

The Legal Creation of Race in America

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When examining history, it seems that a narrative has evolved over time that slavery somehow just happened in the United States due to the need for cheap labor and that Africans were chosen because they could do that labor the best. While this is true, it is far from the full reality of the situation. Like slavery, race took time to be created and accepted by the population and like slavery; race had to be created from a legal framework. For this, we need look no further than colonial Virginia.

It must be acknowledged that there was and still is some debate over whether or not the Africans that came to Virginia in 1619 were slaves or that they slowly, but surely transitioned to slavery. Yet, despite this, there is still evidence that in the mid-1600s, laws were being made to create race.

Interestingly enough, slavery was not originally sought after in colonial Virginia as, “in spite of its seeming superiority, [it] was actually not as advantageous as indentured labor during the first half of the century” [1] due to the high morality of Virginia immigrants. Such morality created a situation where there would be no advantage in owning a person for their entire lives rather than a few years, “especially since a slave cost roughly twice as much as an indentured servant.” [2]

Though, this ‘morality’ was in reality due to economics as up until the 1640s, the main crop for Barbados and Virginia was tobacco. However, Barbados made a switch to cotton and then finally sugar in the early 1640s. This discouraged white indentured servants from going to Barbados as “sugar production required such strenuous labor that men would not willingly undertake it.” [3] Thus, colonial Virginia was given an influx of indentured servants.

Virginia’s transition to slave labor was slow as even though it became more advantageous to own slaves rather than have indentured servants in 1660, in that year the Virginian assembly allowed Dutch slave ships exemption from local duties, however, in that same year the Navigation Acts were passed, resulting in Virginia not implementing slavery as fast as this created a situation which would decrease the number of slaves that could be imported. It also did not help that Virginia was now in competition with sugar planters in the Barbados over this smaller supply of slaves.

The concept of race, originally, was essentially nonexistent as while blacks were identified as Negroes, it “was a national rather than racial designation” and “the early records identify the nationality of all non-Englishmen.” [4] The social structure was much more based on class rather than race. White and black servants would often socialize with one another [5], seeing themselves as being in the same situation and being oppressed by the system.

Yet, even this was soon found problematic. The first recorded punishment for interracial relations was in 1630 in Virginia when Hugh Davis was sentenced to be whipped for “defiling

his body in lying with a Negress.” [6] (While there has yet to be evidence that Davis was white, the language used by the Virginia Assembly implies as such.) This notes that society was quickly changing in its attitudes towards race and interracial relations. Virginia was established in 1607 and within about 20 years social relations had changed so vastly that blacks and whites were not allowed to have romantic relations.

Soon laws were being passed which would further groundwork to later separate and create race. The first such law appeared in the early 1640s where “the courts clearly recognized property in men and women and their unborn progeny.” [7] This is quite revealing as it shows that there was already the creation of a legal basis for what would later become full-fledged slavery in the 19th century where in that time it was assumed that the children of slaves would be slaves. However, it also denotes a difference as the above-mentioned law was all encompassing, it didn’t matter which of your parents was a slave, if you were born to slaves, you were considered a slave whereas in later years the inheritance of slave status was purely matrilineal.

The law soon changed to this matrilineal status in 1662. Due to planters worrying about servant uprisings, suspected cooperation among servants and slaves, as well as “the growing problem of controlling the sexual activity of female servants” [8] the Virginia Assembly passed a law declaring “that the children of enslaved women should follow the condition of their mother” [9] thus creating a situation where the institution of slavery could continue unabated and that the owners would consistently have a source of labor upon which to draw.

The differentiation was fully made between black and white servants began with the case of John Punch. In 1640 the Virginia General Court handed down a ruling to three servants, two white, one black, who had attempted to escape. While the servitude sentences of the two whites were lengthened, John Punch was sentenced to “serve his said master or his assigns for the time of his natural life here or elsewhere.” This was soon followed by a case where a black runaway was caught, yet the length of their sentence was not increased “presumably because he was already serving for life.” [10] Thus, this separation of the races began and with it the meaning of who was black and who was white and what exactly that meant.

Yet, the establishment of slavery also meant the establishment of a different set of rules and regulations regarding slaves. The only disadvantage to owning a slave was the fact that they had no incentive to work, whereas the indentured servant’s incentive came from the fact that they would eventually receive their freedom. In order to get slaves to work, in the first years some masters offered slaves the chance to earn their freedom by working hard or giving them land to grow their own crops. [11]

However, this defeats the very purpose of slavery and with it, its advantages. Thus, slave owners had to realize that the slaves had to be punished much harsher than the servants. In 1669 the Virginia Assembly passed a law which stated in part that “if any slave resist his master and by the extremity of the correction should chance to die, that his death shall not be [viewed as a] felony, but the master be acquitted from molestation.” [12] In other words, if a slave master accidentally kills his slave, he will not be charged with a crime as the slave is considered property rather than a human being. The law even went so far as to ensure that “the public would compensate the master for the loss of slaves thus killed.” [13] In doing this, the Assembly ensured that Virginian society would fully accept slavery.

The differences between black and white also had an interesting effect on black women and reveals further that the legal system created race, however in this case it didn't have to do with relations between black and white servants but rather with taxes. In 1643, African women were categorized as "tithables" (individuals who performed taxable labor) in Virginia revealing that African women were seen as "field laborers with a productive capacity equivalent to that of men." [14] In regarding African women as "tithables," the Virginia Assembly showed that they viewed African and white women differently, with African women being viewed solely as laborers and on the same level as men.

One must note that the separation of black and white women served the interests of the ruling white patriarchy. By separating the two groups and treating one group as a man, the patriarchy was able to give the white woman a feeling of superiority by giving her someone to look down up and feel above. In regarding the African women as a man, the patriarchal system was able to force African women into a situation where they lost their femininity and to be in a much more able position to control black women.

At the exact same time this law was passed, a law further condemning interracial relations was passed with the Virginia Assembly stating that "if any Christian shall commit fornication with a negro man or woman, [he] or [she] so offending shall pay double the fines imposed by the former act." [15] This was done to discourage interracial relations, but also had a disproportionate effect on white women, who, due to "the growing emphasis on bastardy in which the birth of a child constituted 'proof' of sexual misconduct,"[16] could be easily prosecuted were they found with a mixed race child.

Among all of this it must be acknowledged that racial tensions grew as Virginia's transition to slavery became fully realized. The shift from indentured and free to slave labor resulted in the unemployment of many whites; however, those in power were able to allow poor whites to have a sense of superiority against slaves and other non-whites. This was done mainly to dissuade poor whites from realizing that it wasn't the slave, but rather those in the planter class, that had put them in such a miserable situation and thus rebelling against the current social order.

When looking at the historical record, one can see that at the time Virginians began to purchase black slaves in large quantities, "they were also buying Indians" and that constantly seeing Indians with slaves created a situation where "it was easy for Virginians to extend to blacks some of the bad feelings they harbored towards Indians." [17] This may have possibly been caused by the fact that once one begins to see the two groups together and soon associates immediately one with the other.

The Virginia Assembly, through passing legislation, "deliberately did what it could to foster the contempt of whites for blacks and Indians." In 1680 the Assembly passed legislation that meted out a punishment of 30 lashes on any black or Indian that fought a white servant. "This was a particularly effective provision in that it allowed servants to bully slave without fear of relation, this placing them psychologically on a par with masters." [18] Such laws were crucial to keeping the current social order in which the planter class was dominant. By having the servant classes disassociate in every way with the African and Native American slaves, the planter class crushed any chance of worker solidarity and relied on the old divide and conquers strategy to maintain their position in society. It also furthered the acceptance of slavery to be the norm as now the white underclass would be in support of slavery as they would see Africans as deserving of slavery.

The creation of race in America was not one that was suddenly thought up, but rather a slow process a slow process of social engineering that was extremely beneficial to some while excruciatingly painful for others. At the heart of the matter lies the need for a labor source to work the fields, but to do it in such a manner where it could be deemed acceptable and would be in the control of the planter class, thus the legal route was taken to create differences, inferences, and meanings that were solely dependent upon one's skin color.

Notes

[1] Edmund S. Morgan, *American Slavery, American Freedom: The Ordeal of Colonial Virginia*, (New York, New York: W.W. Norton & Company, 1975), pg 297

[2] Morgan, pg 297

[3] Morgan, 298

[4] Lerone Bennett Jr., *The Shaping of Black America* (Chicago, Illinois: Johnson Publishing Company, 1975), pg 18

[5] Bennett Jr., pg 19

[6] Kevin Mumford, "After Hugh: Statutory Race Segregation in Colonial America, 1630-1725," *The American Journal of Legal History* 43 (July 1999): 280

[7] Morgan, pg 297

[8] Kathleen M. Brown, *Good Wives, Nasty Wenches, and Anxious Patriarchs: Gender, Race, and Power in Colonial Virginia* (The University of North Carolina Press, 1996) pg 195

[9] Brown, pgs 195-196

[10] Winthrop D. Jordan, "Modern Tensions and the Origins of American Slavery," *The Journal of Southern History* 28 (February 1962): 23-24

[11] Morgan, pg 311

[12] Morgan, pg 312

[13] Morgan, pg 313

[14] Brown, pg 118

[15] Brown, pg 196

[16] Brown, pg 196

[17] Morgan, pg 330

[18] Morgan, pg 331

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