[2013] *ANZLH E-Journal,* Refereed Paper No 1

Searching for the Hidden Convict in Virginia's Servant Laws

Jennifer Jeppesen
History, University of Melbourne

ABSTRACT

Before the American Revolution there were three unfree labour groups working in Virginia. While slaves have been the focus of a number of studies, and indentured servants the focus of a few, convicts have been largely neglected. In some part, this is due to the fact that indentured servants and convicts have been commonly treated as if they were part of the same group. This journal article attempts to use the laws of Virginia, and those bills which failed to pass, to try and tease apart these two groups and where they stood in regards to the law.

Of the three unfree labour groups working in colonial Virginia, none are more shadowy than convicts. Prior to the end of transportation in 1775 Virginian law often combined all servants, making no distinction between those convicted and those who chose to emigrate under indenture. Court and judgement records also fail to acknowledge any difference between convict and servant. But these laws were not static, and from 1722 to 1762 some Virginian laws slowly evolved to treat convicts separately from indentured servants, and align their legal status closer to that of the slave. There is room to re-examine these laws and the influences behind the slow change in law from convict as servant to convict as quasi slave, but also to explore ways in which convicts and indentured servants can be teased apart in the records. Because our interest is in convicts, the laws that covered both indentured and convict servant will only be a brief overview and instead focus will be on laws that impacted convicts

in more specific ways. This paper examines Virginian law and the idea of felony attaint and the reception of common law into the Virginian colonies in an attempt to understand convict law as it was both tied to servant law and later diverged from it.

This is not the first time these changes in servant legislation have been noted by historians. Servant law came under scrutiny by Warren Billings, who examined them in relation to slave law.[1] The influences of servant bastardy on law was analysed by John Rushton Pagan.[2] Eminent convict historians Abbot Emerson Smith and Roger Ekirch both note laws targeting convicts in attempts to keep them out of the colony.[3] Both Bruce Kercher and Alan Atkinson have looked at the idea of convict attaint.[4] What is new about the approach in this article is the attempt to use the legislation and the factors influencing changes (and attempted changes) in the law to find the ways to separate servants and convicts in the record. The nature of surviving evidence makes this difficult, as these documents regularly treat the two groups as a single entity. It can be argued that with the surviving evidence that the task is impossible. But careful examination of court records in conjunction with shipping records can shed some light on the indenture or convict nature of servants. This preliminary exploration can only go so far, and as such can only partially shed light on the complexities of convicts being classed with indentured servants and thus the complexities in separating them.

[1] Warren M. Billings, 'The Law of Servants and Slaves in Seventeenth-Century Virginia', *The Virginia Magazine of History and Biography* 99, no. 1 (January 1991): 45–62.
[2] John Ruston Pagan, *Anne Orthwood's Bastard: Sex and Law in Early Virginia* (Oxford University Press, 2003).
[3] Abbot Emerson Smith, *Colonists in Bondage* (Peter Smith, 1965); A. Roger Ekirch, *Bound for America: The Transportation of British Convicts to the Colonies, 1718–1775* (Oxford University Press, 1990).
[4] Bruce Kercher, 'Perish or Prosper: The Law and Convict Transportation in the British Empire, 1700–1850', *Law and History Review* 21, no. 3, Fall 2003, http://www.historycooperative.org/journals/lhr/21.3/forum_kercher.html; Alan Atkinson, 'The Free-Born Englishman Transported: Convict Rights as a Measure of Eighteenth-Century Empire', *Past & Present* 144, no. 1 (August 1994): 88–115, doi:10.1093/past/144.1.88.

Laws from England were often borrowed and adapted to the Virginia way of life. The problems of a given moment provided the impulse to borrow from English examples.[5] Servant laws, including convict laws, are part of this trend. A great example of this is the adoption of the Statute of Incorrigible Rouges punishment to Runaway servants (discussed below).[6] Another example of this adaption of English laws are the ones that regulate servants' time of service. English law regarded servant arrangements as unique and could not be modified without both parties' consent. Therefore, as a technical legal standpoint, it was the contractual rights to their labour that was sold.[7] However, in Virginia this did not make fiscal sense. With high demands for labour, combined with the high cost of passage, the only fiscally sensible thing to do was hold servants for longer terms and treat them much the same as chattel property.[8] In fact most other servant laws, which also covered convicts, departed significantly from the English common law.[9] As early as 1642 the English common law of servants being retained only for a year was overturned in Virginia.[10] Later, the legislature ruled that the 1672 Virginian law requiring bastard children to serve until twenty-one

[5] Warren Billings, 'The Transfer of English Laws to Virginia 1606–50', in *The Westward Enterprise: English Activities in Ireland, the Atlantic, and America 1480–1650*, ed. K. R. Andrews (Liverpool: Liverpool University Press, 1978), 219.
[6] Warren M. Billings, 'Some Acts Not in Hening's "Statutes": The Acts of Assembly, April 1652, November 1652, And July 1653', *The Virginia Magazine of History and Biography* 83, no. 1 (January 1975): 39; Billings, 'The Transfer of English Law', 229.
[7] Pagan, *Anne Orthwood's Bastard*, 22.
[8] Mary Sarah Bilder, 'Struggle over Immigration: Indentured Servants, Slaves, and Articles of Commerce', *The Immigration and Nationality Law Review* 17 (1995–96): 3.
I must note that this is a controversial view that I deal with more in depth in my thesis. This view is suggested by many other historians. See Lancaster, 'Almost Chattel: The Lives of Indentured Servants at Hamption-Northhampton, Baltimore County', *Maryland Historical Magazine* 94, no. 3 (Fall 1999): 341–62; Eugene Irving McCormac, *White Servitude in Maryland 1634–1820*, vol. 3–4, Johns Hopkins University Studies in History and Political Science XXII (Baltimore: Guggenheimer, Weil & Co, 1904); Anthony Vaver, *Bound with an Iron Chain: The Untold Story of How the British Transported 50,000 Convicts to Colonial America* (Pickpocket Publishing, 2011), 173; Ekirch, *Bound for America*, 151, 154; Smith, *Colonists in Bondage*, 233; Edith Ziegler, 'The Transported Convict Women of Colonial Maryland, 1718–1776', *Maryland Historical Magazine* 97, no. 1 (March 2002): 18; Don Jordan and Michael Walsh, *White Cargo: The Forgotten History of Britain's White Slaves in America* (NYU Press, 2008), 11, 94, 190, 201.
[9] Billings, 'The Law of Servants and Slaves in Seventeenth-Century Virginia', 45.
[10] ibid., 48.

trumped the British rule that they serve until twenty-four.[11] This shows that English servant laws were adapted to suit the realities of life in the Virginian colony.

Laws surrounding indentured servants started early. Servants were ordered to obey masters and overseers or to labour on public works for offences.[12] In 1631 they were ordered to attend church.[13] Servants could not undertake their own trade, unless they had the permission of their owner.[14] Servants laying violent hands on a master or overseer would receive an additional two-year term of service.[15] They could not travel from home or purchase liquor without a licence.[16] In 1639, Virginia passed a law that you could not trade with another man's servant.[17] The idea was that servants being productive on their own behalf were 'stealing' labour from their master. Obedience was required to coerce the greatest amount of labour possible. These laws were all designed to control servants, and keep them working solely for the benefit of their master.

To prevent the 'many great abuses and much detriment to the service of masters', servants were banned from marriage without the permission of their owners in 1643.[18] This same act banned them from fornication. This law was re-enacted in 1657, 1662, 1696 and 1705.[19] Even the bastard children of servants were to be sold by the parish to recoup the costs of keeping

[11] Pagan, *Anne Orthwood's Bastard*, 142.
[12] Hening 1, Harvard College Library, 161/128.
[13] Hening 1, Harvard College Library, 215/182.
[14] Hening 1, Harvard College Library, 307/274.
[15] Hening 1, Harvard College Library, 571/538.
[16] Hening 2, New York Public Library, 202/195; Hening 3, University of Michigan, 398/395.
[17] Hening, *Statutes at Large,* Volume 1, Harvard College Library, 307/274.
[18] Hening 1, Harvard College Library, 285/252.
[19] Hening 1, Harvard College Library, 471/438; Hening 2, New York Public Library, 121/114; Hening 3, University of Michigan, 152/149; Hening 3, University of Michigan, 444/441. Because the English King had to approve of all laws passed in the colony, each law was only passed for a three or four year period and then had to be extended—often untouched, sometimes with small changes.

them.[20] The aim was to keep servants single and childless, so as to keep their focus on the work of their master.

A big risk for planters was their servants running away. Laws regulating runaways were common. A great example of this is the adoption of the English Statute of Incorrigible Rogues as a punishment for runaway servants.[21] The original English statute was an attempt to curb vagrancy, and the Virginia colonists borrowed the law and modified to their own situation—branding of a runaway servant rather than a vagrant. They were branded with an 'R' for a second offence of running away.[22] Or if they were known runaway risks, their hair was to be kept cropped close above the ears.[23] It was added in 1666 that each constable transporting runaways back to their master was to whip them.[24] Not only was whipping a punishment, the servants had to 'pay' the owners for their lost time, and the cost of recapturing them. For every day away, the servant had to serve double time. So if a servant was away for a week, two weeks was added to their term of service. A month meant two months service. This could easily lead into years of extra service. On top of which, for every 50lbs of tobacco the master spent on recapture, the servant had a month's service added. And heaven forbid they run away with a 'negro' for they would serve not only additional time for their own time lost, but that of the 'negro' as well.[25] In 1726 runaways could have iron collars placed around their neck to be more easily identified.[26] Runaway laws were obviously aimed at recuperating a lost investment. The master had paid for the servant from the outset of the indenture, and it was in their interest to work them to the best profit. These laws aimed not

[20] Hening 2, New York Public Library, 174/167.
[21] Billings, 'Some Acts Not in Hening's "Statutes"', 39; Billings, 'The Transfer of English Law', 229.
[22] Hening 1, Harvard College Library, 287/254.
[23] Hening 1, Harvard College Library, 550/517.
[24] Hening 2, New York Public Library, 273/265.
[25] Hening 2, New York Public Library, 35/26.
[26] Hening 4, Harvard College Library, 169/166.

only to return runaways, but to allow masters to retain them after the original term of service had ended.

Not all of the laws surrounding servants were negative. In 1639 all persons, including servants but excluding negroes, were to be provided with arms and ammunition for their protection against Indians.[27] Some measures were undertaken to provide for them in transit, from 1657 ships were required to provide them with four months' worth of food, clothing and bedding.[28] It was prohibited to bury a servant privately, as there was 'deservedly' suspicion that the master had then caused the death and was trying to cover his tracks.[29] Masters were prohibited from cruelty—they had to provide competent diet (although what that food was to be was not established by the courts), clothing and lodging, and could not exceed 'moderation' in correction. Servants could complain to the courts against masters for harsh treatment or want of food or clothing.[30] Most times however this only resulted in a warning for the master to treat the servant better in the future. In 1676 masters were banned from making deals with their servants—for instance shortening their time of service for giving up freedom dues.[31] This prevented masters knowingly cheating their servants. Servants could not be stripped naked for punishment after 1748, unless ordered by a magistrate.[32] While most of these laws may seem humane on the surface, in many ways they were simply a sheen of respectability. Many of these laws were passed after complaints that servants would not willingly emigrate if Virginia was seen as a harsh place. Thus these laws were aimed at reassuring future emigrants that they would be protected. However these laws were mostly a

[27] Hening 1, Harvard College Library, 257/224.
[28] Hening 1, Harvard College Library, 468/435.
[29] Hening 2, New York Public Library, 60/53.
[30] Hening 2, New York Public Library, 124/117. The Righi thesis notes that most suits servants brought against their masters were contractual violations not abuse, and when they did bring abuse cases they were rarely successful.
[31] Hening 2, New York Public Library, 395/388.
[32] Hening, Volume 5, Harvard University History Library, 541/550.

smoke screen to counteract the negative reports that had been filtering back to England and discouraging immigration.[33] The transit laws also were a protection of investment. The potential labour profit on a sick servant would be greatly reduced, so it was in the planters' interest to insist on food and clothing on board the vessel that brought them. Court cases brought by servants were rarely successful against a master for harsh treatment.[34] They were able to successfully argue if they were held beyond their time or for other contractual disputes, which shows that though they had these rights on paper, it may not mean much in practice.

So the laws surrounding servants were comprehensive and detailed. Servants had both positive and negative constraints and rights under Virginian law. These laws were not static, and changed to suit the realities of life in Virginia, and in particular the presence of convicts.

The culture in Virginia was very conservative—elitist, hierarchical and hostile to social change.[35] When change did happen, it happened slowly as colonists chipped away at the laws they knew and changed them for their own purposes.[36] In England the law regarding purchasable items was one of 'buyer beware'. If goods were faulty or damaged, they could not be returned for a refund unless there was a warranty—which was rare.[37] In Virginia, where the servant was a 'good', a pregnant servant was considered damaged goods. Buyer beware thus did not satisfy a planter buying a pregnant servant unawares, and who then could not use that good to their own advantage. Using the evidence of three cases related to servant bastardry, John Pagan shows a slow shift of Eastern Shaw contract law from the English

[33] Harrower etc.
[34] Righi masters thesis.
[35] David Hackett Fischer, *Albion's Seed: Four British Folkways in America (America, a Cultural History)*, v. 1 (New York: Oxford University Press, 1989), 253.
[36] Pagan, *Anne Orthwood's Bastard*.
[37] ibid., 71.

model of buyer beware to a new seller beware concept.[38] The examples he uses show that Virginian laws quickly moved away from the English model to suit the new situation in Virginia—servant and convict law was no exception.

Yet some changes from English law came about because early Virginians faced situations for which the past was no guide, and they had to create their own bodies of law.[39] A brief pause must be made here to mention the idea of felony attaint. Under British law, once a felon was condemned to death they forfeited their goods to the crown, had no rights to property, nor could they sue or give evidence in court.[40] This idea will be explored later in this paper, but it is important to note here that it seems that early Virginia did not follow this idea of felony attaint.

After the 1700s there was an attempt at greater cohesiveness with British common law driven both by better education and English attempts at alignment. This is perhaps the reason for the changes in convict law, yet this conclusion cannot be reached with certainty. Laws against convicts start showing a trend of aligning closer with the idea that convicts were attaint in spite of this not being followed earlier in the colony.

The process of change of convict laws is neither continuous nor smooth. While one of the first laws passed against convicts in 1722 was overturned by the Privy Council, there were other laws regarding convicts that were debated that never made it into the Virginia legislature. This 1722 act aimed to impose a duty on the importation of convicts (as well as on servants and slaves). English merchants complained about this act, claiming the duty

[38] ibid., 74, also see 111 for other deviations from the English legal model.
[39] Billings, 'The Transfer of English Law', 216.
[40] Kercher, 'Perish or Prosper', para. 21.

imposed would impact on their ability to ship convicts, which was one of the key factors in the law's disallowance. August of 1736 saw the House of Burgesses revisit the idea of a duty on convicts. Remembering the uproar caused by merchants last time, they proposed that the duty be paid by those buying convicts rather than those importing them. Though it was initially approved by the house and sent to a special committee, that committee never reported on it, nor did it ever get final approval.[41] It is almost as if the bill disappeared. There can be several explanations. One is economic—those owning convicts were often the ones passing laws, and they would not have wanted to hit their own pocket. However, this same kind of duty had existed on slaves for a number of years so this is not likely the crucial factor. One is political—perhaps they feared the Privy Council would again disallow the law. I suspect, however, they saw this bill would both be bad for business (for planters and merchants alike) and difficult to enforce. Convicts and indentured servants often arrived on the same ships, worked together and were sold together. Thus it would be difficult to impose a duty on one and not the other.

What is interesting about the passing of laws though, is it seems there might have been differences between convicts and indentured servants which we cannot see in the surviving written records. In June of 1740 a bill was debated in the legislature which would have placed convict women having bastards on equal footing with servants.[42] The existing servant law stated that the masters of a servant bearing a bastard had to pay a fine of fifty pounds, which would be repaid by the servant in the form of a year's extra service. This new law would have obliged owners of convict women servants baring bastards to give security to indemnify the parish from any charges which might accrue, in the same way the existing servant law

[41] H. R. McIlwaine, *6 Journals of the House of Burgesses of Virginia*, vol. 6 (Gale, Making of Modern Law, 2012), 275, 290.
[42] H. R. McIlwaine, *Legislative Journals of the Council of Colonial Virginia* (Library Reprints, Incorporated, 1979), 895.

operated.[43] While it is not evident in either the language of the legislature or in extant court records, this suggests that *perhaps* convict women were treated differently to indentured women. A tantalising (but at this point unprovable) idea. It is unclear if this bill was rejected because convict women were already covered under the existing servant bastardry laws, or because there was a different process in place for convict women of which we currently have no evidence.

In June of 1730 the House of Burgesses debated and passed a bill for the 'Better government of convicts imported and for bringing them to a due and speedy trial'.[44] However once taken to the Upper House for concurrence it was defeated.[45] It is interesting that two years later John Clayton Esq petitioned the upper house for an allowance to be paid him due to the increase in convicts and 'many offenders or low circumstance' whom had not paid the usual fees. The House of Burgesses had denied him any allowance for the service and thus he petitioned the council.[46] The fact that this law and petition were raised suggests that there was some fear of convicts continuing criminality.[47] Yet the fact that both were defeated suggests that the fear was not widespread nor supported by all those who served on the legislative bodies. The spectre of convict criminality appears again in 1752 when an act obliging owners of convict servants to pay for their prosecution passed the House of Burgesses by three votes. This was also defeated in the upper house.[48] A bond for good behaviour was attempted in

[43] McIlwaine, *6 Journals of the House of Burgesses of Virginia*, 6:417; McIlwaine, *Legislative Journals of the Council of Colonial Virginia*, 895.
[44] McIlwaine, *6 Journals of the House of Burgesses of Virginia*, 6:87.
[45] McIlwaine, *Legislative Journals of the Council of Colonial Virginia*, 771, 783.
[46] H. R. McIlwaine, ed., *Executive Journals of the Council of Colonial Virginia Volume 4* (Richmond: Virginia State Library, 1925), 281.
[47] Ekirch and Ellefson have done in depth studies of the criminality of convicts, and find they were less of a problem than free whites. Ekirch, *Bound for America*; C. Ashley Ellefson, 'Capital Crimes: Hanged, Pardoned and Reprieved All Classes by Name 1726–1775' (Maryland Archives Online, 2010), Maryland Archives Online, http://aomol.net/megafile/msa/speccol/sc2900/sc2908/000001/000819/pdf/chart1.pdf.
[48] McIlwaine, *6 Journals of the House of Burgesses of Virginia*, 6:54; McIlwaine, *Legislative Journals of the Council of Colonial Virginia*, 1067.

1759, but that too was rejected—passed to committee and never found its way out again.[49] My argument here is that there can be two reasons convict law was rejected. Either because it hurt the pockets of their owners or because viewing convicts as servants suited the colonists. But it does not seem that regulating them was a high priority for legislatures.

Yet when it could potentially benefit their pocket, colonists did legislate against convicts. In September of 1736 the question of convicts' eligibility to freedom dues was raised. While it passed the House of Burgesses, it was defeated in the upper house.[50] This same act was debated again in May of 1740, but this time was rejected in the lower House of Burgesses.[51] Evidence that these laws against convicts were not a quick or smooth transition is that this same issue was raised again in 1749 with a different outcome. While both the 1736 and 1740 bills were defeated, when the question of freedom dues for convicts was raised in 1749 it passed and became law. However not without significant dissent.[52] One interesting note of dissent is the comment stating that convicts should not be put on the same footing as volunteers: 'For what honest Man would chuse to serve in a Country where no Distinction is made?'[53] This single sentence raises more questions than it answers, and may perhaps just be rhetoric used against a bill the author disagreed with. However, it also might infer that there was differences in treatment of indentured versus convict servants and it is just not evident in the existing written records. The law stayed in effect for almost ten years when convicts were again denied freedom dues in 1758. Denying the dues in 1736, 1740 and 1758 was in line with the need to protect the owners' financial interests. It is perhaps important to note that prior to 1749, there was no law specifically granting or banning freedom dues for convicts

[49] McIlwaine, *6 Journals of the House of Burgesses of Virginia*, 6:95, 96.
[50] ibid., 6:288, 294; McIlwaine, *Legislative Journals of the Council of Colonial Virginia*, 849.
[51] McIlwaine, *6 Journals of the House of Burgesses of Virginia*, 6:403.
[52] McIlwaine, *Legislative Journals of the Council of Colonial Virginia*, 1035.
[53] ibid.

(while the 1736 and 1740 laws failed to pass, laws on the books did not actually ban convicts from receiving them). There is a very real possibility that convicts were sometimes receiving these just as indentured servants were.

Other laws against convicts, which did not impact the owners' financial interests, did pass. Just as negroes were excluded from militia and had trial by bystanders, 1738 saw convicts excluded from the militia and, in case of trial, were to be tried by bystanders instead of those where the crime was committed. Both passed in 1738 and 1748.[54] Also in 1748 the acts stated that convict and negro 'testimony cannot be depended upon' and thus no slave nor 'person convicted and sentenced to transportation' could be a witness or give evidence except against or between other slaves or convicts.[55] This shows a change towards greater alignment with the English attitude of convict attaint. The 1748 version of the act concerning servants and slaves included a section on how long service was required for those arriving in the colony without indentures; this provision specifically excluded convicts for the first time.[56] Prior to this, any person arriving without indenture under nineteen was to serve until twenty-one, and those over nineteen for four years. This was repealed by the King, and a second attempt was made in November of 1758 stating that 'all servants, except convicts' were to serve the above mentioned years.[57] These laws all targeted convicts, without directly impacting the fiscal interests of the owners.

There does seem to be a theme separating the laws which didn't pass from the ones that did. If we look closely, most of the laws that did not pass into legislature are ones that had potential impacts on the wallets of owners. Other than the brief time period between 1749 and

[54] Hening, Volume 5, Harvard University History Library, 28/17, 36/25, 536/545, 537/546.
[55] Hening 5, Harvard Historical Department, 537/546.
[56] Hening, Volume 5, Harvard University History Library, 538/547.
[57] Hening, Volume 6, Harvard College Library, 359/356.

1758 when freedom dues were awarded to convicts, all the other laws passed impacted the convicts without impacting their masters. Exclusion from militia, inability to give testimony, trial similar to that of slaves, denial of voting rights—none of these directly impacted the financial interests of masters. Even the 1722 security that was overturned by the Privy Council would have impacted merchants rather than masters. As many of those on the legislative bodies were servant and convict owners, it makes sense that they would protect their own financial interests. There are of course the two interesting hints within the 1740 bastard law and the 1749 dissent to freedom dues suggesting there was a different set of rules for convicts than there was for servants. While this cannot be verified with any certainty at this time, it is a tantalising idea.

The loss of records in Virginia is devastating to the researcher of this time period, yet even if we had them, we might not be able to discern if a defendant was an indentured or convict servant. The hints in the laws above suggest that there may be a different set of rules which applied to convicts, yet these are not evident in these court records. Hening, by far the most complete record of Virginia laws that survives, is not without its failures. There are a multitude of acts that he did not print—for instance the revised laws of 1652 and the 9th Act of 1639 Regulating Chyrurgions.[58] There is also the suggestion that Hening added the term 'slave' when the original law used a different term.[59] If he changed the terms to slave to reflect his own time, what else did he change? As such, we must proceed with caution in stating that there were few direct mentions of convicts. It is perhaps more accurate to state that Hening did not directly mention convicts.

[58] Billings, 'Some Acts Not in Hening's "Statutes"', 47.
[59] Oscar and Mary F. Handlin, 'Origins of the Southern Labor System', *The William and Mary Quarterly* 7, no. 2, Third Series (April, 1950): 216; doi: 10.2307/1917157.

Before these changes in convict legal status in Virginia can truly be understood, the legal status of convicts as they entered the Virginia colony must be considered. Bruce Kercher has analysed whether felony attaint followed pardoned criminals from England to Virginia, but finds it nearly impossible to find evidence that any of the American colonies followed all the common law rules regarding attaint.[60] In the American colonies, convicts could testify until the 1740s, and once free could hold land and slaves.[61] The problem with attaint, as both Kercher and historian Alan Atkinson point out, is that the 1718 Transportation Act changed the way in which convicts were sentenced to transportation.[62] Prior to 1718, all convicts transported to Virginia were felons reprieved from a death sentence. However, post 1718, convicts could be directly sentenced to transportation by the courts. As a technicality then, these convicts would not have been attained felons, as they were never under the sentence of death. This however is not definitive. There is a suggestion that the pardon process included a pardon from the felony attaint: 'Reprieve persons attained of felony and to transport beyond the seas'.[63] There are also cases where felons were not attained at conviction—Nathaniell Wateridge returned the watch he stole and consented to be transported and 'is not attainted of felony'.[64] An earlier case exists where the convict would consent to go abroad 'if he may be sent without blemish'.[65] It was difficult for contemporaries to tell an indentured servant from a convict, let alone one that was attained as against one who was not.[66] The fact that there is a possibility that not all convicts were attainted makes this even more complicated. Atkinson argues that after the 1718 act, most contemporaries held to the belief that all convicts had

[60] Kercher, 'Perish or Prosper', para. 23, 26, 27, 31.
[61] It is interesting to note that the early Australian colony did not follow rules of attaint either—one of the first court cases were convicts petitioning for the return of their belongings.
[62] *An Act for the further preventing Robbery, Burglary, and other Felonies, and for the more effectual Transportation of Felons, and unlawful Exporters of Wool; and for declaring the Law upon some Points relating to Pirates* (4 Geo. I, C. II).
[63] Calendar State Papers Colonial 1629 quoted in Abbott Emerson Smith Papers, box 1, folder 30, held at William and Mary College. Also in 1622, Calendar State Papers Domestic, 439.
[64] July 1664 Winchester Assizes.
[65] Calendar State Papers Domestic 1619–1625, CLXXIV 77, 17 Nov 1624, CJ Ley to Conneil.
[66] Kercher, 'Perish or Prosper', para. 27.

been spared the gallows by a pardon, in spite of the fact that actual pardoned convicts were not the majority of those transported.[67] The actions of the colonists suggest that attaint was not followed in the colonies, the question is why. Perhaps looking at how much of the English common law actually existed in Virginia can shed some light on why they seemed not to acknowledge convict felony attaint.

There is a significant body of evidence that Virginia did not receive all English common laws.[68] While this article will briefly touch upon a few here there are many more books and articles available to those interested in the subject. Sir William Blackstone's *Commentaries on the Laws of England*, first published in 1765, can shed some light on the manner in which laws were passed from mother country to colony. First he states 'The Kingdom of England, over which our municipal laws have jurisdiction, includes not, by the common law, either Wales, Scotland, or Ireland, or any part of the king's dominions, except the territory of England only.'[69] He then goes on to state 'For as the law is the birth right of every subject, so wherever they go they carry their laws with them.'[70] However, 'this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law, as is applicable to their own situation and the condition of an infant colony; […] What shall be admitted and what rejected, at what times, and under what restrictions, must, in case of dispute, be decided in the first instance by their own provincial judicature, subject to the revision and control of the king in council'.[71] So by 1765 it is acknowledged by

[67] Atkinson, 'The Free-Born Englishman Transported', 19.
[68] Reinsch, Radin, Hilkey, Goebel, Howe, Haskins, Washburn, Chafee, Dulaney. Most studies of common law in America have focused on Maryland, and unfortunately applied it to 'the colonies' as a whole. Each colony, however, followed their own rules and regulations and it was not until after the Revolution in 1776 that some semblance of uniformity is attempted.
[69] William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1765), 93, http://www.heinonline.org.ezp.lib.unimelb.edu.au/HOL/Index?index=beal/blakston&collection=selden.
[70] ibid., 105.
[71] ibid. This material is found in the 2nd reprint of Blackstone. Also digitised here: *http://www.lonang.com/exlibris/blackstone/bla-004.htm* (accessed 29 March 2012).

Blackstone that the American colonies did not take on English laws wholesale and then only what the colony themselves decided on. But Landon Carter takes umbrage at Blackstone's notion that the colonists don't carry common law with them: 'By this doctrine the colonists are in a legal view … a conquered people and are only subject to the Parliament'.[72] These two divergent views show that even contemporaries were unsure how much of the common law was applicable in the Virginian colony.

Modern scholars have had as difficult a time in reconciling the reception of common law as contemporaries did. J. Horowitz echoes Blackstone in stating that the colonists carried common law with them, but only those agreeable to their situation.[73] However not all historians agree. W. Hamilton Bryson argues that it was logical for early Virginians to carry with them their own laws and legal institutions and that the 'legal vacuum' was filled with familiar English Law.[74] Yet Bryson also notes that evolving common law was developed by Virginian courts, not by English judges, meaning that the common law often diverged from the original English model.[75] Historian Jack P. Greene argues that English attempts to bring the colonies to absolute obedience to the King's authority during the restoration were resisted, suggesting that the colony wished to maintain their independence in regards to which laws were or were not in force.[76] Historian William Stoebuck argues that the common law was not uniformly accepted in the colonies, and that the English colonies did not force nor uphold common law in appeals from the colony.[77] In fact, the practice of the Virginian Council trying all cases (except treason) predated the English Star Chamber by a decade and,

[72] Carter 1774 quoted in Bryson 250.
[73] Horowitz.
[74] W. Hamilton Bryson, 'English Common Law in Virginia', *The Journal of Legal History* 6, no. 3 (1985): 249.
[75] ibid., 252.
[76] Jack P. Greene, *The Constitutional Origins of the American Revolution*, New Histories of American Law (Cambridge, New York: Cambridge University Press, 2011), 13.
[77] William Stoebuck, 'Reception of English Common Law in the American Colonies', *William and Mary Law Review 10*, no. 2 (December, 1968): 419–420.

unlike the Star Chamber, did not arouse any objection in England.[78] This is also the argument of historian Ford Hall, who also adds that early statutes were passed by lay judges who were mostly untrained in the law and applied their own common sense ideas of justice.[79] According to historian David Thomas Konig, English precedents for laws does not necessarily mean common law precedents—common law was not the only law in England, and in Virginia conciliar justice ruled.[80] In 1652 an assembly at James city passed a statement declaring the 'Burgesses … have authority to Execute … Equall Justice To all the People … according to Instructions they have, or shall receive from the Parliament of England and according to the *knowne* [laws] of England'.[81] This passage clearly implies that not all of the laws of England were known, or understood by the colonists, even by those in positions of power. This then suggests that if a law was generally unknown it was ignored in the colony. The question of which common laws were received in the Virginia colony is still muddy. Most common laws were applied only if the Virginian colonists saw a need for it, and was often modified for a local situation. To bring it back to the convict theme of this paper, not all common laws were received, and due to lack of evidence it can be inferred that attaint, as it applied to convicts, does not seem to be a common law that the Virginian colonists imported. At least prior to 1736.

Another interesting point about attaint can be gleamed from legal historian Radzinowicz. He writes 'The effect of the pardon was not merely to prevent the carrying out of the sentence,

[78] David Thomas Konig, 'Dale's Laws and the Non-Common Law Origins of Criminal Justice in Virginia', *American Journal of Legal History* 26 (1982): 371.
[79] Ford W. Hall, 'Common Law: An Account of Its Reception in the United States', *The Vanderbilt Law Review* 4 (1950–51): 795, 796.
[80] David Thomas Konig, 'Dale's Laws and the Non-Common Law Origins of Criminal Justice in Virginia', *American Journal of Legal History* 26 (1982): 363.
[81] Billings, 'Some Acts Not in Hening's "Statutes"', 28.

but to give the defendant a new capacity, credit and character.'[82] This suggests that once pardoned, convicts were no longer attained. However, there are two different forms of pardon—the full pardon (or implication of innocence), and the conditional pardon. Convicts would fall under the conditional pardon, but so too would criminals pardoned into the army or for medical experimentation. In cases deserving of the King's mercy the crown remitted forfeitures to the families concerned, suggesting that the convicted themselves were no longer attained.[83] The question then becomes, is attaint associated with conditional pardons as well as those still under a sentence of death?[84] This is a question that is at this time unanswerable, but it raises an interesting point. If attaint did not apply to those conditionally pardoned, as it would not to those fully pardoned, then convicts arriving in the colony were not technically attained. Thus a possible reason as to why it did not appear in the Virginian colony.

Perhaps the main reason that attaint seems not to appear in Virginia is the nature of the establishment of that colony. Virginia began as a company whose interest was profit, not settlement. They would not have been interested in adopting English laws, common or otherwise, except those which protected profit interests. Separated by the distance of the Atlantic, formal institutional connections with England were minimal.[85] Even after the Virginia Company charter was revoked and the colony became a royal one, profit and accumulation of wealth was the highest aspiration and driver of Virginian law.[86] From the early days of the company, there was no private land or money to act as incentive to drive

[82] Chitty criminal Law 2nd ed. 1826, quoted in Leon Radzinowicz, *A History of English Criminal Law and Its Administration from 1750* (London: Stevens and Sons, 1948), 775.
[83] Alonzo Thomas Dill, 'Sectional Conflict in Colonial Virginia', *The Virginia Magazine of History and Biography* 87, no. 3 (July, 1979): 302.
[84] See above. Calendar State Papers Colonial 1629 quoted in Abbott Emerson Smith Papers, box 1, folder 30, held at William and Mary College. Also in 1622, Calendar State Papers Domestic, 439.
[85] Kathryn Preyer, 'Penal Measures in the American Colonies: An Overview', *The American Journal of Legal History* 26, no. 4 (October, 1982): 326, doi: 10.2307/844940.
[86] William Edward Nelson, *The Common Law in Colonial America* (New York: Oxford University Press, 2008), 22; Preyer, 'Penal Measures in the American Colonies', 327.

men to work. Thus coercion was most commonly used to control labourers. This continued into the royal era of the colony, with the law of servitude acting to protect the expectations of volunteer servants (such as freedom dues) while retaining harshness to force them to work.[87] While the brutal repression of the lower classes had a long tradition in England, the difference in Virginia was the use against freemen methods normally only associated with servants—including being sold into servitude as punishment for crime.[88] Labour shortage modified the operation of the criminal justice system, and it stands to reason the application of attaint as well.[89] The harshness of these laws is perhaps another indication as to why the common law of attaint was not carried into the colonies. With laws that prevented marriage, trading would effectively control the servant population, including convicts, without the law of attaint coming into play. Legal rights for convicts and servants alike would have been important to preserve. With high death rates, servants would testify in chancery court to land boundaries, or family connections for wills. Also, this protection of their rights in court may have been a carrot to those in England the colony wished to entice to emigrate.

While it cannot be determined with any degree of certainty that the common law of attaint was actually carried over to and applied or not, the way Virginians acted indicates that attaint was not an important law to the colonists. Whether this was a legal choice, or a natural outcome of the labour shortage cannot at this time be answered. While technically the Virginians adopted much of English basic legal structures, their tendency was to simplify and rely on written statute not judicial opinion.[90] With no evidence in the statutes of attaint, it seems unlikely that the colonists followed that particular rule. The most prominent example

[87] Nelson, *The Common Law in Colonial America*, 41; Sigmund Diamond, 'From Organization to Society: Virginia in the Seventeenth Century', *American Journal of Sociology* 63, no. 5 (March, 1958): 465.
[88] Konig, 'Dale's Laws and the Non-Common Law Origins of Criminal Justice in Virginia', 368, 369.
[89] Douglas Greenberg, 'Crime, Lawn Enforcement, and Social Control in Colonial America', *American Journal of Legal History* 26 (1982): 303.
[90] Billings, 'The Transfer of English Law', 234, 242.

of Virginians ignoring the common law of attaint is Henry Justice. In 1736 Justice was convicted of theft for stealing books from Trinity College Library and sentenced to transportation. Upon arrival, he purchased his freedom and never served as a bonded labourer.[91] He subsequently became a leading lawyer or schoolteacher in Virginia.[92] Someone who was attained would not have been able to rise to a position of prominence, and certainly could not have become a lawyer. Another example is Charles Peale. He was sentenced to death for forging a bill, and reprieved on condition of transportation. This would clearly be an example of a convict who would have been attained if those receiving a conditional pardon were attained (unlike Justice, who had never been under a death sentence). Yet Peale was chosen as the master of a school in Virginia.[93] There are several other examples of successful convicts showing that the law of attaint was not followed in Virginia. Jonathan Ady in 1743 had a mortgage to sixty acres and was a successful cooper. Anthony Lamb, the father of the American Revolutionary John Lamb, was a convict who ran a successful math instrument business, and even owned slaves.[94] Again, an attained individual would not have been able to hold a mortgage nor own slaves, and these examples show that attaint was not applied. So if the common law of attaint was not present in Virginia why then were convicts separated from servant laws beginning in the 1720s? Perhaps a more

[91] Vaver, *Bound with an Iron Chain*, 105–107.
[92] William Stoebuck, 'Reception of English Common Law in the American Colonies', 405. There is however some question of the basis for this fact. Stoebuck has the date of Justice's transportation incorrect by 100 years, and Vaver has stated that Justice settled in France (Vaver, *Bound with an Iron Chain*, 109). Historian Alfred Heston also implies Justice was a lawyer: Alfred M. Heston and Red Bank Monmouth County Historical Association, *Story of the slave; paper read before the Monmouth Colony Historical association on October 30th, 1902* (Camden: S. Chew & Sons Co., 1903), 28. There is a second Henry Justice who left for America in 1701 as an Indentured Servant: Peter Wilson Coldham, *The Complete Book of Emigrants, 4 Vols*, First Edition (Genealogical Pub, 1993), 24. Historian John Fiske implies that Justice was a schoolteacher: John Fiske, *Old Virginia and Her Neighbours* (Cambridge, Mass., 1902), 289, http://hdl.handle.net/2027/nyp.33433035182520. James Davie Butler states 'The transatlantic career of Henry Justice has not been as yet ascertained': James Davie Butler, 'British Convicts Shipped to American Colonies', *The American Historical Review* 2, no. 1 (October, 1896): 26, doi:10.2307/1833611. There is yet another source claiming that Justice returned from transportation in 1739: Gwenda Morgan and Peter Rushton, 'Print Culture, Crime and Transportation in the Criminal Atlantic', *Continuity and Change* 22, no. 1 (2007): 61, doi:10.1017/S0268416006006175.
[93] Morgan and Rushton, 'Print Culture, Crime and Transportation in the Criminal Atlantic', 52.
[94] Vaver, *Bound with an Iron Chain*, 224, 247.

pertinent question is why they were combined in the first place. I argue that the labour shortage in the early days largely answers this question.

Much of the separating of convict and indentured servant has to be done via inference and possibility. Landon Carter parted with a servant farmer named 'Messanger', because he believed that he was stealing sheep to feed to his 'whores'.[95] I have some suspicion that this Messanger was actually a convict. While Carter does not mention his first name, he lets him go in February of 1776. In September of 1776, a James Messanger was tried before the Old Bailey for having returned early from transportation.[96] In the trial, it was recorded that he had been originally convicted the October prior, and he claims he had been working at a public house for six months prior to the trial, placing him in the colony during the time period when Carter had his servant. There are no other recorded servants with the last name Messanger that I can place in the colony for that same time period. However, neither the first Messanger trial nor shipment record has been found at this time. Only through detailed cross checking of individuals can convicts be teased apart. Laws and court records can play a part, especially when the convict law diverged from indentured servant.

It is perhaps not surprising to note that rarely are convicts spoken about separately from servants. Not only in personal papers or diaries, but also in newspapers or speeches, convicts are cloaked behind the term servant. While it is evident in the legislative journals that convicts could be treated separately from the indentured population, this was not a common

[95] Landon Carter and Jack P. Greene, *The Diary of Colonel Landon Carter of Sabine Hall, 1752–1778. Edited, with an Introd., by Jack P. Greene*, Virginia Historical Society Documents: V. 4–5 (Charlottesville: University Press of Virginia, 1965), 970.
[96] www.oldbaileyonline.org, record t17760911-85 (accessed May 2011).

occurrence.[97] Perhaps then the best explanation for why convicts and indentured servants were so regularly treated under the same legal code in Virginia has been given by Bernard Bailyn—the distinction between convict and indentured servant was 'smallest when the need for labour was greatest'.[98] One Virginia law alleged that felonies were perpetrated by 'persons who have been convicted in Great Britain, who are commonly servants here' and later 'those convicted in England being servants'.[99] This does not mean that convicts and indentured servants were indistinguishable, although preliminary research through the legal records does not illuminate significant differences. It is not necessarily that they could not tell them apart in everyday life, rather this is indicative of their language not making the distinction. Even the laws that do pass against convicts do not generate new cases in the court records, rather they bar convicts from privileges previously enjoyed, creating an almost impossible tangle for the researcher to unweave. It is no wonder then that historians have traditionally treated these two groups as one. Popular attitudes certainly had an impact on the law in any given colony.[100] The lack of interest noted in convicts perhaps explains why they were not more legislated separately from indentured servants. It was not until the continental congress in 1776 that English common laws were accepted into America, and not until 1783 when convict transportation was actually banned. These preliminary findings suggests that changes in the convict laws are an association with a greater alignment with attaint. Laws which did not pass tell us that regulating convict importation and convicts themselves was not a high priority, at least not when it impacted the fiscal interests of owners.

[97] By legislative journals I mean the Legislative Journal, the executive Journals and the House of Burgesses Journals all edited by McIlwaine.
[98] Bernard Bailyn, *Voyagers to the West: A Passage in the Peopling of America on the Eve of the Revolution* (Vintage, 1988).
[99] William Waller Hening, *5 Statutes at Large; Being a Collection of All the Laws of Virginia, From the First Session of the Legislature in the Year 1619*, vol. 5, Harvard Library (Richmond: Franklin Press, 1819), 36/25, 536/545.
[100] Greenberg, 'Crime, Lawn Enforcement, and Social Control in Colonial America', 323.