

DANGEROUS WOMAN: ELIZABETH KEY'S FREEDOM SUIT – SUBJECTHOOD AND RACIALIZED IDENTITY IN SEVENTEENTH CENTURY COLONIAL VIRGINIA

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I. INTRODUCTION

Elizabeth Key, an Afro-Anglo woman, was born around 1630 in the Virginia Colony. Twenty-five years later she sued for her freedom after the overseers of her late master's estate classified her and her infant son as *negroes* (Africans or descendants of Africans) rather than as an indentured servant with a free-born child.¹ Unwilling to accept

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1. The extant court documents reporting Elizabeth Key's case are reprinted in THE OLD

permanent servitude, Elizabeth sued for their freedom, and after protracted litigation she and her son were set free.

A few historians and legal scholars mention her case in passing as proof that by the mid seventeenth century people of African ancestry were held as slaves in Virginia.² Only feminist historian Kathleen Brown even mentions that Elizabeth's lawsuit involved not only her freedom, but that of her son.³ To the rest of the historians she was simply a slave, her gender, son and mixed ancestry were irrelevant. None looked closely at the significance of her three interlinking legal arguments: (1) that she was a practicing Christian; (2) who was the daughter of a free Englishman; (3) who bound her out as an indentured servant for nine years which period had expired.

Arguably Elizabeth's pleadings might be an early example of what Kenji Yoshino characterizes as "covering," downplaying aspects of one's identity.⁴ In crafting her legal argument around her father's ancestry and subjecthood Elizabeth downplayed the African ancestry of her enslaved mother. Her argument also might be an example of "racial performance" where the extent one does things that English women and men did during the period becomes an important determinant of one's legal status.⁵ But as I explain in this article other cases decided during this period suggest otherwise.

DOMINION IN THE SEVENTEENTH CENTURY: A DOCUMENTARY HISTORY OF VIRGINIA, 1606-1689 165-69 (Warren M. Billings ed., 1975)[hereinafter OLD DOMINION].

2. The most complete scholarly discussion of Elizabeth Key's freedom suit is found in Warren M. Billings, *The Case of Fernando and Elizabeth Key: A Note on the Status of Blacks in Seventeenth-Century Virginia*, 30 WM. & MARY Q. 467 (1973) (discussing Key's case along with a later suit filed by an African male, Fernando, and focusing on their claim that persons of African descent who were Christians were free not slaves) [hereinafter Billings, *The Cases of Fernando and Elizabeth*]; Warren M. Billings, *The Law of Servants and Slaves in Seventeenth-Century Virginia*, 99 VA. MAG. HIST. & BIOGRAPHY 45, 55-57 (1991) (discussing the mulatto aspects of the suit). Other scholars refer to Elizabeth's case for more limited reasons. See A. LEON HIGGINBOTHAM, IN THE MATTER OF COLOR 44 (1978); Jung Kim, Comment, *Nguyen v. INS: The Weakening of Equal Protection in the Face of Plenary Power*, 24 WOMEN'S RTS. L. REP. 43, 60 (2002); William M. Wiecek, *The Origins of the Law of Slavery In British North America*, 17 CARDOZO L. REV. 1711, 1755 n.157 (1996); Thomas Ingersoll, "Release Us Out of This Cruell Bondegg": An Appeal From Virginia in 1723, 51 WM. & MARY Q. 777, 778 n.6 (1994).

3. Kathleen Mary Brown, *Gender and the Genesis of a Race and Class System in Virginia, 1630-175* (May 29, 1990) (unpublished Ph.D. dissertation, Univ. of Wisconsin) (on file with University of Wisconsin-Madison Library, University of Wisconsin).

4. Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 772 (2002).

5. For a discussion of this concept as it relates to slavery see Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109, 113 n.8, 163-64 (1998). See also John Tehranian, Note, *Performing Whiteness: Naturalization*

Instead I argue that Elizabeth's case and the Virginia colonial authorities reaction to it can better be explained by looking at evolving notions of subjecthood in seventeenth century England. But I also acknowledge that Elizabeth's case has racial overtones. Like *Scott v. Sanford*⁶ decided approximately two hundred years later, Elizabeth's case raises questions about the place of persons with African ancestry within the early Virginia colonial community. From the beginning of this nation "race has been a profound determinant of one's political rights, one's location in the labor market, and indeed one's sense of 'identity.'"⁷

When Dred Scott sued for his freedom the United States Supreme Court decided he could not sue in federal court because whether free or not, as a person of African descent he was not a citizen.⁸ But in Elizabeth Key's time "subjecthood" rather than "citizenship" determined one's rights and privileges within the colonial community. In the end Elizabeth was more fortunate than Scott because of her connection to a powerful English father and a potential English husband. This essay explores Elizabeth Key's freedom suit and what it teaches us about community belonging, racial identity and gender in early colonial America.

Racial markers are imposed or adopted based on historical, social, ancestral, and physical components.⁹ As historian Ira Berlin writes:

Litigation and the Construction of Racial Identity in America, 109 YALE L.J. 817 (2000). Tehranian in his discussion of "race" in seventeenth century Virginia identifies Christian religion as one of the earlier surrogates for what we today call whiteness, he overlooks the significance of ancestry. Tehranian, *supra*, at 830. English ancestry is the surrogate for skin color in the early nineteenth century whiteness cases. *Id.* at 831. But as Tehranian subsequently points out, as more *negroes* became Christians, the determination of community acceptance as white relied more on ancestry or skin tone. *Id.* at 830-31.

6. *Scott v. Sanford*, 60 U.S. 393 (1856).

7. MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S* 1 (1994); *see also* HOWARD WINANT, *RACIAL CONDITIONS* 13-21 (1994).

8. *Scott*, 60 U.S. at 427. According to the Court:

[t]he Question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guaranteed by that instrument to the citizen?

Id. at 403. The Court said no. *Id.* at 529.

9. Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 8 (1994). *See also* Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 STAN. L. REV. 1, 23-36 (1991) (discussing racial categories).

“Race is not simply a social construction; it is a particular kind of social construction—a historical construction . . . it cannot exist outside of time and place.”¹⁰ During the first half of the seventeenth century notions of American *whiteness* and *race* were in their formative stage as were the notions of English subjecthood that greatly influenced American ideas about citizenship. Words like “English” and “Christian” operated as exclusionary categories in the way that the racial category *white* has operated in the United States since the nineteenth century.

Virginia, one of the first colonies to formulate racial definitions, did not attempt to statutorily define these categories until the early eighteenth century.¹¹ The evolving definitions, usually tied to African ancestry, varied over the centuries¹² reflecting, perhaps, the not so secret genealogies of its powerful ruling aristocracies.¹³ Underlying these

10. IRA BERLIN, *MANY THOUSANDS GONE: THE FIRST TWO CENTURIES OF SLAVERY IN NORTH AMERICA* 1 (1998). See also Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, 47 UCLA L. REV. 1705, 1707 n.9 (2000) (explaining that race is fluid, and that “racial identities are unstable, and race has no meaning except that ascribed to it”).

11. An Act Concerning Servants and Slaves, Act of Oct. 1705, in 3 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619 447-62 (William Waller Hening ed., 1823) [hereinafter Hening, STATUTES AT LARGE] (enacted 1705) (“mulatto defined as child, grandchild, or great-grandchild of Negro (and presumably a white) or child of Indian (and presumably a white)”); A. Leon Higginbotham, Jr. & Barbara K. Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 GEO. L.J. 1967, 1967 (1989).

12. Higginbotham & Kopytoff, *supra* note 11, at 1977-79.

13. Thus, in 1967 Virginia in *Loving v. Virginia* defended its prohibition against interracial marriage before the United States Supreme Court on the grounds of preserving the racial “integrity of its citizens.” *Loving v. Virginia*, 388 U.S. 1, 7 (1967). Yet the State saw no inconsistency with this goal and its definition of a *white person* as someone with “no trace whatever of any blood other than Caucasian,” except for any “person who [has] one-sixteenth or less of the blood of the American Indian and no other non-Caucasic blood.” *Id.* at 5 n.4 (citing VA. CODE ANN. § 20-54 (1960) (repealed 1968)). VA. CODE ANN. §20-57 (1960 Repl. Vol.) contained the prohibition against interracial marriage (marriage between “a white person and a colored person”) which the United States Supreme Court declared unconstitutional in *Loving v. Virginia*. *Id.* at 5 n.3, 12. The so-called “Pocahontas exception” preserved the white racial status of prominent Virginians descended from John Rolfe and Powhatan Indian “princess” Pocahontas, as well as that of other Virginians whose ancestors entered the colony during the seventeenth century. Walter Wadlington, *The Loving Case: Virginia’s Anti-Miscegenation Statute in Historical Perspective*, 52 VA. L. REV. 1189, 1202-03 (1966). Given the scarcity of European women in the largely bachelor colony during the first few decades of the seventeenth century, many white Virginians who trace their ancestry back to early Virginia colonists have at least one Native American, or perhaps African ancestor. Liaisons between Englishmen and Indian or later African women resulted in Anglo-Indian and Anglo-African offspring. David D. Smits, “Abominable Mixture” *Toward the Repudiation of Anglo-Indian Inter-marriage in Seventeenth-Century Virginia*, 95 VA. MAG. HIST. & BIOGRAPHY. 157, 172 (1987).

shifting legal definitions was the denial of racial hybridity in favor of mono-racialism.¹⁴ From the colonial period forward this country resisted creation of a space in the body politic for whose ancestry was non-European. Birthright subjecthood in the colonized country and citizenship status in the independent nation was denied to people considered non-“white”.¹⁵ During the colonial era subjecthood naturalization was too costly for most aliens¹⁶, and after the American Revolution citizenship by naturalization was denied to non-whites until the mid twentieth century.¹⁷ The exclusion of non-whites from the body

14. Virginia did not create a perfect social system in which black equaled slave and white equaled free with no confusing middle ground. Virginia's racially based system of slavery was created in the context of continuous racial mixing, legal anomalies, and recurrent attempts to patch holes in the fabric of the system. Higginbotham & Kopytoff, *supra* note 11, at 1970. Mixed race offspring of Europeans and Africans although called mulatto rather than negro, were nevertheless classified as negro “in effect denying that intermixture had occurred at all.” WINTHROP JORDAN, *WHITE OVER BLACK: ATTITUDES TOWARD THE NEGRO, 1550 TO 1812* 177-78 (1968).

15. During the colonial era, “African slaves transported to the New World were for most purposes regarded as chattels; neither they nor their children were counted as subjects, nor were they aliens.” ANN DUMMETT & ANDREW NICOL, *SUBJECTS, CITIZENS, ALIENS AND OTHERS: NATIONALITY AND IMMIGRATION LAW* 74 (1990). See also *Scott v. Sanford*, 60 U.S. 393, 419-20, 427 (1856) (black Americans); *Elk v. Wilkins*, 112 U.S. 94, 109 (1884) (Native Americans). Citizenship for Mexican Americans was contested. *In re Rodriguez*, 81 F. 337, 349 (W.D. Tex. 1897) (allowing the naturalization of a “pure-blooded Mexican” but remarking, “[i]f the strict scientific classification of the anthropologist should be adopted, he would probably not be classed as white”); IAN HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 61 (1996) (“The court allowed the applicant to naturalize on the basis of a series of treaties conferring citizenship on Spaniards and Mexicans in the wake of U.S. expansion into Florida and the Southwest.”). “Despite the admission of Rodriguez to citizenship, Mexicans in the Southwest suffered considerable legal repression in the decades after the U.S. conquest of that region.” *Id.* at n.36 (citing RODOLFO ACUNA, *OCCUPIED AMERICA: A HISTORY OF CHICANOS* (1988)); see also George A. Martinez, *Legal Indeterminacy, Judicial Discretion and the Mexican-American Litigation Experience: 1930-1980*, 27 U.C. DAVIS L. REV. 555 (1994).

16. LAURA HUNT YUNGBLUT, *STRANGERS SETTLED HERE AMONGST US: POLICIES, PERCEPTIONS AND THE PRESENCE OF ALIENS IN ELIZABETHAN ENGLAND* 78 (1996). Naturalization required an Act of Parliament and was very rare. *Id.*; Lien Luu, *Natural-Born Versus Stranger-Born Subjects: Aliens and Their Status in Elizabethan London*, in *IMMIGRANTS IN TUDOR AND EARLY STUART ENGLAND* 72 (Nigel Goose & Lien Luu, eds., 2005). During the sixteenth century concerns about over population in England in the face of increasing immigration from other parts of Europe which worked against a statutory naturalization process. *Id.* at 72; DUMMETT & NICOL, *supra* note 15, at 71-72. “Commerce and colonial development were major factors in nationality and immigration policy . . . Naturalisation was used . . . to encourage the settlement of people who would benefit the economy. In the colonies of the New World, labour of every kind was in great demand.” *Id.* at 71-72. But even with voluntary migration and generous naturalization laws during the late seventeenth and throughout the eighteenth centuries these policies were not sufficient to attract voluntary labor from Europe. *Id.* at 72.

17. *Ozawa v. United States*, 260 U.S. 178, 198 (1922) (holding in all the Naturalization Acts from 1790 to 1906 the privilege of Naturalization was confined to white persons, and the appellant,

politic forced racial hybrids to assert the *white* aspect of their ancestry in claiming full community membership.¹⁸

After a brief discussion of English subjecthood in seventeenth century England and the American colonies I explore the legal theories advanced in Elizabeth Key's freedom suit to determine whether the factors considered by the judging parties continue to have validity in contemporary America. I conclude that treating Elizabeth's claim only as a challenge to slavery is problematic because seventeenth century English judges, unfamiliar with modern slavery, were uncertain about the applicable common law principles to apply. Villeinage – English serfdom – was an imperfect analogy to African slavery; and even if villeinage principles were applied to Elizabeth's case the outcome would have been unclear. In exploring why the Virginia General Assembly agreed to consider Elizabeth's claim, I argue it was influenced by evolving notions of English subjecthood stemming from *Calvin's Case* decided two years after the founding of the Virginia Colony as well as the uncertain status of Africans and their descendants in England.

II. ENGLISH SUBJECTHOOD IN THE SIXTEENTH AND EARLY SEVENTEEN CENTURY

American notions about citizenship have their roots in the understanding of English subjecthood, as it existed in the seventeenth and eighteenth century. The early seventeenth century was an important time in the development of subjecthood concepts in England. Notions of nationhood in a society whose laws were grounded in feudal ideas of subjecthood based on place of birth and mutual political obligation was evolving.¹⁹

in this case, was not Caucasian and therefore belonged entirely outside the zone on the negative side).

18. Thus, litigation about racial status in this country ultimately goes to citizenship status. Legal scholars like Ian Haney Lopez in limiting their discussions about the connection between whiteness and citizenship to naturalization failed to appreciate how the rejection of native-born racial hybrids as full citizens more fully explains the whiteness naturalization cases. See generally LOPEZ, *supra* note 15.

19. Luu, *supra* note 16, at 59.

Besides the stranger's [alien's] relationship to the sovereign, there was also his place within a town. Towns had extensive privileges bestowed by ancient charters. The key differentiation among townsmen was . . . "the dividing line . . . between freemen and non-freemen . . . Only freedmen could hold civic office and only freeman could vote in municipal and parliamentary elections."

Id. at 60 (quoting John Evans).

When Scottish King James IV ascended to the English throne in 1603, uniting the Scottish and English crowns as King James I, the legal status of his Scottish subjects was called into question. *Calvin's Case*,²⁰ decided in 1608, specifically addressed the question of whether a child born in Scotland during the Scottish king's reign became a subject of the English monarch upon King James' ascension to the English throne.²¹ This was an important question because property in England could only be inherited by subjects of the English monarch.²²

Robert Calvin was born in Scotland some time after King James ascended to the English throne.²³ Calvin's guardians argued that he was entitled to two estates in England from which he had been "forcibly dispossessed."²⁴ They brought suit on Calvin's behalf for one estate in the Chancery Court and for the second in the King's Bench and the defendants in each case answered that Calvin was an "alien" and thus "unable to be seised of a freehold in England."²⁵ Because of the seriousness of the issue presented the cases were sent to the Exchequer Chamber and an extraordinary assemblage of judges²⁶ with only two dissents, Lord Coke writing for the majority concluded that anyone born within the English King's domain is a natural-born subject and thus eligible to inherit land in England.²⁷

Lord "Coke's reasoning [also] applied to the colonists,

20. *Calvin v. Smith*, (1608) 77 Eng. Rep. 377 (K.B.).

21. For a discussion of this case and its implications see, Polly J. Price, *Natural Law and Birthright Citizenship in Calvin's Case (1608)*, 9 YALE J.L. & HUMAN. 73 (1997).

22. *Calvin*, 77 Eng. Rep. at 405-06.

23. Price, *supra* note 21, at 81 (stating that Robert Calvin's true name was Robert "Colville" and he was born in Scotland after 1603).

24. *Id.*

25. *Id.* at 82; *Calvin*, 77 Eng. Rep. at 380.

Whoever is born infra legeantiam, within the ligeance of King James of his kingdom of Scotland, is alienigena, an alien born, as to the Kingdom of England: but Robert Calvin was born at Edinburgh, within the ligeance of the King of his kingdom of Scotland; therefore Robert Calvin is alienigena, an alien born, as to the kingdom of England.

Calvin, 77 Eng. Rep. at 380.

26. Price, *supra* note 21, at 82 (explaining that the cases were heard by fourteen judges from the King's Bench, the Court of Common Pleas, along with the Lord Chancellor and the Barons of the Exchequer).

27. *Calvin*, 77 Eng. Rep. at 407 ("Whosoever is born within the King's power or protection, is no alien: but Calvin was born under the King's power and protection; ergo he is no alien"). In essence, Calvin's Case holds that the subjects of James are not aliens to each other, but they remain separately ruled by separate parliaments. King James's ascendancy to the English Throne served to unite both the Scottish and English crowns. Thus in a sense an Englishman would also be a "Scottish subject" because he is the subject of a Scottish King.

persons born outside of England who were born subject to the King could . . . inherit property in England.”²⁸ The rule in *Calvin’s Case*, anyone born within the territory of the sovereign is a subject of the English monarch, became the common law rule,²⁹ but it was not the only way to become an English subject.³⁰ Children born to English parents outside the country became English subjects at birth,³¹ others could become naturalized subjects.³² All others were aliens or denizens – “adopted subjects,” with some, but not all, the rights and privileges of English subjects.³³

Prior to *Calvin’s Case* questions arose over whether a child born in England to alien parents is an English subject. This issue was resolved by statute around 1604, which said that a child of alien parents born in England is a denizen.³⁴ This statute was a reaction to the dominance of foreign-born merchants in overseas trade from England who brought their foreign-born wives with them,³⁵ and left unclear whether a child of

28. David S. Bogen, *The Privileges and Immunities Clause of Article IV*, 37 CASE W. RES. L. REV. 794, 798 (1987).

29. Price, *supra* note 21, at 83. The rule was changed in 1981. *Id.* (citing the British Nationality Act, 1981, c. 61, §§ 1, 3 (Eng.)).

30. *Calvin*, 77 Eng. Rep. at 399.

There be regularly (unless it be in special cases) three incidents to a subject born. 1. That the parents be under the actual obedience of the King. 2. That the place of his birth be within the King’s dominion. And, 3. The time of his birth is chiefly to be considered; for he cannot be a subject born of one kingdom that was born under the ligeance of a King of another kingdom, albeit afterwards one kingdom descend to the King of the other.

Id.

31. *Id.*

32. Daniel J. Hulsebosch, *The Ancient Constitution and the Expanding Empire: Sir Edward Coke’s British Jurisprudence*, 21 LAW & HIST. REV. 439, 472 (2003) (discussing the case of *Craw v. Ramsey* in which the King’s Bench held that the King could not naturalize persons unless through the English Parliament).

33. Luu, *supra* note 16, at 59. Luu writes that denizenship was acquired through a patent letter from the Crown which laid out the rights and privileges conferred on the individual grantee, but “the letter of denization had a fundamental drawback: denizens could not inherit property, and the transmission of this status . . . to . . . descendants depended on the terms of the grant.” *Id.*

34. *Id.* at 65-66.

35. *Id.* at 65.

[I]t was reported in 1576 that “sundry persons being strangers . . . have of purpose brought over their wives from the parts beyond the seas, to be delivered with child within this city and other places within this realm of England, and thereof do take special testimonials thereby to win to those children the liberty that other Englishmen do enjoy.”

Id. But more importantly since only English subjects could inherit property, making English-born children of foreign parents denizens, effectively limited their ability to accumulate and pass on wealth from generation to generation. *Id.* at 59.

one English parent born in England is an English subject (subject of the monarch).

As the foregoing discussion suggests, seventeenth century England was not a homogenous society. For example, persons of African ancestry were numerous enough in London and Bristol that during an economic downturn in 1596 Queen Elizabeth ordered them expelled from her kingdom.³⁶ Despite the Queen's edict Africans did not leave England. By the early seventeenth century there were Africans in the court of James I.³⁷ Initially in the seventeenth century Africans were referred to as humans as opposed to chattel, but the terminology changed in the latter part of that century³⁸

"In 1672 when the new Royal African Company was granted its charter, official terminology began at last to reflect the reality of the African's chattel status."³⁹ Over that century more Africans migrated to or were enslaved and taken to England, and some were able to enter occupations other than domestic service "slipping out of the stereotyped role imposed on them by English society."⁴⁰ Most of the immigrants were males and some free Africans, aliens, married English women who, according to some sources, gave birth to English children.⁴¹ But in light

36. GRETCHEN HOLBROOK GERZINA, *BLACK LONDON: LIFE BEFORE EMANCIPATION* 3-4 (1995) (citing Acts of the Privy Council, xxvi, 1596-1597, 16, 20-21); JAMES WALVIN, *BLACK AND WHITE: THE NEGRO AND ENGLISH SOCIETY* 16-30 (1973) (discussing the effect Africans had on Britain in the 1600s and how "black" was viewed as African); Ali A. Mazrui, *On The Concept of "We Are All Africans"*, 57 AM. POL. SCI. REV. 88 (1963) (associating "black" with "African" and discussing the tendency to refer to people as being from the continent of Africa).

37. The precise legal status of Africans in England is unclear, Paul Edwards and James Walvin write:

many of them [were] freed from slavery when take by Scottish privateers from Portuguese ships; [by] including numbers of black people in his retinue, the King was following a European tradition going back to the court of the Holy Roman Emperor Frederick II (1194-1250), by displaying exotic tokens of royal splendour [sic], but this in turn raises more doubts about their precise status.

PAUL EDWARDS & JAMES WALVIN, *BLACK PERSONALITIES IN THE ERA OF THE SLAVE TRADE* 6 (1983). Initially their leaving was resisted by the noble families many served. Later as English involvement with the slave trade increased, Africans and their descendants became economically desirable commodities. *Id.*

38. JAMES WALVIN, *BLACK AND WHITE: THE NEGRO AND ENGLISH SOCIETY* 38 (1973).

39. *Id.*

40. *Id.* at 197 (citing *The Records of the Church of Christ*, 1640-87, ed. E.B. Underhill, for Hanserd Knollys Society, London, 1847, 33-6; *Parish Register of St. Andrews, Plymouth*, 587).

41. *Id.* at 197. "In the process some of them were assimilated almost to the point of equality with white Englishman, particularly in religious and sexual matters, but much depended on the degree of freedom conceded to the Negro." *Id.* (citing *The Records of the Church of Christ*, 1640-87, ed. E.B. Underhill, for Hanserd Knollys Society, London, 1847, 33-6; *Parish Register of St.*

of the 1576 statute it is unclear whether *Calvin's Case* made these children of free African aliens born in England to English mothers subjects of the monarch.

If subjecthood was dependent on the father's subjecthood, then the child of an alien father and English mother was at most a denizen. Raymond Fagel reports that between 1509 and 1603 "some 80 children born abroad to an English father and a mother from the Low Countries" applied for denization or naturalization, suggesting that both parents must be English for a child born outside the realm to be considered a subject of the monarch at birth.⁴² If, however, *Calvin's Case* means that the child of either an English mother or father born in the English realm is an English subject, then a child of an African father and English mother was presumptively an English subject. This reading of the case would be significant since there is some suggestion that alien Africans were not acceptable members of the English community.⁴³ Historian James Walvin writes that with the intermarriage of African men and English women: "[t]he overall process was thus one of absorption of the Negroes into the poor white communities alongside which they had always lived. The combined process of absorption and decline in

Andrews, Plymouth, 587). By the nineteenth century most of their descendants were absorbed "into the poor white communities alongside which they had always lived[,] [t]he combined process of absorption and decline in immigration." *Id.* at 197. "In the absence of adequate numbers of black women, Negroes in England settled down with white women. Their offspring were English, and with further interracial breeding their pigmentation became lighter and increasingly less noticeable." *Id.*

42. Raymond Fagel, *Immigrant Roots: The Geographical Origins of Newcomers from the Low Countries in Tudor England*, in *IMMIGRANTS IN TUDOR AND EARLY STUART ENGLAND*, *supra* note 16, at 47.

43. Nigel Goose, 'Xenophobia' in *Elizabethan and Early Stuart England: An Epithet Too Far?*, in *IMMIGRANTS IN TUDOR AND EARLY STUART ENGLAND*, *supra* note 16, at 125 ("The fact that Elizabeth I took steps to reduce the number of 'blackamoors' in the capital in the late sixteenth century is well known, and finds reflection in Cecil's remark in the Commons in 1593 that it is "a matter of Charity to relieve Strangers, and especially such as do not grieve our Eyes."); EDWARDS & WALVIN, *supra* note 37, at 6 ("Far from being slaves . . . the black people of James's court were possibly many of them freed from slavery when taken by Scottish privateers from Portuguese ships; in including numbers of black people in his retinue, the King was following a European tradition going back to the court of the Holy Roman Emperor Frederick II (1194-1250), by displaying exotic tokens of royal splendour [sic], but this in turn raises more doubts about their precise status"). "By the time of the accession of George I, the economic importance of the Negro and chattel slavery had resulted in a fundamental confusion in English law. On one hand, the Habeas Corpus Act of 1679 appeared to guarantee basic human rights. On the other, the black was viewed only as a chattel and moveable property, as defined by the Navigation Acts." *Id.* at 15 (citing W.S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 112 (1926)).

immigration rapidly proved to be effective solvents of English black society.”⁴⁴

Given the uncertainty about how English birthright subjecthood was acquired, the first charter of the Virginia Company issued by King James in 1606 contained the following declaration:

[A]ll and every the Persons being our Subjects, which shall dwell and inhabit within every or any of the said several Colonies and Plantations, and every of their children, which shall happen to be born within any of the Limits and Precincts of the said several Colonies and Plantations, shall HAVE and enjoy all Liberties, Franchises, and Immunities, within any of our other Dominions, to all Intents and Purposes, as if they had been abiding and born, within this our Realm of England, or any other of our said Dominions.⁴⁵

The Charter’s declaration does not clarify whether to become a subject of the English monarch at birth requires that both parents be English subjects, or whether English subjecthood attaches if the child’s father is English or if either parent is English. Arguably English colonial subjecthood was dependent on a crown charter and subject to the English parliament as well. Further, the charter states the colonialists’ children born in the colony shall have the same privileges as English subjects, which does not necessarily mean that they were considered English subjects. As my discussion in the next section indicates, Elizabeth’s legal theories seem based on the notion that a father’s English ancestry confers English subjecthood or, at the very least, those privileges of English subjects on an acknowledged child born within the monarch’s realm.

III. ELIZABETH’S LEGAL THEORIES

A. Introduction

Elizabeth Key’s case against the Mottrom estate was heard before a jury in the Northumberland County Court on January 20, 1655/56.⁴⁶

44. WALVIN, *supra* note 38, at 197.

45. Hening, *STATUTES AT LARGE*, *supra* note 11, at 57-66.

46. OLD DOMINION, *supra* note 1, at 167; ADVENTURERS OF PURSE AND PERSON, VIRGINIA, 1607-1624/5, at xxiii (Virginia M. Meyer & John Frederick Dorman eds., 1987) (explaining that until 1752 the Virginia colony used two calendars, the Julian calendar and the Gregorian calendar. Since under the Julian calendar the New Year started March 25th, any event that occurred between

After hearing all the evidence, the county court jury, a relatively recent addition,⁴⁷ found that Elizabeth's father was Thomas Key, a free Englishman.⁴⁸ They also found, as a matter of fact, that Key bound Elizabeth to Humphrey Higginson for a nine year term which had expired.⁴⁹ Based on the jury's factual findings, the County Court judge ruled that Elizabeth ought to be freed.⁵⁰ The Mottrom estate overseers appealed this decision to the General Court.⁵¹

The General Court met in Jamestown⁵² and had both original and appellate jurisdiction in all cases arising in the colony.⁵³ Elizabeth's case was heard at the March 1655/1656 session, but⁵⁴ the only existing records of the General Court proceeding are the notes of Conway Robinson.⁵⁵ Robinson reports only that "a mulatto held to be a slave and appeal taken,"⁵⁶ in other words the General Court decided Elizabeth was a slave, and she appealed.⁵⁷

Undeterred by the General Court's adverse decision, Elizabeth petitioned the General Assembly for a hearing.⁵⁸ Until 1680, the

January 1st and March 25th was indicated using two years).

47. Warren M. Billings, *Pleading, Procedure, and Practice: The Meaning of Due Process of Law in Seventeenth-Century Virginia*, 47 J. S. HIST. 569, 575, 581 (1981).

48. OLD DOMINION, *supra* note 1, at 165.

49. *Id.*

50. *Id.*

51. *Id.*

52. OLIVER P. CHITWOOD, *JUSTICE IN COLONIAL VIRGINIA* 37, 99 (1971). The General Court usually met in the capital. Only on rare occasions did the court meet elsewhere, and there is nothing to suggest that this was one of those rare occasions.

53. *Id.* at 17.

54. Billings, *The Cases of Fernando and Elizabeth Key*, *supra* note 2, at 469 n.9. The actual court record was destroyed by fire in 1865. *Id.*

55. VIRGINIUS CORNICK HALL, JR., *PORTRAITS IN THE COLLECTION OF VIRGINIA HISTORICAL SOCIETY: A CATALOG* 215 (1981). Conway Robinson was the founder of the Virginia Historical Society and lived from 1805-1884. He also worked as a lawyer, author, and Clerk of the General Court from 1828-1831. Billings, *The Cases of Fernando and Elizabeth Key*, *supra* note 2, at 469 n.9. Conway Robinson made copies of the colonial court records whose originals were later destroyed in a fire during the Civil War.

56. H.R. MCILWAINE, *MINUTES OF THE COUNCIL AND GENERAL COURT OF COLONIAL VIRGINIA 1622-1632, 1670-1676: WITH NOTES AND EXCERPTS FROM ORIGINAL COUNCIL AND GENERAL COURT RECORDS, INTO 1683, NOW LOST* 504 (1924); Billings, *The Cases of Fernando and Elizabeth Key*, *supra* note 2, at 469 n.9.

57. PHILIP A. BRUCE, *INSTITUTIONAL HISTORY OF VIRGINIA: IN THE SEVENTEENTH CENTURY* 681-82 (1910). Because no record remains, it is impossible to determine whether the general court retried the case, asserting its original jurisdiction, or acted as an appellate court, simply suspending the county court order until it rendered a decision.

58. Billings, *The Cases of Fernando and Elizabeth Key*, *supra* note 2, at 468-69.

General Assembly was both the legislative body, and the highest appellate court in the Virginia colony.⁵⁹ Upon receipt of Elizabeth's petition, the General Assembly appointed a committee of Burgesses to investigate the matter.⁶⁰ Although there are no records to indicate the nature of the Committee's investigation, there is a report. The Committee report essentially upholds the decision of the County Court.⁶¹

One key to Elizabeth Key's success lies in the theories she used to assert her legal status as a free-born English subject. Her pleadings differed materially from typical seventeenth century freedom suits in several respects. Most seventeenth century freedom suits by English indentured servants in Virginia usually alleged only that the complainant is being held beyond the agreed upon years of service.⁶² But this was just one of the legal theories Elizabeth asserts in her freedom suit; and the validity of that claim seems to rest on two other claims: first that she was the daughter of Thomas Key, a free Englishman, which status she inherited;⁶³ and second, that as a baptized practicing Christian she could not be held in servitude for life.⁶⁴ Based on these two statuses – English paternal ancestry and Christian religion – Elizabeth asserted that she must be treated as an English indentured servant whose term of service had expired.

In the typical freedom suit there would be no need for an English servant to assert free birth since by the seventeenth century English men and women were presumptively free.⁶⁵ Likewise the typical English indentured servant would not have to assert her Christian belief since Christianity also was presumed for English subjects. Evidently, Elizabeth (or the person who drafted the pleadings) understood that her

59. PERCY SCOTT FLIPPIN, *THE ROYAL GOVERNMENT IN VIRGINIA 1624-1775*, in *STUDIES IN HISTORY ECONOMICS AND PUBLIC LAW* 307 (Columbia University Political Science Faculty ed., 1919). At that time the General Court became the highest court in the colony and appeals from that court were made to the Monarch.

60. Billings, *The Case of Fernando and Elizabeth Key*, *supra* note 2, at 469.

61. OLD DOMINION, *supra* note 1, at 167.

62. See George B. Curtis, *The Colonial County Court, Social Forum and Legislative Precedent: Accomack County, Virginia, 1633-1639*, 85 VA. MAG. HIST. & BIOGRAPHY 274, 282 (1977).

63. William M. Wiecek, *The Statutory Law of Slavery and Race in the Thirteen Mainland Colonies of British America*, 34 WM. & MARY Q. 258, 262 (1977).

64. See OLD DOMINION, *supra* note 1, at 167 ("A Report of a Comittee [sic] from an Assembly Concerning the freedome [sic] of Elizabeth Key.").

65. I WILLIAM BLACKSTONE, *COMMENTARIES* *423-24 (describing the attempted introduction of slavery to England by statute in 1547 and its rapid repeal in 1549-1550).

claim was atypical suggesting a sophisticated understanding of community norms.⁶⁶ “In early America . . . women as well as men spoke through ‘court records more openly than through almost any other set of documents.’”⁶⁷

Thus to appreciate the novelty of Elizabeth’s case, her interlinking legal claims merit further examination. They provide insight into the legal and social status distinctions between English and African descendants in colonial Virginia during the middle of the seventeenth century. Each theory is problematic, perhaps foreshadowing the difficulty the colonial legal system had with Elizabeth’s claims.

A more thorough examination of Elizabeth Key’s freedom suit is important for another reason. There is a tendency to discuss slavery from a male perspective giving enslaved women only secondary positions in the struggle to secure freedom. More recent slave scholarship suggests that we need to reconsider how the interaction of race *and* gender often distinguishes black women’s struggles to define themselves legally from similar attempts by white women and black men.⁶⁸

B. Status of the Child Follows the Father (partus sequitur partem)

Elizabeth’s primary argument was that the child of a free English man could not be born a slave. Although various forms of unfree statuses existed in seventeenth century England,⁶⁹ as late as 1701 Sir John Holt, Chief Justice of King’s Bench wrote: “One may be a villein

66. Ira Berlin, *From Creole to African: Atlantic Creoles and the Origins of African-American Society in Mainland North America*, 53 WM. & MARY Q. 251, 252-54 (1996). This level of sophistication is not normally attributed to *negro* slaves. *Id.* But as historian Ira Berlin writes, during the colonial period “Atlantic creoles,” persons of African descent, had an understanding of the society in which they found themselves and used this knowledge to their own advantage. *Id.* at 278.

67. TERRI L. SNYDER, *BRABBLING WOMEN: DISORDERLY SPEECH AND THE LAW IN EARLY VIRGINIA* 7 (2003) (citing CORNELIA HUGHES DAYTON, *WOMEN BEFORE THE BAR: GENDER, LAW AND SOCIETY IN CONNECTICUT, 1639-1789* 285-328 (1995)).

68. See Adrienne Davis, *Slavery and the Roots of Sexual Harassment*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW* 457 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004); Cheryl I. Harris, *Finding Sojourner’s Truth: Race, Gender, and the Institution of Property*, 18 CARDOZO L. REV. 309, 313-15 (1996); Evelyn Brooks Higginbotham, *African-American Women’s History and the Metalanguage of Race*, 17 SIGNS 251, 252 (1992).

69. See Wiecek, *supra* note 2, at 1716-25.

in England, but not a slave.”⁷⁰ Thus by asserting that her father was a *free* Englishman, Elizabeth was arguing that she too was born free.

What is not clear is whether the legal status of her mother also influenced the strength of her claim. Elizabeth’s mother is described in the County Court proceeding as a *negro woman*⁷¹ and as a *slave* in the General Assembly committee report.⁷² It is probable that in seventeenth century Virginia there was no meaningful difference between a *negro* and *slave* when describing a person with African ancestry. Otherwise if her mother was an indentured servant, Elizabeth would be considered free at birth even though she might subsequently be placed in temporary servitude. Customarily, illegitimate children of female indentured servants were placed into service to pay for their keep.⁷³

It also is likely that her mother was an alien, someone not born in the British American Colonies or the English realm, given both the date of Elizabeth’s birth, 1630⁷⁴, and the small number of *negroes* in the colonies at that time.⁷⁵ Thus Elizabeth’s claim to English subjecthood rested on determining whether anyone born in the colony became an English subject, or whether the child of an English subject and an alien born on English territory became an English subject. As mentioned previously, the Virginia Company Charter is unclear on this question.⁷⁶

70. *Id.* at 1716 (citing *Smith v. Brown & Cooper*, (1701) 2 Salk. 666, 91 Eng. Rep. 566 (K.B.)). A late sixteenth century tract asserts: “[a]s for slaves and bondmen we have none; nay such is the privilege of our country . . . that if any come hither from other realms, so soon as they set foot on land they become . . . free . . .” *Id.* at 1715 (quoting WILLIAM HARRISON, *THE DESCRIPTION OF ENGLAND* 134 (F. J. Furnivall ed., 1877)).

71. *OLD DOMINION*, *supra* note 1, at 166 (testimony of Elizabeth Newman, stating that Key was “fined for getting his Negro woman with Childe.”). Interestingly, although only the deposition of Elizabeth Newman refers to Elizabeth’s mother, and Newman calls her a “Negro woman”, once, as above, the article by Warren Billings, says that the “depositions refer to Elizabeth Key’s mother as a slave.” Billings, *The Cases of Fernando and Elizabeth Key*, *supra* note 2, at 468 n.5.

72. *OLD DOMINION*, *supra* note 1, at 167 (“A Report of a Comittee [sic] from an Assembly Concerning the freedome [sic] of Elizabeth Key”).

73. See Mary Sarah Bilder, *The Struggle Over Immigration: Indentured Servants, Slaves, and Articles of Commerce*, 61 MO. L. REV. 743, 772 (1996); Veronica Hendrick, *Codifying Humanity: The Legal Line Between Slave and Servant*, 13 TEX. WESLEYAN L. REV. 685, 688 (2007); Oscar & Mary F. Handlin, *Origins of the Southern Labor System*, 7 WM. & MARY Q. 199, 201-02 (1950); JOSEPH DOUGLAS DEAL, *RACE AND CLASS IN COLONIAL VIRGINIA: INDIANS, ENGLISHMEN, AND AFRICANS ON THE EASTERN SHORE DURING THE SEVENTEENTH CENTURY* 166, 171 (1993).

74. See *OLD DOMINION*, *supra* note 1, at 166.

75. See Wiecek, *supra* note 2, at 1735-38 (describing how England was “late” to the slave trade, and how England used Bermuda, Barbados, and Jamaica for sugar cultivation in the seventeenth century before turning to the slave trade).

76. The rights of English subjects are granted to the colonists’ children in section XV of the

Assuming Elizabeth's mother was a slave, it is possible that customary practice in the colony in 1630 when Elizabeth was born deemed her a slave. There is evidence that children of black slaves in the Virginia colony were held as slaves.⁷⁷ In 1649 several black women were sold as slaves together with their "issue and produce."⁷⁸ Further, in 1657 while Elizabeth was still litigating her case a white servant, Thomas Twine, fathered a child by a black woman also described as a *servant*. The record shows no fine, nor any arrangement for the child's upkeep causing at least one historian to infer that the child was held as a slave by the mother's master.⁷⁹

The colonial legislature did not address this question until 1662, several years after Elizabeth's case. That statute proclaims that the status of the child follows the mother (*partus sequitur ventrem*).⁸⁰ Ultimately this becomes the rule in the slave-holding British American colonies.⁸¹ Thus one thing seems clear, Elizabeth's case, and the existence of other illegitimate offspring of Englishmen and African descended women in the colony resulted in a policy decision by the General Assembly about the fundamental status and rights of persons of Afro-English ancestry. The need for legislation in this area reflects the failure of English common law to provide a satisfactory resolution of the issue.

"When English judges first confronted modern slavery in the seventeenth and eighteenth centuries, as common lawyers they instinctively turned to earlier legal forms of servitude [like villeinage] for help in understanding the meaning of unfreedom."⁸² A villein was a peasant or serf, and villeinage, when it existed, was the closest unfree

Charter of King James I of 1606. 1 Hening, *STATUTES AT LARGE*, *supra* note 11, at 57, 64. The King reiterates the statement of privileges in the Charter of 1609. *Id.* at 95.

77. DEAL, *supra* note 73, at 166-67 (discussing the case of Congo, Cossongo and their children, who were held as slaves by members of the Littleton family for over forty years).

78. Winthrop D. Jordan, *Modern Tensions and the Origins of American Slavery*, 28 J. S. HIST. 18, 24 (1962). In one case, a Maryland man deeded two black men and one woman "and all *their* issue" as slaves. *Id.* (emphasis added). But the record does not clearly indicate whether a child's slave status depended solely on the legal status of the child's mother. In 1645, for example, a male *slave*, Emanuel Driggus, had several children "bound" as servants to his master. The status or ancestry of his children's mother is unknown. DEAL, *supra* note 73, at 279-80. Later Driggus and his wife, Frances (who was also a slave), had three children, all of whom were held as slaves. *Id.* Driggus's owner, Francis Pott, sold their children in the late 1650s. *Id.* at 283.

79. Brown, *supra* note 3, at 218-19.

80. Act XII of 1661, *reprinted in* Hening, *STATUTES AT LARGE*, *supra* note 11, at 170.

81. Wiecek, *supra* note 63, at 262.

82. Wiecek, *supra* note 2, at 1715.

state to slavery English society knew.⁸³ Villeins were considered chattel to be bought and sold at will.⁸⁴ Villeins also could be freed by their masters.⁸⁵

Nevertheless a comparison of the legal status of slaves with that of villeins is an imperfect analogy because villeins had many rights that slaves in America did not. Villeins could “hold real or personal property,” marry without the master’s consent, carry arms and even serve on juries.⁸⁶ “But with little else to go on, English lawyers [nevertheless] cited villeinage, often inaccurately, as a legal precedent that might help explain what it meant to be a slave.”⁸⁷

Applying the law of villeinage, the resolution of Elizabeth’s first claim seems clear. In the fifteenth century, noted English jurist, Sir Edward Coke, in one of the great treatises on the English common law, the four volume *Institutes of the Laws of England*, wrote that if a bondman or serf (*villein*) marries a free woman, their children would be *villeine*, but if a bondwoman (*niefe*) married a free man, their children would be free.⁸⁸ According to Lord Coke, the English common law rule, that the status of the child follows the father, is grounded in the notion of marital unity.⁸⁹ Under common law the legal identity and status of a wife merged with that of her husband⁹⁰; they became one in the eyes of

83. *Id.* at 1716.

84. *Id.*

85. *Id.* at 1717.

86. *Id.*

In their legal status, they partook of the character of slaves on the one hand, and free people on the other . . . The villein, . . . in theory, had not rights against the lord, while the lord could exact special payments from him, such as a fee when a villein’s daughter was married . . . Yet in other respects, the villein was free.

Id. at 1716-17.

87. *Id.* at 1718.

88. 1 LORD COKE, A SYSTEMATIC ARRANGEMENT OF LORD COKE’S FIRST INSTITUTE OF THE LAWS OF ENGLAND 322, § 187.123a (J.H. Thomas ed., 1836) [hereinafter COKE’S FIRST INSTITUTE]. “[I]f a villain taketh a free woman to wife, and have issue between them, the issues shall be villains. But if a nief [bondwoman] taketh a free man to her husband, their issue shall be free.” *Id.*

89. *Id.* at 323, § 187.123a. “The husband and wife are all one person in law, and the nief marrying a free man is enfranchised during the coverture . . . and therefore by the common law of England the issue is free . . .” *Id.*

90. See also 1 BLACKSTONE, *supra* note 65, at 442 (“By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage . . .”).

the law, and that one was the husband.⁹¹ Therefore, the legal status of the father naturally governs the legal status of the child. In this respect English common law was different from civil law countries where the status of the child follows the mother.⁹²

But Lord Coke's statement only governs the status of a *legitimate* child of a freeman and bondwoman. At the time of Elizabeth's birth, Thomas Key was not married to her mother, so Elizabeth was "illegitimate" in the eyes of the law. Thus this common law rule does not apply in her case. One must look further to determine what common law rule applied to a child born to an unwed freeman and bondwoman.

A later section of Lord Coke's *The First Institute* squarely addresses this issue. Coke acknowledges that some judges have mistakenly held that an "illegitimate" child of a bondwoman is a *villeine*, and thus unfree. The correct rule, he writes, is that a child born to unwed parents is a child of no one (*quasi nullius filius*), because the child cannot be heir to anyone.⁹³ Thus this child is not a *villeine* unless the child places her/himself in bond before a court.⁹⁴ Applying Lord Coke's interpretation of the English common law, Elizabeth would be free-born under English law, even though her mother was a slave.

Whether the Virginia colonists understood this to be the common law of England, and thus applicable to the colony is unclear.⁹⁵ They had limited access to the full range of legal materials on this subject. The few case reports by Sir Edward Coke found in colonial inventories were

91. See *United States v. Yazell*, 382 U.S. 341, 361 (1966) (Black, J., dissenting) (explaining the common law rule).

92. "[T]his is contrary to the civil law; for there it is said, *partus sequitur ventrem*." COKE'S FIRST INSTITUTE, *supra* note 88, at 322, § 187.123a. However, "[t]he feudal institution of villeinage, for which abundant legal precedent existed, provided the most likely candidate for being the ancestor of slavery, but judges eventually discarded it as irrelevant." Wiecek, *supra* note 2, at 1716.

93. COKE'S FIRST INSTITUTE, *supra* note 88, at 324, § 188.123a.

94. *Id.* ("[N]o bastard may be a villain, unless he will acknowledge himself to be a villain in a court of record; for he is in law *quasi nullius filius* [a child of no one], because he cannot be heir to any").

95. Paul Finkelman, *The Crime of Color*, 67 TUL. L. REV. 2063, 2083 n.91 (1993). Some scholars argue that the 1662 statute reflected "an attempt to regulate the emerging social and economic institution of slavery in a way that would be most beneficial to the master." *Id.* (citing EDMUND S. MORGAN, *AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA* 333 (1975); 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*, 32 AM. J. LEGAL HIST. 95, 112-13 (1988); Wiecek, *supra* note 63, at 262-63).

written in French.⁹⁶ The first English version of Coke's reports was not available in the colony before 1658, the year after Elizabeth's case was resolved.⁹⁷ Therefore, it is unclear whether Lord Coke's interpretations on this point were readily available to all actors in the colonial legal institutions of the period. Undoubtedly, some of the men who judged Elizabeth's case were familiar with English common law as recorded by Lord Coke; whether they felt bound to follow the law when an Anglo-negro was involved is another question altogether.

On the other hand, Henry Swinburne's legal treatise, *A Briefe Treatise of Testaments And Last Willes*, published in 1590, was widely used in the colony during the seventeenth century.⁹⁸ Written in English, it was readily understandable by any literate person.⁹⁹ In fact, a copy of Swinburne's treatise appears among the inventory of John Mottrom's estate.¹⁰⁰

Swinburne agreed with Lord Coke that under the common law the father's status governed the legal status of legitimate children whose parents had different legal status. As for children born outside of marriage, Swinburne writes:

[A] bastard shall not be bound though the father were a bond-slave, because the lawe dooth not acknowledge any father in this case But howsoever the civill lawe and the laws of this realme differ in this, whether the bondage of the father or of the mother, doo make the childe bonde: Yet in this they doo agree, that a bond-man can not make a testament [will].¹⁰¹

Arguably, Swinburne is silent, or at the very least ambiguous, on whether an illegitimate child inherits the legal status of its mother. All he says is that an illegitimate child does not inherit the legal status of its alleged father. Thus according to Swinburne the legitimacy of Elizabeth's claim of free birth is questionable.

Blackstone's Commentaries, another written authoritative source on

96. Warren M. Billings, *Justice, Books, Laws, and Courts in Seventeenth-Century Virginia*, 85 LAW LIBR. J. 277, 284 (1993).

97. *Id.*

98. HENRY SWINBURNE, *A BRIEF TREATISE OF TESTAMENTS AND LAST WILLS* (1590) (photo. reprint 1978).

99. Billings, *supra* note 96, at 287-88.

100. *Inventory of the Estate of JNO Mottrom*, in NORTHUMBERLAND COUNTY RECORD BOOK, 1652-1658 98 (Frank V. Walczyk ed., 2001).

101. SWINBURNE, *supra* note 98, at 44.

English common law, published well after Elizabeth's case, is in full agreement on every point with Lord Coke's interpretation of the law. Blackstone reasons that because a bastard under law cannot inherit, it would be "hard that he should lose his natural freedom by it."¹⁰² Thus, under Blackstone's interpretation of English common law Elizabeth would be considered free at birth. Blackstone's conclusion also is consistent with judicial commentary elsewhere in the colonies.

The New England colonies considered the offspring of slaves born free until 1670 when the Massachusetts colony revised its law on slavery.¹⁰³ The need for a law on this point suggests that more educated English colonists understood that at common law an English child born to unwed parents was presumed to be free. The status of children with Anglo-African ancestry was not formally resolved in Connecticut until 1704 when the General Assembly in *Abda v. Richards* said that a child's status follows that of the mother.¹⁰⁴ In that case *Abda*, who like Elizabeth Key, had a white father and an enslaved *negro* mother, challenged his enslavement asserting his white ancestry.¹⁰⁵

The Connecticut General Assembly admitted that no law specifically covered persons of mixed ancestry, and that their ruling simply reflected "customary practice."¹⁰⁶ According to historian Lorenzo Greene, *Abda* set a legal precedent in New England.¹⁰⁷ Thus, by the beginning of the eighteenth century, the universal practice was that children of enslaved women in the British American colonies were born into perpetual slavery.¹⁰⁸

Since Elizabeth's claim to freedom hinged on whether her father was a free English man, the first hurdle in the County Court was to establish that she was the daughter of Thomas Key. During the initial trial there was conflicting testimony on this issue. One witness claimed that Elizabeth's father was a "Turke."¹⁰⁹ Slavery was not limited to

102. 2 BLACKSTONE, *supra* note 65, at 94.

103. Massachusetts legalized slavery in 1641, but did not resolve the issue of whether slavery was hereditary until 1670. LORENZO J. GREENE, *THE NEGRO IN COLONIAL NEW ENGLAND 1620-1776* 290, 322 (1942).

104. *Id.* at 182-83.

105. Also like the Key case, the Inferior Court of Common Pleas agreed with him, but the General Assembly reversed. *Id.*

106. *Id.*

107. *Id.*

108. Davis, *supra* note 68, at 459 (stating that all the colonies had adopted the rule by 1682).

109. OLD DOMINION, *supra* note 1, at 166. One witness testified that sixteen or seventeen years earlier he heard "a flying report" (rumors) in Yorke that Elizabeth was the child of Thomas

*negroes*¹¹⁰, thus English ancestry, might have been crucial in establishing Elizabeth's first claim. But, if the court applied English law coming out of villeinage then it would not matter whether her father was a free Englishman or a Turke, unless the free birth rule only applied to the children of English men and women. Elizabeth was born outside of a lawful marriage, and as a child of no one, she would be free.

Another witness swore that nineteen years earlier neighbors of Elizabeth's first master commonly reported that she was Thomas Key's child.¹¹¹ But the most persuasive evidence came from the eighty-year old former servant of John Mottrom who testified that it was commonly known that Thomas Key had been fined by the court in Blunt Point for getting "his Negro woman with Childe," and that child was Elizabeth.¹¹² Her testimony was corroborated by two other witnesses.¹¹³

Key. *Id.* (Testimony of Nicholas Jurnew). According to this witness, Thomas Key reportedly denied it, claiming that a "Turke of Capt. Mathewes" was Elizabeth's father. *Id.*; John H. Wigmore, *The History of the Hearsay Rule*, 17 HARV. L. REV. 437, 444-45 (1904). Most contemporary lawyers would cringe at Jurnew's testimony since he is reporting a rumor, notoriously unreliable evidence - hearsay. The hearsay rule, which prevents this type of testimony from being admitted as evidence in modern trials, was not very well developed in the mid-seventeenth century. Wigmore, *supra*, at 444-45. Noting that "down beyond the middle of the 1600's" hearsay evidence was "constantly received" in courts, "even against opposition." *Id.* at 444. It was only "between 1675 and 1690 that the fixing of the [hearsay] doctrine takes place." *Id.* at 445. Further, county court judges with little or no legal training were not likely to apply such highly formal rules of evidence. If Elizabeth's father was a Turk, then her claim of free birth based on her father's status might fail, especially if English ancestry created a presumption of free birth. This testimony, if believed by the jury, would be significant because in 1655, a "Turke" was neither a free English man, nor a Christian. Liam Seamus O'Melinn, *The Imperial Origins of Federal Indian Law: The Ideology of Colonization in Britain, Ireland, and America*, 31 ARIZ. ST. L.J. 1207, 1248 (1999) (explaining the English use of the term "Turk" to describe those who were "adherents of Islam"); see also the Virginia Act of 1705, reprinted in 3 Hening, STATUTES AT LARGE, *supra* note 11, at 447-48 (explaining that "Turks and Moors in amity with her majesty" would not be enslaved. Before that law, the status of such Turkes was unclear).

110. David P. Tedhams, *The Reincarnation of "Jim Crow": A Thirteenth Amendment Analysis of Colorado's Amendment 2*, 4 TEMP. POL. & CIV. RTS. L. REV. 133, 139 (1994) (stating that slavery was not limited to Africans, but also included "people of any race who bore the badges and incidents of a status which made them 'pariah' in the eyes of the majority"). Note also that Native Americans were briefly enslaved in the British American colonies. See Jonathan L. Alpert, *The Origin of Slavery in the United States - the Maryland Precedent*, 14 Am. J. Legal Hist. 189, 191 (1970) (regarding Indian slaves in Maryland in 1640). Some Indians were enslaved in Virginia between the years of 1676 and 1691. A. Leon Higginbotham, Jr. & F. Michael Higginbotham, *"Yearning to Breathe Free": Legal Barriers Against and Options in Favor of Liberty in Antebellum Virginia*, 68 N.Y.U. L. REV. 1213, 1238 n.136 (1993).

111. OLD DOMINION, *supra* note 1, at 166.

112. *Id.*

113. *Id.* The first witness testified that he heard Elizabeth referred to in the Mottrom household as Thomas Key's "bastard," adding that when Thomas Key's son, John, called Elizabeth

Although there was substantial hearsay evidence in support of Elizabeth's claim, no direct evidence established that Thomas Key was Elizabeth's father. Nevertheless the jury concluded that Elizabeth was Thomas Key's daughter.¹¹⁴ With paternity established the next question was whether her father's status as a free Englishman meant that Elizabeth was an English subject and thus free-born.

C. Indentured Servant versus Slave

Elizabeth's status in her master's household seemed a crucial determinant of her legal status. Elizabeth claimed that she was given to her godfather Humphrey Higginson at age six as an indentured servant. Higginson, among the wealthiest and most influential settlers in the colony during the 1640s,¹¹⁵ left for England sometime in the 1650s and never returned.¹¹⁶ At some point before 1655 he transferred possession

"Black Bess," John was instructed by Mrs. Speke to call her sister, which he did. *Id.* (testimony of John Bayles). It is unclear from the record whether Mrs. Speke is related to Thomas Speke, one of the overseers to the Mottrom estate who appealed the judgment to the General Court. *Id.* at 165. In a more formal court proceeding Elizabeth generally would be required to produce Mrs. Speke to get this statement before the court. However, given that the Mrs. Speke referred to by Bayles probably was the wife of Thomas Speke, one of the overseers to the Mottrom estate, her willingness to testify on Elizabeth's behalf is doubtful. This likelihood might explain why Bayles, rather than Mrs. Speke, the person whose words he repeats, testified on Elizabeth's behalf. An exception to the hearsay rule allows third party testimony about the out-of-court statements of a party opponent or his agent. 4 WIGMORE ON EVIDENCE §1078 (James H. Chadbourne ed., 4th ed. 1972) (explaining that the wife of the party to the suit *might* have been considered his agent). However, it is more likely the testimony was admitted because of general laxity regarding hearsay evidence in the colonial court. See Wigmore, *supra* note 109, at 444-45. The second corroborating witness testified that she saw Elizabeth's mother go to bed with Thomas Key many times, and heard Elizabeth's mother say that Elizabeth was Thomas Key's child. OLD DOMINION, *supra* note 1, at 166 (testimony of Alice Larrett).

114. *Id.* at 165.

115. *Bernard Family*, 5 WM. & MARY Q. 181, 186 n.3 (1897). Humphrey Higginson was a member of the Virginia Council from 1642-1655. *Id.*; 2 PHILIP ALEXANDER BRUCE, INSTITUTIONAL HISTORY OF VIRGINIA IN THE SEVENTEENTH CENTURY 358-59 (1964). Philip Alexander Bruce characterizes Council members as "invariably" among "the wealthiest . . . and most influential" settlers in the colony. *Id.* at 358. A royal appointment, membership in the Council of State, was one of the most influential positions in colonial Virginia. The Council exercised powers roughly analogous to the English House of Lords. It had the right to approve or disapprove all measures proposed by the colonial governor. Council members, already wealthy men, usually grew much richer during their term of office. *Id.* at 359.

116. 2 BRUCE, *supra* note 115, at 382 n.2. In 1656 Higginson attempted to retain his exemption from certain taxes, but the General Assembly refused to continue the exemption because he had "been so long absent out of the country." *Id.* But cf. *The Randolph Manuscript: Virginia Seventeenth Century Records*, 17 VA. MAG. HIST. & BIOGRAPHY 113, 128 n.6 (1909) (explaining that Higginson died in England in 1665).

of Elizabeth to John Mottrom. Her transfer from one master to another was not unusual.

Whether enslaved or indentured, unfree members of the Virginia colony had no control over such transfers. According to historian Douglas Deal, a slave in seventeenth century Virginia might belong to three or four different owners.¹¹⁷ Although indentured servitude was temporary and not inheritable, in many respects servitude was indistinguishable from slavery,¹¹⁸ masters treated indentured servants like land or chattel, selling or gambling them away at will.¹¹⁹ Perhaps for this reason some colonial courts appeared willing to hear servants' complaints.¹²⁰

Three quarters of the servants who sued their masters in the Chesapeake area (Maryland and Virginia) during the seventeenth century won their case.¹²¹ Notwithstanding this high rate of success, since the burden fell on the servant to initiate legal action many servants understandably were reluctant to sue for their freedom.¹²² Despite the availability of legal recourse, servants had great difficulty asserting their legal rights, and challenging their ill treatment. The courts provided little real protection generally permitting abuses that would not have

117. DEAL, *supra* note 73, at 178.

118. Wiecek, *supra* note 2, at 1720-21. See also MORGAN, *supra* note 95, at 127-29 (referring to treatment of servants during the boom period).

119. MORGAN, *supra* note 95, at 127-29.

120. Curtis, *supra* note 62, at 282. The county court also certified the sale and transfer of two servants under indenture agreements, and heard a series of cases involving the rental or lease of six servants. *Id.* The leasing of servants, however, was unusual. *Id.*

121. MARY BETH NORTON, *FOUNDING MOTHERS & FATHERS: GENDERED POWER AND THE FORMING OF AMERICAN SOCIETY* 133 (1996). In contrast, servants in New England were less likely to secure their freedom. *Id.* at 113 n.80. The life of a servant in seventeenth century Virginia was harsh. Few servants would willingly continue after their contract for service had expired. Historian Edmund Morgan points out that indentured servants in the Virginia colony served longer terms than their counterparts in England. Unlike their English counterparts Virginia servants received no wages because their wages had been paid in advance to cover their transportation costs to the colony. Almost all servants were therefore in a condition resembling that of the least privileged type of English servant, the parish apprentice, a child who (to relieve the community of supporting him) was bound to service by court order, until he was twenty-one or twenty-four, with no obligation on his appointed master's part to teach him a trade or pay him. MORGAN, *supra* note 95, at 126.

122. If they lost they went back to masters angry at both the cost of the litigation and the cheek or impudence of the servant in suing. Since the consequences of an unsuccessful freedom suit might be severe, legal actions by servants against their masters probably were not initiated lightly. See Higginbotham & Higginbotham, *supra* note 110, at 1234-36 (discussing "freedom suits"); Billings, *The Law of Servants and Slaves*, *supra* note 2, at 52.

been allowed in England.¹²³ This lack of actual legal protection made an indentured servant extremely vulnerable.¹²⁴ If the servant's master died, "an heir, real or fraudulent, would quickly lay hold of him."¹²⁵

Assuming Elizabeth was an indentured servant, the extension of her service beyond the original term and transfer from one master to another were consistent with the treatment of English servants during the period. The conversion of Elizabeth from indentured servant to slave was a logical step given her ancestry. Her African ancestry made it easier for the Mottrom estate overseers to argue that Elizabeth was a servant for life – a slave.

At the trial Elizabeth produced witnesses who sought to explain the nature of her transfer from Thomas Key to Humphrey Higginson. One witness testified that according to neighbors, Elizabeth was given to Higginson with the understanding that he would transport her to England and deliver her to Thomas Key in nine years. When Thomas Key died before the nine year term expired, the neighbors reported that Higginson said he would take her to England anyway, "give her a portion and lett her shift for her selfe."¹²⁶

Another witness present at the signing of the agreement between Thomas Key and Higginson testified that Higginson promised Key to use "Bess a Molletto . . . as well as if shee were his own Child."¹²⁷ This testimony is corroborated by a written memorandum of the agreement between Key and Higginson. According to the document described in the record, in exchange for food and clothing, Elizabeth, a "Negro Girle," was being put in Higginson's care for nine years.¹²⁸ The memorandum further provided that if Higginson left permanently for England before the nine year term expired, he should take Elizabeth with him at his own expense, and not give her to anyone else. The agreement

123. MORGAN, *supra* note 95, at 127-28.

124. Sexual harassment of female, and occasionally male, servants was common. *Id.* at 129; see also DEAL, *supra* note 73, at 127-28.

125. MORGAN, *supra* note 95, at 116.

126. OLD DOMINION, *supra* note 1, at 166 (Testimony of Anthony Lenton).

127. OLD DOMINION, *supra* note 1, at 167 (Testimony of Anne Clark). Anne Clark testified that she was present when Higginson and Thomas Key signed an agreement witnessed by her deceased husband. *Id.* Having witnessed only the signing, Clark does not necessarily have first-hand knowledge of the agreement's terms. *Id.* She is uncertain whether the document specified that Elizabeth was to be given her freedom when her term expired. *Id.* at 166-67.

128. *Id.* at 165.

also stipulated that Elizabeth should be freed if Higginson died before the nine year term ended.¹²⁹

The whereabouts of the actual document are unknown. All that is left is what the record says about the document.¹³⁰ This record raises several questions about whether the document was an indenture contract or a manumission agreement. If an indenture contract, the document was evidence of Thomas Key's intent to place Elizabeth in temporary servitude. On the other hand, the document could be evidence that Key intended to manumit her in nine years, supporting claims that Thomas Key considered Elizabeth a slave.¹³¹

Thus, the description of this memorandum does not clearly convey whether Thomas Key considered Elizabeth born free or enslaved. Whatever Elizabeth's legal status at the time of the agreement, clearly Key wanted Elizabeth freed at age fifteen, and Higginson broke his promise to set her free. Elizabeth's nine year term of service should have ended in 1645, yet Higginson did not free her before he left for England in the late 1640s or early 1650s. Higginson may have sold Elizabeth to Mottrom directly since it is likely that the two knew each other since their terms in the colonial legislature overlapped.¹³²

Higginson's failure to honor the terms of his agreement with Thomas Key was not unusual. For this very reason Virginia colonial law required registration of indenture contracts to prevent masters from holding servants beyond their agreed term of service.¹³³ It is likely that

129. *Id.*

130. *Id.* at 165, 169 (discussing the agreement and commenting on the destruction of General Court records for the period of Elizabeth Key and Fernando's trials).

131. See generally Robert J. Cottrol, *The Long Lingered Shadow: Law, Liberalism, and Cultures of Racial Hierarchy and Identity in the Americas*, 76 TUL. L. REV. 11 (2001) (describing and contrasting the different approaches to manumission in the slave colonies).

132. THE GENERAL ASSEMBLY OF VIRGINIA, JULY 30, 1619- JANUARY 11, 1978: A BICENTENNIAL REGISTER OF MEMBERS 29 (Cynthia Miller Leonard ed., 1978). Mottrom served in the House of Burgesses in 1652 session for Northumberland County. *Id.* This also means that he and Higginson served in the general assembly together for one year, 1652, which makes it possible that they knew one another.

133. A 1643 Virginia law provided:

WHEREAS divers controversies have risen between masters and servants being brought into the collony without indentures ... Be it therefore enacted ... that such servants as shall be imported haveing no indentures or covenants either men or women if they be above twenty year old to serve fowre year, if they shall be above twelve and vnder twenty to serve five years, and if under twelve to serve seaven years.

1 Hening, STATUTES AT LARGE, *supra* note 11, at 257. Warren Billings writes, "[r]equiring the recordation of indentures and servants' ages guarded against the unscrupulous owner who might try to extend the time of bondage." Billings, *The Law of Servants and Slaves*, *supra* note 2, at 51.

Thomas Key, pursuant to this law, registered Elizabeth's contract, and this would explain why she had access to the memorandum.

D. Christianity as a Marker of Free Status

Sandwiched between the comments about the identity of her father, and the nature of the agreement between Thomas Key and Humphrey Higginson, is a statement about Elizabeth's Christian beliefs. The General Assembly committee report states that Elizabeth was the christened godchild of Colonel Higginson, and seemed knowledgeable about the tenets of her faith,¹³⁴ but the report provides little insight into the weight, if any, the Committee placed on Elizabeth's claim that a Christian could not be held as a slave. Whether black Christians could be held as slaves was a contentious issue, and one which the Committee did not have to answer in Elizabeth's case.

This uncertainty about the compatibility of slavery and Christianity has its roots in English villeinage. Christianity was a prominent factor in the end of villeinage in England.¹³⁵ During the seventeenth century European jurists continued to debate whether Christians should hold other Christians as slaves.¹³⁶ Nevertheless this debate did not prevent Christians in Europe from killing or enslaving other Christians.¹³⁷

The claim that Christians could not be enslaved for life was used earlier with limited success by African descended litigants to escape slavery. For a time in the early seventeenth century customary practice in Virginia may have afforded different status to blacks who were Christians. There is some evidence that black Christians could testify against whites,¹³⁸ and sue in court.¹³⁹ A free black Christian man was able to purchase his "illegitimate" child with a black slave because he

However, Alden Vaughan argues that the 1643 statute only applied to English servants and did not apply to persons of African ancestry, citing a subsequent 1655 statute, imposing longer terms for Irish than English servants, which stated that the 1643 statute was "only [for] the benefitt of our own nation." Alden T. Vaughan, *The Origins Debate: Slavery and Racism in Seventeenth-Century Virginia*, 97 VA. MAG. HIST. & BIOGRAPHY 311, 340 n.87 (1989).

134. OLD DOMINION, *supra* note 1, at 167.

135. JORDAN, *supra* note 14, at 50.

136. Alan Watson, *Seventeenth-Century Jurists, Roman Law, and the Law of Slavery*, in SLAVERY AND THE LAW 367, 374-76 (Paul Finkelman ed., 1997).

137. *Id.* at 374.

138. Finkelman, *supra* note 95, at 2072 (discussing the testimony of a black Christian, John Phillip, in 1624). According to Finkelman, Mr. Phillip was probably "fully assimilated into Anglo-American society" having been baptized as a Christian twelve years earlier in England. *Id.*

139. JOSEPH BOSKIN, INTO SLAVERY: RACIAL DECISIONS IN THE VIRGINIA COLONY 41 (1976).

promised to raise the child as a Christian.¹⁴⁰ More importantly, there is some evidence that black Christians could not be held in servitude for life.¹⁴¹

Historian Joseph Boskin mentions a *mulatto* named Manuel who was baptized and subsequently purchased as a slave by William Whittaker, later a member in the House of Burgesses.¹⁴² In 1644 the General Assembly ruled that Manuel was not a slave, but ordered him “[to] serve as other Christian servants do,” suggesting a term of indenture.¹⁴³ Manuel’s term of service, however, was twenty-one years, considerably longer than the usual term served by English servants.¹⁴⁴ Thus, while black Christians sometimes might escape perpetual servitude, they served longer terms than English indentured servants, suggesting that baptism did not confer equal status with English servants. Thus English subjecthood more than religious belief was a decisive factor, in Elizabeth’s case, Christian belief and practice simply reinforced her claim of English subjecthood.

Elizabeth’s testimony about her Christian baptism and adherence to her faith may have helped her avoid permanent servitude, but Christian baptism alone would not have resulted in her immediate freedom. By the time of her lawsuit, Elizabeth had been a servant for approximately nineteen years, ten years beyond the nine years term she claimed, but not the twenty-one years of service imposed on Manuel by the General

140. Finkelman, *supra* note 95, at 2073.

141. Warren Billings and others suggest that, for a time, customary practice in Virginia may have afforded a different status to *negroes* who were practicing Christians, including the right not to be held in servitude for life. Billings, *The Cases of Fernando and Elizabeth Key*, *supra* note 2, at 469-70. Billings asserts that there must have been other lawsuits which raised this issue, reasoning that “[i]t is highly unlikely that the Assembly would have needed to outlaw suits which seldom occurred.” *Id.* at 470. According to Billings the only two known lawsuits, however, are those filed by Elizabeth Key in 1655 and by Fernando in 1667. *Id.* Billings also notes the close proximity between Fernando’s lawsuit in August and the enactment of the statute in September. *Id.* He also cites an article by Alden T. Vaughan, *Blacks in Virginia: A Note on the First Decade*, 29 WM. & MARY Q. 469, 478 (1972), as suggesting that conversion to Christianity conferred certain rights upon blacks, including the right to be treated as an indentured servant as opposed to a slave. Billings, *The Cases of Fernando and Elizabeth Key*, *supra* note 2, at 470 n.16. Historian Edmund Morgan agrees that before 1660 it was assumed that Christianity and slavery were incompatible, although he admits that “in Virginia [there always had been] a rough congruity of Christianity, whiteness, and freedom and of heathenism, non-whiteness, and slavery.” MORGAN, *supra* note 95, at 331-32. Morgan cites a 1662 General Assembly order to release a Powhatan Indian enslaved for life who was “speaking perfectly the English tongue and desiring baptism.” *Id.* at 331.

142. BOSKIN, *supra* note 139, at 41.

143. *Id.*

144. *Id.*

Assembly. So, even if Elizabeth prevailed on this legal theory, she still would owe approximately two more years of service to the Mottrom estate.

In 1664, a few years after Elizabeth's suit, Maryland slave owners succeeded in getting a law enacted saying that Christian baptism had no effect on a slave's status.¹⁴⁵ The legislative body in that colony rationalized that giving freedom to baptized slaves would cause slave owners to work against religion!¹⁴⁶ Similar reasoning might also apply in the Virginia colony as well, but the issue was not directly addressed for three more years.

In 1667 a *negro* slave named Fernando brought a freedom suit in the Lower Norfolk County Court alleging that he was a Christian, had lived in England and had lived as a freeman, and thus could not be held as a slave.¹⁴⁷ The County Court ruled against him, saying that Fernando is "pretending hee was a Christian."¹⁴⁸ Perhaps the most damning

145. An Act Concerning Negroes & Other Slaves, 1 ARCHIVES OF MARYLAND: PROCEEDINGS AND ACTS OF THE GENERAL ASSEMBLY OF MARYLAND 533-34 (William Hand Browne ed., 1883) [hereinafter 1 MD. ARCHIVES] (explaining that this statute did not explicitly mention slaves' religion, but it was enacted in response to concerns of slaveholders that they would have to free Christian slaves. It deemed "all Negroes . . . already within the province [a]nd all Negroes and other slaves to bee [sic] hereafter imported" and "all Children born of any Negro" as slaves for life). A statute expressly handling the issue of baptism and manumission was enacted in Maryland in 1671. See An Act for the Encourageing the Importation of Negroes and Slaves into this Province, 2 ARCHIVES OF MARYLAND: PROCEEDINGS AND ACTS OF THE GENERAL ASSEMBLY OF MARYLAND 272 (William Hand Browne ed., 1884) [hereinafter 2 MD. ARCHIVES].

146. The lower house of the Maryland legislature requested the Upper House to write the 1664 law:

Itt is desired by the lower howse that the vpper howse would be pleased to drawe vp an Act obligeing negros to serve durante vita they thinking itt very necessary for the prevencon of the damage Masters of such Slaves may susteyne by such Slaves ptending to be Christned And soe pleade the lawe of England Wherevpon was drawne vp an Act intituled An Act for Slaves, and ordered to be sent to the lower howse.

1 MD. ARCHIVES, *supra* note 145, at 526. But the law was not enough for the slaveholders, who sought and received another law to clarify that their religious duties did not interfere with their slaveholding:

[Persons who have] Imported or purchased any such Negroes or Slaues haue to the great displeasure of Almighty God and the prejudice of the Soules of those poore people Neglected to instruct them in the Christian faith or to Endure or permitt them to Receive the holy Sacrament of Babtisme for the Remission of their Sinns upon a mistake and vngrounded apprehension that by becoming Christians they and the Issues of their bodies are actually manumited and made free and discharged from their Servitude and bondage.

2 MD. ARCHIVES, *supra* note 145, at 272.

147. Billings, *The Cases of Fernando and Elizabeth Key*, *supra* note 2, at 467-68.

148. LOWER NORFOLK COUNTY ORDER BOOK, 1666-1675, *reprinted in* OLD DOMINION, *supra* note 1, at 169 (record of Fernando's case in 1667).

evidence, in the court's mind, was the papers Fernando submitted to the court in support of his claim of Christian birth, they were written in a foreign language, probably Spanish or Portuguese, which the court could not understand. If Christianity was seen as just another component of English subjecthood, then any linkage between his case and that of Elizabeth Key decided almost a decade earlier is an imperfect analogy. Mixed race status and Christian belief were not determinative; it was English subjecthood that mattered.¹⁴⁹ But the fact that the County Court entertains this freedom suit by a *negro* slave, rather than dismissing it outright, suggests some uncertainty about whether practicing Christian *negroes* could be held as slaves.

In 1667, shortly after Fernando's case, the General Assembly enacted a law resolving the issue and declaring that baptism of a slave does not change the legal status of that person.¹⁵⁰ But this law only covered slaves who converted to Christianity after entering the colony, not to those slaves baptized prior to their entry into the colony, a later statute closed this gap.¹⁵¹ This question remained unsettled in England.¹⁵²

IV. REFLECTIONS ON THE DISPOSITION OF ELIZABETH'S CASE

The cumulative effect of finding the mixed-race Elizabeth the

149. *Id.* at 169. Fernando appealed his case to the General Court, but the outcome is unknown because the records have been destroyed.

150. The statute reads: "An act declaring that baptisme of slaves doth not exempt them from bondage." 2 Hening, *STATUTES AT LARGE*, *supra* note 11, at 260.

151. Finkelman writes:

In 1682 Virginia again attempted to settle the whole problem of race and religion. An act of that year stated that all "Negroes, Moors, Mollattoes or Indians, who and whose parentage and native country are not christian at the time of their first purchase of such servant by some christian" should be converted when brought to Virginia, but that they would remain slaves for life.

Finkelman, *supra* note 95, at 2075 (citing An Act to Repeale a Former Law Making Indians and Others Free (Nov. 1682), *reprinted in* 2 Hening, *STATUTES AT LARGE*, *supra* note 11, at 490, 491).

152. In *Butts v. Penny* the King's Bench held that an action of trover would lie for one hundred African slaves claimed by the plaintiff. *Butts v. Penny*, (1677) 2 Lev. 201, 83 Eng. Rep. 518 (K.B.). The court in describing Africans said that Africans were "usually . . . bought and sold in America as merchandise, by the custom of merchants." *Id.* In recognizing the chattel character of slavery, the court legitimated it in English law by asserting that Africans were "infidels." *Id.* At least they were "until they bec[ome] Christians." *Butts v. Penny*, (1677) 3 Keble 785, 84 Eng. Rep. 1011 (K.B.). The meaning of this dictum (all the slaves in this case were non-Christians) is unclear, and *Butts* proved to be an unstable precedent. The King's Bench rejected it twenty years later in *Chamberline v. Harvey*, (1697) 1 Ld. Raym. 146, 91 Eng. Rep. 994 (K.B.).

Christian child of a free Englishman coupled with written evidence supporting her claim that she was an indentured servant or at least entitled to be freed, may have been significant. Each factor is a marker of Englishness used during this period to distinguish free from unfree persons. Perhaps once her English paternity is established, the other factors made Elizabeth seem more like an Englishwoman, an English subject, than a *negro* slave.

What is significant is that the General Assembly Committee squarely addressed Elizabeth's claim that the daughter of a free Englishman and a *negro* female slave was free-born. This was a potentially divisive issue in a community desperate for labor. The harsh conditions in the Virginia colony were becoming more widely known in England. Historian Warren Billings writes: "The colony had acquired a justly deserved reputation as a deathtrap during the years of the Virginia Company. Promoters, try as they might, never entirely shook that image with their portrayals of Virginia as a fabulous new Eden."¹⁵³ As a result, by the mid-seventeenth century it was harder to entice strong young English settlers to come as indentured servants.¹⁵⁴ By this time some planters must have been seriously considering substituting black slaves for English indentured servants.

Further, the number of children being born outside of marriage was increasing, much to the dismay of colony leaders. Sexual promiscuity within the colony was rampant.¹⁵⁵ Given the shortage of English women in the Virginia colony, and the large number of single young English men, bound and free, illicit sexual intercourse with Indian and the few black women was not uncommon.¹⁵⁶ Mixed-race offspring were a natural byproduct of these sexual unions. Making children born outside of marriage to unfree mothers free at birth and, more importantly English subjects, could create problems. Who would support them? Where would they fit in a society that considered them children of no one, and conferred legal disabilities on them because of the circumstances of their birth? It might have seemed wise to some to avoid addressing the fundamental question about Elizabeth's status at birth if she could be freed using some other legal theory.

The committee of Burgesses could have found that Elizabeth was

153. Billings, *The Law of Servants and Slaves*, *supra* note 2, at 52.

154. *Id.*

155. MORGAN, *supra* note 95, at 336.

156. *Id.*

free without linking her freedom to a free English father. Thomas Key might have considered Elizabeth a slave when she was born, and decided to free her when she turned fifteen. There are several examples in seventeenth century Virginia of *negroes* being freed by their masters, usually upon the master's death.¹⁵⁷ Thus, the agreement between Thomas Key and Humphrey Higginson might be seen as a manumission agreement. By interpreting the document this way, Elizabeth's freedom at birth claim and the English subject question could be side-stepped. Elizabeth if not free-born would be an alien and would have to apply to become a denizen or subject through naturalization.

It also is possible that Thomas Key considered Elizabeth a slave, but sold her to Humphrey Higginson as an indentured servant. There is at least one reported case in seventeenth century Virginia of this occurring. In 1678, John Cooper, from Boston, sold Antonio, characterized as a *Spanish mulatto*, to a Virginia man for a term of ten years.¹⁵⁸ In the indenture contract Cooper stated that he has the right to sell Antonio for life, but Cooper stipulated that Antonio would be free at the end of the ten year term.¹⁵⁹

But even if she was born free, Elizabeth was placed into service and lost her freedom, albeit temporarily. The committee's initial determination about her father did not automatically resolve the ultimate question about her current status as free or unfree unless Elizabeth inherited her father's legal status as a free English subject. Thus other factors such as the nature of her transfer from Thomas Key to Humphrey Higginson were significant and might be important in determining whether Thomas Key considered Elizabeth an English subject.

The legislative committee noted that Thomas Key imposed several conditions when he transferred possession of six year old Elizabeth to Humphrey Higginson. First, Key stipulated that Higginson was to use Elizabeth for nine years. Second, and perhaps more importantly, according to the committee, Key stipulated that Higginson use Elizabeth

157. See, e.g., YORK COUNTY ORDER BOOK, 1657-1662, at 45, *reprinted in* OLD DOMINION, *supra* note 1, at 164 (explaining that Mihill Gowen, the *negro* servant, who in 1657/58, was freed, along with his son, in the will of his master, Robert Stafford). There also was a *negro* couple, John and Isabell Daule who were freed in 1670 by will of their master, Arthur Jordan. SURRY COUNTY DEEDS AND WILLS, 1657-1672, at 349, *reprinted in* OLD DOMINION, *supra* note 1, at 164-65.

158. MIDDLESEX COUNTY ORDER BOOK, 1673-1680, *reprinted in* OLD DOMINION, *supra* note 1, at 164.

159. *Id.*

“more Respectfully than a Comon servant or slave.”¹⁶⁰ In essence the committee determined that Thomas Key wanted Higginson to treat Elizabeth like an indentured woman in England where service was considerably milder than in the colony.¹⁶¹ Upon receipt of the committee’s report, the General Assembly concluded: “Elizabeth ought to bee free and that her last Master should give her Corne and Cloathes and give her satisfaction for the time shee hath served longer then Shee ought to have done.”¹⁶² No further explanation was provided for this decision.

The different resolutions of Elizabeth’s case by the General Court and the General Assembly is surprising given that both bodies were composed of wealthier colonialists, a few of whom held blacks in some form of bondage. Instead the General Assembly sides with the County Court, the more representative legal institution. One possible explanation is that members of the General Assembly, including those committee members who investigated Elizabeth’s case, knew Thomas Key, an “ancient” settler who briefly served in the Assembly immediately before Elizabeth’s birth, and were not inclined to disregard his written wishes regarding his daughter. It may have mattered that Elizabeth was the child of an early and respected English settler.

Still another explanation is that the General Assembly applied different rules.¹⁶³ Conceivably, the General Court interpreted Swinburne’s ambiguity about the common law on the legal status of a slave’s illegitimate child in favor of the Mottrom estate. It also is possible that members of the Burgess committee investigating Elizabeth’s case were familiar with Lord Coke’s interpretation of English common law, or at the very least, read the ambiguous language in Swinburne’s commentary in favor of Elizabeth. Finally, since during most of the seventeenth century “judges . . . were without legal advice from professional attorneys as to the proper interpretation of laws and precedents,”¹⁶⁴ it is possible that some of the decision-makers in this case were simply mistaken.

This potential conflict about subjecthood and the legal status of

160. OLD DOMINION, *supra* note 1, at 167.

161. See MORGAN, *supra* note 95, at 127.

162. OLD DOMINION, *supra* note 1, at 167.

163. See, e.g., Morris, *supra* note 95.

164. CHITWOOD, *supra* note 52, at 51. Chitwood notes the colony’s hostility toward lawyers. *Id.* But points out that from the middle of the seventeenth century the colony did have an attorney general. *Id.* at 51 n.69.

mixed-race children may explain the need for the 1662 statute saying that the status of the child follows the mother. Elizabeth's case merely crystallized a growing concern about the status of *mulatto* children born of Englishmen and black or Indian women. Within a few years, the legal loophole that provided Elizabeth an avenue to freedom was closed by the General Assembly.

There are various theories about the motivating factors behind the 1662 statute. Warren Billings says that the law was designed not only to define the status of *mulattoes*, but also, more fundamentally, to enforce racial separation in sexual relations.¹⁶⁵ Feminist historian Kathleen Brown counters that the 1662 statute reflects the fear that free English men would wrongly be named as the fathers of African and English bastard children.¹⁶⁶ In theory, prior to the statute, a pregnant black woman slave could use the "theatrics" of naming the father of her child in court to obtain financial support (and possibly freedom) for her child. The possibility of an embarrassing and costly lawsuit also provided some protection for vulnerable enslaved *negro* women from would-be seducers or rapists which Brown argues the 1662 statute removed.¹⁶⁷

Legal jurist and scholar Leon Higginbotham dismisses the significance of race and gender as motivating factors. Instead, he claims that the 1662 statute conferred economic advantage on labor-starved landowners.¹⁶⁸ The key concern of the General Assembly, according to Higginbotham, was protecting the property rights of slave owners.¹⁶⁹ Historian Thomas Morris agrees arguing that while "race" was a factor, the 1662 statute was designed to protect slave owner's property interest

165. "The statute was an attempt to formulate a practical method of defining the status of mulattoes, but the law also carried a deeper intent: it sought to keep the races separate." Billings, *The Cases of Fernando and Elizabeth Key* *supra* note 2, at 473. "Writing [the] civil law doctrine . . . into [Virginia statutory law] indicates the depth of the lawmakers' desire to prevent miscegenation." *Id.*

166. KATHLEEN M. BROWN, *GOOD WIVES, NASTY WENCHES, AND ANXIOUS PATRIARCHS: GENDER, RACE, AND POWER IN COLONIAL VIRGINIA* 132-35 (1996).

167. *Id.* at 133.

168. HIGGINBOTHAM, *supra* note 2, at 44.

169. *Id.*

Once it was established that the black woman's child took the mother's status, the master class gained a crucial economic advantage-its labor force reproduced itself. If the legislature had followed the English legal doctrine . . . the thousands of blacks or mulattoes whose fathers were white would have been free . . . By his illicit relations, a white male could eliminate the cost of purchasing an infant slave; by agreeing to enslave his progeny he became a breeder of slaves.

Id.

in the “increase” of the owner’s property.¹⁷⁰ Thus, financial interests in the protection and enhancement of property trumped concerns about the lives and future offspring of human chattel held in slavery.

A close reading of Blackstone provides yet another possible explanation for this law. He claims that because the father is frequently unknown, and because the woman is “almost useless” to her master during her pregnancy, she must be maintained at “great expense and care.” Therefore, the master should be compensated by getting possession of the woman’s offspring.¹⁷¹ But as mentioned previously, *Blackstone’s Commentaries*, the most influential legal text in colonial America, comes several decades after the 1662 statute.

Nevertheless, Brown and Blackstone’s concerns are reflected in other laws enacted during this period. Between 1657 and 1662 the General Assembly made some significant changes to the bastardy laws, relaxing the penalties assessed on fathers of these children. For example, a 1657 act required a man who impregnated a woman servant to provide the woman’s master with either one year of service or 1500 pounds of tobacco.¹⁷² But the 1661 statute removed that penalty, leaving the father responsible only for the costs of keeping the child.¹⁷³ In addition, both the 1661 and 1662 statutes clarifying the bastardy law refer to the men as the “reputed” father.

Finally, some historians suggest that the legal principle embodied in Virginia’s 1662 statute on the status of “illegitimate” children may have been derived from the rules of English property law which applied to animals.¹⁷⁴ According to Blackstone, “the English law agree[s] with the civil, that *partus sequitur ventrem* in the brute creation, though for the most part in the human species it disallows that maxim.”¹⁷⁵ The Virginia colonial assembly was well aware of the rule that applied to the offspring of livestock. Given that the civil law rule of *partus sequitur*

170. Morris, *supra* note 95, at 113.

171. 2 BLACKSTONE, *supra* note 65, at Chap. 25, *390.

172. 1 Hening, STATUTES AT LARGE, *supra* note 11, at 438-39.

173. 2 Hening, STATUTES AT LARGE, *supra* note 11, at 168.

174. Morris, *supra* note 95, at 108-14. Morris’s conclusion that the 1662 statute followed common law rules on livestock finds support in a transaction reported by Breen and Innes. Jane Gossall, the widow of a free black planter (and daughter of Emanuel Driggus), insisted that her intended new husband draw up a marriage agreement giving Gossall an unassailable right to possess, give, sell and dispose of a particular mare colt, along with the colt’s “increase.” T.H. BREEN & STEPHEN INNES, “MYNE OWNE GROUND”: RACE AND FREEDOM ON VIRGINIA’S EASTERN SHORE, 1640-1676 84 (1980).

175. 2 BLACKSTONE, *supra* note 65, at Chap. 25, *390.

ventrem is mentioned both by Lord Coke and Swinburne, it seems likely that some members of the Assembly also would have been aware of the rule.¹⁷⁶

But there is yet another even more practical explanation for the 1662 statute. If *Calvin's Case*¹⁷⁷ really establishes English subjecthood for all children of English subjects born within the monarch's domain; and English subjects are born free, then the Colony's leaders did not intend to include "illegitimate" Afro-English children within the community of English subjects. Virginia was established as an English colony governed by English subjects loyal to the Crown. While aliens both free and unfree lived within the colony, arguably the General Assembly merely wanted to reaffirm that only children of English women were English subjects. Working from this premise then it was necessary to enact anti-miscegenation laws which were designed initially at preventing English women rather than men from marrying *negroes*.¹⁷⁸ Thus the existence of mixed-raced children was seen as a threat to the very existence of the colonial community's and English nation's identity. Elizabeth's father, understanding the unscrupulousness of his fellow colonialists, tried to protect his offspring from the cruelties of American indenture as well as possible enslavement. His efforts coupled with those of Elizabeth and her advocate resulted in her freedom.

V. LIFE AFTER SLAVERY

We are left to wonder what life was like for a free Anglo-African Englishwoman in mid-seventeenth century Virginia. Shortly after the General Assembly's judgment Elizabeth married William Grinstead, listed in the court records as her legal representative.¹⁷⁹ But Grinstead was more than Elizabeth's legal representative he also was the father of

176. Billings, *supra* note 96, at 283-84, n.12-13.

177. (1608) 77 Eng. Rep. 377, 379 (K.B.) ("[A] man born in Scotland after the accession of King James the First to the English throne, and during his reign" was allowed the rights of English subjects).

178. 1691 Act XVI, "An Act for suppressing outlying slaves" bans marriage of free white men or women "with negroe, mulatto, or Indian man or woman bond or free" and the punishment of such marriage was banishment from the colony. 3 Hening, *STATUTES AT LARGE*, *supra* note 11, at 87. Bastard children of English women "by any negro or mulatto" would be bound out as a servant until the age of 30, and the mother, if free, paid a fine, and if a servant, she would be sold by the church wardens for five years after the expiration of her current term of service. *Id.*

179. OLD DOMINION, *supra* note 1, at 168.

her two children – the whereabouts of the first son are unknown.¹⁸⁰ Uncertainty about her legal status was an impediment to their marriage. Thus Grinstead had a personal stake in the outcome of the case, freedom for his infant son and his sons' mother, so he and Elizabeth were acting in concert.

Self representation was not unusual during this period since lawyers were expelled from the Virginia colonial court system in 1645.¹⁸¹ Briefly allowed to practice again in 1656 if licensed by the governor and county court commissioners¹⁸², they were expelled again the following year.¹⁸³ County Court days were public events attended by free and unfree residents,¹⁸⁴ so it is possible that William and Elizabeth probably attended many court days. Further since Col. Mottrom served as a County Court judge it is likely that Elizabeth had some first-hand knowledge of legal proceedings. But as the alleged chattel of the Mottrom estate, she was not free to travel to Jamestown without the estate's consent to present her case before the General Court and General Assembly, thus it probably fell to William Grinstead to travel by boat from the banks of the Croan River to the General Court and General Assembly in Jamestown.

On July 21, 1659, after securing her freedom, the administrator of Mottrom's estate *transferred* the "maid servant" Elizabeth Key, belonging to the Mottrom estate, and now wife of William Grinstead, to Grinstead.¹⁸⁵ "Thus, she was protected against anyone who might make

180. *Id.* at 167 (Testimony of Elizabeth Newman). According to colonial records Grinstead, a few years younger than Elizabeth, was a farmer and former indentured servant in the Mottrom household.

181. Act VII of Nov. 1645, *reprinted in* 1 Hening, STATUTES AT LARGE, *supra* note 11, at 302.

182. Act VI of Dec. 1656; Act CXII of March 1657-58, *reprinted in* 1 Hening, STATUTES AT LARGE, *supra* note 11, at 419, 482.

183. Clara Ann Bowler, *Carted Whores and White Shrouded Apologies*, 85 VA. MAG. OF HIST. & BIOGRAPHY 411, 423 (1977). Representation for a fee was not permitted until 1680 when a new licensing provision was enacted. *Id.* (citing Act VI of June 1680, *reprinted in* 2 Hening, STATUTES AT LARGE, *supra* note 11, at 478-79). It also is possible that Elizabeth and William got someone with legal training to draft the papers in the case.

184. A festive air surrounded court-days. During these public gatherings people who otherwise lived in isolation met, interacted, conducted business, gossiped, politicked, or simply learned important civic lessons. CHITWOOD, *supra* note 52, at 95. People came from all over the county to hear the cases. As one historian wrote: "[o]n the court-house green assembled, in indiscriminate confusion, [came] people of all classes, the hunter from the backwoods, the owner of a few acres, the grand proprietor, and the . . . negro." *Id.* at 94 (internal quotation marks omitted).

185. OLD DOMINION, *supra* note 1, at 168 (Testimony of Elizabeth Newman).

a legal claim against her as [either] a servant or slave.”¹⁸⁶ The marriage of Elizabeth and William Grinstead itself is novel in colonial Virginia during the mid-seventeenth century. While interracial sexual relations were not uncommon, Elizabeth’s marriage to William Grinstead seems to be one of the few recorded marriages between an Englishman and a free woman of African descent during the seventeenth century.

Under a 1642 law free black women had special burdens unlike free Englishwomen. The statute provided that the labor of black, but not white women was taxed, thus marriage to a free black woman automatically increased the tax burden of the family without regard to the husband’s race.¹⁸⁷ Arguably the financial burden colonial Virginia’s tax laws placed on free black women may have decreased their chances of marrying, and may be one reason why despite an equal sex ratio between black women and men, many free black men, at least on the eastern shore, married white women.¹⁸⁸ In addition, when you consider the implications of the later 1662 law tying perpetual slavery to the wombs of black women, you have another factor discouraging free men, black or white, from selecting black women as wives.

Presumably as a free Englishwoman Elizabeth would be exempt from the taxing statute and this might explain why she seems to have been luckier than most free black women. When John Grinstead died in 1661, Elizabeth married John Parse (Peirce), an English widower.¹⁸⁹ At his death Parse/Peirce left Elizabeth and her two sons, William and John Grinstead, five hundred acres of land.¹⁹⁰

As the foregoing discussion indicates, Elizabeth’s life, even as a

186. W. Preston Haynie, *African-Americans: Obstacles to Freedom*, XXXIII BULL. NORTHUMBERLAND CO. HIST. SOC. 59, 60 (1996) (citing Northumberland Co. Rec. Bk 1658-66, at 27).

187. 1 Hening, STATUTES AT LARGE, *supra* note 11, at 240, 242 (Act I, Church Government).

188. Historian Ira Berlin argues that prominent free black males on the eastern shore of Virginia married white women during the mid seventeenth century without incident, but there are no reports of marriages between white men and black women. Instead Berlin cites the marriage of Elizabeth Key to William Grinstead in Northumberland, not a part of the eastern shore, to argue that black women could similarly enter into such unions. IRA BERLIN, *MANY THOUSANDS GONE: THE FIRST TWO CENTURIES OF SLAVERY IN NORTH AMERICA* 44 (1998). Historians T. H. Breen and Stephen Innes in their study of the eastern shore of Virginia between 1640 and 1676 mention interracial marriages, but none involving black women and white men. Thus the lack of more recorded marriages between white men and black women suggests that these unions were more unusual. Breen and Innes, *supra* note 174, at 83-84, 88.

189. Haynie, *supra* note 186, at 60 (citing Northumberland Co. Rec. Bk 1666-72, at 16/19a).

190. *Id.* (“Grimstead (sometimes spelled Grinstead) remained a Northumberland County name for 150 years.”).

servant, was probably more comfortable than most slaves due to the efforts of her father, Thomas Key, who undertook several actions to protect Elizabeth from the unscrupulous and greedy members of the Virginia colony. He placed her in a relatively comfortable servitude setting and provided written instructions about her care and status. In this respect she was luckier than most Anglo-African children of her era. But her legal case is unusual only because aided by the efforts of two English men, Thomas Key and William Grinstead, she successfully used the law to gain entry into Virginia colonial community as an English subject or with the privileges thereof. Her success triggered reactive legislation quickly closing the door opened by her lawsuit. The existence of laws in many colonies limiting slaves' access to the judicial system suggests that colonial authorities understood the danger of letting unfree persons have access to the courts. When humans considered mere chattel by law can exert power or influence the law, these humans become *dangerous*¹⁹¹, thus Elizabeth Key and others like her who resisted their enslavement were *dangerous women*!

VI. CODA

On March 4, 1833 the Northumberland Board of Commissioners effectuated a General Assembly act authorizing the establishment of county colonization societies to encourage persons of African descent to establish colonies in Africa.¹⁹² A John Grinstead was appointed to serve on a committee to determine the willingness of free persons of color in the county to immigrate to West Africa.¹⁹³ Grinstead is very likely a third or fourth generation descendant of Elizabeth Key and William Grinstead. According to the 1830 U.S. Census records John Grinstead is listed as "white" and living with his wife, three daughters, also listed a white. More tellingly, Grinstead is listed as owning thirty-one slaves.¹⁹⁴

In little less than two hundred years, Elizabeth's descendants came

191. The title *Dangerous Woman* was inspired by a sentence in Karen Berger Morello's book about women lawyers in the United States in which she writes: "[t]he reasons for the resistance to women lawyers can never fully be explained, but it is likely that it has to do with the law's close relationship to power in our society." KAREN BERGER MORELLO, *THE INVISIBLE BAR: THE WOMAN LAWYER IN AMERICA, 1638 TO THE PRESENT* x (1986).

192. 1833 Va. Acts 14-15.

193. Haynie, *supra* note 186, at 66-67 (citing Northumberland Co. Order Bk 1830-35, 282-83).

194. U.S. DEPT. OF COMMERCE, 1830 UNITED STATES FEDERAL CENSUS, VIRGINIA, NORTHUMBERLAND CO. No. M19, roll: 201, page 204.

to be considered white. When they became white under Virginia law is unclear since the colony and later the state changed the definition of “white” several times over the centuries. One of the earliest statutes enacted in 1705 defined a *mulatto* as “the child of an Indian, or the child, grandchild, or great grandchild of a Negro.”¹⁹⁵ Under this statute, assuming Elizabeth’s mother was a *negro* and not a *mulatto*, Elizabeth’s grandchildren would be considered *mulattoes* even if their mother was classified as white. The 1785 law defined anyone with one-eighth or less black ancestry as legally “white.”¹⁹⁶ This means that Elizabeth’s later descendants, assuming they married white spouses, now were considered legally white.

But arguably the legal status of later descendants as white would have been affected by the 1924 law which said that *any* African ancestry made one black in Virginia.¹⁹⁷ The law would effectively strip Elizabeth’s descendants of their long-held white racial status forcing any who were aware of their African ancestry to hide or cover it. Covering was necessary to retain the full benefits of American citizenship conferred on whites, but denied blacks in the early decades of the twentieth century.

195. Higginbotham & Kopytoff, *supra* note 11, at 1977 (citing Ch. IV, 3 Laws of Va. 250, 251, reprinted in 1 Hening, STATUTES AT LARGE, *supra* note 11, at 250-51).

196. Higginbotham & Kopytoff, *supra* note 11, at 1978 (citing Ch. LXXVIII, 12 Laws of Va. 184, reprinted in 1 Hening, STATUTES AT LARGE, *supra* note 11, at 184). The 1785 law which defines who is a *mulatto* actually briefly made it easier for individuals with some African ancestry to be classified as white.

197. *Id.* at 1979 (citing 1924 Va. Acts 534-35; 1930 Va. Acts 96-97).

