Murder in the Shenandoah:

Commonwealth v. John Crane and Law in Federal Virginia

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ABSTRACT

*Murder in the Shenandoah* is an experiential history of a 1791 murder in Virginia’s lower Shenandoah Valley. On July 4, 1791, John Crane, son of a prominent Virginia family, killed his neighbor’s harvest worker and later invoked a “lunacy” defense. Using narrative, the dissertation tells the story of the case as it wound its way through the various stages of Virginia’s court system, recreating that system as Crane saw it – stage by stage, in the midst of Virginia’s battle over law reform. By looking at the law not as case reports and outcomes, but rather as experience, *Murder in the Shenandoah* uncovers a new Virginia, one that defies the traditional dichotomies that have characterized the history of the region – state and local, east and west, gentry and non-gentry. Instead, it reveals that new nation’s most politically and legally influential state was, in the critical early national era, a world in motion.

*Murder in the Shenandoah* is, in both form and content, a popular history. In form, it experiments with rendering a complex subject in a narrative format. In content, it calls into question entrenched scholarly notions of legal pluralism, arguing that the idea has increasingly lost its usefulness – and undercut the very ideas of class and protest that it was originally designed to uncover. In Virginia, people of all classes knew the law, and fought to make it work for them. In both these ways, it links law and law’s history with the people, broadly construed.
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As I traipsed around Virginia and West Virginia in search of John Crane, many people – from librarians to ordinary Virginians and West Virginians – offered tips, local knowledge, or assisted me with research. I began my work in the fall of 2009 at the Berkeley County Historical Society, and its volunteers and researchers, especially the very knowledgeable Don Wood, shared their resources to help me uncover the Berkeley County in which John Crane lived. The staffs at the Handley Regional Library in Winchester, Virginia, and at the Library of Virginia were always helpful and willing to dig a little deeper to see if any stray Crane documents might have fallen between the cracks. The staff at the West Virginia Cultural Center and state archives in Charleston helped with the early stages of my research, and volunteers and staff at the Charles Town Library were welcoming and shared their own resources. John Stealey of Shepherd University encouraged my interest in Charles Town society in the 1790s, and made me feel confident that, in my portrayal of that society, I was on the right track. And Judge
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Rodgers consistently provided essential questions to think about, questions that shaped my work from the get-go. At the very beginning of the project, Stan Katz shared some incredibly helpful thoughts about the story’s meaning, and has been insightful and generous with every new version and chapter. Bill Nelson’s work has long been an inspiration for me, and he and the Golieb Seminar participants made me think hard about the meaning of the jury’s special verdict. And at a pivotal, frustrated moment in December 2012, Peter Onuf, who worked with me on Jefferson when I was his undergraduate student in the 1990s, took on without complaint a messy, incomplete draft of the dissertation, delivered in desperation without fanfare or even paper clips, and helped me over pizza to think about what my next steps might be.

When I left law to return to graduate school in 2005, I knew I was embarking on a wonderful transition, but I had no idea how wonderful. My colleagues in the Princeton History Department, especially Anne Twitty, Dael Norwood, Christopher Moses, Ben Schmidt, Joe Younger, and Joanna Wolaver, immediately made it some of the most fun I’d ever had. And when I fell seriously ill in 2006, these friends and many others rallied to encourage and aid me with grocery trips, rides to doctor’s appointments, and much more in the three and a half years of difficulty that followed. When I was finally able fully resume my work in 2010, these and other friends – Jada Strabbing, Rachel Dockins, Thomas and Mary Carlson, Rev. Dr. Hugh Brown of All Saints Church, Peter Johnsen, Tom Boeve, Suzanne Doubrava, Jack Tannous, and the wonderful ladies of my Sunday afternoon women’s group especially – made it possible for me to make the transition back to Princeton and to thrive there. No high achiever wants to be publicly weak when
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In this vein, I also owe a special thanks to the Princeton History Department. During that difficult time, Molly Greene, John Haldon, Judith Hanson, Audrey Mainzer, and Reagan Maraghy all worked with me to make whatever adjustments were necessary. William Chester Jordan was always there when I needed him, sometimes at critical times, and Sean Wilentz provided essential friendship and encouragement at the final stages of the program. Finally, Stan Katz has repeatedly been incredibly generous with his time and advice.

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retirements behind to make my recovery a possibility however they could – often in extraordinary ways.

In the process, they, too, got to know a lot about John Crane and his world. This rendering of that world and my continued life and career has been literally made possible by their incredible love and sacrifice – and by all of our dogged, stubborn hope.
A Note on Method

The process of telling John Crane’s story prompts a methodological question: why do historians write, and how should they write? This is something that, in the course of crafting *Murder in the Shenandoah*, I have thought a lot about.

As I was putting the finishing touches on this manuscript in September 2013, I took a break from my writing for a salon appointment, to relax between chapter redrafts. The Charlottesville aesthetician, who we will call Leslie, commented about her commute from outside of town, from a neighborhood called “Locust Grove.” I immediately recognized the name, and asked her if it was in Spotsylvania County; it was, indeed, on the border of Spotsylvania and Culpepper. Locust Grove was the plantation of John Crane’s grandfather, Thomas Minor, and I mentioned this fact casually to Leslie. Intrigued, she asked about my book. Always conscious that authors – especially dissertation writers – tend in the last stages of their projects to drone on about facts that interest no one else, I told her only the brief outlines of the *Crane* murder case.

She was surprised. “I love history,” she told me, “and I always thought that back then people could kill each other without any real consequences.” She then quickly demurred – “I’m no scholar, though, I just like to read things.”

I, of course, immediately told her that she was exactly right – that most historians also generally assume that, especially in the South, people murdered each other without many consequences. (Now what happened within the slave system, I explained, was complicated – there were occasional prosecutions, but most violence against enslaved men and women was indeed condoned, although the state was involved in complicated ways.) And, in the nineteenth century, I continued – trying, of course, not to be tedious –
scholars have found that grand juries often refused to indict, and juries typically acquitted. What she thought, I told Leslie, was what historians typically believe. But the late eighteenth century was different. And that, I concluded, was one of the reasons why I was writing this book.

Before that conversation, I had been worrying about Murder in the Shenandoah’s construction – about its tone and narrative format. Was it really scholarly? But afterwards, I realized that I have tried to write this manuscript with people like Leslie in mind – hoping that they could see it on the shelf at a popular historical site, and purchase it to skim in the car on the ride home. And, I have done this because, in my opinion, doing history – spending years and years in archives, and in front of blank, inviting computer screens – is about people: those we write about, and those we write for.

Americans love history, and this can make scholars nervous. Surely, we squirm, popular writing can’t be “right” – works by journalists, or independent scholars, or local historical experts, even when they win prestigious prizes and sell by the hundreds of thousands, must not really “get it.” So while millions of Americans become experts in Lewis and Clark’s expedition, thanks to Stephen Ambrose’s Undaunted Courage, or absorb the picture of John Adams painted in David McCullough’s best-seller, some historians are, at best, uncomfortable. Real history, we insist – implicitly if not always outright – is about not only engaging with, but being too often restrained by, pet historical constructs that turn over in fashion like flapper dresses or bell bottoms. Sometimes, it seems that the more accessible the prose, the less smart it is assumed to be.
But what use is knowledge if it isn’t broadly disseminated? This, at least, is what St. George Tucker thought. When, as discussed in Chapter Six, he published his edition of *Blackstone’s Commentaries*, he did so not to have an expert text that sat on a back shelf; rather, it was in service of democracy, of conveying knowledge to the people. One of the biggest dangers to liberty, Tucker argued, when only elites had access to and knowledge of the law. “Science,” he wrote, “counteracts this mechanical monopoly of knowledge.” This science, he insisted, should be disseminated broadly. After all, “man only requires to understand his rights to estimate them properly; the ignorance of the people is the footstool of despotism.”¹ Granted, the constitutional rights and liberty about which Tucker worried, and stories about crime in the late eighteenth century, may be slightly different. But the principle is the same. What use is knowledge if it isn’t known? And what right do scholars have to criticize the people who use history – those like the Tea Party, or constitutional originalists – if we don’t craft our own work in ways that step outside narrow, parochial debates that quickly become irrelevant?

Of course, the attempt here does not entirely succeed – at least in this early form, which was researched and written in three and a half years, first under unusually difficult constraints and then by an exhausted dissertator in the midst of new course preparations. And, as I discovered, writing nonfiction narrative is hard, much harder than writing fiction (at least for me), and this one has a long way to go. But it was an experiment – an experiment in ways of writing about history that bridge the enormous gap between profession and public.

For this manuscript, I thus deliberately opted for a particular style – one aimed at storytelling, and at a conventional reader, not necessarily at an academic audience. “Opted” is a bit misleading – indeed, Commonwealth v. Crane itself demanded this style. This style attempts to be straightforward, neither overly weighted (except in a few places) with the heavy argument of legal scholarship or with the lofty language that sometimes comes with the anthropologically-motivated “thick description” that characterized some narrative histories of a decade or two earlier. Instead, Murder in the Shenandoah relies on its story – still, admittedly, in a clumsy, infant stage – to make the argument for it.

This method, however, is not just about accessibility, but also about revelation. Understanding Virginia’s criminal law in the 1790s is about experiencing a process, the same one that John Crane experienced. It is a process best seen in motion, not in a collection of case citations or other wide-angle evidence. What emerges with this method is the Virginia that so surprised Leslie – the Virginia that was dedicated, in its own way but at all levels, to the rule of law. Although it is not there yet, I hope that, in its ultimate stages, this project will not only enable me to reveal that world, but to do so in a way that she, and others, could read – and, hopefully, might even want to.
Introduction

It was July 4, 1791, and, despite the holiday, there was much work to be done. In Berkeley County, Virginia – nestled in the rolling hills of the Shenandoah Valley, not far from the confluence of the Shenandoah and Potomac Rivers at Harper’s Ferry – two groups of men were working near the Opequon Creek, bringing in a wheat harvest.

In one group was Isaac Merchant, laboring alongside about twenty-five other men for landowner Thomas Campbell. Isaac probably knew the land well – it had originally belonged to his family, as part of the land grants received by his grandfather, father, and uncle earlier in the century. But the family’s fortunes had turned after his father died in 1771, when Isaac was only eleven years old. Isaac’s brothers received the land (Isaac was only promised a horse to be earned by “staying and assisting well till he comes of age”) and Isaac’s uncle sold his portion – Isaac’s grandfather’s homestead – to Thomas Campbell. Now almost thirty-two and toiling in what was now Campbell’s field, Isaac would have been used to hard work, since the Merchants had not historically been slaveholders. In fact, his grandfather had been a Quaker, although Isaac’s own family

2 For Isaac’s age, see Leota Morgan Berry’s transcription, Register of Morgan’s Chapel, Bunker Hill, W. Va. Episcopal (Fairmont, W.Virginia: Daughters of the American Revolution), on file, Berkeley County Historical Society (hereinafter “BCHS”). For original Merchant family land grants, all in the vicinity of grants to James Crane and John Dawkins Sr., see land grants in Frederick County to William Merchant, May 1, 1760 (81 acres) and May 2, 1760 (358 acres), and to Richard Merchant, April 30, 1760 (187 acres) recorded in Frederick County, Northern Neck Land Grants K, 1757-1762 (Library of Virginia), 118-120; see also the land grant to William Merchant, November 2,1768 (115 acres), recorded in Northern Neck Land Grants O, 1767-1770 (Library of Virginia), 205. For William Merchant’s will, dated December 23, 1771 and probated in June 1772, see Berkeley County Will Book 1, BCHS, 5. Family information indicates that Thomas Campbell’s property was the “home place” of Isaac’s grandfather Richard Merchant, who had surveyed but not patented the land, which he left to his son Richard, who then patented it in 1768 and sold it to Thomas Campbell three years later. See Merchant Family File, BCHS.
had been outside the meeting for years.\(^3\) One of Isaac’s brothers had also been in trouble with the law – charged with counterfeiting shortly after their father’s death, although the charges were ultimately reduced to a misdemeanor.\(^4\) Isaac himself was doing his best to climb back up the social ladder. He had amassed over three hundred acres of land, and although he was currently not a slave owner, he had owned a slave the year before and would again in 1793.\(^5\) In 1790, he paid his taxes in cash.\(^6\)

In the other group was John Crane, who not only worked the land but also owned it. Known in county records as “the younger” or “junior” so as not to be confused with his uncle of the same name, Crane was twenty-four and a new landowner, bringing in his first harvest on land that his father had only recently purchased for him.\(^7\) Crane was descended from two well-known Spotsylvania County families. His father James Crane, “gentleman,” had served as Berkeley’s deputy sheriff and as a founding trustee of Charles Washington’s self-named Charles Town. John’s grandfather, John Scanland Crane, “esquire,” had served as a Colonel in the Spotsylvania militia, a Justice of the Peace, and the county’s High Sheriff – posts indicative of high social standing – throughout much of the late colonial period.\(^8\) Young John’s uncle was a justice of the peace there still,


\(^4\) See “Nov. 20, 1772,” in Berkeley County Court Minute Book, BCHS.

\(^5\) Berkeley County Personal Property Tax, West 1790, BCHS and Berkeley County Personal Property Tax, West 1793, BCHS.

\(^6\) “Adrian Davenport,” Berkeley County list of Taxpayers, 1790, MS # 80-271, West Virginia State Archives, Charleston, WV.

\(^7\) Crane appears on the Berkeley land tax records for the first time in 1790, but as a personal property owner, with land and slaves, for the first time in 1791. See Berkeley County Land Tax, East 1790, BCHS; Berkeley County Personal Property Tax, East 1791, BCHS. Entries from a family Bible that appears to have belonged to Catherine Whiting Crane, John’s wife, list his birth date as December 30, 1766, although the date is of dubious legibility. See Dakota Best Brown, Data on Some Virginia Families (Berryville, Virginia: Virginia Book Company, 1979), 251.

\(^8\) James Crane is mentioned as Deputy Sheriff in “October 16, 1785,” in Berkeley County Court Minute Book, BCHS. For appointment of James Crane, “gentleman” as Charles Town trustee, see William Waller Hening, The Statutes at Large (Richmond, Virginia: George Cochran, 1823),12: 371. John Scanland Crane
although he also owned land in Berkeley.\(^9\) John’s mother, meanwhile, was Lucy Minor, daughter of Thomas Minor of Spotsylvania, a wealthy man who owned at least two large plantations. The Minors were connected by marriage to, among others, Benjamin Waller, one of the most respected lawyers of colonial Virginia.\(^10\)

Good as these connections were, John had married even better. Catherine Whiting, his wife of five years, was the daughter of his uncle’s Berkeley neighbor, Matthew Whiting; her kinsmen were not only among the wealthiest men in the area, they had also served for generations in the House of Burgesses and on Virginia’s elite Council.\(^11\) Her mother was a Robinson, one of the colony’s most distinguished families –

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\(^9\) Tucked in Judge St. George Tucker’s 1793 Book is an August 17, 1790 summons for the General Court judges to sit as the Court of Appeals in the case of \textit{Armistead v. Winslow}, because a substantial number of the Court of Appeals judges were interested in the case and had to recuse themselves. The summons lists as a defendant John Crane and two others, named as “surviving justices of Spotsylvania County.” See St. George Tucker, \textit{1793 General Court Docket Book}, in the Tucker-Coleman Papers, Special Collections Research Center, Swem Library, College of William and Mary (“hereinafter Tucker-Coleman papers”).

\(^10\) Among other appointments, Benjamin Waller served as the clerk of the General Court until 1777, and later as a judge in Virginia’s newly created Court of Admiralty, before dying in 1786. For general information, see “Benjamin Waller,” Colonial Williamsburg History, \url{http://www.history.org/almanack/people/bios/biowallr.cfm} (accessed October 29, 2013). For Crane/Minor connection to the Wallers, see “Will of Thomas Minor, December 19, 1776,” \textit{Spotsylvania County Will Book E}, 1772-1778, Reel 28, Spotsylvania County Microfilm, Library of Virginia. For John Scanland Crane’s service as a justice, see \textit{Justices of the Peace of Colonial Virginia 1757-1775} (Richmond: State of Virginia, 1922), Virginia State Library; for his appointment as High Sheriff, see “November 19, 1772,” \textit{Spotsylvania County Order Book, 1768-1774}, Reel 45, Microfilm, Library of Virginia.

\(^11\) According to Catherine’s Bible, they were married on May 24, 1786. Brown, \textit{Data on Some Virginia Families}, 251. Matthew Whiting appears to have been John Crane the elder’s neighbor because in 1773, slaves of Matthew Whiting were prosecuted for allegedly stealing Crane’s hogs. See entry for “January 19, 1773,” in \textit{Berkeley County Court Minute Book}, BCHS. Matthew Whiting’s exact relationship to the rest of the Whiting clan has long vexed local historians and genealogists, but there is a general consensus that he was related to the other Whitings in Berkeley and in other parts of Virginia – perhaps a brother or a cousin. All evidence points to Catherine being Matthew’s daughter; for instance, her Bible, passed down in the Slaughter family after her second marriage to Smith Slaughter, records the death dates of Matthew Whiting and his son, suggesting that they were her father and brother. See, e.g., Brown, \textit{Data on Some Virginia Families}, 262-64.
one relative had been the Bishop of London; another had been a founding trustee of
William and Mary College and the Secretary for Foreign Plantations; and another served
as the acting governor in the mid-eighteenth century.\textsuperscript{12} A cousin, John Robinson, was the
most powerful native Virginian of the colonial era, serving as Treasurer and Speaker of
the House until his death in 1766.\textsuperscript{13} Some of Catherine’s wealthy Robinson cousins had
become prominent Loyalists during the late war – Beverley Robinson, who had
previously moved to New York, had raised the Loyalist American Regiment and served
as its colonel – but Catherine’s immediate family had remained in Virginia, fighting in
the Revolution or supplying the army as civilians.\textsuperscript{14}

For his first harvest, Crane had help: the slave family who worked in his fields
and also a number of white men, including Crane’s thirty-one year old neighbor, John
Dawkins.\textsuperscript{15} Dawkins had probably known some of the workers in Campbell’s
neighboring field all his life. At the very least, Dawkins knew Isaac Merchant – his
father had given security for Isaac’s mother on her husband’s estate in 1772.\textsuperscript{16} In 1791,
Dawkins’s family had just sold their land, which was contiguous to Crane’s, and his parents and many of his siblings were on their way to Kentucky.\textsuperscript{17}

Berkeley County itself was still relatively new in those days – it had been established in 1772, carved off of neighboring Frederick County – but settlers had been in this area long before, since around 1730. The first wave of Berkeley pioneers was from the North, from Pennsylvania, New Jersey, and New York, and had names like Vanmeter, Hite, and Swearingen, mixed with a few Welshmen, like the double-named Morgan Morgan, known today as the first settler in West Virginia.\textsuperscript{18} Peter Burr, nephew of Princeton President Aaron Burr, Sr. and first cousin of Aaron Burr, Jr., the future Vice President, was also among the first to move to the Berkeley area.\textsuperscript{19} They had received large grants from the colonial government, in exchange for settling families on the land.

But there were also competing settlements, competing claims. Although Governor Gooch argued that the colony had the right to grant the land (and collect revenue from it), Lord Fairfax’s land agent, Robert “King” Carter, contended that the land belonged to Fairfax’s Northern Neck proprietary, and was its to grant.\textsuperscript{20} Carter began granting huge swaths of land, much of it in the names of his own heirs: on one day

\begin{footnotesize}


\textsuperscript{20} Warren R. Hofstra, \textit{A Separate Place: The Formation of Clarke County, Virginia} (Landham, MD: Rowman and Littlefield, 1999), 3.
\end{footnotesize}
in 1730, he made out grants for 50,212 acres of disputed land to his sons and grandsons, and on the next day, he granted more than 11,000 acres to son-in-law Mann Page.\(^{21}\) The land was later divided among Carter’s heirs, and sometimes sold to other leading Virginia families: to Washingtons, Meades, Wormeleys, Randolphs, Byrds, Nelsons, Lees, Throckmortons, and others – including Catherine Crane’s Whiting family.\(^{22}\) In the area’s early years, many of these owners did not live on their lands, but rather leased them for profit or ran them from afar.

Berkeley had German settlers, and absentee Tidewater landlords, but it also had something else: a deep connection to the American Revolution. No less than four generals called the area home. General Daniel Morgan was from nearby Winchester, where he had moved as a young man, and Charles Lee (no relation to the Virginia Lees), Adam Stephen, and Horatio Gates, had also come from or settled in the area. And although George Washington had never lived in Berkeley, he owned land in the area and had made his political start by representing the county, as part of Frederick, in the House of Burgesses in the late 1750s and early 1760s.\(^{23}\)

In 1791 Washington was President, and Berkeley was thriving. Bounded on the south by Frederick and its bustling county seat of Winchester and on the north by the Potomac River, Berkeley offered beautiful, abundant land and easy transportation for people and goods. Maryland was visible just across the Potomac, and in the northernmost part of the county, near the resort town of Bath (otherwise known as


\(^{22}\) Hofstra, *A Separate Place*, 4.

Berkeley Springs), and Pennsylvania lay only a few miles away, across a narrow strip of
Maryland. The county was an economic mix, with mills dotting the landscape on the
county’s abundant rivers alongside farms and plantations. Goods were often transported
to market on the Great Wagon Road, which ran through Winchester and up to
Philadelphia.  

Artisans had set up shops in the county’s towns, particularly
Shepherdstown and Martinsburg, and plantation owners had begun diversifying their own
endeavors – General Adam Stephen, for instance, established a distillery on his land as
well as a rifle production operation, and even contracted to sell rifles to the continental
army during the Revolution.  

Moreover, in the 1780s, the great Virginia families who had formerly been
absentee landowners had begun to move to their Valley lands. By 1791, the annals of
Berkeley included many names well known to history, like Samuel and Charles
Washington (brothers of the General), as well as Carters, Pages, and Fairfaxes.  

By the
1790s, the Valley was the place to be for wealthy Virginians – and a profitable one. John
Page, of Rosewell in Gloucester County, remarked that “the men who have moved from
Gloucester to Frederick make near five times as much there as they did here.”  

The area
was so prosperous that land prices there were two or three times higher than in eastern
Virginia.

24 See Ward, Adam Stephen, 94, 103, and A.D. Kenamond, Prominent Men of Shepherdstown, 1762-1962
(Charles Town, WV: Jefferson County Historical Society, 1962), 11. See also Warren Hofstra and Karl
Raitz, eds., The Great Valley Road of Virginia (Charlottesville, Va.: University of Virginia Press, 2011).
25 Ward, Adam Stephen, 103, 121, 123, 142-44, 222.
26 For early settlers, see, e.g., , Documented History of Martinsburg and Berkeley County, 144-49, 156-171,
180-183, 201-04, 227-28; Gardiner and Gardiner, Chronicles of Old Berkeley, 55 (Charles Washington,
John Augustine Washington and others), 209-212 (Gates), 212-14 (Morgan), 214-17 (Lee).
27 The writer was John Page of Rosewell. Quoted in Hofstra, A Separate Place, 11.
28 Ibid., 26.
This also meant, of course, that some of the areas old residents were moving even further westward – like the family of Crane’s neighbor and reaper, John Dawkins – to places like Tennessee and Kentucky, and sometimes Ohio. There, they searched for new opportunities and more affordable land. Observing the exodus from Frederick and Berkeley to the west, Thomas Bryan Martin, Lord Fairfax’s nephew and heir, commented, “The emigration of inhabitants is … astonishing.”

In 1791, Virginians saw the lower (northern) Valley as Virginia’s future. Internal improvements were a big part of this vision: George Washington’s Potomac Company had plans to build canals in strategic places to make the vast river more navigable for trade, and to link the east with the Ohio River and northwest. Virginia’s incoming governor, Henry “Light Horse Harry” Lee, was an enthusiastic supporter of this project, raving to James Madison, “the views of thousands are pointed to establishments over the mountains for the support of numerous familys . . . . The potomack river will strengthen our connexion by the easy exchange it affords of those things mutually wanted.”

By August 5, 1790, the Virginia Gazette reported that the river’s navigation was now “very practicable,” and that several boats had hauled pig iron and a “considerable quantity of wheat” up its south branch. With little expense, the paper reported, it was said that its navigation could be made “safe, commodious, and profitable.” The same issue carried an ad for “Powtomack Lands” for sale. And, of course, only a year earlier, Congress

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29 Ibid.
32 “Powtomack Lands For Sale,” *Virginia Gazette and Alexandria Advertiser*, e.g. October 14, 1790.
had approved a bill placing the new national capitol on the eastern part of the river as well. Virginia, it seemed, was moving west.

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As the men toiled in Crane’s and Campbell’s fields on July 4, 1791, that fifteenth anniversary of Independence, trouble was brewing. According to one newspaper account, the horses of one of Campbell’s reapers, Abraham Vanhorn, broke into John Crane’s fields. Vanhorn lived in Winchester and used his horses to provide services as a wagoner, as many Valley men had done before him on their way up the social ladder. That morning, as they worked for Campbell, Abraham and his brother Joseph learned that the horses had trampled Crane’s wheat. An angry Crane had driven the horses out of his fields by, newspapers later reported, gouging out their eyes and setting their tails on fire.

This may have been what led Campbell’s reapers, including Isaac Merchant, the Vanhorns, and others, to send a “challenge” to Crane and his men that afternoon, around three o’clock. Campbell’s men may have been demeaning Crane in some way, because when Crane responded to their challenge he went to his neighbor’s fields and confronted the men, insisting, “I can whip any man in this field.” The altercation came to an end, but

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33 “July 1, Senate of the United States,” *Virginia Gazette and Alexandria Advertiser*, July 7, 1790.
34 Newspaper accounts later reported that “Mr. Abraham Van Horne, an inhabitant of that neighborhood,” had “kept and drove a team for several years past.” See, e.g., “Frederick-Town, July 12,” *ClayPoole’s Daily Advertiser* (Philadelphia), July 27, 1791. Another reported that Vanhorn “owned a team, and was held in high estimation by the merchants and others who had occasion for his services.” See, e.g., “Winchester, July 9,” *Connecticut Journal* (New Haven), July 27, 1791. General Daniel Morgan got his start in the Valley as a wagoner, as did Daniel Boone. See Don Higginbotham, *Daniel Morgan: Revolutionary Rifleman* (Chapel Hill: University of North Carolina Press, 1961).
35 See, e.g., “Frederick-Town, July 12,” *ClayPoole’s Daily Advertiser*, July 27, 1791. The jury’s verdict does not include this account.
36 The account that follows is taken almost verbatim from the jury’s verdict, found at *John Crane, 3 Va. 10* (1791).
before Crane and his workers could return to his fields, another dispute arose. Crane himself challenged Campbell’s reapers to a fight, “man to man,” and swore that if he fought any man that day he would “let out his guts.” Crane also challenged Joseph Vanhorn to a fight the next morning, then returned to his own property.37

Later that evening, after sunset, Campbell’s men – including Isaac Merchant and the Vanhorn brothers – passed through Crane’s fields to confirm Abraham’s bet for the next morning’s fight. They were loud, singing and making noise, and John Dawkins took their behaviors as an insult. Dawkins called out to Campbell’s men that he could whip Joseph Vanhorn; Joseph Vanhorn replied that it would not be to his credit if he did, since Dawkins was a much bigger man. At this point Crane came out, and ordered Campbell’s men to leave his field or he would “blow them through.” They immediately turned to leave. Crane called to the house for his gun, which his wife refused to give him. He then called for his knife and, taking it, chased Campbell’s men to the fence. “Abraham Vanhorn, you have used me ill,” he yelled, “and I’ll be damned if I don’t have satisfaction.”

“Not more so than you have used me,” Vanhorn replied.

Crane told Vanhorn to come over the fence and fight, but Vanhorn objected that Crane would use a knife or razor.

“I will give a fair fight,” Crane said.

As the two men faced each other, Catherine Crane came down to the fence. “Mr. Crane,” she cried, “I am surprised you should demean yourself to fight with such a set of negrofied puppies!”

37 Ibid.
Abraham Vanhorn and his fellow reaper Isaac Merchant were by now “much irritated,” and had stripped off their shirts to face Crane and his men. Crane and Vanhorn attempted to get at each other over the fence, but were prevented by Dawkins. Crane then struck at Merchant, who hit Crane and spun him around to face Vanhorn. Vanhorn threw Crane to the ground and held him there for some time. Finally Crane seemed to get the advantage, and at that point Vanhorn cried, “Enough! My guts are cut out!” Stabbed, Vanhorn died of his wounds three days later.38

This is the story of how a day’s work turned into a fatal encounter – or, more specifically, these are the facts basically as found by the jury at John Crane’s trial two months later. The jury could not decide whether Crane was guilty of murder or manslaughter, and thus rendered a “special verdict” describing the facts of the fight as the jury found them, leaving the legal decision to the court. Crane’s trial judge, St. George Tucker, sent the case up to Virginia’s General Court, which determined in a one-sentence opinion that Crane’s actions constituted murder. Years later, when General Court judges William Brockenbrough and Hugh Holmes compiled a collection of criminal case reports, they included not only the General Court’s ruling, but also the jury’s elaborate special verdict, thus preserving for posterity this riveting account of a fight in early national Virginia.39

But Commonwealth v. Crane is more than just a good story. Following the case from the fight itself through the county court hearing, the Virginia district court trial, the General Court, and the pardon process provides a provocative glimpse of law and life in

38 Vanhorn’s death was reported in “Shepherd’s-Town July 11,” The Powtomack Guardian and Berkeley Advertiser (Shepherdstown, VA), July 11, 1791.
late eighteenth century Virginia. It demonstrates the day-to-day operation of Virginia’s
government court reform at the moment of its implementation, and the ways in which that
reform interacted with pre-existing legal forms and class structures, but it also shows how
these courts confronted a particular crime – that of John Crane, facing death for the
Abraham Vanhorn’s murder. On both counts, the case provides a window onto a work
day – both ordinary and extraordinary – for men like Isaac Merchant and Abraham
Vanhorn, whose lives would not otherwise have been significant enough, or their estates
sufficiently great, to have been noted in the pages of history.

The pages that follow examine Commonwealth v. Crane on two levels. On one
level, they follow Crane through the court system and legal process, tracing the many
connections and similarities between state and local courts in this era. Doing so engages
the legal historiography of the South and of Virginia particularly, which has typically
emphasized the gulf between state and local forums. On the another level, it unearths the
people of Commonwealth v. Crane – parties, witnesses, families, judges, juries, and
interested community members – and attempts to reconstruct the social world in which
the case occurred. Such a reconstruction emphasizes the extent to which the law was a
world of elites, but also suggests that the elite class was broader, more fragile, and more
dynamic in composition than might be expected in the Virginia of that era. Together,
these two levels combine to de-center the traditional dichotomies that have characterized
the history of the region – state/local, East/West, and gentry/non-gentry – to reveal the
ways in which what was arguably the new nation’s most politically and legally influential
state was, in the critical era of the 1790s, a world in motion. Indeed, diving into the
sometimes confounding world of Commonwealth v. Crane – recreating its context
through in-depth exploration even as we rely on its text – gives a new entry into Virginia in the 1790s, from the bottom up.

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When I first began reading through collections of early Virginia cases, I anticipated a different project. I had planned on a sweeping study of the development of Virginia’s criminal law between the Revolution and the 1830s – one that would examine, through shifting ideas about crime and its punishment, Virginia’s transition from colony to nation and from nation to self-consciously Southern state. As the first colony, the mother of so many founders and early Presidents, and the capital of the Confederacy, Virginia seemed an ideal vehicle for this study.

But on the way, I stumbled across a 1791 murder case, *Commonwealth v. John Crane*. The case arose out of a fatal fight in a western Virginia harvest field on July 4, 1791, and it first caught my attention as a lawyer. The jury in the case had been unable to agree on a general verdict, and instead of finding Crane guilty of murder or manslaughter, it had rendered a detailed “special” verdict, finding pages of facts but leaving the legal decision to the court. This indicated a bright line distinction between law and fact – one that arose from the jury, although such distinctions have been traditional thought by legal historians to stem instead from judges.40 On the other hand, *Crane* also caught my attention as a historian, because the special verdict contained a long, riveting rendition of the fight itself. In over eight hundred words, Crane’s jury gave a vivid, intense account of the events that had led to his murder charge. I was hooked – by the story itself, and

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particularly by this window into an episode in the life of ordinary men, not founders or writers or politicians, in the late eighteenth century.

Who were these unknown people – John Crane, Abraham Vanhorn, Mrs. Crane, and others – who argued in the fields that day? What had actually happened on July 4, 1791, at the line between Crane and Campbell’s farms? What about in the court process that followed? This question took me to farmlands of what is now Jefferson County, West Virginia, where the site of the fatal fight is still encapsulated in rolling, grassy fields; to the streets of Winchester, Virginia, where Crane was tried and hung; and to Charles Town, West Virginia, where I traced the deed to the Crane family’s town home, pacing out its instructions on the town’s historic streets and locating it in relation to those of others who participated in the case. My journey took me to archives in Charleston, Charles Town, and Martinsburg, West Virginia; Williamsburg, Richmond, and finally Charlottesville, Virginia; New Haven, Connecticut; and also led to brief incursions to Pennsylvania and Kentucky history. It at times spanned decades and even centuries, as members of the families materialized in records, in tales, or sometimes even in person during archival trips and secondary research.

I also discovered something – or, more aptly, someone – else. The man who served as Crane’s trial judge was St. George Tucker, one of the most important jurists and legal scholars in early America. A native of Bermuda who had studied law at the College of William and Mary, then married into Virginia’s gentry, Tucker was in 1791 not only serving as a judge of Virginia’s General Court but also teaching law at the College of William and Mary and annotating William Blackstone’s famous *Commentaries*, and in 1803 would publish his work as the first American edition of
Blackstone; his treatise would become the most widely used American legal text until the 1830s. At the time of *Commonwealth v. Crane*, the judge was also deep into Virginia’s effort to revise its laws; he had been appointed a member of the revisal commission by the Assembly, and was eagerly participating in the effort. The fact that Tucker served as the judge on Crane’s sensational case meant that John Crane’s legal proceedings intersected with the very heart of Virginia’s tense discussion about republican law reform.

As I began to uncover the world of *Commonwealth v. Crane*, my aims changed. Most of all, I wanted to tell its story – the story of John Crane, Abraham Vanhorn, Isaac Merchant, and St. George Tucker. And I wanted to tell that story not just for their sakes, but for what it revealed – about law, about Virginia, and about the process of doing history, especially legal history.

This last was particularly important, because as I began to read about *Crane*, it upended a key lesson that the traditional historiography had led me to believe about law in the American South – that Southern violence was pervasive, condoned, and unpunished. When Alexis de Tocqueville travelled through America in the 1830s, he reported the following conversation with a young Alabama lawyer. The lawyer explained that “There is no one here but carries arms under his clothes. At the slightest quarrel, knife or pistol comes to hand. These things happen continually; it is a semi-barbarous state of society.”

De Tocqueville asked, “But when a man is killed like that, is his assassin not punished?”
The lawyer replied, “He is always brought to trial, and always acquitted by the jury, unless there are greatly aggravating circumstances. . . . This violence has become accepted. Each juror feels that he might, upon leaving the court, find himself in the same position as the accused, and he acquits.” He exhibited several scars on his head from his own fighting, and when asked if he had gone to law for redress, responded adamantly in the negative. “My God! No. I tried to give as good as I got.” Contemporaries corroborated this description.

Historians have pinpointed violence as an important aspect of Southern culture, and long-debated its origins and conventions. Bertram Wyatt-Brown linked Southern violence to the “culture of honor” that provided the structuring ethic for Southern life; others, like Grady McWhiney, pinned Southern habits, particularly fistfights and boxing matches, on the distinctive culture of the Scotch-Irish who settled the Southern backcountry, while Eugene Genovese has pointed to the chivalric code. Edward Ayers agreed that Southern violence was sometimes about ethnicity, and almost always about honor, but insisted that honor itself was in essence a product of the slave system. And where honor dominated, law was relegated to the periphery; for, as Ayers explained,

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42 Ibid.
43 Ibid., 10.
45 Ayers, *Vengeance and Justice*, 22-33.
scholars have accepted that “honor and legalism, as students of other honor-bound
societies have observed, are incompatible.”

This long-term historiographical tendency to see law as secondary in the
American South has also manifested itself in a more recent vein, in tandem with an
emphasis on what legal historians refer to as “legal pluralism.” In The People and Their
Peace (2009), Laura Edwards uses cases gleaned from local courts in North and South
Carolina principally between 1787 and 1840, and argues that ordinary people – justices of
the peace, local men, white women, free blacks and African-American slaves – had their
own conceptions of law in the late eighteenth century. They valued the traditional
“keeping of the peace,” which focused more on people and mediating their problems than
on statutes and legal rules. While state leaders and lawyers pushed for law reform, and
worked to make law uniform and to reform it to embody individual rights, these local
elites and their constituents eschewed notions of rules and uniformity in favor of more
organic notions of community harmony. Over time, however, the legal culture of the
state elites came to dominate the field, and applied national philosophies of individual
rights to the Southern situation, and alienated ordinary people from the law in which they
had previously participated. Just as Ayers’s work dominated scholarly treatments of
crime in the South in the second half of the twentieth century, Edwards’s new paradigm
has come to become the baseline for discussions of Southern law in the twenty-first – for

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46 Ibid., 18.
instance, studies citing Edwards as a model dominate virtually every conference discussion of pre-1900 Southern legal history.48

But as I examined the world of Commonwealth v. Crane, I found something different. People in late eighteenth century Virginia talked about law, agitated for law that would work for them, and used the law to their best advantage. Indeed, the early Virginia that I discovered was a society steeped in law. Virginians argued about what it meant to have a republican law; they prosecuted, convicted, and condemned; they frequently used special verdicts that shifted decision-making to judges, and often acquitted on technicalities. They even convicted defendants, only to ask for pardon for those whom they had just – months ago, weeks ago, or sometimes even moments ago – condemned; their legal system, it seems, contained such adherence to the idea of applying the law that juries and justices even condemned to death people who they were willing to certify, under oath, they did not think actually deserved to die.

Uncovering this reality, however, required researching and writing a story – the story of John Crane’s case as it made its way through the courts. Writing narrative, I discovered, is hard. It is one thing to take a stack of documents and make an argument, another to reconstruct a world from a handful of discarded pieces of paper – a few newspaper articles, the remnants of a court file, and occasionally some tax records. But, in the following pages, that is what I’ve done. And I’ve done so because it is only by recreating this story – only by following the people of Commonwealth v. Crane as they moved from court to court, and place to place – only by seeing the law in motion – that I

was able to view the dynamic relationship between Virginians and their law, and
Virginians and their world. What follows is thus an experiential history of law in early
national Virginia.

This experiential history also uncovers a cultural reality: the fluidity of life in late
eighteenth century Virginia. Not only was law a critical part of the Virginian mind in
1791, but other qualities that historians have found in the nineteenth century South were
also absent. For instance, Crane’s Virginia was the Virginia of the Constitutional
Convention, not the Virginia Resolutions – this meant that many of the political positions
behind which leading Virginians would soon assemble were not yet arrayed. Instead,
men like John Marshall, St. George Tucker, and Edmund Randolph, whose political
positions would later be at odds, were united in seeking a more powerful federal
government – of some sort – and a more powerful judiciary. There were also other
differences – men who had only recently been prominent in colonial government had
either emigrated or otherwise lost power because of their Loyalist sentiments, and men
who came from humble origins but had fought in the Revolution found themselves
powerful in the new republican Virginia. A devastated post-war economy was ruining
old fortunes, and Virginia’s old social structures were in some ways falling away, making
way for new men and new demands in offices that had traditionally been held by
Virginia’s elite; at the same time, those old elites continued to maintain a strong hold on
the Commonwealth’s social, political, and legal life. Some Virginians freed their slaves
and moved to Ohio, others discussed doing so, and still others kept them or bought more.
Most significantly for John Crane, Virginia’s law was also in flux – Virginia had been in
the process of reforming its legal system for over a decade, but after failed attempts, its
criminal laws for the moment remained unchanged from their colonial predecessors. And while Virginia’s laws and life changed and also stayed the same, its people were moving – from east to west, from west to further west, up the social scale and back down it. John Crane’s Virginia was busy, changing, complicated—an old yet thrillingly new world. What would “Virginia” be? 1791 was pulsing with possibilities.

The following pages chronicle this brief moment between July 4, 1791, and July 6, 1792 – the time in which John Crane of Berkeley County, Virginia, faced the state’s legal system. First, a series of short chapters tells the story of Commonwealth v. Crane in a narrative format. Then, the conclusion examines the meaning of the story, discussing the intellectual and social world it uncovers and, most importantly, how thinking about Crane might make us rethink what it means to use law to write American history.

Together, these chapters tell the story as, I like to think, the people of the case would have told it – the story of their encounter with the law. The people who examined and deliberated on Crane’s fate – from the justices of the peace who decided to charge Crane with murder, to the wealthy planters who sat on his grand jury, to the judge who conducted his trial, and the angry, partial witnesses who testified, and the jury that deadlocked on the question of his guilt – all these were, by their actions, creating the law that ultimately sentenced Crane to death. But even as they themselves implicitly negotiated and produced the law that left Crane at the gallows – as they weighed what should happen to them man on whom they sat in judgment – they also turned to the law to decide his fate. This is a story of that dialogue, between popular participation and what St. George Tucker called “legal science”; between class privilege and republican
uniformity; between public events and private conflict, in a nation that was rapidly changing – in short, the story of John Crane and his legal world.
Characters

**John Crane, the younger:** Accused of the murder of Abraham Vanhorn.

**Abraham Vanhorn:** Drove a wagon for a living and lived in Winchester, Virginia. Was working for Crane’s neighbor, landowner Thomas Campbell, on July 4, 1791, when he fought with John Crane and was fatally stabbed.

**Isaac Merchant:** Lived near Crane; his family had owned land in the area for years. Also worked for Campbell and fought with Crane that day.

**John Dawkins:** Crane’s neighbor who worked in Crane’s fields on July 4, who also exchanged words with the Vanhorns and Merchant.

**Catherine Whiting Crane:** John Crane’s wife, related to Virginia’s powerful Whiting and Robinson families.

**James Crane:** John Crane’s father, originally from Spotsylvania County where his own father, John Scanland Crane, had been a justice of the peace, high sheriff, and the colonel of the militia. Was an associate of Charles Washington and served in important local positions.

**St. George Tucker:** Judge of the Virginia’s General Court, and trial judge in Crane’s case. One of America’s foremost legal scholars.
1 Va.Cas. 10
General Court of Virginia.

The Commonwealth
v.
John Crane, the younger.

Nov. 21, 1791.

THIS prisoner was indicted at the District Court of Winchester, in September, 1791, for the murder of Abraham Vanhorn. On his trial, the jury found a special verdict in the following words.

“We of the jury find that about three o’clock on the fourth of July, one thousand seven hundred and ninety-one, John Crane, the prisoner at the bar, was informed by his reapers, that one Campbell’s reapers had sent a challenge to his. That in consequence of this supposed challenge, the said John Crane went with others out of his own field into the field of the said Campbell, which was adjoining to that of Crane’s, and that the said Crane did make use of threatening language, such as he could whip any man in the field, meaning Campbell’s reapers, amongst which was Abraham Vanhorn; but after some altercation we find all parties appear to be reconciled; but before said Crane left the field another dispute arose, in which Crane challenged them to fight, man for man, which Campbell’s party agreed to do, of which number the said Abraham Vanhorn was one: when the parties came near together, they parlied and disputed for some time, the issue of which was, that the prisoner at the bar swore that if he fought any man that day, he would let out their guts, and likewise that he would fight Joseph Vanhorn the next morning, for ten dollars, which the said Abraham Vanhorn was to bet him. The prisoner at the bar leaving Campbell’s field, after some time a certain John Dawkins, one of Crane’s reapers, suspected some insult given by Campbell’s party and going to fight any one that would insult him. The prisoner at the bar observing this, requested the said Dawkins to get him a club, and he would take his knife, which knife he took out of his pocket, declaring they could clear their way through the whole of Campbell’s party, upon which the said Dawkins desisted from prosecuting his intentions, and likewise the prisoner at the bar. We find that between sunset and dark, that the said Abraham Vanhorn with several others passing through the field of John Crane, the prisoner at the bar, to confirm a bet which was to ensue the next morning, and also making a noise and singing, which the said Dawkins conceived was an insult to the prisoner at the bar and his party. Thereupon Dawkins called out that he could whip Joseph Vanhorn. Joseph Vanhorn replied, it would be no credit to him if he did, as he was a larger man; upon which the prisoner at the bar came out, and ordered them out of his field, or he would blow them through, upon which they immediately quitted the field; he then called for his gun, which was refused by his wife; he then called for his knife, and pursued them to the fence, exclaiming Abraham Vanhorn, you have used me ill, and I’ll be damn’d if I dont have satisfaction. Then the said Abraham Vanhorn replied, not more so than you have used me. The prisoner then requested the said Abraham Vanhorn to come over the fence, and fight him; the said Abraham Vanhorn made answer, that he the said prisoner at the bar would use a knife or razor; the said prisoner at the bar replied, come over the fence, and I will give a fair
fight: the wife of the said prisoner at the bar came down crying out, Mr. Crane, I am surprised you should demean yourself to fight with such a set of negrofied puppies. By this time the prisoner at the bar, and the said Abraham Vanhorn, were much irritated; at which the said Abraham Vanhorn, and Isaac Merchant, one of Campbell’s reapers, had their shirts stripped off, which the prisoner at the bar had not: the prisoner at the bar and the said Abraham Vanhorn attempting to get at each other across the fence, who was prevented by John Dawkins. Then the said prisoner struck at Merchant, who struck the said prisoner at the bar, and turned him round, who immediately joined in combat with the said Abraham Vanhorn. We find in the combat that the said Abraham Vanhorn threw the prisoner at the bar on the ground, and kept him there for some time; at length the prisoner at the bar seemed to get the advantage of the said Abraham Vanhorn, at which time the said Abraham Vanhorn cried enough, and said his guts were cut out. We do find that the said Abraham Vanhorn did receive several wounds with a knife, or some sharp instrument, of which wounds the said Abraham Vanhorn died, and that the wounds were given by the prisoner at the bar. Upon the whole matter the jury pray the advice of the court; and if the court should be of opinion that the prisoner is guilty of murder, then we of the jury do find the prisoner guilty of murder; and if the court shall be of opinion that the prisoner is not guilty of murder, but guilty of manslaughter, then we the jury do find the prisoner not guilty of murder, but guilty of manslaughter.”

The District Court not being advised what judgment to give on this verdict, adjourned the question, with the consent of the prisoner, to the General Court for difficulty.

On the 21st November, 1791, the General Court, consisting of Judges Prentis, Tyler, Henry, Jones, Roane and Nelson, entered the following judgment. “This day came as well the attorney general as the counsel for the said Crane, and thereupon the question of law arising upon the special verdict in the transcript of the record of the said case mentioned, to wit, whether the said Crane be guilty of murder, or manslaughter, being argued, it is the opinion of the court that the said Crane is guilty of murder, which is ordered to be certified to the District Court of Winchester.”
Abraham Vanhorn did not die immediately. Instead, after his fight with John Crane, the other men carried him over to Thomas Campbell’s home, where he lingered for three days while his abdominal wounds festered.\footnote{Shepherd’s-Town July 11, “The Potowmack Guardian and Berkeley Advertiser” (Shepherdstown, VA), July 11, 1791. This account identifies David Campbell as the owner of the field; however, a witness’s deposition identifies the owner as Thomas Campbell, and the latter is consistent with Berkeley land records. Tax records indicate that Thomas Campbell had a son living with him – likely David Campbell.} After Abraham finally died around 3 AM on July 7, the coroner’s examination uncovered several large lacerations on his abdomen.\footnote{William Greenway Russell, \textit{What I Know About Winchester}, ed. Garland R. Quarles and Lewis N. Barton (Staunton, Va.: McClure Publishing Co., 1953), 47 n.59.} The “one that proved mortal” was under his ribs on his left side and “penetrated the chest about three inches – the greater part of the small intestines protruded immediately, which were also wounded.”\footnote{“American Intelligence: Winchester, Virginia, July 9,” \textit{Western Star} (Stockbridge, MA), August 2, 1791.}

In surviving historical records, Abraham Vanhorn is a mere shadow. Only a few facts emerge as certain from records: as one newspaper later reported, Vanhorn was a wagoner and, as tax records indicate, he lived in Winchester.\footnote{Frederic Morton, \textit{The Story of Winchester in Virginia} (Strasberg, VA: Shenandoah Publishing House, 1925), 271.} There is no definitive record of his age, or who his parents were; however, a “John Vanhorn & wife” were summoned to court to testify in Crane’s case, and lived in the town of Smithfield, just a few miles to the north of where John Crane harvested his fields. It seems that this couple was Abraham’s parents. For instance, they had recently had a
change in their household size, probably because Abraham had moved to Winchester, leaving only his brother Joseph at home.  

If John Vanhorn and his wife were indeed Abraham’s parents, then we can know at least a little more about him. They were not landowners, but Vanhorn’s father did own three slaves over sixteen and nine horses. (By his death thirteen years later the senior Vanhorn would own lots in the town of Smithfield.) There is also one more fact: in Winchester, Abraham Vanhorn was a frequent attender at court, where he often served on juries with men of vastly different circumstances. This may indicate that he was considered respectable, but it could also mean that he was merely a bystander picked to fill out thin jury pools – the man who would become Crane’s judge, St. George Tucker, complained that Virginia juries were frequently made up of “idle loiterers about the court.”

Vanhorn’s unremarkable life emerged most vividly in the newspaper stories that accompanied his death. This was, in some ways, ironic – that his death brought attention, for the first time, to his life – but it was not atypical. After all, the lives of middling men like Vanhorn left little occasion for public attention except in remarkable circumstances, like murder. But after his death at the hands of the young

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5 John Vanhorn was listed on Berkeley tax lists in 1789 as having two grown sons at home, but in 1791 only one son was still listed in the household, along with three slaves and ten horses. Berkeley County Personal Property Tax lists, second battalion, 1791, BCHS.

6 Berkeley County Personal Property Tax lists, second battalion, 1789, BCHS. In 1791, the senior Vanhorn owned three slaves and five horses. Berkeley County Personal Property Tax Lists, East, 1792, BCHS. By 1793, after Abraham’s death, John Vanhorn was listed as the only white male about 21 in his household. Directly below him on the tax list was Joseph Vanhorn, who would figure large in the Crane case. Although not definitive, the weight of this evidence suggests that Abraham Vanhorn and Joseph were indeed brothers, and that John Vanhorn was their father. Berkeley County Personal Property Tax lists, second battalion, 1793, BCHS.

7 Berkeley County Land Tax lists, 1790 and 1791, BCHS.

8 Frederick County Court, Order Book 22, Microfilm, Reel 76, Library of Virginia.

and privileged John Crane, Abraham became news – the paragon of the virtuous, industrious young man whose life had been prematurely – and as one report said, “dastardly” – cut short.¹⁰ Before the case was over, the story of Crane, Vanhorn, and the legal process that followed would become one of the most-reported crimes in the new nation.

In 1791, Americans spent a lot of time talking about crime. Newspapers thrived on salacious stories of murder and mayhem from around the country, while theorists and lawmakers argued about what criminal law and punishment should look like in a republican state. And Crane’s Virginia was in the vanguard of these conversations. Since 1776, the Virginia Assembly had been attempting to reform the Commonwealth’s criminal laws, but no proposal had, as yet, been able to garner a consensus. So when John Crane stabbed Abraham Vanhorn, he not only landed in jail – he found himself in the middle of Virginia’s tense disagreements over the revisal of its laws.

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Early Americans were fascinated by crime. As historian Steven Wilf has written, in the period between the end of the Seven Years War in 1763 and the turn of the nineteenth century there was an “outpouring of law talk” – and criminal law was at its core. Crime and its punishment was the “most talked about legalism in late-eighteenth-century America’s coffee houses and cobblestone streets.”¹¹ Crowds devoured execution narratives and speeches by condemned felons, and anonymous composers produced hanging ballads. Popular gossip about sensational crimes

ranged from fascination with the macabre to “astute attention to the procedural norms that make law matter.”\textsuperscript{12} Moreover, as the colonists mobilized their opposition to Britain, they drew on the symbols of criminal punishment: mobs hung their targets in effigy, and forced mock executions in which the target would be made to undergo the ritual of the execution – without, ultimately, the hangman. Although these actions proceeded from the people, not legal officials, they demonstrated the deep salience of legal language in American culture – and the willingness to appropriate and reshape it.

After the Revolution, Americans continued to relish crime stories. Reports of murder in early America peppered the nation’s newspapers, and ran the gamut – from conflicts among spouses to crimes on dependents to killing for financial gain, and more. Most involved family members.\textsuperscript{13} For instance, in one case from Salem, Massachusetts, the young Mary Scott was murdered by her father and stepmother, when they purportedly tried to cure her of “the itch” by putting her in front of the fire

\textsuperscript{12} Ibid., 4.
\textsuperscript{13} Wives murdered by husbands: “Litchfield, February 12,” \textit{Political Intelligencer} (Fredericktown, MD), March 8, 1785 (man killed wife by striking her in the head with an axe); “Richmond, January 2,” \textit{Pennsylvania Packet} (Philadelphia), February 12, 1785 (man killed wife and four children); “Baltimore, May 10,” \textit{Providence Gazette}, June 25, 1785 (man killed wife, four children, and his own mother with an axe); “The Speech of Thomas Goss,” \textit{Massachusetts Spy} (Boston), December 8, 1785 (executed for murder of wife); “Philadelphia, December 2,” \textit{Connecticut Gazette} (New Haven), December 16, 1785 (indicted for murdering wife with a pair of iron tongs); “Boston, June 1,” \textit{New York (NY) Packet}, June 8, 1786 (woman’s bloody clothes discovered, husband jailed); “Sentence of Death Against Isaac Coombs,” \textit{American Herald} (Boston), November 27, 1786 (man sentenced to death for murder of his wife); “Wilmington, July 25,” \textit{Pennsylvania Packet} (Philadelphia), July 30, 1787 (man jailed for murder of his wife); “Fredericktown, September 19,” \textit{Maryland Chronicle} (Fredericktown, MD), September 19, 1787 (man convicted of murdering wife and sentenced to death by hanging); “Elizabeth Town, April 8,” \textit{Norwich Packet} (Norwich, CT), April 24, 1789 (man first tried to kill his wife with an axe, but later killed her with a knife); “John Fetheringham,” \textit{Independent Chronicle} (Boston), November 4, 1790 (Fetheringham’s wife found dead, with a broken arm, some hair pulled out, and one of her ears bitten; he then attempted suicide to “go and see Betty” [his wife]); “A Singular Case of Murder,” \textit{Independent Gazeteer} (Philadelphia), November 6, 1790 (wife found dead; knife found in the ground near her and her throat had been cut); “Easton, (M.) September 27,” \textit{New Jersey Journal} (Elizabethtown, NJ), October 12, 1791 (man convicted of the murder of his wife and sentenced to death).
for three hours, threatening to nail her hands to the mantle if she moved; the coroner’s inquest reported that it appeared that the girl had been “roasted.” Other cases repeated in the papers involved slaves or other servants — slaves had been killed by masters, or other whites, like the slave thrown overboard in Rhode Island because she had small pox, or the one whipped to death by Virginian Matthew Farley, or slaves who themselves had killed, like the two slave men charged with attempting to murder a white man in South Carolina. Other reports reflected the supernatural sheen that could attend criminal trials; for instance, a New Jersey slave suspected of murder was made to touch the dead man’s face during the coroner’s examination; when he did, blood left the victim’s nose, and the observers believed that that was a sure sign of the

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15 For slave thrown overboard, see “Newhaven, June 1,” Spooner’s Vermont Journal (Windsor, VT), June 28, 1791; for Farley, see “Richmond, February 4,” New York Daily Gazette, February 19, 1789. Other cases of slaves as victims: “Extract of a Letter from a Gentleman at Richmond in Virginia,” Pennsylvania Packet, July 19, 1785 (woman jailed for killing a slave boy who had been her husband’s property); “From the United States Chronicle,” Spooner’s Vermont Journal, June 14, 1791 (North Carolina tortured young slave girl to death after her escape attempt; found guilty by a jury and sentenced to the maximum punishment of a year in prison and paying the value of the slave); “Litchfield, October 19,” Providence Gazette, November 12, 1791 (slave murdered for “stubbornness” by worker at the glass factory); “Charleston, S.C., April 13,” Independent Chronicle, May 5, 1791 (murder). See, e.g., “Savannah, May 26,” City Gazette (Charleston, SC), June 3, 1791; “Baltimore, February 21,” Pennsylvania Packet, April 12, 1786 (three slaves robbed murdered a woman and burned down her home to conceal the crime); “Fredrick-town, June 20,” Maryland Chronicle, June 20, 1787 (slave was jailed for murder of a slave woman); “Richmond, June 20,” Connecticut Gazette, July 13, 1787 (fired slave convicted of murder); “Richmond, August 1,” Spooner’s Vermont Journal, September 17, 1787 (emancipated slave convicted of murder and executed); “Fredericktown, September 19,” Maryland Chronicle, September 19, 1787 (slave convicted of murder and sentenced to death by hanging); “Wilmington, N.C., August 27,” Connecticut Journal, November 5, 1788 (runaway slave shot pursuer with his musket); “Extraordinary Discovery of Murder,” New Jersey Journal, February 3, 1790 (slave suspected of murder touched corpse’s nose, and it bled, seemingly confirming his guilt); “Jerry,” City Gazette, August 16, 1790 (slave found guilty of murder by two magistrates and 5 freeholders and sentenced to be hung); “Proclamation,” State Gazette of South Carolina (Charleston, SC), January 24, 1791 (proclamation by Governor Charles Pickney of South Carolina offering $100 reward for the capture of the fugitive slaves who had murdered Thomas Riddal); “Savannah, May 26,” City Gazette, June 3, 1791 (slave named King executed for murder); “State of Maryland,” Mail (Philadelphia), July 6, 1791 (Council of Maryland offering reward for the capture of a slave named Will, belonging to John Smoot, who was accused of killing Eli Smoot, had been jailed, and had been freed by John Smoot’s workers).
slave’s guilt. Many of the reported murders were for financial gain; for instance, in Philadelphia in 1787, four men were charged with the murder, rape, and burglary of widow; a 1787 New York case was similar. And still others involved altercations like that between Crane and Vanhorn – disagreements that, in passion, turned fatal, like the 1785 report from New York which described an African American man who, “...enraged at an altercation which took place between him and a white man,” had “plunged an axe into his antagonist’s breast, and exposed his entrails to a public inspection,” or the two men from Philadelphia who had an argument when one threatened to sue; the other advanced on the first and killed him with a stone auger. The most repugnant cases tended to be repeated most often in the newspapers, but even more mundane cases found wide coverage.

But crime wasn’t merely sensational – it was also political. In the 1780s, recasting America’s criminal codes – and demonstrating, through them, the new nation’s essential difference from England’s “bloody code” – became a fundamental part of establishing America’s legitimacy and republican character. This was especially true in Virginia. As Thomas Jefferson wrote in 1778, it was a “duty in the legislature to arrange in a proper scale the crimes which it may be necessary for them to repress, and to adjust thereto a corresponding gradation of punishments.” Death was not the answer; after all, a member of society, “committing an inferior infraction, does not wholly forfeit the protection of his fellow citizens, but, after suffering

punishment in proportion to his offence is entitled to their protection from all greater pain.” Punishments, Jefferson argued, should fit the crime – and no more.

In this, he followed important trends in eighteenth century thought. In 1776, Americans who were up to date on their Enlightenment theory knew that the criminal law – that site where the power of the state met the individual most intimately – was deeply reflective of the nature of government. John Locke had, for instance, begun his important *Second Treatise on Government* by discussing the right to punish crime. Locke asserted that criminal punishment was itself the defining aspect of political power; political power was, he explained, the “right of making laws with penalties of death,” and “consequently all less penalties.” Moreover, the law of nature prescribed limits on criminal punishment: it must be directed to reparation or restraint. Society could punish the law breaker to secure his repentance, deterring him from further actions and deterring others from committing the same offense; or, it could punish in order to repair the injury of whoever was harmed by the act.

Locke identified the power to punish crime as something natural, predating the state, but other theorists discussed how punishment worked within that state once established. In his *Spirit of the Laws*, Charles-Louis de Secondat, Baron de Montesquieu, argued that harsh punishments were reflective of despotic regimes, and were unnecessary in more moderate governments. “Despotic governments,” he explained, needed to use severe punishments that afflicted the body, making death very painful, because in those societies “people are so unhappy as to have a greater

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20 Boyd at 2: 492-93.
22 Ibid., 4.
23 Ibid., 5.
dread of death than regret for the loss of life.”

In moderate governments, however, measures besides (and less than) death could be effective: “the love of one’s country, shame, and fear of blame are restraining motives.” Thus, in “moderate governments,” the laws “do not require so much force and severity.” Montesquieu thus made a general observation: penalties “have increased or diminished in proportion as those governments favoured or discouraged liberty.” This was because “experience shows that in countries remarkable for the lenity of their laws the spirit of the inhabitants is as much affected by slight penalties as in other countries by severer punishments.”

Here, Montesquieu established a principle: punishments should be judged by their effect, not by their essential character. If a more lenient punishment could achieve the same effect as a more severe one, then the lesser punishment should be used. Severity for its own sake was meaningless; after all, criminality, he argued, was not because of “moderation of punishments” but from the “impunity of criminals.” Instead, “let us follow nature,” he wrote, “who has given shame to man for his scourge; and let the heaviest part of the punishment be the infamy attending it.” Indeed, the wrong punishments gave “lessons of cruelty” and ended up “corrupting”

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25 Ibid.
26 Ibid.
27 Ibid.
28 Ibid., 90.
29 Ibid., 91.
30 Ibid.
the people. This was what Montesquieu called “an incurable evil, because it is in the very remedy itself.”

But what should punishments look like? Montesquieu argued that they should be proportioned to the seriousness of the crime, protecting that “which is more precious to society rather than that which is less.” It was a “great abuse,” he contended, “to condemn to the same punishment a person that only robs on the highway and another who robs and murders.” Moreover, the effect was perverse. Knowing that they would face the same penalty for murder as for robbing only gave robbers an incentive to kill their victims, since “the dead . . . tell no tales.” To avoid such perverse incentives, punishments should instead “derive” from the “particular nature of the crime” so that there “are no arbitrary decisions; the punishment does not flow from the capriciousness of the legislator, but from the very nature of the thing.” And if the punishments at law could not themselves be different, there should at least be an expectation of mercy for a less serious crime: “in England they never murder on the highway,” he explained, “because robbers have some hope of transportation, which is not the case in respect to those who commit murder.”

Montesquieu thus laid out several principles for the criminal law. First, governments with more freedom – where men felt affection for the state and had more to live for – could afford to be more lenient. Second, punishments should be as light as possible to achieve the desired end. Third, punishment taught “lessons” – and

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31 Ibid., 92.  
32 Ibid.  
33 Ibid., 97.  
34 Ibid., 98.  
35 Ibid.  
36 Ibid., 198.  
37 Ibid., 98.
the wrong punishments could teach “lessons of cruelty.” Fourth, punishments should be derived from, and tailored to, the nature of the crime.

There was also one final ingredient to Montesquieu’s discussion of crime, one which dealt with the ways in which law was administered in different varieties of governments. In despotic governments there were no laws at all: “the judge himself is his own rule.”38 In monarchies, there were laws to guide the judges; “where these are explicit, the judge conforms to them; where they are otherwise, he endeavors to investigate their spirit.”39 But in republics, the laws ruled: “the very nature of the constitution requires the judges to follow the letter of the law.”40 This was because the law proceeded from the people, and if the judges were allowed to extrapolate away from the law itself, “otherwise the law might be explained to the prejudice of every citizen, in cases where their honour, property, or life is concerned.”41 “The nearer a government approaches a republic,” Montesquieu explained, “the more the manner of judging becomes settled and fixed.”42 He painted England as a blend of these two. “In England, the jury give their verdict whether the fact brought under their cognisance be proved or not; if it be proved, the judge pronounces the punishment inflicted by the law,” which was clearly laid out: “for this he needs only open his eyes.”43

Montesquieu’s principles of leniency and proportionality – and his insistence that republics required careful following of the laws – were picked up by the Italian

38 Ibid., 81.
39 Ibid.
40 Ibid.
41 Ibid.
42 Ibid.
43 Ibid. 81-82.
theorist Cesare Beccaria, and liberally cited in his 1764 treatise, *On Crimes and Punishments*. Here – following in the “steps” of the “immortal Montesquieu” but also insisting on the difference of his account – Beccaria argued that a rational criminal law should be built around mandatory statutory penalties specified by the legislature, calculated to deter crime with minimum repression. Placing punishment within the context of the social contract, he rooted the sovereign’s right to punish crime in “the necessity of defending the depository of the public welfare against the usurpations of private individuals.”

All punishments that exceeded what was necessary to preserve the bond “necessary to hold private interests together” – what men had deposited by virtue of the social contract – were for Beccaria “unjust by their very nature.”

This limitation led Beccaria, unlike Locke and Montesquieu, to condemn the death penalty altogether: “By what alleged right can men slaughter their fellows? Certainly not from the authority from which sovereignty and law derive, [which is] nothing more than the sum of tiny portions of the individual liberty of each person.” The death penalty, he explained, was thus a “war of the nation against the citizen,” one which he argued was unnecessary and not useful – and therefore not within the power of the state. Even worse, it incited compassion for the criminal: “The execution of a criminal is to the multitude a spectacle which in some excites compassion mixed with indignation.” Rather than operating to deter crime, “these

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46 Ibid., 48.  
sentiments alike fill the hearts of the spectators to a greater extent than does the salutary fear that the laws claim to inspire.”

In its stead, Beccaria argued for a penalty that would induce terror of continued suffering – perpetual slavery. In some ways, Beccaria – perhaps reflecting the eighteenth century world in which he lived – saw slavery as a fate worse than death. “A great many people,” he explained, “look upon death with a tranquil and steady eye, some from fanaticism, others from vanity . . . some from a final and desperate attempt to live no longer or to leave their misery behind; but . . . among fetters and chains, under the prof or the yoke, or in an iron cage, and the desperate man finds a beginning rather than an end to his troubles.”

But Beccaria argued for more than the substitution of the death penalty with slavery; he posited an entire system for criminal law and punishment. Criminal penalties should, Beccaria argued, be “determined by a cool examiner” and aimed at the “greatest happiness shared among the greatest number.” Like Montesquieu, he argued that the legislature should focus on preventing the most serious crimes; punishments should be tailored for maximum impressions on the minds of others, with least pain and harm to the criminal. Punishment should not aim to “torment a or afflict a sentient being,” nor could “the cries of a poor wretch turn back time and undo actions which have already been done.” Instead, “the purpose of punishment . . . is nothing other than to dissuade the criminal from doing fresh harm

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48 Ibid., 49.
49 Ibid., 50.
50 Ibid., 5.
51 Ibid., 23.
52 Ibid.
to his compatriots and to keep other people from doing the same.”

Plus, crimes were better prevented by certain punishments than by severe ones: “The certainty of chastisement, even if it be moderate, will always make a greater impression than the fear of a more terrible punishment.”

Part of maintaining the desired certainty – in order to enable the criminal’s rational calculation – was restricting the power of the judge. It was the magistrate’s role to mediate between the sovereign, whose laws had been broken, and the individual accused, and his role should be “a simple assertion or denial of particular facts.”

Judges, Beccaria reasoned, received their laws not from ancestors but from a “living society”; thus their role was limited to applying the law, not interpreting it. That interpretation belonged to the legislature; the judge’s office was “only to examine whether or not a certain man has committed an action contrary to the laws.” For Beccaria, this meant that judicial reasoning was simple. There was a law – had it been violated? The “the conclusion [was] acquittal or condemnation.”

Any further interpretation allowed the judge to inject his own ideas – and with them, uncertainty – into the administration of the law. “Nothing is more dangerous,” Beccaria wrote, “than the common axiom that one must consult the spirit of the law. This is a dike that is readily breached by the torrent of opinion.” After all, when interpreting the “spirit” of a law, the judge’s opinion was highly subjective. “The spirit of the laws,” Beccaria wrote, sounding like the legal realists of almost three

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53 Ibid.
54 Ibid., 46.
55 Ibid., 10.
56 Ibid., 10-11.
57 Ibid., 11.
58 Ibid.
59 Ibid.
centuries later, will “would be dependent on the good and bad logic of a judge, on a sound or unhealthy digestion, on the violence of his passions, on the infirmities he suffers, on his relations with the victim, and on all the slight forces that change the appearance of every object in the fickle human mind.”60 This is why, he explained, “We see the fate of a citizen change several times in going from one court to another, and we see that the lives of poor wretches are at the mercy of false reasonings or the momentary churning of a judge’s humors.”61

The ideal statues would be clear and easily applied. “When a fixed legal code that must be observed to the letter,” Beccaria wrote, “the judge [has] no other task than to examine a citizen’s actions and to determine whether or not they conform to the written law.”62 Literal interpretation avoided a greater evil, the latitude of the judge: “When the standard of justice and injustice that must guide the actions of the ignorant as well as the philosophic citizens is not a matter of controversy but of fact, then subjects are not exposed to the petty tyrannies of many men.”63 Allowing the judge to decide questions of right, beyond merely applying the law to the case, gave judges, Beccaria argued, too much power over the people. Clear laws were empowering to the people; they allowed them to “calculate precisely the ill consequences of a misdeed. It is just as true that they will acquire a spirit of independence, but this will not be to shake off the laws and resist the supreme magistrates; rather, they will resist those who have dared to claim the sacred name of

60 Ibid.
61 Ibid.
62 Ibid., 12.
63 Ibid.
virtue for their weakness in yielding to their private interests and capricious opinions.”

After the judge made his simple determination of whether or not the defendant had transgressed the clear, written laws of the legislature, punishment would come quickly to the guilty. Beccaria opposed pardons, believing them unnecessary – even “dangerous” – in a state with appropriately mild laws. Pardons undermined the certainly he felt was necessary in order for the laws to exercise their proper deterrence; instead, they tended to show “men that crimes may be pardoned and that punishment is not their inevitable consequence is to arouse the enticing hope of impunity and that making people believe that, since remission is possible, sentences which go unremitted are violent acts of force rather than emanations of justice.”

Punishment, Beccaria advised, should be “inexorable.” Indeed, he explained, summarizing his theory, it “should be public, prompt, necessary, the minimum possible under the given circumstances, proportionate to the crimes, and established by law.”

Beccaria’s criticisms of the criminal law became widely circulated, and in 1769, when Sir William Blackstone published the last volume of his Commentaries – the one discussing the English criminal law – he referenced both Beccaria and Montesquieu. Although affirming that “in England … our crown law is with justice supposed to be nearly advanced to perfection,” he acknowledged the too-sanguinary

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64 Ibid.
65 Ibid., 80.
66 Ibid.
67 Ibid., 81.
nature of even England’s criminal punishment.\textsuperscript{68} Blackstone advised that offenses against “social” instead of “natural” rights – offenses like forgery, or theft, where even Mosaic law did not allow the death penalty – should not be capital, because the right to property owed its existence “merely to civil society.”\textsuperscript{69} Blackstone disagreed with Beccaria that death should never be used as a penalty; citing Matthew Hale, he argued instead that “it is only the enormity, or dangerous tendency, of the crime, that alone can warrant any earthly legislature in putting him to death that commits it.”\textsuperscript{70} Deterrence was a lawful end of punishment, Blackstone affirmed, but it could not be achieved at any cost – “there may be unlawful means of enforcing obedience even to the justest laws.”\textsuperscript{71} And, like Beccaria, Blackstone agreed that the proper end of punishment was not “atonement or expiation,” which must be left to the “Supreme Being,” but about results: “precaution against future offenses of the same kind.”\textsuperscript{72} This deterrence operated both on the offender himself and on those who observed his example. But the amount of punishment, he also affirmed, should be proportioned to the end it was to serve, and the more severe punishments “have less effect in preventing crimes than such as are more merciful in general.”\textsuperscript{73}

Citing Montesquieu, Blackstone also observed that too-severe punishments often led to impunity, with the public refusing to enforce them, “out of humanity.” In England, he found “no less than a hundred and sixty” capital crimes declared by act of Parliament “to be felonies without benefit of clergy; or, in other words, to be

\textsuperscript{68} Tucker, \textit{Blackstone’s Commentaries}, 5:5.  
\textsuperscript{69} Ibid., 5:9.  
\textsuperscript{70} Ibid.  
\textsuperscript{71} Ibid.  
\textsuperscript{72} Ibid., 5:11.  
\textsuperscript{73} Ibid.
worthy of instant death,” inflicted “perhaps inattently” by “a multitude of successive independent statutes.” With such severe laws, it was no wonder that “the injured, through compassion, will often forebear to prosecute: juries, through compassion, will sometimes forget their oaths, and either acquit the guilty or mitigate the nature of the offense: and judges, through compassion, will respite one-half of the convict, and recommend them to the royal mercy.” Instead, Blackstone recommended, citing Beccaria’s “ingenious” proposal, that “every state a scale of crimes should be formed, with a corresponding scale of punishments, from the greatest to the least” – or, at least “not assign penalties of the first degree to offenses of an inferior rank.”

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With influential theorists like Locke and Montesquieu talking about crime, the widespread distribution of Beccaria’s treatise – which Jefferson listed as one of the most influential works in civil government – and recommendations for reform from even the staid Blackstone, it was perhaps no surprise that, in 1776, one of Virginia’s very first acts was to examine possible changes to its criminal code. In 1776, only seven years after the publication of Blackstone’s own comments, Virginia’s independence gave the General Assembly a chance to revise – freely – the new state’s laws. As Jefferson later remembered, “When I left Congress, in 76, it was in the persuasion that our whole code must be reviewed, adapted to our republican form of government, and now, that we had no negatives of Councils, Governors & Kings to

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74 Ibid., 5:18.
75 Ibid.
76 Ibid., 5:17-18.
restrain us from doing right, that it should be corrected, in all it’s parts, with a single eye to reason, & the good government of those for whose government it was framed.”

In 1776, the General Assembly passed a bill providing for the revisal of the state’s laws – and criminal law reforms were the very first item on the agenda.

The revisers – Jefferson, Edmund Pendleton, George Mason, Thomas Ludwell Lee, and George Wythe – met on January 13, 1777, to divvy up their work. Fifty-year-old George Wythe was a well-respected Williamsburg legal scholar and law teacher, and recent signer of the Declaration of Independence. Fifty-five-year-old Edmund Pendleton was a prominent lawyer and statesman, the speaker of the House of Delegates, and would soon become Virginia’s first chief justice. Fifty-year-old planter George Mason was a longtime public servant and author of the Virginia Declaration of Rights. Prominent Virginia statesman Thomas Ludwell Lee was forty-eight, a member of the Committee of Safety which had governed the colony after Lord Dunmore’s departure, coauthor of the state’s resolution supporting a declaration of independence, and a member of the Virginia Senate. George Mason left the only notes of the meeting.

The committee agreed on some basic objectives and a few specifics. Only treason and murder were to be punished with death by hanging and forfeiture. Further, “parricide and saticide” – the killing of parents or children – were to be included with petty treason, and in such cases the body of the condemned was to suffer an extra punishment besides execution: being handed over to anatomists.

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80 Ibid.
Suicide would no longer be considered a crime, but a disease. Rape, sodomy, bestiality would be punishable by castration. The default punishment for most crimes would include forfeiture, fine, and labor in the public works. Benefit of clergy and corruption of blood would be abolished. New trials in favor of the criminal would be allowed in criminal cases.\(^{81}\) The committee deferred the question of whether or not pardons would continue.\(^{82}\) Their tentative system, in the spirit of a mix of Beccaria and Blackstone, limited the use of the death penalty and prescribed certain, fixed punishments – ones tailored to fit the crime.

This was a change. In colonial Virginia, punishment had been influenced by both the old world and the new. In general, English law was in force in the colony: the common law certainly, but also applicable statutes passed by Parliament (although there was some dispute about this in the immediate pre-Revolutionary Era). Virginia’s Assembly also made laws for the colony, which were transmitted to the Privy Council for approval but were considered to be in force by default unless later disallowed. Because of the many legal sources at play, however, the details of what was in force and what was not was often, as one commenter wryly put it, using a medieval analogy about the king, “in the judge’s breast” – meaning that judges got to pick and choose what would be applied.\(^{83}\) In general, however, the corpus of English

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\(^{81}\) Ibid., 2:325-28.  
\(^{82}\) Ibid., 2: 325-26, n. (need note number).  
criminal law, including benefit of clergy and the importance of judicial and executive discretion, was in force in Virginia.\textsuperscript{84}

It is unclear, however, exactly how much it was actually enforced. Many of Virginia’s court records were later destroyed during the American Civil War; as a result, compiling statistics is difficult.\textsuperscript{85} Despite these limitations, however, historians have used extant records and newspaper accounts to estimate the state of Virginia convictions in Jefferson’s time. In the nine years before the Revolution, historian Arthur Scott reports that 240 people were presented to the grand jury in capital cases; only thirteen were not indicted. Of those indicted, almost one third were ultimately acquitted. Of the convicted, forty-two were clergied, nine were pardoned, and at least seventeen were hanged. (In Scott’s statistics, forty-five are unaccounted for.)

Larceny, horsestealing and murder accounted for over fifty percent of the cases.\textsuperscript{86} Historian Kathryn Preyer, who examined surviving records from the next two decades, 1789-1800, paints a similar picture. In twenty-eight terms of court, 147 felonies were prosecuted. There were thirty-five total murder prosecutions and thirty-nine for larceny.\textsuperscript{87} One-third of felonies resulted in acquittal. In sixteen others, a witness failed to appear and the prosecution could not proceed. In twenty-one, the defendant escaped. Twenty-four others were convicted and clergied. Seventeen were sentenced to be hanged: those were convicted of murder and horsestealing, and one free black was convicted of rape. (Six of the defendants were black men: one was

\textsuperscript{84} Preyer, “Crime and Reform in Post-Revolutionary Virginia,” 54; Scott, \textit{Criminal Law in Colonial Virginia}, 14-16.
\textsuperscript{85} Preyer, “Crime and Reform in Post-Revolutionary Virginia,” 70-71.
\textsuperscript{86} Preyer, “Crime and Reform in Post-Revolutionary Virginia,” 61 (summary); Scott, \textit{Criminal Law in Colonial Virginia}, 319-21 (gives the full statistics).
\textsuperscript{87} Preyer, “Crime and Reform in Post-Revolutionary Virginia,” 71-72.
charged with rape and hung; one was charged with “felony” and hung; two charged
with grand larceny were clergied; and two were acquitted of larceny but convicted of
burglary.)⁸⁸ One hundred were white males, and their occupations show a system
aimed at the lower classes: fifty-six were laborers, sixteen were yeomen, others were
artisans of various types. Only one “planter” was prosecuted, and he was acquitted of
negro-stealing.⁸⁹ (Although, as John Crane would find, the class listed in the
indictment was not always an accurate indicator).

These numbers, flawed though they are, lend some context to the 1776 reform
efforts. In a system where benefit of clergy was widespread and horsestealing was at
the top of the list of crimes for which defendants were frequently executed, the
Virginia revisers proposed something very different. Death would be used sparingly,
but so would mercy – punishment would be proportioned to the crime, and its
infliction relatively certain.

Some historians have questioned the extent to which Enlightenment theory
played a role in America’s criminal law reforms, and have attributed changing ideas
of justice and punishment more to republicanism – particularly, the language of the
republican moral code. Louis P. Masur advises that although America’s criminal law
reformers clearly borrowed from Beccaria, the Italian treatise should not be viewed as
the catalyst for change, merely as a sourcebook for its making; after all, the treatise
was in print long before reforms began in earnest in the 1790s. It was the experience
of Revolution, Masur argues, and the desire to distinguish America’s new republican

⁸⁸ Ibid., 72.
⁸⁹ Ibid.
governments from Britain’s monarchical ones, provided a critical impetus for change.\textsuperscript{90}

But in Virginia reform efforts came early, and the relationship between theorists like Beccaria and the proposed reforms was explicit. It may be impossible to speculate exactly what, in 1776, made men like Jefferson accept Beccaria’s ideas, but they had clearly been educated with both his admonitions, and those of Blackstone and Montesquieu, about the ways in which existing punishment practices were defective; the moment they were able to attempt to change their laws, they did so, borrowing heavily from these theoretical sources. For instance, even before the Assembly had approved a bill for the general revisal of the law, Jefferson and Pendleton began in their correspondence to speculate about what changes were necessary – to the criminal law, and more broadly. While affirming the need for a “republican” law, their exchange referenced ideas like order and virtue but rejected them, turning more to Beccaria’s hard-nosed theories. Writing to Jefferson, Pendleton advised:

I don’t know how far you may extend your reformation as to Our Criminal System of Laws. That it has hitherto been too Sanguinary, punishing too many crimes with death, I confess and could wish to see that changed for some other mode of Punishment in most cases, but if you mean to relax all Punishments and rely on Virtue and the Public good as Sufficient to promote Obedience to the Laws, You must find a new race of Men to be the Subjects of it … I have heard it insisted on by others.\textsuperscript{91}

Jefferson quickly rejected this theory in his reply:

The fantastical idea of virtue and the public good being a sufficient security to the state against the commission of crimes, which you say you have heard insisted on by some, I assure you was never mine. It is only the sanguinary hue of our penal laws which I meant to object to. Punishments I know are necessary, and I would provide them, strict and inflexible, but proportioned to the crime…. Laws thus proportionate and mild should never be dispensed with. Let mercy be the character of the law-giver, but let the judge be a mere machine. The mercies of the law will be dispensed equally and impartially to every description of men; those of the judge, or of the executive power, will be the eccentric impulses of whimsical, capricious designing man.  

Clearly, Jefferson had been reading Beccaria – and in 1777, he assumed responsibility for the criminal law bill.

It was thus no surprise that the bill he ultimately produced reflected Beccaria’s ideas of a schedule of “strict and inflexible” crimes and punishments, and explicitly cited Beccaria, Montesquieu, Blackstone, and others. It eliminated the death penalty for all crimes except murder and treason, substituting hard labor in some cases, or other punishments. (This change was, for Jefferson, so important to the state’s political fabric that he had even included it in his draft Virginia constitution, which was not adopted.)  

Death was largely replaced by labor in the public works. The bill also provided, in the manner of Beccaria, that execution would be carried out swiftly, two days after the sentence was pronounced – unless that day was Sunday, in

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95 Boyd, Papers of Thomas Jefferson,1:349, 359.
which case it would be on Monday. There would be no more long waits for execution while seeking pardon – which was not explicitly dealt with in the bill – and no more benefit of clergy. Crimes that were formerly clergiable now received punishment, typically hard labor. Virginia law was about to become, as Beccaria had recommended, “inexorable.”

Figure 1: Jefferson’s Proposed Punishments

<table>
<thead>
<tr>
<th>CRIME</th>
<th>PUNISHMENT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Treason</td>
<td>Hanging Forfeiture of land and goods to commonwealth</td>
</tr>
<tr>
<td>(limited to:</td>
<td></td>
</tr>
<tr>
<td>levying war against the</td>
<td></td>
</tr>
<tr>
<td>commonwealth, being</td>
<td></td>
</tr>
<tr>
<td>adherent to the enemies</td>
<td></td>
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<tr>
<td>of the commonwealth,</td>
<td></td>
</tr>
<tr>
<td>giving aid or comfort to</td>
<td></td>
</tr>
<tr>
<td>the enemies of the</td>
<td></td>
</tr>
<tr>
<td>commonwealth. Must be</td>
<td></td>
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<tr>
<td>convicted by open deed</td>
<td></td>
</tr>
<tr>
<td>by evidence of two</td>
<td></td>
</tr>
<tr>
<td>sufficient witnesses or</td>
<td></td>
</tr>
<tr>
<td>own voluntary confession)</td>
<td></td>
</tr>
<tr>
<td>Petty Treason</td>
<td>Hanging Forfeiture of one-half land and goods to the victim’s next of kin;</td>
</tr>
<tr>
<td>(servant murdering master,</td>
<td>other half to go to defendant’s heirs. Body to be delivered to anatomists</td>
</tr>
<tr>
<td>husband murdering wife,</td>
<td></td>
</tr>
<tr>
<td>wife murdering husband,</td>
<td></td>
</tr>
<tr>
<td>parent murdering child,</td>
<td></td>
</tr>
<tr>
<td>child, child murdering</td>
<td></td>
</tr>
<tr>
<td>parent)</td>
<td></td>
</tr>
<tr>
<td>Murder by Duel</td>
<td>Hanging Forfeiture of one-half land and goods to the victim’s next of kin,</td>
</tr>
<tr>
<td></td>
<td>unless the victim was the challenger, in which case land and goods goes to</td>
</tr>
<tr>
<td></td>
<td>the commonwealth. If defendant was the challenger, body is gibbeted.</td>
</tr>
<tr>
<td>Murder, other</td>
<td>Hanging Forfeiture of one-half land and goods to the victim’s next of kin;</td>
</tr>
<tr>
<td></td>
<td>other half to go to defendant’s heirs.</td>
</tr>
<tr>
<td>Murder by Poison</td>
<td>Death by poisoning Forfeiture of one-half land and goods to the victim’s</td>
</tr>
<tr>
<td></td>
<td>next of kin; other half to go to defendant’s heirs.</td>
</tr>
<tr>
<td>Rape, Sodomy</td>
<td>If man, castration. If woman, hole to be bored in her nose of ½ inch diameter.</td>
</tr>
<tr>
<td>Mayhem</td>
<td>Defendant to be maimed in same way as victim was, or a near as possible in</td>
</tr>
<tr>
<td>(“whoever on purpose shall</td>
<td>estimation of the jury. Forfeiture of one-half land and goods to the victim.</td>
</tr>
<tr>
<td>disfigure another, by</td>
<td></td>
</tr>
<tr>
<td>cutting out or disabling</td>
<td></td>
</tr>
<tr>
<td>the tongue, slitting or</td>
<td></td>
</tr>
<tr>
<td>cutting off a nose, lip,</td>
<td></td>
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<tr>
<td>or ear, branding, or</td>
<td></td>
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<tr>
<td>otherwise…””)</td>
<td></td>
</tr>
<tr>
<td>Manslaughter</td>
<td>First offense: Seven years hard labor in the public works.</td>
</tr>
</tbody>
</table>

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98 Ibid., 2:492-504
<table>
<thead>
<tr>
<th>Crime</th>
<th>Punishment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Forfeiture of one-half land and goods to the victim’s next of kin; other half be sequestered during defendant’s labor sentence, with reasonable part of the profits to the support of his family.</td>
<td>Second offense: To be treated as murder.</td>
</tr>
<tr>
<td>Involuntary homicide arising from trespass or larceny or other “unlawful deed” (similar to “felony murder”)</td>
<td>No transferred intent: not manslaughter. unless manslaughter was intended, or murder unless murder was intended.</td>
</tr>
<tr>
<td>Robbery</td>
<td>Four years hard labor in the public works. Restitution to victim of two times the amount taken.</td>
</tr>
<tr>
<td>Burglary</td>
<td>Four years hard labor in the public works. Restitution to victim of two times the amount taken.</td>
</tr>
<tr>
<td>Housebreaking (Daytime burglary)</td>
<td>Three years hard labor in the public works. Restitution to victim of amount taken.</td>
</tr>
<tr>
<td>Horsestealing</td>
<td>Three years hard labor in public works. Restitution to victim of amount taken.</td>
</tr>
<tr>
<td>Grand Larceny (Goods stolen are greater than or equal to $5)</td>
<td>One-half hour in pillory. Two years hard labor in public works. Restitution of amount taken.</td>
</tr>
<tr>
<td>Petty Larceny (Goods stolen are less than $5)</td>
<td>One-quarter hour in pillory. One year hard labor in public works. Restitution of amount taken.</td>
</tr>
<tr>
<td>Counterfeiting (Included counterfeiting or knowingly passing counterfeited goods or paper)</td>
<td>Six years hard labor in public works. Forfeiture of all land and goods to commonwealth.</td>
</tr>
<tr>
<td>Arson</td>
<td>Five years hard labor in public works. Restitution to victim of three times amount of damage.</td>
</tr>
<tr>
<td>Willfully destroying or running away with any sea vessel, or goods on board, or plundering a wreck</td>
<td>Five years hard labor in public works. Restitution of three times amount lost.</td>
</tr>
<tr>
<td>Robbery or larceny of bonds, bills obligatory, bills of exchange or promissory notes, for payment of money or tobacco, latter tickets, etc.</td>
<td>Treated as robbery or larceny of the money or tobacco due on, or represented by the papers.</td>
</tr>
<tr>
<td>Buyers and receivers of stolen goods (Knowing)</td>
<td>Treated as accessories after the fact.</td>
</tr>
<tr>
<td>Prison-breaking (outside accessories who help felons escape from prison)</td>
<td>Deemed accessories after the fact. (No punishment for prisoners themselves who escape).</td>
</tr>
<tr>
<td>Witchcraft, conjuration, enchantment, sorcery, pretended prophesies</td>
<td>Ducking and whipping, at the discretion of jury not to exceed fifteen stripes.</td>
</tr>
</tbody>
</table>

In the Bill’s preamble, Jefferson laid out the philosophy behind these reforms. Government needed to protect the “lives, liberties, and property of others” – securing those rights was, after all, the reason men had entered into society in the first place.
However, men did not “forfeit” all of their rights upon committing a crime. Here, Jefferson picked up the principle from Montesquieu, Beccaria, and Blackstone that punishment should be proportioned to the crime: it was the legislature’s duty, he affirmed, to arrange crimes and punishments in a “proper scale.”

Those punishments, moreover, should have particular aims: reformation and deterrence. “[T]he reformation of offenders,” Jefferson complained, “tho’ an object worthy of the attention of the laws, is not effected at all by capital punishments, which exterminate instead of reforming.” Such laws “should be the last melancholy recourse against those whose existence is become inconsistent with the safety of their fellow citizens.” Here, Jefferson sided with Blackstone’s limited use of capital punishment, instead of Beccaria’s jettisoning of it altogether. He also, however, took a different tact, one that recognized the intrinsic worth of the citizen, even the criminal one: capital punishment “also weaken[s] the state by cutting off so many who, if reformed, might be restored sound members to society, who, even under course of correction, might be rendered useful in various labors for the public.”

Moreover, again turning to Beccaria, their public labor would make them “living and long continued spectacles to deter others from committing the like offenses.”

Finally, milder laws would –as all the theorists had observed – ensure that the laws were actually enforced. “[T]he experience of all ages and countries hath shewn,” Jefferson explained, “that cruel and sanguinary laws defeat their own purpose by engaging the benevolence of mankind to withhold prosecutions, to smother testimony, or to listen to it with bias” – and, in other cases “and by producing

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100 Ibid., 2:492-93 and n.3 (for expanded preamble text from alternate draft).
in many instances a total dispensation and impunity under the names of pardon and privilege of clergy.”

On the other hand if the “punishment were only proportioned to the injury, men would feel it their inclination as well as their duty to see the laws observed.”

The bill thus explicitly revised the convictions underlying Virginia’s criminal law and also sought to change its penalties. Its goals were a milder law, yes; a law better suited to the objections raised by Enlightenment critics about the overuse of the death penalty, and its incompatibility, in some instances, with the law of nature; and the reclamation of offenders, as far as possible. But it was also, in the Beccarian sense, about a more effective law – one that would deter more and punish better.

Plus, the bill also had another ingredient – one where the penalty would more perfectly reflect the crime. Commonly called the lex talionis, Blackstone had described the use of “eye-for-an-eye,” or retaliatory punishment, as a difficult and problematic.

Jefferson’s draft bill, however, reflected, in part, this principle. It prescribed castration for rape, polygamy, and sodomy; and maiming and disfiguring would be punished by the convicted losing, as near as possible, the same body part he had caused to be mutilated in the victim. Jefferson later disowned responsibility for this “revolting” principle, and attributed responsibility to the committee of revisers as a whole. In his November 1, 1778, introductory letter to George Wythe, enclosed with a draft copy of the bill, he noted, “I have strictly observed the scale of

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101 Ibid., 2:492-93.
102 Ibid.
103 Tucker, Blackstone’s Commentaries with Notes of Reference, 5:12.
punishments set by the committee without being entirely satisfied with it.”

Particularly problematic, he thought, was the “Lex Talionis, although a restitution of the Common law . . . [which] will be revolting to the humanized feelings of modern times.” He added, “this needs reconsideration.” 105 (But his letter to Pendleton back in July 1776 had, at least, recommended castration as a penalty, so it had not been entirely forced upon him.) If Jefferson and Pendleton were discussing virtue and proportionality, the other revisers were also willing to take creative, if brutal, approach to revising Virginia’s criminal laws – the law revisers were willing to embrace change.

If some parts of the bill were explicitly aimed at overturning British common law, other parts made a political statement by reverting to ancient, Anglo-Saxon notions of justice with a widespread use of and reform of forfeiture. Reminiscent of the wergild system, the bill revised forfeiture systems so that the victim became more often the recipient of forfeiture instead of the state. The colonial rule had been that on conviction for treason or felony, all the offender’s goods and chattels were forfeited to the Commonwealth; if a death sentence was given, attainder applied, and real property was also subject to forfeiture. 106 In cases of treason, lands had been forfeited to the crown; for other felonies, the crown was entitled to the felon’s landholdings for a year and a day, though it seems that this requirement was a technicality only. 107 Under Jefferson’s proposed system, however, only in the case of treason was forfeiture the same – land and goods were forfeited to the

106 Scott, Criminal Law in Colonial Virginia,107.
107 Ibid.
Commonwealth. In other capital cases – petty treason and murder – only half of the convicted’s land and goods were forfeited, and these forfeitures went to the family of the victim (unless the victim was the challenger in a duel, in which case his half went to the Commonwealth); the other half were retained for the convicted’s own heirs. (A previous Virginia statute had attempted this, only to be disallowed by the Privy Council.) Forfeiture of land was used in non-capital cases as well: in manslaughter and mayhem, half of the convicted’s land and goods went to the victim, while he retained the other half. In this way, the Bill redirected the remedy towards compensating the victim, instead of enriching the state; it also endeavored to provide for the convicted’s family and to preserve his property, even as it punished.

Other parts of the bill made an even more explicit statement about the values that would govern the new republic: law and reason. On law: the bill singled out dueling for special infamy, thus condemning extralegal violence. Under existing law, dueling was not distinguished; indeed, in England, one historian reports, it was even difficult to obtain a conviction. Under Jefferson’s code, however, dueling was branded as especially odious – after execution, the body of a challenger was to be gibbeted, the only crime to be so punished. Gibbeting was not unknown in the lifetime of the revisers, and seems to have been primarily used for lawbreaking slaves; decreeing that a challenging member of the gentry should be gibbeted was thus a strong statement indeed.

108 Ibid.
111 Boyd, Papers of Thomas Jefferson, 2:492-504.
113 See Scott, Criminal Law in Colonial Virginia, 196-97
The punishments for “witchcraft, conjuration, enchantment, sorcery, and pretended prophesies” also made a statement – they redefined these crimes as crimes against reason, not blasphemy. Jefferson’s bill included a preamble to the crime itself, the only one in the bill, redefining the crimes of witchcraft, sorcery, prophesy, etc. as attempts to “delude the people, to abuse their understanding by exercise of the[se] pretended arts.” Second, it made ducking the punishment, along with whipping, which appears nowhere else in the bill as a penalty. Ducking seems to have been a popular penalty for women – in the colonial law, it was the penalty for the female crime of scolding. Along with the use of whipping as punishment – the only place it appears in the bill – this suggests that witchcraft, sorcery, and prophesy were seen as a crime of blacks and white women.\(^\text{114}\) In other words, Jefferson’s punishment of witchcraft took it out of the blasphemy category and reconfigured it as irrational subordinates getting out of hand.

Combined with the works of Montesquieu, Beccaria, and Blackstone, Jefferson’s proposed bill spoke volumes about how one of Virginia’s most determined revolutionaries viewed the potential meanings of criminal punishment in early America. Most importantly, the criminal law was an important reflection of the nature of the state. Just as Montesquieu had associated milder laws with moderate states, and as Beccaria had insisted that protecting the people from tyranny meant laws written by the legislature and strictly enforced on their text – not “spirit” – Jefferson’s bill also set forth the principles that should govern a new republican criminal law: reclaiming the criminal, deterring, making punishment the province of

\(^{114}\) Ibid., 179-80.
the legislature, not the judge, and respecting the limits of state power over the individual.

Jefferson’s reformed criminal law also set out to demonstrate, by its provisions, these values. It took away traditions like clergy, made clemency difficult, and sought to instill republican values by suppressing practices that were at odds with them – honor matches and “irrational” practices like sorcery and witchcraft. It redefined the victim as not the state, but the citizen, and crafted forfeiture practices to reflect that fact. It would also reflect the relative severity of crimes, as the revisers saw it – by punishing infractions within the family and dueling most harshly, the proposed code intimated those crimes were the ones that the new, free society considered the most serious. In the process, instead of teaching the lessons of tyranny and severity – and impunity – about which Jefferson and his theorist sources worried, the new laws would instead teach the very nature of the government behind their decrees.

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Jefferson’s draft bill became part of a package of proposed revised laws that he, Pendleton, and Wythe presented to the General Assembly in 1779. But the Assembly tabled the entire revisal package until after the Revolution, when Jefferson’s friend, James Madison began pushing for ratification of the proposed code. When Madison began his labors in 1785, he was optimistic – he wrote to Jefferson, who was in Paris as Minister to France, that the session proceeded “slowly
but successfully,” until it hit a particular bill: the “bill concerning crimes and punishments.” Here “the adversaries of the code exerted their whole force.”

As Madison discovered, not all members of the Assembly were eager to embrace Jefferson’s proposed system. The bill was, he wrote to James Monroe, “assaile[d] on all sides. Mr. Mercer has proclaim’d unceasing hostility against it.” He reported that “some alterations have been made, and others probably will be made, but I think the main principle of it will probably triumph over all opposition.” By January 1786, Madison had been proved wrong: he wrote to Jefferson that ultimately, the “friends” of the revisal had been force to postpone the whole code until the next session.

In that next session, the bill again faced steep opposition. The “bill proportioning crimes and punishments, on which we were wrecked last year,” Madison reported to Jefferson, “has after undergoing a number of alterations got thro’ a Committee of the Whole,” but he expected a “vigorous attack” on the floor of the House. Part of the negotiations involved amending the bill’s contents – what Madison referred to as its “odious peculiarities.” But even after those changes, Madison reported to George Washington that it had been “thrown out on the third reading by a single vote.”

116 Ibid.
In trying to explain the defeat to Jefferson, Madison said one of the problems was, he suspected, the “rage against Horse stealers.” Because Virginia law punished horsestealing with the death penalty, the proposed bill represented a reduction of the penalty: it would only involve three years hard labor and restitution. Moreover, the legislature had declined to re-authorize the conditional pardon; since 1776, Virginia’s governors had been using conditional pardons to commute some death sentences to hard labor, but the act authorizing them had expired, and the Assembly had declined to reauthorize them. “By this event,” Madison lamented, “our old bloody code is fully restored.” Jefferson took the rejection broadly, attributing it to the fact that “the general idea of our country had not yet advanced” to the point of accepting Beccaria’s rejection of the death penalty. Some reformers wanted to reduce capital punishments, but not everyone agreed.

The failure of Jefferson’s bill meant that, as Abraham Vanhorn expired on July 8, 1791, Virginia’s legal system was, for the moment at least, still all or nothing. If Crane was found guilty of manslaughter, he would qualify for the benefit of clergy, and face no punishment at all. But if he was found guilty of murder, he would hang. There wasn’t much room in the middle. And, as the news of Vanhorn’s death spread, things did not look good for Crane.

In the days after Vanhorn’s death, newspapers as far north as Massachusetts began to pick up the story of the fight between him and John Crane. The first report of the incident, reprinted by papers in Philadelphia, New Jersey, New Haven, and

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123 Madison to Jefferson, February 15, 1787, 11:52
Massachusetts, was dated July 9, 1791, the day after Vanhorn’s death. The papers reported “the particulars of the unhappy affair, as related by some of the persons who were present when it happened.” According to these eyewitnesses:

The aggression originated with Crane, in a harvest field, as the deceased and some others, were going to dinner – that the same was renewed on their return from work a little before dark – that the deceased and Crane mutually agreed to box – that, a very short time after the commencement of the conflict, the deceased cried out – enough – and that his guts were out.

Although a jury of inquest had been called to look into the death, it had not yet returned a verdict. The report concluded by eulogizing Vanhorn, who “owned a team, and was held in high estimation by the merchants and others who had occasion for his services.”

Two days later, on July 11, Berkeley’s local paper, Shepherdstown’s Potowmac Guardian and Berkeley Advertiser, reported a similar story. Although it omitted the eulogy of Vanhorn, its assessment of Crane was no less critical:

The following melancholy transaction took place on Tuesday last, a few miles from this town – Mr. Abraham Vanhorne and Mr. John Crane being in-company with a number of other persons in a harvest field . . . some dispute arising between them, a recourse to blows was immediately had, but the former proving too powerful for the latter, who, finding himself in a situation bordering on a defeat, drew from his pocket a knife, and in a most dastardly and barbarous manner thrust it into the body of Mr. Vanhorne, and wounded him in such a manner that he immediately fell! – he was then taken up and carried to Mr. Campbell’s, where he lay in the most excruciating pain until Thursday morning, when he expired.

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“Crane,” the report advised, “was secured, and has since been safely lodged in Martinsburg gaol.” The coroner’s inquest had by this time concluded; “their verdict: willful murder.”

Then another story hit, the day after the coroner’s inquest. This one, which was not printed in Shepherdstown but did appear in papers throughout the country, contained brand new and shocking information:

Mr. Abraham Van Horne, an inhabitant of that neighborhood, who kept and drove a team for several years past, had just returned from a journey – his horses being fatigued, they were turned loose, in order to give them an opportunity to recreate themselves. In a few minutes afterwards, two of them broke into a wheat field belonging to Mr. John Crane, and, without doubt, did some damage to the proprietor. Mr. Crane having received intelligence that the horses were in his field, immediately repaired thither – cut out the horses’ eyes – tied a bunch of straw to each of their tails, set it on fire and drove them away. . . .

The paper condemned Crane’s “ungovernable disposition,” which, “heated by passion and resentment, knew no bound, but pressed on, with eagle swiftness, the heart it surrounded to obtain a further satisfaction of the inoffensive owner of the beasts.”

According to the story:

Mr. Vanhorne, on hearing of the fate of his horses, went to Crane and remonstrated with him on the impropriety of treating his property in the manner above mentioned. High words arose, and the consequence was that Mr. Vanhorne received a wound in the lower part of his belly given by his adversary with a knife, which let out his bowels, and he died immediately. Thus perished, in the bloom of life a young and useful member of society; particularly distinguished among his neighbors as a peaceable, inoffensive man, and lamented by all with whom he was acquainted.

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126 “Shepherd’s-Town July 11,” *The Potowmack Guardian and Berkeley Advertiser* (Shepherdstown, VA), July 11, 1791.
128 Ibid.
The story was attributed to a “gentleman of veracity,” but it contained some inaccuracies. First, Vanhorn had not died immediately; second, all other accounts would emphasize an extended back-and-forth, as well as a mutual agreement to fight, before Vanhorn was stabbed. The story about Vanhorn’s horses would appear nowhere else in the preserved record, but it certainly provided an explanation – a reason for the explosion of conflict between Crane and Campbell’s reapers.

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Once the coroner’s inquest decided that Vanhorn’s death was the result of “willful murder,” it set the court process into motion. In 1791, Virginia’s court system had, after the inquest, two stages. First, the county court examining court – a called assembly of the Berkeley County Justices of the Peace – would decide whether to release Crane for good, or to send him on for indictment and potential trial at the Winchester District Court in September. Crane’s examining court was scheduled for July 13.

Crane’s case was likely to come down to murder or manslaughter, and that difference depended on the very facts that the papers stressed: provocation, proportionate response, and what the eighteenth century liked to call “depravity.” As Blackstone’s Commentaries explained it, manslaughter arose “from the sudden heat of the passions, murder from the wickedness of the heart.”129 If “upon a sudden quarrel, two persons fight, and one of them kills the other, this is manslaughter;” indeed, even if they quarreled and decided to “go fight in a field” it was still manslaughter, the Commentaries explained, because it was “one continued act of

129 Tucker, Blackstone’s Commentaries with Notes of Reference, 5:190.
passion.”\textsuperscript{130} On the other hand, if there was sufficient time to cool off between encounters, it was murder – “deliberate revenge and not heat of blood.”\textsuperscript{131} Or, as one 1796 case from North Carolina would later explain it, if the provocation would “in ordinary tempers have produced only a slight resentment … and yet the person offended has attached and beaten the other, in such a manner or with such a weapon as shews an intent to kill, and not only to chastise; and in beating he has killed the other, the law will deem it murder.”\textsuperscript{132}

The newspapers had already foreshadowed these considerations. They portrayed Vanhorn – a responsible man who “owned a team” – as someone who responded with moderation when Crane maimed his horses: instead of retaliating in kind, he went to Crane and “remonstrated with him on the impropriety of treating his property in the manner above mentioned.”\textsuperscript{133} Although the “remonstrated” was surely somewhat euphemistic, Vanhorn had confronted Crane with appropriately manly firmness, but not violence. Crane, on the other hand, was the paradigm of the excessive response. In one report, his excessiveness was portrayed as his use of a weapon when Vanhorn had him pinned on the ground – “in a situation bordering on a defeat” – Crane “drew from his pocket a knife” and “in a most dastardly and barbarous manner thrust it into the body of Mr. Vanhorne.”\textsuperscript{134} Another report focused on his overly brutal response to the fact that Vanhorn’s horses had trampled his wheat. These horses “without doubt,” as the newspapers reported, had caused

\textsuperscript{130} Ibid.
\textsuperscript{131} Ibid., 5:191.
\textsuperscript{132} State v. Norris, 2 N.C. 429 (Superior Courts of Law and Equity of North Carolina, 1796).
\textsuperscript{133} “Frederick-Town, July 12,” ClayPoole’s Daily Advertiser (Philadelphia, PA), July 27, 1791.
\textsuperscript{134} “Shepherd’s-Town July 11,” The Potowmack Guardian and Berkeley Advertiser (Shepherdstown, VA), July 11, 1791.
damage to Crane’s crop – his livelihood. This was a significant injury. But Crane then revenged himself in excess – by gouging out the horses’ eyes, and setting their tails on fire, and then killing Vanhorn himself. Their description of Crane’s behavior foreshadowed what would be one of the law’s principal considerations: whether Crane had a “wicked heart.”

While newspapers circulated reports of Crane’s crime and Crane prepared to face the Commonwealth’s courts, something else was also percolating: Virginia law reform – again. While the papers covered the Crane case and told stories of Vanhorn’s moderation and Crane’s “ungovernable disposition,” they also continued the conversation about criminal punishment. The issue had never really died. After all, the same newspapers that covered America’s murders also, at times, carried essays by Dr. Benjamin Rush, the signer of the Declaration of Independence and cutting-edge Philadelphia physician, who repeated arguments that execution was beyond the authority of the republican state and that it actually increased murder by lessening the “horror of taking away human life.” And now, in 1791, Virginia’s General Assembly had recently appointed yet another committee to look into the revision of the laws – including its criminal ones.

In July 1791, the revisers were in Williamsburg, meeting to divide up the work. The man who would take charge of the criminal reforms was a young judge and William and Mary law professor named St. George Tucker – the very man who, if Crane faced trial at Winchester, would preside over his trial.

Meanwhile, in the Martinsburg jail, John Crane waited.

135 Tucker, Blackstone’s Commentaries with Notes of Reference 5:190.
136 “An Enquiry into the Justice and Policy of Punishing Murder with Death,” American Herald (Boston), October 9, 1788.
While John Crane sat in the Martinsburg jail, awaiting his examining court, Judge St. George Tucker was across the state in Williamsburg, working long hours in the study of his rambling house on Market Square. From the very first days of the new republic, Tucker had been in the thick of Virginia’s hottest legal questions. And now, in 1791, he was quickly becoming America’s most important legal scholar. The Professor of Law and Police at the College of William and Mary, Tucker was also a judge on Virginia’s General Court and was scheduled to preside on the Winchester Circuit in September. This meant that if Crane faced trial for Vanhorn’s death, Tucker would be his judge.

That July, the judge was busy. Tucker’s arduous judicial schedule required him to ride circuit around the state in the fall and spring, and to sit at the Richmond sessions of the General Court in November and June. As a result, the judge had to fit in his law lectures around his court responsibilities, teaching two terms in the winter and summer during the judicial recess. So, in July, Tucker’s students crowded into his Williamsburg study, listening to their teacher lecture. But judicial travels and law teaching weren’t Tucker’s only responsibilities. In March, he had enthusiastically accepted an appointment to a committee to revise Virginia’s laws.137 And, during

July, the revisers – mostly judges, along with a few members of the Virginia legislature – were meeting in Williamsburg, divvying up their work.\footnote{138}{Charles T. Cullen, “Completing the Revisal of the Laws of Virginia,” \textit{The Virginia Magazine of History and Biography} 82, no. 1 (1974): 84-99.} 

So, in July 1791, as St. George Tucker busied himself with his students and with meetings with Virginia’s revisers of the laws, there was a lot to deal with. He had been teaching and working on the revisal all summer, and was now about to ride into the wilderness of western Virginia for two months, where it would be difficult to reach him. The responsibilities of the circuit were so arduous that Tucker had thought about quitting – the long absences made him, he complained, “almost a stranger to my own house.” His two year old daughter had even begun to refer to the children’s tutor as “papa.”\footnote{139}{Phillip Hamilton, \textit{The Making and Unmaking of a Revolutionary Family: The Tuckers of Virginia, 1752-1830} (Charlottesville: University of Virginia Press, 2003).} 

But although Tucker disliked some of the law’s demands – the travel, some of the more mundane parts of practice, and more – he was also fascinated by it. As one of his law students praised, Professor Tucker “is more luminous on the subject of law than any man I ever saw.”\footnote{140}{William T. Berry to his brother, January 30, 1804, quoted by Charles T. Cullen, \textit{St. George Tucker and Law in Virginia, 1772-1804} (New York: Garland Publishing, 1987), 132.} The law was many things to Tucker – livelihood, security, political tool. But beneath all its parts – the writs and the errors, the verdicts and the appeals, the lawyers, juries, and judges – thinking about law was one of St. George Tucker’s favorite pastimes. 

And, in the 1790s, that increasingly meant one particular, essential thing: democracy. A republic, he told his law students, was a type of government that, in
America, was “to be considered as a Govt. of the people; as a pure democracy.”

And democracy’s fundamental principles were clear. The people “have a right to uniform government,” and “no free government, and the blessing of liberty, can be preserved to the people, but by a firm adherence to Justice, moderation, temperance, frugality, and Virtue – and by frequent recurrence to fundamental principles.” This, he concluded, “is the principle of a Democracy.”

In 1791, the meaning of democracy wasn’t merely a theoretical inquiry. For centuries, theorists had pontificated on political forms, but now those theories were being met with the opportunity for practical application. As John Adams had exulted to George Wythe in 1776, “You and I, dear friend, have been sent into life at a time when the greatest lawgivers of antiquity would have wished to live. How few of the human race have ever enjoyed an opportunity of making an election of government . . . for themselves or their children!”

Over the past fifteen years, Virginians had formed not one, not two, but three governments: their own state government, the first central government under the Articles of Confederation, and now the new federal government – whose architects were overwhelmingly Virginian. Everyone, it seemed, wanted new laws; figuring out what those new laws should be was, however, more difficult.

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In August, Tucker summed up his summer for his stepson, John Randolph, who was away at Columbia College: “When at home, I have been completely

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142 Ibid., 2-3.
143 John Adams to George Wythe, printed in pamphlet form as “Thoughts on Government,” (Philadelphia: John Dunlap, 1776).
absorbed by duties of one kind or another. Though very unwell, I have for these six weeks been engaged in the business of a revisal of our laws – besides my duty as a professor with the college. Add to these a thousand private concerns . . . .”

Those private concerns were indeed many. It had been a rough few years – years of war, years of a failing Virginia economy, years of restarting his law practice to make ends meet. Then, in 1789, his wife Frances had died from complications of childbirth, leaving a devastated husband and five children, as well as three teenaged sons from her first marriage.

With St. George and Frances, it had been love at first sight. They had met in 1778, at Bruton Parish Church in Williamsburg, on a day of celebration and prayer declared by Virginia’s governor in honor of the recent victory at Saratoga. Almost forty years later, Tucker recalled the scene. Slipping in late, “I happened unwittingly to take my seat next to a pew in which all the Ladies were kneeling most devoutly.” There, he “discovered a face I had seen some years before, with an infant in her Arms: she was now a Widow! And from that moment, had I been a Roman Catholic I should have applied to the Pope for absolution from my Vow.”

Frances Bland Randolph Tucker had been a good catch – she was the daughter of the wealthy Theodorick Bland of Cawsons, and the widow of John Randolph, heir to three large plantations – but it was also a match of great affection for both parties. As a widow, Frances had charge of her considerable estates, and had no need to remarry, but found incentive in the lively and engaging Tucker. For her part, Frances

144 Tucker to John Randolph, August 18, 1791, John Randolph Papers, Small Special Collections, University of Virginia.
145 Tucker to Robert Walsh, 1812, quoted in Hamilton, Making and Unmaking of a Revolutionary Family, 40.
was known as a woman of “quick intelligence,” much like her son John Randolph (later known as “of Roanoke”), who would later become a fearsome and erudite U.S. Representative. As one Virginian later remembered, “It was the joy of my boyhood to sit at [my tutor, Mr.] Robinson’s knee and listen to his conversations with my father and John Randolph’s mother, who lived at Matoax. The world thought that her son spake as never man spake; but she could charm a bird out of a tree by the music of her tongue.”

When Frances died in 1789, Tucker had been inconsolable. He had taken to his room for weeks – “Mr. Tucker’s grief,” the children’s tutor, John Coulter, recorded, “will not permit him to say anything.” In his seclusion, he poured out his anguish onto paper.

Come gentle Sleep and weigh my eyelids down
And o’er my senses shed oblivion’s balm,
‘Ts thine alone corroding care to drown,
‘Ts thine alone the troubled soul to calm

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This bed the scene of all my joys and woes
Awakes Remembrance with her busy train,
Where Bliss unrivaled used to court repose,
Unrivalled Sorrow wakes to endless pain.

Dear partner of my blissful hour and care
Friend of my soul, and mistress of my heart
With thee, e’en wretchedness could bliss appear,
Without thee, even blessings yield a smart.

Come then O Sleep, on downy pinions come
By dreams attended, hover ‘round my head,
Convey my sorrows to the silent tomb

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147 Ibid., 69.
And raise a sleeping angel from the dead.

After Frances’s death, Tucker had moved his family to Williamsburg, and taken up both the professorship and his judgeship. But his grief remained. As he wrote in 1790:

O Death! Thy fatal triumph still I feel,
Thy venom’d dart still rankles in my heart;
My Wounds what human medicine can heal!
What, less than pow’z divine, can ease their Smart?

And now, more tragedy loomed. His stepson Theodorick was ill, and had been for wasting away for several years. Theodorick was currently in Bermuda, Tucker’s homeland, visiting with Tucker’s mother and siblings in hopes that the climate would lead to improvement. But, as St. George confided to Theodorick’s brother John in August 1791, “I have no hope of his recovery.”

As if that wasn’t enough, there was more to worry about. Tucker’s third stepson, Richard Randolph, was also in trouble – of a different sort. Tucker had long worried about Frances’s eldest son; although the judge was adamant about education, in 1786 he had been reluctant to send Richard away for school because he was torn between “my wishes for the improvement of his head, and my fears for the corruption of his heart.” After all, “[i]n such a place as Williamsburg it is at his age hard – trusting a Boy to his own head, & the steps which I had taken to serve as a Check to the imprudence of youth appear to be perfectly futile & ineffectual.” Now, Richard had moved to one of his father’s plantations, Matoax, with his new bride, Judith, and

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150 Ibid.
151 Tucker to Frances Bland Randolph Tucker, April 27, 1786, in Tucker-Coleman Papers.
152 Ibid.
– despite Virginia’s stumbling economy – was entertaining lavishly, drawing on the already-strapped estates of his father and uncle to which Richard was an heir.

Soon Tucker and his estate manager were inundated with requests from Richard for money and supplies, sometimes more than once per week. “Dear Sir,” Richard wrote in one such missive in June 1790, “I have company and was obliged to pay the whole of the sum you sent me to discharge a debt which I thought had been charged to the estate. If you can possibly let the Boy have that sum [two or three dollars] I shall thank you, as I shall be much embarrassed without it.” Three days later Richard wrote again, “I am obliged to call on you again – If you have the money you expected, I shall thank you to let me have it.” Frances’s death had left him less controllable than ever.

Even as he dealt with tragedy and crisis in 1791, St. George Tucker was becoming early America’s foremost legal scholar. This was, in some ways, unexpected. Born and raised in Bermuda, Tucker had come to Virginia in 1772, at the age of nineteen, to study law with George Wythe at the College of William and Mary. It was his first trip off of Bermuda, and letters from home repeatedly admonished him to be cautious. Known at home for practical jokes and a keen sense of humor, Tucker’s father warned him, “be Therefore always upon your guard not to offend in word or deed, nor let … wit get the better of prudence for a stroke of Satire sometimes wounds deeper than a two edged Sword, and what may be overlooked in your near friends and relations, by a Stranger may never be forgiven.” He had,

153 Richard Randolph to St. George Tucker, June 17, 1790, in Tucker-Coleman Papers.
154 Richard Randolph to St. George Tucker, June 20, 1790, in Tucker-Coleman Papers.
155 Henry Tucker Sr. to St. George Tucker, Nov. 30, 1771, in Tucker-Coleman Papers.
after all, as his oldest brother reminded him, now left the island, and entered “the grand Theatre of the World.”\textsuperscript{156}

In Bermuda, the Tuckers ran a successful shipping business, but after the Seven Years War the island’s economy had deteriorated and with it the family’s fortunes. Tucker’s father, Henry Tucker Sr., had felt compelled to look beyond Bermuda for opportunities for his sons. Thomas Tudor Tucker had gone to the University of Edinburgh to study medicine, and since St. George, the youngest, had shown an interest in law, the senior Tucker hoped to send him to study at the Inns of Court.\textsuperscript{157} But when “Tommy’s” Edinburgh education proved more expensive than planned and a Virginian visiting Bermuda remarked on the cheap legal education available at Virginia’s College of William and Mary, Henry Tucker had decided to send St. George to Virginia, for a temporary sojourn before finishing his education in London.\textsuperscript{158}

In Virginia, St. George quickly made friends with leading families – families who could provide valuable connections to him and kin back home. Some of Tucker’s first friends at the College were the sons of Thomas Nelson, Virginia’s powerful Secretary of State, whose job included assigning the lucrative clerk positions in the county courts, worth four to six hundred pounds per year.\textsuperscript{159} These were the jobs sought after by young lawyers, so an acquaintanceship with the Nelsons was key to integrating into Virginia’s legal profession – as Tucker’s father reminded

\begin{footnotes}
\item[157] Ibid., 17-18.
\item[158] Charles T. Cullen, \textit{St. George Tucker and Law in Virginia}, 6-9,
\item[159] Ibid., 11.
\end{footnotes}
him, the Secretary had “many pretty things in his gift.”\textsuperscript{160} For their part, the Nelsons were impressed with Tucker; Secretary Nelson wrote to Tucker’s father in Bermuda that he “observed with much satisfaction,” he wrote, “the growing intimacy” between St. George and his own sons. He commented on St. George’s “good sense, cheerfulness of disposition, and goodness of heart” which have “recommended him to some of the most respectable persons among us.”\textsuperscript{161} At William and Mary, Tucker also became close with John Page, Virginia’s future Governor, who had been raised at Rosewell, the most beautiful estate in the colony.\textsuperscript{162}

As Tucker completed his studies, Secretary Nelson appointed him to one of the coveted county court clerkships. But before Tucker could settle into his new post, Virginia’s revolutionary leaders began closing the colony’s courts, leaving the newly minted lawyer without his livelihood. This threw a considerable wrench into the Tucker family’s plans. St. George first thought of moving to South Carolina, where his brother Thomas Tudor Tucker had set up a medical practice. He then considered proposing marriage to a young Philadelphia woman whom he had met on his first voyage to Virginia; but her main asset, he admitted to his family, was her “very considerable fortune” which might rescue him from “the Trouble of prosecuting the dry and tedious study of law.”\textsuperscript{163} Tucker also tried to find other courts for his practice. In 1775, he obtained admission to the bar of Virginia’s General Court, its

\textsuperscript{160} Hamilton, \textit{Making and Unmaking of a Revolutionary Family}, 28.
\textsuperscript{161} Cullen, \textit{St. George Tucker and Law in Virginia}, 13.
\textsuperscript{163} Hamilton, \textit{Making and Unmaking of a Revolutionary Family}, 43.
superior court, which was still open for business; that court then itself closed almost immediately for the next three years.\(^{164}\)

Out of options and out of money, Tucker returned to Bermuda – what he called “that romantic spot, where peace, health, and poverty have created their joint dominion.”\(^{165}\) But the Tuckers were resourceful, and even in Bermuda the family soon found a way to capitalize on, as well as help, the patriot cause. The Continental Congress’s trade embargo had shut down the Tuckers’ shipping enterprises and impeded food supplies from getting to the island, but the family was instrumental in obtaining an exemption from the embargo for Bermuda – in exchange for a large amount of imperial gunpowder that was stored on the island, which the Tuckers and a few associates captured during a nighttime raid. They shipped it to the rebellious mainland colonies – much to the displeasure of Bermuda’s governor, who was a relative of the family.\(^{166}\)

But there were further opportunities. When St. George learned from John Page that “several people in Maryland and the Northern states,” were making “[i]mmense profit” by running goods past the British navy, the Tuckers soon turned their shipping expertise to a new operation – smuggling. They carried salt, sugar, guns, and munitions to the rebelling colonies and returned to the Caribbean with wheat, rice, tobacco, and indigo, largely from Virginia and South Carolina. Finally, thanks to war, it looked like their fortunes might turn after, as St. George’s brother

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\(^{165}\) Ibid., 12.  
Thomas Tudor Tucker put it, years of “having experienced so many bitter Disappointments and Difficulties.”

It was with these clandestine operations in full swing that, in late 1776, St. George seized the opportunity to return to Virginia to run the mainland end of the new family business. He sailed on a family ship full of salt and cotton, and sold the supplies to the desperate Virginia government for an £1800 pound profit. He also convinced a few Virginia friends to join the operation as partners and received government contracts for much-needed supplies.

Meanwhile, back in the new Commonwealth, Tucker quickly resumed his old connections. Even in the midst of war, Virginia’s social life went on, and Tucker was a favorite for his witty pen and his humorous, outgoing disposition. For instance, at the 1777 wedding of his friend Thomas Nelson and Sally Cary, Tucker was asked to give a poem at breakfast for the entertainment of the guests. He wrote “A Dream on Bridecake,” a playful ramble about his dreams the night before.

At length I sunk into a nap,
With head reclined in fancy’s lap;
She rubbed my temples, chaffed my brain,
And then displayed this scene of pain.
Methought, the claret I’d been drinking
So far from giving aid to thinking,
Had muddled my idea-box,
And clapped my body in the stocks.

Just then, my Flora passing by
This pretty objected chanced to spy;
The wanton saw my helpless case,
And clapped me in a warm embrace;
Her balmy lips to mine she pressed,
And leaned her bosom on my breast,
Her fingers everywhere were gadding.

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167 Ibid., 33.
... Then [she] cried, “Pray when will you be sober?”
“My dear,” said I, “not till October.”

The next morning the guests begged for yet another poem, and Tucker responded with “A Second Dream on Bridecake.” In this sequel, he was turned into a white silk stocking and purchased by his beloved “Flora,” who wore him to a wedding.

Tucker would continue to write poetry for the rest of his life, sometimes for publication, others as private jokes among friends.

But even as he ran with Virginia’s fast social scene, Tucker also turned his pen to more serious topics. The young lawyer turned smuggler wrote a poem entitled “Liberty: A Poem on the Independence of America,” which circulated widely in manuscript form during the American Revolution. Part of that poem had included an ode to George Washington, and ascribed to him biblical feats:

As when that chief, at whose august command,
The sun stood still on Gibeon's bloody plain,
Through Jordan pass'd into the promis'd land,
By Israel's wand'ring race long sought in vain:
Six days, her towering ramparts to destroy,
Round Jericho's proud walls his squadrons past:
The seventh, amidst triumphal shouts of joy,
The sacred Levites sound a mighty blast:
The tottering city trembles at the sound:
And her devoted walls fall thundering to the ground.

Washington was reported to have said that “Mr. St. George Tucker’s poem on liberty was equal to the reinforcement of 10,000 disciplined troops.”

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169 Ibid., 45.
170 Ibid.
But while Tucker continued to make his way in Virginia society, his financial situation again began to crumble. By 1778, commodity prices were fluctuating so rapidly that the family began to lose money between the purchase and sale of their cargo. To make matters worse, the Royal Navy had increased its presence in the Atlantic, making the entire venture more risky. A few ships were lost or captured, and by the end of the decade, the Tucker family’s newest attempt to make its fortune had also run aground. As St. George’s brother Henry lamented, “resignation is a Lesson we must all endeavor to learn.”

It was at that auspicious moment that Tucker had entered Bruton Parish Church in Williamsburg and met Frances Bland Randolph. Their marriage cemented Tucker’s social standing, and rescued Tucker from his financial woes. As one contemporary described it, “one must be very fatigued with hearing the name of Randolph mentioned in travelling in Virginia (for it is one of the most ancient families in the country) … and is likewise one of the most numerous and rich … I am not exaggerating when I say [the seven or eight branches of the family together] possess an income of upwards of a million of livres.”

Tucker moved with Frances and her three sons to her plantation at Matoax, 1305 acres on the Appomattox River, where they entertained friends and family even as they endured the ravages of war. “Mr. Tucker must be the best father-in-law [stepfather] in the world,” one frequent visitor to Matoax had commented during the


172 Hamilton, Making and Unmaking of a Revolutionary Family, 38.

173 Francois Jean, Marquis de Chastellux, Travels in North America (New York, 1828), 275.
1780s, “or his stepchildren would not be so fond of him.” She and Tucker soon had six more, five of whom survived: Frances (1779), Henry St. George (1780), Tudor (1782), Beverley (1784), and Elizabeth (1788).

In 1781, their domestic harmony was interrupted by the British invasion of Virginia. The invasion chased St. George, Frances, and the children to estates further and further inland. As Tucker reported to his brother-in-law, Theodorick Bland, Jr.:

“On the third inst., Patsy Bannister received a letter from her mother, acquainting her that the enemy were coming up the James River … your sister [Frances] had then been but five days mother to her last child. I need not descant,” Tucker continued, “on my own sensations on the occasion, but will only observe I was resolved to keep her utterly ignorant of the impending danger.” Upon hearing the next day that the enemy was near, Tucker “came to a resolution, whatever might be the consequence, to remove your sister &c., out of the way of danger.” They “abandoned Matoax, all of our effects, to their fate.” Theodorick’s and Frances’s parents had also fled from their land. “As you may have heard,” Tucker related, “the old gentleman has lost much by the absconding of his negroes,” but “the most valuable fellows have returned.” Tucker reported that “I have lost none, but have not been without a small share at least in the calamities of war, by the loss of some rum at Richmond; but it was too trifling a quantity for a man to break his heart about.”

After the invasion, Tucker joined groups of volunteers raised for protecting the state. He fought and was wounded by friendly fire in 1781 at the Battle of

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174 Hamilton, Making and Unmaking of a Revolutionary Family, 52.
175 Ibid., xii.
Guilford Courthouse and was then promoted to Lieutenant Colonel, serving until General Cornwallis’s surrender at Yorktown.  

After the war, the family’s life began to change as economic and political turmoil wracked the state, and the Tuckers watched as many of their friends and closest family members lost their financial battles. In 1787, Francis Tucker’s brother-in-law, John Banister, became so financially distressed that he could not even pay state taxes – even his “Chariot horses and several of my best Negroes” were taken in execution for his debts. A year later the embarrassed Banister died, overcome by the weight of his financial collapse. The Nelson and Page families, both of whom had been Tucker’s closest companions and friends since his first introduction to Virginia, also fell on hard times. Like John Banister, Tucker’s friend Thomas Nelson, Virginia’s former Governor whose father had opened the colonies social and professional doors for Tucker, also died in the midst of his financial woes.

Then there was the Randolph estate, inherited from Frances’s first husband. For years, the Virginia Assembly had managed to stall the collection of British debts, but when the Constitution was adopted, Tucker wrote to his stepsons about their pending fate. “That event, my dear children,” he wrote, referring to the adoption of the Constitution, “affects your interest more nearly than those of most others. The recovery of British debts can no longer be postponed, and there now seems to be a moral certainty that your patrimony will all go to satisfy the just debts of your Papa to the Hanbury’s.” He reminded them that “the consequence, my dear boys, must be

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179 Ibid., 74-75.
180 Ibid., 74.
obvious to you – your sole dependence must be on your own personal Abilities &
Exertions.”\textsuperscript{181}

In this new atmosphere, with old wealth crumbling and trade disrupted, Tucker concluded that Virginia had permanently changed. In the mid-1780s, Tucker decided that surviving in the future would depend on professional income, not landed wealth, and resumed his legal practice, first taking cases in county courts and then in the state superior courts.\textsuperscript{182} Tucker complained about the transition to his friend Robert Innes; writing to him in 1783, Innes agreed with Tucker that the “fall of a gentleman of ease and pleasure to one Laborious occupation is disagreeable indeed.”\textsuperscript{183}

Soon the man who had once called the study of law “dry and tedious,” was one of Virginia’s foremost lawyers. He was asked to offer arguments in some of the state’s most important cases, including the 1782 \textit{Case of the Prisoners}, in which he first advanced the idea that the Commonwealth’s courts had the power to review and strike down acts of the legislature they deemed contrary to the state constitution – what today is known as “judicial review.”\textsuperscript{184} In 1785, he wrote a pamphlet advocating greater power in the federal government to regulate commerce; in 1786, the Virginia Assembly appointed him to be a member of the commission that was to meet at Annapolis, to consider amendments to the Articles of Confederation. Tucker

\textsuperscript{181} St. George Tucker to John Randolph, Richard Randolph, and Theodorick Randolph, June 19, 1788, in Papers of John Randolph of Roanoke, #29670, Small Special Collections Library, University of Virginia.
\textsuperscript{183} Robert Innes to St. George Tucker March 25, 1783, in Tucker-Coleman Papers.
drafted resolutions to present at the convention, but instead the delegates opted to call another convention at Philadelphia, to revisit the Articles completely.

Then, in 1787, just as the convention in Philadelphia was completing a new Constitution, tragedy struck a double blow. First, Tucker’s father died in Bermuda after a short illness, leaving the family inconsolable; six months after the senior Tucker’s death, St. George received a report from back home that his Bermuda family’s grief had grown only more intense – “almost insupportable.”\textsuperscript{185} Then, in December 1787, Frances gave birth to a baby girl after a difficult labor. Her health had been frail for several years, and it was her ninth birth. This time she did not recover, and she died on January 18, 1788.\textsuperscript{186}

Frances’s death left left St. George a widower, but not alone – instead, he was in charge of a full household. There were the children, and the tutor, John Coalter, as well as his white housekeeper, Maria Rind, and also many slaves, mainly from the Randolph estates, who occasionally appeared, although usually anonymously, in the family’s correspondence.\textsuperscript{187} Indeed, Frances’s health in 1787 had been partially worsened by an impromptu sixty mile trip to her Chesterfield County lands, where “the extreme, and repeated Cruelty of the overseer” had led to “anarchy” and a near “Mutiny” amongst the slaves. Frances was concerned about the bondsmen and women, but also about the potential loss to the estate, since some of the “most valuable negroes have fled.”\textsuperscript{188}

\textsuperscript{185} Hamilton, \textit{Making and Unmaking of a Revolutionary Family}, 68.
\textsuperscript{186} Ibid., 69.
\textsuperscript{187} Ibid., 62-63 (on the Tuckers and slavery).
\textsuperscript{188} Ibid.
Frances’s death only accelerated Tucker’s changing ideas about property. From his boyhood, he had learned how to adapt to financial adversities, and now he applied those lessons to his current life with a vengeance. He moved his family from the Randolph plantation at Matoax into town in Williamsburg, where he purchased three lots and a house from his friend Governor Edmund Randolph. He explained the move by his desire to educate his children at the college “without parting from them under mine own eye,” but there were also financial considerations at play.\(^\text{189}\) Still convinced that Virginia’s economy was permanently altered, Tucker had sold the lands he had purchased since his marriage and began investing instead in banks and in companies promoting internal improvements.\(^\text{190}\) In 1789, Tucker accepted an appointment to Virginia’s General Court, and in 1790, he took over the professorship at William and Mary, happy to have the steady income. He also began to doubt the wisdom of continuing the slave system, and lectured to his law students about the impropriety and inhumanity of human bondage. “How frequently,” he remarked after summarizing the laws regarding slaves, “the law of nature has been set aside in favor of institutions which are the pure result of prejudice, usurpation, and Tyranny.”\(^\text{191}\)

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By 1791, St. George Tucker spent almost all of his time thinking about Virginia’s law – what it had been, what it was, and how it could be improved. These were questions that he pondered as he lectured his law students, wrote his opinions, and scribbled notes on the spare pages of his docket books while riding from court to

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\(^{189}\) Ibid., 78.


court. Although Tucker may have sometimes resented his profession and the financial burdens that made it necessary, it was also about more than money – indeed, Tucker was deeply interested in the law itself. He disliked the law as a merely practical subject – his short time apprenticing with his uncle in Bermuda and his Virginia county court practice had been miserable – but he strongly valued it for its theoretical and political dimensions. And, the 1780s and 1790s were brimming with such dimensions.

It was perhaps for this reason that Tucker had, in the summer of 1791, eagerly agreed to serve on a committee charged with revising Virginia’s laws. Revising the laws was no small task. It was something that successive committees of legislators, lawyers, and judges had attempted time and time again since 1776, but with only partial success. In 1789, Virginia’s former Attorney General and Governor Edmund Randolph advised the General Assembly that they should appoint a new committee to identify what laws were in force – itself a monumental effort – and to write single statutes compiling all the previous laws on a particular subject.192

Ultimately, the Assembly did just that. The committee was tasked with determining which English statutes were in force and suited to Virginia, which Virginia laws should be continued, and which should be discarded, as well as to “prepare marginal notes, and a full index to all the laws of this Commonwealth.”193 The new committee was made up of Randolph, an assortment of judges, members of the General Assembly, and the Attorney General. Tucker was on the list, and unlike the many Virginians who had tried to dodge the responsibility, he enthusiastically

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193 Ibid., 88.
accepted. Now, in July 1791, he was busy meeting with the rest of the revisers in Williamsburg, working to divvy up their new, large responsibility.

The task was daunting. As everyone in late eighteenth century Virginia knew, just figuring out what the state’s laws were was notoriously elusive. “Few gentleman,” Tucker wrote, “even of the profession … have ever been able to boast of possessing a complete collection” of the laws, and even the clerk of the General Assembly was himself missing many of the acts. For years, new laws had been, Tucker complained soon afterwards, scattered about in a “loose and slovenly manner,” dispersed throughout the state “in unbound, and even uncovered sheets, more like ephemerons than the perpetual rules of property, and of civil conduct in a state.” In 1782, as a practicing attorney, Tucker had even argued a case – and one in which men’s lives were at stake – without having ever seen a copy of the statute at issue. Even as he began to present his argument, which he had been asked to do as an amicus, Tucker had informed the court that “my Embarrassment is excessive on many Accounts – I have never seen the Treason Law.” And so poor was the availability of Virginia’s laws that sometimes attorneys produced unattested manuscript copies of laws during a lawsuit, and the court had to decide whether the seventeenth century

\[196\] Tucker, “Editor’s Preface,” 1:v.
manuscript was an actual Virginia law and, with nothing to compare it to, a true copy of that law.\textsuperscript{198} This was the nature of legal practice in early national Virginia.

But missing statutes weren’t the only problem. Even where statutes existed, it was often unclear what their effects should be. For instance, in 1776 the Virginia assembly had adopted a reception statute that instituted English common law and general parliamentary statutes passed prior to 1607 as the law of the land.\textsuperscript{199} But what did that mean? As some perceptive Virginians pointed out, this meant in practice that Virginians were stuck with old, unimproved English measures, many of which may had never been published in the state, and some of which had contained defects remedied by subsequent Parliaments but not included in Virginia’s reception statute.\textsuperscript{200}

At the same time, Virginia’s new laws also had problems. One in particular, abolishing the feudal property arrangements of primogeniture and entail, written by Jefferson, had passed, but Virginia lawyers and judges complained that it was poorly drafted and caused more problems than it fixed – as Virginia lawyer and recent governor Edmund Randolph remarked to James Madison, “the law of descents is in practice often found to be most unrighteous and difficult of execution. Nay I might say, that it is almost contradictory sometimes.”\textsuperscript{201} And that wasn’t the only problematic part of the code: no one could “explain the Act, intended to determine who shall be mulattoes, which makes a man more of a mulatto, in proportion as he is

\textsuperscript{198} Hobson, “\textit{Hudgins v. Wright, Nov. 11, 1806},” \textit{St. George Tuckers’ Law Reports}, 883-84.
\textsuperscript{199} Cullen, “Completing the Revisal of the Laws,” 84.
\textsuperscript{200} Ibid.
\textsuperscript{201} Edmund Randolph, “To James Madison from Edmund Randolph, March 27, 1789,” National Archives, \url{http://founders.archives.gov/documents/Madison/01-12-02-0029} (accessed [full date]).
more of a negro.” Indeed, Randolph admitted, some of the new laws were, he felt, “productive of very little benefit, if not of real harm in many instances.”

As a judge of the General Court and the state’s only law professor, figuring out Virginia’s laws was already Tucker’s job. Now, as a reviser, he would have the opportunity to solve some of the problems he encountered once and for all. This was about practice, but it was also about theory – particularly, democracy. The revisal, Tucker later explained, had been born of “political experiment” and “a desire to conform to the newly adopted principles of republican government.” And for Tucker, republican government came down to one essential ingredient: the people. In America, Tucker lectured to his law students, republican government was about democracy – indeed, it was “synonymous” with democracy. And for Tucker, the fundamental characteristic of such a democracy was the power of, and respect for, the people.

The American Revolution, he would write only a few years later, had ushered in a “new epoch” in world history. Blackstone had said that the “original written compact of society had, perhaps, in no instance, been ever formally expressed, at the first institution of a state.” But, Tucker advised, this was now incorrect. Whereas previous generations had philosophized about social contracts, Americans had made them real, by “reducing to practice, what, before, had been supposed to exist only in the visionary speculations of theoretical writers.” With America’s written constitutions, “the world, for the first time since the annals of its inhabitants began,

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202 Ibid.
203 Ibid.
204 Tucker, *Blackstone’s Commentaries with Notes of Reference*, 1:x.
saw an original written compact formed by the free and deliberate voices of individuals disposed to unite in the same social bonds; thus exhibiting a political phenomenon unknown to former ages.\textsuperscript{207} This constitution, including the new federal constitution, set forth “limits, which cannot be transgressed without offending against the greater power from whom all authority, among us, is derived; to wit, the PEOPLE.”\textsuperscript{208}

This was different from Britain. American democracy had, Tucker explained, introduced a new type of government into the “western hemisphere.” In this new government, the “indefinite and unlimited power of the people, in whom sovereignty ultimately resides” was opposed to the limited and “definite” powers of the state legislatures and the federal government. Here, “power is not usurped but delegated, and authority is a trust not a right.”\textsuperscript{209} Tucker was proud of the ways in which the new American government differed from Britain. Indeed, when it came to the Constitution, he told his students, “all its defects arise from some degree of approximation to the nature of the British Government.”\textsuperscript{210}

For his law students, Tucker focused mainly on laying out the structure of the federal constitution. But even as he discussed the balance of power among the branches and between the state and federal governments, he structured his discussion around a particular question: to what extent was the new government “conformable to the nature of a democracy”? His answer: the federal Constitution was “another

\textsuperscript{207} Ibid.
\textsuperscript{208} Ibid.
\textsuperscript{209} Ibid., 1:Appendix A. 5.
\textsuperscript{210} Tucker, “Ten Notebooks of Law Lectures,” 1:57.
instance of the immediate exercise of the sovereign power by the people in their collective and individual capacity.”\textsuperscript{211}

The people’s role was, of course, complicated. “The people,” Tucker advised his law students, “are in some respects the sovereign, and in others the subject. When they establish fundamental laws,” he explained, “or appoint magistrates, they are sovereign. When the laws are established, and the magistrate appointed, every individual becomes a subject.”\textsuperscript{212} Moreover, the moment a magistrate or legislature left his official post, he was again a citizen – “when the member quits his seat, or the magistrate descends from the bench he is instantly one of the people.”\textsuperscript{213}

But the people’s role did not stop once they had established fundamental laws. Instead, their direct control over the governing process continued afterwards through, among other things, instructions to their representatives. Tucker eschewed any notion that the people should acquiesce to the wisdom of their superiors. Instead, he emphasized, “in a popular government, the Representative is bound to speak the sense of his constituents upon every subject, where he is informed of it.” Anything else, he declared, would be an “Aristocracy.”\textsuperscript{214}

After all, the people knew their interests better than anyone else. “The aggregate of mankind,” Tucker wrote, understand their own interest and their own happiness better than any individual: they never can be supposed to have resigned the

\begin{footnotes}
\item[211] Ibid., 5.
\item[212] Ibid., 2.
\item[213] Ibid., 52.
\item[214] Ibid., 21.
\end{footnotes}
Right of judging for themselves to any set of men whatsoever.” It was, he concluded, “a right which can never be voluntarily resigned.”

Tucker’s emphasis on the capacity of the people was especially striking given Virginia’s recent history. In the 1770s and 1780s, as Virginia’s traditional ruling gentry had taken posts in the continental government and served as officers in the field, other men had moved into offices, including the Assembly, that had been previously reserved to only a few families. There, they had passed measures that some elites found unpalatable. As the Marquis de Chastellux remarked during his 1782 travels through Virginia, “In the present revolution, the ancient families have seen, with pain, new men occupying distinguished stations in the army and in the magistracy.” This “popular party have maintained their ground,” and had struck at the old elite with a vengeance; as Chastellux noted, “it is only to be regretted that they have not displayed the same activity in combating the English, as in disputing precedence” – i.e., social rank.

The demands of the war had especially prompted middling and lower class Virginians to assert their rights. After attempts to draft poor Virginians into the defense of the state resulted in riots, the Assembly laid high taxes on the wealthy in order to fund bounties for new recruits. St. George Tucker’s father-in-law, Theodorick Bland, complained that he had paid £1435 for himself, and £524 for his son in one county and around £600 in another, to pay their portion towards the hire of soldiers for Revolutionary service. “Such laws,” Bland complained, “I believe will

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215 Ibid., 27.
216 Chastellux, Travels in North America, 291.
217 For a good discussion of class and Virginia’s military recruitment efforts, see Michael A. McDonnell, “Class War? Class Struggles During the American Revolution in Virginia,” William and Mary Quarterly 3rd Series 63, no. 2 (2006): 305-344.
soon reduce the most opulent fortune to a level with that of the inferior class of people, especially if the assembly continues to put the power of taxation into the hands of the very lowest class of people, which they have done in this instance."²¹⁸ A year later, he was describing the assembly as “enemies of America, or fools or knaves” who, he suspected, were attempting to bring on “a revolution in this state” – by which he meant a social revolution.²¹⁹

In the early 1780s, St. George Tucker also doubted the wisdom of the Assembly. After a new election in 1782, he wrote that he hoped that the new house would show “more wisdom, foresight, and stability of conduct,” but feared that “a general misconception of the people, originating partly in their own inattention, and partly to the studied fallacy in the arguments of those who court popularity” would repeal a tax that Tucker thought would have produced much benefit.²²⁰ But despite his misgivings about some of the efforts of Virginia’s Assembly, Tucker continued to insist on the importance of the people – not merely their sovereignty but also their capacity – even as others were beginning to have misgivings.

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Tragedy, poverty, democracy – all this would have been in Tucker’s mind as he worked hard on his lectures and the revisal in July 1791. It was a busy summer – lectures, revising the law, and preparing for his fall circuit. There was one bright spot, however – an upcoming marriage to Lelia Carter, the twenty-four year old widow who served as a tutor for his daughter, Frances.²²¹ Although happy, Tucker

²¹⁸ Col. Theodorick Bland to Dr. Theodorick Bland, October 21, 1780, in The Bland Papers, 1:37.
²¹⁹ Col. Theodorick Bland to Dr. Theodorick Bland, January 8, 1781, in The Bland Papers, 1:51.
²²⁰ St. George Tucker to Dr. Theodorick Bland, May 2, 1782, in The Bland Papers, 1:79.
²²¹ Hamilton, Making and Unmaking of a Revolutionary Family, 79.
seemed less effusive about this second match – maybe it was age, or discretion, or the many additional cares with which he was faced.

But, after several difficult years, this was, at last, something good. Since early 1790, his newly remarried friend John Page had been writing him from Congress, enthusiastically relating the delights of his own bride. “I am truly happy my dear Tucker – Sanguine as my Expectations were, I do assure you I had no Idea of ever being so happy – Heaven seems to have found Miss Lowther to make me happy!” 222 A few weeks later, after noting that he had received Tucker’s last letter while “in bed with my wife,” he added, “Oh Tucker, how I wish you were blest with such a Wife as I am!” Now, after almost four years as a widower, Tucker would have a companion of his own.

The wedding was set for October. In between, a long circuit loomed – first to Winchester, then further west to Monongalia. In the meantime, Tucker would have plenty to think about. The revisers had not had a cordial meeting; they had divided up their tasks, but they had different ideas as to what their aims should be. Tucker was strongly of the opinion that they should be allowed to propose revisions to the laws, as well as to merely catalogue existing ones. James Monroe disagreed; he reported to Jefferson that the question had arisen whether the revisers should “prepare a bill conformable to the law as it now stands,” or whether they could, as he sarcastically described it, “propose on it any new project they thought fit.” Monroe, William Nelson, and Judge Joseph Prentis thought they should confine themselves to existing enactments, but Judge Tazewell, Arthur Lee, and Tucker were more

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222 John Page to St. George Tucker, April 18, 1790, in Tucker-Coleman Papers.
ambitious. The committee had compromised by deciding that any member who thought an existing “policy defective might prepare a bill for the purpose of amending it,” which would, with the approval of the committee, be sent to the legislature along with the bill merely re-enacting existing law. Monroe was still not sure, however, how the revisers who disagreed with him, “particularly Tucker and Lee” would “execute their part” – he seemed to doubt that Tucker would abide by the bargain.

Tucker was apparently, from Monroe’s perspective, making trouble. Perhaps it was because he had the old, 1776 revisal in mind, with its ambitious attempts to reshape Virginia’s government. Perhaps it was because Tucker’s long experience and innovative temperament meant that merely compiling old, flawed laws was distasteful to him. But it was also, perhaps, because he seems to have been assigned the criminal law, with its train of capital offenses. Monroe wrote to Tucker in late July that, in reviewing his own assignment to review and compile the laws respecting awarding of costs in litigation, he encountered provisions giving costs in “malicious prosecutions,” which seemed to “fall under your consideration in the instance refere’d to above.” As a result, he felt it “necessary to mention it to you.” Tucker, it seems, had been assigned the criminal portion of the revisal.

So as Tucker made the long trek to Winchester, it is likely that he was thinking not only about law in general, but about something specific: Virginia’s

223 Cullen, “Completing the Revisal of the Laws,” 93-94.
225 Ibid.; See James Monroe to St. George Tucker, August 18, 1791, in St. George Tucker Papers, Library of Congress, reprinted in The Papers of James Monroe, 2:508-09. Monroe referenced a criminal provision that was included in his assignment, that he thought was more appropriately included with Tucker’s portion, suggesting that Tucker had been assigned the criminal portion of the revisal.
226 Ibid., 508-09.
deeply flawed, yet unreformed, criminal laws. If this was the case, no wonder Tucker resisted merely copying and compiling existing statutes. In August 1791, his thoughts would have naturally been inclined to a particular subject: what should it mean, in Virginia, to punish crime?
July 13, 1791:
Crane’s Examination in Berkeley County

As St. George Tucker prepared for his September circuit, John Crane sat in the Martinsburg jail, awaiting his examination in the Berkeley County Court. It must have been uncomfortable – jails at this time always were – and a scandal. A murder alone was enough to absorb the attention of the county, but this was more. Crane was part of the tight, elite Eastern Virginia power circles that had, for so long, run the county. His in-laws were High Sheriffs, his father their deputy. Now, he was about to be on trial.

In the 1790s, Virginians tolerated a fair degree of violence. Travelers liked to remark upon it – on the rough fights, the brutality of the slave system, and the wide class disparities that kept poor Virginians down. But Virginia’s violence also had rules – and, by allegedly stabbing Vanhorn, John Crane had broken those rules. Now, the question was, what – if anything – would Virginia’s courts do about it?

The court system that Crane confronted in 1791 was just emerging from a period of reform. During the colonial era there had been two types of courts: the county courts and the General Court in Williamsburg. County courts were administrative and judicial bodies, staffed by local justices of the peace who were nominated by existing justices and appointed by the Governor. These local elites appointed overseers of the roads, dealt with the poor, bound out orphans, and also dealt with civil actions and minor crimes. Nothing, in other words, for which the punishment threatened “life or member.” The colonial General Court, on the other hand, had been made up of the members of the Governor’s Council, and sat two
months a year in Williamsburg. It had both original and appellate jurisdiction in civil actions where the amount in controversy was over £10 and exclusive jurisdiction over felonies.¹ Although the General Court had exclusive jurisdiction for trying felonies, the process was nonetheless two-tiered. When felonies arose, an examining court, or “called court,” would meet locally in the counties to consider the evidence against those charged and determine whether it was sufficient to bind the accused over for trial at the capital. A “guilty” verdict from the county justices sent the offender on to Williamsburg to face the grand jury, trial, and, perhaps, execution. The county court could also declare the offender “not guilty,” thus insulating him or her from further prosecution.

By the time John Crane faced trial, this had changed – somewhat. In the 1780s, even as the “Bill for Proportioning Crimes and Punishments” had failed, James Madison had succeeded in achieving court reform. The Virginia Constitution had already created separate courts of law and equity and a new Court of Appeals which heard appeals from both types of tribunals; the General Court had continued to hear both original cases at law and appeals from county courts. In 1788, the legislature took the additional step of dividing up the General Court’s responsibilities, and its judges, among new district courts. These new courts were assize courts, each staffed by two General Court judges like St. George Tucker, who traveled on circuit throughout the Commonwealth to hear cases within the General Court’s jurisdiction.

In 1791, there were five circuits, with two to five district courts within each circuit. District courts were held twice a year, once in the fall and once in the spring. The General Court continued to exist: if at a district court proceeding the two presiding district judges disagreed on a case, or if it was otherwise troublesome, they could refer “for difficulty” to the General Court, which was now essentially the district court judges assembled *en banc*.

For Crane, these changes meant that he would essentially be tried twice, both times near home.

The Berkeley justices were still responsible for the first stage of the process. As in the colonial era, their job was to convene an examining court to determine whether or not Crane was, in their opinion, guilty of murder. If they decided that he was, he would be bound over to the Winchester District Court for indictment and trial during its next court session in September. If, on the other hand, they decided that he was innocent and declined to send him to Winchester, Crane would be discharged – for good.

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In the late eighteenth century, Virginia was famous for a certain type of violence: the “no holts barred” fight, which usually ended with gouging, ear-biting, or castration. In the 1780s, traveler Isaac Weld observed these fights with horror. “Whenever these people come to blows,” he related, “they fight just like wild beasts, biting, kicking, and endeavoring to tear each other’s eyes out with their nails. It is by no means uncommon to meet those who have lost an eye in combat, and there are

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2 See, e.g., Culllen, *St. George Tucker and Law in Virginia*, 71-82.
3 The Virginia General Court mentioned this principle a few years later in *Commonwealth v. Samuel Myers*, 3 Va. Cas. 188 (1811), but it was in operation earlier. See Hugh Rankin, *Criminal Trial Proceedings in the General Court of Colonial Virginia* (Charlottesville: University of Virginia Press for the Colonial Williamsburg Foundation, 1965), 78-79.
men who pride themselves on the dexterity with which they can scoop one out.”

Weld then described the process:

To perform the horrid operation, the combatant twists his forefingers in the side locks of his adversary’s hair, and then applies his thumbs to the bottom of the eye, to force it out of the socket. If ever there is a battle, in which neither of those engaged loses an eye, their faces are however generally cut in a shocking manner. But was is worse than all, these wretches in their combat endeavor to their utmost to tear out each other’s testicles. Four or five instances came to my own observation, as I passed through Maryland and Virginia, of men being confined in their beds from the injuries which they had received of this nature in a fight.4

Nor was this just a Virginian pastime: “in the Carolinas and Georgia,” Weld explained, “I have been credibly assured, that the people are still more depraved in this respect than in Virginia.”5

Other travelers left similar accounts. One anonymous English observer – the translator of French military officer and Revolutionary War veteran François Jean de Beauvoir, Marquis de Chastellux’s famous account of his travels in North America—described “the Virginian mode of fighting” this way:

In their combats, unless specifically precluded, they are admitted (to use their own term) “to bite and gouge,” which operations, when the first onset with fists is over, consists in fastening on the nose or ears of their adversaries with their teeth, and dexterously scooping out an eye; on which account it is no uncommon occurrence to meet men in the prime of youth, deprived of one of those organs. This is no traveler’s exaggeration, I speak from knowledge and observation.6

The anonymous Englishman had himself had barely avoided such a fight at Leesburgh – less than thirty miles from where the fight between Vanhorn and Crane

5 Ibid.
6 Chastellux, Travels, 293 Transl. note.
took place. His account of the day demonstrates the salient mix of Virginian pleasantry, leisure, and violence:

During a day’s residence at Leesburgh, I was myself accidentally drawn into one of these parties, where I soon experienced the strength of the liquor, which was concealed by the refreshing coolness of the water. While we were seated round the spring, at the edge of a delightful wood, four or five countrymen arrived, headed by a veteran Cyclops, the terror of the neighborhood, ready on every occasion to risk his remaining eye. We soon found ourselves under the necessity of relinquishing our posts, and making our escape from these fellows, who evidently sought to provoke a quarrel.

The day, however, was not over:

On our return home, whilst I was rejoicing at our good fortune, and admiring the moderation of my company, we arrived at a plain spot of ground by a wood side, on which my horse no sooner set foot, than taking the bit between his teeth, off he went at full speed attended by the whoops and hallooings of my companions…at the end of half a mile my horse stopped short, as if he had been shot, and threw me with considerable violence over his head.

The visitor soon discovered that he had been the butt of a joke. “The company,” he remembered, “rode up, delighted with the adventure; and it was then, for the first time, I discovered that I had been purposely induced, by one of my friends, to change horses with him for the afternoon.” The horse “had been accustomed to similar exploits on the race ground; that the whole of the business was neither more nor less than a Virginian piece of pleasantry.” His “friends,” he also learned at the end of the day, “thought they had exhibited great moderation in not exposing me, at the spring, to the effects of ‘biting and gouging.’”

The joke had, perhaps, been provoked by the traveler’s attitude towards Virginia. In his notes, he described the state derisively and indicated the feelings he may have done a poor job concealing from his hosts: “The indolence and dissipation

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7 Ibid.
of the middling and lower classes of white inhabitants of Virginia,” he affirmed, “are such as to give pain to every reflecting mind. Horse-racing, cock-fighting, and boxing-matches, are standing amusements, for which they neglect all business; and in the latter of which they conduct themselves with a barbarity worthy of their savage neighbors.”  

Perhaps his “friends” had enjoyed scaring their snobbish visitor.

But even if the English traveler had been played for a fool, the fights were very real, and their causes could be trivial. New Jersey native Philip Vickers Fithian, who was in Virginia serving as a tutor for the wealthy Carter family, scathingly described the types of incidents that could lead to violence. Perhaps, he hypothesized, the men had loved the same woman, and

one has in Jest or reality some way supplanted the other … perhaps has mislaid the other’s hat, or knocked a peach out of his Hand, or offered him a dram without wiping the mouth of the Bottle; all these, and then thousand more quite as trifling and ridiculous are thought and accepted as just Causes of immediate Quarrels, in which every diabolical Stratagem for Mastery is allowed and practiced.

To Fithian, Virginians seemed ready to fight about anything and everything.

Fights that included gouging and other types of maiming were a staple of life in Berkeley as well. In 1776, Berkeley constable Hugh Gray was examined for feloniously maiming James Nichols “and pulling out his eyes,” and bound to the next grand jury. Berkeley lawyer Magnus Tate was also a fighter; in one proceeding, “it is recorded that Magnus Tate appeared before the court claiming against a person

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8 Ibid.
10 Hugh Gray’s case was heard on January 17, 1776. *Berkeley County Minute Book*, BCHS.
who had bitten off his ear. Witnesses testified to the fact, and the ear was produced as evidence, and ‘Magnus Tate’s ear was put on record.’”\(^{11}\)

This violence seemed to outsiders to be without boundaries or restraint, but that was deceiving. In his careful study of fighting in the Ohio Valley during this period, historian Eliot Gorn argues that even the most brutal fights took place according to careful rules. First, before fighting, men would agree to the type of fight. “Before two bruisers attacked each other,” Gorn explains, “spectators might demand whether they proposed to fight fair – according to Broughton’s Rules – or rough-and-tumble.” Most men, he found “chose to fight ‘no holts barred,’ doing what they wished to each other without interference, until one gave up or was incapacitated.” In these “no holts barred” fights, weapons were the only thing off limits.\(^{12}\)

But, according to Gorn, the socioeconomics of the fight were changing. Although brawling was typically a pastime of the lower classes, in the eighteenth century Virginia gentry sometimes found themselves drawn into these fights as well. By the end of the century, however, “gentlemen became less inclined to engage in rough-and-tumbling.” Instead of demonstrating their prowess through violence and physical dominance, Gorn explains, “many in the planter class now wanted to distinguish themselves from social inferiors by more genteel manners, gracious living, and paternal prestige.”\(^{13}\)

\(^{11}\) Gardiner and Gardiner, *Chronicles of Old Berkeley*, 204.  
\(^{12}\) Gorn, “Gouge, Bite, Pull Hair and Scratch,” 20.  
\(^{13}\) Ibid., 22.
Perhaps this was why Catherine Crane had been so surprised that her husband would brawl with the men who worked in his field – “demean” himself to “fight with such a set of “negrofied puppies”; at the same time, perhaps his willingness to do so revealed John’s own insecurity about his social place – about how far above he was, in reality, from these men who reaped his neighbor’s fields. John was the son of James Crane, and he had married well. But in other ways, his class was insecure. He owned around two hundred acres of land, but that was less than many of his combatants – less than Isaac Merchant, for instance, and nearly the same as John Dawkins’s family. He owned four slaves, but that was less that Abraham Vanhorn’s father. He had married a genteel woman, and he had generations of good stock to draw from, but how much did that matter in the fields of Berkeley County, when Crane was bringing in his first harvest? Where did John Crane fit? That question would thread its way through the case from beginning to end.

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When John appeared before the examining court on July 13, 1791, it was not his first time as a defendant in the county court. In 1788, he had faced charges for an unspecified breach of the peace.\(^{14}\) The court had required Crane to post a £100 bond, with two sureties of £50 apiece, to assure that he would keep the peace for at least a year.\(^{15}\) This presentment could have been a harbinger of things to come – although no details of John’s case survive, breaking the peace was a charge often used in cases of domestic violence, slave abuse, or fighting. Crane was also a defendant in a

\(^{14}\) The record only identifies “John Crane,” not whether it was the elder or younger, but given the latter’s subsequent history and the information that emerged about him, it is likely that it was him.

\(^{15}\) December 17, 1788, Berkeley County Minute Book, BCHS.
pending civil assault and battery suit in the Winchester District Court.\textsuperscript{16} Being before
the court for breaking the peace or assault and battery (which was far from
uncommon in eighteenth century Berkeley) and being charged with murder were,
however, two very different things.

The Berkeley County Court had changed in recent years – and, in other ways,
had not changed enough. In colonial Virginia, county justices like Berkeley’s had
held great sway over most matters of the colony’s political life. In the words of one
historian, “No institution was more central to Tidewater Virginia culture than the
county court, in both physical eminence and practical culture.”\textsuperscript{17} They met once a
month at the county courthouse to hear cases, punish minor crimes, probate wills, and
to deal with many other matters of county governance – maintenance of roads, the
binding out of orphans to serve in families that would care for them in return, and
much more.\textsuperscript{18} Court day brought people from all over the county – landowners and
genteel ladies, yeomen, servants, slaves, and those from other counties with business
to which they needed to attend – to the county seat and, more specifically, to the
courthouse. Indeed, court sessions were like county fairs, complete with peddlers,
drinking at the nearby “ordinary” (or tavern), horse races and cock fights, and all the
gossip and frivolity that naturally came with them.

The justices of the peace who presided over the county courts were even
ranked on their commissions in order of social status, although the greater magnates

\textsuperscript{16} Ephriam Worthington v. John Crane, September 4, 1792, “Superior Court Order Book,” Reel 93,
Frederick County Records, Winchester District Court Order Book, 1789-1793 (hereinafter “Winchester
District Court Order Book”).
\textsuperscript{17} A.G. Roeber, “Authority, Law, and Custom: The Rituals of Court Day in Tidewater Virginia, 1720-
\textsuperscript{18} For a good description of Virginia’s county courts, see Roeber, “Authority, Law, and Custom,” 29-
52; as well as Isaac, The Transformation of Virginia.
did not tend to actually preside on court day.\textsuperscript{19} Berkeley County’s first Commission of the Peace, issued in 1772, had followed exactly this pattern. Because of Berkeley’s unusual social mix – absentee Tidewater landlords who had received their land from Lord Fairfax’s land agent, Robert Carter, and local high-status settlers who had obtained their (competing) grants from colonial governors – the Peace had reflected both types of elites. For instance, the very first justice named on Berkeley’s first Commission of the Peace was Ralph Wormeley IV. According to tradition, Wormeley, whose family intermarried throughout the colonial era with the colony’s governors and other leading clans, had purchased his Berkeley lands during a Williamsburg auction; after indulging in too much punch, he bid 50 guineas on a plot of land. George Washington, who had surveyed the area, congratulated him on his purchase and offered to purchase it if he wished to sell. Wormeley, who had at first regretted his careless bid, took Washington’s word for it and declined to sell, although he continued to live at his lavish estate, Rosegill – which his grandson described as containing “a chapel, a picture-gallery, a noble library, and thirty guest-chambers.”\textsuperscript{20}

The next justices lived in the Valley. Jacob Hite was named second. He had immigrated to the Valley with his father in 1731-32 from Pennsylvania, as part of the very first settlement in the Valley – his father had received one of the very first land grants on the condition that he settle the land with a number of families, which he

\textsuperscript{19} As Roeber explains, “great magnates sat irregularly.” Roeber, “Authority, Law, and Custom,” 32 n. 7.

The wealthy Hites had become almost immediately constitutive of society in the area; Jacob Hite had served twice as Sheriff of Frederick County and as a Justice of the Peace there. Van Swearingen, named third, was from a family who had come to Berkeley around the same time as the Hite family, in the 1730s – his father, Thomas Swearingen, had in 1755 established the first ferry across the Potomac west of the Blue Ridge, and was a vestryman of Frederick Parish. The next justice, Thomas Rutherford, was Van Swearingen’s son-in-law, and the couple had recently named their newborn son Van, after her father. Thomas was also following in the footsteps of his own father, who had been on the first commission of the peace for Frederick County when it was established in 1743. Thomas Rutherford was, it seemed, related to just about everyone who mattered. Not only was he Van Swearingen’s son-in-law, but his sister had married Col. James Wood, the son of the Winchester founder. He also had one brother, Robert Rutherford, who along with Wood served as a member of the House of Burgesses for Frederick County. Robert

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21 There is some debate about the actual number. See T.K. Cartmell, Shenandoah Valley Pioneers and Their Descendants (Winchester: The Eddy Press, 1909), 1. For Jacob Hite, see Ward, Adam Stephen, 104; Doherty, Berkley County, U.S.A., 10, 42.

22 Ward, Adam Stephen, 105.

23 Cartmell, Shenandoah Valley Pioneers, 67, 181, 266. See, e.g., Kenamond, Prominent Men of Shepherdstown, 110.


25 Cartmell, Shenandoah Valley Pioneers, 19. The elder Rutherford, however, was not from New Jersey or Pennsylvania; instead, he was Scottish but had hailed more immediately from Essex County, Virginia, then had purchased over fifteen hundred acres of land in the Frederick/Berkeley area beginning in 1736. Rutherford and Rutherford, A Genealogical History, 86. The elder Thomas died in 1768, so the Thomas Rutherford on the Berkeley Court was his son.

26 Cartmell, Shenandoah Valley Pioneers, 289. There are some different versions as to whether Mrs. Wood was the sister or daughter of Thomas Rutherford. Compare with Frederic Morton, The Story of Winchester in Virginia: The Oldest Town in the Shenandoah Valley (Westminster, MD: Heritage Books, Inc., 1925), 53.
Rutherford would soon become a Burgess for Berkeley and later a member of Congress. Both Rutherford sons thus took leading positions in the new county.

The Commission of the Peace named twenty-one men in all, and as the list continued, it named both families with preeminence in the Tidewater and local high-status settlers. Several of the other justices, besides Wormeley, had connections to the Carter land or to Lord Fairfax more directly. Robert Carter Willis was a young man in his twenties, years younger than the other justices, but – as is evident from his name – he was the grandson of Robert Carter of Nomini Hall and “King” Carter’s great-grandson. George Washington’s brother Samuel was also named a justice, as were Sheriff Adam Stephen and his brother Robert; the Washingtons had long been connected with the Fairfax family, since their oldest brother’s marriage to one of the Fairfax women, and both Adam and Robert Stephen had been rent-collectors for Lord Fairfax. Indeed, if there was a lesson to be learned from observing the identities of the justices, it was that, in the Northern Neck, association with Fairfax paid off.

The Berkeley justices were thus a motley crew – they had come from the north and the east; some were immediately from overseas, and others had already lived in Virginia for generations. The justices who also owned land and lived elsewhere rarely presided. For instance, Ralph Wormeley seems to have never...

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30 Ward, Adam Stephen.
31 Other justices were James Nourse, William Little, John Neavill, Hugh Lyle, James Strode, Robert Stogdon, and James Seaton. Commission of the Peace dated Nov. 6, 1772, but in minute book undated, sometime after January 1773. Berkeley County Minute Book, BCHS.
attended, although he continued to be named on commissions of the peace.\footnote{32} Samuel Washington was also rarely there, except for three recorded times between 1772 and 1776 – once when a new commission of the peace was directed to the county after Virginia had declared its Independence, once when thirteen of his kinsmen Matthew Whiting’s slaves were charged with stealing John Crane the elder’s hogs, and one other time.\footnote{33} His brother Charles was soon added to the peace, however, and frequently attended.\footnote{34} Robert Carter Willis also frequently presided at county court sessions.

However, just because Berkeley’s courts were run by the elite didn’t mean they were unified. Even before the Berkeley County Court’s first meeting, the new county was already embroiled in controversy between two of the county’s most powerful residents. Jacob Hite had sought to have the county seat located at the town he had created on his own property, Hitestown. But Hite was disappointed. Instead, the county seat went to Adam Stephen, who was also named the new county’s Sheriff. Hite was incensed. There was already bad blood between Hite and Stephen, arising from a disagreement over some wheat of Stephen’s that had been processed at Hite’s mill. Now, the selection of Stephen’s land for the county seat enriched him considerably at Hite’s expense.\footnote{35} For the first few months of the new county’s life, Hite and several other justices continued to protest the selection of Martinsburg as a

\footnote{32} Commission of the Peace dated Nov. 6, 1772, but in minute book undated, sometime after Jan. 1773. \textit{Berkeley County Minute Book}, BCHS.
\footnote{33} At this session the case was continued; most of the slaves were later acquitted. “November 1772,” in \textit{Berkeley County Court Minute Book}, BCHS.
\footnote{34} See “June 21, 1774,” in \textit{Berkeley County Court Minute Book}, BCHS.
\footnote{35} See Ward, \textit{Adam Stephen}, 103-107.
seat, until the Governor demonstrated his displeasure by removing some of them from
the Commission of the Peace and issuing a new one.36

Rumbling against Stephen continued, particularly after Stephens backtracked
on a promise to supply “at his own expense” the materials for the new courthouse and
land for a courthouse and jail. The county court recorded, “Adam Stephen, Gent.,
having at November Court last Agreed in Open Court to furnish the County at his
own expense with plank and Scantling for the Building the Court house and also an
acre of ground to build it upon condition that the said Building should Immediately be
put in Execution,” had not begun the work. Stephens instead “this day appeared in
Court and looking on the former order of Court as not binding on him agreed to give
only the stone and One Acre of land to build the said Court House upon.” (Unlike
the rest of Berkeley’s County Court minutes, this one was unsigned by any particular
justice.)37

The Hite-Stephen feud came to a head a few months later, when Stephen, as
Berkeley’s new Sheriff, seized fifteen of Hite’s slaves and twenty-one horses in
execution of a debt judgment. Stephen brought them to the county stable and jail, but
a posse, which included Hite’s son Thomas, stormed the county jail, tied up the jailor
and a guard, chopped down the jail door, and broke the lock on the stable. Thomas
Hite and his collaborators were brought up on charges of “[f]eloniously & Rioting
breaking open the Gaol.” but acquitted, although they were made to post bond for

36 Undated minutes of November 6, 1772 Commission of the Peace, appearing after January 1773, in
Berkeley County Court Minute Book, BCHS.
37 “January 19, 1773,” Berkeley County Court Minute Book, BCHS.
good behavior. There were no long-term consequences – soon Thomas Hite was a member of the House of Burgesses.\textsuperscript{38}

Amidst this tempestuous beginning, the Berkeley Court was getting down to the business of establishing a county. Law was central to the new court’s first sessions. The court quickly admitted six attorneys to practice in the Berkeley court, including Philip Pendleton, nephew of colonial leader – and soon to be prominent revolutionary – Edmund Pendleton; by June 1772, Magnus Tate – minus an ear, apparently – was also appearing as counsel.\textsuperscript{39} “This day the parties came by their attorneys” was a common phrase in the county’s minute book.\textsuperscript{40} Alexander White was appointed the county’s first deputy attorney, and William Jenkins was directed to purchase “a sufficient number of law books for the use of this county.” There was also, of course, business to be done – there were a number of land transactions and appointments of overseers of various roads. And, the first court probated the will of William Merchant, whose son Isaac would figure so prominently in \textit{Commonwealth v. Crane}.\textsuperscript{41} There was apparently also extensive discussion regarding the proper design of the courthouse in these first sessions. In August 1773, the court issued an order that the “[p]lan of the Court House lodged in the Clerk’s Office be altered the seat for the Justices and the Walls to be Built in a Circular form instead of a square agreeable to the second plan.”\textsuperscript{42} Within only a few court sessions, Berkeley’s transition from outpost of Frederick to self-governing county was well underway.


\textsuperscript{39} Mays, \textit{Edmund Pendleton}, II:44; “June 16, 1772,” in Berkeley County Minute Book, BCHS.

\textsuperscript{40} “June 16, 1772,” in Berkeley County Minute Book, BCHS.

\textsuperscript{41} “May 19, 1772,” in Berkeley County Minute Book, BCHS.

\textsuperscript{42} “Aug 17, 1773,” in Berkeley County Minute Book, BCHS.
In the years before the Revolution, the Berkeley court was overwhelmingly occupied with civil actions. For instance, on August 18, 1772 – a day when John Crane senior, the uncle of the young defendant, was appointed overseer of an estate – there were twenty-seven actions on the case, eighteen petitions, thirteen in trespass, assault and battery, sixty-three debt actions, as well as assorted attachments and ejectments. Two cases were referred to mediation by two justices, “by consent of the parties,” and the court also dealt with administrative duties, especially the maintenance of roads and tax lists.\textsuperscript{43} The court often dealt with one or two orphans per court, binding them out to local families. Occasionally a case like Elizabeth Eaton’s arose – Eaton had her term of service extended by a year for a “base born child” while in service, but the overwhelming majority of court activity dealt with civil actions, carefully classified in court records by the cause of action.\textsuperscript{44} March 1773 was another typical court: the justices bound out six orphans, gave licenses to Phillip Lower and Henry Bedinger to keep “ordinaries” (taverns) at their houses, and addressed 229 pending lawsuits, “in debt,” “in case,” and “in trespass.” They ordered fourteen litigants to pay their witnesses in tobacco (twenty-five pounds per day). The next day they addressed more suits, including twenty-eight in debt against Jacob Hite.\textsuperscript{45}

Most of Berkeley’s crime was property crime – theft, horsestealing, counterfeiting, and the like. There were few violent crimes, at least not ones that appeared in the courts. In the pre-Revolutionary period, for instance (the period for which the best records exist), the county court examined one man for rape, four

\textsuperscript{43} “Aug 18, 1772,” in \textit{Berkeley County Minute Book}, BCHS.

\textsuperscript{44} For Eaton, see “Sept 15, 1772,” in \textit{Berkeley County Minute Book}, BCHS.

\textsuperscript{45} “March 17, 18, 1773,” in \textit{Berkeley County Minute Book}, BCHS.
defendants in the case of the county’s only murder, and one woman for suspected infanticide, all of whom were sent on to Williamsburg for trial; and Hugh Gray’s examination for feloniously maiming James Nichols. There were also acquittals: among others, one “negro man” Henry, belonging to John Keywood, was acquitted of breaking into the house of John Clawson and Benjajah Martin “and committing sundry violences” but instead found guilty of only a misdemeanor and sentenced to thirty-nine lashes. And, finally, there was a sensationalized case against Thomas Hite for “feloniously and notoriously rioting and breaking open the gaol of said county;” the charges were reduced to breaking the peace.

After the Revolution, property crimes continued to predominate in the Berkeley examining court. There was a case of breaking into a barn and stealing wheat; an alleged watch-stealing; and a charge that four defendants broke into a smith shop and stole “tools and sundry articles.” One presentment did allege felonious wounding and robbing, but the charge was reduced to petit larceny. Two other defendants faced allegations of counterfeiting. There were also some non-specific charges for “felony,” a case where a magistrate was assaulted in the course of his duties (bystanders refused to intervene) and a murder; although Jan Logan, the woman who was charged with the murder, was found not guilty in the examining court.

46 John Potts was examined for rape on June 29, 1773; William Wallis, Thomas Morgan, Jeremiah Thomas, and John Casity were examined for murder on November 19, 1774; Mary Howell was examined for murdering her bastard child on April 27, 1776; Hugh Gray’s case was heard on January 17, 1776. Berkeley County Minute Book, BCHS.
47 See entry for “December 20, 1774,” in Berkeley County Minute Book, BCHS.
48 See entry for “May 17, 1774,” in Berkeley County Minute Book, BCHS.
49 See entries for “October 3, 1789, Feb. 8, 1790, June 22, 1790, and April 15, 1789,” in Berkeley County Minute Book, BCHS.
50 See entry for “Jan 7, 1790,” in Berkeley County Minute Book, BCHS.
court and ordered discharged, co-defendant Arthur Gordon was sent to the district court for trial.  

This low incidence of fatal violence comports with surviving coroner’s records from other Virginia counties. For instance, surviving coroner’s records from Frederick County show that the county coroner was involved in any unexpected death, and those seem to have been few. There, coroner’s inquests investigated ten deaths between 1779 (the period for which records begin) and 1791. Two were determined to have been suicide; two had accidentally fallen from their wagons and were run over; two were killed by falling trees; one died from exposure after excessive drinking and passing out in the cold; one appeared to be undetermined natural causes, with no marks of violence; in one the inquest merely summarily concluded that death resulted from “accidental causes,” without elaboration; , and one was determined to be murder.  

So, although a low incidence of deaths of freemen in Berkeley’s examining court could have indicated that the authorities declined to prosecute, that does not appear to have been the case.  

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During the colonial period, being a justice had come with a a certain level of intimidation. As the Anglican evangelist Rev. Devereux Jarratt later remembered, as

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51 See entries for “Jan. 2, 1790, May 18 and 19, 1790, and June 22, 1790,” in Berkeley County Minute Book, BCHS.
52 Suicide: James Knight, August 5, 1779 (suicide “by means of a cord”), and Martha Sherrard, July 8, 1781 (“in a fit of lunacy” “by means of a cord”); run over by wagon: James Erwin, January 24, 1779 and David Ferguson, Nov. 22, 1789; killed by falling tree: Jacob Hickman June 4, 1789 and Philip Dick, June 7, 1789; exposure after intoxication: James McAnulty, October 20, 1790; natural causes: George Innis (free negro), November 14, 1780 (natural – found dead with “no marks of violence appearing on his body”); accidental causes: Greenberry D. Craig, Nov. 22, 1788: (“came to his death in an accidental manner”); murder: Willam Heffern, July 25, 1790 (murdered by Medlicott with a spade). Frederick County Coroner’s Inquisitions 1779-1846, Library of Virginia, Accession No. 1016883.
a boy in colonial Virginia, “when I saw a man riding the road, near our house, with a wig on . . . I would run off,” from a mixture of fear and deference; such ideas “of the difference between gentle and simple were,” Jarratt remembered, “universal among all of my rank and age.”

When justices appeared in court, they meted out discipline, sanctioned those who abused or contested their authority, and generally reminded the county of their power. Undoubtedly, there were always Virginians who were less enamored with the airs of their “betters,” but in the era immediately before the American Revolution, that discontent simmered just beneath the surface.

But by the 1790s, that was changing. The first alteration had to do with popular dissent. The economic pressures of war and the social and political space it opened had exploded any latent discontent into plain view. There had always, of course, been evidence of dissention in the county court – like a bystander who neglected to remove his hat or who appeared in court intoxicated, or a planter who told one county undersheriff to “Kiss his Arse” in front of the court and was fined.

But, during the Revolution, this dissent became more obvious. Army commissions and the responsibilities of the Continental Congress or Virginia’s Council took many elite Virginians out of the Assembly and relocated them to other roles, leaving openings for a broader base of men to serve in the Assembly, where they bucked demands for taxes and began to manifest an independence of spirit that left Virginia’s older gentry worried. After the Revolution, Virginia’s landscape looked different.

As historian Rhys Isaac has demonstrated, the deference of the old society was gone,

replaced by the rumblings of Virginians who were eager to have their own voices heard in their new, post-Revolutionary society and government.

These changes in leadership and in deference were also felt in Virginia’s county courts. Historians have long remarked on the decline in deference to Virginia’s county magistrates, which was increasingly evident after the Revolution. Across Virginia, grand juries presented their magistrates for dereliction of duty or complained to the central government about the justices’ absence, drunkenness, or other failings. This same disdain materialized in Berkeley as well – in the spring of 1790, for instance, the court minutes reported that magistrate James Maxwell had been attacked “while in the execution of his office as magistrate.” Not only was the assailant brought before the county court, but so were two others for refusing to help – Maxwell had apparently been assaulted while others looked on.

Moreover, when local men complained about the justices, they had a particular complaint: those justices were not following the law. In 1792, a long list of Berkeley citizens – including several justices of the peace – would petition the General Assembly, complaining about their county court. “The great objects of civil government,” they reminded the Assembly, “are to protect individuals in the enjoyment of their civil rights & property, to punish wrongdoing and to redress the injured.” But “in vain,” they continued, “are constitutions formed and laws made for these valuable purposes, unless the laws are executed and justice regularly administered.”

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55 Ibid.
56 “John Bryan examined for Felony,” in Berkeley County Minute Book, BCHS, (1790).
57 Virginia Legislative Petitions, Berkeley County 1792, Library of Virginia.
The petition explained what the signatories thought was lacking – the ability to collect a “just debt.” County courts, the petition explained, so delayed their suits that creditors suffered “a greater loss from the delay of justice, than he would have suffered by giving up the debt or submitting to the injury.” Moreover, the “delay produces a want of punctuality in the payment of debts and in the compliance with contracts and is destructive of that confidence which ought to exist among men,” and was an “encouragement to the ill-disposed to do wrong.” They recommended paying magistrates for their duties, to ease the burdens of attending court, or allowing a single magistrate to dispense of low-level suits. The petition was signed by most of Berkeley’s leading citizens, including John Crane’s father, James Crane.58

Problems in collecting debt were not limited to Berkeley County. Indeed, debtor-creditor relationships had been one of the dominant issues of the 1780s. Desperate debtors had closed courts around the country, sometimes burning the courthouses themselves; in 1787, Virginia’s own Greenbrier County, farmers believing they paid “greater Taxes than any people under the Sun,” burned down the county jail, then signed a statement asserting that they were victims of “Great Oppression.” They bound themselves not to pay the “certificate tax” – a new tax aimed at calling in war bonds – and pledged to stand by each other, in “preventing the Sheriff from taking their property for debt or taxes.” They sent copies of their new Association to other backcountry counties.59

Virginians – and Americans – disagreed about the cause of these economic woes. A few things were clear: circulating specie was scarce and taxes were high.

58 Ibid.
The war effort had left Americans with higher taxes than they had ever faced under the British – sometimes three or four times higher. These were made even more burdensome by the fact that there was very little specie with which to pay them.

During the war, the British and French armies had scattered specie throughout the states by buying supplies and through other expenditures, but that source had now dried up. As a 1785 Virginia bill, proposing to repeal a tax, put it:

> From the apparent scarcity of circulating specie, the sudden and great fall of our staple commodity, together with the difficulties thrown in the way of our trade, it is found impracticable without involving the people in too great and deep distress, to collect from them the one half tax levied for the year 1785 . . . and there is reason to believe that, by remitting of the said tax, the people will be hereafter enabled to pay the revenue taxes with more ease and punctuality.

Without specie in circulation, prices plummeted. Farmers could, for instance, sell their livestock to obtain cash to pay their taxes or their debts, but with so very little specie on hand, the sale would bring in artificially depressed return. As one Massachusetts laborer, William Manning, confided to his journal, the rich gained by this state of affairs – it meant that “if they could reduce the prices by one half, it would in its operation be just the same to them as though their salaries were doubled.” This meant that, in effect, “the debtors in general now pay as much as three pounds for every one pound they owe.”

> Why was there so little specie? James Madison attributed it to “extravagance” that “sends away the coin to pay the unfavorable balance” on imports. Between

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60 Ibid., 29.
61 Ibid., 64.
1784 and 1786, the new United States imported nearly £8 million in British goods and exported merely £2.5 million. As a letter from abroad printed in the *Virginia Advertiser* commented as early as 1784, “Very few dollars make their appearance now – the new States are almost exhausted of specie already.” In May 1785, Madison reported to Jefferson that “the internal situation of this State is growing worse and worse. Our specie has vanished. The people are again plunged in debt to the Merchants, and those circumstances added to the fall of Tobo. In Europe & a probably combination among its chief purchasers here had reduced that article to 20/.” Foreign purchases were up; the tobacco market was glutted; and British merchants were, Madison thought, artificially depressing prices.

Others had another explanation: the war debt. States needed to collect specie to send to Congress in order to pay on the nation’s debts to foreign nations incurred during the war; specie crept out to Europe through those channels as well. Then there was the domestic debt. During the war, the states and the Continental Congress had given out large numbers of promissory notes, for everything from services to supplies. These were often converted into bonds, and now, after the war, the government worked to pay interest to the bondholders on the face value of the certificates. Judge St. George Tucker’s brother, Thomas Tudor Tucker, now a member of the South Carolina House of Representatives, observed in 1786 that without the bondholders, the assembly could have gotten by with only a “very light

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65 *Papers of James Madison*, 9:54 n. 5.
tax.” 69 And by the 1780s, these bonds had been sold for a pittance by their original holders and purchased by speculators – indeed, William Manning observed that by requiring former soldiers, who had often received bonds for their payment, to pay their taxes in specie, the government actually forced the sale of their certificates, which were then purchased by speculators. 70 So when farmers and laborers paid their taxes, they protested that they were being crushed for the benefit of the monied class – and that the outflow of specie was in fact the fault of the “non-productive speculators,” who were being paid in specie by the state governments and then spent their money on luxuries abroad, only exacerbating the country’s distress. 71 Edmund Pendleton complained that gold and silver seemed to “circulate only in the Vortex of Phila. or what other place Congress may set in.” 72 Even Madison admitted that the situation was a tight one. “Our situation,” he wrote, “is truly embarrassing. It can not perhaps be affirmed that there is gold & silver eno’ in the country to pay the next tax.” 73

Madison knew what he didn’t want: paper money. His legislative opponents, he knew, would argue that there were no alternatives but to “emit paper money or postpone the collection” of taxes. That plea would be, he wrote, “rung into our ears by the very men whose past measures have plunged us into our difficulties.” 74 After all, Madison blamed Virginia’s post-war economic problems to a large extent on the paper money disasters of the Revolutionary era. During the war, Virginia’s Assembly

69 Holton, Unruly Americans, 32.
71 Holton, Unruly Americans, 101.
72 Papers of James Madison, 9:54 n. 5.
74 Ibid.
– like those up and down the coast – had emitted much currency and created runaway inflation; they then allowed debtors to pay debts in paper money which was actually worth hundreds of times less than its face value. In 1780, Tucker summed up the Virginia situation to his friend John Page. “Last May or rather last July,” he observed, “a silver dollar was worth forty paper ones by act of the Assembly. We have since found the Philosopher’s Stone, and by a mere breath of Hocus Pocus, a paper dollar is now worth” – legally, he meant – “as much as a silver one, for the man who is or has been in debt for their twenty years. But,” he continued:

Stranger to tell, no sooner is the bill transferred from debtor to creditor but it becomes paper again, and worth but the eighteenth part of what he received it for. I have heard it said that great Discoveries in any art or science were never the result of the researches of any Body of Men, but always of an individual. But here we find the maxim absolutely contradicted by Experience; for an aggregate Assembly have discovered what no individual in the Universe will attain to the comprehension of.  

Tucker’s dry humor reflected the consensus of the men who had to accept this worthless paper as creditors, and felt that property was being redistributed through these currency measures. For instance, in 1773, Jefferson had contracted to sell a large amount of land to pay an inherited debt; by the time the purchasers paid after the war had begun, they used paper money which, Jefferson complained, “was not worth oak leaves.” As Virginia attorney William Grayson wryly observed, “The Ancients were surely men of more candor than we are. They contended openly for an

76 St. George Tucker to John Page, undated by placed in 1780, *St. George Tucker Papers*.
abolition of debts, while we strive as hard for the same thing under the decent &
specious pretense of a circulating medium.” 78

But despite this history, as taxpayers protested both their lack of specie and
their taxes, they asked to be able to pay their taxes in commodities – that would “be
of great ease and relief to the people” – or for paper money that could be used in lieu
of specie. 79 To many Virginians, a world without paper money seemed intolerable.
As a report from Baltimore, reprinted in the *Virginia Journal*, explained, “When we
know the universal complaint to be want of a circulating medium, it certainly must be
the wish of every honest citizen to see the public distresses of this state alleviated by a
prudent emission of paper currency…. In our present situation,” the paper explained,
“we are in want of money – Trade languishes – and the very mechanic and the laborer
feel the consequent distress.” To concerned men like Madison, the author reassured
that the key was “prudent” emission of paper money, one that would maintain value
because of the credit of the emitting entity. “Before the Revolution we could not do
without paper,” the article reminded readers, “why do we torment ourselves now?” 80

The newspapers spoke for many of Virginians who felt that they were
undergoing unnecessary hardship. Citizens from Brunswick County, Virginia
summed up their view of the situation in 1786, when they complained to the
Assembly that “the honest laborer who tills the ground by the sweat of his brow
Seams hitherto be the only sufferors by a revolution which out to be glorious by

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78 Holton, *Unruly Americans*, 58.
79 See, e.g., “Petition of Citizens of Botetourt County, June 3, 1782” and “Petition of Citizens of
Brunswick County, October 28, 1786,” Legislative Petitions, in *Journal of the Virginia House of
Delegates*, Library of Virginia, November 2, 1785, 15.
which the undeserving only reap the benefit off.” And in 1786, even such a foe of paper money as James Madison admitted to James Monroe that “the scarcity of money is really great.”

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As Americans struggled over payment of debt and taxes, the make-up of Virginia’s county courts began to subtly change. In the colonial period, the Commission of the Peace had been made up of each county’s greatest landowners, and the House of Burgesses had been predominantly the province of the colony’s elite. But now, many of those who had traditionally held power were preoccupied with other offices – the Governorship, the Council of State and the new Senate, as well as federal offices like the Continental Congress. Sometimes newer names filled the resulting void, sometimes at the county courts and in the General Assembly.

In Berkeley, some of the old families continued to have power. For instance, Robert Stephen, Adam Stephen’s brother, had signed the minutes of almost every county court since 1772, and continued to do so. But at most courts, the bulk of the justices were not those who had appeared so often in the 1770s, and the representatives were different, too. For instance, one newer Berkeley justice was Andrew Waggoner. In the 1750s, Waggoner’s brother had served as a mere recruit under George Washington on General Braddock’s ill-fated expedition to expel the French from the Ohio territory; at that time, Washington was also Berkeley’s representative, as part of Frederick, to the House of Burgesses. But in 1791, it was Andrew Waggoner who was a Berkeley Justice of the Peace and the county’s

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81 Holton, Unruly Americans, 131.
82 James Madison to James Monroe, June 4, 1786, Papers of James Madison
representative to the General Assembly, and Washington who was the new President. The lines of Virginia’s political participation had shifted to a different place on the social scale.

The new district courts had further chipped away at the character of the old county courts. In some ways, their proceedings still looked the same. They still bound out orphans, appointed overseers of the road, dealt with wills and estates, and heard civil cases. They also still exercised the same function in criminal cases as they had during the colonial era. When felonies arose, an examining court or “called court” would meet locally in the counties to consider the evidence against those charged, and determine whether it was sufficient to bind the accused over for trial in the state courts. But despite seeming similarities, the locus of power had shifted to new tribunals. What would this mean for John Crane?

It’s hard to know what John Crane expected when he appeared at the Berkeley Court on July 13, 1791. He must have seen many familiar faces – friends and associates of his father, men he had known all of his life. Justice Cato Moore was a neighbor of the Cranes who assessed their taxes each year, and who also served as a Charles Town trustee with James Crane. George Cunningham’s family had been early settlers in the area of the Opequon Creek, before Berkeley was formed. James Campbell’s family had come to Berkeley from Scotland via Pennsylvania; a James Campbell, probably the same one, served in the Virginia legislature for two terms, ran a trading post, and had also served as Berkeley’s sheriff. Justice Andrew Waggoner, who did not preside at court that day, sometimes served in the Assembly as well. Others present were William Little, John Turner, James Maxwell, Nicholas Arrick,
John Briscoe (another Crane neighbor, either the original justice or his son) and John Kearsley, who had served in the Revolutionary War. Kearsley and More had signed, with James Crane, the petition complaining about the Berkeley County Court.

But if John thought that his connections would be lead to his release, he was quickly disillusioned. The justices’ job was to decide if Crane was guilty of murder and should be sent to the Winchester District Court for trial; or whether he was not guilty and should be let go entirely, but with a man dead, there was little chance that Crane would get off that easily. Plus, the examining court had no power to discriminate between degrees of culpability – as Virginia’s appellate courts had affirmed again and again, an examining court could “acquit, but they cannot determine.”

Crane probably sat nervously while the justices heard their first case – that of Stirling Cooke, accused of feloniously stealing “sundry goods” from Samuel Johnston. Newspapers reported that Cooke had gone to the springs at Bath “under the pretense of being dumb,” and after being here for some time, had “pretended to come to the use of his tongue.” He had been treated well by Johnston, “whom he rewarded

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83 For Robert Stephen, see Ward, Adam Stephen, 93. For George Cunningham and information on the Cunningham family, see Betty Cunningham Newman, Adam and 500 More Cunninghams of the Valley of Virginia c. 1734- c.1800 (Westminster, MD: Heritage Books, 2000), 227-236, and Berkeley County, Virginia Land Tax Records, West 1791, BCHS, names “George Cunningham, Esq.,” owning 186 acres. For James Campbell, see Willis F. Evans, History of Berkeley County West Virginia (Westminster, MD: Heritage Books, 1928), 273; Berkeley County Land Tax Records, West 1791, BCHS, names “James Cunningham, Esq.” as owning 310 acres. For Cato Moore, see, e.g., Berkeley County Personal Property Tax Records, East 1784, BCHS, collecting taxes from John Crane the elder and other nearby landowners. For Kearney, see Millard Kessler Bushong, A History of Jefferson County West Virginia, 1719-1940 (Westminster, MD: Heritage Books, 1941), 499. For Maxwell, see Berkeley County Minute Book, May 18, 1790, BCHS.
84 Virginia Legislative Petitions, Berkeley County 1792.
85 Thomas Sorrel’s Case (General Court 1786), Hobson, St. George Tucker’s Law Reports, 1:117.
by stealing from his benefactor some wearing apparel and some money.”

Cooke was found guilty, but instead of being sent to the Winchester court, he was sentenced to “twenty-five lashes . . . well laid on.” The court then turned to John Crane, and gave a long, full hearing to Crane’s case.

Although Cooke’s proceeding was quick, Crane’s court lasted for two full days. It was Berkeley’s longest examining court ever, according to surviving records. Two days was a long time for an examining court to last. For instance, the examining court for George Wythe Sweeney, one of Virginia’s most notorious defendants who was accused of poisoning his celebrated uncle George Wythe only a couple of years later, lasted only a few hours. But with Crane, newspapers reported that the arguments “of the attorney’s employed on the occasion took up the greater part of the two days.”

For the entire case – from the examining court to his execution – Crane would protest his innocence. How, though, was that possible? Had not an entire field of people seen Crane stab Vanhorn? Although there is no record of what Crane and his counsel argued in the examining court, materials from later in the case shed some light. First, Crane seems to have insisted that there had been a general melee, and that in the fight, Vanhorn was stabbed – by someone else. First, there was the fact that the knife had been found not on Crane himself, but – as Judge St. George Tucker would later note – was “upon a negro.”

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87 Berkeley County Court Minute Book, July 13-14, 1791, BCHS.
90 “Shepherd’s-Town, (Vir.), July 18,” Litchfield Monitor (Litchfield, CT), August 17, 1791.
that the knife appeared to be the one used to stab Vanhorn. Crane contended, apparently, that someone else – presumably his slave – had stabbed Vanhorn.

He was able to make this claim, it seems, because the stabbing had occurred in the midst of a melee that included multiple people, not just Crane and Vanhorn. A deposition by Crane’s harvest worker, Hugh McDonald, painted this picture of the scene:

Mr. Crane and his hands, together with myself, went to dinner; after dinner we returned to work. A negro man of Mr. Cranes informed John Dawkins & the rest of us, that Mr. Campbell’s hands had sent us a challenge to fight them; upon which Dawkins highly resented & said he would go and see Campbell’s hands, for he was not afraid of any one man that was then in Campbell’s field. After some little time, Mr. Crane came from his house to his field; John Dawkins then said to Mr. Crane that Campbell’s hands had sent him & his hands a challenge. Mr. Crane made answer & said he did not know what harm he had done to offend any of Mr. Campbell’s hands, & said he would go and know the truth of it; which we all then went too [sic] Campbell’s field to ask them what offence we had given them? They answered, none.

Afterwards, according to McDonald, all seemed to be well. “Campbell then invited Crane & his harvest hands to take a drink of grog with him; which was done, and then Crane & his hands returned to Crane’s field.” Crane went back to his house.

McDonald continued:

Mr. Crane was lying on his bed, when the noise of Campbell’s hands approaching Crane’s house, induced Crane to order them off his premises, & threatened to shoot Vanhorn; & Merchant then assailed Crane, and in the fight Vanhorne [sic] was stabbed.

“Vanhorn was stabbed.” The McDonald deposition portrays a challenge that comes out of the blue, and a befuddled and peaceful Crane attacked – with a subsequent
free-for-all fight in which Vanhorn was mysteriously stabbed. In McDonald’s account, the real instigators were John Dawkins and Isaac Merchant.

Had Crane – or someone else – taken advantage of the chaos and planted the knife on one of the slaves who worked alongside the white men in the field that day? Whatever Crane argued, the justices were not convinced. After hearing testimony from John Dawkins, Isaac Merchant and other men who had been in Crane’s and Campbell’s fields, they charged Crane with murder. Newspapers reported that Crane was escorted by “strong guard” to the Winchester jail to await trial during the district court’s September session. The Commonwealth’s witnesses posted bond to assure their appearance at Winchester, when the court next met in September. In the meantime, “the passions and prejudices of the people ran very high against” young John.

Now, the case belonged to the Winchester District Court – and to Judge St. George Tucker. Winchester was also close to home for Crane; there, as in Berkeley, Crane would see many familiar faces – including some that he had seen already during his examining court at the county level.

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92 “Deposition of Hugh McDonald, October 1, 1791,” Calendar of Virginia State Papers, 5:372; see also “Petition of Various Berkeley County Justices, May 29, 1792,” Calendar of Virginia State Papers, 5:599, explaining that Crane was deprived of McDonald’s testimony at trial.
93 McDonald, it seems, did not testify at Crane’s court hearing, but his deposition, which was submitted to the Virginia General Court on appeal survives, and gives a picture of what Crane’s arguments might have been.
94 Berkeley County Court Minute Book. Berkley County Historical Society.
95 “Winchester, July 16,” New Hampshire Gazette, and General Advertiser, August 11, 1791; Berkeley County Court Minute Book, July 14, 1791.
96 Ibid.
97 “J. Peyton to the Governor, April 30, 1792,” Calendar of Virginia State Papers, 5:519.
September 1, 1791:  
Crane’s Indictment: The Winchester District Court

The Winchester District Court finally convened on September 1. That court included not only Berkeley County, but also Frederick, Hampshire, Hardy, and Shenandoah.¹ Unlike modern courts, two judges were supposed to preside at Virginia’s district courts – two judges from the state’s General Court, riding on circuit. Judges St. George Tucker and Henry Tazewell had both been assigned to Winchester. Tazewell, however, was ill and unable to attend, so Tucker presided alone.²

As Judge Tucker took the bench in Winchester in September 1791, he was at the beginning of an almost six hundred mile journey. Winchester was part of the Winchester/Monongalia circuit, one of five circuits scattered throughout the state. Each circuit contained two to five district courts, which were held twice a year, once in the fall and once in the spring. After Winchester, Tucker was scheduled to head on to the Monongalia District Court, in Morgantown (today West Virginia), which served counties even further west – Monongalia, Harrison, Ohio, and Randolph – before returning back home to Williamsburg.³ With such a demanding job, Tucker had considered resigning his post, but financial concerns had pressed him to continue.⁴

¹ Charles Cullen, St. George Tucker and Law in Federal Virginia, 1772-1804 (New York: Garland, 1987), Appendix C.
² St. George Tucker, September 1, 1791, in Notes on Cases, Tucker-Coleman Papers.
³ St. George Tucker, Monongalia District Court, September 1791 term, in Notes on Cases, Tucker-Coleman Papers. See also Cullen, St. George Tucker and Law in Federal Virginia, Appendix C.
Tucker was a new judge, and the Winchester District Court was a new court. The district courts had been established in 1788, after years of complaining about the General Court. By 1787, the General Court was so behind in its docket that Tucker had complained that “it was computed that the suits then depending” in the General Court “could not be tried in less than five years, and they still continued to accumulate.” There were problems on the criminal side, too. Because suspected criminals were still examined in the county, then sent to the General Court for trial, the county sheriff was responsible for transporting the prisoner to the public jail in the capital to await trial, and witnesses and jurors had to attend court in the capitol. Criminals were thus held for months before trial, and long travel made witnesses and jurors unreliable. Additionally, a statute of limitations provided that in capital cases charges against a defendant would be dropped if he was not tried by his third General Court appearance; absent good cause for the delay, further prosecution was then forever barred.

By the mid-1780s, then, there was a strong sense among some that the courts needed further reform. There was also strong opposition to reform from some quarters, particularly from Patrick Henry and justices from his area of the state, who favored more local governance. After several false starts, in 1787 the Assembly, with James Madison at the helm, passed a bill creating district courts. Virginia’s judges then objected to some of the new duties imposed on them by the bill,

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5 Tucker, Blackstone’s Commentaries with Notes of Reference, 4:11.
6 William Waller Hening, The Statutes at Large (Richmond, Virginia: George Cochran, 1823), 9:474.
8 Ibid.
necessitating further revision. The law was revised, and finally, in 1789, the thirteen new district courts began to operate. These courts met twice a year, in September and April; they were dispersed throughout the state, but armed with the same powers and jurisdictions as the old General Court itself, and each staffed by two General Court judges, riding circuit. The General Court also continued to exist: if at a district court proceeding the two presiding district judges disagreed on a case, or if the case was otherwise troublesome, they could refer it “for difficulty” to the General Court, which was now essentially the district court judges assembled en banc. With district courts in September and April and General Court sittings in November and May, being a General Court judge was now an arduous proposition.

The judges alternated circuits, but Judge Tucker had presided over three of the new Winchester court’s seven sessions – more than any other judge – and was becoming familiar with the area. After a previous trek on the same route, back in the spring of 1790, Tucker’s friend William Nelson had congratulated him on “returning unscathed from the west.” Tucker thought highly of Winchester – only ten years later he would advise his son and new lawyer Henry to set up his practice in

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9 The judges’ objection became known as the “Judges’ Remonstrance.” The proposed bill enlarged the Court of Appeals, which was made up of judges from the General Court, Admiralty, and Chancery; it then required those judges to ride on circuit. The Court of Appeals refused, however, to appoint clerks for the new district courts pursuant to the act; instead, they objected that the bill was unconstitutional, both because it made Admiralty and Chancery judges provide over actions at law, and because it added to the duties of the judges without an increase in pay, thus effectively decreasing the judges’ salaries in contravention of the constitutional provision that judges were to hold office during good behavior without such reduction. The legislature revised the bill. Many Virginians considered this an important moment in the commonwealth’s constitutional history. See Cullen, *St. George Tucker and Law in Virginia*, 72-75.
10 Ibid., 82.
11 See, e.g., ibid. at 80; Hening, *Statutes at Large*, 12:730-763.
12 The district courts’ first sessions were in the spring of 1789. The records for the Winchester District Court are missing until the fall 1789 session. For more on court reform, see Cullen, *St. George Tucker and Law in Virginia*.
Winchester. The west was, Tucker had determined, Virginia’s future, particularly for a hard-working young lawyer.\textsuperscript{14} And, after his three sessions in Winchester, Tucker was probably becoming familiar with many of the area’s citizens and officials – after all, the same people appeared in his court time and time again.

In order to make it to Winchester by September 1, Tucker had departed Williamsburg on August 19. The night before his journey, he took a moment to write a letter to his stepson John Randolph. “I will probably not have it in my power to write again until I am home,” he cautioned. “Do not attribute my silence to any inattention to or forgetfulness of you – when abroad I am seldom in a situation to write letters.”\textsuperscript{15} The fact that since John’s brother, Theodorick, was quite ill made this even more difficult. “I lament,” Tucker told John, “that I have no hope of hearing from him before I leave on my circuit, and I go tomorrow.”\textsuperscript{16}

Tucker arrived in Winchester on time, and John Crane was brought before the Winchester Court on September 1, 1791, on the first day of its fall session. He may have been a little worse for wear – Crane had been confined in the Winchester jail since his examining court date in July, and that facility left much to be desired. A recent committee appointed by the court to look into the jail’s condition had concluded that it was poorly suited for its purpose. The roof was “open in various parts and the Shingles in general decayed,” with only “very small rooms without passage or entry.” One room was appropriated for debtors, and another single room

\textsuperscript{14} Hamilton, \textit{Making and Unmaking of a Revolutionary Family}, 108-113.
\textsuperscript{15} St. George Tucker to John Randolph, 18 August 1791, in the John Randolph Papers, Box 1, Small Special Collections, University of Virginia.
\textsuperscript{16} Ibid.
for “the confinement of Criminals of every description and Sex.” The whole building also had “but one fire place, by which means the confined are deprived of that necessary comfort.” In fact, the building was so dilapidated that, the committee concluded, the expenses necessary for its repair “would not be very unequal to a new building.”

Crane was probably eager to escape his confinement, and hoping that he would not have to spend the winter in that open, unheated building.

In past sessions the grand jury had often had several cases to consider, but that September Crane’s was the only case before them. It was not, however, the first time that the Winchester court had faced a capital case. In fact, in its short existence, it had tried at least two other murder cases. In the April 1790 term, Berkeley laborer Arthur Gordon was charged with murder, but was not indicted – the woman originally charged as his co-conspirator was exonerated by the county court, so perhaps the evidence against Gordon was weak, too. Then, the following fall, in the September 1790 term, Dr. James Medlicott, a “doctor of medicine or practitioner of Physick” was charged for the murder of William Hefferman. Medlicott was convicted, although a petition signed by a “large number of the inhabitants of Frederick and adjoining areas” argued that the circumstances were greatly aggravating. The petition explained that Medlicott was “exceedingly provoked with abusive epithets, and struck with a heavy cudgel” by Hefferman, and then “ran into his house, seized, which proved to be a spade, with which he struck the deceased and by which blow he was

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17 September 8, 1789, Winchester District Court Order Book, 1789-1793, Frederick County Records, “Superior Court Order Book,” Reel 93 (hereinafter “Winchester District Court Order Book”). Although this report was made two years earlier, subsequent records do not indicate the construction of a new jail or the renovation of the old one.
18 Others had indicted for crimes ranging from horsestealing to forgery to grand larceny to assault. Records for the first court no longer exist.
19 January 2, 1790, Berkeley County Court Minute Book, BCHS.
20 September 3, 1790, Winchester District Court Order Book.
killed.” The signatories begged the Governor to consider the “great difference in character of the two men.” Medlicott was not pardoned, however, but only given a temporary reprieve.²¹

In this context, John Crane might have been a little worried. His own case was, at its very best, not that far from Medlicott’s. And to make matters worse, Winchester grand juries tended to indict. Of sixteen cases presented since spring 1790, with crimes ranging from horsetealing to forgery to grand larceny to assault to buggery, Winchester’s grand juries had indicted all but four (the buggery charge was among the four).²² So as John Crane prepared for the September 1791 court session, he was probably aware that, most likely, he would stand trial. So, on September 1, he prepared to face the men who would determine that question.

Many of those men were familiar. Indeed, they were the same men who ran Berkeley County, and nearby Frederick, and, in many cases, the state government. Although the Winchester District Court was a new court, in its operations it drew from long-established people and networks of the Valley – and of Virginia itself. To be sure, the new reforms created new courts where state judges, like Tucker, presided over proceedings in the localities. But in Winchester, if the surrounding county courts themselves lost power, the people who ran those county courts often merely

²² The grand jury records for the spring and fall 1789 terms do not survive. In April 1790: Solomon Watson and James Ridley indicted for horsetealing; an indictment against James McIlhaney for forgery; Benjamin Bussell accused of grand larceny, not a true bill; and Arthur Gordon accused of murder, not a true bill. September 1790: John Manning, laborer, indicted for grand larceny, James Medlicott indicted for murder, John Alfin, Matt Wright indicted for burglary and felony, John Brown perjury, James McIlhaney for misdemeanor, James Blue for assault and battery committed upon Alexander Rogers, John Laches for assault committed upon Dennis Deerfield. April 1791: James Price for Grand Larceny, not a true bill, Pumrick George for Buggery, not a true bill. Winchester District Court Order Book.
took their influence to the new district court. Historians who have studied courts like Virginia’s in the early national era have generally depicted them as characterized by two warring factions—local justices of the peace, jealous of their privileges, and state reformers seeking to create new republican courts. But following *Commonwealth v. Crane* through the courts offers a different story. If local leaders had ambiguous feelings about the new courts, they nonetheless participated in them, as grand jurors, jurors and litigants. In many ways, same network of elites found power in both courts. This, at least, is what John Crane would encounter as he made his way through Virginia’s court system in 1791: a block of elites with local, state, and national ties.

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Crane’s grand jury assembled on September 1 to deliberate on the charges against him. That grand jury, while all genteel, ran the gamut of social backgrounds and political loyalties. Its foreman was General Daniel Morgan, the Revolutionary War hero; its other members were the sons of local founders, or the offspring of Virginia’s top families. Winchester was the west, but, as Crane’s grand jury would demonstrate, it was well-connected. And many of these men were also local justices of the peace, now sitting as state grand jurors. When it came to the Winchester District Court, county, state, and sometimes national authority overlapped.

Foreman Daniel Morgan was fifty-five years old at the time of Crane’s case, and lived near Winchester. By 1791, Morgan was a seasoned and distinguished community member, but he had a tough and gritty life behind him. If many of

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Virginia’s elite had deep roots and high connections, Morgan was self-made. Probably born in New Jersey to Welsh parents around 1735, Morgan had, like many Valley men, moved to western Virginia via Pennsylvania and the Great Wagon Road. When he arrived in the Frederick area sometime during the winter of 1752-53, he first worked as a farm hand, but soon became the foreman of his neighbor’s saw mill. He then switched to wagon-driving at the suggestion of a local landowner. Within a year, Morgan had purchased his own team and gone into business for himself.\(^{24}\)

But Morgan, and the Winchester/Berkeley area to which he had moved, were soon right in the middle of a budding conflict with France. In 1754, Virginia’s Governor Dinwiddie dispatched a young George Washington on an expedition to reinforce an outpost on the Ohio manned by Virginia militia. The expedition was intended to fortify British trading rights and territorial claims against French encroachment; Old Frederick County, which then included Berkeley, contributed thirty-nine of 159 Virginians in the expedition, all recruited by Adam Stephen.\(^ {25}\)

Serving under Washington, these Virginians travelled into the northwest and encountered a small party of French soldiers from Fort Duquesne. They killed ten, including Ensign Joseph Coulon de Villers, Lord Jumonville, beginning a controversy that sparked the French and Indian War. \(^ {26}\)

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\(^{26}\) They were then chased by the angered French, who claimed that the murdered party had been sent merely to talk peace. Washington was forced to surrender at a quickly crudely constructed fort called “Fort Necessity”; in the surrender, Washington signed – perhaps because of translation difficulties – a document admitting to the “assassination” of Jumonville, and sparked an international diplomatic crisis. See Thomas E. Crocker, *Braddock’s March* (Yardley, PA: Westholme Publishing, 2009), 2-11.
Britain responded to the international crisis by attempting to confront the French presence in the Ohio Valley head-on, and again the Valley played a key role. The British government dispatched Major General Edward Braddock to America to lead an assault on Fort Duquesne. The plan was a daunting one – Braddock’s force would cut roads across the wilderness and drag artillery across the land and over mountains to assault the French fort. Although Braddock arrived with British Regulars, he also drew heavily from Virginia’s men to fill out his ranks – ultimately 800 enlisted.\textsuperscript{27} Adam Stephen again successfully recruited men from Winchester to serve, and he himself headed a “Company of Rangers,” made up of fifty men, to accompany Braddock to Fort Duquesne.\textsuperscript{28} One section of Braddock’s force marched through Winchester, quartering with civilians and gathering supplies as it went. It also recruited civilian help, particularly from wagon drivers who could help haul supplies to the main force at Fort Cumberland. Recruited by the British, Daniel Morgan and other drivers hauled supplies to the fort; when they arrived, they were impressed by Braddock into further service.\textsuperscript{29}

Braddock had a clear plan and clearer orders for his assault on Duquesne and much of it must have seemed fanciful to his Virginia recruits. Artillery had been brought across the ocean and was to be dragged through wilderness, up and down mountains for a full European-style assault on the French fort. And before the artillery could be dragged, roads had to be cut – often over the mountains – in order to avoid easy assaults by French-allied Indians in the valleys. Wagon drivers like

\textsuperscript{27} In all, Braddock’s force consisted of two British regiments, three independent companies, artillerymen, nine Virginia companies, one Maryland company, on North Carolina company, and some Pennsylvania frontiersmen. Ward, \textit{Adam Stephen and the Cause of Liberty}, 15-16.
\textsuperscript{28} Ibid., 16.
\textsuperscript{29} Higginbotham, \textit{Daniel Morgan: Revolutionary Rifleman}, 4.
Morgan were commanded to accompany the strapped and overwhelmed army on this impractical expedition west.\textsuperscript{30}

Then, on Braddock’s expedition, Morgan encountered Britain in new and disconcerting ways. The British army was a rough institution, and Braddock – although something of a rogue in his own behavior – was known for his discipline of his troops. In this atmosphere of growing discontent and tightened discipline, the Valley wagoners were considered a “troublesome group,” and they were not exempt from martial discipline.\textsuperscript{31} In an attempt to keep order in the camp, particularly as provisions grew slim and the terrain became ever rougher, the General gave out sentences of up to 1000 lashes for various breaches of discipline.\textsuperscript{32} In an altercation with a British officer, Morgan knocked the other man down – some accounts say that he hit him with his whip – and a court-martial ordered Morgan to receive four hundred or five hundred lashes. According to his biographer, “before the ordeal ended, his back was bathed in blood and his flesh hung down in ribbons.”\textsuperscript{33}

Morgan survived, and continued with the army as Braddock made his way to Fort Duquesne. After the fighting started, however, Morgan and other wagoners – including future frontier legend Daniel Boone – took the opportunity to flee and go home.\textsuperscript{34} This was a canny decision, because the Virginia troops who stayed were overwhelmingly slaughtered: Washington later estimated that of the three companies of Virginia troops, only about thirty men remained alive.\textsuperscript{35} This was largely because

\textsuperscript{30} Ibid., 1-4.
\textsuperscript{31} Ibid., 4.
\textsuperscript{32} See Crocker, Braddock’s March, 164, 172.
\textsuperscript{33} Higginbotham, Daniel Morgan: Revolutionary Rifleman, 4-5.
\textsuperscript{34} Crocker, Braddock’s March, 228.
\textsuperscript{35} Ibid.
Braddock had ignored suggestions – and then pleas – from his Virginia men to fight guerilla-style. Adam Stephen later observed that Braddock had found “to his woeful Experience, what had been frequently told him, that formal Attacks & platoon firing never would answer against the Savages & Canadians.”\(^{36}\) When one company of eighty men led by Frederick County’s Edward Waggoner took cover behind a fallen tree anyway, and began firing on the enemy, British regulars mistook them for the enemy and killed fifty of them.\(^{37}\) And when British Regulars weren’t mistakenly firing on their own men, they were running; Washington reported to Dinwiddie that although the Virginia troops had “behav’d like men and died like soldiers, the dastardly behavior of the Regular troops (so called) (English soldier) expos’d all those who were inclined to do their duty to almost certain Death; and . . . broke and ran like Sheep before the Hounds.”\(^{38}\) A Boston letter writer later observed in the *Public Advertiser*, that “Old England Officers and Soldiers being sent to America” had “neither Skill nor Courage for this Method of Fighting, for the Indians will kill them as fast as Pigeons.”\(^{39}\)

Back in Frederick County, Daniel Morgan’s experience had not alienated him from military life – only from the British. He joined the militia, eventually serving as an officer, and when the American Revolution came, he was appointed to lead one of two companies of Valley sharpshooters to be sent to Cambridge, Massachusetts to reinforce the new Continental Army. So many area men volunteered that Morgan and his fellow Captain, Andrew Stephenson, had tryouts – shoot-offs where the men

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\(^{36}\) Ward, *Adam Stephen and the Cause of Liberty*, 20.


\(^{38}\) Ibid., 238.

displayed their skills. Such was their talent and enthusiasm that Morgan ultimately accepted sixty-nine recruits, although Congress had only authorized forty-eight.\textsuperscript{40} The two Virginia companies set out on a foot race to Cambridge; Morgan’s company arrived first, marching six hundred miles in three weeks.\textsuperscript{41} The New England troops were amazed by the Valley riflemen’s marksmanship, as were the fearful British, who the Valley men liked to pick off from a distance between skirmishes – despite orders to the contrary.\textsuperscript{42} These young riflemen dressed the frontier part, mustering in hunting shirts and leggings, carrying rifles, tomahawks, and scalping knifes.\textsuperscript{43}

After the war, Morgan returned to the lower Valley. But he was not fully retired – only a few months after Crane’s case, he would be appointed by Washington as a commander in the Army sent to confront the Whiskey Rebellion; in fact, the same Berkeley County newspaper that contained the news of Vanhorn’s death also contained a long description of the new excise tax on liquor.\textsuperscript{44} He would also later serve in Congress as a Federalist. But if Morgan rose to military, political, and social prominence, he never forgot his first encounter with British power. For the rest of his life he would tell the tale of his whipping on Braddock’s expedition, and boast: he had counted the lashes, he said, and the soldier who administered the beating had miscounted. The British still owed him one lash.\textsuperscript{45} What had begun as punishment became, in Morgan’s telling, yet another story of British incompetence and American victory.

\textsuperscript{40} Higginbotham, \textit{Daniel Morgan: Revolutionary Rifleman}, 23.
\textsuperscript{41} Ibid., 25.
\textsuperscript{42} Higginbotham, \textit{Daniel Morgan: Revolutionary Rifleman}, 25.
\textsuperscript{43} Ibid., 23.
\textsuperscript{44} “Shepherd’s-Town July 11,” \textit{The Potowmac Guardian and Berkeley Advertiser}, July 11, 1791.
\textsuperscript{45} Higgenbotham, \textit{Daniel Morgan: Revolutionary Rifleman}, 4-5.
If, as he sat on Crane’s grand jury in 1791, Morgan carried the thirty year-old scars of hundreds of lashes from the British, another member of the grand jury, John Wormeley, was a member of a family that yearned for England. From one of Virginia’s elite colonial families – one ancestor had been governor, and many had served on the Council – Wormeley was the son of Ralph Wormeley IV, who had been named one of Berkeley’s first justices of the peace.\textsuperscript{46} John Wormeley had been raised at the family’s Rosegill estate – the one a family member described as containing “a chapel, a picture-gallery, a noble library, and thirty guest-chambers.”\textsuperscript{47} The Wormeleys were “unrepentant Tories.”\textsuperscript{48} Both John’s brothers, Ralph and James, had been prominent Loyalists; during the Revolution, Ralph had been banished by the General Assembly to the family’s Berkeley lands, and James had fled to England, where he served in the King’s Guard. (Ralph had even been educated at Eton, where he made friends with Charles James Fox and Lord Carlisle, and sat for a portrait with them.\textsuperscript{49} And James later returned to England permanently, where he met with financial distress but refused offers of employment, insisting, according to his son, that he “had never had anything to do with commerce,” and “did not think such employment becoming a member of his family.”\textsuperscript{50} But, at the Winchester District Court, John Wormeley and the backwoods Daniel Morgan sat side by side.

Despite their differences in background, however, Wormeley and Morgan had something in common: they had both served on numerous Frederick County Court

\textsuperscript{46} The Recollections of Ralph Randolph Wormeley, Written Down by His Three Daughters (New York: Privately Printed, 1879), 14, in Small Library Special Collections, University of Virginia. A.G. Roeber provides good background on the phenomenon of the elite Virginia “Council families” in \textit{Faithful Magistrates and Republican Lawyers}, at, e.g., 45-46 n.25.

\textsuperscript{47} Recollections of Ralph Randolph Wormeley, 11.

\textsuperscript{48} Roeber, \textit{Faithful Magistrates}, 199.

\textsuperscript{49} Recollections of Ralph Randolph Wormeley, 11.

\textsuperscript{50} Ibid., 14-15.
juries together, and with the victim, Abraham Vanhorn. In a series of cases in the November 1789 court, all three men had sat together in judgment on a number of civil cases.\textsuperscript{51} So, to at least two members of this grand jury – two with high, if different, prominence – Abraham Vanhorn was not just a name, but a man with whom they had spent substantial time, in civic duty that had crossed social boundaries, even if it had not leveled hierarchy.

Two other men on the grand jury panel were somewhere in between the extremes of backwoods Morgan and patrician Wormeley. John and Matthew Page were from a family with deep, patriotic Virginia roots. The Page brothers each owned nearly twenty-three hundred acres, and retained dynastic ties to their families back east: for example, John Page was married Maria Byrd, daughter of William Byrd III.\textsuperscript{52} They were part of the group of old Virginia families who inherited or purchased Carter land in eastern Frederick County, and now relocated to their western holdings to enjoy a healthier climate with less malaria and the fertility of Valley lands. Once out west, as historian Warren Hofstra has explained, these new residents “began to recreate the life into which they had been born.” They “erected impressive manor houses,” and “in many subtle ways altered the tenor of economic and social


life in Old Frederick.”\textsuperscript{53} If, as historians have argued, the gentry elite was losing its power in other areas of Virginia, in Frederick County it was, in some ways, gaining.

The Wormeleys and Pages had Eastern roots, but also on the grand jury was another type of Valley elite. Grand juror Robert Wood was the son of James Wood, the founder of Winchester. The Woods were one of the Valley’s foundational families – besides having established the now bustling city of Winchester, the elder James had served as a justice of the peace and as the first Frederick County Court clerk.\textsuperscript{54} Robert Wood was now himself a Frederick County Justice of the Peace, and his brother, also named James Wood, had become a General in the American Revolution; James Wood was now the Commonwealth’s lieutenant governor and the head of its Council of State – the body established to advise and limit the Governor’s exercise of executive authority.\textsuperscript{55} The Woods did not have the Tidewater roots of the Wormeleys or Pages, but they held a lot of local and state power.

There were others on the grand jury, many influential but with names less known to history. Former Berkeley County justice of the peace Thomas Rutherford again served, as he had in so many previous sessions. Rutherford was, incidentally, Robert Wood’s brother-in-law and the brother of Robert Rutherford, who was currently serving in the Virginia General Assembly and would later be a U.S. Congressman. Another grand jury member, Charles Yates, did not even live in the area, although he owned land in Berkeley; Yates was a Fredericksburg merchant, and was also the current caretaker for Rutherford’s son, who was apprenticing with him in

\textsuperscript{53} Hofstra, \textit{A Separate Place}, 12.
Fredericksburg – and, according to surviving letters, running up large bills that vexed his father.\textsuperscript{56} Other prominent Berkeley men, whose names frequently appeared in Berkeley records, like Bataille Muse, were also called as grand jurors.

One grand juror had even already heard the case as a member of the Berkeley County Court. This was Berkeley County Court Clerk, Moses Hunter, son-in-law of General Adam Stephen, who had been the county court clerk since 1785.\textsuperscript{57} Despite his county position, Hunter was still summoned for Crane’s grand jury and served.\textsuperscript{58}

And although Hunter’s county court ties are particularly striking, they were not singular. Many members of Crane’s grand jury served or had served as justices of the peace in their respective counties were from families who had historically held those seats, or served the county court in other capacities. Grand juror John Woodcock was a Frederick County justice.\textsuperscript{59} John Page had been recommended as someone to be added to the Frederick County Commission of the Peace.\textsuperscript{60} Thomas Rutherford had formerly been a Berkeley justice, and the Wormeley family had long held powerful governmental offices, including justiceships.\textsuperscript{61} And grand jurors Charles Smith and John Page had both served as foremen on Frederick County’s grand juries.\textsuperscript{62} Other members undoubtedly served in other ways, now difficult to unearth.

\textsuperscript{56} Thomas Rutherford letters, in John Briscoe Papers, Charles Town Public Library, Charles Town, WV.
\textsuperscript{57} Hunter was appointed county court clerk on December 21, 1785. See Berkeley County Court Minute Book, BCHS.
\textsuperscript{58} See minutes for October 1, 1791, Winchester District Court Order Book.
\textsuperscript{59} See, e.g., May 1790 session of the Frederick County Court, in Frederick County Court Order Book.
\textsuperscript{60} Ibid.
\textsuperscript{61} See chapter 3, supra.
\textsuperscript{62} For Smith, see May 1790, Frederick County Court Order Book. For Page, see March 1790, Frederick County Court Order Book.
Historians have marked the institution of Virginia’s district courts, and similar reforms in other states, as the beginning of big changes – particularly, of the increasing triumph of professional ideas of law over country justice. A. G. Roeber writes that the passage of the 1787 district court bill “marks the end of the period when justices of the peace had any political impact on the legal future of Virginia.” He links this to social changes: throughout the post-Revolutionary period, he finds, new men increasingly filled the ranks of county offices, including justiceships, corresponding with increasing dissatisfaction with county court performance. For their part, justices opposed the new courts and the correspondent weakening of their authority. And it seems they had reason to – once the new courts were instituted, much business moved into the new forums, and many lawyers shifted their practices from county courts to district courts. These and similar reforms are often described as fitting within an ideological battle, and a concomitant governmental shift, from old pastoral ideas of law to new, professionalized ideas of republican government.

However, examining the identities of the men who comprised these courts shows that, when it came to the consequence of the new courts on local and state power, reality was complicated. Indeed, the lower Valley’s oldest families – the families who had been on Berkeley’s first Commission of the Peace – were now exerting their influence at the new district court. Some of them no longer served as justices, but if they no longer wielded power at the county, they had found a more potent forum – here, instead of controlling minor cases, they sat in judgment on major ones.

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63 Roeber, *Faithful Magistrates and Republican Lawyers*, 201.
64 Ibid.
65 Ibid.
Indeed, in many ways, the Winchester District Court looked like the courts of the counties from which it drew its cases. Its first sessions were packed with the names of Berkeley’s elites – men like Adam Stephen, Ralph Worneley, Jr., and Robert and Thomas Rutherford.66 As in Berkeley, there were lots of debt actions mixed with the occasional suit “in case” or in trespass, along with frequent recordings of land transactions and, finally, wills offered for probate. And some of the cases were actually the same – actions brought up on appeal from Berkeley’s county court, or from others within the district court’s jurisdiction. (The majority of appeals, incidentally, were from Berkeley).67 Even the lawyers were the often the same who had previously practiced in the county court – names like Alexander White, Philip Pendleton (nephew of Edmund Pendleton), and others.68

Of course, these similarities also indicated important shifts. The lawyers practicing in the district courts had moved their practices from the county, and men who would have been county clerks a generation earlier – the position that Tucker had so eagerly sought from Secretary Nelson – now wanted more lucrative district court posts.69 In this way, although they were ostensibly extensions of the pre-existing General Court, in some ways the new district courts were culturally supplanting county courts.

66 See September 1789, Winchester District Court Order Book.
67 Nineteen of the ruled-on appeals were from Berkeley; another five appeals from Berkeley had insufficient records. Only ten appeals total came from the other counties in the district.
68 See, e.g., Thomas Bryan Martin and Gabriel Jones, ex. of Thomas Lord Fairfax v. Adam Stephen, September 2, 1789 (Philip Pendleton, attorney for Stephen); September 1, 1790 (Alexander White admitted to practice), Winchester District Court Order Book.
69 See discussion in Roeber, Faithful Magistrates and Republican Lawyers, 202-204. In the colonial era, young lawyers like Tucker had eagerly sought lucrative county court clerk posts; in the young United States, young lawyers looked for jobs in the new district courts.
And, of course, these new courts often reversed county decisions. According to surviving records, between 1789 and 1791 the Winchester District Court ruled on cases from the county courts in its district; it affirmed thirteen and reversed thirteen. Another nine cases were continued because the record was insufficient, and the county clerks were directed to produce a more complete record.\(^\text{70}\) Sixth-three percent of Berkeley County’s appeals were reversed.\(^\text{71}\) And, incidentally, all of the

\(^{70}\) The records for the first court session and part of the second are missing. The evidence from the remaining records is as follows. **Affirmed:** David Hunter & Co. v. Roger Dixon, September 3, 1789 (Frederick); John Magill v. Humphrey Murphy, September 5, 1789 (Frederick); William Carlyle v. James McBride, September 8, 1789 (Hampshire); William Dark and John Dark v. Ignatius Simms, April 23, 1790 (Berkeley); William Brady, Benjamin Beeler and Magnus Tate v. Francis Willis Jr., April 23, 1790 (Berkeley); William Brady, Magnus Tate, and John Smith v. Warner Washington Jr., April 23, 1790 (Berkeley); George Rootes v. Thomas Nelson, Thomas Nelson Jr., and Hugh Nelson, ex. of William Nelson, April 23, 1790 (Berkeley); William Askew v. Francis Willis, April 23, 1790 (Berkeley); George Rootes, William Brady, and James Crane v. John Augustine Washington, Charles Washington, and James Nourse, ex. of Samuel Washington, April 23, 1790 (Berkeley); Thomas Steward, John McCormick, and George Rootes v. John A. Washington, Charles Washington, and James Nourse, ex. of Samuel Washington, April 23, 1790 (Berkeley); Warner Washington Jr. v. Jeremiah Warden et al, April 23, 1790 (Frederick); Warner Washington Jr. v. Samuel Pleasants, adm of Israel Pemberton, April 23, 1790 (Frederick); John Moore v. Reubin Moore Jun., April 25, 1791 (Shenandoah); **Reversed:** John Baker v. John Briscoe, April 23, 1790 (Berkeley) (agreed by parties); David Kennedy, Samuel Read, and George Riley v. Beard’s ex., April 23, 1790 (Berkeley); Robert Throckmorton and John Crane v. William Carr, April 23, 1790 (Berkeley); George Rootes v. William Hammond, April 23, 1790 (Berkeley); George Rootes v. Henry Baker, April 23, 1790 (Berkeley); Ephraim Worthington executor of Robert Worthington v. Cornelius Conway, April 25, 1791 (Berkeley); Benjamin Beeles v. George Hite, co-administrator of Isaac Hite, April 25, 1791 (Berkeley); Jacob Hackney et. Al v. Overton Cosby and James Ross, executors of James Mills, April 25, 1791 (Berkeley); Jackob Hackney et al v. Overton Cosby and James Gregory, surviving partners of James Mills & Co., April 25, 1791 (Berkeley); same; Amos Nichols v. John Light, April 25, 1791 (Berkeley); Robert Wilson v. John Carrick, April 16, 1791 (Berkeley); Morgan Morgan v. Seakin Dorsey, April 16,1791 (Berkeley); **Record Insufficient:** Ephraim Johnston and Thomas Johnston v. John Williamson, April 23, 1790 (Hampshire); James Wilson et al v. John Smith, April 23, 1790 (Berkeley); Benjamin Beeler and Waller Clark v. George Hite, adm of Jacob Hite, April 23, 1790 (Berkeley); Jacob Hackney, William Brady, and William Stubbs v. Overton Crosby and James Gregory, surviving partners of James Mills & Co, April 23, 1790 (Berkeley); same; Samuel Reed et al v. Alexander Henderson, April 23, 1790 (Berkeley); Thomas Campbell and Thomas Horner v. Missers Walsh & Co., April 23, 1790 (Frederick); Thomas Campbell and Thomas Horner v. George Douglass, April 23, 1790 (Frederick); John Cook v. Samuel Beall, April 23, 1791 (Frederick); Philip Pendleton et al. v. William Helm, April 25, 1791 (Berkeley), all in Winchester District Court Order Book.

\(^{71}\) **Affirmed:** William Dark and John Dark v. Ignatius Simms, April 23, 1790 (Berkeley); William Brady, Benjamin Beeler and Magnus Tate v. Francis Willis Jr., April 23, 1790 (Berkeley); William Brady, Magnus Tate, and John Smith v. Warner Washington Jr., April 23, 1790 (Berkeley); George Rootes v. Thomas Nelson, Thomas Nelson Jr., and Hugh Nelson, ex. of William Nelson, April 23, 1790 (Berkeley); William Askew v. Francis Willis, April 23, 1790 (Berkeley); George Rootes, William Brady, and James Crane v. John Augustine Washington, Charles Washington, and James Nourse, ex. of Samuel Washington, April 23, 1790 (Berkeley); Thomas Steward, John McCormick, and George
Winchester Court’s reversals came out of the Berkeley County Court. Apparently James Crane and the other men who had petitioned for reform were not alone in their disapproval.

But the high reversal rate was in some respects misleading. Although the General Court’s records have not survived, the limited evidence in St. George Tucker’s notes of its proceedings suggests its reversal rate was similar, at least in the years immediately preceding the creation of district courts. Between 1786 and 1789, Tucker’s notes indicate that the court reversed about 80 percent of the appeals it heard from the counties. Surviving reports from a much earlier era, 1720-40, also show a high reversal rate, around 50 percent. Given the fee structure in Virginia’s courts,
this should not be a surprise. Since Virginia’s courts made the losing party bear both parties’ costs of appeal, the General and then district courts were likely to draw strong appeals in the first place.\textsuperscript{75} Litigants were discouraged from appealing solely for another bite at the apple; instead, by the time a case was taken up on appeal, the appellant was fairly sure that reversal would occur – or at least had calculated the likelihood of reversal as worth the risk of doubled court and attorney’s fees if he lost. There was thus a built-in incentive only to bring appeals that were solidly meritorious. Indeed, in some appeals from the county, both parties even agreed in court that the county court’s ruling was incorrect.\textsuperscript{76} Focusing on reversal statistics alone thus has the potential to overstate a rise in antagonism between county justice and state courts.

Moreover, justices themselves were participants in the new district court. Sometimes they brought appeals from county decisions themselves, when litigating in their individual capacities.\textsuperscript{77} At other points the justices or other county officers instituted their own, original suits in the district court instead of the county.\textsuperscript{78} And,

\textsuperscript{75} See, for instance, \textit{William Brudy, Benjamin Beeles, and Magnus Tate v. Frances Willis Jr.}, April 23, 1790, in Winchester District Court Order Book.

\textsuperscript{76} \textit{John Baker v. John Briscoe}, April 23, 1790 (Berkeley) (agreed by parties), in Winchester District Court Order Book.


\textsuperscript{78} \textit{Adam Stephen v. John Rheinfield}, Debt, April 16, 1791; \textit{Adam Stephen v. David Mitchell}, September 3, 1791, abated because of Stephen’s death; \textit{Thomas Rutherford v. Lewis Stephens}, Sept. 5, 1789; \textit{Adam Stephen v. John Hollenbeck}, April 14, 1790; \textit{Thomas Rutherford v. Lewis Stephens}, April 22, 1790 (Rutherford was a former Berkeley justice); \textit{William Brady, John Smith, Magnus Tate v. Warner Washington}, April 23, 1790; \textit{David Hunter v. Terrence Popejoy}, April 14, 1790; \textit{David Hunter v. Joseph Thompson}, April 14, 1790; \textit{John Cooke v. Morgan Morgan, late Sheriff of Berkeley}, September
sometimes, they were defendants – particularly in debt cases, when Berkeley’s leading men often found themselves in front of the district court having to account for their arrears. Some of these cases were in their official capacity, others personal.

And this should not be surprising: in the turbulent times of the 1780s, particularly as the courts reopened to debt collection, it was the leading men – the ones most likely to be appointed to high county positions – who were also most likely to have widespread networks of debt and credit that would embroil them in debt lawsuits, particularly when someone died and an estate had to be settled. Virginia, after all, was a debt economy, one much of whose commerce rested on borrowing against future crops. The wealthier the man, the more likely he was to be both a debtor and a creditor.

But if the Berkeley justices and other county officials appeared frequently as litigants, they also showed up in the district court in other capacities. Men who were justices or former justices in their counties frequently served as members of juries and

2, 1790 (two suits); James McAlister v. John Vanmeter, April 25, 1790; James Wilson and Son v. Humphrey Keyes, April 22, 1790; Andrew Waggoner v. William Baylis, September 7, 1789.
grand juries, sometimes repeatedly – Thomas Rutherford, who was on Berkeley’s first Commission of the Peace in 1772, served on virtually every grand jury in the Winchester District Court. Robert Throckmorton, a Berkeley justice, served on the September 1790 grand jury. Justice George Cunningham served as a juryman on John Hough’s suit against Adam Stephen in 1790. Justice Nicholas Orrick was made an arbitrator by the district court in a suit in the April 1790 term. Similarly, Berkeley’s county sheriff was not only often in court in his official capacity but also as a citizen serving in other ways. For instance, one such Berkeley sheriff, Smith Slaughter, served on multiple juries in the fall 1789 term, while also answering suits in his official capacity.

There may, of course, have been power dynamics here. When justices served on juries or grand juries, they were summoned by the court to serve in those capacities. And when they did not show, they faced sanctions – for instance, Berkeley County justice John Briscoe was ordered in contempt in 1790 when he failed to appear at court in time to serve on a grand jury. (Briscoe appeared three days later and offered reasons for his absence and was excused). Once present at

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80 See grand jury list for April 15, 1791, including, among others, John Briscoe and Thomas Rutherford. Grand jury list for April 15, 1790, including Thomas Rutherford. Winchester District Court Order Book.

81 September 9, 1790, Winchester District Court Order Book.

82 Amos Nichols v. Peter Light, April 15, 1790, Winchester District Court Order Book.

83 Slaughter named as Berkeley Sheriff in September 1789 records, Thomas Bryan Martin and Gabriel Jones, Executors of Thomas Lord Fairfax v. Adam Stephen, Sept. 3, 1789, Winchester District Court Records, library of Virginia microfilm. In the same court session, Slaughter served as a juror in Thomas Shepherd v. Jasper Ball and Sigumund Stribling, a suit in trespass, assault and battery. See September 4, 1789. He was also a juror the next day, in William Glascock v. James Gumiel Dowdall, a suit in case, see Sept. 5, 1789, and was also named in a suit in his official capacity on the same day. See William Allason v. James Crane, in debt, and again the next day, on September 7, in George Hite v. William Brady and Alexander White, a debt case. Slaughter continued to frequently serve on juries in subsequent terms. See Wed. Sept 8, 1790, Governor for the use of Moses Hunter v. Morgan Morgan, Winchester District Court Order Book.

84 September 1, 1790; September 4, 1790, Winchester District Court Order Book.
court, Briscoe then served on a petit jury in a misdemeanor case.\textsuperscript{85} And when he was called for grand jury service the next April, he appeared on time.\textsuperscript{86} But if the men who served as county justices were summoned by the district court, the flip side of that reality was also true: the district court chose to summon men who served as local justices and thus chose to give them tremendous power – not to exclude them from court duties. Although the district courts were certainly encroaching on county territory, they were also absorbing, empowering, and providing a new forum for county personnel. The legal reality was shifting, but was, in many ways, still comprised of the same basic parts. Moreover, the justices do not seem to have been unwilling participants. It was not uncommon for the same person to appear in several different capacities in the same session – on several different juries, for instance, and prosecuting a suit while defending another. In the April 1790 session, for instance, Berkeley’s Thomas Rutherford served on the grand jury, as a defendant in a lawsuit, a juror in four civil cases, and a plaintiff in another.\textsuperscript{87}

Indeed, in many ways, the move to district courts gave substantial control to local elites – the same ones who themselves tended to play a large role in county justice. Now, rather than a grand jury at the capitol in Williamsburg, the grand jury was made up of local elites. And, rather than making locals travel to Williamsburg or Richmond for their lawsuits or to serve as jurors or witnesses, that burden was shifted to the state judges who, like Tucker, trudged from court to court and circuit to circuit.

\textsuperscript{85} Commonwealth v. James McIlhaney, September 7, 1790, Winchester District Court Order Book.
\textsuperscript{86} April 15, 1791, Grand jury list, Winchester District Court Order Book.
\textsuperscript{87} Grand jury listed on April 15, 1790; Preeson Bowdoin v. Robert Rutherford, Thomas Rutherford, and William Little, April 20, 1790; Edmund Pendleton and Peter Lyons, Trustees v. William Throckmorton, April 22, 1790 (juror); John Bull v. William Little, April 22, 1790 (juror); Thomas Rutherford v. Lewis Stephen, April 22, 1790; John Murray et al v. William Jennings, April 22, 1790 (juror); Edward Snickers v. Joseph Butler, April 22, 1790 (juror), Winchester District Court Order Book.
That shift was not lost on the judges – they had even successfully protested
the original version of the district court bill, which required them to ride circuit and
also sit on both the General Court and the Court of Appeals; as a result, the Assembly
removed their Court of Appeals responsibilities. From one perspective, much was put
under the authority of these new district judges. But from another, these new judges
were unappreciated servants, exchanging their own time and energy at the beck and
call of courts around the Commonwealth. That was, perhaps, how Judge Tucker felt
on September 1, 1791, fresh from his long journey with many more miles in front of
him.

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As the motley assemblage of Virginia’s gentleman on Crane’s grand jury
prepared to consider whether to declare his indictment a true bill, Judge Tucker had a
few words for them about their job – about what it meant to be a grand jury in a
republic. If it was like other grand jury charges that Tucker gave, he probably said
something like this:

If those writers who contend that Virtue is the vital principle of
a Democracy deserve that attention which their works have generally
received from the enlightened part of mankind, nothing can contribute
to the political health of such a Government, so much as those
institutions which are calculated to enforce obedience, as well to
moral, as to civil Duties. Of Institutions of this nature, that of Grand-
Juries appears to have been one of the wisest provisions which our
Ancestors have introduced into the Jurisprudence of that Country,
from whose Constitution and Laws we have selected many of the most
important regulations, whilst we have happily avoided most of their
defects, which time and experience have unfolded.

The Object of the Institution of Grand-juries is, that a regular
Inquiry, at stated, and these not distant, periods, may be made into all
Offenses against the common happiness; and an impartial punishment,
where such offences are discovered, be inflicted without regard to the
Circumstances of the Offender. In a republic where there is no
sovereign but the laws; -- where no discrimination of interests prevails; where all are equally bound to afford, & entitled to receive that protection which the laws only can afford to the Individual, such Enquiries; such Vigilance; and such Impartiality are indispensably necessary to the preservation of the Government, & to the security & happiness of the Citizens.

This important trust by the happy Constitution & laws of our Country you are this day called upon to perform, & enjoined by the solemn obligation of an oath to perform it, with diligence, and with Impartiality: -- You are the accusers of the Commonwealth, on the one hand, and the Guardians of the lives & fortunes of your fellow Citizens on the other; -- As accusers you are bound to present all offences that have, or shall come to your knowledge, whilst you are impanell’d on the present Occasions: -- On the other hand you are not to accuse any one falsely, nor through hatred or malice, but you are to present the Truth, only, without favor or prejudice. – Hence arises that protection to your fellow Citizens, which entitles you to the Appellation of the Guardians of their lives & fortunes: for no man can have his Live, his Limbs, or his Estate put in hazard by any Accusation, unless that accusation first receives the solemn sanction of your Oaths.

Having thus offered a few remarks on the nature of your institution, I shall briefly observe that the Objects of your Enquiries are abuses of every kind; -- for whatever may tend to injure the Constitution of our republic – to obstruct, pervert, or evade Justice, -- to disturb the public peace – to violate the right, to injury he persons – or corrupt the morals of our fellow citizens, ought to be notified in your presentments; except in such Cases, only, where a specific penalty inflicted by law is less than five Dollars, or 200 pounds of Tobacco: such Cases being reserved for the Jurisdiction of the County Courts. 88

Tucker then reminded the jury that presentments needed to be based on the knowledge of at least two of its members and concurred in by twelve. Although some indictments would be drawn up by the Attorney for the Commonwealth and presented to the grand jury, they were not limited to those cases; instead, “you may . . . present any thing [sic] which may come to your knowledge in any other way; & should you wish to have witnesses brought before you, the Court will order the proper process for

88 St. George Tucker, Grand Jury Charge, filed with General Court Docket 1793, Tucker-Coleman Papers.
that purpose on your application.” After this or a similar charge, the grand jury
withdrew – Morgan and Worneley, loyalists, patriot generals, new men, and
descendants of old families – to consider the case, “without regard to the
Circumstances of the Offender.”

But although they were supposed to consider the case without regard to those
circumstances, part of the grand jury’s decision-making included something else:
Crane’s class. In the eighteenth century, it was customary for Virginia indictments to
list the defendant’s class after his name – “John Smith, laborer,” for instance – and
Tucker instructed his grand juries to do so. Crane’s class, though, apparently
stumped whoever drew up the indictment. Although indictments, especially in big
cases like Crane’s, were sometimes written ahead of time and handed to the grand
jury with blanks left for items that were in question, Crane’s indictment left only one
blank – his class. The Winchester Court clerk also left a blank for Crane’s class, to
be filled in later – apparently his status, even after the indictment was returned as a
true bill, required further deliberation.

So, after the indictment was returned, someone – the court, the grand jury –
had to debate: where did John Crane fit in the jumble of the Valley’s elites? His
roots were to the east, but unlike the Page brothers, his father had a long presence in
the west – it appears from court and land records that the Crane family may have
actually lived in Berkeley, even though they continued to own land in Spotsylvania
County until the 1780s. His grandfather had been the High Sheriff of Spotsylvania, a

89 Ibid.
90 Indictment, Commonwealth v. Crane, Misc. Court Records, 1744-1855, District Court Criminal,
Frederick County, Library of Virginia.
91 September 1, 1790, Winchester District Court Order Book.
county justice, and Colonel in the militia, which signifies especially elite status. On the other hand, his father served not as a Berkeley sheriff, but as the deputy sheriff, a position that historians have seen as less exalted, more for the middling rank. (Judge Tucker’s stepson, John Randolph, would later scoff that after the Revolution, the Virginia General Assembly was filled with “a knot of deputy sheriffs and hack attorneys, each with a cruet of whiskey before him, and a puddle of spittle between his legs.”)² But James Crane, John’s father, was named in county records as a gentleman, and his affairs were well-intertwined with those of elite area families. And John had married among Berkeley’s wealthiest and most well-connected. (And after his execution, Catherine Whiting Crane would remarry to Smith Slaughter, who had served as Berkeley’s High Sheriff – her high status continuing, even after her husband was hanged at the gallows.)³

To be sure, Crane owned not thousands of acres, like the Page brothers, but a mere two hundred. But gentility was slightly more complicated than that. James Crane “gentleman” did not own much more – only 204 acres and nine slaves.⁴ And other Berkeley gentlemen also seemed to own about the same amount of land, although some owned much more, and others, like some of the Catherine’s Whiting relatives, were vast slaveholders. But the genteel class divide, if records are any evidence, was not between these vast property holders and everyone beneath them, but instead included men like James Crane—men who owned just a few hundred acres and a handful of slaves and were also called “gentlemen” and wielded

² Roeber, Faithful Magistrates and Republican Lawyers, 203.
³ Brown, Data on Some Virginia Families, 251.
⁴ Berkeley Land Tax Records, East 1791, BCHS; Berkeley County Personal Property Tax Records, East 1791, BCHS.
considerable local power. John’s marriage to Catherine Whiting and the consistency of that marriage with other aspects of his family ties makes it seem that he was closer to that status than a bare examination of property records might suggest. John Crane may not have been a high Virginia aristocrat or have owned vast acreage, but that did not prevent him from being genteel like his father – whatever genteel meant.

In the end, the court designated John a “yeoman” – a decision that may have surprised and dismayed the Crane family. In two generations, they had fallen enormously. John Scanland Crane, the young defendant’s namesake grandfather, had held Spotsylvania County’s highest positions, as High Sheriff and militia Colonel. Now, John Crane the younger was designated a yeoman. In studying the nineteenth century, Stephanie McCurry has found that “yeoman” was typically used to describe a middling sort, dependent on his farm and his own labor for his sustenance, while a “gentleman” was someone of superior social position – although the difference was “one of degree, not kind.” Yeomen typically owned fewer than five slaves, “only two of whom were likely to have been adults,” and were typically “bound by the land and logic of family farms.” 95 John fit this description on paper, but his family background was quite different.

But the decision was made. The clerk, or foreman Morgan, wrote John’s new class into the blank in the indictment in awkward, extra-large script, yet still not large enough to fill the space. As a result, John Crane – family, marriage, and connections aside – became a “yeoman” in the Commonwealth’s records and moved on to trial reduced to the status of some of the men who worked for him in his fields on the day

of Vanhorn’s death – the very men whom Catherine Whiting Crane had derided as “negrofied puppies.”
September 3, 1791:  
An “Imperfect Special Verdict”

After the grand jury returned its indictment on September 1, 1791, John Crane had a choice. Two judges were supposed to preside at each of Virginia’s district courts, and since Judge Henry Tazewell was ill, there was not a full court to conduct Crane’s trial. As a result, John could delay his trial and instead stay in the Winchester jail until the next term of court in April; then, if two judges were still not available, he could post bail and have his trial delayed again. Finally, if there was still only one judge at that third term, he would be discharged.¹

It was a trade-off: the cost was spending the winter in the Winchester jail, but the potential payoff was release without trial. And because Virginia’s judges had to travel long distances on circuit to preside at the district courts, release was not out of the realm of possibility. Indeed, Judge Tucker observed in his edition of Blackstone’s Commentaries that, because of this rule, “some of the most atrocious offenders that were ever brought to the bar of a court” had “escaped the punishment due to their crimes.”²

Crane, however, decided to waive this right, and instead petitioned Judge Tucker to be tried immediately.³ The poor condition of the Winchester jail was almost certainly a factor. As a petition later filed on his behalf noted, he had already

¹ See Hobson, “General Introduction,” St. George Tucker’s Law Reports, 1:35
“suffered much indeed from a long and painful confinement in a wretched and loathsome prison.”

But whatever the jail’s conditions, Crane and his family must have remained optimistic about his acquittal. If they had been certain that he would be convicted and condemned to death, they surely would have opted to prolong his pre-trial period as long as possible. Their optimism, of course, may have been unrealistic, given the recent execution of Medlicott, hung for murder after a fight in circumstances even more questionable than Crane’s. But Crane still petitioned for trial, foregoing even the opportunity of delay and eventual release from the lack of a full court.

In response to Crane’s petition, Judge Tucker set the trial for the very next day, September 2, 1791. The district court clerk sent out summons for witnesses to appear – some for the Commonwealth, others for Crane. One summons directed “John Vanhorn and his wife,” who seem to have been Abraham Vanhorn’s parents, to the court to “speak on behalf of John Crane jun.” Maybe they were hostile witnesses, summoned to impeach accounts of Abraham’s death – to suggest an intervening cause, or to elicit other information that might help John Crane’s case. Later, Crane’s supporters would claim that he had been deprived of material evidence, including the testimony of Hugh McDonald, who had been working in his fields that day – McDonald was the reaper who later certified that the aggressors had

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4 “Petition of Citizens for the Pardon of John Crane, Jr.,” 28 April 1792, in Calendar of Virginia State Papers, 5:511. 
5 James Medlicott’s Case, September Term, 1790, Superior Court Order Book 1789-1793 (Frederick County), Library of Virginia; Edward McGuire et al., “Petition for the Pardon of James Medlicott,” Calendar of Virginia State Papers, 4:209.
6 See summons in Commonwealth v. Crane District Court File.
7 Ibid.
been Merchant and Vanhorn, not Crane. There is no record of why McDonald did not testify – perhaps he did not make it to court in time. His deposition would be taken a month later, on October 1.

The court summoned a venire of jurors from Crane’s area of Berkeley County, near Charles Town, Virginia, and the case went to trial on September 2. Crane had excellent legal representation. His lawyer was Charles Lee, a leading member of Virginia’s bar and the brother of Henry “Light Horse Harry” Lee, soon to be Governor of Virginia. Educated at Princeton, Lee had read law with Jared Ingersoll in Philadelphia before returning to Virginia. In only a few years, President George Washington would appoint him U.S. Attorney General, a post he would retain under President John Adams. It may have been good for Crane, and for Lee, that Judge Tazewell was ill and not at court; a few years later, when Lee was Washington’s attorney general, Tazewell would privately comment that with a “confidential Council” of Pickering, Wolcott, McHenry, and Lee, Washington was surrounded with “a council not more remarkable for their Talents, than they will prove to be for their attachment to the principles of Republicanism.” But those would be different times, too – after the split between Federalists and Jeffersonian republicans had driven deep enmity into Virginia’s dense social network. When that happened, Tazewell – and Tucker as well – would be staunchly with the Republicans, and Lee would remain a moderate Federalist. But for now, those changes were in the future – although roots of those resentments were already fermenting as the grand jury heard Crane’s case.

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8 Thomas Whittaker et al. to the Governor, May 29, 1792, Calendar of Virginia State Papers, 5:598-99.
9 Ibid.
Newspapers across the country reported on the trial. “On Friday morning,” the paper reported, “a jury from this County was empaneled, and after the evidences given, the attorneys continued pleading til twelve o’clock that night, when the jury retired to the jury room.” It was quickly evident that they were in a deadlock. Even though Winchester juries typically returned their verdicts the same day, Crane’s jurors were still out at the end of September 2. John was remanded to jail, and the court adjourned, while the jury – confined “without refreshment of any kind” – continued to deliberate. September 3 progressed, but still no verdict. As the paper reported, the jury “continued in the jury room, until nine o’clock on Saturday evening.”

Then, they finally reached a verdict – of a sort. The exhausted and frustrated jurymen returned and found him “guilty,” but did not decide whether his actions were murder or manslaughter. Instead, they issued a “special” verdict, one which gave an over eight hundred word account of the facts related to the fatal fight in which Crane had stabbed Vanhorn and asked the court to decide whether, on those facts, Crane was guilty of manslaughter or murder.

The jury’s verdict, which seems to have been written by its foreman Gerard Alexander, gave a long, careful account of the events that had led up to Vanhorn’s mortal wounds. They found (deletions and insertions in original):

We the Jury find that about three o’clock on the fourth of July, one thousand seven hundred and ninety-one, John Crane, the prisoner at the bar, was informed by his reapers, that one Campbell’s reapers had sent a challenge to his. That in consequence of this supposed

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11 Winchester District Court, Friday Sept 2, 1791; “Petition of Citizens for the Pardon of John Crane, Jr.,” 20 April 1792, in Calendar of Virginia State Papers, 5:371-72.
12 “Shepherdstown, September 5,” Mail (Philadelphia), September 17, 1791.
challenge, the said John Crane went with others out of his own field into the field of the said Campbell, which was adjoining to that of Crane’s, and that the said Crane did make use of threatening language, such as he could whip any man in the field, meaning Campbell’s reapers, amongst which was Abraham Vanhorn; but after some altercation we find all parties appear to be reconciled; but before said Crane left the field another dispute arose, in which Crane challenged them to fight, man for man, which Campbell’s party agreed to do, of which number the said Abraham Vanhorn was one: when the parties came near together, they parlied and disputed for some time, the issue of which was, that the prisoner at the bar swore that if he fought any man that day, he would let out their guts, and likewise that he would fight Joseph Vanhorn the next morning, for ten dollars, which the said Abraham Vanhorn was to bet him. The prisoner at the bar leaving Campbell’s field, after some time a certain John Dawkins, one of Crane’s reapers suspected some insult given by Campbell’s party and going to fight any one that would insult him. The prisoner at the bar observing this, requested the said Dawkins to get him a club, and he would take his knife, which knife he took out of his pocket, declaring they could clear their way through the whole of Campbell’s party, upon which the said Dawkins desisted from prosecuting his intentions, and likewise the prisoner at the bar. We find that between sunset and dark, that the said Abraham Vanhorn with several others passing through the field of John Crane, the prisoner at the bar, to confirm a bet which was to ensue the next morning, and also making a noise and singing, which the said Dawkins conceived was an insult to the prisoner at the bar and his party. Thereupon Dawkins called out that he could whip Joseph Vanhorn. Joseph Vanhorn replied, it would be no credit to him if he did, as he was a larger man; upon which the prisoner at the bar came out, and ordered them out of his field, or he would blow them through, upon which they immediately quitted the field; he then called for his gun, which was refused by his wife; he then called for his knife, and pursued them to the fence, exclaiming Abraham Vanhorn, you have used me ill, and I’ll be damn’d if I dont have satisfaction. Then the said Abraham Vanhorn replied, not more so than you have used me. The prisoner then requested the said Abraham Vanhorn to come over the fence, and fight him; the said Abraham Vanhorn made answer, that he the said prisoner at the bar would use a knife or razor; the said prisoner replied, come over the fence, and I will give a fair fight: the wife of the said prisoner at the bar came down crying out, Mr. Crane, I am surprised you should demean yourself to fight with such a set of negrofied puppies. By this time the prisoner at the bar, and the said Abraham Vanhorn, were much irritated; at which time the prisoner the said Abraham Vanhorn, and the said Isaac Merchant one of Campbell’s reapers had their shirts stripped off, which the prisoner at the bar had not: the prisoner at the bar and the said Abraham Vanhorn attempting to get
at each other across the fence, who was prevented by John Dawkins. Then the said prisoner struck at Merchant, who struck the said prisoner at the bar, and turned him round, who immediately joined in combat with the said Abraham Vanhorn. We find in the combat that the said Abraham Vanhorn threw the prisoner at the bar on the ground, and kept him there for some time; at length the prisoner at the bar seemed to get the advantage of the said Abraham Vanhorn, at which time the said Abraham Vanhorn cried enough, and said his guts were cut out. [Illegible word crossed out]. We do find that the said Abraham Vanhorn did receive several wounds with a knife, or some sharp instrument, of which wounds the said Abraham Vanhorn died, and that the wounds were given by the prisoner at the bar.\textsuperscript{13}

At the end, the jury simply concluded:

\begin{quote}
Upon the whole matter, the Jury pray the advice of the court, & if the court should be of opinion that the Prisoner is guilty of Murder, then we of the jury \textit{do find him the Prisoner is guilty of murder}, then we the Jury do find the Prisoner is Guilty of Murder, & if the Court shall be of opinion that the Prisoner is not guilty of Murder, but guilty of Manslaughter, then we of the Jury do find the Prisoner not Guilty of Murder, but guilty of manslaughter.\textsuperscript{14}
\end{quote}

The jury was carefully considering and revising the verdict’s language – both for clarity, and seemingly to make it more legal-sounding.

At least three of the jurors in Crane’s case would later protest that they had agreed to the special verdict only reluctantly and under hardship. Gerard Alexander certified to the Governor that “myself & three more of the Jurors were of opinion that the said John Crane was guilty of manslaughter, and not of willful murder.”\textsuperscript{15} Jurors Benjamin Strother and Thomas Griggs also petitioned the Governor, certifying that they too “were of the opinion that the said John Crane was not guilty of willful

\textsuperscript{13} Winchester District Court, September 3, 1791, Superior Court Order Book 1789-1793 (Frederick County), Library of Virginia.\textsuperscript{14} Verdict, \textit{Commonwealth v. Crane} District Court File.\textsuperscript{15} “Gerard Alexander’s Certificate as to John Crane, Jr.,” April 19, 1792 in \textit{Calendar of Virginia State Papers}, 495.
murder – only manslaughter.” Months afterwards, when 133 citizens of Berkeley County, including Clerk of Court and grand juror Moses Hunter, grand jury foreman Daniel Morgan, Justice Cato More, and prosecution witness Thomas Campbell, petitioned the Governor to pardon Crane, they related (among other facts) the circumstances that led to the jury’s unusual verdict:

[Y]our Petitioners beg leave to state these peculiar circumstances; that the Jury by whom he was tried, were unable to agree upon their verdict for two whole days, and the greater part of as many nights, making the whole near forty hours; during all this time they were confined without refreshment of any kind, and were by necessity driven to find the imperfect special verdict upon which the Judgement of the court has since been given; that four or five of that very Jury have ever since their verdict, declared, and still declare that the unfortunate prisoner had not in their opinion been guilty of murder.17

District Court Clerk Peyton confirmed the petition’s account of events: “I am apprehensive,” he wrote to the Governor, “that those in his favor were induced to acquiesce, being two days confined on the business under a full persuasion that it would finally be determined [by the court] to be manslaughter only.”18

And just who were the jurors who had been so overpowered in the jury room? The three who would later write the governor to insist that they had only believed Crane to be guilty of manslaughter were all wealthy and important men. One was the foreman, Gerard Alexander. Originally from Fairfax County, where he was a neighbor of George Washington, Alexander’s family was one of the very first in the Alexandria area and had given their name to the new city. In 1790, Alexander owned 712 acres of property in Berkeley, more than triple James Crane’s holdings and nearly

16 “Certificate of Benjamin Strother and Thomas Griggs as to John Crane Jr.,” April 23, 1792, in Calendar of Virginia State Papers, 504.
17 “Petition of Citizens for the Pardon of John Crane, Jr.,” April 20th, 1792, in Calendar of State Papers, 508-513.
18 J. Peyton to Governor, April 30th, 1792, in Calendar of State Papers, 519.
the largest in the county.\textsuperscript{19} The second was forty-one year old Revolutionary veteran Captain Benjamin Strother, the son of a prominent Fredericksburg merchant and brother of the High Sheriff of King George County. Strother likely knew the Cranes from Spotsylvania; his daughter would later marry John Crane’s brother Joseph.\textsuperscript{20} The third, Thomas Griggs, lived across the street from Crane’s father James in Charles Town; like Crane, he was one of the town’s founding trustees. Griggs was also patron of one of the area’s first Methodist churches – a Methodist revival had recently swept through the area and absorbed a number of the Cranes’ friends and neighbors. In 1791, Juror Griggs, a transplant from Lancaster County, was forty-five, had lived in the Berkeley area since 1770 and married into Virginia’s prominent Carter family.\textsuperscript{21} Foreman Alexander indicated to the Governor that a fourth juror also argued for manslaughter, but there is no record of who he was.

The jurors who argued on Crane’s behalf in the jury room and later to the Governor were not the only prominent men on the jury, however, or the only jurors who knew the Cranes. In fact, the panel resembled a “who’s who” of Berkeley County. Abraham Shepherd, for instance, owned the town of Mecklenburg, which was renamed “Shepherdstown” in his family’s honor and was also a Revolutionary

\textsuperscript{19} Berkeley County Land Tax records, 1790. A dispute over Gerrard Alexander Sr.’s will helps establish the juror Gerrard Alexander’s identity; the dispute involved the senior Alexander’s Fairfax and Berkeley (by then Jefferson) County lands, and ended up in court in 1808; summaries of that case reveal that the senior Alexander purchased land in Frederick/Berkeley/Jefferson county from Lord Fairfax, and that he had a son named Gerrard, who would be the Crane jury foreman. Alexander’s forebears were among the first landowners in the northern Virginia area. See Lyman Chalkley, 

\textsuperscript{20} William Armstrong Crozier, \textit{The Buckners of Virginia and the Allied Families of Strother and Ashby} (The Genealogical Association: New York, 1907), 234; Aler, \textit{History of Martinsburg and Berkeley County}, 143-44.

\textsuperscript{21} Bushong, \textit{A History of Jefferson County}, 58, 61, 71, 77.
War veteran who conducted business for the county and owned mills. Magnus Tate was a lawyer and one of the “gentlemen” named a founding trustee of Charles Town with James Crane in 1787 – and also, it seems, the same Magnus Tate who had appeared in court years for fighting years earlier, minus an ear. David Gray was a veteran of the Revolutionary War and a Shepherdstown landowner; he appears in the history of the area in 1787 as one of the sworn witnesses to inventor James Rumsey’s first successful steamboat ride on the Potomac. John Taylor was probably the son of one of the first pioneers in the Berkeley area. And George Reynolds was later elected to the General Assembly as a Federalist. Juror William Helms owned 300 acres – more than John or James Crane. (A Meredith Helm had been on the first commission of the peace in Frederick in 1743). A few other names left less information in the historical record: John Bates, William Dyles, and Joseph Wainsford.

When John Crane faced his jury, then, he did so in the midst of a peculiar kind of elite democracy. And although Crane’s jury might be an extreme example – one can imagine potential jockeying to sit on the jury of this celebrated case, a jury that would condemn or possibly exonerate James Crane’s son – it does not seem to be truly exceptional. Other leading figures from Berkeley County also frequently filled

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23 Gardiner and Gardiner, Chronicles of Old Berkeley, 204. There may be two Magnus Tates, father and son.  
26 Ibid., 75.  
27 Berkeley County Land Tax Records, 1790. BCHS.  
28 Cartmell, Shenandoah Valley Pioneers and Their Descendants, 19.  
29 Commonwealth v. Crane District Court File.
the rosters of the Winchester District Court’s juries. And although St. George Tucker later complained that juries were, after the first few days of court, made up of “idle loiterers,” his complaint in its assumption proves the elite rule – that juries were expected to consist of leading citizens and that such was routinely the case during the early days of a court session.30

It is hard to know exactly how these men felt as they confronted Crane’s case. Was there genuine disagreement based on the facts? Or did the jurors in favor of a murder conviction think that the jurors who argued for manslaughter were swayed by ties to James Crane? Did impartiality lock heads with friendship? Or were the facts disputed and uncertain?

The jurors who favored Crane and Crane’s attorney were not the only ones who thought that manslaughter was the appropriate result. Another observer, Robert Throckmorton, a local elite whose family frequently served in county offices, told the Governor that his recollection of the testimony was that Crane was provoked and then engaged with both Merchant and Vanhorn at the same time:

I was at his Tryal . . . . One thing has much weight with me, which is after their [Campbell’s reapers’] day’s work was done, they went to Crane’s house, where it do not appear they had any business but to renew a quarrel that had Ran very high the preceding day. It likewise appears that Crane was engaged with two men partly at the same time.

“A man in that situation,” Throckmorton observed sympathetically, “would be likely to do all he could to defeat his adversary; for when a man is fighting, he has little time to reflect, but it seems natural for him to do all he can to extricate himself.”31

31 Robert Throckmorton to the Governor, June 19, 1791, in Calendar of State Papers, 599. On Throckmorton, see, e.g., Amanda C. Gilreath, Frederick County Virginia, Deed Books 19 and 20, 1780-1785, Abstracted (Heritage Books: Westminster, MD, 1995), 23; W.M. Noble, “The
Witnesses, jurors, and community members thus continued to have strongly differing views about Crane and his guilt. And the Cranes seem to have believed that John would triumph at trial – John himself petitioned for trial with Tucker, instead of delaying his trial until the court’s spring term. Were their hopes pinned on a different understanding of what had happened that day at Campbell’s fence – or merely on their social standing?

Locked in disagreement, the jury had passed the buck – to Judge Tucker. Tucker later expressed his exasperation that the jurors had not been able to compromise with a manslaughter verdict. Although, he later commented, “no man could be persuaded to find murder what he thought manslaughter, a departure on the side of mercy was what might with some reason to be expected in those of a different opinion.” But no such departure had come – Crane’s jurors had obviously felt strongly about their conflicting verdicts.

After the verdict, uproar ensued. Charles Lee, Crane’s counsel, was concerned and thought that it omitted proven facts that were in Crane’s favor. This was, he suspected, because the jury had not understood that they were “material” facts, essential to the determination of the degree of Crane’s guilt. And because the court would make its legal decision – whether Crane would hang for murder or was guilty of manslaughter only – based on the facts provided by the jury in the verdict, it was critical that the verdict include all material facts. As a result, Lee asked Judge Tucker to allow him to point these omissions out to the jury and ask them to modify

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Throckmorton Family of Virginia,” *Virginia Magazine of History and Biography*, vol. 15 (1908), 81-82.
32 Robert Throckmorton to the Governor, June 19, 1791, in *Calendar of State Papers*, 599.
33 Lee to Tucker, 4 September 1791, Tucker-Coleman Papers.
34 Ibid.
their findings. Tucker at first reluctantly agreed to Lee’s request.\textsuperscript{35} Lee proceeded to address the jury, but as he listened to the counsel’s arguments, Judge Tucker became concerned that Lee was overstepping and interrupted him. As Lee later wrote to Tucker in a heated exchange about the case: “It was conceived by you when you last interrupted me, that I was reflecting upon the conduct of the jury, which ought not to be allowed – I am sure that the jury did not so understand my remarks and that I did not impeach them of any misconduct but attributed the omissions to their opinion that they were not material.”\textsuperscript{36} On Tucker’s part, he felt that Lee’s remarks were “particularly pointed against a fact found by the Jury . . . and not against an omission.”\textsuperscript{37}

When Tucker interrupted Lee for the final time, Crane’s counsel let his displeasure be known. He retorted tartly that “if the court was truly satisfied that all facts proved in favor of Crane were included in the verdict,” then “judgment of death might be pronounced.”\textsuperscript{38} Since Crane had not yet been convicted of murder – the verdict had, after all, left the legal decision to the court – the meaning of Lee’s hyperbole was evident: the contents of the verdict did not matter. Tucker had already decided on murder. Lee’s comments infuriated Tucker. His feelings, the judge later told Lee, had “not been violated in an equal degree for many years.”\textsuperscript{39}

Into this volatile context came the question of John Crane’s fate. Was he guilty of murder or manslaughter? A special verdict in a capital case was not ideal and left the most important decision a republic could make – whether to extinguish

\textsuperscript{35} Ibid.
\textsuperscript{36} Ibid.
\textsuperscript{37} Tucker to Lee, 4 September 1791, Tucker-Coleman Papers.
\textsuperscript{38} Ibid.
\textsuperscript{39} Ibid.
the life of a citizen – up to a judge rather than a jury. In the post-Revolutionary era, this concern was especially acute. Not only were there misgivings about capital punishment in general, but the right to trial by jury was also a flash-point for perceptions of British abuse and American resistance to it, from John Peter Zenger’s case – in which Zenger’s counsel argued that juries held sway over law as well as fact in seditious libel prosecutions – to concerns about British attempts to give jurisdiction to jury-less vice admiralty courts. More recently, Antifederalists had protested the new Supreme Court’s ability to hear appeals in law as well as fact. During Virginia’s ratification debates, the Commonwealth’s premier orator, Patrick Henry, had passionately warned that if a people lost their right to trial by jury, all others would follow.

Of course, John Crane had not lost his right to trial by jury, not really. Instead, his jury had given it up. Stuck in an impasse, they had relinquished their law-finding power to the court. And although this caused a number of problems for Crane, his counsel, and Tucker, this was not just a form used by a jury in a pinch. Instead, they had used a very particular legal tool, the special verdict – an old form that, in post-Revolutionary Virginia, was increasingly being put to new uses.

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According to Judge Tucker, special verdicts were “the practice, constantly, in difficult cases” in Virginia. Tucker’s legal notebooks, in which he recorded the

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cases he observed as an attorney or over which he presided as a judge, were full of cases involving special verdicts. For instance, during the April 1787 term of the General Court, Tucker recorded seventeen cases heard by the court; four involved special verdicts. In another, the parties had agreed on the facts and then asked the court to apply the law, another common form which created a situation similar to a special verdict. And, after Crane’s special verdict in the 1791 Winchester Court session, other Winchester juries would issue two more special verdicts in civil cases, one of which was almost six and a half pages in length. And in the next court session in April 1792, they returned two more. Special verdicts were a persistent feature of Virginia legal practice – and evidence of Virginians’ willingness to use the technical legal forms to shift the decision in any individual case to the court – whether or not the court wanted it.

Anglo-American special verdicts had a long, complicated history. Sir Frederick Pollock and Frederic William Maitland find them in England as far back as the thirteenth century, where they originated as a way for juries to avoid drawing legal conclusions. In order to avoid prosecution for false verdicts, called “attaint,” jurors sometimes returned a special verdict asking “the aid of the justices” or stating both their facts and their conclusion. As long as the facts were included as well, the judges were free to correct their legal conclusion, if it turned out to be false. This

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45 Winchester District Court Order Book, September 5 and 6, 1791.
46 Winchester District Court Order Book, April 16 and 21, 1792.
practice, of course, shifted the risk of an erroneous verdict from the jurors to the judges, who were also subject to penalties of their own. As Pollock and Maitland explain, “Neither jurors nor justices had any wish to decide dubious questions.” As a result, the main contest between judge and medieval jury was, as Edmund M. Morgan has noted, not for greater power, but for an avoidance of responsibility. Judges often rejected special verdicts, forcing “the jurors into statements which explicitly answer the words of the writ,” which in effect required “an oath about matter of law.” This was enough of a problem that a 1285 statute forbade the practice, and explicitly allowed jurors to return both general and special verdicts “if they state the truth of the matter and pray the aid of the justices.”

In later years judges themselves used special verdicts – particularly the separation of fact from legal conclusion – as a way to control the jury. As John Langbein has shown, by the early eighteenth century English judges in the Old Bailey dominated the jury trial, not only examining witnesses but also directing verdicts of guilty and not guilty. They at times ordered special verdicts like Crane’s – containing the facts but leaving the legal decision to the court – when they saw “conflict looming” between jurors or between the opinion of the court and that of the jurors; this allowed the court itself to determine whether criminal liability attached. Langbein reports that in some instances judges recorded verdicts with which they

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49 Ibid., 586.
51 Morgan, “History of Special Verdicts,” 586.
52 Ibid., 587.
55 Ibid., 296.
disagreed, while in others they “persisted in opposing fully formulated verdicts.”

For instance, at times judges rejected guilty verdicts and required the jury to return a special verdict instead. Even if the jury did convict against the wishes of the judge, the judge might still appeal to the king for the suspect’s pardon. By mid-century, Blackstone protested against the waning power of the jury.

In Virginia, use of special verdicts stretched back to the colonial era. Although surviving records are few, Sir John Randolph and Edward Barradall’s reports of General Court cases from the 1730s and 1740s include a number of civil cases arising from special verdicts. These included controversies over wills, disputes in detinue over slaves, tax liability, debts, land ownership, and other issues originating from both county courts and General Court juries. And Virginia’s surviving colonial county court records also show special verdicts. William Nelson finds judges directing special verdicts in Virginia county courts in the early eighteenth century, and at times granting a new trial if the jury refused to comply. While this power did not disappear as the eighteenth century progressed, judges’ willingness to use it – and, Nelson argues, their authority to do so – did diminish.

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56 Ibid., 291.
57 Ibid., 296.
59 Parsons v. Lee, Sherifff of Stafford, Jeff. 49, 1737 Va. Lexis 1 (April 1737). For other special verdicts in the colonial Virginia General Court, see e.g. Edmonds v. Hughes, Jeff. 2, 1730 Va. Lexis 2 (April 1730); The King v. Moore, Jeff. 8, 1733 Va. Lexis 2 (Oct. 1733); Morris v. Chamberlayne, Jeff. 14, 1735 Va. Lexis 4 (April 1735); Legan, Lessee of Chew v. Stevens, Jeff. 30, 1736 Va. Lexis 3 (October 1736); Giles et ux. & Mallecote v. Mallecote, Jeff. 52, 1738 Va. Lexis 2 (April 1738); Webb v. Elligood, Jeff. 59, 1739 Va. Lexis 1 (April 1739). Due to the nature of Randolph’s and Barradall’s reports (used by Jefferson), in these reports the contents of the verdicts are recounted second-hand, through the arguments of counsel. For instance, Parsons was a county court case, while others like The King v. Moore originated in the General Court. The origin of some of the other cases is less clear, but they appear to have been tried in the General Court.
60 Nelson, “How the Rich Got Richer and the Poor Got Enslaved: Colonial Virginia’s Legal Order as Model for Repression” (draft on file with the author), 92-93.
61 Ibid.
The extent to which judges could similarly order special verdicts in post-Revolutionary Virginia is hazy. In the 1787 case of *Posey v. Mark*, the Virginia General Court confronted a case where the county court had “advised” a special verdict. Although the court decided the case on a different point, the judges all agreed that it would have been error had the court “directed” the verdict. As Judge Carrington noted, they “doubted not that the ‘advice’ was meant as a ‘direction.”’\(^{62}\) Such reluctance on the part of post-Revolutionary Virginia judges to direct special verdicts makes sense. The ability of the judge to order or direct a special verdict was also under fire in Britain at the time, as part of a heated political contest over the role and control of the jury.\(^{63}\)

Only a few years later, however, by the mid-1790s, Judge Tucker’s notes show that the state courts had resumed (if they ever had truly stopped) the practice of directing special verdicts. In *Christian Carne’s Case* in 1794 – a case which involved the forgery of an Auditor’s certificate – the court, concerned about the variance between “Bowling Stark” and “Bolling Starke” and the fact that a copy of the journals of the House of Assembly by which Stark and his fellow auditor had been appointed were not available, directed the jury to acquit the prisoner. The jury retired, but soon came into court dissatisfied with the Court’s direction, “whereupon,” Judge Tucker recorded in his notes, Judge “Nelson agreed that the point should be reserved.” The jury found Carne guilty of transferring the Certificate, “if the Court should be of Opinion that parole proof of the Appointment of the auditors was acceptable, and if

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\(^{63}\) Langbein, “The Criminal Trial Before the Lawyers,” 296.
the variance was not material.” The judges adjourned the case to the General Court. And in the 1796 case of *Williamson v. Dement*, Tucker, presiding at the Monongalia District Court, noted that one of the parties had asked the court to instruct the jury on a matter, but “the Court directed a Special Verdict, saying the point was of too much importance to be hastily determined.”

Juries, however, did not necessarily comply. Just as, in *Carne*, the special verdict was a remedy for the jury’s refusal to acquit outright, in the 1795 case of *Hanson v. Kirkpatrick’s Executors*, Judge Tucker directed a jury in the Dumfries District Court to reserve a point via a special verdict, but they refused and returned a general verdict instead. The Court appears to have accepted the verdict.

Tucker may have occasionally directed special verdicts, but he did not like them. In his edition of *Blackstone’s Commentaries*, he blamed them on Virginia’s juries – lazy, unqualified, or otherwise problematic, unable to fulfill their required function.

Where the courts are held in country places, the juries, after the first day or two, instead of being composed of the most respectable freeholders in the county, men above the suspicion of improper bias [sic], or corruption; men whose understandings may be presumed to be above the common level, are made up, generally, of idle loiterers about the court, who contrive to get themselves summoned as jurors, that they may have their expenses borne: and are in every other point of view the most unfit persons to decide upon the controversies of the suitors. The parties and their attorney are unprepared for a challenge, and the trial proceeds, not unfrequently, without a fourth part of competent jurymen to decide the question….Hence the number of special verdicts, demurrers to evidence, and points reserved; which the

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parties, mutually apprehensive of a decision by an incompetent jury, are ever ready to propose, or agree to.”\(^{67}\)

Tucker’s take on special verdicts was bleak; they resulted, he complained, in giving judges “an influence in questions of fact which may become highly pernicious.”\(^{68}\)

If parties often used special verdicts to avoid a jury, the verdicts also served to isolate important legal issues for decision by the court—particularly at this moment where much of Virginia’s law was in flux. Special verdicts often appeared, for instance, when it was in doubt which Virginia statutes were in force or whether a British statute applied. In the 1787 case of \textit{Hannah v. Davis}, the plaintiffs claimed freedom by virtue of Native American ancestry, but Virginia’s position on Indian slavery had changed several times during its colonial period; the applicable acts and repeals were confusing. The case thus provoked a long and learned argument by some of Virginia’s best lawyers.\(^{69}\) Similarly, the prosecution of John Pim Herald for bigamy raised the question of which English statutes were still in force in Virginia. Herald’s jury found him guilty “if the Statute of 1 James 1 ch: 11 concerning Bigamy extends to and is now in force in This Commonwealth; otherwise we find him not guilty.”\(^{70}\) Counsel argued that Virginia’s ordinance of 1776 adopting certain English statutes “made in aid of the common law, not local to that Kingdom,” did not apply to

\(^{67}\) Tucker, \textit{Blackstone’s Commentaries}, 4:Appendix 64-65.
\(^{68}\) Ibid.
\(^{69}\) Plaintiffs’ counsel, Thomas Nelson, argued that making slaves of foreign subjects was “contrary to the law of God and the Law of Nature,” and thus any Act to that effect was null and void. Defendant’s counsel, John Tyler, father of the future president, walked through the specifics of legislative enactments on the subject, and argued that the burden of proof in the matter was not on the slaveholder to prove descent from a slave, but on the slave to prove descent from a free person. James Monroe, in turn, argued for the plaintiffs based on the apparent intention of the acts in question to open free trade with the Indians, as did John Marshall. Tucker’s friend William Nelson addressed himself on the plaintiffs’ behalf to perceived shortcomings in the special verdict. \textit{Hannah & others against Davis} (April 20, 1787), Hobson, \textit{Law Reports}, 1:166-68.
the bigamy statute, which by its own provisions applied only to “England and Wales,” and was thus explicitly local. Adding a few other points, the court agreed, and Herald was discharged.71

Special verdicts also appeared in other types of complicated cases. Many involved land or other property disputes.72 Kennedy v. Wallers, for instance, raised the question of whether the owner of a slave hired to another person for a year could maintain a trespass action against a stranger, by whom the slave was killed, during the period for which he was hired.73 An occasional case also raised issues of federal power, as in the 1787 case of Newell v. Elam, which involved the ownership of a slave who had previously belonged to the plaintiff but was later been taken by the Marquis de Lafayette’s troops from “a party of the Enemy and sold by General orders” and was now in the possession of the defendant. After the revolutionaries sold the slave back into slavery, the slave’s former owner sued his current owner. The jury found that the facts of the case, including the plaintiff’s property in the slave before “that period” – before the slave’s escape to British lines – but did not reach a legal conclusion. At the General Court, the current owner cited a resolution of Congress of 1782 to support the validity of the sale, arguing that the body had the sole right of determining the disposition of property taken from the enemy. The plaintiff argued in reply that the slave was not taken in battle and that there were not

71 Ibid.
73 Kennedy v. Wallers (May 20, 1808), Hobson, Law Reports, 2:1099-1104.
acts of Congress relative to capture on land. After deferring the question for several
courts, the General Court decided in favor of the plaintiff.\footnote{Newell et ux v. Elam (October 12, 1787), Hobson, Law Reports, 1:182.}

Sometimes the verdicts hinged on small, but equally critical, details. For
instance, in \textit{Christian Carne’s Case}, where Carne had forged an Auditor’s certificate
but had misspelled the Auditor’s name, the jury drew up a special verdict to isolate
the problem of the misspelling.\footnote{Carne’s Case, 1:293-294. The court agreed that it was a hard question, and referred it to the General
Court. I have not yet been able to locate that Court’s decision.} In \textit{John Whealand’s Case}, the problem was that the
counterfeiting statute, under which Whealand was charged, was actually an ordinance
of Virginia’s revolutionary Convention, not the General Assembly, but the indictment
referred to it as an Act of the Assembly; the jury found Whealand guilty of
counterfeiting, “if the Court be of the opinion that the ordinance of Convention, in
Law is an Act of Assembly as recited in the Indictment.” On this verdict, the court
gave judgment for the prisoner.\footnote{John Whealand’s Case (June 22, 1789), Hobson, Law Reports, 1:226.}

As Herald, Carne, and Whealand’s cases indicate, special verdicts appeared in
criminal cases as well as civil ones, although they were rarer. In some of these cases,
like John Crane’s, they arose out of difficult fact patterns. Judge Tucker’s notes alone
name several cases of this type. For instance, in \textit{Commonwealth v. Benjamin
Humphries}, the 1787 burglary case mentioned above, Humphries and a co-conspirator
had both intended to commit a burglary. When the time came, however, Humphries
merely remained at a distance and then received part of the stolen goods. Was he
guilty of burglary? The court found that Humphries was not guilty; although the
particular distance from the crime specified in the jury’s verdict would have been
sufficient to convict him of burglary, the jury verdict lacked the finding that he
“remained there aiding and abetting, and received goods knowing them to be stolen.”
Absent that finding, Humphries was discharged.\textsuperscript{77} Another case, \textit{Commonwealth v. Williams}, concerned theft of a slave.\textsuperscript{78} Finally, a 1796 case, \textit{Commonwealth v. Mitchell}, also out of Winchester, raised the same question as Crane’s, on a similarly long, complicated fact pattern: was the defendant guilty of murder or manslaughter?\textsuperscript{79}

Tucker was also the judge in \textit{Mitchell}, but unlike in \textit{Crane}, in \textit{Mitchell} he was pleased with the special verdict. There, Tucker commented in his notes that the verdict would be a good vehicle to examine some of the thornier issues about the differences between murder and manslaughter: “this Special Verdict,” he recorded, “was with the Assent of the prisoner adjourned to the General Court for the Law thereupon to be settled, as it seemed to us that it would prove a very leading case to determine the Limits between Murder and Manslaughter.”\textsuperscript{80} Not so in \textit{Crane}. Here, Tucker wished the jury had just decided on manslaughter.\textsuperscript{81} If judges sometimes directed special verdicts, such was not the case in \textit{Commonwealth v. Crane}. Here, the verdict seems to have come straight from the jury itself.

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Obviously, the members of the jury felt strongly in Crane’s case – strongly enough to deliberate for forty hours. But, rather than merely result in a hung jury – which occasionally happened, at least in civil cases – they opted for a special

\textsuperscript{79} \textit{Robert Mitchels Case} (April 16, 1796), Hobson, \textit{Law Reports}, 1:373.
\textsuperscript{81} Ibid.
verdict. Why? Had Tucker refused to let them out of their dry, food-bare sequester until they decided? Or did they reach the point where, in their disagreement, they determined that the special verdict was their only option?

It’s impossible to know exactly what motivated Crane’s jury. At first glance, it might seem that at least some of the jurors were merely reluctant to condemn the son of another local elite to death, and that was certainly part of it. Like juries everywhere, Virginia’s juries were known to occasionally decide cases based on their own personal feelings, regardless of the law. In one of his criminal jury charges from the time period, Tucker even admonished the jurors, “you are sworne to decide according [to] the Evidence, and the Evidence only; to do so, you must divest yourselves of prejudice, and of favor. – the Law, which you will take with you, and the Charge which you received from the Clerk when sworne, will direct you in what matter to frame your Verdict, whatever that Verdict may be.” Of course their verdict, if for the prisoner, was the final word, even if it was “expressly against Law, and expressly against evidence.” According to Tucker, however, this did not leave the jury unbound: “these principles do not constitute the Jury to be arbitrary Judges in criminal Cases, bound neither by Law, nor any other obligation but their own whim and caprice. – On the contrary, the Jury are bound to determine, according to the Evidence, & according to Law.” If the jury “undertakes to determine the Law

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82 See Bowdoin v. Rutherford (April 20, 1790): “Jury could not agree and by consent a juror was withdrawn.” Hobson, Legal Papers, 237; Airy v. Kelham (Oct 17, 1797): freedom suit, “but the jury could not agree, therefore no Verdict was given.” Tried again on May 20, 1800. Hobson, Legal Papers, 417.

contrary to the Directions of the court therein, they do it at the peril of their consciences.” 84

But there were also reasons that the case could be seen as manslaughter, not murder, and Crane’s favorable jurors were not the only ones who thought so. The difference between murder and manslaughter turned on questions of premeditation—and, in practice, on the way in which the disagreement between Crane and Vanhorn had escalated over the course of the afternoon. On this, there were strongly differing opinions.

There are very few surviving Virginia opinions from the time that involve the distinction between murder and manslaughter, let alone explicate it. Moreover, Tucker left no notes about the Crane case—only a handful of letters between him and Charles Lee. But one of Tucker’s long, detailed jury charges from only a few years later gives a clue as to the state of law in Virginia on the question. In a May 1800 case in the Accomack District Court, Tucker addressed the case of a man who had beaten a women to death by “throwing her on a Bed, beating her with his fists, kicking her, & choaking her with his hands, in consequence of which she died on the fourth day after.” 85 The judge advised the jury that manslaughter was the “unlawful killing of another, without malice, express or implied,” and could be done “voluntarily, as upon a sudden heat; or involuntarily, but in the Commission of some unlawful act.” Voluntary manslaughter depended on a sudden provocation, and was committed “without any previous intention against the Life or person of him that is

84 Robert Armstrong’s Case (April 13, 1803), Hobson, Legal Papers, 1:503
85 By this time, Virginia had reformed its criminal law by statute, and created degrees of murder; however, Tucker’s charge still dealt with the common law background before moving into the statutory changes.
killed. Murder is killing with *malice aforethought*; it is the result of a willful deliberate intention to do harm to the person of him that is slain, and not the effect of a sudden quarrel, or violent passion.\textsuperscript{86}

The malice necessary for conviction of murder could be, Tucker explained, express or implied. It included not only malice against the deceased in particular, but also “any Evil design in general: the dictate of a wicked, depraved and malignant Heart.” Express malice was when “one with a sedate, deliberate Mind and formed design, kills another,” a design evidenced by actions like lying in wait, former grudges, and “concerted Schemes to do him some bodily harm,” including dueling. Express malice also included a beating that occurred on a sudden provocation, but done so cruelly that “though he did not intend his death, yet his is guilty of Murder by express malice; that is, by an express evil design, the genuine Sense of Malice.” Here Tucker referenced several English cases, including that of a park-keeper who caught a boy stealing wood and tied him to a horse’s tail and dragged him along the park until he died. Thus sudden provocation, when paired with a cruel and bizarre response, constituted murder by express malice. The malice was implied, on the other hand, by the very act in some cases, such as killing “suddenly without any, or without a considerable provocation,” which was evidence of an “abandon’d heart.”\textsuperscript{87}

Both were distinguished from killing in self-defense. In his charge, Tucker specified that when “both parties are actually combatting” at the time of the killing, then it was not self-defense, but manslaughter at best. If someone killed his adversary when overcome by that adversary, “this is revenge, and not self-defense, and the

\textsuperscript{86} McCottrack’s Case (May 15, 1800), Hobson, *Legal Papers*, 1:470.
\textsuperscript{87} Ibid., 1:471.
slayer is guilty of Manslaughter, at the least. And if there be any previous Malice, such a slaying may amount also to Murder, according to the Circumstances of the Case.”

This seemed to be exactly the scenario at issue in Crane’s case. According to the law as laid out by Judge Tucker, which is likely similar to the instructions he gave to Crane’s jury, Crane – if he was the assailant and not his slave, a claim which no one seemed to take seriously – was, at best, guilty of manslaughter, having killed Vanhorn during a fight when overcome by Vanhorn. The question was whether there had been previous malice. Or, as Tucker put it in another jury charge from around the same time, “if upon an Old Quarrel or Grudge, a man should pre-meditatedly seek an Occasion of Revenge; and to effect it, should go privately arm’d to a place where he knew that he should meet his Adversary, and there maliciously provoke him to fight, or to strike him; and upon such stroke being given should immediately kill him,” he would be guilty of murder. Had Crane maliciously provoked Vanhorn to fight, with an already formed intention to kill him?

There were elements in the special verdict that suggested that that was what Crane might have done. According to the verdict, earlier in the day Crane had said that if he fought anyone that day, he would “let out their guts.” (And, according to comments Tucker made about the case, the testimony had actually been that he would “let out their guts with a knife.”) Then, right before they began to fight – and after Catherine Crane had refused to give her husband a gun – the jury found that Vanhorn

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88 Ibid., 1:470.
89 John Carters Case, (October 2, 1800), Hobson, Legal Papers, 1:479.
90 Tucker to Lee, 4 September 1791, Tucker-Coleman Collection.
had protested that Crane “would use a knife or a razor.” Crane had assured him that no, he would “give a fair fight.” However, when pinned to the ground, Crane had then pulled out a knife and stabbed Vanhorn. Under this view, Crane seemed to have tricked Vanhorn into the fight.

“Fair fight,” however, was also a phrase freighted with other meaning. As discussed in Chapter Three, historian Eliott Gorn identified two distinct types of fights in this period: “fair fights” and “rough and tumbles.” 91 “Fair fights” were traditional fist fights, conducted according to Broughton’s Rules, the rules of English boxing. A “rough and tumble” fight, later just called “gouging,” was a free-for-all match that included eye-gouging, biting, castration, and all sorts of other physical indignities, and terminated only when one party essentially cried “uncle” – normally when someone’s eye was gouged out, which was the “rough and tumble” equivalent of the knockout punch. According to Gorn, the brawlers set the rules ahead of time, deciding “whether they proposed to fight fair – according to Broughton’s Rules – or rough-and-tumble.” 92 Read in this context, the emphasis in the Crane case on a “fair fight” could have a completely different meaning. Rather than an assurance that he would not use a weapon, it could mean that he agreed to a traditional fistfight, as opposed to the more brutal “boxing” or “rough-and-tumble” fighting.

One particular line from the case then leaps out: the jury’s finding that after Vanhorn pinned Crane to the ground, he held him there for some time. Merchant and Vanhorn were clearly very angry – is it possible that at that moment, when Crane

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92 Ibid.
expected the fight to be over, for Vanhorn it was just beginning? That he was clawing at Crane, or otherwise assaulting him beyond the rules of the fight? Perhaps Crane, the gentleman’s son, knew tales of the rougher fights – of ear biting and eye gouging, which happened frequently in Berkeley – and brought along the knife out of fear, specifically for self-defense. Pinned and defending himself against a roughness to which he did not agree, maybe Crane pulled out the knife to protect himself. In such a situation, he might indeed protest his innocence, as he repeatedly did throughout the case.

Contrasts between the jury’s verdict and newspapers reports can be read to support the inference that these questions of “fair fighting” were indeed at issue. One widely reprinted newspaper report, from just days after Vanhorn’s death, explained that “the deceased and Crane mutually agreed to box.”93 In the context of Gorn’s study, which identifies “box” as a synonym for “rough-and-tumble” fighting, this is significant. According to this newspaper account, Crane and Vanhorn agreed to box – a no holds barred fight – and “a short time after the commencement of the conflict, the deceased cried out ‘enough’ and that his guts were cut.”94 The jury’s verdict modifies this in two respects: first, the term “box” nowhere appears in the verdict, only “fight,” and second, the verdict specifies that “Abraham Vanhorn threw the prisoner at the bar on the ground and held him there for some time” before Crane

94 See, e.g., Burlington Advertiser, or Agricultural and Political Intelligencer, July 26, 1791 (Burlington, NJ).
finally used his knife. Perhaps the jury was suggesting that it was Abraham Vanhorn, not John Crane, who had broken the rules of the fair fight – not to mention that two men, not just one, had first assailed Crane. The verdict also emphasized this last point:

[T]he said Abraham Vanhorn, and Isaac Merchant one of Campbell's reapers, had their shirts stripped off, which the prisoner at the bar had not: the prisoner at the bar and the said Abraham Vanhorn attempting to get at each other across the fence, who was prevented by John Dawkins. Then the said prisoner struck at Merchant, who struck the said prisoner at the bar, and turned him round, who immediately joined in combat with the said Abraham Vanhorn. We find in the combat that the said Abraham Vanhorn threw the prisoner at the bar on the ground, and kept him there for some time….

Crane had not pulled out then knife until held on the ground for some time, after being engaged with both Vanhorn and Merchant. With these details, perhaps at least some members of the jury felt – or maybe hoped – they had laid the groundwork for manslaughter.

Moreover, the fight had been the culmination of a long day of hostilities that, according to the verdict, were largely provoked by Campbell’s men. For instance, the verdict traced the start of the conflict to actions by Vanhorn and Campbell’s reapers, who cut through Crane’s fields and issued a challenge. Their taunts were enough to draw a hostile response from John Dawkins, who had said that he could “whip Joseph Vanhorn.” After that confrontation cooled, the verdict again pinned its revival on Campbell’s men, and on Crane’s reaper, John Dawkins: “We find that between sunset and dark,” the jury wrote, “that the said Abraham Vanhorn with several others passing through the field of John Crane, the prisoner at the bar, to confirm a bet

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95 Crane, 1 Va. at 13.
96 Ibid., 12-13.
which was to ensue the next morning, and also making a noise and singing, which the
said Dawkins conceived was an insult to the prisoner at the bar and his party."97
After that, Dawkins involved Crane in the fight.

Finally, the verdict painted the picture of a situation that had quickly
escalated. As Crane and Vanhorn engaged in a standoff – Crane telling Vanhorn to
fight, Vanhorn worried that Crane would use a knife – Mrs. Crane had entered the
fray, yelling, “Mr. Crane I am surprised that you would demean yourself to fight with
such a set of negrofied puppies.”98 As historian Joanne Freeman has identified, in the
eighteenth century “puppies” was the type of insult that was sure to provoke a fight:
“Rascal, scoundrel, liar, coward, and puppy: these were fighting words, and anyone
who hurled them at an opponent was risking his life.” Freeman continues: “The
hushed anticipation at their mention is almost palpable in accounts of honor disputes.
Faces blanch. People go still. Background noise stops. And all eyes turn to the
accuser and his victim, waiting to see how the moment will play out.”99

Adding in the “negrofied” undoubtedly only made a snide insult all-the-more
biting, and was a reference to the white men who worked in the fields. Especially
when directed at working men by an elite woman – and in light of pre-existing
tensions in the area between new families from the Tidewater and old families who
had long farmed with their own hands – Catherine’s words must have exploded onto
the already tense field. The insult was important enough, and memorable enough,
that it appeared in the man’s testimony, and made its way into the jury verdict. And it

97 Ibid., 12.
98 Ibid.
was after this insult that, according to the verdict, Vanhorn and Merchant became “much irritated; at which the said Abraham Vanhorn, and Isaac Merchant one of Campbell's reapers, had their shirts stripped off, which the prisoner at the bar had not.”\footnote{100} However the fight had started, at this moment Crane may have indeed faced serious threat.

The intensity of the conflict as well as any potential “cooling off” moments in between were essential in determining Crane’s guilt. In a similar 1796 case from North Carolina – one also involving multiple conflicts that eventually escalated into a stabbing – the court observed, “The great distinction between murder and manslaughter is this, manslaughter is committed under the operation of furious anger, that suspends for a time the proper exercise of reason and reflection, and which hath been stirred up by some great provocation: for there are some provocations that are not indulged with an allowance of exciting the passions to such excess, and thus a distinction is formed between the degrees of provocation.”\footnote{101} Moreover, if sufficient time passed between the provocation and the killing, it became murder, unless there was “fresh provocation.”\footnote{102} Even then, however, the response needed to be proportionable to the offense.\footnote{103} As Crane’s jury detailed the long day’s events, it described not one conflict, but multiple conflicts, each with their own importance and circumstances. In doing so, the jury was leaving room for new conflicts, new provocation – for manslaughter. The question, however, was how provoking those

\footnote{100} Crane, 1 Va. 13.  
\footnote{101} State v. Norris, 2 N.C. 429, 446 (Superior Courts of Law and Equity of North Carolina, 1796).  
\footnote{102} Ibid., 448.  
\footnote{103} Ibid., 440-41.
events were seen to be, and the extent to which those several heated incidents related
to each other.

During the hours of September 3 and September 4, 1791, Crane’s jury battled
over whether he was guilty of murder and manslaughter. In the process, they
illustrated their willingness to use a technical legal form to shift an intractable conflict
from themselves to the court. But John Crane’s verdict – with its big questions and
high stakes – also demonstrated just how problematic special verdicts could be. After
all, juries could agree on a version of facts, while drawing wildly different inferences
from those facts. This was different from a case like *Hannah v. Davis*, the slave
freedom suit, where the question was which statues were in force in the
Commonwealth. Instead, a case like *Crane*, where the operative question was about
the legal implications of a certain set of facts, presented a situation where fact and law
were much more intertwined. The special verdict solved the jury’s problem, but it
also created many new ones for Crane – and for the court.

So, as he left the bench on September 3, 1791, St. George Tucker now had a
big problem of his own: the case’s key question was now in his lap.
September 3, 1791:
Judge Tucker and Guarding Republican Liberty

Judge St. George Tucker had just left the bench after receiving the Crane verdict, late in the evening of September 3, 1791, when he scrawled a short message to attorney Charles Lee in the flickering candlelight. “In a cooler moment,” he wrote, “it is not improbable you may be convinced that in my official conduct I have neither deserved the Imputation of partiality, nor of blood-thirstyness – if so,” he continued, “I have a right to expect from your candor, an acknowledgement that those expressions which you this Evening made use of at the bar, and which in my interpretation of them may have a tendency to fix that stigma on my character, were either unmerited, or unintended.”

The previous hours had been heated. After almost forty hours of deliberations, Crane’s jury had reached its compromise “special” verdict – leaving the case’s key question, whether Crane was guilty of murder or manslaughter, in Tucker’s lap. No matter how common special verdicts were in Virginia, the verdict’s final sentences – delivered in a murder case – must have sounded cowardly to Tucker: “Upon the whole matter the jury pray the advice of the court. If the court should be of opinion that the prisoner is guilty of murder, then we of the jury do find the prisoner is guilty of murder; and if the court shall be of opinion that the prisoner is not guilty of murder, but guilty of manslaughter, then we the jury do find the prisoner

104 St. George Tucker to Charles Lee, September 3, 1791, Tucker-Coleman Collection, Swem Library Special Collections, College of William and Mary, Williamsburg, Virginia. Spelling, capitalization, and punctuation of original documents has been largely retained, with occasional modernization for clarity.
not guilty of murder, but guilty of manslaughter.” The verdict had found facts, but it had dodged the most difficult part of the case – it would leave it to Judge Tucker to decide whether Crane lived or died.

But it wasn’t just the verdict that had made Tucker angry. Instead, it was his exchange with Charles Lee at the bar of the court. After the jury had rendered its special verdict, Tucker had, against his better judgment, allowed Lee to address them; Crane’s attorney wanted to ask them to add facts to their findings. But after listening to Lee’s arguments, Tucker had cut the lawyer off. Lee responded harshly, telling Tucker that if he was so satisfied that the verdict was just, then “judgment of death might be pronounced.” Tucker, Lee insinuated, didn’t care what the verdict said. Tucker had already decided that Crane was guilty of murder.

Moreover, Lee had made the accusation in a very public way. Although the jury had delivered its verdict late at night, in such a high-profile, high-stakes case, there may have been a full room of citizens and attorneys present to witness the exchange that ensued. For instance, John Marshall was present for the session, representing clients and also arguing in front of Tucker on other matter, *Hite’s Orphans v. Martin*, one of the many cases related to the dispute between the Hite family and the Fairfax heirs over land in the Northern Neck.

Charles Lee replied to Tucker’s message the next day. He denied calling Tucker “bloodthirsty,” but even his version of events conveyed deep frustration.

The expressions to which I suppose your letter of last evening relate must be these or some like them – “That if the Court was satisfied that all the facts proved which were favorable to the prisoner, were found

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106 Commonwealth v. John Crane, the Younger, 13.
107 Charles Lee to St. George Tucker, 4 September 1791, Tucker-Coleman Papers.
108 Hite’s Orphans v. Martin, Sept. 9, 1791.
in the verdict, it must remain so and judgment of death might be pronounced.” Having been permitted to address the jury upon the defects of the verdict who were willing to hear what might be said, I was doing so in as proper a manner as then occurred to me, when I was several times interrupted and however I may be mistaken, I must declare my opinion to be that I was improperly interrupted – It was conceived by you when you last interrupted me, that I was reflecting upon the conduct of the jury, which ought not to be allowed – I am sure that the jury did not so understand my remarks and that I did not impeach them of any misconduct but attributed the omissions to their opinion that they were not material – Thus I thought it a vain thing for me interrupted as I had been to proceed in my attempt to obtain an addition of facts in the verdict, and used the expressions before recited.”

He then added the obligatory apology: “you resented them immediately in a manner unexpected to me and which then and ever since has given me pain.”

Tucker replied immediately. Still clearly agitated over the previous evening's events, he wrote:

I have this moment received your letter in answer to mine . . . if my recollection does not deceive me your Expression was, if the Court are satisfied that all the facts favorable to the prisoner were found in the verdict, let it be recorded and Judgement of death pronounced. The Idea conveyed by such a turn of expression, I conceived, might rouse a temper less susceptible than my own to an instant reply. I am willing, Sir, however to suppose, it could not have been [? Intended] by you that I was activated [?] by such principles as I then thought might be inferred from the expression.

With regard to my interrupting your remarks on the verdict I then thought, and still think I was strictly in the line of my duty in so doing, as they were at the last time particularly pointed against a fact found by the Jury, and which I thought fully proved and not against an omission. You will do me the Justice to recollect that however I might have doubted (as I really did) the propriety of entering at large again upon the testimony you were permitted to go through every fact stated in your notes, and had your remarks been confined to the omissions only in the verdict I would have sat till this time with pleasure to have heard them.

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109 Lee to Tucker, 4 September 1791.
110 Tucker to Lee, 4 September 1791.
The judge then went on, however, to give his view of the case. In his opinion, he freely admitted, Crane had done well with the special verdict.

I own I was satisfied with the Verdict, as one more favorable to the prisoner than I expected, for if there were omissions of fact in his favor it appeared to me that there were much more important omissions of fact which might have operated strongly against him. I declined saying any thing to the Jury on the testimony but had I proceeded to instruct them respecting it, there were several parts of the verdict which might have undergone a considerable alteration to the prejudice of the prisoner – the testimony of Mr. Campbell was wholly omitted, and that particular part of the testimony which you were observing upon, defective in a leading feature. I mean the omission of the words with a Knife after, saying he would let out the Guts of any person he should fight with that day.

Tucker then examined the specifics of the evidence, including the mysterious knife:

The deceased’s observation as to what he thought he saw in his hand when he struck Merchant; and the positive proof that the knife produced in court, tho’ found upon the negro, was the one the prisoner had in the afternoon – and that the Knife was bloody and dirty when found, taken with . . . other circumstances appeared to me far to outweigh any fact proved on the part of the prisoner which was omitted.

Even so, he explained, he wished that the jury had compromised and found a general verdict of manslaughter. In any case, his feelings, the judge told Lee as he himself apologized for any offense, “had not been violated in an equal degree for many years.”

Lee's insinuations struck to the heart of Tucker's view of his role as a judge – particularly, as a republican judge. What it meant to be a judge was something that St. George Tucker had thought a lot about. Indeed, he had built his career on it. In a succession of cases during the 1780s and 1790s, the Virginia judiciary – led by

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111 Ibid.
112 Ibid.
Tucker claimed the power to police the boundaries of the state Constitution and thought carefully and publicly about how the law should be imposed in individual cases. The aim was clear: what was formerly arbitrary and monarchical would now be protective and republican. In this day-to-day working out of the meaning and nature of judging in a republic, the figure of the judge began to emerge, fitfully and paradoxically, as the guardian of republican liberty.

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When Tucker had made one of his first forays back into legal practice in 1782, he had found himself involved in one of the hottest cases of the day, *The Case of the Prisoners*, also known as *Commonwealth v. Caton*.\(^{113}\) Originally at the court only as an observer, Tucker scribbled some thoughts on the case for his friend William Nelson, who then suggested that Tucker deliver them to the court himself as amicus curiae.\(^{114}\) What resulted was a thoughtful parsing of the role of the judiciary in the commonwealth's new legal order and a passionate argument in favor of the court's power to nullify an act of the legislature – what we now call judicial review.

*Caton* raised the issue of a conflict between the Virginia Constitution and the Virginia Treason Act. The case involved three prisoners convicted of giving aid to the British and condemned to death for treason. The Treason Act had stripped the governor of his traditional power of pardon and moved the ability to grant clemency to, in its words, the "General Assembly." Following this procedure, the convicted

\(^{113}\) *Commonwealth v. Caton*, 8 Va. 5 (1782).

men had petitioned the General Assembly for pardon; the House of Delegates granted
the pardon, but the Senate refused to concur, making the pardon appear invalid.  

The Virginia Constitution had, however, seemingly prescribed a different
procedure. It gave the governor the power of pardon "except where . . . the law shall
otherwise particularly direct; in which cases, no reprieve, or pardon shall be granted,
but by resolve of the house of delegates." The constitution thus suggested that in
cases where the law stripped the governor's pardon power, that power would be
exercised instead by the House alone. Under this rubric, the prisoners' pardon by the
House was valid. The question for the court was whether, in light of this conflict,
pardon by the House was sufficient to constitute clemency. Embedded within that
problem was what Tucker (and others) referred to as the Grand Constitutional
Question: if the Constitution and Treason Act were in conflict, what was the court to
do?  

Tucker argued strongly in favor of the court's power to invalidate the Treason
Act. After dispensing with preliminary issues, Tucker began his constitutional
argument by framing the question as "whether the Judges have a right to decide on
the validity or nullity of a positive Act of Assembly." His answer was yes, and his
explanation proceeded through a serious of logical steps.

His first two points emphasized the proper role of the judicial branch. First,
Tucker outlined the separation of powers laid down by the Virginia Constitution,
which established separate branches, including judicial and legislative ones, and

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115 Commonwealth v. Caton, 5.
116 For more on Caton, see William Michael Treanor, "The Case of the Prisoners and the Origins of
117 Ibid., 505.
118 Tucker, Notes of Argument, 2.
specified that "neither exercise the powers properly belonging to the other." Second, he set forth that the judiciary alone had the power to interpret laws. "Now I hold it to be uncontrovertible," he asserted, "that the power properly belonging to the Judiciary Department is to explain the Laws of the Land as they apply to particular Cases." As a result, "when such Cases arise, the Interpretation of the Laws of the Land is in the Judiciary alone." The legislature could then respond after the fact by explaining its acts, so that "no further Doubts may occur in the future Construction of them." But in all current cases involving particular controversies, the judiciary alone could (and should) interpret the law. Otherwise, the divided powers of the constitution would be undermined; this “Spirit of our Constitution” was, Tucker explained, also “agreeable” to Montesquieu's concern that if the same man were to both make the law and to apply it, there would be no check on arbitrary laws.119

Having established the judiciary's supremacy over particular controversies, Tucker argued that the constitution trumped any conflicting statute. Tucker first noted that the “judiciary alone . . . can decide what is or is not Law, and consequently . . . on the validity or nullity of different Laws contradicting each other.” In Britain, the general rule of construction was that a later statute conflicting with a former one operated to repeal the first one, but in this case, the former law was not merely any law but the constitution – the “Basis and Foundation of Government.” Any act of the legislature contrary to the constitution, if allowed to stand, would then alter this foundation. And because the constitution was established by a higher power than the

119 Ibid., 2-4.
legislature—the people—the legislature had no power to alter it. Instead, any act of the legislature contrary to the constitution would be “null and void.”

Tucker here acknowledged that the history of constitutional construction went against his reasoning – after all, he explained, in Britain, “constitutional” documents, such as the Magna Carta, were altered over time by acts of Parliament. But the British situation was different, Tucker stressed. There, even foundational acts were seen as merely “explanatory” of the British Constitution, which was said to exist “beyond the Memory of Man” and could “only be collected from immemorial Usages, or such statutes as have from time to time been made to explain it; or amend it.”

But Virginia was different. Whereas the British Constitution “partakes of the nature of their Common Law” and was “constructive,” Virginia’s was “express.” Whereas the “British is traditional . . . ours on the Contrary was formed with all the solemnity of an original Compact between Citizens.” This meant that whereas Parliament had the power to “interpret” and thus implicitly shape and reshape the British Constitution, Virginia’s assembly had no such power. Indeed, this Virginia Constitution was committed to writing and made public “to all its Citizens, who became parties thereto,” precisely so that it “might not be misinterpreted.”

Working within this hierarchy of new legal texts, Tucker ended his argument for the principle of judicial review with a final, dramatic flourish. The constitution was law, applicable in particular cases as well as general principles; the judiciary was charged with interpreting the law in particular cases; therefore, the Constitution could be described as those “fundamental principles of our Government of which the

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120 Ibid., 5-6.
121 Ibid., 7-9.
Judiciary Department is constituted the Guardian.” The inquiry before the court, then, was to try every legislative enactment against a touchstone: if an act was “absolutely and irreconcilably contradictory to the Constitution, it cannot admit of a Doubt that such an act is absolutely null and void.” Indeed, such an act would be void “ab Initio.”¹²²

Tucker's arguments for judicial review and his idea of the judge as a bulwark of liberty embodied and facilitated an important shift in the republican conception of the judicial role. As leading historians of the period have noted, suspicion of judicial discretion was a significant aspect of the revolutionary mind-set. Historian Gordon Wood has explained that at the revolution, the colonists had a “profound fear of judicial independence and discretion” stemming from the experiences of the colonial period—when lay judges, irregular recording of colonial court decisions, and the intricacies of colonial legal systems meant that judges frequently innovated in their judicial role.¹²³ Legal historian Morton Horwitz agrees that the revolutionary generation was suspicious of judges, arguing that their concerns fixed particularly on judicial constructions of statutes.¹²⁴ The result was a desire for simple and clear statutes that could be easily put into practice.¹²⁵ As Thomas Jefferson had written about the criminal law at the beginning of Virginia's law reform, “Let mercy be the character of the law-giver, but let the judge be a mere machine.” Decisions of “the judge, or of the executive power,” Jefferson had explained, would be the “eccentric

¹²² Ibid., 9-10.
¹²⁵ See, e.g., Wood, Creation of the American Republic, 298.
impulses of whimsical, capricious designing men.”¹²⁶ In this era, the legislature – the voice of the people – was the most trusted branch.

Tucker's arguments in *Caton* emphasized a limited judiciary, but in applying those limits, he also simultaneously elevated the judiciary to be the “guardian” of the constitution. Because judges were bound to obey the constitution, which was the supreme act of the people, they were also bound to construe legislative acts within its bounds and should declare void any act that transgressed constitutional limit. The limited nature of the judiciary, its subservience to the people, thus led to extraordinary power: the power to strike down an act of the legislature. If, as Horwitz argues, the revolutionary generation was indeed most concerned with judicial construction of statutes, Tucker's argument contained a great irony: after all, he claimed for judges not just the construction of any statute but the sole power of construction of the supreme statute – at least with regard to particular cases.

The legislature, of course, still had some power – it might later clarify its meaning in previous acts (which, Tucker noted, would essentially amount to new legislation, their undoubted province), but they could not expound on or interpret a law as applying to “particular Persons or Cases, altho' they have undoubtedly a right to explain their General Pollicy.” “Indeed,” he continued, “this right of Interpretation does not exist in the Legislative, nor yet in the Executive,” and “is consequently vested in the Judiciary alone.” He explained that “if the Legislative have a right to determine or explain the Laws judicially, that is to decide in Particular Cases, the Judiciary, who are by the Constitution appointed as a counterpose to it, is entirely

annulled and one of the pillars on which our Government is established is totally destroyed.”

Moreover, in these particular cases, the constitution was the supreme law, trumping any other ordinary law. Judges were “sworn to decide in all matters brought before them agreeable to the Laws of the Land, yet is the Constitution the first Law by which they are bound.” Tucker even ended his argument with an extraordinary statement. Having clarified the meaning of the written constitution, he summarized: “Here then are explained those Fundamental Principles of our Government, of which the Judiciary Department is constituted the Guardian.”

In arriving at this point, Tucker seemed to rely on two complementary lines of thought. On one hand, he emphasized the judiciary's subservience to the constitution, which bound the judicial branch in the exercise of its powers. On the other hand, he also implicitly stressed that the constitution was ordinary as well as supreme law, applicable not just in restraining the judicial branch in general but also in particular cases and controversies — hence all the talk about the judiciary's supremacy over particular cases. Tucker would continue to develop this theme: in his law lectures of the 1790s, he told his students regarding the federal Constitution, “If it be asked what is the consequence in Case the federal Governm't should exercise powers not warranted by the Constitution, we may answer, that where the usurpation may affect immediately an individual the remedy is to be sought by recourse to the Aid of the Judiciary department to which the Cognisance of the Case properly belongs.”

Where the unconstitutional action instead affected a state, and when “Rights will be

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127 Tucker, Notes of Argument, 6, 9.
128 St. George Tucker, 1791 General Court Docket Book, Tucker-Coleman Papers. This note is then continued in the 1792 Docket Book, so it was written sometime in that year or afterward.
invaded by every Such Act.” Tucker turned to the state legislatures to “sound the alarm.” By the time he wrote *Blackstone’s Commentaries* in 1802, he was even more explicit: an unconstitutional act against an individual entailed “an undoubted right to redress, by application to the judicial Courts of the State, or of the United States according to the nature of the case.”

Tucker's designation of the judiciary as the guardian of the constitution in particular cases was an important move. As legal scholar Larry Kramer emphasized, there were many potential avenues for constitutional interpretation and enforcement in this era, and the judiciary had not yet emerged as the supreme interpreter of constitutions, state or federal. Instead, Kramer contends, in this era, the predominant understanding of constitutions continued to be derived from Britain's “customary” constitution, under which the “people themselves” were seen as the main enforcers of the constitution; the constitution's interpretation was not confined to any particular branch or office of government, including the judiciary.

As Tucker's argument to the court in *Caton* demonstrates, however, the future judge and legal scholar was already thinking along different lines. Whereas Kramer argues that most new state constitutions were propounded merely as a “practical necessity” to fill the gap left by independence and continued to be conceived along the same lines as their English ancestor, Tucker saw them as fundamental change. “No parallel can possibly be drawn,” he insisted, “between the Constitution of Great Britain and this Country.” Because Parliament could “explain” both the common

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129 Ibid.
130 *Blackstone’s Commentaries*, ed. Tucker, 1:91 n. 20.
132 Ibid., 54.
law and the constitution, it could over time “explain” the constitution differently and thus essentially repeal a former understanding. “By this Fiction in Law,” Tucker argued, “(for it seems to deserve that name) the British Constitution may be modeled agreeable to the will of Parliament.” But the Virginia Constitution was different, framed with the solemnity of “an Original Compact” and “committed to writing,” with all the citizens as “parties thereto.” Tucker emphasized that the people were the supreme governor and through the constitution had established a limited government. Because of this limited constitutional government and the applicability of the constitution as law, the judiciary was “constituted the Guardian” of the “fundamental principles of our Government” contained in the new Virginia Constitution.

In this way, the judicial review advanced by Tucker's *Caton* argument involved the vindication of the people and their sovereignty. The sovereign people had, in convention, entered into a constitutional compact. By enforcing their will, Tucker saw the courts not as disregarding the people’s legislature in favor of the judiciary but rather as implicitly deferring to a legislature that was greater than the General Assembly – the assembly of citizens that had, in theory at least, set forth the constitution. Indeed, Tucker's position in *Caton* sought to uphold that popular power in two ways – first conceptually, by protecting the people's sovereign act as embodied in the Virginia Constitution, and second, by the factual consequences of his argument, which sought to vindicate the decision of the House of Delegates (the lower and more popular branch of the Virginia Assembly) to pardon the prisoners. In *Caton*, judicial

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133 Tucker, Notes of Argument, 7-8.
134 Ibid., 9.
review was democratic – the protection of the people's sovereignty by the republican judge.

And although Tucker may have been at the forefront of the thinking of the time with this argument, he was by no means alone. The Virginia Court of Appeals sidestepped the issue of judicial review for the time being, but George Wythe's opinion set forth his willingness to exercise judicial review if necessary – indeed, his opinion also implicitly sets up the judge as the guardian of republican government:

I have heard of an English chancellor who said, and it was nobly said, that it was his duty to protect the rights of the subject, against the encroachments of the crown; and that he would do it, at every hazard. But if it was his duty to protect a solitary individual against the rapacity of the sovereign, surely, it is equally mine, to protect one branch of the legislature, and, consequently, the whole community, against the usurpations of the other: and, whenever the proper occasion occurs, I shall feel the duty; and, fearlessly, perform it. . . . Nay more, if the whole legislature, an event to be deprecated, should attempt to overleap the bounds, prescribed to them by the people, I, in administering the public justice of the country, will meet the united powers, at my seat in this tribunal; and, pointing to the constitution, will say, to them, here is the limit of your authority; and, hither, shall you go, but no further.  

Only six years later, during the Virginia ratification convention, John Marshall (who was likely in the audience during Tucker's *Caton* argument), contended that usurpations of the federal Constitution would be dealt with by the judicial branch. “If,” he argued, federal lawmakers “were to make a law not warranted by any of the powers enumerated, it would be considered by the Judges as an infringement of the Constitution which they are to guard.” In subsequent years, both Tucker and Marshall would work to advance the principle. As a new judge in 1789, Tucker

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136 See Treanor, "Case of the Prisoners," 497.
137 Kramer, *People Themselves*, 82.
drafted an opinion in favor of judicial review in the case of Commonwealth v. Eldridge, but he seems never to have delivered it. By 1791, fully formed judicial review in Virginia was imminent; two years after Crane's case, it would emerge in Kamper v. Hawkins, written at the district court level by Tucker himself and argued by Marshall.

Some scholars have suggested that Virginians may have been somewhat exceptional in their insistence on and acceptance of judicial review. Legal scholar William Treanor ascribes this difference to the dominance of Virginia’s gentry over both the legal profession and the legislature, resulting in greater respect for lawyers and less friction between the bar and the assembly. Historian A. G. Roeber’s work on colonial Virginia lawyers suggests a similar explanation, one based on the adept ways in which those lawyers, traditionally conceived as (in the parlance of the time) a “court” interest, repositioned themselves as advocates for independence and republican government, or for the country as a whole. But whether or not Virginia was exceptional, St. George Tucker came of age as a lawyer in the Commonwealth's legal milieu, and Tucker conceived of his duties as a republican judge within this paradigm, which he helped to form.

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140 See Kramer, People Themselves, 69.
141 Treanor, "Case of the Prisoners," 500.
142 Roeber, Faithful Magistrates.
But the law was, then as now, about more than constitutional cases. Even as Tucker and others argued that judges were to “guard” the fundamental principles of government, concerns about judicial interpretation did not go away. *Commonwealth v. Posey* (1788) illustrates how Virginians were grappling with the role of the judge in the ideologically fraught area of statutory interpretation and precedent. If the issue in *Caton* was protecting the republican form of government, here it was about the meaning of republican judging in an individual case. And if *Caton* was about interpreting the Constitution, *Posey* was about republican interpretation of the laws.

*Posey* was one of those cases that was caught in the middle of Virginia’s unfinished law reform and in the midst of its political turmoil. John Price Posey had never quite been at the top of Virginia society, but he certainly drifted around its edges. He was a longtime associate of the Washington family and childhood friend of John Parke Custis, George Washington’s stepson, and managed Custis’s New Kent County properties. In New Kent, Posey became a justice of the peace and a representative to the General Assembly. But after Custis’s death, Washington fired Posey, accusing him of stealing from the estate. Around this time, Posey, whom Washington referred to as “a most consummate villain” was also charged with misdemeanor fraud. In the summer of 1787, Posey was arrested for assaulting the county sheriff and confined to the county jail. He escaped, and three days later, the jail and clerk’s office caught fire. Posey, whose fall from grace was so complete that he was identified in his indictment as a “laborer,” was arrested and charged with

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enticing two accomplices to, in the words of one, to “burn the Damn'd prison down” and to set fire to the clerk's office, apparently to destroy some records.\textsuperscript{144}

People all over Virginia talked about the case, which melded fears of violent unrest with the gossip of a spectacular fall from grace. “I have heard much of threaten’d Riots, In Opposition to the payment of debts and taxes,” Edmund Pendleton wrote to James Madison in 1787, “but no particular Instance of mischief of the sort, except the burning of the Court House in King William, the Prison in New Kent, and the Clerk’s Offices of both. That the famous Mr. Posey was author of the latter, nobody seems to doubt, tho’ they have not yet evidence sufficient to convict him.”\textsuperscript{145} Posey’s accomplices, however, soon decided to testify for the state..

Posey was convicted of arson, a capital offense, by the General Court, and he appealed to the Court of Appeals. Frances Tucker wrote to her husband, who was at the General Court, that she had heard that Posey’s lawyers “were handsomely paid for a defense.” Had any of “Posey's guineas,” she wondered, made their way to St. George’s “pockets?”\textsuperscript{146} They had not, for Tucker had just been appointed to represent the Commonwealth – to his “great mortification,” he told Frances – at the Court of Appeals, because the Commonwealth's attorney was indisposed.\textsuperscript{147}

Tucker thus found himself at the center of the case not only watched for its notoriety, but for the controversial nature of the law that the court was called to apply.

\textsuperscript{146} Frances Bland Randolph Tucker to St. George Tucker, 9 October 1787, Tucker-Coleman Collection.
\textsuperscript{147} St. George Tucker to Frances Bland Randolph Tucker, 3 November 1787, in ibid.
Under the defeated Bill for Proportioning Crimes and Punishments, arson would have been punished by a mere five years forced labor, but because of its defeat, the common law of crimes remained in force. And, to make matters worse for Posey, arson of the sort Posey was accused of was, according to the common law, a non-clergyable crime. This meant that, only months after the General Assembly had failed – by only one vote – to abolish the death penalty for all crimes except murder and treason, a former member of the General Assembly faced the death penalty for a crime in which no one had been killed.

And the authority for this sentence was not any act of the Virginia Assembly, but rather the convoluted enactments of old Parliaments and various interpretive opinions of English judges. The statutes were confusing – giving clergy, then taking it away again – and at the Court of Appeals, Posey’s counsel, Andrew Ronald, argued that, when read on their face, Posey was entitled to the benefit of clergy. The problem, however, was that English judges had long read the same statutes to take away clergy. Arguing for more than a day, Ronald insisted that the precedent – including an opinion by venerated English jurist Lord Coke – was wrong. “Don't you pity me,” Tucker wrote to his wife while listening to the second day of Ronald's argument, “for being obliged to answer so long an argument, especially as I shall, I fear, not even gain honor by the Contest.”

Ronald urged the court to review the statutes, complicated by centuries of repeals and reinstatements, de novo – “the antiquity of the precedent,” he insisted,

148 Preyer, "Crime, the Criminal Law, and Reform," 69.
150 St. George Tucker to Frances Bland Randolph Tucker, 3 November 1787, ibid.
“was nothing compared with the letter of the statutes.”

His arguments were, on one hand, the desperate measures of a condemned man’s lawyer, but the fact that the Court of Appeals heard the case – when there was no right of appeal to that court in criminal cases – showed how seriously they took the arguments he raised. The question went far beyond Posey; it was about the reception of British precedent and the proper canons of judicial interpretation in the new nation.

When Tucker finally made his argument, he revisited both the text of the statutes and the precedent and argued that both pointed to Posey’s execution. Arson, even the burning of buildings like the clerk's office and the jail, was, he argued, a felony at common law and one of the few offenses to which clergy was not extended. Tucker then walked the court through the English statutes in force in Virginia that had taken away clergy from various crimes or restored it. English precedent was correct, he told the court, in its interpretation of these statutes: clergy was unavailable. Even before receiving his letter, Frances had already heard from other sources that St. George “spoke in Posey's case for four hours.” She teased, “I shall cease to wonder at your silences at home in future, for I think as loquacious as I am, it would last me for a month at least.”

The explicit question at hand was about arson and benefit of clergy, but a deeper issue was also at stake: what did it mean for a judge to interpret law in a republic, and, more particularly, what role did British precedent play? For some members of the court, there was a certain level of embarrassment about determining a

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153 Ibid.
154 Frances Bland Randolph Tucker to St. George Tucker, n.d. [filed with November 1787], ibid.
man’s fate in their new republic by being bound by the opinions of British judges on complex, ancient, and confusing acts of Parliament. Judge Tazewell, writing in dissent, agreed with Ronald that the statutes should be read de novo and gave a passionate opinion on that point. Although, he admitted, “adjudications upon statutes are often to be considered, as valuable expositions of the grounds and extent of the enactments, yet,” he concluded, “in a case of life and death, I cannot be bound by the dictum of a British judge, upon a written law; for, although I venerate precedents, I venerate the written law more.” Judge Wythe must have agreed – he registered his dissent but said that it would be “tedious and unnecessary” to state the reasons for it.

Other judges, however, were more wedded to the English authorities that had so long governed Virginia’s courts. Judge Mercer argued that Coke’s opinion had been the authority when Virginians settled the colony and should stay that way – “as our ancestors brought the doctrine of Powlter’s Case, with them into this country, it ought to be regarded as the law of the land.” And as Judge Fleming concluded, “Coke’s decision has been so uniformly considered as the true construction of the statutes that it has become the law of the land; for precedents, so long acquiesced in, cannot be overturned without more danger than benefit.” By a majority, the Court of Appeals agreed with Tucker, and Posey was condemned to death. Upon hearing the sentence of death, “Posey, choked with tears, confessed his crime ‘and said he

156 Ibid., 122.
157 Ibid.
158 Ibid.
hoped through the merits of his Saviour, to obtain a pardon for the sins of his past life.” He was executed in January 1788.\textsuperscript{159}

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The veneration of written law in Ronald’s argument and Tazewell's opinion indicated the change that was taking place in Virginia’s legal thought about both the law and the judge. Blackstone had described judges as “the depositories of the laws; the living oracles, who must decide in all cases of doubt.”\textsuperscript{160} But Ronald's argument and Tazewell’s opinion – refusing to be bound by bad precedent, even if it was old precedent, when there was written law at hand – contained echoes of the new way of regarding law and the judge’s role. Blackstone had also recognized that precedents “against reason” were not really precedents at all, but the arguments in the Posey case seemed to go further, in a direction consonant with republican thoughts on law. In this new legal world, judges were not oracles imparting rules from “time immemorial” on a merely receptive public. Instead, they were the agents of that public, drawing their authority and their rules from writing – from laws promulgated by the people. In the most basic sense, this meant a law driven by statutes, not by judicial opinions or the common law.

But as the other judges' opinions demonstrated, Tazewell’s was not the only republican option on the table. Indeed, the majority seemed willing to uphold even bad precedent in the name of certainty. They could have followed Tucker’s argument, found that Coke was correct, and thus obviated the biggest question raised by the case

\begin{footnotes}
\item[160] Blackstone's Commentaries, ed. Tucker, 1:68-69.
\end{footnotes}
— whether to follow long-standing but incorrect English precedent. Judge Patrick Henry did just that, concluding that “principle and precedent unite in the interpretation” that Posey was not eligible for clergy. But other members of the court were willing to go further. For example, as Judge Peter Lyons explained, precedent itself was important, since “there is more danger to be apprehended from uncertainty, than from any exposition,” whether or not correct, because “when the rule is settled, men know how to conform to it; but when all is uncertain, they are left in the dark, and constantly liable to error.” Judge John Tyler agreed that “it would be dangerous to decide against such long-admitted precedents upon statutes of such antiquity.” The other judges were in accord. Judge Blair even noted that the precedent, though he thought it was wrong, was binding.

It is unclear how far Tucker himself was willing to go toward upholding incorrect English precedent. A later reporter of the case quoted Tucker as stating in his argument to the court that Coke's construction, which had “stood the test of so many ages was not, now, to be shaken.” However, Tucker's argument notes suggest that this statement was more about the correctness of the precedent than its inherent binding authority. According to those notes, Tucker focused on parsing through all of the relevant statutes to conclude that Coke's opinion was actually correct. Tucker thus worked, at least primarily, within the same statutory ground as Ronald and Tazewell, although he came to a different conclusion. Tucker’s statement about the importance

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161 Commonwealth v. Posey, 113.
162 Ibid.
163 Ibid., 121-22. Judge Tyler noted, however, that his decision was limited to a British statute, and "upon one of our acts of assembly, I shall, whenever the case is doubtful, incline to follow the letter of the statute."
164 Call's reporter included this argument. See 1787 Va. lexis **3, **4 (Va. 1787).
of long-standing precedent seems to have been more about the fact that its correctness had been tested than about its authority regardless of whether it was correct.

However, emphasizing the importance of precedent would not have been entirely out of character for Tucker. After all, throughout his career, Tucker combined support for the British legal tradition with a republican emphasis on written law. His edition of Blackstone, for example, preserved much of that jurist's work while annotating sections on sovereignty and adding appendixes on issues such as the federal constitution and slavery. At the same time, as historian Ellen Holmes Pearson showed, Tucker transformed the common law into a republican institution by arguing that in America, the common law was grounded in consent, expressly adopted by individual states through reception statutes. This viewpoint gave the common law what Pearson calls a “solidly visible foundation based on consent, choice, and new customs tailored to the needs of America's vigorous republican societies.”

In this essentially middle way, Tucker combined republican sentiment with, in some areas at least, precedent – precedent was valid, but for republican reasons. Moreover, the precedent for which Tucker argued in Posey was not merely any pronouncement by a British judge: Coke's *Institutes* had been the text of every aspiring lawyer and a primary guide to the Virginia courts in the colonial era.

In such a situation, as the majority opinions indicated, there were republican reasons to support precedent. Precedent (at least as it was conceived in this era) restrained power by following known, disseminated rules. Tazewell’s opinion

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165 Ellen Holmes Pearson, *Remaking Custom* (Charlottesville: University of Virginia Press, 2011), 30. Morton Horwitz also emphasizes the transformation in this era of the authority of the common law from natural law to consent, although he sees Tucker as a more ambiguous figure.

might follow the form of the new republican jurisprudence, but it also unsettled long-
standing precedent to reinterpret a similarly long-standing statute. Doing so
paradoxically put enormous power in the hands of judges, who might without
warning reconfigure centuries of law – precisely the statutory construction about
which the revolutionaries worried. In this new legal world, many things were up for
grabs, including the meaning of republican judging. All observers seemed to agree,
however, that it was about restraining power – whether through known, disseminated
rules explicated in precedent or through the clarity of a statute. And again it was the
judges who, although restrained by law, were also in the position to put those
restraints into practice.

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In both *Posey* and *Caton*, Virginia lawyers and judges of the 1780s were
feeling out the meaning of republican law – and, more specifically, the proper role of
a republican judiciary. In the process, the judge haltingly emerged as republicanism's
guardian instead of its antithesis. In *Caton*, the principle of a limited, constitution-
bound judiciary led Tucker into the world of judicial champions who guarded and
vindicated the people's constitution through the exercise of judicial review. The
judiciary of Tazewell's *Posey* dissent was similarly both limited and strong – limited
in the sense that it was bound to decide by the texts of statutes, directly proceeding (in
republican theory at least) from the people, instead of by an amorphous body of
professionalized, judge-made law, but strong in its authority to upset centuries of
precedent for the sake of text. The *Posey* majority's view declined to exercise this
strong power but simultaneously elevated the powers of previous generations of
jurists. In both cases, the judge began to emerge as a key figure for the protection of – even enactment of – republican liberty.

The law on which these judges were being called to defend – even, at times, against the legislature – was the people's law, and this conception was an essential part of the new republican reality. Before the war, colonists argued about divine justice and natural law; afterward, as Tucker explained in his edition of Blackstone, it was now more appropriate to rely on “the authority of the American Congress or of the several state Conventions than the opinions of speculative writers on government whatever: inasmuch as the declarations and acts of these bodies were the foundation of the late revolution, and form the basis of the several republics that have been established among us; and have thus become constitutional declarations on the part of the people.” As a result, “those acts and declarations might be considered, in our own republic at least, as settling the controversy between speculative writers, in all cases to which they extend.”

Not only did fundamental law now come from the people but, Tucker argued, both it and more ordinary enactments remained their province. Law traditionally had been the professional realm of judges and lawyers, but Tucker argued that this proprietary knowledge should be broken wide open – indeed, that doing so was critical to protecting republican government. One of the biggest dangers to liberty, according to Tucker, was a state of affairs where only government officials had access to and knowledge of the law. As government became more complex in civilized society, those who administered it acquired “a mechanical acquaintance with

its powers” that enabled them, “by a slight alteration in the frame, [to] produce an entire revolution in the principles of its action; to detect the cheat requires a thorough acquaintance with the principles of its original construction, and the purposes to which it was intended to be applied.” For this reason, knowledge of legal science needed to be widespread. “Science,” he wrote, “counteracts this mechanical monopoly of knowledge, and unfolds to its votaries those principles which ought to direct the operations of the machine.” After all, “man only requires to understand his rights to estimate them properly; the ignorance of the people is the footstool of despotism.”\textsuperscript{168}

Democratizing law mean not jettisoning it but rather educating the people at large as to its workings. Partly for this reason, Tucker published his edition of \textit{Blackstone's Commentaries}, which, like many other law reform projects of this era, collected in one place widely scattered statutes and precedents for easily accessible use. Protecting liberty required enabling the people to know what the law was and how it worked. Law restrained government and empowered the people. And the systematization of knowledge – the science of liberty – was both the result of a free government and necessary to preserve it. “An enlightened people,” he wrote, “who have once attained the blessings of a free government, can never be enslaved until they abandon virtue and relinquish science.”\textsuperscript{169} Writing out the law and disseminating it – statutes, cases, and constitutions – was in this way a professional exercise, but it was also an essential part of protecting liberty. The law was popular, but it was no less law.

\textsuperscript{168} Ibid., 1: xvi.
\textsuperscript{169} Ibid., 1: xvii.
Tucker thus struck a precarious but deeply committed balance between professionalization and democratization, with each in service of the other. The Constitution was fundamentally law, within the special province of the judges and lawyers, and, at the same time, it was fundamental law proceeding from the people. The law was science, but it was science that should be widely disseminated. Attention to the law as science, legal learning, law reform, and professionalism was meant not to take the law from the people but to give it back to them. Law – and by implication, the judiciary – might be a fraught site for republican liberty, but it also had particular, perhaps even peculiar, potential.

In the midst of all this republican theory were cases – messy cases like John Crane’s. Murder cases were unusual occurrences, and as Tucker wrote on September 3, 1791, he had reason to be upset. Crane's life was hanging in the balance, and Lee had publicly impugned the judge's impartiality – essentially, his fitness as a republican judge. As Tucker wrote to Lee that evening, he might have already decided to offer Crane the option of taking the jury's question – murder or manslaughter – to the General Court. But Tucker did not flinch from telling Lee his feelings about Crane's guilt because the issue for him – his offense at Lee's insinuations of bloodthirstiness – was not about his belief in Crane's guilt but rather was about impartiality and fairness. This was certainly about honor, a concept that generations of historians have ably discussed in relation to the South. But honor needs something on which to hang its hat – a threatened value on which to operate. Here, the honor at stake was republican honor, and its threatened value was Tucker's
identity as a republican judge. As judge, Tucker saw himself as both the preserver of the forms of republican government and the champion of its substance. This was a new conception, but it was already gelling as he addressed the jury's special verdict and the objections put forth by Lee.

Tucker, however, now had a decision to make. He had probably known that he would send the case up to Virginia’s General Court – after all, he was the only judge at Winchester, and special verdicts often went to the General Court anyway. And in this case, that provided Tucker with a double out – not only would he not rule on the case now, but he would be absent from the November General Court session, thanks to his impending wedding. So, on September 5, the Winchester paper reported that “the court, being comprised of only one judge,” had allowed Crane “to determine . . . whether the present judge should pass sentence, or be postponed to a full court.” Crane decided to take the case to the General Court.170 So, with that, Tucker washed his hands of Commonwealth v. Crane, and turned to the next matter on the docket.

Tucker was finished, but the case was still undecided. So, Crane and his family prepared for the next step – the November session, in Richmond, of the General Court.

170 "Shepherd's-Town, September 5." Mail. September 17, 1791.
Judge Tucker referred John Crane’s case to the General Court, and the judges heard it on November 21, 1791. Because the General Court was presided over by all of the judges sitting en banc, normally Tucker would have been a part of that proceeding as well, even though he had heard the case at the district level. But November 1791 was a special occasion for the judge – Tucker had married Lelia Carter the previous month, and did not attend the Court's November session. It was one of the few courts that Tucker missed in his long career. But this did save the judge from having to consider Crane's case again – particularly after Lee had accused him of partiality at the trial. At the District Court, Tucker had been able to avoid explicitly ruling on Crane's fate, but at the General Court, that would have been impossible.

The General Court’s decision was short, merely a final order finding Crane guilty of murder and sending the case back to the district court. The final order that appeared in Virginia’s reports provided no analysis of Crane's claims or the jury's verdict, or any indication of the views of the various judges. Instead, the court merely ordered:

The District Court not being advised what judgment to give on this verdict, adjourned the question, with the consent of the prisoner, to the General Court for difficulty.

On the 21st November, 1791, the General Court, consisting of Judges Prentis, Tyler, Henry, Jones, Roane and Nelson, entered the following

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172 Ibid..
judgment. “This day came as well the attorney general as the counsel for the said Crane, and thereupon the question of law arising upon the special verdict in the transcript of the record of the said case mentioned, to wit, whether the said Crane be guilty of murder, or manslaughter, being argued, it is the opinion of the court that the said Crane is guilty of murder, which is ordered to be certified to the District Court of Winchester.173

A pardon petition in favor of Crane, signed by over a hundred citizens of Berkeley County, adds slightly to this story; it reported: “your petitioners are informed that the [General] court was divided, and that even there two of the judges thought that Judgement ought not to be against the Prisoner.”174

Only days after the General Court’s November decision, James Crane penned a short, poignant request to the Governor: “James Crane requests a pardon for his son, condemned for the death of Abraham Vanhorn.”175 Then, during the next session of the Winchester District Court in April, Judges Joseph Prentis and Joseph Jones, who were assigned to the Winchester Circuit that spring, recited the order of the General Court and sentenced Crane to death.176 A few days later, John Crane filed his own, equally terse, petition requesting a one month reprieve.177

176 Order Book, Winchester District Court, April 26, 1792.
In the meantime, letters poured in from Berkeley County. They came from family members, neighbors, friends, acquaintances, and leading members of the county and the region. Some were from the very men who had helped condemn Crane – witnesses, justices of the peace, members of the grand jury and jury. Some letters were long and detailed, others short; some talked about the crime, others about the character of Crane and his family. And, from the letters, a new story also emerged, and brought to light something that had long been whispered about among certain members of Berkeley’s elite: John Crane had “lunatic” fits.

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As supporting documents flooded the Richmond offices of the Governor and the Council of State – often from the same people who had been involved in the prosecution – they asked for Crane’s pardon on two principal grounds. The first tended to refer back to manslaughter – both to the difficulty of the case and the irregularity of the circumstances of the jury’s verdict.

Some letters emphasized that a number of Crane’s jurors thought that the crime was much closer to manslaughter than to pre-meditated murder. On April 19, after the case was remanded from the General Court and seven days before the Winchester District Court formally pronounced the judgment of death on Crane, the jury’s foreman certified before the Winchester clerk:

I, Gerard Alexander, foreman of the Jury on the trial of John Crane the younger, for the death of Abr’m Vanhorne, do hereby certify that myself & three more of the Jurors were of opinion that the said John Crane was guilty of manslaughter and not of willful murder.\(^\text{178}\)

\(^{178}\) Gerard Alexander’s Certificate as to John Crane, Jr., April 19, 1791., Calendar of Virginia State Papers, 5:495.
Four days later, two other jurors certified the same, before a Berkeley County justice of the peace: “We, Benjamin Strother and Thomas Griggs . . . were of opinion that the said John Crane was not guilty of willful murder – only manslaughter.”

On top of the jurors’ certifications, the clerk of the Winchester District Court sent his own letter to the Governor, emphasizing that the jurors’ letters were not a post-conviction change of heart. “The Jurors upon his trial were much divided in their opinion with respect to the crime,” clerk John Peyton reported, which he supposed was inevitable. Peyton was “apprehensive that those in his favor were induced to acquiesce, being two days confined on the business under a full persuasion that it would be manslaughter only.” A petition signed by a long list of Berkeley citizens stressed the same thing: that ever since the jury, confined for “near forty hours,” had been “by necessity driven to find the imperfect special verdict upon which the Judgement of the court has been since given,” and that “four or five of that very Jury have ever since their verdict, declared and still declare that the unfortunate prisoner had not in their opinion been guilty of murder.” The case was of “such difficulty” and “so peculiarly circumstanced” that the petitioners hoped the Governor would intervene.

The petitioners’ arguments for manslaughter, however, reached beyond the jury’s unusual verdict and its own inner conflict, and also emphasized the evidence on the crime itself. Berkeley’s Robert Throckmorton, for instance, wrote to the Governor that Crane was deserving of pardon:

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179 Certificate of Benjamin Strother and Thomas Griggs, as to John Crane, Jr. April 23, 1791, Calendar of Virginia State Papers, 5:504.
180 J. Peyton to the Governor, 30 April 1791, Calendar of Virginia State Papers, 5:519.
I have taken the Liberty of writing [sic] to you and your Honorable Council concerning young John Crane, who is now under sentence of Death, and none but you can save him. I was at his Tryptal and heard the witnesses which were much prejudiced against him, and by appearance would say as much as they could against and as little in his favour. One thing has much weight with me, which is after their day’s work was done, they went to Crane’s House, where it do not appear they had any business but to renew a quarrel that had Ran very high the preceding day. It likewise appears that Crane was Ingaged with two men partly at the same time. A man in that situation would be likely to do all he could to defeat his adversary; for when a man is fighting, he has little time to reflect, but it seems natural for him to do all he can to extricate himself.

Several witnesses, Throckmorton emphasized, supported “the two men being in contact with him at the same time.”\(^\text{182}\) Plus “the Jury were divided and could not agree; that the foreman and four others, perhaps the ablest of them, were in his favour – the Judges were also divided.” Crane, Throckmorton concluded, “ought not to suffer death.”\(^\text{183}\)

A letter from County Court Clerk and grand juror Moses Hunter, and Justice of the Peace Andrew Waggener, who also served as Berkeley’s member of the House of Delegates, emphasized similar facts:

We believe that passion was one great cause of this misfortune. . . . We do not wish to reflect upon the deceased, nor can we presume to justify what the prisoner has been guilty of, but we beg leave to remark that if the party who were going home from Campbell’s harvest field, one of which Mr. Vanhorn was, had have taken the nearest and common rout, and had not called upon Crane, he would not have been thrown into this violent passion, which so frequently deprived him of his reason, and the melancholy event could not have happened.

Hunter and Waggener begged the Governor to grant Crane a pardon, and gave the opinion “that if the languishing prisoner could be so happy as to receive your merciful

\(^{182}\) Robert Throckmorton to the Governor, 19 June 1791, Calendar of Virginia State Papers, 5:599.

\(^{183}\) Ibid.
interference in his favor, he would in future become a peaceable, orderly and valuable
citizen.”¹⁸⁴

But the letter’s reference to “violent passion” and Crane’s deprivation of his
“reason” also referenced the second factor in the petitions flooding the governor –
lunacy. Whereas Crane himself protested his innocence, his supporters – seemingly
spurred on by his father – informed the Governor that Crane had been known to have
“fits” since the 1780s. Richard Ransom, a Berkeley Justice of the Peace, certified
under oath that in 1788, when the young John Crane and Catherine had visited
Ransom’s house for the night, “some short time after [their arrival] I discovered a
great alteration in Mr. Crane appearing to look very wild out of his eyes.” Crane
insisted that he needed to go home, and he and Catherine left despite their previous
plans to stay. Concerned, Ransom sent his son along with them, “for fear of his
meeting with some accident; in a very short time or sooner than I expected he had got
home, and a messenger came for me, informing me Mr. Crane had a fit.” Ransom
himself immediately traveled to the Cranes’, “where I saw Mr. Crane Quite Insensible
of his complaint – ravin Distracted; at times took several people to hold him. He
continued in this way of madness for six or seven hours quite out of reason.” Ransom
concluded, “These fits of madness has followed him ever since at times.”¹⁸⁵

¹⁸⁴ A. Waggener and Moses Hunter to the Governor, 14 June 1792, Calendar of State Papers, 598. On
Waggener, see Virgil Anson Lewis, A History of West Virginia in Two Parts (Philadelphia: Hubbard
Brothers, 1889), 499; Willis F. Evans, History of Berkeley County West Virginia (Westminster MD:
Heritage Books, 1928), 279.
¹⁸⁵ “Rich’r’d Ransom’s Certificate as to John Crane Jr.,” April 14, 1792, Calendar of State Papers,
5:491.
Other letters gave their own first-hand accounts. Members of Catherine’s Whiting family, along with Robert Throckmorton, Berkeley justice of the peace Giles Cooke, and others certified:

[W]e have seen Mr. John Crane, the younger, whom stands charged with the death of Abraham Vanhorn, seized with uncommon fits; at which time appeared to be a kind of madness for some time before he was confined to his bed, & after his recovery, which was generally three or four days before he came to his reason; & when that was obtained, he often mentioned that he did not remember anything of his being disordered, tho’ felt himself very sore, weak, and light-headed – the first of his seizure was late in the year 1786.186

Dr. Robert Henry also certified that he had treated Crane during these fits. Writing to Dr. James McClurg, a member of the Virginia Council of State charged with advising the Governor on Crane’s pardon, Henry explained that on November 20, 1788, when called upon to treat Crane, Henry had “found him laboring under a violent nervous affection of the whole frame, Particularly most violent spasms of the lower Intestines, attended with strong symptoms of Phrensy.”187 He was not informed then that Crane had had a “fit,” because the family wished to “keep it a secret.”188 He treated Crane on this and subsequent occasions, but each time the symptoms returned and were accompanied with “stronger appearances of Real Madness.” Henry related that he had never seen Crane in a fit, but that his own wife had suffered them, and that he suspected that Crane’s were of the same sort – “that suffocating or strangling kind, which people of an unhappy passionate temper, and over heated animal spirits are liable to, and which often ends in total madness.” They had “always been occasioned by his overheating himself, either by the ardent use of spirits, too much exercise, or

186 Judith Whiting, William Howard, Robert Throckmorton, Daniel Duffield, Susanah Whiting, Giles Cooke, certify as to John Crane, Jr., April 14, 1792, Calendar of Virginia State Papers, 5:491.
187 Dr. Robert Henry to Dr. James McClurg, 14 April 1792, Calendar of Virginia State Papers, 5:492.
188 “Robert Henry’s Certificate as to John Crane Jr.,” April 14, 1792, in Calendar of State Papers, 496.
something Ruffling his temper."  

Henry certified that he had subsequently attended Crane for the same complaint in 1789, “always for the same symptoms of phrensy, with this difference that it bordered more on madness & continued longer and more alarming, that it was preceded by a Fit, as the family informed me.”

Henry’s account was second by the testimony of another area physician, Edward Tiffin, Crane’s neighbor in Charles Town and the future governor of Ohio. Tiffin had been called upon to attend Crane on June 24, 1786; Crane had “that day been seized with Fits, of what kind I cannot say, as the violence of them was over before I got to him. But I found him perfectly insensible of his situation, and his whole frame in violent agitations. His situation in great measure resembled a mania while it lasted.” He had again attended Crane for the same complaint, “which was more violent than the others – from what cause they originated I cannot say; but they have returned at times ever since, & every time I have had opportunity of knowing anything about them, have deprived him of the use of his reason.”

Even the keeper of the Winchester jail certified that he had witnessed the fits during Crane’s confinement. Jailor Edward Powers wrote two separate petitions on behalf of John Crane, relating that during Crane’s confinement he had witnessed “violent fits, which I am not able to determine; they appeared to be a kind of madness, at which time was under the necessity of calling on my next door neighbor to assist me in keeping him confined, to prevent him from doing injury to himself.”

Then, according to Powers, Crane’s “hard struggles so weakened him, and his nerves

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189 Dr. Robert Henry to Dr. James McClurg, 14 April 1792, *Calendar of Virginia State Papers*, 5:492.
190 “Robert Henry’s Certificate as to John Crane Jr.,” 14 April 1792, in *Calendar of State Papers*, 496.
so affected, that he would be very black in the face, followed with a choking that I expected every moment to be his last, tho’ still recovered by three of four days before he would come to his natural reason.” Once back to his senses, Crane, according to Powers, “often mentioned that he did not remember anything of his being disordered, but felt himself very sore, weak, and light-headed.” Otherwise, Crane had “behaved himself as an honest, well disposed man.” Powers also mysteriously reported that “many reports have been propagated to his prejudices since the said prisoner has been in my custody, which I must say is false.”

In all, the Governor received at least twenty-two printed pages of documents relating to the Crane case. Those who had not personally witnessed John Crane’s fits and spells vouched for the character of those who had, or spoke more generally of the character of the young man and his family. As Winchester District Court Clerk John Peyton told the Governor, the furor against Crane had subsided, “and mercy seems now on all hands to have taken place thereof.”

Peyton affirmed that the crime was of such a horrible nature that pardon was seldom granted, but he expressed his wish that Crane would be an exception. “This,” he wrote, “I am conscious would gratify the wishes of many respectable citizens of this County, and would not only restore to the community a member once thought to be useful, but to an amiable woman, and ancient and respectable parents, a husband and son.”

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193 Ibid.
194 Edward Powers’ Certificat, April 30, 1792, Calendar of Virginia State Papers, 5:520.
195 J. Peyton to the Governor, 30 April 1791, Calendar of State Papers, 519.
196 J. Peyton to the Governor, 30 April 1791, Calendar of State Papers, 519.
Peyton was not the only person to reference Crane's "ancient and respectable parents." Indeed, the distress of James and Lucy Minor Crane permeates the state’s records, from the one sentence notation of James Crane’s petition for a pardon for his son, received on December 2, 1791, only weeks after the Virginia General Court’s decision, through every Crane-related letter that followed. Many of the missives begin with a notation about the information having been solicited by James Crane: “Being called on by Mr. James Crane”; “I have just been applied to by Mr. James Crane”; “Mr. James Crain . . . has solicited my signature to a petition which prays a pardon for his son.” One gets the impression of James Crane himself going door to door, house to house, and to the Winchester jail, trying desperately to free his son.

One letter, from Frederick County justice of the Peace John Smith, states that James Crane himself had approached Smith to sign the petition. Smith explained that he had never seen John Crane, so he could not vouch for him; nevertheless “if the favorable representations of others should in any manner engage the Executive to the prayers of a mild and benevolent Father and those of a mother whose goodness is exceeded by few of her sex; permit me to add those of, Sir, your m’st obed. & Hum. Serv’t.”

Letter after letter echoed the concern for Crane's parents. One also ended with a dire prediction; the letter expressed the hope that Crane’s pardon would “lengthen the days of his venerable parents, his mother especially, who is thought will not surmount the shock, should he be executed.” And the Berkeley County citizens’ petition, which focused primarily on Crane’s spells of lunacy and the fact that his jurors were forced into the special verdict by deprivation and now disavowed it, ended by adding that “the situation of this unhappy man is in itself truly pitiable, but

197 “Robert Throckmorton to the Governor,” June 19, 1792, Calendar of Virginia State Papers, 5:599.
that their consideration and concern are greatly heightened by the distresses of his affectionate wife, and his aged and much respected Parents.”

The pardon petitions in favor of Crane thus made two arguments and added an important descriptive factor. First, they argued that justice – particularly the circumstances of the crime and its verdict – required that Crane not be put to death for his crime. Second, they argued that Crane was not even responsible for the crime – that he had not been mentally competent at the time of its commission. And finally, they reminded the governor that he came from a good, “respectable” family, one that ran in the same social circles as the best men in the county.

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In the early 1790s, pardons were still an important part of making sure that Anglo-American criminal law, including in Virginia, functioned in a way that was tailored to the crime and its circumstances. In the Commentaries, Blackstone wrote, the magistrate essentially held “a court of equity in his own breast, to soften the rigour of the general law, in such criminal cases as merit an exemption from punishment.” This was because although “law (says an able writer) cannot be framed on principles of compassion to guilty: yet justice, by the constitution of England, is bound to be administered in mercy.” The power to pardon was, Blackstone asserted, one of the great advantages of monarchies; in democracies, he cautioned, this “power of pardon can never subsist; for there nothing is higher is acknowledged than those who administer the laws.”

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199 Tucker, Blackstone, 5:396.
200 Ibid.
Blackstone’s words echoed a common maxim, the one that Judge Tucker’s grand jury charge had set forth – “in a republic, there is no sovereign but the laws.” Blackstone’s observations about the incompatibility of pardon and democracy merely took this maxim to its logical conclusion: if authority stopped with the law, then there was, he reasoned, no room for the kind of personal equity exercised by the king through a pardon. Other writers agreed about the incompatibility, even if they disagreed about the desirability of pardons. For instance, Cesare Beccaria, whom Blackstone cited as an authority disfavoring pardons, argued that laws should be mild, proportionate, and certain: “happy is the nation,” Beccaria had written, “where [clemency and pardon] will be considered as dangerous.” Clemency, he argued, “is a virtue which belongs to the legislature, and not to the executor of the laws.” At the base of Beccaria’s objection was both a distrust of what he called “private judgment,” and also its tendency to, he contended, undermine the law. “The prince in pardoning,” he wrote, “gives up the public security in favour of an individual, and, by his ill-judged benevolence, proclaims a public act of impunity.” Instead, “Let, then, the executors of the laws be inexorable, but let the legislator be tender, indulgent, and humane.”

Beccaria envisioned an ambitious alternative to the system of harsh, bloody punishments and arbitrary clemency that seemed to them to predominate in the old monarchies. As Beccaria had acknowledged, after arguing that clemency should be excluded in “perfect legislation,” “This truth will seem harsh to anyone who lives among the disorders of a system of criminal justice in which pardon and clemency are as necessary as the laws are absurd and as sentences are barbaric.” In a regime where

201 Cesare Beccaria, Essay on Crimes and Punishments, 80.
the legislators had created new laws, mild and suited to the crime, however, such clemency wound no longer, Beccaria reasoned, seem necessary.\textsuperscript{202}

Jefferson had set forth similar sentiments in his draft of the unsuccessful “Bill For Proportioning Crimes and Punishments.” There, he had declared that it was “a duty in the legislature to arrange in a proper scale the crimes which it may be necessary for them to repress, and to adjust thereto a corresponding gradation of punishments,” and that “if the punishment were only proportioned to the injury, men would feel it their inclination as well as their duty to see the laws observed.”\textsuperscript{203} Jefferson’s preamble had suggested that too-severe penalties tended to subvert the execution of the law, but also focused strongly on the offender’s identity as a member of society as well: a member of society, he wrote, “committing an inferior injury, does not wholly forfeit the protection of his fellow citizens, but, after suffering punishment in proportion to his offence is entitled to their protection from all greater pain.”\textsuperscript{204}

Jefferson and the other members of the original 1776 revisal had not decided whether to retain pardons; at their first meeting, there must have been disagreement, because their notes indicated that the issue was deferred.\textsuperscript{205} But the spirit of Jefferson’s bill had, at least, echoed the lines of Beccaria’s treatise. Proper punishment should, in general, be determined by the legislature in a uniform manner – not adjusted to the offender on a case-by-case basis.

\textsuperscript{202} Ibid.
\textsuperscript{203} Boyd II, 492-93.
\textsuperscript{204} Ibid.
\textsuperscript{205} Ibid., 325-26.
On the one hand, Beccaria’s and Jefferson’s approach to law seemed to echo a similar attitude to the ideas about the Constitution that Judge Tucker made to the court in *Caton*, and which he later expanded upon in his notations to Blackstone. In talking about the Constitution, Tucker had emphasized that it was “written, that it might not be misunderstood,” and that it “settled the controversy between speculative writers.” He evinced a similar positivism: the previous, multiple sources of law – tradition, precedent, theory – had been replaced by legislation. For Tucker, it was about the legislation of the most supreme assembly, the convention of the people that had formed the constitution; for Beccaria and Jefferson, it was about the normal civil legislature, which was able to have the final word on penal laws. Both suggested that justice was best done by compact and, in the case of Beccaria and Jefferson, in bulk – by treating like cases alike, with no room for adjustment.

But if both Beccaria and Blackstone, and with them Jefferson, doubted the suitability of pardons to a society oriented towards the public – for Beccaria, public utility or for Blackstone, democracy – Tucker’s own notations to Blackstone suggested something different. To Blackstone’s discussion about pardons being one of the very best features of monarchy and to their unsuitability with democracy, Tucker appended a note: “This boasted advantage is not excluded from democratic governments, witness the constitution of Virginia; that of the federal government, and those of every republic in the American union.” Tucker thus claimed the “boasted

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advantage” – that monarchy allowed the separation of law and mercy, and thus the continuance of mercy – for democracy as well.

The fact that pardons continued in Virginia was owed perhaps, in part, to Virginia’s lack of criminal law reform. But whatever their source, in the last decades of the eighteenth century, pardons played a crucial role in the administration of Virginia’s criminal law. The power to give them still belonged, in most cases, to the Governor, who was supposed to make his decision in consultation with the Council of State, the Executive Council created by the Virginia constitution to advise the Governor on various matters. Surviving records of Virginia’s Council of State, list forty-five pardons granted between October 1788 and Crane’s General Court hearing in 1791. The Calendar of Virginia State Papers, moreover, at times indicates other pardons were granted that do not appear in the Council’s Journals. Pardons were issued to all sorts of people – whites, free blacks, and slaves, although the whites were usually denoted as “laborers” if class was mentioned. Offenses spanned the spectrum – horsestealing, murder, theft, felony, and other crimes – often with little explanation in surviving records, only that the convicted was an appropriate object for “mercy.” One defendant, Arthur Farley, convicted of murder, was presumably pardoned for tenuous connection to the crime – his kinsman and co-defendant, Matthew Farley Sr., was unanimously denied a pardon and executed for murdering a slave through excessive whipping.\(^{208}\) Another, Catherine Crull, convicted of murdering her husband, was recognized to suffer from fits of madness and was

pardoned and committed to the Commonwealth’s lunatic hospital in Williamsburg on
the opinion of a number of doctors and lawyers, including John Marshall.209

Some types of pardons were used systemically. Because criminal law reform
was pending but not yet completed, Virginia's governors routinely used pardons to
commute death sentences for all crimes except murder to a term of years laboring in
the public works. These “conditional” pardons both buffered the sanguinity of the
criminal law and traded death for labor – a small step towards the system that
Beccaria recommended.210

But these pardons also made some Virginia legal officials uncomfortable. It
was unclear if the Governor held the constitutional power to pardon in this manner –
essentially, to adjust the sentence, without absolving of the crime. Some argued that
it merely required an act of the legislature, authorizing the practice; others had deeper
concerns about constitutionality. Finally, in 1786, the Virginia Court of Appeals
ruled that conditional pardons issued by the executive were indeed unconstitutional –
the executive could pardon, but attached conditions were unenforceable, and the
power to attach them not granted by the Virginia constitution.211

At other times, pardons were used not to reduce a sentence itself, but as a type
of immunity, to procure testimony in a particular case. For instance, in 1782,
Attorney General Edmund Randolph advised the Governor that pardons were
particularly useful for conspirators whose testimony the Commonwealth wanted to
use in court against their confederates. Randolph felt that the fact that these witnesses

209 Ibid., 5:35
211 Commonwealth v. Fowler, 4 Call 36 (Va. 1785).
were already pardoned, before their testimony, made that testimony more credible – otherwise the jury would think that they were saying whatever the Commonwealth wanted them to say, in hopes of achieving goodwill and leniency later. Or, as Randolph put it, they would think that the witness was “making court to government for his life by the virulence of evidence against his accused brother.”

Otherwise, as Randolph advised in requesting the Governor to pardon a suspected horse thief whose testimony Randolph desired, the witness’s credibility “could be ‘very much suspected.’”

But pardons were used for more than administrative or prosecutorial purposes. Instead, as in John Crane’s case, pardons were asked for – and often granted – to remedy errors at trial, to seek to do justice in a broad way not allowed by law, or to acknowledge the repentance or non-dangerousness of an offender. In late eighteenth century Virginia, justices of the peace, witnesses, and other court personnel filed petition after petition asking for pardon for someone whom they had helped to convict. Because there was no right of appeal in criminal cases in Virginia, sometimes their petitions informed the governor of a legal error which had taken place during the trial. For instance, in the case of Phil, a slave who had been convicted of an unspecified felony in the New Kent County Court, the Commonwealth’s attorney for the county and the county justices informed the

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212 “Letter from Edward Randolph to Governor Harrison,” Calendar of Virginia State Papers and Other Manuscripts from January 1, 1782 to December 31, 1784, ed. William P. Palmer (Richmond, Virginia: James E. Goode, 1883) 3: 193-194. The “Edward” is a typographical error – Edmund Randolph was the attorney general at the time, and the letter appears to be advising about events related to the treason prosecution in the Case of the Prisoners.

213 “Letter from Edmund Randolph, Attorney General, to Governor Harrison,” Calendar of Virginia State Papers and Other Manuscripts from January 1, 1782 to December 31, 1784, ed. William P. Palmer (Richmond, Virginia: James E. Goode, 1883) 3: 395. Randolph mentions this technique twice within a ten month period, suggesting that it was a normal practice.
Governor that the court had only sentenced Phil to death after being shown a law that Attorney General Edmund Randolph had later informed them was no longer in effect. According to the correct law, clergy was available. Unable to correct their error, the petitioners asked the Governor to pardon Phil. In a similar letter, the Rockingham County Commonwealth’s Attorney asked for pardon for another slave; Jack’s conviction had arisen solely because the petitioner had “carelessly, not willfully” allowed Jack’s accomplice to testify against him, in direct contravention of an act passed in October 1789.

In other cases, legal officials, especially justices of the peace, requested pardon for more general considerations of justice. For instance, in one case, justices of the Nansemond County Court recommended that the governor pardon Coff, a slave who had been sentenced to death for an unspecified felony, because they believed that another slave – an accomplice whose testimony resulted in Coff’s conviction – was actually the “principal” offender in committing the crime. In another case, the justices of the Mathews County Court recommended that the governor pardon Cornell, a slave belonging to Benjamin Marable for breaking and entering into the storehouse of Lewis Gan, citing his “good character previous to his committing the

aforesaid offence.\footnote{217} And in Petersburg District Court, court clerk William Whitlock forwarded to the Governor petitions from Martin’s friends and the jury requesting Martin’s pardon, citing “Martin’s youth and subsequent good behavior since the felony was committed.”\footnote{218} The justices of New Kent County similarly unanimously recommended for pardon the slave Hercules, who had been sentenced to death for assisting John Price Posey to burn down the county jail and clerk’s office.\footnote{219}

A letter from General Court judges Tazewell and Nelson sheds particular light on the ways in which law and justice interacted not just at the county but also in cases at the state district courts. In 1792, at the same time as the Governor was considering Crane’s pardon, Judges Tazewell and Nelson recommended that William Cheetwood of Powhatan County – found guilty of arson for burning the county jail – be pardoned for his crime. They related that immediately after convicting Cheetwood – who was “of a fair character” but had a “weak mind” and was sometimes “deprived of reason” – the jurors had delivered to the court a statement requesting his pardon. Because there was a question whether Cheetwood’s crime was a capital one, the judge had referred the case to the General Court, but the judges asked the Governor to pardon Cheetwood even before the General Court had made his condemnation final to save him from “a severe imprisonment” in the meantime.\footnote{220}

\footnote{219} “Negro Slave, Hercules,” December 12, 1787, Calendar of Virginia State Papers, 4:367.
\footnote{220} Judges Henry Tazewell and William Nelson to the Governor, 13 April 1792, Calendar of Virginia State Papers, 5:528-29.
Petitions like these made clear both Virginians’ respect for the letter of the law and their concern that justice be done appropriately to each case. The jury’s conduct in the *Cheetwood* case made explicit the fact that they had followed the law, even though they then immediately prayed that its sentence would not be carried out—here there was no possible lapse of time or change in community sentiment to account for the change between verdict and pardon petition. The many surviving petitions from justices of the peace suggest a similar attitude—justices (who had final jurisdiction in cases concerning slaves) seem to have routinely delivered guilty verdicts in cases and then petitioned for the condemned slave’s pardon.

To be sure, at other times the justices convicted a defendant of a lesser crime than that with which he had been charged, thus adjusting the punishment up front to what they considered to be appropriate. But the many pardon petitions that inundated Virginia’s governors also illustrates that, in many cases, both county courts and district courts rendered verdicts with which, as general matters of justice, they disagreed. Whether it was concern about whether a defendant had taken the fall for a co-conspirator, qualms about his age or responsibility, the conviction that he had repented, or the fact that evidence had subsequently come to light which made the propriety of the result less certain, Virginia’s magistrates, jurors, witnesses, and judges did their own jobs, but also turned to the executive to do justice in ways that the law had not. In petition after petition, a picture emerged—of fact-finders who had made decisions according to law, then asked the Governor to mitigate the sentence. In 1791, it seems, the harsh sanctions that remained the law were buffered—by the legal inheritance of clergy, and by the discretion of the executive.
There were, of course, cases where the pardon request was more complicated. In some, as in the case where the wrong statute had been applied, it was more of an appeal – used to fix a legal error.\textsuperscript{221} In others, other petitions also arrived suggesting that community opinion was far from unanimous: for instance, Thomas Gatewood contradicted other pardon petitions when he asked Governor Lee not to pardon Argyle, a slave who had been sentenced to death for robbing him, claiming that Argyle was “a notorious villain & an old offender.”\textsuperscript{222} In his case, local opinion was far from unanimous.

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Nor was opinion unanimous in John Crane’s case, but his father did a good job of making it look like it was. On behalf of his son, James Crane mounted was seems to have been the most extensive pardon campaign of late eighteenth century Virginia. Crane’s friends and family petitioned for a pardon, but they knew, as several of them acknowledged, that the chances were slim – as Winchester District Court Clerk John Peyton admitted in his letter to Governor Lee, murder was a crime for which mercy was “seldom interposed.”

But seldom did not mean never – indeed, only a two years earlier, Catherine Crull, who had been convicted of murdering her husband, had been pardoned and committed instead to the lunatic asylum in Williamsburg. As Virginia Attorney General Joseph Jones had written to then governor Edmund Randolph: “The conduct of this ill-fated woman brought strongly to mind the case of one Phillips, from the

\textsuperscript{221} Bartlett Williams, Attorney for the County and the Members of the Court to the Governor and the Honorable, the Council of State, 18 January 1790. Calendar of Virginia State Papers Vol. 5: 101.

\textsuperscript{222} Thomas Gatewood to the Governor, 13 May 1792. Calendar of Virginia State Papers and Other Manuscripts from July 2, 1790 to August 10, 1792, ed. William P. Palmer and Sherwin McRae (Richmond, Virginia: Rush U. Derr, 1885) vol. 5: 543-544.
county of Hanover, who, during the regal government, was tried and convicted for shooting his wife. He was pardoned on suggestion of Lunacy and committed to the lunatic hospital, where I remember frequently to have seen and conversed with him." And in May 1792, as Crane’s petitions piled up on Governor Lee’s desk, two other condemned defendants raised the same claims – both Ralph Crawforth Anderson, convicted of murder, and Isaac VanMiter, convicted of horse-stealing. Anderson had been convicted of murder in the Richmond District Court; in May 1792, his brothers wrote a letter to the Governor that claimed that their brother suffered from “interruptions of reason,” that he had never borne any “resentment” toward Green before killing him, and asked for his pardon on this account. Judges Henry Tazewell and William Nelson also wrote, seconding the pardon request: “The state of the prisoners [sic] mind was offered to the Court and Jury as an apology for his conduct, and some testimony as to his insanity was examined, but it was not considered as sufficient in the opinion of either. Since the judgment, several papers on that subject have been sent to us. We take the liberty to enclose them to your Excellency.” Crawford's mental state had been raised at both the trial and pardon stage. Anderson’s request seems, also, to have been successful – a “Ralph C. Anderson” appears again in Virginia records only a couple of years later, in

223 Joseph Jones, Attorney General, to Governor Beverley Randolph, 28 January 1789, Calendar of Virginia State Papers.
225 Tazewell and Nelson to the Governor, 13 April 1792, Calendar of State Papers, 528.
Chesterfield County – near the Richmond District Court where Anderson had been convicted.  

William Waller Hening’s *The New Virginia Justice*, a handbook produced in the 1790s to aid justices of the peace, similarly indicates the ways in which an insanity defense was handled. According to Hening, “ideots and lunatics who are under natural disability of distinguishing between good and evil, are not punishable by any criminal prosecution.” Hening defines lunatics as those “who sometimes have their understanding and sometimes not.” Whether a criminal was actually a lunatic or not was to be determined by an inquest, returned by the sheriff, with evidence presented either to the court or to the trial jury.  

Although practice may have varied from the straightforward dictates of Hening’s manual, these sources indicate that Crane could have raised an insanity defense in the examining court or in the district court, although he seems to have not done so.

But there was no indication that he had done so—Tucker and Lee make no reference to lunacy evidence in their letters, and none of the letters reference any such evidence having been before the court. Since the petitioners stated that the Crane family had attempted to keep John’s condition a secret, this is no surprise – perhaps they felt certain of their manslaughter defense, and thought airing John’s condition was unnecessary. Or perhaps it was only later, after John’s conviction, when they attempted to connect his “fits” to the crime. Saving lunacy until then allowed the

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226 “Petition for Jack.” *Calendar of Virginia State Papers and Other Manuscripts from January 1, 1794 to May 16, 1795*. Ed. Sherwin McRae and Raleigh Colston (Richmond, Virginia: J.H. O’Bannon, 1888) vol. 7: 30. This was received on February 19, 1794.

227 William Waller Hening, *The Virginia Justice: Comprising the Office and Authority of a Justice of the Peace in the Commonwealth of Virginia* (Richmond: Johnson & Warner, 1810), 380-381.
Cranes to continue to conceal John’s illness, a goal the letters written on Crane’s behalf suggest was of great value to his family.

Here one glimpses another face of “honor.” Often seen in the study of the South as an enabling force, giving license to touchy behavior and extraordinary reactions to minor slights, honor also had a constraining side, one that necessitated the maintenance of one’s reputation. Indeed, here class may have played against Crane, making him less likely to reveal his instabilities.

And if the Cranes, or John himself, were at first reluctant to air the full extent of his ailments, it is possible that the extraordinarily passionate outpouring of the letters begging his pardon, and what Court Clerk John Peyton described as a change in community sentiment, came in the face of a full disclosure of his mental illness in the months after the trial and General Court’s decision. Perhaps only after that tribunal’s decision did the Cranes seek to connect their son’s periodic “fits” to Vanhorn’s death. And maybe these revelations – before a closely held secret – accounted for the dramatic turn in public opinion. At this eleventh hour, as James Crane travelled around the Valley gathering signatures for his son, the desperate Cranes probably regretted not having raised the issue of John’s lunacy earlier.

Crane's petitions stand out, even amongst hundreds of other surviving petitions amidst Virginia state papers. They are striking first for their sheer voluminousness – whether because of strong feeling about John's case or because of James Crane's clout and status, the family was able to procure at least thirteen petitions on John's behalf. They are also notable for their comprehensiveness – the letters provided detail, personal observations, and medical expertise.
At the last stage of Crane's proceedings, as at the beginning, Berkeley County was against telling stories—stories about him and his crime. But the truth behind these stories is elusive. Why did so many of Berkeley's citizens petition for Crane's pardon? Was it out of sympathy for James and Lucy Crane, or because they really thought that justice demanded it? Did they suspect that, given the nature of the crime, and the fact that James Medlicott had recently been executed despite a far more ambiguous crime, it was a futile enterprise, and thus see no harm in attempting to help the Cranes? Did they feel obligated, given James Crane's status, or did they genuinely seek to help the young, condemned man?

And what of John Crane himself? Even with the wealth of information in Crane’s pardon petitions, it is still hard to grasp the reality behind the formulations. Was Crane’s the case of a privileged, mentally ill man whose parents had for years sought to keep his affliction secret; a man now sentenced to die for something he could not control? Or was it a last minute defense made possible by his parents’ clout and connections? Was Crane’s illness unrelated to his stabbing of Vanhorn? Or had it driven him to commit a crime that, as some accounts suggested, he could not even remember?

If the pardon petitions suggest that Berkeley was united behind Crane's cause, a closer look makes things more complicated. True, no petitions were submitted that flatly opposed Crane's pardon, as sometimes happened in other cases. But if many signatures appeared in Crane's support, others were conspicuously missing. Three of Crane's jurors wrote to say they thought Crane was only guilty of manslaughter, but no other jurors wrote to the governor about their verdict. Thomas Campbell signed
the petition on Crane's behalf, but John Dawkins and Isaac Merchant did not. If Berkeley feeling had swung towards Crane, there were stubborn, if officially silent, dissenters. These citizens, particularly those who had witnessed Vanhorn’s death first hand in Campbell’s fields, may have seen John’s “ungovernable disposition” – as the Shepherdstown paper had called it almost a year earlier, when it first ran the story of Vanhorn’s death – less as an excuse, and more as the “barbarous” heart behind his crime.

In the end, Crane’s request was denied. Had his credible case of manslaughter actually lessened his case for pardon? Or was it the lack of support from legal authorities – like Judge Tucker, or the Attorney General, James Innes, or any judges of the General Court? In any case, Crane’s pardon did not materialize. John Crane would face the gallows.
Conclusion: Execution and Exegesis

James Crane’s friends and neighbors may have written to Richmond, but in the end, it was the ordinary farmers and laborers – the “negrofied puppies” – who were vindicated by the state machinery. The pardon application was denied, despite the fact that Governor Henry Lee was the older brother of Crane’s lawyer, and that the President of the Virginia Council, which deliberated on Crane’s pardon application and made recommendations to the governor, was James Wood of Winchester, brother of Crane’s grand juror Robert Wood, whose signature appeared at the top of Crane’s longest pardon petition.

Crane was executed at Winchester in 1792, along with William Johnson, a convicted horse-thief. There was a ritual to executions in the eighteenth century – confession, apology, and exhortation of others to follow a better path.¹ Johnson complied with this ritual; the newspapers reported that his “behavior at the place of execution was suited to his unhappy situation, and he died apparently satisfied of having made his peace with the Supreme Governor of the Universe.” But “John Crane, Jun., who was executed at the same time, met his fate with reluctance,” the paper euphemistically reported, “persisting in his innocence to the last.”²

Crane and Johnson were two of the first executions of whites supervised by the Winchester District Court and carried out locally instead of in the capital. As a result, the people who watched John as he was dragged to the gallows and who heard his final protestations of innocence were his friends, neighbors, and family, and those of his victim, Abraham Vanhorn. Because the Commonwealth’s new legal reforms

¹ See, e.g., Wilf, Law’s Imagined Republic.
² Baltimore Evening Post, July 26, 1792.
had delegated the authority of the General Court to the new district courts, the case
which had begun locally essentially ended that way as well.

Local punishment was one of the newest aspects of Virginia’s remodeled
court system. The district courts brought the state’s jurisdiction into the localities,
essentially decentralizing the state’s judicial system, while at the same time
cementing a pyramid of tribunals from the district level to the Court of Appeals. In
the old system, the burdens of court proceedings had been placed primarily on local
people – on the litigants, witnesses, jurors, and other officials who had to spend days
travelling from their homes in order to litigate a case in the General Court in
Williamsburg and then Richmond. But, in the new system, that burden was shifted to
state officials – especially to judges like Tucker, who spent a good portion of the
calendar year trudging from place to place, bringing the courts to the people. This
fact was not lost on the judges, who in 1788 had protested the General Assembly’s
first district court bill, which had required the General Court justices to both ride
circuit and sit on the Court of Appeals. An amended district court bill, which was
soon passed in 1789, created a free-standing Court of Appeals and thus absolved the
General Court judges from one of their responsibilities.\(^3\) Even with this change,
being a judge was onerous – years later, St. George Tucker would advise his son-in-
law against taking an appointment to Virginia’s Court of Appeals, based on years of
“painful observation & experience.”\(^4\)

\(^3\) For more about court reform and the Judges’ Remonstrance, see Roeber, *Faithful Magistrates and Republican Lawyers*, and Cullen, *St. George Tucker and Law in Virginia*.
\(^4\)St. George Tucker to John Coalter, 3 June 1811, Tucker-Coleman Papers.
Of course, moving the courts to the people also brought state jurisdiction to local places, invading the physical territory of the county courts. This state penetration of local communities has led some commentators to see legal reforms like Virginia’s as a centralizing move, despite their apparent decentralization – as an attempt to eradicate legal pluralism by replacing local courts with state tribunals. In her recent book, *The People and Their Peace*, historian Laura Edwards argues that during this era, state courts and local courts (in her study, the courts of North and South Carolina) were very different tribunals run by individuals with distinct ways of doing law. Local courts, she contends, were (in their own, flawed way) communitarian and democratic; they sought to do justice broadly, unconstrained by the niceties of law and legal practice, by relying on community will and case-by-case, contextualized determinations. State courts, on the other hand, were staffed with professionalized lawyers and judges more interested in procedure than context and invested in conceptions of individual rights that “turned people into legal abstractions.”

According to Edwards, beginning in the late eighteenth century state-level courts began to strip authority from local courts and people and vest it in centralized state courts; in the process the voices of the local community were lost amidst the confining state jurisprudence of rights. Edwards paints local areas as democratic and pluralistic, and state courts as professionalized bastions of the elite dedicated to the rule of law.

John Crane’s case, however, cautions against a too-stark division between state and local courts. Instead, *Commonwealth v. Crane* demonstrates that – at least

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in Virginia – both forums were comprised of prominent men who often wielded power at both the state and local levels. For instance, several of Crane’s jurors and grand jurors would later be federal or state officeholders: Daniel Morgan was not only a nationally renowned General, but later represented Berkeley in Congress; Moses Hunter, Thomas Rutherford, George Reynolds and Magnus Tate would all later serve in the General Assembly; and Magnus Tate also became a U.S. Representative. And others, like Robert Wood, whose brother was President of the Virginia Council and would soon be elected governor, were only one step away from state power. These same individuals who participated in the state courts held powerful local positions as well: Thomas Rutherford appears occasionally as a Berkeley County justice of the peace, and either this Thomas or his father was the first High Sheriff of Frederick County. Magnus Tate practiced law in the Berkley County Court and was recommended by the county court as a justice of the peace; and Robert Wood fulfilled the same position in Frederick County. These men were chosen to sit on Crane’s jury and grand jury because of their local prominence; at the same time, that prominence led to and sometimes came from ties across the state.

Thomas Rutherford’s brother Robert provides a good example of the ways in which state and local power overlapped, and how prominent individuals moved easily from one sphere to another. Robert Rutherford, who was educated at Edinburgh, was a member of the House of Burgesses but resigned his 1772-74 term to become Frederick County’s coroner. He then returned to the House of Burgesses in 1775 and when relations between the Assembly and Governor began to deteriorate, became

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a member of the Virginia Convention, and then served in the state senate from 1777 to 1790. A few years later, in 1793, he would be elected a U.S. Congressman of the “republican” persuasion, although in this last characteristic he differed from many other elected officials in the Berkeley area, many of whom became Federalists, including Daniel Morgan, Abraham Shepherd, George Reynolds, and Magnus Tate. Berkeley justice James Nourse’s son even worked for Alexander Hamilton’s Treasury.) Rutherford lived near Charles Town and was appointed a Charles Town trustee with James Crane in 1786, in the midst of his political career.

In an age where political participation was still tied to property ownership, local and state power networks were bound to be connected. This was perhaps even more apparent in a newly settled area like Berkeley, which had fewer people to choose from when leaders were elected for local and state-wide positions. When choosing individuals to serve as justices, as members of the General Assembly, and in other capacities, Berkeley people and leaders chose over and over from the same pool of men – men like Robert Rutherford, Magnus Tate, Daniel Morgan, and others.

Local and state connections, however, were not merely generated by the scarcity of life in the old west, but also followed it there. Although some men like Daniel Morgan were self-made, and some like Abraham Shepherd were wealthy but with out-of-state origins, others were products of Virginia’s old gentry. Just as John Crane’s family carried its old Spotsylvania connections to Berkeley, and Catherine Crane’s family carried connections to the powerful Robinson and Whiting clans, the

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8 Bushong, Historic Jefferson County, 80.
Page brothers who sat on John Crane’s grand jury were first cousins of Jefferson’s and Tucker’s good friend, John Page of Rosewell, who at the time of the case was a U.S. Congressman and would later be elected Virginia’s Governor. Although they lived in what was technically “the west,” they were descendants of a family who had loomed large in Virginia throughout the eighteenth century, with all the connections that entailed; grand juror John Page, for instance, who lived in Frederick in “the west,” married Maria Byrd, daughter of Robert Byrd III. When defendants like Crane faced county and district courts, they thus simultaneously faced forms of state, local, and sometimes national power.

In this way, the Crane case shows the Berkeley area – Virginia’s first west – to have been well-integrated with the rest of the state by the 1790s. Despite being physically west (for the eighteenth century, at least), Berkeley was at the same time very much Virginia, ruled by many of the same families and represented by the same names one might find elsewhere in the Commonwealth. These related and yet different people sometimes agreed and sometimes disagreed, sometimes led distinct lives but sometimes did not. They often had different interests, but not always. They married each other, visited each other, and maintained connections that can be lost on historians who assume that Winchester or Martinsburg (in the lower Valley where the Crane case takes place) comprised a different world from, say, King and Queen County in the Tidewater. Over time, the families in Berkeley developed their own identities as western elites – identities shaped, no doubt, by the introduction of new

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families – but they never forgot their connections to, for instance, Robert “King” Carter or other elite forbearers, as the names they gave their children demonstrate.

This was true not just for the wealthy families with Virginia roots who moved west, but also for other Berkeley settlers who had moved into Virginia from the North or overseas. The Valley’s immigrants established large plantations, owned many slaves, and married into Virginia’s prominent clans. For instance, Scottish immigrant General Adam Stephen’s daughter – illegitimate daughter, no less – married Alexander Spotswood Dandridge (grandson of the former governor, second cousin of Martha Washington, and brother-in-law of Patrick Henry), and early German settler Jost Hite’s grandson married James Madison’s sister, Nelly.12 By the 1790s, many of Berkeley’s wealthy families, regardless of origin, were already well-intertwined in the region, and embraced the identities and values of the Old Dominion. Similarly, the alliances in the Crane case do not fit neatly into a north versus south or east versus west framework. The three jurors who argued for manslaughter did have roots in lower Virginia, but many of Crane’s petitioners, including those who sent individual letters, were from the Valley’s German stock. By the 1790s, regional and ethnic origins had merged into an elite who seem to have paid more attention to money than heritage.13

The one constant – the one that transcended regional origin or other variables, as the wealthy and respected Hite family demonstrates – was reliance on slaves. Land ownership was important, but if Berkeley’s records are any indication, it was

12 For Dandridge, see Ward, Adam Stephen, 219-21; for Nelly Madison, see National Trust for Historic Preservation, “Belle Grove History,” available online at http://www.bellegrove.org/index.php/?about/history.
13 Higginbotham reaches a similar conclusion in Daniel Morgan: Revolutionary Rifleman.
not sufficient for achieving genteel status. But one could be a smallish landholder like James Crane and, with the right family connections and enough slaves, be a gentleman. Accordingly, Berkeley gentlemen who chose to manumit their slaves, like Crane’s friends and Methodist converts Thomas Worthington and Edward Tiffin, moved to Ohio, instead of remaining as slaveless masters in the Valley. In this way, Virginia mores were defining Berkeley, at the same time as Berkeley was participating in the definition of Virginia. As in the rest of the nation, however, the prevailing slave-owning order was not uncontested, in this era where leading gentlemen still lamented the corruptions and brutality of the slave system, and where Crane’s judge, St. George Tucker, could still publish an emancipation scheme and retain his respectability, even if his ideas provoked controversy.

Once Berkeley and the areas it represents are re-integrated into our conceptions of Virginia, Crane’s case shows the way in which those conceptions need to be revised. Much the same way as historians have seen the legal culture of the era as binary – state elites versus local communities – and its culture as easily divisible between east and west, white Virginia’s class structure has often been seen as composed of two rival groups, the gentry and non-gentry. There was an extent to which that was true – after all, the conflict at the fence between Crane and Campbell’s fields seemed to embody the class conflict that had so pervaded Virginia only a couple of years earlier, when angry farmers had burned court houses and bound together, pledging to resist collection of their taxes. That discrepancy, after

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14 See William Lang, “Governor Edward Tiffin – A Biography,” in The History of Seneca County (Springfield, OH: Transcript Printing Co, 1880), 196-202, relying on interviews with Tiffin’s daughters, and memoirs and letters of Tiffin and his family.

15 St. George Tucker, A Dissertation on Slavery, with a Proposal for the Gradual Abolition of it in the State of Virginia (Philadelphia: Matthew Carey, 1796).
all, is what led Catherine Crane to yell to her husband not to fight with “such a set of negrofied puppies.” Men like Crane, Catherine inferred, did not jump into a field to fight with their neighbor’s workers.

The ambiguous nature of Crane’s class provides one of the case’s most fascinating and elusive aspects. On one hand, a first perusal of the case – of John Crane, “yeoman,” fighting with the men who worked in Campbell’s fields on July 4, 1791 – conjures up a picture of middling western farmers. But John Crane was something different – the son of one of the county’s most prominent men, and well-connected to the Virginia gentry who ruled the colony and then the state. He was, also, an elite.

Or was he? Despite John’s connections, on July 4, 1791, he owned less land than many of the men who worked in his fields. Isaac Merchant surpassed him by almost a hundred acres; Abraham Vanhorn’s father owned more slaves. By this measure, John Crane was, indeed, just another yeoman – making Catherine’s slur all the more ridiculous, and all the more infuriating. No wonder that, with her words, Vanhorn and Merchant became “much irritated,” as the verdict reported, and stripped off their shirts to face Crane. In that light, the words of this desperate, perhaps haughty woman appeared ridiculous. At the same time, the words and signatories of Crane’s many pardon petitions reminded the Governor and Council that John Crane was different – that he was not just any defendant.

In this way, class in *Commonwealth v. Crane* is both rigid and surprisingly supple. On one hand, as notions of class play out in the case, names, families, and people seem to carry more weight than wealth and property. Catherine Crane, for
instance, clearly felt that, despite her husband’s middling property ownership status, she and he were better than the men who worked in his fields. And, at this, the frustration of Campbell’s workers is palpable. Perhaps this rigidity – this ceiling – on Virginia advancement was partly what was prompting so many people like Isaac Merchant’s brother and John Dawkins’s parents to relocate farther west.

At the same time, class in Crane emerges as, in law, dependent entirely on wealth. Crane is classified as a yeoman – despite his gentleman father, and his “esquire” grandfather. Crane’s abrupt fall in the world brings to mind the class fragility about which Virginia leader George Mason worried extensively; Mason lamented that no matter how great a “Man’s Rank or Fortune,” his “posterity must quickly be distributed among the different Classes of Mankind, and blended with the Mass of the People.” While contemplating a new government at the Federal Convention, he wrote that he “often wondered at the indifference of the superior classes of society” to the importance of a broad electorate, when “the course of a few years, not only might but certainly would, distribute their posterity throughout the lowest classes of society.”

A rapid descent down the social ladder is also apparent in *Commonwealth v. Posey*; in his indictment, defendant Posey, former justice of the peace in New Kent County and former member of the General Assembly, was designated a “laborer.” On the other hand, when one looks closely at Posey, companion and friend of John Parke Custis, one also gets the feeling that Virginia’s gentry may have never felt that he belonged – not quite.

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At the same time as some fell in status, others rose. When St. George Tucker entered Virginia in 1772, he was from a genteel Bermuda family, but he had few connections in the mainland colonies. He and his brother, Thomas Tudor Tucker, who moved to South Carolina, managed to climb their way through America’s social structure. In South Carolina, the Edinburgh-trained Thomas initially found that he could get only “negroes” as clients for his medical practice, and struggled; St. George fared better, making friends with leading Virginians, but still found himself on the periphery until the Revolution came and he began to run the family’s smuggling operation. And while the social standing of Tucker’s Bermuda background was a necessary foundation for his later incorporation into the Virginia elite, it was Tucker’s marriage to Frances Bland Randolph, and thus into Virginia’s clan-ocracy, that integrated him most fully into the life of the new state.

In Virginia after the Revolution, class was thus both fluid and rigid—fluid in the falls down the social scale, like John Crane’s and John Price Posey’s, and the climbs up it, both those of St. George Tucker and of men like Adam Stephen or Daniel Morgan, or like the new men who began to exercise power in the General Assembly or, sometimes, the county courts. There were also, of course, thanks to the Revolution, those formerly powerful families who opted out of the new order—men like James Wormeley, who moved to Britain, or the Loyalists who relocated to Nova Scotia.

At the same time, Virginia’s dense kin networks—those who complained about some of the changes in the type of “new” men who led Virginia’s government—continued to dominate, making it hard for some to fall too far or climb too high. This
may have crossed the mind of Isaac Merchant, as he worked in the fields for his neighbor, Campbell, and yet was called a “negrofied puppy” by the wife of a man who owned far less land than he did. And Catherine Crane may have taken the safeguards of her name for granted when, a couple of years after John’s execution, she married a man who had served as Berkeley’s high sheriff, the same office her kinsmen had also held on and off since the colonial era. Her husband’s ignominious end did not send her into the darkness outside of acceptable Berkeley society – but perhaps she expected that.

The inner contradictions of Virginia’s class structure can be easy to miss, especially when using sources created by the gentry themselves in the antebellum period. As many historians of the South have noted, available sources are heavily biased toward the planter class, who, though a minority, employed forced laborers who enabled them to philosophize, correspond, and serve in public office. Not only are their accounts of life in the South as a whole (and perhaps especially in Virginia) predominant, their accounts of class also overshadow all others: their depictions of their less fortunate neighbors, employees, and enslaved workers as people fundamentally different often stand alone, such that observations about one segment of the population about the dissipation or laziness of other segments, black or white, are taken at face value as evidence about the character and manners of those who did not have the learning or leisure to themselves reflect on paper.

But these aristocratic accounts concealed messy realities – not only the many relationships between masters and the slaves who, as Annette Gordon-Reed has so eloquently and incisively shown, were often their concubines, children, and siblings,
but also the white families who had climbed up and fallen down the social ladder, or who were far less different than their depicter might wish to think. All too often, gentry accounts of their “betters” – whether Catherine Crane’s crude slur or other descriptions couched in more sophisticated language – have been taken for granted as definitive. As much as later upper class Virginians liked to see their status as an inborn commodity, it was (at least for whites) constantly in the process of being constructed and reconstructed, both inside and outside the courtroom.

In this way, Catherine Crane’s statement is arguably, for the historian, the most revealing moment of the jury’s arrestingly vivid verdict. Later observers argued that Southern slavery led to the association of manual labor with bondage and blackness, and made the South’s non-slaveholding whites unwilling to toil in the fields. Historians have largely accepted this claim. But although Merchant and Vanhorn reacted strongly when Catherine called them “negrofied puppies,” the statement in many ways said more about her prejudices than theirs. Crane’s and Campbell’s reapers had toiled in fields for their whole lives, and many of them – perhaps all – would continue to do so. But Catherine, raised among Virginia’s most privileged class, saw things differently – for her, manual labor was something that only slaves did. Any idea that labor was “negrofied” and should be shunned was, at least that day in Crane’s and Campbell’s fields in 1791, more about the prejudices of Virginia’s old slaveholding elite than those white men who actually worked. Perhaps

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19 Upton Sinclair succinctly captured this common view, which became an oft-repeated anti-slavery argument, in his novel *Manassas*, in which Professor Otis explains, “You hear slavery justified . . . because the negroes are inferior, but it is not only the negroes it degrades – look at the working classes of the whites…. A poor man in the South will not work besides negroes, and he cannot compete for the good soil with the great planters; so he squats on used-up land and sinks lower every year.” *Manassas: A Novel of the War* (New York: Macmillan &Co., 1904), 72.
this is why Hugh McDonald’s deposition, which Crane’s supporters presented to the General Court and Governor on John’s behalf, not only emphasized that Crane had been provoked and then ambushed by Merchant and Vanhorn, but also that he had spent at least part of the day reclining – not in the field. And maybe this is why families like John Dawkins’s uprooted and moved to Kentucky.

Crane’s case thus cuts beneath the glossy images of class, wealth, heritage and Virginia life offered by the elite as the definitive word on their society, and offers an important window, albeit an imperfect one, onto the South at its demographically most typical – a picture of white landowners with few or no slaves toiling in each others’ fields on a hot July day, and of individuals in the process of rising or falling in class status, persons with no property who would later have some, and sons of gentlemen settlers who now worked with their hands. Several of the men listed in Crane’s case – like Isaac Merchant, who spent the rest of his life reacquiring his family’s property – at the time of the fight owned little land but would themselves be larger landowners several years later. Others, like John Dawkins, whose family had long owned land and was descended from early settlers in the area, nonetheless toiled with their hands in a neighbor’s harvest field, and were in the process of relocating even further west. Finally others, like John Crane, were raised as gentlemen but for this moment were spending at least part of the day in the fields.

Like these individuals – like John Crane and Abraham Vanhorn and Isaac Merchant and John Dawkins – the Virginia of Crane’s case was a Virginia in motion, in the process of becoming and of departing, of encompassing and excluding. Whatever Virginia may have become by 1830, 1865, or 1890, in 1791 it was a place

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20 See “Deposition of Hugh McDonald, October 1, 1791,” Calendar of Virginia State Papers, 372.
old by North American standards but still being born, still in the process of generating its new, free polity, still assimilating new migrants from the Northeast and overseas, still stretching and redefining its boundaries as its white inhabitants claimed and settled new areas, and as other areas, like Kentucky, broke off to become new states. When one looks more closely at the characters, the landscape, and the hues and textures, the portrait becomes fluid – a blended, complex swirl of meaning and motion, much of which is beyond our grasp.

This Virginia in motion is lost, however, if one focuses on the law as it was eventually pronounced, rather than how it worked – from court to court, and from participant to participant. Given the paucity of records that exist for the period – not many cases offer records even as complete as Crane’s, which is thin compared to records left by cases of later eras – this motion is often hard to catch in full. But part of the exercise is not just about historical sources, but also about methodological orientation – about seeing the case as a moment in an unfolding drama about the law and its application to life.

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Using legal materials presents a special challenge, for those materials are at once more credible and more suspicious. On one hand, they are produced either by or for a body charged with truth and justice. Crane’s jury verdict, for instance, is not the account of a random witness or potentially agenda-driven newspaper, but instead the reasoned conclusion of some of the “best” men in the community as to what happened that day in Crane’s field. On the other hand, these same indicia of trustworthiness also mean that the documents require greater scrutiny. The jury
verdict, as the later letters supporting Crane’s pardon so plainly show, was a product of compromise, in a time where feelings about the event in question ran strong. Likewise, the letters are written with an end in mind, and the behavior they describe tracks almost perfectly the legal descriptions of the temporary “lunatic” in legal treatises of the era. Without trivializing the importance of oaths to those who gave their certified testimonies about Crane’s condition, how much had that testimony been fashioned to correspond with prevailing views about insanity and legal responsibility?

Legal materials are difficult, however, not just because they are adapted to the demands of the often particular legal process, but also because they are by nature decontextualized. A simple reading of the verdict in Crane’s case, for instance, gives much information, but leaves out many important details. For instance, it lists Crane as a yeoman, and of course does not mention his prominent father or the fact that he was a brand new landowner. It omits that there were any slaves in the field, although since both Crane and Campbell (at least) were slave owners, there must have been other men and maybe women toiling next to the white men whose names ended up recorded in the verdict, other witnesses to the fight who were not allowed by law to testify. And because the case involves an area now included in West Virginia, it evokes an ethos of rugged hills and frontier justice; the verdict leaves the impression of two rival groups of young, backcountry laborers and lower status yeoman, fighting in the rough style so famous in accounts of lower class brawls. But such assumptions are far from the truth – the men in the field that day varied from the

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21 See Gorn, “Gouge, Bite, Pull Hair and Scratch: The Social Significance of Fighting in the Southern Backcountry.”
enslaved to the white laborer to the prosperous yeoman to the gentleman’s son, all at work amid large plantations nestled in the soft, rolling hills of the Shenandoah Valley.

The many blanks left by legal materials makes it tempting to fill them in with what historians think they know. This is a particular problem in the South, where hindsight is so strong, and stereotypes so deep, that it is easy to read pat answers from the antebellum and postbellum periods back into the early days of the states that would later make up the Confederacy and border region. In this way, conclusions gleaned from one time and place are easily extrapolated to Southerners of all eras and places. As Alexis de Tocqueville quoted his Mississippi lawyer as explaining, “At the slightest quarrel, knife or pistol comes to hand. These things happen continually . . . he is always brought to trial, and always acquitted by the jury, unless there are greatly aggravating circumstances.”

It is easy to attribute this same behavior, a willingness to condone violence and refusal to convict, to Southerners across time, but this was certainly not the reality that young John Crane encountered in 1791, as he was tried, convicted, and then hung – despite his father’s best efforts – for the murder of fellow combatant in a harvest field. Seeing the complicated and intricate reality of *Commonwealth v. Crane* actually requires one to trace the historical context – context that would have been obvious to those involved, but is frustratingly elusive to the modern reader.

It also requires an understanding of how courts operated – legal strategies, the meanings and processes of examination, trial, and appeal. For much of the meaning and drama of the *Crane* case comes out not just in the case itself, but in the context of

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22 Ayers, *Vengeance and Justice*, 17.
the new court system, built on reformers’ desires to perfect the legal system of their recently independent commonwealth. Courts were being moved to localities in order to expedite the legal process and make state adjudication more accessible and available throughout Virginia.23 Pardons, although still in use, were out of favor as relics of a monarchical system where the sovereign’s will (individual and extra-legal, and thus despotic to republican reformers) was allowed to have the last word. And problems with criminal punishment, especially the common law’s over-reliance on the death penalty, had been noted by Virginia’s legal reformers as early as 1776. Jefferson even proposed a new criminal code, but attempted reforms had not yet been enacted when Crane faced his death in 1791. By the end of the decade, however, the Virginia Assembly had created “degrees” of murder; then, Crane’s case would have probably merited a second-degree classification, which carried only a penitentiary sentence with a maximum of eighteen years.24

But watching the motion of the Crane case is important not just for history, but also for how we conceive of the law. Crane’s experience with the law was not just about the outcome, but also about the exhausting, overwhelming, and uncertain process that brought it about. At each stage, that process was shaped by all the resources his father could marshal, and by Crane’s own vehement protestations of innocence. But also at each stage, representatives of the legal system were charged with reaching behind the many varying stories to determine the truth. Crane, like

23 See, e.g., Roeber, Faithful Magistrates and Republican Lawyers; Cullen, St. George Tucker and Law in Virginia.
many defendants after him, faced not just a legal outcome, but also an extended
encounter with the legal process.

And, as with many criminal cases, even with the wealth of documents
available about John Crane the truth is still beyond reach. Did having Vanhorn’s
horses trample his wheat trigger a nervous “fit” in John Crane, who then maimed
them, and in doing so provoked Merchant and Vanhorn? If that story was merely
fiction invented by distant newspapers, did the hoots of Vanhorn and his companions
as they left work for the evening evoke Crane’s affliction? Or was Crane completely
lucid at the time of the crime? Were the “fits” an invention of his family and friends
to procure his pardon? Did he carry the knife into the field intending to stab
Vanhorn, or did he pull it out in self-defense when trapped on the ground and
besieged by two assailants? Or did someone else in the tumble – Merchant, or
another – actually stab Vanhorn by accident?

It is difficult to untangle all the threads – anger, violence, class, and mental
illness – to judge if John Crane’s execution was a victory or a tragedy for the legal
system. A poor man’s son died, and a rich man’s son was executed. But it may also
have meant the execution of a man who was not culpable for his actions – who, as he
at one point claimed, could not even remember them. In a sense, the frustrations that
confound us reading the Crane case are the same ones that confounded the many
individuals who addressed it at the time.

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Virginia was in the process of reforming its criminal law in 1791, but it was a
work in progress. As Crane’s family and friends petitioned for John’s pardon, Judge
Tucker continued to work on Virginia’s revisal of the laws. He pushed – perhaps thinking of the criminal law and the defects he had seen in cases like Posey, and maybe even Crane – to be able to not just compile laws but to also propose reforms. But he lost. In 1792, the revisers published the fruit of their efforts – merely a restatement of already-existing statutes on things like the time lapse between sentence and execution. (Not less than thirty days, the statute decreed).

Tucker liked to think of law as a science, but law making and judging were a messy business in Virginia in 1791. This was certainly true literally, as Tucker and other judges trudged around the state on their circuits to sit at district courts dispersed throughout Virginia's vast territory. But it was also the case jurisprudentially. On one hand, the Commonwealth’s laws and legal system were rapidly changing; independence had brought new structures of power, new statutes, and new legal questions. On the other hand, many things had stayed the same, and Virginia’s judges confronted the disjunction between these two realities every time they dealt with a common-law case or precedent based on a British statute. Virginia’s law, like its judges, was on the move – transitioning from the colonial to the republican, from the inherited to the created.

And it was still moving. In 1796, four years too late for Crane, the General Assembly finally passed a sweeping reform of the state’s criminal laws. The bill’s proponent, George Keith Taylor, restated many of the arguments from the first Virginia revisal, although his arguments were this time more permeated with the

26 Draughts of Such Bills (1792).
rights language of the new American nation. “[O]ur existing criminal system,” he argued to the Virginia Assembly, “is a tyrannical infringement on natural right.” It “does not operate to amend the delinquent, to deter others from imitating his example … [and] tends to increase rather than to diminish crimes, by operating on the hopes [of leniency] more than on the fears of the criminal, and by exciting the sympathy and compassion of his judges.”

Taylor proposed, and the Assembly adopted, legislation creating both a penitentiary and an adjusted scale of crimes and punishments – including a new category for “second degree” murder, now punished by imprisonment for a term of years, not death. Second degree murder was emerging at this moment as a popular category elsewhere, but perhaps John Crane’s sensational case had made Virginia’s Assembly ready – finally – to adjust the laws.

But the reforms came too late for John Crane. In 1791–92, Crane was caught in an unfolding and as yet unfinished republican legal world, one that recognized degrees of culpability but had not yet incorporated them. That year, John’s experience of the law was, like St. George’ Tucker’s, messy. It involved courts that were new, and authority figures who were both new and old. It reflected his social standing but also defied it – and even recast it as his case progressed thought the courts. It involved law that was old, so old that Virginia’s lawyers and judges – as John Price Posey had discovered – turned to reporters written by England’s long-dead judges to explain it, and a political reality that was in many ways new, or at least unmoored from old restraints. If Crane, with his family connections, might have benefited from the deference of the pre-Revolutionary period, he would have also

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29 Ibid.
30 See Masur, “The Revision of the Criminal Law in Post-Revolutionary America.”
benefited from the republican reforms which were yet to come. The world he encountered was perhaps both too republican, and not republican enough.

Virginia’s world was still in progress in 1791, and there were many possibilities. Although it is easy to see the Old Dominion in light of its subsequent history – the capitol of the Confederacy, the seat of “Lost Cause” nostalgia – in the 1790s this future was far from assured. The new president, Washington, was an advocate of nationalism; many of the prominent individuals involved in Crane’s case – Henry Lee, Charles Lee, Abraham Shepherd, Daniel Morgan, Magnus Tate, and others – would soon identify themselves as Federalists. And much of the law associated with John Marshall and with Federalist legal theory was being birthed in Marshall’s Virginia – not just by him, but also by judges like Tucker, who would later become a staunch Jeffersonian, and whose son Beverly would be one of the first legal theorists of states’ rights and secession.

In 1792, of course, as family and friends watched as John Crane was dragged to the gallows, their thoughts may have centered more on the past. The world was changing, and James and Lucy Crane and the Whiting family surely felt their impotence in its wake. Perhaps Thomas Throckmorton, the Frederick County Sheriff, also questioned the new reality of independent, republican government as he prepared to execute John Crane. The law that Crane encountered that year was a work in progress, part of the attempted creation of, and engagement with, republican legal principles and institutions.

Crane protested his innocence to the end. But innocence is a difficult thing. Perhaps he did so because he had not stabbed Vanhorn or had done so in self-defense,
or maybe because, as he claimed, his “lunatic” mind did not remember the altercation at all. Or maybe, despite full knowledge that he had actually committed the crime, he simply felt that he had not done anything wrong – and that he did not deserve to die. In any and all of these sentiments, he would have echoed many a defendant before and since.

St. George Tucker, for his part, disengaged himself from the case, and was on a different circuit in the spring of 1792, when the Winchester District Court reaffirmed Crane’s death sentence (on remand from the General Court) and sealed his legal fate. He had his own problems – Theodorick’s death that spring, and then a scandal: Tucker’s difficult stepson Richard, living wildly at Matoax, was accused of fathering an illegitimate child with his sister-in-law, Nancy Randolph (Richard’s wife’s sister – and, in Virginia’s close kin circles, Richard’s own cousin). Nancy had been delivered of the child in secret, and it was found dead. Was the father Richard, or his dead brother, Theodorick? And had Richard killed it? A trial for infanticide ensued, and Tucker made a public defense of Richard in the papers. He was acquitted – largely because of the inadmissibility of slave testimony – but the stench of scandal remained. Richard died in 1796, at the age of 26.31 Tucker had been hard on James Crane’s son, but he soon found himself defending his own.

Despite the scandal, Tucker’s legal reputation continued to rise. In 1793, he authored the district court opinion in Kamper v. Hawkins, forcefully advocating the power of judicial review years before Marbury v. Madison, and powerfully cementing

31 Cynthia Kierner, Scandal At Bizarre: Rumor and Reputation in Jefferson’s America (Charlottesville: University of Virginia Press, 2006).
his reputation as a leading legal thinker in the new Republic. But Crane may have stuck with Tucker; it’s likely that he had it in mind as he prepared his appendix to his edition of Blackstone, published in 1803. Unqualified juries, he complained, who misunderstood or misapplied the evidence, too often gave the courts “an influence in questions of fact which may become highly pernicious.” Concerns about juries led counsel, Tucker complained, to propose “special verdicts, demurrers to evidence, and points reserved.” Finding a competent jury was not only, he emphasized, about “estate,” but also about “ability, integrity, and impartiality.” Which of those three, if any, did Tucker think had gone wrong back in 1791, when he watched the law unfold in Commonwealth v. Crane?

Four years later, the General Court heard the case of Commonwealth v. Mitchell, in which Robert Mitchell stood charged with the murder of Frederick Becktoll, a boarder in his home who had tried to intervene in a fight between Mitchell and his wife. The case also occurred in Berkeley County and came out of the Winchester District Court, where Tucker and Paul Carrington, Jr., were the judges. Like Crane, it arrived at Richmond courtesy of a lengthy special verdict, detailing the facts of the fight – which included a physical altercation, acquisition of a weapon, and then pursuit of the fleeing boarder by Mitchell, as well as the damning finding that Mitchell “did intentionally shoot” Becktoll and then attempted to arrange the scene to cover up the crime. As with Crane, the jury left the question of murder or manslaughter up to the court, and Tucker and Carrington referred the case to the General Court. This time, however, the General Court, which included Tucker,

32 3 Va. 20 (1793).
33 St George Tucker, “Appendix” to Blackstone’s Commentaries, 4: 64-65.
34 3 Va. 116 (1796).
determined unanimously that Mitchell was “not guilty” of murder, but only of manslaughter.\textsuperscript{35} This time the appellate court went with the lesser, not the harsher option.

One has to wonder what the remaining family of John Crane – his widow Catherine, now remarried, and John’s brother, Joseph Crane – and their neighbors thought of that decision.

\textsuperscript{35} St. George Tucker, “Robert Mitchell’s Case,” April 16, 1796, in “Winchester District Court April Term 1796,” Tucker’s \textit{Notes on Cases}, v. 5, Tucker Coleman Collection. Tucker indicated in his notebook that he gave an opinion, but filed it with a different collection of court papers – now lost.
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