"The Prevention of That Abominable Mixture and Spurious Issue": Continuity in the Prosecution of Miscegenation in Virginian Laws and Court Decisions, 1630-1691

Steven Lilley

In a study of the legal "legitimation" of Virginian black slavery during the seventeenth century, Warren M. Billings challenges the assumption that the development of the institution was an "unthinking decision." He argues that the realm of interracial sexual relations was one area in which colonial legal authorities demonstrated "calculation" in the creation of slavery. "White Virginians," he explains, “wished to curb miscegenation and to keep existing slaves and their progeny from becoming free."[1] Conversely, other historians have argued that law-makers and law-enforcers did not actively discourage interracial sex and parenthood until they created explicit legislation for this purpose in the 1660s and again in the 1690s.[2] However, an examination of Virginian laws and court decisions against fornication from 1630 to 1691 reveals a different story. Colonial law-enforcers inherited their revulsion for miscegenation between whites and Africans from the English religious and intellectual tradition, and they used three different legal methods to prevent it. Before introducing legislation that explicitly sought to punish whites for miscegenation in the 1660s and 1690s, the secular authorities of the 1630s and 1640s resorted to enforcing moral laws meant for the Church courts. They then introduced general laws against fornication that were disproportionately applied to cases of pre-marital sexual intercourse involving blacks.

English travellers had expressed disgust towards sex between whites and Africans since the sixteenth century, so it came as no surprise that colonial burgesses sought to prevent miscegenation. In his famous study on American attitudes towards blacks, Winthrop D. Jordan concludes that these explorers often saw heathenism as "linked . . . explicitly with barbarity and blackness."[3] As geographer George Best noted in 1578, the ungodliness embodied within the dark complexions of Africans was seen as "some natural infection" that persisted even if the mother had a "good complexion." Jordan observes that Best's conclusion was likely based on a biblical question from Jeremiah 13:23, which asked "Can the Ethiopian change his skin/ or the leopard his spots?" The geographer wrote that he based his assumption on his observation of the son of "an Ethiopian as blacke as cole" and "a faire English woman." Despite the whiteness of his mother, this child was "as blacke as the father was" and therefore fully heathen.[4] Such common English views towards the “infection” of “heathen” blackness help to explain

[1] Warren M. Billings, "The Law of Servants and Slaves in Seventeenth-Century Virginia," *The Virginia Magazine of History and Biography* 99, no. 1 (Jan., 1991): 45-46 and 55. The "unthinking decision" that Billings challenges is argued in Winthrop D. Jordan, *White Over Black: American Attitudes Toward the Negro, 1550-1812* (Williamsburg: University of North Carolina Press, 1968), Chapter 2.

[2] See, for example, Jordan, *White Over Black*, 79, and Edmund S. Morgan, *American Slavery, American Freedom: The Ordeal of Colonial Virginia* (New York: W.W. Norton & Company, 1975), 333.

[3] Jordan, *White Over Black*, 24.

[4] George Best, "Experiences and reasons of the Sphere, to proove all partes of the worlde habitable, and thereby to confute the position of the five Zones," in Richard Hakluyt, *The Principal Navigations, Voyages, Traffiques and Discoveries of the English Nation* . . . (Glasgow: Unknown Publisher, 1905), 7:262-263, as cited in Jordan, *White Over* Black, 15. Like other early-modern English sources I use in this essay, I have preserved Best's original spelling.

the attempts of seventeenth century Virginian law-enforcers to prevent the sexual union of whites and Africans.

These colonial officials first sought to prevent sexual relations between Christian English colonists and the first African slaves by prosecuting such acts under moral laws that were outside of their jurisdiction. While fornication was seen as an offence "against the laws of God and the sanctity of marriage," it was nevertheless "a matter for regulation by church courts."[5] In cases of pre-marital sex between whites, the secular authorities only intervened if such actions breached the terms of an indentured servant's contract. In the year 1626, for example, the Virginia Company's General Court found Mr. Samuel Sharp's servant, Henry Carman, guilty of committing fornication with a white servant named Alice Chambers. Part of Carman's contract stipulated that his service would "begin again for seven years" if he engaged in behaviour such as "whoredom." Evidently, his relations with Ms. Chambers constituted "whoredom," for the court ordered him to "serve seven years longer."[6] There was no mention of any punishment for Carman's offence besides the fulfilment of his contractual obligations.

While the General Court left moral punishments to the church courts in Carman's case, colonial authorities soon took it upon themselves to mete out retribution if an African was caught fornicating with a white colonist. The case of Hugh Davis in 1630 is often cited as the first known example of litigation that prohibited miscegenation.[7] Davis had "[defiled] his body in lying with a negro," and he was sentenced "to be soundly whipped, before an assembly of Negroes and others for abusing himself to the dishonor of God and shame of Christians."[8] There was no mention of whether or not the "negro" in question was punished. Historian Kevin Mumford questions the "traditional" assumption that Davis was a white man based on the fact that his name was listed and the black woman's was not.[9] However, the colonists' "customary practice" of recording the full names of whites without noting their race and doing the opposite for Africans supports the conclusion that he was indeed white.[10] Regardless of Davis's race, the General Court soon demonstrated its desire to prevent miscegenation in the case of Robert Sweat in 1640. For having a child with "a negro woman servant," Sweat was sentenced to "do public penance . . . at *James city* church in the time of devine service according to the laws of *England*." In a much harsher gesture, the court sentenced the "negro woman" to "be whipt at the whipping post."[11] As Mumford points

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[5] Billings, "The Law of Servants and Slaves," 55.

[6] Orders of the General Court, Oct. 11, 1626, *Robinson Transcripts*, 52, in Philip Alexander Bruce, *Economic History of Virginia in the Seventeenth Century: An Inquiry Into the Material Condition of the People, Based Upon Original and Contemporaneous Records* (New York: MacMillan and Co., 1896), 2: 41-42. https://archive.org/stream/economichistory09brucgoog#page/n0/mode/2up.

[7] See Kevin Mumford, "After Hugh: Statutory Race Segregation in Colonial America, 1630-1725," *The American Journal of Legal History* 43, no. 3 (Jul., 1999): 280, for a list of such interpretations.

[8] William Waller Hening, *Statutes at Large; Being a Collection of All the Laws of Virginia from the First Session of the Legislature in the Year 1619* (New York: R. & W. & G. Bartow, 1823), 1: 146, http://vagenweb.org/hening/vol01.htm.

[9] Mumford, "After Hugh," 281-282. Mumford and others also suggest that the "negro" in question might have been a man. If he was, then Davis might have "defiled" his body in a homosexual encounter. See, for example, A. Leon Higginbotham Jr. and Barbara K. Kopytoff, "Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia," in *Interracialism: Black-White Intermarriage in American History, Literature, and Law*, ed. Werner Sollors (New York: Oxford University Press, 2000), 102, footnote 98. Despite this speculation, it seems unlikely that the "negro" was a man, for one would expect the authorities to have recorded a punishment for what was considered to be such a heinous crime.

[10] Higginbotham and Kopytoff, "Racial Purity and Interracial Sex in the Law," 102, footnote 98.

[11] H.R. McIlwaine, ed., *Minutes of the Council and General Court of Virginia* (Richmond: Virginia State Library, 1924), 477, http://www.virtualjamestown.org/practise.html#5.

out, "a bill of sale does actually indicate that [Sweat] was white,"[12] so historians do not dispute the fact that this was a case of interracial fornication. While Sweat received a lighter sentence than Davis, the fact that a harsh punishment was transferred to the African woman indicates that the General Court sought to discourage miscegenation by punishing at least one of the perpetrators. The court demonstrated its revulsion for interracial sex by enforcing moral laws that were outside of its jurisdiction.

A few years later, Virginia law-makers used legislation to place moral law-enforcement concerning fornication under their jurisdiction. Following the creation of such a statute in the 1642-1643 legislative sessions, lawmakers attempted to deter miscegenation by applying a statute forbidding fornication to cases of miscegenation while ignoring many incidents of pre-marital sex between whites. The law imposed penalties of fines or extended terms of service on servants and "freemen" who had pre-marital sex with "a mayd or woman servant.”[13] Despite being meant for colonists of any race, as demonstrated by the authors’ use of racially neutral terms, there are few surviving records of court cases that show whites being prosecuted for the offence of pre-marital sex. The courts could have prosecuted many such fornicators because there was a ubiquity of marriages in which brides were already pregnant in the Chesapeake colonies.[14] A reason for the lack of trials against whites who fornicated amongst themselves may have been the fact that “death rates were so high and birth rates were so low that any birth, whether legitimized by a marriage or not, was cause for celebration rather than criminal prosecution.”[15] In cases of miscegenation, however, court records reveal that the authorities preferred to prosecute those who engaged in sexual intercourse out of wedlock. In 1649, for example, colonist William Watts and "Mary (Mr. Cornelius Lloyds negro Woman)" were forced "to doe penance by standing in a white sheete with a white Rodd in their hands" in front of a Lower Norfolk County congregation.[16] While the court gave neither party fines or extensions of service, this public display of interracial fornicators provided a stark contrast to the wedding ceremonies whites generally received.

Historian Edmund S. Morgan disagrees with the assertion that Virginian law-enforcers paid particular attention to interracial fornicators before the 1660s. He supports this claim by citing the evidence of "court records [showing] the usual fines for whipping for fornication, regardless of the sinner's color." In addition, he notes that Watts' punishment was replicated in 1654 when "both a white couple and a negro couple" were charged with fornication in Northampton.[17] Despite the overall quality

[12] Mumford, "After Hugh," 283.
[13] Hening, *Statutes at Large*, 1: 252-253.
[14] Douglas Greenberg, "Crime, Law Enforcement, and Social Control in Colonial America," *The American Journal of Legal History* 26, no. 4 (Oct., 1982): 302-303.
[15] Greenberg, "Crime, Law Enforcement, and Social Control," 302-303.
[16] "Case of William Watts and Mary," *Lower Norfolk Co. Order Bk. (Va.)* (Unknown Publication City: Unknown Publisher, 1649), vol. 1646-1650: 113a, as cited in Byron Curti Martyn, "Racism in the United States: A History of the Anti-Miscegenation Legislation and Litigation" (PhD diss., University of Southern California, 1979), 11, *ProQuest*.
[17] Morgan, *American Slavery, American Freedom*, 156 and 333. Winthrop Jordan similarly claims that the sentence for Watts and Mary "was sometimes used in cases of fornication between two whites," and he cites page 110 of Philip Bruce's *Economic History of Virginia* as evidence. The only passage on this page that seems to relate to Jordan’s claim is the assertion that "a general statute was passed imposing a heavy fine upon all white men who were guilty of criminal intimacy with female slaves, and this was the regulation at the time when the number of negroes in Virginia did not exceed several hundred." Bruce cites a law from 1662 that forbade Christians from fornicating with blacks as evidence. Therefore, Jordan does not cite "cases of fornication between two whites;" he cites one piece of legislation against miscegenation that was put in place eight years later. This information does not support his claim. See Jordan, *White Over Black*, 79, Bruce, *Economic*

of his research, however, he only substantiates this particular claim by referring to the example above. Furthermore, Africans formed a small minority in the colony at this time;[18] the fact that two of the three cases of fornication listed above involved blacks indicates that punishment was proportionally higher for cases where Africans had pre-marital sex with whites or other blacks. In contrast, a single case in which two whites were punished for fornication is insignificant when compared to the vast numbers who married without legal consequences following a pre-marital pregnancy.[19]

Despite disagreement regarding the efforts of Virginian courts to sexually segregate blacks and whites before the 1660s, most historians concur that law-makers and law-enforcers actively sought to curb miscegenation after this period.[20] This conclusion follows from the comparative examination of two statutes enacted against fornication in 1662 and the resulting litigation. Legislators in December of 1662 imposed penalties for interracial fornication and parenthood that were explicitly harsher than those for cases of fornication between whites. They directed these punishments at white Christians instead of blacks. Using religious language that reflected English prejudices formed in the previous century, they forbade "any christian" from fornicating with "a negro man or woman." Those who did so would "pay double the ffines imposed by the former act."[21] This "former act" was likely a statute enacted in March of the same year that fined any "man or woman soever" who committed fornication "five hundred pounds of tobacco." If the offender was a servant who could not pay, the fine would be imposed on this person's master.[22] In a review of Virginian court cases from the 1660s, A. Leon Higginbotham Jr. and Barbara K. Kopytoff have documented numerous cases in which the courts enforced these discriminatory statutes. A noteworthy example from 1663 involved a "free black property owner" named John Johnson who impregnated a white servant named Hannah Leach.[23] Johnson was forced to pay unspecified "damages,"[24] while Leach "escaped whipping only because her master agreed to pay 1,000 pounds of tobacco." This fine was halved in cases of fornication between whites, as seen in the case of John Oever and Margaret Van Noss in the same year. Black accomplices were also consistently charged the standard fine of 500 pounds of tobacco for interracial fornication.[25] The authorities gave white Christians the primary responsibility of ensuring racial purity by imposing the ordinary penalty on black fornicators and assigning masters responsibility for the behaviour of their servants.

Near the end of the seventeenth century, legislation against interracial sex became more severe and explicit for white culprits. The desire to prevent miscegenation was unmistakable in a statute from

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History of Virginia, 2: 110, and Hening, *Statutes at Large*, 2: 170.

[18] As noted above, Philip Bruce claims that the number of blacks in Virginia "did not exceed several hundred." See Bruce, *Economic History of Virginia*, 2: 110. Morgan's research indicates that the black population was between 1,550 and 2,510 in 1674. He estimates that Virginia's total population at the same time was 31,900. These figures show that blacks constituted 4.9% to 7.9% of the total population. Documentary scarcity prevents an accurate calculation of the black population during the 1660s. See Morgan, *American Slavery, American Freedom*, 404, and 421-422.

[19] See Greenberg, "Crime, Law Enforcement, and Social Control," 302-303, and *supra*, 5.

[20] See, for example, Jordan, *White Over Black*, 79, and Morgan, *American Slavery, American Freedom*, 333.

[21] Hening, *Statutes at Large*, 2: 170.

[22] Hening, *Statutes at Large*, 2: 114-115.

[23] Higginbotham and Kopytoff, "Racial Purity and Interracial Sex in the Law," 103-104.

[24] T. Breen and S. Innes, *"Mine Owne Ground": Race and Freedom on Virginia's Eastern Shore, 1660-76* (New York: Oxford University Press, 1980), as cited in Higginbotham and Kopytoff, "Racial Purity and Interracial Sex in the Law," 104.

[25] Higginbotham and Kopytoff, "Racial Purity and Interracial Sex in the Law," 103-104.

April of 1691, for the authors of this law stated that their goal was

> . . . the prevention of that abominable mixture and spurious issue which hereafter may increase in this dominion as well by negroes, mulattoes, and Indians intermarrying with English, or other white women, as by their unlawfull accompanying with one another.[26]

Any free "white man or woman" who married members of such races would "be banished and removed from [the] dominion forever." Furthermore, if any free "English woman" had "a bastard child by any negro or mulatto" she would have to pay a fine "of fifteen pounds sterling" and her child would "be bound out as a servant by the . . . Church wardens untill he or she . . . [attained] the age of thirty yeares."[27] This sentence was more severe than the standard "ten pounds sterling" for whites who fornicated with other whites.[28] By prescribing more ruthless penalties such as banishment and the expropriation of illegitimate children, authorities created strong incentives for white colonists to refrain from interracial sex. Court records show that law-enforcers punished these whites using this law. Shortly after the law was passed, for example, a white colonist named Ann Wall was "ordered to pay fifteen pounds sterling" for having two children with "a negro whom she claimed as her husband." Furthermore, her children were "delivered to [Mr. Peter] Hobson, to be held until they were thirty years of age."[29]

Ann Wall faced a less violent sentence than that of Hugh Davis in 1630, and the Virginia authorities who punished her expressed their intention to prevent interracial sex more explicitly than sixty years prior. While the methods of sexually segregating white and black colonists changed over the course of the seventeenth century, the desire to prevent miscegenation persisted in the minds of this era’s colonial officials. The English formed unfavourable opinions towards Africans in the previous century, viewing blackness as a sign of infectious heathenism. Because of these views, secular colonial burgesses in Virginia were willing to infringe upon the jurisdiction of Church courts in order to punish interracial fornicators in the 1630s and early 1640s. In 1642, they enacted a statute against fornication in an effort to legitimize their enforcement of moral laws. Contrary to the analysis of some twentieth century historians, colonial law-enforcers more often used this law to prosecute interracial fornicators than two whites who had premarital sex. New statutes in 1662 allowed the authorities to impose harsher and more discriminatory sentences for miscegenation than those handed down in cases of fornication between whites. As the subjects of this punishment, white Christians had to bear the responsibility of ensuring racial purity while their black sexual partners received ordinary penalties. In 1691, legislators finally expressed the intent behind this unequal treatment in explicit terms, and whites who deviated from the burgesses' norms faced the severe penalties of banishment and the loss of their illegitimate children. While legal sexual segregation kept "existing slaves and their progeny from becoming free," this phenomenon was the result of prior prejudices against those with black skin more than a conscious effort

[26] Hening, *Statutes at Large*, 3: 86.
[27] Hening, *Statutes at Large*, 3: 86-88.
[28] This penalty came from a general statute against fornication that was also enacted in April of 1691. See Hening, *Statutes at Large*, 3: 71-74.
[29] Bruce, *Economic History of Virginia*, 111. From the wording of the 1691 law discussed above, it can be inferred that Hobson was the Church Warden.

to institute slavery.[30]

[30] See Billings, "The Law of Servants and Slaves," 55, and *supra*, 2.

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