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# Charters of Liberty in Black Face and White Face: Race, Slavery and the Commons

By Peter Linebaugh

The Magna Carta is renowned as the 'Charter of Liberty' which inspired modern constitutional safeguards against the power of the State. But its smaller companion, the Charter of the Forest, enshrining the customary rights of the commoners to land and resources, has been overlooked. Cutting between the political struggles of the early 1700s and the 1720s, Peter Linebaugh shows how the struggle against enclosures in the woods of England is inextricably linked with the struggle against slavery in the Atlantic

I am thinking about revolution and constitution, where the former means the overthrow of capitalism and the latter means the ways we re-constitute our governance. Capitalism is the accumulation of commodities, and the production of surplus value by means of unpaid labour. Government concerns the rule of the Many by the Few, a task solved by *divide et impere* and named the Constitution.

The legal cliché is that the American is a written constitution, while the English is unwritten. Yet strictly speaking this is untrue inasmuch as both have stemmed from the Magna Carta of 1215, 790 years ago.

The Norman and Angevin kings afforested as much as a quarter of England, making game reserves, monopolising hydrocarbon energy resources, in zones where the only law was the king's pleasure. They were crusaders, in world competition with Jews and Arabs for the commerce of the Mediterranean, and to launch such crusades they forced marriages among the barony and took children hostage, pulled teeth of Jewish money lenders, as well as squeezing the serfs and villeins dry. Civil war was the result but cease-fire was obtained with Magna Carta. It revealed the contradictions: between state and church, between monarchs and barons, between them and merchants, between all those three and the commoners who were dependent on forest resources.

Magna Carta has 63 chapters. It is accompanied by a smaller charter, the Charter of the Forest with seventeen chapters. They belong together. They are the two documents printed first in the book of English law for over five centuries. The most esteemed commentators, Edward Coke who influenced the 17th century English Revolution and William Blackstone who influenced the 18th century American Revolution, always treated the two charters as one; the English charters of liberty. We can follow their precedent.

villains

Image > Anja Kirschner

A word about each. The Magna Carta used to be well known and what was most well known in it was chapter 39, because four principles of justice are sometimes derived from it, viz., habeas corpus, trial by jury, prohibition of torture, and due process of law. All of these have been curtailed by the USA Patriot Act. The Charter of the Forest assumes a notion of the 'commons' or a practice of subsistence commoning in the hydrocarbon energy resources of the time. This important presupposition is indicated by technical terms, viz., herbage, assarts, pannage, chiminage, and estovers. Herbage means grazing for cattle; assarts means clearing trees and grubbing stumps for gardening or growing grains; pannage means letting pigs into the woods for mast and nuts; chiminage means no tolls on the roads and paths; estovers means getting wood for fuel, for housing, and for tools and implements.

Now, to express these theoretically we might say that they refer to use-rights rather than to exchange value and thus they refer to particular, concrete labours rather than abstract labour with its universal equivalent in money. From this formulation we might then say they refer to a pre-capitalist mode of production, or we might say they refer to those classes of people whose goal in economic life is the consumption of uses rather than the accumulation of money. In short, they refer to the Many not the Few.

Considering the two charters, some of their provisions concern subsistence and some concern government. Some are negative; they prevent or prohibit arbitrary behavior by armed forces of the king, such as bailiffs, sheriffs, knights and so forth. Others are positive; they provide fuel, travel, food, milk, clothing for commoners. So, like two baskets of law, panniers on the back of a mule, they have trudged down the centuries, sometimes hidden from view or apparently stuck in a slough, at others times requiring a goad to get going again.

There is a third point, the mule can turn around and go the other way. Both charters were committed to disafforestation, or the removal of the king's sole law and the return to conditions prior to the afforestation of the Norman Conquest. Energy resources were to be returned or restored and reparations made for harm done. The King took what did not belong to him; two centuries later he was made to return it. Thus, they reversed two hundred years of history making it, so to speak, go backwards. So much for the self-serving bourgeois doctrine of progress!

The important difference between English and American constitutional development is not that one is unwritten and the other is written. The difference is Africa. American constitutional and revolutionary history depended, first, on taking Indian lands, and, second, on maintenance and expansion of unwaged labour on the plantation where slaves produced surplus value. This is an 18th century problem, as references to the Declaration of Independence and the American Revolution make clear, and as the references of the U.S.A. constitution of 1787 as amended subsequently also makes clear.

In England the protracted struggle to maintain subsistence by access to the commons, or (to express this dynamically) by *making* commons, or commoning, had the unintended consequence of closing England through the repressive response of the Parliamentary Enclosure Acts passed between 1760 and 1830. What was the relationship between, on the one hand, the expropriation from Africans by the slave trade and the resistance to enclosures and, on the other hand, the formation of the working class? This was the problem some of us of 'the Warwick School' set ourselves in the early 1970s. We saw it, at first, as a problem of 'crime'. Then we saw it as a problem of 'custom'. We did not see it as a problem of 'colour', nor did we treat it as a problem of 'capitalism'. Certainly, we failed to see it constitutionally.

To see it as crime was easy enough. George Rudé taught us that revolutionary crowds were criminalised by counter-revolutionaries and their historians. E.J. Hobsbawm taught us that the romanticised criminal, Robin Hood, appears in the transition into capitalism but not during the transition *out* of capitalism. Plus were not the great revolutionaries imprisoned, and did not the prisons – Siberia, Kilmainham, Devil's Island, Soledad, Robbin's Island – become seminaries of truth?

We were conscious of colour, because unpaid labour in America depended on it. In 1963 James Baldwin published *The Fire Next Time*, an essay whose wrath anticipated the municipal rebellions of the future but with a title alluding to the rainbow sign.<sup>1</sup> In 1963 the English translation appeared of Franz Fanon's *The Wretched of the Earth* which expressed the hurricane-like energy of the Third World in general and north Africa in particular. It warned against black capitalism. That was also the year of E.P. Thompson's *The Making of the English Working Class* whose version of the working class saved it from Cold War dismissals and whose call to human agency seemed to revive the nerve

of change, as it showed the autonomous self-activity of workers in the past in strike, riot, mutiny, and commotion. These American, African, and English voices were anti-capitalist and anti-imperialist.

Between 1963 and 1968 occurred the great municipal rebellions in American ghettos under the slogan of 'Black power'. How was a revolutionary class analysis to be made? Though we understood Black, we were not yet aware of white. We did not yet understand the DuBois principle of 'the wages of whiteness'.<sup>2</sup>

In 1968 after 'the summer of love' I drove across the country from Columbia University anti-war sit-ins to the Berkeley commune and the bulldozing of People's Park. We stopped in Bloomington, Indiana, in whose rare books library I found a scholarly key to the contradictions besetting the world. It was yet another book by 'anonymous' who in my naiveté I thought was the most frequently mentioned 'author' in the library card catalogue. 'Anonymous' seems to have understood the problem and here was the answer called *The History of the Blacks of Waltham in Hampshire (1723)*. I had it photocopied and then protected by some cardboard covers I made and hinged with band-aid tape, which I took with me to England where 'criminality', Black history, and the English working class were going to join, I thought, in a grand revolutionary project. Edward Thompson soon had us formed into a research collective and I gave Edward my treasured copy of *The History of the Blacks* which surely would introduce to England the 'black power' discussions which were rocking the USA. Some years later he returned it, with his marginalia, after it had helped him get started with *Whigs and Hunters (1975)* which was published with *Albion's Fatal Tree (1975)*.

He wrote a brilliant book about law and the ruling class, but it was not the book I had dreamed of. It did not lay the axe to the root. I wanted a book about Africans and commoners. I would put forward the fact that the poachers defended commoning, not just by disguising themselves but by disguising themselves as *Negroes*, and they did so at Farnham, near the heart of what became the quintessence of England as Jane Austen so gently wrote about it, or Gilbert White, the ornithologist, so carefully observed it, or William Cobbett, the radical journalist, so persistently fulminated about it.

Round about Farnham timber was wanted for the construction of men-of-war and East Indiamen which stopped in Portsmouth for repairs, or were built there from scratch for the purpose of the globalisation of commodity trade characteristic of the time. Here's how a flashpoint in the episodes of the Waltham Blacks began: 'Mr. Wingfield who has a fine Parcel of growing Timber on his Estate near Farnham fell'd Part of it: The poor People were admitted (as is customary) to pick up the small Wood; but some abusing the Liberty given, carry'd off what was not allow'd, which that Gentleman resented; and, as an Example to others, made several pay for it. Upon which, the Blacks summon'd the Myrmidons, stripp'd the Bark off several of the standing Trees, and notch'd the Bodies of others, thereby to prevent their Growth; and left a Note on one of the maim'd Trees, to inform the Gentleman, that this was their first Visit; and that if he did not return the Money receiv'd for Damage, he must expect a second from ... the Blacks.' This is not exactly tree-hugging or Indian chipko, though it did have warrant among local antiquarians in the nineteenth century who searched for a charter of such commoning. The leader of the Blacks and '15 of his Sooty Tribe appear'd, some in Coats made of Deer-Skins, others with Fur Caps, &c. all well armed and mounted: There were likewise at least 300 People assembled to see the Black Chief and his Sham Negroes....'

Charles Withers, Surveyor-General of Woods, observed in 1729 'that the country people everywhere think they have a sort of right to the wood & timber in the forests, and whether the notion may have been delivered down to them by tradition, from the times these forests were declared to be such by the Crown, when there were great struggles and contests about them, he is not able to determine.' The Waltham Blacks, they said, 'had no other design but to do justice, and to see that the Rich did not insult or oppress the poor.' They were assured that the chase was 'originally design'd to feed Cattle,

and not to fatten deer for the clergy, &c.’ The central common right was pasture, ‘common of herbage’ as the Forest Charter says. Keeping a cow was possible on two acres, and less in a forest or fen. Half the villagers of England were entitled to common grazing. As late as the 18th century ‘all or most householders in forest, fen, and some heathland parishes enjoyed the right to pasture cows or sheep.’<sup>3</sup> So, the Waltham Blacks were class conscious. There was also an awareness at the time that the keeping of a cow, essential to the material constitution of the country, was backed up by charter. Timothy Nourse denounced commoners at the beginning of the century. They were ‘rough and savage in their Dispositions.’ They held ‘leveling Principles.’ They were ‘insolent and tumultuous’ and ‘refractory to Government.’<sup>4</sup> In September 1723 Richard Norton, the Warden of the Forest of Bere, wished to ‘put an end to these arabs and banditti.’ The commoner belonged to a ‘sordid race.’ The commoner was compared to the Indian, to the savage, to the buccaneer, and to the Arab.

The ‘Blacks’ defended the customs of the commoners; the commoners were both criminalised and racialised in the discourse of the enclosers, the privatisers, and the big wigs. There was even the suggestion that attacking them was a sort of crusade. The Waltham Black Act of 1722 thus became, among other things, a means of drawing a colour line and criminalising common right.<sup>5</sup>

We can put forward as evidence what was neglected in Thompson, the fact of the African slave trade. Blacking, wrote the anonymous historian in that treasured pamphlet history, commenced ‘about the times of general confusion, when the late pernicious schemes of the South Sea Company boure all things down before them, and laid waste what the industry and good husbandry of families had gather’d together.’<sup>6</sup> The South Sea Company was a slave trading company, formed a few years earlier, to take advantage of the *asiento* or licence to trade to Spanish America. On September 11, 1713, Royal African Company congratulated itself on obtaining ‘such advantageous terms, as never were before granted to the people who undertook the furnishing of negroes to the Spanish West Indies.’ The crisis of the commons began as a financial crisis which itself arose from slaving.

The South Sea Bubble was the wreck of a kind of capitalist commoning. Thirty years earlier, this new form of commoning had been produced through developments within English constitutional governance. During the 1690s sovereign legal authority (King-in-Parliament) united with the financial form of value resulting in the Bank of England, Lloyd’s Insurance Company, the Coinage Act, &c. Money and other financial instruments liquefied the clumsy, cumbersome form of wealth as private property which was presented as use values in warehouses, docks, ships, shops, etc., and moreover placed it directly under fiscal state command. The creation of monetary liquidity permitted the distribution of surplus value as investment in various commercial and industrial enterprises according to the needs of capital as a whole without regard to rates of exploitation in individual enterprises. Investment and speculation appeared insubstantial, disembodied, atmospheric or gaseous. The South Sea ‘bubble’ popped owing to cupidity which seemed infinite and to anonymous Atlantic obstacles, namely, resistance, recalcitrance, and revolt.

The decade between 1716 and 1726 was the golden age of piracy, Marcus Rediker informs us.<sup>7</sup> The significance of piracy during these years was twofold – it was multiracial and it was against the slave trade. They blockaded ports, disrupted the sea lanes. The pirate ship ‘might be considered a multiracial maroon community.’ Hundreds were African. Sixty of Blackbeard’s crew of a hundred were black. Rediker quotes the Negro of Deptford who in 1721 led ‘a Mutiny that we had too many Officers, and that work was too hard, and what not.’ They also prevented the slave trade from growing. This was the complaint of Humphrey Morice, MP, Governor of the Bank of England, owner of a small fleet of slavers, who led the petitioning to Parliament and who suffered severe losses in 1719, the year that serious blacking commenced. A naval squadron was sent to west Africa. Four hundred and eighteen pirates were hanged. The conjuncture of apparently very distant forces, struggle for common rights and the Atlantic slave trade, in fact met in intimate proximity.

Daniel Defoe, the most prolific prose writer in the English language, was preoccupied with the issues of Atlantic labour power. Coincidentally, his writing transpired during the privatisation of the printed word by means of Queen Anne's Copyright Act. He precisely combined the intimate conjunction of opposites with a trans-Atlantic background. *Robinson Crusoe, Mariner* was published in 1719. The book dramatises the labour theory of value, glories in the intricacies of the division of labour, and puts the European foot (Crusoe) on the African neck (Friday). Alexander Selkirk, the actual person who was the prototype of *Robinson Crusoe*, died in February 1721 as a sailor in a naval squadron that was sent to west Africa to extirpate the piracy interrupting the slave trade. *The Adventures and Misadventures of Moll Flanders*, published in 1722 treats the issues of criminalisation of the commons and large scale cooperative labour. Upward social mobility was not accomplished by 'affirmative action' but negative criminality, as Moll Flanders hooked up with highwaymen on the first step of the ladder of success and whose final rung she at last attained – a Virginia tobacco plantation – so she too could put the boot to the African enslaved.

These are the classic fictional disquisitions on subsistence, survival, and surplus in that era of off-shore and homeland plunder; they also present heroic prototypes of the 'white' worker. Indeed, these novels coincided almost to the year with 'the invention of the white race,' to give the title of Ted Allen's compelling thesis.<sup>8</sup>

A buffer stratum was to be created by offering material advantages to white proletarians to the lasting detriment of black proletarians. When and how did the 'wages of whiteness' originate? The first date DuBois gives in the protracted process is 1723 when laws were passed in Virginia making Africans and Anglo-Africans slaves forever. The bonded people objected in 1723 to the Bishop of London and the King 'and the rest of the Rullers.' 'Releese us out of this Cruell Bondegg' they cried. In the same year Richard West, the Attorney General, objected to the same law, 'I cannot see why one freeman should be used worse than another, merely upon account of his complexion....' But the Governor of Virginia understood the necessity of 'a perpetual Brand' – skin colour, or the phenotype, which marked the person as surely as the burnt flesh caused by the golden brands used by the South Sea Company. In this way, Ted Allen tells us, a 'monstrous social mutation' occurred, namely, that stratum within the American class structure which derives its hopes, security, and welfare from white skin privilege. It has been essential to the constitution of American class relations ever since.

This was not known to Thompson. The experience within England (though not Ireland) was different, where the policing of the wage relationship, or the exploitation of the Many by the Few, did not depend upon the colour line, and where therefore it was unnecessary to constitute that structure of white supremacy. Thompson wrote the famous 'rule of law' coda to *Whigs and Hunters*. 'As the last imperial illusions of the twentieth century fade, so preoccupation with the history and culture of a small island off the coast of Europe becomes open to the charge of narcissism. The culture of constitutionalism which flowered here, under favoured conditions, is an episode too exceptional to carry any universal significance.' Yet, even smaller than England was the island where Robinson Crusoe met Friday and that story spread world-wide.

The colonists of the north American mainland, even at the time of Robinson Crusoe (1719), the Waltham Black Act (1722), and the South Sea Bubble (1722), had begun to graft some of that English constitutionalism to their own purposes. For example, The New-England Courant in its summer issue of 1722 sought to be rectify the stupidity of the colonists by quoting chapter 39 of Magna Carta and commented, 'No Freeman shall be taken, &c. These words deserve to be written in letters of gold, and I have often wondred that they are not inscribed in Capitals in all our Courts of Judicature, Town-halls, and most publick edifices; they being essential to our English Freedom and Liberties...' 'No man ought to be put from his Livelyhood without answer' rings hollow to the unemployed, or to the Indians who were proclaimed rebels in the same newspaper for attacking fifteen commercial vessels intruding

on their fishing grounds and whose women and children were taken in captivity to Dunstable. 'No man can be exiled or banished out of his native country' is hypocrisy to the men and women and children from the west coast of Africa enslaved in America. *The New England Courant's* sole advertisement reads 'A likely Negro Woman to be sold by *Mr. Thomas Selby* at the Crown Coffee-House, the lower end of Kingstreet.'

Thompson, however, did not accept a 'South Sea' or Atlantic perspective, much less a planetary one in his references to constitutionalism. He reversed himself, moving from a mood of postcolonial narcissism to one of praise for the English ruling class as a whole: '... the inhibitions upon power imposed by laws seem to me a legacy as substantial as any handed down from the struggles of the seventeenth century to the eighteenth, and a true and important cultural achievement of the agrarian and mercantile bourgeoisie, and of their supporting yeomen and artisans.' And when Thompson writes of the culture of constitutionalism, why does he exclude the charters of liberty?

Dorothy Thompson, many years later, attributed this coda to heated arguments that she had with her husband and co-worker, Edward, arguing that 'he was leaning too far in the direction taken by some of the contributors to *Albion's Fatal Tree* in dismissing the law simply as an instrument of class power.'<sup>9</sup> The context of the discussions about these books took place in 1970 and 1971; when for instance Howard Zinn in November 1970 said 'The Problem is Civil Disobedience', and he ran down the law, how the bill of rights is publicised but not enforced, how the property laws are enforced but not publicised. He showed how decorum and propriety fool us and cause us to revere the law. He reminded us that often we have to go outside the legal framework – the Civil War, the Union drives, the American Revolution. He said 'people in all countries need the spirit of disobedience to the state....' The American and the English experiences were different. The Attica revolt was in September 1971, and the trial of the Mangrove Nine was finished in 1971. Internment without trial was introduced in 1971, and 'Bloody Sunday' was in January 1972. These events of state terrorism were not yet answered by similar violence of those taking an anti-imperialist stand. Furthermore, they still seemed part of an ancient constitution in which 'race' played trumps.

Our books were not published until 1975. During the interval the world changed direction. The PLO assassinated Israeli athletes at the Munich Olympics. The IRA brought the war to England. The Guildford pub bombing of October 1974 left five dead, a month later the Birmingham pub bombing killed twenty-one. While the political climate became more violent, the intellectual climate became more academic, more legalistic, more obscure. Critical Legal Studies (formed in 1977) stuck to the high theory of Frankfurt School and French post-structuralism, obtusely reluctant to engage English social history, or to raise the constitutional issues of race or the commons.

There is a vast amount of English social history since 1975 (and before) recording the importance of customary rights to common forest resources. Moreover, that story is now clearly understood to have happened all over the world. J.M. Neeson produced a great book about the commons from earlier discussions concerning custom. Called *Commoners*, it showed that subsistence use-rights remained a material basis of many English agrarian workers. Meanwhile, others of us adduced the evidence that the wage relation arose from the process of criminalisation and the process of criminalisation arose from custom. The irrationality of the wage concealed the unpaid labour. But could these aperçus attain constitutional importance or were they destined to dismissal as un-theorised ditty?

The law locks up the man or woman  
Who steals the goose from off the common  
But lets the greater villain loose  
Who steals the common from the goose

The violence and the terror, ‘the military option’ as the Italian Red Brigades put it, made it harder to see the Charters, or the commons, as anything other than a wild goose chase. Looking back now we can see that the issue was not the rule of law against terrorism: the issue was the preservation of commoning against new enclosures.

We could use some theory of the kind that transformed Magna Carta for the Levellers, of the kind that transformed Magna Carta for the abolitionists. In 1774 the former African-American slave, Olaudah Equiano, put on white face in London in order to obtain a warrant of habeas corpus. This is among the first actions by which Magna Carta was appropriated for the trans-Atlantic movement to abolish slavery. In the same year Granville Sharp wrote ‘The wisdom of ages has made [Magna Carta] venerable, and stamped it with an authority equal to the Constitution itself, of which it is, in reality, a most essential and fundamental part; so that any attempt to repeal it would be treason to the State! This glorious Charter must, therefore, ever continue unrepealed: and even the articles which seem at present useless, must ever remain in force.’<sup>10</sup> Granville Sharpe used the charters against slavery, racial and otherwise, but, despite an obsession with the gothic frankpledge, he did not take his stand with the commons, unlike Thomas Spence or Gracchus Babeuf. Similarly with Frederick Douglass who said in 1854, ‘Let the engine of the Magna Carta beat against the Jericho walls of Slavery, and no seven days blowing of ram’s horns would be necessary,’ a reference to the jubilee which, while emancipating slaves, also restored the commons.

marano

**Film still > from Polly II, Anja Kirschner**  
**Photograph: Alessandra Chila**

Edward Thompson failed to mention Magna Carta and more strategically he omitted the Charter of the Forest. There was an opportunity to link the constitution to the commons at that point in time, Walpole 1720-1723, when some English and African commoners could be found together on the seven seas and in the wild wood. The moment passed: privatisation and slavery advanced together. We hear Blackstone crow as he defined private property as ‘that sole and despotic common which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.’ (He admitted in his *Commentaries* that there are elements such as light, air, and water which ‘must still unavoidably remain in common.’)

Today, the commons comes back to us from the South! Subcommandante Marcos provided the voice of the Zapatistas and the indigenous people of Chiapas calling for the return of Article 27 and the *ejidos*, or common land, while reminding us of the Magna Carta. As the Many demand water, energy, and wherewithal against the surplus value hogged by the Few, we must reprise those moments when the act of constitution showed not racist *divide et impere* but that old, old friend of all, the commons. This enterprise calls for our contemporary appropriations of *both* of the Charters of Liberty.

## FOOTNOTES

<sup>1</sup> The title alludes to a slave song:  
‘God gave Noah the rainbow sign,  
No more water, the fire next time’. Editor’s note.

<sup>2</sup> David Roediger, *The Wages of Whiteness: Race and the Making of the American Working Class* (Verso: New York, 1991). In the preparation of this essay I thank David Roediger and his colleagues at the University of Illinois, Champaign-Urbana

<sup>3</sup> J.M. Neeson, *Commoners: Common Right, Enclosure, and Social Change in England, 1700-1820* (Cambridge, 1993), p. 317

<sup>4</sup> Timothy Nourse, *Campania Foelix, Or a Discourse of the Benefits and Improvements of Husbandry* (1700), pp. 15-16

<sup>5</sup> ‘The Black Act was instituted in 1723... in response to the Waltham deer poachers. It made it a felony (that is, a hanging offence) to appear armed in a park or warren, or to hunt or steal deer, with the face blackened or disguised...’, [http://en.wikipedia.org/wiki/Black\\_Act](http://en.wikipedia.org/wiki/Black_Act)

<sup>6</sup> *The History of the Blacks of Waltham in Hampshire*, Anonymous, (1723)

<sup>7</sup> Marcus Rediker, *Villains of All Nations: Atlantic Pirates in the Golden Age* (Beacon Press: Boston, 2004)

<sup>8</sup> Ted Allen, *The Invention of the White Race*, volume two, *The Origin of Racial Oppression in Anglo-America* (Verso, 1997)

<sup>9</sup> Daniel H. Cole, ‘“An Unqualified Human Good”: E.P. Thompson and the Rule of Law’ [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=169264](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=169264)

<sup>10</sup> *A Declaration of the People’s Natural Right to a Share in the Legislature* (1774), pp. 202-3

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