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Poor Babes, Desperate Mothers: Concealment of Dead Newborns in Early Virginia

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In May 1715, the magistrates of Richmond County, on Virginia's Northern Neck, began an investigation of Margaret Richardson, an unmarried white servant rumored to have falsely denied her pregnancy, murdered her newborn daughter, and concealed the infant's body. A justice of the peace empaneled a coroner's jury to look into the allegations. Richardson led the jurors to the spot in a tobacco field where she had buried her child's body. Pointing to the shallow grave, she exclaimed, "there is my poor Babe." An enslaved person "put a hoe under it, and lifted the Child up dirt and all, and the Arms were extended up over it's head." The back of the child's head seemed to have suffered a blow, though the rough exhumation may have caused the damage. At a hearing before the county examining court, Richardson admitted that she had delivered her baby alone. She insisted, however, that the infant had been born dead. When asked why she had not reported the birth to anyone, Richardson replied, "I was a fool and knew no better." The Richmond County magistrates bound her over for trial at the court of oyer and terminer in Williamsburg "on Suspition of Murdering her Bastard Child." [1]

[1] *Criminal Proceedings in Colonial Virginia: [Records of] Fines, Examination of Criminals, Trials of Slaves, etc., from March 1710 [1711] to [1754] [Richmond County, Virginia]*, ed. Peter Charles Hoffer and William B. Scott, American Legal Records, vol. 10 (Athens, GA, 1984), 14-16. Unfortunately, we do not know the outcome of Richardson's trial because most of the provincial government's judicial records were destroyed in a fire set by

Richardson's confession of a clandestine birth and burial subjected her to prosecution for presumptive murder under Virginia's version of the English Infanticide Act of 1624. Officially entitled An Act to Prevent the Destroying and Murdering of Bastard Children,[2] the Jacobean act of Parliament made the concealment of a newborn's death "almost conclusive evidence of the child's being murdered by the mother," a rule that, as Sir William Blackstone put it, "savours pretty strongly of severity."[3] This essay examines Virginians' enforcement of the 1624 act and the 1710 provincial statute that replaced it. Virginians' principal objective, the essay argues, was not so much to protect innocent life as to intimidate pregnant servants in order to force them to

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Confederate soldiers when they evacuated Richmond in the closing days of the Civil War. On the conflagration that destroyed between 800 and 1,000 buildings in the city on April 3, 1865, see Nelson Lankford, *Richmond Burning: The Last Days of the Confederate Capital* (New York, 2002), 3, 135-45. The records of Richmond County, which is located around fifty miles from the city of Richmond, survived the Civil War, however. They show that the county incurred substantial costs in prosecuting Richardson. Richmond Co. Order Book (1711-16), 369-70. The county court record books are available on microfilm at the Library of Virginia in the city of Richmond.

[2] 21 Jac. I, c. 27 (1624). The House of Lords recorded the title as "An Act to prevent the destroying and murthering of Bastard Children." *Journals of the House of Lords*, vol. 3, *1620-28* (London, 1771), 427. Some statutory compilations also used that title, e.g., *The Statutes at Large*, ed. Danby Pickering, vol. 7, *1597-1660* (Cambridge, 1763), 298. In *The Statutes of the Realm*, however, the word "destroying" is missing. The title is simply "An Acte to prevent the murthering of Bastard Children." The following text of the act appears in *The Statutes of the Realm*, vol. 4, *1547-1624* (London, 1819), 1234-35:

> Whereas many lewd Women that have been delivered of Bastard Children, to avoyd their shame and to escape Punishment, doe secretlie bury, or conceale the Death, of their Children, & after if the Child be found dead the said Women doe alleadge that the said Childe was borne dead; whereas it falleth out sometymes (although hardlie it is to be proved) that the said Child or Children were murthered by the said Women their lewd Mothers, or by their assent or procurement: For the preventing therefore of this great Mischeife, be it enacted by the Authoritie of this present Parliament, That if any Woman after one Moneth next ensuing the end of this Session of Parliament, be delivered of any Issue of her Body Male or Female, which being born alive, should by the Lawes of this Realme be a Bastard, and that she endeavor privatelie either by drowning or secrett burying thereof, or any other way, either by herself or the procuring of others, soe to conceale the Death thereof, as that it may not come to light, whether it were borne alive or not, but be concealed, in every such Case the Mother soe offending shall suffer Death as in case of Murther, except such Mother can make prooffe by one Witnesse at the least, that the Child (whose Death was by her soe intended to be concealed) was borne dead.

[3] William Blackstone, *Commentaries on the Laws of England*, vol. 4 (Oxford, 1769), 198.

disclose their condition, thereby enabling their masters to demand extra service as compensation for any losses that they may have sustained as a result of the servants' illicit child bearing.[4]

Prosecuting Unwed Mothers Under the English Infanticide Act

Prior to Parliament's enactment of the 1624 statute, prosecutors had difficulty convicting unwed mothers who were suspected of murdering their newborns. The crown had to prove that the woman delivered a live child and killed her baby with premeditation ("malice aforethought"). By the mid-sixteenth century, premeditation meant that the accused intended to hurt the victim; an indictment did not have to allege a specific intent to kill.[5] In an age of rudimentary forensic medicine, the live-birth requirement was especially hard to satisfy in cases where the defendant had delivered secretly and later claimed that the child was born dead. The 1624 act attempted to overcome this problem through a burden-shifting device. If the prosecution could prove that the defendant had intentionally concealed the death of her nonmarital child, the statute created a rebuttable presumption that the baby had been born alive. Unless the mother produced at least one credible witness who testified that the child never drew breath or showed other signs of having lived outside the mother's womb, the jury could further presume that the defendant had murdered the infant. This second presumption—that a mother who hid the corpse of a child who had been born alive must have been trying to cover-up an infanticide—satisfied the premeditation requirement of a common-law murder charge.

[4] Childbearing by servants was generally illegal because Virginia law prohibited servants from marrying without their masters' permission, which was seldom granted. William Waller Hening, ed., *The Statutes at Large; Being a Collection of All the Laws of Virginia, from the First Session of the Legislature*, vol. 2 (New York, 1823), 114.

[5] Sir John Baker, *The Oxford History of the Laws of England*, vol. 5, *1483-1558* (Oxford, 2003), 555.

Most early modern judges and commentators viewed the 1624 act as a purely procedural measure. The statute "doth not make a new offence," the court declared in *Rex v. Davis* (1664), "but maketh a concealment to be an undeniable evidence" of common-law murder.[6] Indictments based on the statute did not conclude with the words "contra formam statuti" (against the form of the statute), Sir Matthew Hale noted, "for the statute only directs the evidence, where the case is within it, but created not a new crime."[7] Many defendants managed to thwart a finding of intentional concealment by showing that they had made preparations for the baby's delivery—the so-called "linen defense"[8]—or had revealed the pregnancy to someone. If the crown could not prove an intentional concealment, the case fell outside the 1624 act, and the prosecution went forward in the same fashion as in any other common-law murder case. In that event, Hale explained, the jury would be called upon to determine "whether she murdered it or not, by those circumstances, that occur in the case, as if it be wounded or hurt, &c."[9] Without the statutory presumptions, the outcome of an infanticide case hinged on actual proof of a live birth and a

[6] *Rex v. Davis*, Kelyng, J., 32, 84 Eng. Rep.1068,1069 (Newgate gaol delivery, 1664).

[7] Sir Matthew Hale, *Historia Placitorum Coronae: The History of the Pleas of the Crown*, vol. 2 (London, 1736), 289. See also William Hawkins, *A Treatise of the Pleas of the Crown*, vol. 2 (London, 1721), 438. Concealing a nonmarital child's birth, "by secret Burying or otherwise," did not become a separate crime in England until 1803, when Parliament made concealment an imprisonable offense that a jury could use as an alternative basis for punishing an unwed mother who had been acquitted of murder. Malicious Shooting or Stabbing Act 1803 (Lord Ellenborough's Act), 43 Geo. III, c. 58, § 4. In 1861, Parliament went further and prescribed imprisonment for anyone who concealed the birth of a child by a "secret Disposition of the dead Body," whether the child died before, at, or after its birth. Offences Against the Person Act 1861, 24 & 25 Vict. c. 100, § 60. Infanticide became a discrete crime in 1922. Infanticide Act 1922, 12 & 13 Geo. V, c. 18. See also the Infanticide Act 1938, 1 & 2 Geo. VI, c. 38.

[8] Early modern women sometimes reserved special linens for use during childbirth. These linens "protected bedding used in ordinary life from the potent bodily fluids produced during childbirth," and they had both emotional and ritual significance. "When they were newly made or purchased for a particular birth, they might also be invoked as a legal defense against infanticide under English law in cases where a child subsequently died." Kathleen M. Brown, *Foul Bodies: Cleanliness in Early America* (New Haven, CT, 2009), 88.

[9] Hale, *Historia Placitorum Coronae*, 2:289.

violent death. As the court remarked in *Davis*, "if there be no sign of hurt upon the child, it is no murder."[10]

Although Parliament ostensibly passed the 1624 act for the purpose of protecting children, the historian Mark Jackson has persuasively argued that the Jacobean statute's main aim was to discourage single women from engaging in illicit sex and then hiding their pregnancy in order to avoid the shame and punishment inflicted by England's fornication and bastardy laws.[11] Those penalties included fines, whipping, and incarceration, as well as penance exacted by ecclesiastical authorities. The 1624 act targeted servants in particular, for they were viewed as secretive, licentious, and prone to criminality.[12] Unmarried English servants sometimes killed their infants because, for them, motherhood was a disaster. A servant might be fired if her employer discovered her condition. Without a good character reference, she would be hard-pressed to find another job. To a desperate woman, infanticide and concealment of the child's body may have seemed the only way out of a dire predicament. J. M. Beattie found that perhaps as many as two-thirds of the women charged under the 1624 act at the Surrey, England, assizes between 1660 and 1800 were servants.[13] Similarly, R. W. Malcolmson calculated that a majority of the women suspected of infanticide in cases at London's Old Bailey between 1730 and 1774 were clearly identifiable as servants.[14] Juries were often sympathetic to defendants,

[10] Kelyng, J., at 33, 84 Eng. Rep. at 1069.

[11] Mark Jackson, *New-Born Child Murder: Women, Illegitimacy and the Courts in Eighteenth-Century England* (Manchester, 1996), 35, 45-46.

[12] Amy L. Masciola, "'The unfortunate maid exemplified': Elizabeth Canning and representations of infanticide in eighteenth-century England," in *Infanticide: Historical Perspectives on Child Murder and Concealment, 1550-2000*, ed. Mark Jackson (Aldershot, Eng., 2002), 60-61.

[13] J. M. Beattie, *Crime and the Courts in England, 1660-1800* (Oxford, 1986), 114-17.

[14] R. W. Malcolmson, "Infanticide in the Eighteenth Century," in *Crime in England, 1550-1800*, ed. J. S. Cockburn (Princeton, NJ, 1977), 202.

resulting in a high acquittal rate, particularly in the late eighteenth century, but prosecutions persisted nonetheless because of their assumed deterrent effect.[15]

Virginia acquired the Infanticide Act of 1624 as part of the transatlantic transfer of legal culture that accompanied English colonization in North America. Parliamentary statutes came into Virginia's legal system via either of two routes. The first was extension, an exercise of the royal prerogative that projected particular laws beyond the realm of England and imposed them on the king's subjects overseas. The second was accretion, a voluntary process of adoption, incorporation, and application that gradually added individual English statutes to Virginia's body of laws because the colonists found them useful.[16] Until the early eighteenth century, Virginians assumed that the 1624 act operated in the colony by means of extension. To foster the faithful implementation of this and other parliamentary legislation, the Virginia General Assembly passed a law[17] in 1666 requiring courts throughout the colony to buy sets of the English *Statutes at Large* and various other law books such as Michael Dalton's *The Countrey Justice*, an indispensable handbook for justices of the peace that contained a handy summary of the 1624 act.[18] As we shall see, after many years of enforcing the 1624 act, Virginians concluded that the

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[15] Jackson, *New-Born Child Murder*, 46-47, 133-34, 145, 150-52.

[16] For more about the extension and accretion of acts of Parliament in early Virginia, see John Ruston Pagan, "English Statutes in Virginia, 1660-1714," in "*Esteemed Bookes of Lawe" and the Legal Culture of Early Virginia,* ed. Warren M. Billings and Brent Tarter (Charlottesville, VA, 2017), 57-94.

[17] Hening, *Statutes at Large*, 2:246. The 1666 law book act was repealed in 1748. *The Acts of Assembly, Now in Force, in the Colony of Virginia* (Williamsburg, VA, 1752), 15, 362-63.

[18] Michael Dalton, *The Countrey Justice; Containing the Practice of the Justices of the Peace as well in as out of their Sessions* (London, 1666), 330 (summarizing the Infanticide Act of 1624).

English statute had not, in fact, crossed the Atlantic. They wished to retain the law's perceived benefits, however, so in 1710 they incorporated Parliament's language into provincial legislation.

Prosecutions of women suspected of murdering their newborns began at the county court level. A coroner's jury usually determined the cause of death by inspecting the child's body and questioning witnesses. Sometimes officials enlisted the aid of midwives and other women to investigate whether a birth had occurred and to estimate a newborn's gestational age.[19] If the coroner's jury found that a homicide probably had been committed, the sheriff brought the accused before the justices of the peace, who interrogated the defendant and witnesses. If the magistrates concluded that the accusation had merit, they bound the defendant over for trial at the General Court, which sat in the capital (Jamestown from1607 to1698; Williamsburg from1699 to 1780). Composed of the governor and councilors, the General Court adjudicated felony trials with the aid of a twelve-man jury. English law required that juries come from the vicinity of the crime in order to take advantage of any inside information that the jurors might possess. The Virginia legislature decided, however, that due to "the remotenesse of our habitations," strict conformity to English practice could not be achieved. To "come as neere to them as we possibly may," the General Assembly devised a compromise. Six jurors would come from the neighborhood where the crime was committed, and the other six from the capital.[20] The cost of sending the jurors, the defendant, and the witnesses to Jamestown or Williamsburg had to be borne by the county where the prosecution originated.

[19] On the role of midwives and women's juries as investigators in infanticide cases, see Mary Beth Norton, *Founding Mothers and Fathers: Gendered Power and the Forming of American Society* (New York, 1996), 226-28, 237-39.

[20] Hening, *Statutes at Large*, 2:63-64.

Rex v. Swan, an infanticide case begun in Middlesex County in 1700, illustrates the process that colonists used to prosecute women during the period when the 1624 act was assumed to be in effect. This litigation also reveals jurors' power to ignore the statute if they did not wish to apply it to a particular defendant. The case began when the county coroner summoned a jury to question Sarah Swan, who was suspected of murdering her newborn and concealing the child's body. Swan was an unmarried servant of Colonel Ralph Wormeley II, the secretary of the colony and the wealthiest plantation owner in Middlesex County.[21] The jurors interrogated Swan and a fellow female servant in Secretary Wormeley's manor house, Rosegill. Swan admitted giving birth, and after viewing the infant's body, the coroner's jury determined that the child "was lost through willfull neglect of the mother."[22] The coroner ordered the sheriff to take Swan into custody and bring her before the justices of the county court. She confessed to the magistrates that she had delivered a child and claimed that the infant had been born dead. Swan acknowledged that she had not called anyone to assist at the delivery, "but concealed the same, and hidd the . . . Child." The county court ordered her "committed into close Prison as a Criminall" and sent her to Williamsburg for trial by the General Court.[23] There the jury acquitted her of the charge of "Concealing the death of her bastard Child."[24] The case is particularly interesting because of the light that it sheds on jury discretion. Despite Swan's "willfull neglect" of her newborn, her concealment of the infant's body, and her inability to

[21] Darrett B. Rutman and Anita H. Rutman, *A Place in Time: Middlesex County, Virginia, 1650-1750* (New York, 1984), 153-54.

[22] Middlesex Co. Orders (1694-1705), 351.

[23] Middlesex Co. Orders (1694-1705), 342.

[24] *Executive Journals of the Council of Colonial Virginia*, vol. 2, *1699-1705*, ed. H. R. McIlwaine (Richmond, VA, 1927), 154.

produce a witness who could verify her account of a stillbirth, the jury still declined to convict her. Their verdict showed that the statutory presumptions of a live birth and premeditated murder were only as strong as the jurors' willingness to use them.

Sex Regulation and Coerced Labor

Why did unwed mothers such as Margaret Richardson and Sarah Swan attempt to hide their pregnancies and their children's bodies? If they had actually murdered their infants, the desire to escape punishment obviously provided their motivation. But what if they were telling the truth when they claimed that their babies were stillborn? Early modern sex laws operated as shaming devices that reinforced the community's moral values. Richardson and Swan may have behaved evasively in order to spare themselves the humiliation that typically accompanied public exposure as a "bastard bearer." Living in Virginia, however, they also had an even more powerful reason to hide their maternity: they wanted to avoid being trapped by the colony's extra-service requirement for pregnant servants.

Confronted by chronic labor shortages for much of the seventeenth century, Virginia's lawmakers devised a way for men such as themselves to profit from illicit childbearing by using it as a justification for demanding extra work from unwed mothers. In the 1650s, the burden of compensating masters for time lost due to pregnancy had fallen only on males. A man who impregnated a servant not only had to pay a fine for fornication and support the child but also had to pay the woman's employer for the loss of her labor, either by serving him for a year or by paying him 1,500 pounds of tobacco.[25] The Assembly changed that policy in 1660 by making

[25] Hening, *Statutes at Large*, 1:253, 438-39; "Some Acts Not in Hening's *Statutes*: The Acts of Assembly, April 1652, November 1652, and July 1653," ed. Warren M. Billings, *Virginia Magazine of History and Biography*, 83 (1975): 37-38.

female servants liable to equal punishment with males.[26] Two years later, the legislature went to the other extreme by making women solely responsible for compensating their masters and by raising the amount to 2,000 pounds of tobacco or two years of labor.[27]

Virginia law also enabled masters to extract extra work by paying their servants' fornication fines. Persons convicted of the "filthy sin of fornication" had to render 500 pounds of tobacco to their parish. Theoretically, the 1662 fornication statute applied equally to men and women.[28] On the Eastern Shore, men and women were fined in roughly equal numbers from the 1630s through the 1660s. But in the 1670s, women were charged with sex offenses in three times as many cases as men, and in the 1680s and 1690s, women were prosecuted ten times as often as men.[29] Few servants could afford to pay their fines themselves, so they had to seek help from their masters. If a master paid his servant's fornication fine, he was entitled to another half year of service; should he refuse to pay, the servant would receive a whipping.[30]

The cases of Katherine Higgins and Phyllis Herne provide good examples of how Virginia's extra-service system worked. In 1685, the York County Court sentenced Higgins to

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[26] "Some Acts Not in Hening's *Statutes*: The Acts of Assembly, October 1660," ed. Jon Kukla, *Virginia Magazine of History and Biography*, 83 (1975): 83.

[27] Hening, *Statutes at Large*, 2:115.

[28] Hening, 2:114-15. The legislature reenacted this 500-pound fornication fine for both men and women in 1696. If the defendant could not pay the fine, the offender would receive "twenty-five lashes well laid on," or two months imprisonment. Hening, 3:139. In 1723, the General Assembly prescribed a fine of either 500 pounds of tobacco or fifty shillings of current money of Virginia for "any lewd woman [who] shall be delivered of a Bastard Child." If she failed to pay, she received twenty-five lashes on her bare back at the public whipping post. *The Laws of Virginia, Being a Supplement to Hening's The Statutes at Large, 1700-1750*, comp. Waverly K. Winfree (Richmond, VA, 1971), 256. This measure was reenacted in 1727. Hening, *Statutes at Large*, 4:213. In 1769, the legislature prescribed a twenty-shilling fine for free women who bore illegitimate children and prohibited whipping them if they failed to pay. Hening, 8:376.

[29] John Ruston Pagan, *Anne Orthwood's Bastard: Sex and Law in Early Virginia* (New York, 2003), 126.

[30] Hening, *Statutes at Large*, 2:115, 3:139.

receive thirty-nine lashes on her bare back for fornication, presumably because she could not afford her fine. The court remitted her whipping when her master, John Page, a member of the Council of State, wrote a letter to the York justices agreeing to pay the parish 500 pounds of tobacco for Higgins's fine in return for an order compelling her to serve him for six months after her indenture expired. Higgins delivered a live child, allowing Page to claim two more years of service as compensation "for the loss & trouble he hath sustained."[31] Phyllis Herne's master, Arthur Upshur, demanded six years of additional service because she had borne three out-of-wedlock children while in his service. Appearing before the Accomack County Court in 1690, Herne "did humbly supplicate her . . . Masters favour in remitting some of her time given him by the . . . Law." She promised to perform "three years good and faithfull service" if he would not insist on receiving all of his statutory entitlement. In a display of magnanimity that was rare for a Virginia master, Upshur "did condescend" to accept her proposal and in open court agreed to settle for three years of extra service in lieu of the full time granted him by law.[32]

Unlike Upshur, most masters took full advantage of their opportunities to "fleece" lesser folk.[33] As T. H. Breen has observed, "in Virginia, long before the massive enslavement of black Africans, human relationships were regarded as a matter of pounds and pence."[34] Some "dissolute masters" pursued their compensation rights even to the extent of deliberately impregnating their servants in order to extend their servitude. The legislature tried to stop this

[31] York County Deeds, Orders, Wills (1684-87), 7, 16.

[32] Accomack Co. Orders (1690-97), 5.

[33] I have borrowed the term "fleece" from Edmund S. Morgan, *American Slavery, American Freedom: The Ordeal of Colonial Virginia* (New York, 1975), 196, 277, 292.

[34] T. H. Breen, "Looking Out for Number One: The Cultural Limits on Public Policy in Early Virginia," in Breen, *Puritans and Adventurers: Change and Persistence in Early America* (New York, 1980), 120.

practice by providing that if a master impregnated his servant, the churchwardens were to sell her services to a third party and put the proceeds in the parish treasury.[35] If the master's son got the servant pregnant, however, the master could claim the additional labor.[36]

Masters gained an additional windfall by indenturing servants' offspring. Magistrates customarily bound nonmarital children to their mother's employer from infancy to adulthood. On the Eastern Shore, servants' children were often indentured at ages ranging from two months to around two years. One infant was bound for twenty-four years just nine days after he was born.[37] Under a 1672 statute, males had to serve until twenty-one and females until eighteen.[38] A 1691 law required the mixed-race children of white mothers to serve until they were thirty.[39] The legislature boosted the age to thirty-one in 1705.[40] Just as the children of enslaved women inherited their mother's status,[41] most nonmarital children of indentured females were essentially born into servitude.

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[35] Hening, *Statutes at Large*, 2:167. The extra-service requirement for women who were impregnated by their masters dropped to one year or 1,000 pounds of tobacco in 1706. The parish where the child was born retained the right to sell the mother's time. Hening, 3:453. The law was reenacted in 1753. Hening, 6:361.

[36] Pagan, *Anne Orthwood's Bastard*, 85, 174 n.26.

[37] Pagan, *Anne Orthwood's Bastard*, 109.

[38] Hening, *Statutes at Large*, 2:298.

[39] Hening, 3:87.

[40] Hening, 3:453. The lawmakers liked this system so much that in 1723 they extended it to future generations. If a mixed-race female who was obliged to serve until the age of 30 or 31 gave birth to a child during her period of servitude, that child also had to serve the mother's master until the age of 30 or 31. Hening, 4:133. This rule lasted until 1765, when the General Assembly acknowledged the policy's "unreasonable severity towards such children" and put all servants' nonmarital children on an equal footing. Males had to serve until 21 and females until 18. Hening, 8:134-35. The General Assembly reaffirmed those age limits in 1769 and required masters to provide food, clothing, and lodging, and to teach the child to read and write. Hening, 8:370.

[41] Hening, 2:170 (1662 statute declaring that "all children borne in this country shalbe held bond or free only according to the condition of the mother").

Race exerted a powerful influence on Virginia's sex regulations. In 1662, the General Assembly doubled the fine owed by a "christian," i.e., white person, who committed fornication "with a negro man or woman."[42] The punishment for inter-racial sex became more severe after 1680 as Virginians began importing significant numbers of enslaved people and grew more anxious about maintaining the color line. A 1691 law provided that a white servant who had a child with a black or mulatto would be sold by the churchwardens for five additional years of service after she finished her original term.[43] The penalties for intra-racial sex went down, however, as the expanding supply of enslaved workers eased masters' perceived need to squeeze as much labor as possible from whites.[44] In 1696, the legislature halved the amount of extra service demanded from female servants who bore children fathered by men of their own race. If a white servant conceived a child with a white man, for example, she had to compensate her master with 1,000 pounds of tobacco or one year of service, plus an additional six months if the master paid her 500-pound fornication fine.[45]

Stillbirth reduced rather than eliminated a woman's extra-service obligation. In 1705, the grand jury of Richmond County presented Katherine Thatchell "for Burying of her Bastard Child

[42] Hening, *Statutes at Large*, 2:170.

[43] Hening, 3:87. The General Assembly reaffirmed that policy in its 1705 revisal of the laws, though it offered women the option of paying the parish fifteen pounds of current Virginia money instead of rendering five years of additional service. Hening, 3:453. Few female servants would have had access to enough money to buy their freedom. The law was reenacted in 1753. Hening, 6:361.

[44] See Morgan, *American Slavery, American Freedom* (arguing that the growth of slavery reduced masters' predatory conduct toward poorer whites and fostered the development of white supremacy as an ideology that united whites across economic class lines).

[45] Hening, *Statutes at Large*, 3:139-40. In 1705 and again in 1753, the General Assembly reaffirmed the requirement that female servants render one year of extra service or pay their master 1,000 pounds of tobacco. Hening, 3:452; 6:360. The requirement was tacitly repealed in 1785 when the legislature adopted a revised Act Concerning Servants. Hening, 12:190-91.

privately,"[46] a felony charge apparently grounded on the 1624 act. A month later, her master, Abraham Goad, came before the county court and swore "that the said Child was decayed and to the best of his Judgment still born and that he had taken it up some small time after the Buryall thereof." Based on the master's less-than-expert testimony, the justices of the peace dismissed Thatchell's felony presentment while fining her 500 pounds of tobacco for fornication. Goad agreed to pay the fine on her behalf as well as Thatchell's court costs. She, in turn, "by and with her owne Consent," agreed to serve Goad for an additional eight months.[47]

Anne Peacock, a Richmond County servant arrested in 1706 on suspicion of murdering her infant, paid a much higher price following her acquittal. Peacock confessed that she had delivered a baby, "butt it was borne dead," so she had "putt itt out of Doors by a tree till she could have time to Bury itt." The county court ordered her to stand trial in Williamsburg on a charge of "Concealing the death of a Bastard Child."[48] She must have prevailed at the General Court (the record has not survived), for she was back in Richmond County three months later. Her prosecution had been expensive. The county clerk charged 200 pounds of tobacco for attending special sessions of the county court. Five of the veniremen (jurors) received 100 pounds apiece; the sixth, probably the foreman, got 125 pounds. The man who ferried the jurors and witnesses across the Rappahannock River charged 200 pounds plus another 200 pounds for transporting Peacock's master and mistress, William and Anne Smith, who were the crown's star witnesses. Each of the two queen's attorneys billed the county 1,000 pounds of tobacco for their

[46] Richmond Co. Order Book (1704-08), 39.

[47] Richmond Co. Order Book (1704-08), 44.

[48] Richmond Co. Order Book (1704-08), 166; *Executive Journals of the Council*, ed. McIlwaine, vol. 3, *1705-21*, ed. H. R. McIlwaine (Richmond, VA, 1928), 82.

prosecutorial services.[49] The sheriff charged five pounds of tobacco for every mile that he conveyed a prisoner from Richmond County to Williamsburg, a fee totaling approximately 575 pounds. The Williamsburg jailer charged five pounds of tobacco a day. Peacock was incarcerated for around ten days and perhaps longer, so the jailer's fee came to fifty pounds or more.[50] All told, the prosecution cost over 4,300 pounds of tobacco. And when the General Court set Peacock free, Richmond County sent her the bill.

As an impoverished servant, Peacock could not possibly satisfy a debt of that magnitude. Predictably, her master and chief accuser, William Smith, paid the bill for her. Smith then sued Peacock in the county court "for Jaylor's Fees and other expenses disbursed on her account dureing the time of her imprisonment and Tryall att Williamsburgh." She had only one asset—her labor—that she could use to meet her obligation. She agreed to serve Smith for an additional four years to reimburse him for paying the costs of a prosecution that Smith himself probably had initiated.[51] Had Peacock asked someone to assist her delivery and witness the burial of her stillborn infant's remains, the most that she would have owed Smith was half a year of extra service for paying her fornication fine. By punishing her severely for making the wrong choice, the Richmond County justices sent a strong message to other servants who might be contemplating concealment: you may escape the gallows, but Virginia's legal system will still demand its pound of flesh.

Enacting and Enforcing Virginia's Infanticide Act of 1710

[49] Richmond Co. Order Book (1704-08), 199.

[50] *Laws of Virginia*, comp. Winfree, 27.

[51] Richmond Co. Order Book (1704-08), 171.

In 1710, the General Court discharged a defendant who had been prosecuted under the 1624 act after "the ablest Lawyers here" advised the judges that the English statute did not extend to Virginia because it was a post-settlement enactment and Parliament had not explicitly included the colony in the legislation's ambit.[52] Lest "that Judgment should give encouragement to such wicked practices" as secret childbirth and burials, the Council, sitting as the upper house of the General Assembly, ordered the preparation of a bill incorporating "the very terms of the Act of Parliament with some small variation adapting it to the circumstances of this Country."[53]

[52] If an act of Parliament did not expressly mention the colonies, its territorial reach was implicitly limited to England and Wales, but the monarch could extend it simply by ordering officials to enforce the law in the colonies. If a bill in Parliament named the colonies as objects of the proposed legislation, the king's assent simultaneously exercised the monarch's legislative power as the king-in-Parliament and his prerogative to prescribe laws for his possessions abroad. Extending statutes by assent, as occurred in the case of the seventeenth-century navigation laws, made legislating for the colonies a collaborative venture between the king and the houses of Parliament. For more on the theory and formalities of extension, see John Ruston Pagan, "Loyalty and Insecurity in Charles II's Virginia," in *Loyalty to the Monarchy in Late Medieval and Early Modern Britain, c. 1400-1688*, ed. Matthew Ward and Matthew Hefferan (London, 2020), 260.

[53] Lieutenant Governor Alexander Spotswood to Lords Commissioners for Trade and Plantations, June 8,1711, National Archives (formerly Public Record Office), Colonial Office (cited hereafter as CO), 5/1363, f. 298. The letter is transcribed in *The Official Letters of Alexander Spotswood, Lieutenant-Governor of the Colony of Virginia, 1710-1722*, ed. R. A. Brock, vol. 1 (Richmond, VA, 1882), 57-58. The text of Virginia's Act to Prevent the Destroying and Murdering of Bastard Children (1710), is in *Acts of Assembly, Passed in the Colony of Virginia, from 1662, to 1715* (London, 1727), 1:326-27. A similar version appears in Hening, *Statutes at Large*, 3:516-17.

The 1710 act provided:

> Whereas several lewd Women, that have been delivered of Bastard Children, to avoid their Shame, and to escape Punishment, do secretly bury or conceal the Death of their Children, and after, if the Child be found dead, the said Women do alledge, that the said Child was born dead, whereas it falleth out sometimes (although hardly it is to be proved) that the said Child or Children were murdered by the said Women their lewd Mothers, or by their Assent or Procurement: For preventing therefore of this great Mischief, Be it enacted by the Lieutenant-Governor, Council and Burgesses of this present General Assembly; and it is hereby Enacted by the Authority of the same, That if any White or other Woman, not being a Slave, after One Month next ensuing the End of this present Session of Assembly, be delivered of any Issue of her Body, Male or Female, which, being born alive, should by Law be a Bastard, and that she endeavour privately, either by Drowning, or secret Burying thereof, or any other Way, either by her self, or the procuring of others, so to conceal the Death thereof, as that it may not come to light, whether it were born alive or not, but be concealed, in every such Case, the Mother so offending shall suffer Death, as in case of Murder; Except such Mother can make Proof, by one Witness at the least, that the Child, whose Death was by her so intended to be concealed, was born dead.
>
> And to the End this Act may be made Publick, Be it further Enacted, by the Authority aforesaid, That the same shall be read yearly, on some *Sunday* in *May*, in all Parish-Churches and Chapels within this Colony, by the Minister or Reader of each Parish, immediately after Divine Service, under the Penalty of Five hundred Pounds of Tobacco for every Omission and Neglect therein; to be recovered with costs, by the

After the Virginia bill was amended a couple of times, the measure swiftly passed both houses of the General Assembly, and the governor signed it into law in December 1710.[54] Virginia's Act to Prevent the Destroying and Murdering of Bastard Children remained in force throughout the rest of the colonial period.[55]

Virginia lawmakers did not break new ground when they transformed the 1624 act of Parliament into provincial legislation that received its "obligation, and authoritative force, from being the law of the country."[56] Massachusetts already had incorporated the 1624 English statute

> Informer, in an Action of Case, wherein no Essoign, Protection, or Wager of Law, or more than one Imparlance, shall be allowed. And the Church-wardens of every Parish are hereby required to provide a Copy of this Act, at the Charge of the Parish, under the Penalty of Five hundred Pounds of Tobacco; to be recovered in Manner aforesaid.

[54] *Legislative Journals of the Council of Colonial Virginia*, ed. H. R. McIlwaine, 2d ed. (Richmond, 1979), 493, 494, 495, 497-98; *Journals of the House of Burgesses of Virginia, 1702/3-1705, 1705-1706, 1710-1712*, ed. John Pendleton Kennedy and H. R. McIlwaine (Richmond, 1905-15), 259, 261, 262, 264, 265, 268, 298.

[55] The 1710 act appeared in *An Abridgement of the Publick Laws of Virginia in Force and Use, June 10, 1720* (London, 1722), 116-17; *Acts of Assembly, Passed in the Colony of Virginia, from 1662, to 1715* (London, 1727), 326-27; *A Collection of All the Acts of Assembly, Now in Force, in the Colony of Virginia* (Williamsburg, VA, 1733), 256; *The Acts of Assembly, Now in Force, in the Colony of Virginia* (Williamsburg, VA, 1752), 85; John Mercer, *An Exact Abridgement of All the Public Acts of Assembly of Virginia, in Force and Use, January 1, 1758* (Glasgow, 1759), 254; and *The Acts of Assembly, Now in Force, in the Colony of Virginia* (Williamsburg, VA, 1769), 59.

[56] Blackstone, *Commentaries*, 1:106.

into provincial law in 1692 and 1696.[57] Connecticut had done so in 1699.[58] Virginia came next, in 1710, and South Carolina soon followed in 1712.[59] Three more mainland British colonial legislatures copied the parliamentary act into their own statute books later in the same decade: New Hampshire in 1714;[60] Pennsylvania in 1718;[61] and Delaware in 1719.[62] Virginia's

[57] *The Acts and Resolves, Public and Private, of the Province of the Massachusetts Bay*, vol. 1 (Boston, 1869), 55, 255. Massachusetts lawmakers hoped that reading the colony's version of the 1624 act to juries would bolster their willingness to convict, but the enactment turned out to have little impact. Peter C. Hoffer and N. E. H. Hull, *Murdering Mothers: Infanticide in England and New England, 1558-1803* (New York, 1981, 59-63. In 1785, the Massachusetts legislature tried to increase the chances of securing a conviction by reducing the penalties for concealment. *The Perpetual Laws of the Commonwealth of Massachusetts*, vol. 1, *November 1780 to March 1788* (Boston, 1801), 222-23. Under the revised statute, if a woman hid her pregnancy and secretly delivered a nonmarital child, she incurred a fine of up to fifty pounds or imprisonment for up to three months. If she concealed the death of her newborn in order to prevent people from discovering whether the infant had been born alive or not, she faced a macabre form of shaming rather than execution. She was "set on the gallows, with a rope about her neck, for the space of one hour" and required to post a bond guaranteeing her good behavior. Should the jury conclude that the defendant had willfully murdered her child, she received a death sentence. The grand jury could charge a woman with all three offenses in the same indictment. If the petit jurors acquitted her of willful murder, they could still convict her on either or both of the concealment charges.

[58] *Acts and Laws of His Majesties Colony of Connecticut in New-England* (Boston, 1702), 13. The 1699 Connecticut act was copied almost verbatim from the 1696 Massachusetts statute. *The Public Records of the Colony of Connecticut, from August 1689, to May, 1706*, ed. Charles J. Hoadly (Hartford, CT, 1868), 285 n.* In 1808, the Connecticut legislature amended the statute to make it conform to the 1785 Massachusetts revision, also changing the fine for concealing pregnancy and delivery to 150 dollars. *The Public Statute Laws of the State of Connecticut*, vol. 1 (Hartford, CT, 1808), 302-03.

[59] *The Statutes at Large of South Carolina*, ed. Thomas Cooper, vol. 2, *1682-1716* (Columbia, SC, 1837*),* 513, 744. The South Carolina legislature repealed the act in 1795. *Acts and Resolutions of the General Assembly, of the State of South Carolina, Passed in Nov. and Dec. 1795* (Charleston, SC, 1796), 44-45.

[60] *Laws of New Hampshire*, ed. Albert Stillman Batchellor, vol. 2, *Province Period, 1702-1745* (Concord, NH, 1913), 127. The 1714 act was repealed in 1792. *The Laws of the State of New-Hampshire, Passed at a Session of the Honorable General-Court, Begun and Holden at Dover, June, 1792* (Portsmouth, NH, 1792), 403.

[61] *Laws of the Commonwealth of Pennsylvania, from the Fourteenth Day of October, One Thousand Seven Hundred, to the Sixth Day of April, One Thousand Eight Hundred and Two,* 6 vols. (Philadelphia, PA, 1803), 1:132. In 1790, the legislature amended the statute to require the prosecution to prove a live birth. *Laws of the Commonwealth of Pennsylvania*, 3:443-44. Then, in 1794, the legislature abolished capital punishment for concealing a nonmarital child's death and substituted imprisonment for up to five years. Jurors could still consider concealment as evidence in a willful murder case, but they could not convict unless they concluded that the mother "did wilfully and maliciously destroy and take away the life" of her child. *Laws of the Commonwealth of Pennsylvania*, 5:6. On the background of these changes, see G. S. Rowe, "Infanticide, Its Judicial Resolution, and Criminal Code Revision in Early Pennsylvania," *Proceedings of the American Philosophical Society*, 135 (1991):200-32.

[62] *Laws of the State of Delaware, from the Fourteenth Day of October, One Thousand Seven Hundred, to the Eighteenth Day of August, One Thousand Seven Hundred and Ninety-Seven*, vol. 1 (New Castle, DE, 1797), 67. The Delaware legislature repealed the 1719 statute in 1779. *Acts of the General Assembly of the Delaware State, at a Session Begun at Dover the Twentieth Day of October 1778, and Continued by Adjournments; Being their Third Session* (Wilmington, DE, 1779), 46.

neighbors Maryland[63] and North Carolina[64] adopted the 1624 act by continued usage rather by explicit statutory incorporation.

Virginia's presumptive-murder statute diverged from its English prototype in two significant ways. The first "small variation" dealt with the mechanism for disseminating the law. The colony did not yet have a printing press, and had one existed, illiteracy would have prevented many servants from reading the act. To circumvent this problem, the legislature required clergymen to read the measure aloud in church every May. Ministers faced a fine of 500 pounds of tobacco if they neglected to deliver the General Assembly's threat to hang any woman who concealed her newborn's corpse.[65] Second, lawmakers confined the act's coverage to "any white or other woman, not being a slave,"[66] a phrase that referred primarily to indentured servants. Enslaved women sometimes committed infanticide because of despair over their children's future, a desire to resist, or a sense of shame or dishonor stemming from masters' abuse of their bodies.[67] But unlike whites and free blacks, enslaved women did not kill their

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[63] William Kilty, *A Report of all Such English Statutes as Existed at the Time of the First Emigration of the People of Maryland, and Which by Experience Have Been Found Applicable to Their Local and Other Circumstances; and of Such Others as Have Since Been Made in England or Great-Britain, and Have Been Introduced, Used and Practised, By the Courts of Law or Equity; and also all Such Parts of the Same, as May be Proper to be Introduced and Incorporated into the Body of the Statute Law of the State* (Annapolis, MD, 1811), 172-73. Kilty, the chancellor of Maryland, criticized the "injustice and inhumanity" of the 1624 act and deemed it "not to be proper to be incorporated with our laws."

[64] In 1818, the North Carolina legislature passed a statute declaring that the 1624 act was "no longer in force in this State." The lawmakers substituted a provision incorporating much of the English statute's language, but they reduced the penalty for concealment of a nonmarital child's death to a misdemeanor punishable by a fine of up to 500 dollars and an imprisonment not exceeding a year. *The Laws of the State of North-Carolina, Enacted in the Year, 1818* (Raleigh, NC, 1819), 29. On the prosecution of infanticide in North Carolina during the colonial period, see Donna J. Spindel, *Crime and Society in North Carolina, 1663-1776* (Baton Rouge, LA, 1989), 49, 88-89.

[65] Hening, *Statutes at Lar*ge, 3:516-17.

[66] Hening, 3:516.

[67] Jeff Forret, "'The Prisoner . . . Thinks a Great Deal of Her Virtue': Enslaved Female Honor, Shame, and Infanticide in Antebellum Virginia," in *The Field of Honor: Essays on Southern Character and American Identity*, ed. John Mayfield and Todd Hagstette (Columbia, SC, 2017), 217-30. For examples of coroners' jury verdicts

children in order to avoid a service extension, as they were already bound for life. The General Assembly aimed the 1710 statute directly at whites and free blacks because the lawmakers knew that Virginia's extra-service requirement created an especially strong incentive for those female servants to kill their newborns and hide their bodies. Besides, colonial masters had other ways to discipline enslaved women who murdered their children, including capital punishment imposed by special jury-free courts of oyer and terminer which employed relaxed standards of proof and whose judgments of execution entitled slaveowners to petition the legislature for compensation.[68]

Like the Jacobean original, Virginia's statute did not create a new offense but simply made it easier for the crown to prove common-law murder. Proof that a woman had deliberately concealed her child's death gave rise to the statutory presumptions of a live birth and premeditated murder. A defendant could rebut evidence of intentional concealment by availing herself of the traditional "linen defense." If she managed to persuade the court or jury that she had taken concrete steps to deliver and care for a living child, the 1710 act's presumptions no longer applied. The case could still go forward as a willful murder prosecution, however, in which event the crown could point to the defendant's clandestine disposal of her newborn's body as probative evidence that she had killed the child with premeditation.

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accusing enslaved women of murdering their newborns and hiding their bodies, see the 1805 case of Milley, enslaved servant of Rebecca Capells, in Lunenburg Co. Circuit Court Health and Medical Records, Coroners' Inquisitions, 1752-1924, box 1, accession no. 0007434990, Library of Virginia (Milley admitted that she secretly buried her newborn with the child facing downwards but claimed that the infant was stillborn; the coroner's jury found that the child had been smothered to death with dirt); and the 1808 case of Hannah, enslaved servant of Elizabeth Goulding, in Prince Edward Co. Circuit Court Health and Medical Records, Coroners' Inquisitions, 1759-1946, box 1, folder 1800-09, accession no. 0007313244, Library of Virginia (after initially denying that she had given birth, Hannah confessed that she had hidden her child's body in some brush; the coroner's jury found that she had strangled the infant and broken its neck bone). Neither verdict addressd the accused's motive for committing infanticide.

[68] Hening, *Statutes at Large*, 3:102-03, 269-70; Anthony S. Parent, Jr., *Foul Means: The Formation of a Slave Society in Virginia, 1660-1740* (Chapel Hill, NC, 2003), 128-29.

The distinction between *presumptive murder* (common-law murder proved through the use of statutory presumptions) and *willful murder* (common-law murder proved without the aid of presumptions) occasionally produced a court decision that looks anomalous to historians.[69] On closer reading, though, the case sometimes turns out to be nothing more than a demonstration of the technical constraints of presumptive murder prosecutions, in contrast to the more open-ended nature of prosecutions brought under a willful-murder theory. *Rex v. McCarty*, a 1715 murder proceeding in Northumberland County, is a case in point. Catherine McCarty, who apparently was a servant,[70] fell while trying to go over a fence. She was seven and a half months pregnant at the time, and the fall caused painful injuries. McCarty told the county court that the trauma brought on the premature birth of a dead female child near a path beside a small stream. There "she raked a hole in the ground with her hands and buryed it," she said. Two female witnesses testified that prior to the falling incident, "any time when by them asked" McCarty "denyed not her being with child." Between the delivery and her arrest, McCarty "owned readily" that she had given birth; described the circumstances of the delivery and burial; and explained why she had not returned to her master's house after she had hurt herself ("there was Company and men there"). The witnesses added that during their conversation with McCarty, she "did produce some Child bed linen," the traditional proof of innocent intent in presumptive murder cases. At this point in the proceeding, the justices "heard and Considered the Act of Assembly in force in such Cases provided," almost certainly a reference to the 1710 act. Despite the statute's clear inapplicability to the fact of the case, the JPs did not dismiss the charge against

[69] See, for instance, the skeptical account of the Northumberland County Court's ruling in *Rex v. McCarty* (1715) in Julia Cherry Spruill, *Women's Life and Work in the Southern Colonies* (Chapel Hill, NC, 1938), 325.

[70] Spruill, *Women's Life and Work in the Southern Colonies*, 325.

McCarty. Instead, they were "of opinion that she cannot be discharged by this Court from the fact whereof she stands accused," and they bound her over for trial by the General Court at Williamsburg.[71]

The record does not reveal what the magistrates said during their deliberations over McCarty's culpability, but it seems highly unlikely that they based their decision on the 1710 act. Although McCarty had given birth alone and had privately buried her newborn's body, she had not concealed her pregnancy and childbirth from the two witnesses. The JPs' suspicions had been aroused, however, by McCarty's post-delivery effort to lay the groundwork for the well-known "linen defense." She had behaved like a guilty person who feared imminent arrest and was trying to concoct a plausible explanation of her conduct. She may not have committed presumptive murder, the justices probably reasoned, but willful murder remained a distinct possibility. The magistrates therefore kicked the case upstairs to the General Court in order to give the crown an opportunity to try McCarty for willful murder. The same witnesses would testify, and the king's attorney probably would have trouble proving a live birth and a premeditated killing. The odds of an acquittal were certainly in McCarty's favor. Nevertheless, the JPs decided to bind her over in order to signal their disapproval of her actions.[72]

Women accused of infanticide sometimes persuaded magistrates to release them from custody by producing witnesses who could corroborate their stories. Anne Tayloe appeared before the Lancaster County bench in 1714 accused off covertly delivering a child that she had allegedly placed in a chamber pot and later buried. Tayloe denied that she had ever been

[71] Northumberland Co. Order Book (1713-19), 109-10.

[72] The outcome of *Rex v. McCarty* is unknown.

pregnant and elicited testimony from a female neighbor who swore that she had seen signs of Tayloe's menstruation in the months immediately preceding the alleged infanticide. This evidence, along with weaknesses in the prosecution's case, spared Tayloe from being sent to Williamsburg to stand trial for murder.[73] Elizabeth Renolds, a Richmond County woman arrested in 1723 "on Suspition of privately burying of a Child born of her body which by Law was a bastard," also won a dismissal because a witness was present at a key moment. Renolds told the county justices that "she had a Child Lately borne of her body but that the same was born Dead."[74] She claimed that Burgess Longworth, evidently a man of property in the county,[75] had been with her when she gave birth. The magistrates called Longworth to the bar to testify, and he swore that he saw Renolds "when she was Delivered of a Child but the same was borne Dead." That was all the justices needed to hear. They ordered her discharged from custody, although she did have to pay the jailer's fees. [76]

If a jury found a woman guilty of willful murder, she would have been sentenced to death and promptly executed.[77] But neither surviving court records nor newspaper reports back up a historian's claim that "a rather large number of women received the death penalty for concealing

[73] For an excellent analysis of the Tayloe case with a detailed account of the evidence, see Kathleen M. Brown, *Good Wives, Nasty Wenches, and Anxious Patriarchs: Gender, Race, and Power in Colonial Virginia* (Chapel Hill, NC, 1996), 306-13.

[74] *Criminal Proceedings in Colonial Virginia*, ed. Hoffer and Scott, 57.

[75] See Richmond Co. Order Book (1711-16), 78, and Richmond Co. Order Book (1716-17), 227.

[76] *Criminal Proceedings in Colonial Virginia*, ed. Hoffer and Scott, 57-58.

[77] At a Council meeting held in Jamestown in November 1692, the newly arrived governor, Sir Edmond Andros, sought advice on the customary way to handle death sentences in Virginia. A woman had been sentenced to die "for the Murder of a Bastard Child," and Andros asked the Council "what was the usuall proceedings here in such Cases." The councilors responded that a warrant for her execution was to issue as a matter of course. *Executive Journals of the Council*, vol. 1, *1680-99*, ed. H. R. McIlwaine (Richmond, VA, 1925), 272. The woman probably was hanged. Arthur P. Scott, *Criminal Law in Colonial Virginia* (Chicago, IL, 1930), 201 n.24.

the death of their illegitimate children."[78] The sources indicate that an unknown—and unknowable—number of Virginia women were sentenced to death for murder in prosecutions that relied, at least in part, on proof of concealment. Yet I have not found a single case containing clear evidence that the colony actually executed an unwed mother *solely* on the strength of the presumptions in the 1624 and 1710 acts. Regarding colonial Virginia, it is inaccurate to say, as did a second historian, that "Many instances appear of the execution of women for child murder or for concealing the death of a bastard."[79] The most that one can assert with confidence is that colonists occasionally hanged women for child murder and that in some of those cases the defendant's concealment of her infant's death served as one of the pieces of evidence that the crown used to prove that she had acted willfully. Concealment *in and of itself* did not result in any verifiable executions, however.

The destruction of the General Court's records has forced historians of colonial crime to rely heavily on brief reports that appear in the *Virginia Gazette*, a Williamsburg newspaper founded in 1736. The *Gazette* mentions several women who were charged with killing their children, and those accounts seldom provide enough procedural detail for us to identify which were willful murder prosecutions using ordinary common-law standards of proof and which were presumptive murder cases based on the infanticide acts. Colonial newspaper accounts almost never say anything about the circumstances surrounding a particular crime, and sometimes they do not even give the defendant's name. In 1737, for example, the *Virginia Gazette* reported that four people had received death sentences at the recently concluded General Court, including "1

[78] Hugh F. Rankin, *Criminal Trial Proceedings in the General Court of Colonial Virginia* (Williamsburg, VA, 1965), 136.

[79] Spruill, *Women's Life and Work in the Southern Colonies*, 325.

Woman for the Murder of her Bastard Child."[80] The newspaper reported in 1738 that an unnamed "young Woman who was committed, on Suspicion of murdering a Bastard-Child, was try'd and acquitted" at the court of oyer and terminer.[81] A 1739 article in the *Gazette* mentioned that Elizabeth Maze, from Lancaster County, was hanged at the public prison "for the Murder of her Bastard Child."[82] In Maze's case, at least we have the Lancaster County Court's record of her examination, yet it merely tells us that she was brought before the court "on Suspicion for the Murder of her Bastard Child" and denied the charge. The court bound her over for trial at the General Court after examining five female and two male witnesses, but their depositions have not survived. The records in Maze's case do not say anything about concealment, let alone mention the 1710 act.[83] *The New-York Weekly Journal* reported that, in 1741, Anne Plunket was executed near Williamsburg "for the Murder of her Bastard Child,"[84] again without indicating that the presumptive-murder statute played any role in the woman's conviction. In 1751, the *Virginia Gazette* informed its readers that a petit jury at the court of oyer and terminer had acquitted Martha Little, who was tried "for the Murder of her Bastard Child,"[85] a charge that may or may not have involved the 1710 act.

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[80] *Virginia Gazette* (Parks), May 6, 1737, p. 3. The *Gazette* is accessible at the Colonial Williamsburg Digital Library: https://research.history.org/DigitalLibrary/va-gazettes/.

[81] *Virginia Gazette* (Parks), June 16, 1738, p.3. This court of oyer and terminer was created by royal command to augment the General Court by holding additional sessions at the capital for the trial of felonies, thereby preventing long incarcerations between court sittings. *Royal Instructions to British Governors, 1670-1776*, ed. Leonard Woods Labaree, vol. 1 (New York, 1935), 336; *Executive Journals of the Council of Colonial Virginia*, ed. McIlwaine, vol. 3, *1705-21*, 255. This tribunal should not be confused with the special courts of oyer and terminer that county justices of the peace used to try enslaved people for felonies. Hening, *Statutes at Large*, 3:102-03, 269-70.

[82] *Virginia Gazette* (Parks), Nov. 23, 1739, p. 3.

[83] Lancaster Co. Order Book (1729-43), 250. The county court record refers to the defendant as Elizabeth Mase.

[84] *New-York Weekly Journal*, Feb. 21, 1742, p. 1 (accessible in America's Historical Newspapers Collection at https://www.newsbank.com).

[85] *Virginia Gazette* (Hunter), June 13, 1751, p. 3.

The *Virginia Gazette*'s reporting in the closing decade of the colonial period remained terse while occasionally providing a morsel of context. The *Gazette*'s account of the execution of Martha Sharp in 1767 "for child murder" said that the Chesterfield County mother had "denied the crime for which she suffered, and laid it upon the father of the child."[86] Concealment was not mentioned. In 1771, the *Virginia Gazette* reported that Emilia Whiting, from Fauquier County, was acquitted by the General Court "for the Murder of her Child," with no reference to either concealment or the child's out-of-wedlock status.[87] The report of Sarah Hall's conviction for "Child Murder," in 1772, noted that she had "received the Governor's Pardon,"[88] suggesting that Hall had been convicted of presumptive murder rather than willful murder, for only the monarch could pardon the latter.

Pardoning Presumptive Murder

The 1624 and 1710 acts seemed bloodthirsty, but the availability of pardons substantially mitigated their harshness. The chief aim of the infanticide statutes was deterrence, not retribution. The colonial government did not have to hang unwed mothers in order to achieve the desired *in terrorem* effect. To send a shiver of fear throughout the female population, all officials had to do was periodically go through the motions of condemning a woman to death. The courtroom became a theater, and the whole community watched the judges' performance. Afterwards, having issued their warning about the dangers of concealment, the judges would show the defendant mercy by recommending that she receive a pardon.

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[86] *Virginia Gazette* (Purdie and Dixon), June 11, 1767, p. 2.

[87] *Virginia Gazette* (Purdie and Dixon), Apr. 18, 1771, p. 3.

[88] *Virginia Gazette* (Purdie and Dixon), Nov. 5, 1772, p. 3.

Obtaining a pardon took time, however. Condemned women sometimes waited years for their release from custody. In 1689, for example, the General Court sentenced Elizabeth Lewis to death under the 1624 act for concealing the death of her nonmarital child. Lewis petitioned for mercy, "affirming the Child was born dead."[89] The governor, Lord Howard of Effingham, was in England,[90] and in his absence the Council reprieved the execution of Elizabeth's sentence until the next term of the General Court. Remarkably, Effingham's successors and the Council continued to postpone Elizabeth's hanging from term to term until at least 1694. In June of that year, the governor and Council received a report that Elizabeth "hath by some liberty given her by the Sheriff verey much misbehaved herselfe." They ordered the sheriff to keep her in "Close Custody" in Jamestown's jail "as a Condemned person."[91] The records do not reveal what ultimately happened to Lewis, but her series of reprieves evince a deep reluctance to hang a woman whose conviction rested on statutory presumptions rather than on actual proof of willful murder.

Virginia's governors tended to interpret their pardon powers expansively in infanticide cases. Governor Francis Nicholson's commission, conferred by King William III in 1698, authorized him to pardon criminals, "Treason and Willful Murder only excepted."[92] Nicholson

[89] *Executive Journals of the Council*, ed. McIlwaine, 1:522.

[90] *The Papers of Francis Howard, Baron Howard of Effingham, 1643-1695,* ed. Warren M. Billings (Richmond, VA, 1989), 420.

[91] *Executive Journals of the Council*, ed. McIlwaine, 1:314.

[92] Commission from King William III to Francis Nicholson, July 20, 1698, CO 5/1359, p. 217. I viewed this document on microfilm 29, Virginia Colonial Records Project, which is available at the Virginia Museum of History and Culture and at the Library of Virginia. Although the governor could not pardon people who had been convicted of treason or willful murder, he could grant reprieves until the monarch's "pleasure may be further known." The willful murder exception to the pardon power had appeared in earlier gubernatorial commissions. See, e.g., Commission from King Charles II to Governor Lord Howard of Effingham, Sept. 28, 1683, in *Papers of Francis Howard, Baron Howard of Effingham*, ed. Billings, 12. The willful murder exclusion remained a standard clause in governors' commissions throughout the colonial period. Leonard Woods Labaree, *Royal Government in America: A Study of the British Colonial System Before 1783* (New Haven, CT, 1930), 406.

thought that the term "Willful Murder" did not include murder prosecuted through the use of statutory presumptions. In 1702, he pardoned a York County woman, Ann Tandy, whom the General Court had sentenced to death for "concealing the Death of her Bastard Child."[93] One of Nicholson's successors, Lieutenant Governor Alexander Spotswood, initially challenged the purported distinction between willful and presumptive murder. Eventually he came around to Nicholson's view when he grasped the centrality of pardons to Virginia's interconnected network of criminal and labor laws.

Spotswood confronted the pardon issue in 1713, when the General Court's grand jury indicted Jane Ham, a servant from King William County, for killing and concealing the death of her nonmarital child. The petit jury convicted her of presumptive murder, and the Court sentenced her to death. The judges—who in their role as councilors had helped to enact the 1710 law—thought that Ham did not deserve to hang. They told Spotswood that the trial had not uncovered evidence that she had "done any violence to the . . . Child, to occasion it's death, but only endeavoured to conceal her being delivered thereof." Moreover, Ham "appeared to be a very ignorant person, and not like to be apprised of the Law which makes such Concealment penal." The judges therefore recommended her as a fit recipient of the lieutenant governor's mercy.[94] Spotswood demurred, telling the councilors that the crime for which Ham had been convicted made her "liable to the same punishment as in case of wilfull Murder," hence "he was

[93] *Executive Journals of the Council*, ed. McIlwaine, vol. 2, *1699-1705*, 236, 237. For the early stages of Tandy's prosecution, see York Co. Deeds, Orders, Wills (1698-1702), 518, 526; York Co. Deeds, Orders, Wills (1702-06), 73.

[94] *Executive Journals of the Council*, ed. McIlwaine, 3:344.

restrained by his Commission from pardoning the same." The most that he could do was ask Queen Anne to issue a pardon; in the meantime, he would grant Ham a reprieve.[95]

In May 1713, Spotswood wrote William Legge, the earl of Dartmouth, who served as the secretary of state for the Southern Department, asking him to lay Ham's case before the queen. The lieutenant governor told Dartmouth that the jury had found Ham "guilty of concealing the Death of her bastard child, tho' upon the whole Evidence it did not appear that it was occasion'd by any violent means used by her." Ham's crime "being made wilful by the Law," Spotswood thought that he could not pardon her without the queen's express command. All of the judges of the General Court had "represented her as an object of mercy, and more especially in regard she might be ignorant of the Law, being but lately enacted here."[96] Spotswood's last point may have been disingenuous. The 1710 act was new, but its 1624 prototype had been enforced in Virginia for at least forty years.

Fourteen months passed, yet Spotswood received no word from London about the status of his pardon recommendation. In July 1714, he wrote Dartmouth's successor, Henry St. John, viscount Bolingbroke, asking him to look into Ham's case. He again emphasized that she had not acted violently, and he revised his ignorance-of-the-law argument to make it more persuasive. He had somehow discovered that the 1710 statute had never been read in Ham's

[95] McIlwaine, 3:344, 346. As lieutenant governor, Spotswood exercised the powers granted to the absentee governor, the earl of Orkney. Commission from Queen Anne to George Hamilton, earl of Orkney, Dec.10, 1709, C.O. 5/1363, pp. 3-26 (viewed on microfilm reel 30, Virginia Colonial Records Project). Orkney's commission empowered the governor or, in his absence, the lieutenant governor to pardon all offenses except treason and willful murder. C.O. 5/1363, p. 17. The same restriction on the governor's pardoning power appeared in the Commission from King George I to Orkney, Jan. 15, 1715, in "The Randolph Manuscript: Virginia Seventeenth Century Records," *Virginia Magazine of History and Biography*, 20 (1912), 343. Spotswood signed Jane's reprieve at a Council meeting on June 10, 1713.

[96] Spotswood to Dartmouth, May 13, 1713, in *Official Letters of Alexander Spotswood*, ed. Brock, 2:19.

parish church, "as it was particularly directed to be, and is the only way of publication in this Country, where we have no printing." He implored Bolingbroke "to move her Majestie to extend her Royal mercy to this unfortunate Woman, (who has now lain upwards of fifteen months in prison)." Spotswood's final argument in favor of a pardon rested on an astonishingly frank description of the coerced-labor system that drove many women to desperation. Ham "is the more deserving of compassion," he told Bolingbroke, "in regard that being a Servant, by the laws of this Country, her having a Bastard Child would have entailed upon her a Longer Servitude; the fear of which, probably, was the reason why she conseal'd her Delivery and the Death of the Child." [97]

Spotswood's hope that Queen Anne would grant a pardon vanished in mid-October when he learned that the queen had died at the beginning of August.[98] Great Britain had a new monarch, King George I, whom the lieutenant governor could ask to pardon Ham, but she had already spent a year and a half in prison, and Spotswood did not wish to prolong her incarceration. He met with the Council in December 1714 and sought their advice. The councilors came up with a legal theory that enabled Spotswood to pardon Ham without violating his commission. Although "the punishment for concealing the death of a Bastard Child is by Law declared to [be] the same as that of wilfull murder," the councilors reasoned, "the crime is very different & especially since upon her trial it did not appear that she had any ways occasioned the death of her Child."[99] They concluded that Spotswood's commission prohibited him from pardoning violent, premeditated homicides, but not from pardoning convictions based on the

[97] Spotswood to Bolingbroke, July 21, 1714, in Brock, 2:74.

[98] Spotswood to Bolingbroke, Oct. 25, 1714, in Brock, 2:75.

[99] *Executive Journals of the Council*, ed. McIlwaine, 3:391-92.

burden-shifting presumptions of the 1710 statute. Accepting that interpretation, Spotswood set Ham free.

Legal technicalities sometimes prevented governors and lieutenant governors from pardoning women convicted of presumptive murder, compelling them to refer the judges' pardon recommendation to the crown. In 1737, for instance, a General Court grand jury charged Mary Thornton, a Nansemond County widow, with giving birth "alone and Secretly" to a female child whom she suffocated and strangled "with her Hands about the Neck" of the baby.[100] Thornton denied the charge and claimed that her infant had been stillborn, but she did not produce a witness to the birth. The jurors returned a guilty verdict, as prescribed by the 1710 act. The judges believed Thornton's side of the story, however. There "appeared Circumstances sufficient on her Tryal to induce them to believe the Child was stillborn,"[101] the judges reported, so they sentenced Thornton to death and then asked Lieutenant Governor William Gooch to spare her life. Gooch doubted that he could pardon Thornton himself because the indictment had

[100] Record of the Conviction of Mary Thornton, General Court, Williamsburg, VA, April 19, 1737, C.O. 5/1337, f. 199 (viewed on microfilm reel 47, Virginia Colonial Records Project).

[101] Lieutenant Governor William Gooch to Peter Leheup, 22 June 1737, in C.O. 5/137, f. 197 (viewed on microfilm reel 47, Virginia Colonial Records Project).

charged her—probably fictitiously[102]—with violently killing the child.[103] He asked Virginia's agent in London to make an expedited request that King George II pardon Thornton. "She is a very poor woman" who must "lie in prison . . . at the Country's Charge" until the pardon arrived, Gooch explained, "so I hope to have it by one of the first ships" bound from London to Virginia.[104] The king pardoned Thornton in late August.[105] Presumably the lieutenant governor released her when the royal warrant reached him that autumn, about half a year after her trial. Making an example of Thornton had served its purpose by warning women of the perils of concealment and reminding them that their liberty sometimes depended on the benevolence of powerful men.

Conclusion

Virginians used the 1624 and 1710 presumptive-murder statutes more for the purpose of deterring the evasion of extra servitude than as instruments of capital punishment. As Johanna

[102] The allegations of suffocation and strangulation were probably just boilerplate inserted by the grand jury clerk to satisfy pleading requirements. An indictment had to allege that the accused woman delivered a live, nonmarital child, and "some manner of killing it must be alleged, as by strangling or otherwise." It was not necessary "to charge that the mother concealed the death, though it be necessary to prove it." Edward Hyde East, *A Treatise of the Pleas of the Crown*, vol. 1 (London, 1803), 349. If the crown succeeded in proving an intentional concealment of the child's body, the prosecution did not have to prove the actual manner of death; the 1710 act's presumptions of a live birth and a premeditated killing would support a murder conviction. If the crown failed to prove intentional concealment, however, the statute became immaterial. Were the crown to proceed with the case as a willful murder prosecution, the true manner of death would have to be proven. Foreseeing that possibility, the draftsman of an indictment would not allege an unlikely manner of killing, for that would create the risk of a variance between the indictment and the proof. Unless the draftsman had more reliable information from, say, the verdict of a coroner's jury, he would insert an allegation that was conjectural but potentially provable. Suffocation and strangulation were common ways to commit infanticide, so the clerk in *Thornton* may have viewed them as the default options when he drafted her indictment.

[103] Record of the Conviction of Mary Thornton, C.O. 5/1337, f.199.

[104] Gooch to Peter Leheup, June 22, 1737, C.O. 5/1337, f. 197 (viewed on microfilm reel 47, Virginia Colonial Records Project).

[105] Thomas Pelham-Holles, duke of Newcastle, to Gooch, Aug. 25, 1737, C.O. 324/37, pp. 80-81 (viewed on microfilm 95, Virginia Colonial Records Project).

Geyer-Kordesch has remarked, "[t]rials for child murder in the early modern period were still medieval show trials. They drove home one thing: conform."[106] In the Virginian context, conformity meant obeying the law's requirement that child-bearing servants compensate their masters not only with their own unpaid labor, but also with that of their offspring. Concealing dead newborns deprived masters of their expected gains. To protect employers' interests, Virginia's legal system threatened execution in order to frighten pregnant women into revealing their condition and accepting the legal consequences. I do not claim that Virginia was unique in using presumptive-murder legislation this way. Further research might reveal that other colonies deployed their adaptations of the 1624 act in pursuit of similar objectives. My goal merely has been to show that in Virginia—England's largest and most economically important mainland American colony—the presumptive-murder laws functioned primarily as compulsory labor devices and only secondarily as true penal measures.

Convictions under the 1624 and 1710 acts rarely, if ever, resulted in an execution. Virginians would hang a woman if the evidence clearly proved that she had done violence to her child, but they hesitated to kill a mother solely on the strength of statutory presumptions. As in England and New England,[107] Virginia jurors often acquitted women who had been accused of concealing their child's body. Even in those instances where jurors felt obliged to convict, they expected the governor or the monarch to pardon the defendant unless the proof demonstrated that she had committed willful murder. The prosecutorial process itself provided a form of

[106] Johanna Geyer-Kordesch, "Infanticide and the erotic plot: a feminist reading of eighteenth-century crime," in Jackson, ed., *Infanticide: Historical Perspectives on Child Murder and Concealment, 1550-2000*, 127.

[107] In Connecticut, for example, infanticide prosecutions often ended in acquittals, "but they served to place poor, transient servant women in the public spotlight." Cornelia Hughes Dayton, *Women Before the Bar: Gender, Law, and Society in Connecticut, 1639-1789* (Chapel Hill, NC, 1995), 211.

punishment, however. Defendants had to undergo humiliating interrogation; transportation over great distances to stand trial in the capital before the colony's most prominent officials; the terror of hearing a death sentence pronounced; and lengthy incarceration while waiting for clemency.

By exercising restraint instead of enforcing Virginia's "cruel and sanguinary laws"[108] to the letter, the masters who ran the legal system preserved the 1710 act's cultural acceptability even after the American Revolution had prompted a reevaluation of law's role in a republican commonwealth. Thomas Jefferson's proposed revision of Virginia's criminal laws, written in 1778, strongly criticized the presumptions in the 1624 and 1710 statutes and advocated treating infanticide like other types of homicide committed against family members.[109] James Madison introduced Jefferson's capital punishment bill in the House of Delegates in 1785,[110] where it was defeated by a single vote the following year.[111] In 1790, the General Assembly charged a committee of revisors with the task of going through Virginia's acts and consolidating laws on similar subjects.[112] When the revisors pulled together the various laws that they could find on out-of-wedlock births, they produced a retrograde composite bill that would have reenacted both the 1710 presumptive murder statute and the 1753 law requiring a year of extra service.[113] The

[108] Thomas Jefferson, "A Bill for Proportioning Crimes and Punishments in Cases Heretofore Capital," in *The Papers of Thomas Jefferson*, vol. 2, *1777-79*, ed. Julian P. Boyd (Princeton, NJ, 1950), 493.

[109] *Papers of Thomas Jefferson*, ed. Boyd, 2:494n.*.

[110] *Journal of the House of Delegates of Virginia, 1785-86* (Richmond, VA, 1786), 10-11.

[111] *Journal of the House of Delegates of Virginia, 1786-87* (Richmond, VA, 1787), 97; James Madison to George Washington, Dec. 24, 1786, in *The Papers of James Madison*, vol. 9, *1786-87*, ed. Robert A. Rutland et al. (Chicago, IL, 1975), 225; Madison to Jefferson, Feb. 15, 1787, in *Papers of James Madison*, 9:267.

[112] Hening, *Statutes at Large*, 13:130-31.

[113] The revisors submitted their report to the governor in 1792. *Draughts of Such Bills as Have Been Prepared by the Committee Appointed Under the Act [of 23 Dec. 1790], on the Subjects of Those Laws, which from Their Multiplicity Require to be Reduced into Single Acts* (Richmond, VA, 1792). The revisors' "Bill concerning Bastards, and to prevent the destroying and murdering of Bastard Children" appears on pages 161-62 of their report.

House of Delegates passed the bill in 1792, but the Senate defeated it.[114] The Senate's rejection of the revisors' bill led some people to think that the 1710 act had been repealed.[115] Eminent authorities thought otherwise,[116] though, and the presumptive-murder statute remained in force for another quarter of a century. In 1817, a new set of revisors, led by the Jeffersonian politician and jurist Spencer Roane, advised the General Assembly that the law was unfit for retention.[117] The legislature finally repealed it in March 1819,[118] sixteen years after Parliament had scrapped the Jacobean original.[119]

[114] *Journal of the House of Delegates of the Commonwealth of Virginia, 1792* (Richmond, 1793), 159, 169, 190, 192; *Journal of the Senate of Virginia, 1792* (Richmond, VA, 1949), 94, 97.

[115] Consequently, the statute did not appear in *A Collection of All Such Acts of the General Assembly of Virginia, of a Public and Permanent Nature, as Are Now in Force*, comp. Augustine Davis (Richmond, VA, 1794). or in *A Collection of All Such Acts of the General Assembly of Virginia, of a Public and Permanent Nature, as Are Now in Force*, comp. Samuel Pleasants (Richmond, VA, 1803).

[116] St. George Tucker, *Blackstone's Commentaries: with Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia*, vol. 5 (Philadelphia, PA, 1803), 198 n.10, 358 n.23; William Waller Hening, *The New Virginia Justice, Comprising the Office and Authority of a Justice of the* Peace, *in the Commonwealth of Virginia*, 2nd ed. (Richmond, VA, 1810), 143 n.*.

[117] *Journal of the House of Delegates of the Commonwealth of Virginia, 1817-18* (Richmond, VA, 1818), 9; *Draughts of Such Bills, as Have Been Prepared by the Revisors of the Laws* (Richmond, VA, 1817), 430.

[118] *Journal of the House of Delegates of the Commonwealth of Virginia, 1818-19* (Richmond, VA, 1819), 204, 206, 208, 214; *Journal of the Senate of the Commonwealth of Virginia, 1818-19* (Richmond, VA, 1819), 185; *Acts of the General Assembly of the Commonwealth of Virginia, 1818-19* (Richmond, VA, 1819), 14; *The Revised Code of the Laws of Virginia: Being a Collection of All Such Acts of the General Assembly, of a Public and Permanent Nature, as Are Now in Force*, vol. 1 (Richmond, VA, 1819), 594.

[119] Parliament repealed the 1624 infanticide act in the Malicious Shooting or Stabbing Act (Lord Ellenborough's Act), 43 Geo. III, c. 58, § 3 (1803).