9 ◂▸ *Paul Finkelman*

CRIMES OF LOVE, MISDEMEANORS OF PASSION

The Regulation of Race and Sex in the Colonial South

From the beginning of European settlement sexual activity in the South was multiracial. In the first years of the Virginia colony almost all the settlers were male. This was generally true in other southern colonies as well. Thus, while this essay focuses mostly on Virginia, the patterns I discuss apply to other places as well.[1] Just as Virginia led the way in creating slavery in what became the United States, so too did the first colony lead the way in stigmatizing and criminalizing love, and sometimes sex, between the races. Thus, in trying to understand the contours and twists of the "devil's lane," it is both appropriate and necessary to begin in Virginia.

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Throughout the seventeenth century there were far more European men than European women in Virginia. The first three boats to arrive at Jamestown had only men on them. Women began to trickle in after 1608, but they were few in number. In the 1630s, for every six men sailing to Virginia only one woman embarked. By the 1650s, the ratio of emigrants was down to three to one.[2]

Given the paucity of white women, it is not surprising that early on some Englishmen had relations with Native American women. Most famous was John Rolfe who married Chief Powhatan's daughter, Pocahontas. This high-level union between an Indian "princess" and an English leader had obvious political implications. But Rolfe's affection for his bride seems to have been

genuine. His eager courtship suggests that English attitudes toward race were hardly firm or preconceived in the early seventeenth century. Indeed, even in the twentieth century, Virginians displayed an unexpected tolerance for Indian heritage among people who were otherwise "white."[3] This tolerance of some Indian "blood" was necessary because more than a few "white" Virginians in fact had some Native American ancestry. Nevertheless, for a variety of reasons, including Indian disinclination to choose English spouses, there were in the end relatively few Indian-English marriages in early Virginia.[4]

The arrival of Africans broadened the base for this multiracial society; whites and blacks developed liaisons that flowered into love and marriage. This happened among all classes of whites, but increasingly interracial marriage blossomed between servants. Starting in the 1620s, a growing number of blacks, as slaves and servants, worked side-by-side with white indentured servants. English indentured servants accepted black co-workers with little regard for their race, and "the unfamiliar appearance of the newcomers may well have struck them as only skin deep." As Edmund Morgan has noted, "The two despised groups initially saw each other as sharing the same predicament. It was common, for example, for servants and slaves to run away together, steal hogs together, get drunk together. It was not uncommon for them to make love together."[5]

These interracial affairs of the heart affected only a few people. The small number of interracial relationships may have been mostly a result of the relative shortage of women in early Virginia. White men always outnumbered white women in colonial Virginia. In 1625, when all but a handful of the settlers were white, an incomplete census found that there were nearly six men for every woman in the colony. By the end of the century the white population of the colony was still 60 percent male, and among adults it may have been as high as 70 percent male. Gary Nash notes that in comparison to the colonies in Latin America and the Caribbean, sex ratios among whites in Virginia were almost reasonable. But, for the third or more of Virginia's white males who were unlikely to find a European wife, the fact that they were not as poorly situated as their Caribbean counterparts offered little consolation. Black men were even worse off. In the seventeenth century they outnumbered their female counterparts four to one, and for at least the first two decades of the eighteenth century, two new African males arrived for every new female.[6] Given these demographic constraints, lack of opportunity, if nothing else, limited interracial romance in the early colonial period.

But opportunities did present themselves, and men and women of both races, to paraphrase George Washington Plunkett, "seen their opportunities and they took 'em." In 1656, Elizabeth Key, a woman of mixed ancestry, married her white attorney, who had successfully sued for her freedom. At about the same time Francis Payne, a free black male, married a white woman, while sometime before 1671 Francis Skiper, a white man, married a black woman. Scattered records suggest other marriages between whites, of both sexes, and blacks of both sexes. Sex was of course not limited to marriage. In 1649, a white man and a black woman did public penance in Norfolk for "fornication." Between 1690 and 1698, at least seven white women were punished in

just Westmoreland and Norfolk Counties for bearing mulatto children. Similarly, between 1702 and 1712 white women gave birth to nine illegitimate mulattoes in Lancaster County.[7]

In early Virginia, there were enough instances of interracial sexual liaisons to trouble the authorities, once they decided that such relationships threatened the social order. This fear did not emerge, however, until notions of race were directly tied to status and political power. As the number of exploited workers grew in Virginia, the leaders of the colony became increasingly fearful of a servile rebellion. After 1660, when the black population began to grow more rapidly, the fears of the elite increased. As Edmund Morgan has persuasively argued, racism became a tool for driving a wedge between the black and white segments of the lower classes. After Bacon's Rebellion, in 1676, the "wave of the future" in Virginia was to "subdue class conflict by racism" that "would sweep Virginians into their paradoxical union of slavery and freedom in the eighteenth century."[8] A major component of this creation of racism was the concerted effort of the Virginia House of Burgess to prevent or control interracial sexual relations.

The fear and ultimately the criminalization of interracial sex also stemmed from the creation of slavery. Slavery was unknown in English law.[9] Virginians initially legitimized bondage because the slaves were "heathens," who had been purchased as slaves in their own country. A traditional defense of slavery was that "captive heathens" were "really unfit for freedom." As early as the thirteenth century, Europeans began to conclude that "true slavery was appropriate only for pagans and infidels." Initially Virginia applied this rule to Africans. Those who were Christian and "civilized" might be treated as other Englishmen. Thus, in 1624, a Virginia court allowed a black named John Phillip to testify in a proceeding involving whites because he was "A negro, Christened in *England* 12 years since."[10] However, by the 1660s this justification for slavery made no sense. Some masters, prodded by conscience or the Anglican clergy, baptized their slaves. Similarly, some Africans saw conversion as a way out of their bondage and willingly accepted Christianity. In 1667, the Virginia House of Burgesses solved this potential problem with a law "declaring that baptisme of slaves doth not exempt them from bondage."[11]

As religion and foreignness receded as justifications for slavery, color or race took over. If slavery was tied to color, then racial separation had to be maintained. Otherwise, it would soon become impossible to tell the slaves from their masters. Often laws reflect social norms. This may have been the case when colonial Virginia began to proscribe interracial sex. However, the evidence suggests that the process was reversed. Virginia's lawmakers quite deliberately set out to alter social norms involving sex, in order to encourage racial separation to both justify enslavement and encourage landless whites to believe that they could rise in the social hierarchy at the expense of blacks. Once legal mechanisms made it clear that interracial sex came with penalties, it was only a small step to the development of social norms that precluded, or at least frowned on, such relations.

The earliest regulation of race and gender had little to do with sex or love; it was, oddly enough, a tax law. In 1643, the House of Burgesses provided that black women servants would be taxed at the same rate as male servants. White female servants remained untaxed.[12] This law was probably a recognition that most African women were being used as field servants and should be taxed accordingly. This law did not directly affect the black women, since their masters paid the tax. But, because the master had to pay taxes on African women as though they produced as much as European or African men, the master had a strong economic incentive to send African women into the tobacco fields, even if that was not his initial intention when he purchased them.

In hindsight, this law can be seen as the beginning of a distinction between black and white women. Unlike white women, black women—so the law seemed to say—were fit only for the fields. While initially designed to reflect the kind of work African female servants and slaves did, this statute had the pernicious affect of lowering the status of blacks within Virginia society. These extra taxes created a "cost of color"—a sort of civil penalty for being black. This made life more difficult for free blacks who also had to pay this tax. If they could not afford this cost, then they presumably would have been sold into temporary servitude until the amount was paid.

This law also placed a tax on interracial marriage between white men and black women. At the time this law was passed, such marriages were legal. Thus, the 1643 law led to the bizarre outcome that Francis Skiper, a white Virginian, had to pay a tax for his black wife Ann.[13] He would not have had to pay a similar tax for a white wife. Presumably other white men who married black women also faced this marriage tax.

In the next two decades the Virginia lawmakers seem to have ignored the small, but growing, number of black women in the colony. However in this period Virginia, for the first time, openly acknowledged the existence and legality of racially based slavery. Once recognized, the institution had to be regulated. The status of black and mulatto children and the increase in interracial sex that came with a growing black population, called for special legislation.

In 1662, Virginia took its most important step in stamping the mark of the law on people of African ancestry. The title of the act—"Negro womens children to serve according to the condition of the mother"—only partially explains the nature of the law. The full statute provided:

> WHEREAS some doubts have arrisen whether children got by any Englishman upon a negro women should be slave or ffree, *Be it therefore enacted and declared by this present grand assembly*, that all children borne in this country shalbe held bond or free only according to the condition of the mother, *And* that if any christian shall committ ffornication with a negro man or women, hee or shee soe offending shall pay double the ffines imposed by the former act.[14]

This statute applied to black human beings the civil law concept of *partus sequitur ventrem*—which William Blackstone accurately explained meant that: "Of all tame and domestic animals, the brood belongs to the owner of the dam or mother." The law was a clear break from the English common law rule that a child follows the status of the father (*partus sequitur partem*).[15]

Despite the origin of this rule, it would be wrong to assume that the Virginia Burgesses had purposefully dehumanized blacks by saying that the children of black women should be treated, in term of their status at law, in the same way animals were treated. Rather, this law should be seen for what it was: an attempt to regulate the emerging social and economic institution of slavery in a way that would be most beneficial to the master.[16]

Any other rule would have created great problems for social relations. As William Wiecek has noted, "To permit these mulatto offspring to take the status of their father would not only be an anomaly—a slave woman raising her children to freedom presents obvious difficulties—but it would also lead to an unthinkable blurring of racial and social lines in a society that viewed miscegenation as a 'stain and contamination' to white racial purity."[17]

Such problems would not have been insurmountable. Under common law, children took the status of their fathers, and so bound women had raised free children in Britain. Similarly, under ancient Jewish law slave women raised the free children of their nonslave partners. But, neither bondage in Britain nor slavery in other societies outside of the New World were tied to race. However, the Virginia master class could only justify enslavement—and create bondage—by tying race to status. The "stain and contamination" of race may not have been a normative value by 1662, but clearly the legislature hoped to make it one.

This law also had an important economic component. In his *Commentaries on the Laws of England*, Blackstone explained that *partus sequitur partem* evolved as a rule for determining who owned the offspring of domestic animals because with animals the "male is frequently unknown" while "the dam, during the time of her pregnancy, is almost useless to the proprietor . . . wherefore as her owner is the loser by her pregnancy, he ought to be the gainer by her brood."[18] Of course the father of the children of black women was usually ascertainable, although social pressures might have militated against any serious attempt to determine paternity. Bnt the notion of recompense for the loss of service during pregnancy made sense to the emerging slaveowners in Virginia.

In this law the twin engines driving Virginia toward slavery—racial difference and economic gain—merged over regulations of law, sex, and procreation. Most whites assumed (incorrectly) that mulattoes were always the offspring of white men and black women. Thus, the 1662 law helped lead to a presumption of enslavement for all blacks, to be rebutted only by showing that the mother of the person in question had been free.

In addition to striking at the uncertain status of children of mixed parentage, this law was designed to prevent miscegenation itself. Declaring that a man's child would be a slave if the mother was also a slave would not necessarily lead white men to decline to have sex with slave women—indeed, it could

have been an incentive. By predetermining the status of a possible offspring, white men might have been *less* concerned about the outcome of their sexual adventures. Slaveowners were unlikely to bring bastardy charges against white fathers, because the masters, after all, would gain the value of a new slave. Furthermore, the main social (as opposed to moral) reason for bastardy laws was to make sure that illegitimate children would be fed, clothed, housed, educated, and prepared for adult life. The 1662 law obviated all these problems for the bastard children of slave women and white men: the owner of the woman would pick up the tab and be handsomely recompensed by the value of the new slave. Thus, rather than discouraging miscegenation and immoral relations between slave women and white men, this law could easily have had the opposite result.

This result might be especially true for masters who sought sexual escapades with their female slaves. Fornication normally brought legal and community sanctions. It, along with bastardy, was a minor crime, but a crime nonetheless. But fornication with a slave woman was a misdeed at which the law winked. The slave could not testify against the master (or any other white), and the master was unlikely to report his own misdeeds and moral weaknesses to the authorities. The law almost completely removed the likelihood of punishment of white masters for interracial lust directed at their own slaves, even as it appeared to raise the penalties for such activities.

The law tried to prevent such sex for the pleasure (and perhaps the profit) of the white male participant by doubling the fine for any white who was convicted of fornication with a black. The phrase "any christian" in the law clearly refers to whites. They would now pay a double fine for illegal sex with blacks. But, in fact, this "fine" would most likely fall only on white men who had relations with free black women, or white women who bore children with black men. White women who bore illegitimate mulatto children also would be prosecuted for fornication. They furthermore faced extra stigma for ignoring the emerging racial taboos of the colony.

Besides directly tying race and ancestry to enslavement, this law also led to the perverse result that masters who fathered children with their female slaves would end up enslaving their own mixed-race children. The anti-fornication provision may have been designed to prevent this. In the end it did not work very well, and instead created conditions over the next two centuries where thousands of southern white men would become the owners of their mixed-race children.

Virginia might have avoided this problem by allowing for interracial marriage. Because of the colony's gender imbalance, many black women would doubtless have ended up married to whites, and certainly more than a few white women would have married black men. A fluid and expanding frontier society was the ideal place for marriage to overcome race, as it had for John Rolfe and Pocahontas. But, that would have undermined the separation of the races—and the creation of slavery—that the legislature was trying to encourage. Thus, in the 1690s, the Virginia legislature took steps to prevent interracial marriage.

In 1691, the House of Burgesses passed a law designed to prevent "that abominable mixture and spurious issue which hereafter may encrease in this dominion, as well by negroes mulattoes, and Indians intermarrying with English, or other white women, as by their unlawfull accompanying with another."[19] Under this law any white, male or female, marrying a nonwhite would be banished from the colony within three months. The law also provided that any free "English woman" who bore a mulatto child would pay a special fine of fifteen pounds or be sold as a servant for five years in order to raise money to pay the fine. The mulatto child would be a servant until age thirty.[20]

In both these laws, race became the key to the legal infraction. The common act of marriage became criminal, with the severe penalty of banishment, if only one of the parties was white. Giving birth to a bastard child was already a violation of the law, but this statute made the penalty much worse if the mother was white and the father was not. Moreover, this law made the child, innocent of any infraction, subject to servitude for thirty years merely because of the race of his or her parents. This servitude was imposed even though the mother might be a free white woman and the father a free black man. Significantly, this law did not affect white men who fathered children with black women. The legislature may have already assumed that most black women were slaves, and thus their children would be slaves. Mulatto slaves might be inconvenient, but would not pose any great problem for the society. Nor were they likely to become a burden on the community, since as slaves they would be fed, clothed, and subject to discipline by their masters.

The 1691 statute also prohibited any master from freeing a slave within Virginia.[21] Thus, if slaveowners did father children with their slaves, and have some compunctions about enslaving their children, they were debarred from acting on any parental instincts. They could either raise their children as slaves within Virginia or exile their children as free people. Either way, the slave children suffered for their color.

In 1705, Virginia once again tried to discourage marriages between whites and blacks. Under the colony's first comprehensive slave code, whites marrying blacks could be jailed for six months and fined ten pounds. This act reaffirmed the fifteen pounds/five years servitude penalty for white women having mulatto children. The illegitimate mulatto children of white women would be bound out by the churchwardens until age thirty-one. Unlike the earlier law, this law did not have penalties for women having children with Indians. Rather, the law only prohibited "that abominable mixture and spurious issue" of "English, and other white men and women intermarrying with negros or mulattos, as by their unlawful coition with them." Under this law, ministers performing marriages between blacks and whites could be fined 10,000 pounds of tobacco—an enormous sum.[22]

The 1705 law did not make interracial marriages null and void. This failure of the legislature to nullify such marriages was a result of canon law, and the understanding that once a marriage was solemnized, it could not be undone by mere statute. Nevertheless, given the penalties for such marriages, it is

unlikely that after 1705 anyone in Virginia would have wanted to enter into them or perform them.[23]

The 1705 law also dealt harshly with the innocent mixed-race children born to free white women. The mulatto "bastard child" of any "free christian white woman" would be bound out as a servant until age thirty-one. A 1723 law further declared that any children born to females who were servants until age thirty-one would also serve the mother's master until age thirty-one. In 1765 the legislature changed this rule slightly, by reducing the period of servitude to twenty-one years for mulatto boys and eighteen for mulatto girls.[24] This reduction suggests that there were perhaps fewer and fewer white women bearing mulatto children and thus less need for regulating interracial sex.

The snccess of laws punishing race mixing seems clear. Hostility to interracial marriage and children of mixed ancestry grew during the eighteenth century. So too did the female population. By the time of the Revolution, Virginia effectively regulated interracial sex. Most whites accepted the norms, created in the seventeenth century, that they should never marry a black. White nien nnderstood that they could have relations with their slaves without suffering any penalty. Because the children from such unions were born into bondage, other whites seemed unconcerned. Such acts might violate moral or religious laws, but in the eyes of the criminal code they were at worst forgivable misdemeanors for which almost no white male was ever prosecuted. Most white women, on the other hand, understood the severity of penalties for a relationship with a black man.

Thus, it is somewhat surprising that Virginia's revolutionary leaders would spend much time trying to puiish what was not happening very often. But Thomas Jefferson, who in many ways spoke for his generation, was obsessed in his fear of miscegenation, especially if it involved white women. During the Revolution he used his political influence to try to exile white women who chose black mates and to punish the children of such relationships simply beeause they were of mixed ancestry.[25]

Shortly after he signed the Declaration of Independence, Jefferson left the Second Continental Congress to serve in the Virginia legislature. He remained there until June 1779, when he became governor. This legislative career was one of the most satisfying and creative periods in Jefferson's life. Early on he chaired a committee to completely revise Virginia's laws and was able "to set forth in due course a long-range program emphasizing humane criminal laws, coniplete religious freedom, and the diffusion of education, and thus to appear on the page of history as a major prophet of intellectual liberty and human enlightenment." During and after Jefferson's service in the legislature, Virginia adopted many of the committee's proposed laws, including bills for establishing religious freedom, creating public education, allowing easier access to citizenship, reforming the criminal code, and abolishing primogeniture and entail.[26]

One of Jefferson's goals was to modernize Virginia's criminal code, incorporating the humane concepts found in the new criminology of Caesar de Beccari. He reduced the number of capital crimes for white offenders to two and removed various barbaric customs from the criminal code. Jefferson also proposed a tighter slave code, increased penalties for slave criminals, and retained "most of the inhumane features of the colonial slave law."[27]

Jefferson was proud of his law liberalizing rules for white immigrants seeking citizenship. But this law, adopted just before he became governor, prohibited free blacks from becoming citizens. Under another proposed law, which did not pass, any slave manumitted in the state had to leave Virginia within a year or "be out of the protection of the laws." Another of Jefferson's proposed laws—which the legislature also rejected— would have banished any white woman bearing "a child by a negro or mulatto." If she failed to leave the state the woman would be outlawed and the child bound out for an unspecified time, after which the child would be banished from the state.[28]

Jefferson's proposed legislation for free blacks, manumitted slaves, and white women with their mixed-race children conflicts with his endorsement of the natural rights of "life, liberty, and the pursuit of happiness." A white woman could not pursue her happiness with a black mate; a manumitted slave could not exercise the liberty of living in the state of her birth with her enslaved children and husband; a free black citizen of Massachusetts, who might have been a veteran of the Continental line, could not pursue happiness in Virginia.

Fortunately for Virginia's free black population and its white female population, the legislature rejected Jefferson's harsh proposals. However, in 1792, Virginia reaffirmed its opposition to interracial marriage with an act for "preventing white men and women from intermarrying with negroes and mulattoes." This law may have reflected fears that in the post-Revolutionary environment social control might break down. Since 1782, Virginians had had the right to emancipate their adult slaves within the state. Thus the growing population of ftee blacks might have been seen as a threat to the "racial purity" of the white population. The 1792 law provided a $30 fine and a six-month sentence for any white man or woman who married a black. Oddly enough, not until 1849 would the Virginia legislature make such marriages "absolutely void."[29]

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Although Jefferson failed in his attempt to banish or outlaw any white woman bearing "a child by a negro or mulatto," interracial marriage remained illegal. Moreover, the social norms and legal prohibitions that Virginia created in the seventeenth century remained viable for more than two centuries in the Old Dominion and throughout the South. Virginia's early laws criminalizing interracial marriages proved to be the most durable legacy of the colonial response to race.

The anti-miscegenation laws survived the Constitution of 1787, the Civil War Amendments of 1865–70 that otherwise created a fundamentally new

racial order, and even the *Brown* revolution of 1954. They remained on the books in Virginia and elsewhere in the South until 1967. At one time or another, at least thirty-eight states prohibited racially mixed marriages, not only between whites and blacks, but also, among others, between "Malayans, American Indians, Chinese, Koreans, Japanese . . . [and] Hindus." As late as World War II, thirty-one states still forbid racially mixed marriages. In 1956, the Supreme Court refused to rule on the constitutionality of miscegenation laws, in a decision constitutional law professors have difficulty explaining by any theory of law. Sixteen states still had such laws on their books, in 1967, when the Supreme Court found them unconstitutional in *Loving v. Virginia*.[30]

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Notes

1. For example, Virginia did not initially prohibit intermarriage. Instead, starting in 1705, Virginia punished the preachers who performed such marriages as well as the participants. Similarly, in 1715, Maryland fined ministers officiating over mixed marriages and in 1717 instituted servitude for the couple involved. "An Act Relating to Slaves and Servants," Act of 1715, and "A Supplemenrary Act to the Act Relating to Servants and Slaves," Act of May 1717, in *The Laws of the Province of Maryland Collected in One Volume*, 119, 124, 200 (Philadelphia, 1718, reprint ed., John D. Cushing, ed., 1977).
2. Frank Wesley Craven, *White, Red, and Black: The Seventeenth-Century Virginian* (New York: W. W. Norton, 1977), 26–27.
3. In 1924, at the height of the Jim Crow era, for example, Virginia defined a white person as having "no trace whatsoever of any blood other than Caucasian." But this law allowed someone to be "white" if the person had up to one-sixteenth Indian ancestry. Act of March 20, 1924, ch. 371, § 5, *1924 Virginia Acts* 534, 535. In 1950, the law of Virginia declared people to be nonwhite if they had "ascertainable any Negro blood" and no more than "one-fourth of more" of Indian blood. Pauli Murray, *States' Laws on Race and Color*, Davison Douglas, ed. (1950; reprint Athens: University of Georgia Press, 1996), 462.
4. See generally Gary Nash, *Red, White, and Black: The Peoples of Early America*, 2nd ed. (Engelwood Cliffs, N.J.: Prentice-Hall, 1982), 275–79. Nash finds a greater rate of Indian-English intermarriage in Georgia and South Carolina.
5. Edmund Morgan, *American Slavery, American Freedom: The Ordeal of Colonial Virginia* (New York: W. W. Norton, 1975), 327.
6. Morgan, *American Slavery, American Freedom*, 408, 336. Of 1,210 settlers in the colony, existing records account for 750, of these, 634 were male and only 116 were female. Gary Nash estimates that in 1720 only-one fifth of the black population in the colonies was female. Nash, *Red, White, and Black*, 281.
7. Morgan, *American Slavery, American Freedom*, 334, 155, 336. See also Warren M. Billings, "The Cases of Fernando and Elizabeth Key: A Note on the Status of Blacks in Seventeenth Century-Virginia," *William and Mary Quarterly*, 3rd Series, 30 1973; 467–74.
8. Morgan, *American Slavery, American Freedom*, 328.
9. See Jonathan A. Bush, "The British Constitution and the Creation of American Slavery," in Paul Finkelman, ed., *Slavery and the Law* (Madison, Wis.: Madison House, 1996).

10. David Brion Davis, *The Problem of Slavery in Western Culture* (Ithaca: Cornell University Press, 1966), 346; David Brion Davis, *Slavery and Human Progress* (New York: Cornell University Press, 1984), 33. *In re Sir Henry Maneringe*, in H. R. McIlwaine, ed., *Minutes of the Council and General Court of Colonial Virginia* (Richmond: Virginia State Library, 1924), 33 [Hereinafter cited as McIlwaine], reprinted in Paul Finkelman, *Law of Freedom and Bondage* (New York: Oceana Press, 1986), 10.
11. On using religion to become free, see the case of *In re John Graweere*, McIlwaine, 477 (March 31, 1641), reprinted in Finkelman, *Law of Freedom and Bondage*, 11. "An act declaring that baptisme of slaves doth not exempt them from bondage," 2 Hening 260 (September 1667), reprinted in Finkelman, *Law of Freedom and Bondage*, 16.
12. "Act Concerning Church Government," Act of March, 1642–43, 1 Hening, *Virginia Statutes at Large*, 240.
13. Edmund Morgan, *American Slavery, American Freedom*, 334.
14. Act XII, 2 Hening 170 (December 1662).
15. William Blackstone, *Commentaries on the Laws of England* 2:390 (Oxford: Clarendon Press, 1765).
16. For similar conclusions, see William Wiecek, "The Statutory Law of Slavery and Race in the Thirteen Mainland Colonies of British America," *William and Mary Quarterly* 3rd Series, 34, 1977, 282; reprinted in Paul Finkelman, ed., *Colonial Southern Slavery* (New York: Garland, 1989). Morgan, *American Slavery*, 333; and Thomas D. Morris, "Villeinage . . . as it existed in England, reflects but little light on our subject:' The Problem of the 'Sources' of Southern Slave Law," *American Journal of Legal History*, 32, 1988, 95, 112.
17. Wiecek, "Law of Slavery and Race," 263.
18. 2 Blackstone, *Commentaries*, 390.
19. "An act for suppressing outlying Slaves," 3 Hening 86–87 (April 1691). Virginia's law was not the first—thirty years earlier, Maryland prohibited miscegenation. Robert J. Sickels, *Race, Marriage, and the Law* (Albuquerque: University of New Mexico Press, 1972), 64.
20. Ibid.
21. Ibid., at 88.
22. "An Act Concerning Servants and Slaves," Chap. 49, Sec. 18, Sec. 20, 3 Hening 447, 453–54 (October 1705).
23. In 1705 at least one couple petitioned for the right to marry, despite the fact that the future husband was allegedly a mulatto. He apparently denied that he was a mulatto. H. R. McIlwaine, ed., *Executive Journals of Colonial Virginia* (Richmond: Virginia State Library, 1928) 3:28.
24. "An act directing the trial of Slaves. . . ." 4 Hening 126 at 133 (1723), the law also provided that if a female held to service until age thirty had children before her servitude ended, the children would also serve the master until age thirty. "An Act to prevent the practice of selling person as slaves who are not so, and for other purposes therein mentioned," 8 Hening 133 (1765).
25. For a fuller discussion of Jefferson's racism and fear of miscegenation, see Paul Finkelman, *Slavery and the Founders: Race and Liberty in the Age of Jefferson* (Armonk, N. Y.: M. E. Sharpe, 1996), Chaps. 5 and 6.
26. Dumas Malone, *Jefferson the Virginian* (Boston: Little Brown, 1948), 247–63, quoted at 247, 251, 263.
27. John Chester Miller, *The Wolf by the Ears: Thomas Jefferson and Slavery* (New

York: Free Press, 1977), 20; Davis, *Slavery in the Age of Revolution*, 174. The legislature eventually rejected some of the more vicious aspects of Jefferson's proposed criminal code for slaves.

28. "A Bill concerning Slaves," in Julian Boyd, ed., *The Papers of Thomas Jefferson* (Princeton: Princeton University Press, 1950), 2:470–73. "An act declaring who shall be deemed citizens of this commonwealth," 10 Hening's Statutes at Large 129 (May 1779). After Jefferson left the governorship, the legislature passed a liberalized manumission law but rejected his harsh proposal for expelling free blacks. "An act to authorize the manumission of slaves," 11 Hening 39 (May, 1782). The legislature also failed to accept the proposal to expel the white mothers of mixed-race children.
29. Act of Dec. 22, 1795, ch. 42, *1792 Laws of Virginia*, 130–35; *Virginia Code of 1849*, ch. 109, sec. 1. On the history of these laws see Peter Wallenstein, "Race, Marriage, and the Law of Freedom: Alabama and Virginia, 1860s–1960s," *Chicago-Kent Law Review*, 70, 1994, 371–438.
30. *Brown* v. *Board of Education*, 347 U.S. 483 (1954). Sickels, *Race, Law, and Marriage*, 64–65. *Naim v. Naim, appeal dismissed*, 350 U.S. 985 (1956). See Harvey M. Applebaum, "Miscegenation Statutes: A Constitutional and Social Problem," *Georgetown Law Review*, 53, 1964, 49, reprinted in Paul Finkelman, ed., *Race, Law, and American History: The Era of Integration and Civil Rights, 1930–1990* (New York: Garland, 1992), 1; *Loving v. Virginia*, 388 U.S. 1 (1967). See, generally, Wallenstein, "Race, Marriage, and the Law."