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# The Law Only As an Enemy: The Legitimization of Racial Powerlessness through the Colonial and Antebellum Criminal Laws of Virginia

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# THE "LAW ONLY AS AN ENEMY": THE LEGITIMIZATION OF RACIAL POWERLESSNESS THROUGH THE COLONIAL AND ANTEBELLUM CRIMINAL LAWS OF VIRGINIA\*

A. LEON HIGGINBOTHAM, JR.\*\*

AND

ANNE F. JACOBS\*\*\*

*In the seventeenth, eighteenth, and nineteenth centuries American judges' and legislators' obligation to do justice collided with the South's race-based system of slavery. The statutes and caselaw of this period reveal not only judicial and legislative sanction of slavery, but also an effort on the part of lawmakers and judges to bolster the system's effectiveness by enacting and upholding a regime that rendered black slaves powerless before the law.*

*In this Article A. Leon Higginbotham and Anne F. Jacobs describe the inequities of the criminal law of colonial and antebellum Virginia in prosecutions of slaves and free blacks. Although Virginians led the infant nation in declaring the equality of every human being, the state was also in the vanguard of efforts to subjugate blacks: over the years before the Civil War the Commonwealth refined a legal system rooted in racial injustice. Blacks in Virginia, as elsewhere, had the worst of both worlds. The law deemed them less than human, failing to recognize their fundamental rights whenever such treatment benefited*

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We gratefully acknowledge the very substantial research assistance of Steven Niven on the entire Article; Holly Hill, Alma Gomez, and Darlene Snowden did research on some aspects of the Article.

We wish to acknowledge the generous support of the Rockefeller Foundation, the Ford Foundation, the Potamkin Foundation, the William Penn Foundation, and the Mellon Foundation to the University of Pennsylvania for their continuing research project on Race and the American Legal Process, from which one book, *In the Matter of Color*, has been published and from which two additional books will be published in 1994.

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*the white establishment. Black criminal defendants were denied the substantive and procedural protections that whites took for granted. Upon conviction, blacks were punished more severely than whites for commission of the same offenses, and were held to account for behavior that for whites was not even criminal.*

*Judge Higginbotham and Ms. Jacobs chronicle Virginia's legacy of legal complicity with race-based slavery, providing numerous examples of Virginia's explicit endorsement of a harsher, fundamentally unjust criminal law for blacks. They point to vestiges of such disparate treatment in the criminal law of the late twentieth century, such as the documented fact that black defendants tend to receive stiffer sentences than white defendants for similar offenses. Judge Higginbotham and Ms. Jacobs conclude by exhorting modern Americans to strive to overcome the remnants of injustice and unfairness that exist in the criminal law today.*

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I. THE DUALITY OF THE SLAVE: ALWAYS PROPERTY, SOMETIMES  
A PERSON, AND NEVER A CITIZEN

Abolitionist William Goodell, lamenting the plight of American slaves, wrote that the slave "can know *law only as an enemy, and not as a friend.*"<sup>1</sup> Goodell explained that

[t]he slave, who is but "a chattel" on all *other* occasions, with not one solitary attribute of personality accorded to him, becomes "*a person*" whenever he is to be *punished*! He is the only being in the universe to whom is denied all self-direction and free agency, but who is, nevertheless, held responsible for his conduct, and amenable to law. . . . He is under the *control* of law, though *unprotected* by law.<sup>2</sup>

This double standard of chattel and person lay at the heart of the criminal laws that governed slaves in antebellum America and was exemplified by Chief Justice Roger Brook Taney's decision in *United States v. Amy*.<sup>3</sup> Taney concluded that although slaves were not "citizens" under the United States Constitution (as decided two years earlier in his opinion in *Dred Scott v. Sandford*<sup>4</sup>), and thus were not entitled to its protec-

1. WILLIAM GOODELL, THE AMERICAN SLAVE CODE 309 (photo. reprint 1969) (1853) (emphasis added).

2. *Id.* Another scholar has described the duality as follows:

The nature of human slavery led to many strange legal complications. In law a slave was a person who could commit a crime and be punished. He could under some circumstances be himself the subject of a homicide or a larceny. At the same time a slave was hardly a person at all but belonged legally in a classification of property.

JUNE P. GUILD, BLACK LAWS OF VIRGINIA 13 (1936).

3. 24 F. Cas. 792 (C.C.D. Va. 1859) (No. 14,445) (Taney, Circuit Justice). Until the Circuit Court of Appeals Act of 1891, ch. 517, 26 Stat. 826, United States Supreme Court justices sat as circuit judges throughout the nation. Taney wrote *Amy* while sitting as a circuit judge in the district of Virginia.

4. 60 U.S. (19 How.) 393 (1857). Chief Justice Taney, speaking for the majority, said:

tions, they nevertheless were "persons" within the public acts of the United States who "may commit offences which society has a right to punish for its own safety."<sup>5</sup>

Typical of the extensive case law and legislation about slavery in colonial and antebellum Virginia,<sup>6</sup> the *Amy* case highlights the predicament of those engaged in the buying, selling, and ownership of human

[A]t the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted[,] . . . [public opinion] had for more than a century . . . regarded [blacks] as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect . . .

*Id.* at 407. For the most insightful analysis of this case, see DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* 322-414 (1978).

5. *Amy*, 24 F. Cas. at 809, 810. Taney also wrote:

It has been argued in support of the motion that a slave, in the eye of the law, is regarded as property; and, as the act of congress speaks only of persons, without any reference to the property of the master, and makes no provision to compensate him for its loss, it was not intended, and does not operate, upon slaves.

It is true that a slave is the property of the master, and his right of property is recognized and secured by the constitution and laws of the United States; and it is equally true that he is not a citizen, and would not be embraced in a law operating only upon that class of persons. Yet, he is a person, and is always spoken of and described as such in the state papers and public acts of the United States.

*Id.* at 809.

6. As to why one should focus on Virginia alone rather than randomly cite cases and statutes from a variety of states, we believe that question has been answered in detail in an earlier article:

Our premise is that it is better to provide a comprehensive view of the evolution of the entire slavery jurisprudence and race relations law as it affected . . . blacks in a single state. Virginia, because it provided significant leadership for all the colonies, is an excellent choice as a starting point. Virginia was the birthplace of American slavery. Virginians played a major role in leading the American Revolution and in shaping the destiny of the new nation after 1776. Yet, tragically, Virginia was also a leader in the debasement of blacks by pioneering a legal process that perpetuated racial injustice. Just as they emulated other aspects of Virginia's policies, many colonies followed Virginia's leadership in slavery law.

Virginia's leaders were, on occasion, troubled by the contradiction between their support for the ideals of freedom and equality in the Declaration of Independence and the Constitution and their opposition to those ideals for free blacks and slaves. Patrick Henry lamented, "[w]ould any one believe that I am Master of Slaves of my own purchase! I am drawn along by ye general Inconvenience of living without them; I will not, I cannot justify it." [Letter from Patrick Henry to Robert Pleasants (January 18, 1773), reprinted in GEORGE S. BROOKES, *FRIEND ANTHONY BENEZET* 443 (1937)]. Thomas Jefferson expressed his fears about the possible repercussions of the mistreatment of blacks, stating:

[C]an the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the gift of God? . . . Indeed I tremble for my country when I reflect that God is just: that his justice cannot keep sleep forever . . . The Almighty has no attribute which can take side with us in such a contest.

beings. The key to maintaining the slavery system and maximizing the profits of the master was to keep slaves and free blacks<sup>7</sup> as powerless and

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[THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 163 (William Peden ed., 1955)].

But despite their misgivings about the harsh treatment of blacks, white Virginians enacted repressive legislation to protect their property interests in slaves and to maintain their hegemony over free blacks. Whites were able to justify their oppression of free blacks and slaves because they presumed all blacks were inferior to them. They recognized also that the oppression of all blacks was necessary to make the slavery system function at maximum efficiency.

A. Leon Higginbotham, Jr. & Greer C. Bosworth, "*Rather Than the Free*": *Free Blacks in Colonial and Antebellum Virginia*, 26 HARV. C.R.-C.L. L. REV. 17, 20-21 (1991) [hereinafter Higginbotham & Bosworth, "*Rather Than the Free*"] (citations reproduced in part in brackets, omitted in part).

7. For purposes of this Article, we will use the term "black" as a synonym for the terms "colored," "Negro," "Afro-American," and "African American." The semantic debate concerning these terms is rooted in the problems of race in twentieth-century America. Booker T. Washington, the Reverend Walter Brooks, and other early twentieth-century black activists devoted considerable thought to the question of "the proper name for blacks." See GILBERT T. STEPHENSON, RACE DISTINCTIONS IN AMERICAN LAW 20-25 (1910). E.A. Johnson, professor of law at Shaw University, claimed that:

The term "Afro-American" is suggestive of an attempt to disclaim as far as possible our Negro descent, and casts a slur upon it. It fosters the idea of the inferiority of the race, which is an incorrect notion to instill into the Negro youth, whom we are trying to imbue with self-esteem and self-respect.

*Id.* at 22-23. Stephenson concluded that "'Negro' (with the capital 'N') will eventually be applied to the black man in America." *Id.* at 24-25. See generally *id.* at 20-25 (discussing the "proper name for black men in America").

In the New Deal era, a black newspaper commissioned a poll of readers to determine the most popular choice of self-definition. The popular choice at that time was "colored" with 1,590 votes, followed by "negro" with 893 votes. See BALTIMORE AFRO-AMERICAN, Aug. 8, 1937 (Philadelphia ed.), at 1. It is yet to be seen whether the increased use of "African American" will replace "black" as the accepted term of public record and popular usage as "black" replaced "negro" in the late 1960s. As A. Leon Higginbotham, Jr. noted in a previous article, however:

We recognize that it is impossible to use one phrase that satisfies everyone. Sometimes the debate on semantics as to which term should be used diverts people from the important substantive issue. The important issue is whether people are being treated adversely because of their skin color. Discrimination is no less harsh if one is identified as black, African-American or Negro.

Higginbotham & Bosworth, "*Rather Than the Free*," *supra* note 6, at 17 n.4. The term "black" has become increasingly controversial. See Laura B. Randolph, *Interview with Justice Thurgood Marshall*, EBONY, Nov. 1990, at 216. Justice Marshall used the term "Afro-American" and the interviewer persistently used the term "black." Justice Marshall explained:

First, please note that I don't use the terms "Black" or "Negro." Instead I use the term "Afro-American," because that term is a more respectful reflection of the contributions that descendants from diverse and culturally rich African traditions have made to the mosaic of American society.

*Id.* In another article in the same issue of *Ebony*, Higginbotham used the term "black." A. Leon Higginbotham, Jr., *45 Years in Law and Civil Rights*, EBONY, Nov. 1990, at 82-86.

In 1910, Stephenson wrote in his chapters "What is a Negro" and the "Proper Name for Black Men in America" that

submissive as possible. After studying "slavery jurisprudence" by reading thousands of statutes and cases and innumerable articles and books on American slavery, we submit that for Americans in power several premises, precepts,<sup>8</sup> goals, and implicit agreements defined the nature of American slavery and directed how it should be administered. Sometimes these premises and goals were articulated precisely in statutes, judicial opinions, and executive orders. At other times, because they understood and supported these pernicious propositions, all in power undoubtedly agreed that it would be superfluous to announce or codify the common understanding. Whether articulated as formal rules of law or

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[t]hose who are anxious *NOT* to wound the feelings of that race speak of them as "Colored People" or "Darkies"; while those who would speak contemptuously of them say "Nigger" or "Coon." "Nigger" is confined largely to the South; "Coon," to the rest of the country. Again, one occasionally finds "Blacks" and "Black Men" in contradistinction to "Whites" and "White Men."

STEPHENSON, *supra*, at 20-21 (emphasis added).

8. The term "precept" as used here is intended to encompass a broader understanding than its occasional use in legal cases. This use is more consistent with the definition in *Webster's Third New International Dictionary*, which defines a "precept" as

a command or principle intended as a general rule of action (the dominance of his party was the most important [precept] of his life—Carol L. Thompson): as a commandment enjoined respecting moral conduct (observe the sixth commandment not as a [precept] of divine law but as a counsel of profitable prudence—W.L. Sullivan)

....

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1783-84 (4th ed. 1976).

In *Adams v. Vose*, 67 Mass. (1 Gray) 51 (1854), the court stated that a precept is not to be confined to civil proceedings and is not of a more restricted meaning than process. It includes warrants and processes in criminal as well as civil proceedings. *Id.* at 58.

The United States Supreme Court often uses the term "precept" as a synonym for "principle" or a concept "in harmony with general principles." See *United States v. Rodgers*, 461 U.S. 677, 716 n.5 (1983) (Blackmun, J., concurring in the judgment in part and dissenting in part); see also *Missouri v. Jenkins*, 110 S. Ct. 1651, 1667 (1990) (Kennedy, J., concurring in part and concurring in the judgment) ("Today's casual embrace of taxation imposed by the unelected, life-tenured federal judiciary disregards fundamental precepts for the democratic control of public institutions."); *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 591 (1989) ("Although 'the myriad, subtle ways in which Establishment Clause values can be eroded' are not susceptible to a single verbal formulation, this Court has attempted to encapsulate the essential precepts of the Establishment Clause." (quoting *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring))); *Lingle v. Norge Div.*, 486 U.S. 399, 404 n.3 (1988) ("'Comprehensiveness is inherent in the process by which the law is to be formulated . . . requiring issues raised in suits of a kind covered by § 301 [of the Labor Management Relations Act] to be decided according to the precepts of federal labor policy.'" (quoting *Teamsters v. Lucas Flower Co.*, 369 U.S. 95, 103 (1962))); *Pattern Makers' League of N. Am. v. NLRB*, 473 U.S. 95, 131 (1985) (Blackmun, J., dissenting) ("The Court previously has recognized that it violates precepts of voluntary unionism to bind a member to promises he did not knowingly make."); *Supreme Court of N.H. v. Piper*, 470 U.S. 274, 289-90 (1985) (Rehnquist, J., dissenting) (indicating that a "fundamental precept" is analogous to a fundamental right or liberty).

not, a broad consensus on these overriding principles or precepts led to the legitimization of slavery and of racism.

We have attempted to distill the essence of the relevant colonial and antebellum Virginia cases and statutes into ten basic, underlying precepts that formed the legal and moral foundation of American slavery and early race-relations law. Under our present formulation, the first three precepts of American slavery were:

1. *Inferiority*: Presume, preserve, protect, and defend the ideal of the superiority of whites and the inferiority of blacks.<sup>9</sup>
2. *Property*: Define the slave as the master's property, disregard the humanity of the slave except when it serves the master's interest, and deny slaves the fruits of their labor.<sup>10</sup>
3. *Powerlessness*: Keep blacks—whether slave or free—as powerless as possible so that they will be submissive and dependent in every respect, not only to the master, but to whites in general. To assure powerlessness, subject blacks to a secondary system of justice with lesser rights and protections and greater punishments than for whites.<sup>11</sup>

9. See generally A. Leon Higginbotham, Jr. & Valarie Bowen, *Whiteness the Nimbus of Superiority, Blackness the Stigma of Inferiority: The Legal Sanctioning of Racist Ideology* (1991) (unpublished monograph, on file at University of Pennsylvania Law School) (discussing in detail the precept of "inferiority").

10. See generally A. Leon Higginbotham, Jr. & Barbara K. Kopytoff, *Property First, Humanity Second: The Recognition of the Slave's Human Nature in Virginia Civil Law*, 50 OHIO ST. L.J. 511, 514-34 (1989) [hereinafter Higginbotham & Kopytoff, *Property First, Humanity Second*] (discussing in detail the precept of "property").

11. Other precepts of slavery were:

4. *Racial Purity*: Draw an arbitrary racial line and preserve white purity as thus defined. Tolerate sexual relations between white men and black women; severely punish sexual relations between white women and non-white men.

5. *Manumission and Free Blacks*: Limit and discourage manumission; minimize the number of free blacks in the state. Confine free blacks to a status as close as possible to slavery.

6. *Family*: Recognize no rights of the black family; destroy the unity of the black family; deny slaves the right of marriage; demean and degrade black women, black men, black parents, and black children; then condemn them for their conduct and state of mind.

7. *Education*: Deny blacks any education, including a knowledge of their culture, and make it a crime to teach those who are slaves how to read or write.

8. *Religion*: Recognize no rights of slaves to define and practice their own religion, to choose their own religious leaders, or to worship with other blacks. Encourage them to adopt the religion of the white master and teach them that God is white and will reward the slave who obeys the commands of his master here on earth. Use religion to justify the slave's status on earth.

9. *Liberty—Resistance*: Limit blacks' opportunity to resist, rebel, or flee by curtailing their freedom of movement, freedom of association, and freedom of expression. Deny blacks the right to vote.

10. *By Any Means Possible*: Support any practice or doctrine from any source whatsoever that maximizes the profitability of slavery, legitimizes racism, and retaliates, frequently by



This Article examines primarily powerlessness—the third precept of slavery. Along with the precepts of inferiority and property, powerlessness constituted the foundation of the legal system of slavery.<sup>12</sup> Proponents of slavery recognized the truth of abolitionist and ex-slave Frederick Douglass's admonition on powerlessness:

Beat and cuff the slave, keep him hungry and spiritless, and he will follow the chain of his master like a dog, but feed and clothe him well, work him moderately and surround him with physical comfort, and dreams of freedom will intrude. . . . You may hurl a man so low beneath the level of his kind, that he loses all just ideas of his natural position, but elevate him a little, and the clear conception of rights rises to life and power, and leads him onward.<sup>13</sup>

This Article examines how Virginia's colonial and antebellum criminal justice system helped maintain blacks' powerlessness and submissiveness in order to ensure the dominance of the master and perpetuate slavery. The Article analyzes how the Virginia legislature and courts most often made the law "only an enemy" for blacks—and never a friend.<sup>14</sup>

As early as the seventeenth century, Virginia lawmakers had to decide whether slaves would be treated like all other persons or whether they would have a special and different status. The concept of deterring criminal behavior through the use of fines was meaningless in the case of slaves, who by definition were paupers.<sup>15</sup> Moreover, several years of pe-

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means of violence, against those of both races who dare to advocate abolition or who, by their speech or actions, deny the inherent inferiority of blacks.

For a general discussion of these precepts, see A. Leon Higginbotham, Jr., *The Ten Precepts of Slavery* (1991) (unpublished manuscript, on file with author) [hereinafter Higginbotham, *Ten Precepts*].

12. For a further explanation of the precepts of slavery and their consequences, see A. Leon Higginbotham, Jr., *Race, Sex, Education, and Missouri Jurisprudence: Shelley v. Kraemer in a Historical Perspective*, 67 WASH. U. L.Q. 673, 679-702 (1989) [hereinafter Higginbotham, *Missouri Jurisprudence*]; A. Leon Higginbotham, Jr. et al., *De Jure Housing Segregation in the United States and South Africa: The Difficult Pursuit of Racial Justice*, 1990 U. ILL. L. REV. 763, 820-24 [hereinafter Higginbotham et al., *De Jure Housing Segregation*]; Higginbotham & Bosworth, "Rather Than the Free," *supra* note 6, at 21 n.18; Higginbotham & Kopytoff, *Property First, Humanity Second*, *supra* note 10, at 513-34; A. Leon Higginbotham, Jr. & Barbara K. Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 GEO. L.J. 1967, 1969-2000 (1989) [hereinafter Higginbotham & Kopytoff, *Racial Purity and Interracial Sex*]; and Higginbotham, *Ten Precepts*, *supra* note 11.

13. FREDERICK DOUGLASS, *THE LIFE AND TIMES OF FREDERICK DOUGLASS* 150 (photo. reprint 1962) (1845).

14. See GOODELL, *supra* note 1, at 309.

15. Regarding statutes forbidding stealing a letter from the United States mail, Chief Justice Taney stated:

It is true, that some of the offences created by this act of congress subject the party to both fine and imprisonment, and it is evident that the incapacity and disabilities of a

nal imprisonment, without compensation to the slave's owner, worked against the master's economic interests. And the notion of parity in punishment, whereby individuals who had committed the same type of crime would be punished with equal severity or equal leniency, was repugnant to a racist system that viewed blacks as inferior to whites.<sup>16</sup>

Although some modern historians and antebellum contemporaries have alleged that Virginia was "the most humane of slave states in day-to-day practice,"<sup>17</sup> the Commonwealth also "maintained the most repressive system of criminal law regarding slaves."<sup>18</sup> Slaves could receive the death penalty for at least sixty-eight offenses, whereas for whites the same conduct either was at most punishable by imprisonment or was not a crime at all.<sup>19</sup> Because slaves were property, however, masters did not want a criminal justice system capable of irrevocably damaging their profitable investment in the slave. Thus, legislation was enacted that provided for reimbursement from the public purse to masters whose slaves were condemned to death.<sup>20</sup>

In addition to its harsh criminal code, Virginia's emphasis on speedy and efficient resolution of slave criminal cases meant that slaves had few of the procedural protections and appellate rights granted to whites or

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slave were not in the mind and contemplation of congress when it inflicted a pecuniary punishment; for he can have no property, and is also incapable of making a contract, and consequently could not borrow the amount of the fine; and a small fine, which would be but a slight punishment to another, would, in effect, in his case, be imprisonment for life, if the court adopted the usual course of committing the party until the fine was paid. And we think it must be admitted that, in imposing these pecuniary penalties, congress could not have intended to embrace persons who were slaves, and we greatly doubt whether a court of justice could lawfully imprison a party for not doing an act, which by the law of his condition, it was impossible for him to perform; and to imprison him, to compel the master to pay the fine, would be equally objectionable, as that would be punishing an innocent man for the crime of another.

United States v. Amy, 24 F. Cas. 792, 810 (C.C.D. Va. 1859) (No. 14,445) (Taney, Circuit Justice).

16. For a detailed discussion of the lack of parity in the punishment of whites and blacks, see *infra* notes 294-542 and accompanying text.

17. Daniel J. Flanigan, *Criminal Procedure in Slave Trials in the Antebellum South*, 40 J. S. HIST. 537, 546 (1974); see also GEORGE M. STROUD, A SKETCH OF THE LAWS RELATING TO SLAVERY IN THE SEVERAL STATES OF THE UNITED STATES OF AMERICA 77-80 (photo. reprint 1968) (1856) (arguing that of the Southern states Virginia adopted the most humane attitude toward slaves in ordinary matters).

18. Flanigan, *supra* note 17, at 546.

19. STROUD, *supra* note 17, at 77-80; Flanigan, *supra* note 17, at 543. Commentators differ on the number of offenses for which blacks could receive capital punishment but whites could not. Stroud suggests 68; Flanigan states that there were "over seventy." STROUD, *supra* note 17, at 77-80; Flanigan, *supra* note 17, at 543.

20. See *infra* notes 201-02, 543-45 and accompanying text.

even to slaves in neighboring slave states.<sup>21</sup> Rights considered fundamental to white Virginians—such as the right to trial by jury—had no place among the rights of slaves.<sup>22</sup>

Virginia judges and lawmakers also faced the difficult task of defining the legal status of free blacks and mulattoes in the state's criminal justice system. The evidence suggests that Virginia did not know quite what to do with free blacks. In some instances they were treated as free men, with the corresponding protections and punishments that whites received; in other matters their legal status was largely indistinguishable from that of the slave.<sup>23</sup> In Virginia the free black was never a citizen, but rather a bifurcated individual—part slave and part free; which of these polar statuses would prevail at any time was never certain.<sup>24</sup> As one scholar has noted:

Free blacks would logically stand a greater chance of being convicted for the same kind of behavior [as slaves] since they—“slaves without masters”—suffered from racial subordination in the courts yet did not have the benefit of owners' self-interested intervention.<sup>25</sup>

Perhaps the most profound example of free blacks' precarious and unique legal status was the fact that as punishment for committing what was for whites a noncapital crime, free blacks could be sold into slavery. Such enslavement for whites was inconceivable. In those rare instances when whites could be forced to satisfy debts with indentured servitude<sup>26</sup> for a term of years, a black person born a free man could end up a slave by virtue of the color of his skin.<sup>27</sup>

21. For discussions of the procedural protections and appellate rights granted to whites and slaves in Southern states besides Virginia, see articles cited *infra* note 38.

22. See *infra* notes 41-48 and accompanying text.

23. See Higginbotham & Bosworth, “*Rather Than the Free*,” *supra* note 6, at 17-19.

24. *Id.*; see also A. Leon Higginbotham, Jr. & F. Michael Higginbotham, “Yearning to Breathe Free”: Legal Barriers Against and Options in Favor of Liberty in Colonial and Antebellum Virginia 7-8 (1991) (unpublished manuscript, on file with author) [hereinafter Higginbotham & Higginbotham, “Yearning to Breathe Free”] (discussing slaves' limited opportunities for obtaining their liberty and becoming free blacks).

25. PHILIP J. SCHWARZ, *TWICE CONDEMNED: SLAVES AND THE CRIMINAL LAWS OF VIRGINIA 1705-1865*, at 317-18 (1988).

26. See A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS* 392-95 (1978) [hereinafter HIGGINBOTHAM, *IN THE MATTER OF COLOR*]; see also A.E. SMITH, *COLONISTS IN BONDAGE* 18-21 (1947) (discussing generally the role of indentured servitude in European migration to America and indicating its relatively infrequent punitive application).

27. HIGGINBOTHAM, *IN THE MATTER OF COLOR*, *supra* note 26, at 20-30; see, e.g., ARTHUR P. SCOTT, *CRIMINAL LAW IN COLONIAL VIRGINIA* 307-23 (1930). The former book discusses the case of John Punch, in which the court imposed different sentences for the same crime:

Although a survey of statutes and cases offers significant revelations of blacks' degraded status under the law, it simply cannot portray the magnitude of the cruelty that confronted slaves and free blacks in their daily lives. The inferences that can be drawn about the actual treatment of slaves solely from an examination of cases and statutes are limited. Most of the slaves' suffering happened on the plantations, outside the realm of the courts—and thus beyond the purview of the modern legal commentator. Actual cruelty to slaves on plantations was far worse than that portrayed in the cases.

Philip Schwarz has highlighted the problem of concentrating solely upon evidence from slave trials, stressing that masters often resorted to private executions and beatings of slaves.<sup>28</sup> Similarly, Eugene D. Genovese has noted:

Despite the efforts of the authorities and the courts, masters and overseers undoubtedly murdered more slaves than we shall ever know. If the number did not reach heights worthy of classification as "statistically significant," it probably did loom large enough to strike terror into the quarters. It could happen. It sometimes did. And the arrests, convictions, and punishment never remotely kept pace with the number of victims.<sup>29</sup>

Those whites who killed slaves usually "escaped without any punishment at all."<sup>30</sup> John Blassingame's account of plantation "justice" suggests that assault which stopped short of murder was a regular occurrence: "On numerous occasions, planters branded, stabbed, tarred and feathered, burned, shackled, tortured, maimed, mutilated, crippled and castrated their slaves."<sup>31</sup>

There are, therefore, great dangers of underestimating the cruelty that reigned on the plantations. Indeed, slave narratives provide a far

[O]ne called *Victor, a dutchman*, the other a *Scotchman* called *James Gregory*, shall first serve out their times with their master according to their Indentures, and one whole year apiece after the time of their service is Expired. . . . And after that service . . . to serve the colony for three whole years apiece, and that the third being a negro named *John Punch* shall serve his said master or his assigns for the time of his natural Life here or elsewhere.

HIGGINBOTHAM, IN THE MATTER OF COLOR, *supra* note 26, at 28 & n.20 (quoting MINUTES OF THE COUNCIL AND GENERAL COURT OF COLONIAL VIRGINIA 1622-32, 1670-76 (H.R. Mollwaine ed., Richmond 1924) [hereinafter MINUTES OF THE COUNCIL AND GENERAL COURT]).

28. SCHWARZ, *supra* note 25, at 52.

29. See EUGENE D. GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* 39 (1974).

30. KENNETH STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTEBELLUM SOUTH* 222 (1956).

31. JOHN W. BLASSINGAME, *THE SLAVE COMMUNITY: PLANTATION LIFE IN THE ANTEBELLUM SOUTH* 63-64 (1972).

more accurate portrait of the injustice of the system than a mere reading of appellate cases. The following narrative, recounted in 1937 by former slave Ed Craddock, is likely more typical of what could, and did, happen to slaves: "Stories told me by my father are vivid . . . One especially, because of its cruelty. A slave right here in Marshall angered his master, was chained to a hemp-brake on a cold night and left to freeze to death, which he did."<sup>32</sup> Nevertheless, like the study of a cancerous cell through

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32. Interview of Ed Craddock, in 11 GEORGE P. RAWICK, *THE AMERICAN SLAVE: A COMPOSITE AUTOBIOGRAPHY* 96 (2d ed. 2d prtg. 1975) (interview set out in Vol. 10, *Missouri Narratives*, at 96-97). For a discussion of slave narratives, see Higginbotham, *Missouri Jurisprudence*, *supra* note 12, at 688-93. The exhaustive research of scholars John Blassingame and George Rawick has provided a wealth of information on slave conditions in Virginia and throughout the South. Blassingame includes an 1841 newspaper narrative from England of a Virginia slave who had escaped to Canada and had subsequently visited the British and Foreign Anti-Slavery Society in London. *SLAVE TESTIMONY: TWO CENTURIES OF LETTERS, SPEECHES, INTERVIEWS, AND AUTOBIOGRAPHIES* 217-25 (John W. Blassingame ed., 1977). His name, ironically, was Mr. Madison Jefferson, and he provides a very detailed account of plantation "justice":

At Beaconove Saltwicks, where he was hired out for some time, a man received five hundred lashes, this was for striking his master, whom he fought till he was overpowered—the master and two sons punished this poor wretch successively with the cow hide, which is a strip of raw hide cut the whole length of the ox, and twisted while moist until it tapers to a point; when it has become dry and hard, it has somewhat the appearance of a drayman's whip, but the sharp edges projecting at every turn cut the flesh at every stroke; it is indeed a dreadful instrument of punishment. Another case of severe punishment occurred during the period of his stay at this last named estate—a slave was caught in the act of running away, and on being brought back was whipped severely: he threatened to revenge himself by killing his master, and this having been told the latter, he had him seized whilst in the very act of lying in wait; he was again most severely whipped, and then chained in the coal bank to dig coal, being fed on a small allowance of bread and water; in a week afterwards he was found dead. Another method of punishment is called "bucking;" the hands are tied together and passed over the knees, and a stick is then passed between the arms and knees, and the poor victim is thus left helplessly to roll about while under the infliction of punishment. On a neighboring estate, belonging to a person named Lewis, he has seen a man staked with a cat tied on his back, which they whipped to make it bite and scratch the quiverin' flesh—and sometimes the cat is drawn from the shoulders to the hips. Surely an ingenuity more than human is exhibited here; well may it be said, that, "if the influence of slavery on the minds of the slaves is brutalising, on the minds of the master it is *infernalising*."

*Id.* at 220-21 (footnote omitted).

In George Rawick's collection of the 1930s Works Progress Administration slave narratives, former slaves and their children recounted their experiences of slavery. One Minnie Fulkes described the punishment of her mother who had resisted the sexual advances of an overseer; in plantation justice such resistance was clearly a crime.

Honey, I don't like to talk 'bout dem times, 'cause my mother did suffer misert. You know dar was an' overseer who use to tie mother up in the barn with a rope aroun' her arms up over her head, while she stood on a block. Soon as dey got her tied, dis block was moved an' her feet dangled, yo' know, couldn't tech de flo'.

Dis ol man, now, would start beatin' her nekkid 'til the blood run down her back to her heels. I took an' seed th' whelps an' scars for my own self wid dese here

a microscope, examining the cases and statutes on slavery can reveal much, though not all, of the system's pathology.<sup>33</sup> As George Stroud has so aptly stated:

In representative republics . . . like the United States, where the

two eyes. ([It] 'was a whip like dey use to use on horses); it wuz a piece of leather 'bout as wide as my han' from little finger to thumb. After dey had beat my mama all dey wanted another overseer. Lord, Lord, I hate white people and de flood waters gwine drown some mo. Well honey dis man would bathe her in salt and water. Don't you kno' dem places was a hurtin'. Um, um.

I asked mother, what she done for 'em to beat and do her so? She said, "nothin, tother than she refused to be wife to dis man."

Interview of Minnie Fulkes (March 5, 1937), in 16 RAWICK, *supra* (interview set out in Vol. 17, Virginia Narratives, at 11-12).

Charles Crawley, a child during slavery, noted that his master and mistress were "good to me as well as all us slaves," but then goes on to account for the punishment of runaway slaves:

There was a auction block, I saw right here in Petersburg on the corner of Sycamore street and Bank street. Slaves were auctioned off to de highest bidder. Some refused to be sold. By dat, I mean, "cried." Lord! Lord! I done seem dem young'uns fought and kick like crazy folks; child it was pitiful to see 'em. Dem dey would handcuff an' beat 'em unmerciful. I don't like to talk 'bout back dar. It brun' a sad feelin' up me. If slaves 'belled, I done seed dem whip 'em wid a strop cal' "cat nine tails." Honey, dis strop wuz 'bout broad as yo' hand, from thum' to litle finger, an' 'twas cut in strips up. Yo' done seen dese whips dat they whip horses wid? Well dey was used too.

Interview of Charles Crawley (Feb. 20, 1937), in 16 RAWICK, *supra* (interview set out in Vol. 17, Virginia Narratives at 7-9).

33. In a similar context, one of the authors has written:

I am aware that an analysis of cases, statutes, and legal edicts does not tell the whole story as to why and how this sordid legal tradition managed to establish itself. Nevertheless, there is merit in abolitionist William Goodell's statement: "no people were ever yet found who were better than their laws, though many have been known to be worse."

While I recognize that a view of slavery from the perspective of the law does not make a complete picture, I join in the conclusions of Winthrop D. Jordan when writing on the Colonial period and C. Vann Woodward when writing on the Reconstruction period. Jordan has advised us:

While statutes usually speak falsely as to actual behavior, they afford probably the best single means of ascertaining what a society thinks behavior ought to be: they sweep up the felt necessities of the day and indirectly expound the social norm of the legislators.

And C. Vann Woodward has stated:

I am convinced that law has a special importance in the history of segregation, more importance than some sociologists would allow, and that the emphasis on legal history is justified.

While I do not represent what I put forward here as a complete picture of the practices of the society, that canvas will never be painted unless someone first treats adequately the interrelationship of race and the American legal process.

HIGGINBOTHAM, IN THE MATTER OF COLOR, *supra* note 26, at 7-8, 406 nn.16-17 (quoting WINTHROP D. JORDAN, WHITE OVER BLACK 588 (1968) and C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW xiii (3d ed. 1974)).

popular voice so greatly influences all political concerns, . . . the laws may be safely regarded as constituting a faithful exposition of the sentiments of the people, and as furnishing, therefore, strong evidence of the practical enjoyments and privations of those whom they are designed to govern.<sup>34</sup>

Just as some may disagree about the fairness of the plantation system's treatment of slaves, scholars sharply disagree about how fair Southern appellate courts were in slave cases. At one end of the spectrum, historian Ulrich Phillips and political scientist A.E. Keir Nash generally have lauded the fairness of the Southern courts, which they say "minimized the impact of admittedly harsh codes."<sup>35</sup> In contrast, we believe that the courts more often than not served as the judicially robed enforcers of a vicious, inhumane system. In our view, the few times appellate courts chose to spare a slave's life are not particularly noteworthy in light of the reality that the slave courts legitimized, gave credence to, and placed their imprimatur upon the cruelty of slavery.

The underlying difficulty for scholars examining antebellum slave law is determining how much esteem to bestow upon the virtues of the judicial system during slavery. Michael Hindus was undoubtedly correct when he argued that the southern court's primary purpose was not to be just:

These trials demonstrate why the notion of justice for slaves may be self-contradictory. On the one hand, the trials show that the master's authority was indeed limited. Slaveowners could not exercise unfettered dominion over their own or anyone else's slave. On the other hand, the function of the law was to circumscribe permissible behavior and to ostracize and penalize the unacceptable. It was to regulate, but not supersede or even interfere with the relationship between master and slave.<sup>36</sup>

More than eighteen years ago, one of us criticized<sup>37</sup> a scholar who had written a flurry of then-recent articles that were generally laudatory of the "State Supreme Courts of the Old South"<sup>38</sup> and their treatment of

34. STROUD, *supra* note 17, at v.

35. See MICHAEL S. HINDUS, *PRISON AND PLANTATION: CRIME, JUSTICE AND AUTHORITY IN MASSACHUSETTS AND SOUTH CAROLINA, 1767-1878*, at 130 n.3 (1980).

36. *Id.* at 160-61.

37. See A. Leon Higginbotham, Jr., *Racism and the Early American Legal Process, 1619-1896*, 407 ANNALS AM. ACAD. POL. & SOC. SCI. 1, 1-17 (1973) [hereinafter Higginbotham, *Early American Legal Process*].

38. A.E. Keir Nash, *A More Equitable Past? Southern Supreme Courts and the Protection of the Antebellum Negro*, 48 N.C. L. REV. 197 (1970); A.E. Keir Nash, *Fairness and Formalism In the Trials of Blacks in the State Supreme Courts of the Old South*, 56 VA. L. REV. 64 (1970) [hereinafter Nash, *Fairness and Formalism*]; A.E. Keir Nash, *Negro Rights, Unionism*,

slaves and free blacks.<sup>39</sup> This Article reflects the insights we have accumulated in this field over the last two decades. We hope that the Article will offer a fresh perspective that brings into question earlier scholarship about the alleged fairness of the plantation system and the Southern antebellum appellate courts.<sup>40</sup>

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*and Greatness on the South Carolina Court of Appeals: The Extraordinary Chief Justice John Belton O'Neall*, 21 S.C. L. REV. 141 (1969).

39. In an earlier article, A. Leon Higginbotham, Jr., said that Professor Nash had reviewed "a relative paucity of cases." Higginbotham, *Early American Legal Process*, *supra* note 37, at 9 (emphasis added). In all fairness, he should have deleted the phrase, "relative paucity," but the rest of his analysis he affirms unequivocally:

I am not unmindful that there are some antebellum cases where the courts imposed some limitation on the extent to which blacks could be beaten, mutilated, prosecuted, and killed. Professor A.E. Keir Nash has written a series of articles generally extolling the treatment of blacks by the "State Supreme Courts of the Old South." After reviewing a relative paucity of cases, he was so impressed that he said:

Yet, it is not quixotic to ask whether the black's existence was better aided by the judicial fairness and integrity of [antebellum] judges such as Pearson and Green minus the mandate of the fourteenth amendment than by that mandate unaided by judicial compassion.

My answer to Professor Nash is: even with their degraded status after the termination of slavery and the impotence of the Fourteenth Amendment, blacks were inestimably better off than in their prior existence when slavery was a way of life and a few southern appellate judges made the chains a bit less cutting. It seems strange that one hundred years after the emancipation some scholars have to be reminded of Professor Litwack's comment that "the inherent cruelty and violence of Southern slavery requires no further demonstration . . ." The denial of marriage, the denial of the right to own property, the debasement of a man and his children living as slaves in perpetuity cause Professor Nash's findings to have minuscule significance in evaluating the justice in slavery. With millions enslaved and denied the above rights, there is only slight solace in Professor Nash's findings that a few southern appellate courts were concerned about procedural fairness to the relatively few slaves who were charged with crime or in the relatively few cases where whites—usually strangers—were prosecuted for brutalizing slaves. Further, as to the fate of the masses of slaves, Stroud seems far more persuasive than Nash when the former stated in 1856 that even when the applicable law prohibits certain violence by the master:

The evil is not that laws are wanting, but that they cannot be enforced; not that they sanction crime, but they do not punish it. And this arises chiefly, i[f] not *solely*, from the cause which has been more than once mentioned,—the exclusion of the testimony, on the trial of a white person, of all those who are *not white*.

Higginbotham, *Early American Legal Process*, *supra* note 37, at 9-10 (quoting Nash, *Fairness and Formalism*, *supra* note 38, at 99-100, and STROUD, *supra* note 17, at 55) (footnotes omitted).

40. Our study of South Africa during the last fifteen years, *see* A. Leon Higginbotham, Jr., *Racism in the American and South African Courts: Similarities and Differences*, 65 N.Y.U. L. REV. 479 (1990); Higginbotham et al., *De Jure Housing Segregation*, *supra* note 12, has impressed us as to the folly of lauding the "independence" or "fairness" of judges who by their position and authority are providing "formalism" for laws that are neither just nor fair, but are fundamentally oppressive.



## II. THE SLAVE SYSTEM OF JUSTICE

Characterizing the judiciary's treatment of slaves and free blacks as a "system of justice" is almost a semantic illusion. Free whites were guaranteed an elaborate system of procedural rights and protections, but blacks suffered under an equally elaborate regime of injustice and harsh penalties. The result was implicit justice for whites and explicit injustice for blacks. White Virginians implemented this bifurcation in the legal system by denying slaves and, during some periods, free blacks the basic legal rights they themselves took for granted.

### A. *No Right to Trial by Jury*

Perhaps the most fundamental right white Virginians held was the right to a jury trial:

Trial by Juries is the Englishman's Birthright, and is that happy way of Trial which, notwithstanding all Revolutions of Times, hath continued beyond all memory to this present Day; the Beginning whereof no History specifies, it being contemporary with the Foundation of the State, and one of the Pillars of it, both as to Age and Consequence.<sup>41</sup>

This sacred birthright, however, applied only to free white men. In 1692, the Virginia legislature decided that the elaborate system of procedural protections developed for free white men need not apply to the slave.<sup>42</sup> For all offenses punishable by death "or loss of member" (dismemberment), a special slave court was created.<sup>43</sup>

The White man makes all the laws, he drags us before his courts and accuses us, and he sits in judgement over us.

It is fit and proper to raise the question sharply what is this rigid colour-bar in the administration of justice? Why is it that in this courtroom I face a White magistrate, confronted by a White prosecutor, and escorted into the dock by a White orderly? Can anyone honestly and seriously suggest that in this type of atmosphere the scales of justice are evenly balanced?

Why is it that no African in the history of this country has ever had the honour of being tried by his own kith and kin, by his own flesh and blood?

NELSON MANDELA, *NO EASY WALK TO FREEDOM* 127 (1965). It is impossible to distinguish the role of "fair" South African judges vigorously enforcing apartheid from that of Southern appellate judges enforcing the slavery laws.

41. RICHARD STARKE, *THE OFFICE AND AUTHORITY OF A JUSTICE OF PEACE, EXPLAINED AND DIGESTED UNDER PROPER TITLES* 233 (Williamsburg, 1774).

42. See Act of April 1692, Act III, in 3 *THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619*, at 102, 102-03 (William W. Hening ed., 1819-23) [hereinafter *HENING'S STATUTES AT LARGE*] (act "for the more speedy prosecution of slaves committing Capital Crimes").

43. See *id.*

Transporting prisoners to the general court in Williamsburg to stand trial was a burdensome, time-consuming, and expensive process.<sup>44</sup> The General Assembly determined that, with respect to slaves, "[t]he expense and delay involved were . . . unnecessary to secure substantial justice, and . . . accordingly provided that the Governor should issue commissions of Oyer and Terminer for the trial of any slaves accused of capital offenses."<sup>45</sup> Entitled "An act for the more speedy prosecution of slaves committing Capital Crimes," the law provided that "a speedy prosecution of negroes and other slaves for capital offences is absolutely necessarie," and that henceforth, slaves were to be tried "without the sollemnitie of jury" by commissions of oyer and terminer, which were county courts consisting of at least five justices of the peace whom the Governor appointed.<sup>46</sup> "Without the sollemnitie of jury," a slave accused of a capital offense was simply delivered up to the court, the charges against him were placed on the record, and the trial proceeded.<sup>47</sup>

A challenge to this system was brought in 1857, when an attorney argued that the prosecution of one slave for the murder of another violated the Fifth and Sixth Amendments to the United States Constitution

44. For a description of the Virginia state court structure in the relevant period, see THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 131-32 (William Peden ed., 1955). In the early republican and antebellum periods, Virginia had three "superior courts": the high court of chancery (consisting of three judges), the general court (five judges), and the court of admiralty (three judges). The high court of chancery and the general court received appeals from the county courts and had original jurisdiction when the amount in controversy equalled or exceeded 10 pounds sterling, or when the cause in action concerned title to, or the boundaries of, land. The admiralty court's jurisdiction was entirely original. The high court of chancery and the general court held their sessions in the capital (Williamsburg, and later Richmond) at stated times, the chancery court twice each year and the general court four times per year (one civil term and three criminal terms). *Id.*

Virginia's supreme court, known during the eighteenth and nineteenth centuries as the "supreme court of appeals," originally consisted of the judges of all three superior courts and assembled twice a year in the capital. By the first decade of the nineteenth century the supreme court of appeals had acquired a bench all its own, and its judges—among them Spencer Roane, St. George Tucker, and Edmund Pendleton—were praised for their erudition throughout the country. The supreme court of appeals originally had jurisdiction over civil appeals only, but the Virginia legislature eventually expanded its jurisdiction to criminal appeals as well. *Id.*

45. *Id.* at 45-46; Flanigan, *supra* note 17, at 544.

46. Act of April 1692, Act III, in 3 HENING'S STATUTES AT LARGE, *supra* note 42, at 102, 102-03 (act "for the more speedy prosecution of slaves committing Capital Crimes"). Oyer and terminer courts originated in England as a means of ensuring a speedy trial. SCOTT, *supra* note 27, at 45 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES \*270). The present federal speedy prosecution statute is predicated on assisting the defendant, in contrast to the concern about speedy trials in early Virginia, which, at least in part, aimed to keep jail costs down and to lessen the chance of escape. *Id.* at 57.

47. See, e.g., GUILD, *supra* note 2, at 168 (citing Act of 1848, ch. XXVI, § 1, 1847-48 Va. Acts 162, 162 (providing that trial of slaves "shall be without a jury, upon a charge entered of record and not by presentment, information or indictment")); SCOTT, *supra* note 27, at 72-73.

because there had been no grand jury indictment or trial by jury. The Appomattox County oyer and terminer court rejected the argument and sentenced the slave, Reuben, to hang.<sup>48</sup>

### B. *The Pretrial Procedural Nonrights of Slaves*

As a consequence of Virginia's special system of "justice," slaves were denied not only a jury trial, but also, in whole or in part, certain pretrial procedural rights. Free blacks and whites were arrested on warrant<sup>49</sup> and brought to court for both a preliminary hearing and an examination before a justice of the peace, at which witnesses testified and other preliminary evidence could be presented.<sup>50</sup> The State formally charged free men either by grand jury indictment, by presentment, or by information.<sup>51</sup> Those bound over for trial were either released on bail or detained in the county jail,<sup>52</sup> because certain offenses such as treason, murder, manslaughter, and arson were notailable offenses.<sup>53</sup> Judges also denied bail to whites who married blacks or mulattoes.<sup>54</sup> Apparently, Virginia considered interracial mixing at least as serious as murder, manslaughter, treason, and arson.<sup>55</sup>

As for the "process" due slaves, they were sometimes arrested on a warrant, but often were not. For example, no warrant was necessary for jailing runaway slaves.<sup>56</sup> After 1824 any slave could be jailed without process.<sup>57</sup> As one court later explained, a warrant was unnecessary because "the arrest of the slaves did not touch the liberty of the master."<sup>58</sup>

48. SCHWARZ, *supra* note 25, at 290.

49. SCOTT, *supra* note 27, at 53.

50. *Id.* at 55-58, 59-62.

51. "A presentment was an accusation made by members of the grand jury, or other persons specially appointed by law; primarily, this was to be based on personal knowledge, thus differing from an indictment." *Id.* at 71. An "information" was brought either exclusively by the attorney general or the King's attorney or by an individual together with the King's attorney. *Id.* at 72.

52. *Id.* at 60.

53. *Id.* at 62.

54. Act of Oct. 1705, ch. XLIX, § XIX, in 3 HENING'S STATUTES AT LARGE, *supra* note 42, at 447, 453-54 (act "concerning Servants and Slaves").

55. Indeed, miscegenation was a criminal offense in Virginia until 1967, when the United States Supreme Court declared Virginia's antimiscegenation statute unconstitutional. See *Loving v. Virginia*, 388 U.S. 1, 12 (1967). For cases involving the "crime" of miscegenation in colonial Virginia, see SCOTT, *supra* note 27, at 281-83; see also Higginbotham & Kopytoff, *Racial Purity and Interracial Sex*, *supra* note 12, at 1989-2007 (discussing attempts to discourage voluntary interracial sex).

56. SCOTT, *supra* note 27, at 54.

57. GUILD, *supra* note 2, at 82-83 (citing Act of 1824, ch. 35, §§ 2-3, 1823-24 Va. Acts 37, 37-38).

58. *Abrahams v. Commonwealth*, 40 Va. (1 Rob.) 675, 683 (1842).

Before patrols could enter a slave's quarters, however, they had to obtain a search warrant because masters feared the destruction of their slave property by overzealous patrols.<sup>59</sup>

It is unclear whether slaves were entitled to bail prior to 1835. But in that year the Virginia legislature recognized slaves' limited right to bail:

Whereas, doubts have arisen whether slaves areailable, it is enacted that slaves shall be let to bail who are apprehended for crimes not punishable with death or dismemberment, and if the crime be so punishable and only a light suspicion of guilt fall on the party, he shall beailable. No slave shall be bailed after conviction of any felony.<sup>60</sup>

Slaves were of course incapable of posting their own bail and thus depended on a free person to secure their temporary release until a commission of oyer and terminer could be convened.

Inability to obtain bail could have serious consequences for one forced to endure the cruelties of the county jail. Some slaves died because of harsh jail conditions.<sup>61</sup> Many suffered from frostbite,<sup>62</sup> which caused the death of at least one slave.<sup>63</sup> In another case a jailed slave who had been condemned to die but was recommended for a pardon "was under the Necessity, from the Inclemency of the Weather, of having his right Leg and left Foot cut off."<sup>64</sup>

59. Daniel J. Flanigan, *The Criminal Law of Slavery and Freedom, 1800-1868*, at 81 (1973) (unpublished Ph.D. dissertation, Rice University).

60. GUILD, *supra* note 2, at 163 (citing Act of 1835, ch. 63, 1834-35 Va. Acts 45, 45).

61. SCOTT, *supra* note 27, at 203 n.35. An 1863 statute mentions a slave who died in jail, although the cause of death was not indicated: "The governor is directed to deliver to B.B. and J.W. Cooley, an infant child of the slave Harriet, who was condemned to be hung, but who died in the jail at Richmond before execution of sentence." See GUILD, *supra* note 2, at 92 (citing Act of 1836, ch. 87, § 1, 1835-36 Va. Acts 115, 115).

62. SCOTT, *supra* note 27, at 203 n.35.

63. *Id.* at 310 n.65.

64. *Id.*; see also Higginbotham, *Ten Precepts*, *supra* note 11 (discussing the ninth precept of slavery, which provides: "Deprive blacks of any freedom of movement, freedom of association, and any opportunity to resist, rebel, or flee."). White fear of slave insurrection and the need of slaveowners to exert complete control over their property combined to produce scores of legal restrictions on blacks' freedom of movement. The authors have noted at least 81 legislative acts concerning runaways alone in the Virginia statutes.

The early legal record of Virginia appears relatively color-blind in its attempt to control runaways. See GUILD, *supra* note 2, at 37 (citing Act of 1642, Act XXII, in 1 HENING'S STATUTES AT LARGE, *supra* note 42, at 254, 254-55 (not specifying race as a factor in the branding (with an "R") of runaways)). By 1680, however, the movements of blacks were, to paraphrase Justice Thurgood Marshall speaking of a later period, increasingly "single[d] out . . . and give[n] . . . special treatment" in the Virginia legal system: "No negro . . . or slave may . . . go from his owner's plantation without a certificate and then only on necessary occasions; the punishment twenty lashes on the bare back, well laid on." *Id.* at 46 (citing Act of 1680,

In *Dabney v. Taliaferro*<sup>65</sup> a slaveowner brought suit against the sheriff and jailor, Dabney, to recover the value of his slave, Bartlett, who had been jailed as a runaway.<sup>66</sup> It seems that the "slave was rendered entirely useless to his master, by neglect of duty, on the part of the defendant . . . in not furnishing [in the middle of winter] diet, fire, and bed covering."<sup>67</sup> As a result Bartlett "became *diseased* and *frost-bitten from cold, crippled and maimed*."<sup>68</sup> The supreme court of appeals affirmed the judgment for the slaveowner in the amount of \$400.<sup>69</sup> Of course, the irony in this case is that the person who actually endured the pain and suffering because of the frostbite had no right for damages under the law—only his master did.

Jail conditions were so horrible that in 1823 the Virginia legislature was prompted to enact a statute providing that when jailed slaves were not receiving adequate clothing, it was the jailor's duty to supply them with "proper Negro clothing or other necessaries."<sup>70</sup> As *Dabney* illustrates, however, such legislative enactments did not necessarily protect the slave.

### C. *The Pretrial Procedural Nonrights of Free Blacks*

Lest it be assumed that procedural deprivations were based on the slave's bonded status as opposed to his race, a bill passed in 1832 removed all doubts. The legislation provided that free blacks and mulattoes were thereafter to be tried in the same manner as slaves except in cases of homicide and other capital offenses.<sup>71</sup> Thus, in noncapital felony and misdemeanor cases, free blacks and mulattoes were no longer tried in the white man's court and became, in the eyes of the criminal law, indistinguishable from slaves. Scholars have suggested that this legislation was enacted in the aftermath of the Nat Turner rebellion,<sup>72</sup> out of fear or

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Act X, in 2 HENING'S STATUTES AT LARGE, *supra* note 42, at 481, 481-82); HIGGINBOTHAM, IN THE MATTER OF COLOR, *supra* note 26, at 4 (quoting Justice Thurgood Marshall).

By 1832, in the wake of the Nat Turner rebellion, discussed *infra* note 72, restrictions on the movements of slaves were extended to "free" blacks and mulattoes. See GUILD, *supra* note 2, at 107-08 (citing Act of 1832, ch. XII, 1831-32 Va. Acts 21, 21-22).

65. 25 Va. (4 Rand.) 256 (1826).

66. *Id.* at 256.

67. *Id.*

68. *Id.* (emphasis added).

69. *Id.* at 259, 263.

70. GUILD, *supra* note 2, at 81 (citing Act of 1823, ch. 30, § 13, 1822-23 Va. Acts 31, 34).

71. *Id.* at 106 (citing Act of 1832, ch. XXII, § 11, 1831-32 Va. Acts 20, 22); see also Act of Mar. 14, 1848, ch. XXVI, § 1, 1847-48 Va. Acts 162, 162 (act "to reduce into one the several acts concerning crimes and punishments, and proceedings in criminal cases").

72. Nat Turner was born in Southampton County, Virginia in 1800. A literate man, well-versed in the Bible, he considered himself a prophet to whom the Holy Spirit had given in-

revenge.<sup>73</sup>

As for bail,<sup>74</sup> an 1848 statute extended to free blacks and mulattoes essentially the same bail terms applicable to slaves: "If the offense be a felony and the party charged a slave or free Negro, except in the case of free Negroes charged with felonious homicide, or any offense punishable with death, the magistrate shall bail or commit him for trial at the next succeeding court."<sup>75</sup> Notably, this same statute—which provided that slaves and free blacks be tried "without a jury, upon a charge entered of record and not by presentment, information or indictment"<sup>76</sup>—also provided that "[c]riminal proceedings against Indians and persons of Indian descent shall be the same as against white persons."<sup>77</sup> The statute drew clear racial lines separating black people from all others.

The 1832 legislation was devastating indeed for free blacks and mu-

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struction to begin a slave rebellion in 1831. After delaying the uprising for a number of weeks, Turner and five fellow slaves killed five members of his master's family. Aided by 60 other slaves, Turner's uprising killed 55 whites in the space of 48 hours, but an attempted march on the county seat of Jerusalem was thwarted by the local militia. Although Turner himself was not captured and executed until several weeks later, the immediate response of whites was swift and brutal. In one day, over 120 blacks were lynched and many more were maimed and beaten in a "reign of terror." John W. Cromwell, *The Aftermath of Nat Turner's Insurrection*, 5 J. NEGRO HIST. 208, 209-12 (1920).

Philip J. Schwarz has shown that Turner's actions, while dramatic in their scope, were not unique in early nineteenth-century Virginia. Between 1800 and 1834, 66 blacks were executed and another 34 transported out of the Commonwealth for "conspiracy and insurrections." SCHWARZ, *supra* note 25, at 248; *see also id.* at 255-60 (describing several insurrections and the trials that followed).

73. The extension of slaves' legal handicaps to free blacks and mulattoes expressed whites' deepening hostility toward all blacks in the aftermath of Nat Turner's rebellion. *See supra* note 72. Elements in the Virginia House of Delegates and Governor John Floyd sought the forcible removal of free blacks from the Commonwealth. Although after lengthy debate no such act was passed, the Virginia legislature in 1833 appropriated \$18,000 a year, payable to the American Colonization Society, to encourage the removal of free blacks to Liberia. *See Higginbotham & Bosworth, "Rather Than the Free," supra* note 6, at 32. The migration of free blacks into the Commonwealth was also prohibited by an Act of 1834. *See GUILD, supra* note 2, at 109-10 (citing Act of 1834, ch. 68, §§ 1-12, 1833-34 Va. Acts 77, 77-81).

Cromwell also cites the fears of Virginia delegates that free blacks would be more susceptible to Northern abolitionists' pressures than would slaves. Accordingly, the House of Delegates removed the "indulgent kindnesses" and "many instances of solicitude for their welfare" which Governor Floyd perceived were accorded to free blacks under Virginia law. *See Cromwell, supra* note 72, at 218-30 (quoting Gov. John Floyd's Annual Message). For indications that such "kindness" and "solicitude" were little in evidence prior to the Turner rebellion, *see Higginbotham & Bosworth, "Rather Than the Free," supra* note 6, at 17.

74. For a fuller discussion of the denial of bail to slaves and free blacks, and to whites who married blacks or mulattoes, *see supra* notes 54, 60-64 and accompanying text.

75. GUILD, *supra* note 2, at 168 (citing Act of 1848, ch. XXVI, § 1, 1847-48 Va. Acts 162, 162).

76. *Id.* (quoting Act of 1848, ch. XXVI, sec. 1, 1847-48 Va. Acts 162, 162).

77. *Id.* at 167 (quoting Act of 1848, ch. XI, § 27, 1847-48 Va. Acts 121, 124).

lattoes because it removed important procedural rights. Ten years earlier, in *Commonwealth v. Tyree*,<sup>78</sup> the general court recognized the fundamental importance of being tried as a free man. John Tyree, a black man, was sent by the examining court to a superior trial court to stand trial on the charge of raping a woman.<sup>79</sup> (Her race was not specified.) The following day one William Tompkins went before the superior court and claimed that Tyree's real name was Armistead and that Armistead was his runaway slave.<sup>80</sup> Tompkins petitioned to have the indictment quashed on the ground that the court lacked jurisdiction to try his slave.<sup>81</sup> The case was adjourned to the general court due to the novelty and difficulty of the issue.<sup>82</sup>

The general court, in an opinion by Judge Brockenbrough (with Judge Daniel dissenting without written opinion), held that if an examining court, after inquiring into a black defendant's status as a slave or free man, sent the defendant to trial as a free man and he was indicted as such, the superior court could address the issue of his status as free man or bondsman only if the defendant objected to the jurisdiction of the court by a plea in abatement.<sup>83</sup> A jury then would decide whether he was a slave or a free man, which would determine the manner in which he was to be tried.<sup>84</sup> If, however, the prisoner did not plead in abatement the jurisdictional issue, no evidence intended to show his status as a slave was admissible.<sup>85</sup>

Judge Brockenbrough distinguished Tyree's case from capital cases in which the court would inquire whether the accused was *non compos mentis* (mentally incompetent),<sup>86</sup> or "mute from obstinacy, or from the visitation of God."<sup>87</sup> In those cases the trial of the accused was to be suspended.<sup>88</sup> Here, in contrast, "the consequence of sustaining the objection to the jurisdiction . . . would be, that instead of punishing him [as a free black] in the Penitentiary, he might be condemned [as a slave] to lose his life."<sup>89</sup> Thus, whereas an examination of a mentally incompetent person would operate *in favorem vitae* (in favor of liberty), an examination

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78. 2 Va. (2 Va. Cas.) 262 (1821).

79. *Id.*

80. *Id.* at 262-63.

81. *Id.*

82. *Id.* at 264.

83. *Id.* at 266-67.

84. *Id.*

85. *Id.* at 267.

86. *Id.* at 266.

87. *Id.*

88. *Id.*

89. *Id.*

to determine whether a slave was posing as a free man would operate *against* life. Judge Brockenbrough concluded: "The Court cannot, therefore, convert a principle dictated by humanity into an instrument of cruelty."<sup>90</sup>

*Tyree* was a curious decision, because a slave posing as a free man presumably would never expose his status as a slave and challenge the court's jurisdiction to hear his case. The superior court left the burden of establishing a black person's status as a free man or slave to the examining court. If the examining court decided that the defendant was a free man, then essentially, the inquiry was at an end.

This case shows the importance of one's status as a free man—to be free could mean *life*, whereas to be enslaved could mean *death*. Subsequent Virginia legislation also reflected the value of this characterization. Twenty-five years later, the Virginia legislature provided as follows:

Whenever a colored person is charged with any crime, as a free person, any person who claims such person of color may assert his claim and a jury must determine the claim.

If any person of color shall be confined in the jail or penitentiary under sentence as a free person, the question whether the person is or is not the slave of a petitioner shall be tried by a jury; the Commonwealth's Attorney shall act as counsel for the prisoner, as well as for the Commonwealth. If the person is found to be a slave, he shall be delivered to the owner, who shall give bond conditioned to have the slave delivered for prosecution, unless he is fairly sold at public auction and removed from Virginia.<sup>91</sup>

Two other statutes highlight the precarious legal status of slaves who sought freedom. A 1786 act had allowed that "[o]ne being detained in slavery, and suing for his freedom, shall be tried in the same manner as a free man. No person having an interest in a slave shall sit upon the trial of such a slave."<sup>92</sup> An act of 1840, however, stated that "[s]laves entitled to their freedom, after a term of years or after the death of another person, shall be tried as slaves."<sup>93</sup>

Even during the period when free blacks were allowed trial by jury, the law precluded a jury of one's peers because blacks could not serve as

90. *Id.*

91. GUILD, *supra* note 2, at 115 (citing Act of 1846, ch. 95, § 1, 1845-46 Va. Acts 67, 67).

92. Act of 1786, ch. LVIII, § I, in 12 HENING'S STATUTES AT LARGE, *supra* note 42, at 345, 345, quoted in GUILD, *supra* note 2, at 158.

93. GUILD, *supra* note 2, at 165 (citing Act of 1840, ch. 61, § 2, 1839-40 Va. Acts 51, 51-52).



veniremen.<sup>94</sup> In light of the lynch-mob mentality that often predominated at the trials of blacks accused of crimes against whites, it is unclear which fate was worse: to be deprived of a jury trial, or to be tried by a panel of angry and hostile jurors.<sup>95</sup>

#### D. No Right to a Unanimous Judgment of Conviction

Since before the American Revolution, the right to a unanimous verdict in criminal cases has been a fundamental right in American jurisprudence.<sup>96</sup> The requirement of a unanimous jury verdict guaranteed this right to free Virginians.<sup>97</sup> Because slaves and, at certain times, free blacks, were denied the right to a jury trial,<sup>98</sup> a logical alternative would have been to require that they be convicted and sentenced to death only upon the unanimous judgment of the justices. At first, however, slaves did not even have that protection.<sup>99</sup> A 1772 statute provided that "sentence of death shall not be passed upon a slave unless four of the court, being a majority, shall concur."<sup>100</sup> Thus, a slave could be hanged, dismembered, or whipped based on a mere majority vote of the judges.

In 1786 the law was amended to require unanimous judgments for

94. See Act of Aug. 1734, ch. VII, §§ II-III, in 4 HENING'S STATUTES AT LARGE, *supra* note 42, at 403-04 (act "for better regulating the trial of criminals, for Capital Offences").

95. As to whether free blacks benefitted from being tried by a jury composed of white men, see *Ball v. Commonwealth*, 35 Va. (8 Leigh) 726 (1837), in which a jury convicted a free black woman of murdering a white man, despite the trial court's belief that the evidence was wholly insufficient to support the verdict. *Id.* at 727-31. To the same effect is *Grayson v. Commonwealth*, 47 Va. (6 Gratt.) 712, 713-24 (1849), *subsequent appeal*, 48 Va. (7 Gratt.) 613, 615-19 (1850), discussed *infra* notes 585-603 and accompanying text. Cf. *Commonwealth v. Fells*, 36 Va. (9 Leigh) 613, 615-20 (1838) (jury unable to reach verdict in the trial of a free black accused of assaulting a free white with intent to kill, an offense punishable by death).

96. In federal criminal cases, the Sixth Amendment requires unanimous verdicts for conviction. See, e.g., *Apodaca v. Oregon*, 406 U.S. 404, 414, 369 (1972) (Powell, J., concurring) (stating that it is universally understood throughout the history of Sixth Amendment adjudication that a unanimous verdict is an essential element of a jury trial); *Johnson v. Louisiana*, 406 U.S. 356, 369 (1972) (Powell, J., concurring) (unanimity is one of the indispensable features of federal jury trial); see also *Andres v. United States*, 333 U.S. 740, 748 (1948) ("[U]nanimity in jury verdicts is required where the Sixth . . . Amendment appl[ies]."); *Patton v. United States*, 281 U.S. 276, 288 (1930) (same); *United States v. Smedes*, 760 F.2d 109, 111 (6th Cir. 1985) (unanimous verdicts required in federal criminal trials); *United States v. Pachay*, 711 F.2d 488, 494 (2d Cir. 1983) (Meskill, J., concurring) (same).

97. SCOTT, *supra* note 27, at 101.

98. For a discussion of slaves' jury trial rights, see *supra* notes 41-48 and accompanying text.

99. Act of Oct. 1786, ch. LVIII, § I, in 12 HENING'S STATUTES AT LARGE, *supra* note 42, at 345 (act "directing the method of trying Slaves charged with treason or felony"); see also Act of Mar. 14, 1848, ch. XXVI, § 4, 1847-48 Va. Acts 162, 162 (act "to reduce into one the several acts concerning crimes and punishments, and proceedings in criminal cases").

100. GUILD, *supra* note 2, at 157 (citing Act of 1772, ch. IX, in 8 HENING'S STATUTES AT LARGE, *supra* note 42, at 522-23).

conviction whenever slaves were charged with treason or felony.<sup>101</sup> Six years later the legislature again changed the law to provide that in *all* slave trials, the judgment of conviction had to be based on a unanimous verdict.<sup>102</sup> Not until 1748 were *free* blacks entitled to a unanimous verdict of guilt in all criminal trials: "The trial of a Negro shall be on confession or oath of one or more witnesses, but if the court is of divided opinion, the Negro shall be acquitted."<sup>103</sup> Not until 1819 was the law amended to provide that slaves could not be condemned to death unless the justices were unanimous.<sup>104</sup> Moreover, by an 1848 act, slaves could not be executed, nor free blacks sentenced to the penitentiary, unless all the trial justices agreed.<sup>105</sup>

### *E. Restrictions on the Right to Testify in Court*

Perhaps one of the most basic procedural deprivations that blacks, enslaved and free, suffered was their preclusion from testifying against whites and, during certain periods, from testifying against other blacks, mulattoes, and Indians.<sup>106</sup> With one stroke of the pen, the slave was denied the right to be heard, to call witnesses on his behalf, and to confront the witnesses against him.<sup>107</sup>

101. *Id.* at 158 (citing Act of 1786, ch. LVIII, in 12 HENING'S STATUTES AT LARGE, *supra* note 42, at 345).

102. *Id.* at 160 (citing Act of 1792, ch. 41, in I THE STATUTES AT LARGE OF VIRGINIA 122, 122-30 (Samuel Shepherd ed., Richmond 1835-36)).

103. *Id.* at 155 (citing Act of 1748, ch. XXXVIII, § 6, in 6 HENING'S STATUTES AT LARGE, *supra* note 42, at 104-06); see SCOTT, *supra* note 27, at 46.

104. Our research has failed to uncover this statute; however, the general court referred to this legislation in its opinion in *Elvira, A Slave*, 57 Va. (16 Gratt.) 561, 562-63 (1865), discussed *infra* text accompanying notes 170-81.

105. GUILD, *supra* note 2, at 168 (citing Act of 1848, ch. XXVI, 1847-48 Va. Acts 162, 162).

106. Concerning the competence of mulatto witnesses, see *Dean v. Commonwealth*, 45 Va. (4 Gratt.) 541, 541-43 (1847), discussed in Higginbotham & Kopytoff, *Racial Purity and Interracial Sex*, *supra* note 12, at 1980.

107. This restriction applied not just to slaves, free blacks, and mulattoes, but to Indians as well. In contrast to Virginia's preclusion of a slave's right to speak in his own defense, the Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor . . ." U.S. CONST. amend. VI. In consideration of the fundamental value of the right to speak in one's own defense, the Supreme Court has found that the right of confrontation and cross-examination is an essential and fundamental component of a fair criminal trial. See, e.g., *Faretta v. California*, 422 U.S. 806, 816 (1975); *Barber v. Page*, 390 U.S. 719, 725 (1968); *Parker v. Gladden*, 385 U.S. 363, 364-65 (1966); *Pointer v. Texas*, 380 U.S. 400, 403 (1965).

The right of the accused to confront the witnesses against him is essential to the interest of fairness, so that the defendant has the opportunity to cross-examine the accusers and to ensure the integrity of the fact-finding process. See, e.g., *Coy v. Iowa*, 487 U.S. 1012, 1015-20 (1988); *Lee v. Illinois*, 476 U.S. 530, 540 (1986); *Ohio v. Roberts*, 448 U.S. 56, 64 (1980). In a depar-

Originally, a 1705 statute prohibited all blacks, slave or free, from giving evidence of any kind under oath.<sup>108</sup> Blacks accused of criminal acts, some punishable by death, had no right to testify under oath in their own defense.<sup>109</sup> Although a court might permit them to speak, their words were considered wholly unreliable, as their testimony was unsworn.<sup>110</sup> The original rationale for this legislation was that blacks, mulattoes, Indians, and others who had not been Christianized were heathens who could not be sworn to tell the truth: “[P]opish recusants convict [Roman Catholics], negroes, mulattoes and Indian servants, and others, not being christians, shall be deemed and taken to be persons incapable in law, to be witnesses in any cases whatsoever.”<sup>111</sup>

Then, in 1723, the testimony of blacks, mulattoes, and Indians, bond and free, was permitted, but only against slaves accused of capital offenses, and only with “pregnant circumstances”—that is, with independent proof of their veracity.<sup>112</sup> In addition, those who were Christians

ture from the common law, the Supreme Court has held that the defendant in a criminal trial has the right under the Fifth, Sixth, and Fourteenth Amendments to take the stand and testify in his own defense. *See* *Rock v. Arkansas*, 483 U.S. 43, 49-52 (1987).

In addition, the right to confrontation is deemed to be so essential to a fair trial that even the absence of the defendant from the trial may violate the right to confrontation and due process. *See, e.g.,* *United States v. Gagnon*, 470 U.S. 522, 526 (1985); *Illinois v. Allen*, 397 U.S. 337, 338 (1970).

Despite the acknowledged fundamental nature of the right of confrontation, however, the right is not absolute. *Maryland v. Craig*, 110 S. Ct. 3157, 3163 (1990); *United States v. Beau-lieu*, 893 F.2d 1177, 1180 (10th Cir.), *cert. denied*, 110 S. Ct. 3302 (1990). Yet the standard of exception may be stringent. *See, e.g.,* *Coy*, 487 U.S. at 1020, 1022 (holding that use of a one-way mirror which permitted the defendant to see the witnesses, but did not permit them to see the defendant, was a violation of defendant’s Sixth and Fourteenth Amendment rights). *But cf. Craig*, 110 S. Ct. at 3166-67 (upholding Maryland procedure pursuant to which child testified on one-way closed circuit television).

108. Act of Oct. 1705, ch. XIX, § XXXI, in 3 HENING’S STATUTES AT LARGE, *supra* note 42, at 287, 298 (act “for establishing the General Court, and for regulating and settling the proceedings therein”). At some point early in Virginia’s existence as a colony, sworn testimony of blacks (Christian blacks, at least) apparently was permitted. *See* MINUTES OF THE COUNCIL AND GENERAL COURT, *supra* note 27, at 33 (citing *Re Tuchinge* (Va. Gen. Ct. 1624) (taking the sworn testimony of “John Phillip A negro Christened in England 12 years since” in the trial of a white man)).

109. As Schwarz has stated, “their forced silence before the bench made true justice impossible.” SCHWARZ, *supra* note 25, at 51.

110. For an example of a case in which a slave was permitted to give unsworn testimony in his own defense, see the synopsis of the trial of the slave Will, discussed *infra* text accompanying notes 139-42.

111. Act of Oct. 1705, ch. XIX, § XXXI, in 3 HENING’S STATUTES AT LARGE, *supra* note 42, at 287, 298 (act “for establishing the General Court, and for regulating and settling the proceedings therein”); *see* SCHWARZ, *supra* note 25, at 51; STROUD, *supra* note 17, at 46-47; *see also* *Winn v. Jones*, 33 Va. (6 Leigh) 74, 75 (1835) (finding that free black called as a witness on behalf of plaintiff, a white man, was not competent to testify).

112. Act of May 1723, ch. IV, § III, in 4 HENING’S STATUTES AT LARGE, *supra* note 42, at

were permitted to serve as witnesses in the general court.<sup>113</sup> In 1732, however, the legislature determined that even the testimony of *Christian* blacks, mulattoes, and Indians would not be allowed.<sup>114</sup> The legislature decided to prohibit these individuals from testifying, notwithstanding their Christian status, because their "base and corrupt natures [meant that] their testimony cannot certainly be depended upon."<sup>115</sup> Henceforth, they could testify only at capital slave trials, and there only if accompanied by pregnant circumstances.<sup>116</sup> Thus, while their testimony was considered too untrustworthy to be admitted at the trial of free persons, it nevertheless could be admitted in the trial of slaves subject to death or dismemberment.

In 1748, the Assembly again amended the law to provide that blacks could testify in general only in capital slave trials, but that free *Christian* blacks, Indians or mulattoes could testify against or between other blacks, Indians, or mulattoes, slave or free.<sup>117</sup> According to Oliver Chitwood, an early twentieth-century historian of colonial Virginia, the effect of precluding such testimony was to relieve free blacks, Indians, and mulattoes from satisfying their debts "because they could not be proved in the court."<sup>118</sup> Hence, the amendment permitting these groups to testify was intended to insure that they would not escape payment of their debts.<sup>119</sup> Even though they could testify, however, they rarely were

126, 127 (act "directing the trial of Slaves, committing capital crimes; and for the more effectual punishing conspiracies and insurrections of them; and for the better government of Negroes, Mulattos, and *Indians*, bond or free").

113. OLIVER P. CHITWOOD, *JUSTICE IN COLONIAL VIRGINIA* 98 (1905).

114. Act of May 1732, ch. VII, § V, in 4 HENING'S STATUTES AT LARGE, *supra* note 42, at 325, 326-27 (act "for settling some doubts and differences of opinion in relation to the benefit of Clergy; for allowing the same to Women; and taking away of Reading; and to disable certain Persons, therein mentioned, to be Witnesses").

115. *Id.* at 327.

116. *Id.* § II, at 325.

117. Act of Oct. 1748, ch. XXXVIII, § XI, in 6 HENING'S STATUTES AT LARGE, *supra* note 42, at 104, 107 (act "directing the trial of Slaves committing capital crimes, and for the more effectual punishing conspiracies and insurrections of them; and for the better government of negroes, mulattoes, and Indians, bond or free").

118. CHITWOOD, *supra* note 113, at 99.

119. In 1806, George Wythe, a Virginian who had signed the Declaration of Independence, had been Speaker of the Virginia House of Delegates, and had been described by Thomas Jefferson as "the most salutary influence on the course of my life," see DUMAS MALONE, *JEFFERSON THE PRESIDENT: SECOND TERM, 1805-1809*, at 137 (1974), was poisoned. Three of Wythe's freed black servants also were poisoned. Two weeks after the poisoning, Wythe, who was 81, and one of his servants, Michael Brown, died. IMOGENE E. BROWN, *AMERICAN ARISTIDES: A BIOGRAPHY OF GEORGE WYTHE* 284-96 (1981).

The preliminary hearings of the case suggested strongly that Wythe's grandnephew, George Wythe Sweeney, had administered the poisonings. Sweeney had amassed considerable gambling debts, had forged six bank checks in his granduncle's name, and, along with Brown

considered credible witnesses.

A 1785 legislative amendment precluded black or mulatto testimony except in actions against blacks or in civil cases in which blacks were parties.<sup>120</sup> In 1801 the law was changed yet again to provide that blacks, whether slave or free, could testify in "pleas of the Commonwealth for or against Negroes, bond or free, or in civil pleas when free Negroes shall alone be parties."<sup>121</sup> And by an 1818 law, no black, mulatto, or Indian could testify except against or between blacks, mulattoes, or Indians.<sup>122</sup> This appears to have remained the law regarding such testimony until the post-war enactment of 1866, which even then continued to restrict blacks' testimony:

Colored persons and Indians shall, if otherwise competent, and subject to the rules applicable to other persons, be admitted as witnesses in the following cases: in all civil proceedings, where a colored person or an Indian is a party; in all criminal proceedings in which a colored person or an Indian is a party, or in which the court is of the opinion that there is probable cause to believe that the offense was committed by a white person in conjunction with a colored person or Indian.

The testimony of colored persons shall in all cases be given *ore tenus* and not by deposition.<sup>123</sup>

One year later blacks finally were given the full and unrestricted right to testify in Virginia.<sup>124</sup>

Slaves and free blacks who were permitted to testify faced severe penalties for perjury that were far harsher than any penalty imposed on whites for the same offense.<sup>125</sup> Legislation provided that blacks or Indians who were not Christians and who were found to have perjured them-

and Wythe's other servants, was the main beneficiary of George Wythe's will. Arsenic powder was found in the jail where Sweeney had been detained and arsenic-blotted papers were found in his room and in the Wythe outhouses. Nevertheless, when placed on trial, Sweeney was found not guilty of the poisonings primarily because the most telling evidence against him "was gleaned from negroes, which is not permitted by our laws to go against a white man." BROWN, *supra*, at 297 & n.2 (quoting RICHMOND ENQUIRER, Sept. 9, 1806).

120. GUILD, *supra* note 2, at 158 (citing Act of 1785, ch. LXXVII, in 12 HENING'S STATUTES AT LARGE, *supra* note 42, at 182-83).

121. *Id.* at 161 (quoting Act of 1800, ch. 70, in II THE STATUTES AT LARGE OF VIRGINIA, *supra* note 102, at 300, 300-01).

122. *Id.* at 163 (citing Act of 1818, ch. L, § 3, 1817-18 Va. Acts 66, 66).

123. *Id.* at 170 (citing Act of 1866, ch. 24, § 1, 1865-66 Va. Acts 89, 89-90).

124. *Id.* (citing Act of 1867, ch. 62, § 1, 1866-67 Va. Acts 81, 81 ("At the extra session it is enacted that hereafter colored persons shall be competent to testify in this state as if white.")).

125. *See, e.g.*, Act of Oct. 1748, ch. XXXVIII, § IX, in 6 HENING'S STATUTES AT LARGE, *supra* note 42, at 104, 106-107 (act "directing the trial of slaves committing capital crimes; and for the more effectual punishing conspiracies and insurrections of them; and for the better government of negroes, mulattoes, and Indians, bond or free").

selves were, "without further trial," to have their ears nailed to the pillory and then chopped off, and, in addition, were to receive thirty-nine lashes.<sup>126</sup> Whites, on the other hand, were imprisoned or fined.<sup>127</sup> Hence, blacks, who were regarded as too "base and corrupt" to tell the truth, were nevertheless held to a higher standard of truthfulness and punished more severely than whites who, in light of their perceived moral superiority, presumably should have known better.

#### F. *No Right to Appeal*

Slaves had no right to appeal a conviction from the oyer and terminer courts, to petition for a new trial, or to petition for a writ of habeas corpus.<sup>128</sup> Whites, on the other hand, had such rights.<sup>129</sup> The inability

126. The charge to "every Negro, Mulatto, or Indian, not being a Christian," was as follows:

You are brought hither as a witness; and, by the direction of the law, I am to tell you, before you give your evidence, that you must tell the truth, . . . and that if it be found hereafter, that you tell a lie, and give false testimony in this matter, you must, for so doing, have both your ears nailed to the pillory, and cut off, and receive thirty-nine lashes on your bare back, well laid on, at the common whipping-post.

Act of May 1723, ch. IV, § V, in 4 HENING'S STATUTES AT LARGE, *supra* note 42, at 126, 127-28; see also Act of May 1723, ch. IV, § IV, in 4 HENING'S STATUTES AT LARGE, *supra* note 42, at 126, 127 (act "directing the trial of Slaves, committing capital crimes; and for the more effectual punishing conspiracies and insurrections of them; and for the better government of Negros, Mulattos, and *Indians*, bond or free"). Such harsh punishments also were inflicted on whites in the very early years of Virginia's existence, but as the legal system developed and law enforcement became more systematic, Virginia repealed these Draconian measures—at least with respect to whites. CHITWOOD, *supra* note 113, at 83. These penalties, however, continued to be meted out to blacks.

127. Act of Oct. 1789, ch. XXVI, § 2, in 13 HENING'S STATUTES AT LARGE, *supra* note 42, at 34, 34-35 (act "against such as shall procure or commit wilful Perjury, and against Embracery").

128. Act of Apr. 1692, Act III, in 3 HENING'S STATUTES AT LARGE, *supra* note 42, at 102, 102-03 (act "for the more speedy prosecution of slaves committing Capitall Crimes"). Slaves and free blacks could appeal misdemeanor convictions to the next term of lower courts with no further right of appeal. *Id.*

The slave's inability to appeal is significant for two reasons. First, it meant that there were no reported appellate cases regarding slave crimes. One therefore might assume incorrectly that few if any cases were decided adversely to slaves rather than recognizing that there were no *reported* adverse cases because of the system's total preclusion of appeals. Accordingly, a scholar reviewing only the appellate cases might assume that there were no significant injustices to blacks because of the absence of cases. To the contrary, the very absence of cases demonstrates racial bias because of the system's total preclusion of appeal. Some scholars may have been too laudatory of the appellate system because they were unaware of the inability of blacks to file appeals. See our discussion of A.E. Keir Nash, *supra* note 39, and sources cited therein.

129. See SCOTT, *supra* note 27, at 106-07, 112-21. The Habeas Corpus Act was extended formally to Virginia in 1710. *Id.* at 78. The writ, however, was rarely used. *Id.* at 58-59. By case law, free blacks had the right to petition for a writ of habeas corpus. *Commonwealth v. Jones*, 43 Va. (2 Gratt.) 558, 559-60 (1845); *DeLacy v. Antoine*, 34 Va. (7 Leigh) 438, 449

to appeal meant that the judgments of the slave courts, presided over by local county justices, were shielded from scrutiny by higher Virginia tribunals.<sup>130</sup>

These local county justices were commonly regarded as unlearned in the law, susceptible to local pressures and prejudices, and capable of committing grave legal errors. Therefore, many people believed that these local judges should not be entrusted with deciding cases involving life and limb.<sup>131</sup> This belief, however, applied to whites only; these same judges composed the commissions of oyer and terminer that presided over capital slave trials.<sup>132</sup> Slaves were therefore doubly damned: not only were they deprived of trial by jury but, in addition, they were tried by county justices deemed too inept and unlearned to preside over white people's capital cases.

Procedural and technical errors, as well as substantive legal errors, were commonplace. These "var[ied] from the admission of improper evi-

(1836). When slaves petitioned for their freedom, however, habeas corpus was not the appropriate route. See Higginbotham & Higginbotham, "Yearning to Breathe Free," *supra* note 24, at 7-49.

In *Cropper v. Commonwealth*, 41 Va. (2 Rob.) 849 (1843), a "free woman of colour" was tried and convicted of simple larceny by a court of oyer and terminer and sentenced to five years in the penitentiary (based on a prior conviction for petit larceny). *Id.* at 879. The woman petitioned the general court for a writ of habeas corpus on the ground that by statute, see Act of 1832, ch. XXII, § 9, 1831-32 Va. Acts 20, 22, blacks or mulattoes, whether free or enslaved, were to be tried by a justice of the peace when charged with simple larceny valued at \$20 or less. *Cropper*, 41 Va. (2 Rob.) at 879-80. The general court granted the writ because the court of oyer and terminer lacked jurisdiction to hear the case. *Id.* at 881.

130. The slave's inability to appeal severely limited the number of reported cases. Slave cases did not reach the high court except when slaves were the victims, rather than the perpetrators, of criminal acts. As Philip Schwarz has shown, such cases involving black victims were themselves rare as court officials "knowing how easily the attempt to prosecute a white person for killing a slave could end in acquittal or with a pardon . . . may rarely have bothered to bring charges." SCHWARZ, *supra* note 25, at 79. Schwarz's recent study of slaves and the criminal laws of Virginia has substantially supplemented the earlier studies of Arthur P. Scott (1930), see SCOTT, *supra* note 27, and Daniel Flanigan (1973 & 1974), see Flanigan, *supra* notes 17 & 59. By sifting through years and years of records and primary sources, Flanigan, Scott, and Schwarz have provided a treasure-trove of information concerning the slave's status in the Virginia criminal justice system.

Scott argued that it is impossible to determine exactly how many slaves were tried for murder, because the records are incomplete. SCOTT, *supra* note 27, at 204 n.37. He concluded, however, that even where they are complete, there were only a few trials. *Id.* at 204. Slave trials averaged about one per year for each county, and most of those were for stealing. *Id.* at 312 nn.70 & 72. Schwarz accepted that there were relatively few trials in the 17th and early 18th centuries but that the comprehensive slave code enacted in 1805 and the rapid rise in the slave population thereafter led to a substantial increase. SCHWARZ, *supra* note 25, at 38-39.

131. See Flanigan, *supra* note 59, at 86-91.

132. *Id.*

dence to ignorance of substantive criminal law."<sup>133</sup>

In one case, though the witness who procured the slave's admissions acknowledged that he thought them inadmissible, and though the record itself revealed that the confession was obtained through promise of favor, the court still allowed it to go to the jury. In another case not only was the slave offered a lesser punishment in exchange for his confession but he had endured a whipping from his master before he confessed.<sup>134</sup>

In another case,

[o]ne lawyer complained that the court had convicted a slave through a misunderstanding of the legal definition of burglary. Another attorney contended that the court had handed down an unauthorized sentence—death where the law called only for sale and transportation. The Princess Anne County Court, according to one petitioner, permitted the master "frequently to interrupt the prisoner's counsel, during his arguments. This example was followed by the witnesses. The latter, in defiance of the remonstrances of the prisoner's counsel[,] interrogated each other. What a child (who was too young to be admitted as a witness) was *heard to say* was received in testimony; and (perhaps improperly) evidence of the character of the accused was admitted."<sup>135</sup>

The fallibility and biases of the justices of the peace were so great that one lawyer, petitioning on behalf of a slave convicted of murder, was prompted to say that "[b]ut for the excitement which prevailed, I could not have conceived such a sentence possible, by a reflecting court."<sup>136</sup> Similarly, Schwarz recounted the case against the slave Robin:

[I]n a December 9, 1724 trial, the Lancaster County oyer and terminer judges could not secure a guilty verdict on the first vote. Rather than record a verdict of not guilty, as most other

133. Flanigan, *supra* note 17, at 544. For a more comprehensive discussion of these procedural, technical, and substantive errors, see Flanigan, *supra* note 59, at 98-99.

134. Flanigan, *supra* note 59, at 98 & n.52 (citing Archives of Virginia, Richmond, Va., Executive Papers, Letters Received [hereinafter Va. Archives], Petition accompanying Commonwealth v. Harry (Jan. 11-21, 1828 folder); *id.*, Letter from Jacob Swoope to Governor, Sept. 11, 1829; *id.*, Petitions, n.d. (1834 M-Z folder)). Since 1936 the United States Supreme Court has held that state convictions of murder that rest solely upon confessions extorted by torture are void under the Due Process Clause of the Fourteenth Amendment. See *Brown v. Mississippi*, 297 U.S. 278, 279, 285 (1936).

135. Flanigan, *supra* note 59, at 98-99 & n.53 (citing Va. Archives, *supra* note 134, Letter from M.M. Patton to Governor, June 12, 1828 (June 1-10 folder); *id.*, Letter from J.N. Baker to Governor & Executive Council, Oct. 5, 1828 (Oct. 1-10 folder); *id.*, Letter from Everard Hall to Governor & Executive Council, Sept. 30, 1829).

136. *Id.* at 116 & n.83 (quoting Va. Archives, *supra* note 134, Letter from Everard Hall to Governor & Executive Council, Sept. 30, 1829).



justices would have done, those in favor simply delayed proceedings until the next day, when other hanging judges joined them to form a majority against Robin.<sup>137</sup>

This is not to suggest that these judges were wholly incapable of fairness. There were instances in which the justices recommended that a slave be given mercy. Sometimes the justices even acquitted slaves despite the testimony of white men.<sup>138</sup> In *Negro Will his Tryal*,<sup>139</sup> for example, a slave was accused of "breaking Gaol"—or breaking out of jail.<sup>140</sup> The slave pleaded not guilty, and upon his trial, the jailer testified under oath that Will had escaped from the jail and was absent for several days.<sup>141</sup> The court heard what the slave Will had to say in his own defense, even though, as discussed previously, slaves were precluded from giving sworn testimony.<sup>142</sup> Despite the jailer's testimony, the court found Will innocent.<sup>143</sup> He also was acquitted of robbery, the underlying offense for which he was jailed.<sup>144</sup> Will had pleaded not guilty to that offense as well, and the victim did not come forward to give evidence.<sup>145</sup>

From the sparse account of the case, it is impossible to determine why the court acquitted the slave of breaking out of jail. Perhaps the court considered the underlying charge of robbery unwarranted and unjust, causing the judges to empathize with Will for trying to escape punishment for a crime he did not commit—a crime punishable by death.<sup>146</sup> The record of the case neither indicates why the court rejected the jailer's testimony nor describes what the slave said in his own defense.

In the 1734 case of *Negro Peter and Beshoof's Tryal*,<sup>147</sup> two slaves were acquitted of murdering one John Shaw.<sup>148</sup> Shaw's race was not specified; he was referred to merely as "one of our Lord the King's Liege People."<sup>149</sup> The two slave defendants were acquitted even though the

137. SCHWARZ, *supra* note 25, at 76 n.19.

138. See 10 AM. LEGAL RECORDS., CRIMINAL PROCEEDINGS IN COLONIAL VIRGINIA, RICHMOND COUNTY 1710-54, at 18, 151, 215 (Peter C. Hoffer & William B. Scott eds., 1984) [hereinafter RICHMOND COUNTY PROCEEDINGS].

139. *Id.* at 16-18.

140. *Id.*

141. *Id.*

142. See *supra* notes 106-27 and accompanying text.

143. RICHMOND COUNTY PROCEEDINGS, *supra* note 138, at 17.

144. *Id.*

145. *Id.*

146. See Act of Oct. 1705, ch. XI, in 3 HENING'S STATUTES AT LARGE, *supra* note 42, at 269, 269.

147. RICHMOND COUNTY PROCEEDINGS, *supra* note 138, at 150.

148. *Id.*

149. *Id.* The term "liege" at one time meant "vassal," but during this period of time sim-

court heard the testimony of four witnesses against them.<sup>150</sup>

In a rather unusual case, an oyer and terminer court recommended that a slave convicted of burglary be given mercy by the Governor, "it appearing to this court that it is the First Offence of this Kind by him Committed and Seeming to them for the circumstances of the case Doubtfull Whether he was Sensible of the crime for which he is Sentenced."<sup>151</sup> Yet these occasional displays of mercy did not negate the fact that slaves were placed at substantial risk of life in being tried by local judges, without recourse to an appeal.

In 1823 a slave attempted to appeal his conviction to the general court in the case of *Peter, "a slave," v. Commonwealth*.<sup>152</sup> A commission of oyer and terminer for Hampshire County had found Peter guilty of murder and sentenced him to hang.<sup>153</sup> Peter had applied for a writ of error to the appellate court, and the application was denied.<sup>154</sup> He then attempted to appeal the superior court's decision through an application to the general court for a writ of error.<sup>155</sup> In an opinion by Judge White, the general court noted the novelty of the slave's attempt to appeal, as no such appeal had occurred in the 150 years that slave trials had taken place in Virginia.<sup>156</sup> The court held that the legislature had never intended "that the judgment of these Courts of Oyer and Terminer should be submitted to the revision and correction of any other *Legal Tribunal*. . . . [T]he only relief which that Law leaves to the convict, is to be sought from the Executive."<sup>157</sup>

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ply meant "citizen" or "loyal subject." See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1305-06 (4th ed. 1976).

150. RICHMOND COUNTY PROCEEDINGS, *supra* note 138, at 151. In a third case of this kind, a slave named Samson was acquitted of breaking and entering and stealing a gelding worth 10 pounds sterling despite the testimony of the gelding's owner. *Id.* at 215. Unfortunately, the record of the proceedings of the Richmond County court of oyer and terminer contains only a brief summary of each case, giving the charge and the outcome. No explanation of the court's ruling is set forth. *Id.*

151. *Id.* at 228. "'Sensible' meant *compos mentis*; idiots or a madmen [sic] could not be held to have intended to commit a felony because they could not control their own acts. Governors could pardon insane persons for lesser felonies; the king pardoned, upon the governor's application, in murders and treasons." *Id.* at 228 n.146; see also SCHWARZ, *supra* note 25, at 24 (discussing dismissal of charges against a slave named Will on the ground that "he was a Lunatic & not in his proper Senses").

152. 4 Va. (2 Va. Cas.) 330 (1823).

153. *Id.* at 330.

154. *Id.*

155. *Id.*

156. *Id.* at 330-31.

157. *Id.* at 331 (emphasis added); see also *Anderson v. Commonwealth*, 32 Va. 803, 805, 5 Leigh 740, 742 (1835) (holding that "a writ of error does not lie to the judgment of a county or corporation court sitting as a court of oyer and terminer for the trial of a free negro or mulatto"); *Anderson v. Commonwealth*, 31 Va. 747, 749, 4 Leigh 693, 696 (1834) (holding that a

In the 1854 case *Ex parte Morris*<sup>158</sup> the Virginia Supreme Court of Appeals implicitly acknowledged the importance of being able to appeal a conviction. William Morris, a free black, was tried and convicted by the mayor of Richmond for violating an 1849 law prohibiting free blacks from returning to the Commonwealth after having travelled to a non-slaveholding state.<sup>159</sup> He was required to give a bond for \$500—a huge sum of money in those days—providing that he would leave the state within ten days.<sup>160</sup> Morris attempted to appeal the mayor's decision to the county court. The mayor refused to permit the appeal<sup>161</sup> despite Morris' insistence that he had an absolute right to appeal from a misdemeanor conviction by virtue of a Virginia statute providing that “[i]n the case of a negro convicted, of a misdemeanor, by a justice, there may be an appeal from the decision to the county or corporation court, by the negro, if free, or if he be a slave, by his owner.”<sup>162</sup>

Morris then applied to the circuit court for a writ of mandamus to compel the mayor to allow the appeal, but the circuit court refused to issue the writ.<sup>163</sup> It was only upon applying to the highest court in the state for a writ of supersedeas, which the court allowed, that Morris' right to an appeal was recognized.<sup>164</sup> In an opinion by Judge Lee, the court remarked: “Unless his right to the appeal be asserted, there will be a failure of justice . . . .”<sup>165</sup> Thus, Morris, a free black, was able to circumvent this recognized failure of justice that had denied slaves a right of appeal for approximately 200 years.

*Morris* is also a classic example of most of the precepts of slavery.<sup>166</sup> By ordinance, Morris was “powerless” to travel to any “nonslaveholding state.”<sup>167</sup> If he did travel to a free state, such as Pennsylvania or Ohio, he could not return to visit his family—and for the offense of entering a nonslaveholding state, a free black upon return would be imprisoned in-

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writ of error does not lie from the general court to a judgment of the county or corporation court sitting as a court of oyer and terminer). For a discussion of executive clemency, see *infra* notes 187-216 and accompanying text.

158. 52 Va. (11 Gratt.) 292 (1854).

159. *Id.* at 292.

160. *Id.* at 292-93.

161. *Id.*

162. 2 THE CODE OF VIRGINIA, WITH THE DECLARATION OF INDEPENDENCE AND CONSTITUTION OF THE UNITED STATES, AND THE DECLARATION OF RIGHTS AND CONSTITUTION OF VIRGINIA, tit. 55, ch. CCXII, § 15 (Richmond, William F. Ritchie 1849).

163. *Morris*, 52 Va. (11 Gratt.) at 293.

164. *Id.* at 295.

165. *Id.* at 296.

166. See *supra* notes 8-11 and accompanying text.

167. *Morris*, 52 Va. (11 Gratt.) at 292.

definitely if he could not post a \$500 bond.<sup>168</sup>

It was not until 1865, when the War Between the States was fast approaching its end, that the supreme court of appeals (which had replaced the general court as the highest court in Virginia),<sup>169</sup> permitted a slave to challenge a conviction by the county court. *Elvira, A Slave*,<sup>170</sup> concerned a slave woman accused of attempting to poison her master's family. In a remarkable demonstration of judicial activism, the supreme court of appeals proceeded to rule on the merits in favor of the slave, without deciding the important jurisdictional question presented, and ordered that she be discharged and returned to her master.<sup>171</sup> Elvira, who belonged to one C. Ford, had been tried by a commission of oyer and terminer. Four of the five justices presiding found her guilty and sentenced her to sale and transportation beyond the Confederate States.<sup>172</sup> One justice dissented.<sup>173</sup> Curiously, it was Elvira's *master* who applied to the judge of the circuit court of the city of Petersburg for a writ of habeas corpus on the ground that the conviction was illegal because only four of the five justices concurred in the judgment.<sup>174</sup> An 1819 statute provided that no slave tried for a felony could be condemned unless all of the justices sitting agreed that the slave was guilty.<sup>175</sup> The circuit court allowed the writ but concluded that the judgment of the majority of the court was legal and thus upheld the conviction.<sup>176</sup> The slave's master then applied on her behalf to a judge of the supreme court of appeals for a writ of error, which was allowed.<sup>177</sup>

Justice Moncure, writing for the court, chose to ignore the jurisdictional issue whether the circuit court and his own court had the authority and power to entertain the writs: "It is unnecessary to express any opinion on the question arising in this case as to the jurisdiction, as well of this court as the court below; this court being equally divided in opinion on that question, and being therefore unable to decide the case on that

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168. *Id.* at 292-93.

169. See HELEN T. CATTERALL, *JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO* 75 (1926). For a more detailed discussion of the structure of the Virginia courts in the period covered by this Article, see *supra* note 44.

170. 57 Va. (16 Gratt.) 561 (1865).

171. *Id.* at 570-71.

172. *Id.* at 562, 564-69.

173. *Id.* at 561.

174. *Id.* at 561-62.

175. *Id.* at 562 (citing 1 REVISED CODE OF THE LAWS OF VIRGINIA, ch. 111, § 32, at 421, 428-29 (Thomas Ritchie, Richmond 1819)).

176. *Id.*

177. *Id.* at 565.

ground.”<sup>178</sup> Consequently, the court proceeded to rule that in any trial in which a slave is accused of an offense punishable by death, the judgment of guilt must be unanimous.<sup>179</sup> Because Elvira had been charged with an offense punishable by death, the fact that she was sentenced instead to sale and transportation did not negate the requirement of unanimity.<sup>180</sup> The court held that, based on the lack of unanimity as to Elvira’s culpability, she in effect had been acquitted. The court ordered that she be discharged and returned to her master.<sup>181</sup>

The *Elvira* case stands in stark contrast to an earlier, 1829 case, in which Lieutenant Governor O.V. Daniel reprimanded the county court of Goochland for sentencing a slave to death despite a nonunanimous conviction by the court.<sup>182</sup> The Lieutenant Governor declared “the detention of the slave from the day of the trial [to be] tortious and illegal.”<sup>183</sup>

It is, at the very least, ironic that it was not until 1865 that a slave was able to obtain appellate review of a conviction by the court of oyer and terminer. Within a matter of months, the Confederacy, the separate system for trying slaves, and even slavery itself, would cease to exist. No one can know what prompted Justice Moncure and his brethren first to sidestep the important jurisdictional issue and then to rule in favor of the slave *Elvira*.<sup>184</sup> Perhaps the decision was prompted by the recognition that the South was losing the war and a consequent, implicit acknowledgement that this system of trying slaves could no longer be justified and legitimized. The decision is significant not only because the supreme court of appeals was unanimous on the merits but also because, as already noted, half the court agreed that the slave had the right to obtain appellate review of the lower court’s conviction.<sup>185</sup> Of course, the result may simply be explained by the willingness of *Elvira*’s master to petition on her behalf to have the appeal granted, thus suggesting his belief in her innocence. Whatever the reasons for the decision, its impact was negligible: “Until this aberrant decision, which benefited only one person, Virginia slaves, at least as far as the judiciary was concerned, were at the mercy of overriding local prejudice and the plentiful possibilities of error

178. *Id.* at 562.

179. *Id.* at 566.

180. *Id.*

181. *Id.* at 571.

182. Flanigan, *supra* note 59, at 99.

183. *Id.*

184. See *Elvira, A Slave*, 57 Va. (16 Gratt.) 561, 561-65 (1865), discussed *supra* notes 170-81 and accompanying text.

185. See *supra* text accompanying note 178.

by justices of the peace too often deficient in legal knowledge."<sup>186</sup>

### G. Executive Clemency

Because slaves had no meaningful right to an appeal and because at least sixty-eight capital offenses applied to slaves,<sup>187</sup> the possibility of a grant of clemency from the governor was critically important to slaves as a means of escaping the death sentence. By statute, the governor had the authority to commute a slave's death sentence,<sup>188</sup> and the courts of oyer and terminer were required to send the governor a record of the trial proceedings and testimony in every case in which a slave was condemned to death.<sup>189</sup> The governor also was authorized by statute to sentence slaves, in lieu of the death penalty, to "sale and transportation"—the governor could contract with any person for the sale and purchase of condemned slaves, so long as they were transported out of the United States.<sup>190</sup> Although these slaves were then supposed to be sold into slavery "beyond the limits of the United States," evidence suggests that slave traders often sold them into other slave states.<sup>191</sup>

Scholars have suggested that the governor sometimes showed mercy to slaves to alleviate the harshness of the Virginia slave code and its enforcement in the courts.<sup>192</sup> One study found that two-thirds of the slaves condemned to death from 1790 to 1864 were sentenced by the governor to "sale and transportation" instead.<sup>193</sup> In fact, whites sometimes petitioned the governor to grant clemency to slaves sentenced to death. In

186. Flanigan, *supra* note 17, at 544.

187. See *supra* note 19 and accompanying text.

188. See, e.g., GUILD, *supra* note 2, at 86 (citing Act of 1841, ch. 61, 1840-41 Va. Acts 70, 70).

189. Flanigan, *supra* note 17, at 544.

190. Act of Dec. 1801, ch. 4, § 1, in II THE STATUTES AT LARGE OF VIRGINIA, *supra* note 102, at 314, 314 (act "empowering the governor to transport slaves condemned when it shall be deemed expedient"); Act of Dec. 1800, ch. 70, § 4, in II THE STATUTES AT LARGE OF VIRGINIA, *supra* note 102, at 300, 300-01 (act "to reduce into one the several acts concerning slaves, free negroes and mulattoes"); see GUILD, *supra* note 2, at 70 (citing Act of 1801, ch. 43, in II THE STATUTES AT LARGE OF VIRGINIA, *supra* note 102, at 344, 344-45).

191. Both the Louisiana Purchase in 1803 and the annexation of Florida in 1818-19 severely limited the potential destinations of transported slaves. The abolition of slavery in the British and French West Indies in the 1830s and 1840s further encouraged the transportation of reprieved slaves to the Deep South states. See SCHWARZ, *supra* note 25, at 28-29.

192. Flanigan, *supra* note 17, at 543.

193. Ulrich B. Phillips, *Slave Crime in Virginia*, 20 AM. HIST. REV. 336, 339 (1915) (discussing the voucher system of reimbursing masters whose slaves were condemned). Schwarz notes that "nearly nine hundred" Virginia slaves were transported out of the Commonwealth between 1801 and 1865. SCHWARZ, *supra* note 25, at 28. During this period 454 slaves were executed. *Id.* at 29.

one example of such intervention, a man named William Ramsey petitioned the governor in 1792:

A young negro, a valuable tradesman in this town, is condemned to die on the tenth of next month. His master employed no attorney, and it is the general opinion he has a much greater regard for the high value set upon his negro than for life. From our long friendship I petition you to pardon him.<sup>194</sup>

The petition was supported by many signatures from the townspeople, and the sentence was commuted.<sup>195</sup>

In a case from Patrick County, a group of citizens petitioned the governor to spare the life of a fifteen-year-old slave sentenced to death for rape.<sup>196</sup> They requested that the boy be transported from the colony because “[h]e had not understood the enormity of the crime and thought it punishable only by corporal punishment.”<sup>197</sup> The petitioners themselves thought the offense was punishable by castration rather than death.<sup>198</sup> The race of the victim was not specified. It would be helpful to know whether the victim was black or mulatto, or perhaps a white woman of “questionable moral fiber,” since it is highly unlikely that a black man would be forgiven for raping a white woman.<sup>199</sup>

By contrast, in some instances citizens petitioned for severity rather than mercy. For example, citizens from two counties urged the governor to approve the death sentence for one slave convicted of arson. According to these citizens,

[f]ire in the hands of this ignorant and misguided portion of our population has become an alarming source of mischief. The amount of property that has been consumed in the last few years by this devouring element and by the instrumentality of

194. Letter of William Ramsey of Alexandria, Virginia to Governor, reproduced in Phillips, *supra* note 193, at 339.

195. *Id.*

196. Flanigan, *supra* note 59, at 16.

197. *Id.*

198. *Id.* at 16 & n.28 (citing Va. Archives, *supra* note 134, Petition of Sundry Citizens of Patrick County, n.d. (July 12-20 folder)).

199. Although the mere accusation of rape by a white woman virtually ensured conviction of a black man, appeals for executive clemency were often sought if the “character” of the white woman was in doubt. In one case in 1833, a jury appealed for executive clemency for a free black man whom they had convicted for the rape of a white woman from a family of “exceedingly disreputable character.” JAMES JOHNSTON, RACE RELATIONS IN VIRGINIA & MISCEGENATION IN THE SOUTH, 1776-1860, at 262-63 (1970). As the woman’s mother had “long entertained negroes,” the family was perceived to be “below the level of the ordinary grade of free negroes.” *Id.*; see Higginbotham & Kopytoff, *Racial Purity and Interracial Sex*, *supra* note 12, at 2012-19 (discussing the issue of consent); see also SCHWARZ, *supra* note 25, at 206 (same). For a discussion of how the Virginia courts treated alleged rape, see *infra* text accompanying notes 503-42.

this wicked and miserable people . . . has been immense. We are in danger of having our dwellings lighted over our own and families['] heads. We hold our property by a tenure which is completely at their mercy. Many of our citizens have been doomed to witness in one night, nay in one hour, the destruction of a year[']s labour by the hands of the midnight incendiary[.]<sup>200</sup>

When the governor did order the transportation of slaves out of the state, factors other than compassion may have motivated his decision. By statute, the state was required to compensate slaveowners for the value of their condemned slaves.<sup>201</sup> According to Schwarz, the intention of this provision was to persuade slaveholders not to conceal their slaves' offenses for fear of economic injury.<sup>202</sup> Some slaveowners preferred the money rather than the return of a troublesome slave; this was particularly true in the case of runaway slaves.<sup>203</sup> Hence, from the governors' perspective,

[t]ransportation saved the state great expense. Since the state reimbursed masters when their slaves were put to death, executions of slaves were inordinately expensive. For example, from 1820 through 1831 the state paid almost \$125,000 to masters whose slaves were condemned to death. Sale and transportation gave the state an opportunity to recoup its losses.<sup>204</sup>

Even when the governor exercised his power of clemency, he had no authority to grant a new trial.<sup>205</sup> The slave, therefore, had no chance for complete exoneration.<sup>206</sup> The general court recognized the limitations of

200. Flanigan, *supra* note 59, at 48-49.

201. *See, e.g.*, Act of Oct. 1705, ch. XI, in 3 HENING'S STATUTES AT LARGE, *supra* note 42, at 269, 269-70 (act "for the speedy and easy prosecution of Slaves, committing Capitall Crimes"). Masters were also entitled to compensation from the government when their runaway slaves were killed in the course of being apprehended. *See, e.g.*, Act of Apr. 1691, Act XVI, in 3 HENING'S STATUTES AT LARGE, *supra* note 42, at 86, 86-88; GUILD, *supra* note 2, at 50 (citing Act of 1705, ch. XLIX, §§ XXXVIII, XXXIX, in 3 HENING'S STATUTES AT LARGE, *supra* note 42, at 447, 461); *id.* at 156 (citing Act of 1748, ch. XXXVIII, § 21, in 6 HENING'S STATUTES AT LARGE, *supra* note 42, at 104, 110).

202. SCHWARZ, *supra* note 25, at 20.

203. SCOTT, *supra* note 27, at 302; *see also supra* note 64 (discussing runaway slaves).

204. *See* Flanigan, *supra* note 59, at 66.

205. *Id.*

206. Flanigan, *supra* note 17, at 545. The governor could not pardon a condemned slave except by express legislative enactment. *See, e.g.*, Act of Mar. 21, 1861, ch. 169, § 1, 1860-61 Va. Acts 255, 255 (authorizing the governor to pardon a slave and restore him to his master); *see also* Act of Apr. 2, 1861, ch. 171, § 1, 1860-61 Va. Acts 256, 256 (same); Act of Feb. 16, 1861, ch. 170, § 1, 1860-61 Va. Acts 255, 255-56 (same). The legislature also could authorize the commutation of a sentence. *See, e.g.*, GUILD, *supra* note 2, at 89 (citing Act of 1851, Resol. No. 22, 1850-51 Va. Acts 411, 411 ("A Negro slave, William, a felon, convicted in Fauquier [County] and his punishment commuted to transportation has since become lunatic



a pardon from the governor:

The remedy of a pardon, as a substitute for a new trial, falls short of complete justice to the prisoner, as well as to the public. To the prisoner, a pardon is not equal to an acquittal, to which the case supposes he is entitled. His reputation and character are much more affected by the one than the other. A pardon discharges from punishment; an acquittal from guilt. Pardon may rescue him from the penitentiary or a halter; but it cannot redeem him from the infamy of a conviction.<sup>207</sup>

Some slaves might even have preferred death to sale and transportation.<sup>208</sup>

In the mid-nineteenth century the Virginia legislature amended the state's law to allow the *courts* to impose sale and transportation on slaves as a third class of punishment for certain offenses.<sup>209</sup> As the general court observed in *Elvira, a slave*,<sup>210</sup> the reviser's note in the legislative reports of 1849 read:

Instead of having for slaves but two classes of punishment, a third at least should be recognized by law. There should . . . be a designation of offences too serious to be punished by stripes, yet not sufficient to be punished by death, in which the sentence should be that the slave be sold to be transported beyond the limits of the United States. That might be the sentence of the court in a considerable number of cases. Even then the sentence of death would still be pronounced in many cases in which the executive should have the power of relieving for transportation.<sup>211</sup>

Sale and transportation could apply as an alternative sentence for those offenses that, if committed by whites, would *not* be punishable with

and unsalable, is ordered to be removed from the penitentiary to the Eastern Lunatic Asylum for reasons of humanity as well as other considerations."); see also *id.* at 115 (citing Act of Mar. 19, 1847, ch. 286, § 1, 1846-47 Va. Acts 234, 234) ("The sentence of Jane Hailstock, a free woman of color, found guilty of arson, is ordered commuted.").

207. *Ball v. Commonwealth*, 35 Va. (8 Leigh) 727, 728 (1837).

208. As Schwarz observed,

The punishment that could cause the most lasting pain to the Virginian slave was being "sold to Georgia." This private, unregulated action presented bondspople 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.

SCHWARZ, *supra* note 25, at 11.

209. Act of March 14, 1848, ch. XXVI, § 1, 1847-48 Va. Acts 162, 162.

210. For a discussion of *Elvira*, see *supra* text accompanying notes 170-81.

211. *Elvira, A Slave*, 57 Va. (16 Gratt.) 561, 564-65 (1865) (citing reviser's note).

death.<sup>212</sup> The choice lay in the discretion of the court.<sup>213</sup>

For those slaves not fortunate enough to escape a death sentence, a 1748 statute provided that a slave could not be executed until ten days had elapsed after conviction, except in cases of conspiracy, insurrection, or rebellion.<sup>214</sup> The waiting period was later increased to thirty days.<sup>215</sup> This statutory requirement was not always followed, however. One such incident of speedy justice occurred in 1751 in the James City County court of oyer and terminer: “[A] felony [committed] last [night], the felon tried, sentenced and [executed] this afternoon.”<sup>216</sup> The most dangerous aspect of such a hasty disposition was that it compounded the injustice by trying, convicting, and executing a slave while the community’s passions were most inflamed, and precluded the possibility of clemency from the Governor.

Aside from the governor’s power to grant clemency, two additional features of Virginia’s criminal justice system served as a buffer of sorts against the harsh criminal slave code: the benefit of clergy and the assistance of counsel.

#### H. Benefit of Clergy

Benefit of clergy originated in medieval England as a means of sparing those who had mastered the ability to read.<sup>217</sup> Under this doctrine, convicted felons were able to plead benefit of clergy for crimes other than murder, rape, treason, arson, horse stealing, burglary, and robbery.<sup>218</sup> If

212. *Id.* at 565.

213. *Id.*

214. Executions of free persons were to be carried out within two to three weeks. Act of Oct. 1748, ch. XXXVIII, § VIII, in 6 HENING’S STATUTES AT LARGE, *supra* note 42, at 104, 106 (act “directing the trial of Slaves committing capital crimes; and for the more effectual punishing conspiracies and insurrections of them; and for the better government of negroes, mulattoes, and Indians, bond and free”); see SCOTT, *supra* note 27, at 123 (citing Act of May 1722, ch. V, in 4 HENING’S STATUTES AT LARGE, *supra* note 42, at 106 (act “for amending the act concerning Servants and Slaves; and for the better government of Convicts imported; and for the further preventing the clandestine importation of persons out of this colony”)).

215. See GUILD, *supra* note 2, at 158 (citing Act of 1786, ch. LVIII, § 1, in 12 HENING’S STATUTES AT LARGE, *supra* note 42, at 345); *id.* at 155 n.3 (citing Act of 1792, ch. 41, in I THE STATUTES AT LARGE OF VIRGINIA, *supra* note 102, at 122, 122-30).

216. SCOTT, *supra* note 27, at 123 n.244 (citing *Diary of John Blair*, 8 WM. & MARY C. Q. HIST. MAG. 12 (1899)).

217. *Id.* at 103. The term “clergy” in this context simply meant scholarship—that is, the ability to read and write—and could apply to laymen as well as ecclesiastics. See OXFORD ENGLISH DICTIONARY 491 (1st ed. 1933).

218. CHITWOOD, *supra* note 113, at 69; SCOTT, *supra* note 27, at 103. At various times, additional offenses were outside the benefit of clergy. See, e.g., GUILD, *supra* note 2, at 54 (citing Act of 1732, ch. VI, §§ I-II, in 4 HENING’S STATUTES AT LARGE, *supra* note 42, at 324, 324-25 (penalty for stealing a slave is death without benefit of clergy)); *id.* at 160 (citing

granted clergy, the defendant was branded in the hand ("burnt in the hand"<sup>219</sup>) as proof that he had been given clergy, which was granted only once in an individual's lifetime.<sup>220</sup>

In a 1732 act the Virginia legislature extended the benefit of clergy to women, blacks, and Indians.<sup>221</sup> Arthur Scott described the impetus for this change in the law:

The law probably grew out of a case described by Governor Gooch in a letter to the Bishop of London in 1731. A negro-woman slave was being tried by Commission of Oyer and Terminer for stealing, and the Governor had a lawyer raise the point for her that she was entitled to clergy, being a Christian. The Court was divided, and Gooch "had the case adjourned into the General Court." In spite of the Attorney General's opinion that clergy should be granted, the General Court divided six to six. The case was referred to England with "political reasons for and against it."<sup>222</sup>

The Crown approved; clergy was extended to women, blacks, and Indians, and the reading requirement was eliminated.<sup>223</sup> Under this law, "benefit of clergy was assured to slaves convicted of felonies . . . except for manslaughter and breaking and entering with theft of more than 5 [shillings] worth of goods (crimes which were clergyable when committed by a free person), murder, treason, burglary, and robbery."<sup>224</sup> Man-

Act of 1792, ch. 41, in I THE STATUTES AT LARGE OF VIRGINIA, *supra* note 102, at 122, 122-30 (penalty for stealing or selling as a slave a free person is death without benefit of clergy)).

219. GUILD, *supra* note 2, at 154 (citing Act of 1732, ch. VII, §§ I, III-VI, in 4 HENING'S STATUTES AT LARGE, *supra* note 42, at 325-27).

220. CHITWOOD, *supra* note 113, at 69.

221. Act of 1732, ch. VIII, §§ I, III-VI, in 4 HENING'S STATUTES AT LARGE, *supra* note 42, at 325-27.

222. SCOTT, *supra* note 27, at 104-05.

223. See GUILD, *supra* note 2, at 154 (citing Act of 1732, ch. VII, §§ I, III-VI, in 4 HENING'S STATUTES AT LARGE, *supra* note 42, at 325-27).

224. RICHMOND COUNTY PROCEEDINGS, *supra* note 138, at 138. The exception for theft of goods over five shillings was later increased to 20 shillings. CHITWOOD, *supra* note 113, at 69. At various times, other slave crimes also were held by statute to be outside the benefit of clergy. See, e.g., GUILD, *supra* note 2, at 164 (citing Act of 1837, ch. 71, 1836-37 Va. Acts 49 (ravishing or attempting to ravish a white woman)); *id.* at 164 (citing Act of 1836, ch. 72, §§ 1-2, 1835-36 Va. Acts 48, 48) (disturbing or obstructing railroad)); *id.* at 155 (citing Act of 1748, ch. XXXVIII, §§ III-XXVI, in 6 HENING'S STATUTES AT LARGE, *supra* note 42, at 104, 105-12) (administering medicine)).

It is unclear whether some blacks might have been entitled unofficially to benefit of clergy prior to the passage of the 1732 statute. One bit of evidence suggesting that clergy was indeed available was a 1723 law providing that "if any number of Negroes exceeding five conspire to rebel, they shall suffer death, and be utterly excluded the benefit of clergy." *Id.* at 52 (citing Act of 1723, ch. IV, § II, in 4 HENING'S STATUTES AT LARGE, *supra* note 42, at 126). This implies that some offenses were indeed clergyable.

slaughter was later made a clergyable offense for slaves,<sup>225</sup> but “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>226</sup>

Benefit of clergy was abolished for free persons in 1796<sup>227</sup> but continued to apply to slaves for certain offenses until 1848.<sup>228</sup> It might seem strange that free men were deprived of a procedural protection which slaves still enjoyed. This seeming aberration is explained by the fact that under the same act that abolished benefit of clergy for free persons, it was declared that “[t]he death penalty for all crimes, except murder in the first degree committed by free persons is abolished.”<sup>229</sup> Since the death penalty would apply only to first-degree murder, and since this crime was not a clergyable offense, benefit of clergy was no longer needed for free persons. Slaves, however, continued to be subject to the death penalty for numerous offenses.<sup>230</sup>

### I. Assistance of Counsel

The final protection for slaves in the Virginia justice system was the assistance of counsel. In 1705 the Virginia legislature passed a law requiring slaveowners to appear in their slaves' defense “as to matters of fact” in capital cases.<sup>231</sup> According to Scott, “[t]his was somewhat of a novelty, but the reason was obvious: Slaves were too valuable to be hanged without due deliberation.”<sup>232</sup> Although the government compensated masters when their slaves were condemned to die, in some in-

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225. GUILD, *supra* note 2, at 157 (citing Act of 1765, ch. XXVI, § 1, in 8 HENING'S STATUTES AT LARGE, *supra* note 42, at 136, 137-38).

226. SCHWARZ, *supra* note 25, at 21 (emphasis added).

227. Act of Dec. 15, 1796, ch. 2, § 13, in II THE STATUTES AT LARGE OF VIRGINIA, *supra* note 102, at 5, 8; see SCOTT, *supra* note 27, at 105.

228. Act of Mar. 14, 1848, ch. XI, § 22, 1847-48 Va. Acts 121, 124; Act of Dec. 15, 1796, ch. 2, § 13, in II THE STATUTES AT LARGE OF VIRGINIA, *supra* note 102, at 5, 8 (act “to amend the penal laws of this commonwealth”); see SCOTT, *supra* note 27, at 105.

229. GUILD, *supra* note 2, at 161 (citing Act of 1796, ch. 2, § 13, in II THE STATUTES AT LARGE OF VIRGINIA, *supra* note 102, at 5, 8).

230. See SCHWARZ, *supra* note 25, at 26 (noting that death penalty was applicable to slaves convicted of “non-clergyable” offenses). Even when benefit of clergy was abolished for slaves in 1848, slaves were still subject to the death penalty not just for first-degree murder but additional offenses as well. See GUILD, *supra* note 2, at 167-68 (citing Act of 1848, ch. XII, §§ 2-5, 1847-48 Va. Acts 125, 125 (providing that slave also shall receive death penalty for attempted rape of white woman, conspiracy to rebel, and assault with intent to kill white person)).

231. GUILD, *supra* note 2, at 152 (citing Act of 1705, ch. XI, in 3 HENING'S STATUTES AT LARGE, *supra* note 42, at 269-70); see SCOTT, *supra* note 27, at 46.

232. SCOTT, *supra* note 27, at 79.

stances the compensation was inadequate.<sup>233</sup> Many of the slaves possessed valuable skills and were not easily replaced. Hence, the master as property owner might have preferred the return of the slave rather than his execution. To this end, over time, slaveowners began hiring attorneys to represent their accused slaves.<sup>234</sup>

In 1792 slaves were given the right to court-appointed legal counsel, with a fee of five dollars to be paid by the master.<sup>235</sup> Moreover, a 1795 statute provided that "a person conceiving himself to be detained as a slave illegally may make complaint in court [and] the petitioner shall be assigned counsel who without fee shall prosecute the suit."<sup>236</sup>

At first glance, one could conclude that the provision of counsel to slaves was based on the Virginia legislature's humanitarian concern that due process be afforded blacks. Unfortunately, the preface to the statute indicates that the legislature had less honorable motives. In the preface, the legislators expressed concern about the "voluntary association of individuals in other states of this union" who were claiming that certain blacks were free, and thus by their acts were "depriving masters of their property and slaves."<sup>237</sup> The voluntary associations they despised were groups of abolitionists. After their preamble, noting these primary concerns, the legislators then stated

to the end that an easy mode may be pointed out by law for the recovery of freedom when it is illegally denied, it is enacted that a person conceiving himself to be detained as a slave illegally may make complaint in court; the petitioner shall be assigned counsel who without fee shall prosecute the suit.<sup>238</sup>

Other nonhumanitarian aspects of the 1795 statute were intended to constrain advocacy for the rights of blacks. The statute provided, for exam-

233. *Id.* at 46; *see also* Phillips, *supra* note 193, at 336 ("[R]ates of compensation to the masters . . . varied widely.").

234. As Schwarz has observed, "This development was natural in a society whose property owners increasingly relied on professionals to protect all their property in courts." SCHWARZ, *supra* note 25, at 23-24.

235. GUILD, *supra* note 2, at 160 (citing Act of 1792, ch. 41, in I THE STATUTES AT LARGE OF VIRGINIA, *supra* note 102, at 122, 122-30). The law subsequently was amended to reimburse appointed counsel at a fee of \$25. Act of Mar. 14, 1848, ch. XXVI, § 3, 1847-48 Va. Acts 162, 162 (act "to reduce into one the several acts concerning crimes and punishments, and proceedings in criminal cases").

236. GUILD, *supra* note 2, at 67 (citing Act of 1795, ch. 11 (misnumbered II), in I THE STATUTES AT LARGE OF VIRGINIA, *supra* note 102, at 363, 363-65); *see also id.* at 198 (citing Act of 1818, ch. LI, § 5, 1817-18 Va. Acts 71, 71-72 ("Slaves who conceive themselves illegally held may make complaint; the petitioner shall be assigned counsel.")).

237. *Id.* (citing Act of 1795, ch. 11 (misnumbered II), in I THE STATUTES AT LARGE OF VIRGINIA, *supra* note 102, at 363, 363-65).

238. *Id.* (citing Act of 1795, ch. 11 (misnumbered II), in I THE STATUTES AT LARGE OF VIRGINIA, *supra* note 102, at 363, 363-65).

ple, that if any person aided a slave in prosecuting a freedom suit and if the claim were not "established," the aider would forfeit \$100 to the owners of the slave.<sup>239</sup>

Interestingly, whites had no corresponding right to court-appointed counsel in criminal cases. Whites were allowed, in nonfelony cases, to *retain* counsel, although they rarely took advantage of this right.<sup>240</sup> In capital trials, however, whites were not even entitled to hire counsel unless some difficult point of law was at issue.<sup>241</sup> Over time, this rule changed, but it was not until after 1830 in England that the full right to retain counsel in felony cases was recognized for whites.<sup>242</sup> As Scott has noted, "[t]he first explicit reference to the right of persons accused of felony to have counsel is '*declared*: That in all trials of capital offences, the prisoner, upon his petition to the court, shall be allowed counsel.'" <sup>243</sup>

As with the right to benefit of clergy,<sup>244</sup> it might seem curious that slaves had the right to court-appointed criminal counsel yet whites did not. One explanation may be that by the rule of law slaves had no property of their own and thus had no money with which to hire legal counsel. This theory is consistent with an 1818 statute, which provided that indigent persons also were entitled to assigned counsel in prosecuting civil suits "against any person within the Commonwealth."<sup>245</sup>

It also has been suggested that slaves were provided with counsel because they were wholly ignorant of their rights under the criminal law. Abolitionist Charles Goodell, for example, believed that because slaves could not read they had no way of knowing what conduct was proscribed.<sup>246</sup> But other scholars, such as Philip Schwarz, assert that slaves were well aware of the punishments that were meted out to fellow slaves;<sup>247</sup> serious crimes were rare enough that everyone in the community knew when a slave had been executed. The more likely explanation as to why slaves were provided counsel is that they "were too valuable to

239. *Id.* at 68 (citing Act of 1795, ch. 11 (misnumbered II), in I THE STATUTES AT LARGE OF VIRGINIA, *supra* note 102, at 363, 363-65).

240. Act of Aug. 1734, ch. VII, § III, in 4 HENING'S STATUTES AT LARGE, *supra* note 42, at 403, 404 (act "for better regulating the trial of criminals, for Capitall offences").

241. SCOTT, *supra* note 27, at 77.

242. *Id.*

243. *Id.* at 79 (quoting Act of Aug. 1784, ch. VII, § III, in 4 HENING'S STATUTES AT LARGE, *supra* note 42, at 403, 404).

244. See *supra* notes 217-30 and accompanying text.

245. GUILD, *supra* note 2, at 198 (citing Act of 1818, ch. LI, § 5, 1817-18 Va. Acts 71, 71-72).

246. See Flanigan, *supra* note 59, at 20.

247. SCHWARZ, *supra* note 25, at 45-46.

be hanged without due deliberation."<sup>248</sup>

Another reason for providing counsel to slaves may have been that, unless required by law to hire counsel for their accused slaves, some slaveowners preferred to receive reimbursement from the government for their executed slaves.<sup>249</sup> The legislature was most likely aware of the harshness of the slave code, the opportunity for inept judges to commit grave error, the desire of slaveowners to be rid of troublesome slaves and still be reimbursed, and the potentially heavy financial burden to the state. The legislature's motivation was probably more economic than humanitarian, believing that in the long run Virginia needed some safeguard to prevent the slaughter of healthy and valuable slaves and to avoid reimbursing the owners.

In some situations, the slave had no one but his lawyer to protect him.<sup>250</sup> In one notorious case the prosecutor of a slave told the governor that "there is not a human being in this county (his counsel excepted) who is sufficiently interested in his fate to make the least exertion on his behalf."<sup>251</sup> Although some have argued that these lawyers were in league with the slaveholders,<sup>252</sup> Flanigan takes another view:

Cases of incompetence and neglect must have occurred, but it was remarkable how many court-appointed attorneys in Virginia took an interest in the slave's fate after conviction and petitioned the governor for commutation of death sentences to sale and transportation. On occasion these men risked the good will of white citizens. One lawyer wrote that the people of the county "admonish me to be silent . . ." Another [lawyer] was told "that should I defend the prisoner, it would conflict with my future prospects at the bar."<sup>253</sup>

In light of the fact that slaves received some limited procedural pro-

248. SCOTT, *supra* note 27, at 78-79.

249. For a discussion of the right of masters to receive reimbursement for their executed slaves, see *supra* notes 201-02, *infra* notes 543-45 and accompanying text.

250. Young lawyers, such as future-president John Tyler, used slave trials to hone their legal skills. Tyler, who at that time was also a congressman, defended a slave, Stephen, who in 1819 was on trial for the alleged assault and robbery of a free black man. SCHWARZ, *supra* note 25, at 243. Tyler was unsuccessful, however, and Stephen was convicted and executed on Christmas Eve, 1819; this was the only case in the first three decades of the nineteenth century when a slave was hung for the robbery of a non-white. See *id.* at 235, 243.

251. Flanigan, *supra* note 59, at 119 & n.94 (quoting Va. Archives, *supra* note 134, Letter from Matthew Dunbar to James N. Fry, Feb. 3, 1834).

252. *Id.* at 118 (discussing assertion by Frederick Douglass).

253. *Id.* at 119-20 & n.95 (citing Va. Archives, *supra* note 134, Letter from M.M. Patton to Governor, June 12, 1828 (June 1-10 folder); *id.*, Letter from Richard K. Craler to Governor, April 2, 1827; *id.*, Letter from Everard Hall to Governor & Executive Council, Sept. 30, 1829; *id.*, Letter from Wilson Flanoy to Governor, April 2, 1839; *id.*, Letter from J.N. Baker to Governor & Executive Council, Oct. 5, 1828).

tections such as benefit of clergy and appointment of counsel, arguably slaves in colonial and antebellum Virginia fared relatively well in the criminal justice system. But the truth remains that slaves and free blacks were in a far worse position than whites. Whites, for example, never lost their right to a jury trial or to an appeal.<sup>254</sup>

Without the limited safeguards of executive clemency, benefit of clergy, and appointed counsel, the consequences for blacks would have been devastating. While in some instances individual judges, governors, and citizens may have shown some measure of compassion towards the slave, these gestures, when they occurred, were probably in large part a response to the unnecessary severity of the criminal slave code. The few procedural benefits theoretically belonging to slaves were motivated largely, if not entirely, by a desire to protect the economic interests of the master and the state rather than the humane interests of the slave.<sup>255</sup>

An examination of the separate system established for the prosecution of slaves indicates that Virginia's emphasis was on speedy justice—but not in any benevolent sense, like the modern right of criminal defendants to a speedy trial.<sup>256</sup> Rather, the antebellum brand of speedy and efficient justice was an attempt to punish slaves as quickly and summarily as possible while still assuring that the master's property interests were protected. The elaborate system of justice provided for free whites had no place in the life of an accused slave. In some instances, individual actors in the criminal justice system were willing to spare a slave's life, though not necessarily his limbs, ears, or genitals. Occasional gestures of mercy, however, were relatively insignificant when measured against the ruthless and merciless legal system that was established for trying slaves. As Flanigan has stated, "no other slaveholding states adopted procedural systems that consistently weighed so heavily against accused slaves as those of Virginia and South Carolina."<sup>257</sup> These rare reprieves were deceptive, presenting a false veneer of justice and mercy.

The next section explores how the Virginian slaves' inability to appeal, to be sworn as a witness (even in one's own defense), or to be tried by a jury of one's peers ("the birthright of every Englishman") was coupled with the harshest substantive criminal slave code known to the

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254. For discussion of the right to jury trial, see *supra* notes 41-48 and accompanying text; for discussion of slave appeals at oyer and terminer courts, see *supra* notes 128-86 and accompanying text.

255. As Schwarz has noted, "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." SCHWARZ, *supra* note 25, at 14.

256. See *supra* note 46.

257. Flanigan, *supra* note 59, at 100.



American slave states. This double-edged sword ensured that blacks in colonial and antebellum Virginia would remain completely powerless and at the mercy of the white slaveholding society.

### III. THE SUBSTANTIVE CRIMINAL CODE OF VIRGINIA

Any government that imposes a tyrannical system against many of its people always must live with the persistent fear that the victims of oppression may someday revolt, break their chains, and, if necessary, even slay their oppressors. Shakespeare understood the dynamics of victims' response to villainy. As he wrote in *The Merchant of Venice*:

He hath disgrac'd me . . . scorn'd my nation . . . cool'd my friends, heated mine enemies; and what's his reason? . . . If you prick us, do we not bleed? If you tickle us, do we not laugh? If you poison us, do we not die? And if you wrong us, shall we not revenge? If we are like you in the rest, we will resemble you in that. . . . The villainy you teach me, I will execute, and it shall go hard but I will better the instruction.<sup>258</sup>

Virginia slaveholders always feared that the villainy they imposed on their slaves might someday be replicated with the fulfillment of Shakespeare's prediction that "[t]he villainy that you teach me I will execute, and it shall go hard, but I shall better the instruction." The following section discusses how the substantive criminal law imposed villainy on blacks and how it was used to preserve and perpetuate slavery.

#### A. *The Preservation of Slavery by the Abolition of Freedom of Speech and Press*

The degree to which the Virginia slaveowning establishment sought to preserve the "peculiar institution" through the criminal law is apparent in an 1836 statute, entitled "An Act to suppress the circulation of incendiary publications, and for other purposes."<sup>259</sup> In their preamble the legislators noted that "attempts have been recently made by certain abolition or anti-slavery societies and *evil disposed* persons, being and residing in some of the non-slaveholding states, to interfere with the relations existing between master and slave in this state."<sup>260</sup> They viewed these antislavery efforts as attempts "to excite in our coloured population a spirit of insubordination, rebellion and insurrection, by distributing among them, through the agency of the United States mail and other

258. WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 3, sc. 1, ll.51-69 (David Bevington ed., Scott, Foresman & Co. 1967).

259. Act of Mar. 23, 1836, ch. 66, §§ 1-4, 1835-36 Va. Acts 44, 44-45.

260. *Id.* pmb., at 44 (emphasis added).

means, certain incendiary books, pamphlets, or other writings of an inflammatory and mischievous character and tendency."<sup>261</sup> To thwart such dangers, they decreed:

That any member or agent of an abolition or anti-slavery society, who shall come into this state, and shall here maintain, *by speaking or writing*, that the owners of slaves have no property in the same, or advocate or advise the abolition of slavery, shall be deemed guilty of a high misdemeanor.<sup>262</sup>

The 1836 act further provided that anyone inciting "persons of colour" to rebel or "denying the right of masters to property in their slaves" shall, if a slave or "other person of colour," be punished by stripes and sold and transported beyond the United States, and if a free person, be deemed guilty of a felony and imprisoned for two to five years.<sup>263</sup> As in Hitler's Third Reich, any books, pamphlets, or other writings advocating the prohibited activity were to be burned.<sup>264</sup>

The legislature's concern about suppressing slave revolts and precluding even nonviolent critiques of the slave system produced a series of ironies. As Henry Steele Commager noted, the Virginia Bill of Rights was the "most famous of the Declarations of Rights of the original state constitutions"; it was "adopted with slight changes and two additions, by the Virginia Convention of 1776. It exerted a wide influence not only in this country but in France."<sup>265</sup> Paradoxically, however, when it came to issues of slavery, the Old Dominion prohibited the freedom of press that Virginians had long praised and insisted was "one of the great bulwarks of liberty [that] can never be restrained but by despotick governments."<sup>266</sup>

When Patrick Henry rose before a Richmond congregation on March 23, 1775 to plead so eloquently his cause on behalf of white property owners opposed to taxation without representation, he declared, "Is

261. *Id.*

262. *Id.* § 1, at 44.

263. *Id.* § 2, at 44.

264. *Id.* § 3, at 44-45; see *Commonwealth v. Barrett*, 36 Va. (9 Leigh) 665, 665-66 (1839) (holding that to sustain prosecution under § 1 of this act, the accused must be a member or agent of an abolition or antislavery society).

265. DOCUMENTS OF AMERICAN HISTORY 103 (Henry S. Commager ed., 8th ed. 1968). The article on religious freedom in the Virginia Bill of Rights was drafted by Patrick Henry. 1 WILLIAM W. HENRY, PATRICK HENRY: LIFE, CORRESPONDENCE AND SPEECHES 430-35 (New York, Charles Scribner's Sons 1891). For discussion of the Virginia Bill of Rights, see B. FAY, REVOLUTIONARY SPIRIT IN FRANCE AND AMERICA 263 (1927); HUGH B. GRIGSBY, THE VIRGINIA CONVENTION OF 1776, at 18-20 (photo. reprint 1969) (1855); KATE M. ROWLAND, THE LIFE OF GEORGE MASON (New York, G.P. Putnam's Sons 1892).

266. VA. BILL OF RIGHTS cl. 12 (1776), reprinted in DOCUMENTS OF AMERICAN HISTORY, *supra* note 265, at 104.

life so dear or peace so sweet as to be purchased at the price of chains and slavery? Forbid it, almighty God. I know not what others may wish, but as for me, give me liberty or give me death."<sup>267</sup> Yet in Patrick Henry's Virginia, advocating any semblance of liberty for blacks or the ultimate abolition of slavery was a crime for which one could be fined and sent to prison.<sup>268</sup>

Virginia preened itself on its special contribution to assuring free speech and free press for the nation. The First Amendment, which Virginians drafted, prohibited Congress from making any "law . . . abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for redress of grievances."<sup>269</sup> Yet during this same era Virginia's lawmakers passed statutes that were the antithesis of guarantees of freedom of speech and of the press. On the issue of abolition, Virginia legislators would deny totally all freedom of speech, freedom of the press, freedom to assemble, and freedom to petition the government for a redress of grievances.<sup>270</sup>

In 1850 the general court had an opportunity to construe the 1848 version of this statute, which punished "[a]ny free person who, by speaking on or writing, shall maintain that owners have not right of property in their slaves."<sup>271</sup> Offenders could be imprisoned for up to twelve months and fined up to \$500.<sup>272</sup> In *Bacon v. Commonwealth*<sup>273</sup> a minister named Jarvis C. Bacon, "a free person," was convicted under this statute. The evidence showed that he made the following statement to his congregation: "If I was to go to my neighbor's crib and steal his corn, you would call me a thief, but that it was worse to take a human being, and keep him all his life, and give him nothing for his labour, except once in a while a whipping or a few stripes."<sup>274</sup> Bacon's counsel, in moving for a new trial, argued that the minister had not denied any master's legal right to property in his slave but merely counseled that it was a sin, an action which was the minister's right under the Virginia

267. 1 HENRY, *supra* note 265, at 266.

268. See Act of Oct. 1785, ch. LXXVII, § IV, in 12 HENING'S STATUTES AT LARGE, *supra* note 42, at 182. Note that the Virginia statute did not merely prohibit speech or articles that constituted an immediate threat, or a "clear and present danger" to the overthrow of the government.

269. U.S. CONST. amend. I.

270. See Act of 1795, ch. 11 (misnumbered II), in I THE STATUTES AT LARGE OF VIRGINIA, *supra* note 102, at 363, 363-65.

271. Act of Mar. 14, 1848, ch. X, § 24, 1847-48 Va. Acts 113, 117 (act "to reduce into one the several acts concerning crimes and punishments, and proceedings in criminal cases").

272. *Id.*

273. 48 Va. (7 Gratt.) 602, 602 (1850).

274. *Id.* at 603.

Constitution's guarantee of free speech.<sup>275</sup>

The general court, reviewing the case, agreed that "[a]ny statute tending to restrain the exercise of the freedom of speech . . . should be strictly construed by the Courts."<sup>276</sup> The court held, therefore, that "[t]o dissuade a member of a Christian flock from merchandizing in slaves, or taking and keeping human beings in slavery, may be done by a pastor, without any denial of the right of owners to property in their slaves."<sup>277</sup> The general court held that Jarvis was entitled to a new trial because the evidence did not support conviction.<sup>278</sup>

It was most certainly to the defendant's benefit that he was a minister who had made his indirect but stirring attack upon slavery in the context of a religious sermon. The deference that the court placed on religious speech was evident in its opinion. In discussing the duty of the courts to interpret narrowly any statute tending to restrain free speech, the court added: "This should more especially be the case when the exercise of that freedom has for its object matters of religious doctrine and discipline."<sup>279</sup>

In this unique and special context, the court declined to uphold the conviction of a minister for preaching freedom from sin to his congregation.<sup>280</sup> In another context, however, the accused might not have been so fortunate. Although a preacher might escape conviction, an abolitionist who dared to speak out against slavery as morally wrong was probably more vulnerable to prosecution and conviction. Indeed, the court did not hold that the statute, either on its face or as applied to the minister's conduct, was violative of the Constitution; it merely held that the preacher's conduct did not fall within the prohibitions of the statute.<sup>281</sup>

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275. *Id.* at 604-06.

276. *Id.* at 607.

277. *Id.* at 608.

278. *Id.* at 612.

279. *Id.* at 607.

280. While there is no mention of Reverend Bacon's color—he is referred to as a "free person"—it seems highly unlikely that he was black. *See id.* at 602. There had been a scattering of black preachers who commanded mixed-race congregations during the Second Great Awakening of the late eighteenth century, but by the 1820s this practice had ended. At the same time, black preachers whose congregations were black were placed under the close supervision of white pastors. ALBERT RABOTEAU, *SLAVE RELIGION: THE "INVISIBLE INSTITUTION" IN THE ANTEBELLUM SOUTH* 128-40 (1978). Furthermore, in the wake of the Gabriel and Nat Turner rebellions, white Virginians were particularly fearful of the use of Christian religion as an incitement to slave resistance. *See* SCHWARZ, *supra* note 25, at 271-75. In this context, and since Judge Lomax's opinion makes clear that some of the congregants were themselves slaveholders, there can be little doubt that the "free person" whose freedom of speech is debated in such eloquence and detail by the court was white.

281. *Bacon*, 48 Va. (7 Gatt.) at 602.

B. *Exclusion of Abolitionists from Jury Trials and Prohibitions on Teaching Blacks How to Read and Write*

In addition to prohibiting speech critical of slavery, Virginia adopted a series of laws which provided that any active assistance of slaves seeking freedom would be severely punished. One law, for example, made it a capital offense for free persons to conspire with slaves to rebel.<sup>282</sup> Anyone "harboring or entertaining" a slave without the master's consent was subject to a fine. (Free blacks not able to pay were subject to thirty-nine lashes.)<sup>283</sup> Numerous laws of this sort ensured that any efforts to help slaves secure their freedom were quickly squelched.<sup>284</sup>

Even something as seemingly innocuous as reading and writing was banned. Teaching blacks to read or write was strictly prohibited as a criminal offense.<sup>285</sup> In the early colonial period, however, Virginians felt little concern about the potential danger to white society of educating blacks, slave or free.<sup>286</sup> Indeed, in the immediate post-revolutionary period, benevolent and religious workers were allowed access to slaves and free blacks to assist in their education.<sup>287</sup> Then, in the nineteenth century, a series of laws was passed that banned the assembly of free blacks for the purpose of teaching them reading and writing<sup>288</sup> and that prohibited free blacks from attending supposedly free public schools.<sup>289</sup> Slaves were not allowed to attend schools, either. The willingness of Virginia lawmakers to uphold these restrictions on black access to education was made clear in the 1853 prosecution of Margaret Douglass for opening a school for free black children.<sup>290</sup> Douglass, who was not an abolitionist, was jailed for one month.<sup>291</sup>

It is not surprising that a society so paranoid about abolitionists speaking their mind would be equally fearful if opponents of slavery were on a jury. Thus, in 1798, the following statute was passed: "In all cases, wherein the property of a person held as a slave demanding freedom,

282. GUILD, *supra* note 2, at 68 (citing Act of 1797, ch. 4, §§ 1-2, in II THE STATUTES AT LARGE OF VIRGINIA, *supra* note 102, at 77, 77-79).

283. *Id.*

284. *Id.* at 107-08 (citing Act of 1832, ch. XXII, § 7, 1831-32 Va. Acts 20, 21-22).

285. Act of Mar. 15, 1848, ch. X, § 39, 1847-48 Va. Acts 113, 120 (act "to reduce into one the several acts concerning crimes and punishments, and proceedings in criminal cases").

286. CARTER WOODSON, THE EDUCATION OF THE NEGRO PRIOR TO 1861, at 2-9 (1919).

287. *Id.*

288. Act of Apr. 7, 1831, ch. XXXIX, §§ 4-5, 1830-31 Va. Acts 107, 107 (act "to amend the act concerning slaves, free negroes, and mulattoes").

289. Act of Feb. 19, 1845, ch. 26, § 10, 1844-45 Va. Acts 19, 32 (act "to establish a system of free schools in the county of Albemarle").

290. PHILIP S. FONER & JOSEPHINE F. PACHECO, THREE WHO DARED 57 (1984).

291. *Id.* at 69.

shall come before a court for trial, no person who shall be proved to be a member of any society instituted for the purpose of emancipating negroes from the possession of their masters, shall be admitted to serve as a juror in the trial of said cause."<sup>292</sup> The desire to maintain the powerlessness of Virginia's slaves thus encroached upon one of the most important privileges of a citizen—to serve on a jury and decide the fate of fellow citizens or residents. When the drafters of the Sixth Amendment wrote that the accused in all criminal prosecutions was entitled to "an impartial jury of the state and district wherein the crime shall have been committed," presumably they did not envision a partisan jury stacked solely in behalf of the slaveholders.

### C. *White Violence, Black Victims, and the Disparity in the Punishment of Blacks and Whites*

#### 1. General Disparities

Today extensive debate rages over the question whether blacks receive excessively disproportionate sentences for the same crime as compared to whites.<sup>293</sup> The argument is generally predicated, however, on an extensive statistical analysis of actual sentencing patterns involving statutes that appear to be race neutral and do not use explicit racial language to sanction disparities in sentencing.<sup>294</sup> During the colonial and

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292. Act of Jan. 25, 1798, ch. 4, § 2, in II THE STATUTES AT LARGE OF VIRGINIA, *supra* note 102, at 77, 77). One might argue that precluding persons who supported the abolition of slavery was similar to the equally restrictive practices sanctioned by the current United States Supreme Court, pursuant to which prospective jurors with conscientious scruples against the death penalty are excluded as a matter of right. See *Witherspoon v. Illinois*, 391 U.S. 510, 510-32 (1968) (permitting challenges in capital case of all prospective jurors biased against capital punishment). In both instances, one party ends up with a jury irrevocably stacked against his best interests. See generally Joseph A. Colussi, *The Unconstitutionality of Death Qualifying a Jury Prior to the Determination of Guilt: The Fair-Cross-Section Requirement in Capital Cases*, 15 CREIGHTON L. REV. 595, 595-617 (1982) (examining the right to be tried by a jury drawn from a cross-section of society); Stanton D. Krauss, *The Witherspoon Doctrine at Witt's End: Death-Qualification Reexamined*, 24 AM. CRIM. L. REV. 1, 68-92 (1986) (reviewing *Witherspoon* doctrine in light of *Wainwright v. Witt*, 469 U.S. 412 (1985)); Walter E. Oberer, *Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?*, 39 TEX. L. REV. 545, 557-67 (1961) (arguing that death-qualified jury denies defendant due process regarding guilt/innocence determination); Welsh S. White, *Death-Qualified Juries: The "Prosecution-Proneness" Argument Reexamined*, 41 U. PITT. L. REV. 353, 385-405 (1980) (discussing various interests at play in death-qualifying a jury).

293. See, e.g., U.S. GEN. ACCOUNTING OFFICE, DEATH PENALTY SENTENCING INDICATES PATTERN OF RACIAL DISPARITIES (1990) [hereinafter DEATH PENALTY SENTENCING] (collecting and analyzing numerous studies on racial disparity in the imposition of capital punishment).

294. Dissenting from the United States Supreme Court's conclusion in *McCleskey v. Kemp*, 481 U.S. 279 (1987), that statistical evidence showing that the death penalty in Georgia was disproportionately imposed on black defendants who had been convicted of killing whites

antebellum periods, one did not have to study sentencing patterns of trial judges to ascertain whether judges were imposing far more severe sentences on blacks than on whites for the same crime; most often, the legislation blatantly required more severe sentences for blacks.

Stroud vividly highlighted the racial disparity in criminal sentencing in antebellum Virginia.<sup>295</sup> There were sixty-eight crimes for which slaves might receive the death sentence as compared to only one, first-degree murder, for which whites could be put to death.<sup>296</sup> One Virginia statute provided that a slave would be punished with death for any offense that, if committed by a free person, would be punishable by imprisonment for not less than three years.<sup>297</sup> Under an 1836 act free persons convicted of disturbing or obstructing a railroad were imprisoned for two to five years, while slaves convicted of this offense were sentenced to death without benefit of clergy.<sup>298</sup>

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could not be used to prove a violation of a particular defendant's Eighth or Fourteenth Amendment rights, Justice Brennan wrote:

At some point in this case, Warren McCleskey doubtless asked his lawyer whether a jury was likely to sentence him to die. A candid reply to this question would have been disturbing. First, counsel would have to tell McCleskey that few of the details of the crime or of McCleskey's past criminal conduct were more important than the fact that this victim was white. Furthermore, counsel would feel bound to tell McCleskey that defendants charged with killing white victims in Georgia are 4.3 times as likely to be sentenced to death as defendants charged with killing blacks. In addition, frankness would compel the disclosure that it was more likely than not the race of McCleskey's victim would determine whether he received a death sentence: 6 of every 11 defendants convicted of killing a white person would not have received the death penalty if their victims had been black, while, among defendants with aggravating and mitigating factors comparable to McCleskey's, 20 of every 34 would not have been sentenced to die if their victims had been black. Finally, the assessment would not be complete without the information that cases involving black defendants and white victims are more likely to result in a death sentence than cases featuring any other racial combination of defendant and victim. The story could be told in a variety of ways, but McCleskey could not fail to grasp its essential narrative line: there was a significant chance that race would play a prominent role in determining if he lived or died.

*Id.* at 321 (Brennan, J., dissenting) (citations omitted). A number of studies indicate that racial discrimination in the imposition of the death penalty is not limited to the state of Georgia. See DEATH PENALTY SENTENCING, *supra* note 293, at 1-2, 5-7 (government report evaluating 23 studies of capital sentencing patterns throughout the nation).

295. STROUD, *supra* note 17, at 75-78.

296. *Id.* at 77-80.

297. GUILD, *supra* note 2, at 167 (citing Act of 1848, ch. XII, § 1, 1847-48 Va. Acts 125, 125).

298. *Id.* at 164 (citing Act of 1836, ch. 72, § 2, 1835-36 Va. Acts 48, 48). The discrepancies in the substantive criminal law were abolished by Chapter 17 of the Act of 1866: "All laws in respect to crimes and punishments, applicable to white persons, shall apply in like manner to colored persons and Indians unless otherwise specially provided. All acts and parts of acts imposing on Negroes the penalty of stripes, where the same is not imposed on white persons,

Such disparities in punishment were not predicated on differentiations as to whether one's status was free or slave. Even free blacks received disparate treatment as compared to whites; the statutes provided for the sale of free blacks into slavery and their banishment from the United States as punishment for criminal offenses.<sup>299</sup> Free blacks and mulattoes were the only groups that could be enslaved as a form of punishment.<sup>300</sup> By an act of 1823 the Virginia legislature provided:

Henceforth, when any free Negro shall be convicted of an offense, now by law punished by imprisonment for more than two years, such person instead of confinement shall be punished by stripes at the discretion of the jury, and shall moreover be adjudged to be sold as a slave and banished beyond the limits of the United States.<sup>301</sup>

Five years later, the legislature amended the law to provide that free blacks subject to crimes punishable by stripes, sale, and transportation were thereafter, for the first offense, to be imprisoned for five to eighteen years and, for succeeding offenses, to life in prison.<sup>302</sup>

Over the following years, the statutes fluctuated with respect to whether free blacks were to be sold into slavery, executed, or imprisoned. Although the United States Supreme Court has long declared that the right to travel is a fundamental privilege and immunity assured by the Constitution, in 1831 Virginia declared that free blacks who came to Virginia or free blacks and mulattoes who remained in the Commonwealth "contrary to law" were to be sold into slavery.<sup>303</sup> In 1860 there was a partial re-enactment of the 1823 statute allowing enslavement as a form of punishment.<sup>304</sup> Such laws demonstrate the precarious status of free blacks in antebellum Virginia—they walked a tattered tightrope between slavery and freedom, their "freedom" more an illusion than a reality.

This illusion of "freedom" was dealt a fatal blow in the 1824 deci-

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[are repealed]." *Id.* at 170 (citing Act of Feb. 27, 1866, ch. 17, §§ 2-3, 1865-66 Va. Acts 84, 84-85).

299. See Act of 1801, ch. 43, in II THE STATUTES AT LARGE OF VIRGINIA, *supra* note 102, at 344, 344-45; Act of Dec. 1800, ch. 70, § 4, in II THE STATUTES AT LARGE OF VIRGINIA, *supra* note 102, at 300, 300-01.

300. For a discussion of the special treatment of Indians, see HIGGINBOTHAM, IN THE MATTER OF COLOR, *supra* note 26, at 31.

301. Act of Feb. 21, 1823, ch. 32, § 3, 1822-23 Va. Acts 35, 35-36 (act "farther to amend the penal laws of this commonwealth"), cited in GUILD, *supra* note 2, at 101.

302. GUILD, *supra* note 2, at 103 (citing Act of 1828, ch. 37, §§ 1-2, 1827 Va. Acts 29, 29).

303. *Id.* at 106 (citing Act of 1831, ch. XXXIX, §§ 4-5, 1830-31 Va. Acts 107, 107).

304. Act of Mar. 29, 1860, ch. 54, § 1, 1859-60 Va. Acts 163, 163 (act "authorizing the Sale of Free Negroes into Slavery who are sentenced to receive certain punishments and imprisonment").



sion of the general court in *Aldridge v. Commonwealth*.<sup>305</sup> Aldridge, a free black man convicted of grand larceny, was sentenced under an 1823 statute to receive thirty-nine lashes and to be sold as a slave and transported and banished beyond the limits of the United States.<sup>306</sup> Aldridge challenged the validity of the 1823 act under the Virginia Constitution and Bill of Rights, asserting that his sentence constituted cruel and unusual punishment.<sup>307</sup>

The general court, in an opinion by Judge Dade that is eerily similar to Chief Justice Taney's later opinion in the infamous *Dred Scott* case,<sup>308</sup> held that the Virginia Bill of Rights did not apply to blacks and mulattoes, whether free or enslaved:

Can it be doubted, that [the Bill of Rights] not only was not intended to apply to our slave population, but that the free blacks and mulattoes were also not comprehended in it? The leading and most prominent feature in that paper, is the equality of civil rights and liberty. And yet, nobody has ever questioned the power of the Legislature, to deny to free blacks and mulattoes, one of the first privileges of a citizen; that of voting at elections, although they might in every particular, except color, be in precisely the same condition as those qualified to vote. The numerous restrictions imposed on this class of people in our Statute Book, many of which are inconsistent with the letter and spirit of the Constitution, both of this State and of the United States, as respects the free whites, demonstrate, that, here, those instruments have not been considered to extend equally to both classes of our population. We will only instance the restriction upon the migration of free blacks into this State, and upon their right to bear arms.<sup>309</sup>

The court concluded that the ninth section of the Virginia Bill of Rights, which prohibited cruel and unusual punishment, had no bearing on the enslavement of a free black, and affirmed Aldridge's conviction.<sup>310</sup>

## 2. Murder, Manslaughter, and Brutality

Scholars have noted the intensely harsh, and often wantonly violent, atmosphere of colonial Virginia.<sup>311</sup> Thomas Jefferson spoke eloquently,

305. 4 Va. (2 Va. Cas.) 447 (1824).

306. *Id.* at 448-49.

307. *Id.* at 447.

308. *See id.* at 447-48; *supra* note 4.

309. *Aldridge*, 4 Va. (2 Va. Cas.) at 449.

310. *Id.*

311. T.H. BREEN & STEPHEN INNES, *MYNE OWNE GROUND: RACE AND FREEDOM ON VIRGINIA'S EASTERN SHORE, 1640-1676*, at 105-06 (1980).

and accurately, of the “perpetual exercise of the most boisterous passions, the most unremitting despotism on the one part [the masters], and degrading submissions on the other [the slaves]” that characterized slave society in revolutionary Virginia.<sup>312</sup> The extent of murder and manslaughter may never be known fully because the killing of slaves by whites rarely reached the courts, particularly in the colonial era.<sup>313</sup> Similarly, murders of whites by slaves may often have been dealt with at the level of plantation justice.<sup>314</sup> Nevertheless, those cases that did reach the courts reflected the deep racial disparity of a criminal justice system in which the law was, for blacks, an enemy<sup>315</sup> before which they remained powerless.

Within the Virginia criminal justice system, courts confronted several decisive variables: Was the perpetrator white or black? If white, was the perpetrator an owner, a hirer, or a stranger? If black, was the perpetrator a slave or a free black? Was the victim white or black? If white, was the victim an owner or hirer? Was the victim a white indentured servant? If black, was the victim the perpetrator’s slave or a hired slave or a free black?

In the following sections, we compare the consequences of black-on-white crime with white-on-black crime by juxtaposing the offenses of murder, manslaughter, assault, and rape according to race. In other words, we contrast the killing of blacks by whites with the killing of whites by blacks; assault by whites against blacks versus assault by blacks against whites; and finally, the rape of black women by whites versus the rape of white women by blacks. We believe organizing the discussion in this manner starkly and clearly reveals the drastic racial disparities in Virginia’s substantive criminal code. We begin, however, by comparing the restraints on the master in his treatment of indentured servants with the total lack of restraint on the master’s treatment of slaves.

#### a. Legal Differentiation Between Cruelty to a Servant and Killing a Slave

An act of 1661-62 prohibited cruelty by masters upon their servants.<sup>316</sup> At that early date numerous white indentured servants worked

312. JEFFERSON, *supra* note 44, at 155-56.

313. SCHWARZ, *supra* note 25, at 79-80, 137-38, 287.

314. *Id.* at 79, 137-49.

315. See GOODELL, *supra* note 1, at 309-10.

316. The statute provided as follows:

*Cruelty of masters prohibited.*

WHEREAS the barbarous usage of some servants by cruell masters bring soe much scandall and infamy to the country in generall, that people who would willingly ad-

in Virginia.<sup>317</sup> Because of the presumption that whites were superior, it is doubtful whether the legislature would have passed such an anticruelty statute if all servants then had been black, mulatto, or Indian.

The disparity between the statute protecting servants and the one enacted eight years later to protect masters is dramatic. Whereas in 1661 a servant could file a complaint against his master for cruelty or poor treatment,<sup>318</sup> by 1669 a master was permitted to kill his slaves with impunity. The 1669 Act, entitled "An act about the casuall killing of slaves," provided:

[I]f any slave resist his master (or other by his masters order correcting him) and by the extremity of the correction should chance to die, that his death shall not be accompted ffelony, but the master (or that other person appointed by the master to punish him) be acquit from molestation, since it cannot be presumed that prepensed malice (which alone makes murther ffelony) should induce any man to destroy his owne estate.<sup>319</sup>

Thus, beginning in the early colonial period, an entirely different standard applied to masters in their treatment of white servants than in their treatment of black slaves. Morgan observed that

slaves could not be made to work for fear of losing liberty, so they had to be made to fear for their lives . . . [I]n order to get an equal or greater amount of work, it was necessary to beat slaves harder than servants, so hard in fact, that there was a much larger chance of killing them than had been the case with servants.<sup>320</sup>

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venture themselves hither, are through feare thereof diverted, and by that means the supplies of particuler men and the well seating his majesties country very much obstructed, *Be it therefore enacted* that every master shall provide for his servants competent dyett, clothing and lodging, and that he shall not exceed the bounds of moderation in correcting them beyond the meritt of their offences; and that it shalbe lawfull for any servant giving notice to their masters (haveing just cause of complaint against them) for harsh and bad usage, or else for want of dyett or convenient necessaries to repaire to the next commissioner to make his or their complaint, and if the said commissioner shall find by just proofes that the said servants cause of complaint is just the said commissioner is hereby required to give order for the warning of such master to the next county court where the matter in difference shalbe determined, and the servant have remedy for his grievances.

Act of Mar. 1662, Act CIII, in 2 HENING'S STATUTES AT LARGE, *supra* note 42, at 117-18.

317. GUILD, *supra* note 2, at 9; HIGGINBOTHAM, IN THE MATTER OF COLOR, *supra* note 26, at 34, 392-95.

318. It has been observed that "in the sixteen hundreds especially . . . white servants were cruelly treated, ran away, were hunted down and branded, even as Negroes." GUILD, *supra* note 2, at 10.

319. Act of Oct. 1669, Act I, in 2 HENING'S STATUTES AT LARGE, *supra* note 42, at 270.

320. EDMUND S. MORGAN, AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA 312 (1975).

Thus, the legislature assured masters that they would not be criminally punished for killing their slaves.

Although under the law a master was presumed not to have intended to murder his slave no matter how direct and severe the killing, the opposite presumption applied to a slave who killed a white person. In the latter scenario, intent to murder was presumed.<sup>321</sup> One historian has suggested that, while such a presumption may be attributed to the inherent racism of Virginia judges, the "presupposition of premeditation by slaves who killed whites was not necessarily inaccurate."<sup>322</sup> Schwarz based this claim on his belief that the punishments for slaves who killed whites were so severe, and the possibility of capital punishment so high, that few slaves "would fight a white person under these conditions without a strong motivation to resist that person's authority."<sup>323</sup>

Certainly a slave was just as capable of acting in the heat of passion as was a free person. Moreover, the notion of *presumed* intent to murder is contrary to the basic notion, taught to first-year law students, that under the doctrine of *mens rea*<sup>324</sup> such intent cannot be presumed but rather must be proved by the prosecution. The Virginia legislature thus succeeded in turning fundamental notions of criminal law on their head.

A 1705 statute required masters to supply wholesome food, clothing, and shelter to their servants and provided that masters "shall not, at any time, give immoderate correction; neither shall, at any time, whip a christian *white* servant naked, without an order from a justice of the peace."<sup>325</sup> Any unauthorized whipping of a naked Christian white servant resulted in imposition of a fine of forty shillings, to be paid to "the party injured."<sup>326</sup> Servants were permitted to file complaints against their masters for improper treatment.<sup>327</sup>

What was the comparable rule for slaves? Whereas masters were prohibited from giving "immoderate correction" to their white servants, a master who *killed* his slave in the course of correcting him was immune from punishment:

321. See SCHWARZ, *supra* note 25, at 117. Schwarz notes that when "a slave arsonist unknowingly killed a white person, that slave was by the slave code's definition guilty of murder in the first degree: almost any time a slave killed a white person, judges treated that act as homicide with malice aforethought." *Id.*

322. *Id.* at 234.

323. *Id.*

324. As defined in *United States v. Greenbaum*, 138 F.2d 437 (3d Cir. 1943), "*mens rea*" means "guilty knowledge and wrongful intent." *Id.* at 438.

325. Act of Oct. 1705, ch. XLIX, § VII, in 3 HENING'S STATUTES AT LARGE, *supra* note 42, at 447, 448 (act "concerning servants and slaves") (emphasis added).

326. *Id.*

327. *Id.* § VIII, in 3 HENING'S STATUTES AT LARGE, *supra* note 42, at 448-49.

And if any slave resist his master, or owner, or other person, by his or her order, correcting such slave, and shall happen to be killed in such correction, it shall not be accounted felony; but the master, owner, and every such other person so giving correction, shall be free and acquit of all punishment and accusation for the same, *as if such accident had never happened*.<sup>328</sup>

This statute also made it lawful for any person to kill and destroy runaway slaves "by such means as may be thought fit," and any runaway slave who was apprehended could be dismembered or otherwise punished in "any other way not touching his life."<sup>329</sup>

There were limits on the cruelty that the master could impose on the servant, but few, if any, constrained the master's cruelty to a slave. The only explanation for this disparity is that the legislature considered slaves subhuman and not entitled to similar moderation and care. Even horses and cows were protected from senseless cruelty.<sup>330</sup> The slave was unique—set apart for special treatment. Was it simply, as Morgan postulated, because of his special status as a lifetime servant?<sup>331</sup> Or was it that the color of his skin justified the rule that he could be killed with impunity, whereas a "christian white servant" could not even be whipped naked without an order from the justice of the peace?<sup>332</sup>

Any servant who resisted his master or became violent was required to render an additional year or years of service to the master.<sup>333</sup> Since the service of slaves could not be extended, they were whipped instead. The racial motivation of this statute is demonstrated by the additional clause stating that if any "negro, mulatto, or Indian, *bond or free*, shall at any time, lift his or her hand in opposition against any *christian*, not being negro, mulatto or Indian,"—that is, against any white Christian—that person was to receive thirty lashes on his or her bare back.<sup>334</sup>

328. *Id.* § XXXIV, in 3 HENING'S STATUTES AT LARGE, *supra* note 42, at 459 (emphasis added).

329. GUILD, *supra* note 2, at 50 (citing Act of 1705, ch. XLIX, §§ VII, VIII, XXXIV, in 3 HENING'S STATUTES AT LARGE, *supra* note 42, at 447, 448, 449-50, 459).

330. *See* Commonwealth v. Turner, 26 Va. (5 Rand.) 678, 689 (1827) (Brockenbrough, J., dissenting) (citing Commonwealth v. Leach, 1 Mass. 45, 46 (1804) and *Republica v. Teischer*, 1 Dall. 335, 338 (Pa. 1788)).

331. MORGAN, *supra* note 320, at 312.

332. *Id.* at 311-13.

333. Act of Oct. 1705, ch. XLIX, § XIV, in 3 HENING'S STATUTES AT LARGE, *supra* note 42, at 451 (act "concerning Servants and Slaves"); *see also* GUILD, *supra* note 2, at 39 (citing Act of 1659-60, Act XIII, in 1 HENING'S STATUTES AT LARGE, *supra* note 42, at 538 (act "that no Servant lay violent hands on his Master or Overseer")); *id.* at 41 (citing Act of 1661-62, Act CIV, in 2 HENING'S STATUTES AT LARGE, *supra* note 42, at 118 (act "Against unruly servants")).

334. Act of Oct. 1705, ch. XLIX, § XXXIV, in 3 HENING'S STATUTES AT LARGE, *supra*

The racial underpinnings of such laws became even more pronounced in later years. For example, an 1848 law provided that “[s]laves or free Negroes using provoking or menacing language or gestures to a white person . . . are punishable by stripes, not exceeding thirty-nine.”<sup>335</sup> Hence, it was not primarily slave status that determined one’s standing in antebellum Virginia; the fundamental determinant was the color of one’s skin. In this racially-based caste system, the laws of the land protected only white Christians.

It was not until 1792 that Virginia recognized any right of self-defense for blacks. In that year, the legislature provided that

[n]o Negro or mulatto, bond or free, shall lift his hand in opposition to any person not being a Negro, under penalty of not exceeding thirty lashes on the bare back, well laid on, *except* when it shall appear that such Negro was wantonly assaulted and lifted his hand in self defense.<sup>336</sup>

Enforcing that limited right of self-defense from wanton assault, however, often must have been a “right without a remedy,” since by law blacks were precluded from testifying against whites.<sup>337</sup>

When reading of these disparities in the law, one must ask: Was there any significant recognition of the slave as a human being, entitled to protection by the majesty of the law? In some rare instances the humanity of the slave was recognized, not because doing so would benefit the master but because the slave, as a person, was entitled to protection:

In 1716 Governor Spotswood provoked bitter criticism by directing the Attorney-General to prosecute a woman for the murder of one of her slaves. According to the Governor’s report to the Board of Trade, a healthy negro had died under correction. A coroner’s jury took up the body, which had been buried secretly, and found a verdict of murder. An attempt

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note 42, at 447, 459 (emphasis added) (act “concerning Servants and Slaves”). This statute further provided:

And also, if any negro, mulatto, or Indian, bond or free, shall at any time, lift his or her hand, in opposition against any christian, not being negro, mulatto, or Indian, he or she so offending, shall, for every such offence, proved by the oath of the party, receive on his or her bare back, thirty lashes, well laid on; cognizable by a justice of the peace for that county wherein such offence shall be committed.

*Id.* § XXXIV, cited in GUILD, *supra* note 2, at 156.

335. GUILD, *supra* note 2, at 168 (citing Act of 1848, ch. XII, § 6, 1847-48 Va. Acts 125, 125).

336. *Id.* at 159-60 (citing Act of 1792, ch. 41, in I THE STATUTES AT LARGE OF VIRGINIA, *supra* note 102, at 122, 122-30).

337. *See id.* at 158 (citing Act of 1785, ch. LXXVII, in 12 HENING’S STATUTES AT LARGE, *supra* note 42, at 182-83); *supra* notes 106-27 and accompanying text.

was then made to have further proceedings dropped, which the Governor opposed.

“Yet untill your [Lordships] condemn it, I will dare stand to my Charge given to a Grand Jury here, vizt: that in this Dominion no Master has such a Sovereign Power over his Slaves as not [to] be liable to be called to an Account whenever he kills him; that at the same time, the Slave is the Master’s Property he is likewise the King’s Subject, and that the King may lawfully bring to Tryal all Persons here, without exception, who shall be suspected to have destroyed the Life of his Subject.”<sup>338</sup>

Perhaps motivated in part by sentiments such as those of Governor Spotswood and in part by the revulsion of some concerned citizens, some extreme forms of slave torture resulting in death did become punishable beginning in 1723, when the exemption from punishment for killing a slave was modified as follows:

*Be it enacted, by the authority aforesaid* That if any slave shall happen to die by means of . . . dismembring, by order of the county court, or for or by reason of any stroke or blow given, during his or her correction; by his or her owner, for any offence by such slave committed, or for or by reason of any accidental blow whatsoever, given by such owner; no person concerned in such dismembring correction, or accidental homicide, shall undergo any prosecution or punishment for the same; unless upon examination before the county court, it shall be proved, by the oath of one lawful and credible witness, at the least, that such slave was killed wilfully, maliciously, or designedly; neither shall any person whatsoever, who shall be indicted for the murder of any slave, and upon trial, shall be found guilty only of manslaughter, incur any forfeiture or punishment for such offence or misfortune.<sup>339</sup>

Under this law one could be prosecuted for the willful, malicious, or designed killing of a slave. Yet if found guilty of only manslaughter, no punishment could be imposed. Of course, manslaughter was a crime—if the victim was white. The paradox was that in any criminal prosecution, a conviction for manslaughter in the killing of a white person could result in years of imprisonment while the law recognized no such crime of manslaughter in the killing of a slave. The legislature was careful to pro-

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338. SCOTT, *supra* note 27, at 202 (quoting Governor Spotswood).

339. Act of May 1723, ch. IV, § XIX, in 4 HENING’S STATUTES AT LARGE, *supra* note 42, at 127, 132-33 (act “directing the trial of Slaves, committing capital crimes; and for the more effectual punishing conspiracies and insurrections of them; and for the better government of Negros, Mulattos, and *Indians*, bond or free”).

vide, however, that this law was not to be construed to defeat a slaveowner's right to recover damages from persons who killed his or her slave.<sup>340</sup> Thus, the master's property interest remained protected.

Although theoretically a master could be punished for the willful murder of a slave under this statute, obstacles often prevented the master's prosecution. The act required the oath of a "credible witness" that the slave was killed "wilfully, maliciously, or designedly."<sup>341</sup> Since by law blacks were not considered "credible witnesses," whites were largely immunized from prosecution for the murder of slaves. As Stroud has observed, although laws against murdering slaves were on the books, they were not enforced:

The evil is not that laws [concerning murder of one's own slave] are wanting, but that they cannot be enforced; not that they sanction crime, but that they do not punish it. And this arises chiefly, if not solely, from . . . the exclusion of testimony, on the trial of a white person, of all those who are not white.<sup>342</sup>

Moreover, even in those instances when "credible witnesses" were willing to testify against the slaveowner, it was difficult to prove that the punishment of a slave for some infraction, real or imagined, crossed the line from an unintentional killing to willful murder. As discussed below, deaths from some of the most severe beatings imaginable were treated as merely accidental.<sup>343</sup>

Slaveowners and others enjoyed exemption from criminal liability for slave manslaughter until 1788 when the legislature repealed the act declaring the killing of a slave by correction to be only manslaughter.<sup>344</sup> Thus, subsequently all whites were theoretically liable for the killing of blacks, slave or free, to the same extent as for the killing of whites. Nevertheless, only a few whites were ever even prosecuted for killing blacks.<sup>345</sup>

340. *Id.* § 20, in 4 HENING'S STATUTES AT LARGE, *supra* note 42, at 133. Regarding a slaveowner's right to recover damages against one injuring his slave property, see *infra* notes 371-73 and accompanying text.

341. Act of May 1723, ch. IV, § XIX, in 4 HENING'S STATUTES AT LARGE, *supra* note 42, at 132-33 (act "directing the trial of slaves").

342. STROUD, *supra* note 17, at 20.

343. See *infra* text accompanying notes 359-68.

344. Act of Oct. 1788, ch. XXIII, in 12 HENING'S STATUTES AT LARGE, *supra* note 42, at 681 (act "to repeal part of an act, directing the trial of slaves"); see GUILD, *supra* note 2, at 156 (citing Act of 1748, ch. XXXVIII, § XXII, in 3 HENING'S STATUTES AT LARGE, *supra* note 42, at 447, 455 (providing that slave manslaughter is not punishable)). It continued to be lawful for anyone to kill and destroy any "outlying Negro" by any means without accusation or impeachment of any crime. GUILD, *supra* note 2, at 156 (citing Act of 1748, ch. XXXVIII, § XXI, in 3 HENING'S STATUTES AT LARGE, *supra* note 42, at 447, 454-55).

345. The legislature did not provide an explanation for its repeal of the law making slave



b. Cases Involving the Killing of Slaves

The earliest cases involving prosecution for slave homicide did not appear in the reports. In the 1729 case of *Andrew Bourne*, an overseer who had killed a slave in a fit of passion was convicted of willful murder and sentenced to death. Governor Gooch granted Bourne clemency. The Governor felt that the verdict of the jury in the general court was unjust: "[T]he executing of him for this offence may make the slaves very insolent, and give them occasion to contemn their Masters & overseers, which may be of dangerous Consequences in a Country where the negroes are so numerous and make the most valuable part of the People's Estates."<sup>346</sup>

In what appears to have been the first instance in which a white person was punished for killing a slave, the *Virginia Gazette* reported the following case under the headline "Hung for Negro Murder": "1739—Charles Quinn, an overseer, and David White, an accessory, from Essex County, for the murder of a negro belonging to Colonel Braxton by whipping him to death in a most cruel and barbarous manner."<sup>347</sup> How does one explain the prosecution in this case? First, it should be noted that it was not the owner who was being prosecuted for the killing of his slave; instead, the defendants were an overseer and an associate—persons of lower status. Possibly the fact that the slave belonged to a colonel helped to arouse the public sentiment against the murderers. Presumably, Colonel Braxton did not sanction the cruel and barbarous assault on the slaves, the defendants probably did not have the funds to reimburse the colonel, and the colonel could not be reimbursed by the state for his losses.

In May 1742, William Lee, an overseer, was examined by the Richmond County court, which found sufficient evidence to send Lee on to Williamsburg for trial.<sup>348</sup> Lee was committed to the county jail for "Feloniously Killing Will a Man Slave Belonging to Thomas Barber Gentleman."<sup>349</sup> Barber, it appears, was a justice of the peace who the

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manslaughter a nonoffense. One proffered explanation for the change in the law is that some of the revolutionary notions of liberty and humanity engendered by the American Revolution carried over into the treatment of slaves. See SCHWARZ, *supra* note 25, at 24. Schwarz also notes that "the problem was that all these apparent reforms effectively perpetuated bondage. They were intended to prevent another revolution." *Id.* at 25.

346. HUGH F. RANKIN, *CRIMINAL TRIAL PROCEEDINGS IN THE GENERAL COURT OF COLONIAL VIRGINIA* 113 & n.60 (1965) (citing Letter from Gov. William Gooch to Secretary of State, June 29, 1729).

347. See SCOTT, *supra* note 27, at 202-03, 203 n.33 (citing *VIRGINIA GAZETTE*, Nov. 23, 1739).

348. RICHMOND COUNTY PROCEEDINGS, *supra* note 138, at 218.

349. *Id.*

governor sometimes commissioned to preside at the court of oyer and terminer.<sup>350</sup> At the conclusion of the testimony, which indicated that Lee may have whipped and beaten the slave to death, the court concluded that just cause existed for trying Lee.<sup>351</sup> The court granted Lee's request for bail.<sup>352</sup> It is worth asking whether the fact that a respected justice of the peace owned the deceased slave had anything to do with Lee's examination and trial. There is no record, however, to reveal the outcome of Lee's trial.

In another case referenced in the *Virginia Gazette*, a slaveowner was convicted of murdering his own slave:

William Pitman, being found guilty by the jury, received sentence of death from the General Court for beating his negro boy to death.

"This man has justly incurred the penalties of the law, and we hear will certainly suffer, which ought to be a warning to others to treat their slaves with moderation . . . ."

— April 21, 1775<sup>353</sup>

It is not known whether the sentence was actually carried out.

The next recorded prosecution for malicious slave killing was *Thomas Sorrell's Case*,<sup>354</sup> in which Sorrell was charged with murdering a slave for whom he was an overseer.<sup>355</sup> After a series of procedural appeals and motions raising the question whether the overseer could be prosecuted for manslaughter, he was put on trial and acquitted.<sup>356</sup> According to the court reporter, St. George Tucker,<sup>357</sup> this verdict of not guilty was "directly contrary to evidence."<sup>358</sup> *Thomas Sorrell's Case* illustrates the distinction drawn by the Virginia courts and legislature be-

350. *Id.* at 219, 222, 224-26, 228-34.

351. *Id.* at 219.

352. *Id.*

353. SCOTT, *supra* note 27, at 203 n.34 (citing VIRGINIA GAZETTE, April 21, 1775).

354. 22 Va. (1 Rand.) 16 (1821).

355. *Id.* at 17.

356. *Id.* at 17-18.

357. St. George Tucker was a professor of law at the College of William and Mary (1800-03), a judge of the Supreme Court of Appeals of Virginia (1803-11), and a judge of the United States District Court for the District of Virginia (1813-28). See Chris Levin, St. George Tucker, Race and the American Legal Process (1982) (unpublished manuscript, on file with authors). Levin notes the inconsistencies of Tucker's significant efforts to secure gradual emancipation for Virginia's slaves and his personal actions as a slaveholder who made no provision for the manumission of his slaves. See *id.* at 5; see also WINTHROP JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812, at 555-60 (1968) (discussing Tucker's attempt to find " 'some middle course between the tyrannical and iniquitous policy' of slavery 'and that which would turn loose a numerous, starving, and enraged banditti, upon the innocent descendants of their former oppressors' ").

358. *Thomas Sorrell's Case*, 22 Va. (1 Rand.) at 18.

tween slave homicide committed by a master as compared to that committed by a hirer or overseer.

*Souther v. Commonwealth*<sup>359</sup> is the most dramatic case involving the murder of one's own slave. It is not clear why the prosecution was even initiated; at one point, the prosecutor joined in the defendant's motion to dismiss the complaint on the ground that it was not a crime to kill one's own slave.<sup>360</sup> The facts as described in the indictment and in detail by the court as to the "manner, means and duration"<sup>361</sup> of the beating inflicted on the slave read more like the savagery one would expect in fiction than in a civilized society:

The indictment contains fifteen counts, and sets forth a case of the most cruel and excessive whipping and torture. The negro was tied to a tree and whipped with switches. When Souther became fatigued with the labour of whipping, he called upon a negro man of his, and made him cob Sam with a shingle. He also made a negro woman of his help to cob him. And after cobbing and whipping, he applied fire to the body of the slave; about his back, belly and private parts. He then caused him to be washed down with hot water, in which pods of red pepper had been steeped. The negro was also tied to a log and to the bed post with ropes, which choked him, and he was kicked and stamped by Souther. This sort of punishment was continued and repeated until the negro died under its infliction. It is believed that the records of criminal jurisprudence do not contain a case of more atrocious and wicked cruelty than was presented upon the trial of Souther.<sup>362</sup>

The court earlier had held in *Commonwealth v. Turner*<sup>363</sup> that a master could not be indicted for the malicious, cruel, and excessive *beating* of his own slave.<sup>364</sup> The *Souther* court reasoned, however, that it did not necessarily follow from the holding in *Turner* that a master also was immune from prosecution when an excessive beating resulted in the death of the slave:

It is the policy of the law in respect to the relation of master and slave, and for the sake of securing proper subordination and obedience on the part of the slave, to protect the master from prosecution in all such cases, even if the whipping and punishment be malicious, cruel and excessive. But in so in-

359. 48 Va. (7 Gratt.) 673 (1851).

360. *Id.* at 676.

361. *Id.* at 675-76.

362. *Id.* at 679.

363. 26 Va. (5 Rand.) 678 (1827).

364. *Id.* at 685-86.

flicting punishment for the sake of punishment, the owner of the slave acts at his peril; and if death ensues in consequence of such punishment, the relation of master and slave affords no ground of excuse or palliation. The principles of the common law in relation to homicide, apply to his case, without qualification or exception; and according to those principles, the act of the prisoner, in the case under consideration, amounted to murder.<sup>365</sup>

While the *Souther* court was unanimous in holding that under certain circumstances a slaveowner could be convicted for murdering his slave, the judges disagreed as to whether the defendant was guilty of first- or second-degree murder.<sup>366</sup> Judge Field, delivering the opinion of the court, referred to the Sessions Acts of 1847-48, which provided that murder committed by "wilful and *excessive whipping* [or] *cruel treatment*" was murder in the first degree, which was to be punished with *death*.<sup>367</sup> Hence, it was obvious to Judge Field that *Souther* was guilty of first-degree murder, not manslaughter. Judge Leigh, on the other hand, believed that excessive whipping of a slave did not necessarily constitute first-degree murder; in order to be so characterized, there must have been an intent to kill.<sup>368</sup>

The opinion does not indicate whether the court ultimately ruled that *Souther* was guilty of first- or second-degree murder. The court upheld the five-year sentence which the jury imposed, however, which indicates that *Souther* was found to have committed second-degree murder, since the 1847-48 statute made first-degree murder punishable with death.<sup>369</sup>

*Souther* was an important ruling because the court refused to give slaveowners total immunity from the laws punishing the murder of slaves. Nevertheless, the disparity in legal treatment when blacks were the victims is revealed when one considers the sentence *Souther* received. Regardless of whether he committed first- or second-degree murder, he received only a five-year sentence. That a man could receive so inconsequential a sentence for such a brutal crime indicates how little value was placed on the humanity of slaves. Had the defendant tortured, whipped, beaten, choked, and killed a white person the way he did his slave, it is inconceivable that a jury would have imposed, and the court would have accepted, a mere five-year term of incarceration for such a killing.

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365. *Souther*, 48 Va. (7 Gratt.) at 680.

366. *See id.* at 674-86.

367. *Id.* at 681-82.

368. *Id.* at 686 (Leigh, J.).

369. *Id.* at 687.

It also is important to emphasize that if by some twist of fate a slave managed to survive such a ferocious attack, the master was *completely immune* from prosecution.<sup>370</sup> He could beat his slave with impunity and without limits so long as the slave did not die from the assault.

"The numerous civil suits that masters brought against overseers and hirers for severely wounding or killing slaves indicated that gross abuse was all too common."<sup>371</sup> By law an owner could bring an action to recover against another for killing or dismembering his slave.<sup>372</sup> In effect, slaveowners had a choice of remedies—they could collect a fine or press criminal charges—which depended on the ability of the defendant to pay the fine, as well as his social and economic status.<sup>373</sup>

This tradition of racial disparity in sentencing carried on well into the twentieth century. According to Schwarz, "[a]lmost 87 percent of the men and women executed by the Commonwealth of Virginia between 1908 and 1962 were black."<sup>374</sup> The Virginia data are not dissimilar to other findings which suggest that in the administration of criminal laws juries and judges have shared consistently the perception that blacks are less valuable than whites.<sup>375</sup> As Schwarz has stated:

370. Flanigan, *supra* note 59, at 98-103.

371. *Id.* at 76 (endnote omitted).

372. Act of May 1723, ch. IV, § XX, in 4 HENING'S STATUTES AT LARGE, *supra* note 42, at 126, 133 (act "directing the trial of Slaves, committing capital crimes").

373. With regard to civil actions involving the fatal shooting of a slave, see *Kennedy v. Waller*, 12 Va. (2 Hen. & M.) 415 (1808). In that case the plaintiffs obtained a verdict for \$450, representing the value of the slave. *Id.* at 418. The issue the court addressed was whether the plaintiffs as trustees of the slave had a sufficient ownership interest in the slave to maintain the cause of action. *Id.* at 417. Judge Tucker commented: "I lament that a case originating possibly in moral turpitude should go off upon such grounds. But we must decide according to law, and not according to our private feelings. I am therefore of opinion that the judgment must be wholly reversed." *Id.* at 418.

In *Brown v. May*, 15 Va. (1 Munf.) 288 (1810), May brought an action of trespass against the defendants "for breaking and entering his close, and beating several of his slaves . . . 'so that he was deprived of their service for a long time.'" *Id.* The jury returned a verdict for the plaintiff for \$150 in damages. *Id.* The general court, observing that the bill of exception failed to state that the slaves were found to be acting improperly, affirmed the judgment for the plaintiff. *Id.* at 291-93.

In *Harris v. Nicholas*, 19 Va. (5 Munf.) 483 (1817), a hirer's overseer, "so unlawfully, cruelly, and excessively beat and whipped the said slave . . . that the slave afterwards died." *Id.* at 484. One counsel stated that "the facts pleaded bring it within the definition of murder in the first degree." *Id.* at 488. The general court held that the hirer was not liable for failing to return the slave "*well clothed*," since the act of the overseer was a willful and unauthorized trespass. *Id.* at 483, 489-90. There is no indication that the overseer was ever prosecuted for causing the slave's death.

374. SCHWARZ, *supra* note 25, at 320.

375. There is clear evidence from one former slave state, Georgia, that white lives continue to be valued more highly than black lives when determining the punishment in murder cases. In the Chattahoochee, Georgia judicial district (which includes the city of Columbus), 65% of

It is no accident that black people faced the kinds of laws, courts, or mobs they did for many decades after 1865. Whites' perception of Afro-Virginians not only as black but also as former slaves or descendants of slaves has had everything to do with the way the majority of whites have perceived and tried to control black people.<sup>376</sup>

### c. Black Defendants and White Justice

In the slavery system no crime was more serious than the murder of a master by a slave or servant. Such a murder was known as petit treason.<sup>377</sup> If male, the defendant was to be hung, quartered, and beheaded;

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all murder victims between 1973 and 1990 were black, and 35% of the victims were white. In those cases in which the death penalty was sought, however, only 15% of the victims were black, while 85% of the victims were white. See David Margolick, *In Land of Death Penalty, Accusations of Racial Bias*, N.Y. TIMES, July 10, 1991, at A1, A12. The same article includes a statement by George Kendall of the NAACP Legal Defense and Education Fund noting that "[t]he tradition of the black codes and slave codes, which provided different harsher punishments for offenders who harmed whites than blacks, remains today in places like Columbus." *Id.* at A12; see also *supra* note 294 (discussing *McCleskey v. Kemp*, 481 U.S. 279 (1987)).

376. SCHWARZ, *supra* note 25, at 321. A compendium of studies released by the General Accounting Office, the investigative arm of Congress, reveals that the race of the victim continues to be a significant factor in determining who receives the death penalty in this country. See DEATH PENALTY SENTENCING, *supra* note 293, at 5-7. In 1991 a bill entitled the "Racial Justice Act" was introduced in Congress that would have allowed death-sentenced individuals the opportunity to demonstrate that death sentences in the particular jurisdiction or state in which he or she was sentenced are imposed more frequently upon persons of one race, or for crimes against persons of one race. S. 1241, 102d Cong., 1st Sess. § 207 (1991). If such discrimination were shown the defendant would be sentenced to life imprisonment instead of death, unless the state were able to demonstrate that the disparity was explained by a nonracial factor. *Id.*

377. As defined by *Black's Law Dictionary*, petit treason was, "[i]n old English law, the crime committed by a wife in killing her husband, or a servant his lord or master, or an ecclesiastic his lord or ordinary." BLACK'S LAW DICTIONARY 1501 (6th ed. 1990). High treason, in contrast, was, "[i]n English law, treason against the king or sovereign, as distinguished from petit or petty treason, which might formerly be committed against a subject." *Id.* Although most slaves were convicted of petit treason, there were a few instances in which they were tried for high treason. In 1710, for example, two slaves, Salvadore, an Indian, and Scipio, a black, were convicted of plotting a slave insurrection. The need of the authorities to maintain order throughout the colony is evidenced by the punishments the two slaves received:

To the end therefore that their execution and exemplary punishment may have a due effect for deterring other Slaves from entering into such dangerous Conspiracys It is ordered that Salvadore be executed . . . at the Court house of Surry County on the first Tuesday in May, and that his body be disposed of as follows viz. his head to be delivered to the Sherif of James City County and by him sett up at the City of Williamsburgh. Two of his quarters likewise delivered to the Sherif of James City one whereof he is to cause to be sett up at the great guns in James City and the other to deliver to the Sherif of New Kent County to be sett up in the most publick place of the said County, and the other two quarters to be disposed of and sett up as the Justices of the County of Surry shall think fitt to direct.

SCOTT, *supra* note 27, at 161-62 (quoting Act of Oct. 1710, ch. XVII, in 3 HENING'S STAT-

if female, the defendant could be burned at the stake.<sup>378</sup> In the seventeenth century several cases of servants convicted and executed for petit treason were tried, but the race of the defendants is unknown.<sup>379</sup> In eighteenth-century Virginia, however, all recorded cases of petit treason involved slaves.<sup>380</sup> In an effort to deter others from committing this offense, the heads and quarters of executed slaves were displayed prominently either at specified crossroads or on buildings or other public places.<sup>381</sup> One such public place was the chimney of the Alexandria courthouse where the heads of four slaves, convicted of poisoning their overseers, were mounted in 1767.<sup>382</sup> A more symbolic demonstration of the judicial system's role in perpetuating the powerlessness of Virginia's slaves is hard to imagine. In an earlier case, a slave who had killed his master and then had escaped by stealing a horse was "captured, tried promptly, and sentenced to death. . . . The said Negro was executed accordingly and it is Ordered by the Court that the Sheriff cut off his head and put it on a Pole near the Courthouse to deter others from doing the

UTES AT LARGE, *supra* note 42, at 539-40). Scott further notes that "Scipio was to be executed in Gloucester County, and his head and quarters were to be exhibited in various parts of Gloucester, Lancaster, and King and Queen counties." *Id.* at 162.

Following the Declaration of Independence, the Virginia Assembly redefined high treason as "levying war against the commonwealth, or giving aid and comfort to its enemies." *Id.* at 163. Virginia revolutionaries clearly feared the prospect of a war on two fronts: against a British king who sought, or so they believed, to enslave them, and against those very individuals whom they had enslaved. At least one black, Bob—his status as slave or free is not clear—was convicted of high treason and executed, and his body was displayed in public, in 1778. SCHWARZ, *supra* note 25, at 188-89. Three years later another slave, Sancho, was found guilty of spying for the British and was hung. *Id.* It is interesting to note that one slave, Billy, obtained a reprieve from a conviction of treason following a dissent by two oyer and terminer judges and an appeal for executive clemency by the executor of the estate of Billy's owner, a prominent landowner named Mann Page. *Id.* at 189. The governor, Thomas Jefferson, accepted Page's claim that a slave could not commit treason, as a slave was not a citizen. *Id.*

378. One historian has noted that "[t]he custom in England was to strangle the victim into insensibility before the fire was lighted, and presumably this was done in Virginia also." SCOTT, *supra* note 27, at 197. In one well documented case from 1745, a slave, Eve, was found guilty of poisoning her owner's milk. Following an illness that lasted several months, the owner died, and Eve was duly sentenced to be "carried upon a Hurdle to the place of Execution and there to be Burnt." SCHWARZ, *supra* note 25, at 92; see also SCOTT, *supra* note 27, at 197 (relating the same story, but dating it to 1747). Slave women convicted of arson were not burned at the stake, but they could be hung and decapitated. For example, Violet, a slave who set fire to her owner's property in 1780, was hung, and her severed head was placed on display on a pole near the village of Staunton. See SCHWARZ, *supra* note 25, at 115; SCOTT, *supra* note 27, at 196-97.

379. At least one of the men sentenced to death for petit treason in the seventeenth century was an English indentured servant. See SCOTT, *supra* note 27, at 195.

380. See *id.* at 194-97 & nn.2-12.

381. *Id.* at 196 & nn.8-9.

382. *Id.* at 309-10 & n.65.

Like."<sup>383</sup>

The quartering, beheading, and public display of the condemned was also the penalty inflicted for high treason, a crime that presumes the defendant is a citizen who owes fidelity to his government.<sup>384</sup> Slaves were deemed to owe allegiance not to the country, but only to their white masters.

In 1894 a dispute arose between certain Virginia historians as to whether colonial Virginia had a practice of hanging and quartering blacks.<sup>385</sup> In answer to the dispute, P.G. Miller, the deputy clerk of Goochland County, Virginia and "a gentleman learned in Virginia history,"<sup>386</sup> revealed the following account: In 1733 a commission of oyer and terminer assembled in Goochland County to try six slaves accused of murdering a man named Robert Allen.<sup>387</sup> The slave Champion confessed and was sentenced to be hanged.<sup>388</sup> Three other slaves were acquitted. The slave Valentine pleaded not guilty but was found guilty and sentenced to be hanged.<sup>389</sup> The last slave, Lucy, was acquitted of the murder but was sentenced to receive twenty-one lashes because she knew of the murder but did not report it.<sup>390</sup> The final order of the court read: "Ordered that the heads & quarters of Champion & Valentine be set up in severall parts of this County."<sup>391</sup> Hence, the deceased, Robert Allen, may well have been the slaves' white master since they were punished in accordance with the offense of petit treason.<sup>392</sup>

383. SCOTT, *supra* note 27, at 196 (quoting VIRGINIA GAZETTE, June 3-10, 1737). One report of this case noted that "it was expected that four more would soon meet the [s]ame [f]ate." *Id.* (quoting BOSTON CHRON., Jan. 11-18, 1768). Poisoning, which by its very nature was "[h]ard to predict, hard to control, and hard to prove," increasingly came to be used by slaves as a weapon of resistance to a slaveowner's authority. SCHWARZ, *supra* note 25, at 94. For an extended discussion of the role of poisoning in colonial and antebellum Virginia, see *id.* at 92-113.

384. See, e.g., BLACK'S LAW DICTIONARY 1501 (6th ed. 1990) (defining "treason" as "[a] breach of allegiance to one's government").

385. See *Hanging and Quartering*, 1 VA. MAG. HIST. BIOGRAPHY 328, 328 (1894).

386. *Id.*

387. *Id.* at 328-29.

388. *Id.* at 329.

389. *Id.*

390. The court's exact words were that "she is supposed to have known of the murder after it was committed & did not discover the same." *Id.* (quoting minutes of Goochland County Ct., June 25, 1733).

391. *Id.* at 330 (quoting minutes of Goochland County Ct., June 25, 1733). The court ordered reimbursement to be made "for providing Tarr, burying the trunk, cutting out the quarters[,] a Pott, Carts & horses, carrying and setting up the heads & quarters of the two Negroes at the places mentioned by order of Court." *Id.* (quoting minutes of Goochland County Ct., June 25, 1733).

392. *Id.* at 329.



The first recorded conviction of a slave for the murder of his master did not occur until 1732.<sup>393</sup> According to one estimate, there were only twenty-four recorded cases of whites murdered by slaves between 1740 and 1785.<sup>394</sup> At least seventeen slaves were convicted for the murder of fellow slaves in this same period,<sup>395</sup> and another 116 slaves were convicted and sixty-one slaves acquitted of the separate crime of poisoning, which often, but not always, led to the death of the victim.<sup>396</sup> Of the thirty-five slaves sentenced to hang for poisoning, twenty-three of their victims were white while only seven victims were black.<sup>397</sup> In five instances the race of the victim was not identified.<sup>398</sup>

The more complete records of slaves convicted of murder in the antebellum period suggest a similar correlation between the race of the victim and the punishment of the perpetrator. While there has been some debate among historians as to how many slaves were convicted of murder in antebellum Virginia,<sup>399</sup> the general consensus is that the murder of a white by a black was punished with greater severity than the murder of a black by another black.<sup>400</sup> In four Virginia counties between 1785 and 1831, for example, eighteen slaves were convicted of murdering whites, and fourteen slaves were found guilty of the murder of fellow slaves: all of those convicted of killing whites received the death sentence, but only seven of those who murdered slaves were so punished.<sup>401</sup>

Despite this obvious disparity in sentencing, slaves were more inclined to kill owners, overseers, and other whites than they were to mur-

393. SCHWARZ, *supra* note 25, at 81. Of course, some slaves who had murdered their masters or members of their masters' families may never have been put on trial, but punished privately, particularly in the early colonial period. *See id.* at 79-82.

394. *Id.* at 142. Schwarz is aware of the incomplete nature of Virginia's criminal trial records in the eighteenth century. He suggests that a more complete figure would be approximately 53 to 68 slaves convicted of murdering at least 64 to 88 whites between 1740 and 1785. *Id.* at 144. Schwarz's figures are based upon his assumption that he has uncovered 60% of all slave trials ever held in Virginia. *Id.* n.18.

395. *Id.* at 152-54. The overwhelming majority of those slaves killed (15 out of 17) did not belong to the same owner as their attacker, and so the victims' owners were forced to use the courts to recoup their loss of property. *Id.* at 154.

396. *Id.* at 96.

397. *Id.*

398. *Id.*

399. In 1915, Ulrich Phillips accounted for 346 slaves convicted of first-degree murder between 1780 and 1865, a figure also accepted by the more recent study of Daniel Flanigan. Phillips, *supra* note 193, at 336; Flanigan, *supra* note 59, at 404. Schwarz contends that 376 slaves were convicted of murder in this period. SCHWARZ, *supra* note 25, at 233. These figures deal with first-degree murder only and do not account for insurrections such as Nat Turner's rebellion.

400. *See* SCHWARZ, *supra* note 25, at 230-35; Flanigan, *supra* note 59, at 50, 413-14.

401. SCHWARZ, *supra* note 25, at 231. The counties were Essex, Henry, Spotsylvania, and Southampton, the last of which was the site of Nat Turner's rebellion in 1831. *Id.*

der fellow blacks.<sup>402</sup> Several cases reveal some of the motives behind slaves' murders of their white masters. Revenge was often a factor:

A Virginia Slave murdered her mistress in 1827, apparently because the mistress had denied the slave the right to marry the man she wanted. In the same year a husband and wife, who were the property of different owners, conspired to poison her master because he refused to allow her husband to see her. Two years later a slave conspired to murder a white man who was preparing to sell the slave's wife and child.<sup>403</sup>

Slave conspiracies to murder their masters were reactions to the treatment the slaves received:

Such conspiracies usually resulted from habitual cruel treatment by a master or overseer. A Virginia lawyer asked the governor to transport certain slaves because the crime had been the consequence of "the severity and privations which they endured under the discipline of a most rigid master, . . ." In another case six slaves dispatched a master who had chained a slave who was also his daughter because she refused to have sexual intercourse with him.<sup>404</sup>

In another case,

[a] slave had accidentally allowed a tree that he was cutting to fall on a white man's dog. The white approached the slave threatening to give him 500 lashes, but the slave struck first, with his axe. Though the slave might intend originally to keep the master from beating him, pent-up hatred might cause him to kill the white who had dominated him for so many years. A Virginia slave told a white witness that his master was "such a rascal and has treated me so mean," and that "when he first struck he did not intend to kill him, but something, he could not tell what, had induced him to repeat the blows." Another

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402. Flanigan suggests that around two-thirds of victims murdered by slaves between 1790 and 1864 were white. Flanigan, *supra* note 59, at 404. Schwarz contends that 55.6% of the victims of slave murders were white in this period, but also notes that high murder rates of whites coincided with periods of slave resistance and insurrection. SCHWARZ, *supra* note 25, at 232, 246-47. For example, in the years from 1795 to 1799, which immediately preceded Gabriel's Plot in 1800, 77.3% of the murder victims of slaves were white. *Id.* at 233. Similarly, three quarters of the murder victims of slaves were white in the five years prior to Nat Turner's rebellion in 1831. *Id.*

403. Flanigan, *supra* note 59, at 54 & n.70 (citing Va. Archives, *supra* note 134, Commonwealth v. Judy, Aug. 25, 1827 (Sept. 21-30 folder); *id.*, Commonwealth v. Billy, Sept. 27, 1827 (Sept. 21-30 folder); *id.*, Commonwealth v. Frederick, Jan. 26, 1829 (Feb. 10-20 folder)).

404. *Id.* at 54-55, 55 n.71 (citing Va. Archives, *supra* note 134, Letter from Richard K. Craler to Governor, Apr. 2, 1827; *id.*, Commonwealth v. Petty, Sept. 10, 1830 (May-Sept. folder) ("In this case the female slaves involved were transported, but the male slaves were hanged.")).

slave "rejoiced as he dug his master's grave, 'I have killed him at last.'"<sup>405</sup>

Despite the unrelenting punishments and beatings that a slave might receive at the hands of an overseer, an owner, or another white, there were only rare instances in which a slave might claim self-defense in the killing of a white person. Such cases generally involved whites of low socioeconomic background.<sup>406</sup>

Slaves killed their own children more often than white children.<sup>407</sup> Was it mercy killing?<sup>408</sup> When white children were the victims, most often the murderess was the child's nurse.<sup>409</sup> In one case a slave poisoned a white child because she was tired of having to get up with him

405. *Id.* at 57 & n.76 (citing Va. Archives, *supra* note 134, Commonwealth v. Ben, Feb. 9, 1835 (1835 folder); *id.*, Commonwealth v. Allen, Oct. 19, 1827 (Oct. 12-30 folder); JOHNSTON, *supra* note 199, at 28).

406. Consider, for example, Schwarz's discussion of a slave, Jacob, who in 1818 was found not guilty on grounds of self-defense of stabbing a white man. Those who had testified against Jacob did not themselves own slaves or land, and the victim, James Miller, was himself of relatively low social status. SCHWARZ, *supra* note 25, at 240-41.

407. Flanigan, *supra* note 59, at 51, 404.

408. An earlier article by one of the authors discusses the prosecution of a mother for the murder of an infant child. Though the case arose in a different jurisdiction, we think it exemplifies the distraught condition of many slave mothers in Missouri and Virginia. In *Jane* (a slave) v. State, 3 Mo. 45 (1831), *Jane* was convicted of the murder of her infant child, Angeline.

She was charged with "knowingly, willfully, feloniously and of her malice aforethought" mixing "a certain deadly poison" and giving it to her infant child to drink on December eighth and ninth. The indictment alleged that On December eleventh, so "that she might more speedily kill and murder said Angeline" with "malice aforethought" she wrapped and covered Angeline in bed clothes and then "choked, suffocated and smothered" her, and that, as a result of the poisoning and the smothering, the infant died.

Thus, the state prosecuted the mother vigorously for taking the life of her slave child. Did the state prosecute because it cared about the dignity and life of a child born into lifetime slavery with the concomitant disadvantages of Missouri's law? Or did the state prosecute because *Jane's* master was denied the profit that he would have someday earned from the sale or exploitation of Angeline? Was the state fearful that if mothers started to kill their slave infants it might jeopardize the potential wealth of slave masters?

. . . Perhaps the mother recognized that someday her daughter would be snatched from her and put on the auction block and that a master would use Angeline as a breeder to increase his economic wealth. Perhaps the mother anticipated that someday her daughter's body would be laced with scars from whips of brutal overseers and masters, with the type of vengeance that Missouri law sanctioned against blacks. Perhaps the mother felt that the taking of her daughter's life was an act of mercy compared to the cruelty she might confront in Missouri's jurisprudence.

Higginbotham, *Missouri Jurisprudence*, *supra* note 12, at 694-95 (citing *Jane*, 3 Mo. at 45-49 (citations omitted)); *id.* at 694-96 (discussing *Jane* in the context of Missouri jurisprudence).

409. Flanigan, *supra* note 59, at 51, 52 n.68 (citing Va. Archives, *supra* note 134, Commonwealth v. Nelly, May 30, 1834 (July folder)).

at night.<sup>410</sup>

According to Flanigan, case law from other states indicates that the crime of poisoning was a favorite among female slaves.<sup>411</sup> Slaves were known to poison their masters under the guise of giving them medicine.<sup>412</sup> Any slave caught administering medicine of any kind, unless by order of the master, was guilty of a felony without benefit of clergy.<sup>413</sup> Only if the slave could prove she did not intend to injure her master would she be eligible for benefit of clergy.<sup>414</sup> Flanigan describes a rather amusing account of the various poisons used by slaves when such common poisons as arsenic and strychnine were unavailable: "Powdered scopions [sic] ashes, four snake heads, and spiders beaten together in buttermilk,' 'rat's bane,' 'mixtures of leaves and heads of reptiles,' powdered glass and even crushed puppies comprised part of the menu."<sup>415</sup>

Ironically, slaves could strike terror in the hearts of their masters despite the masters' absolute dominion over them. In one instance, a slaveowner named John Dosewell urged the governor to execute his slave rather than transport him.<sup>416</sup> The slave had attempted to poison his master.<sup>417</sup> Dosewell wrote that slaveowners

are in a great degree in the power of their slaves, who cook and prepare all their food . . . The owners of slaves must abandon them entirely, or live in a condition almost worse than death, if their slaves shall once find out that they may improve the opportunity of their malignity, which is twice, and sometimes thrice every day presented, *at the hazard only of exchange of residence.*<sup>418</sup>

Dosewell's comments reveal the degree to which a frightened slaveholder could lose sight of the far greater misery and terror the slave suffered. To declare that masters "are in a great degree in the power of their slaves" is to dramatize how distorted a slaveowner's perception could become. While masters may indeed have feared their slaves, the most obvious solution—to "abandon them entirely"—apparently was not

410. *Id.*

411. *Id.* at 53 (citing *State v. Clarissa*, 11 Ala. 57, 58 (1847); *Jane v. Commonwealth*, 59 Ky. (2 Met.) 30, 31 (1859); *Josephine v. State*, 39 Miss. 613, 615 (1861)).

412. SCOTT, *supra* note 27, at 310-11.

413. *Id.* at 311.

414. *Id.*; see *id.* at 311 n.67 (discussing prosecutions for this offense).

415. Flanigan, *supra* note 59, at 53; see also JOHNSTON, *supra* note 199, at 27 (same).

416. Flanigan, *supra* note 59, at 52.

417. *Id.*

418. *Id.* at 52, 53 n.69 (citing Va. Archives, *supra* note 134, Letter from John D. Dosewell to Governor & Executive Council, Aug. 9, 1828 (Aug. 1-10 folder)).

seriously considered. Furthermore, Dosewell's claim of fear is rather suspect when one considers that he *chose* to live in this "*condition almost worse than death.*"<sup>419</sup> He speaks as if he had no choice in the matter. Perhaps most ironic, this slaveowner viewed living in fear of his slaves, rather than slavery itself, as a condition worse than death.

### 3. Assault and Battery

#### a. White Assaults, Black Victims

The cases involving whites assaulting blacks reveal a great deal about the values of antebellum judges and legislators and their perceptions concerning the human status, or lack thereof, of blacks. A recurring question that arises in the study of slavery is whether white Virginia judges regarded slaves primarily as human beings and only secondarily as chattels, or whether slaves were perceived primarily as property whose human qualities and suffering were irrelevant considerations for the courts. In his vigorous dissent in *Dred Scott v. Sandford*,<sup>420</sup> Justice MacLean emphasized that "[a] slave is not a mere chattel. He bears the impress of his maker, and is amenable to the laws of God and man; and he is destined to an endless existence."<sup>421</sup> MacLean's position was that federal jurisprudence should be predicated on the assumption that blacks were human beings, and that these human factors must be taken into consideration both when adjudicating property claims and when construing the United States Constitution.

Likewise, in 1823 Chief Justice John Louis Taylor of North Carolina wrote that courts must "keep pace with the march of benignant policy, and provident humanity, which for many years has characterized every legislative act, relative to the protection of slaves, and which Christianity by the mild diffusion of its light and influence, has contributed to promote."<sup>422</sup> In the adjacent state of Virginia, however, the appellate cases do not reveal any of the benign policy or "provident humanity" of which Chief Justice Taylor and Justice MacLean spoke. Instead, with at most one possible exception, in assault cases the Virginia appellate courts were concerned primarily with the status of the offender rather than with the egregiousness of the harm or injury to the slave.

Assault and battery of a slave, free black, or mulatto went largely unpunished. As already noted, by statute and case law the assault of a

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419. *Id.* (citing Va. Archives, *supra* note 134, Letter from John D. Dosewell to Governor & Executive Council, Aug. 9, 1828 (Aug. 1-10 folder)).

420. 60 U.S. (19 How.) 393, 529-64 (1857) (MacLean, J., dissenting).

421. *Id.* at 550 (MacLean, J., dissenting).

422. *State v. Hall*, 9 N.C. (2 Hawks) 582, 583 (1823).

slave was not recognized as a criminal offense in the eighteenth century.<sup>423</sup> Between 1800 and 1860 there were eight reported appellate cases involving the indictment of whites for either the murder or assault of blacks.<sup>424</sup> It is unknown how many whites were prosecuted or acquitted in the trial courts; if acquitted, there would have been no appeal and thus, no appellate record of the case. The dearth of appellate cases and the courts' frequent sanction of assaults on slaves by white hirers and masters suggest, however, that criminal prosecutions were rare.

In those sporadic instances when a prosecution did occur, the records suggest that most often its impetus was primarily to protect the slaveowner's property rights and to serve as a warning to others that slave property should not be damaged by persons who were neither the owner nor his designee.<sup>425</sup>

The first appellate case dealing with an assault on a slave was *Commonwealth v. Chapple*,<sup>426</sup> in which a woman, Dolly Chapple, was indicted and convicted by a jury under the general mayhem statute prohibiting the malicious stabbing of a slave.<sup>427</sup> Her race was not specified in the opinion and there was no reference as to whether she owned the slave; given the extraordinary authority of the master over the slave, however, the court undoubtedly would have stated that she was the

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423. See *Commonwealth v. Turner*, 26 Va. (5 Rand.) 678, 685-86 (1827). For further discussion of *Turner*, see *infra* notes 449-85 and accompanying text.

424. Retrieval of the original appellate cases is extremely difficult; we have therefore relied on Helen Catterall's listing of cases. See 1-4 CATTERALL, *supra* note 169 (listing all known cases discussing slaves and slavery in America). After reading the original records of all of the reported cases in Virginia in which whites were indicted for murdering or assaulting blacks, we have been able to identify only eight. These cases are: *Souther v. Commonwealth*, 48 Va. (7 Gratt.) 673 (1851); *Commonwealth v. Howard*, 38 Va. (11 Leigh) 661 (1841); *Brooks v. Commonwealth*, 31 Va. 721, 4 Leigh 669 (1833); *Commonwealth v. Turner*, 26 Va. (5 Rand.) 678 (1827); *Commonwealth v. Carver*, 26 Va. (5 Rand.) 660 (1827); *Commonwealth v. Booth*, 4 Va. (2 Va. Cas.) 394 (1824); *Commonwealth v. Cohen*, 4 Va. (2 Va. Cas.) 158 (1819); *Commonwealth v. Chapple*, 3 Va. (1 Va. Cas.) 184 (1811).

425. A civil case from 1792 indicates the proprietary (as opposed to humanitarian) concern of the master for the well-being of his slave. In *Hoomes v. Kuhn*, 8 Va. (4 Call.) 274 (1792), Kuhn suspected a slave belonging to Hoomes of robbing his store, and he whipped the slave severely. *Id.* at 274. Upon hearing of the whipping Hoomes confronted Kuhn, and a fist fight ensued. Kuhn sued Hoomes for assault and battery and had the slave prosecuted for theft. *Id.* The slave was acquitted. *Id.* Hoomes then brought an action against Kuhn for whipping the slave and recovered 17 pounds. *Id.* Kuhn's counsel noted that Hoomes had "recovered compensation for the *personal affront* received by whipping the slave, without his knowledge." *Id.* at 277. For this "personal affront," a jury awarded Hoomes "vindictive damages, there being no actual loss of service sustained." *Id.* at 278.

426. 3 Va. (1 Va. Cas.) 184 (1811).

427. Act of Jan. 28, 1803, ch. 4, § 2, in II THE STATUTES AT LARGE OF VIRGINIA, *supra* note 102, at 405, 405.

owner if that were the case, just as they did in other cases.<sup>428</sup> On the other hand, if the assailant, Chapple, were black, it is unlikely there would have been any prosecution.

The statute under which Chapple was indicted provided that the victim was entitled to receive three-fourths of a fine levied against the perpetrator of the crime.<sup>429</sup> Chapple argued that since a slave could not legally hold property, the legislature could not have intended to make the stabbing of a slave a punishable offense.<sup>430</sup>

The argument of Chapple's attorney is typical of the specious reasoning that so often was set forth to "prove"—as Chief Justice Taney later asserted—that blacks "had no rights which the white man was bound to respect."<sup>431</sup> The attorney general argued on behalf of Virginia

that there is nothing in the law which shews clearly that an injury to a slave was not intended to be made punishable: that there were no words of exclusion, or exception, and that a slave in this country has been frequently decided to be legally and technically a person, on whom a wrong can be inflicted; that the giving a portion of the fine to the party grieved was intended to benefit him, and that his incapacity to take, ought not to skreen the prisoner from punishment.<sup>432</sup>

Chapple's argument that it was not a crime to stab a slave because the slave could not receive compensation may have struck a perilous doctrinal fear in the court, because such an argument could be applied to *femes covert*—married women—who under Virginia law could not own property in their own names.<sup>433</sup> The attorney general stressed that

*femes covert* could not take the fine, and it would be monstrous to contend that the act did not include injuries to them: and that there was no difficulty in rendering judgment against the accused for the whole fine assessed by the jury, although the person grieved might not be able to obtain his portion.<sup>434</sup>

The court held that under section 3 of the Act of 1803, a malicious stabbing of a slave was indeed indictable.<sup>435</sup>

428. See, e.g., *Commonwealth v. Turner*, 26 Va. (5 Rand.) 678, 685-86 (1827), discussed *infra* notes 449-85 and accompanying text.

429. *Chapple*, 3 Va. (1 Va. Cas.) at 185 (citing Act of Jan. 28, 1803, ch. 4, § 2, in II THE STATUTES AT LARGE OF VIRGINIA, *supra* note 102, at 405, 405).

430. *Id.* at 184-85.

431. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857).

432. *Chapple*, 3 Va. (1 Va. Cas.) at 185.

433. *Id.* at 185-86.

434. *Id.* at 185.

435. *Id.* at 186; see Act of Jan. 28, 1803, ch. 4, § 3, in II THE STATUTES AT LARGE OF VIRGINIA, *supra* note 102, at 405, 405-06.

*Chapple* was an important case because, at least obliquely, it recognized some semblance of humanity in the slave by holding that the legislature intended to make it a crime to maliciously stab a slave. Yet while some might call *Chapple* a humanitarian decision, one also could ask whether it was based more on a desire to protect the master's property than on humanitarian concerns. Subsequent Virginia case law confirmed this latter view, clearly rejected any humanitarian inferences attributable to *Chapple*, and emphasized that the slave's protection was for the benefit of the master.

In *Commonwealth v. Booth*,<sup>436</sup> for example, Richard Booth was indicted for aggravated assault upon a hired slave, Bob, belonging to Robert Fenn.<sup>437</sup> While Bob was under his control, Booth allegedly "did violently, severely and cruelly beat, bruise, wound and exceedingly ill treat [him], so that [Bob's] life was thereby greatly endangered, and . . . to the great damage of the said Robert Fenn, his owner and proprietor, to the evil example of all others in like cases offending."<sup>438</sup> The jury found the defendant guilty and assessed a sixty dollar fine, subject to the court's decision on two questions:

1. Can the Defendant be indicted and punished for the excessive, cruel and inhuman infliction of stripes on the slave Bob, while in his possession, and under his control as a *hired* slave, for the space of one month, permanent injury having resulted to the said slave from such infliction?
2. Can the Defendant be punished under the Indictment found in this Case?<sup>439</sup>

The court declined to answer the first question because it involved "a grave and serious [issue], as well as delicate enquiry into the rights and duties of slave-holders, and the condition of their slaves."<sup>440</sup> Concerning the second question, the court found the indictment inadequate in failing to specify the relation of the parties and to charge "that it is the *excess* of the punishment which is complained of, and not, that the right to punish at all, is questioned."<sup>441</sup> The court held that by proving that, as an employer, he had temporary ownership of the slave, the defendant was entitled to a judgment of acquittal in his favor.<sup>442</sup> In declining to decide the first certified question, the court was particularly reluctant to grant a

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436. 4 Va. (2 Va. Cas.) 394 (1824).

437. *Id.* at 394.

438. *Id.*

439. *Id.*

440. *Id.* at 396.

441. *Id.* at 395.

442. *Id.* at 396.



hirer of slaves any immunity when the owner claimed *civil* damages—particularly when, as noted in the first question, there was permanent injury to the slave.

Three years after *Booth*, the issue of the criminal liability of strangers assaulting slaves arose in *Commonwealth v. Carver*.<sup>443</sup> The defendant, William Carver, was indicted for “feloniously, maliciously, and unlawfully shooting, with intent to maim, disfigure, disable, and kill, a negro man slave of the name of Armistead, the property of Andrew Houston.”<sup>444</sup> The indictment was brought under the general mayhem statute of 1819.<sup>445</sup> Upon being convicted by a jury, Carver moved to arrest the judgment on the ground that it was not a felony for a free white man to shoot a Negro slave.<sup>446</sup>

The superior court judge “adjourned” the case to the general court to decide whether a slave was someone on whom a free person could commit the offense of mayhem under the 1819 act.<sup>447</sup> Judge Brockenbrough, speaking for the court, held that a Negro slave was indeed a person on whom a free white person could commit the offense of mayhem. The opinion, however, is bereft of any sympathy for the injury the slave endured. Instead, the court conceded that the case was prosecuted for “the benefit of the master” and that the conviction was sustained solely on that basis:

[T]here appears no reason, arising from the relative situation of master and slave, why a free person should not be punished as a felon for maiming a slave. Whatever power our laws may give to a master over his slave, it is as important for the interest of the former, as for the safety of the latter, that a stranger should not be permitted to exercise an unrestrained and lawless authority over him. It is for the benefit of the master, and consoling to his feelings, that a third person should be restrained under the pains and penalties of felony, from maiming and disabling his slave.<sup>448</sup>

In one of the most devastating decisions to emerge from the high court of Virginia regarding the rights of blacks, the general court drew a

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443. 26 Va. (5 Rand.) 660 (1827).

444. *Id.* at 660-61.

445. “‘Mayhem’ at common law is defined as the unlawful and violent deprivation of another of the use of such of his members as may render him less able in fighting to defend himself . . .” 57 C.J.S. *Mayhem* § 1 (1948).

446. *Carver*, 26 Va. (5 Rand.) at 661.

447. *Id.* The superior court judge believed that the slave was not a person under that act, but the judge felt constrained by the general court’s earlier decision in *Chapple*. He therefore adjourned the question to the general court. *Id.*

448. *Id.* at 665.

clear and sharp distinction between the right of a master to assault a slave maliciously and the right of a mere stranger to do so. In *Commonwealth v. Turner*,<sup>449</sup> decided in 1827 (the same year as *Carver*), Turner was indicted for cruelly beating his slave, Emanuel, "with certain rods, whips and sticks."<sup>450</sup> The defendant demurred<sup>451</sup> to the indictment, and the superior court certified to the general court the issue of whether a master may be indicted and punished by fine and imprisonment "for the malicious, cruel, and excessive beating of his own Slave."<sup>452</sup>

The court sustained the demurrer, ruling that an owner could not be criminally liable for excessive battery of his slave.<sup>453</sup> Judge Dade, writing for the majority, concluded that while no statute precluded indictment of the master for such conduct, the common law could not be applied to punish it.<sup>454</sup> Judge Dade obviously was concerned about the immorality of the decision that he was rendering. Nevertheless, he protested a bit too much. He introduced his opinion by saying:

In coming to a decision upon this delicate and important question, the Court has considered it to be its duty to ascertain, not what may be expedient, or morally, or politically right in relation to this matter, but what is the law. It is its duty to expound and declare the actual law; and not to make, or amend it.<sup>455</sup>

After this protestation he launched into one of the most lengthy exegeses on slavery and biblical law ever written in a slavery case. Judge Dade observed that when slavery was first introduced into Virginia, neither English common law nor early colonial legislation provided any guidance concerning the treatment of slaves.<sup>456</sup> He said "[t]he rules were to be established, either by the positive enactments of the lawmaking power, or to be deduced from the Codes of other countries, where that condition of man was tolerated."<sup>457</sup> Judge Dade then embarked on a lengthy discourse on the history of slavery; he first discussed the systems of slavery that existed among the Jews, the ancient Greeks, and the an-

449. 26 Va. (5 Rand.) 678 (1827).

450. *Id.*

451. In the common-law system of pleading, the "demurrer" was a responsive pleading by the defendant in which he admitted the facts alleged in the indictment or complaint but disputed the legal sufficiency of those allegations. See BLACK'S LAW DICTIONARY 432-33 (6th ed. 1990).

452. *Turner*, 26 Va. (5 Rand.) at 678.

453. *Id.* at 680-81

454. *Id.* at 684-86.

455. *Id.* at 678.

456. *Id.* at 680.

457. *Id.*

cient Romans.<sup>458</sup> He found no support for the indictment from these sources, concluding that "[t]he uncontrolled power of the captor over the life of his captive might be readily understood to imply every inferior power."<sup>459</sup> He noted further that under the system of villeinage in England, the master could be indicted for maiming his villein because, according to Lord Coke, the villein was a subject of the King.<sup>460</sup> Judge Dade surmised that punishment for this brutality was not based on any concept of "the rights of the villein, the cause of humanity, or the good order and manners or morals of society," but rather on the fact "that the villein was, by the maiming, less serviceable to the King in his wars."<sup>461</sup>

Similarly, Judge Dade opined that when the courts have held a slaveowner criminally liable for violently beating his slave in the open market place,

it is not because it was a slave who was beaten, nor because the act was unprovoked or cruel; but, because *ipso facto* it disturbed the harmony of society; was offensive to public decency, and directly tended to a breach of the peace. The same would be the law, if a horse had been so beaten. And yet it would not be pretended that it was in respect to the rights of the horse, or the feelings of humanity, that this interposition would take place.<sup>462</sup>

Judge Dade found no support for the indictment in Virginia statutory or common law. He observed that no statute criminalized slave assault.<sup>463</sup> He then noted that from 1669 to 1788, the slaveowner was expressly exempted by statute from criminal liability for killing his slaves in the course of correcting them.<sup>464</sup> Hence, the master could not be punished for inflicting any *lesser* injury on the slave during correction.<sup>465</sup>

Judge Dade conceded that "[s]ince 1788, the life of the slave is protected by the laws equally with that of the freeman. And the statutes for punishing maiming extend as well to the protection of the bond as the free, from this high and aggravated degree of personal injury."<sup>466</sup> He nevertheless concluded that the common law provided the slave no protection from "minor injuries" (i.e., anything less than maiming) which the master inflicted, and that even if it did, such law was "nullified" by

458. *Id.* at 681.

459. *Id.* at 682-83.

460. *Id.* at 683-84.

461. *Id.* at 684.

462. *Id.* at 680.

463. *Id.* at 684-85.

464. *Id.*

465. *Id.* at 685.

466. *Id.*

the statutory scheme that had existed from 1669 to 1788.<sup>467</sup>

Judge Dade reasoned that to criminalize a cruel slave battery would be to create new common law, which he ruled the court had no power to do.<sup>468</sup> He referred to two earlier cases in which the court had held that it lacked the power to criminalize conduct not penalized expressly by statute.<sup>469</sup> In his words, "great changes are not to be made by the courts. It is only silent, and almost imperceptible changes, which are recognized, and in due time, confirmed, and established by the judicial tribunals."<sup>470</sup>

Judge Dade felt obliged to comment, "It is greatly to be deplored that an offence so odious and revolting as this, should exist to the reproach of humanity."<sup>471</sup> Nevertheless, he concluded that the courts were powerless to protect the slave from cruel, malicious, and excessive beatings by his master, and he deferred to both the "tribunal of public opinion" and the legislature to criminalize this conduct.<sup>472</sup>

In an impassioned and well-reasoned dissent, Judge Brockenbrough found full support in the common law for the indictment.<sup>473</sup> (Judge Brockenbrough, it must be remembered, authored the opinion in *Carver*.<sup>474</sup>) Whereas Judge Dade had emphasized that slave killing, when committed by a master, was not punishable from 1669 to 1788, Judge Brockenbrough countered that from 1620 to 1669, and from 1788 to the present, it *was* a felony for a master to kill his slave.<sup>475</sup> Otherwise, he reasoned, there would have been no need for the 1669 statute about the "casuall killing of slaves" that decriminalized this conduct.<sup>476</sup> When "this ferocious and sanguinary system of legislation was abolished . . . [in] 1788," he continued, "[b]y that repeal, the common law was ex-

467. *Id.*

468. *Id.* at 685-86.

469. *Id.* at 679 (citing *Anderson v. Commonwealth*, 32 Va. 803, 805, 5 Leigh 740, 741-42 (1835); *Commonwealth v. Isaacs*, 26 Va. (5 Rand.) 634, 637 (1826)).

470. *Turner*, 26 Va. (5 Rand.) at 686.

471. *Id.*

472. *Id.* These words were echoed in large part by Judge Thomas Ruffin two years later in *State v. Mann*, 13 N.C. (2 Dev.) 263, 268 (1829). In holding that the master must retain absolute power over his slaves, even to the extent of being allowed to shoot them if necessary, Judge Ruffin stated: "I most freely confess my sense of the harshness of this proposition; I feel it as deeply as any man can; and as a principle of moral right every person in his retirement must repudiate it. But in the actual condition of things it must be so. There is no remedy." *Id.* at 266.

473. *Turner*, 26 Va. (5 Rand.) at 688-90 (Brockenbrough, J., dissenting).

474. See *Commonwealth v. Carver*, 26 Va. (5 Rand.) 660, 661 (1827), discussed *supra* text accompanying notes 443-48.

475. *Id.* (Brockenbrough, J., dissenting).

476. *Id.* at 687 (Brockenbrough, J., dissenting).

pressly revived.<sup>477</sup>

Judge Brockenbrough essentially engaged in a balancing of interests between the master's property rights and the state's interest in punishing excessive and unnecessary infliction of pain. He reasoned that the destruction of slave property was not necessary to the master's full enjoyment of his property rights.<sup>478</sup> Under the common law

[t]he slave was not only a *thing*, but a *person*, and this well-known distinction would extend its protection to the slave as a person, except so far as the application of it conflicted with the enjoyment of the slave as a thing. Upon this ground, was [the slave] protected . . . I see no incompatibility between this degree of protection, and the full enjoyment of the right of property.<sup>479</sup>

Judge Brockenbrough remarked that if a person could be indicted under Massachusetts law for poisoning a cow, or under Pennsylvania law for killing a horse, then similarly an indictment could be sustained under Virginia law for the malicious and inhuman beating of a slave.<sup>480</sup> He quite astutely observed, moreover, that adoption of his position would not have negative consequences for society:

When it is recollected, that our Courts and Juries are composed of men who, for the most part, are masters, I cannot conceive that any injury can accrue to the rights and interests of that class of the community. And with respect to the slaves, whilst kindness and humane treatment are calculated to render them contented and happy, is there no danger that oppression and tyranny, against which there is no redress, may drive them to despair?<sup>481</sup>

Judge Dade's majority opinion in *Turner* was a diminution of the spirit and substance of *Chapple* and *Carver*, in which the court had been willing to protect the slave under the mayhem statute despite there being no affirmative protection of the slave in the language of the statute.<sup>482</sup> In declining to adopt Judge Brockenbrough's view that there should be limits on the master's power to beat a slave, the general court's majority adopted the uncompromising view that the master must have absolute

477. *Id.* at 689 (Brockenbrough, J., dissenting).

478. *Id.* at 688 (Brockenbrough, J., dissenting).

479. *Id.* at 688-89 (Brockenbrough, J., dissenting).

480. *Id.* at 689 (Brockenbrough, J., dissenting).

481. *Id.* at 690 (Brockenbrough, J., dissenting).

482. See *Commonwealth v. Carver*, 26 Va. (5 Rand.) 660, 661-65 (1827), discussed *supra* notes 443-48 and accompanying text; *Commonwealth v. Chapple*, 3 Va. (1 Va. Cas.) 184, 185-86 (1811), discussed *supra* notes 426-35 and accompanying text.

power and the slave must be powerless.<sup>483</sup> The implication of *Turner* is that a slave in Virginia had fewer protections than a cow in Massachusetts or a horse in Pennsylvania.

An interesting contrast can be made between Judge Dade's observation that the English villein, as a subject of the King, was protected from maiming, and Governor Spotswood's view, a century earlier, that a slave was the King's subject and thus could not be willfully destroyed.<sup>484</sup> Judge Dade apparently did not take the view that the slave was a citizen who could be rendered "less serviceable" to his country by maiming. In comparing the American system of slavery to the English villeinage system, Judge Dade did not draw the conclusion one might have predicted—that just as a villein was less serviceable to the King, so was a slave rendered less serviceable to his country.<sup>485</sup>

In the 1841 case *Commonwealth v. Howard*<sup>486</sup> the general court held that a white person could be indicted for knowingly and willfully injuring a female slave "by violently and inhumanely assaulting and beating her to the great injury of the slave, and to the great damage of [the owner]."<sup>487</sup> What was notable about the court's decision, however, was not so much the fact that it sustained the indictment, but the court's basis for doing so. The statute upon which the indictment was founded was one that protected trees "or any other timber, or property, real or personal, belonging to another" from being cut down, destroyed, or injured.<sup>488</sup> The court sustained the indictment under this statute based on the slave's status as property rather than as a person.<sup>489</sup> The same statute had been interpreted in 1834, in *Commonwealth v. Percavil*,<sup>490</sup> to protect "living domestic animals," not just inanimate objects.<sup>491</sup> Hence, while the court in *Howard* was willing to punish brutality toward the slave, it did so by treating the slave as property under a willful trespass

483. See *State v. Mann*, 13 N.C. (2 Dev.) 263, 266 (1829), discussed *supra* note 472.

484. See *supra* text accompanying note 338.

485. See *GUILD*, *supra* note 2, at 191 (citing Act of 1782, ch. VIII, § III, in 9 HENING'S STATUTES AT LARGE, *supra* note 42, at 352-53). This Act notes that "[d]uring the Revolutionary War, many slaves were enlisted by their owners. . . . Because such slaves have contributed towards American liberty and independence, they are all deemed free and may sue, in forma pauperis, and may recover damages if detained." *Id.*

486. 38 Va. (11 Leigh) 661 (1841).

487. *Id.* at 661-62.

488. Act of Feb. 14, 1823, ch. 34, § 1, 1822-23 Va. Acts 36, 36-37 (act "to provide for the more effectual punishment of certain offenses").

489. *Howard*, 38 Va. (11 Leigh) at 661-62.

490. 31 Va. 740, 4 Leigh 686 (1834).

491. *Id.* at 741, 4 Leigh at 687.

statute, thereby protecting the master's interests rather than the slave as a human being.

The views of the Virginia courts on assaults of slaves may be summarized by noting that the courts' humanitarian concerns were directly related to the master's advantage. While humanitarian concerns may be inferred in cases involving strangers who assaulted slaves, such concerns were less evident when hirers of slaves were involved, and the humanitarian concern for the slaves evaporated when the master was the defendant. The assault cases demonstrate that even for those who considered a slave a human being, the slave, nevertheless, was at the bottom of the barrel of humanity. One judge stated in *Carver* that "an alien enemy" is entitled to all of the protection of the mayhem statute and that "whilst he is permitted to remain in the country, yet he cannot maintain an action during the war: it cannot for a moment be supposed that he may be shot, stabbed, disfigured or disabled, without subjecting the offender to the other pains and penalties of the act."<sup>492</sup> In antebellum Virginia, slaves had a lower status even than alien enemies loyal to a foreign government.

#### b. Black Assaults, White Victims

Virginia statutes aimed at free blacks offer the most telling evidence that the state's criminal law governing assaults was racially motivated rather than based on status as free man or bondsman. A free black found to have assaulted a white would be punished by whipping,<sup>493</sup> whereas no such penalty existed for whites assaulting a black. Such punishments served to degrade blacks, free or slave, to cast them as inferior beings, and to bring them closer to the lowly status of the slave. There was no pretext for laws such as these; they simply reflected the white man's contempt for the black man.

Any aggressive gesture toward a white by a black was punishable, and blacks received a heavier penalty than whites did for assaulting whites. One of Virginia's earliest laws provided that if a black, mulatto, or Indian "lift[ed] up his hand" against a Christian white, he was to receive thirty lashes.<sup>494</sup> Prohibited actions included "provoking language or menacing gestures" directed at a white person.<sup>495</sup>

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492. *Commonwealth v. Carver*, 26 Va. (5 Rand.) 660, 664 (1827), discussed *supra* notes 443-48 and accompanying text.

493. Act of Oct. 1748, ch. XXXVIII, § XX, in 6 HENING'S STATUTES AT LARGE, *supra* note 42, at 104, 110 (act "directing the trial of Slaves committing capital crimes").

494. Act of June 1680, Act X, in 2 HENING'S STATUTES AT LARGE, *supra* note 42, at 481, 481-82 (act "for preventing Negroes Insurrections").

495. Act of Mar. 14, 1848, ch. XII, § 6, 1847-48 Va. Acts 125, 125 (act "to reduce into one the several acts concerning crimes and punishments, and proceedings in criminal cases").

In 1728 Sambo, a black slave, was convicted of theft and striking a white man.<sup>496</sup> The court ordered the sheriff to give him thirty-nine lashes "and then sett him in the pillory and naile both his Ears, therefore to stand one hour and at the Expiration of the same to cut them both off."<sup>497</sup> It is not clear from the record whether the slave received this penalty because he had committed theft or because he had struck a white man.

Punishment for assaults on whites became increasingly severe. An 1823 law provided that any black or mulatto punished for this offense was to be whipped and "banished from the United States forever. If such convict at any time shall return, he shall suffer death without benefit of clergy."<sup>498</sup> In 1832, in the aftermath of the August 1831 Nat Turner rebellion, the punishment was changed to death.<sup>499</sup> In 1846 the punishment was changed again to imprisonment for five to eighteen years.<sup>500</sup> And finally, in 1848, the punishment was death or, at the jury's discretion, imprisonment for one to five years.<sup>501</sup> It was obvious that the severity of one's punishment depended on race. Whites who assaulted free blacks or other whites with intent to kill were subject merely to imprisonment for one to ten years.<sup>502</sup>

#### 4. Rape or Attempted Rape

##### a. Rape of Black Women

If the murder and assault of blacks were rarely prosecuted in antebellum Virginia, the situation with respect to the rape of black women was even worse. Legislation provided that "[i]f any free white man do ravish a woman over the age of ten years, when she did not consent before nor after, . . . the person so offending, his aiders, counsellors and abettors shall be adjudged felons."<sup>503</sup> Since the statute refers to women in general, rather than to white women, presumably the rape of a free

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496. RICHMOND COUNTY PROCEEDINGS, *supra* note 138, at 111.

497. *Id.*

498. Act of Feb. 21, 1823, ch. 33, § 1, 1822-23 Va. Acts 36, 36 (act "to provide more effectually for the punishment of slaves, free negroes and mulattoes, found guilty of assaulting and beating, with intention to kill, a white person, and for other purposes").

499. Act of Mar. 15, 1832, ch. XXII, § 6, 1831-32 Va. Acts 20, 21 (act "to amend an act entitled, 'an act for reducing into one the several acts concerning slaves, free negroes and mulattoes, and for other purposes'"); see SCHWARZ, *supra* note 25, at 27.

500. GUILD, *supra* note 2, at 115 (citing Act of 1846, ch. 94, § 1, 1845-46 Va. Acts 66, 66).

501. Act of Mar. 14, 1848, ch. XIII, § 2, 1847-48 Va. Acts 126, 126 (act "to reduce into one the several acts concerning crimes and punishments, and proceedings in criminal cases").

502. *Id.* ch. XI, § 12, 1847-48 Va. Acts 121, 123.

503. CHAPMAN JOHNSON & ROBERT G. SCOTT, REVISION AND DIGEST OF THE CRIMINAL CODE OF VIRGINIA 36-37 (1846).



black woman would have been a punishable offense. We have found no reported cases, however, in which a white was prosecuted for the rape or attempted rape of a black woman, free or slave. The only two eighteenth-century cases involving the prosecution of black slaves for raping slave women date from 1783; in one case the defendant was acquitted and in the other the charges were dropped.<sup>504</sup> Statistics on slaves condemned to death indicate that in two instances, a slave was sentenced to death for the rape of a mulatto woman.<sup>505</sup>

In the nineteenth century the government prosecuted the rape of a black woman in only a handful of cases.<sup>506</sup> In 1829 a slave, Lewis, was found guilty of the rape of Amey Baker, a free black, and executed.<sup>507</sup> In 1850 a slave named John was sentenced to be transported out of the Commonwealth for raping a slave woman, but this case seems to be the only instance in which the rape of a slave incurred such a penalty.<sup>508</sup> As for the treatment of female slaves by their masters, it seems to have been understood that a master had the right to do whatever he wished with his property, so long as she did not die from the abuse.<sup>509</sup>

The Virginia Supreme Court of Appeals did not address directly the question whether a slave had any personal rights that could be violated by rape, but the other slave states that debated this issue decided that no such rights existed. Mississippi<sup>510</sup> and Missouri,<sup>511</sup> for example, decided that the rape of a slave woman was simply not a crime, even when committed by a slave. When it involved the prosecution of black slaves for the rape of black slave women, Virginia, unlike other states, did not *declare* that such rapes were not a crime. But no declaration was necessary, because “[t]he law simply did not criminalize the rape of slave

504. See SCHWARZ, *supra* note 25, at 156 n.45 (citing trial of Toby, Dec. 2, 1783, Norfolk County Ct. Minute Book 1782-83, at 222; cancelled trial of Kitt, July 29, 1783, Westmoreland County Ct. Order Book 1776-86, at 148).

505. See Phillips, *supra* note 193, at 337. No date is given for these cases.

506. See SCHWARZ, *supra* note 25, at 205-10.

507. *Id.* at 207.

508. *Id.* at 293 (citing trial of Coleman, Nov. 17, 1856, Mecklenburg County Ct. Order Book 1853-58, at 353).

509. For a discussion of fornication laws, see Higginbotham & Kopytoff, *Racial Purity and Interracial Sex*, *supra* note 12, at 1989-2007.

510. See *George v. State*, 37 Miss. 316, 318-20 (1859) (holding that rape of a female slave under the age of ten by a slave was not a crime because English common law did not recognize slavery and thus recognized no rights of slaves, and because Mississippi extended no such rights through legislation; all rights in slave rested with master).

511. In *State v. Celia*, Vol. 2 Index to Ct. Cases of Callaway County, File No. 4,496 (1855), the Missouri Supreme Court held that a slave woman could not kill her master in resisting his sexual assaults. See *id.* at 13. (The Clerk of Callaway County paginated only the front of each page; thus, citation to page numbers may include either the front or the back of that page.)

women.”<sup>512</sup> This is not to suggest that slave women in Virginia were distinctly better off than slave women elsewhere. What is significant is that there was not one reported prosecution of a white man for the sexual assault of a black or mulatto woman in either colonial or antebellum Virginia. This fact provides one of the most telling illustrations of black women’s complete and utter powerlessness before the criminal laws of Virginia.<sup>513</sup>

#### b. Rape of White Women

Compared to the rape of black women, the rape of a white woman, particularly by a black man, was one of the most serious offenses an individual could commit in Virginia. For most of the colonial era Virginia did not *formally* recognize any differences in punishment of whites and blacks convicted of the rape of a white woman; men of both races faced the death penalty for this crime.<sup>514</sup> The evidence is at best fragmentary—historian Arthur Scott uncovered only ten cases of rape and two cases of attempted rape prior to 1774.<sup>515</sup> In these cases, however, significant differences may be discerned in the patterns of prosecution against blacks and whites accused of raping white women. Six white men were accused of rape.<sup>516</sup> In three of the cases, the men were acquitted,<sup>517</sup> and in one a servant convicted of attempted rape was given thirty-nine lashes, was made to wear an iron collar, and was required to serve several additional terms.<sup>518</sup> Two of the white men were found guilty and condemned to death, one in 1627 for seducing four girls under the age of consent<sup>519</sup> and one in 1774, although there is no record of the crime or an execution in this case.<sup>520</sup> In contrast, three of the five blacks accused of raping white women were found guilty and executed while two were found not guilty of rape but convicted of the lesser offense of assault.<sup>521</sup> In a sixth case, the general court recommended “[s]trong measures to . . . appre-

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512. SCHWARZ, *supra* note 25, at 159.

513. The “slave woman [was] at the mercy of the fathers, sons or brothers of her master.” FREDERICK DOUGLASS, *MY BONDAGE AND MY FREEDOM* 60 (photo. reprint 1968) (1855). Regarding the consequences of fornication between a white man or woman and a slave, see Higginbotham & Kopytoff, *Racial Purity and Interracial Sex*, *supra* note 12, at 2003 (discussing *Commonwealth v. Jones*, 43 Va. (2 Gratt.) 555 (1845)).

514. See SCOTT, *supra* note 27, at 207-09 & nn.45-55.

515. For a list of these cases, see *id.* at 207-08 & n.53.

516. *Id.* at 207.

517. *Id.*

518. *Id.* at 208 n.53.

519. *Id.* at 207.

520. *Id.*

521. *Id.* at 208.

hend Robin[,] a negro who had ravished a white woman."<sup>522</sup> There is no record of whether he was captured or tried.

By the end of the colonial period, however, de facto racial bias gave way to an explicit racial codification of the laws concerning the rape of white women. In the nineteenth century, according to Flanigan:

Whites were far more concerned about the chastity of white women than the physical security of slaves. Statistics from Virginia indicate that whites considered rape more serious even than attempted murders and assaults on whites. For actual as opposed to attempted rape a larger percentage of convicted slaves suffered the death penalty than for murder of whites . . . .<sup>523</sup>

As discussed above, there are no recorded prosecutions for the rape of a black or mulatto woman by a white man.<sup>524</sup> But a number of cases involving the prosecution of slaves for the rape or attempted rape of white women were tried.<sup>525</sup> Punishments for such crimes were severe, and at various times legislation required that blacks convicted of rape or attempted rape of a white woman be castrated.<sup>526</sup> Although a law of 1769 concluded that castration was too severe a penalty and would no longer be imposed upon whites for certain offenses, castration for *attempted* rape of a white woman continued to be permitted for blacks.<sup>527</sup> The Act of 1769 stated that "whereas dismembering is often disproportionate to the offense, and contrary to the principles of humanity, it shall not now be lawful to direct castration of any slave, except on conviction of an attempt to ravish a white woman."<sup>528</sup> In 1823 the law was amended to provide that slaves or free blacks who attempted to rape a white woman were to "suffer death by hanging by the neck."<sup>529</sup> Legislation enacted in

522. *Id.* n.51.

523. Flanigan, *supra* note 59, at 68 (citation omitted).

524. *See supra* text accompanying note 513.

525. Phillips notes that 73 slaves were convicted of rape and 32 slaves were convicted of attempted rape between 1774 and 1864. Phillips, *supra* note 193, at 336-37. Schwarz states that between 1724 and 1739, the "conviction rate in trials of slaves accused of raping a white woman was 100[%]." SCHWARZ, *supra* note 25, at 82.

526. GUILD, *supra* note 2, at 157 (citing Act of 1769, ch. XIX, in 8 HENING'S STATUTES AT LARGE, *supra* note 42, at 358, 358-61); *id.* at 159 (citing Act of 1792, ch. 41, in I THE STATUTES AT LARGE OF VIRGINIA, *supra* note 102, at 122, 122-30); *see* SCHWARZ, *supra* note 25, at 162-63, 206, 208.

527. Act of Nov. 1769, ch. XIX, § 1, in 8 HENING'S STATUTES AT LARGE, *supra* note 42, at 358, 358 (act "to amend the Act, intituled an Act to amend the Act for the better government of Servants and Slaves").

528. GUILD, *supra* note 2, at 157 (citing Act of 1769, ch. XIX, in 8 HENING'S STATUTES AT LARGE, *supra* note 42, at 358, 358-61 (act "to amend the Act, intituled an Act to amend the Act for the better government of Servants and Slaves")).

529. *Id.* at 163 (citing Act of 1823, ch. 34, § 1, 1822-23 Va. Acts 36, 36).

1837 stipulated that blacks convicted of raping (as opposed to attempting to rape) a white woman were to be sentenced to death without benefit of clergy.<sup>530</sup>

Although slaves continued to be subject to the death penalty for rape, an 1848 statute provided that free blacks convicted of rape or of abducting a female with intent to defile could be subject either to the death penalty or, "at the discretion of the jury confinement of five to twenty years."<sup>531</sup> In contrast, whites guilty of rape were subject to imprisonment for ten to twenty years, and whites guilty of abduction with intent to defile were subject to a three- to ten-year term of imprisonment.<sup>532</sup>

The discrepancies in punishment were blatant. Whereas a white man convicted of raping a white woman would receive ten to twenty years imprisonment, a free black convicted of the same offense could receive death or imprisonment for five to twenty years.<sup>533</sup>

These numerous revisions in the slave criminal code reveal the growing paranoia of the white male elite in nineteenth-century Virginia towards the threat of black male sexuality. Despite a "downward statistical trend"<sup>534</sup> in the number of slaves who actually raped white women in the last forty years of slavery, the perception of Virginia whites was that black rape of white women "was on the increase and ought to be severely guarded against."<sup>535</sup>

It was also in this era that "[f]or the first time, threats or instances of lynching slaves suspected of raping or otherwise sexually assaulting white women began to occur regularly."<sup>536</sup> The myth of the black rapist and the desire of southern white men to protect the virtue of southern white womanhood had been integral catalysts for the myriad laws that sought to control black sexuality. The emergence of extra-legal lynching would perpetuate whites' attempt to render black Virginians powerless even after emancipation. In fairness, it should be noted that lynching of black men accused of rape seems to have occurred less often in late nineteenth- and early twentieth-century Virginia than in other states.<sup>537</sup> Nev-

530. Act of Mar. 29, 1837, ch. 71, § 1, 1836-37 Va. Acts 49, 49 (act "amending the act, entitled 'an act to provide for the more effectual punishment of certain offenses'").

531. GUILD, *supra* note 2, at 165 (citing Act of 1848, ch. XIII, 1847-48 Va. Acts 126, 126).

532. *Id.*

533. See STROUD, *supra* note 17, at 78.

534. See SCHWARZ, *supra* note 25, at 292-93.

535. *Id.* at 293 (quoting Gov. Henry A. Wise).

536. *Id.* at 291-92.

537. *Id.* at 295. For discussions of the sexual dynamics of lynching in the South, see JACQUELYN D. HALL, *REVOLT AGAINST CHIVALRY: JESSIE DANIEL AMES AND THE WOMEN'S CAMPAIGN AGAINST LYNCHING* 145-57, 322 n.87 (1979) (containing biography describing

ertheless, between 1908 and 1962, every man executed for rape in Virginia was black.<sup>538</sup>

In 1977, in *Coker v. Georgia*,<sup>539</sup> the United States Supreme Court held it unconstitutional to execute a defendant for the rape of an adult woman.<sup>540</sup> That decision was based upon the majority's view that the penalty of death was disproportionate to the offense of rape, and thereby violative of the Eighth Amendment's prohibition against cruel and unusual punishment.<sup>541</sup> The *Coker* decision could just as easily have been based on the notion that the imposition of capital punishment for the crime of rape in this country was a violation of the Equal Protection Clause. Of the 455 men who have been executed in this country for rape, 405 were black.<sup>542</sup>

#### IV. THE DISPOSITION OF CONDEMNED SLAVES

In all cases in which the Virginia courts of oyer and terminer sentenced a slave to death, the justices were required to set a value for the slave and order the master's reimbursement from the public purse.<sup>543</sup> In 1723 this law was amended to provide for reimbursement to the master for slaves sentenced either to death or to sale and transportation.<sup>544</sup> A 1748 statute, however, provided that no legal remedy would exist for an owner of a slave killed by court order.<sup>545</sup>

In eighteenth-century Virginia, a voucher system developed whereby a slaveowner would be reimbursed for slaves sentenced to death. Ulrich Phillips' study of this system is a valuable source of information.<sup>546</sup> Due to the lack of lower court records, it is impossible to deter-

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Jessie Daniel Ames and the Association of Southern Women for the Prevention of Lynching); IDA B. WELLS, ON LYNCHINGS: SOUTHERN HORRORS; A RED RECORD; MOB RULE IN NEW ORLEANS 122-34 (1969).

538. SCHWARZ, *supra* note 25, at 320.

539. 433 U.S. 584 (1977).

540. *Id.* at 592.

541. U.S. CONST. amend. VIII. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." *Id.*

542. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATS., NATIONAL PRISONER STATISTICS—CAPITAL PUNISHMENT 18 (1979), reprinted in HUGO A. BEDAU, THE DEATH PENALTY IN AMERICA 60-61 (3d ed. 1982).

543. Act of Oct. 1705, ch. XLIX, § XXXVIII, in 3 HENING'S STATUTES AT LARGE, *supra* note 42, at 447, 461 (act "concerning Servants and Slaves").

544. Act of May 1723, ch. IV, § XVI, in 4 HENING'S STATUTES AT LARGE, *supra* note 42, at 126, 131-32 (act "directing the trial of Slaves, committing capital crimes").

545. *Id.* § XXV, in 4 HENING'S STATUTES AT LARGE, *supra* note 42, at 111-12.

546. All of the information discussed in this section with respect to the statistics on slave crimes was collected by Phillips. See Phillips, *supra* note 193, at 336. Schwarz notes that Phillips used only the files of the Auditor's Office, which contained information on condemned

mine what offenses slaves committed and what punishment they received. The vouchers reveal vital information, however. The earliest recorded voucher was paid in 1774.<sup>547</sup> In the 1780s, 66 convictions were entered; in the 1790s, 112; in first decade of the 1800s, 179; in the 1810s, 185; in the early 1850s, 168 (the records for 1856-59 are missing); in 1860, 26; in 1861, 28; in 1862, 15; in 1863, 6; and in 1864, 7.<sup>548</sup>

According to Phillips the total number of slaves sentenced to death was 1,418, only 91 of whom were women.<sup>549</sup> Of slaves condemned, 301 were convicted of either a felony or a crime not specified by the record. The remaining 1,117 are broken down as follows: For murder, 346;<sup>550</sup> for rape, 73;<sup>551</sup> for attempted rape, 32.<sup>552</sup> Two of the victims were white children—one an infant, the other under the age of ten. Two of the victims were mulatto women.<sup>553</sup> No slave women were reported as the victims of rape by slaves.<sup>554</sup>

Fifty-five victims (mostly whites) suffered poisoning and attempted poisoning. Women committed 15 of the 55 crimes. Other assault and violent crimes totalled 11, with 2 of the victims being black.<sup>555</sup>

The number condemned for insurrection and conspiracies was 91; for arson, 90; for burglary, 257; for highway robbery, 15; for horse theft,

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slaves. See SCHWARZ, *supra* note 25, at 55. Schwarz has substantially supplemented Phillips' study with lower court records and private correspondence. *Id.* at 55-57.

547. Phillips, *supra* note 193, at 336.

548. *Id.* at 336-37.

549. *Id.* at 337. For a comment on the limitations of Phillips' study, see SCHWARZ, *supra* note 25, at 55.

550. The murder victims are identified as follows:

Master	56	
Overseer	7	
White Male	98	
Mistress	11	
White Female	13	
White child	9	
Free black male	7	
Male slave	59	
Female slave	14	
Slave child	12	(all murders by slave women of their own children)
Undescribed	60	

Phillips, *supra* note 193, at 337. For a discussion of infanticide by slaves, see SCHWARZ, *supra* note 25, at 252-54.

551. Phillips, *supra* note 193, at 337.

552. *Id.*

553. *Id.*

554. *Id.*

555. *Id.* at 338.

20; for theft, 24; and for forgery, 1.<sup>556</sup> At least one slave was sentenced to death in 1839 for "causing to be printed certain writings denying the right of masters to property in their slaves."<sup>557</sup> It is difficult to ascertain how many of the slaves condemned to death were actually executed.<sup>558</sup>

Daniel Flanigan, who has interpreted the significance of these statistics, observes that between 1790 and 1864, 194 whites were murdered at the hands of slaves, whereas only ninety-two blacks were killed by slaves.<sup>559</sup> From 1827 to 1830 and 1833 to 1835, slaves killed thirty-four whites and twelve blacks.<sup>560</sup> Flanigan notes that some slaves may not have been tried for murdering other slaves, "since whites did not consider it as serious a crime for a slave to commit murder or manslaughter on another slave as to kill a white."<sup>561</sup> This is yet another example of what little value whites placed on the life of a slave. Flanigan concludes that, even accounting for this gap, the statistics evince a disproportionate number of white victims over black victims—a result he found all the more remarkable because of the frequent interaction of slaves with each other and the severe sanctions imposed for slave attacks on whites.<sup>562</sup>

## V. PLANTATION AND EXTRAJUDICIAL JUSTICE

Because prosecution of slaves was time-consuming and expensive most enforcement of the law took place on the plantation. Although masters were responsible for seeing that breaches of the law by their slaves or servants were reported,<sup>563</sup> the law actually sanctioned the master's private law-enforcement authority over the slave. Most often the master or overseer meted out the punishment rather than a public official, but city ordinances also permitted the slaveholder to send his slaves to the workhouse or to jail to be punished.<sup>564</sup>

One historian has argued that this system of publicly regulated punishment may have benefited the slave because "[c]ity ordinances limited

556. *Id.*

557. *Id.*

558. According to Schwarz, after the institution of sale and transportation, between 1801 and 1865, only 454 slaves were executed. SCHWARZ, *supra* note 25, at 29.

559. Flanigan, *supra* note 59, at 49-50.

560. *Id.* at 50.

561. *Id.*

562. *Id.*

563. See, e.g., Act of Feb. 1727, ch. VII, §§ III-IV, in 4 HENING'S STATUTES AT LARGE, *supra* note 42, at 209-10 (act "for the . . . restraint of Slaves or Servants"); see also SCOTT, *supra* note 27, at 52 ("Particular laws sometimes imposed special obligations, as when masters were made responsible for seeing that breaches of law by their slaves or servants were reported.")

564. Flanigan, *supra* note 59, at 77.

the number of stripes that could be administered while the master's rage might know no bounds."<sup>565</sup> But abolitionist William Jay viewed it this way: "The public arm, instead of protecting the slave against the master, *assists* the master in the exercise of his irresponsible despotism over the slave."<sup>566</sup> As such, the master "becomes *ex officio*, in virtue of his being a slaveholder, a judicial functionary himself, with the powers of a court of justice to award sentence, and order a public officer to put it in execution."<sup>567</sup>

The informal system of plantation justice that developed was created in the interests of efficiency and for the protection of the master's property rights. As Flanigan noted:

Often this system included minor offenses such as thefts, trespasses, and assaults on other slaves committed on neighboring plantations. For depredations of this character the planters might simply get together and agree on a punishment, usually a specified number of lashes administered by the master of the offending slave. The law not only sanctioned this system but encouraged it.<sup>568</sup>

As Professor Schwarz observed,

This combination of private and public power appears starkly in Robert "King" Carter's action against two of his slaves, Bambara Harry and Dinah, in 1710. According to Carter, they were "incorrigible"—no punishment could control them. So Carter successfully petitioned the Lancaster County Court for permission to amputate their toes. Carter or his agent would perform the actual dismemberment . . . .<sup>569</sup>

Because so many crimes against slaves, free blacks, and mulattoes never reached the courthouse, there is no way to know how many were actually lynched or otherwise punished.

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565. *Id.* The thesis that flogging a slave, whether by a master or by a public official, was in any way beneficial to the person being flogged is highly questionable. The main beneficiaries of the urban system of publicly regulated beatings were the slaveowners themselves who were "saved . . . [the] trouble" of inflicting punishment and also were spared a "slight wear and tear of feeling." See RICHARD C. WADE, *SLAVERY IN THE CITIES: THE SOUTH, 1820-1860*, at 95-96 & n.47 (1964) (citing LOUIS HUGHES, *THIRTY YEARS A SLAVE, FROM BONDAGE TO FREEDOM* 9 (Milwaukee, South Side Printing Co. 1897)). Frederick Douglass, among others, noted that the attempts of urban slaveowners to maintain a public appearance of decorum facilitated a less arbitrarily cruel system of slave correction. "He is a desperate slaveholder," Douglass claimed, "who will shock the humanity of his non-slaveholding neighbors, by the cries of the lacerated slaves . . ." *Id.* at 95 & n.45 (quoting FREDERICK DOUGLASS, *MY BONDAGE AND MY FREEDOM* 148 (1855)).

566. Flanigan, *supra* note 59, at 76-77 (citing GOODELL, *supra* note 1, at 167).

567. *Id.* (citing GOODELL, *supra* note 1, at 167).

568. *Id.* at 74.

569. SCHWARZ, *supra* note 25, at 80.



Various statutes also permitted the extrajudicial capture and punishment of runaway slaves. Slaves that had been outlawed (runaway slaves who had committed other offenses or who had wrought havoc)<sup>570</sup> could, upon recapture, be penalized "either by dismembering or any other way not touching his life, as may be thought fit, for reclaiming such incorrigible slave, and terrifying others from like practices."<sup>571</sup> Due to the apparent overzealousness of certain whites, however, the legislature amended the law in 1723 to provide that slaves notoriously guilty of running away could be dismembered when they could not be captured by *ordinary* means.<sup>572</sup> The law was later amended in 1769 to prohibit castration of runaway slaves because such punishment was "disproportioned to the offence, and contrary to the principles of humanity."<sup>573</sup> As already noted, castration continued to be permitted for slaves convicted of attempting to ravish a white woman.<sup>574</sup>

Masters sometimes offered more reward money for killing a runaway slave than for taking him alive.<sup>575</sup> Slaves would sometimes commit suicide just to avoid capture. One case that exemplifies the plight of runaway slaves and the vehemence with which they were pursued was reported in the *Journal of Virginia Burgesses* in 1755:

The petition of George Mason set forth that a negro Dick had run away, and committed felonies; he was outlawed, captured, and delivered to a man named James; while being taken to a constable he tried to escape; he was injured, and then tied with a rope to a horse's tail, and then dragged to a house, where he expired. A committee of burgesses found that the negro had run away, and had committed some crime for which the County Court had cut off one ear; he ran away again, was duly outlawed, captured by some soldiers on the march to Ohio, delivered to Daniel James, who took him to a constable; the slave pulled James off his horse, and tried to escape, saying he had been outlawed, and would be hanged if he went to prison; James struck him several blows; soon afterward the slave fell, and would not or could not go on; James dragged him at the

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570. See SCOTT, *supra* note 27, at 301.

571. See GUILD, *supra* note 2, at 51 (citing Act of 1705, ch. XLIX, § XXXVII, in 3 HENING'S STATUTES AT LARGE, *supra* note 42, at 447, 460-61).

572. See Act of May 1723, ch. IV, § XVIII, in 4 HENING'S STATUTES AT LARGE, *supra* note 42, at 126, 132 (emphasis added) (act "directing the trial of Slaves, committing capital crimes").

573. Act of Nov. 1769, ch. XIX, § 1, in 8 HENING'S STATUTES AT LARGE, *supra* note 42, at 358, 358 (act "to amend the Act, intituled an Act to amend the Act for the better government of Servants and Slaves").

574. *Id.*; see *supra* text accompanying notes 526-28.

575. See *supra* note 203 and accompanying text.

horse's tail; coroner's jury found no bruises sufficient to cause death; James said he believed the slave had taken poison as he saw him swallow something, after which he vomited . . . .<sup>576</sup>

It is not known how many slaves committed suicide to free themselves from their miserable existence. But the threat of suicide was a constant reality. In *Chapman v. Campbell*<sup>577</sup> a man who had just purchased a slave inquired as to "whether there was any thing in the jail with which [his] negro [slave] could inflict an injury on himself."<sup>578</sup> The new owner was concerned "that the man might do some violence to himself."<sup>579</sup> The slave, Gilbert, was to be transported out of the state within a short time. Rather than taking his life, however, he broke out of jail and successfully made his escape.<sup>580</sup> In another instance, the legislature ordered that a master be given \$1325 for the value of his slave who had been condemned to die, but who hung himself prior to his execution.<sup>581</sup>

As a direct result of laws allowing the capture of runaway slaves and the enticement of reward money, a system of organized patrols developed as an arm of the militia and an extension of private law enforcement.<sup>582</sup> The patrols were appointed by the county court whenever it was determined that extra men were needed, usually when an uprising was suspected.<sup>583</sup>

Slave patrollers were, according to J. Winston Coleman, considered the lowest of the low,

" 'the offscouring of all things, the refuse, the ears and tails of slavery, the wallet and satchel of polecats, the exuvial, the meanest and worst of all creatures. Like starved wharf rats, they are out at night, creeping into slave cabins to see if they have an old bone there; they drive out husbands from their own beds and take their places.' "<sup>584</sup>

This system of "plantation justice" and private law enforcement, which included the master's authority to *kill* a slave and yet escape pros-

576. SCOTT, *supra* note 27, at 309-10 n.65 (quoting J. VA. HOUSE OF BURGESSSES 253, 259 (May 5 & 16, 1755)).

577. 54 Va. (13 Gratt.) 105 (1856).

578. *Id.* at 107.

579. *Id.*

580. *Id.* at 108. The case arose from the slaveowner's demand for payment from the man who had agreed to purchase the slave, but who refused to pay after the slave escaped.

581. GUILD, *supra* note 2, at 92-93 (citing Act of 1864, ch. 98, § 1, 1863-64 Va. Acts 74, 74).

582. Flanigan, *supra* note 59, at 79.

583. *Id.* at 80.

584. *Id.* at 80 (quoting J. WINSTON COLEMAN, SLAVERY TIMES IN KENTUCKY 98 n.30 (1940) (quoting Lewis Clarke)).

ecution, insured the slave's total dehumanization. With no laws to protect the slave from his keepers and an equally harsh system of public law enforcement, the circle of injustice was complete.

Even when laws for the protection of blacks theoretically existed, the reality of race hate often demonstrated the impotence of the legal right. This reality was poignantly illustrated in *Grayson v. Commonwealth*,<sup>585</sup> in which a free negro, William Grayson, was indicted for the murder of David W. Miller, who was white.<sup>586</sup>

In 1848, Grayson had become indebted to two local merchants, Settle and Miller, in the amount of two or three dollars.<sup>587</sup> In retaliation, one of the owners took Grayson's spade and shovel "and told the prisoner that he could not have them until he had paid all that he owed."<sup>588</sup> On the evening of the murder, Grayson went to the store and requested his spade and shovel, but was "peremptorily refused."<sup>589</sup> He later returned to the store, paid off his account, and retrieved his spade and shovel.<sup>590</sup> "[A]bout an hour and a half after night" he went to a friend's cabin, where he stayed all night;<sup>591</sup> he claimed he lost his spade and shovel" en route to the cabin.<sup>592</sup>

That evening, Miller was murdered: He "was killed by several blows on the head, inflicted by a dull-edged instrument."<sup>593</sup> When found, the murder weapon—Grayson's shovel—displayed "marks of blood and one human hair."<sup>594</sup> The following day, when Grayson appeared at the store, he had on the same clothes that he had worn the night before, and "there was no appearance of blood on his clothes or person, [which] . . . were carefully examined."<sup>595</sup> At his first trial, the jury found him guilty of murder in the first degree and the court sentenced him to be hung.<sup>596</sup> On appeal the general court reversed the judgment and remanded the case for a new trial.<sup>597</sup> The court noted "that there is no evidence which connects the accused with the homicide . . . at

585. 47 Va. (6 Gratt.) 712 (1849).

586. *Id.* at 713.

587. *Id.*

588. *Id.* at 713-14.

589. *Id.* at 714.

590. *Id.* at 717.

591. *Id.* at 721-22.

592. *Id.* at 717-18.

593. *Id.* at 715-16.

594. *Id.* at 719.

595. *Id.* at 722.

596. *Id.* at 713.

597. *Id.* at 724.

most, it amounts only to a suspicion that he had some hand in it."<sup>598</sup>

*Grayson v. Commonwealth* was again before the general court in June of 1850.<sup>599</sup> The evidence presented at the second trial was substantially similar to that introduced at the first trial, but revealed one new twist. The general court noted that "[a]fter the inquest had been taken and signed," Grayson

was directed to be committed to jail, when it was proposed—the certificate of facts says—by a gentleman present, as a means of finding out where the spade and shovel were to be found, that the prisoner should have his hands put into a vice, and by torture compelled to confess. His hands were put into a vice and the force of the screw applied; but he persisted in the statement that he had before made, that he was drunk, had lost his spade and shovel, and did not know where they were.<sup>600</sup>

Grayson was again "found guilty of murder in the first degree, and sentenced to be hung."<sup>601</sup> The general court again reversed the conviction and ordered a new trial. The court concluded:

[W]e are again unanimously of opinion, that [the evidence] . . . is wholly insufficient to sustain the verdict and judgment.

. . . .

. . . Declarations of persons accused are not much to be relied on; but in this case the truth of the declarations was persisted in under peculiar circumstances;—under severe torture, which we are sorry to say the bystanders, under the great excitement of the movement, forgetful of the mild spirit of our law, thought themselves at liberty to inflict. . . . [T]he testimony . . . is hardly sufficient to raise a suspicion against him.<sup>602</sup>

The last entry by the court reporter reads: "After the decision of the Court granting to the prisoner another trial, an armed mob in the day-time, took him from the jail and hung him: And thus to punish a man whom they suspected of murder, they committed murder themselves."<sup>603</sup>

## VI. CONCLUSIONS

The criminal justice system for free and enslaved blacks in colonial and antebellum Virginia was designed to keep blacks as powerless and submissive as possible to insure the preservation of slavery and the domi-

598. *Id.*

599. 48 Va. (7 Gratt.) 613 (1850).

600. *Id.* at 614.

601. *Id.* at 613.

602. *Id.* at 615-19.

603. *Id.* at 619 (court reporter's note).

nation of the white race over the black. A master's authority over his black human beings was total—he could beat, maim, torture, and in many circumstances even kill the slave. Legitimized cruelty was the natural consequence of such a system. It was a system which explicitly demanded that for the slave there be no choice but total submission, and little or no remedy for the master's cruelty.

A criminal justice system that assured masters almost unlimited discretion in controlling or disposing of their "property" reflected what Frederick Douglass observed on the Fourth of July, 1852. Speaking from the perspective of blacks and slaves rather than that of whites and slaveholders, Douglass said:

This Fourth July is *yours*, not mine. *You* may rejoice, *I* must mourn. To drag a man in fetters into the grand illuminated temple of liberty, and call upon him to join you in joyous anthems, were inhuman mockery and sacrilegious irony. I say it with a sad sense of the disparity between us. I am not included within the pale of this glorious anniversary! . . . The blessings in which you, this day, rejoice, are not enjoyed in common.—The rich inheritance of justice, liberty, prosperity and independence, bequeathed by your fathers, is shared by you, not by me. The sunlight that brought light and healing to you, has brought stripes and death to me.<sup>604</sup>

Under this legalized system of "stripes and death," blacks had the worst of both worlds: they received almost no protection from cruelty and slaughter and were punished far more severely than whites. They were treated as less than human whenever it benefited the economic interests of the white master or the white power structure. Yet, when it came to punishing them, blacks were held to a more rigorous standard than whites. Not only were they punished more harshly for the same offenses whites committed, but they also risked execution and dismemberment for conduct that was legal for whites.<sup>605</sup> Referred to as ignorant, immoral, and savage, they were expected to conform to a system of laws that legitimized cruelty and rendered them powerless. William Goodell was correct when he stated that the slave "is under the *control* of law, though *unprotected* by law, and can know law only as an enemy, and not as a friend."<sup>606</sup>

What is the relevance of this history to our nation today? Should we ponder over our treatment of the weak, the poor, and the dispossessed of

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604. Frederick Douglass, *The Meaning of July Fourth for the Negro*, in 2 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS, at 189 (Philip S. Foner ed., 1950).

605. See STROUD, *supra* note 17, at 78.

606. GOODELL, *supra* note 1, at 309.

*all races?* How far have we really come in recognizing the equal value of every human being? Should we wonder whether future generations will find parallels between today's system of justice and national policy and the cruelty imposed upon powerless blacks and slaves during the colonial and antebellum period?<sup>607</sup>

In accepting his nomination for a second term, Franklin Delano Roosevelt said: "There is a mysterious cycle in human events. To some generations much is given. Of other generations much is expected. This generation of Americans has a rendezvous with destiny."<sup>608</sup> It is up to those of us in the twilight of the twentieth century and the beginning of the twenty-first to determine whether in our generation's rendezvous with destiny, we, as others have attempted before, will move our nation toward a society that is more just and fair for *all* of its citizens.

607. One of the authors has written elsewhere:

It would be ideal [if studies on blacks in colonial and antebellum Virginia] . . . were merely an exploration of historical events that have no relevance to America today. It would be gratifying if one could conclude that the tragic oppression of free blacks in colonial and antebellum Virginia was an episodic matter that does not affect the present state of black Americans. Thus, our present study would be the equivalent of displays of dinosaur skeletons in museums. It would be merely an interesting perspective of history that is not in any way being replicated in the present. However, most thoughtful scholars recognize the extraordinary interrelationship between the centuries of oppression that both slaves and free blacks endured during the colonial and antebellum periods and today's racial balance sheet in America. In short, some aspects of the legacy of our past still live on and haunt us. This legacy dilutes our present attainments and diminishes our future potential.

. . . .

In 1987 Gerald D. Jaynes and Robin M. Williams expanded Myrdal's analysis by describing the "unfinished agenda of a nation still struggling to come to terms with the consequences of its history of relations between black and white Americans." In many ways this history has left what they call "a legacy of pain" including the "continuance of conditions of poverty, segregation, discrimination, and social fragmentation of the most serious proportions."

The events which occurred 125 to 250 years ago in Virginia and elsewhere . . . have a nexus with the social and economic studies of the last half century.

Higginbotham & Bosworth, "*Rather Than the Free*," *supra* note 6, at 63-65; see also GERALD D. JAYNES & ROBIN M. WILLIAMS, *A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY* 3-32 (1989) (measuring the change in status of black Americans over 50 years from a number of perspectives and concluding that "the great gulf that existed between black and white Americans in 1939 has only been narrowed; it has not closed"); GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* 997-1024 (1944) (identifying common elements in the political and social status of blacks in America in the context of the Revolutionary, Civil, and First and Second World Wars); Evelyn Brooks Higginbotham, *Beyond the Sound of Silence: Afro-American Women in History*, 1 *GENDER & HIST.* 50, 62-63 (1989) (emphasizing the importance of recognizing, for purposes of historical assessment, the role of black women).

608. Franklin D. Roosevelt, *Address of Acceptance of the Presidential Nomination for a Second Term*, in FRANKLIN D. ROOSEVELT: *SELECTED SPEECHES, MESSAGES, PRESS CONFERENCES AND LETTERS*, at 151 (Basil Rauch ed., 1957).

More than twenty-three years ago, the Kerner Commission<sup>609</sup> concluded its powerful report by noting that the history of our country has not been "the realization of common opportunities for all within a single society" and that the alternative for the future was to stop "the continuing polarization of the American community and, ultimately, the destruction of basic democratic values."<sup>610</sup> It concluded that "[f]rom every American it will require new attitudes, new understanding, and above all, new will. The vital needs of the Nation must be met; hard choices must be made."<sup>611</sup> For this generation, we must ascertain whether we have the ability to acquire "new attitudes, new understanding, and above all, new will" to sever the legacy of the past and to build a better world for all Americans where no one should view the law or the system of government as an enemy.

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609. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968).

610. *Id.* at 1.

611. *Id.*