to find; however, slavery existed in other colonies and the custom seems to have been followed without the need for statutory or judicial justification.[4]

When the English took over control of the Delaware River region in 1664, the so-called Duke of York's Laws[5] were promulgated to regulate these areas. In that document there was a provision dealing with bond slavery:

> No Christian shall be kept in Bondslavery, villenage or Captivity, Except Such who shall be Judged thereunto by Authority, or such as willingly have sould, or shall sell themselves, In which Case a Record of such Servitude shall be entered in the Court of Sessions held for that Jurisdiction where Such Matters shall Inhabit, provided that nothing in the Law Contained shall be to the prejudice of Master or Dame who have or shall by any Indenture or Covenant take Apprentices for Terme of Years, or other Servants for Term of years or Life.[6]

3. See DuBois, The Suppression of the African Slave Trade to the United States of America, at 24, wherein the author indicates that in the original Swedish colonies along the Delaware, slavery may have been prohibited.

4. Catterall, *op. cit. supra* note 2, at 59 and Act of Virginia Assembly, Mar. 12, 1661, 2 Hen. 26.

5. Duke of York's Patent, 1664, Book of Laws of Pennsylvania, 1676-1682, p. 3.

6. *Id.* at p. 12.

This document sheds some light on the question of Negro slavery. First, the prohibition applied only to Christians, thereby presumably not affecting Africans or Indians not converted to that faith.[7] Secondly, the prohibition made certain exceptions: those who had been sentenced to bondage and those who were indentured by choice. In addition, the device of apprenticeship and servitude, whether for a term of years or for life, was excepted.

The term apprentice, it would appear, applied only to a person who was held to service for a term of years, while servant could mean one who was held for a term of years or for life. While a servant for a term of years was presumably free after his period of service, a servant for life was bound forever. They were both called servants, however, so that historical references to servants provide us with no clue as to the nature of the servitude. Servitude received further differentiation in a later provision dealing with the assignment of servants. That language read in part:

> No Servant, except such are duly so for life, shall be Assigned over to other Masters or Dames by themselves their Executors or Administrators for above the Space of one year, unless for good reasons offered; the Court of Sessions shall otherwise think fitt to order, In such Case the Assignment shall stand good Otherwise to be void in Law.[8]

Although the word slavery was not used, with the advent of the Duke of York's Laws, slavery or servitude for life was recognized in Pennsylvania.

Perhaps, at first, all so-called servants were treated as servants for a term. It would appear that William Penn had some sentiments in this direction. In his Charter to the Free Society of Traders in 1682, the year Charles II granted his Patent, Penn provided, in effect, that if the traders held Negroes they should make them free at the end of their term which was about fourteen years. The sentiment is clearly evident in the Quaker protest against slavery made at Germantown in 1688 and in George Keith's Declaration of Principles in 1693; it was the impetus to the movement among the Friends, which, starting about 1696, led finally to the emancipation of all the Negroes they held in servitude and to the strong Quaker leadership in the fight for abolition.

7. Because Negroes were converted to Christianity it became necessary to develop new reasons for holding them in bondage. There soon arose the argument that Negroes were not human or at least unalterably inferior.

8. Duke of York's Patent, *supra* note 5, at page 38. Other provisions respecting servants are found throughout the Duke of York's Laws, *e.g.*, burial, p. 14; instruction and punishment of children and servants, p. 19; fugitives, p. 28; sales by servants, runaways, payment for service, cruel treatment of servants, assignment of servants and reward for faithful service, pp. 37, 38.

Nevertheless, during the period immediately after Penn had been granted his Charter, slavery—that is, servitude forever—was practiced. The Assembly passed no statutes and the courts made no rulings that have been recorded, but slavery was a reality. In 1700 a statute was enacted which provides some insight into not only the distinction between types of servitude but also between whites and Negroes. In that year an "Act for the Better Regulation of Servants" contained a section designed to prevent embezzlement of goods by servants. The section provided different penalties depending upon the race of the embezzling servant.

> VII. And for the more effectual discouragement of servants imbezzling their masters or owners goods, *Be it enacted*, That whosoever shall clandestinely deal or traffick with any servant, white or black, for any kind of goods or merchandize, without leave or order from his or her master or owner, plainly signified or appearing, shall forfeit treble the value of such goods to the owner; and the servant, if a white, shall make satisfaction to his or her master or owner by servitude, after expiration of his or her time, to double the value of the said goods: And if the servant be a black, he or she shall be severely whipped, in the most public place of the township where the offense was committed.[9]

Conceivably the law was so worded because there were few instances in which a Negro—now generally held for life—could give satisfaction by the addition of time at the end of his servitude since his term ended with death.

However, while slavery was legally recognized, it was also being restricted by the law. The restrictive measures took the form of acts imposing tariffs on the slave traffic. A duty of twenty shillings was placed in 1700. This was raised to forty shillings five years later. By that time workers in the anti-slavery movement gained new allies in the form of white workingmen who did not want to compete with the lower paid Negroes who may have been free men or freed servants. In 1712, the Assembly passed "An Act to Prevent the Importation of Negroes and Indians into this Province," which made the duty twenty pounds per head. The preamble to that act read:

> Whereas Divers Plots and Insurrections have frequently happened, not only in the Islands but on the Main Land of America, by Negroes, which have been carried on so far that several of the Inhabitants have been thereby barbarously Murthered, an

9. Act 27 Nov. 1700, 1 Sm. L. 10; LAWS OF PENNSYLVANIA, ch. XLIX § 7. See also Act of 1787, Sept. 29, 2 Sm. L. 432, § 6, still compiled as 18 P.S. § 1332, making an apparent distinction between Negroes and servants.

> instance whereof we have lately had in our neighboring Colony of New York . . .[10]

Those who feared slave revolts, white workingmen who feared the economic competition and those with abolitionist sentiments, worked together to produce a number of acts of the Assembly aimed at the prevention of importation of slaves, so that by 1750 the practice had almost completely ceased. In 1773, the last act designed to prevent the slave trade was passed, but by this time the laws were no longer necessary. At the outbreak of the Revolutionary War the traffic in slaves came to a complete halt. In 1780, the importation of slaves was prohibited absolutely and slavery was to be gradually abolished.[11]

THE BADGES OF SERVITUDE

Despite the passage of time the Negro still wears the badges of his earlier servitude. These indicia are a carry-over from slavery and the attenuated forms of specialized treatment which the law permitted or required. Other identifiable ethnic groups at one time or another in their history in America have suffered discrimination. Negroes, however, because of the combination of high visibility, large population *and* slavery, have been the recipients of continuing negative treatment as a group. Despite the American ideal of legal recognition of the individual and his personal rights, slavery created the climate in which negative group identification could flourish.

The development of legally recognized slavery in Pennsylvania was rapid and covered a relatively brief eighty-year period. In this time Negroes came to be held as slaves while other persons subjected to servitude were held to service for a term of years. This distinction, service for life and in perpetuity as contrasted with service for a period of years, appears at first to be the only difference between white and Negro servants. Prior to 1700, the Negro, even if held for life, was controlled by the same restrictions, tried in the same courts and punished with the same penalties as to the white servant. These restrictions were neither numerous nor detailed. After 1700, the practice seems to have become more rigidly followed, and the Negro servant became subject to different treatment and distinct laws.

This distinction came about partly because of a recognition of the difference in the nature of the property possessed by the master. In the case of the servant for a term, the owner had a right to the service of the person for a period of time less than life. This service was a chose in possession, capable of being bought, sold, transferred as a chattel, inherited by will, bequeathed and dealt with as any other piece of per-

10. Act 7 Jun. 1712, II Stat. at L. 433, See, DuBois, *op. cit. supra*, note 3, at 206 (app.).
11. Act 1, Mar. 1780, X Stat. at L. 67; 1 Sm. L. 492.

sonalty. At the end of the service, however, no lingering incidents of servitude remained. The servant could not be held to a longer period than his indenture (and whatever extensions were tacked on as punishment for the commission of crimes) unless he obligated himself anew. The incidents of slavery were crucially different, however. While the service of the slave was also a chose, the perpetual nature of the slave's servitude tended to cause a merger of the service aspects of possession with the human personality of the slave. This caused the slave himself—the human being—to be thought of as a thing. The Negro, being subjected to perpetual servitude, came to be dealt with as an article of merchandise. It did not take long for the incidents of slavery to be extended to all Negroes, free as well as slave, merely because they were Negroes.

Slavery gave rise to a new class of persons. In the beginning the only slaves in Pennsylvania were those who were imported into the region and sold for life. But after a time, the children born to slaves raised the question of how to deal with these offspring. This problem was solved by the idea that ownership of the Negro for life encompassed ownership of his progeny. The simple rationale was that since the slave was unable to rear his children, (because he was not economically a free agent in any sense), all of his substance belonged to the master including the service of his children who would be held to lifetime service as recompense for the costs the master assumed for rearing them.

Under this system, however, the child of a slave was not necessarily a slave if one of his parents was free. The common law rule was that the child followed the condition of the father; under the Roman doctrine of *partus sequitur ventrem*, the child followed the condition of the mother. The Supreme Court of Pennsylvania,[12] in *Pirate v. Dalby*,[13] decided that the civil law rule applied in America. In that case, the plaintiff, apparently born in Maryland, was the offspring of a mulatto woman and a white father. Upon coming to Philadelphia in the service of the defendant, the child's light appearance caused a stir among anti-slavery advocates who caused this action *de homine replegiando*[14]

12. Pennsylvania has had a variety of courts. The Provincial Court, established in 1684, eventually became the Supreme Court of Pennsylvania under the first constitution of 1776. From 1780 to 1806, there was a High Court of Errors and Appeals which had jurisdiction to examine all judgments of the Supreme Court in cases involving amounts exceeding the value of 400 bushels of wheat. Justices of the Supreme Court sat at *nisi prius* throughout the state during the early 1800's and in Philadelphia as late as 1874.

13. 1 Dall. 167 (1786). The Supreme Court of the United States in Williamson v. Daniel, 25 U.S. 567 (1825) and McCutcheon v. Marshall, 33 U.S. 218 (1834) ruled that *partus sequitur ventrem* was the law of the land.

14. "To replevy a man." This was an early English writ which lay to replevy a man out of prison or out of the custody of a private person upon giving security to the sheriff that the man shall be forthcoming to answer any charge against him. It was replaced by the writ of *habeas corpus* in England, but was revived in the United States for a time and was

to be instituted. The court not only ruled that *partus sequitur ventrem* applied, but also that it was possible to have property in a person and that a bona fide purchase, without deed, was all that was necessary for a valid transfer of a Negro.[15]

If literally applied, the civil law rule would mean that the child born of a free mother would be free even though the father might be a servant or a slave. This was not the case in Pennsylvania. The civil law rule was modified by custom and usage and by statute[16] so that the Negro or mulatto child was a slave or a servant. Thus, the child of slave parents was a slave. The child of a slave mother and a free father was a slave. The child of a free mother and a slave father was a servant for a term of years.

Where the parentage was mixed racially, the same rule applied and the mulatto offspring might be a slave or a servant. If the mother were a slave and the father a free white, the child would be a slave. If the mother were a free white woman and the father a slave, the child would be a servant for a term of years.[17] The child of free Negro parents was presumably free but, as shall be illustrated that freedom was more apparent than real. This destructive impact on the family unit imposed by slavery and its offspring, segregation and discrimination, is still felt today.[18]

The year 1700 can be said to be the point in time in which discrimination and segregation because of race became legally recognized in Pennsylvania. Once having been recognized, it set the pattern for popular attitudes which, even after the colony was one of the first to abolish slavery, continued in the mind of the general public.

In 1700 the colonial legislature enacted a law regulating the trial and punishment of Negroes.[19] This law marked the beginning of a new kind of treatment of the Negro in that, by subjecting him to different courts and different penalties, it definitely identified him as belonging to a separate class distinct from all others in the colony. From this distinction it was but an easy step to distinguish Negroes in other ways. Thus,

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used in actions to test the validity of servitude for life. See, BOUVIER'S LAW DICTIONARY (1897 ed.).

15. Pennsylvania never went to the extent of declaring that Negro slaves were real property as did some of the other colonies. See, BALLAGH, HISTORY OF SLAVERY IN VIRGINIA, ch. 11.

16. *"An Act for the Better Regulation of Negroes in this Province,"* Act 5 Mar. 1725-26, ch. CCXCII, § 8, IV Stat. at L. 59.

17. See language of Rush, J. in Respublica v. Betsy, 1 Dall. 468 at 475 (1789).

18. See, FRAZIER, THE NEGRO FAMILY IN THE UNITED STATES (1948); MEAD, MALE AND FEMALE (1949).

19. Act 27 Nov. 1700, II Stat. at L. 77-79; repealed in Privy Council and passed again by the Assembly in 1705-1706, II Stat. at L. 233-236.

in 1725-26, a code was enacted "For the Better Regulating of Negroes in this Province,"[20] which subjected the Negro to special regulation and control, not because he was a slave but because he was a Negro.

Under the 1700 "Act for the Trial of Negroes," special courts were set up for the adjudication of criminal actions involving Negroes. These special courts consisted of two justices of the peace and six "of the most substantial freeholders of the neighborhood." They were to hear, try and determine cases of murder, manslaughter, buggery, burglary, rape, attempted rape or any other "high or heinous offenses" committed by any Negro or Negroes. If the Negro was convicted, a warrant was to be directed to the high sheriff—and it was to be executed "on pain of being disabled to act any longer in that post or office."

The death penalty was imposed for rape or ravishment of any white woman or maid, or for murder, buggery, or burglary. For attempted rape or robbing, stealing or fraudulently taking away any goods living or dead above the value of five pounds, the penalty was thirty-nine lashes and branding with the letter "R" or "T," with consequent banishment from the province within six months never to return on pain of death. The Negro was to be kept in prison at the master's expense until exportation.

The act also provided that any Negroes carrying any weapon (guns, sword, pistol, fowling piece, clubs or other arms) without the master's special license would be whipped with twenty-one lashes on his or her bare back. And it prohibited any meeting of more than four Negroes on any day including the "First Day," except on the master's business; the penalty was public whipping at the discretion of the justice of the peace not exceeding thirty-nine lashes.

In contrast, the penalty generally imposed for rape was thirty-one lashes and seven years hard labor for the first offense. For the second offense the punishment was castration and branding with the letter "R." For stealing cattle, if the cattle were found alive and well, the felon had to make double satisfaction to the owner. If the cattle were not found, the felon had to make four-fold satisfaction and the justices of the court of Quarter Sessions could, in their discretion, order the felon whipped and cause him to wear the letter "T" for six months. For stealing "dead" goods over five shillings in value, the felon would have to pay the owner four-fold, would be whipped not exceeding twenty-one lashes, and would be ordered to wear a badge or mark on the outer garment. Failure to wear the badge led to a punishment of twenty-one lashes.

As can be readily seen, there was a significant difference in the treat-

20. Act 5 Mar. 1725-66, ch. CCXXII, § 8, IV Stat. at L. at 59.

ment of Negroes as contrasted with whites for the same crimes; not only were separate courts created specially to deal with the criminal acts of Negroes, but also the punishments were different. Only in the case of murder was the penalty the same. Negroes were prohibited from meeting in groups of more than four on any day and they alone were prohibited from carrying weapons: it was not a crime for white men to meet or to carry weapons.

The 1725-26 legislation dealt not only with slaves but also with free Negroes. These regulations are similar to the so-called Black Codes enacted by the southern states following Reconstruction. In the manner of the times, an introduction or preamble was included within the act prior to the sections dealing with free Negroes. This preamble reads as follows:

> And whereas 'tis found by experience that free negroes are an idle, slothful people and often prove burdensome to the neighborhood and afford ill examples to other negroes: . . .[21]

The act then provided that owners who had set their slaves free had to post a recognizance of thirty pounds to indemnify the locality for any expense of caring for the Negro if he "by sickness or otherwise be rendered incapable to support him or herself, but until such recognizance be given such Negroes shall not be deemed free." In the case of emancipation by will, the executor was required to give the recognizance at the time of probate.

Negroes who were not employed were liable to be bound out to service by magistrates. Children whether freed or free were liable to be bound out, males until twenty-four years old, females until twenty-one years old. No reason is given in the statute for the binding out of children. The only justification seems to be that they were young and Negro. The pertinent part of the section reads:

> And if any negro be set free under the age of twenty-one years, or where there be children of free negroes, it shall and may be lawful for the overseers of the poor and there are hereby ordered, with the assent of two or more justices of the peace, to bind out to service such negro or negroes, a man child until he comes to the age of twenty-four years, and a woman child to the age of twenty-one.[22]

Free Negroes or mulattoes who harbored or entertained any Negro, mulatto or Indian slave or servant without consent of the master or mistress were liable to a fine of five shillings for the first hour and one shilling for each additional hour. Likewise, if any free Negro bartered,

21. Act 5 Mar. 1725-26, ch. CCXCII, § 3, IV Stat. at L. 59.
22. Act 5 Mar. 1725-26, ch. CCXCII, § 4, IV Stat. at L. 59.

traded or in any way dealt with any slave without permission he had to make restitution to the aggrieved party and was also to be publicly whipped not exceeding twenty-one lashes. If the Negro could not pay his fine or forfeiture, a judge could order satisfaction by servitude.

This law also forbade the marriage of Negroes and whites. It imposed a fine of a hundred pounds upon the minister, pastor, magistrate or other person who officiated at the marriage ceremony. The white man or woman who cohabited or dwelt with a Negro under the pretense of being married was subject to a fine of thirty pounds; they could also be sold into servitude for a maximum of seven years. Likewise their children would be put out to service until they reached the age of thirty-one years.

If any free Negro married a white person, the Negro man or woman was to become a slave for life. If the free Negro committed adultery or fornication with a white person, the Negro was to be bound out to service for seven years and the white person punished as aforementioned. The marriage, however, was not nullified.

The law also imposed a penalty of ten lashes for any Negro found tippling or drinking in or near any house or shop where strong liquors were sold. The act imposed several other restrictions upon the actions of Negroes, as slaves or servants, which affected the actions of free Negroes. For example, the same section prohibiting tippling also required whipping for any Negro found away from his master's house without permission after nine o'clock at night. One need not stretch the imagination unduly to picture situations in which free Negroes were whipped for being out after the curfew. Thus, the crippling restrictions, the distinctions in treatment, the philosophy of discrimination manifested by the law of the times, isolated the Negro and set the stage for the future.

The period from the passage of the Black Codes to 1780 was characterized by a continuation of the practices of slavery. No new, special legislation has been found and no cases have been unearthed which point to dramatic instances of a change. To be sure, the free Negro was still in the throes of his dilemma—his "negroness" always gave rise to the possibility of his being subjected to the abuses of slavery.

GRADUAL ABOLITION

In 1780, the "Act for the Gradual Abolition of Slavery" was passed,[23] due, in large part, to the activity of the Quakers.[24] In 1788, a further

23. Act 1 Mar. 1780, 1 Sm. L. 67.

24. One cannot gainsay the effect of the sentiments aroused by the struggle for independence being waged at the time. In fact, the lengthy preamble to the act made reference to the fight for freedom against England and man's common brotherhood under God.

act was passed to fill some of the defects of the 1780 act.[25] From 1788 onward, there was a long period during which slavery existed but was gradually dying out. The incidents of slavery, the indicia of servitude and inferiority, however, remained long after slavery was abolished.

Nevertheless, Pennsylvania was one of the first states to pass an abolition statute.[26] In brief, this law provided (after a lengthy preamble, setting out the issues in the struggle with England as justification for the removal of the bounds of slavery), that after the passage of the act, no child born in Pennsylvania would be a slave; that children (whether Negroes or mulattoes) born of a slave mother would be servants until they were twenty-eight; that all those presently slaves should be registered by their masters before November 1, 1780, and that those not registered on or before that date[27] would be deemed free. This law also abolished the old discriminations in the trial and punishment of Negroes and almost all of the special legislation dealing with those of color.[28]

While this statute was enforced by the courts with presumptions in favor of freedom wherever it was possible, there were hard cases.[29] If the master had complied with the registration procedures, nothing could be done; but if the specific conditions of the law had not been satisfied, such as not listing the sex of the slave,[30] his birth date,[31] the owner's occupation,[32] or if registration was made by someone other than the owner or his authorized agent,[33] generally the courts would rule that the slave was free. Of course, if no registration was made at all, the slave was declared a free man.[34] The mechanism for getting into court was the writ *de homine replegiando* or *habeas corpus*.

At the time of the passage of the abolition act of 1780, there were two

25. Act 28 Mar. 1788, 2 Sm. L. 443.

26. See DuBois, *op. cit. supra* note 3 at 222-29 (app.).

27. An extension was granted to January 1, 1783, in favor of citizens of Washington and Westmoreland counties, previously under the jurisdiction of Virginia, to register such slaves as were held on September 23, 1780.

28. A slave, however, could not testify against a free white man; this disability was not removed until 1847. Act 1847, 3 Mar., P.L. 206, § 7.

29. See Pirate v. Dalby, 1 Dall. 167 (1786); Respublica v. Richards, 2 Dall. 224 (1795); Giles v. Meeks, 1 Addison 384 (Washington Co. Ct. 1799); Respublica v. Findley, 3 Yeates 260 (1801); Campbell v. Wallace, 3 Yeates 572 (1803); Commonwealth v. Blaine, 4 Binn. 185 (1811); Marchand v. Peggy, 2 S & R 17 (1815); Wright alias Hall v. Deacon, 5 S & R 62 (1819); Butler v. Delaplaine, 7 S & R 378 (1821); Stiles v. Nelly, 10 S & R 365 (1823); Commonwealth *ex rel.* Pompey Cribs v. Vance, 15 S & R 35 (1826); Commonwealth *ex rel.* Taylor v. Hasson, 1 P & W 237 (1831).

30. Wilson v. Belinda, 3 S & R 396 (1817); Lucy v. Pumfrey, 1 Addison 380 (1799).

31. Commonwealth v. Greason, 4 S & R 425 (1818).

32. Wilson v. Belinda, 3 S & R 396 (1817); but see, Commonwealth *ex rel.* Pompey Cribs v. Vance, 15 S & R 35 (1826).

33. Elson v. McCulloch, 4 Yeates 115 (1804).

34. Respublica v. Blackmore, 2 Yeates 234 (1797).

kinds of servitude derived from birth. One was slavery for life, the other service for thirty-one years. To all intents and purposes, this latter service was merely a form of limited slavery. As one judge said in explaining the distinction, "[t]he latter took place where a child was born of a white mother by a black father. The usage in such case has been to hold the issue in slavery until the age of thirty-one years because of its base birth."[35] It is to be noted that this practice was derived not only from usage as the court indicates but from strict requirement of law.[36]

The 1780 Act was found to be open to serious criticism, not only because it was somewhat loosely drawn but also because it did not protect against certain abuses which reached alarming proportions. For example, many Pennsylvanians openly maintained the slave trade outside the state borders. Slave owners within the state still sold their slaves in neighboring states and sent their female slaves away when they were pregnant so that the children would not be born on free soil. In addition, the practice of kidnapping continued unabated. The 1788 legislation attempted to explain and clarify the 1780 Act and to enforce it by stringent penalties. This law provided that the births of the children of slaves were to be registered, that husband and wife were not to be separated by more than ten miles without their consent, and that pregnant females should not be sent out of the state pending their delivery. It punished the slave trade by a penalty of one thousand pounds. In addition, the practice of kidnapping was prohibited and offenders were punished by a fine of one hundred pounds and imprisonment at hard labor for a minimum of six months. That section, in part, reads as follows:

> 7. And be it further enacted . . . That if any person or persons shall, . . . by force and violence, take and carry, or cause to be taken and carried, or shall by fraud seduce or cause to be seduced, any Negro or Mulatto from any part or parts of this state, to any other place or places whatsoever, with a design and intention of selling and disposing, or of causing to be sold, or keeping and detaining or causing so to be, as a slave, or servant for a term of years, every such person and persons, their aiders and abetters shall upon conviction thereof . . . forfeit and pay the sum of one hundred pounds . . . and shall also be confined at hard labor for any time not less than six months, nor more than twelve months, and until the costs of prosecution shall be paid.[37]

In a prosecution for kidnapping under the above section a slave and his owner were visiting Philadelphia, after which the slave refused to

35. Respublica v. Betsy, 1 Dall. 468, 475 (1789).

36. Act 5 Mar. 1725-26, ch. CCXCII, IV Stat. at L. 59.

37. Act 5 Mar. 1725-26, ch. CCXCII, § 7.

return to Virginia. He was coerced into New Jersey and then forceably returned to the master. The court dismissed the indictment of kidnapping against the owner on the grounds that the act did not apply to the recapture of runaway slaves of a visitor, but applied only to the capture and enslavement of free Negroes.[38]

The cases testing the provisions of these laws continued until well into the middle 1800's.[39] Some cases turned upon minute factual differences. Some, however, were novel and indicated a growing awareness among former slaves of their rights in court. In *Negro, Peter v. Steele*,[40] for example, an action of assumpsit was brought for work, labor and services performed during the time that the Negro was held under a false claim of slavery. The trial court granted the defendant's motion on the ground that assumpsit would not lie, but the Supreme Court reversed and granted a new trial, declaring that the plaintiff could waive the tort and sue for contractual damages.

At this time, the Pennsylvania Negro was fighting for his freedom using the courts and employing techniques of persuasion and appeals to morality. This effort was waged both on an individual basis and through organizations. The Commonwealth, too, was using its sovereignty to protect, to some degree at least, not only the Pennsylvania Negro from kidnapping but also the fugitive slave from recapture.

Conflicts between Pennsylvania's legal position against the slave trade and slavery itself and those of its sister states became manifest in the 1820's. Pennsylvania courts were deciding cases involving fugitive slaves and captured Negroes with a presumption in favor of freedom wherever possible; the Federal constitutional and legislative provisions dealing with fugitive slaves[41] began to assume a foreboding significance.

Fugitive slaves were the focus of a struggle between Pennsylvania and Maryland which went to the Supreme Court of the United States, which brought the Commonwealth to the threshold of attempted nullification and which presaged the Civil War. Maryland had complained re-

38. Respublica v. Richardson, 2 Dall. 224 (1795).

39. See cases cited in notes 29 and those following. See also, Respublica v. Gaoler of Philadelphia, 1 Yeates 368 (1794); John v. Dawson, 2 Yeates 449 (1799); Respublica v. Smith, 4 Yeates 204 (1805); Commonwealth *ex rel.* Jessie v. Craig, 1 S & R 22 (1814); Wood v. Negro Stephen, 1 S & R 175 (1814); Commonwealth v. Holloway, 2 S & R 305 (1816); Commonwealth *ex rel.* Johnson v. Holloway, 3 S & R 3 (1817); Commonwealth v. Hambright, 4 S & R 217 (1818); Alexander v. Stokely, 7 S & R 299 (1821); Commonwealth v. Barker, 11 S & R 360 (1824); Miller v. Dwilling, 14 S & R 441 (1826); Scott v. Waugh, 15 S & R 17 (1826); Commonwealth *ex rel.* Hall v. Cook, 1 Watts 155 (1832); Commonwealth *ex rel.* Hall v. Robinson, 1 Watts 158 (1832).

40. 3 Yeates 250 (1801); see also Cowperwaite v. Jones, 2 Dall. 55 (Com. Pl. Phila. 1790), but see Urie v. Johnson, 3 P & W 212 (1831).

41. U.S. CONST. art. IV, § 2; Act 12 Feb. 1793, ch. 7, I Stat. 302.

peatedly that fugitives were finding a haven in Pennsylvania. In fact, this was quite true. The "underground railroad," which originated in the City of Columbia in Lancaster County in the late 1700's, was the mechanism by which countless Negroes were led to safety and freedom from the South. Branches and extensions were found in many parts of the state, but in southeastern Pennsylvania—in York, Lancaster, Chester and Delaware counties—where it had its origins, it had its most effective impact.[42]

The Pennsylvania courts tried to be helpful to the Negro cause,[43] but the possibility always existed that the Negro runaway would not be let free.[44] The federal law was clear. It stated that any owner or his agent might reclaim a runaway wherever found, but in doing so he had to take the fugitive before a federal circuit or district court judge or before a state magistrate who was, upon satisfactory proof, to issue an order granting the Negro to his master.[45]

In 1820, Pennsylvania enacted legislation forbidding aldermen or justices of the peace from acting in fugitive slave cases.[46] It was said that this legislation was needed to curb great abuses. Maryland claimed otherwise and eventually a delegation from that state conferred with a joint committee of the Pennsylvania legislature. From this conference came legislation in 1826 which purported to "give effect to the provisions of the law of the United States."[47] In actual fact the law aided slave owners in only one respect: it permitted the claimant to place an alleged runaway in a Pennsylvania jail pending his trial. The claimant had to secure a warrant for the arrest of the alleged runaway and had to produce evidence together with an affidavit subscribed to by a justice of the peace in the locality from which the fugitive was alleged to have escaped. The testimony of other interested parties was barred. The act also set up protections for Negroes by providing a penalty of five hundred to two thousand dollars and imprisonment at hard labor for from seven to twenty-one years for kidnapping.

This law was enacted partly to pacify Maryland but primarily to end the practice of kidnapping Negroes. Its most dramatic and significant application was in this latter respect. In 1837, Edward Prigg and others assumed the task of finding and returning the female slave of a Maryland owner who had apparently escaped to Pennsylvania in 1832. They found the woman and removed her to Maryland with her children, one of

42. See SIEBERT, THE UNDERGROUND RAILROAD FROM SLAVERY TO FREEDOM.

43. See Commonwealth *ex rel.* Johnson v. Holloway, 2 S & R 305 (1816).

44. Wright alias Hall v. Deacon, 5 S & R 62 (1819); Butler v. Dalaplaine, 7 S & R 378 (1821); Commonwealth *ex rel.* Taylor v. Hasson, 1 P & W 267 (1831).

45. Act 12 Feb. 1793, ch. 7, 1 Stat. 302.

46. Act 27 Mar. 1820, 7 Sm. L. 285.

47. Act 27 Mar. 1826, 9 Sm. L. 150.

whom was born in Pennsylvania, despite the fact that the magistrate before whom they appeared pursuant to the 1826 act refused to take cognizance of the case. Consequently, they were indicted for kidnapping and found guilty. Maryland took an interest in Prigg's case but failed in an attempt to quash the indictment. On an appeal to the United States Supreme Court, in 1842, the Court decided that Prigg was not guilty because the act upon which the indictment was founded was unconstitutional and void.[48]

The Supreme Court's decision caused a violent reaction. In 1847 an act was passed reaffirming the most stringent penalties against kidnapping in the 1826 law. It went further in that it refused to allow any officer of the state to assist in carrying out the federal law of 1793. Under severe penalty, it forbade any judge or state officer to take cognizance of any case arising under the law and imposed a penalty upon a jailer who confined a Negro except where the judges had jurisdiction. Finally, it declared that any person attempting to take a Negro with violence was guilty of a misdemeanor.[49]

It now became impossible for an owner to reclaim a Negro slave in Pennsylvania. The other states were adamant in their demand for federal protection. This they received in the form of the Fugitive Slave Law of 1850[50] which was enacted to counteract the effect of Pennsylvania's stand. Nonetheless, the issue had been drawn; Pennsylvania enforced its laws to the utmost. The public was aroused as never before: the white population was openly hostile to agents who came to reclaim escaping Negroes. Negroes themselves banded together in armed groups to prevent recaptures and returns.[51]

Throughout the long history of the struggle for freedom and equality in the United States, one interesting fact appears again and again: there has been a legally imposed gap between the pronouncement or recognition of a civil right and the actual realization and enjoyment of that right. Thus, while Pennsylvania stood in the forefront of the fight against slavery, it was not fighting for freedom and equality. It must be remembered that the statute of 1780 was for the *gradual* abolition of slavery.

On the national level, emancipation after the Civil War meant only the removal of legal servitude. The Civil War Amendments were interpreted to signify only the barest minimum national citizenship.[52] As

48. Prigg v. Pennsylvania, 16 Pet. 536 (1842).

49. Act 1847, 3 Mar., P.L. 206.

50. Act 18 Sept. 1850, 9 Stat. 462.

51. For a detailed description of one bloody incident in Christiana, Pennsylvania, see U.S. v. Hanway, 26 Fed. Cas. 105 (Cas. no. 15,299), 2 Wall. Jr. 139, (Cir. Ct. E.D. Pa. 1851).

52. In the same way, in recent times, that Brown v. Board of Education, 347 U.S. 483

will be shown, freedom for the Negro in Pennsylvania in the nineteenth century was limited. It meant only the absence of slavery.

THE UNCONQUERABLE PREJUDICE OF CASTE

The free Negro in Pennsylvania was still shackled by the badges of servitude. The restrictions of the Black Codes of 1725-26 still prevailed, despite their repeal by the abolition of slavery statutes. Discrimination because of race was the common practice in all aspects of community life. The Negro was denied the right to vote because he was a Negro. This denial was particularly objectionable because the constitutional provision at the time granted the franchise to all freemen. It read:

> In elections by the citizens, every freeman of the age of twenty-one years, having resided in the State two years next before the election, and within that time paid a State or county tax, which shall have been assessed at least six months before the election, shall enjoy the rights of an elector: Provided, That the sons of persons qualified as aforesaid, between the ages of twenty-one and twenty-two years, shall be entitled to vote, although they shall not have paid taxes.[53]

In October, 1835, pursuant to this provision, William Fogg, a Negro, brought an action on the case against Hiram Hobbes, inspector of the general election, and Levi Baldwin, John Miller and Uriah Gritner, judges of the general election held in Luzerne County.[54] Fogg proved that he was a free man of adult age, a citizen of the Commonwealth and that he had paid all taxes assessed against him. He was nevertheless denied the right to vote by the defendants. The trial court, in its charge to the jury, stated that the suit was brought "for the purpose of ascertaining the political rights of the man of color in Pennsylvania."[55] Having found no expression in the constitution or laws of the United States or of Pennsylvania which could have been construed legally to prohibit free Negroes and mulattoes who were otherwise qualified from exercising the rights of an elector, the court directed the verdict for the plaintiff. The defendants appealed, claiming that the court erred in charging that there was no provision in Pennsylvania law which prohibited free Negroes or mulattoes from exercising the rights of electors.

The supreme court reversed the verdict and judgment. The opinion by Chief Justice John Bannister Gibson provides an instructive insight into the plight of the Negro then and now. Justice Gibson first cited a

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(1954), 349 U.S. 294 (1955), declared a present constitutional right which was to be effectuated and presumably enjoyed "with all deliberate speed."

53. Pa. Const. art. III, § 1 (1790).

54. Hobbes *et al.* v. Fogg, 6 Watts 553 (1837).

55. *Id.* at 554.

phantom precedent[56] which purported to answer the principal question of the case. Simply stated, the question was whether the word 'freeman' in the Pennsylvania Constitution of 1790 included one who was colored. The court decided that it did not. The reasoning of the court can be summarized as follows:

> (1) If the constitutional declaration of universal and unalienable freedom was meant to include the colored race, it would have abolished slavery; however, a mitigated form of slavery persisted long after 1776.
>
> (2) The colored race took no part in the "social compact" which was entered into by the founders of the commonwealth and the nation.
>
> (3) "[O]ur ancestors settled the province as a community of white men, and the blacks were introduced into it as a race of slaves; whence an unconquerable prejudice of caste, which has come down to our day, insomuch that a suspicion of taint still has the unjust effect of sinking the subject of it below the common level."[57]
>
> (4) Negroes were subject to the stern restrictive codes of 1725-26 which remained in effect until the emancipation act of 1780. It would be "irrational to believe that the progress of liberal sentiments was so rapid in the next ten years, as to produce a determination in the convention of 1790, to raise this depressed race to the level of the white one."[58]
>
> (5) Both the constitutions of 1776 and of 1790 used the term freeman. "Now, if the word freeman were not potent enough to admit a free Negro to suffrage under the first constitution, it is difficult to discern a degree of magic in the intervening plan of emancipation, sufficient to give it adequate potency, in the second."[59]

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56. Of interest to legal researchers is the court's novel approach to *stare decisis:*
About the year 1795, as I have it from James Gibson, Esq., of the Philadelphia Bar, the very point before us was ruled, by the High Court of Errors and Appeals, against the right of Negro suffrage. Mr. Gibson declined an invitation to be concerned in the argument, and therefore, has no memorandum of the cause to direct us to the record. I have had the office searched for it; but the papers had fallen into such disorder as to preclude a hope of its discovery. . . . But Mr. Gibson's remembrance of the decision is perfect, and entitled to full confidence. That the case was not reported, is probably owing to the fact that the judges gave no reasons; and the omission is the more to be regretted, as a report of it would have put the question at rest, and prevented much unpleasant excitement. Still the judgment is not the less authoritative as a precedent. *Id.* at 555.

57. Hobbes *et al.* v. Fogg, 6 Watts 553, 558 (1837).

58. *Id.* at 559.

59. *Ibid.*

> (6) Negroes had no citizenship in other states and suffered disabilities under state laws and constitutions as well as the federal constitution. How could Pennsylvania confer freedom and citizenship so as to overbear the laws imposing countless disabilities on him in other states? The court concluded ". . . interpreting the constitution in the spirit of our institutions, we are bound to pronounce that men of color are destitute of title to the elective franchise."[60]

Chief Justice Gibson's opinion is all the more remarkable because it antedated that of Mr. Justice Taney's in *Dred Scott v. Sanford*[61] by twenty years and provided a blueprint for that decision. In *Dred Scott*, the Court concluded that the Negro was not to be included in the general definition of citizen. In fact, the Negro was considered so inferior that he had no rights which a white man was bound to respect. At times the language in the two cases appears to have been written by the same person.

The result of the *Hobbes* decision was to leave the Pennsylvania Negro in political limbo. Just as *Dred Scott* was later to place national citizenship beyond reach of any Negro, so *Hobbes* removed political power—and the consequent ability to correct the wrongs imposed upon him.

To make certain that further consideration of the question of the right of Negroes to vote would not arise, in the year following *Hobbes* the Pennsylvania constitution was amended; the pertinent provision in Art. III section 1 was revised to read: "In elections by the citizens, every white freeman of the age of twenty-one . . . shall enjoy the rights of an elector."[62]

Deprived of the franchise, segregated and discriminated against, the Negro had to use the courts to seek definition of and protection of his rights. The courts, however, were generally reluctant to act as instruments of change. In *Foremans v. Tamm*,[63] a Negro claimed title to certain land by virtue of an act allowing pre-emption of vacant lands belonging to the Commonwealth. Foremans, a white man, tried to seize the land on the theory that Tamm had no rights to land because he was a Negro. The Supreme Court held that the Negro would prevail. Nonetheless, the Court was careful to distinguish this case from one dealing with political rights. The Court said:

> Whenever the white population, . . . think proper to admit into political partnership either the black population of Africa

60. *Id.* at 560.
61. 19 How. 393, 15 L. Ed. 691 (1856).
62. Pa. Const. 1838, art. III, § 1.
63. 1 Grant 23, 10 Leg. Int. 38 (1853).

> or the red aborigines of America, they have a right to do so. Until this is done, the Negro and the Indian must be content with the privileges extended to them without aspiring to the exercise of the elective franchise or the right to become our legislators, judges and governors.[64]

The legal prejudice of caste was haphazardly applied. The idea that Negroes were to be treated differently, the notion that citizenship rights were not available, or if available, were to be rationed out according to whim and caprice, prevailed. Segregation was the rule, but in Pennsylvania the legal tide was turning.[65]

THIS CULTURED HELL

The story of the quest of the Negro in Pennsylvania for full citizenship is the story of all Negroes in all parts of the country. Admittedly, a discussion of the legal aspects of the struggle does not present the full picture of frustration and partial fulfillment, of decision and disappointment that has been the fate of the American Negro up to now. Yet the study of the legal picture will, to some degree at least, provide us with an insight into the nature of the battle that has been waged and perhaps with an idea of the conflicts yet to come.

We see clearly that the guarantee of civil rights to all persons without regard to race, creed or color does not mean that these rights are thereby secured from encroachment by the mass of citizens, or by the courts, for that matter. Yet there are many who view the enactment of legislation or the rendering of a judicial decision as the goal. This study of Pennsylvania's early civil rights history shows that, while laws are necessary, they are by no means the final solution. A legal framework of protections is merely the first essential in a hierarchy of essentials.

In the final analysis, the accomplishment of civil rights objectives depends upon the willingness of the individual citizen to treat another citizen with respect and dignity. The law will be of service in setting

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64. *Ibid.*

65. *Railroads:* Goines v. McCandless, 4 Phila. 255, 18 Leg. Int. 36 (Dist. Ct. Phila. 1861); Westchester & Philadelphia R. Co. v. Miles, 5 Smith 209, 55 Pa. 209 (1867); but see, Derry v. Lowry, 6 Phila. 30, 22 Leg. Int. 164 (Com. Pl. Phila. 1865); Central Railroad of N.J. v. Green, 86 Pa. 421 (1878); Act 1867, Mar. 22, P.L. 38, 67 Pa. Stat. Ann. 651 (1950). *Public Accommodations:* U.S. v. Newcomer, Fed. Cas. no. 15, 868, 11 Phila. 519 (Dist. Ct. Phila. 1876), applying the Civil Rights Act of 1875; Drew v. Peer, 93 Pa. 234 (1880); Re Russ' Application, 20 Pa. C.C. 510 (Quarter Session Dauphin Co., 1898); Act 1887, May 19, P.L. 130. *Education:* Act 1854, May 8, P.L. 617, § 24, repealed Act 1881, June 8, P.L. 76, §§ 1, 2; Act 1869, Feb. 12, P.L. 150, §§ 15, 54, § 54 repealed Act 1872, Apr. 9 P.L. 1048, § 15 repealed Act 1911, May 8, P.L. 309; Commonwealth *ex rel.* Brown v. Williamson, 30 Leg. Int. 406, 10 Phila. 490 (Com. Pl. Luzerne Co. 1873); Kaine, *et al.* v. Commonwealth *ex rel.* Manaway, 101 Pa. 490 (1882).

standards and in punishing specific failures to pay this respect, but this is a limited accomplishment. We have not as a nation come to grips with the essential dilemma, which may well be a fundamental defect in our American system. This essential dilemma is caused by an uncertainty about the meaning of rights.

Some rights, long guaranteed to white persons by federal and state constitutions, have gradually and grudgingly been held to apply to Negroes. This recent broadened application conflicts squarely with the assumed prerogatives of the dominant majority. An important aspect, then, of the civil rights struggle involves the conflict between the customary "rights" of the majority to discriminate on the basis of race and the still novel idea of the "rights" of Negroes to full equality in every facet of life.

Probably, few Americans have considered the proposition that the full spectrum of privileges, options, advantages and protections of citizenship should be available to the Negro. There are many who see the quest for equality as a direct threat to what has been assumed to be the special rights of white men since the nation's beginning. They see each legal gain as a palpable diminution of their package of privileges. The extent to which the concept of rights in fact includes the option to treat Negroes and other minorities discriminatorily means that every civil rights gain *is* such a threat and reduction.

Theoretically, the law requires that we take each Negro as an individual, treat him as such, and accord him the rights any other individual has and enjoys. However, the societal context in which the law was interpreted required us to deal with the Negro as a symbol—a symbol of the demeaning myths and sad realities of the past. Legally, socially, politically, our nation has dealt with the statistical Negro; it continues to do so socially and politically. Our context remains a variation of the operational hypothesis of *Hobbes v. Fogg*.[66]

The law has been used in the attempt to bring about changes in national atitudes. While the law is by no means the ultimate weapon for or against these assumptions, it has, in the past, been used to crystalize and support them. It is now being used to dispute them.

On so many occasions Pennsylvania has, through its laws, set the tone or struck the pose that was to become the national posture in race relations. The conflicting attitudes manifested in Pennsylvania's legislative and judicial history were symbolic of the national ambivalence. From the Black Codes of 1725-26, which restricted freedom and mobility of all Negroes because they were Negroes, through the uncertain search for a method of dealing with the half-free Negro in the nineteenth cen-

66. Hobbes *et al.* v. Fogg, 6 Watts 553 (1837).

tury to the sweeping human rights laws of today, Pennsylvania can be seen as one of the leaders of the nation.

The law has changed over the years but the dilemma remains. In fact, the very existence of so many civil rights laws on the local, state and federal levels points up the problems of social change still to be solved.[67] The poet, Claude McKay, perhaps best characterized the position of the twentieth century American Negro in his poem "America":

> Although she feeds me bread of bitterness,
> And sinks into my throat her tiger's tooth,
> Stealing my breath of life, I will confess
> I love this cultured hell that tests my youth![68]

It is that love of country, tested and thwarted by centuries of denial and frustration, but grown nevertheless deep and abiding in a cultured hell of high promise, that has sustained the Negro as he wrought changes in the legal system. It may be that same love of country which will allow him to change the social system so that the nation will, indeed, conquer the heretofore unconquerable prejudice of caste.

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67. American women have faced similar kinds of legal restraints and now struggle to effect social and attitudinal changes. On the question of sex discrimination, see Murray and Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232 (1965).

68. SELECTED POEMS OF CLAUDE MCKAY (New York, Bookman Associates, 1953), p. 59.