that was the most innovative and suggestive part of the *Representation*. He drew on a tradition extending back to Magna Charta (1215), which had provided, in its famous 39th chapter, that no freeman (*"liber homo"*) should be killed, imprisoned, or disseised "except by the lawful judgment of his peers or [*sc.* and] by the law of the land."[36] During the reign of Edward III, Parliament had refurbished the *per legem terrae* provisions by extending Magna Charta's provisions to all men, not just freemen, in a celebrated declaration: "no man of what estate or condition that he be, shall be put out of land or tenement, nor taken nor imprisoned, nor disinherited, nor put to death, without being brought in answer by due process of the law."[37] The Habeas Corpus Act[38] had explicitly extended the protection of the Great Writ to "any person or persons." Sharp argued that these provisions gave all persons in England, including black slaves, a statutory right to contest their restraints in the courts through the writ of habeas corpus.

Here again, procedure was closely tied to substance; for if Sharp's interpretation of the procedural right were to be accepted, the substantive issue of the legality of slavery would be unavoidably raised, if not partially determined. Sharp's view would dissolve the American lawyer's cherished distinction between procedural and substantive due process, for the same claim that would get a slave into court—that he was a protected "person" deprived of his liberty without due process of law—would ipso facto if not ipso jure challenge the very basis of his enslavement. Sharp thus represents a link in the chain of descent from Magna Charta through the medieval Parliaments to the nineteenth century American antislavery movement and the due process clause of the fourteenth amendment.

Having relied on one group of statutes in favor of liberty, Sharp could not avoid another group that recognized or at least condoned slavery: the parliamentary statutes regulating the slave trade, granting concessions to slavers, and confirming masters' property rights in slaves.[39] In the face of these laws, Sharp simply

36. The translation, including the rendering of *vel* as meaning both "or" and "and," is from 1 C. Stephenson & F. Marcham, Sources of English Constitutional History 121 (2d ed. 1972).

37. 28 Edw. 3, c. 3 (1354). *See also* 20 Edw. 3, c. 4 (1346): "Every Man may be free to sue for and defend his Right in our Courts and elsewhere, according to the Law."

38. 31 Car. 2, c. 2 (1679).

39. *See* 5 Geo. 2, c. 7 (1732); 23 Geo. 2, c. 31 (1750); 25 Geo. 2, c. 40 (1752). These statutes define "slaves" and "Negroes" as goods, assets, or property. The charter of the New Royal African Company (1672) defined "slaves" and "negroes" as "goods" and "commodities". *See* Calendar of State Papers, Colonial Series, America and West Indies, 1669-1674, at 409-12 (W. Sainsbury ed. 1889). In 1677, Solicitor General Sir Francis Winnington rendered an opinion that "negroes ought to be esteemed goods and commodities within the Acts of Trade and Navigation" requiring commodities exported from English colonies to be shipped in English bottoms. Calendar of State Papers, Colonial Series, America and West Indies 1677-1680, at 120 (W. Sainsbury & J. Fortesque eds. 1896).

argued that when statutes create an injustice, courts should treat them as being superseded by statutes favoring liberty, which are of superior obligation.[40]

Although Sharp conceded a contractual basis for slavery—by suggesting, perhaps needlessly, that a man might voluntarily agree, for consideration, to become a slave—he denied that slavery had any other source of legitimacy. This position required him to argue around the imperfectly reported dicta of the previous cases and the Yorke-Talbot opinion. Sharp did what he could with the antislavery precedents, and drew eclectically on continental civil jurists to demonstrate that if questions posed by slavery had to be decided on the basis of property rights, then the right of a slave to the property of his own person and the fruits of his labor overrode any supposed right of the master to either.[41] "True justice makes no respect of persons," he insisted, "and can never deny to any one that blessing to which all mankind have an undoubted right, their natural liberty." He thus stressed two themes that were to pervade later constitutional antislavery debate: the appeal to natural or higher law to override unjust, merely mundane ordinances, and the idea that a sweeping explicit declaration, such as the all-men-are-born-free-and-equal phrase of the Declaration of Independence, admits of no implicit racial exceptions.

In preparing the *Representation* and carrying forward the *Somerset* case, Sharp underwent the vexing frustration of having William Blackstone, already recognized as an authoritative expositor of English law, modify his publicly and privately expressed opinions against the validity of slavery.[42] In the first edition of his *Commentaries on the Law of England*, published in 1765, Blackstone had emphatically declared that slavery in its pure form "does not, nay cannot, subsist in England" and had laboriously repudiated three origins of slavery that continental writers had recognized as legitimating it (captivity in war, self-sale, inherited status). Citing *Smith*

40. Sharp, Representation at 26-27.

41. *Id.* at 38; *accord, An Argument Against Property in Slaves*, 42 Gentleman's Magazine 309-310 (1772).

42. E. Lascelles, Granville Sharp and the Freedom of Slaves in England 22-23 (1928).

v. Brown and Cooper, Blackstone had ventured the opinion that as soon as a slave comes into England, he becomes free, just the doctrine Sharp was striving for. Blackstone had gone on, though, to suggest that slavery might have a contractual basis, and that whatever rights an English master derived on this basis continued in force and were unaffected by baptism.[43]

Troubled by the uses to which Sharp and others were putting the more libertarian parts of his writings, and not wishing "to pronounce decisively on a matter which is *adhuc sub judice,*"[44] Blackstone cautiously modified the relevant passages in his third edition to remove the implications that slavery rested on a contractual basis and that a slave enjoyed "liberty" under English laws.[45] He stated that "whatever service the heathen negro owed to his American master, the same is he bound to render when brought to England and made a christian;" he also revised an earlier statement that a slave becomes free upon coming to England to read that he merely comes under the "protection of the laws, and so far becomes a freeman: though the master's right to his service may possibly still continue."[46] These were disastrous shifts of emphasis from Sharp's point of view.

Sharp did some research into the colonial statutes concerning slavery, particularly those of Virginia,[47] but he never came to grips with the critical question they posed for the imperial relationship: how would a decision such as the one sought in *Somerset's Case* affect the colonies? Could the colonies legitimate slavery in the metropolis by establishing or recognizing it through municipal legislation, as the West India planters contended? Or, conversely, could the metropolitan courts illegitimate it in the colonies by holding it incompatible with the metropolitan constitution? Sharp groped toward the latter possibility in a footnote in the *Representation*—"wheresoever the bounds of the British empire are ex-

43. 1 W. Blackstone, Commentaries 123, 411-12 (1st ed. 1765).

44. Letter from William Blackstone to Granville Sharp, Feb. 20, 1769. *Sharp Trans.* NYHS.

45. 1 W. Blackstone, Commentaries 424-25 (3d ed. 1768). One author claims that Blackstone made the change in his second edition. F. Shyllon, *supra* note 4, at 61.

46. *Compare* 1 W. Blackstone, Commentaries 123 (1st ed. 1765), *with id.* at 127 (5th ed. 1773), on this last quoted sentence.

47. Yet he failed to exploit a suggestive passage in Virginia's first comprehensive slave code, Act of 1705, c. 49, § 6, 3 Hening 448 (1823), providing that a slave's "being in England" would not work an automatic emancipation without other proof of manumission. Perhaps the statute was an early indication of colonial concern about the issues Sharp was raising.

tended, there the Common Law of England must of course take place"[48]—but he abandoned the possibility by merely urging that the colonial legislatures have greater respect for the common law principles that underlay the British constitution. He did not explore possibilities implied in the stipulation in colonial charters that the colonial legislatures could enact only laws "not contrary to the laws of this realm of England."[49] This was an avenue that later American antislaverymen exploited.

Whereas the bulk of contemporary abolition agitation in England was directed at outlawing the slave trade or modifying its severities, Sharp's *Representation* struck directly at slavery itself. The work was, furthermore, an entirely secular effort. This approach was somewhat out of character for Sharp; he was a devout and scrupulously orthodox communicant of the established Church, and spent many of his later years writing pamphlets in defense of orthodox trinitarian doctrine, in striving to convert the Jews, and in proving that the popish church was the Whore of Babylon described in the Book of Revelation. Yet in the *Representation* he bridled his usual inclinations and stuck to the worldly issues surrounding slavery.

Sharp distributed free copies of the *Representation* to attorneys to help them propagate the doctrines he had worked out, and simultaneously sought an appropriate case through which to argue his views to a competent court. Several presented themselves between 1770 and 1772, and, according to Thomas Clarkson's recollections,[50] the black secured liberty in each one; but none of this litigation gave an authoritative answer to the question whether a slave becomes free when brought into England.

But in one of these test cases promoted by Sharp, Mansfield made several tantalizing suggestions about the directions in which the law of slavery might move. In *Rex* ex rel. *Lewis v. Stapleton,*[51] the defendant was prosecuted for assault and false imprisonment

48. "[W]hatsoever right the members of a provincial assembly may have to enact bye-laws, yet in so doing, they are certainly bound, in duty to their Sovereign, to observe, most strictly, the fundamental principles of the constitution, which his Majesty is sworn to maintain; for wheresoever the bounds of the British empire are extended, there the Common Law of England must of course take place, and cannot be set aside by any private law whatsoever. . . ." Sharp, Representation, at 70-71.

49. The wording is from the Connecticut charter (1662), *excerpted in* 2 C. Stephenson & F. Marcham, *supra* note 36, at 590.

50. 1 T. Clarkson, The History of the Rise, Progress, and Accomplishment of the Abolition of the African Slave-Trade by the British Parliament 74-75 (1808).

51. A transcript of arguments and other proceedings in this unreported case is in *Sharp Trans.* NYHS, from which all quotations in the text are taken.