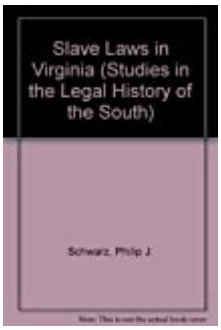
H-Net Reviews
in the Humanities & Social Sciences



Philip J. Schwarz. *Slave Laws in Virginia.* Athens: University of Georgia Press, 1996. xvi + 253 pp. $40.00 (cloth), ISBN 978-0-8203-1831-8.

Reviewed by Annette Gordon-Reed (Professor of Law, New York Law School)

Published on H-Law (August, 1997)

Virginia's Slaves and Masters in the Context of Law

In *Slave Laws in Virginia*, Philip J. Schwarz, who teaches history at Virginia Commonwealth University, explores how the interactions between "African Virginians and European Virginians" (p. xiv) shaped the political and cultural landscape of the state and, in the process, helped to shape that state's laws during the era of slavery. Schwarz declares Virginia "excellent" for such study "because of the longevity of the institution there and the numbers of people involved in it" (p. xiv). However, this slender volume is not meant to be a comprehensive survey of Virginia law during the slave regime. It is, instead, a very interesting series of essays designed to explore how white Virginians set about the task of constructing a system of laws that would legitimize their domination of enslaved blacks.

Central to this book is Schwarz's belief that, when considering Virginia's legal system under slavery, "it is useful to analyze the intersection or interaction of the behavior of owners and of the enslaved" (p. 5). He understands that laws are not simply "made" by legislatures and judges. Rather, lawmaking is a process that has its beginnings in the specific, extralegal, cultural milieu in which legislators and judges act. For this reason, we cannot simply focus upon the actions and thoughts of those who made positive (formal) law–rather, we must take into account how masters and slaves, through their day-to-day interactions, helped form the contours of Virginia's legal system.

Schwarz is particularly keen to recognize the ways that slaves influenced lawmaking. He insists that the Africans brought to America were not mere objects to be acted upon. They arrived from their many societies of origin with values and cultural norms that could not have been totally obliterated during the horrors of the middle passage. Even after their arrival, their humanity constantly asserted itself as their responses to their captivity intruded upon, and helped to shape, the expectations of those who enslaved them.

In the most necessarily inventive part of the book, which is prefaced by a responsible caveat, Schwarz tries to imagine how the earliest African slaves in America would have responded to the legal system as it applied to them. He relies heavily upon the insights of anthropology and ethnographic studies to make some reason-

able and fascinating conjectures. The problem, however, is that here, as in other parts of the book, the discussion could have benefited from more precise definitions of terms and the inclusion of a few more details.

For example, did the terms "district court," "civil case," and "criminal case" mean the same thing in West African societies as they did in North America? How do we determine what was uniquely African about the systems the first slaves had known in their homeland? It is possible that the early Africans encountered much about their legal systems and the North American version that was the same–for example, the concept of punishment for theft and the requirement that evidence be offered to prove a charge. Certainly perceptions of difference helped to shape Africans' views of their captives, but the similarities may have made a difference as well. Schwarz's statement that "professional advocates did act in the name of clients in a minority of West African courts" (p. 25) sent me racing to the endnotes hoping to find out more details about this claim. I found citations to sources, but no specific examples to satisfy the natural curiosity raised by Schwarz's thought-provoking presentation.

These are not major problems, however. Schwarz's main point–that the behavior of the earliest slaves was a product of both African expectations and American realities–comes through. Indeed, that point would be too obvious to make if racism had not for so long promoted the notion that Africans had no legitimate societies, laws, customs, or values from which to derive a set of expectations. Given the prevalence of that belief, Schwarz's discussion is a valuable corrective.

The interaction between masters and slaves gave rise to what is called the customary law of slavery–the informal rules of the game between masters and slaves, and among the slaves themselves. Even though these rules could exist in the private sphere, and be varied and heavily dependent upon the circumstances and personalities involved, both master and slave were still subject to the formal laws of Virginia. The vast majority of legislators and judges, slave-holders or not, were concerned with protecting slavery as an institution at the core of their society. Although individual masters may have been inclined to handle a problem with slaves, or an opportunity that arose out of the business of slavery, in a particular way, legislators and judges had the power (and, they would have said, the *responsibility*) to look to the "big picture." The clearest part of that picture, Schwarz rightly maintains, was the need to preserve white supremacy at all cost.

Even so, legislators and judges were familiar with the exigencies of managing the slave population. Accordingly, laws were often conceived, updated, and fine-tuned in response to their perceptions of, and reactions to, the nature and behavior of the enslaved Africans. In effect, the slaves *acted*, and the masters (on the plantation and in the legislature and courts) often *reacted*. As Schwarz sees it, the task for historians is to "connect ... the law of slavery to the cycles of slaves' actual or suspected behavior and court decisions or statutes" (p. 7).

But how does one do this? The causal nexus between the behavior of slaves and the promulgation of various criminal laws is more immediately obvious–as the best chapters in this book, those on capital punishment and the transportation of slave convicts, make clear. Fear of organized rebellion, individual poisonings–any violence toward masters–were blows struck against the white supremacy at the heart of Virginian society. Such threats were more than just an individual master's business.

The extent to which slaves influenced civil law is harder to gauge. For example, Schwarz suggests that Suzanne Lebsock's finding that white female slaveowners were more likely to free their slaves than were their male counterparts raises the question whether "other documents" might indicate that slaves were "active participants in attracting white women's special attention" (p. 8). It is an interesting speculation, but the real question is how the slaves' behavior in this particular context affected the way that lawmakers drafted the laws pertaining to the distribution of property.

Schwarz's chapter on Thomas Jefferson's use, in his capacity as slave-owner, of customary law and statutory law is generally well thought out, but problematic in one glaring way. In a book that is otherwise exemplary for its attempt to bring the lives of slaves into the picture and that is concerned with the intersection between customary and formal law, Schwarz curiously falters in his detailed discussion of the drafting and execution of Thomas Jefferson's will.

Jefferson freed five slaves in his will and, as was required by law, petitioned the legislature to allow them to remain in the state. Two of the slaves freed, Madison and Eston Hemings, were the sons of Sally Hemings, Jefferson's alleged mistress. Schwarz notes that Jefferson never formally freed Hemings herself; he suggests that she was not freed because she was too old and her sons would not have been able to care for her, which sounds remarkably like Jefferson's general reason for not freeing

his slaves–the assumption that they would be unable to care for themselves and their families.

Schwarz's discussion unnecessarily relies on theory when facts are readily available. Sally Hemings was freed by *customary* law. One salient function of customary law was to allow masters and slaves, when the situation warranted, to avoid some of the problems caused by compliance with statutory law. Given Hemings's notoriety (deserved or not), it doesn't take much imagination to understand why the informal route was taken over the formal one, which would have required the recording of a public document and a further request for legislative permission for Sally Hemings to remain in Virginia. Instead, Hemings simply went to live with her sons who managed to rent a house, which they eventually bought. The sons, both skilled carpenters and musicians, did in fact care for her until her death. Both men became property owners and died with money in the bank; on his death, for example, Eston Hemings had over $4,000–a substantial sum in 1852. Why picture Eston and Madison Hemings as presumptively ineffectual? Couldn't the people who knew them as young men see the potential that was obviously there?

There is more. Eston Hemings, who was only eighteen at the time of the execution of Jefferson's will, was given the remainder of his time–in other words, he was set free before the time that Jefferson's will specified. Schwarz notes that one of Jefferson's "most creative legal acts or thinking concerning his bonds-people ... was his de facto manumissions of Beverley and Harriet, a son and a daughter of Sally Hemings" (p. 58). Examining these events in their entirety, we see that, through skillful application of customary *and* formal law, an entire family of slaves was set free. The situation presents such a clear example of the very interaction this book is designed to examine, that we wonder why Schwarz, usually so perceptive and imaginative in these pages, didn't do a better job with it.

Schwarz's discussions of capital punishment of slaves and Virginia's practice of transporting out of the state slaves who had been convicted of crimes and sentenced to death are the strongest in the book. He skillfully shows how the intersection of economics and the desire for physical self-preservation influenced lawmakers and judges. We learn that capital punishment was then, as it is today, expensive and controversial. In a system built upon dehumanization and harshness, the killing of a recalcitrant slave would seem to be of little moment–but Schwarz shows that the matter was more complicated. Issues of self-image ("our legal system is just, we are people with a sense of mercy") and economics ("a criminal has been condemned, but he is the property of a white person," or "what does this mean for taxpayers?") entered into the equation. As a result, white Virginians did not voice or feel the enthusiasm for capital punishment that we might expect.

The practice of transporting condemned slaves out of the state implicated not only local law, but the relations between states. What do we make of Virginia's willingness–until other states reacted against it–to transport its most dangerous slaves into the midst of other white people, not caring what effect they might have upon their places of destination? Those same Virginians expected–even demanded–that "sister" states, in the name of comity, return fugitive slaves, even if that requirement offended a significant number of that sister state's citizens. Pervading these controversies is the recognition of the fragile nature of the concept of "Union."

We come away from Schwarz's book having been informed on a number of issues, but wishing that he had fleshed out his interesting points a little more. Indeed, his book is a gold mine for anyone seeking topics that cry out for further investigation. Still, this work should be judged primarily on the basis of what the author set out to do. On that score, *Slave Laws in Virginia* is a considerable success.

Citation: Annette Gordon-Reed. Review of Schwarz, Philip J., *Slave Laws in Virginia.* H-Law, H-Net Reviews. August, 1997.

URL: http://www.h-net.org/reviews/showrev.php?id=1241