Law and the Cultural Production of Race and Racialized Systems of Oppression

Early American Court Cases

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America, to the extent that it is a nation of laws, must be understood within the context of these laws. Unfortunately, these laws have not always conformed to the ideals associated with the principles of life, liberty, and the pursuit of happiness. Through much of our history, the law has served to protect a racialized elite from competition from another racialized nonelite. Race and racialized sociopolitical systems of inequality have served to structure American society since its inception. Ignoring the rhetoric of freedom, justice, and equality for all, America developed laws that were distinctively racial in character, substance, and operation. This article demonstrates the exact period, conditions, and processes whereby racism and racist social structures came into being. It is argued that laws and the legal record represent uniquely cultural elements of America. As such, they demonstrate the cultural production of race and racialized systems of oppression.

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In the course of doing research for another publication, I serendipitously discovered a wealth of information regarding the development of race and racism within American jurisprudence. Soon, I realized that these records not only documented the development of race and racism but they also reveal how culturally central these ideas have been throughout the formative period of American society. Furthermore, they clearly document the fact that Blacks were neither passive nor complacent participants in the process. Quite the contrary, they actively fought, attempted to circumvent, and challenged the legal apparatus that gradually displaced their freedom, denied their humanity, and circumscribed their identity. Although sociologists have provided a detailed analysis of how the laws, customs, values, and institutions have functioned to establish and define the parameters of race and racial identity (Killian, 1982), they also have shown keen interest in how these parameters have been structured by and are elucidated in the court record. This record is a uniquely cultural document that allows us to

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understand how essentially racist values, attitudes, and opinions became interspersed throughout American culture, identity, and history (Ackerman, 1999).

The legal cases used to prepare this article represent limitations and therefore entail biases. Obvious limitations of time and space require that some type of restrictions be utilized. Other limitations have to do with the availability of source material. The richness of court cases from Virginia, dating back to the early 1700s, was not only fruitful but also necessary to allow me to continue. Although overreliance on Virginia cases can produce bias, the centrality of Virginia to the development of racial attitudes and social structures cannot be ignored. Virginia was the first of the English colonies to allow slavery. Virginia was also the judicial model for other states as they developed their own legal system of race, racism, and racialism. The basic ambivalence observed in America can be seen in the ambivalence of the Virginia judicial record. On one hand, it legislatively allowed for emancipation and allowed slaves to sue for freedom and manumission by private owners. On the other hand, it made such procedures extremely costly and tenuous. Consequently, any analysis of the legal construction of race must center on Virginia and this ambivalence. The fact that rarely were the interests of Africans represented in these court records obviously reflects the bias of our cultural development. This article, concentrating on the Black/White divide, presents other sources of bias. Clearly, the experiences of other groups, most noticeably Native Americans, Asians, Hispanics, and various other White ethnics, also must be taken into consideration if we are to fully understand race, racism, and the processes of racialization. The absence of such clearly limits the analytical and critical usefulness of this article. Recognizing these limitations, I believe that such an analysis focusing on early American contact situation between African and European will demonstrate the circumstances that led to the historical mythology of race in our experience. Furthermore, by concentrating on the court record, we are able to examine how European imperialism, American greed, and caprice created, maintained, and perpetuated a culture of race, racism, and racialization throughout much of our history.

This article aims to explore this record to further understand how law serves as an inimitable instrument in the cultural production, maintenance, and perpetuation of race, racism, and racialized social systems. With this in mind, the primary purpose of this article is exploratory; consequently, the cases chosen are intended to be illustrative, not exhaustive.

SLAVERY: THE IMPOSSIBLE DECISION

When faced with the judicial record, one soon realizes the centrality of slavery in defining and establishing race and racialized systems of oppression within the American experience. Slavery, more than any other social institution in early America, was the vehicle that focused our attitudes regarding race. Slavery also

was the most important social, political, and economic institution in early America. This assertion rests on the observation that all other American institutions were linked with, influenced by, or relied on the institution of slavery. I doubt if anyone would challenge my assertion that slavery was the quintessential American institution throughout its first 300 years of existence. For the doubters, I offer the following: If we assume, as does Genovese (1974, p. 5), that there were about 4 million slaves in 1860 America, and if we assume an average value of each slave to be $500, then the value of this slave population amounted to $2 billion. Even if we counted the assessed valuation of all railroads and industrial facilities, we would not reach this sum. Given this observation, and the history of race in America, it also seems safe to conclude that slavery, more than any other social institution in early America, was the vehicle through which much of our attitudes, angst, frustration, and national identity with regard to race were channeled. From its inception, the slave trade was legally established as a deliberate vehicle to ensure European profits at the expense of the African.

> The Portuguese in 1455 commenced the slave trade. They were followed by the Spaniards and Dutch. The African company was established in England in 1672 (Charles II), and in 1689 they entered . . . into an agreement to supply the Spaniards with slaves. In 9 and 10 William III. (1698) an act passed relative to the slave trade; and also in 1726 (13 Geo. I ch. 8), and in 1749 (23 Geo. II. ch. 31.). (*Mahoney v. Ashton*, 1799)

Although England would not abolish slavery until 1807, and 1833 for the Empire, as early as 1705, English Courts began curtailing the practice. Three seminal cases can be identified that established the legal limits of slavery. These cases would be cited and repeated throughout the struggle to abolish slavery both in the English Empire and its former colonies. The first case, *Smith v. Cooper*, established the principle that a slave was free as soon as they set foot on English soil. The second precedent essentially argued that England was too "pure" to allow Slavery to "breathe" (Blaustein & Zangrando, 1968).

> The state of slavery is of such a nature that it is incapable of being introduced on any reasons, moral or political. . . . It's so odious, that nothing can be suffered to support it. (*Sumerset v. Stewart*, 1772, cited in Blaustein & Zangrando, 1968)

With this decision, Lord Chief Justice William Murray Mansfield freed 14,000 Negro slaves from Great Britain and also ended the public auctions throughout the British Isles. Unfortunately, these had little impact on slavery in the American colonies. In many ways, the royal families of Europe could not ignore the easy profits available in this sale in human souls. Treaties would be written, whole continents absorbed, fortunes and profits made, and wars waged among European nations to define, control, maintain, and perpetuate this cruel trade in human flesh.

> In 1689, all the Judges of England, with the eminent men who then filled the offices of Attorney and Solicitor General, concurred in opinion, that Negroes were "merchandise," within the general . . . terms of the Navigation Act. . . . The famous case of Somerset, . . . whilst it determined that Negroes could not be held as slaves in England, recognized the existence of slavery in the colonies, as does the whole legal policy, both of that country and of France. . . . The slave trade was long the subject of negotiations, treaties, and wars, between different European States, all of which consider it as a lawful commerce. (The Antelope, Supreme Court of the United States, 1825)

Thus, although many European nations had effectively outlawed slavery on their own soils and among their own citizens, they universally declared Africans fair game for their cruel intentions. Starting just prior to the discovery voyage of Columbus, Spain, Germany, and England established these intentions by formalizing their business interests into decrees, treaties, and monopolies in human souls. The Royal Decrees were therefore deliberate actions that created, racialized, and sanctioned the international collaboration that led to the creation of the African slave trade. These decisions would further structure and define a process that immediately became ingrained in the cultural fabric of the "new world," a process that helped to create the legal framework that not only justified but also gave legitimacy to racial distinctions in this country. Although the immorality of slavery would be debated in courts throughout Europe and the Americas, these same courts would nevertheless reaffirm its legality. Such reaffirmation would typically be expressed, with feigned sorrow, as by necessity the only legal recourse available.

> There is a case in 2 Salk 666, which has not been mentioned at the bar, though it bears considerable relation to the present controversy. It was an action of Indebitatus Assumpsit for a negro fold; and it was said by HOLT Chief Justice, that a negro by entering England becomes free; but that a sale in Virginia, if property laid, will support the action. Hence, we perceive, how solicitous the courts of that kingdom have been, on the one hand, to discountenance slavery in England; but, on the other hand, to do full justice to the sale, which, by the Lex Loci, was lawful in Virginia, where it was made. (*Pirate v. Dalby*, 1786)

What these courts failed to discuss were the overwhelming economic necessity the colonies and the Europeans attached to the slaves.

The first evidence of racial distinctions and differential treatment based on these distinctions are not identifiable in colonial court cases until 1630. In September of that year a White man was punished for "lying with a Negro" (Palmer, 1971, p. 67). This ruling leaves us to wonder if he was punished for adultery or for having sex with a Negro woman. What is obvious is that the court sent a clear message that neither was permissible. The ambiguity regarding the status of the African was soon removed. Ten years later, the Virginia Courts would establish servitude for life in a case involving runaway servants. This case is instructive because although three men ran away, two—a Scot and a Dutchmen—were

required to serve an additional 4 years "after the time of their service is expired . . . ; the third being a negro named John Punch" was ordered to serve "his master or his assigns for the time of his natural life" (Palmer, 1971, p. 67). Thus, John Punch's name should go down in history as being the first official slave in the English colonies.

Without any statutory provisions regarding slaves in Virginia, owners were able to exercise considerable power over when and under what conditions they would be emancipated. Such power remained unchecked until 1696, when several laws were created to basically control free Blacks. Free Blacks, presumably more likely to be paupers, were deemed to be not only inconvenient but also financially burdensome on the Commonwealth. Therefore, former owners, who would emancipate their slaves, were obliged to transport them out of the Commonwealth within 6 months. If they failed to provide such transportation, former owners were to pay churchwardens £10 for defraying the expense of transportation. This act did little to limit or curtail the power of emancipation vested in the owners. The Act of 1723, however, did provide "that no person should emancipate a slave but for meritorious services, and by permission of the Governor and Council." This Act remained in effect until 1782, when owners of slaves, by deed or will, could emancipate their slaves. The one proviso

> that all slaves so set free, not being in the judgment of the Court of sound mind and body, or being above the age of 45 years, or being males under the age of 21, or females . . . under the age of 18 years, shall respectively be supported and maintained by the person so liberating them, or by his or her estate; or in default, the Court might order a distress on his estate for that purpose. (*Maria and Others v. Surbaugh*, 1824)

While emancipation was not outlawed, the severity of these Acts significantly curtailed the practice.

The fact that slavery did eventually come into being demonstrates the extent to which colonial judicial and legislative authorities were willing to stretch the legal fabric to suit their purposes. Of interest is the observation that such justifications were being judicially fashioned on the eve of the American Revolution. Thus, in spite of the revolutionary fervor aimed at severing ties with the English Empire, we find Virginia embracing those aspects of the Canon law that would enhance, preserve, and protect the Commonwealth's interest in slavery. Specifically, in the 1772 case of *Robin et al. v. Hardaway et al.*, it was argued that slavery, similar to the English system of villeinage, had its roots in both the common and natural law.

> In fact there is no great difference between slavery in its absolute state, and that species of it called villeinage, known to our common law. This too, derived its origin from the rights of war, the ancestors of the villeins having been originally captives in war. So that this is a plain recognition of that right by our municipal law, under which, therefore, as well as under the law natural, the captor may hold his prize. The laws of 1679 and 1682, particularly, so much complained . . . of, were

> founded on principles of self-defense, and may be considered as proofs of the humanity of our ancestors, who substituted this punishment . . . captives, instead of those cruel deaths they inflicted on ours. (*Robin et al. v. Hardaway et al.*, 1772)

The argument basically rested on the logic that in either self-defense or war, the right to kill ones captive was undisputed. Therefore, slavery was a humane if not civilized way of preserving the life of the captive while still holding them accountable for their actions. If natural law did not suffice, then the law also rested on the observation that

> in the earlier stages of social confederacies, we find this connection between master and servant established. If this had been contrary to the law of nature, it could never have been tolerated under the Jewish theocracy. Yet that it was so tolerated, Holy writ affords us ample testimony. (*Robin et al. v. Hardaway et al.*, 1772)

Because, by implication, God had ordained slavery, not only was it legal but moral as well. As mentioned above, although slavery was not recognized in English cannon law, villeniage was. What this record fails to make clear is that villeniage also had long since been abolished under English Canon law. Ignoring this minor point, colonial courts had found their linchpin on which to hang slavery.

The legal precedents now being established dictated not only the parameters of race but also the legal construction of racism as well. Hence, to the extent that both of these statements prove accurate, we can therefore talk about both race (i.e., racial identities based on skin color) and racism (i.e., differential treatment based on the hierarchical arrangement of race) as being legally constructed.

EARLY COURT DECISIONS AND THE CONSTRUCTION OF RACE AND RACIAL IDENTITY

From the first sets of cases to reach the colonial courts we note that although racial differences are observable, racial equality seems to have been the norm. Initially, White and Black indentured servants experienced relative equality in the English colonies. Going even further, it is apparent that racial identity was legally identifiable; one does not note an initial situation of racism being given legal credence. That is to say, whereas the statutes make explicit reference to both Negroes and Whites (as distinct racial groups), no apparent differences in treatment or circumstance were identifiable based on these racial group designations. The court record, with all its richness, also informs us as to the first Blacks to come into the colonies, their status, and how they were treated. We observe that

> The first Negroes brought into this country were in the year 1619, about the last of August, when a Dutch man of war came in and sold twenty to the settlement. Smith's history of Virginia, 126, note. There was no separate property in lands or

> labor at that time, but all worked together for the common good, and consequently the right to these Negroes was common; or perhaps they lived on a footing with the whites, who, as well as themselves, were under the absolute direction of the president. Beverley and Stith. 182. who takes this on his authority, states the arrival of these Negroes in 1620. But Smith is most to be credited, as he had it from the relation of John Rolfe, a member of the council, and our first secretary, who was on the spot. In 1625, another negro called Brass, was taken in at the West Indies, by one Captain Jones, to assist in working his vessel hither. I find an order of the General court of October 3, 1625, that he shall "belong to Sir Francis Wyatt, then governor, as his servant, notwithstanding any sale by captain Jones, on any challenge by the ship's company." Rot. N. 1. fo. 85. 96. I suppose this order was made on some litigation of the property in the said negro. (*Robin et al. v. Hardaway et al.*, 1772)

With the establishment of the Virginia Company, political and class distinctions also were established. Specific duties and rights were accorded to patrons, masters, and private individuals with respects to subordinates. These subordinates included indentured servants and a racial-designated subclass that was created with indefinite provisions of servitude.

> The Company shall use their endeavors to supply the colonists with as many blacks as they can, on condition hereafter to be made, in such manner, however, that they shall not be bond or held to do it for a longer time than they shall think proper. (Jameson, 1909)

At issue, however, is whether the legal status of these Black servants and those other servants were substantively different. Palmer (1971) asserts that prior to 1630, there was no "evidence of legal distinctions between Negro and white servants in Virginia" (p. 66).

Labor shortages caused many colonial administrators to explore more "creative and permanent" solutions to their problems. The 1662 Virginia Constitution stipulated that the status of a Negro child would be that of its mother, and for the first time, the Virginia Assembly and its Constitution used the term of *slave* (Palmer, 1971). Two years later, the Maryland Colonial Assembly made Negro slavery perpetual. Accordingly, we find

> An act concerning Negroes and other slaves. Sect. 1. Be it enacted by the right honourable the Lord Proprietary, by the advice and consent of the Upper and Lower Houses of this present General Assembly, that all Negroes, or other slaves within the Province, and all Negroes and other slaves to be hereafter imported into the Province, shall serve durante vita, and all children born of any negro or other slave, shall be slaves as their fathers were for the term of their lives. (*Butler v. Boarman*, 1799)

This act also makes all children born of slaves equally slaves. Thus, slavery becomes perpetual. It would take a separate act to sever the humanity from the slave and to make them property. How cruel an act that stipulated,

> So that, were we to consider slaves as real estate purely, those after acquired, would have passed in the present case. . . . But we will now consider what kind of estate they are, and to what rules they are subject. They are neither real nor personal purely, but are of an amphibious nature. Thus they are real where the proprietor dies interstate, but personal in every other instance. They are liable to execution for debts; marriage is an alienation of them; they pass by will as a chattel personal, and no remainder of them can be limited. In the . . . present case, therefore, they should be considered as personal estate, because they resemble that as to their transient nature, and also as to the particular quality now under consideration, to wit, alienation by testament. (*Herndon et al. v. Carr*, 1772)

Thus, slaves, now as form of "amphibious" or fluid property, could be deeded, willed, and declared to be "chattel personal" or movable, living property. Thus, the humanity of the slave was stripped; they had become a thing. Other states would site this Act in their justification for extending "thingness" to their slaves as well (*Glasgow v. Flowers*, 1795). But what is a slave? Again, observing *Peter v. Hargrave* (1848), it is noted,

> Thus, we see that persons in the status of slavery have no civil rights, save that of suing for freedom when entitled to it: they can make no contracts, nor acquire any property: they can obtain no redress by action against their masters or others, for personal injuries: they are in truth civiliter mortuus, and without protection of public authority, except that of the criminal law. (*Peter v. Hargrave*, 1848)

Not satisfied with controlling the present circumstance(s) that the slaves found themselves in, slave-holding Whites also attempted to dictate the future. As early as 1738, court cases can be identified whereby slave holders placed in their wills clauses that laid claim not only to the slave mother but her unborn babies. For example, we note,

> Now the profits are not in esse; they are but a possibility. So the profits that shall be made of any commerce, may be devised, and I can see no difference between a devise of this sort and the devise of a Negro child that shall be born. (*Giles et ux. & Mallecote v. Mallecote*, 1738)

Therefore, unborn children of slaves were viewed as a form of profits that, as with other objects of commerce, could be deeded, sold, invested in, and so forth, much like futures trading in today's marketplace. With these court cases and related legislative acts, the mere possession of Black skin was coincident with discriminatory treatment. The Virginia Act of 1748 made all Africans slaves (*Peter v. Hargrave*, 1848; *Wilson v. Isbell*, 1805), and as a consequence, merely being Black carried with it negative connotations.

> In case of a person visibly appearing to be a Negro, the presumption is that he is a slave; but in the case of a person visibly appearing to be a white man or an Indian, the presumption is that he is free. To this point, the principal case is cited in

> *Fulton's Ex'rs v. Gracey*, 1859; *DeLacy v. Antoine*, 7 Leigh 448; *Gregory v. Baugh*, 2 Leigh 682, 683. (*Hudgins v. Wrights*, 1806)

These same laws excluded all Whites from such a burden. Because paternity was always problematical, maternity was an initial test of who had the right to freedom.

> The sources of the right to freedom are, 1. The white race in the maternal line; 2. The race, in the same line, of American Indians, for the period during which they could not lawfully be reduced to bondage; 3. Emancipation; 4. Descent in the maternal line from individuals so entitled. Emancipation may be, 1. By . . . the voluntary act of the owner, when permitted, and in the mode prescribed by law; 2. By way of forfeiture for the violation or non-observance of statutory inhibitions or regulations; 3. By operation of laws of our sister states within their respective limits, as recognized within our own. (*Peter v. Hargrave*, 1848)

If we understand racism to be the utilization of power to discriminate against others on the basis of group membership, clearly, racism was born in American culture through these court proceedings. Citing from *Peter v. Hargrave* (1848), again, provides further evidence of the cultural construction of racism in that the judge recited,

> These various sources furnish the grounds of claim in suits for freedom; and the denial of them, with the conflicting allegation of uninterrupted bondage as incidental to the servile race of African. (*Peter v. Hargrave*, 1848)

Thus, slavery, "incidentally" was attached to the "servile" race of African. Implicit in the construction of race and racism was this value regarding the race of African.

Slavery, to be profitable, also was linked to the labor needs of an expanding colonial market. It was argued that for this expansion to occur it must be at the expense of Blacks. The institution of slavery seemed to have been even more concerned with controlling the sexual liberties of both Blacks and Whites. The court records demonstrate conclusively that racial inequality also was predicated on sexual inequality. Thus, although being Black was prima facie evidence of being less equal and subject to political, economic, and social discrimination, many fail to acknowledge how sexual exploitation and control also was linked to these discriminatory processes. To a significant extent, racial hierarchies also came into being as a means of controlling who would sleep with whom. Court cases throughout the early 1700s would use the Act of 1705 indiscriminately to punish White women to include their offspring, for daring to love a Black man.

> If any woman servant shall have a bastard child, by a negro or mulatto, or if a free Christian white woman shall have such bastard child by a negro or mulatto; in both the said cases the churchwardens shall bind the said child to be a servant until it

> shall be of thirty-one years of age. (Act of 1705, c. 49. s. 18, see *Howell v. Netherland*, 1770)

Of interest is that this act also removes a slight glitch in previous laws relative to religious freedom. Prior to this act, some confusion existed regarding what was to be done with Baptized slaves. By this act, we further note,

> Baptism of slaves doth not exempt them from bondage; and all children shall be bond or free according to the condition of their mothers and the particular directions of this act. (*Howell v. Netherland*, 1770)

By 1723, even the children of the children of Mulattos were punished with servitude.

> Then comes the act of 1723, c. 4. s. 22, enacting, that where such mulatto bastard, as by law was obliged to serve till thirty-one, shall have a child during her servitude, such child shall serve to the age of thirty-one. This extended the servitude, then, to the second as well as the first generation, and here a binding was not made requisite: the binding of the mother and a birth during her servitude, being sufficient to bring a mulatto of the second generation under the operation of that act. (*Gwinn v. Bugg*, 1769)

In the same year, one can find a similar set of issues and concerns being expressed in a Maryland Court:

> And forasmuch as divers freeborn English women, forgetful of their free condition and to the disgrace of our nation, marry Negro slaves, by such also divers suits may arise touching the issue of such women, and a great damage befalls the masters of such Negroes for prevention whereof, for deterring such freeborn women from such shameful matches. Be it further enacted . . . that whatever issue of such freeborn women so married shall be slaves as their fathers were. (*Butler v. Boarman*, 1799)

The next step in the legal creation of race occurred as Southern states legally separated poor Whites from poor Blacks. This division served the interests of the elite by dividing the source of potential threats to their hegemony by aligning the interests of poor Whites with that of their own. Virginia, in the mid-17th century, went farthest by

> condemning the practice of white women intermarrying with Negroes, by which means also divers suits might arise touching the issue, &c. enacts, that whatsoever free-born subject woman should intermarry with any slave from and after the last day of that Assembly, should serve the master of such slave during the life of her husband, and that all the issue of such free-born woman so married, should be slaves as their fathers were. (*Butler v. Boarman*, 1799)

Stiff fines (10,000 pounds of tobacco) also were levied against both masters, mistresses who may encourage this practice, and those ministers performing the actual marriage. The fines were to be equally divided between the Lord Proprietary and the informer. All forms of intergroup relations were prohibited between Blacks and Whites in furtherance of the social construction of race. Of further interest is the observation that no similar provisions were made for English men similarly predisposed. These laws became even more odious in that they recognized the children of Black men to be uniquely classified as slaves. Observe the language in *Pirate v. Dalby* (1786):

> In England there was formerly a species of slavery, distinct from that which was termed villenage. Swinb. p. 84. 6. Edit. is the only authority I remember on this point, though I have before had occasion to look into it with attention. But from this distinction has arisen the rule, that the issue follows the condition of the father; and its consequence, that the bastard is always free; because, in contemplation of law, his father is altogether unknown, and that, therefore, his slavery shall not be presumed, must be confined implicitly to the case of Villeins. It would, perhaps, be difficult to account for the singular deviation on the law of England, from the law of every other country upon the same subject. But it is enough for the present occasion to know, that as villeinage never existed in America, no part of the . . . doctrine founded upon that condition, can be applicable here. The contrary practice has, indeed, been universal in America; and our practice is so strongly authorized by the civil . . . law, from which this sort of domestic slavery is derived, and is in itself so consistent with the precepts of nature, that we must now consider it as the law of the land. (*Pirate v. Dalby*, 1786)

This case legally establishes the slave status of any issue whose father was Black. Note that this case clearly presumes that the status of such a Black father was that of a slave, unless otherwise noted. This is just the opposite of the practice in England, where they would not dare "presume" the status of slavery. If one were to go through the cases on "illegitimate" children in the Virginia Court record, one would note that this presumption is only applied to those cases where the father was presumed to be Black. These court cases and laws were interested in more than controlling slaves but sexuality. We should note that race, racism, and sexual controls are all interwoven.

The politics of race and racism aims at controlling who has access to sexual rewards and privileges. The fact that the only persons, according to the above cases, who were free to choose their sexual partners were White men is evidence of the political motivations behind the development of racism in this country. Race, racism, and racialized systems serve to preserve certain rights for one group at the expense of others. In that these rights gradually became defined as values and imbued in such cultural institutions as marriage and family, church and state, economy and community, it is clear that these represent cultural features of the American experience.

The gradual development of the system is further documented in law. Again, the Virginia Court cases provide illumination:

> 1670, c. 12. Purv. 172. "an act concerning who shall be slaves." The words of it are, "whereas some disputes have arisen whether Indians taken in war by any other nation, and by that nation that takes them sold to the English, are servants for life or term of years; it is resolved and enacted, that all servants not being Christians, imported into this country by shipping, shall be slaves for their life time, but what shall come by land shall serve, if boys and girls, until thirty years of age, if men and women, twelve years and no longer." (*Hudgins v. Wrights*, 1806)

Again, this case makes reference to the obligation to be "servants for life"; thus, they were made into slaves. Virginia Supreme Court records indicate that by 1682, the full-scale institution of slavery, to include the importation, capture, and sale of slaves, was legally sanctioned. Of interest again is the fact that only persons of color could hold this ignoble distinction. As indicated,

> In 1682, it was declared that all servants brought into this country, by sea or land, not being Christians, whether Negroes, Moors, mulattoes, or Indians, except Turks and Moors in amity with Great Britain; and all Indians which should thereafter be sold by neighbouring Indians, or any others trafficking with us, as slaves, should be slaves to all intents and purposes. The General Court held . . . that passing the act authorising a free and open trade for all persons, at all times, and at all places. (*Hudgins v. Wrights*, 1806)

The store was open; the trade in these humans was legal "at all times" and "at all places." The primary purpose of this act was to extend the categories of who could or were defined as slaves. It is noted that included in this list are essentially all persons of color who had come into contact with the Britons. Of particular interest is also how Native Americans were so classified. This act made slaves of all Indian servants imported by sea or land and of all Indians sold as slaves by other Indians trafficking in this state. One need not be too creative to think of the various ways by which Indian servants could be "imported by sea or land."

Greater refinements to these developments are also found in Maryland Court cases, where we note that punishments extending past condition of servitude include stigma associated with the Negro or Black race in general (*Butler v. Boarman*, 1799). What is even more damning in these cases is the observation that even the offspring of servants or slaves are now classified as slaves. Put simply, slavery has now become a perpetual institution.

> By the act of 1715, c. 44. sect. 26, 27. the issue or children . . . of white women by Negroes are to be servants until they arrive to thirty-one years of age, the mother to be a servant for seven years, to be adjudged by the court. (*Butler v. Boarman*, 1799)

The legal rights of Negro and Mulattos (regardless of whether free or slave) were further restricted in the act of 1717. Here we note that

> By the act of 1717, c. 13. no negro, mulatto slave, free negro or mulatto, born of a white woman during the time of servitude by law, to be admitted evidence where a white person is concerned. (*Butler v. Boarman*, 1799)

The development of negative stereotypes, stigmas, and immoral denotations are well developed in the acts of 1728. According to the preamble to the act of 1728, the copulation between White women or free Mulatto women and Negro men was not only unnatural but also inordinate. Furthermore, it is noted that

> By the act of 1728, c. 4. such free mulatto women having children by Negroes and their issue, to be subject to the same penalties that white women and their issue are. Ib. sect. 3. Free negro women, having bastards by white men, and their issue, to be subject to the same penalties that white women are for having children by Negroes. (*Butler v. Boarman*, 1799)

This last act is extremely important. Although it still penalizes the offspring of interracial unions, it further penalizes "free Negro women" for interracial sexual relations with White men; it apparently holds White men blameless in the process. No penalties are suggested to be associated with their actions. The results of this are many and far-reaching. By implication, the issue of such a union is by definition "bastards." Bastards hold no legal claim to their father's property. Also by implication, it is the woman in both cases who is to be punished. The effect of these various acts is to provide total access to the bodies of both Black and White women to White men, and to deny access to White women, free Negro, and Mulatto women to Black men. Racially devised sexual pecking orders, allowing White men total access, have now been legally established.

The attitude of the day is well preserved in the Virginia Statute of 1682, which made slaves "of all servants brought or imported into this country by sea or land. Whether Negroes, Moors, mulattoes or Indians . . . whose parents . . . were not Christians, at the time of first purchase of such servants by some Christians" (*Robin et al. v. Hardaway et al.*, 1772). Such laws were still on the books just 20 years before the American Revolution, where we observe again in Virginia Law prohibitions aimed at "prevent(ing) that abominable mixture of white . . . men or women with Negroes or mulattoes, whatever white man or woman being free, shall intermarry with a negro or mulatto, &c. shall be committed to prison, &c" (*Howell v. Netherland*, 1770).

Still other researchers have concluded that one of the primary functions of slavery was to coercively discourage interracial sexual liaisons (see, e.g., Bardaglio, 1995; Jordan, 1968). In post–civil war America, lynching would accomplish the same mission.

The U.S. Constitution called for all states to impose restrictions on the slave trade within 20 years of its signing. Therefore, Virginia and other states, in anticipation of this, began grappling with these issues. The Virginia Assembly, as early as 1792, passed provisions that declared,

> Slaves which shall hereafter be brought into this commonwealth, and kept therein one whole year together, or so long at different times as shall amount to one year, shall be free. (*Scott v. London*, 1806)

Rather than settling the issue, this act and others only acerbated it as the federal and state court system hemorrhaged with cases from all camps challenging or asserting the right to racially determine access to liberty, such as in the North Carolina Court, in the case of the *State v. Mann* (1791), that the master has absolute and uncontrolled authority over the life of the slave.

A BRIEF NOTE ON THE NORTH AND THE SUPREME COURT IN THE EARLY CONSTRUCTION OF RACE AND RACIAL IDENTITY

Clearly, as this nation proceeded toward independence, it had already accumulated a sizeable body of judicial precedents establishing not only race but also racial disparities. The problem for the federal courts, as indicated above, was that decidedly divergent views had been developed in separate state courts. Northern and Southern High Courts had developed radically different views regarding both race and racial differences. Although racial disparities were legally justified in both systems, judicial disputes often arose because of varying state precedents. Thus, the role of the U.S. Supreme Court was explicitly defined to adjudicate such disputes. From the very first session, the Supreme Court has grappled with issues of race, racial identity, and racial privilege (or racism). Often, the Court attempted to simply apply the standard applicable in a particular state from which the case had arisen. Therefore, although the Court gave the appearance of trying to be neutral, it nevertheless in its rulings not only clarified but also justified racial designations and thus disparities. Specifically, in 1787, Supreme Court decision by Chief Justice M'Kean, citing Virginia law as the precedent, states the majority's argument,

> The issue is whether the plaintiff is a freeman or a slave. If the jury think, from the evidence, that the plaintiff's mother was a slave at the time of his birth, according to the laws of Virginia, where he was born; we will point out the legal consequence that flows from the establishment of this fact.
>
> Slavery is of a very ancient origin. By the . . . sacred books of Leviticus and Deuteronomy, it appears to have existed in the first ages of the world; and we know it was established among the Greeks, the Romans, and the Germans. In England there was formerly a species of slavery, distinct from that which was termed villenage. Swinb. p. 84. 6. Edit. is the only authority I remember on this point, though I have before had occasion to look into it with attention. But from this distinction has arisen the rule, that the issue follows the condition of the father; and its consequence, that the bastard is always free; because, in contemplation of law, his father is altogether unknown, and that, therefore, his slavery shall not be presumed, must be confined implicitly to the case of Villeins. It would, perhaps, be difficult to account for the singular deviation on the law of England, from the law of every other country upon the same subject. But it is enough for the present occasion to know, that as villeinage never existed in America, no part of the . . . doctrine founded upon that condition, can be applicable here. The contrary practice has, indeed, been universal in America; and our practice is so strongly authorized by

> the civil . . . law, from which this sort of domestic slavery is derived, and is in itself so consistent with the precepts of nature, that we must now consider it as the law of the land. (*Pirate v. Dalby,* 1786)

What is remarkable is the extent to which U.S. law diverged from English Cannon Law. Note, while citing such law, the Court acknowledged that under the system of villeinage, the condition of the father dictated the status of the child. Just the opposite of this practice was universally considered "as the law of the land." Again, when we recall that the force of previous law was to punish White and Mulatto women for having sexual relations and children with Black men, White men were held harmless. Not only harmless but, as this case established, they were actually encouraged to increase their property by participating in this practice.

Fear of Blacks was at the heart of some of the racist sentiments, court rulings, and court cases that developed. For example, several Southern States, fearful that free Blacks originating from places where slave rebellions had occurred, barred their entry. Consequently, Blacks from the West Indies were barred from entering Georgia in 1793, South Carolina in 1794, North Carolina in 1795, and Maryland in 1797 (Jordan, 1968, pp. 380-382). Judicially, this fear was expressed in such cases as *Smith v. Turner* (1849), where it was argued,

> And it may be remarked here, that the very act of Congress before referred to proves that the whole power of regulating or prohibiting the importation of persons is vested exclusively in the general government. It was passed upon a petition from North Carolina, setting forth that the French had set free their slaves in Guadaloupe, and the aid of Congress was invoked to protect the institutions of the South from the dangerous contact of free persons of color. The State felt its want of power over the subject. She knew it was vested in Congress alone, and to Congress she turned . . . for relief. That body immediately prohibited the "importation" of "negroes, mulattoes, and persons of color," free as well as slaves, into any State which by law had prohibited or should prohibit the importation of any such person or persons. And this act sanctioned to this day the legislation of the Southern States, to a great extent, upon this very subject. (*Smith v. Turner,* 1849)

The concern was that free Blacks might "inevitably produc[e] . . . the most serious discontent, and ultimately leading to the most painful consequences." The ruling also stated, "I cannot imagine any power more unnecessary to the general government, and at the same time more dangerous and full of peril to the States" (*Smith v. Turner,* 1849).

As the Nation came closer and closer to the 1808 constitutional prohibition on the importation and sale of slaves, the fissures became ever more apparent. Strange, although the intent of the Constitution was to gradually abolish the importation and sale of slaves, the judicial system seemed hell bent on preserving and maintaining the system. Thus, in the case of "The Negro London" who sought his freedom, the U.S. Supreme Court reversed a lower courts ruling granting such. Writing for the majority, Chief Justice Marshall wrote,

> The owner must be a person "inclining to remove into the state," at the time the slave was brought in. This inaccuracy [is] founded on the idea [that] forfeiting the property, accrues on bringing the slave into the state, whereas, it attaches on his continuance in the state for twelve months. Till such continuance has taken place, the offence has not been committed. (*Scott v. London*, 1806)

In this case, the Court established the precedent that slaves could be rented or used across state lines as their master saw fit. The loophole in the Virginia law was that such use could not exceed 12 months. The Supreme Court not only upheld this loophole but also the continuance of slavery in the process. Several dozen cases that followed, from a variety of states, would not alter the basic nature and structure of slavery in the United States. For this reason, the civil war became more and more inevitable.

It should be understood that although the majority seemed steadfast in its support of slavery and racism, there was a minority that constantly challenged their fellow Justices to assert the dignity of Blacks and the basic inhumanity of racism and, hence, slavery. Justice Duvall, against slavery and against his colleagues on the High Court, argued,

> And people of color from their helpless condition under the uncontrolled authority of a master, are entitled to all reasonable protection. A decision that hear-say evidence in such cases shall not be admitted, cuts up by the roots all claims of the kind, and puts a final end to them, unless the claim should arise from a fact of recent date, and such a case will seldom, perhaps never, occur. (*Queen v. Hepburn*, 1813)

The Act of 1823 also provided a means by which free Blacks could be forced into slavery.

> By an Act which passed on the 21st February, 1823, be it is enacted in the 3d section, that "when any free negro or mulatto shall be convicted of an offence, now by Law punishable by imprisonment in the Jail and Penitentiary-house for more than two years, such . . . person, instead of the confinement now prescribed by Law, shall be punished with stripes, at the discretion of the jury, shall moreover be adjudged to be sold as a slave, and transported and banished beyond the limits of the United States, &c." (*Attoo v. Commonwealth*, 1823)

Again, particular attention should be directed to the form of punishment exclusively reserved for free Blacks or Mulattos. They could be beaten, sold into slavery, and banished from the United States. One can only wonder about how effective the banishment was, or if it was merely a device to increase the profits of slavers still operating within the United States.

No other person in America was required to continually prove their legitimacy, their rights to liberty, or their humanity (*Hudgins v. Wrights*, 1806). The final travesty of justice came when the Virginia Supreme Court held that the

presumption of law was that people of African descents were slaves (*Fulton's Ex'rs v. Gracey*, 1859).

Although much of what we have come to know regarding race, racialized structures, and racial identity have been forged on a Southern frame, the North was not silent throughout this process. The Massachusetts Bay Puritans, in 1641, past the rhetoric of our history books, were more concerned with political expediency than political freedoms. In the process of abolishing bond slavery in its *Body of Liberties*, it also somewhat hypocritically still defined slaves as "those lawful captives taken in just wars, and such strangers as willingly sell themselves or are sold to us" (Blaustein & Zangrando, 1968). After the Revolution, Northern states slowly allowed for emancipation. This process was by necessity slow because most all of these states provided that the children of current slaves (who were not first sold to Southerners) could become free only after they had labored an average of 28 years (Freehling, 1994). Although the Mennonites of Pennsylvania, believing that slavery violated Christian principles, in 1688 were the first in this country to protest this evil system, the first court cases that successfully challenged the system in William Penn's colony did not occur until the period immediately preceding the Declaration of Independence. The Quakers would lead this charge, as Pennsylvania became the center of the abolitionist movement in this country. Pennsylvania law presumed that persons were guaranteed liberty regardless of race or color. Indeed, this state and its people seem to have been very far ahead of the rest of the nation when it declared,

> In other countries, a black or sable hue were deemed presumptions of slavery: happily here it is otherwise. There is no ambiguity in the penning of this law. In all the sections preceding the 7th, where Negroes or mulattoes are spoken of, they are described as slaves or servants, but this clause has no such distinguishing characters. The words are, any negro or mulatto generally, which will comprehend as well slaves and servants, as freemen of that color; and this more fully appears by the report of the committee of the house of assembly on the 8th March 1788. (*Respublica v. Richards*, 1795)

Many of these cases derived from the 1780 Pennsylvania Act for the gradual abolition of slavery. The spirit of this act is found in a 1797 State Supreme Court case where the court would not

> entertain (any) leanings between "the different works" of an Almighty hand; "essential justice respects not suitors of a white, tawny or black colour." But if a distinction must necessarily be set up, it ought infallibly to be in favour of liberty. (*Respublica v. Blackmore*, 1797)

Pennsylvania courts would repeatedly rule that color or complexion could not be used to justify differential access to justice, equality, and freedom.

These acts and Court rulings affirmed that slavery was immoral and therefore held no legal claims within the state. This being said, the Court refused to overturn portions of the act that reaffirmed limited slavery.

> Free Negroes or mulattoes can be bound here as servants until 21 years of age, but no longer; but those who have been bound in other states and brought into this state, may be compellable to serve until 28 years old, according to the terms of their indentures. (*Respublica v. Gaoler of Philadelphia County*, 1794)

Several dozens of cases, brought by young Blacks seeking the blessings of liberty, sought to challenge these provisions. These cases again demonstrate the fact that Blacks were not willing or passive participants in this system. These laws presumed that Negroes and/or Mulattoes were by definition less capable of sustaining themselves or their children. Strangely, now they would be forced into indentured servitude until the age of 28 for their own good. These laws continued the status of Blacks as distinct people.

Separate or dual legal status of Blacks continued throughout the states. This separate or dual legal status preserved the unequal access to freedom, power, and resources typically available to other Americans. The laws presumed that Blacks, whether slave or free, were to be treated differently than Whites. Their status was always subject to challenge by courts and others. The response of Blacks to this duplicity, although varied, was nonetheless consistent. A slave, simply known as Toby, exemplifies the tenacity of slaves to use "whatever means necessary" to secure their freedom.

> The negro was the slave of general John Sevier, of the South Western Territory, and was purchased and retained by him as such for eight or nine years. He was put under the custody of major Sevier his son, to attend him on a visit to Philadelphia, in the month of January 1794. In April following, shortly before the major's return home, Toby absconded, but being discovered, was sent over into New Jersey. Major Sevier, and the defendant his brother in law, also crossed the Delaware. . . . The negro attempted to escape from them, but was pursued, and being overtaken, was struck several times by both, and was sent against his will to Gloucester, and from thence to his master's place of abode by the defendant. The defendant acknowledged, that he had sent the negro over into Jersey to compel him to return home. (*Respublica v. Richards*, 1795)

The court, by siding with his master, refused to consider either the legitimacy or the humanity of Toby. The determination of Pennsylvania courts to abolish slavery, however, should not be dismissed. Not only did the courts consistently rule in favor of slaves but also held former owners to be liable. For example, we note that in *Jones v. Conoway* (1804), the court determined,

> The true rule in assessing the damages seems to be, by fairly estimating the yearly services of the negro during the time he was held by the plaintiff, and deducting thereout his clothing, maintenance, and other necessary expenditures. As far as this balance exceeds the yearly interest of the consideration money, it should go

> towards the payment of the principal sum. For the residue, together with the 100 dollars damages, and 18 dollars and 59 cents costs and a reasonable sum for defending the action of replevin, and interest on the different sums, the plaintiff appears entitled to a verdict, as the fair measure of his damages.

Drawing on English custom and laws, the Pennsylvania laws of 1790 went further than any of the Southern colonial laws in that it required the former owners to provide for "freedom dues" or a settlement. Thus, former slaves would not be a burden on the township to which they would be manumitted. Former slaves brought several cases throughout Pennsylvania in an effort to secure their freedom dues. One such case in 1810, reaching the state's Supreme Court, asserted,

> But the law . . . for the abolition of slavery compels the master to maintain the slave unless he manumits him before twenty-eight, and therefore no settlement is necessary. (*The Overseers of the Poor of Forks Township in Northampton County v. The Overseers of the Poor of Catawessa Township in Northumberland County*, 1810)

It was obviously in the interest of the particular Township to ensure that former owners paid such settlements, because otherwise such responsibilities by law fell on them. In 1788, New York went even further by declaring

> that if any person shall sell as a slave within this State, any negro or other person, who has been imported or brought into this State, after the 1st June, 1785, such seller, his factor or agent, shall be guilty of a public offence, and shall forfeit £100, and the person so imported and sold shall be free. (*Sable v. Hitchcock*, 1800)

Nationally, it is interesting that even in cases where the Constitutional ban on the importation of slaves was explicitly violated, the Court was reluctant to rule in such a way as to challenge slavery. This reluctance is clearly seen in the case of *The Brigantine Amiable Lucy v. United States* (1810). Briefly, the Lucy had been ordered forfeited as a consequence of its captain bringing slaves into the port of Orleans. The Court, ruling on the technicality that the Territorial government had not passed any specific laws banning the importation of slaves, held the owners and captain harmless. This is interesting given the supremacy of U.S. Constitutional law to either state and especially territorial law. Nevertheless, the Court ruled,

> inasmuch as the territorial legislature of Orleans had never prohibited such importation, the act of the 28th of February, 1803, did not apply. If the territory is to be assimilated to a state, so as to bring the case within the spirit of the law, yet, there must have been a prohibition by the territorial legislature, to make it a parallel case. (*The Brigantine Amiable Lucy v. United States*, 1810)

The status of Blacks consistently was the subject of Supreme Court cases. The Court, asserting the sovereignty of states in certain matters, strove to rule in such a way as to affirm this sovereignty. Therefore, when a case regarding racial

segregation, slavery, and so forth, arose from a state where slavery was legal, the Supreme Court ruled in favor of the state. Similarly, Federal Courts (especially the Supreme Court) attempted to steer a path down the middle, avoiding at all cost any hint of challenging state sovereignty. What we find, therefore, in these earliest of Federal Case narratives, are ambivalent tendencies both asserting the legality and the illegality of slavery, racial caste, and racialized social structures.

It would take a civil war and the lives of countless Americans to eliminate this cruel institution. Although the institution of slavery would be eliminated, the parameters of race and racialized social structures would remain intact as new forms and types of race law came into being. Although beyond the scope of this article, it is evident that these race laws were in all respects no different in temperament, substance, and intent than those that preceded them. In point of fact, just 5 years before the end of the 19th century, the Supreme Court would once again reaffirm this nation's belief in racial inequality, racialized social structure, and race when it upheld a Louisiana statute requiring the segregation of White and Black people in railway cars in *Plessey v. Ferguson* (1896). This case set the stage for the next century where Du Bois would argue that the crises of the 20th century would be the crises of the color line.

CONCLUSION

We are now in a position to make the following conclusions. The cultural production of race, racism, and racialized systems of oppression operate significantly within multiple institutional systems within America. Legal decisions, more than laws themselves, provide a unique view into the values, mores, institutions, and attitudes that serve to define and structure historical processes, behaviors, and events. The fact that race, racism, and racialized systems of oppression have existed for more than 300 years within America suggest that they are more then just social phenomenon. Rather, their longevity suggests that race, racism, and racialized systems are part of the very cultural fabric of America. One of the primary vehicles by which these factors have been produced has been within the legal system. Particularly, legal discourse found in the court transcript allows for the observation of how racial, racist, and racialized ideologies were generated.

America, to the extent that it is a nation of laws, must be understood within the context of these laws. Unfortunately, these laws have not always conformed to the ideals associated with the principles of "life, liberty, and the pursuit of happiness." Quite the contrary, the laws often have intentionally denied these democratically inspired principles to many of its people. Through much of our history, the law has served to protect a racialized elite from competition from another racialized nonelite. Race and racialized sociopolitical systems of inequality have served to structure American society since its inception. Ignoring the rhetoric of freedom, justice, and equality for all, America developed laws

that were distinctively racial in character, substance, and operation. These race laws served to define racial identity, which in turned defined who could marry whom and where one could eat, sleep, live, and work. These race laws also defined not only the quality but also the quantity of liberty. They defined how and how much pursuit of happiness would take place by whom, and they distributed the blessings of liberty according to a predetermined racial hierarchy. This article also demonstrated the exact period, conditions, and processes whereby racism and racist social structures came into being. The argument that these have always been in existence is hereby dismissed.

Finally, this article demonstrates the interplay beetween material greed and sexual obsessions helped produce the climate that allowed for the creation of both racism and racialized social structures. These observations lead to the conclusion that a "frank and honest discussion" that does not take into consideration the economic justifications and sexual components of racism and racialized social systems will not advance their elimination. Even if the laws were on the surface equally applicable to all, how these laws were enforced and interpreted often was a source of unequal treatments. For this reason, the student of inequality also has investigated the functioning of both enforcement and judicial bodies. This article has demonstrated that the sociological imagination applied to Court Record provides unique insights into the legal construction of race, racial identity, and racism, as exemplified in Court documents. Particularly, it has shown that throughout the American experience, the Constitution and the Courts have functioned in many ways to not only interpret but also to underscore American views on race and racial identity. When we observe that slavery, race, racism, and racialized cultural systems developed in a time when freedom, justice, and liberty were on the rhetorical horizon, we can only conclude that it was an impossible decision made under impossible circumstances. Such, however, was the reality of our collective insanity.

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