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Virginia, 1720 to 1750**



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# Authority, Law, and Custom: The Rituals of Court Day in Tidewater Virginia, 1720 to 1750

A. G. Roeber

The *Laws* of a country are necessarily connected with every thing belonging to the people of it; so that a thorough knowledge of *them*, and of their progress, would inform us of everything that was most useful to be known about them.<sup>1</sup>

**I**N July 1746 the *London Magazine* published the travel notes of a young Englishman recently returned from a tour of the American colonies. Of Virginia, he reported that “the principle [*sic*] Meetings of the Country are at their Court-Houses, as they call them; which are their Courts of Justice.” Describing Yorktown, he noted that “the Court-House is the only considerable publick Building, and is no unhandsome Structure.” Of the sessions in Williamsburg, he commented that they were conducted “with a Dignity and Decorum, that would become them even in Europe.”<sup>2</sup> These observations were correct but understated. In fact, the

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<sup>1</sup>Joseph Priestley, *Lectures on History*, I (London, 1793), 149, and quoted on the title pages of William Waller Hening, ed., *The Statutes at Large; Being a Collection of all the Laws of Virginia . . .* (Richmond, 1819-1823), hereafter cited as *Statutes at Large*.

<sup>2</sup>“Observations in Several Voyages and Travels in America in the Year 1736. (From *The London Magazine*, July 1746),” *William and Mary Quarterly*, 1st Ser., XV (1907), 147, 222-223. The Englishman also observed a great number of lawyers at Williamsburg and York; this grouping of attorneys around the capital began in the late 17th century. See Philip Alexander Bruce, *Institutional History of Virginia in the Seventeenth Century: An Inquiry into the Religious, Moral, Educational, Legal, Military, and Political Conditions of the People*, I (New York, 1910), 570-587. On the training of Virginia lawyers see Alan McKinley Smith, “Virginia Lawyers, 1680-1776: The Birth of an American Profession” (Ph.D., diss., The Johns Hopkins University, 1967). For a different interpretation explaining the low number of lawyers in outlying counties in contrast to professional growth around Williams-

English traveler's sense of the importance of court day in colonial Virginia would have been strengthened considerably had he remained longer and noted more closely the events of that occasion. No institution was more central to Tidewater Virginia culture than the county court, in both physical eminence and practical consequence. Yet historians have generally neglected to pay attention to the "Dignity and Decorum" of court rituals—the dramaturgical exercises—in which propertied authority and communal custom defined the shared values of the culture by means of the law.<sup>3</sup>

Virginians of the mid-eighteenth century lived in a world both formal and familiar. The tension produced by exchanges between formal and familiar styles enabled the gentlemen justices of the peace and the county residents over whose legal affairs they presided once a month, every month, to define social rank, mutual obligation, and shared values. To do this, the law itself and its procedures had to embody the formal and familiar qualities of Virginia life. Clearly, power and authority belonged to the propertied, and the body of rules that was Virginia law constituted the dimensions and boundaries of conduct, obligation, and order. The authoritative and customary institutions which the Old Dominion had inherited from England were celebrated in public statements such as the one Sir William Gooch made to the General Court grand jurors in 1730. Informing them that they should see to the safety of their community, Gooch reminded the jurors that ancient procedures and laws were only as good as the "execution of them, is *punctual* and *exact*." Virginians concurred. A writer to the *Virginia Gazette* argued for the regular enforcement of law, since "Law is a dead Letter, and lives only in the due Administration there-

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burg, see A. G. Roeber, "Faithful Magistrates and Republican Lawyers: The Transformation of Virginia's Justices of the Peace, 1705-1805" (Ph.D. diss., Brown University, 1977), and "The Scrutiny of the Ill-Natured Ignorant Vulgar': Lawyers and Print Culture in Virginia, 1716-1774" (forthcoming).

<sup>3</sup>In addition to Bruce's institutional studies of the courts see Albert Ogden Porter, *County Government in Virginia: A Legislative History, 1607-1904* (New York, 1947), and George Lewis Chumbley, *Colonial Justice in Virginia: The Development of a Judicial System . . .* (Richmond, 1938). More useful on specifics of procedure and application of law is Arthur P. Scott, *Criminal Law in Colonial Virginia* (Chicago, 1930), and, on the General Court, Hugh F. Rankin, *Criminal Trial Proceedings in the General Court of Colonial Virginia* (Charlottesville, 1965). The exceptional, if impressionistic, study of Charles S. Sydnor, *Gentleman Freeholders: Political Practices in Washington's Virginia* (Chapel Hill, N.C., 1952), first suggested the value of looking at court day rituals, an insight developed in the 1970s by Rhys Isaac, especially in "Evangelical Revolt: The Nature of the Baptists' Challenge to the Traditional Order in Virginia, 1765-1775," *WMQ*, 3d Ser., XXXI (1974), 345-368. For an excellent overview of the literature on ideas and social action see Richard R. Beeman, "The New Social History and the Search for 'Community' in Colonial America," *American Quarterly*, XXIX (1977), 422-443. Beeman's survey reveals the paucity of studies on the law and legal institutions; such studies should be fitted into the emerging social and cultural historiography.

of." For Virginians, "the Laws of *England* are our best Inheritance, the Ties of harmonious Society, and Defence of Life, Liberty, and Property. . . . *English* Law (from Antiquity not to be traced) hath preserved it's Purity, and Certainty," and "this Purity, and Certainty of Law, hath been transmitted to us."<sup>4</sup> Virginians participated in discovering the meaning of law—ancient, formal, but customary. The degree of participation varied, depending on social distance from the authorities who dominated the center of power that was the courthouse. In a semiliterate society, it was not in printed opinions of authors, but in ritual actions, in face-to-face familiar meetings in the courthouse, that the reality of law unfolded in a formal setting modulated by routine and repetition.<sup>5</sup>

The key that unlocks the meaning of court day is *action*—action that proceeded as a kind of dramatic play, whose setting we can reconstruct from contemporary records. Certain "acts" in this cultural pageant are especially worthy of our attention, for they informed Virginians where they stood in society, what obligations they owed to social superiors and inferi-

<sup>4</sup>"A Charge to the Grand Jury" (Williamsburg, 1730), in William Parks, *Printer and Journalist of England and Colonial America*, ed. Lawrence C. Wroth (Richmond, 1926), 33. *Virginia Gazette* (Parks), Oct. 3-10, 1745. On the "customary" and "immemorial" qualities of common law thinking see J. G. A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (Cambridge, 1957), 30-70. Virginians like William Beale appealed to antiquity and custom in the county courts, even in defiance of English common law prohibitions: see Richmond County Orders, June 4, 1739, where Beale defended his right to stop up a public way, "setting forth that he and his ancestors here for a Long time Enjoyed the conveniency of keeping gates upon the severall roads Leading through his land without which he could not have the benefit of a pasture." All county orders and inventories are at the Virginia State Library Archives, Richmond.

<sup>5</sup>The main point of departure among historians of colonial America for methods of historical anthropology has been the work of Clifford Geertz, upon which the present essay depends heavily. See especially Geertz, "Thick Description: Toward an Interpretive Theory of Culture," in *The Interpretation of Cultures* . . . (New York, 1973), 3-32; Geertz, "Centers, Kings, and Charisma: Reflections on the Symbolics of Power," in Joseph Ben-David and Terry Nichols Clark, eds., *Culture and Its Creators: Essays in Honor of Edward Shils* (Chicago, 1977), 150-171. On the importance of ritual action in a world of oral communication see Walter J. Ong, *The Presence of the Word: Some Prolegomena for Cultural and Religious History* (New Haven, Conn., 1967), and *Interfaces of the Word: Studies in the Evolution of Consciousness and Culture* (Ithaca, N.Y., 1977). On the literacy rate in Virginia see Kenneth A. Lockridge, *Literacy in Colonial New England: An Enquiry into the Social Context of Literacy in the Early Modern West* (New York, 1974), 77-78, 90, 93. Lockridge concludes that the literacy rate may have begun to stagnate after 1750; at best, two-thirds of able-bodied white males may have been literate in Virginia. On the importance of personal meetings in such a culture see the ideas advanced by Erving Goffman in *The Presentation of Self in Everyday Life* (New York, 1959), *Behavior in Public Places: Notes on the Social Organization of Gatherings* (New York, 1963), and *Interaction Ritual: Essays on Face-to-Face Behavior* (Chicago, 1967).

ors, and what constituted the accepted norms of social conduct. Those norms were defined not merely by authority and power but by communal sanction. The oath of the justice told the county that he must "do equal right, to the Poor, and to the Rich," and do so with "cunning, wit" (that is, intelligence and skill), and "power." As the Virginia correspondent to the *Gazette* observed, law lives only in its administration; and it is particularly in four select but similar patterns of action that we glimpse the interplay of authority and custom within the theater of court day. The "acts" to watch are (1) contempt of court, (2) settlement of debt cases, (3) the meeting of the grand jury, and (4) the use of the court by the propertyless. In these are mirrored the justices' attempts to "do equal right to all manner of people, great and small, high and low, rich and poor . . . without favour, affection, or partiality," according to their rank and station.<sup>6</sup>

The principals of the drama in which the entire county played a part were His Majesty's gentlemen justices, the planters who had risen from humble and fractious seventeenth-century antecedents, and who, by the 1720s, were secure in their rank and claim to deference. Familial pedigrees had for the most part been established a generation or two earlier. The justices included both elite magnates and lesser squireens, allied by marriage, who, as a rule handed down their seats from father to son, from uncle to nephew.<sup>7</sup>

<sup>6</sup>The oath of justice is in *Statutes at Large*, III, 508-509 (quotations are italicized in original). The method used here combines quantification of the most numerous types of action in 12 Tidewater county courts over most of the 18th century with the analysis of such action as symbolic, ritualized summation of key cultural concepts such as deference, hierarchy, dependence, and property. On action-as-text see Paul Ricoeur, "The Model of the Text: Meaningful Action Considered as a Text," *Social Research*, XXXVIII (1971), 529-562; Robert K. Merton, "The Unanticipated Consequences of Purposive Social Action," *American Sociological Review*, I (1936), 894-904; Alfred Schutz, "Concept and Theory Formation in the Social Sciences," in Maurice Natanson, ed., *Philosophy of Social Sciences: A Reader* (New York, 1963), 231-249, esp. 247-249; and Schutz, "Common-Sense and Scientific Interpretation of Human Action," *ibid.*, 302-346, esp. 342-346. The selected patterns of action spring from a broad sampling and were significant in ritual and symbolic fullness for the participants. The 12 counties studied are York, Henrico, Warwick, Charles City, Middlesex, Essex, Caroline, Lancaster, Richmond, Westmoreland, King George, and Northumberland. For quotation see *Statutes at Large*, III, 509.

<sup>7</sup>Inventories of justices at death, sampled for the various counties, reveal a wide range of wealth, but with every member's personal wealth counted in hundreds of pounds current money. Courts were kept running by a faithful group of magistrates, for example, three Randolph brothers in Henrico, and Taylors, Taliaferros, and Buckners in Caroline. Great magnates sat irregularly; the eminent Corbin, Beverley, and Baylor families in Caroline were allied by marriage with the above-named faithful magistrates but sat infrequently; the same was true of the Carters and Byrds in their counties, with the exception of the highly conscientious Landon Carter in Richmond. On Caroline see T. E. Campbell, *Colonial Caroline: A History of Caroline County, Virginia* (Richmond, 1954), 349. Campbell found that no jus-

The passing on of a seat to a junior member of the family also meant that the public rank of the assembled bench was visibly proclaimed not only according to the degree of propertied wealth possessed but according to age as well. The rank of the justices was immediately obvious since the commission of the peace named the senior justices "of the Quorum" first. Quorum justices were regarded as more learned in the law than their associates because of their experience; the counties came to rely on them as customary leaders. These stalwarts were essential to the functioning of the court: one of them at least had to be present for a lawful court to sit. Deference to the grey locks of the colony's patriarchy encouraged the courts to press the governor into appointing even aged men like Francis Thornton, who had refused one commission already, "alleging that he was Sickly and uncapable," and Leonard Hill, who declined "because he is now antient & thinks himself uncapable." Lancaster County mourned the loss of Edwin Conway in 1752 when he refused to sit after serving forty years. The seventy-one-year-old retired "for that his Sense of hearing is much impaired and he is far advanced in Years." As late as 1787, Essex County pointed out to the governor the necessity of nominating two mature men even though the loyalty of one of them to the Revolution had been questionable. Since John Upshur and James Edmondston could no longer sit, the next two most experienced justices were essential because "they . . . as senior magistrates would keep more Order and decorum in Court."<sup>8</sup>

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tice ever owned fewer than 1,000 acres. Family connection and tradition, however, were just as important. In York, Thomas Barber, whose family had served on the bench since the 1650s, refused to sit, and the court ordered the sheriff to wait on him to plead with him. When he died, his total inventory was only £105 10s. York Orders, Mar. 19, 1710/11, May 18, 1713. Barber's fellow justice Robert Reade owned 22 slaves and 2 indentured mulattoes, with other chattels. York Orders, May 18, 1713. King George justice William Strother's personal estate was valued at £858 19s. 3<sup>1</sup>/<sub>2</sub>d. King George Inventories, 1721-1744. At the other end of the spectrum were men like Augustine Washington, whose personal inventory in the King George Inventories read: July 1, 1743, £824 8s. 3d., including 27 slaves and surveyor's instruments in that county, in Westmoreland, June 28, 1743, £409 10s. 8d.; and in Stafford, £287 8s. Washington's rank would have been comparable to that of James Burwell of York, whose inventory totaled 42 slaves and other servants, as well as a personal estate worth £2,386 18s. 10d. York Orders, Mar. 16, 1718.

<sup>8</sup>On the value of older men see David Hackett Fischer, *Growing Old in America: The Bland-Lee Lectures . . .* (New York, 1977), and his disagreements with Lawrence Stone in "Growing Old: An Exchange," *New York Review of Books*, Sept. 15, 1977. For Stone's views see *The Family, Sex, and Marriage in England, 1500-1800* (New York, 1977), 58-60, 403-404, 125-218. For the examples cited for Virginia see York Orders, July 21, Aug. 19, 1719; on Edwin Conway, Lancaster Orders, June 19, 1752, and Horace Edwin Hayden, *Virginia Genealogies: A Genealogy of the Glassell Family of Scotland and Virginia* (Wilkes-Barre, Pa., 1891), 238-244; on Essex, justices to Gov. Randolph, Mar. 27, 1788, in William P. Palmer,

Property, family, and experience were important, and literacy in a largely aural culture also set the bench apart from the people of the country. Yet the unlearned folk and learned gentry had a common cultural experience. From the fragmentary literary remains of the gentry one can glean the sense that literacy was coupled in their minds with familiar wisdom. Since barristers, attorneys-at-law, and even attorneys of fact who were not also gentlemen were scarce in Virginia before 1750, the gentlemen justices took a peculiar pride in their literate, if homely, legal ability. As one planter observed, "It is a shame for a gentleman to be ignorant of the laws of his country and to be dependent on every dirty pettifogger," but highly "commendable . . . for a gentleman of independent means, not only [not] to stand in need of mercenary advisers, but to be able to advise his friends, relations, and neighbors of all sorts." Justice Landon Carter aptly defined the proper use of literate knowledge when a lawyer accused him of not knowing how to bring a suit to trial. The feisty colonel retorted that "it pleased me to find a Gentleman Pique himself on a little Mechanical knowledge . . . Attorneys were always lookt upon as so many Copyers and their knowledge only lay in knowing from whom to Copy Properly." Such an attitude helps to explain the lack of a licensing law for attorneys in Virginia from 1690 to 1732; the rarity of these professionals even after that latter date until 1750 enabled the justices both to sustain their singular authority and to deal in direct, familiar terms with the people and cases before them.<sup>9</sup>

Those cases, and the administrative details of local life, were the stuff of which the court's extensive powers were made. Monthly courts in the Virginia counties had originally exercised jurisdiction over civil cases and petty criminal causes. By the 1660s these courts were called county courts; the justices by then had acquired a broad range of duties that included caring for roads, bridges, and ferries, probating wills, trying cases at law

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ed., *Calendar of Virginia State Papers and Other Manuscripts*, IV (Richmond, 1884), 417-419.

<sup>9</sup>Charles Carroll of Doughregan Manor to Charles Carroll of Carrollton, Oct. 16, 1759, in Thomas M. Field, ed., *Unpublished Letters of Charles Carroll of Carrollton* (New York, 1902), 33-34, and quoted in Richard Beale Davis, *Intellectual Life in the Colonial South, 1585-1763*, III (Knoxville, Tenn., 1978), 1588. Jack P. Greene, ed., *A Diary of Colonel Landon Carter of Sabine Hall, 1752-1778* (Charlottesville, Va., 1965), 92-93. Virginia licensed attorneys as early as 1643 but repeatedly reversed policy; by 1690 all attempts had been given up (*Statutes at Large*, IV, 357-362). Between 1732 and 1750 the profession began to grow at a prodigious rate, judging from the number of licenses presented in the county courts by men swearing the oath of an attorney. Eventually, of course, the rise of the profession altered the personal quality of going-to-law on court day. For details of the growth of the profession and its impact see Roeber, "Faithful Magistrates" and "Lawyers and Print Culture," *passim*. As few as three attorneys were in active practice between 1732 and 1750 in some of the Tidewater counties; as many as 10 in more heavily populated areas and sites of merchant activity, for example, Essex County.

and in equity, and examining white suspects in order to determine whether they should be sent to trial for felony before the General Court in Williamsburg or whether an immediate punishment on a lesser charge should be imposed in the county. Sitting under a commission of oyer and terminer, the justices tried slaves for both petty crimes and capital offenses. As the eighteenth century dawned, the county court enforced a host of statutes purposefully drawn broadly to give the justices wide-ranging discretionary powers over nearly every aspect of local life.<sup>10</sup>

An overture established the tone of the drama by which the justices put law in motion. Standing in the door of the courthouse, the deputy clerk or undersheriff issued an archaic bidding that coupled the formal authoritative bench—the locus from which power emanated—with the familiar gatherings on the piazza, on the green, in the nearby ordinary: “Oyez, Oyez, Oyez, silence is commanded in the court while his Majesties Justices are sitting, upon paine of imprisonment. All manner of persons that have any thing to doe at this court draw neer and give your attendance and if any one have any plaint to enter or suite to prosecute lett them come forth and they shall be heard. God Save the King.” By this means were all bidden to “draw neer” to those gentlemen justices who sat with tricorns on their wigs before the uncovered ranks of society.<sup>11</sup>

<sup>10</sup>For summaries of the court’s duties see Porter, *County Government*, and the sample of 17th-century laws and orders and the introductory essay on local government in Warren M. Billings, ed., *The Old Dominion in the Seventeenth Century: A Documentary History of Virginia, 1606-1689* (Chapel Hill, N.C., 1975), 69-103. No white person could be tried for felony in the counties. My survey of “Called Courts” reveals that, for example, in Caroline 21 separate examinations resulted in only 9 people being sent to Williamsburg, on charges of horse-stealing, breaking and entering, and theft. The remainder were found not guilty or were summarily punished (at times at their own request) or bound over to the grand jury session to await a bill of indictment. Likewise, in King George County during 1730-1750, 30 examinations sent 18 culprits to Williamsburg, primarily for burglary but also for murder, forgery, and accidental shooting. Twenty-five were whipped, fined, found not guilty, or remanded to the grand jury on a lesser charge. In York, 24 sessions examined 29 people, sent 15 to Williamsburg for theft and murder, 1 for forgery, 1 unspecified, and dealt with another dozen in the county. Slaves were tried by the justices for felony and executed as well under the county court’s power derived from the commission of oyer and terminer; on slave trials see below.

<sup>11</sup>The “stile” for calling the court is in *Statutes at Large*, II, 59-60, 72. Forms used for swearing jurors and officers and those cited hereafter in conducting the order of business are drawn from one of the most common manuals of the day, *The Office of the Clerk of Assize: . . . Together with the Office of the Clerk of the Peace . . .* (London, 1676). Americans adapted such treatises to local conditions; see James Parker’s *Conductor Generalis: or the Office, Duty, and Authority of the Justice of the Peace . . .* (New-Jersey, 1764), modelled on Richard Burn’s *The Justice of the Peace and Parish Officer* (London, 1755), 505-516. On the manuals and law treatises in Virginia see William Hamilton Bryson, *Census of Law Books in Colonial Virginia* (Charlottesville, 1978), 31-82.

The dramaturgy of this opening spectacle was not less effective for being humbler than in England or, for that matter, in the General Court of the colony. There was no preliminary sermon, no formal procession from parish church to shire hall, no parade of judicial gowns or gold-laced coats, no tip-staffs leading the way. Yet justices in Virginia could expect the deference due them as "beings of a superior order," in the words of Deveureux Jarratt, who recalled from boyhood that "when I saw a man riding the road, near our house, with a wig on . . . I would run off." In those times, he believed, "Such ideas of the difference between *gentle* and *simple* were . . . universal among all of my rank and age." The vivid visual symbols of propertied "quality" were awesome, even frightening, outside the context of court day. Within the setting of the courtroom, county folk heard the well-defined rules according to which justice was to be done in return for their deference. The oath sworn by each justice in order of seniority defined and limited authority's obligations in public, oral fashion. No magistrate was permitted to serve as counsel in a cause before him, unless a litigant needed representation and could not afford an attorney; all proceedings, whether taken before one justice or before the whole bench, would be public and recorded—print culture would operate for the simple as well as for the gentle; and no justice was allowed any "fee, gift, or gratuity, for any thing to be done by virtue of [his] office." The rule-making quality of law here limited the otherwise illimitable power of the gentlemen justices, but demanded deference from the ruled while assuring them of familiar and regular administration of the law, applied with "cunning, wit, and power."<sup>12</sup>

As we examine the ritual actions of court day, we must place ourselves upon the set or stage where the drama took place. The courthouse was located at a crossroads near the center of the county, on a green with a tavern or ordinary close at hand. By the 1720s, the old wooden frame courthouses were giving way to new buildings that were the boasts of the shires. Most of the new Tidewater courthouses were patterned after models first developed at the capital in Williamsburg. The Virginian who came riding up to the courthouse beheld a public meetingplace that was markedly superior to his own home dwelling. Most Virginia houses in the early eighteenth century were still of the English puncheon type, susceptible to termites and rotting. A contemporary described for a London correspondent the house of a neighbor as a "Shell, of a house without Chimneys or partition, & not one tittle of workmanship about it more than a Tobacco house work."<sup>13</sup> The courthouse, in contrast, was an impressive place. Outside, the county standard flew in the morning air, and, as

<sup>12</sup>*The Life of the Reverend Deveureux Jarratt* . . . (Baltimore, 1806), 14. On General Court ritual and appointments see Rankin, *Criminal Trial Proceedings*, 63-87. The oath of a justice is in *Statutes at Large*, III, 508-509.

<sup>13</sup>Fitzhugh to Nicholas Hayward, Jan. 30, 1686, Richard Beale Davis, ed., *William Fitzhugh and His Chesapeake World, 1676-1701* . . . (Chapel Hill, N.C., 1963), 203, 208, n. 4.

coaches and horsemen arrived and gentlemen took early draughts in the ordinary, the red brick of the courthouse on its green stood in sharp contrast to the surrounding woods. Viewed from the entry side, the courthouse presented an arcaded loggia of five rounded arches and a flagged pavement. This porch was usually occupied by servants, slaves, and smallholders who milled about, hawked wares, quarreled, or listened to the proceedings inside. The arcaded piazza had recently become an integral part of public symbolism and display in Virginia, and was used to connect the large main houses of the greater planters to lesser buildings or "dependencies." The "dependent" nature of the lesser orders of society who occupied these piazzas was ratified in the architecture of the courthouse, just as the interior of that building signified that it was particularly the place of authority, formality, and power.<sup>14</sup>

On entering the courthouse proper, the spectator saw to his immediate right and left the two rooms reserved for the deliberations of the jury. But his attention would have been drawn quickly to the point from where the action of court day sprang. The social ranking of the county was confirmed as he walked the length of the building gazing at portraits of the royal family or colonial officials in ascending order of significance along the side walls. The wall above the bench was dominated by the king's arms, and immediately below the royal emblem were arrayed the seats of the gentlemen justices ranging behind the bench that was raised above the floor at least one foot and sometimes three. A jury box was affixed directly below the bench; clerk, deputy king's attorney, and sheriff each had a place within the bar, and the walls of this space were wainscotted, in contrast to the plastered and whitewashed interior of the public area. The county's perception that the bar was a place somewhat apart from the larger room was modified by the architectural device of a "neat Mondillion Cornice all round the whole" room.<sup>15</sup>

<sup>14</sup>On courthouse architecture and the evolution of a public style of display in plantations and government buildings see Marcus Whiffen, *The Public Buildings of Williamsburg: Colonial Capital of Virginia, an Architectural History* (Williamsburg, 1958), 50, 152-161; Whiffen, "The Early County Courthouses of Virginia," *Journal of the Society of Architectural Historians*, XVIII (1959), 2-10; Frederick Doveton Nichols, "Palladio's Influence on American Architecture," *Palladio in America* (Milan, 1976), 101-125, esp. 105-107 on the arcaded loggia; and C. Malcolm Watkins, *The Cultural History of Marlborough, Virginia . . .* (Washington, D.C., 1968), 115-122. On contemporary houses and their evolution see Henry Chandlee Forman, *Virginia Architecture in the Seventeenth Century* (Williamsburg, 1957).

<sup>15</sup>See Lancaster Orders, Aug. 8, 1740. On Elizabeth City's old 1693 courthouse see William Montgomery Sweeny, "Gleanings from the Records of (Old) Rappahannock County and Essex County, Virginia," *WMQ*, 2d Ser., XVIII (1938), 297-313, esp. 307; Campbell, *Colonial Caroline*, 125-127; and Evelyn Taylor Adams, *The Courthouse in Virginia Counties, 1634-1776* (Hamilton, Va., 1966). The concept of "otherness" or "noumenal" space set aside from the "phenomenal" familiar world is developed by Rudolf Otto, *The Idea of the Holy: An Inquiry into the Non-Rational Factor in the Idea of the Divine and Its Relation to the Rational*, trans. John

Not a little imposing, this scene was nonetheless a familiar one. County residents marked the rhythm of their communal lives by the events that unfolded here. As winter ended in March, courts convened after inclement weather that often forced cancellations of sessions in December and January. Suits were brought; freeholders were notified to be on hand in May to sit as participants in the "Grand Inquest" of the county. Public claims and grievances were often settled in the spring; the grand jury met in May; summer sessions wilted in the merciless heat and humidity of the low country. In September cooler weather and the ripening of crops occasioned constables' complaints of farmers tending "seconds" or inferior stalks of tobacco; every fourth year that month the vestries "beat the bounds" of the parishes and made a return of their processioning to the court. Orphans' estates were inquired into in late autumn, and the county gathered again in November for another biannual examination of petty sins and misdemeanors. In December the county levy was laid. Punctuating this yearly cycle were the "called courts" and oyer and terminer sessions, whose meetings were infrequent and, though important, mere reflections of the monthly gatherings of the county court. On those regular, repeated occasions we can pierce the curtain of time as it rose to reveal the law in action.<sup>16</sup>

#### ACT I. AUTHORITY AND DEFERENCE: CONTEMPT OF COURT

Court sessions opened to a medley of affairs. Sometimes the justices estimated the age of slaves brought in for public record of tithable status; road surveyors were appointed; a case docketed from an earlier session

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W. Harvey, 2d ed. (New York, 1950), 65-68; Mircea Eliade, *Images and Symbols: Studies in Religious Symbolism*, trans. Philip Mairet (New York, 1961); and Wendell C. Beane and William G. Doty, eds., *Myths, Rites, Symbols: A Mircea Eliade Reader*, 2 vols. (New York, 1976). See also Peter L. Berger, *The Sacred Canopy: Elements of a Sociological Theory of Religion* (New York, 1967), and Berger and Thomas Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (New York, 1966). That ritual actions in a legal context should be viewed as a species of quasi-religious definition of life in semiliterate cultures can be seen in Victor W. Turner, *The Ritual Process: Structure and Anti-Structure* (Chicago, 1969), and *Dramas, Fields, and Metaphors: Symbolic Action in Human Society* (Ithaca, N.Y., 1974); Max Gluckman, *The Judicial Process among the Barotse of Northern Rhodesia* (Manchester, 1955), and *The Ideas in Barotse Jurisprudence* (New Haven, Conn., 1965); Lloyd A. Fallers, *Law Without Precedent: Legal Ideas in Action in the Courts of Colonial Busoga* (Chicago, 1969); and Paul Bohannan, *Justice and Judgment among the Tiv* (Oxford, 1957).

<sup>16</sup>The cycle was dictated by statutes drawn by Burgesses who had been justices and would be again when they finished their terms of office or were turned out. See Jack P. Greene, "Foundations of Political Power in the Virginia House of Burgesses, 1720-1776," *WMQ*, 3d Ser., XVI (1959), 488-506; four-fifths of the members during this era were former justices. Of the 39 lawyers Greene identifies, 28 sat after 1745—another index of the growing importance of lawyers after 1750.

was heard immediately. The county got down to participating at once, the formal anthems of the king's law intoned over a *continuo* line of scuffling and murmuring. Flies buzzed in and out of open doors and windows; sounds intruded from the courthouse porch and nearby ordinary where business transactions and the peddlars' hawking competed for attention with racehorses pounding across the green. Inside, the court directed action upon the formal stage to the keeping of the king's peace.

That peace was interrupted from time to time by Virginians clearly not intimidated by gentry authority to such a degree that they remained silent. Like the hierarchical culture itself, their obstreperous behavior was graduated in seriousness, as was the response of the court. The collective identity of the justices was routinely invoked whenever someone challenged their dignity. Always referring to themselves as "this Court," the justices carefully guarded their authority. When Allen Hawthorn came into the room with his hat on, the justices noted that such an act "appeared to this Court an Insolent behaviour." Hailed before the bench, Hawthorn, "readily acknowledging his fault & humbly Begging pardon for the same," was able to satisfy the justices that he had not meant to affront them. The predictable response: they were "well satisfied" and "it is therefore ordered he be released out of Custody paying fees." Hawthorn was reminded of his inferior rank; the justices confirmed their authority. He was called upon to explain and apologize; the court thereupon administered a minimal correction. Upon such ritual occasions, face-to-face encounters with authority took place within carefully circumscribed limits, according to commonly accepted linguistic exchanges.<sup>17</sup>

The intensity of such encounters naturally varied with the grossness of the offense and the rank of the offender. Culprits were treated firmly but in the light of the justices' recognition of the temptations of the nearby tavern. Magistrates were accustomed to hearing an offender confess that his behavior stemmed from "being much in drink." The court was thus only temporarily startled by Richard Patterson "by his Looking in at the Court and Speaking out a Loud 'Come here You Dogs and Fight.'" Fined 29 shillings and put in the stocks until the court rose, he was remanded to the sheriff's custody and ordered "before the court Tomorrow Morning (when perhaps he may be sober)." Another planter through his vivid, albeit vulgar, language threatened the natural order of society from his "appearing Drunk and Insolent by his bidding Benjamin Weeks undersheriff Kiss his Arse in the face of the Court." Though fined for his behavior, three weeks later "the said Davis came now into Court in a very submissive manner and asked pardon for the high offence he had been guilty of & promises for the future to take care never to be guilty of an offense of the Like nature." The court's formulaic response graciously proclaimed to all that "this Court being willing to Show & grant Compassion etc. do therefore retract their said order" that Davis be fined.<sup>18</sup>

<sup>17</sup>Westmoreland Orders, July 31, 1728.

<sup>18</sup>The use of alcohol and tobacco in the courtroom was forbidden. Drunkenness,

Planters and lawyers who questioned the integrity of the court's decisions could expect a higher penalty for their outrages. Richard Lowe had to pay £5 current money, which was not remanded, for saying that the sheriff, justices, and clerk were rogues for charging him more than his taxable status allowed, "which Impudent, base, false, and scandalous Speeches were fully proved against him . . . by Sundry Witnesses." William Kennan, one of the few attorneys appearing in the county courts during this era, paid the same sum for asserting the court had made "a Roguish order in favor of one Moses Self in a Suit." Similarly, when John Bolling, a former justice, Burgess, and wealthy Henrico planter, came into court and behaved "himself after a very rude manner to the Justices by calling them Puppies and calling on God to damn them together with other misdemeanours," he was taken into custody and fined.<sup>19</sup>

Yet the court knew where custom and social convention set limits to its use of the law. Its treatment of two important but distinct groups of men guilty of the same sort of "contempt" signalled this recognition to the county. When a new commission of the peace appeared under the governor's hand, the sitting justices of Westmoreland County sent the sheriff to the tavern to request that the new nominees appear in court. Several did, but the court sent the sheriff out again; he returned to report that five of the gentlemen were still in the ordinary, and, when asked why they would not come in and swear, he stated that "the Reason they gave him was they would come into court when they See fit."<sup>20</sup>

This exchange set in motion a definition of rank and authority that had to be moved forward with great delicacy. The sitting justices rose to the occasion. One of their number, George Lee, demanded that the recalcitrants be forced to give up their law books, copies of which were sent to each county for use by the court. The men who had issued such a peremptory challenge to their equals on the bench were summoned and threatened with a fine. Perhaps to prove their magisterial rank, they kept the court waiting for eighteen months, then surrendered the books, whereupon the fines were discontinued. Apparently some of the lesser planters misread this symbolic exchange and some time later also failed to appear

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even on the part of sitting justices, had marred many 17th-century proceedings. A statute of 1676/7 warned that drunken magistrates would be fined and, upon a third offense, removed from office (*Statutes at Large*, II, 384). No instances of drunken behavior, grand jury presentments, or reprimands by the council against justices for the period 1700-1750 have been found. Examples of contempt and apology cited are found in Essex Orders, Nov. 21, 22, 1727, and Westmoreland Orders, May 29, 1739, Jan. 29, 1744/5, and Mar. 26, 1746.

<sup>19</sup>Westmoreland Orders, June 28, 1738; Henrico Orders, June 6, 1720. Attorneys were obviously expected to behave as officers of the court. The few instances (8) of contempt by an attorney before 1750 in the counties studied resulted from a lawyer's questioning the justices' legal expertise. See Roeber, "Faithful Magistrates," 77-79, 106-108.

<sup>20</sup>Westmoreland Orders, Feb. 22, 1736/7.

in court when summoned for jury duty. The justices irately noted that even after the court “was So Indulgent to Send the Sheriff out to Call them who it Seems were in the ordinary,” they ignored this officer’s summons and “Informed the Court that they . . . would Come when they had done dinner.” Standing upon its collective dignity, the magisterial gentry noted that “for [this] Contempt this Court do hereby Inflict the fine of Twenty Shillings upon Each of them.” Moreover, the fines were not remanded.<sup>21</sup>

These acts involving authority and the deference due it moved in predictable patterns and in varying degrees of importance as demanded by the nature of the exchanges. The various presentations and definitions of self and rank were publicly acted out, with no intermediaries between bench and community. Once authority’s rightful place had been defined, another action—another dramatic exchange of a different sort—could proceed upon the stage of court day.

## ACT II. LAW AND MUTUAL OBLIGATIONS: DEBT CASES

Law is a form of social control, and its application by officials shows how the rules of society work. Eighteenth-century definitions of law described it as the “rule of justice,” or “giving to every man what is his due.”<sup>22</sup> In order to insure that every person received his due, the law defined obligations and set the boundaries by which people could tell what to expect from one another in public intercourse. For Virginians living in a plantation economy dominated by the staple crop, tobacco, this meant that the law had to deal with indebtedness. So chronic was debt that one observer noted the “great number of Litigious suits” and concluded that “to be arrested for debt is no scandal here.”<sup>23</sup> The reason was that the law recognized social and economic reality: in a society with little circulating specie, where debts were paid in tobacco, the condition of everyone from planter magnate to yeoman was at least modestly levelled by dependence on the market. Hence, the law ensured social order and guaranteed that every man would receive his due—the money owed him—when it provided the forum for face-to-face meetings where the propertied majority settled obligations before the justices.

<sup>21</sup>*Ibid.*, Apr. 1, 1741, Mar. 1, Aug. 31, Oct. 31, 1738.

<sup>22</sup>Samuel Johnson, *A Dictionary of the English Language* . . . (London, 1755), under “Law” and “Justice.” A useful definition of law as a “rule-making” process where “primary rules” are elaborated in action, or at a “secondary” level by officials, is in H. L. A. Hart, *The Concept of Law* (Oxford, 1961), 77-96, at 92. This functional definition is protested by Lon Fuller, who insists that moral questions are not so easily separated from functional, positive aspects of law. See the exchange between the two men in Frederick A. Olafson, ed., *Society, Law, and Morality: Readings in Social Philosophy* (Englewood Cliffs, N.J., 1961), 439-505, and Lon L. Fuller, *The Morality of Law* (New Haven, Conn., 1964). On the relationship between law and property see below.

<sup>23</sup>Journal of Nicholas Cresswell, Dec. 12, 1774, Leesburg, Loudon County, Va., MSS, Colonial Williamsburg Foundation.

The personal quality of such encounters was aided by the fact that lawyers were forbidden to involve themselves in small debt cases. The prescribed way to settle such issues was to move for judgment by petition. The plaintiff stood and presented his claim; most debtors readily "confessed judgment" to the sum owed; payment was agreed on according to schedule. If the schedule was not met, a creditor requested that the court declare for him the rightness of his demand for the sum, and this was routinely done. At this point, a rather more elaborate game of face-saving sometimes began, with the debtor intervening before a creditor could get the court's judgment against the recalcitrant. Declaring that he protested the plaintiff's bill and "saved to himself" all exceptions to it, the debtor pleaded for time "to imparl," a request that was always granted. By imparling, the debtor hoped to come to an agreement with the plaintiff out of court. From the frequency with which planters resorted to this device and from the numerous notations, "dismissed, the parties being agreed," one may conclude that mutual obligations were upheld, and public honor maintained, by those debtors who did not immediately "confess judgment."<sup>24</sup>

Even justices of the peace had to submit to these procedures. In Henrico County, Peter Randolph, a planter, sued justice John Ellis, who admitted that the action "against him is Just for Ten pounds Current money." Ellis was ordered by his fellows on the bench to honor the debt and to pay costs. If a planter grew impatient for payment of a sum after judgment had been made in his favor, the law specified that he wait a year and a day before seeking a writ of *scire facias* to recover the debt. Reluctance to become harsh about payment reveals itself in one planter's regretful decision to proceed "against John Ward on a Judgment obtained by the said Bolling of a longer Date than ten Years."<sup>25</sup>

This on-going ritual action of suing and being sued kept planters and farmers coming to court every month, to see who was recovering against whom, and what their own role in the drama might be at any given moment. Exactly this state of affairs kept Ralph Wormeley of Middlesex County constantly attuned to what was happening at court day. For months Wormeley dunned his neighbors, especially John Turberville of Hickory Hill, for their debts, so that they should "not oblige me, contrary to my wish, to adopt another mode of applying, which necessity only shall urge me upon." Wormeley's preference for an amicable settlement was heightened by his need to hold *his* creditor Thomas Reid at bay. Finally obtaining an execution against Turberville, which was served at court,

<sup>24</sup>The law forbade a lawyer to take a fee in any cause brought by petition for a small debt, and for detinue and trover by petition for any sum under £5 (*Statutes at Large*, IV, 426-428); an exception was made in 1736 for collecting debts on behalf of a client in another county when the plaintiff could not be present (*ibid.*, 486-487). Imparling was in use from the 1730s onward; see any county order book.

<sup>25</sup>For the *scire facias* action, brought by John Bolling, Jr., see Henrico Orders, June 3, 1753; and *ibid.*, *Randolph v. Ellis*, Mar. 1, 1762.

Wormeley quickly scribbled to the sheriff of Westmoreland County: "Sir: Please to pay to the order of M. Tho. Reid of Northumberland the sum of £100 (the first paid into yr. hands) out of the money made by virtue of the Exec. levied on the estate of J.T. Esq. of Hiccorry Hill—& for so doing this shall be your warrant."<sup>26</sup>

In those rare instances where a case of debt was genuinely contested, a defendant still invoked the community's awareness of mutual obligation by "praying oyer" of his cause and "putting himself upon the country," asking that a jury hear his case. The assembled county then heard the clerk demand of the plaintiff, "A.B. come forth and prosecute the action against C.D. or else thou will be nonsuit," and then of the defendant, after the plaintiff (who rarely failed to appear) had entered his declaration, "C.D. come forth and save thee and thy bales or else thou wilt forfeit thy recognizance." Though the jury's participation helped to ensure that communal custom and experience were part of the decision, the law and the final declaration rested with authority—the justices before whom the case was argued. Except when the jurors delivered a verdict in these disputes, debts—at all times the single most numerous civil cause before the county courts—were settled between the two parties alone, in face-to-face definitions of mutual obligation in a public forum.<sup>27</sup>

### ACT III. THE LEGAL AUTHORITY OF COMMUNAL SANCTION: THE GRAND JURY

A third kind of action cast the spotlight of public attention farther from the bench, into circles broader than that of the propertied planters and farmers. The biannual convening of the grand jury was a familiar ritual in which twenty-four "grave and substantial freeholders" gathered after being notified two months in advance by the sheriff to attend the May or November court. From the twenty-four, fifteen at least were impaneled, and as the court came to order the clerk stood and called out: "You good men that be returned to enquire for our Sovereign Lord the King, and the body of this county . . . answer to your names, every man at the first call, and save your fines." Though the justices were clearly the head of the "body of the county," the grand jurors also functioned with authority, swearing three at a time to uphold the oath their foreman took with his hand on the Gospels. Jurymen were bound to "present no man for hatred,

<sup>26</sup>Entry Dec. 20, 1783, May 17, July 2, 1784, Aug. 23, 1788, Mar. 1792, Jan. 23, 1795, Letterbook of Ralph Wormeley, 1783-1802, MSS, Alderman Library, University of Virginia, Charlottesville. The time involved here was extraordinarily long; nonetheless, it was quite common for debt causes to grind on for several years, especially if an actual trial of the issue took place.

<sup>27</sup>The clerk's words were prescribed by statute (*Statutes at Large*, II, 59-60). For examples of cases see any county order book. Jury trial of debt cases before 1750 was rare—usually not more than 3 to 7 per year, but increasing steadily thereafter as economic growth, indebtedness, and the legal profession all expanded. Judgment by petition was the most common action in debt cases.

envy, or malice, neither [to] leave any man unpresented for love, fear, favour, or affection, or hope of reward; but [to] present things truly, as they come to . . . knowledge, according to the best of your understanding. So help you God."<sup>28</sup>

Though the freeholders of the county, as grand jurymen, shared in the authority of the court, they did not thereby earn the opportunity of rising from jury box to magistrates' bench. Grand jurymen did not become justices. Faithful servants of the court, they often continued to appear for jury duty time after time, in addition to holding other county offices. The Rust family of Westmoreland County may be fairly representative of their counterparts in neighboring Tidewater communities. Peter Rust served as grand jurymen and foreman during the 1740s and 1750s. A man of modest means but excellent parts, he was forced to ask the court to bind out to various masters three orphans left to his care because their estate could not sufficiently compensate him. He served as road surveyor, a duty shared with George and Vincent Rust. Vincent, also a grand jurymen, was given the lucrative post of tobacco inspector, let his rank go to his head, and was fined for insolence, but four months later was back in good grace and received a license to keep tavern. Jeremiah Rust served the court with his relatives, though in humbler fashion: he was paid 540 pounds of tobacco for cleaning the courthouse. Despite long years of service in various capacities, the Rusts never did become justices.<sup>29</sup>

<sup>28</sup>The grand juries met in April and December in the late 17th century (*Statutes at Large*, II, 74), and courts were admonished to hold a session at least once a year (*ibid.*, 407-408). Juries were to meet in May and November after 1705; courts were warned that failure to call the grand inquest would result in a fine of 400 pounds of tobacco against each justice (*ibid.*, III, 368). Surveying the county records between 1720 and 1750, one finds that no grand jury ever presented its justices for failure on this head, nor were fines levied against the justices by the General Court, as far as the records show. Nevertheless, though most counties always called at least one jury in a calendar year, in small counties where population was scattered (for example, Northumberland) the courts did not always see fit to call two juries a year. The best record was York's, which missed only one grand jury—in Nov. 1726. Middlesex and King George, on the other hand, were quite remiss, neglecting at least a dozen times to call the juries; in Middlesex entire years were skipped—in 1734, 1737, 1745. Gaps in county records make an average estimate nearly impossible, but for counties with fairly complete runs of order books the generalization that courts regularly held the grand inquest seems valid.

<sup>29</sup>On the Rusts see Westmoreland Orders, Jan. 29, 1754, Nov. 28, 1753, May 27, 1755, Mar. 29, July 25, Nov. 28, 1758. In Caroline, Campbell found that out of 343 jurors only 28 ever attained magisterial rank (*Colonial Caroline*, 351-356). David Alan Williams found the same absence of former jurors on the benches of Middlesex and Surry ("Political Alignments in Colonial Virginia Politics, 1678-1750" [Ph.D. diss., Northwestern University, 1959], 91-101). See also Williams, "The Small Farmer in Eighteenth-Century Virginia Politics," *Agricultural History*, XLII (1969), 91-101. The differentiation between magisterial and grand jury planters seems to have been emerging in the late 17th century. See Kevin P. Kelly, "Economic and Social Development of Seventeenth-Century Surry County, Vir-

Farmers and planters like the Rusts, once sworn to their duty, rose to the clerk's bidding to "stand together and hear your charge," as the county at large was admonished to keep silent "under paine of imprisonment" while the charge was given. A formulaic summary of general moral principles as well as of types of offenses to be investigated, the charge was delivered by the senior justice or the deputy king's attorney. Modelled on such English examples as those contained in Richard Chamberlain's *The Complete Justice*, it reminded listeners that religion and morality were "the only Foundations whereon Society and civil government subsist." Man's laws should reflect God's and were sadly necessary since conscience alone would never suffice to restrain "Fashionable Vices" in the "depraved state" of human existence. It was the purpose of law to deter men from evil, promote the general good, and ensure that the "particular Rights of every individual may be preserved & maintained."<sup>30</sup>

It was for this dual reason—to sustain the common weal and protect individuals—that the jurymen were to present offenders who violated God's laws or were guilty of civil nuisances. The grand jury was exhorted to name all whom they found to have violated the Sabbath, missed church, scoffed at the sacraments or scripture, blasphemed, or got drunk. In second order of importance were offenders who sold drink without a license, failed to keep up roads, let their mill dams fall into disrepair, or "conceale[d] Tithable persons to the great Griefe and Damage of the Inhabitants of this County." The court further delegated its power to use "wit and cunning" to the jurors by reminding them that they were to present "all those who you know are guilty of any hanius Crime Either against almighty God, the King & Queens Maj[es]ties, or Wronge done to your Neighbour—although the said Cryme be not Expresly nominated or Sett downe . . ." Having withdrawn to consider this weighty charge, the jury drew up the list of persons to be presented according to their own knowledge or on information given by the churchwardens or by two witnesses, carefully noting the names of the informants under each presentment. When the jury reentered the courtroom, the foreman read out the presentments, which were then entered on the record. The court thanked the jury and it was dismissed, the clerk crying out to the undersheriffs, "Make way for the gentlemen of the grand inquest."<sup>31</sup>

Having played their mediatory role between authority and community,

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ginia" (Ph.D. diss., University of Washington, 1972). Most grand jurymen owned about 500 acres during their time of service in the first half of the 18th century.

<sup>30</sup>(London, 1681), 470-485. See "Charge to a Grand Jury" (n.d.), Latané Family Papers, 1667-1800, Alderman Lib. Chamberlain's work contains the model in "A Compendious Charge to be given at the Quarter Sessions," which follows a discussion of the law divided into its two parts: "first the Laws Ecclesiastic for the peace of the Church, and Laws Civil, or Temporal, for the peace of the Land" (*Complete Justice*, 470).

<sup>31</sup>The county charge quoted here is also divided, with moral offenses first and civil nuisances second. See "Some helps for the Grand Jury of Middlesex, 1693/4,"

the grand jurymen resumed their seats in the courtroom and the action shifted back to the principals—the justices of the peace—who ordered the accused to appear at next court. There the court artfully combined “cunning, wit, and power” in a manner guaranteed to uphold authority and communal custom by putting offenders to shame on the public stage of court day. That Virginians recognized the impact of shame on their public personalities is revealed in the vast number of nonappearances to answer presentments. Such “non-action” was a presumptive admission of guilt, and was so considered by the court, which levied an appropriate fine on all persons “being thrice solemnly called but appearing not.” Nonappearance enabled the court to exact monies for the relief of the county’s poor, a practice that had the additional advantage of relieving the tax burden on propertied gentry and yeomen. The occasional outright confession of guilt confirmed the utility of the courts’ practices, as when John Stuard was presented for profanity, failed to appear, and had the sheriff tell the court that he “confessed himself to be guilty and was ashamed to appear before the Court, but would Willingly Submitt to the Courts Judgement.”<sup>32</sup>

Formal authority itself was not immune to this sort of corrective pressure; indeed, holding public office and exemplifying propertied personality made justices even more subject to psychological and social sanctions. A great wagging of tongues therefore assailed the sensitive justice Landon Carter when he had to step down from the bench and admit the rightness of a presentment for swearing, pay the fine, and resume his place. The mortification of Robert Wormeley Carter was eloquent, though privately confessed. To his diary Carter confided about his presentment, “I take shame to myself it being for swearing; I recollect the matter; an insolent fellow accused me of usury; which provoked me & put me off guard. May God pardon me.” This awareness that formal authority could be subjected to customary sanctions through the law may have tempered the severity of judgments. When John Forrister was presented for operating “a tip’ling house” without a license, the court discovered he could not pay his fine but accepted his earnest promise never again to sell liquor illegally. The justices declared that they knew him “to be very poor and that he hath a Wife and Several Children.” In view of their familiarity with this case, the justices “in Compassion beg leave to Recommend him to the Governor as an object of Charity.”<sup>33</sup>

In all such instances arising from the grand jury’s sitting, formal authority mingled with familiar custom. Authority was shared with the grand jurors, and the communal nature of acts involving ritual confession and expiation of sin was heightened. Since shaming affected the great as well as

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Middlesex County, Virginia Deeds, etc., 1679-1694, No. 2 [1a], Virginia State Library, Richmond. I wish to thank Anita Rutman for this reference.

<sup>32</sup>Henrico Orders, July 6, 1741.

<sup>33</sup>Richmond Orders, July 4, 1745; entry of Aug. 9, 1791, Robert Wormeley Carter Diary, Earl Gregg Swem Library Special Collections, College of William and Mary, Williamsburg; Henrico Orders, Aug. 4, 1746.

the simple, such acts touched all free members of the county. (For the most part, slaves and servants were dealt with by their masters on the plantations.) Freeholders guilty of missing church, failing to keep up their roads, having illegitimate children, swearing or getting drunk were publicly identified and reprovved.<sup>34</sup> Beneath them in the social order, and usually at court day restricted to the porch, were the unpropertied of Virginia. Yet even to them, whose lives only occasionally were touched by the justices on the bench, the public stage of court day was accessible, and they, too, played a part in the drama that displayed qualities both formal and familiar.

#### ACT IV. AUTHORITY AND ITS OBLIGATIONS BEFORE THE LAW: SLAVES AND SERVANTS

So far we have observed exchanges between the formal and familiar spheres of Virginia life that involved those propertied actors whose public personalities and identities received definition and confirmation at court day. Beyond the circles of the great and middling ranks of the society, however—at the periphery of these exchanges—stood men and women in varying degrees of unpropertied servitude. If law was something more than a coercive tool employed solely to the advantage of the propertied gentry, court day must reveal that additional quality. The recognition of the significance of slaves and servants by the court was signaled by its actions, both in its treatment of such persons and in the props and appurtenances deemed appropriate for their rank.<sup>35</sup>

<sup>34</sup>Tabulation of presentments reveals that missing church was the most common offense in Middlesex, Essex, Lancaster, and Northumberland, and second most common in York, Caroline, King George, Richmond, and Westmoreland. Women presented for bastardy represent the second most numerous offense; prosecution on this head was high, as it was for missing church. The presentments are not an index of bastardy in Virginia. To these figures one would have to add informations and complaints of churchwardens and masters against servant women. No county attempted to prosecute putative fathers with any rigor before 1750. A new law of 1769 encouraged free white women (not servants or slaves) to come into court and accuse the reputed father, provided he was not a servant (*Statutes at Large*, VIII, 374-377). The new law abolished the practice of whipping women who were unable to pay the 20s. fine. A man could be jailed if he failed to pay a recognizance bond of £10; if found guilty, he was liable for child support at a rate determined by the court. Tabulation of presentments for 1750-1770 reveals a marked drop of bastardy presentments. Since bastard children had to be bound out at the parish's expense and constituted a public charge on property, one can only wonder why sanctions against property in the form of fines were not more regularly imposed and why fathers were not more vigorously pursued for child support. Whether the reluctance to shame a planter or farmer by bringing him into court on this charge outweighed the monetary burdens imposed by supporting illegitimate children at the public's expense is a tantalizing but unresolvable question.

<sup>35</sup>Property, far from constituting merely "possessions," embraced everything that was "held" or "pertained" to the person, no matter how humble. Thus one's

The presence of the lowest members of Virginia society on the courthouse porch was recognized in August 1750 when the Richmond County Court ordered its sheriff to "employ some person to rail in a Yard with good saw'd Whiteoak Rails and Locust posts Twenty foot in Wedth from each Corner of the Courthouse five foot high, The rails to be within three inches of one another, And to sett up four Benches in each of the Piazzas and one under each of the Windows in the body of the Courthouse of a Convenient hight and Breadth for people to set on."<sup>36</sup> Such an order, though not directed exclusively for the benefit of servants, and not at all for that of slaves, nonetheless testifies to the court's awareness of the lower orders of society whose standing and due were confirmed by the court's actions in regard to them and in their behalf.

The formal authority of the justices was invoked by servants as a reminder of obligations owed these denizens of the piazza who were themselves a species of property and possessors of very little. Occasionally a servant's plea was brought by an intermediary but more often by the servant himself. The "wit and cunning" of the court, as well as social standards of rank based on race, were in full play as servant Thomas Cox complained against his master, William Woodson. The justices listened, agreed "that the said Cox hath not been kept as a white servant ought to be," and ordered that in future his master should provide him with "Sufficient diet, lodging, and cloathing, and . . . not immoderately Correct him."<sup>37</sup>

White servants had rights above those of black servants or slaves, as the above instance demonstrates. Yet obligations incumbent on authority to give black Virginians their due were occasionally, if infrequently, invoked with success by Afro-Americans. Beaten and imprisoned by Elias Newman, a black woman named Sarah argued that she was over twenty-one and free, contrary to Newman's claim that she was his wife's slave. In this

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religion, social obligations and rights, vesture, and diet all fall under this heading. Clearly, persons of great wealth held the most properties, of various sorts, including that property around which so much of English common law revolved—land. The upholding of the gentry's rights to property, however, was important not only to them but also to the lower orders, who had a right to expect *their* property to be guaranteed them at law. See the following discussions of the symbolic and public nature of private property and its ties to "fundamental rights": G. P. Gooch, *Political Thought in England: Bacon to Halifax* (London, 1914); David Little, *Religion, Order, and Law: A Study in Pre-Revolutionary England* (New York, 1969), 176-189; Howard Nenner, *By Colour of Law: Legal Culture and Constitutional Politics in England, 1660-1689* (Chicago, 1977), 36-39. The potential abuses of the law of property and the often unintended consequences wrought by authority's actions have been insightfully treated by Douglas Hay in "Property, Authority, and the Criminal Law," in Hay *et al.*, *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (New York, 1975), 17-64, and by E. P. Thompson in *Whigs and Hunters: The Origin of the Black Act* (London, 1975), 258-269.

<sup>36</sup>Richmond Orders, Aug. 6, 1750.

<sup>37</sup>Henrico Orders, Mar. 5, 1722/3.

instance, an attorney-at-law, John Martin, acted as Sarah's representative, though whether appointed by the court for her *in forma pauperis*, as was sometimes the case, we do not know. Newman's protests to Sarah's bill were ruled insufficient, and he was forced to carry his case on appeal to Williamsburg, where we lose sight of it.<sup>38</sup>

Servants, black and white alike, usually came into court of their own volition, and were not represented by an attorney but, like the rest of society, stood in face-to-face meeting with authority. And it was precisely the justices' jealous sense of that authority that worked for the lesser ranks of the social order. Certainly this is the reason why the court ordered a planter publicly whipped for beating the slave of another without the sanction of the law. Cruel or arbitrary punishment was not opposed for its own sake but rather because of the threat to constituted authority—its own—which the court protected. Yet here again, the interplay of authority and custom, formal and familiar, is obvious, and both types of actors in the drama got something out of the situation. This same quality of the law—that it protected both the public, propertied personality of authority while intervening for dependents as well—moved the farmer Job Shadrick to complain to his patron, Augustine Washington, a gentleman justice. Abused by John Bayes, the captain of a troop of soldiers, Shadrick insisted that Bayes "suffered them to beat him in a Barbarous manner." Washington had written to Bayes for an explanation, "but instead of Complying he flung the Letter in the fire and said Col. Washington might kiss his backside." For his insult, Bayes was arrested, brought into the public forum, and forced to give security for his good behavior.<sup>39</sup>

In some degree, qualities we have seen in other acts—shame, intercession by the "gentle" members of society for inferiors, jealous protection of authority—all seem to have coalesced in the act that revealed the rank and rights of the lower orders. Thus one indentured servant's canny use of the court provides a fitting climax to the dramatic play we have been observing. Captured and brought into court after attempting to run away, Alexander Stewart loudly demanded protection since he was "inhumanely rased as well In his Diett and Great Severity" by his master, John Livingston, Jr. Sensing the spectacular potential of his position, Alexander maneuvered the Court into ordering that he be "stript in Court and it

<sup>38</sup>Essex Orders, Nov. 20, 1745. For examples of courts providing an attorney *in forma pauperis* (usually the deputy king's attorney) see King George Orders, Apr. 1, 1737; Middlesex Orders, June 2, 1747, for freedom dues for Mulatto Frank (Frank won the case July 7); and Richmond Orders, Apr. 2, 1739. The King George justices provided the king's attorney to a poor widow who wished to sue the sheriff for maladministration of her deceased husband's estate.

<sup>39</sup>York Orders, June 17, 1728; Westmoreland Orders, Apr. 21, 1757. The Westmoreland Court drove home its patronage powers by locking up the unfortunate Bayes until "two good Securitys" could be found to guarantee his behavior. The justices then offered two of their most eminent fellows in Virginia, Thomas Ludwell Lee and Richard Henry Lee, as securities.

appearing to the said Court that the said Alexander has bin severely whipped by ye many Stripes on his Naked Skin Contrary to any authority by Law for so doeing," the justices issued a public reprimand. Though Alexander was to return to Livingston's service, the court admonished the master to treat his servant "in a more Christian and Human Manner than he before has and that he doe Not suffer him to be used any otherwise," lest upon "further Complaint and Just Occation & Cause" he be dealt with severely by the court.<sup>40</sup>

Though the justices of the counties did not regularly interfere with the private law administered on the plantations to servants—and never, as far as we can tell, with regard to slaves—it is nevertheless true that law held meaning and consequence for the lesser ranks of society. The trials of slaves for felony in oyer and terminer sessions were a kind of spectacle that deserves separate treatment; yet even there one finds that the formal letter of the law was regularly moderated by familiar custom. The king's law functioned in those instances, too, where Afro-Americans stood on trial for their lives before the justices. Yet it is perhaps significant that those sessions were separate from the regular meetings of court day, and we should not try to force a total unity of action upon a culture whose prevailing views were ambiguous and tortured at best, in that slaves were regarded simultaneously as human beings and as chattel property.<sup>41</sup>

Planters and farmers, free blacks and mulattoes, servants and tenants—all left the stage of court day in Tidewater Virginia secure in the sense that communal affairs had been shaped and ratified by themselves, that the rhythm of public life continued, and that customary institutions were firmly guided by the authority of the gentry. That authority, expressed through the application of law, upheld the defense of property and, through that, the public identities, the well-being, and the security of most of society. The law could only give every man his due if it was replete with

<sup>40</sup>Essex Orders, May 19, 1752.

<sup>41</sup>Philip J. Schwarz of Virginia Commonwealth University has kindly shared with me his preliminary conclusions on slave trials ("Slave Crimes in Eighteenth-Century Virginia," work in progress). He contends that by the 1770s, 60% to 80% of the slaves tried were pardoned, their sentences were commuted, or the goods they stole were devalued. Like the whites accused of felony, the overwhelming majority of slaves tried were not executed for felony, and, as with whites, their most numerous offense was breaking and entering and theft of goods. In every county on which the conclusions of the present essay rest, white offenders far exceeded blacks in numbers, and there were many more Called Courts than oyer and terminer sessions. See Gerald W. Mullin's excellent evocation of Virginia's patriarchal culture, and the figures for Richmond County, in *Flight and Rebellion: Slave Resistance in Eighteenth-Century Virginia* (New York, 1972). Mullin's conclusions, like my own, differ from those of Edmund S. Morgan, who contends that slavery in 18th-century Virginia was based on a "competitive" rather than a "paternalist" set of values. See Morgan, *American Slavery—American Freedom: The Ordeal of Colonial Virginia* (New York, 1975), 325-326, n. 33.

suasive images, commonly accepted values. Where it failed, it did so because the Virginia society failed to grapple with the contradictions inherent in chattel slavery based upon race. Besides being a mode of social control whereby authority was sanctioned and norms of behavior were enforced, the law regularly, predictably appeared as a sentinel guarding the boundaries and defining relationships between the worlds of formal authority and customary, familiar county life.

Contemporary English opinion, so highly valued in eighteenth-century Virginia, wisely held (though it failed to put into practice) the conviction that law should rarely be enforced through the mere fear of punishment. Rather, it should promote acquiescence among a people persuaded of its value. "We find by experience," wrote Richard Chamberlain in 1681, "that it is not frequent punishment that prevents offences . . . It is better preventing, than redressing offences."<sup>42</sup> As long as the routine, the rituals, the repetition of the "acts" we have observed continued—as long as shared perceptions were publicly expressed and communication between various ranks of society was guaranteed—court day flourished. In their deft handling of the occasional displays of violence, hauteur, and vulgarity, and the ills attendant on chattel slavery, Virginia's justices promoted the interplay between formality and familiarity in county life. Whether the existence of court day with its attendant controls of public opinion and censure had a beneficial effect upon private law in the plantations, we can only speculate. Certainly one senses that in its formal architecture, its dramaturgy, its visual and aural symbolism, the courthouse was a sort of "everyman's plantation." To a degree, everyone in the county "belonged" there and rightly expected to receive what was due him as he defined himself, his rank, his relationships to others. Authority, in the persons of the justices, managed to give various ranks of Virginians what was theirs, as the law was supposed to do, by a judicious mixture of "cunning, wit, and power." At its best, court day was the arena in which authority, law, and custom mingled in ritual exchanges. Deference to authority was expected all down the line. Mutual obligations had to be acted out as well, as both business and self-images were advanced in the settlement of debt. Communal sanction served to ratify authority's presence by mediating that presence by means of the grand jury, and in exchange for deference, obligations were set upon superiors as well. Over all, the public law, the public authority of the king's court loomed large in everyone's mind.

Sir Edward Coke, the great expositor of the ancient, customary nature of English law, would have been pleased at the commingling of formality and familiarity wrought by the gentlemen justices of the peace in Virginia. Of the commission of the peace he had once said that it was "such a forme of subordinate government for the tranquillity and quiet of the Realm, as no part of the Christian world hath the like, if the same be duly exe-

<sup>42</sup>*Complete Justice*, 485.

<sup>43</sup>Edward Coke, *Fourth Part of the Institutes of the Laws of England* (London, 1644), 170. Rhys Isaac has suggested that during the 1760s the Baptist conventi-

cuted.”<sup>43</sup> The due execution of the office by Virginia’s justices kept court day alive as the stage upon which the dynamic between authority and custom, formalism and familiarity, guided the vigorous evolution of a culture intensely proud of English law “from antiquity not to be traced.” While the dialectic lasted, court day continued to be the occasion for “the principal meetings of the Country.”

cles provided a novel sense of communal order and social sobriety in a formerly chaotic society. Isaac sees those qualities as very potent in the Tidewater, “where no cultural tradition existed as preconditioning for the communal confession, remorse, and expiation that characterized the spread of the Baptist movement” (“Evangelical Revolt,” *WMQ*, 3d Ser., XXXI [1974], 359). On the contrary, I suggest that precisely because religion, order, and law were vital elements of gentry culture as expressed in the ritual of court day, Isaac’s Baptists were (correctly) perceived as direct threats to an already-existing liturgical and dramatic occasion. Hence there is a small but significant difference in our interpretations. The decline of court day in the 1760s requires separate treatment.