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## **The Birth of a Nation: A Study of Slavery in Seventeenth-Century Virginia**

RANDOLPH M. McLAUGHLIN\*

Race based slavery in North America had its origins in seventeenth-century Virginia. Initially, the position of the African worker was similar to that of the indentured servants from England.<sup>1</sup> During the early to mid-seventeenth century, both African and English indentured servants served for a period of years and received the protections to which a servant was entitled.<sup>2</sup> However, during the 1640s there appeared examples of Africans also being held as slaves.<sup>3</sup> Thus, during the seventeenth century there existed a dual system of servitude or bondage for the African worker. One basis for this duality was the common law practice that mandated that Christians could not hold fellow Christians as slaves.<sup>4</sup>

This dual system existed until the 1660s when the Virginia General Assembly, the legislative and highest judicial body in the colony, began to enact legislation that made it more difficult for Africans to assert claims that they were servants and not slaves.<sup>5</sup> While the legal status of the black worker declined, that of white servants was elevated. White servants were granted protections under the laws as African

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1. See *infra* notes 25-44 and accompanying text for a discussion of the comparable status of the English indentured servants and the African servant.

2. See *infra* notes 67-73 and accompanying text for a discussion of the thesis that both servants, black and white, had similar conditions of servitude during the 1640-1660 period.

3. See *infra* notes 80-81, 86 and accompanying text for examples of the duality in the status of African workers.

4. See *infra* notes 89-101 and accompanying text for a discussion of cases wherein African workers petitioned for freedom based on their conversion to Christianity.

5. See *infra* notes 108, 112 and accompanying text for an analysis of the statutes that established the contours of the slavery institution during the 1660s.

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servants and enslaved persons were denied those same accommodations.<sup>6</sup> By 1705, the institution that became a codified system of slavery had been fully adopted in Virginia, and Africans had been reduced to property.<sup>7</sup>

This article will explore the historical and legal status of the Africans in the Virginia Colony from 1619-1705. Part II will examine the status of African workers during the early years from 1619-1640. Part III will examine the transitional years from 1640-1660. Part IV explores the movement towards a fully formed slave institution. Part V discusses the final stage of the enslavement of Africans: the elimination of the servant status found in the early periods.

### The Early Years – 1619-1640

In 1618, an English ship, *The Treasurer*, set sail from James City, Virginia, ostensibly for the purpose of obtaining salt and goats for the colony.<sup>8</sup> However, the vessel was loaded with gunpowder, ammunition, flags, and other essentials necessary for a man-of-war.<sup>9</sup> The ship headed south in the direction of the West Indies.<sup>10</sup> Somewhere in the West Indies, the Treasurer joined forces with a Dutch man-of-war. The two vessels captured a Spanish frigate that was transporting approximately one hundred Africans to the Spanish colonies in the Caribbean.<sup>11</sup> Finding no gold, the pirates seized the Africans.<sup>12</sup> Adverse winds and violent storms overtook the ships and they were separated. In the latter part of August 1619, after several weeks at sea, the Dutch man-of-war entered the James City harbor carrying twenty of the Africans who had been captured from the Spanish vessel.<sup>13</sup>

The following account of these events was reported in John Rolfe's letter to Sir Edwin Sandys, the treasurer of the Virginia Company of London.

About the latter end of August, a Dutch man of Warr of the burden of 160 tunes arrived at Point Comfort, the commanders name Capt. Jope, his pilot for the West Indyces, one Mr. Marmaduke an Englishman. They mett with the Trer in the West Indyces, and deternyed to hold consort shipp,

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6. See *infra* note 107 and accompanying text for evidence that white servants were given protections that were not similarly accorded to black workers.

7. See *infra* notes 147-164 and accompanying text for an analysis of the 1705 statute.

8. VA. WRITERS' PROGRAM, ST. OF VA. CONSERVATION COMM'N, THE NEGRO IN VIRGINIA I (1940).

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

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hetherward, but in their passage, lost the other. He brought not anything but 20 and odd negroes, which the Governor and Cape Merchant bought for victualle (whereof he was in great need as he ptended) at the best and easiest rates they could.<sup>14</sup>

It has been suggested that these Africans had been baptized by the Spanish.<sup>15</sup> This has been supported by the reports of these persons having Spanish names.<sup>16</sup> It is further supported by the Spanish custom of baptizing Africans prior to their departure for the Spanish colonies.<sup>17</sup> English common law held that a slave who had been baptized became “infranchised” and thereby acquired his freedom. This rule was supported in England as late as 1677 in the case of *Butts v. Penny* 3 Keble 785.<sup>18</sup>

Labor was in short supply in Virginia. The men who came to make their fortunes and return to England were not the type to clear forests, plant and harvest tobacco, and engage in other forms of manual labor.<sup>19</sup> They were gentry and lower aristocracy who had come to the colony to increase their wealth and return to English society.<sup>20</sup> In England, there were large numbers of urban and rural poor. The prisons were crowded with felons who were offered their freedom and passage to Virginia in exchange for contracting to work for a planter for a period of years.<sup>21</sup> Some servants came with pre-existing contracts, while others were brought over and sold by ship captains to planters upon their arrival in Virginia.<sup>22</sup> The latter situation appears to have been the arrangement that was entered into for the Africans on the Dutch ship.<sup>23</sup> They were purchased by the Governor and the Cape Merchant, both colonial officials.<sup>24</sup>

There appears to be some support for the proposition that the early African immigrants were placed in a system quite similar, if not identical, to that of the English servant. According to two censuses conducted from 1623-25, there were twenty-three Africans in the colony. All twenty-three were listed as servants in the censuses.<sup>25</sup> In the county records from 1632-1661, blacks were designated as

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14. *Id.*

15. 1 HELEN TUNNICLIFF CATTERALL, *JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO* 55 (1926).

16. *Id.* at 56.

17. *Id.*

18. *Id.* at 55, n. 14.

19. EDMUND MORGAN, *AMERICAN SLAVERY, AMERICAN FREEDOM* 83-84 (1st ed. 1975).

20. *Id.*

21. *Id.* at 236.

22. MORGAN, *supra* note 19, at 83-84.

23. *Id.*

24. *Id.*

25. John Henderson Russell, *The Free Negro 1619-1865*, 23 (1913) (unpublished Ph.D. dissertation, John Hopkins University) (on file with John Hopkins University).

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servants, Negro servants, and Negroes.<sup>26</sup>

In the first volume of William Waller Hening's *The Statutes at Large*, a collection of all the laws passed by the Virginia legislature from 1619-1660, there were no listings under the heading "slaves." Based on these historical references, the African worker occupied a position similar to that of the English indentured servant during this period.<sup>27</sup>

There was a small number of Africans imported into the colony over the next few years.<sup>28</sup> In 1621, an African named Antonio was brought on the *James*.<sup>29</sup> In 1622, the *Margrett and John* brought a woman named Mary.<sup>30</sup> In 1623, the *Swan* brought John Pedro.<sup>31</sup> It is interesting to note that many of the first Africans had Spanish names. This indicates that pirating Spanish vessels for their cargoes was still prevalent and that these Africans were baptized.

As early as 1624, an African named John Phillip was sworn and examined as a witness in the Jamestown Court.<sup>32</sup> He was deemed qualified to testify, because he was a free man and had been Christianized in England twelve years prior.<sup>33</sup> During this period, religion played a large role in determining a person's status.

In 1625, the first court case dealing with the status of an African seized from a Spanish ship is reported.<sup>34</sup> Captain John Powell<sup>35</sup> and Captain Jones, who had been the captain of the *Mayflower*,<sup>36</sup> seized a Spanish frigate off the coast of Cuba.<sup>37</sup> Arriving in the colony on July 11, 1625, the English ship carried raw hides, tobacco, a Frenchman, a Portuguese, and an African named Brase.<sup>38</sup> The Portuguese sued in the General Court for his lost wages after the captain died, and the court was called upon to determine which claimant had a right to the labor of the African.<sup>39</sup> The court decided that Brase was to work for the colony and that the Portuguese was to be paid out of Brase's labor.<sup>40</sup> Brase was assigned to work for Lady Yeardley, the wife of

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26. *Id.* at 24.

27. *Id.* at 23-24.

28. VA. WRITERS' PROGRAM, *supra* note 8, at 2-3.

29. *Id.* at 2.

30. *Id.*

31. *Id.*

32. *Id.* at 12.

33. *Id.*

34. VA. WRITERS' PROGRAM, *supra* note 8, at 2-3.

35. Captain Powell had commanded one of the ships that brought the first Africans to the colony. 1 CATTERALL *supra* note 15, at 76, n. 2.

36. *Id.* at 76, n. 3.

37. *Id.* at 76.

38. 1 CATTERALL, *supra* note 15, at 76.

39. *Id.*

40. *Id.*

the governor.<sup>41</sup> He was to be paid forty pounds of tobacco each month for his services as long as he remained with Lady Yeardley.<sup>42</sup>

Brase was to be *paid* for his labor on a monthly basis. One does not pay a slave a wage. Slaves work for no remuneration. However, a servant who labored had already been paid for his or her labor in the form of the passage costs. Since there had been no pre-arrangements for the purchase of Brase's labor and no payment had been made by the colony to the ship captain, it was decided that Brase himself was to be paid for his labor.<sup>43</sup>

This case illustrates that, during this period, there was a degree of flexibility in the labor system in order to accommodate the arrival of Africans for whom there were no preexisting contractual obligations. African workers were being placed into an institution that more resembled servitude than slavery.

Philip Bruce in his *Economic History of Virginia* had the following comments to make with respect to the status of Africans in the early period.

[Y]et it is a remarkable fact, that not until many years after the introduction of the negro into Virginia, do we find him referred to in the statute book, as a slave. In the beginning, he was simply a servant for life, different from the white servant in the length of his term of service.<sup>44</sup>

Bruce is correct in stating that African servants endured longer periods of servitude, but not all Africans were servants for life. It was not until the 1640s that the first case of an African slave is reported.<sup>45</sup> When the first Africans arrived in the colony, there was already a system of labor, indentured servitude, and the new arrivals were placed inside this already existing institution.

In 1630, the first mention of a black person was reported in the Judicial Proceedings of the Governor and Council of Virginia.<sup>46</sup>

Hugh Davis is to be soundly whipped, before an assembly of Negroes and others for abusing himself to the dishonor of God and shame of Christians by defiling his body in lying with a negro; which fault he is to acknowledge next Sabbath day.<sup>47</sup>

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41. VA. WRITERS' PROGRAM, *supra* note 8, at 3. George Yeardley became governor of the colony in 1619. MORGAN, *supra* note 19, at 83.

42. 1 CATTERALL, *supra* note 15, at 76; *see also* VA. WRITERS' PROGRAM, *supra* note 8, at 3.

43. VA. WRITERS' PROGRAM, *supra* note 8, at 3.

44. PHILLIP ALEXANDER BRUCE, *ECONOMIC HISTORY OF VIRGINIA IN THE SEVENTEENTH CENTURY* 65 (1907).

45. *See infra* note 58 and accompanying text.

46. 1 THE STATUTES AT LARGE 146 (William Waller Hening ed., 1823).

47. *Id.*

There was no punishment for the black woman in this report. However, there was for Hugh Davis, who we may presume was white. It is also interesting that he was to be whipped before a company of blacks and others and to acknowledge his offense in the church gathering on the next Sabbath day.<sup>48</sup> In 1705, a law was passed that prohibited masters from whipping naked white servants without an order from the justice of the peace.<sup>49</sup> Yet in 1630, a white man was to be soundly whipped for having intercourse with a black woman.

During this early period in Virginia's history, instead of attempting to reduce the status of Africans to that of an enslaved person, there were cases of Africans being placed within the preexisting system of indentured servitude.<sup>50</sup> As demonstrated below, during the period 1640-1660, some Africans were considered slaves and others were deemed servants. However, by the latter portion of the seventeenth century, the movement towards slavery had been substantially completed.

### **The Transitional Years 1640-1660 – Servants, Slaves, or Both**

In the mid-1600s, the institution of slavery developed in Virginia. Judicial decisions during this time provide examples of the transition. While the dual system of African servitude and slavery continued, the status of Africans was being threatened by the courts and later the legislature.

In the years following the Hugh Davis case, the number of Africans forced into the colony varied:

1635	26
1636	7
1637	28
1638	30
1639	46
1642	7
1643	18
1649	17 <sup>51</sup>

48. *Id.*

49. 3 THE STATUTES AT LARGE 448 (William Waller Hening ed., 1823).

50. 1 CATTERALL, *supra* note 15, at 57. One example of the treatment of black workers as servants is demonstrated by the case of John Graweere, a servant to William Evans. In 1641, Graweere was permitted by Evans to "keep hogs." *Id.* Graweere was to provide "half the increase" to Evans and could keep the other half "for his own benefit." *Id.* Another example of this transitional period is the case of Manuel, who was determined by the Assembly to be a servant and not a slave due to his Christian religion. *Id.* at 58.

51. BRUCE, *supra* note 44, at 75.

By 1649, there were three hundred Africans in the colony.<sup>52</sup>

In 1640, there was another case of miscegenation reported, but this time the punishment fell mostly on the black woman.<sup>53</sup> Robert Sweat, a white man, was charged with impregnating a black servant.<sup>54</sup> Sweat was punished by having to do penance for his offense at James City church during the Sunday service.<sup>55</sup> The black woman, however, was to be whipped at the whipping post.<sup>56</sup> Ten years earlier a white man was whipped for having intercourse with a black woman. In the Sweat case, a black *pregnant* woman was whipped for the same offense, and no corporal punishment was imposed on the white male.

This case implicitly granted to any Englishman the right to commit fornication with an African woman and be assured that his only punishment would be public penance for his crime. The black woman was to be tied to the whipping post, bearing the transgressions of the man who, most often, was her rapist.<sup>57</sup>

Also in 1640, the first court case recognizing the status of perpetual servitude for Africans was reported.<sup>58</sup> Six white servants and a black man escaped from their employer's plantation but were subsequently re-captured.<sup>59</sup> Miller, the prime agent, was given thirty lashes with the whip and had the letter "R" burned on his cheek. Seven years were to be added to Miller's term of servitude.<sup>60</sup> The punishment for the five other white servants was less severe and only two years were added to their term of service.<sup>61</sup> The African was given the same sentence as Miller, but no additional time was added to his period of servitude.<sup>62</sup> It was the usual punishment for servants to have their period of indenture extended for running away and other infractions of the penal laws. However, here, there was no additional time added to the term of service of the African. This means that he could not have his period extended, as he was a servant for life or a slave.<sup>63</sup>

The John Punch case is further evidence that slavery existed for Africans long before the term ever reached the statute books.<sup>64</sup> In 1640, three servants of Hugh

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52. *Id.* at 74.

53. 1 CATTERALL, *supra* note 15, at 78.

54. *Id.*

55. *Id.*

56. *Id.*

57. VA. WRITERS' PROGRAM, *supra* note 8, at 13.

58. Russell, *supra* note 25, at 30 n. 55.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* ("These facts indicate that the negro was a slave 'incapable of making satisfaction by addition of time,' and that such discriminations as were made because of his race of color were made by inflicting upon him a severer corporal punishment than his white fellow-conspirators received.").

64. Russell, *supra* note 25, at 29-30; *see also* VA. WRITERS' PROGRAM, *supra* note 8, at

Gwyn ran away. The servants consisted of a Scotsman who was called James Gregory, a Dutchman who was called Victor, and an African named John Punch.<sup>65</sup> After their recapture, the General Court of Northampton County ordered that the three servants be each punished with thirty lashes. The Scotsman and the Dutchman were required to serve their terms and an additional year. The African, John Punch, was sentenced to serve for his natural life as a slave.<sup>66</sup>

This case represents the first judicial decision wherein an African was sentenced to servitude for life as a punishment for a crime. The sentence meted out to Punch lends further support for the thesis that he was not already a slave as it would be impossible to sentence a slave to a punishment of servitude for life.

The decision in this case would surely deter other Africans from running away as their periods of servitude could be extended to life if they were caught. It is also interesting that at this stage of history whites and blacks were running away together and engaging in sexual relations.

The life of the African worker was not substantially different from that of their white counterparts, and consequently, it is not surprising that the two races associated and cooperated with one another. The labor extracted from servants of all races was substantially the same. Bruce made the following comment with respect to the working conditions for blacks and whites in the colony:

Side by side in the field, the white servant and the slave were engaged in planting, weeding, suckering, or cutting tobacco, or sat side by side in the barn manipulating the leaf in the course of preparing it for market, or plied their axes the same trees in clearing away the forests to extend new grounds.<sup>67</sup>

Bruce's statement is an accurate depiction of life in the Virginia tobacco fields, even though he incorrectly stated that all Africans were slaves. During this period when the races worked side by side, there was little distinction between white servants and black servants or slaves. The relationship of black and white workers to the means of production was the same in that both labored on another man's land for little or no remuneration. These workers had more in common with each other

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14. There is some dispute regarding the year of the Punch case. Russell reports that the case was decided in 1640 and VA. WRITERS' PROGRAM stated that the case was heard in 1649. With the exception of the year of decision, both sources contain the same factual information. *Id.*

65. *Id.* at 29; see also VA. WRITERS' PROGRAM, *supra* note 8, at 14.

66. Russell, *supra* note 25, at 30; see also VA. WRITERS' PROGRAM, *supra* note 8, at 14. According to Ancestry.com, former President Barack Obama's mother was related to Mr. Punch. Sheryl Gay Stolberg, *Obama Has Ties To Slavery Not by His Father but His Mother, Research Suggests*, N.Y. TIMES, July 30, 2012.

67. BRUCE, *supra* note 44, at 105.

than either did with the planter class. That they ran away together and had intercourse is not surprising.

In spite of the movement towards enslaving Africans, there still existed some Africans who were declared servants and given their freedom at the end of their terms. In September of 1644, the General Assembly, the legislative body of Virginia and the highest judicial entity, decided that Manuel, who had been sold to Thomas Bushrod as a slave forever, had only to serve as other Christian servants. Manuel was to serve for a period of twenty-one years, yet the average period of servitude for other Christians was five years.<sup>68</sup>

This case illustrates that during the 1640s there were attempts to reduce Africans to slaves, and they were allowed to petition the courts to have their cases determined. The basis for Manuel's freedom was that he was a Christian and, therefore, could not be held as a slave. Manuel was also the mulatto son of an English servant woman.<sup>69</sup> This again shows the degree of miscegenation by both women and men of both races.

In 1646, the first case of an African being sold as a slave forever is reported. Francis Pott sold to Stephen Charlton a black woman named Marchant and a black child named Will to be slaves forever.<sup>70</sup> At the same time Pott was able to sell Africans as slaves, he also held others as servants. In either 1645 or 1647, Frances Pott had two African children (Elizabeth and Jane Dregis) bound to serve him for a period of years.<sup>71</sup> He was required to provide them with clothing, meat, drink and lodging. Pott was also to raise them in the Christian faith.<sup>72</sup>

It appears from the agreement that Elizabeth Dregis was to serve for a period of thirteen years and Jane Dregis was to serve for twenty-nine years.<sup>73</sup> Jane Dregis only served seven years, as her father was able in 1652 to purchase a release from Captain Pott for his daughter.<sup>74</sup> These contracts established that the Dregis children

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68. VA. WRITERS' PROGRAM, *supra* note 8, at 13-14.

69. *Id.* at 14.

70. Russell, *supra* note 25, at 34.

71. *Id.* at 26.

72. *Id.* ("This Indenture witnesseth yt I Capt. Francis Pott have taken to service two Daughters of my negro Emanuell Dregis to serve & bee to me my heyers Exors. Adms. or Assigns. The one whose name is Elizabeth is to serve thirteene years which will be compleat & ended in ye first part of March in ye yeare of our Lord God one thousand six hundred Fifty & eight. . . . And ye other child whose name is Jane Dregis (being about one yeare old) is to serve ye said Capt. Pott as aforesaid until she arrive to ye age of thirty years old wh will be compleate and ended . . . [May 1674], And I ye said Francis Pott doe promise to give them sufficient meate, drinke, Apparel & Lodging and to use my best endeavor to bring them up in ye feare of God in ye knowledge of our Saviour Christ Jesus. And I doe further testify yt the Eldest daughter was given to my negro by one who brought her upp by ye space of eight years and ye younger he bought and paid for to Capt. Robert Shephard (as maye bee made appear).").

73. *Id.*

74. *Id.* at 26-27. In 1652, her father, Emanuell Driggs, purchased his daughter's release from the contract. *Id.* The following receipt was issued to Driggs: "24, May 1652. This day

were not held as slaves, but rather as indentured servants with proscribed terms of employment. That their father, Emanuell Dregis, was able to purchase his daughter's agreement lends support for the notion that blacks had the ability to enter into agreements with whites. Similarly, in 1648, Stephen Charlton entered into an indenture agreement wherein his black servant was to serve for a period of ten years.<sup>75</sup>

The Pott and Charlton agreements were indentureship contracts. The terms were similar to those under which English persons were serving. The employers were required to provide suitable clothing, diet, and lodging. With respect to the Charlton contract, the period of servitude was ten years, which was not an uncommon period of years for a servant to labor. These cases illustrate that at this time blacks were capable of making contracts and, apparently, of having them enforced through the courts. Later, when all Africans were deemed slaves, similar agreements were no longer possible. Yet at this early stage in the development of slavery, black workers were provided with some modicum of protections under the law.

It is interesting to note that both Pott and Charlton had African servants and slaves in their employ. One possible explanation is that the Africans who had been baptized could not be held as slaves as this would violate English common law. However, non-Christians were not similarly protected. The statement in the indentureship papers that the Dregis daughters were to be raised in the Christian faith and the fact that they were not to be held as slaves supports the belief that, during the 1640s, an African's conversion to Christianity might entitle him or her to freedom. This was not true in later years, when such loopholes were abolished.

In addition to the indentureship agreements mentioned above, black servants were permitted to own property, such as cattle, hogs and poultry.<sup>76</sup> In 1652, Captains Pott and Charlton entered into an agreement that provided for property rights, including inheritance rights to Emanuell Driggs and Bashasar Farnando, two black servants. Under the terms of the agreement, Driggs and Farnando had purchased farm animals that had increased in number. The agreement provided that the animals and their increase would be the property of the servants and that they could dispose of these animals during their lifetime or at their death.<sup>77</sup>

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Capt. Pott acknowledged yt thee hath recd of Emanuell Driggs Negro satisfaction and full payment for & in consideration of the present freedome of Jane Driggs, daughter of ye sd Emanuell Driggs, the sd girle beinge aged about eight years." *Id.*

75. *Id.* at 26. The text of the indentureship agreement contained the following terms: "Be it thought fitt & assented unto by Mr. Steph. Charlton in Court that Jno G. Hamander Negro, his servant, shall from ye date hereof [1648] serve ye sd Mr. Charlton (his heyers or assns.) until ye last days of November wh shall be in ye year of our Lord . . . one thousand six hundred Fifty & eight and then ye sd Negro is to bee a free man." *Id.*

76. Russell, *supra* note 25, at 27.

77. *Id.* The text of the agreement is set forth herein: "Whereas Emanuel Driggs and Bashasar Farnando negroes now servants unto Capt. Franc Pott have certain cattle, Hoggs &

The Pott-Charlton agreement clearly states that the Africans mentioned therein were servants, not slaves, although slavery was not unknown at that time in the colony. In addition, the fact that Driggs and Farnando had the absolute right to their property, even after their death, supports the conclusion that these individuals occupied a status somewhat higher than that of a slave who were themselves property. Bills of sale were recorded in the county court for the transfer of property to Driggs and Farnando, which again illustrates that Africans were regarded as capable of making contracts and enforcing them.<sup>78</sup>

The Dregis or Driggus family mentioned in the above document appears to be the same one who purchased his daughter's freedom from Captain Pott in 1652. In the records of Northampton County in the years 1689 to 1698, there was a Driggs family of free blacks reported as living in that county.<sup>79</sup>

Another example of the dual system of servitude and slavery is found in an agreement between William Whittington and John Pott. In 1652, William Whittington sold to John Pott a black child named Jowan and "her issue and produce forever."<sup>80</sup> Clearly, by including the children of Jowan in the terms of the sale, she was not a servant, but had the status of an enslaved person.

At the same time that some Africans were held as slaves and servants, the example of Anthony Johnson illustrates how fluid the labor system was during this period. Johnson, an African, was brought to the Virginia colony in 1621 and was freed within two years.<sup>81</sup> He married one Mary, who came to the colony in 1622.<sup>82</sup> By 1651, Johnson had imported five servants.<sup>83</sup> Johnson was granted two hundred and fifty acres in Northampton County based on the number of servants he had in his employ.<sup>84</sup> On the banks of the Pungoteague River, Johnson had established the first black community in the colonies with one dozen Africans.<sup>85</sup>

Remarkably, the first court case that determined that an African, who had not committed a crime, could be held as a slave involved one of Anthony Johnson's servants. In 1653, one of the servants of Anthony Johnson, John Casor, sought to

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poultry now in their possession ye weh they have honestly gotten and purchased in their service formerly under ye sd Capt. Pott & since augmented and increased under the service of Capt. Steph. Charlton now we, sd Pott & Charlton, doe hereby declare yt ye said cattle, hoggs, & poultry (with their increase) are ye proper goods of the above sd Negroes; and yt they may freely dispose of them either in their life tyme or att their death. In witness our hands 30th Dec 1652. Francis Pott." *Id.*

78. *Id.* at 27-28.

79. *Id.* at 28.

80. *Id.* at 34.

81. VA. WRITERS' PROGRAM, *supra* note 8, at 11.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* In 1654, Richard Johnson, presumably a former servant of Anthony Johnson, was able to import two white servants and received 100 acres of land along the Pungoteague River. *Id.*

persuade his employer and the courts that he was to be a servant and not a slave. Casor had contended that he had indentureship papers and that Johnson had kept Casor in his service beyond the terms of the agreement.<sup>86</sup> Initially, Johnson released Casor to Robert Parker, but later relented and filed suit in Northampton County Court for the return of Casor as his servant for his natural life.<sup>87</sup> In 1654, the Court ordered that Casor be returned to Johnson and that Parker pay all costs of the suit.<sup>88</sup>

This case illustrates that, without a written paper, the African's claim that he was a servant was not likely to carry much weight in the courts of Virginia. It is fair to assume from the statements of Robert and George Parker that there did at one time exist an indenture for John Casor. Unfortunately, it had been lost or destroyed, and the court did not agree that he should be freed. The Casor case is also interesting as Johnson, a black man, was able to file suit against Parker, presumably a white man.

Another court case provides insight into how one could use religion to petition for one's freedom. In 1655, Elizabeth Key petitioned the Northumberland county court for her freedom.<sup>89</sup> She was the daughter of Thomas Key<sup>90</sup> and an African woman whose status at the time is uncertain. In 1636, Thomas Key bound his daughter to Humphrey Higginson for a period of nine years.<sup>91</sup> Sometime after, she passed into the possession of Colonel John Mottron who died in 1655.<sup>92</sup>

In 1656, Elizabeth Key argued that she was a free woman and based her claim on three contentions.<sup>93</sup> Her first claim was that her father had been a free man and

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86. *Id.* at 12.

87. *Id.*

88. *Id.* According to the court records, Casor claimed that "hee came unto Va for seven or eight years of Indenture, yt hee had demanded his freedom of Anth Johnson his Mayster; & further sd yt hee had kep him his servant seaven years longer than hee should or ought." Russell, *supra* note 25, at 32-33. Messrs. Robert and George Parker confirmed Casor's statement as follows: "they knew that ye sd Negro had an Indenture in one Mr. (Sandys) hand on ye other side of the Baye & . . . [I]f the sd Anth Johnson did not let ye negro go free the said negro Jno Casor could recover most of his cows from him." *Id.* Anthony Johnson made a complaint in court "against Mr. Robert Parker that hee detayneth one Jno Casor a negro the plaintiff's servant under pretense yt the sd Jno Casor is a freeman." *Id.* Johnson's complaint was received, and the Court rendered the following judgment: "The court doe fynd that ye sd Mr. Robert Parker most unrightly keepeth ye sd negro John Casor from his right Mayster Anthony Johnson & . . . Be it therefore ye Judgement of ye Court & ordered that ye sd Jno Casor negro shall forth return into ye service of his sd Mayster Anthony Johnson and that the sd Mr. Robert Parker make payment of all charges in the suit and execution." *Id.*

89. Warren M. Billings, *The Case of Fernando and Elizabeth Key: A Note on the Status of Blacks in Seventeenth Century Virginia*, 30 THE WM. & MARY Q. 467, 468-469 (1973).

90. Thomas Key was a burgess in the General Assembly of 1629/30. *Id.* at 468, n.4.

91. *Id.* at 468.

92. *Id.*

93. *Id.*

that under English common law the child inherited the father's status.<sup>94</sup> The second claim was that she had been baptized and that as a Christian she could not be held as a slave for life.<sup>95</sup> Her final contention was that her term of servitude to Higginson had expired, so she was a free woman.<sup>96</sup>

The jury in the case found in her favor, and she was freed by the county court.<sup>97</sup> One of the overseers of the Mottron estate, her last employer, appealed to the General Court where the verdict was reversed.<sup>98</sup> Key's lawyer, William Greensted, appealed to the General Assembly, and the case was remanded to the county court for Northumberland County.<sup>99</sup> That court reaffirmed its original decision.<sup>100</sup> The last record of Elizabeth Key was her marriage certificate to her lawyer, William Greensted.<sup>101</sup>

It is unclear which of the arguments she raised persuaded the county court to rule in her favor. Her first contention that her status should follow her father's is perhaps the most significant. By 1662, this could no longer be argued as a statute had been passed that stated that the condition of children of mixed parentage should follow that of the mother.<sup>102</sup> The chances of a child having a black mother and a white father were far greater than the reverse as there were few white women and large numbers of white men in the colony.<sup>103</sup> The black women were also subjected to complete domination, as, by the time of the 1662 Act, many were slaves and had no rights under the law.<sup>104</sup> Elizabeth Key's second contention that her Christianity entitled her to be a servant and not a slave would not be given much weight by 1667, because a statute was passed that provided that baptism would not alter one's status.<sup>105</sup>

From 1640 to 1660, the status of Africans was ambiguous. Some Africans were servants for a period of years. This group had the rights of other members of the servant class. They could make and enforce contracts, and Africans were also able to enter courts and petition to have their status determined. If an African servant was forced to work beyond his or her term of service, that person could bring an action against his or her employer for back wages. It was this fear that prompted Anthony Johnson to release John Casor from bondage.

At the same time, there existed another system of bondage -slavery. Gradually,

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94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *See infra* note 112 and accompanying text.

103. MORGAN, *supra* note 19, at 235.

104. *See infra* note 113 and accompanying text.

105. *See infra* note 116 and accompanying text.

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slavery was replacing the status of some Africans being held as indentured servants. Some servants sought to resist this trend by arguing in court that they had only contracted for a period of years.<sup>106</sup> If they had the papers to prove their claims, they might achieve their freedom. If, like John Casor, they had no written proof, then it was likely that the courts would deem them slaves. Similarly, like John Punch, a black servant could be sentenced to slavery if he committed a crime.

### **The Movement Toward Slavery – 1660-1680**

The years covered in this section illustrate the increasing codification of the African's status as a slave. Protections were accorded systematically to English servants and in some cases by extension to African servants, whereas the African slave's position and opportunity to achieve freedom declined. It became more difficult for African servants to argue successfully that they were not slaves based on religion or having a free man as a father, whereas in the earlier period, servants achieved their freedom with these types of claims.

In the year 1660, the General Assembly passed a statute that dealt with the problem of English servants running away with Africans:

March 1660 Act XXII, Bee itt enacted that in case any English servant shall runaway in company with any negroes who are incapable of makeing satisfaction by addition of time, Bee itt enacted that the English so running away in company with them shall serve for the time of the said negroes absence as they are to do for their owner by a former act.<sup>107</sup>

This statute illustrates that as late as 1660 English servants were running away with both African servants and slaves. The statute was directed at punishing the English by extension of their terms of servitude to compensate the planter for the absence of the African slave. This may be seen as an attempt by the planter class to discourage whites from associating with blacks and escaping with them. The act exacts a double penalty for an English servant who ran away with an African slave, as the servant was required to serve an additional number of years for his own offense and an extra number for the African who was incapable of addition of time to his servitude. However, with respect to those Africans who were serving under an indentureship agreement the provisions of the statute would not apply to English servants who ran away with them as the African servants' term could be extended.

The General Assembly had occasion to deal with the problem of English servants running away with African slaves again in 1661:

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106. Billings, *supra* note 89, at 468-469.

107. 2 THE STATUTES AT LARGE 26 (William Heller Hening ed., 1823).

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March 1661 Act CII . . . [I]n case any English servant shall runaway in company of any negroes who are incapable of making satisfaction by addition of time, it is enacted that the English soe running away in the company with them shall at the time of service to their own masters expired, serve the masters of said negroes for their absence soe long as they should have done by this act if had not beene slaves, every Christian in company serving his proportion; and if the negroes be lost or dye in such time of their being runaway, the Christian servants in company with them shall by proportion among them, either pay fower thousan five hundred pounds of tobacco and caske or fower yeares service for every negroe soe lost or dead.<sup>108</sup>

This act again places an extra burden on the English servant for running away with the slave as he was required to serve the length of time that the African would have been required to serve had he not been a slave. In addition, if any of the Africans died, the English servants would be required to pay a substantial fine or serve four years for each African lost. This was a further delineation of the policy of separating the servant/slave class along race lines.

During this same year, protections were being granted to servants by statute in an attempt made to curb their employer's cruelty.

March 1661 Act CII. Cruelty of Masters Prohibited. Whereas the barbarous usage of some servants by cruell masters bring soe much scandall and infamy to the country in generall, that people who would willingly adventure themselves hither, are through feare therefore diverted, and by that meanes the supplies of particular men and the well seating his majesties country very much obstructed, Be it therefore enacted that every master shall provide for his servants competent dyett, clothing, and lodging, and that he shall not exceed the bounds of moderation in correcting them beyond the meritt of their offenses; and that it shalbe lawfull for any servant giveing notice of their masters (haveing just cause of complaint against them) for harsh and bad usage, or else for want of dyett or convenient necessaries to repaire to the next commissioner to make his or their complaint, and if said commissioner shall find by just proofes that the said servants cause is just the said commissioner is hereby required to give order for the warning of such master to the next county court where the matter in difference shalbe determined, and the servant have remedy for his grievances.<sup>109</sup>

This act suggests that some servants were being treated very harshly by their

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108. *Id.* at 118.

109. *Id.* at 117-118.

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masters in their attempts to extract labor from the servants. The reports of this harsh and cruel treatment were so prevalent as to discourage servants from venturing to the Virginia Colony. The act goes on to create certain entitlements for the servant class. They were to be provided with sufficient food, clothing and lodging. That a statute was needed to create this right would seem to indicate that previously the quantity and quality of the necessities of life were solely determined by the whim of one's employer. African servants in the previous period were having these very same protections written into their indenture papers. This is supported by the Dregis case mentioned above. Theoretically, the provisions of this statute applied to African servants. However, given the codification of slavery for Africans, it is equally likely that the statute was intended only to protect English servants.

The act next prohibits masters from exceeding the bounds of moderation when punishing or whipping his servants. However, this statute does not punish a master for using severe means of reprimand when the offenses of the servant were considered substantial. In addition, a cause of action was created in the servant for his employer's harsh treatment or denial of food, clothing or lodging. The servant was required to give notice to his master that he was violating the servant's statutory rights. Once this was done, the servant could take his leave and make a complaint to the nearest commissioner, who would decide the merits of the claim. If the claim was meritorious, the master could be sued in county court. It is unclear from the statute what remedy the servant had for these abuses, or how damages were to be assessed.

How does this act relate to African servants and slaves? Clearly, it did not apply to slaves, as they were never mentioned in the act, whereas elsewhere the distinction between servant and slave was quite clear. Other statutes provided that with respect to slaves, masters could not possibly exceed the bounds of moderation in punishing them. It is questionable whether this statute was intended to apply to African servants. The preamble of the act is somewhat ambiguous, but it seems to indicate that the legislature was concerned that the harsh treatment of servants by some masters had discouraged servants from coming to the colony. The colony's reputation for brutalizing its servants could have had the effect of discouraging the willing immigration of servants. This concern would seem to indicate that the statute was directed at servants who had choices about where they would settle. Most of the African servants came, in the early years, from Spanish vessels that had been raided along the route to the West Indies. These Africans had no choice with respect to where they settled. It was the English servant who had an element of choice and it was this immigrant that the act was attempting to attract. There never were any such acts passed that similarly granted slaves any protections whatsoever during the seventeenth century.

Act CIV, passed in 1661, dealt with "unruly servants" who resisted their

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masters by striking them with their hands.<sup>110</sup> These individuals were to serve one year after their term had expired.<sup>111</sup> Following directly after an act that comments on the harsh treatment that masters gave their servants, it makes one wonder whether in the former act the planters were more concerned with the image of Virginia, and in the latter sought to ensure their right to “correct” their servants. As this act applied to servants, presumably, it was also applicable to black servants.

The General Assembly, in 1662, had occasion to legislate on the issue of how to determine the status of children of mixed parentage:

Act XII. Whereas some doubt has arisen whether the children got by any Englishman upon a negro woman should be slave or free, Be it therefore enacted and declared by this present grand assembly that all children borne in this country shall be held bond or free only according to the condition of the mother. And if any christian shall commit fornication with a negro, hee or shee soe offending shall pay double the fines imposed by the former act.<sup>112</sup>

This act altered what had been the preexisting English common law that stated that the child inherited the condition of his father. Elizabeth Key’s contention that she should be a free woman as her father was a free man would not be allowed after this act was passed. This statute also illustrates the use of the law to draw distinctions between workers based on race.

The concern of planters regarding servants resulted in the General Assembly in 1663 adopting a statute that prohibited servants from leaving their employer’s plantation without a permit.<sup>113</sup> The language of the act illustrates the planters’ fears of servile insurrection. Servants were prohibited from unlawful meetings or from leaving without permission. These same requirements were later utilized to restrict the movement of African slaves.

At the same time as Africans were being placed into slavery, there continued

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110. *Id.* The act provided as follows: “Whereas the audacious unruliness of many stubborn and incorrigible servants resisting their masters and overseers have brought many mischiefs and losses to diverse inhabitants of this country, *Be it enacted and ordained* that the servant that shall lay violent hands on his or her master, mistress or overseer, and be convicted thereof by confession or evidence of his fellow servants . . . before any court in this country, the same court is hereby required and authorized to order such servant or servants to serve his or her said master or mistress or their assigns one year after his or her time by custome indenture or law is expired.” *Id.*

111. *Id.*

112. *Id.* at 170.

113. *Id.* at 195. Act XVIII provided as follows: “For better suppressing the unlawful meetings of servants, *It is thought fitt and enacted by this present grand assembly and the authority thereof* that all masters of families be enjoyned and take espeicall care that their servants doe not depart from their houses on Sundays or any other dayes without perticuler lycence from them.” *Id.*

to exist the parallel form of servitude: indentureship. In 1665, an African was bound to serve George Light for five years, a routine period of service.<sup>114</sup> The general court in the same year set one African free after serving seven years. The court also granted another African his freedom in 1665.<sup>115</sup>

In spite of the continued presence of African servants, their position was becoming increasingly precarious. In 1667, the General Assembly closed one of the doors through which Africans had escaped to freedom.

Act III – An act declaring that baptisme of slaves doth not exempt them from bondage. Whereas some doubts have risen whether children that are slaves by birth, and by the charity and piety of their owners made pertakers of the blessed sacrament of baptisme, should be vertue of their baptisme be made ffree; It is enacted by this grand assembly, and the authority thereof, that the conferring of baptisme doth not alter the condition of the person as to his bondage or ffreedom: That diverse masters, ffreed from this doubt, may more carefully endeavour the propagation of christianity by permitting children, though slaves, or those of greater growth if capable to be admitted to that sacrament.<sup>116</sup>

Once again, we find law being made to ensure that Africans could be held in perpetual slavery. One by one, the doors through which Africans had escaped to freedom were closed. First, the English common law was altered so that the status of a child would follow that of the mother. Second, the law that prohibited Christians from holding other Christians as slaves was changed. This law was applied in the case of Elizabeth Key, who was granted her freedom. However, this rule caused problems, as planters could not be certain as to the status of their African servants if they became Christians. As Key had done, other African servants petitioned for their freedom based on this contention. These cases created problems of ownership and court challenges for planters. In an effort to secure their “property,” the planters had the criteria of baptism eliminated from the statute books. This act also pre-supposes the existence of children who were slaves by birth. Apparently, the system of perpetual slavery had begun to take its place on the stage of Virginia’s history.

The aforementioned statute with respect to the elimination of baptism from the freedom equation was passed in September of 1667.<sup>117</sup> In August of 1667, there appears the case of an African, Fernando, who sought to obtain his freedom on the basis of his conversion to Christianity.<sup>118</sup> He brought his action in the county court

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114. RUSSELL, *supra* note 25, at 26.

115. *Id.* at 31.

116. 2 THE STATUTES AT LARGE, *supra* note 107, at 260.

117. *Id.*

118. Billings, *supra* note 118, at 467-468.

for lower Norfolk County, claiming that he was a Christian and had served several years in England before coming to Virginia.<sup>119</sup> He contended that he was to serve for the same period of years as an English bondsman.<sup>120</sup> Before this suit, Fernando's status was that of a slave.<sup>121</sup> The problem was that the proof of his conversion to the Christian religion was written in Portuguese, and the judges could not read the document. The county court dismissed the case and Fernando is reported as having appealed the case to the general court. There is no record of the result of the appeal.<sup>122</sup>

This case illustrates the increasing difficulty that Africans, without the proper papers in English, were encountering in proving their claims that they were servants. Just a month later, Fernando's claim would have been seriously suspect, as the act that made it possible for Christians to hold fellow Christians as slaves was passed that same year.

Another indication that the problem of servants absconding was a continuing issue in Jamestown was the fact that the General Assembly in 1668 adopted another act addressing the runaway problem. The act provided that masters would be able to inflict moderate corporal punishment on, as well as extension of time for, servants who ran away.<sup>123</sup> The statute had both a punishment element and a deterrence justification. Presumably, the corporal punishment was designed to deter the servant from attempting to run away again, whereas the extension of term was to compensate the master for the loss of the services of the servant during the servant's time as a runaway.

One year later, in 1669, the General Assembly relieved masters from criminal liability if a slave was killed during the course of a punishment meted out by the master or his agents:

October 1669 Act 1 – An act about the casuall killing of slaves

Whereas the only law in force for the punishment of refractory servants resisting their master, mistress or overseer cannot be inflicted upon negroes, nor the obstinacy of many of them by other than violent means suppressed, Be it enacted and declared by this grand assembly, if

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119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. 2 THE STATUTES AT LARGE, *supra* note 107, at 266. The 1668 Act was entitled "An act about correction of runaways." It provided, in pertinent part, "Whereas it has been questioned whether servants running away may be punished by corporall punishment by their masters or magistrate since the act already gives the master satisfaction by prolonging their term of service, It is declared and enacted by this assembly that moderate corporall punishment inflicted by master or magistrate upon a runaway servant, shall not deprive the master of the satisfaction allowed by the law, the one being as necessary to reclayme them from persisting in that idle course, as the other is just to repaire the damages susteyned by the master." *Id.*

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any slave resist his master (or other by his masters order correcting him) and by the extremity of the correction should chance to die, that his death shall not be accompted ffelony, but the master (or that other person appointed by the master to punish him) be acquit from molestation, since it cannot be presumed that prepensed malice (which alone makes murther ffelony) should induce any man to destroy his owne estate.<sup>124</sup>

The 1669 act recognized that the statutes that provided for the punishment of servants who resisted their masters, etc., could not apply to “Negroes.” As noted above, the 1668 Act acknowledged that runaway servants could have their terms extended, but obviously, a slave could not have his or her term extended. Therefore, there was a need for an additional statute to address the punishment of slaves. The preamble also gives voice to the resistance that slave masters were experiencing from African slaves. This may partially be explained by the attempts of planters to place all Africans into slavery. It may also be explained as resentment on the part of Africans who previously had a similar status to white servants at being subjected to a life of slavery.

The act removes the murder of a slave from the crimes considered felonious by the assembly. There were to be no criminal sanctions whatsoever for taking the life of an African slave. If a slave resisted his master or his master’s servant, and he died as a result of the severity of the punishment, this would not be considered a felony. The reason given for so deciding was that the master could not have the requisite premeditation or malice necessary for murder to be charged, because no man would destroy his own property. This presumes that slaves were already being considered as chattel and were beginning to lose their human identities.

The right of Africans to purchase servants, as had been done in the transitional years, was also being restricted by statute. The following act was passed in 1670.

October 1670 Act V – Noe negroes nor Indians to buy christian servants  
Whereas it hath been questioned whither Indians or negroes manumitted or otherwise free, could be capable of purchasing christian servants, It is enacted that noe negroes or Indians through baptised and enjoyned their own ffredome shall be capable of any purchase of christians, but yet not debarred from buying any of their own nation.<sup>125</sup>

The preamble indicates that Africans were not only being manumitted, but were obtaining their freedom through other means, presumably through termination of their terms of service. This would indicate that even at this late date the dual system

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124. *Id.* at 270.

125. *Id.* at 280.

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still existed. Africans, though themselves Christians, were prohibited from purchasing as servants members of European nations, whereas they still retained the right to purchase servants from their own nations. One possible explanation for this is that Africans were not considered equal to Europeans, even if Christian. Previously, Christianity had been almost exclusively a European phenomenon. However, with the advent of African Christians, distinctions began to be drawn by the planters and legislators along race lines. This had not always been the case. There are examples of Africans purchasing white servants and receiving land grants by head-rights based on the importation of these servants—this law sought to prevent this from ever occurring again. This law represents a further attempt to alter the pre-existing custom or practice in order to limit the rights of the African freedmen. It also was another effort to separate the freedmen, as well as the servants, along race lines.

In October of 1670, the following act made all non-Christians imported into the colony by ship slaves,

Act XII. It is resolved and enacted that all servants not being Christians imported into this colony by shipping shall be slaves for their lives, but what shall come by land shall serve if boyes or girles until 30 yeares of age, if men or women twelve yeares and no longer.<sup>126</sup>

Apparently, Christianity still carried some protection from slavery, in spite of the act of 1667 that removed this restriction for children who were born slaves and later baptized. By this statute, all Africans who were non-Christians and imported by ship into the colony were to be considered slaves. However, if he or she had already been a Christian or had come into the colony by land, then that person would serve for a period of years, as required by the act. This illustrates the continued existence side by side of both servitude and slavery for Africans.

In the following year the legislature adopted a statute that equated Africans with field animals.

September 1671. Act IV, Whereas in the former act the estates of persons dying intestate, it is provided that sheep, horses, and cattle should be delivered in kind to the orphant to which some have desired that negroes may be added.<sup>127</sup>

The act goes on to establish that when planters died intestate, Africans were to be appraised and sold as the field animals that were property of the estate. Africans were thereby placed on a similar footing with common farm animals. Once again, we see the decline of Africans into the status of property. The word used to describe

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126. *Id.* at 283.

127. *Id.* at 288.

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blacks in the act is not slave, to distinguish those Africans who were servants, but rather “negroes,” the presumption being that “negro” was now synonymous with slave.

Even as Africans were increasingly being placed into the category of slaves, some were still able to acquire their freedom due to their status as servants for a period of years. In 1673, the case of *Moore v. Light* was reported as follows,

Andrew Moore A Servant Negro to Mr. Geo: Light Doth in Court make Appeare by Severall othes that he Come into this County but for five years . . . [O]rdered that the Said Moore bee free from his said master, and that the Said Mr. Light pay him Corne and Clothes . . . and four hundred pounds tob’o and Caske for his service done him Since he was free and pay costs.<sup>128</sup>

Similarly, in 1674, a black woman was able to sue for her freedom in the case of *West v. Negro Mary*:

Concerning A negro woman called black mary purchased by the Said Administrators from Coll. John Vassall, It is ordered that the Said negroe woman returne to her Service, And that the Administrators . . . with the first opportunity take Care to write to Coll Vassall to know whether the Said negroe woman was A Slave or free, and if Appeare she was noe slave when bought, then they shall pay her for her Services what this Court shall Adjudge.<sup>129</sup>

As can be seen from these cases, even at this late date, Africans were capable of entering the courts of Virginia and contending that they were entitled to the protection of the law as members of the servant class. Andrew Moore’s employer was required to pay him corn, clothes and four hundred pounds of tobacco as payment for the time that Moore served Light beyond his five-year indenture. In the case of Mary, the court readily accepts the notion that she may be a servant or a slave, implicitly acknowledging the fact that both institutions continued to exist for Africans. Thus, in this period there were examples of a duality in the status of some Africans—servant or slave. Those distinctions would later disappear as the institution of slavery emerged as the only status for Africans.

The precarious position of black servants was not only being threatened by the legislature, planters were also attempting to force Africans to sign longer periods of indenture. In 1675, Philip Gowen, who was black, filed a complaint that Charles

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128. 1 CATTERALL, *supra* note 15, at 79.

129. *Id.* at 80.

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Lucas had with “threats and a high hand and conspiracy” made him sign indenture papers that extended his period of service by an additional twenty years.<sup>130</sup> Gowen also contended that he was entitled to enjoy his freedom and be paid three barrels of corn and a suit of new clothes.<sup>131</sup> The court ordered that Gowen be set free from any and all obligations to Lucas and that the indenture that had been acknowledged in Warwick County was invalid due to coercion.<sup>132</sup> Lucas was further required to pay Gowen corn and other expenses.<sup>133</sup>

This case illustrates that planters were not only attempting to make all Africans brought into the colony slaves, but also, through threats and coercion, seeking to force black servants to sign extremely long terms of indenture. However, at this juncture, relief could still be sought in the courts of Virginia by Africans against white masters.

Despite the development of laws and cases wherein Africans were considered slaves, in the late 1670s there were still examples of Africans who were deemed servants. In 1678, a Spanish mulatto named Antonio was sold by John Endicott of Boston to Richard Medlicott of Virginia.<sup>134</sup> Antonio was to serve for a period of ten years, after which he was to be a free man.<sup>135</sup> During the same year, another servant named Antonio was sold by John Suffin of Boston to Ralph Wormely for a period of ten years. He also was to be freed afterwards.<sup>136</sup> The fact that both had Spanish names supports the belief that they were Christians before coming to Virginia. The act of 1670, that defined which groups were to be slaves, made slaves of non-Christians who came to Virginia by sea. Because these men presumably were Christians before they came to Virginia, it was possible for them to be considered servants.<sup>137</sup> These cases demonstrate that even at this stage, when slavery was being developed as an alternative to servitude, it was possible for an African to enter the colony as a servant.

Between 1660 and 1680, there were numerous attempts to place Africans into the status of slave. The General Assembly passed several laws that made it increasingly difficult for Africans to be considered servants. As early as 1667, the legislature had altered the English common law to remove religion as a basis for freedom. That year it was determined that the conferring of baptism did not alter the status of a child who had been born a slave, or of an adult who converted after coming to Virginia. Thus, a child born a slave who later converted could continue to be held as a slave. This represents the first break in the ironclad rule that Christians could not hold other Christians as slaves. In the 1680s, this rule would be further abrogated.

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130. VA. WRITERS' PROGRAM, *supra* note 8, at 14.

131. *Id.*

132. 1 CATTERALL, *supra* note 15, at 80.

133. *Id.*

134. *Id.* at 60.

135. *Id.*

136. *Id.*

137. *Id.*

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As slavery developed, so did the cruelty of its proponents. By 1669, if a planter beat his slave to death, no criminal sanctions were applied. This gave every planter the right to exercise the power of life and death over other human beings. Yet, at the same time as Africans were being debased, degraded, and statutorily made into non-human beings, Christian English servants were being accorded privileges and protections. In 1661, a statute was passed that created a whole range of rights for servants who had been treated harshly by their employers. In 1668 another act was passed that enabled planters to inflict only moderate corporal punishment on servants. Contrast this with the act of 1669 whereby planters were permitted to kill slaves, so long as it was for the purpose of “correction.”

Throughout this period, there are repeated references in statutes and in reported cases of cooperation and association between African and English workers. They escaped together, had sexual relations with each other, worked side by side under similar conditions, and engaged in the same work. In 1676, under the leadership of a former member of the planter aristocracy Nathaniel Bacon, servants, freedmen, and some slaves rose up in rebellion and forced the governor to flee Jamestown.<sup>138</sup> Bacon and his followers burned the city to the ground on September 19, 1676.<sup>139</sup> It took the arrival of British troops to return control of the colony to the planter class. Even then, eighty slaves and twenty servants continued to resist, but they were eventually captured and returned to their masters.<sup>140</sup> The freedmen, servants, and slaves had almost destroyed the Virginia colony in their effort to achieve some control over their own lives. The planters realized the possibilities that this type of union might bring about and later sought to divide further this group of people along race lines.

It is not clear whether the planters actually perceived the threat of a united servile class, and thus sought to instill and foster racism, or whether their own racist ideologies prompted their legislative edicts. Regardless of their motives, the use of race to divide the workers was emerging in the statute books with respect to the distinctions being drawn between servants and slaves. In the years following Bacon’s Rebellion, the movement towards slavery for Africans intensified.

### **The Final Stage - Slavery - 1680-1705**

During the last twenty years of the seventeenth century, the movement towards slavery culminated in the total debasement of the African workers. The legislature during this period created statutes that eliminated the former provisions that had enabled some Africans to achieve their freedom and established a fully formed slavery institution.

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138. MORGAN, *supra* note 19, at 268.

139. *Id.*

140. *Id.* at 268-69.

The first statute that dealt with slave insurrections was passed in 1680, four years after Bacon's Rebellion was crushed.

Act X – Whereas the frequent meeting of considerable numbers of negroe slaves under pretence of feasts and burialls is judged of dangerous consequence; for prevention whereof for the future, Bee it enacted . . . that . . . it shall not be lawfull for any negroe or other slave to carry or arme himself with any club, staffe, gunn, sword or any other weapon of defence or offence, nor to goe or depart from his masters ground without a certificate from his master, mistris or overseer, and such permission not to be granted but upon perticular occasions; and every negroe or slave soe offending not haveing a certificate aforesaid shallbe sent to the next constable who is hereby enjoyned and required to give the said negroe twenty lashes on his bare back well laid on and it is further enacted . . . that if any negroe or other slave shall presume to lift up his hand in opposition against any christian, shall for every offence . . . have and receive thirty lashes on his bare back well laid on. And it is hereby further enacted . . . that if any negroe or other slave shall absent himself from his masters service and lye hid . . . and shall resist any person or persons that shalby any lawful authority be employed to apprehend and take said negroe, that then in case of such resistance, it shalbe lawful for such person tokill the said negroe or slave soe lying out, and resisting.<sup>141</sup>

This appears to be the first statute directly concerned with insurrections by Africans. There were no such statutes with respect to servant rebellions, though servants in rebellion with Bacon were to be treated as runaways. The law clearly demonstrates the fears and apprehensions of the planter class that Africans, if allowed to carry any weapon for offense or even defense, would rise up in rebellion due to their condition of bondage. If the servants in 1676 had done the same to protest the harsh conditions that they labored under for so many years, the African slave had even greater reason to rebel against the even more brutal system that was evolving.

The punishment for an African leaving the plantation without prior approval was twenty lashes. However, if he raised his hand against any Christian, servant or otherwise, he was to receive thirty lashes. This act placed the African at the mercy of every Christian in the colony, servant as well as planter. The African could not defend himself in a dispute with a white servant. If he dared to do so, he would be tied to the whipping post. This represents a further decline in the status of Africans in comparison to European servants. The latter were implicitly elevated by this Act, as now they were able to exert power over their former co-workers. This may be the lesson the planters learned from Bacon's rebellion. If they continued to oppress both the English and the African servants, and these two groups were of the same legal and social status, the fear that they would one day unite in rebellion was a real one.

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141. 2 THE STATUTES AT LARGE, *supra* note 107, at 481.

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In order to prevent this from occurring, one of the groups was given privileges and the other placed into a state of permanent bondage.

In 1682, the General Assembly passed a law that was to close all doors to Africans seeking to achieve their freedom.

1682 Act I . . . Be it further enacted . . . that all servants . . . which from and after publication of this act shall be brought or imported into this country, either by sea or land, whether Negroes, Moors, Mollattoes or Indians, who and whose parentage and native country are not christian at the time of their first purchase of such servant by some christian, although afterwards and before such their importation and bringing into this country, they shall be converted to the christian faith; and all Indians which shall hereafter be sold by our neighboring Indians, or any other trafiqueing with us as for slaves are hereby adjudged, deemed and taken to be slaves to all intents and purposes, any law, usage or custome to the contrary notwithstanding.<sup>142</sup>

This act places all Africans brought into Virginia into the category of slaves for life; the final door had been closed. The preamble of the act discusses the unsatisfactory effect of the 1670 law that was repealed by this act. That law (1670) had made slaves only those non-Christians imported by sea. Those brought by land, or those who were Christians, were to be servants. The preamble also states that problems had arisen when Africans were purchased as slaves and afterwards converted to the Christian faith. By the 1670 law, these Africans could not be sold as slaves in the colony by one person to another, but rather they were sold for a period of years. The act of 1682 was designed to prevent any Africans from taking advantage of the provision in the former law. In the preamble, it was also stated that some Africans were still in the servant class up until the 1682 act. Afterwards, it would be extremely difficult for any black person to be sold as a servant.

The 1682 statute was designed to prevent any African from entering court and petitioning for his or her freedom. After this act, there were no grounds or contentions to be raised in support of one's claim to freedom. If one came within the language of the statute, then there was only one status available: that of a slave.

This act also was designed to "improve" the earlier act of 1670 that only applied to non-Christians who came by sea. By this law, Christians could also be held as slaves. This represents the final development of the trend initiated in 1667 when it was determined that baptism did not alter one's status. Earlier, we saw cases of Africans contending that because they were Christians, they could not be held as slaves. However, that contention was no longer possible. This was the culmination

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142. *Id.* at 491-492.

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of the efforts by the planter class to place all Africans into the class of slaves. There are also no reported cases of blacks found to be servants by the courts of Virginia during this period. After this act, it was almost impossible to make such an argument. The act does not represent the beginning of slavery; rather, it was the culmination of the process began in 1646 when the first African was sold as a servant forever. However, the 1682 act was an expression of racism inasmuch as Christian Africans were no longer protected from the slavery institution. Now, only white Christians were protected from slavery, not the African Christian.

The act of 1691 hammered another nail in the coffin of slavery for African workers. The statute was entitled “An act for suppressing outlying slaves” and provided:

“ . . . it shall and may be lawfull for such person and persons to kill and distroy such negroes, mulattoes, and other slave or slaves by gunn or any otherwise whatsoever . . .”<sup>143</sup>

It provided that an escaped slave could be murdered or destroyed. Under this statute, it was deemed lawful for anyone who captured a runaway slave to kill him or her by any means available. This would mean that runaways could be lynched, maimed, or murdered for seeking to regain their lost liberty.

The act of 1691 further described the attempts to separate the workers along race lines.

Whatsoever Englishman or other white man or woman being free shall intermarry with a negroe, mulatto, or Indian man or woman bond or free shall withing three months after such marriage be banished and removed from this dominion forever.<sup>144</sup>

This act illustrates the type of activity that the planters were seeking to proscribe. This statute was aimed at discouraging intermarriage between the races. The punishment for such marriage was banishment from the colony. It is evident from the statute that white men and women were marrying persons of other races, as a statute would not be necessary if the problem did not exist. It is also interesting to note that the statute did not ban such marriages. Instead, the punishment was banishment. If a white woman had a child with a black man, she was to be fined fifteen English pounds sterling; if she were unable to pay, she would be sentenced to work for five years as a servant.<sup>145</sup> It should be noted that there was no analogous punishment for white men who had intercourse or children with black women.

In an effort to prevent manumitted Africans from competing with the large

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143. 3 THE STATUTES AT LARGE, *supra* note 49, at 86.

144. *Id.* at 87.

145. *Id.*

planters and the increasing class of small white planters, the statute of 1691 provided the following:

That no negro or mulatto to be . . . , set free by any person or persons whatsoever, unless such person, pay for the transportation of such negro or negroes out of the country within six months after such setting them free.<sup>146</sup>

After this act, no African could be set free without being banished from the colony. The goal of this law was to prevent freed Africans from acquiring land within the colony and competing with whites. It would also have the effect of separating the newly freed African from family or friends who had not been freed. The de-humanization of African Americans was almost complete. The development of the particular type of slavery practiced in the United States would not be complete until Africans had been utterly debased to the level of property.

Finally, in 1705 the General Assembly adopted the first comprehensive slavery statute that removed all former protections that Africans had been able to utilize to petition for their freedom.<sup>147</sup> This was the final stage in the peculiar institution of American chattel slavery. Thus, Africans left the ranks of legal human beings entitled to those inalienable rights that would be so sacrosanct to the signers of the Declaration of Independence nearly three-quarters of a century later. Whereas formerly he had been the equal of the English servant, the African was now the equal of a farm animal.

The 1705 act not only dealt with slaves, but also re-emphasized previously enacted entitlements for white servants. The slave code also represented the legislature's attempt to place in one act all the piecemeal laws that had been passed with respect to servants and slaves. However, there were important additions to the already existing statutes: section three of the 1705 slave code eliminated a servant's right to enter the courts and seek to prove that he or she had agreed to serve for a period of years.<sup>148</sup> The code further stated that if a servant asserted that he or she had an indenture, the servant's owner could bring him or her before a justice of the peace to determine if the claim was valid. If the servant could not produce his or her papers, it was taken for granted that there never were any such papers. The person was prevented from ever re-asserting the claim or of taking advantage of the benefits of an indenture or asserting that they should not be held as a slave.<sup>149</sup>

Thus, with one statute, cases such as those from the earlier periods where

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146. *Id.* at 87-88.

147. *Id.* at 447.

148. *Id.*

149. *Id.*

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Africans successfully sued for their freedom as servants were precluded. Section three was therefore designed to defeat the claims of all who had oral agreements of indenture, especially if those papers had been lost. It would also defeat the claims of servants like John Casor who had contended in 1653 that he had signed papers that proved that he was a servant and not a slave, but was unable to produce those papers. Unfortunately, the court in that case ruled that Casor was a slave. The General Assembly in 1705 was merely ensuring that all other courts would rule similarly in the future. The English servant who was brought in with or without an indenture was required to serve only for five years. The African servant who could not produce his or her indenture was sentenced to be a slave for life according to section three of the 1705 statute.

Section three also provided that all servants brought into the colony either by land or sea who were not Christians in their native land were to be deemed slaves. Even if the servant had subsequently converted to the Christian religion, his or her lack of Christian ancestry, which no African person could possibly have, condemned them to slavery.<sup>150</sup>

Section four of the 1705 slave code also restated the provisions of the 1682 statute that eliminated Christianity as an avenue of freedom.<sup>151</sup> Religion was thus no longer the deciding factor in the question of status; the Virginia General Assembly had conclusively decided that it would be race. No longer did the system have the flexibility of the earliest period. No longer did the dual system exist side by side for Africans. From henceforth, all black servants who could not produce the proper papers were to be slaves, regardless of baptism as a Christian.

The act, at the same time as it oppressed African workers, provided protections for white servants. Section VII provided that no Christian white servant was to be whipped naked without an order from the justice of the peace.<sup>152</sup> Servants were permitted under section VIII to enter a court in order to file complaints against their masters for abuse or deprivation of food, clothing and lodging.<sup>153</sup> However, section XVII provided “[t]hat in all cases of penal laws, whereby persons free are punishable by fine, servants shall be punished by whipping, after the rate of twenty lashes for every five hundred pounds of tobacco, or fifty shillings.”<sup>154</sup> It appears that what the assembly gave with one hand it was willing to take with the other.

The 1705 statute also prohibited Africans from purchasing servants of other races. Section XI provided that “no negroes . . . although Christians . . . shall, at any time, purchase any christian servant, nor any other, except of their own complexion or such as declared slaves by this act.”<sup>155</sup> The Act further provided that if an African purchased a “christian white servant, the said servant shall, *ipso facto*, become

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150. *Id.*

151. *Id.*

152. *Id.* at 448.

153. *Id.*

154. *Id.* at 452.

155. *Id.* at 449-450.

free.”<sup>156</sup> By the terms of this section, Africans, although Christian, could not “purchase” white servants, only black servants or slaves. Clearly, race was becoming a determining factor in regards to privilege and freedom.

As the legislature sought to further separate the races with respect to their status in society by the act of 1705, so too it sought to increase the penalties for intermarriage. Pursuant to section XI, “if any person, having such christian servant, shall intermarry with any negro, mulatto, or Indian, Jew, Moor, Mahometan or other infidel, every christian white servant of every such person so intermarrying shall, *ipso facto*, become free . . . from any service then due to such master or mistress so intermarrying.”<sup>157</sup> Under this section, if a master or mistress married across race lines, all white Christian servants would be freed from service. Interestingly, only white servants would be freed not African servants or slaves.

In addition to the foregoing punishment for intermarriage, Section XIX increased the penalty for miscegenation<sup>158</sup> That section provided that if an “English or white man or woman, being free, shall intermarry with a negro or mulatto man or women, bond or free, shall by judgment of the county court be committed to prison, and there remain, during the space of six months, without bail.”<sup>159</sup> Whereas in the 1691 statute the punishment for racial intermarriage was banishment, under Section XIX the punishment was increased to six months of imprisonment.

This again demonstrates the tendency of the legislature to divide the laboring class along race lines. These measures, that the workers themselves did not readily adopt, were nevertheless forced upon them by statute. Out of the Burgesses’ fears of servile insurrection, the seeds of racism were sown.

To ensure that such marriages could not performed by ministers in the colony, Section XX of the 1705 statute was added.<sup>160</sup> Section XX provided that “no minister of the church of England, or other minister . . . shall hereafter wittingly presume to marry a white man with a negro or mulatto women; or to marry a white woman with a negro or mulatto man, upon pain of forfeiting and paying, for every such marriage the sum of ten thousand pounds of tobacco.”<sup>161</sup>

Finally, under Section XXXVII, a runaway slave could be killed or dismembered by the authorities.<sup>162</sup> Under this section, upon capture of a runaway, it was “lawful for any person . . . to kill and destroy such slaves by such means as he, she or they shall think fit without accusation or impeachment of any crime for the

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156. *Id.*

157. *Id.* at 447, 449-450.

158. *Id.* at 453-454.

159. *Id.*

160. *Id.* at 454.

161. *Id.*

162. *Id.* at 460-461.

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same.”<sup>163</sup> The statute further provided that the owner of a recaptured slave could seek an order from the county court for “such punishment to the slave, either by dismembering, or any other way, not touching his life, as they in their discretion shall think fit, for the reclaiming any such incorrigible slave, and terrifying others from the like practices.”<sup>164</sup>

With the 1705 statute, chattel slavery was fully realized. Whereas in earlier periods, Africans had the ability to seek their freedom under common law or statutory provisions of the colony, now all Africans had effectively been reduced to non-persons. Clearly, from this statute runaways slaves could be killed by any person who captured them or subjected to any punishment, including, but not limited to, cutting off their arms, legs, or other body parts after the owner secured a court order for such dismemberment. The intent of this statute is evident in the final clause that stated that the purpose of such punishment was to instill fear in other slaves that they too could be subjected to such treatment for seeking to escape to freedom. Thus, it can be reasonably concluded that with the adoption of the 1705 statute, blacks had no rights that whites were bound to respect.

Over one hundred and fifty years later, the United States Supreme Court would come to the same conclusion when it held, in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857), that blacks were “so far inferior that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit.” The seeds for that decision were planted in the soil of Virginia in 1705.

## Conclusion

When the first Africans arrived in Jamestown, the institution of slavery, as it later developed, was unknown. These Africans were placed into the existing labor system—indentured servitude. However, by 1705, the African worker in the Virginia colony had been dehumanized to the level of property. Whereas in 1619 the position of Africans approximated that of the English servant, by 1705 a labyrinth of legislation and case law was enacted that would alter the status of black servants to that of slaves. After the 1705 statute, there were no longer any avenues by which an African could seek his or her freedom from bondage. They were all slaves for life. The institution would later spread to the other English colonies in North America and culminated in the Civil War in 1861 that resulted in the end of formal slavery for African Americans.

In addition to the use of race to establish the slavery institution in Virginia, race was also used to divide white and black workers. The analysis of the cases and statutes enacted in Virginia during the seventeenth century paint a graphic picture of the use of race to divide and separate black and white workers who had the same or

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163. *Id.*

164. *Id.*

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a very similar relationship to the means of production—the plantations that produced what was then the cash crop—tobacco. In the earliest periods in Jamestown, there appears to have been few distinctions drawn by the whites and blacks who labored in the same fields, tilling the same soil, and laboring in the hot Virginia sun for the elite planter class. Over time, race was used to divide this group of workers and to elevate one group and debase the other. It is unclear whether the motivation for this divide and conquer strategy was the racist ideology of the planters or their perceived self-interest. Regardless of the intent behind these draconian measures, the result was the same—black workers were reduced to property, whereas white workers were provided protections against the depredations that had been their lot under the indentured servitude system.

The use of race to separate similarly situated workers did not end in seventeenth-century Virginia. Throughout American history race has been a potent dividing line. W.E.B. Dubois, in his seminal work, *The Souls of Black Folk*, stated that the problem of the twentieth century was the color line. History has proven his statement correct regarding the past century. However, it would have been more accurate for Dubois to state that the problem of the color line is an American phenomenon that had its antecedents in the seventeenth century. As demonstrated above, race was used as the litmus test for freedom in the mid-to-late seventeenth century.

Race continues to be used throughout American history to elevate one class of worker over another. After the end of the Reconstruction in 1876, federal troops were removed from the Southern states, and America's version of apartheid (segregation) reinforced the separation of the workers along race lines. By giving white workers a perceived elevated status over black workers, the Southern gentry were able to maintain their power and privilege. Of course, race continues to mask the class nature of American society.

As race was used to maintain power and status throughout American history, whites and blacks were sometimes able to recognize their common humanity and interests. During the post Reconstruction period, a coalition of white and black farmers formed the Populist movement and challenged white supremacy.<sup>165</sup> Unfortunately, race was again used to divide the workers by the enactment of segregation laws that benefited one group and debased another. That effort had its culmination in the “separate but equal” doctrine of *Plessy v. Ferguson*, 163 U.S. 537 (1896).

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165. Thomas E. Watson, *The Negro Question in the South*, reprinted in A POPULIST READER, SELECTIONS OF THE WORKS OF AMERICAN POPULIST LEADERS, 118-128 (GEORGE BROWN TINDALL, ED., 1966). Thomas Watson, a leader of the movement stated in his essay, *The Negro Question in the South*, “[T]he crushing burdens which now oppress both races in the South will cause each to make an effort to cast them off. They will see a similarity of cause and a similarity of remedy. They will recognize that each should help the other in the work of repealing bad laws and enacting good ones.” *Id.* at 128.

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A similar effort to unite across race lines was evident during the Civil Rights movement of the 1950s and 1960s. White and black students united to combat white supremacy and American apartheid. Massive groups of protesters marched across the south and challenged the status quo. In Mississippi in 1964, three civil rights workers (James Chaney, a black Mississippian, and Andrew Goodman and Michael Schwerner, two white men from New York City) were murdered for their work in Neshoba County. The effort of the civil rights coalition of whites and blacks was defeated by appealing to the racism of white Southerners. The defeat of this coalition culminated in Richard Nixon's use of a Southern Strategy to appeal to racist white Southerners to vote for Republicans and to abandon the Democratic Party.<sup>166</sup>

While Dubois believed that the color line was the problem of the twentieth century, other lines have emerged during twenty-first century. As evident in the 2016 presidential election, race, religion, ethnicity, and sexual identity have risen to the forefront of the effort to maintain power and privilege. Once again, as in the earlier periods of American history, wedge issues were used to destroy coalitions across these lines. During the 2008 and 2012 presidential elections, coalitions were formed across these divides to elect the first African-American president. The backlash against that coalition during 2016 led to the election of the current president, who used these issues to mobilize a divisive base.

It remains to be seen whether the use of race and other identifiers will continue to be an effective strategy to maintain political, economic, and social control and dominance. From the history of Virginia and the later periods of the United States, at various moments, coalitions of workers across race lines have been able to rise above the issues that divided them and to see their common interests. Whether the forces that unite us as opposed to those who seek to divide us will continue their success depends greatly on the hard work we must all do to reach out across racial and other lines to see our common humanity.

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166. Thomas A. Johnson, *Negro Leaders See Bias in Call of Nixon for "Law and Order,"* N.Y. TIMES, Aug. 13, 1968, at 27.

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