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# Twice Condemned

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Slaves and the Criminal

Laws of Virginia, 1705–1865

Philip J. Schwarz

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## Preface

A Roman epigram—"As many slaves, so many enemies"—illuminates the central feature of what Orlando Patterson has called the political psychology of slavery.<sup>1</sup> The white authorities of Virginia appear to have accepted the Roman perception. That helps to explain why they ordered that untold thousands and thousands of slaves be whipped or given other corporal punishments, sent at least 983 slaves into exile between 1801 and 1865, and condemned at least 555 to death between 1706 and 1784 and executed 628 between 1785 and 1865. Free whites and white servants received corporal punishment and the death penalty through the same period, but definitely less often—dramatically so between 1785 and 1865. White authorities singled out enslaved defendants because they were slaves. While accusing them of being dangerous to property and people, those whites also regarded them as guilty of being dangerous to slavery.

Between 1706 and 1865, those people whom white authorities in Virginia called slaves and then also judged to be criminals killed at least 199 white people, 98 other slaves, and 14 free blacks. Another 160 poisoned or were feared to have poisoned other people, and 149 resorted to arson in order to attack whites only. More than 211 had physically attacked white people. Some 1,277 were convicted of felonious stealing or other property crimes. Particularly threatening to

1. Orlando Patterson, *Slavery and Social Death: A Comparative Study* (Cambridge, Mass., 1982), 39, 339. Seneca made the proverb famous in *Ad Lucilium epistulae morales*, Epistle XLVII, "On Master and Slave": "totidem hostes esse quot servos." The original and Richard M. Gummere's translation are in the Loeb Classical Library edition (3 vols.; London, 1917–30), I, 302–303. See also Keith Hopkins, *Conquerors and Slaves* (Cambridge, England, 1978), 119n43; and William Watts, "Seneca on Slavery," *Downside Review*, XC (1972), 183–95.

slavery were the more than 181 slaves convicted of plotting or raising insurrection. Given that these figures do not include unprosecuted or undetected behavior, it is clear that whites, and even other slaves, had something to fear from some slaves. These figures of official violence or action in conflict with defiant, aggressive, or enraged slaves depict a clash of enemies. The most obvious foes were the enslavers and the enslaved. Many whites involved regarded the suspected and convicted slaves as domestic enemies, or the "internal enemy." Many slaves perceived white authorities as enemies, albeit not authoritative. Some of the fury fell on other slaves.

Because of my belief that conflict is quite often a most revealing indication of the nature of any society, I decided to look at the trials of slaves, the most numerous records of such conflict in the large slave society of Virginia. Many historians have depicted dramatic examples of the fundamental, sometimes deadly, conflict that was endemic to societies based primarily on slave labor. Few, however, have attempted to focus on the prevalence, longevity, and variety of such discord. My purpose has been to obtain a better, but obviously not complete, idea of how often slaves in Virginia engaged in behavior defined as criminal.<sup>2</sup> Essential to this question of "how often" is a measure of changes over time and place as well as differences among various slaves or groups of slaves. The main point of my analysis of this behavior is that the tensions, hostility, and conditions involved profoundly influenced the slave society of Virginia, both as a whole and in its constituent parts. I mean to suggest some implications of my conclusions for the study of slavery in the Old Dominion and the Old South. My study also bears on the legacy of slaves' illegal behavior and white authorities' reactions to it for later Virginian and American history.

Held to slavery by the law, some men and women broke the law. Whether committed rebels or not, many of these people stood trial in slaveholders' courts for criminal offenses. The courtroom actions were parts of battles in which both slaves and slaveowners used their strongest weapons against each other. This conflict between lawbreaking slaves and the defenders of the law of slavery changed over time and differed over space. Using more than four thousand trials that took

2. Winthrop Jordan is only one among those who have called for this sort of study. *White Over Black: American Attitudes Toward the Negro, 1550-1812* (Chapel Hill, 1968), 392.

place in the 160 years between 1705 and 1865, this study traces the manner in which diverse slaves and whites developed opposing perceptions of legitimate behavior and then acted on the basis of those perceptions.

It was one thing for this sort of conflict to occur in the seventeenth century, when blacks made up so small a percentage of the colony's population and whites tried black suspects in much the same way they did lower-class white suspects. But as the slave and the white communities developed, members of both groups pursued shifting strategies to deal with each other. At any given time, there were major variations in slaves' attacks on whites or even on other slaves, depending on where they lived, how long they had been there, and the previous behavior of other slaves there. Vincent Harding has convincingly demonstrated in *There Is a River* that the interaction of Afro-Americans and Euro-Americans has been in constant flux.<sup>3</sup> So also was the relationship between slaves and the criminal justice system controlled by whites. The history of the conflict between the legally subjugated and dominant peoples of Virginia, the largest slave society in North America from 1705 through 1865, shows why.

A disclaimer is essential. The purpose of my study is by no means to characterize slaves as criminal or deviant. The damage done by such characterization of free or enslaved Afro-Americans is incalculable. I have written in accordance with certain moral assumptions and I have made the implicit moral judgments that any historian must, especially when dealing with slavery, but I do not mean for such judgments to be the primary emphasis here. My most fundamental tenet about black defendants whom slave court justices found guilty is that they are still morally innocent unless proved guilty beyond the shadow of a doubt. I have neither implicitly nor explicitly attempted to establish such guilt. I do not claim the authority to judge the morality of any of those defendants. It might be unwise to leave such judgments to those who know less about some slaves' allegedly criminal behavior than I do, but I am left with no impression stronger than that I still know too little to pass off glib moral generalizations about peo-

3. Vincent Harding, *There Is a River: The Black Struggle for Freedom in America* (New York, 1981), esp. 107. In George P. Rawick (ed.), *The American Slave: A Composite Autobiography* (41 vols.; Westport, Conn., 1972-79), Ser. I, Vol. IV, Pt. 1, p. 139, a former slave in Texas explained it in another way: "Slavery, one to 'nother, was purty rough. Every plantation have to answer for itself."

ple who lived through what I merely analyze and who suffered oppression that I have never experienced.

I have accordingly relied on a nonpejorative definition of slave crimes as those actions of slaves that were in conflict with Virginia's slave code and that normally resulted in public prosecution and, frequently, in public punishments that ranged from whippings to various forms of execution. We must remember, as did slaves, that those who held ultimate power in slave societies made every effort to treat as crimes those acts of slaves that they deemed flagrantly immoral, impossible to prevent through private means, liable to encourage similar behavior among other slaves if neither suppressed nor publicly punished, dangerous to white society if not sometimes to other slaves, and threatening to the very authority of owners and other powerful whites. Such behavior was historically criminal—*i.e.*, in conflict with criminal laws of the time—even if most such behavior might be positively characterized as “convictional crime,” deriving from laudable or reasonable motives or convictions.<sup>4</sup> Slaves knew what the slave codes meant whether they had read a word of them or not. Those codes were part of the world that slaveholders made and defended. In trying to make their own world, slaves could defiantly resist these codes, but they could not ignore them. Neither can historians.

4. Useful historical or political studies of the problem of defining political crime are: Barton L. Ingraham, *Political Crime in Europe: A Comparative Study of France, Germany, and England* (Berkeley, 1979); Stephen Schafer, *The Political Criminal: The Problem of Morality and Crime* (New York, 1974), the source of the term *convictional crime*; Austin T. Turk, *Political Criminality: The Defiance and Defense of Authority* (Beverly Hills, 1982). I found Ingraham to be the most helpful, but my definition of slave crime differs from his definition of political crime because of the different circumstances involved.

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## *Abbreviations*

<i>AHR</i>	<i>American Historical Review</i>
<i>AJLH</i>	<i>American Journal of Legal History</i>
<i>C.C.M.B.</i>	County Court Minute Book
<i>C.C.O.B.</i>	County Court Order Book
<i>C.M.B.</i>	Court Minute Book
<i>C.O.B.</i>	Court Order Book
<i>C.S.</i>	Condemned Slaves, Virginia State Library, Richmond
<i>CVSP</i>	<i>Calendar of Virginia State Papers</i>
<i>CWRD</i>	Colonial Williamsburg Research Department
<i>EJC</i>	<i>Executive Journals of the Council of Colonial Virginia</i>
<i>JAH</i>	<i>Journal of American History</i>
<i>JHB</i>	<i>Journals of the House of Burgesses</i>
<i>JNH</i>	<i>Journal of Negro History</i>
<i>JSH</i>	<i>Journal of Southern History</i>
<i>LJC</i>	<i>Legislative Journals of the Council of Colonial Virginia</i>
<i>MCGC</i>	<i>Minutes of the Council and General Court of Colonial Virginia</i>
<i>NEQ</i>	<i>New England Quarterly</i>
<i>UVa</i>	University of Virginia
<i>VBHS</i>	Virginia Baptist Historical Society, Richmond
<i>VCRP</i>	Virginia Colonial Records Project microfilms
<i>VEPLR</i>	Virginia Executive Papers, Letters Received, Virginia State Library, Richmond
<i>VHS</i>	Virginia Historical Society, Richmond
<i>VMHB</i>	<i>Virginia Magazine of History and Biography</i>
<i>VSL</i>	Virginia State Library, Richmond
<i>WMQ</i>	<i>William and Mary Quarterly</i>

## *Introduction*

The salient feature of both private and courtroom confrontations between enslaved blacks and free whites was the diametrically opposed points of view of the Afro-Americans and their accusers, judges, and owners. From the first time a Virginian slave "raised his hand against a white Christian" in the obscure depths of the seventeenth century, the same potential existed for deep-seated conflict of perspectives and values between slaves accused of crimes and whites of various ranks and stations in the earliest North American slave society. This conflict was played out in similar informal and formal contexts from the seventeenth through the nineteenth century. Each action by a slave that threatened the property or safety of other people also had the potential, and often the clear power, to weaken, even destroy slavery. Thus the informal and the formal contexts took on a character that differed distinctly in many respects from the character of both legal and illegal interaction among white people.

Slaves and white authorities as well had to develop their understanding of slave societies. This was no less true of what whites called slave crimes than of other aspects of perpetual bondage. Not only did different people live in slave societies but they did so at different times. Informal and formal modes of interaction changed over time, requiring new perceptions and responses. The institution of slavery may look timeless, as if it had always existed and always would, should no epic event such as the Civil War intervene. But everywhere it existed it began, took certain forms, changed, and sometimes even died a natural death. Although slavery died anything but a natural death in Virginia, it developed from an inchoate, vague form in the seventeenth

century to a hardened yet flexible form in the nineteenth. So it was with the phenomenon of slave crime. It was not always there. The separate code for slaves did not take form until 1705, even though criminal laws concerning slaves had started to appear some years before. The slave code went through several revisions, those of 1748 and 1848–1850 being among the most important. Revisions reflected behavioral and perceptual transformations among slaves, whites, and also free blacks and Native Americans.

The hybrid nature of Virginia's people and institutions evolved over the seventeenth and eighteenth centuries. If the colony was an English outpost in the early seventeenth century, it was "home" to most of its inhabitants by the mid-eighteenth century. Dependent on indentured servants for labor in the 1600s, it relied almost exclusively on slave labor in the 1700s. But it had thereby become a biracial society, a combination of dominant whites and enslaved blacks, with Native Americans nearly forgotten and free blacks living in between as "slaves without masters." So it was with slave crime. The regular courts and laws served those who dealt with blacks in the early seventeenth century. They even served some blacks, such as Anthony Johnson, in their dealings with whites. The law was completely in the hands of whites by the time the colony became a state; separate courts and distinctive laws, even if hybrids of English law, the slave laws of Caribbean island governments, and the pragmatic notions of Virginian planters, covered slaves. But more and more slaves ignored or defied these laws and courts.

Chapters 1 and 2 try to show that slave crime did not exist in a historical vacuum. White Virginians employed a combination of Old World and New World experiences and values in order to shape the shackles they fastened onto their new slaves. They obviously learned how to defend slavery against slaves, as the survival of the institution for so long testifies, but their constant modification of the slave code and courts shows that they had to be ready to react to new movements among slaves. Chapter 2 explores the manner in which Creoles and newly imported enslaved Virginians confronted free Virginians in and out of criminal courts in ways that had a social significance larger than the significance of the acts alone. That chapter deals with the difficult question of how historians can discern such significance in the trial records of the criminal courts for slaves in spite of the obvious bias of those courts.

The perspective of African and Afro-American bondspeople is generally absent from these first chapters. It is possible to recount the African experience with laws, crimes, and courts in some detail.<sup>1</sup> That rich aspect of newly imported Africans' culture undoubtedly shaped their perception of slaveowners' courts. But we unfortunately lack evidence of how Afro-Virginians applied the legal and judicial values of their ancestors to the new society they encountered along the Chesapeake. Instead, we have to study what a large number of enslaved Virginians did in defiance of or in conflict with the slave code of the Old Dominion.

1. P. J. Schwarz, "Adaptation of Afro-American Slaves to the Anglo-American Judiciary" (Paper delivered at the forty-first Conference of the Institute of Early American History and Culture, April 30, 1981, Millersville [Pa.] State College).

## *1. The Shape of the Shackles*

It is possible to match, horror for horror, many of the punishments that slaveowners inflicted upon defiant slaves with those that other authorities in European and American—indeed, African—societies administered to the people under their control. The leaders of slave societies relied on everything from leg-irons and the pillory to drawing and quartering or hanging in chains to control aggressive slaves. But military officers, English county justices, tribal judges in West Africa, and even ecclesiastical officials also resorted to such means to suppress those who endangered their rule or their societies. There is no point, then, in analyzing the means slaveowners used to control slaves to demonstrate the obvious: that transplanted Europeans and their descendants relied on legal and judicial practices long since established in their homelands in order to subordinate the laboring class in their plantation societies. Nor do we need any more proof of the almost self-evident proposition that slavery was by nature a brutal system, based on and ultimately maintained by the ruthless use of force.

It is the functioning of the slaveowners' mode of domination that needs to be analyzed. The nature of the system of control on which slaveowners relied for self-protection and for the perpetuation of slavery depended largely on the nature of slavery in their societies. Was the society so dependent on lifetime bondage that it was a slave society? The more any society was based on slavery, the greater was the chance that legislators would develop an independent set of laws and courts for slaves alone. Virginia was just such a society by 1700. Did the slave society change dramatically over time? If so, then the system of con-

trol would also change in an adaptive fashion, as did Virginia's. If the slave society maintained itself from the seventeenth through two-thirds of the nineteenth century, as happened in the Old Dominion, then many adaptive changes took place not only because the society—including any larger society of which it became a part—changed but also because the behavior of slaves varied in accordance with the development of their own communities. Did plantation owners employ their slaves in the production of one crop or diverse crops? Were there many skilled slaves in the society, especially in urban areas? Both diversification and urbanization meant that slaves could normally operate more independently than those who worked in rural, group-labor conditions. Independent slaves certainly would influence the structure and day-to-day operation of the judicial system for all bondspople and the manner in which blacks dealt with that system.

The central questions, then, are the influence of slaves' criminalized behavior on slavery, the slave code, and the judicial system, the impact of slavery on the criminal code and judicial system for slaves, and the impact of that code and system on slaves. What difference did it make that slaves engaged in illegal behavior in a society controlled by slaveholders? Did such behavior truly endanger slavery? To what extent did white leaders use the system for the perpetuation of slavery as well as for the protection of life and property? In what ways did the code and judicial system for slaves differ from as well as resemble the code and judicial system for free people, both black and white? What was the significance of this system of control existing in Virginia, a society based on racial slavery?

While slavery in North America was primarily a system of forced, lifetime labor, central to the perpetuation of this method of extracting work from human beings were the means of trying to coerce the absolute subservience of slave to owner. The coercion of labor and of obedience overlapped to create the total slave society within which so many bondspople had to live, no matter what their wishes or values were. As the statistics of official whippings, hangings, and sentences of transportation reveal, even many of those slaves who aggressively challenged the system of slavery fell to the power that defended it. However much attention subsequent chapters will give to defiant slaves, it is essential to begin with an analysis of the particulars and development of the system of control with which they collided. The

slaves knew that system in its operation. Thorough knowledge of it is the prerequisite of trying to understand the manner in which a large number of enslaved blacks attempted to deal with it.

Prisoners wear shackles and chains. Instruments of physical restraint are prominent among symbols of penal control. Some slaves occasionally or even permanently had to carry these signs of punishment. But slaveholders weighed down all their victims with invisible shackles even before they actually administered punishments for particular offenses. "The white man was the slave's jail," recalled one former slave.<sup>1</sup> Slaveholders spent an extraordinary amount of time trying to prevent bondspeople from acting in conflict with the norms invented or perpetuated by masters. They also expended a great deal of energy in imposing negative sanctions on those slaves who nevertheless allegedly did commit offenses against the slaveholders' society.

The owners or their surrogates were the first rule-makers, the corrections officers, and even sometimes the executioners. "Every master is born a petty tyrant," George Mason of Virginia told the Constitutional Convention in 1787.<sup>2</sup> Slaveholders had to answer to few people; they could rule in almost complete privacy. They were implacable, sometimes unpredictable, and truly powerful. Because of their ultimate role as supreme authorities, like monarchs who assumed that all power and right flowed through them, owners inevitably became involved in the process of punishment. And that prevented anyone from being actually a kind master. Any master could show kindness on occasion; some masters were regularly kind. But to remain a master, to defend slavery, almost all slaveholders would sooner or later have to wield the whip or direct or participate in the many other processes of suppressing defiant slaves.

The case of Dr. Richard Eppes of Hopewell, Virginia, is instructive. One of his former slaves remembered him as a "nice old man." As a physician, Eppes did show concern for human suffering and he encountered more than his share of personal pain. His sensitivity informed his opinions concerning slavery as well. "The worst feature in the system of slavery," he wrote in 1852, "is the punishments to be

1. Rawick (ed.), *The American Slave*, VII (Oklahoma), 112-13. See J. Thorsten Sellin, *Slavery and the Penal System* (New York, 1976).

2. Max Farrand (ed.), *The Records of the Federal Convention of 1787* (4 vols.; New Haven, 1937), II, 370.



inflicted, which give me a dista[s]te for the whole institution." About three months after expressing this uneasiness, however, Eppes recorded his own whipping of George. That George had not provided milk for Eppes's morning coffee fails to account for the disproportion between offense and punishment. The real reason for Eppes's cruelty was that between the time he confessed to abhorrence for the fundamental security that violence provided slaveholders and the morning he had wantonly employed one omnipresent means of securing that protection, his young wife and newborn daughter had suddenly died. Those deaths, he would later lament, had made him "reckless and miserable."<sup>3</sup>

No one could fail to be moved by the suffering Eppes endured after he lost his family. Yet what legal protection was there for the many slaves who, like George, had to suffer the effects of owners' "reckless and miserable" states? It was apparent to even the most fanatical defender of slavery that evil people could abuse their position as slaveholders and inflict abominable and barbaric punishments upon slaves. But the deepest evil of slavery, which Eppes himself partly understood, was that even in the hands of a kind master, the whip lacerated the skin of fellow human beings.<sup>4</sup>

A host of eighteenth-century planters such as William Byrd II and Landon Carter rationalized their arbitrary powers by assuming the role of benevolent patriarch. Lesser planters apparently tried with varying degrees of success to follow the example set by the grandes.<sup>5</sup> As a man who inherited his father's estate in 1850, Eppes tried to combine the eighteenth-century ideal of planter-patriarch with the antebellum concept of the expert farmer and manager. Eppes regarded all his "people" as part of his "family," but he also tried to regularize and systematize all aspects of plantation life. Criticizing the leniency of a new overseer, Eppes concluded that he lacked "system." This slaveowner tried to train his slaves and regulate their con-

3. *Weevils in the Wheat: Interviews with Virginia Ex-Slaves*, ed. Charles L. Perdue (Charlottesville, 1976), 269–73; Richard Eppes Diary, January 8, April 16, 1852, in Eppes Family Muniments, 1722–1948, VHS.

4. See Michael L. Nicholls, "'In the Light of Human Beings': Richard Eppes and His Island Plantation Code of Laws," *VMHB*, LXXXIX (1981), 67–78.

5. Rhys Isaac, *The Transformation of Virginia, 1740–1790* (Chapel Hill, 1982), 328–57; Gerald W. Mullin, *Flight and Rebellion: Slave Resistance in Eighteenth-Century Virginia* (New York, 1972), 62–80; Daniel Blake Smith, *Inside the Great House: Planter Family Life in Eighteenth-Century Chesapeake Society* (Ithaca, 1980); Michael Zuckerman, "William Byrd's Family," *Perspectives on American History*, XII (1979), 279–87.

duct just as he bought the best new machinery and kept it in good repair.<sup>6</sup>

But Eppes's slave George could testify to the limited worth of his master's rational systematizing. It ultimately could not control Eppes's use of power. People such as George knew where the shackles were because they knew who fastened them to slaves. While the owner was the supreme authority on the plantation, the overseers and drivers (both black and white) often exercised day-to-day authority. The latter men resembled policemen on the beat. Some of them, especially the whites, consented to the patriarchal and managerial values of the owners. All of them would keep their jobs, maintain their "professional" reputations, and retain their privileges only as long as they controlled the slaves. So the overseers and drivers did what they believed in or what they could get away with. Those who hired slaves from other owners acted similarly.<sup>7</sup>

Plantation authorities actually had many powers. Fundamentally, they could inflict a wide variety of pain. They could deprive blacks of basic needs, such as family or food. They could withdraw "privileges"—overnight passes to visit family members, liquor allowances, or holidays. Switches and whips were the most prevalent instruments of administering corrective suffering. No amount of debate over how much the whip was actually used can obscure the fact that, as slaves knew, it could always be used. As Herbert Gutman has put it, the whip had high "social visibility." A Virginian former slave interviewed in 1925 explained that he "lived in fear of the whipping post and for this reason made himself the most docile of servants."<sup>8</sup>

Former slaves have testified to the gruesome variety of corporal punishments to which owners and their surrogates could resort. Stocks, plantation jails, "hot boxes" (iron enclosures that baked the

6. Michael Mullin discusses the systematic planter-manager in his collection of documents, *American Negro Slavery* (New York, 1976), 151–210. Eppes Diary, April 26, 1852.

7. Eugene D. Genovese, *Roll, Jordan, Roll: The World the Slaves Made* (New York, 1974), 12–22; Mullin, *Flight and Rebellion*, 29–31; William Kauffman Scarborough, *The Overseer: Plantation Management in the Old South* (Baton Rouge, 1966); Kenneth M. Stampp, *The Peculiar Institution: Slavery in the Ante-Bellum South* (New York, 1956), 36–40, 106–108, 175–83.

8. Stampp, *The Peculiar Institution*, 171–91, a standard survey of punishments; Leon F. Litwack, *Been in the Storm So Long: The Aftermath of Slavery* (New York, 1979), 158, 238, 371–74; Herbert Gutman, *Slavery and the Numbers Game: A Critique of Time on the Cross* (Urbana, 1975), 19–20; John W. Blassingame (ed.), *Slave Testimony: Two Centuries of Letters, Speeches, Interviews, and Autobiographies* (Baton Rouge, 1977), 568.

victim in the sun), stringing up by the thumbs, iron collars, shackles, and other instruments of torture awaited slaves who dared to defy their owners or overseers. Ultimately and most tragically, owners and others could sometimes murder troublesome slaves and never have to answer to anyone for doing so. Before Virginia law allowed manslaughter convictions of those who killed slaves while ostensibly correcting them, owners and their allies were virtually untouchable. Afterwards, a few spent several-year terms in the Virginia Penitentiary, but several fled to other states. There was a continuing problem with this extreme mode of discipline. Who would pay for the loss of the slave? What overseer could afford to? Why not just sell recalcitrant slaves, or let the government execute them and pay compensation?<sup>9</sup> The punishment that could cause the most lasting pain to the Virginian slave was being "sold to Georgia." This private, unregulated action presented bondspeople with the uncertainties of new surroundings and owners at best, and at worst with separation of families and the lifelong specter of working under the harsh and sometimes brutal conditions of gang labor on a West Indies sugar plantation or later on a cotton or sugar plantation in the Deep South.<sup>10</sup>

Slaves who managed to evade or overcome plantation authorities' sanctions faced several kinds of public, collective controls. Ecclesiastical institutions exerted strong influence on the lives of a significant minority of slaves. That minority was small in the early eighteenth century but became somewhat larger in Virginia by the Civil War. Bondspeople baptized in the eighteenth-century Anglican parish churches later heard ministers sermonize against stealing from owners and other sins. Some accepted these admonitions against theft, but others created an ethical rationale for rejecting them. After

9. On whites' killing slaves, see William Waller Hening, *The Statutes at Large, Being a Collection of All the Laws of Virginia* (13 vols.; Richmond, 1809–23), II, 270, IV, 132–33, XII, 681; Anthony Benezet to John Wesley, May 23, 1774, in Roger Bruns (ed.), *Am I Not a Man and a Brother: The Antislavery Crusade of Revolutionary America, 1688–1788* (New York, 1977), 315; Benjamin Rush, *An Address to the Inhabitants of the British Settlements in America on Slave-Keeping* (Philadelphia, 1773), *ibid.*, 236; Philip J. Schwarz, "Forging the Shackles: The Development of Virginia's Criminal Code for Slaves," in David J. Bodenhamer and James W. Ely, Jr. (eds.), *Ambivalent Legacy: A Legal History of the South* (Jackson, Miss., 1984), 125–46.

10. Norrece Thomas Jones, Jr., "Control Mechanisms in South Carolina Slave Society, 1800–1865" (Ph.D. dissertation, Northwestern University, 1981), 26–54, finds the same to have been true in South Carolina. For a reflection of how prevalent was the fear of such sale from Virginia, see trial of Ned, May 21, 1836, Preston County (now West Virginia), and Petition for clemency, received May 23, 1836, both in 1836 rejected claims folder, VEPLR.

the Great Awakening (the first and the second) spread into the black community, more and more Afro-Americans joined Baptist and Methodist churches. Both bodies eventually tried to justify their failure to abolish slaveholding among their white members by claiming to be the special means of morally uplifting the slave members. Through careful attention to slave members' behavior, Baptists and Methodists hoped to render slaves acceptable to God if not to humanity.<sup>11</sup>

The Baptists exercised church discipline over black members for the straightforward reason that they disciplined any and all of their members. The problem was that abstractly equal rules fell unequally on enslaved and free members. Various congregations agonized over whether to punish slaves who took new spouses after old ones had been sold to distant or unknown owners. There was no hesitation, however, about censuring or dismissing those slaves whom slaveowning members accused of fighting, cursing, lying, gaming, drunkenness, stealing, insolence, assault, or other offenses.<sup>12</sup> Punishment of personal sins also effectively defended the institution of slavery. As the members of Tomahawk Baptist Church of Chesterfield County testified, "We have . . . taken under consideration the state of hereditary slavery and think it is not the business of the church, but the legislators." As a result, many Baptists supported slavery in practice.<sup>13</sup>

During many nonworking hours, slaves well knew they could encounter still another collective body designed by whites to control Afro-Americans' every move at certain times. Patrollers are a part of black folklore either as symbols of evil or as examples of people whom slaves could outsmart. It depended upon time, place, and size of plantation. Most patrollers in eighteenth-century and antebellum Virginia served during weekends, which were frequently slaves' "time off." As might be expected, the number of patrollers and the hours of service

11. The most recent general treatment is Mechal Sobel, *Trabelin' On: The Slave Journey to an Afro-Baptist Faith* (Westport, Conn., 1979).

12. Sobel, *Trabelin' On*; Boar's Head Swamp (Antioch, Henrico County) Baptist Church Minute Book (1787, 1791–1828), in VBHS, shows that 15.9 percent of the white members were excommunicated for various offenses, while 23.5 percent of the black members were so disciplined. South Quay (Nansemond County) Baptist Church Minute Book (1775–1827), photostat in VSL, shows the percentages of 19.3 for the former and 19.0 for the latter.

13. For good examples, see Boar's Head Swamp Church Minute Book, July–August, 1818; Henrico C.C.M.B. (1816–19), 393, 410; South Quay Church Minute Book, 30; Tomahawk (Chesterfield County) Baptist Church Minute Book (1787–1842), 3, microfilm in VSL; and Piney Branch (Spotsylvania County) Baptist Church Minute Book (1813–51), November, 1815, photostat in VSL.

rose dramatically during insurrections or insurrection scares. In some counties, virtually no notice of patrollers' actions appears in the record books. Perhaps their activities were taken for granted, or there were too few slaves to require patrollers' surveillance, or whites felt so secure that they failed to keep up patrols. Those few detailed records that have survived indicate that patrollers concentrated on the largest plantations. That was a practical approach not only because the larger slaveowners controlled the counties but because a few patrollers could thereby watch a large number of slaves.<sup>14</sup>

Some slaves had to deal with the patrollers more often than did others. It was runaways who had the most to fear from them. Slaves going to and from church meetings, especially hidden ones, had to be careful, as did husbands or wives going to meet their spouses on other plantations. Patrollers were the ultimate means of preventing insurrection, so conspirators had to watch them closely. So did any slaves planning to steal goods from outside their own "territory."<sup>15</sup> Patrollers were of virtually no use in preventing killing, poisoning, rape, or arson, however. Most such actions either occurred on a plantation or happened unpredictably and in secret.

When masters, overseers, churches, and patrollers all failed to prevent slaves from violating slaveholders' rules, many whites chose to punish blacks with the full majesty of the law. Anomalous, anachronistic "monarchists" though they were in their assumption about their powers and rights, Virginian slaveholders from the beginning of the legally supported institution in the 1660s until the enforced end in the 1860s insisted that slavery must be based on the law. That could not be common law, of course, since it did not recognize lifetime bondage. But slaveholders thus had all the more power to shape the legal system because they and they almost alone would create the necessary positive law. As a result, not only was slavery as a form of property ownership supposed to exist under the law, but slaves as human beings

14. Arthur P. Scott, *Criminal Law in Colonial Virginia* (Chicago, 1930), 307–308, reviews the patrol laws. Some of the most detailed records of patrollers' activities are in Patrol Accounts, 1758, and "A Jornel of Pattroling," April–November, 1763, Sussex County Court [Loose] Papers, 1758, 1763–64, microfilm in VSL. Detailed papers on costs are in "Patrollers, 1806–35, Accounts, etc., Certificates," Caroline County Historical Papers, box 3, VSL. For extra patrols after an insurrection, see Southampton C.C.M.B. (1830–35), 170–77, 264–71.

15. See, for example, trial of Caleb, June 1, 1826, Amherst County, C.S., box 5, and VEPLR at April 22, 1826.

were, in spite of their legally defined status as chattel, also supposed to exist under the law.

Official hangings of slaves made obvious the ultimate power of legal punishment that white authorities could exercise. The aggregate statistics in Table 1 show that slaves could face execution by hanging, the final punishment, for consistent reasons before the 1780s and for a new group of fairly predictable reasons between the 1780s and 1865. Between 1706 and 1784, of the alleged victims of slaves condemned to hang, 91.4 percent were white. Amelioration in the judicial system stands out in the reversal of the proportion of hanging sentences for offenses against property and offenses against persons between the first and second eighty-year segments. That change is, however, prefigured in the percentages for the infrequently used and extreme methods—hanging convicts and displaying their severed heads, or that and quartering—and is less sharp than might appear since I could not verify that all sentences in the first period were carried out.

The legal and judicial shackles were particularly complicated in structure but rather simple in intention. Evolving over the entire history of the “peculiar institution” in the Old Dominion, the statutes and courts changed in numerous ways, as much in reaction to slaves’ actual and feared behavior as to shifts in the jurisprudential stance of Virginia’s leaders. Modifications appeared frequently in the categorization of crimes—which were felonies and which were also capital offenses—the empowerment of courts, the length of time permitted between indictment and trial, the forms, functions, and rituals of the actual trial, the recording of testimony, and the number or percentage of votes required for conviction or condemnation. Virginia’s legislators also regularly altered mandatory and discretionary sentences, the manner of execution, the availability of pardons, the use of transportation as an alternative sentence, the conferral of benefit of clergy, gubernatorial pardoning powers, and the payment of compensation for executed or transported slaves. Good Anglo-Saxons all and supporters of the emerging bourgeois ideology of individual rights before the law, Virginia’s white authorities did provide some due process protection for slave defendants, or at least for masters whose slave property faced court action. Their intention, however, seems to have been to control all slaves and to defend slavery.<sup>16</sup>

16. Schwarz, “Forging the Shackles.”

*Table 1. Slaves Sentenced to Hang, Crimes, and Executions, 1706–1865*

<i>Crime charged</i>	<i>Sentence:</i>		<i>Extraordinary Sentences, 1706–1809</i>					
	<i>Hang, 1706–1784<sup>a</sup></i>	<i>% This Sentence</i>	<i>Hanged, 1785–1865</i>	<i>% Slaves Hanged</i>	<i>Body or Head Displayed</i>	<i>% This Sentence</i>	<i>Body Quartered and Displayed</i>	<i>% This Sentence</i>
Against property	312	56.2%	84	13.4%	3	12.0%	0	—
Against persons	137	24.7	432	68.8	22	88.0	5 <sup>b</sup>	71.4%
Against system	7	1.3	0	—	0	—	0	—
Insurrection	13	2.3	81	12.9	0	—	2	28.6
Unspecified felony	85	15.3	31	4.9	0	—	0	—
Robbery and treason	1	trace	0	—	0	—	0	—
Total	555	100.0	628	100.0	25	100.0	7	100.0

SOURCES: For Extraordinary Sentences—county court records; C.S., boxes 1–2; *Virginia Gazette*, February 4, 27, 1737. Known pardons excluded; 15 (45.5 percent) verified; no instances found after 1809. The reported dissection of Nat Turner's corpse was not ordered by the court (Oates, *The Fires of Jubilee*, 143). For Hanged, 1785–1865—C.S., boxes 1–10, Treasury Cash Journal, VEPLR, and county court records when possible. All verified.

NOTE: Crimes against property include all forms of stealing and arson; crimes against persons are murder and attempted murder, poisoning or illegal medication, rape and attempted rape, and assault; aiding a runaway, forging a pass, and perjury are the crimes against the system; unspecified crimes are those which clerks designated as felonies but which they did not further identify. Destruction of seventeenth- and eighteenth-century General Court records and the decentralization of the state's criminal courts for free people after the 1780s have made it impossible to collect comparative data on executions of free people in Virginia. Figures painstakingly gathered from a variety of sources by Watt Espy, of the Capital Punishment Research Project, indicate at least 77 executions of free people between 1706 and 1784 and 50 between 1785 and 1864.

<sup>a</sup>Hanging sentences only, according to county records. Verification available in 131 (23.6 percent) of the 555 cases. Known pardons excluded. Figures in first four columns include extraordinary sentences.

<sup>b</sup>Includes one slave woman burned to death after being convicted of poisoning her master in 1746 and another female slave burned to death after conviction for murder in 1737.

The development of laws and judicial institutions for slaves in Virginia was rather dynamic. Changes in society certainly influenced that development. As the oldest British-American colony, the first North American colony to introduce and legalize slavery, and the colony or state with the largest slave population in North America, the Old Dominion necessarily underwent a long and massive process of becoming and sustaining itself as a slave society. In spite of Virginia's distinctive size, the ratio of slaves to whites varied from county to county and from decade to decade, contributing in another way to the development of the laws and the courts. Finally, the departure, either forced or voluntary, legal or illegal, of thousands and thousands of bondspople from Virginia between the American Revolution and the Civil War also changed, sometimes dramatically, the social circumstances to which changes in the slave code and court system were in part a response.

Whites created and expanded Virginia's criminal code for slaves primarily to control slaves in the interest of peace and order in the slave society. There are parallel developments in the criminal codes for free whites, free blacks, and enslaved blacks, but the slave code had something of a life of its own.<sup>17</sup> One of the first laws relative to slaves passed in Virginia established that subordination of chattels would require separate criminal sanctions. Laws concerning servants would not work when applied to slaves, the 1669 "Act about the casuall killing of slaves" declared. Masters who killed slaves while correcting them, therefore, would be exempt from prosecution. Eleven years later, the House of Burgesses reserved for bondspople the special punishment of thirty lashes should they lift their hand against *any* Christian.<sup>18</sup>

The second and equally important point is that even though no slave served in the House of Burgesses, voted for a single burgess, or sat on a judge's bench in any county, slaves did influence the creation and development of the criminal code reserved for them alone. The 1669 and 1680 laws reflect the manner in which the behavior of slaves moved legislators to act as they did. According to the 1669 law, the "obstinacy" of many blacks meant that they could not be "supprest" by "other than violent means." Whites would be able to keep the law

17. *Ibid.* Like English law, which county judges tried to exploit, slave law was intrinsically subject to only so much bending. E. P. Thompson, *Whigs and Hunters: The Origins of the Black Act* (New York, 1975), 258–69; Mark Tushnet, *The American Law of Slavery, 1810–1860: Considerations of Humanity and Interest* (Princeton, 1981), 27–30.

18. Hening, *The Statutes at Large*, II, 270, 481–82.



in their own hands in order to deal with lawless blacks. The wording may amount to nothing more than rationalization; the law itself was still a response. From the perspective of the twentieth century, it is easy to infer from this response that some black Virginians had already mounted firm resistance to their subordination. This resistance could take a collective form as well. The 1680 law against slaves who attacked Christians also proscribed unlawful meetings of blacks, since "the frequent meeting of considerable numbers of negroe slaves under the pretence of feasts and burials is judged of dangerous consequence."<sup>19</sup>

The culmination of white Virginians' efforts to segregate the prosecution of slaves came in the 1692 "Act for the more speedy prosecution of slaves committing Capitall Crimes." Speed was "absolutely necessary in such cases," the preamble stated, because other slaves needed to be "affrighted to commit the like crimes" and because previous prosecutions in the centralized General Court or in special bodies had caused too much expense and delay. Thereafter, slaves accused of capital offenses would be tried by county courts of oyer and terminer—that is, county notables, usually the justices of the peace, acted under a gubernatorial commission issued expressly for the trial of the slave in question and empowering them to try and sentence the defendant "without the solemnitie of the jury." The judges would issue orders for execution, loss of member, or other punishment. Almost all would be done according to the laws of England, including the categorization of the offense as capital, the form of the court of oyer and terminer, and the passing of final judgment "as the law of England provides in the like case." The one exception was that jury trials would be refused to all slave defendants in capital cases, not just in instances of treason or sedition. Englishmen would apply some English laws to "heathen" Africans in a special way.<sup>20</sup>

19. *Ibid.*

20. *Ibid.*, III, 102–103. The best description of Virginia's oyer and terminer court system is in Peter C. Hoffer's introduction to *Criminal Proceedings in Colonial Virginia*, ed. Peter Charles Hoffer and William B. Scott, American Historical Association, American Legal Records, X (Athens, Ga., 1984), xlv–lii. Thad W. Tate, Jr., *Negro in Eighteenth-Century Williamsburg* (Charlottesville, 1972), 93–96, is another excellent description of the judicial system for slaves. Warren M. Billings, "Pleading, Procedure, and Practice: The Meaning of Due Process of Law in Seventeenth-Century Virginia," *JSH*, XLVII (1981), 577, places this creation in the context of Virginia governors' having used the oyer and terminer commission. See also *JHB*, 1692, pp. 384–86, 389–90, 396; and *EJC*, I, 171–72. White Virginians had attempted in 1646 to set up a separate judicial process for Indians, but it is not clear whether or how the system worked (Edmund S. Morgan, *American Slavery—American Freedom: The Ordeal of Colonial Virginia* [New York, 1975], 232).

Virginia's white leaders preserved the basic aspects of slave tribunals intact for the rest of the life of slavery—more than 170 years. Numerous bondspeople would appear in courtrooms as suspects and leave after having been legally exonerated. Others would face scenes of near hysteria in spite of the purported rationality of written law and formal institutions. Until the 1840s, accused rapists had little chance of legal survival in a court of oyer and terminer. A speedy trial often would not allow time for the eventual appearance of conflicting evidence in such cases. The slave prosecuted for poisoning had a much better chance, for the court's ability to convict was only as great as its capacity to elicit testimony that judges who claimed at least rudimentary acquaintance with the law might likely accept in the presence of their peers and with the realization that the governor and the council might review the case.

Only certain actions would lead to the prosecution of slaves in courts of oyer and terminer. As the title of the 1692 law indicated, any capital offense required this mode of prosecution. Since the laws of England then in force made many crimes capital, slaves could do a fairly large number of things that would bring on court action. Yet their circumscribed lives allowed them to violate the criminal code only in certain ways. The "usual" capital offenses were burglary, robbery, theft of items of high value, arson, manslaughter, murder, poisoning, and rape. The House of Burgesses became more specific in later years. In addition, by legislation of 1691, which allowed designated persons to kill any outlawed slave—one proclaimed to be a runaway with no intention of returning—with absolute legal impunity, the burgesses had created a new kind of extrajudicial punishment.<sup>21</sup> In 1723 the house responded to the growing problem of insurrection and established that any group of five or more slaves who might "consult, advise, or conspire, to rebel or make insurrection, or shall plot or conspire the murder of any person or persons whatever" would receive the mandatory sentence of death. No such statutes appeared in English codes; Old Dominion Anglo-Americans had just confronted a dangerous slave plot, however. They would apply their legal originality to Africans and Afro-Americans.<sup>22</sup>

21. Sir Leon Radzinowicz, *A History of the English Criminal Law and Its Administration from 1750* (3 vols.; London, 1948–56), I, 628–57; Hening, *The Statutes at Large*, III, 86–88; George Webb, *The Office and Authority of a Justice of the Peace* (Williamsburg, 1736); Richard Starke, *The Office and Authority of a Justice of the Peace* (Williamsburg, 1774).

22. Hening, *The Statutes at Large*, IV, 126. English gentry and their allies did create

But Virginian slaves dealt with peculiar owners. For more than a century, blacks would have a chance to escape the full force of the law. Officially debased, mostly illiterate, probably mostly non-Christian, and certainly non-European, Afro-Virginians would, in changing circumstances, be able to plead benefit of clergy. It was a situation created by British subjects who were somewhat inconsistent about applying English laws and traditions to slaves.<sup>23</sup> In 1731, Lieutenant Governor William Gooch began the process by which slaves received a guarantee of the privilege of being able to "plead their clergy." Knowing that Mary Aggie, a slave defendant in a York County theft case, was a professed Christian, Gooch unsuccessfully tried to support her plea for mercy on the grounds that her faith cancelled out the already traditional impediments of race and status. He then moved the case through a divided General Court and an uncertain council and appealed to the attorney general and the solicitor general of England, who gave Gooch a favorable opinion.<sup>24</sup> The 1732 House of Burgesses consequently laid down the rule that slaves could receive the same benefit of clergy that whites enjoyed, but, of course, in fewer cases. Benefit would be confined to whites, and thus denied to slaves, for manslaughter, burglary at night, and daytime burglary involving goods worth more than five shillings.<sup>25</sup>

As if regretting the necessity to confer English legal privileges on transplanted Africans and their descendants, the burgesses took the opportunity to include in the same act the prohibition of blacks' testimony in any court case except a trial of a slave for a capital offense. In spite of the law's implicit recognition that a growing number of blacks were converting to Christianity, it nevertheless concluded that "they are people of such base and corrupt natures, that the credit of their

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many new capital statutes during the same years (Douglas Hay, "Property, Authority and the Criminal Law," in Hay *et al.* [eds.], *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* [New York, 1975], 17-63).

23. Hening, *The Statutes at Large*, IV, 325-27.

24. In spite of the question Gooch raised, at least one slave had received benefit of clergy as early as 1726 (Lancaster C.C.O.B. [1721-29], 192-93). For his account of the search, see Gooch to Bishop of London, May 31, 1731, in Correspondence of the Bishop of London, III, Fulham Palace Papers, 15, VCRP, also printed in *VMHB*, XXXII (1924), 322-25. See also *EJC*, IV, 243; and King George C.C.O.B. (1721-34), 566.

25. Jordan, *White Over Black*, 188, 191, 208, on the values of the bishop of London and metropolitan administrators; Hening, *The Statutes at Large*, IV, 325-27. General treatments include Landon C. Bell, "Benefit of Clergy" (Typescript in VSL); William K. Boyd, "Documents and Comments on Benefit of Clergy as Applied to Slaves," *JNH*, VIII (1923), 443-47; and Tate, *Negro in Eighteenth-Century Williamsburg*, 94-96.

testimony cannot be certainly depended upon." White leaders would accept benefit because it could protect the property of slaveowners. But blacks' testimony in cases involving white people could only make trouble for slaveowners. Legislators would later realize the inconsistency in not allowing blacks to testify in civil and noncapital cases involving other Afro-Americans, but before 1866 they would not relent on the exclusion of black witnesses, slave or free, from any trial involving whites.<sup>26</sup>

The construction of such safeguards did not stop with features that would merely appeal to slaveowners' interests. The House of Burgesses early made certain that successfully trying a slave for a capital offense would literally contribute to the interest of those who possessed slave property. The 1705 legislation and all subsequent renewals ensured in one way or another that if the government destroyed the life of a slave convicted of a capital crime, it would nevertheless make every effort to maintain the owner's original capital investment. That is, the government would compensate the owners of condemned slaves for their monetary loss. The intention of this provision was to persuade slaveholders not to conceal their slaves' offenses for fear of economic injury. Instead, public trials could ensure the public safety. This measure probably conferred some real protection on slaves from arbitrary and inconsistent private punishment by uncommunicative masters who acted independent of one another, but it was relative protection, since consistency and fairness by no means prevailed at all times in the courts.<sup>27</sup>

By 1748, however, legal and judicial shackles so carefully constructed by whites had clearly failed to live up to their creators' and beneficiaries' expectations. It was "absolutely necessary," announced the lieutenant governor, the council, and the burgesses, "that effectual provision should be made for the better ordering and governing of slaves, free negroes, mulattoes, and Indians, and detecting and punishing their secret plots, and dangerous combinations, and for the speedy trial of such of them as commit capital crimes." What kind of improvement was needed? The third section of the 1748 act made clear that poisoning had become a special problem.<sup>28</sup> During the same year, a

26. Hening, *The Statutes at Large*, IV, 25–27, VI, 107; Franklin Johnson, *The Development of State Legislation Concerning the Free Negro* (Westport, Conn., 1979), 193.

27. Hening, *The Statutes at Large*, III, 269–70; *The Code of Virginia* (2nd ed.; Richmond, 1860), 815–17.

28. Hening, *The Statutes at Large*, VI, 104–105; Radzinowicz, *A History of the English Criminal Law*, I, 628–29.

particularly ominous threat to slaves emerged from Williamsburg. Hog stealing was a traditional activity for all the "lower sort" in Virginia. Laws existed that promised many stripes—*i.e.*, strokes of the whip—for enslaved first offenders and several kinds of mutilation for second offenders. But public punishment was infrequent, with predictable results. The "Act against stealing hogs" of October, 1748, consequently decreed that after June 10, 1751, any slave convicted a third time of hog stealing would suffer death without benefit of clergy. Whether this terrifying language had the desired result cannot be measured. No slave ever received such a sentence in any court whose record has survived, and we have no way to determine whether there would otherwise have been any or many third offenders. Suffice it to point out that as was true for the whip, the availability of this penal weapon was undoubtedly well known to slaves.<sup>29</sup>

Any amelioration that occurred thereafter was a sure sign not only of the influence of the Enlightenment and perhaps the Great Awakening but also of planters' increasing confidence that they could control bondpeople who seemed decreasingly alien to them. But it is not always possible to distinguish amelioration from increasing rigor. In 1765, for example, the burgesses streamlined the procedure by which county officials could secure commissions for justices of oyer and terminer. No longer would a sheriff or his agent have to journey all the way to Williamsburg each time there was a need for a commission. From then on, governors issued blanket commissions to specific judges who would hear those cases in their counties. This legislation would save time and money, of course, but would it affect due process? The same act also recognized that even slaves accused of having "base and corrupt natures" could kill someone without malice aforethought. In other words, it was possible for slaves to be guilty of manslaughter. By the legislation of 1765, then, slaves would be able to plead for benefit of clergy when convicted of manslaughter. Yet the burgesses restrained themselves in the interest of white safety and supremacy. Benefit of clergy would be available only to slaves convicted of manslaughter for killing a slave.<sup>30</sup>

The same sharp but deadly distinction characterized the next major modification of the Old Dominion's criminal code for the enslaved. Legislation of 1769, whose title revealed the layers of change already

29. Morgan, *American Slavery*, 217–18, 237; Hening, *The Statutes at Large*, VI, 121–24; Schwarz, "Gabriel's Challenge," 296–98.

30. Hening, *The Statutes at Large*, VIII, 137–39.

incorporated into the slave code—"An Act to amend the Act, intituled an Act to amend the Act for the better government of Servants and slaves"—explained that the previously conferred power to dismember outlying slaves (*i.e.*, those runaways who defied owners' and courts' orders to return and who lived off the land and by raiding plantations) was a punishment "often disproportioned to the offence, and contrary to the principles of humanity." No longer would such a punishment be employed to discipline outlying slaves. The act went on, however, to destroy any misconception free or enslaved Virginians might have that the burgesses had softened their attitude toward "deviant" slaves. County courts of oyer and terminer could order the castration of any slave convicted of *attempting* to rape a white woman. The act read as if it left untouched a power justices already had. In fact, it conferred new authority on them, and a rise in the number of rape convictions encouraged them to hold that authority in reserve and eventually use it.<sup>31</sup>

Before the American Revolution, the legislators of Virginia made two more major and possibly ameliorative revisions in the legal and judicial system on which whites relied to suppress defiant slaves. Legislation of February, 1772, seemingly preserved more slaves from the gallows, making it more difficult for justices to sentence slaves to death, and extending benefit of clergy for one other offense. Thereafter, at least four justices, being also a majority, must vote for condemnation. Landon Carter fumed in private that this law, merely an effort to save money, would make nearly impossible the courts' use of the sanction of hanging. The more than seventeen slaves sentenced to death between March and December, 1772, would undoubtedly have disagreed with Carter, especially since that was twice the number condemned to death during the same period in 1771. Amelioration was rather unpredictable. Lawmakers write on the human skin, Catherine the Great reportedly wrote to Diderot at about this time.<sup>32</sup>

The language of the same act's extension of benefit of clergy to slaves "convicted of breaking and entering houses in the night time, without stealing goods or chattels from thence" reveals the central theme of

31. *Ibid.*, 358–61. Rape continued to be a capital offense.

32. Hening, *The Statutes at Large*, VIII, 522; Landon Carter, *The Diary of Colonel Landon Carter of Sabine Hall, 1752–1778*, ed. Jack P. Greene (2 vols.; Charlottesville, 1965), II, 676; Louis Philippe, Comte de Ségur, *Mémoires, ou souvenirs et anecdotes* (5th ed.; 2 vols.; Paris, 1844), II, 127 ("je travaille sur la peau humaine").

almost every change made between the 1780s and the 1860s in Virginia's criminal code for slaves. "A slave who shall break any house in the night time," the act established, "shall not be excluded from clergy, unless the same breaking, in the case of a freeman, would be a burglary." In spite of the postrevolutionary reform of the criminal code, revision of the judiciary, and development of the state penitentiary—all for free people only—the system of suppressing dangerous behavior among slaves would not simultaneously match the system for whites. Errant bondspeople were in greater jeopardy of capital punishment. One can find identical features in sections of the Commonwealth's codes for blacks and whites only if one juxtaposes a somewhat later set of laws for blacks and an earlier collection of statutes for whites. Reform for slaves existed, but it lagged behind reform for whites.<sup>33</sup>

The American Revolution's ambiguous legacy for slaves appears most starkly in the system of criminal laws and courts for slaves. The "amelioration" during the 1760s and 1770s was a well-sharpened, two-edged sword. Even though the simple conviction rate in trials of slaves dropped between the 1760s and 1770s, that was temporary. The rate began to rise again in the early 1780s. Data from representative counties for the years thereafter indicate that the simple conviction rate always fluctuated. What revolutionary humanitarianism may have done, therefore, was to provide a temporary breathing period, not a permanent change.

Officials did, however, make some improvements. Hanging, for example, did decline, even though sentences of hanging had not declined by the 1780s. (Only sentencing to the harsher forms of execution had begun to decrease.) By the 1780s, the state executive's granting of full pardons to many condemned slaves grew dramatically, saving many a person from the hangman. The reduction of felony charges to misdemeanor verdicts continued, as did the numerous grants of benefit of clergy. One reason for these trial results was that even though owners had long been able to speak in court on matters of fact concerning their slaves on trial, some were now beginning to send trained attorneys instead. This development was natural in a society whose property owners increasingly relied on professionals to protect all their prop-

33. Kathryn Preyer, "Crime, the Criminal Law and Reform in Post-Revolutionary Virginia," *Law and History Review*, I (1983), 53–85; Schwarz, "Forging the Shackles."

erty in courts. It could lead either to lesser sentences or to the result secured by young lawyer Luther Martin when he appeared on behalf of the slave Dick in Accomack County Court in August of 1775. Presented by, oddly enough, the grand jury for illegal preparation of medicines, Dick pleaded not guilty, and he and Martin won a continuance until November court. At that time, the king's attorney simply dropped the charges, whether intimidated by Martin's developing skills or acting from other motives is not known.<sup>34</sup>

Whatever its source, a heightened awareness of extenuating circumstances began to appear in the records of slave trials in the revolutionary era. Judges began to recognize some of the "temptations" slaves faced or take into account the "hard usages" a slave had received from a white person. One court even went so far as to drop the charges against Will, who had been accused of murdering another slave, on the grounds that at the time of the action "he was a Lunatic & not in his proper Senses." Similarly, due to the optimistic and libertarian emphases of revolutionary ideology, a party of humanity had begun to debate, and occasionally to do battle, with the party of the devil. The humanitarians made known their distaste for the cruelty exercised by many overseers. Some even joined efforts to secure pardons or reduced punishments for slaves who had violated the law either under the duress of depraved whites or in reaction to especially cruel superiors. In 1788 the legislature changed the law concerning whites who killed slaves in the process of correcting them. Now the Commonwealth could charge such people with manslaughter. Thereafter, scattered trials of such killers of slaves occurred in the assorted courts for free people. Legislators also built some more safeguards for slaveowners' human property, perhaps even for the slaves themselves, into the state's slave code.<sup>35</sup>

34. Accomack C.C.O.B. (1774-77), 377, 393. See A. G. Roeber, *Faithful Magistrates and Republican Lawyers: Creators of Virginia Legal Culture, 1680-1810* (Chapel Hill, 1981).

35. *EJC*, VI, 390; trial, October 15, 1776, Prince Edward C.C.O.B. (1773-81), 502-503; *EJCS*, I, 228; trial, December 21, 1785, Henrico C.C.O.B. (1784-87), 380 (I have seen no other such judgment of temporary insanity in the trial of a slave); Mullin (ed.), *American Negro Slavery, 71-72*; *The Letters of Elijah Fletcher*, ed. Martha von Briesen (Charlottesville, 1965), 23; Judge Nelson to Governor Cabell, December 21, 1805, and "Petition of Sundry the Inhabitants of the County of Prince George in behalf of Robin," November 16, 1786, both in VEPLR. On trials of whites for killing slaves, see Hening, *The Statutes at Large*, XII, 681; Brunswick C.C.O.B. (1784-88), 433 (to General Court); Spotsylvania C.C.O.B. (1792-95), 414 (to District Court); Spotsylvania C.C.M.B. (1815-19), 151-53 (to Superior Court), (1821-24), 308 (to Superior Court), (1826-29), 287-88, 313 (to Superior Court); Essex C.C.O.B. (1800-1801), 247 (acquitted); Petition of Franklin District cit-



But the problem was that all these apparent reforms effectively perpetuated bondage. They were intended to prevent another revolution. Mixed as the motives for the reforms may have been, white leaders would have an easier, but by no means assured, chance of controlling their slave society. It is the limitations on the reforms for slaves that reveal the character of the lawmakers' program. When those authorities completely revamped the criminal justice system for free people, creating district courts (1788), abolishing the death sentence for all offenses except first-degree murder (1796), ending benefit of clergy (1796), and eventually opening a penitentiary (1800) that was practically unique for a southern state, they left the nearly century-old oyer and terminer courts virtually intact. Local judges would still retain life-and-death powers over slaves. Segregated slave courts, among the most powerful in the slave South, would continue to exist partly so that slavery could continue to exist. The only other visible change resulting from the Revolution was that cases would now be tried in the name of the Commonwealth rather than the Crown.<sup>36</sup>

The most significant change effected in the 1786 law concerning trials of slaves was that thereafter only a unanimous court of oyer and terminer could condemn a slave to death.<sup>37</sup> The number of execution sentences did drop dramatically between 1786 and 1787, but that decline was deceptive since the same number of condemnations was

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izens to Governor Cabell, 1807, Petition of Thomas Johns and others, September, 1807, William B. Williams to Governor Cabell, July 15, 1808, John T. Mason to Governor Cabell, November 17, 1808, Maryland governor's proclamation of December 20, 1808, and Daniel McLaren to Governor Tyler, September 2, 1810, all in VEPLR; Proclamation of Governor Preston, April 25, 1818, in *Richmond Enquirer*, May 29, 1818, p. 4; Petition of 109 Northampton County citizens to Governor Pleasants, December 4, 1822 (January, 1824, folder), Inquisition on body of Maria, slave of Fielding Curtis, February 11, 1826, Proclamation of Governor Tyler, March 27, 1826, Proclamation of Governor Giles, December 9, 1828, reward receipt, August 5, 1829, Inquisition on the body of Armistead, slave of William Conner, September 23, 1829, and Fredericksburg Mayor Thomas Goodwin to Governor Giles, September 24, 1829, all in VEPLR. For petitions against executions, see Edmund Randolph to Governor Beverley Randolph, January 14, 1790, in *Miscellaneous Manuscripts*, Chicago Historical Society (CWRD microfilm M-97); John Caruthers to Governor Cabell, June 10, 24, 1806, Petition of Norfolk citizens, October, 1807, Arthur Lee to Governor Cabell, October 11, 1807, William Sharp to Governor Cabell, October 29, 1807, Petition of Brunswick County citizens, March, 1808, Robert Tinsley to Governor Tyler, June 22, 1826, C. Anthony to Governor Tyler, June 22, 1826, Petition of Staunton citizens to Governor Giles, September, 1829, all in VEPLR.

36. Preyer, "Crime, the Criminal Law and Reform," 53-85; Daniel Flanigan, "The Criminal Law of Slavery and Freedom, 1800-1868" (Ph.D. dissertation, Rice University, 1973), 100, 103.

37. Hening, *The Statutes at Large*, XII, 345; *The Papers of Thomas Jefferson*, ed. Julian Boyd *et al.* (21 vols. to date; Princeton, 1950-), II, 616-17.

recorded in 1787 as in 1785, and the number rose again between 1788 and 1799, before Gabriel's Plot and prior to the legalization of transportation. One more change was intended to be ameliorative. Some new language appeared in the 1786 act. All previous legislation had empowered courts of oyer and terminer to try slaves accused of capital offenses alone. The "act directing the method of trying Slaves charged with treason or felony" covered a broader category of crimes than did the earlier statutes. Now justices could use oyer and terminer powers to try slaves accused of any felony. Court records from representative cities and counties indicate that justices did thereafter try more slaves per year. Perhaps this modification did have an ameliorative effect by taking more punishments out of unsupervised and unrestrained hands.<sup>38</sup>

After 1789, slaves would plead for benefit of clergy before unreformed tribunals, while free people would for a few years ask for the same privilege in completely reformed judicial bodies. As before, slaves faced a more rigid criminal justice system than did free people. As if to underscore this condition, authorities decided in 1796 to restrict the death penalty not only to those free persons convicted of murder in the first degree but also to all slaves convicted of "non-clergyable" offenses. In the 1856 edition of *A Sketch of the Laws Relating to Slavery*, George M. Stroud used the Old Dominion's statutes to make the overwhelmingly convincing point—a point that would be reiterated by an associate justice of the U.S. Supreme Court in the Civil Rights Cases of 1883—that slaves convicted of crimes were subject to grossly unequal punishment in comparison to whites and even to free blacks. He listed all the more than sixty offenses for which Afro-Virginian bondspeople could be condemned to death but for which no free white person could be executed. Stroud had to list that many offenses because Virginia's code made so many distinctions within the main categories of crime, such as the seventeen different kinds of arson.<sup>39</sup>

38. The courts were those of Brunswick, Essex, Henrico, Henry, Southampton, and Spotsylvania counties, and the city of Richmond, for 1786 through 1799. The totals reveal a spurt in 1787 and a slight rise thereafter: ten in 1786; thirty in 1787; nine in 1788; fifteen in 1789; eleven in 1790.

39. Hening, *The Statutes at Large*, XII, 532–38, XIII, 30–32; Roeber, *Faithful Magistrates*, 192–230; Samuel Shepherd, *Statutes at Large of Virginia, from October Session 1792, to December Session 1806, Inclusive* (3 vols.; Richmond, 1835), II, 8; George M. Stroud, *A Sketch of the Laws Relating to Slavery in the Several States of the United States of America* (1856; rpr. New York, 1968), 77–80. Justice Joseph P. Bradley maintained that punishments more severe for slaves than for free persons were one of slavery's "necessary incidents," or "inseparable incidents of the institution" (109 U.S. 3 [1883]).

Daniel J. Flanigan has characterized the Old Dominion's antebellum penal system for slaves as about the most repressive in all the slave South. The reason, he persuasively concludes, is that Virginians had one of the oldest criminal codes for slaves on the mainland of North America. They might revise certain secondary aspects of it, but they would be loath to modify its most basic features. Whites relied on the same fundamental categories of criminal statute—homicide, poisoning, assault, rape, arson, theft, and robbery—in order to curb any aggressive members of the "alien" population in their midst.<sup>40</sup> Two major changes did occur in the penal system for slaves between 1800 and 1865, however. One was a sea change that modified details in accordance with the development of the white, free black, and enslaved sectors of Virginia's population. The other was a colossal effort of white Virginians to have their cake and eat it too.

Changes in the slave code during this period could directly affect the rate of prosecution for certain crimes. In 1823, for instance, perhaps in response to the Vesey Plot in South Carolina, and probably in reaction to the rise in convictions of slaves for murdering whites in the previous eight years, an act passed that mandated transportation for slaves convicted of intentional and malicious assault of or beating a white person with intent to kill. The penalty for that offense became death without benefit of clergy in the spring of 1832, as shocked legislators reacted to Nat Turner's Revolt in August, 1831. Table 2 shows that in the years 1825 through 1829 the convictions for this offense had grown dramatically, and that in spite of the severe penalty after 1832, the number of convictions resulting in execution or transportation remained at about the same level until the 1850s, when it rose markedly since judges could no longer grant benefit of clergy to bondpeople for any offense.<sup>41</sup>

One might think, then, that a state with so many capital offenses of which to convict slaves would have been even busier at the gallows than it actually was. Yet in this area, Virginians' judiciary had their deterrence and looked like humanitarians as well. In early 1801, partly in response to Gabriel's Plot and partly as an effort to eliminate as much as possible the spectacle of public hangings, legislation went into effect that allowed the governor and the council, either upon rec-

40. Daniel J. Flanigan, "Criminal Procedure in Slave Trials in the Antebellum South," *JSH*, XL (1974), 546-47.

41. *Supplement to the Revised Code of the Laws* (Richmond, 1833), 147, 234; *The Code of Virginia* (Richmond, 1849), 753.

Table 2. Slaves Executed or Transported for Assaulting Whites with Intent to Kill, 1785–1864

1785–89	0	1825–29	14
1790–94	1	1830–34	12
1795–99	2	1835–39	11
1800–1804	6	1840–44	11
1805–1809	2	1845–49	11
1810–14	4	1850–54	23
1815–19	3	1855–59	33
1820–24	4	1860–64	16
Total	22	Total	131

SOURCES: C.S., boxes 1–10, and miscellaneous county court order and minute books.

ommendation of justices of oyer and terminer or on their own, to sell condemned slaves to persons who guaranteed to transport them out of the United States to places from which they could not return to Virginia. Such slaves would wait for purchasers in the Virginia Penitentiary, then go into exile from Virginia forever—out of sight, out of mind, and incapable of a second offense in the Old Dominion. Nearly nine hundred Afro-Virginians would become deportees before still another change occurred in 1858.<sup>42</sup>

By 1857 the market for convicted felons, especially insurrectionaries, had somewhat diminished outside the United States. Few European colonies desired Afro-Americans who had already shown what

42. I have treated this subject at greater length in "The Transportation of Slaves from Virginia, 1801–1865," *Slavery and Abolition: A Journal of Comparative Studies*, VII (1986), 215–40. For the basic sources, see *The Papers of Thomas Jefferson*, II, 504; Jefferson to Governor Monroe, September 20, 1800, in *The Writings of Thomas Jefferson*, ed. Paul L. Ford (10 vols.; New York, 1892–99), VII, 457; Shepherd, *Statutes at Large*, II, 279–80; "Letter from the Governor," *Journal of the House of Delegates*, 1841–42, pp. 87–88; "Statement Shewing the Number and Cost to the Commonwealth of Executed and Transported Slaves, For the Twenty Years Which Ended the 31st December 1840," *Journal of the House of Delegates*, 1841–42, docu. no. 43; Message of Governor Floyd, *Journal of the House of Delegates*, 1848–49, p. 24; *Governor's Biennial Messages to the General Assembly . . . December 7, 1857* (Richmond, 1857), 150–51; Stamp, *The Peculiar Institution*, 243–44, 258; Clement Eaton, *The Freedom-of-Thought Struggle in the Old South* (New York, 1964), 94; Helen T. Catterall, *Judicial Cases Concerning American Slavery and the Negro* (5 vols.; Washington, D.C., 1924–26), III, 558–59, covers *State v. William H. Williams*, 7 Rob. La. 252 (1844), a prosecution of a trader for sneaking into Louisiana some slaves transported from Virginia. The names of the slaves can be traced through "A List of Slaves and Free Persons of Color received into the Penitentiary . . . 1816 to . . . 1842," C.S., box 10; and papers concerning *State v. Williams*, in Supreme Court of Louisiana Collection, docket 4671, Earl K. Long Library, University of New Orleans.

they thought of docility. Slavery in the British and French West Indies had legally ended in the 1830s and 1840s; Spanish Florida was now in the Union; other areas had come under U.S. control; and, finally, Deep South states had objected loudly to slave traders' initially undetected practice of "dumping" transported slaves within their boundaries. Perhaps the most obvious disadvantage of the system for white Virginians was that it lost considerable money for the state. In one of the last efforts to shore up the criminal code for slaves, the Virginia General Assembly of 1858 declared that enslaved laborers who would previously have been condemned to sale and transportation could now benefit the public as state-owned laborers on public works. Strangely enough, still another revision of the law in 1864 allowed the governor to transport a "reprieved" slave outside the Confederate states. At least fourteen blacks were exiled in 1864 and 1865 as a result of this act, but there is no indication of where they could possibly have been taken outside the Confederacy.<sup>43</sup>

State officials regarded the sale and transportation of convict bondsmen as a reprieve. It is difficult to determine how much suffering resulted from this sentence, however. Little or no record survives of early destinations. Some went to Cuba, others to Spanish Florida, and a few even went to the Dry Tortugas, the future place of confinement for Dr. Samuel Mudd, who set John Wilkes Booth's broken leg. Transportation was no real punishment, declared Governor Wise in 1857. He did not ask the forced migrants how they felt; we cannot. But a persistent tradition said that there were more dangerous slaves in the Deep South simply because the upper South had sent so many slaves there in self-defense.<sup>44</sup>

Whatever happened to the enslaved exiles, the fate of Afro-Virginians who stood on the gallows is clear. After institution of the alternative of transportation, or between 1801 and 1865, the hangman's noose still granted 454 slaves the only kind of freedom for which many could hope. About two-thirds of them suffered the pain of death be-

43. *State v. Williams*, Supreme Court of Louisiana Collection; *Acts of the General Assembly*, 1857-58, pp. 39-40; *Acts of the General Assembly*, 1863, p. 54.

44. George Goosley to Governor Page, June 5, 24, 1802, Norfolk Mayor Thomas Newton to Governor Page, September 8, 1802, Memorial of William Fulcher, December, 1806 ("undated"), all in VEPLR; R. E. Griffith, Sr., "Notes on Rock Hill," *Proceedings of the Clarke County Historical Association*, III (1943), 47; Stephen Z. Starr, *Colonel Grenfell's Wars: The Life of a Soldier of Fortune* (Baton Rouge, 1971), 273-79; *Governor's Biennial Messages . . . 1857*, p. 151; Litwack, "Been in the Storm," 138.

cause they had been convicted of crimes against persons—forcing pain, terror, or death on someone else. In relation to whites' standards then, at least some proportionality between punishment and crime existed in these cases. But the ugly look of double jeopardy, of being condemned once by slavery and then again in court, characterizes the entire process. One can hardly expect that white Virginians—and the small percentage of black victims—would not struggle for self-preservation. The problem is in the systematic refusal of slave laws and courts to acknowledge and protect the right of slaves to self-preservation.

At times, whites convinced themselves that their legal and judicial system succeeded in protecting them from the special and grave danger posed by the presence of a suppressed slave population. Surely that system did terrorize some people into submission. Slaves had to take seriously the risk of going to the gallows. But there were those who either ignored the system or recognized it for what it was and therefore set out to exploit, undermine, or utterly destroy it. Many black people perceived the shape of the shackles. For some, that shape meant complete restraint. Others attempted to learn how to move about, even to run, in spite of the irons. The men and women in this study sought to escape from or break these shackles.

Except in times of large-scale slave plots or fear thereof, the legal and judicial system created a kind of order in the lives of slaves. Systems of absolute power claim to provide safety in order, but slaves thus had a good idea of what to expect should they behave in certain ways. The most significant implication of the relative predictability of the system of *legal* control is that many of those slaves who chose to challenge it could do so on the basis of their own values. The seemingly omnipresent stealing by slaves exemplifies how such illegal behavior can appear to be merely a reaction but was in fact more than that. Those slaves who did not steal as well as those who distinguished between stealing from other slaves and stealing from whites, or even between stealing from their owners as opposed to other whites, could base their behavior on their own ethic.<sup>45</sup> Their decisions were not

45. Jacob Stroyer, *Sketches of My Life in the South* (Salem, Mass., 1890), 28–29, 44–45, 52–54; Albert J. Raboteau, *Slave Religion: The "Invisible Institution" in the Antebellum South* (New York, 1978), 294–97; Garry Wills, *Inventing America: Jefferson's Declaration of Independence* (Garden City, N.Y., 1978), 226–27; Michael Craton *et al.* (eds.), *Slavery, Abolition, and Emancipation: Black Slaves and the British Empire: A Thematic Documentary* (London, 1976), 141; Stanley Feldstein, *Once a Slave: The Slaves' View of Slavery* (New York, 1971), 172–78; Blassingame (ed.), *Slave Testimony*, 153, 170, 173, 219, 374,

necessarily reflexive reactions to their situations. According to a pre-scient white observer, there was a direct relationship between white relegation of blacks to the status of property and many slaves' retaliatory appropriation of whites' property:

The man, in whose favour no laws of property exist, probably feels himself less bound to respect those made in the favour of others. When arguing for ourselves, we lay it down as a fundamental, that laws, to be just, must give a reciprocation of right: that, without this, they are mere arbitrary rules of conduct, founded in force, and not in conscience: and it is a problem which I give the master to solve, whether the religious precepts against the violation of property were not framed for him as well as his slave? And whether the slave may not as justifiably take a little from one, who has taken all from him, as he may slay one who would slay him?<sup>46</sup>

The problem with this formulation is that it places slaves in a subordinate position, dependent on white error or immorality as an excuse, guide, or justification for action. Like some of Jefferson's other attempts to solve the American dilemma, his reasoning here combined the assumptions of white supremacy and the theory of the social contract. Whites have violated the contract, so slaves can act for themselves. But the situation of slaves required that they first act for themselves and in accordance with their own notions if they wished to have any power over their own lives.

Still, it was against special shackles that many slaves would struggle in the effort to act for themselves. Other groups in North American, Western Hemisphere, and European societies would find themselves in legal and judicial shackles as well, but the simple fact that they were not slaves inevitably meant that their shackles differed from those fastened onto slaves. Those groups included free blacks,<sup>47</sup> Native

652; Rawick (ed.), *The American Slave*, Supp., Ser. 1, Vol. III (South Carolina), Pt. 3, p. 172, Pt. 4, pp. 179–80, Vol. II (South Carolina), Pt. 2, p. 161, among many other examples; Frederick Douglass, *The Life and Times of Frederick Douglass Written by Himself* (Rev. ed., 1892; London, 1962), 104–105; Litwack, "Been in the Storm," 478, 522; Henry L. Swint (ed.), *Dear Ones at Home: Letters from the Contraband Camps* (Nashville, 1966), 22; Lawrence W. Levine, *Black Culture and Black Consciousness: Afro-American Folk Thought from Slavery to Freedom* (New York, 1977), 122–31; Ralph Roberts, "A Slave's Story," *Putnam's Monthly*, IX (June, 1857), 617–18; *Weevils in the Wheat*, 78, 116, 124, 139–40, 181, 244–45. Whether her remarks were tailored for white consumption is not clear, but one interviewed former slave did state that slaves did not think stealing was right. They only did it because they were driven to by hunger.

46. Thomas Jefferson, *Notes on the State of Virginia* (Chapel Hill, 1955), 142.

47. Ira Berlin, *Slaves Without Masters: The Free Negro in the Antebellum South* (New York, 1974), 183, 186–87, 360–62; John H. Russell, *The Free Negro in Virginia, 1619–1865* (1913, rpr. New York, 1969), 164–67; Schwarz, "Forging the Shackles," 125–46; June Purcell Guild, *Black Laws of Virginia* (Richmond, 1936), 161–70; Stroud, *A Sketch of the Laws*, 77–80.

Americans,<sup>48</sup> members of other ethnic groups,<sup>49</sup> contract servants, convict servants, the poor, military volunteers and draftees, laborers, especially union organizers, prisoners, and women, particularly those accused of witchcraft.<sup>50</sup> Numerous segments of European populations

48. U.S. Army, Military Commission, 1862, Papers, photostats, in Minnesota Historical Society, St. Paul (originals in Records of the Senate, RG 46, SEN 37A-F2, National Archives); David A. Nichols, *Lincoln and the Indians: Civil War Policy and Politics* (Columbia, Mo., 1978), 75–78, 94–118, 175; William W. Folwell, *History of Minnesota* (4 vols.; St. Paul, 1922–30), II, 109–241; the “Peach Gang” incident (1638), an episode of “Ourstory,” a 1975 series that appeared on public television station WNET and is available as a feature film; Yasuhide Kawashima, “Forced Conformity: Puritan Criminal Justice and Indians,” *Kansas Law Review*, XXV (1977), 361–73; Kawashima, “Jurisdiction of the Colonial Courts Over the Indians in Massachusetts, 1689–1763,” *NEQ*, XLII (1969), 532–50; Kawashima, *Puritan Justice and the Indian: White Man’s Law in Massachusetts, 1630–1763* (Middletown, Conn., 1983); Lyle Koehler, “Red-White Relations and Justice in the Courts of Seventeenth-Century New England,” *American Indian Culture and Research Journal*, III (1979), 1–31; W. Stitt Robinson, Jr., “The Legal Status of the Indian in Colonial Virginia,” *VMHB*, LXI (1953), 249–59; James P. Ronda, “Red and White at the Bench: Indians and the Law in Plymouth County, 1620–1691,” *Essex Institute Historical Collections*, CX (1974), 200–215; Colonial Office, Class 5, No. 1314, fols. 208–209, No. 1341, fols. 16–17, in VCRP; Sussex County, Virginia, Court Papers, 1756–1757, bundle no. 5, microfilm reel 38, in VSL; Memorial of Edith Turner, Nottoway Indian, December, 1821, and Petition of Pamunkey Indians to protect “our laws, rules, and regulations,” February 18, 1836, both in VEPLR; Timothy Morgan, “Turmoil in an Orderly Society: Colonial Virginia, 1607–1754: A History and Analysis” (Ph.D. dissertation, College of William and Mary, 1976), 35–51, 71–81, 97–104, 116–23, 148–55, 204–208; *Ex parte Crow Dog*, 109 U.S. 556 (1883), *U.S. v. Kagama*, 118 U.S. 375 (1886), *Keeble v. U.S.*, 412 U.S. 205 (1973), and *U.S. v. Antelope*, 430 U.S. 641 (1977); Wilcomb E. Washburn, “The Historical Context of American Indian Legal Problems,” *Law and Contemporary Problems*, XL (1976), 12–24; U.S. Bureau of Indian Affairs, Division of Law Enforcement Services, *Indian Law Enforcement History* (Washington, D.C., 1975); William Thomas Kagan, *Indian Police and Judges: Experiments in Acculturation and Control* (New Haven, 1966), 88–89; Tim Vollmann, “Criminal Jurisdiction in Indian Country: Tribal Sovereignty and Defendants’ Rights in Conflict,” *Kansas Law Review*, XXII (1974), 387–412; Brend H. Gubler, *A Constitutional Analysis of the Criminal Jurisdiction and Procedural Guarantees of the American Indian* (Saratoga, Calif., 1974); Mary Beth West, *Manual of Indian Criminal Jurisdiction* (10 vols. to date; Washington, D.C., 1977–); Laurence French and Jim Hornbuckle, “An Analysis of Indian Violence: The Cherokee Example,” *American Indian Quarterly*, III (1977–78), 335–56; *Voices from Wounded Knee, 1973: In the Words of the Participants* (Rooseveltown, N.Y., 1974); *New York Times Index*, 1973–86.

49. Divergent approaches include: David R. Johnson, *Policing the Urban Underworld: The Impact of Crime on the Development of the American Police, 1800–1887* (Philadelphia, 1979); James Francis Caye, “Crime and Violence in the Heterogeneous Urban Community: Pittsburgh, 1870–1899” (Ph.D. dissertation, University of Pittsburgh, 1977); Ronald Lee Boostrom, “The Personalization of Evil: The Emergence of American Criminology, 1865–1910” (Ph.D. dissertation, University of California, Berkeley, 1974); Eric H. Monkonnen, *The Dangerous Class: Crime and Poverty in Columbus, Ohio, 1860–1885* (Cambridge, Mass., 1975); Michael S. Hindus, *Prison and Plantation: Crime, Justice, and Authority in Massachusetts and South Carolina, 1767–1878* (Chapel Hill, 1980); Allen Steinberg, “History of Immigration and Crime,” in U.S. Select Commission on Immigration and Refugee Policy, *U.S. Immigration Policy and the National Interest: Staff Report* (10 vols.; Washington, D.C., 1981), Appendix A, 463–630.

50. Two sources of voluminous citations from the growing literature on crime in early America are Douglas Greenberg, “Crime, Law Enforcement, and Social Control in Colo-



became marked people who knew judicial discrimination and oppression quite well. Serfs, peasants, women, again especially those accused of witchcraft, heretics, Jews, Muslims, Gypsies, and even colonists understood how their status affected their chances in a criminal court when their behavior threatened a member of a society's dominant group.<sup>51</sup> Noblesse oblige or genteel restraint may have saved some oppressed Europeans from the harshest penalties just as paternalism could protect some slaves from the worst punishments.<sup>52</sup> The fundamental similarity was that all such peoples were not equal before the law.

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nia America"; and Kathryn Preyer, "Penal Measures in the American Colonies: An Overview," both in *AJLH*, XXVI (1982), 293–325, 326–353. See also T. H. Breen, James H. Lewis, and Keith Schlesinger, "Motive for Murder: A Servant's Life in Virginia, 1678," *WMQ*, 3rd ser., XL (1983), 106–20; Frederick Hall Schmidt, "British Convict Servant Labor in Colonial Virginia" (Ph.D. dissertation, College of William and Mary, 1976), 245–49; Marion Dargan, "Crime and the Virginia Gazette, 1736–1775," *University of New Mexico Bulletin, Sociological Series*, Vol. II, No. 1 (1934), 55; Fairfax Harrison, "When the Convicts Came," *VMHB*, XXX (1922), 250–60; Eli Faber, "Puritan Criminals: The Economic, Social, and Intellectual Background of Crime in 17th-Century Massachusetts," *Perspectives in American History*, XI (1977–78), 81–144; Faber, "The Evil That Men Do: Crime and Transgression in Colonial Massachusetts" (Ph.D. dissertation, Columbia University, 1974); Jules Zanger, "Crime and Punishment in Early Massachusetts," *WMQ*, 3rd ser., XXII (1965), 471–77; Nicholas Canny, "The Permissive Frontier: The Problem of Social Control in English Settlements in Ireland and Virginia, 1550–1650," in K. R. Andrews et al. (eds.), *The Westward Empire: English Activities in Ireland, the Atlantic, and America, 1480–1650* (Liverpool, England, 1978), 17–44; Richard B. Morris, *Government and Labor in Early America* (New York, 1946), 461–500; Lawrence Towner, "Fondness for Freedom: Servant Protest in Puritan Society," *WMQ*, 3rd ser., XIX (1962), 201–20; Towner, "'A Good Master Well Served': A Social History of Servitude in Massachusetts, 1620–1750" (Ph.D. dissertation, Northwestern University, 1955), 118–45, 329, 397–430; John Putnam Demos, *Entertaining Satan: Witchcraft and the Culture of Early New England* (New York, 1982), esp. 401–409, "List of Known Witchcraft Cases in Seventeenth-Century New England"; Lyle Koehler, *A Search for Power: The 'Weaker Sex' in Seventeenth Century New England* (Urbana, 1980), 264–300, 383–417, 474–91; Morgan, "Turmoil in an Orderly Society," 124–29; Richard Slotkin, "Narratives of Negro Crime in New England, 1675–1800," *American Quarterly*, XXV (1973), 3–31. For some notion of the punishments to which various American soldiers were liable, see Douglas Southall Freeman, *George Washington: A Biography* (7 vols.; New York, 1948–57), II, 131, 138–39, 202, 259, V, 112.

51. Besides the work of such authors as Douglas Hay, among the best examples of the voluminous literature on crime in Europe is a comparative study, namely, Peter Kolchin's "The Process of Confrontation: Patterns of Resistance to Bondage in Nineteenth-Century Russia and the United States," *Journal of Social History*, XI (1978), 457–90. See also Douglas Hay, "Crime and Justice in Eighteenth- and Nineteenth-Century England," in Norval Morris and Michael Tonry (eds.), *Crime and Justice: An Annual Review of Research*, II (1980), 45–84; Albert Hartshorne, *Hanging in Chains* (London, 1891), which indicates (p. 110) that the last hanging in chains in England was in 1834; and Malise Ruthven, *Torture: The Grand Conspiracy* (London, 1978).

52. Hay, "Property, Authority and the Criminal Law," in Hay et al. (eds.), *Albion's Fatal Tree*, 17–63.

But no other system of legal and judicial discrimination was quite the same as that created by the slave code. Slavery, of course, made the difference in the shape of the shackles. Members of other groups in various societies fulfilled dominant groups' worst expectations of them when they violated criminal statutes. Like the deviants in Kai T. Erikson's study of seventeenth-century Massachusetts, those oppressed, exploited, or despised peoples of the world who committed crimes reinforced the dominant groups' perception of their own worth and values.<sup>53</sup> White authorities relied on separate and discriminatory codes and courts for slaves partly for the same reason, but they did so primarily because almost any defiant slave threatened whites' sense of control and superiority.

If the shackles were shaped mainly for political reasons and secondarily for social reasons, how did Virginian slaves deal with the shackles? Their actions were political in effect even when they were not politically motivated. That was because of white leaders' perceptions, which were stronger at some times and some places than others. Therefore only that behavior of slaves perceived by white authorities as dangerous, threatening, or destructive—*i.e.*, criminal—can show us how slaves dealt with the legal and judicial shackles.

53. Kai T. Erikson, *Wayward Puritans: A Study in Deviance* (New York, 1966).