

# When slavery wasn't a dirty word in NJ

*Editor's Note: This is Black History Month, and the piece that follows is a poignant reminder of a period too often forgotten, a period when the legal system in New Jersey — judges, attorneys and lawyer-politicians — put the state's stamp of approval on slavery.*

For most of us, slavery has no more connection to New Jersey than a cotton plantation. But despite our current reputation as a progressive state, the sad record reveals slavery existed in New Jersey from the 17th century until it was abolished in 1865 by the 13th Amendment — an amendment New Jersey initially rejected. In fact, New Jersey, which did not support Lincoln in either presidential election, was the last northern state to outlaw slavery.



## The Law and More Gary K. Wolinetz

The legacy of slavery, which once brought this nation to Civil War, confronts us to this day. As we discuss race relations in our legal system, we should step back and examine the evidence of legislated racism in our own backyard in the past — the enforcement of the New Jersey slave codes.

### Colonial laws

The Dutch likely introduced slavery in New Jersey in the early 17th century. After the colony came under British control, the Lords Proprietors enacted a series of laws governing slavery and encouraged the practice by granting immigrant landowners additional land for each slave they owned. In 1702, Queen Anne directed Lord Cornbury, our first governor, to take the necessary steps to ensure that the "province [has] a constant and sufficient supply of merchantable negroes."

As a colony, New Jersey adopted a series of laws imposing harsh criminal penalties upon slaves and prohibiting freed slaves from owning property. For example, a 1704 law held that a slave convicted of stealing "shall be whipped on the bare back with forty stripes ... and be likewise burnt with a hot iron on the most visible part of the left cheek near the nose, with the letter 'T' by the constable ..." Any slave convicted of using "force or persuasion" to have sexual relations with a

white woman was subject to castration and execution. Furthermore, children of freed slaves were forever barred from purchasing or inheriting land in the colony.

In 1714, the colony created a more expansive slave code. Concluding that "free negroes are an idle and slothful people," the 1714 act required owners to post a bond for any freed slave. That law also continued the prohibition against freed slaves owning land and proscribed severe criminal penalties against slaves. It decreed, for example, that a slave convicted of murder, attempted murder, rape or arson "shall suffer the pains of death in such manner as the aggravation or enormity of their crimes shall ... merit and require." This often meant burning alive at the stake.

In the mid-18th century, there were approximately 4,600 black slaves in New Jersey. Seeking to discourage unsupervised slave activity, a 1751 law provided that slaves who met in groups of more than five or were seen outside after 9 p.m. without their master's permission were subject to 20 lashes by the constable.

### Revolution's impact

Though the Declaration of Independence declared it "self-evident that all men are created equal," New Jersey did not abolish or even mention slavery in its 1776 Constitution. The Revolutionary War, however, was responsible for the freedom of many slaves in New Jersey. Some escaped while others earned their freedom by fighting in the Continental Army or the New Jersey Militia. Some even joined the British Army to take advantage of the proclamation of Virginia's royal governor promising to free any slave who fought for the British.

After the Revolution, the controversy over slavery in New Jersey (and elsewhere) evidenced a conflict between the protection of property rights and the principles expressed in the Declaration of Independence. Simply stated, should slavery be preserved because a master's "liberty" encompassed his right to keep slaves? Or should slavery be abolished to ensure that liberty also applied to enslaved blacks? Alternatively, should the state adopt some middle ground and gradually emancipate slaves over the course of several generations?

Ultimately, the proponents of gradual emancipation prevailed and, beginning in 1786, the Legislature enacted a series of laws designed to eliminate slavery in the state and to improve the lives of existing slaves. Declaring slavery a "barbarous custom," the 1786 statute prohibited the importation of new slaves and the exportation of slaves to other states. The law also permitted a master to be indicted for "inhumanely treating and abusing his or her slave."

In 1788, the Legislature prohibited in most circumstances the removal of slaves from the state without the slave's consent. That law also provided that slaves convicted of criminal offenses would receive the same punishment as white lawbreakers. In a departure from laws in the South, the statute required masters to teach slave children to read and write.

In 1798, with its slave population totaling more than 11,000, New Jersey enacted a detailed slave code that repealed virtually all pre-existing slave legislation. This law demonstrated that while corporal punishment of slaves may have been discouraged,

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it still remained part of our state's laws. Thus, slaves who "assemble[d] together in a disorderly or tumultuous manner," carried a gun or hunted on Sunday, or were seen outside after 10 p.m. without their master's permission, were subject to being whipped by the constable. Slaves also were prohibited from testifying in civil matters and could testify only in a criminal case against another slave. Furthermore, predating the former pass laws of South Africa, the 1798 act required that free blacks traveling outside their home county carry a certificate of freedom signed by two justices of the peace.

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However, the 1798 code did make some efforts to improve the conditions of slavery. For example, masters who inhumanely treated and abused their slaves were subject to a fine. Like the 1788 act, the new legislation required that masters teach slave children how to read. The act also provided that slaves between the ages of 21 and 40 could be set free upon compliance with specific manumission requirements.

### Judiciary's response

New Jersey courts were guided by the established rule that "negro slaves have always been looked upon in the same light with other personal property, and transferred in the same manner." *State v. Heddon*, 1 N.J.L. 377. Because slaves were considered "personal property," the law required that "negroes claiming their

freedom must prove themselves entitled to it." *State v. Lyon*, 1 N.J.L. 403. In fact, as late as 1821, New Jersey's highest court affirmed a jury instruction that "black men, in contemplation of the law, are *prima facie* slaves, and as such are entitled to be treated as such." *Gibbons v. Morse*, 7 N.J.L. 253.

Befitting the status of slaves as property, New Jersey courts applied basic contract principles to various commercial disputes involving slaves. For example in *State v. Mount*, 1 N.J.L. 337, a slave was sold with the condition that she be freed after 10 years if she remained childless. After 10 years, the slave sued for her freedom even though she had given birth to several children. The Supreme Court rejected her petition because in bearing children she had failed to satisfy a condition precedent of her sale. There also was *Stoutenborough v. Haviland*, 15 N.J.L. 266, that applied warranty principles to the sale of a 15-year-old boy ultimately determined to be free because his seller was "subject to the same rules as the seller of any other chattel."

### Gradual emancipation

Not until 1804, when the black slave population totaled approximately 12,000, did New Jersey provide for the gradual emancipation of slaves. In doing so, New Jersey became the last northern state to begin the emancipation process.

The 1804 law provided that children of slaves born after July 4, 1804 shall be free, but required they labor as servants for their master — females until age 21 and males until 25. Slaveholders objected to this law because it forced them to support slave children who eventually would become free. To address their concerns, the law provided that slave children over age 1 could be abandoned to the poorhouse. Once abandoned, the children could be bound

out to individuals who would be compensated by the state for the maintenance of each child. Often the children were bound out to the original master. Thus, the law benefited slave owners because, though they lost a slave, the original master had an "apprentice" paid for by the state.

Despite the goals of gradual emancipation, the 1804 act did not ban the sale of slave children, even those considered "apprentices." For example, in *Ogden v. Price*, 9 N.J.L. 167, a 13-year-old girl was assigned to defendants. Relying on the language of the act that an apprentice was subject to assignment, the court upheld the contract. Noting that it had "nothing to do" with the "policy" of slavery, the court rejected the argument that the potential "sale by the assignees at a public auction will be an outrage against humanity" because such an argument would, taken to the extreme, "do away with slavery itself by an act of the court."

### 1844 Constitution

Article 1 of the 1844 Constitution reiterated the principle contained in the Declaration of Independence that "[a]ll men are by nature free and independent." The adoption of this article gave new life to abolitionists who believed the liberty of the remaining 600 slaves superseded the property rights of their masters. It also set the stage for the most renowned slave case in New Jersey, *State v. Post*, 20 N.J.L. 368.

There, the Supreme Court rejected the argument that the "free and independent" clause mandated the freedom of the remaining slaves. Noting the long history of slavery in New Jersey, the Supreme Court held that it had "no power to enact a law, nor to set aside a law, even to remedy what we consider a great private or public wrong or to remove a great public evil; that power belongs to

another department of the government." The Supreme Court explained that if the framers of the 1844 Constitution had intended to outlaw slavery, they would have clearly said so.

In response to *Post*, New Jersey enacted legislation in 1846 that abolished slavery, but did not actually free any existing slaves. This law provided that all slaves (most of whom were aged and infirm) were "free" subject to certain "restrictions and obligations." One such restriction was that newly freed slaves served for the remainder of their lives as "apprentices" to their master. However, the legislation did free all children of "apprentices" born after the act and provided that "apprentices" could petition for their freedom if their master was guilty of "any misuse, refusal or necessary provision of clothing, unreasonable correction, cruelty or other ill treatment."

In 1860, there were 18 lifetime "apprentices" in New Jersey. If they survived the Civil War, these "apprentices" did not receive their freedom until the 13th Amendment was ratified. Only the adoption of that amendment in 1865, which New Jersey initially rejected, for finally ended involuntary servitude in New Jersey.

### Conclusion

The statutes and court decision regarding slavery remain a part of our state's legal heritage. Even though it was a far different time and place, we must not forget that New Jersey lawyers once earned a fee representing clients who bought and sold persons based on the color of their skin. Similarly, case law memorializes the New Jersey judges who took judicial restraint to the extreme and while pointing fingers at the Legislature nonetheless routinely enforced the statutes and common law principles that held slaves in bondage.